CALL FOR CONSISTENCY: TITLE VII AND SAME-SEX HOSTILE ENVIRONMENT SEXUAL HARASSMENT

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The Fifth Circuit has definitively held that same-sex hostile environment harassment is not actionable under Title VII. Another circuit court, however, has held that a cause of action exists under Title VII for same-sex hostile environment harassment in certain, limited circumstances.¹ Yet other circuits have held that same-sex sexual harassment is actionable under the statute.² Because of this conflict between circuits, the Supreme Court has just this summer agreed to rule on the issue.³ Same-sex hostile environment harassment clearly should be held actionable under Title VII.⁴ This comment seeks to address factors that have contributed to and which cast light upon this anomalous result. Such factors include both the internal inconsistencies in the hostile environment harassment law as it is applied in various contexts, as well as external inconsistencies in hostile environment harassment law as


1. See Wrightson v. Pizza Hut of America, Inc., 99 F.3d 138, 141 (4th Cir. 1996) ("[A] claim under Title VII for same-sex 'hostile work environment' harassment may lie where the perpetrator of the sexual harassment is homosexual."); Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 753 (4th Cir. 1996) ("In sum, while harassment directed toward an individual employee by another individual of the same gender may be actionable if it is directed at the employee 'because of' the employee's gender, the plaintiff must overcome the presumption in that circumstance that the harassment was not 'because of' that employee's gender.").

2. See Fredette v. BVP Management Associates, 112 F.3d 1503 (11th Cir. 1997); Doe v. City of Belleville, 119 F.3d 563, 574 (7th Cir. 1997); Yeary v. Goodwill Industries-Knoxville, Inc., 107 F.3d 443, 448 (6th Cir. 1997); Quick v. Donaldson Co. Inc., 90 F.3d 1372, 1379 (8th Cir. 1996).


4. See 42 U.S.C. § 2000e-2(a)(1) (1988) ("[I]t 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 . . . .").
compared to racial and religious harassment law. Furthermore, an attempt will be made to evaluate the sources of these internal and external inconsistencies, and an alternative approach to hostile environment claims will be suggested which will eradicate such inconsistencies.

I. HISTORY OF HOSTILE ENVIRONMENT HARASSMENT

Title VII provides that it is unlawful for an employer "to discriminate against any individual... because of such individual's race, color, religion, sex, or national origin." Sex discrimination was included within the protection of Title VII immediately before the law was passed and there is, therefore, a dearth of legislative history regarding the intent of Congress in including the provision. However, it is clear from the limited available history that the primary concerns voiced by those proposing the amendment involved obtaining equal treatment for women. It is also evident that the proposed addition of the word "sex" resulted in great opposition to Title VII as a whole with numerous members of the House agreeing to vote for passage of the bill only if the term "sex" was stricken from the act.

There exist two recognized forms of sexual harassment which are actionable under Title VII, "quid pro quo" sexual harassment and "hostile environment" sexual harassment. Quid pro quo sexual harassment involves the employer's conditioning the receipt of a benefit on sexual conduct by the employee. Hostile environment harassment does not involve such direct pressure to engage in sexual conduct, but rather involves exposure to workplace conduct which is pervasively offensive and psychologically intimidating such that it affects the employees' "conditions of employment" and, therefore, is in violation of Title VII. Hostile environment sexual harassment has its origins in the racial discrimination context. An environment, so polluted by racial animosity that it infringes on an employee's psychological well-being, has been held to violate Title VII to the same extent as discrimination by an employer who intentionally imposes racially disparate treatment on employees. Hostile environment harassment has also been found to lay the basis for a Title VII violation where the harassment is directed at the employee's

5. Id.
7. See id.
9. See id. at 1455.
10. See, e.g., Gray v. Greyhound Lines, East, 545 F.2d 169, 176 (D.C. Cir. 1976); Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971).
A. Supreme Court Origins of Hostile Environment Sexual Harassment

It is from these sources, in the areas of racial, religious, and national origin harassment, that hostile environment sexual harassment developed as an affront actionable under Title VII. The Supreme Court first recognized hostile environment sexual harassment in *Meritor Savings Bank v. Vinson.* The Court emphasized that Title VII was broadly written and intended to reach the full range of incongruous treatment of men and women and, therefore, was not limited to employer conduct which impinged on tangible attributes of employment such as compensation. Further, the Court emphasized that it could discern no reason to allow hostile environment to be actionable in the context of harassment based on race, religion, or national origin, but to foreclose the legal remedy provided by Title VII in the context of sexual, hostile environment harassment. The Court then articulated the requirements for a hostile environment sexual harassment claim under Title VII. The conduct alleged must be unwelcome and sufficiently severe to alter the employee's conditions of employment. The Court also reiterated that mere utterance of an offensive word would not be sufficient to satisfy the requirements of a Title VII violation. Furthermore, the Court held that existence of a hostile work environment should be determined from a "totality of the circumstances."

The Court further refined the requirements of a hostile environment sexual harassment action in *Harris v. Forklift Systems.* In *Harris,* the Court rejected the requirement that a hostile work environment must actually result in psychological damage to the employee to be actionable under Title VII. The Court stated that an actionable hostile environment claim would require a work environment that was more abusive than one that contained the occasional "merely offensive" comment, but did not

11. See Cariddi v. Kansas City Chiefs Football Club, Inc., 568 F.2d 87, 88 (8th Cir. 1977) ("[D]erogatory comments [can] be so excessive and opprobrious as to constitute an unlawful employment practice under Title VII.").
12. See Compston v. Borden, Inc., 424 F. Supp. 157, 160-61 (S.D. Ohio 1976) ("When a person vested with managerial responsibilities embarks upon a course of conduct calculated to demean an employee before his fellows because of the employee's professed religious views, such activity will necessarily have the effect of altering the conditions of his employment.").
14. See id. at 64.
15. See id. at 65.
16. See id. at 67-68.
18. See id. at 22.
require tangible psychological injury. Instead, the inquiry was whether a "reasonable person" would perceive the work environment as objectively abusive because of the sexually harassing conduct. The Court went on to suggest that the hostile environment inquiry was not a bright line test and, instead, involved a consideration of several factors including, but not limited to, the frequency and severity of the offensive conduct and the effect of such conduct on the employee.

B. Lower Court Refinements of the Harris & Meritor Standards

Some courts since Harris have suggested that the "reasonable person" perspective on harassing behavior should be further refined to evaluate the behavior from the perspective of the reasonable victim. In the case of male on female harassment this would require an interpretation of the behavior from the perspective of the reasonable woman. This standard has not, however, been universally adopted, and most courts continue to employ a gender neutral reasonable person standard.

In addition to the inclusion of a gender specific reasonable person, other lower courts have required the additional finding that the harassment would not have been engaged in "but for" the victim's sex. This "but for" requirement flows from the Title VII requirement that the harassment or discrimination be "because of" the employee's sex. One court, for example, has indicated that hostile environment harassment in violation of Title VII would be found where objectionable demands are made of a female employee that would not also have been made of a male.

19. See id. at 21.
20. See id. at 22.
21. See id. at 23.
22. See, e.g., Burns v. McGregor Elec. Indus., Inc., 989 F.2d 959, 962 n.3 (8th Cir. 1992) (noting the EEOC supports the evaluation of Title VII claims from the perspective of the victim); Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991) ("In evaluating the severity and pervasiveness of sexual harassment, we should focus on the perspective of the victim.").
23. "Male on female harassment" will be used throughout this comment to connote harassment perpetrated by a male harasser on a female victim.
24. See, e.g., Burns, 989 F.2d at 962 n.3 ("In hostile environment litigation under Title VII, the appropriate standard is that of a reasonable woman under similar circumstances."); Ellison, 924 F.2d at 878 ("A complete understanding of the victim's view requires . . . an analysis of the different perspectives of men and women.").
employee.\textsuperscript{27} This finding, taken to its logical conclusion, results in the holding of some courts that behavior which is objectionable to, and directed at, both men and women cannot form the basis for a Title VII action because both men and women are being treated with equivalent hostility.\textsuperscript{28} Courts have suggested that in instances where offensive conduct is directed at both genders, an individual may still have a state law action in tort to address the objectionable conduct.\textsuperscript{29}

Currently, the only standard set forward by the Supreme Court in the area of hostile environment harassment is that articulated by \textit{Meritor} and \textit{Harris}. Under that standard, the requirements that must be met for a hostile environment harassment claim are that the behavior be unwelcome, severe, and pervasive enough that a reasonable person would view the behavior as altering the conditions of employment. Additionally, in certain courts the "reasonable victim" standard is employed and the "but for" the employee's sex test must also be met.

