TITLE VII AND THE INEQUALITY-ENHANCING EFFECTS OF THE BISEXUAL AND EQUAL OPPORTUNITY HARASSER DEFENSES

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I. THE PUZZLE

Title VII of the Civil Rights Act of 1964 (Title VII)¹ provides that it is an “an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual’s . . . sex . . . .”² Encompassed within and violative of this no-sex-discrimination mandate³ is workplace sexual harassment inflicted upon targeted employees by their employers and coworkers.⁴

Virtually all claims of unlawful workplace sexual harassment present allegations that the perpetrator has targeted women or men. A less frequent sexual harassment scenario—the case of the harasser who targets both men and women—has presented a puzzle for courts and commentators.⁵

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². Id. § 2000e-2(a)(1).
³. Title VII’s prohibition of sex discrimination was a last minute addition to and attempt to sabotage H.R. 7152, the proposed Civil Rights Act of 1964. Representative Howard Smith, Democrat of Virginia, hoped that adding “sex” to the bill’s prohibition of discrimination on the basis of race, color, religion, or national origin would make the legislation “so controversial that eventually it would be voted down either in the House or Senate.” CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 116 (1985); see also Robert C. Bird, More than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act, 3 WM. & MARY J. WOMEN & L. 137, 137 (1997); Deborah Epstein, Can a “Dumb Ass Woman” Achieve Equality in the Workplace?: Running the Gauntlet of Hostile Environment Harassing Speech, 84 GEO. L.J. 399, 409 n.62 (1996). That attempt failed, of course, and “the modern law of sex discrimination got its statutory footing . . . .”; Paul Gewirtz, The Triumph and Transformation of Antidiscrimination Law, in RACE, LAW AND CULTURE: REFLECTIONS ON BROWN V. BOARD OF EDUCATION 110 (Austin Sarat ed., 1997).
⁴. See infra Part III.
⁵. For court decisions dealing with this issue, see infra Part IV. For scholarly discussions of this subject, see Charles R. Calleros, The Meaning of “Sex”: Homosexual
Suppose that two employees, one male and one female, are sexually harassed by the same (male or female) supervisor or coworker. Both employees sue, alleging that the harassment violates Title VII. Suppose, further, that the employer moves to dismiss the action, arguing that there is not and cannot be a violation of the statute since the supervisor or coworker harassed a man and a woman. Thus, the employer contends, no showing of discrimination "because of sex" can be made since one sex was not singled out for or subjected to the alleged harassment.

As this argument has been accepted by some courts and rejected by others, this Essay examines the differing views and dissimilar results reached by courts in cases involving bisexual harassers (those who are sexually attracted to both sexes and act on their desires), and equal opportunity harassers (whose sexual orientation and desires are not known but who harass both men and women). Taking the position that bisexual and equal opportunity harassment violate Title VII, this Essay attempts to demonstrate that Title VII sexual harassment law and policy does and should protect both male and female targets of such harassment and should not be limited to instances in which harassers go after one, but not the other, sex. On this view, incidents of bisexual and equal opportunity harassment should be and are actionable where any harasser crosses the line between, on one side, the harassed who are unlawfully "sexed" and denied equal employment opportunities and, on the other side of the line, the non-harassed who are not sexed and work free from the adverse effects of the un-welcomed sex-based impositions of supervisors and coworkers. This line may be crossed where men or women, as well as men and women, are the targets of harassment.

The discussion proceeds as follows. A prefatory Part II discusses the concept of intentional discrimination under Title VII and various ways of establishing that certain employer conduct violates the statute. Part III then provides an overview of Title VII's prohibition of workplace sexual harassment and the analytical framework created and applied by the United


7. Robert Brookins, A Rose by any Other Name... The Gender Basis of Same-Sex Sexual Harassment, 46 DRAKE L. REV. 441, 527 (1998); Franke, supra note 6, at 720.

8. See infra notes 16–18 and accompanying text.
States Supreme Court in cases involving unisexual and unequal opportunity perpetrators who harass men or women. Part IV, turning to bisexual and equal opportunity harassment, argues that courts should reject employers' argument that, as a matter of law, such harassment does not violate Title VII. Acceptance of the bisexual and equal opportunity harasser defenses would result in an increase of unchecked and un-remedied workplace harassment, thereby producing an inequality-enhancing effect antithetical to the antidiscrimination purposes and policies of the statute. The Essay then concludes with brief closing remarks.

