

WHEN MEN HARASS MEN: IS IT SEXUAL HARASSMENT?

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INTRODUCTION

Over the past few decades, the issue of workplace sexual harassment has finally entered into mainstream discourse and is no longer limited to male-female relations. As sexual minorities¹ are becoming more vocal in demanding equal rights, people are beginning to recognize that the same type of sexual harassment in the workplace that has been perpetrated against women is being perpetrated against gay men and lesbians.

Unfortunately, allegations of "same-sex" harassment have, for the most part, been met with disfavor in the courts.² Title VII makes it unlawful for an employer to discriminate on the basis of sex.³ The courts have struggled with whether same-gender sexual harassment can be motivated "because of sex." Most courts have interpreted the word "sex" in its narrowest sense to mean biological sex, which is determined by a person's genitalia.⁴ Based on that interpretation, these courts will find a cause of action only where the conduct at issue was motivated by the employee's physically being male or female. Courts have either explicitly or by unspoken assumption singled out X and Y chromosomes as the sole determinants of a person's gender, failing to consider how the employee self-identifies or how society perceives and defines the gender role and performance of the employee.

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1. I use the term "sexual minorities" to signify lesbians, gay men, bisexuals, transsexuals, and bi/transgendered people.

2. *See, e.g.,* *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191 (4th Cir. 1996) (holding that plaintiff has no cognizable claim for sexual harassment where both victim and alleged harasser are heterosexuals of same sex); *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446 (5th Cir. 1994) (holding that male subordinate has no cognizable sexual harassment claim against male supervisor). While this article was in press, the United States Supreme Court held that same-sex sexual harassment is actionable under Title VII if it is "because of sex." *Oncale v. Sundowner Offshore Serv., Inc.*, No. 96-568, 1998 WL 88039, at *2 (U.S. Mar. 4, 1998). Despite this seemingly favorable ruling for victims of same-sex sexual harassment, the Court's decision limits recovery to a very narrow set of circumstances where the harassment occurs because of the plaintiff's biological sex. *See id.* at *4; *see also infra* notes 60-62 and accompanying text and note 87.

3. 42 U.S.C.A. § 2000e-2(a)(1) (West 1994).

4. *See, e.g.,* *McWilliams*, 72 F.3d at 1195-96 (explaining that involved heterosexual male-on-male conduct did not occur "specifically 'because' of the victim's sex").

The term “sex” embodies many interrelated factors, including chromosomes, genitalia, secondary sex characteristics, gender traits, and sexuality. Traditionally, each of these concepts was thought to embody duality—all people were thought to be either male or female (duality in chromosomes, genitalia, and secondary sex characteristics), masculine or feminine (duality in gender traits), and sexually attracted to only males or only females (duality in sexuality). A person’s biological chromosomes and genitalia were used as the determinant of all the other factors. That is, a person with male genitalia was expected to act masculinely and to be sexually attracted to females, and vice versa.

When all five factors converge in one person, the courts are not called upon to grapple with all the ideas embodied in the term “sex.” Issues of sex, sexuality, and gender roles, however, are no longer as simple as they used to be. Reality suggests there is no intrinsic or stable sexual or gender identity.⁵ Scientific advances have brought about the medical capability of altering one’s biological sex. Feminist and gay advocacy has resulted in a greater awareness and acceptance of sexual minorities and fewer expectations regarding traditional gender roles. It is not uncommon to see women working in physically challenging jobs such as the military or as CEO’s of big corporations—jobs that were traditionally reserved for men. Likewise, more men are taking on the traditionally female nurturing role, taking a more active role in the rearing of their children. It is now abundantly clear that there is a spectrum of sexes, and gender roles, and a person’s sexual identity is not always based on his or her biological organs.

By assuming that maleness and femaleness are two opposing, easily defined, and mutually exclusive categories, the courts perpetuate stereotyped distinctions between the sexes and exclude from protection those people who are singled out for adverse treatment in the workplace based on their failure to conform to gender stereotypes. The result is confusing jurisprudence which has a disparate impact on sexual minorities.⁶ By defining “sex” restrictively as “biological sex,” courts have chosen the least relevant aspect of “sex” as a determinant of whether a person has a cause of action under Title VII.⁷ This narrow interpretation of Title VII conflicts with its underlying purpose—failing to assure a work environment free of discriminatory ridicule for all people.

The courts’ narrow and simplistic reading of the statute ignores the reality that sexual harassment is based on power, not on sexual attraction.⁸ Power exists independently of biological sex. Men can be targets of sexual

5. See *infra* notes 74, 80 and 81 and accompanying text.

6. See *Wright v. Methodist Youth Serv., Inc.*, 511 F. Supp. 307 (N.D. Ill. 1981).

7. See, e.g., *McWilliams*, 72 F.3d at 1191.

8. See Amelia A. Craig, *Musing About Discrimination Based on Sex and Sexual Orientation as “Gender Role” Discrimination*, 5 S. CAL. REV. L. & WOMEN’S STUD. 105, 112 (1995) (explaining that desire of heterosexual men to maintain power and dominance is motivation behind sexual harassment).

harassment for a variety of reasons.⁹ For example, a man in a low level job can be a target of a female boss,¹⁰ and gender performance can reinforce certain assumptions about power.¹¹ Based on socially constructed norms, certain masculine gender traits have come to be associated with power and success, while anything feminine has come to be devalued in the workplace. Therefore, anyone, male or female, who exhibits feminine characteristics can be a target for sexual harassment. The outdated assumption espoused by many courts that sexual harassment can only occur between men and women lacks insight into the depth of ways one person can assert power over another, the ubiquity of power relations within sexuality, and the complex relationships between sex, sexuality, and power.

Title VII is a remedial statute that, under established rules of construction, should be interpreted broadly.¹² Accordingly, courts should interpret "because of sex" in its broadest sense to mean not only biological sex, but also anything relating to sexual issues, behavior, anatomy, or identity, as long as the harassment implicates and exploits power imbalances between the sexes. This more flexible approach to Title VII will allow courts to shift the focus from the sex, gender or sexual preference of the victim, to the nature of the harassing conduct, the motivation behind it, and its effect on perpetuating gender imbalances and stereotypes in the workplace.

I. BACKGROUND

Imagine the following scene: several men in your office take a disliking to you. Your male supervisor and co-workers tease and taunt you on a daily basis. Their actions range from verbally abusive conduct such as name-calling, teasing, and challenging your sexuality, to physical abuse such as grabbing your crotch, physically holding you down and exposing themselves to you, and actually threatening to rape you. Under Title VII you would probably expect to have a cause of action for such profoundly abhorrent behavior, as there is little doubt it would unreasonably interfere with your work. You would be right if you were a woman. If you were a man, however, you would probably not have a cause of action.¹³ It is precisely this type of despicable

9. Although the argument below applies in varying degrees to all sexual harassment cases, this Article focuses exclusively on hostile environment sexual harassment involving two men.

10. See, e.g., *Easton v. Crossland Mortgage Corp.*, 905 F. Supp. 1368, 1373 (C.D. Cal. 1995) (noting that female supervisor asked male service person if "the color of the skin on his arm matched that on his penis"), *rev'd*, 114 F.3d 979 (9th Cir. 1997).

11. See *infra* notes 140-45 and accompanying text.

12. See *Miller v. Vesta Inc.*, 946 F. Supp. 697, 702 (E.D. Wis. 1996) (stating "[i]t is not the courts' role to limit the protections Congress conferred by selecting broad and general language").