II. \textbf{SAME-SEX HOSTILE ENVIRONMENT HARASSMENT}

Currently, circuit and district courts are split on whether a claim for same-sex sexual harassment should be actionable under Title VII. The reasoning of those courts that have held that such harassment is not actionable differs somewhat, although the ultimate result is identical, leaving the employee no Title VII remedy for the harassing behavior. The inconsistent reasoning of courts that have held that same-sex harassment is not actionable makes it difficult to predict what the ultimate resolution will be when the Supreme Court decides the issue in \textit{Oncale}. Furthermore, the reasoning of these courts generally is not based on the standards set forth by the Court in \textit{Meritor} and \textit{Harris}. Rather, the courts have interpreted the additional requirements for a hostile environment claim under Title VII that have been added by lower courts, such as the "but for" test. The inconsistent treatment of same-sex harassment claims by lower courts has resulted in increased confusion in sexual harassment law—an area of law which, though speciously settled by the Supreme Court in \textit{Meritor}, has left lower courts struggling to resolve the more complex variations of these issues in a world that is increasingly socially and sexually complicated.

\textbf{A. Circuits That Have Held Same-Sex Sexual Harassment Not}

\begin{itemize}
\item \textsuperscript{27} \textit{See Bundy}, 641 F.2d at 942 ("The supervisor . . . made demands of [the employee] that he would not have made of male employees.").
\item \textsuperscript{28} \textit{See Rabidue}, 805 F.2d at 620.
\item \textsuperscript{29} \textit{See Henson}, 682 F.2d at 904 (noting, prior to the Supreme Court's decision in \textit{Meritor}, that "[i]n such cases, the sexual harassment would not be based upon sex because men and women are accorded like treatment.").
\end{itemize}
**Actionable Under Title VII**

One circuit to rule definitively on the issue of same-sex hostile environment harassment is the Fifth Circuit, which held that same-sex hostile environment harassment is not actionable under Title VII. The court in *Garcia* found that same-sex sexual harassment was not actionable through reliance on an unpublished appellate decision and a district court case in which the court found that heterosexual same-sex harassment, even that which contains sexual overtones, is not actionable under Title VII. The Fifth Circuit did not discuss the issue in further detail and stated only that such activity does not fall within the protection of Title VII.

The district court in *Goluszek* did not reason that same-sex hostile environment discrimination was not actionable because of the plaintiff-employee’s failure to satisfy the “but for” test. Instead, the court focused on the fact that, as a whole, the environment in which the plaintiff was employed was not anti-male, and therefore, any harassment which had occurred was not actionable. However, an anti-male or anti-female environment is not a requirement for an actionable sexual harassment claim under Title VII as articulated by the Supreme Court in *Meritor* and in *Harris*. Even so, the court did in fact find sufficient evidence that the plaintiff would have been treated differently by his supervisors if he had been a woman. Hence, the “but for” test was satisfied because “but for” the employee being male, he would have received different treatment. Therefore, although the plaintiff satisfied one of the additional requirements for a hostile environment claim under Title VII, the Fifth Circuit denied his action on alternative grounds.

The *Goluszek* court focused on the intent of Congress in enacting Title VII, which was, according to the court, to eradicate “discrimination ... stemming from an imbalance of power and an abuse of that imbalance by the powerful, which results in discrimination against a

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30. See *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446 (5th Cir. 1994). The court held that same-sex harassment was not actionable where Garcia alleged that he had been sexually harassed by his male supervisor. See id. at 452. The alleged conduct of the supervisor included sexual gesturing toward and touching of Garcia. See id. at 448.

31. See id. at 451-52 (citing Giddens v. Shell Oil Co., No. 92-08533 (5th Cir. Dec. 6, 1993), and *Goluszek v. H.P. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988)).

32. See id. at 452.

33. See *Goluszek v. H.P. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988). Goluszek was a heterosexual male who was harassed by his heterosexual co-workers. The harassment focused on the plaintiff’s inferred lack of sexual experience and his accused ineffectual masculinity. See id. at 1454. The harassment included sexual comments regarding the plaintiff’s past sexual experiences and suggestions by co-workers of future sexual activity, as well as physical threats of a sexual and non-sexual nature. See id.

34. See id. at 1456.

35. See id.
discrete and vulnerable group." The court found that even though the plaintiff may have been harassed because he was a male, he was not subjected to the harassment in an environment which was anti-male, and therefore, the harassment was not actionable under Title VII. The court indicated further that several forms of harassment of employees exist, including those which have sexual overtones, which are not actionable under Title VII because the behaviors are not of the type intended to be prohibited by Congress in enacting the statute. The court did, however, acknowledge that a "wooden" application of the language of Title VII would appear to provide for a cause of action. Nonetheless, the court declined to apply such a formulation of the language of the statute, finding instead that allowing for a cause of action for same-sex sexual harassment under the language of Title VII would conflict with the intent of Congress in enacting the statute. Therefore, Goluszek failed to state a claim under Title VII because, even though he was harassed because he was a male, his harassment could not be "harassment by the powerful of the powerless," because he was not employed in an environment where, in general, men were a less powerful group.

Many other courts that have also found same-sex sexual harassment not actionable under Title VII have done so through reliance on Garcia's reasoning, which in turn relied on the reasoning of Goluszek. Some

36. Id.
37. See id.
38. See id. at 1456 ("Title VII does not make all forms of harassment actionable, nor does it even make all forms of verbal harassment with sexual overtones actionable.").
39. See id.
40. See id.
41. See Benekritis v. Johnson, 882 F. Supp. 521 (D.S.C. 1995). Plaintiff-employee was harassed on two occasions by his male mentor. See id. at 523-24. The harassment included physical conduct of a sexual nature between the employee and a more experienced fellow employee. See id. The court reviewed the findings of courts which held same-sex harassment actionable and those which held it not actionable and elected to follow the reasoning of the courts in Garcia and Goluszek. See id. at 526. See also Ashworth v. Roundup Co., 897 F. Supp. 489 (W.D. Wash. 1995). Plaintiff-employee in Ashworth was harassed by a supervisor through physical and verbal conduct of a sexual nature. See id. at 490. The court rejected the line of cases which hold that same-sex harassment is actionable under Title VII and instead elected to follow the reasoning of Garcia and Goluszek. See id. at 494. The court found that the case was factually analogous to Goluszek and that, as was the case in Goluszek, the plaintiff in Ashworth had failed to establish that the employment environment was anti-male. See id. Therefore, although the supervisor-defendant's behavior may have constituted sexual harassment, it was not actionable under Title VII. See id.