II. TITLE VII “DISCRIMINATION”

Under Title VII, it is unlawful for an employer to fail or refuse to hire or to fire, “or otherwise to discriminate against any individual” in employment matters on the basis of race, color, religion, sex, or national origin. In addition, an employer may not “limit, segregate, or classify his employees . . . or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee” because of one of the statutorily specified characteristics. The text of the statute contains no further specification or operational definition of what constitutes intentional discrimination. This gap has been filled by courts in cases wherein judges formulate and apply “discrimination” concepts as they answer the question whether certain employer conduct violates the statute.

One way of identifying intentional discrimination is found in the disparate-treatment model developed by the Supreme Court. Under that model actionable discrimination exists where an employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. . . . Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII.

12. Int’l Bhd. Teamsters v. United States, 431 U.S. 324, 335–36 n.15 (1977) (citations omitted). The Court noted that disparate-treatment claims are distinguishable from claims of disparate impact:
What does the disparate-treatment prohibition require of employers, and how does or can the proscription protect employees? Each applicant or employee covered by Title VII is entitled to seek employment and to perform work free from an employer's consideration and decision-making on the basis of race, color, sex, religion, or national origin. Thus, and as a matter of law, applicants and incumbent workers are raceless, sexless, etc., when they come to and enter the labor market and workplace, and they are not to be treated and evaluated on the basis of criteria proscribed by Title VII. Stating the point differently (and with certain exceptions), prospective and incumbent workers who have been "raced" or "sexed" by an employer have been classified on the basis of an irrelevant characteristic as they pursue the income, dignity, self-respect, and other rewards and benefits of employment.

The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive is not required under a disparate-impact theory. Either theory may, of course, be applied to a particular set of facts. See also Griggs v. Duke Power Co., 401 U.S. 424 (1971) (stating that the Supreme Court creates the disparate-impact theory); 42 U.S.C. § 2000e-2(k) (2000) (codification of disparate-impact cause of action).


14. See Robert C. Post, Jr., Prejudicial Appearances: The Logic of American Antidiscrimination Law 14 (2001) ("American antidiscrimination law typically requires employers... to make decisions as if their employees did not exhibit forbidden characteristics—as if, for example, employees had no race or sex.").

15. There is no violation of Title VII where an employer acts on the basis of religion, sex, or national origin "in those certain instances where religion, sex, or national origin is a bona fide occupational qualification necessary to the normal operation of that particular business or enterprise..." 42 U.S.C. § 2000e-2(e) (2000); see also UAW v. Johnson Controls, Inc., 499 U.S. 187, 201 (1991) (discussing the bona fide occupational qualification (BFOQ) exception in the context of a sex discrimination case). Employers may also consider sex, race, and other characteristics as factors in making employment decisions pursuant to voluntary affirmative action plans. See, e.g., Johnson v. Transp. Agency, Santa Clara County, 480 U.S. 616 (1987); United Steelworkers v. Weber, 443 U.S. 193 (1979).

16. On the "race-ing" of individuals, see Glenn Loury, The Anatomy of Racial Inequality 207 n.6 (2002) (using "raced" as an adjective to "express with economy the notion that a person's fate is affected by racial categorization"); Taunya Lovell Banks, Exploring White Resistance to Racial Reconciliation in the United States, 55 Rutgers L. Rev. 903, 904 n.4 (2003) (using the term 'raced' as a verb... to remind the reader that race in the United States is often imposed on some groups of people"); see also Charles R. Lawrence III, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 Duke L.J. 431, 443 n.52 (discussing the use of race as a verb because "the social construction of race is an ongoing process"); Kendall Thomas, The Eclipse of Reason: A Rhetorical Reading of Bowers v. Hardwick, 79 VA. L. REV. 1805, 1806-07 (1993) (noting use of race as a verb and extending the concept to sexual identity).