13. Although the United States Supreme Court recently found that same-sex sexual harassment is actionable under Title VII, its decision is limited in scope, insofar as the harassment must be motivated by animus or hostility toward all men or all women. See *Oncale v. Sundowner Offshore Serv., Inc.*, No. 96-568, 1998 WL 88039, at *4 (U.S. Mar. 4, 1998). It remains to be seen how the lower courts will apply the *Oncale* decision, but it is likely that, based on a literal reading of the case, the conduct described above would not be considered sexual harassment. See *infra* notes 60-62 and accompanying text and note 87.

conduct which courts have stated with overwhelming consistency is inexcusable in the workplace,¹⁴ that is the subject of many same-sex sexual harassment lawsuits.¹⁵ The debate regarding same-sex sexual harassment in the workplace does not focus on where we should draw the line between innocent or playful teasing and hostile and abusive conduct, or whether the plaintiff is too sensitive or unable to take a joke. The question goes more deeply to the core of our understanding of civil rights, asking whether all or just some people are entitled to a work environment free of sexual intimidation and humiliation.

In 1981, the first United States District Court faced the issue of same-sex sexual harassment.¹⁶ In *Wright v. Methodist Youth Services, Inc.*, a male plaintiff brought an action against his former employer alleging that he was discharged because he rejected homosexual advances made toward him by his supervisor.¹⁷ The District Court held that if the plaintiff could show that "but for" his sex he would not have been subjected to his supervisor's conduct, the plaintiff could recover under Title VII.¹⁸

The Fifth Circuit became the first United States Court of Appeals to address the issue of same-sex harassment in *Garcia v. Elf Atochem North America*.¹⁹ The plaintiff alleged that on several occasions, a plant foreman "grab[bed]" his "crotch area and ma[de] sexual motions from behind."²⁰ Citing an unpublished opinion, the court stated that sexual harassment by a male supervisor against another male was not actionable under Title VII.²¹

Following *Garcia*, the Fifth Circuit heard another case involving same-sex sexual harassment. In the case of *Oncale v. Sundowner Offshore Services, Inc.*,²² a male plaintiff alleged that his male supervisor assisted another male co-worker in holding him down as another male co-worker touched the plaintiff's neck and arm with his penis. The allegations also included threats of homosexual rape and forceful anal penetration involving a bar of soap.²³ The circuit court noted that district courts had widely criticized and rejected the *Garcia* decision.²⁴ However, the court was bound to follow *Garcia* as precedent because, in the Fifth Circuit, one panel could not override the decision of another.²⁵ Thus, in the Fifth Circuit, no occurrence of same-sex sexual harassment would be actionable under Title VII.

14. See, e.g., *McWilliams*, 72 F.3d at 1196.

15. See, e.g., *Doe v. Belleville*, 119 F.3d 563 (7th Cir. 1997); *Quick v. Donaldson Co.*, 90 F.3d 1372 (8th Cir. 1996); *McWilliams*, 72 F.3d at 1191; *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446 (5th Cir. 1994).

16. See *Wright v. Methodist Youth Serv., Inc.*, 511 F. Supp. 307 (N.D. Ill. 1981).

17. See *id.* at 310.

18. See *id.*

19. 28 F.3d 446 (5th Cir. 1994).

20. *Id.* at 448.

21. See *id.* at 451-52 (citing *Giddens v. Shell Oil Co.*, 12 F.3d 208 (5th Cir. 1993) (unpublished)).

22. 83 F.3d 118 (5th Cir. 1996), *rev'd*, No. 96-568, 1998 WL 88039 (U.S. Mar. 4, 1998).

23. See *id.* at 118-19.

24. See *id.* at 119.

25. See *id.*

The Fourth Circuit soon followed in the path of the Fifth Circuit. In *McWilliams v. Fairfax County Board of Supervisors*,²⁶ the Fourth Circuit heard a case involving a claim of hostile work environment sexual harassment. The male plaintiff worked as a mechanic. His male co-workers called themselves "lube boys," and subjected the plaintiff to various forms of unwelcome sexual behavior. This behavior included teasing the plaintiff about sexual matters, exposing themselves to the plaintiff, and actual physical assaults such as blindfolding the plaintiff, forcing him to his knees, and simulating oral sex with a finger in his mouth.²⁷

The Fourth Circuit held that the plaintiff's claim failed as both the alleged harassers and the victim were heterosexual males.²⁸ The court asserted that the result was "compelled by a commonsense reading of the critical causation language of the statute"²⁹ Specifically, the harassment was not "because of" the plaintiff's sex.³⁰ While the court described the conduct as "shameful," it could not find that such actions by a heterosexual male against another heterosexual male were "because of sex."³¹ The court noted that "this sort of behavior is utterly despicable," that "it may rise to levels that adversely affect the victim's work performance, . . . and that no employer should tolerate it"³² Nonetheless, the court concluded that to interpret Title VII to reach conduct where only heterosexual males were involved, would extend the protection beyond its intended purpose to "unmanageably broad protection of the sensibilities of workers simply 'in matters of sex.'"³³

In 1996, the Eighth Circuit created a split in the federal circuit courts through its decision in *Quick v. Donaldson Company*.³⁴ The case involved the verbal and physical harassment of Quick, a male plaintiff, by male co-workers. One specific practice was that of "bagging." While the court noted that "bagging" had been defined in many ways, all of the practices seemed to involve a male using his hand to touch another male in the groin.³⁵ Despite complaints by Quick to his supervisor, the "bagging" incidents continued.³⁶ In one incident, the co-workers squeezed Quick's left testicle so hard, it produced swelling and bruising.³⁷ In addition, Quick, a heterosexual, endured verbal harassment because his male co-workers believed that he was homosexual.³⁸ The District Court granted the defendant's motion for summary judgment, holding that a male could only state a claim of sexual harassment

26. 72 F.3d 1191 (4th Cir. 1996).

27. *See id.* at 1193.

28. *See id.* at 1195.

29. *Id.*

30. *See id.*

31. *See id.*

32. *Id.* at 1196.

33. *Id.*

34. 90 F.3d 1372 (8th Cir. 1996).

35. *See id.* at 1374.

36. *See id.* at 1375.

37. *See id.*

38. *See id.*

when he could “show an anti-male or a predominantly female environment making males a disadvantaged or vulnerable group in the workplace and treating female employees differently and more favorably.”³⁹

The Court of Appeals reversed the District Court’s decision, noting that “the key inquiry is whether ‘members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.’”⁴⁰ As the record from the court below was absent of any “bagging” incidents involving female employees, the Court of Appeals reversed the decision to grant defendant’s motion for summary judgment.⁴¹

Very recently, the Seventh Circuit added to the array of same-sex harassment cases in *Doe v. Belleville*.⁴² In a case involving all heterosexual parties, the court held that sexual harassment of a man by other men is actionable under Title VII.⁴³ The plaintiffs in that case were two sixteen year-old twin brothers.⁴⁴ One of the brothers, J. Doe, was overweight, and was nicknamed by his co-workers the “fat boy.”⁴⁵ H. Doe, the main target of the abuse, was called the “fag” or the “queer” because he wore an earring.⁴⁶ One co-worker, Jeff Dawe, regularly called H. his “bitch” and threatened to take him “out to the woods” and “get [him] up the ass.”⁴⁷ Other co-workers, including the boys’ supervisor, joined in the abuse, calling both boys names and encouraging Dawe to take H. out and “get a piece of that young ass.”⁴⁸ The abuse turned physical when Dawe proclaimed, “I’m going to finally find out if you are a girl or a guy,” and proceeded to back H. into a corner and grab his testicles.⁴⁹

The Seventh Circuit held that H. Doe was harassed “because of sex,” if not because of “the sexual character of the harassment itself,” then because of “the harassers’ evident belief that in wearing an earring, H. Doe did not conform to male standards.”⁵⁰ Holding that the sexual preference of the harasser is immaterial in hostile work environment cases, the court noted:

[W]e doubt that it would have mattered for H. Doe to know, when his testicles were in Dawe’s grasp, that Dawe was heterosexual or (as his deposition reveals) that he lived with a woman, and thus that he may not have been sexually interested in H. The experience was still humiliating in a deeply personal way, as only sexual acts can be.⁵¹

39. *Id.* at 1375-76.

40. *Id.* at 1378 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993) (Ginsburg, J., concurring)).

41. *See id.* at 1379.