But see Oncale, 83 F.3d 118. The Fifth Circuit indicated in Oncale that they might now, although bound to follow precedent, doubt the validity of the decision in Garcia. See id. at 119. After indicating that under the reading of Title VII found in Meritor, the sex of the harasser and the employee would not appear to be relevant to a determination of whether conduct was actionable under Title VII, the court stated it could not adopt such a
courts, however, in holding that same-sex sexual harassment is not actionable, have focused instead on the need for an element of desire for sexual gratification in order for hostile environment sexual harassment to be actionable under Title VII. This requirement effectively precludes same-sex heterosexual harassment from coverage by the statute while allowing same-sex homosexual harassment to be actionable under Title VII. However, grounding a viable cause of action for hostile environment harassment in the existence of sexual attraction is problematic, not only because issues of proof will be difficult, but also because this analytic perspective ignores the well-established explanation for the phenomenon of sexual harassment. Generally, sexual harassment evolves from an abuse of power, rather than a desire for sexual gratification. Finally, other courts have found same-sex sexual harassment not actionable because, at

reading and was instead obligated to follow the precedent of Garcia, which relied on the reasoning of Goluszek. See id. “Although our analysis in Garcia has been rejected by various district courts, we cannot overrule a prior panel’s decision. In this Circuit, one panel may not overrule the decision, right or wrong, of a prior panel in the absence of an intervening contrary or superseding decision by the Court en banc or the Supreme Court.” Id. (emphasis added) (footnote omitted).

42. See, e.g., Martin v. Norfolk S. Ry. Co., 926 F. Supp. 1044 (N.D. Ala. 1996). In Martin, the plaintiff was subjected to verbal and physical harassment of a sexual nature by his male, heterosexual co-workers. See id. at 1046-47. The court held that, in the case of heterosexual same-sex hostile environment harassment, Title VII does not provide for a cause of action. See id. at 1050. The court first articulated the presumption that harassment exists in the heterosexual male-female context, in the bisexual context with either sex, or in the homosexual context with an individual of the same sex when the individual would not treat individuals of the opposite sex in the same manner. This presumption, according to the court, results from the perceived need for sexual gratification implicit in these types of harassment. See id. at 1049. By contrast, in the case of same-sex heterosexual harassment no such presumption exists because there is no desire for sexual gratification and, thus, no discrimination. Therefore, such cases are not actionable under Title VII. See id. For at least one court, then, “because of sex” in Title VII turns on sexual gratification rather than solely disparate treatment.

See also Childress v. City of Richmond, 907 F. Supp. 934 (E.D. Va. 1995). Childress involved a claim by male police officers for hostile environment sexual harassment for comments directed at female officers. The court looked to case law regarding same-sex hostile environment harassment as persuasive authority although the case presented the novel issue of the ability of individuals to assert a hostile environment claim when the harassment was directed at co-workers of the opposite sex. See id. at 939. After noting that the prevailing view of the case law is that same-sex sexual harassment is not actionable the court went on to note that “[o]ne pattern, at least, is clear: for same-sex harassment to support a claim, there must be an allegation of quid pro quo or, at the very least, some sexual element to the harassment or hostile environment.” Id.

43. See, e.g., Judith I. Avner, Sexual Harassment: Building a Consensus for Change, 3 KAN. J.L. & PUB. POL’Y 57, 61 (1994) (“[S]exual harassment . . . is a learned behavior . . . . [T]his learned behavior is condoned in our society and is a by-product of . . . . inequality which exists among men, women, and other groups . . . . [T]his hierarchy of inequality is based on some groups having power over others and it is sanctioned by differential treatment and ultimately force.”).
least in the context of heterosexual same-sex harassment, the harassment is not "because of" the victim's sex as required by the language of Title VII.\textsuperscript{44}

The major areas, then, where courts have found authority for failing to allow for a cause of action for same-sex hostile environment harassment under Title VII are in the intent of Congress and in the plain language of Title VII. First, the intent of Congress is not considered to include remedying harassment in the workplace unless the environment is one that evidences hostility toward the victim's gender as a whole. Second, courts hold that the plain requirement of Title VII's language that the harassment be "because of" the victim's sex, limits the remedy to only certain claims that involve either a harasser of the opposite sex or a harasser or victim who is homosexual. This perspective argues that it would be imprudent to read the language of the statute more broadly as this would result in excessive Title VII litigation.

Finally, as with the prudence argument for limiting the availability of Title VII remedies, courts have found that the "because of sex" language of the statute implies that a sexual gratification component is necessary to satisfy the causation requirement in the statute. These divergent justifications for barring a cause of action for same-sex heterosexual harassment are linked by the common theme that, whether or not there should be a legal remedy, Title VII either in language or design does not protect these employees.

B. Circuits that Have Held Same-Sex Sexual Harassment Actionable Under Title VII

While some courts have been reluctant to do so, other courts, for reasons just as disparate, have held that same-sex hostile environment harassment is actionable under Title VII. The Fourth Circuit is one circuit to indicate that the statute may, in certain circumstances, provide for a

\textsuperscript{44} See, e.g., McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191 (4th Cir. 1996), cert. denied, 117 S.Ct. 72 (1996). In McWilliams, the plaintiff was subjected to both physical and verbal harassment of a sexual nature by his male co-workers, all of whom were allegedly heterosexual. The court first indicated that its finding was limited to heterosexual same-sex hostile environment harassment claims and was not intended to preclude actions based on discrimination in employment decisions such as hiring or firing or to preclude hostile environment claims where the individuals are of the same-sex but either the victim or the oppressor are homosexual. See id. at 1195 n.4. The court then provided, focusing on the plain language of Title VII, that "we do not believe that in common understanding the kind of shameful heterosexual-male-on-heterosexual-male conduct alleged here... is considered to be 'because of the [target's] 'sex.'" Id. at 1195-96. This finding was necessary, according to the court, to avoid extending the protections of Title VII to an "unmanageably broad" category of behaviors, which could not, according to the court, have been intended by Congress when it included the limiting causation language in the statute. See id. at 1196.
cause of action for the victims of same-sex hostile environment harassment under Title VII.\textsuperscript{45} However, it is clear that, at least in the Fourth Circuit, the victim of same-sex hostile environment sexual harassment will face a more difficult time establishing a claim under Title VII than will the individual who is the victim of harassment by those of the opposite sex.\textsuperscript{46}

Some courts have held that same-sex sexual harassment is actionable, rejecting the requirement, articulated in Goluszek, that the environment needs to be hostile to all members of the victim's sex.\textsuperscript{47} In Doe, the Seventh Circuit "reject[ed] the narrow construction of Title VII advanced by Goluszek, Garcia, and their progeny. Unless we read into the statute limitations that have no foundation in the broad, gender-neutral language that Congress employed, it is evident that anyone sexually harassed can pursue a claim under Title VII, no matter what her gender or that of her harasser."\textsuperscript{48} Likewise, in Fredette, the Eleventh Circuit found it could "readily conclude that the Goluszek rationale is flawed. The law is well established that Title VII protects men as well as women, without regard to whether the workplace is male-dominated."\textsuperscript{49} Therefore, the court held same-sex hostile environment harassment actionable through reliance on the plain language of the statute and by noting the absence of anything to indicate Congressional intent to the contrary in the legislative history of

\textsuperscript{45} See Hopkins, 77 F.3d 745. Hopkins was decided two months after the Fourth Circuit's holding in McWilliams, which stated that Title VII did not provide for a cause of action for same-sex heterosexual harassment. The Hopkins court, by contrast, found no such exclusionary language in the wording of Title VII. See id. at 751. Therefore, "sexual harassment of a male employee, whether by another male or by a female, may be actionable under Title VII if the basis for the harassment is because the employee is a man." Id. at 752. Subsequently, the Fourth Circuit abated any ambiguity regarding its approach to same-sex hostile environment harassment in Wrightson, holding that there would be a cause of action for same-sex sexual harassment only when the perpetrator is homosexual. See Wrightson, 99 F.3d at 141.

\textsuperscript{46} See Hopkins, 77 F.3d at 752. Therefore, although rejecting the de facto rule that same-sex hostile environment harassment is not actionable, the court nonetheless indicated that the employee would face a substantially more difficult burden of proof when the harasser and the employee are of the same sex. See id. In effect, the victim in this instance will have to overcome the presumption that the conduct is not "because of" the individual's sex but rather, according to the court, is motivated by some other reason. The court went on to hold that "while harassment directed toward an individual employee by another individual of the same gender may be actionable if it is directed at the employee 'because of' the employee's gender, the plaintiff must overcome the presumption in that circumstance that the harassment was not 'because of' that employee's gender." Id. at 753. Further, after Wrightson, it would seem that such a presumption can only be rebutted where the harasser is a homosexual.