I analogize the concept of race-ing to sex and other Title VII protected categories.
benefits of work and working.\textsuperscript{17} Where employees are "raced" or "sexed" in matters of hiring, compensation, work assignments, promotions, and other terms and conditions of employment (as many are in many workplaces),\textsuperscript{18} employers have erected barriers for some workers that others do not have to contend with or strive to and hopefully overcome. Those classificatory barriers can constitute differential and unequal treatment subject to and prohibited by Title VII.

A Title VII plaintiff can prove that an employer has engaged in disparate-treatment discrimination in several ways. Under one evidentiary approach, discrimination can be established by direct evidence "that can be interpreted as an acknowledgement of discriminatory intent by the defendant or its agents . . . ."\textsuperscript{19} For example, an employer's intentional and open refusal to hire any women or African Americans or Latinos or Latinas, which are acts not commonly seen "now that employers have taught their supervisory employees not to put discriminatory beliefs or attitudes into words oral or written,"\textsuperscript{20} would constitute such direct evidence.

In the absence of direct evidence of discrimination, a Title VII plaintiff can rely upon circumstantial evidence consisting of "suspicious timing, ambiguous statements oral or written, behavior towards or comments directed at other employees in the protected group, and other bits and pieces from which an inference of discriminatory intent might be drawn."\textsuperscript{21} Because "‘[e]quality’ is a relative concept [and] involves a comparison,"\textsuperscript{22} an inference of discrimination may arise where the treatment of a plaintiff-employee is compared to the treatment of other similarly situated employees not in her protected group.\textsuperscript{23} Under another

\textsuperscript{17} For general discussions of this concept, see CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY (2003); PAULA M. RAYMAN, BEYOND THE BOTTOM LINE: THE SEARCH FOR DIGNITY AT WORK (2001); Vicki Schultz, Life's Work, 100 COLUM. L. REV. 1881 (2000).

\textsuperscript{18} Marion Crain & Ken Matheny, Labor's Identity Crisis, 89 CAL. L. REV. 1767, 1825 (2001).

\textsuperscript{19} Troupe v. May Dep't Stores Co., 20 F.3d 734, 736 (7th Cir. 1994); see also Standard v. A.B.E.L. Servs., Inc., 161 F.3d 1318, 1330 (11th Cir. 1998) ("Direct evidence is evidence that establishes the existence of discriminatory intent behind the employment decision without any inference or presumption.").

\textsuperscript{20} Troupe, 20 F.3d at 736; see also Tristin K. Green, Targeting Workplace Context: Title VII as a Tool for Institutional Reform, 72 FORDHAM L. REV. 659, 659 (2003) ("Discrimination in the workplace today is increasingly less a problem of overt employer policies or targeted discriminatory animus than it is a problem of subtle, often unconscious, bias creeping into everyday social interactions and judgments on the job.").

\textsuperscript{21} Troupe, 20 F.3d at 736.

\textsuperscript{22} Fiss, supra note 13, at 244.

\textsuperscript{23} Suppose, for example, that a female employee is discharged by her employer for violating an absenteeism policy while similarly situated male employees with far worse absenteeism records are not terminated. A statutory violation may be inferred because the
approach, a plaintiff-employee could argue that an employer’s stated reason for an adverse employment action is pretextual, i.e., is not the true reason and is not believable or worthy of credence. For example, an employer may assert that it discharged an employee, not because of her sex, but because she violated the company’s anti-absenteeism policy. If the employee demonstrates that the employer’s proffered reason is pretextual, a factfinder may (but is not compelled to) find that the employer violated Title VII in terminating her employment.\textsuperscript{24}

Is a comparison of an employer’s treatment of individuals in a protected group and similarly situated persons who are not members of that group always required in intentional discrimination cases? With respect to sex discrimination, should a female plaintiff automatically lose her disparate-treatment case if she does not present evidence of the employer’s treatment of similarly situated male employees? Any inclination to quickly and definitively answer these questions in the affirmative should be resisted in light of the Supreme Court’s recent decision in \emph{Olmstead v. Zimring}.\textsuperscript{25} There, individuals with mental disabilities challenged their confinement in a segregated environment and sought placement in community care residential programs. The defendant argued that the plaintiffs had not been subjected to discrimination in violation of the Americans with Disabilities Act (ADA)\textsuperscript{26} because “‘discrimination’ necessarily requires uneven treatment of similarly situated individuals” and the plaintiffs “had identified no comparison class, i.e., no similarly situated individuals given preferential treatment.”\textsuperscript{27} “Satisfied that Congress had a more