42. 119 F.3d 563 (7th Cir. 1997).

43. *See id.* at 574.

44. *See id.* at 566-67.

45. *See id.* at 566.

46. *See id.*

47. *Id.* at 567.

48. *Id.*

49. *Id.*

50. *Id.* at 575.

51. *Id.* at 580.

The court explained that to constitute sexual harassment, the conduct need not be an overt sexual advance—that is, the harasser need not have a desire to have sex with the victim.⁵² Any overtly sexual and sex-based conduct in the workplace is prohibited by Title VII.⁵³ When the harassment is not explicitly sexual, it can still be gender-based when it is “visited upon workers of one gender but not the other.”⁵⁴ This test is met when harassment is based on gender stereotypes:

a man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers’ idea of how men are to appear and behave, is harassed ‘because of’ his sex.⁵⁵

The court also found that the name-calling, the references to sexual assault, and the intrusive, intimate touching all expressly invoked H.’s gender.⁵⁶ In all likelihood, the court observed, the defendants’ intent was to humiliate H. as a man.⁵⁷

This split in the circuits over whether same-sex sexual harassment is actionable under Title VII led the Supreme Court to grant certiorari on a recent Fifth Circuit case, *Oncale v. Sundowner Offshore Services, Inc.*⁵⁸ In a unanimous opinion, the Supreme Court held that same-sex sexual harassment is actionable under Title VII.⁵⁹ The Court reasoned that although male-on-male sexual harassment was not the principal evil with which Congress was concerned when it enacted Title VII, “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of legislators by which we are governed.”⁶⁰

While this landmark decision could potentially have an important impact on the workplace environment, the holding is limited in a way that leaves open many questions of application. In response to the concern that Title VII will expand into “a general civility code for the American workplace,”⁶¹ the Court assured that the harassment, even if perpetrated by someone of the same sex as the victim, must be motivated by “general hostility to the presence of [one sex] in the workplace.”⁶² Thus, the Court’s analysis focuses exclusively on biological sex, limiting sexual harassment to situations where the harasser treats men as a group differently from women as a group. Still ex-

52. *See id.*

53. *See id.*

54. *Id.*

55. *Id.* at 581.

56. *See id.* at 580.

57. *See id.*

58. 83 F.3d 118 (5th Cir. 1996), *cert. granted*, 117 S. Ct. 2430 (1997), *rev’d*, No. 96-568, 1998 WL 88039 (U.S. Mar. 4, 1998).

59. *See Oncale v. Sundowner Offshore Serv., Inc.*, No. 96-568, 1998 WL 88039 (U.S. Mar. 4, 1998).

60. *Id.* at *3.

61. *Id.*

62. *Id.* at *4.

cluded from protection is the effeminate or sexually prudish man who is singled out by his male coworkers or employers and teased, taunted and ridiculed because he does not conform to traditional and expected gender roles.

II. ANALYSIS

There are two types of sexual harassment claims under Title VII, the "hostile environment" claim and the "quid pro quo" claim. Quid pro quo sexual harassment occurs when a tangible or economic benefit of employment is conditioned upon the target's submission to a request for sexual favors.⁶³ For example, firing an employee for refusing sexual advances constitutes quid pro quo sex discrimination under Title VII.⁶⁴ A hostile environment sexual harassment claim arises when harassment is "sufficiently severe or pervasive to alter the condition of the victim's employment and create an abusive working environment."⁶⁵ In same-sex harassment cases of the quid pro quo variety in which the superior requests sexual favors from the same-sex subordinate, the harasser is presumed to be sexually attracted to the employee—that is, the employer is presumed to be gay.⁶⁶ Most courts have found a cause of action in those cases based on the apparent fact that the harassment is targeted at employees of only one sex.⁶⁷

By contrast, when the alleged harassment takes the form of hostile work environment, the challenged conduct does not involve sexual advances, but rather crude sexual jokes, persistent taunting and sexual touching. Most of these suits are brought by an employee who either is homosexual, is perceived to be homosexual, or has heightened sensibilities (i.e. finds comments of a sexual nature distasteful) against a heterosexual employer.⁶⁸ Courts are less sympathetic to the plaintiffs in these cases, and less willing to recognize that such conduct occurs because of sex.⁶⁹

Same-sex sexual harassment in the workplace is most often perpetrated through the unwanted sexual advances upon females by lesbians (quid pro

63. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986).

64. See *Williams v. Saxbe*, 413 F. Supp. 654, 657-58 (D.D.C. 1976).

65. *Meritor*, 477 U.S. at 67.

66. See *id.* at 65.

67. See, e.g., *Yeary v. Goodwill Ind.-Knoxville, Inc.*, 107 F.3d 443, 446-47 (6th Cir. 1997); *Wrightson v. Pizza Hut of Am.*, 99 F.3d 138, 142-43 (4th Cir. 1996); *King v. M.R. Brown, Inc.*, 911 F. Supp. 161, 167 (E.D. Pa. 1995); *Ecklund v. Fuisz Tech., Ltd.*, 905 F. Supp. 335, 337-38 (E.D. Va. 1995); *EEOC v. Walden Book Co., Inc.*, 885 F. Supp. 1100, 1101-02 (M.D. Tenn. 1995); *Prescott v. Independent Life & Accident Ins. Co.*, 878 F. Supp. 1545, 1550-51 (M.D. Ala. 1995); *Wright v. Methodist Youth Serv., Inc.*, 511 F. Supp. 307, 310 (N.D. Ill. 1981).

68. See, e.g., *Doe v. Belleville*, 119 F.3d 563, 566 (7th Cir. 1997) (explaining that main target of harassment deemed by perpetrators as "fag" or "queer").

69. See, e.g., *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1198 (4th Cir. 1996); *Martin v. Norfolk S. Ry. Co.*, 926 F. Supp. 1044, 1052-53 (N.D. Ala. 1996); *Easton v. Crossland Mortgage Corp.*, 905 F. Supp. 1368, 1385 (C.D. Cal. 1995), *rev'd*, 114 F.3d 979 (9th Cir. 1997); *Mayo v. Kiwest Corp.*, 898 F. Supp. 335, 338 (E.D. Va. 1995), *aff'd*, 94 F.3d 641 (4th Cir. 1996); *Vandeventer v. Wabash Nat'l Corp.*, 887 F. Supp. 1178, 1182 (N.D. Ind. 1995); *Goluszek v. H.P. Smith*, 697 F. Supp. 1452, 1457 (N.D. Ill. 1988).

quo harassment), or taunts by males toward gay or effeminate men involving crude discussions of sexuality (hostile work environment harassment).⁷⁰ Because quid pro quo harassment tends to be motivated in greater part by sexual attraction, while hostile environment harassment tends to be motivated in greater part by animosity toward the victim, the analyses of these two types of sexual harassment are quite different. Additionally, although stereotyped expectations of men and women affect all men and women, the influences and outcomes of such stereotyping are not uniform.⁷¹ A woman exhibiting masculine characteristics is often more readily accepted than a man who exhibits feminine ones.⁷² Thus, although the interpretations and ideas proposed below apply in varying degrees to any type of sexual harassment, this Article will focus on hostile environment sexual harassment involving two men for illustrations and explanations.

The rationale behind the different treatment of quid pro quo and hostile environment cases stems from the courts' interpretation of the phrase "because of sex" in Title VII. Title VII makes it unlawful for an employer "to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin . . ." ⁷³ There is much debate about the meaning of "sex" in the context of Title VII. The word is complex, multifaceted, and ambiguous, meaning either biological sex (male or female), core gender identity (woman or man), gender role identity (feminine or masculine), or sexual behavior.⁷⁴ The legislative history of Title VII does not offer much help in defining the word "sex." The inclusion of the word "sex" came as a result of a floor amendment by Representative Howard Smith, an opponent of Title VII.⁷⁵ Smith proposed the amendment apparently in "satire and iron cajolery" to inspire opponents to vote against the bill.⁷⁶ The bill passed as amended, however, with little debate on the issue of sex discrimination.⁷⁷

To understand the broad meaning of the term "sex," it is necessary to understand the meaning of its component parts. As a biological denotation, sex (male or female) generally denotes "the physical attributes of bodies,

70. See Craig, *supra* note 8, at 108 (making observation based upon intake calls from individuals seeking legal assistance from Lambda Legal Defense and Education Fund from June 1993 through January 1995).