\textsuperscript{47} See Doe, 119 F.3d 563; Fredette, 112 F.3d at 1509; Johnson v. Community Nursing Servs., 932 F. Supp. 269 (D. Utah 1996) (holding that Title VII does not exclude same-sex sexual harassment from protection).

\textsuperscript{48} Doe, 119 F.3d at 574.

\textsuperscript{49} Fredette, 112 F.3d at 1509 (footnotes omitted).
Title VII.

In Johnson, the plaintiff was subjected to verbal sexual harassment by her homosexual, female supervisor. The court expressly rejected the *Goluszek* requirement that the environment in which the victim is harassed must be hostile to all members of the victim's gender.\(^{50}\) "This interpretation would impose an additional requirement to a Title VII cause of action.... Title VII 'does not require that the work environment be hostile to all workers of the plaintiff's sex; it requires that the work environment be hostile to the plaintiff.'"\(^{51}\) The court went further, focusing on the plain language of Title VII, to state that there was no evidence in the language of the statute that would exclude a cause of action when the harasser and the victim are of the same sex. "Rather, the language of Title VII creates a 'broad rule of workplace equality.'"\(^{52}\)

The court in *Sardinia v. Dellwood Foods*\(^{53}\) indicated that the source of most jurisprudence holding same-sex sexual harassment not actionable essentially relied on *Goluszek*, which is itself founded almost exclusively on the reasoning of a single law journal commentary that did not even reach the question of same-sex sexual harassment or the question of legislative intent in enacting Title VII.\(^{54}\) Therefore, the decision of the court in *Goluszek* holding that the purpose of Title VII was to correct an imbalance of power and that the statute's protections should only extend to those individuals who are employed in an environment which is hostile to their gender as a whole, is not supported by anything other than the opinion of a single author. "[T]hese 'underlying concerns' are not Congress's but the viewpoint of a law student... [and] the Note was written two years before *Meritor*, the Supreme Court's first and foremost interpretation of hostile environment sexual harassment claims under Title VII."\(^{55}\) Other courts have, instead, rejected the aspect of the *Goluszek* reasoning that articulated the purpose of the statute as a means to redress an imbalance of power.\(^{56}\) In *King* the plaintiff was subjected to sexual harassment by her female, homosexual supervisor. The court explicitly rejected the finding of *Goluszek* that the sole purpose of Title VII was to equalize the imbalance of power between men and women in the

\(^{50}\) See Johnson, 932 F. Supp. at 272.

\(^{51}\) Id. at 272-73.

\(^{52}\) Id. at 273.


\(^{54}\) See id. at *4 (indicating that reliance on a law journal Note was, *inter alia*, a "leap" to denying same-sex harassment claims).

\(^{55}\) Id.

workplace. Further, according to the court, there is no evidence, either in the statutory language of Title VII or in the legislative history of the statute, to indicate that Congress intended to extend its protections only to situations where an individual is harassed by a member of the opposite sex. The rejection of this theoretical position is based on the prior extension of Title VII to male victims of sexual harassment. Allowing Title VII to provide for a cause of action for male victims of sexual harassment belies the purpose of the statute being merely to redress the imbalance of power between men and women in the workplace. Furthermore, there is no evidence of such a limiting intent on the part of Congress either in the language or legislative history of Title VII.

Yet other courts have held homosexual same-sex harassment actionable under the reasoning that the Meritor Court expressly spoke in gender neutral terms, which did not limit the application of hostile environment harassment to heterosexual male on female harassment. First, the court in Sardinia found that there is nothing in the language of Title VII to prevent allowing a cause of action for same-sex sexual harassment. Further, "Goluszek ignores Supreme Court precedent...

57. See id. at 167 ("This Court respectfully declines to follow the reasoning of Goluszek... that the only sex discrimination Title VII endeavors to prevent is that 'stemming from an imbalance of power . . . '").
58. See id. ("[N]othing in the text of the statute indicates that Title VII's protections extend only to individuals who are harassed by members of the opposite sex . . . [and] no legislative history exists on this issue . . . ").
59. See, e.g., Prescott v. Independent Life & Accident Ins., 878 F. Supp. 1545 (M.D. Ala. 1995). Prescott involved the question of whether an employee subjected to quid pro quo harassment stated a cause of action when the harasser was of the same sex, which the court answered in the affirmative. However, the court also discussed whether same-sex hostile environment harassment would be actionable and likewise answered that question in the affirmative. See id. at 1549. The court explicitly rejected the Goluszek holding that the environment need be hostile to all members of the individual's sex, stating that "while this argument may be logically appealing, it is not the current state of anti-discrimination jurisprudence. If it were, a similar argument could be made when a white plaintiff attempts to sue for reverse discrimination under Title VII." Id. at 1550.
60. See Sardinia, 1995 WL 640502 at *5; see also Quick, 90 F.3d at 1378; EEOC v. Walden Book Co., 885 F. Supp. 1100, 1102 (M.D. Tenn. 1995) ("Although Vinson involved the sexual harassment of a female subordinate by a heterosexual male supervisor, the language used by the Court in defining sexual harassment as discrimination based on sex was not limited to opposite sex situations."); Raney v. District of Columbia, 892 F. Supp 283, 287 (D.D.C. 1995) ("[I]t cannot be denied that even if the Civil Rights Act of 1964 is silent as to its intended scope, the law's breadth has since increased by judicial interpretation."); Roe v. K-Mart Corp., Civ.A.No. 94-0068 (GK/PAJ), 1995 WL 316783, at *1 (D.S.C. Mar. 28, 1995). ("The Supreme Court did not restrict its holding to sexual advances from members of the opposite sex as the victim."). In Quick the court announced the appropriate test as that outlined in Harris. However, it should be noted that the defendants in Quick failed to raise directly the issue of the permissability of a cause of action for same-sex harassment under the statute. See Quick, 90 F.3d at 1372. Therefore, the Eighth Circuit has not squarely confronted the issue. See Doe, 119 F.3d at 574 n.8.
‘without question, when a supervisor sexually harasses a subordinate because of the subordinate’s sex, the supervisor “discriminates” on the basis of sex.’\textsuperscript{61} Second, the court then indicates that the \textit{Goluszek} court recognized that the unsuccessful plaintiff in that case may have been harassed because of his sex, but that the Fifth Circuit, according to the court, then erroneously concluded that the harassment was not actionable because it did not take place in an anti-male environment. Third, the court in \textit{Sardinia} also found it untenable to allow reverse discrimination cases to proceed, but not to allow same-sex harassment cases to be actionable under Title VII.\textsuperscript{62} Fourth, disallowing same-sex harassment claims contradicts EEOC guidelines which were relied on by the Supreme Court in \textit{Meritor}.\textsuperscript{63} Finally, the \textit{Sardinia} court indicated that under a totality of the circumstances analysis, “suffering sexual harassment from supervisors of the same sex does nothing to diminish the severity of that harassment . . . .”\textsuperscript{64}