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\textsuperscript{25} 527 U.S. 581 (1999). In referencing \emph{Olmstead} as support for the position taken in this Essay, I recognize that the facts of that case are distinguishable from those commonly found in Title VII bisexual and equal opportunity harassment cases, and therefore only cite \emph{Olmstead} as an important decision setting forth the view that discrimination can be found in the absence of comparative data.
\textsuperscript{26} 42 U.S.C. §§ 12101–12213 (2000). \emph{Olmstead} addressed allegations of unlawful discrimination in public services under ADA Title II’s prohibition of discrimination against a qualified individual with a disability. 42 U.S.C. § 12132. A different definition of discrimination is set forth in ADA Title I, the employment discrimination part of the statute. Under Title I discrimination includes “limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee.” 42 U.S.C. § 12112(b)(1). Title I’s definition of discrimination tracks the prohibitions of Title VII. See 42 U.S.C. § 2000e-2(a)(2) (2000), discussed supra note 10 and accompanying text.
\textsuperscript{27} \emph{Olmstead}, 527 U.S. at 598 (internal quotation marks and citation omitted).
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comprehensive view of the concept of discrimination advanced in the ADA” and rejecting the defendant’s argument,28 the Court determined that in the ADA “Congress explicitly identified unjustified ‘segregation’ of persons with disabilities as a form of discrimination.”29 As the placement of mentally disabled persons in institutions constituted the proscribed segregation, the plaintiffs had been deprived of the ADA’s protection, the Court concluded that the absence of evidence of differential treatment of comparators did not foreclose their claims.

If every applicant and employee is entitled to seek and hold employment free from an employer’s sex-ing and like actions, and if discrimination can and does occur independent of, and not just in comparison to, the way an employer treats relevantly and similarly situated applicants and employees, it follows that a judicial finding of a violation of Title VII may be possible where an employer subjects both men and women to sexual harassment.30 The fact that an employer indiscriminately discriminates31 should not place it beyond the reach of legal regulation and


29. Olmstead, 527 U.S. at 599–600 (citations omitted); see also 42 U.S.C. § 12101(a)(2) (noting that “historically, society has tended to isolate and segregate individuals with disabilities”); § 12101(a)(5) (discrimination against the disabled includes segregation).

Justice Thomas, dissenting, argued that “[u]ntil today, this Court has never endorsed an interpretation of the term ‘discrimination’ that encompassed disparate treatment among members of the same protected class.” 527 U.S. at 616 (Thomas, J., dissenting). Noting the dictionary definition of “discrimination” (“distinguish,” “differentiate,” or making a “distinction in favor of or against” a person or thing), Justice Thomas wrote that “[d]iscrimination, as typically understood, requires a showing that a claimant received differential treatment vis-à-vis members of a different group on the basis of a statutorily described characteristic.” Id. Specifically referring to Title VII, the Justice stated that an analysis of a claim of discrimination under that statute requires a comparison of persons in different protected groups. Justice Thomas concluded that the majority’s “new species of ‘discrimination’” erroneously “look[ed] merely to an individual in isolation, without comparing him to otherwise similarly situated persons . . . By adopting such a broad view of discrimination, the majority drains the term of any meaning other than as a proxy for decisions disapproved of by this Court.” Id. at 624; see also id. at 611 (Kennedy, J., concurring) (agreeing with Justice Thomas “that on the ordinary interpretation and meaning of the term, one who alleges discrimination must show that she received differential treatment vis-à-vis members of a different group on the basis of a statutorily described characteristic” (internal quotation marks omitted)).

Responding to Justice Thomas, Justice Ginsburg argued that his position was “incorrect as a matter of precedent and logic.” Id. at 598 n.10 (citing, among other cases, Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 76 (1998)).