71. See MARIANNE HESTER ET AL., *WOMEN, VIOLENCE AND MALE POWER* 38 (1996).

72. See Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 *YALE L.J.* 1, 3 (1995).

73. 42 U.S.C.A. § 2000e-2(a)(1) (West 1994).

74. See Katherine M. Franke, *The Central Mistake of Sex Discrimination: The Disaggregation of Sex From Gender*, 144 *U. PA. L. REV.* 1, 7 (1995).

75. See Christopher W. Deering, Comment, *Same-Gender Sexual Harassment: A Need to Re-examine the Legal Underpinnings of Title VII's Ban on Discrimination "Because of Sex,"* 27 *CUMB. L. REV.* 231, 235-36 (1997).

76. See *id.* at 236 n.28 (citing Francis J. Vaas, *Title VII: Legislative History*, 7 *B.C. INDUS. & COM. L. REV.* 431, 441-42 (1996)).

77. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986).

specifically the external genitalia,"⁷⁸ and has been viewed as relatively immutable.⁷⁹ Gender (masculinity and femininity), on the other hand, is cultural, socially constructed, and mutable.⁸⁰ Gender is used to "describe personality attributes and socio-sexual roles that society understands to be 'masculine' or 'feminine' and which society ascribes on the basis of sex."⁸¹

Over time, biological sex has become conflated with gender; maleness is conflated with masculinity and femaleness with femininity. From social experience, a person comes to expect males to conform to certain roles that have been repeated over time and habitualized, and females to conform to certain other roles.⁸² Society (and the law) have learned to view biological sex as the determinant of gender. The conflation of sex and gender has historically and popularly been accepted as a truism: "persons born with penises are supposed to exhibit a particular social personality and persons born with vaginas another; if not, they are disclaimed as 'sissies' or 'tomboys.'"⁸³

Many courts have fallen prey to this conflationary status quo in their interpretation of the word "sex." When courts state that the term "sex" in Title VII refers to "gender,"⁸⁴ they are generally referring to "an individual's distinguishing biological or anatomical characteristics."⁸⁵ In effect, courts have precluded claims based on the victim's self-identified and socially constructed gender and limited sex discrimination to conduct or treatment which would not have occurred but for the plaintiff's biological sex. Based on that interpretation, some courts have specifically held that Title VII protection for hostile work environment does not extend to victims who are the same-sex as their harassers.⁸⁶ Other courts have held that although male-on-male conduct is theoretically actionable, a plaintiff may not prevail unless he can meet the heavy burden of proving that the conduct created an "anti-male bias" or "anti-male atmosphere" in the workplace.⁸⁷ Those courts assume, for exam-

78. Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender & Sexual Orientation to its Origins*, 8 YALE J.L. & HUMAN. 161, 164 (1996).

79. The possibility of sex change operations, of course, changes that fact.

80. See JUDITH BUTLER, GENDER TROUBLE 25 (1990) (stating "[t]here is no gender identity behind the expressions of gender; that identity is performatively constituted by the very 'expressions' that are said to be its results").

81. *Id.*

82. See PETER L. BERGER & THOMAS LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE 48-74 (1967).

83. Valdes, *supra* note 78, at 166.

84. See, e.g., *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 749 n.1 (4th Cir. 1996) (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239-41 (1989)); *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 329 (9th Cir. 1979); *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 662 (9th Cir. 1977); *Shoiber v. Emro Marketing Co.*, 941 F. Supp. 730, 734 (N.D. Ill. 1996); *Dobre v. National R.R. Passenger Corp.*, 850 F. Supp. 284, 286 (E.D. Pa. 1993).

85. *Dobre*, 850 F. Supp. at 286.

86. See, e.g., *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 451-52 (5th Cir. 1994).

87. In *Oncala v. Sundowner Offshore Serv., Inc.*, for example, the Supreme Court explained: A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace. A same-sex harassment plaintiff may also, of course, offer direct com-

ple, that when a male supervisor is taunting a male employee, he is not doing so because the employee is "male," thereby creating an environment hostile to all men. Therefore, the discrimination is presumptively not based on "sex" or "gender" regardless of how intensely the harassment focuses on sex, sexuality, or gender roles.

There are several distinct problems with the courts' narrow interpretation of the phrase "because of sex." Most critically, courts have bifurcated personhood into "male" and "female" components, attributing distinct characteristics to men and women as if they apply universally and without variation. By using "male" and "female" as opposing binaries, courts accept the validity of biological sexual differences, perpetuating stereotyped distinctions between the sexes, and ignoring normative gender ideology. The result is penalization of gender atypicality and devaluation of people who are feminized.⁸⁸

Basing hostile environment claims on genital identity is impractical based on the fundamental fact that physically, not all people fall neatly into the category "male" or "female." Biologically speaking, there are at least five sexes that run along the spectrum from female to male. There are three major genital subgroups in addition to those of male and female: hermaphrodites, who possess one testis and one ovary; male pseudo-hermaphrodites, who have testes and some aspects of female genitalia but no ovaries; and female pseudo-hermaphrodites, who have ovaries and some aspects of the male genitalia, but lack testes.⁸⁹ "If the state and legal system have an interest in maintaining a two-party sexual system, they are defying nature."⁹⁰ Other definitional problems arise in the transgender context, where courts have differed in defining what is a male and what is a female.⁹¹ Given the judicial confusion regarding the precise definitions of "male" and "female," basing civil protections on such a distinction makes little sense.

More fundamentally, emphasis on biological sex mandates the subordination of women, feminized men, and sexual minorities. Such a narrow view of sexual identity perpetuates the existence of traditional gender identity and behavioral norms which devalue women and sexual minorities. The paradigm of genital identity establishes and maintains the hierarchical differentiation between men and women. "'Male' is the grammatical and semantical

parative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.

Oncale v. Sundowner Offshore Serv., Inc., No. 96-568, 1998 WL 88039, at *4 (U.S. Mar. 4, 1998); see also *Easton v. Crossland Mortgage Corp.*, 905 F. Supp. 1368 (C.D. Cal. 1995); *Vandeventer v. Wabash Nat'l Corp.*, 867 F. Supp. 790, 796 (N.D. Ind. 1994).

88. See Valdes, *supra* note 78, at 170.

89. See Anne Fausto-Sterling, *How Many Sexes are There?*, N.Y. TIMES, Mar. 12, 1993, at A29.

90. *Id.*

91. Compare *In re Ladrach*, 513 N.E.2d 828, 832 (Stark Co. Prob. Ct. 1987) (holding male-to-female transsexual was still considered male under Ohio law), with *M.T. v. J.T.*, 355 A.2d 204, 208-09 (N.J. Super. Ct. 1976) (holding male-to-female transsexual was considered female under New Jersey law for purposes of marriage).

norm that relegates 'female' to a deviant and derivative status."⁹² Sexual identity is then elided with sexual behavior,⁹³ and any deviance from expected gender roles is punished.

The courts have arguably chosen the least relevant aspect of "sex" as a factor on which to base sexual harassment determinations. Notably, most important differences between men and women are grounded not in biology, but in gender normativity.⁹⁴ "In every way that matters, sex bears an epiphenomenal relationship to gender; that is, under close examination, almost every claim with regard to sexual identity or sex discrimination can be shown to be grounded in normative gender rules and roles."⁹⁵ Biological distinctions, therefore, are much less informative than gender distinctions. It is gender, and the hierarchy of gender differences, which transforms an anatomical difference into a socially relevant distinction. Accordingly, what it means to be a woman, and what it means to be a man should be understood not in biological terms, but according to gender normativity, and the behavioral aspects of sexual identity.