In addition, other courts have held same-sex hostile environment harassment to be covered by Title VII, particularly in the case of homosexual harassers, because the “but for” test is satisfied and the harassment is, therefore, actionable.\textsuperscript{65} In \textit{Yeary}, the Sixth Circuit stated

\begin{itemize}
  \item[61.] See \textit{Sardinia}, 1995 WL 640502 at *5.
  \item[62.] See id.
  \item[63.] See id. at *6.
  \item[64.] Id.
  \item[65.] See Yeary, 107 F.3d at 448; see also Pritchett v. Sizeler, Civ.A.No. 93-2511, 1995 WL 241855 (E.D. La. 1995). In a context where the harasser was a homosexual male harassing a heterosexual male, the court held that “[s]ame gender harassment is clearly a form of gender discrimination because ‘but for’ the gender of the subordinate, [he] would not have been subjected to the harassment.” \textit{Id.} at *2. It should be noted, however, that the court was most concerned in \textit{Pritchett} with not permitting homosexual supervisors to harass their subordinates with impunity rather than assuring that regardless of the sexual orientation of the harasser that individuals are protected from sexual harassment. See \textit{id.} For instance, if the harasser is heterosexual and is creating a sexually hostile environment for a homosexual employee of the same sex, because of his or her sex, it is unclear whether the \textit{Pritchett} court would likewise find this harassment actionable under Title VII.\textsuperscript{66}

\textit{See also Griffith} v. Keystone Steel & Wire, 887 F. Supp. 1133 (C.D. Ill. 1995). The \textit{Griffith} court allowed the same-sex cause of action by relying on indications in the Seventh Circuit by Judge Posner that such harassment would likely be actionable in the circuit and the statutory language, which contains no limiting language that would preclude a cause of action for employees harassed by members of the same sex. See \textit{id.} at 1136. In addition, the court rejected the \textit{Goluszek} requirement that the victim be employed in an environment that is hostile to his or her gender generally to have a claim under Title VII. The court held that the same-sex hostile environment harassment was actionable. “Griffith has alleged that he was subjected to unwelcome sexual harassment because of his sex that was not directed to female employees, [therefore] he states a claim under Title VII.” \textit{Id.} at 1137. \textit{See also Wright} v. Methodist Youth Services Inc., 511 F. Supp. 307, 310 (N.D. Ill. 1981) (finding that regardless of the gender of the harasser or the harassed, “the legal problem would be identical . . . the exaction of a condition which, but for his or her sex, the employee would
that

[tru]he only question here is whether a complaint can potentially state a Title VII claim when both the harasser and harassed are of the same sex . . . There is no question that Yeary has sufficiently alleged that he was harassed "because of" his sex . . . He had to put up with abuse and harassment that women there did not have to endure.66

Therefore, at least in a context where the employee is sexually propositioned by a supervisor of the same-sex, the Sixth Circuit has found such conduct actionable through application of the "but for" test.

Thus, although the reasoning of courts which have held that same-sex hostile environment is actionable is disparate, certain common themes are apparent. First, courts that uphold a cause of action under Title VII reject the anti-male or anti-female environment requirement that was articulated by the Goluszek court. Furthermore, the plain language of Title VII, which contains no express preclusion, is held to lay the basis for a same-sex hostile environment harassment claim. Finally, courts have relied on the "because of sex" language of Title VII and have found that, in the case of same-sex hostile environment harassment, this type of harassment must be demonstrated to be "because of sex" to the same extent that heterosexual hostile environment harassment must be so demonstrated. However, the "because of sex" requirement does not alone preclude allowing such a cause of action to proceed under Title VII and may instead cause the plaintiff to be subjected to a more stringent standard of proof than in the case of heterosexual, opposite sex hostile environment harassment.

III. INCONSISTENCIES WITHIN THE SEXUAL HARASSMENT FRAMEWORK

Although it is questionable whether Title VII when enacted contemplated a cause of action for hostile environment sexual harassment at all, once having extended the statute's coverage to provide for such a cause of action, the statute should be applied consistently to all the various permutations of sexual harassment. As the law now stands, there exist numerous inconsistencies within the sexual harassment framework, including extending Title VII's coverage to protect males in the workplace, which belie many of the arguments currently pressed to justify the inconsistent result of not allowing a cause of action for same-sex sexual harassment under Title VII. Furthermore, as evidenced by the treatment of the bisexual harasser, the disparate treatment of same-sex hostile environment cases is merely symptomatic of an overarching problem in

66. Yeary, 107 F.3d at 448.
sexual harassment law that appears to rely on artificial demarcation points for allowing remedies under the statute, rather than fundamental consistencies that would flow naturally from the underlying purpose of Title VII, which is undeniably to remove hostility based on immutable characteristics like race and sex from the workplace.

A. The Straightforward Application of the Meritor Framework in Male on Female Sexual Harassment

In the context of harassment perpetrated by a male harasser against a female victim, the application of the analytic framework established in *Meritor* has been straightforward. Courts require that the alleged harassment has the purpose or effect of creating a hostile work environment and that the harassment is sufficiently severe or pervasive to alter the conditions of employment. These requirements are evaluated from the totality of the circumstances and from the standpoint of the reasonable person.

Notably absent from the cases concerning harassment by a male perpetrator against a female victim are the additional requirements (e.g., an anti-female environment) that have been articulated in the same-sex hostile environment case law. In fact, at least one court has held that where it is clear that the victim would not have been harassed "but for" her sex, the content of the harassment need not be sexual in nature.

Intimidation and hostility toward women because they are women can obviously result from conduct other than explicit sexual advances. Title VII "evinces a Congressional intention to define discrimination in the broadest possible terms. Congress chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameter of such nefarious activities."

At least one other court, by contrast, has held that even if the motivation for harassment is gender neutral, if the manner in which the harassment is carried out is gender specific, a Title VII claim will exist. "[P]laintiff’s coworkers often chose sexually harassing behavior to express their dislike of plaintiff, conduct which would not have occurred if she

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68. See *Tomka*, 66 F.3d at 1304.
69. See id.
70. See *Hall* v. Gus Const. Co., 842 F.2d 1010 (8th Cir. 1988).
71. *Id.* at 1014.
72. See *Winsor* v. Hinckley Dodge, Inc., 79 F.3d 996, 1000 (10th Cir. 1996).
were not a woman."73

Therefore, in the context of heterosexual opposite sex harassment, courts have not had difficulty discerning when an actionable Title VII claim has been articulated solely through reliance on the test articulated by the Supreme Court. Further, some courts have even gone so far as to relax the implicit requirements of Meritor and fail to require even that the sexual harassment have sexual content or when the content is sexual that it be motivated by the female victim’s sex alone.

B. Extension of Title VII to Protect Men Harassed by Women

The protections of Title VII have been extended to protect men from harassment by female supervisors in the workplace. This evolution of Title VII jurisprudence undercuts the argument made, in particular by the Goluszek court, that the purpose of Title VII was to protect those with minority status in the workplace.

In the area of quid pro quo sexual harassment, it is clear that Title VII protects male employees to an equal extent as it protects female employees from such behavior.74 Further, it is implicit in the language used in decisions finding hostile environment harassment where the victim is female, that hostile environment harassment is actionable under Title VII when the victim is male.75 “To maintain an action under Title VII, a plaintiff must demonstrate that he or she has experienced [harassment].”76 This is consistent with the handling of causation in racial discrimination cases, where the victim is a majority group member. In these cases, the Supreme Court has unequivocally held that the protections of Title VII were intended to run to all individuals, whether or not they are members of a racial minority group.77

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73. Id.
74. See Showalter v. Allison Reed Group, Inc., 767 F. Supp. 1205, 1211 (D.R.I. 1991) ("[B]oth plaintiffs are members of a ‘protected group.’ Title VII protects both males and females from sexual harassment.") (citation omitted). Showalter involved an instance of quid pro quo sexual harassment where the employer was male but forced his male employees to engage in sex with his secretary in return for retaining their jobs. See id. See also Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 682 (1983) ("Male as well as female employees are protected against discrimination.") (explaining protection under Title VII).
75. See, e.g., Brooms v. Regal Tube Co., 881 F.2d 412, 418 (7th Cir. 1989).
76. Id. (emphasis added).
77. See McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 278-79 (1976) ("[Title VII’s] terms are not limited to discrimination against members of any particular race. [T]he Act . . . prohibit[s] ‘discriminatory preference for any racial group, minority or majority.’") (emphasis in original) (citations and brackets omitted). Furthermore, the Court indicated that this determination is fully consistent with legislative history of Title VII, which makes clear that the Act was intended to “cover white men and white women and all Americans.”
Therefore, the holding of Goluszek, which required that an individual who has a cause of action under Title VII for hostile environment harassment must be employed in an environment that is hostile to the victim's gender as a whole, is completely inconsistent with the plain language of Supreme Court precedent. Furthermore, if this were a requirement of Title VII law, "a similar argument could be made when a white plaintiff attempts to sue for reverse discrimination under Title VII. That white plaintiff would have been at all times a member of the 'dominant race'." This result would obviously conflict with well settled Supreme Court doctrine. Just as a white plaintiff has a cause of action under Title VII when he or she is faced with racial discrimination, the male employee has a cause of action, as does a female employee, when faced with sexual harassment.