30. See infra Part IV.

remedy on the ground that, because the employer "treat[s] everyone badly," there can be no discriminatory treatment prohibited by the statute. Any individual who has been improperly sexed or raced has been deprived of the right to work free from the discrimination-related burdens of such classifications, as that person's employment status has been adversely affected and he or she has been treated differently from other employees who have not been so classified and affected.

III. UNISEXUAL AND UNEQUAL OPPORTUNITY HARASSMENT

It is now well settled that sexual harassment, a "species of gender discrimination," falls within the prohibitory and remediable scope of Title VII. The Supreme Court has so held in several decisions involving unisexual and unequal opportunity harassers who targeted men or women employees.

In its 1986 decision in Meritor Savings Bank, FSB v. Vinson, a case involving allegations of male-on-female harassment, the Court declared that "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor discriminates on the basis of sex." Such harassment may be directly linked to the grant or denial of a tangible condition of employment (this is known as quid pro quo harassment), or may take the form of a hostile environment "sufficiently severe or pervasive to alter the conditions of... employment and create an abusive working environment." Speaking of hostile-environment harassment, the Court stated:

34. Brooks v. City of San Mateo, 229 F.3d 917, 923 (9th Cir. 2000).
35. 477 U.S. 57, 64 (1986) (internal quotation marks omitted).
36. "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998) (citations omitted).
37. See id. at 742 (holding that cases based on carried-out threats of retaliation for denial of some sexual liberties are referred to as "quid pro quo" cases); Eugene Scalia, The Strange Career of Quid Pro Quo Harassment, 21 HARV. J.L. & PUB. POL. 307, 308 (1998) ("Quid pro quo harassment conditions employment on sexual favors.") (citations omitted).
38. Meritor, 477 U.S. at 67 (internal quotations removed); see also Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 271 (2000) (per curiam) (holding that a single instance of hostile-environment harassment was an isolated instance "that cannot remotely be considered 'extremely serious,' as our cases require") (citations omitted).
Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run the gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets. 39

In a subsequent male-on-female harassment case, Harris v. Forklift Systems, Inc., the Court held that an abusive work environment can violate Title VII even where the plaintiff is not psychologically harmed. 40 The Court noted that a hostile work environment offends the statute’s “broad rule of workplace equality,” can detract from an employee’s job performance and discourage the retention of employment, and can end career advancement. 41 In addition to listing some of the factors to be examined in abusive environment cases, 42 the Court set out objective and subjective analytical prongs applicable to such claims:

Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII’s purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim’s employment, and there is no Title VII violation. 43

Two decisions issued by the Court in 1998 provided further judicial commentary on and analysis of the discriminatory dynamics and effects of supervisory sexual harassment. 44 Burlington Industries, Inc. v. Ellerth 45

39. Meritor, 477 U.S. at 67 (referring to racial harassment, the Court noted and built upon an earlier United States Court of Appeals for the Fifth Circuit decision holding that racial and national origin harassment violated Title VII); see Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971) (Title VII protects against discrimination against employees based on race and national origin).
41. Id.
42. The Court called for the application of a totality-of-circumstances standard examining, among other things, “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance . . . .” Id. at 23.
43. Id. at 21-22.
44. Both decisions, Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998), and Faragher v. City of Boca Raton, 524 U.S. 775 (1998), held that “[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively) authority over the employee.” Ellerth, 524
emphasized that harassing supervisors utilize their agency relationship with employers when making tangible employment decisions adversely affecting employees. A tangible employment action in most cases inflicts direct economic harm. As a general proposition, only a supervisor, or other person acting with the authority of the company, can cause this sort of injury. Tangible actions “fall within the special province of the supervisor. The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control,” and his or her actions are official acts of the company and “are the means by which the supervisor brings the official power of the enterprise to bear on subordinates.” That “power and authority invests his or her harassing conduct with a particular threatening character . . . .” Like Ellerth, Faragher v. City of Boca Raton recognized “that supervisors have special authority enhancing their capacity to harass . . . .” Agreeing with the plaintiff’s argument “that there is a sense in which a harassing supervisor is always assisted in his misconduct by the supervisory relationship,” the Court reasoned that the “agency relationship affords contact with an employee subjected to a supervisor’s sexual harassment, and the victim may well be reluctant to accept the risks of blowing the whistle on a superior.” A harassing supervisor’s