Basing sexual harassment claims on biological sex is not only illogical, but also impractical, as biological sex is often inseparable from the other aspects of sex noted above. As one historian explained, "[s]ociety and the individual are inseparable; they are necessary and complementary to each other, not opposites As soon as we are born, the world gets to work on us and transforms us from merely biological into social units."⁹⁶ Judith Butler proposes that even sex is socially constructed, suggesting that in fact there is no real distinction between sex and gender.⁹⁷ She explains:

If gender is the social construction of sex, and if there is no access to this "sex" except by means of its construction, then it appears not only that sex is absorbed by gender, but that "sex" becomes something like a fiction, perhaps a fantasy, retroactively installed as a prelinguistic site to which there is no direct access.⁹⁸

Disaggregating sex and gender, as a result, is quite difficult if not impossible.⁹⁹

92. See Allan C. Hutchinson, *Part of an Essay on Power and Interpretation*, 60 N.Y.U. L. REV. 850, 876 (1985).

93. See Tamsin Wilton, *Genital Identities: An Idiosyncratic Foray into the Gendering of Sexualities*, in *SEXUALIZING THE SOCIAL* 102, 104 (Lisa Adkins and Vicki Merchant eds., 1996).

94. See Franke, *supra* note 74, at 2.

95. *Id.* Franke opines that "we all possess a degree of sexual agency beyond the rigid determinism of biology, or the bleak overdeterminism of strong constructionism." *Id.* at 8.

96. EDWARD HALLETT CARR, *WHAT IS HISTORY?* 36 (1961).

97. See JUDITH BUTLER, *BODIES THAT MATTER* 5 (1993) (stating "[w]hen the sex/gender distinction is joined with a notion of radical linguistic constructivism . . . the 'sex' which is referred to as prior to gender will itself be a postulation, a construction, offered within language, as that which is prior to language, prior to construction"); see also Martha Ertman, *Contractual Purgatory for Sexual Minorities: Not Heaven, But Not Hell Either*, 73 DENV. U. L. REV. 1107, 1163 (1996).

98. BUTLER, *supra* note 97, at 5.

99. See Franke, *supra* note 74, at 31-40.

Traditional, antiquated notions of sexuality, where one's biological sex would determine his or her gender identity, both self and societal, which in turn would account for the person's sexual behavior, are no longer accepted. In today's society of advanced technological and medical possibilities, a society which has become more tolerant of social diversity, we cannot and are no longer required to make the same assumptions about a person's sexuality. The concept of "sex" today goes well beyond mere genital anatomy and encompasses the totality of an individual's sexual identity.¹⁰⁰ It is the feminine gender traits, and not the genital organs with which they are associated, that are the signifiers of the sex-based power imbalance Title VII was designed to eradicate.

Male victims of hostile environment harassment by other males tend to be either homosexual, perceived by co-workers as homosexual, or outwardly demonstrate feminine characteristics.¹⁰¹ In all these situations, arguably, the employee is being harassed because of his gender role identity—that is, the harassment is motivated by the employee's failure to live up to gender expectations. The same traits or behavior exhibited by a man would not be objectionable to the harasser if displayed by a woman. It is the fact that they are displayed by a man that inspires the harasser's hostility. Males who demonstrate feminine characteristics fail to meet the image society has created for men.¹⁰² When a person does not conform to socially constructed and expected gender roles, he is a target for sexual harassment.¹⁰³ That sexual harassment, in effect, is motivated by the employee's gender.

The Supreme Court has recognized that treatment in the workplace based on gender stereotypes is actionable under Title VII. In *Price Waterhouse v. Hopkins*,¹⁰⁴ a female senior manager was subject to verbal abuse because she did not conform to the stereotypical female role; she was denied partnership because the partners saw her as too aggressive.¹⁰⁵ Specifically, partner evaluation forms described her as "macho," and stated that she "overcompensated for being a woman."¹⁰⁶ When a partner explained the decision to Hopkins, he told her to "walk more femininely, talk more femi-

100. In the case of transgendered people, for example, one's sense of being a man or woman has no relation to the anatomical characteristics that label her as male or female The sex of a transgendered person is only partially based on the genitals; the rest is a sometimes strange admixture of complementary and competing anatomical secondary physical characteristics, behaviors, life histories, psychological presumptions, and stereotypes.

Kristine W. Holt, Comment, *Reevaluating Holloway: Title VII, Equal Protection, and the Evolution of a Transgender Jurisprudence*, 70 TEMP. L. REV. 283, 296, 301 (Spring 1997).

101. See Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479, 2516 (1994).

102. See Case, *supra* note 72, at 12 (including as examples of adjectives "conventionally coded as masculine . . . 'aggressive,' . . . 'dominant,' 'forceful,' . . . and 'strong'").

103. See Craig, *supra* note 8, at 112 (explaining that desire of heterosexual men to maintain power and dominance motivates sexual harassment).

104. 490 U.S. 228 (1989).

105. See *id.* at 234.

106. *Id.* at 235.

ninely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”¹⁰⁷

The Court noted that when an employer acts on the belief that a woman should behave in a certain manner, the employer “has acted on the basis of gender.”¹⁰⁸ The court construed the phrase “because of sex” broadly stating:

As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.¹⁰⁹

This decision recognizes that gender is not based merely on physical attributes, but also on the expected roles a person should play in society.

Since women now have a cause of action based on gender role discrimination, so too should men. Title VII has been construed to protect men as well as women¹¹⁰ and to give rise to a cause of action for “reverse discrimination” against members of the traditionally powerful group.¹¹¹ When a man is harassed for failing to behave aggressively, for not walking, talking or dressing masculinely, or for not shamelessly bragging of sexual conquests of women, that man is being harassed because of sex stereotypes.¹¹² Based on *Hopkins*, that man should have a cause of action under Title VII.

Despite this recognition of a cause of action for enforcement of gender rules and the recognition that Title VII is meant to protect men as well as women, most courts have not recognized the same gender-role cause of action for men perceived as effeminate as they have for women perceived as masculine. The *Hopkins* Court stated that it is unlawful to discriminate against a woman for possessing male qualities. This ruling is understandable given what the court deemed as a “Catch-22”: if masculinity is associated with power and success in the workplace, then women cannot succeed in the workplace if they can be punished for displaying these masculine traits. Instead of extending the same protections to effeminate men, the courts have permitted harassment based on an employee’s gender traits to continue

107. *Id.* (citing *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1117 (D.D.C. 1985)).

108. *Id.* at 250.

109. *Id.* at 251 (quoting *Los Angeles Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

110. *See, e.g., Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986) (citing *Los Angeles Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978) and stating that Title VII “evinces a congressional intent to ‘strike at the entire spectrum of disparate treatment of men and women’”); *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 682 (1983) (holding that employer’s insurance plan violated Title VII by discriminating against employees’ husbands).

111. *See, e.g., Twyman v. Secretary of Defense*, 1995 WL 702388 (EEOC Nov. 9, 1995); *Gierut v. Postmaster General*, 1994 WL 740064 (EEOC Aug. 25, 1994).

112. *See Craig, supra* note 8, at 111 (explaining that “[i]n reality, it is not the gender of the victim that serves as the basis for the harassment, but the gender role to which she or he is expected to conform”).

where the employee happens to be a male exhibiting female traits. These individuals, however, are perhaps the most in need of protection in the workplace. As one commentator has observed, since feminine qualities are universally devalued, a man who exhibits feminine qualities is “doubly despised, for manifesting the disfavored qualities and for descending from his masculine gender privilege to do so.”¹¹³

By allowing harassers to single employees out for adverse treatment based on possession of feminine characteristics, the courts implicitly sanction continued disparaging treatment toward and devaluation of qualities deemed feminine. Such derision of feminine traits perpetuates the gender imbalances which Title VII was designed to alleviate. A jurisprudence which protects women who act masculine but not men who act feminine preserves the gender hierarchy in the workplace. It ensures workers equal rights to act masculine, while preserving the privileged status of those masculine traits but refusing protection to those who do not exhibit them. In effect, it allows gender-role discrimination against one sex and not the other, and thus allows adverse treatment because of sex. It also allows continued derision of the feminine traits, but not the masculine, reinforcing gender-based power imbalances. In effect, the *Hopkins* decision really marks the continuing devaluation of qualities deemed feminine.