Not only is the additional requirement of Goluszek of an anti-male or anti-female environment nonexistent in other areas of Title VII case law, the requirement actually directly conflicts with the established rule of law that Title VII's protections are not limited to those individuals who are members of particular groups. Rather, it is an individual cause of action triggered when an individual employee is faced with conduct which violates his or her Title VII rights and not those of his or her race or gender as a whole.

C. Inconsistency of Disallowing a Cause of Action Where the Harasser is Bisexual

Another area of inconsistency within the sexual harassment framework is evident in the treatment of harassment that is perpetrated by an oppressor who is bisexual. At least one court has indicated that it may not provide for a cause of action where the perpetrator of the harassment is bisexual and, therefore, likely to impose similar harassment on members of both sexes. Other courts, however, have stated that the fact that an oppressor is an equal opportunity harasser will not cure behavior that would otherwise be violative of Title VII.

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*Id.* at 280 (citations omitted).


79. *See* Barnes v. Costle, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977) ("In the case of a bisexual supervisor, the insistence upon sexual favors would not constitute gender discrimination because it would apply to male and female employees alike.") It should be noted, however, that this statement was dicta in a footnote and therefore cannot be fully relied upon as predictable authority for how this court would rule if faced with the actual issue.

The existence of a cause of action turning on whether or not the oppressor is bisexual will cause difficult issues of proof for both parties. It is unclear, from the limited indications of how these cases will be resolved, what standard of evidence will be required for a plaintiff to prove that his or her harasser is not in fact bisexual. For instance, one court could require that the harasser identify himself or herself as bisexual without requiring sexual orientation to be proven through extrinsic evidence. This is obviously problematic because it would provide an incentive on the part of the harasser to declare him or herself bisexual to avoid a violation of Title VII.

However, it is clear that the treatment of the bisexual harasser, like the treatment of same-sex hostile environment harassment, is yet another area of Title VII law that must be resolved consistent with the plain language of the act and previous Supreme Court interpretation. It would appear that the "because of sex" language of Title VII would equally be satisfied in the case of the bisexual harasser. A bisexual individual who sexually harasses either or both genders does so "because of" the sex of the victim, regardless of the victim's gender. Therefore, there is no justification for the sexual orientation of the harasser to immediately exempt the behavior from the purview of Title VII.

IV. INCONSISTENCIES OF SEXUAL HARASSMENT UNDER TITLE VII AS COMPARED TO RACIAL OR RELIGIOUS HARASSMENT

Sexual harassment cases are resolved inconsistently turning either on the sex of the harasser and the harassed, on whether the environment as a whole is hostile to the victim's gender or on the sexual orientation of the oppressor. These anomalies are yet more evident when compared with the more consistent treatment of the variations of racial and religious harassment under Title VII.

‘cure’ his conduct toward women.”). See also Chiapuzio v. BLT Operating Corp., 826 F. Supp. 1334 (D. Wy. 1993). The court noted that it is highly unlikely that Congress intended to protect an individual from harassment that is directed at an employee by a homosexual supervisor and not that directed at him or her by a bisexual supervisor. See id. at 1336-37 (quoting Vinson v. Taylor, 760 F.2d 1330, 1333 n.7 (D.C. Cir. 1985) (Bork, J., dissenting)). If this were the case, then it would appear that all that Congress sought to remedy by Title VII was discrimination because of gender, and not sexual harassment. Therefore, the court pointed out, once the decision has been made to extend the protections of Title VII to instances of harassment, and not solely discrimination, this decision requires a reconfiguration of the Title VII harassment doctrine to include a cause of action for harassment by a bisexual supervisor on equal terms as harassment by a homosexual or heterosexual supervisor. See id.

81. See Chiapuzio, 826 F. Supp. at 1337 ("Where a harasser violates both men and women, ‘it is not unthinkable to argue that each individual who is harassed is being treated badly because of gender.’") (citation omitted).
A. Religious Harassment

The requirements for a cause of action for hostile environment religious harassment continue to be the same basic requirements that exist for a cause of action for sexual harassment under Title VII as outlined by the Supreme Court in *Meritor*. Victims who seek to state a claim under Title VII for religious hostile environment discrimination must, as must those seeking to state a claim for sexual harassment, establish that the harassment was "because of" their religion. The central limitation for successful articulation of a cause of action under Title VII for religious harassment, however, appears to be the severity of the religious harassment, rather than turning on whether or not the harassment occurred "because of" the victim's religion.

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[Plaintiff] must make a showing that 1) unwelcome comments, jokes, acts, and other verbal or physical conduct of an ethnic and/or religious nature were made in the workplace; 2) such conduct had the effect of creating an intimidating, hostile, or offensive working environment or unreasonably interfered with an individual's work performance; and 3) the employer knew or should have known of the conduct.

See also *Turner v. Barr*, 806 F. Supp. 1025 (D.D.C. 1992). The court indicated that "an employer violates Title VII "simply by creating or condoning an environment at the workplace which significantly and adversely affects (the psychological well-being) of an employee because of his race or ethnicity."" *Id.* at 1027 (citation omitted). The comments on which the cause of action was based included references to the plaintiff's race and religion. *See id.* at 1027-28. The court, under a "totality of the circumstances" analysis, held that the plaintiff was subject to the abuse because of his religion and race. *See id.* at 1029. However, the court made no specific finding regarding whether the plaintiff would have likewise been harassed if he had been of a different race. Instead, the court appeared to be focusing on the racial and religious content of the abuse to determine that the harassment was because of plaintiff's religion and race as required by Title VII. *See id.* at 1028-29.

83. See, e.g., *Goldberg v. City of Philadelphia*, No. CIV. A. 91-7575, 1994 WL 313030, at *10 (E.D. Pa. June 29, 1994). The court listed the five elements that a plaintiff must demonstrate to establish a hostile environment religious harassment claim. The first element is that the victim was harassed because of his religion. The second and third elements are that the harassment was pervasive and that it detrimentally affected the plaintiff. The fourth is that the conduct would detrimentally affect a reasonable person of the same religion and the fifth requirement is the existence of respondeat superior liability. *See id.*

84. See, e.g., *Shapiro v. Holiday Inns, Inc.*, No. 89 C 7458, 1990 WL 44472, at *9 (N.D. Ill. Apr. 6, 1990). The court stated that racial slurs may not be sufficient to state a claim for religious harassment under Title VII. *See id.* at *6*. Rather, the plaintiff must still demonstrate that the conduct was sufficiently severe to alter the conditions of employment. *See id.* at *9*. In *Shapiro*, the victim was unsuccessful in pursuing a cause of action under Title VII because, although apparently assumed by the court to be harassed "because of" her religion, the conduct was not severe enough according to the court to alter the conditions of the plaintiff's employment. *See id.*
The treatment of religious hostile environment claims has been relatively straightforward, requiring neither a showing of an anti-religious atmosphere nor an explicit showing that "but for" the victim's religion the oppressor would not have harassed the victim. The implication of this disparity is that in the religious context, where religious slurs are often used as the vehicle of harassment, there is a prima facie showing of religious animus. Therefore, the Title VII requirement that religious harassment be because of the victim's religion is implicitly satisfied by the form of the abusive language itself. While this is, perhaps, an unproblematic assumption, it should be equally unproblematic to hold that, when slurs of a sexual nature are aimed at an employee, those slurs are prima facie evidence that he or she is harassed "because of" his or her sex, whether or not the underlying motive for the harassment was focused on the sex of the victim.