Some courts have justified this lacuna in the scope of Title VII by reasoning that harassment of effeminate men is based on sexual orientation, which is not a protected trait under Title VII.¹¹⁴ The Equal Employment Opportunity Commission [hereinafter “Commission”] has held that Title VII prohibits discrimination on the basis of sex, but that does not include sexual preference or orientation.¹¹⁵ Male-on-male hostile environment harassment is, however, rarely based exclusively on sexual preference. In fact, often the victim, the harasser, or both are heterosexual.¹¹⁶ The common thread running through same-sex hostile environment claims is that the employee is perceived by his co-workers or supervisor as being gay or displaying feminine characteristics. Discrimination against effeminate men should not be seen as a mere subset of discrimination on grounds of sexual orientation. These employees are actually suffering from a form of gender discrimination against women—“derision of some of the same qualities that make women targets for sexual harassment.”¹¹⁷ The hostile environment sexual harassment inflicted on a woman—taunts that stress feminine sexual passivity and lack of aggressiveness or power—is very similar to the sexual harassment inflicted

113. Case, *supra* note 72, at 3.

114. See, e.g., *Dillon v. Frank*, 952 F.2d 403 (6th Cir. 1992) (citing EEOC Compl. Man. (CCH) § 615.2 (1981)); *Carreno v. IBEW Local No. 223*, 54 Fair Empl. Prac. Cas. (BNA) 81 (D. Kan. 1990) (citing EEOC Compl. Man. (CCH) § 615.2 (1981)).

115. See, e.g., *Smith v. Department of Navy*, 01841210, 1459/A12 (EEOC 1986); *Campbell v. Department of Health and Human Serv.*, 01831816, 1077/B1 (EEOC 1983).

116. See, e.g., *Doe v. Belleville*, 119 F.3d 563 (7th Cir. 1997); *Quick v. Donaldson Co.*, 90 F.3d 1372 (8th Cir. 1996); *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191 (4th Cir. 1996); *Goluszek v. H.P. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988).

117. *Abrams*, *supra* note 101, at 2516.

on gay or effeminate men. This commonality reflects the “desire of certain ‘active’ masculine males to drive out of the workplace those they see as contaminating it with the taint of feminine passivity.”¹¹⁸

Feminine gender traits in men and gay male sexual orientation are far from overlapping categories—there are, of course, effeminate men who are not gay, and gay men who are not effeminate.¹¹⁹ Hostile environment harassers generally target anyone who is effeminate, whether gay or not.¹²⁰ While gender discrimination and sexual preference discrimination may coexist in some instances, in many instances one exists and the other does not. Thus, gender-based discrimination against effeminate men is a separate category of discrimination that may converge with sexual orientation based discrimination. When these two forms of discrimination coexist, it is virtually impossible to discern whether a particular act of hostility was motivated by gender discrimination or sexual orientation discrimination;¹²¹ such hostility is likely motivated by both. Accordingly, although the Commission has held that sexual orientation and preference do not receive protection under Title VII, it has also held that sexual harassment is prohibited, regardless of the sexual preference or orientation of the plaintiff.¹²² Even accepting that sexual orientation is not a protected trait, these acts of hostility are nonetheless motivated in part by gender-role reinforcement and punishment of males who disrupt the gender hierarchy by relinquishing their masculine privilege in favor of more feminine traits.¹²³ This conduct is still motivated, at least in significant part, by the sex and gender of the victim. Because this type of conduct reinforces gender stereotypes and derision of feminine traits in the workplace, it is an insidious form of sex discrimination that must be recognized to serve the broad remedial purpose of Title VII. If consistently applied, Title VII jurisprudence would recognize a cause of action for such conduct.¹²⁴

The courts’ interpretation of “because of sex” conflicts with the goals of Title VII. Title VII is a remedial statute designed to “effectuate a broad social purpose.”¹²⁵ As such, most courts have held that Title VII should be

118. Case, *supra* note 72, at 7.

119. *See id.* at 57.

120. *See id.* at 7 (arguing that motive behind sexual harassment is to drive out of workplace all who contaminate “it with the taint of feminine passivity”).

121. *See* Samuel A. Marcossou, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L.J. 1, 3 (1992).

122. *See* McClain v. International Trade Comm’n, 01852958, 1755/C1 (1987).

123. *See* Case, *supra* note 72, at 3 (explaining that man who exhibits feminine qualities is despised for not only exhibiting those qualities, but also “for descending from his masculine gender privilege to do so”); Craig, *supra* note 8, at 112 (concluding that motivation behind sexual orientation discrimination is desire of heterosexual men to maintain power and dominance “both for their own sake and as a definitional sense of identity”).

124. Even if the discrimination is based exclusively on sexual preference, the victim should still have a cause of action. Such harassment would still be because of sex. *See infra* notes 146-53 and accompanying text (discussing power hierarchies).

125. *Allstate Ins. Co. v. EEOC*, 4 Fair Empl. Prac. Cas. (BNA) 806 (S.D.N.Y. 1972); *see also* ERNEST C. HADLEY & GEORGE M. CHUZI, *SEXUAL HARASSMENT FEDERAL LAW* (1995)

interpreted broadly.¹²⁶ The goal of Congress in passing Title VII was not to give a person special protection due to certain characteristics. Rather, Title VII was meant to lift all capricious and arbitrary hurdles to employment¹²⁷ and to afford employees “the right to work in an environment free from discriminatory intimidation, ridicule, and insult.”¹²⁸ Congresswoman May, arguing in favor of the addition of “sex” in Title VII, described Title VII as an “endeavor to have all persons, men and women, possess the same rights and same opportunities.”¹²⁹ By limiting the reach of Title VII protection to people possessing certain physical characteristics, courts are systematically and legally discriminating against sexual minorities, in contravention of the goals of the statute. Inclusion of the socially constructed elements of gender in hostile work environment analysis would alleviate the disparate impact which the current Title VII jurisprudence has on sexual minorities.

The most logical and fair interpretation of “because of sex” is a definition that encompasses all the aspects of “sex” embedded within that term, including sexual activity, sexual behavior, sexual anatomy, sexual identity, gender stereotypes, or any other issues relating to sex and gender, as long as the conduct implicates a power imbalance. To state a cause of action under Title VII, the plaintiff must show that he or she perceived the conduct as undesirable or offensive and that it was not solicited or invited.¹³⁰ In *Harris v. Forklift Systems, Inc.*,¹³¹ the United States Supreme Court stated that in hostile environment cases, courts must evaluate the totality of the circumstances, including the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or whether it unreasonably interferes with an employee’s work.¹³² This standard focuses on the be-

(citing *Joines v. Department of Army*, 01832141, 1179/C14 (1984) and explaining that Title VII is remedial statute intended “so far as possible [to] eliminate the discriminatory effects of the past as well as bar like discrimination in the future”).

126. See, e.g., *EEOC v. First Catholic Slovak Ladies Ass’n*, 694 F.2d 1068, 1070 (6th Cir. 1982) (citing *Cincinnati Ass’n for the Blind v. NLRB*, 672 F.2d 567 (6th Cir. 1982) and *Dunlop v. Carriage Carpet Co.*, 548 F.2d 139 (6th Cir. 1977)), *cert. denied*, 464 U.S. 819 (1983); *Quijano v. University Fed. Credit Union*, 617 F.2d 129, 131 (5th Cir. 1980) (citing *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421, 425 (8th Cir. 1970)); *Hart v. J.T. Baker Chem. Co.*, 598 F.2d 829, 831 (3d Cir. 1979) (citing *Bonham v. Dresser Indus., Inc.*, 569 F.2d 187, 192-93 (3d Cir. 1977)); *Craig v. Department of Health, Educ. & Welfare*, 581 F.2d 189, 193 (8th Cir. 1978) (citing *Bell v. Brown*, 557 F.2d 849, 853 (D.C. Cir. 1977)); *Bell v. Brown*, 557 F.2d 849, 853 (D.C. Cir. 1977) (citing *Coles v. Penny*, 531 F.2d 609, 615 (D.C. Cir. 1977)); *Davis v. Valley Distrib. Co.*, 522 F.2d 827, 832 (9th Cir. 1975), *cert. denied*, 429 U.S. 1090 (1977) (citing *EEOC v. Wah Chang Albany Corp.*, 449 F.2d 187, 189 (9th Cir. 1974)); *Hauck v. Xerox Corp.*, 493 F. Supp. 1340, 1349 (E.D. Pa. 1980), *aff’d*, 649 F.2d 859 (3d Cir. 1981) (citing *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970)); *cf. Peyton v. Rowe*, 391 U.S. 54, 65 (1968); *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967).

127. See *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 457 (1975).

128. *Meritor Sav. Bank v. Vinson* 477 U.S. 57, 65 (1986).

129. *Waag v. Thomas Pontiac, Buick, GMC, Inc.*, 930 F. Supp. 393, 400 n.5 (D. Minn. 1996) (citing 110 CONG. REC. 2577, 2583 (1964)).

130. See *Meritor*, 477 U.S. at 68.

131. 510 U.S. 17, 23 (1993).

132. See *id.* at 23.

havior of the alleged harasser rather than on the victim. Regardless of who the victim is, any sufficiently inappropriate insertion of sexually explicit language or behavior into the workplace should be considered sexual harassment. Prohibiting proscribed types of conduct diverts attention away from the gender and sexual preference of the victim, toward what employees, without regard to race, class, gender or sexual preference, are entitled to expect when they enter into the employment relationship.

In order to determine whether the conduct was inappropriate, the court must examine its motivations, which in turn requires an evaluation of the power relationship between the parties. The root of sexual harassment is generally not sexual attraction, but the desire to assert power over an individual.¹³³ The harassers exploit what they consider to be a weakness in their victims to reassert their superiority and to keep the victims subordinated.¹³⁴ The gender role played and the gender traits exhibited by the employee help dictate the power differentials between the parties.

Some courts have relied on the idea that sexual harassment is about power to exclude same-gender sexual harassment cases from the purview of Title VII.¹³⁵ In *Goluszek v. H.P. Smith*,¹³⁶ for example, a male plaintiff sued his male employers for sexual harassment. He did not claim that his harassers were homosexual. In rejecting the plaintiff's claim, the court emphasized that Title VII was meant to remedy an "imbalance by the powerful which results in discrimination against a discrete and vulnerable group The 'sexual harassment' that is actionable under Title VII 'is the exploitation of a

133. See CATHARINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979) (identifying sexual harassment as act of power); Craig, *supra* note 8, at 110 (stating "courts—both the ones that have recognized same-sex harassment and the ones that have not—do recognize that the objective of such harassment is maintenance and abuse of power and dominance, rather than a real desire for sex"). It is well-accepted today that rape, sexual harassment in its most extreme form, is a crime of violence rather than sexual attraction. See, e.g., SUSAN BROWNMILLER, *AGAINST OUR WILLS: MEN, WOMEN AND RAPE* (1975) (characterizing rape as widespread and violent effort to assert power and possession over women's bodies); Peggy Miller & Nancy Biele, *Twenty Years Later: The Unfinished Revolution*, in *TRANSFORMING A RAPE CULTURE* 47, 49 (Emilie Buchwald et al. eds., 1993) (stating that rape in all its forms "is an act of violence, a violation of the victim's spirit and body, and a perversion of power . . ."); Alexandra Stiglmayer, *The Rapes in Bosnia-Herzegovina*, in *MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA* 82, 84-85 (Alexandra Stiglmayer ed., 1994) (explaining that rape is a way to demonstrate power and to "humiliate and annihilate the enemy" and is also a tool of "ethnic cleansing"); Jonathan Willens, *Structure, Content and the Exigencies of War: American Prison Law After Twenty-five Years*, 37 *AM. U. L. REV.* 41, 60 (1987) ("Certainly prison rape is not primarily committed by homosexuals, so sexual gratification is not an adequate explanation. The connection between prison rape and the prison economy demonstrates that power is a crucial element in prison life."). Sexual harassment is often viewed as a mild form of rape, so undoubtedly the motivations of the two crimes are similar. See Nan Stein, *No Laughing Matter: Sexual Harassment in K-12 Schools*, in *TRANSFORMING A RAPE CULTURE* 310, 317-18 (comparing child's motivation in bullying to motivation behind sexual harassment).

134. See Craig, *supra* note 8, at 106, 112 (explaining both that many men see qualities typically regarded as "feminine" as denoting weakness and that motivation behind sexual harassment is desire of heterosexual men to maintain power and dominance).

135. See, e.g., *Goluszek v. H.P. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988).

136. *Id.*

powerful position to impose sexual demands or pressures on an unwilling but less powerful person.’”¹³⁷ Thus, according to the *Goluszek* court, only those forms of sexual harassment that made the victim feel inferior because of the victim’s gender were actionable.¹³⁸ As the plaintiff could not show any imbalance of power between himself and other males, and he could not show that he worked “in an environment that treated males as inferior,” or where an “anti-male environment” existed, the conduct was not actionable.¹³⁹

The *Goluszek* court assumed that the power disparity that exists when a man harasses a woman could not exist between two men because the imbalance of power is predicated on a notion of inferiority of the other biological sex. If that were true, it would not be possible for any man to be sexually harassed because men are traditionally the dominant sex. The flaw in this reasoning is striking. This logic rests on a simplistic view of gender-based power dynamics which assumes that all traits that are discriminated against to perpetuate a male and masculine dominated workplace are possessed solely by women. Because gender is socially constructed and determined by traits other than genitalia, it is also possible for a man to possess such feminine gender traits and the concomitant lack of power.

“[P]ower is socially constructed”¹⁴⁰ Power “only exists in action”¹⁴¹ and operates “through roles assigned and assumed in social practices.”¹⁴² In every day life, there are certain symbols or characteristics that communicate power, including gender, age, skin color, and physical condition.¹⁴³ Certain members of society are able to “secure compliance” from other members on a regular basis. Over time, these people are viewed as “powerful”—the image of power actually becomes the source of power.¹⁴⁴ Through our life experiences we learn to associate certain characteristics with power. “From this perspective, power is a socially constructed and mediated capacity that is manifest and immanent throughout all human experience”¹⁴⁵

137. *Id.* at 1456 (citing Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449 (1984)).

138. *See id.* at 1456 (citing Note, *supra* note 137, at 1451-52).

139. *Id.*

140. Michael Hunter Schwartz, *Power Outage: Amplifying the Analysis of Power in Legal Relations (with Special Application to Unconscionability and Arbitration)*, 33 WILLAMETTE L. REV. 67, 74 (Winter 1997).

141. *Id.* at 71 (citing MICHEL FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS* 89 (Colin Gordon ed., Colin Gordon et al. trans., 1980)).

142. *Id.* at 72 (quoting Allan C. Hutchinson, *Part of an Essay on Power and Interpretation*, 60 N.Y.U. L. REV. 850, 881 (1985)).

143. *See id.* at 73.

144. As explained by one social scientist, Steven L. Winter, [Power is] not an external force that operates on a passive victim. [Rather,] it is the emergent quality of a reciprocal social relation. Just as its assertion enacts power, deference can generate or sustain it. Power is the product of an interplay of actions and attitudes between social actors, each equipped with corresponding or complementary images of a particular social relation. Thus, what produces “power” must also be in the head of those who are its subjects.