In the case of religious harassment, no inquiry is made into whether or not the harassment was specifically motivated by the particular religious faith of the individual. Furthermore, such an inquiry into the actual motivations would be and is very difficult to undertake. While it would prove difficult for a court to discern actual motives, it would nevertheless be straightforward to look to the plain content of the harassment to discern whether or not it is because of sex or because of religion. However, it is apparent that should courts desire to place the additional limitation on religious harassment claims that has been placed on sexual harassment actions, plaintiffs would be faced with the same difficulties in stating a cause of action as those faced in the same-sex sexual harassment context.

For example, if an employer was shown to harass all employees of various different religions, courts could claim, as they have in the same-sex harassment context, that such harassment was then not because of the victim's religion, but rather is motivated by general hostility. However, this course of action has not been pursued by courts and, therefore, victims of religious harassment are not confronted with the difficulty of establishing that their harasser targeted them because of their religion as are plaintiffs who seek to sue an employer for same-sex sexual harassment under Title VII.

85. See, e.g., Weiss v. United States, 595 F. Supp. 1050, 1056 (E.D. Va. 1984). The court indicated that the plaintiff can make out a cause of action under Title VII for hostile environment harassment by demonstrating "[c]ontinuous abusive language, whether racist, sexist, or religious in form." Id. at 1056.

86. See, e.g., Rosen v. Baker, No. CV-88-1969, 1995 WL 264169, at *7 (E.D.N.Y. May 1, 1995) ("The cases discussing hostile work environments due to religious animus have consistently been in the context of spoken derogatory remarks or coerced religious activity.") The court went on to hold that having a Bible in one's office did not rise to the level of severity required to state a cause of action under Title VII for religious harassment.
B. **Racial Harassment**

Racial harassment cases, like religious harassment cases under Title VII, have not had the tortuous history of sexual harassment cases. Rather, the test remains the straightforward test announced by the court in *Meritor* and district courts have not made efforts, as they have in the sexual harassment context, to further refine the inquiry.\(^7\) Some courts, however, have indicated that the racial harassment must be severe and pervasive\(^8\) and must stem from racial animus or must be racial in content.\(^9\) The evaluation is to be undertaken from a totality of the circumstances perspective.\(^9\) The court in *Aman* emphasized that there was no requirement that the statements creating the racially hostile working environment be explicitly racial. Rather, it is only necessary that the statements made by the alleged harasser reveal, implicitly, racial hostility for those statements to create a hostile environment. "There are no talismanic expressions which must be invoked as a condition-precedent to the application of laws designed to protect against discrimination. The words themselves are only relevant for what they reveal—the intent of the speaker."\(^9\)

The court, however, did indicate that it is relevant in a racial harassment claim that there be evidence that the individual would not have been treated the same had he or she been white.\(^9\) However, the court did not rest its finding of a racially hostile environment on a showing of this disparity.

Therefore, in the context of racial harassment, the standard for a victim to demonstrate that harassment is "because of" his or her race seems to be even less demanding than the requirement in the religious context which in turn is more easily satisfied then the sexual harassment

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87. See Carter v. Ball, 33 F.3d 450, 461 (4th Cir. 1994)("A racially hostile working environment must be sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere."). Further, the court stated that the statements on which the hostile environment claim are predicated cannot be trivial or isolated incidents and the employer must have actual or constructive notice of the offensive conduct. See id.; see also White v. Federal Express Corp., 939 F.2d 157, 160 (4th Cir. 1991).


89. See Bolden v. PRC Inc., 43 F.3d 545, 550-51 (10th Cir. 1994), cert. denied, 116 S.Ct. 92 (1995). The court indicated that to support a claim for a racially hostile work environment the plaintiff must demonstrate that the harassment was severe and pervasive enough to alter the terms and conditions of employment and that "the harassment was racial or stemmed from racial animus." *Id.* at 550. But see Lee v. Junior College Dist., No. 4:94CV415 CDP, 1995 WL 363723, (E.D. Mo. Mar. 8, 1995), aff'd, 91 F.3d 148 (8th Cir. 1996)(holding that conduct that involved questioning a black employee about specifically racial issues did not constitute behavior that reflected racial hostility).


91. *Aman*, 85 F.3d at 1083.

92. See id.
context. In the racial context, not only will racist statements be *de facto* evidence that harassment is because of an individual’s race, but statements that are arguably racial only by implication may be inferred to be because of race.

This result is obviously correct in the context of racial harassment. However, there is no justification for not applying the same sensitive inquiry to the context of same-sex sexual harassment. In the context of sexual harassment, arguably sex-neutral comments will not be imputed to a gender-specific hostility. Rather, first the comments must be explicitly sexual and even then, in the context of same-sex sexual harassment, the victim may still fail to state a claim under Title VII because the statements are held not to be motivated “because of” the victim’s sex. The implication is that when the content is racist, the harassment is automatically because of one’s race. This is of course a correct result; however, it should be contrasted to the sexual harassment context which does not allow a mere showing of sexual content to be proof that the harassment is because of sex.

Furthermore, in the racial discrimination context the defense that the individual who was responsible for the discrimination was found to be of the same race as the individual discriminated against has been found to be untenable. In fact, the contention that the harasser being of the same race as the defendant should provide a defense for discrimination charges has been dismissed out of hand by at least one court, reasoning that it is the employer as a whole who is charged with racial discrimination, a violation of Title VII, and not the specific supervisor. Although, occurring in a slightly different context than hostile environment harassment, these cases

93. See United States v. Crosby, 59 F.3d 1133, 1135 n.4 (11th Cir. 1995) (“[The defendant] is black... we acknowledge that a Title VII violation may occur even where a supervisor or decision-maker is of the same race as the alleged victim.”) The court, however, did go further to reject the government’s contention that the defendant in this particular instance treated members of his own race any differently than all other employees. Id.

94. See Billingsley v. Jefferson County, 953 F.2d 1351 (11th Cir. 1992). The court found that the defendants contention that the presence of a black man in a supervisory position did not impute the defendant with the supervisor’s race and thereby make it impossible that they be charged with racial discrimination against a black employee. Id. “The presence of a black man in a supervisory or decision-making position in Jefferson County cannot shield the county from liability under Title VII.” Id. at 1353. See also In re Lewis, 845 F.2d 624 (6th Cir. 1988). Although discussing the state law claim and not the Title VII claim by the plaintiff, the Lewis court aptly summarized the incongruity of denying a discrimination action where the oppressor is of the same race as the victim, indicating the incredibility of the defendant’s contention by questioning whether the “defendant mean[t] to imply that, because blacks, women, or older persons are involved in the decision-making structure of a company, then race, sex or age discrimination cannot occur?” Id. at 634.
indicate persuasive authority for the proposition that should cases arise where the victim claims that he or she has been subject to hostile environment racial harassment, the victim will not be denied a cause of action under Title VII solely because his or her harasser is of the same race.

This result should be contrasted with the hostile environment context where the mere fact that the harasser is heterosexual and of the same gender as the victim often will result in the victim being denied a cause of action under Title VII. Further, even in circuits where a cause of action is permitted for same-sex hostile environment harassment, the victim is held to a higher standard when he or she is subjected to harassment by an individual who is of their same gender than he or she would be if the individual were of the opposite gender. This inconsistency causes the ability of the victim to seek reprisal for unsolicited harassment to turn on what gender has chosen to inflict the damage—chosen them to be their victim. In contrast, criteria such as the severity of the conduct are generally employed in other contexts to limit the availability of Title VII remedies to particularly egregious forms of harassment.