Steven L. Winter, *The “Power” Thing*, 82 VA. L. REV. 721, 741-42 (1996).

145. Schwartz, *supra* note 140, at 74.

Society has constructed a power hierarchy of genders where maleness is associated with power and femaleness is associated with passivity and weakness.¹⁴⁶ Maleness is a symbol which communicates not only the physical attributes of a person, but the social roles that person plays as well. It is a role that has been reinforced over time by social interaction. Masculinity can be communicated not only through outward visual appearances, but also through behavior. Thus, a person who behaves in a masculine way communicates power to others—power that can be used to control the behavior of others. A person who does not behave in a masculine way communicates weakness and the ability to be controlled.¹⁴⁷ Under the existing gender-based power dynamics, such persons communicate a lack of power and are vulnerable to an abuse of power. The result of this social construction of power is that what is seen as masculine—aggressive, ambitious, assertive, competitive, dominant, forceful, or independent behavior, is more highly valued than what is seen as feminine—understanding, warm, gentle, or passive behavior.¹⁴⁸

Many heterosexual men desire to maintain the socially constructed perception of male strength to reinforce their own sense of identity and position of privilege in the gender hierarchy.¹⁴⁹ This desire motivates sex discrimination against those who do not communicate the same sense of power, including women and feminine men.¹⁵⁰ When a male communicates feminine characteristics, that male communicates a lack of power.¹⁵¹ Other males around him may exploit this perceived vulnerability by accentuating their own masculine characteristics. To some degree, stereotypical notions of masculinity are tied to images of sexual conquest. Thus, men may accentuate their own masculinity through sexual conversation, exposing themselves, sexual touching, or even threats of sexual force. In essence, these males would then be using “matters pertaining to sex,” their own sexuality, and the prominent role of this sexuality in their gender identity and power status to reinforce and demonstrate their own masculinity. In doing so, they exert their power over another male who fails to exhibit the same masculine characteristics. “Seeing a feminine man evokes a tremendous amount of anxiety in many men; it triggers an awareness of their own feminine qualities, such as

146. *Compare* Case, *supra* note 72, at 12 (explaining that adjectives generally regarded as “masculine” include “‘aggressive, . . . ‘dominant,’ ‘forceful,’ . . . and ‘strong’”), *with* Craig, *supra* note 8, at 106, 112 (explaining that qualities regarded as “feminine” such as passivity and sensitivity are seen as sign of weakness).

147. *See* Schwartz, *supra* note 140, at 73 (using example of white male and explaining that he can communicate power based, *inter alia*, on his gender).

148. *See* Case, *supra* note 72 at 6, 12.

149. *See* Case, *supra* note 72, at 3 (explaining that many men despise men who exhibit feminine qualities because in doing so, they are “descending from [the] masculine gender privilege”); Craig, *supra* note 8, at 112 (explaining that heterosexual men desire maintenance of power and dominance for own sake and as definitional sense of identity).

150. *See* Craig, *supra* note 8, at 112 (concluding that desire of heterosexual men to maintain power and dominance is motivation behind sexual harassment).

151. *See id.* at 106 (explaining that many men consider “feminine qualities” to be sign of weakness).

passivity or sensitivity, which they see as being a sign of weakness.”¹⁵² Harassing these men is a way of maintaining their own power.¹⁵³

The social construction of power also subordinates sexual minorities as well as feminized people in the gender hierarchy. Because of the conflation of sex, gender and sexuality, society has come to expect not only certain gender traits, but also a prescribed set of sexual behavior from people according to their biological sex. If a person's gender and sexual performance is inconsistent with what is expected of his or her biological sex, that person is subordinated in the gender hierarchy. As a result, heterosexual males are privileged to enforce hegemonic paradigms of sexuality and sex roles on others less powerful in the gender hierarchy.

It is also clear from the courts' treatment of reverse discrimination cases that a man can be sexually harassed based on powerlessness, even if he does not display feminine or gender-inappropriate traits.¹⁵⁴ Although the gender hierarchy often informs our understanding of the power relationship between two people, power exists outside of gender. There is a myriad of other ways in which one person can come to have power over another person, particularly in the workplace. Employers, by definition, have significant power over their employees because of their ability to punish or reward their employees. In addition, the “boss” or “supervisor” is often a person who possesses certain qualities. To be a successful boss, a person may need to be aggressive. Aggressiveness is often viewed as a male quality. As aggressive people find themselves in a position of power, that becomes one image of power. A male then, need only show an aggressive tendency to fit the role of a leader as created by social views.

Employers may have additional power over their employees based on economic and social inequalities likely to be found between the two groups. When jobs are scarcest, the disparity in bargaining power between an employer and employee is greatest. At such times, the employer generally has a greater ability to affect the employee's life, by threatening to fire the employee, failing to give the employee a raise, or giving the employee more menial or less satisfying work. Although an employee can threaten to quit, such a threat will have little meaning when the job market allows the employer to hire easily new, qualified people. For these reasons, it is possible for a man to be sexually harassed by a woman or by another man who is his superior or in a position of power over him.

CONCLUSION

Same-sex sexual harassment is an assertion of power in which the harasser subjects a subordinate to adverse working conditions based on gender-related traits. Even in the narrowest anatomical sense of the word, this har-

152. *Id.*

153. *See id.* at 112 (explaining that sexual harassment is motivated by desire of heterosexual men to maintain power and dominance).

154. *See supra* notes 110-112 and accompanying text.

assment is based on sex. It should be actionable, regardless of the biological sex or sexual preference of the employee. Any person who endures the comments or behavior of a supervisor or a co-worker that pertain to matters of sexual activity, sexual identity, or gender-stereotyped traits should have a cause of action for sexual harassment under Title VII, especially if the gender traits singled out by the harasser communicate a lack of power under traditional and stereotypical notions of gender-appropriate behavior. This reading of Title VII would include protection for homosexuals, transgendered persons, and all other sexual minorities as long as their sexual or gender-related characteristics did not impede their job performance. Sexual harassment should be actionable as long as the plaintiff can show he was singled out based on his exhibition of sexual or gender-related traits that, in the traditional masculine-dominated gender hierarchy, signify a lesser degree of power and dominance than the masculine, heterosexual harasser.

By focusing on the connections between all the different facets embodied in the term “sex,” it is apparent that “sex, gender, and sexual orientation jointly motivate acts of discrimination that are presently perceived as being ‘based’ only on one of these three endpoints.”¹⁵⁵ Sexual harassment is founded on the presumption that traditional gender roles should be enforced. When a male superior treats a female employee like a sex object, or makes her surroundings highly sexualized, he is exploiting his power over her in order to force her into “the traditional, feminine role of submissive sex partners to men” and remind her that she is “expected to be feminine and deferential towards men—to adhere to traditional gender roles.”¹⁵⁶ Ultimately, he is inappropriately introducing sex into the workplace and discriminating against her because of her gender. When a male superior taunts a male employee who is homosexual, or who displays feminine characteristics, by crassly discussing sexual conquests, or forcing the subordinate to view heterosexual pornography, that superior is similarly asserting his power by exploiting the employee’s failure to act according to expected gender roles. Just like the male-female scenario, the employer is improperly bringing sex and gender into the workplace and discriminating against his subordinate based on the roles persons of that gender are expected to play.

Same-sex sexual harassment can be just as frequent, pervasive, severe, threatening, humiliating, and disruptive to work as opposite-sex harassment. Every time courts deny an employee a cause of action for same-sex hostile work environment, they are giving employers the green light to sexually harass men who violate gender stereotypes. As long as failure to comply with strict gender-role stereotypes is viewed as grounds for abuse, and employers are allowed to administer the abuse, society will continue to perceive these men as weak and exploit them.

155. Valdes, *supra* note 78, at 169.

156. Craig, *supra* note 8, at 107-08.