VI. A NEW APPROACH: A CALL FOR CONSISTENCY

It is evident from an evaluation of the inconsistent treatment of hostile environment sexual harassment, which now turns on the gender of the victim and harasser as well as on their sexual orientation, that the current framework for such actions under Title VII is unworkable. These analytic frameworks are not only logically inconsistent—they are also jurisprudentially irreconcilable. Furthermore, the inconsistent treatment of sexual harassment claims cannot be reconciled with the treatment of racial and religious harassment cases from which the cause of action for sexual harassment originally evolved. A new approach that would result in a consistent and internally and externally logical application of hostile environment sexual harassment claims must be implemented.

One feasible option would be simply to utilize the requirements outlined by the Supreme Court in *Meritor*, including their inherent limitations that the behavior must be severe and pervasive and viewed as abusive from the perspective of a reasonable person in the plaintiff's situation. The requirement that the harassment be "because of" the individual's sex would undoubtedly be satisfied, even in the heterosexual same-sex harassment context, if the test employed in racial or religious harassment cases was applied. For example, if the content of the harassing speech is sexual, there should be the rebuttable presumption that the speech is directed at the gender of the victim. This is consistent with the treatment of racial slurs in the racial harassment context although the
presumption is not rebuttable in that context. In the sexual harassment context, because there are instances where reference to sexual topics is socially and legally acceptable even in the workplace, the presumption that the speech directly addresses the victim's gender should be rebuttable by the defendant.

The "but for" test adopted by some courts could also be retained if the test were refined so that it would yield consistent results across the various types of sexual harassment cases. For example, the question asked by a court could be, "but for the victim's gender would the harasser have engaged in factually-specific conduct X?" In all but very limited contexts, this approach would not lead to the confusion that now exists in the area of hostile environment law. Even in the case of the bisexual harasser, it is highly unlikely that harassing behavior directed at men would be identical to the harassing behavior directed at women. If solely because of social construction or biology, abusive sexual comments made toward women will necessarily be distinct from those that would be directed at men. Further, in the rare case where the harassment is identical, rather than immediately excepting the conduct from the statute's protections, the court could allow the defendant to utilize the equality of his harassment as an affirmative defense. Such a defense would be that the behavior was not related to the victim's gender or sex and, therefore, is outside the scope of Title VII.

Finally, any requirement that the individual victim of sexual harassment must be employed in an environment that is hostile to his or her entire gender to state a cause of action under Title VII should be wholly discarded, as well as should most of the current case law which relies on such a perspective to deny the victim of same-sex harassment a cause of action under Title VII. Not only is such a requirement inconsistent with sexual harassment law and other areas of Title VII jurisprudence, it patently conflicts with the entire spirit of a statute designed to protect the individual. Such a requirement leads to the incongruous result that, for an individual to be protected by the civil rights statute, he or she must work in an environment that has abused his or her entire gender before the statute, which speaks to individual protections, will be triggered.

Ultimately, however, the area of hostile environment harassment law must be reevaluated and reconfigured so that it is realigned to protect those interests it was written to address, discrimination based on immutable characteristics in the workplace. If the law remains as it now stands, it will only achieve equality for harassers whose conduct fits into cramped and artificial categories and will not reach those who continue to abuse, but now choose their words or the sex of their victim more carefully.
VII. CONCLUSION

Assuming the debatable conclusion that it was a wise decision to establish hostile environment sexual harassment from the narrow wording of Title VII and the dearth of legislative history, the doctrine must now be applied consistently regardless of the various heterosexual and homosexual permutations in which this objectionable behavior manifests itself.

Courts have, however, held fast to the notion that hostile environment harassment is not about ridding the workplace of hostile, degrading behaviors that focus on the sexuality of the individual harassed. Rather, courts often seem to suggest that the doctrine seeks only to rid the workplace of behaviors, whether offensive or not, that are inconsistent across genders. The result of this underlying perspective has been a doctrine for hostile environment harassment that is both inconsistent and illogical. Regardless of what the origins of the doctrine were, the doctrine has clearly evolved. If, for example, the original purpose was to make women equal participants in the workplace, that is obviously no longer solely what the doctrine seeks to address, since it has been consistently extended to men who are harasses by their superiors.

Further, arguments that the doctrine is designed to remedy environments that are anti-male or anti-female are also inconsistent with the doctrine’s application which, except in the area of same-sex harassment law, does not require that the environment as a whole be categorizable as such. Furthermore, whether or not the evolution of the application of the doctrine to males being harassed by females has been correct, once that further step has been taken the doctrine should be applied consistently regardless of the gender or sexual orientation of the harasser.

Instead, when examining whether it is sufficient to have created a "hostile environment," the focus of the doctrine should be on the sexual content and extremity of the harassment. The doctrine, as it now stands, is not only internally inconsistent with regard to its application within the sexual harassment context, but is also inconsistent when compared to the treatment of religious and racial harassment from which the sexual harassment doctrine evolved. In those contexts, the doctrine has been applied straightforwardly and consistently. This lends further support to the argument that the inconsistencies in the sexual harassment context have evolved from the unwillingness of courts to accept that underlying the doctrine is the desire to rid the workplace of conduct which is abusive and sexual in nature and thereby offensive, whoever engages in the conduct and to whomever it is directed, male or female, heterosexual or homosexual.

In certain circuits, as the doctrine now stands, it is impossible for
someone who is bisexual to harass either men or women because of the application of the "but for" test. This result is completely illogical and sends the frightening message that as long as you create a sexually degrading hostile environment which renders all individuals, male and female, unable to work, there can be no cause of action. It is incomprehensible how this result could possibly perpetuate the intentions of Congress in enacting Title VII. In contrast, should an employer hurl racial epithets at all individuals with whom he works, this behavior would not somehow be cured of its racially offensive content or Title VII violative nature because the employer was an equal opportunity racial harasser. In the context of racial harassment the question is simple: was this racially offensive conduct directed at someone who as a consequence of their race felt harassed? The question should be just as simple in the sexual harassment context.

The suggestion of this comment is that the Title VII doctrine should be reconfigured in two fundamental ways. First, courts should accept that the common, fundamental theme of all hostile environment cases, whether sexual, religious, or racial, is that the workplace should be devoid of hostile, abusive, and degrading conduct directed at individuals because of personal, private factors which touch on categories of attributes that this country has deemed irrelevant and inappropriate in the workplace, among them race, sexuality, and religion. Second, the already established sexual harassment doctrine should be applied to every scenario. The artificial distinctions between who can and who cannot maintain a cause of action, which appear to be based on stereotypical notions of what is and is not acceptable for heterosexual and homosexual males and females, should be wholly discarded.

There will remain inherent limits on liability that have always been present to prevent excessive Title VII litigation and the consequential unreasonably sensitive work environments. The conduct must still be pervasive and offensive such that a reasonable person in the plaintiff's situation would find the work environment abusive and hostile. All that needs to be done is to infuse the reasonable person with the characteristics of the particular defendant's sexual orientation and gender to effectuate the natural limitations of this approach. Otherwise, the doctrine will continue to be devoid of any consistency and logic and may result in a woman being informed that she has not been sexually harassed after being subjected to repeated misogynistic comments, grabbed on occasion, and faced with lewd remarks by her entire office, because those who are employed are all bisexual and would have abused a man as well.

There is clearly a fear on the part of courts that extending the sexual harassment doctrine in this way will lay the groundwork for endless litigation. However, the limitations of the doctrine, which have previously
prevented excessive litigation, remain and behavior that is merely offensive remains, for better or worse, inactionable under Title VII. However, an alternative approach that would provide for a cause of action universally for the victims of harassment that has a sexual content and which rises to the level of an abusive environment, can assure victims that they will have an internally and externally consistent body of law with which to seek redress.