U.S. at 765; Faragher, 524 U.S. at 777. An employer has an affirmative defense to liability or damages in these cases and must prove, by a preponderance of the evidence, that it “exercised reasonable care to prevent and correct promptly any sexually harassing behavior” and “that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” Ellerth, 524 U.S. at 765; Faragher, 524 U.S. at 807. This affirmative defense is not available in cases involving supervisory sexual harassment culminating in tangible employment actions; in those cases, the acts of the supervisor are, as a matter of law, the acts of the employer. See Ellerth, 524 U.S. at 765; Faragher, 524 U.S. at 808. The Ellerth/Faragher affirmative defense is available in constructive discharge cases where a plaintiff shows “that the abusive working environment became so intolerable that her resignation qualified as a fitting response.” Pa. State Police v. Suders, 124 S. Ct. 2342, 2344 (2004). The defense is not available, however, where a “plaintiff quits in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation . . . .” Id. at 2347.

It should be noted that sexual harassment perpetrated by nonsupervisory coworkers has been judged under a negligence standard holding the employer liable only where it knew or should have known of the harassing conduct. See Faragher, 524 U.S. at 799; Courtney v. Landair Transp., Inc., 227 F.3d 559, 564 (6th Cir. 2000).

46. On tangible employment actions, see supra note 36.
47. Ellerth, 524 U.S. at 762.
48. Id.
49. Id. at 763 (citation omitted).
51. Id. at 803.
discriminatory actions "necessarily draw upon his superior position over
the people who report to him, or those under them," and it may be difficult
for employees to resist misconduct by those who have the power to hire
and fire and set and change a worker's terms and conditions of
employment.52

Oncale v. Sundowner Offshore Services, Inc. considered a male-on-

male hostile-environment harassment cause of action brought by an
employee working in an all-male workplace located on an oil rig in the
Gulf of Mexico.53 A unanimous Court, in an opinion by Justice Scalia,
concluded that "nothing in Title VII necessarily bars a claim of
discrimination because of ... sex merely because the plaintiff and the
defendant (or the person charged with acting on behalf of the defendant)
are of the same sex."54 While "male-on-male sexual harassment in the
workplace was assuredly not the principal evil Congress was concerned
with when it enacted Title VII," the Court made clear that "statutory
prohibitions often go beyond the principal evil to cover reasonably
comparable evils, and it is ultimately the provision of our laws rather than
the principal concerns of our legislators by which we are governed."55

Justice Scalia was not persuaded by the employer's argument that
recognition of a claim of same-sex sexual harassment would "transform
Title VII into a general civility code for the American workplace ... .56
Title VII "does not prohibit verbal or physical harassment in the workplace;
it is directed only at discrimination" because of sex57 occurring in certain

52. Id.
53. 523 U.S. 75, 76–77 (1998). The Court reviewed and reversed the Fifth Circuit's
ruling that same-sex sexual harassment was not cognizable under Title VII. See Oncale v.
The Fifth Circuit applied its earlier decision in Garcia v. Elf Atochem No. Am., 28 F.3d 446
(5th Cir. 1994), wherein the court concluded that "'[h]arassment by a male supervisor
against a male subordinate does not state a claim under Title VII even though the
harassment has sexual overtones. Title VII addresses gender discrimination.'" Id. at 451–
52 (citation omitted) (quoting Giddens v. Shell Oil Co., 12 F.3d 208 (5th Cir. 1993)
(unpublished)).
54. 523 U.S. at 79 (internal quotation marks omitted).
55. Id.
56. Id. at 80. Title VII would not expand into a general civility code, Scalia reasoned,
because the statute "does not reach the genuine but innocuous differences in ways men and
women routinely interact with members of the same sex and of the opposite sex. The
prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in
the workplace; it forbids only behavior so objectively offensive as to alter the conditions of
the victim's employment." Id. at 81 (internal quotation marks omitted). The proscription
of objectively offensive behavior is "crucial ... and ... sufficient to ensure that courts and
juries do not mistake ordinary socializing in the workplace—such as male-on-male
horseplay or intersexual flirtation—for discriminatory conditions of employment." Id. (internal quotation marks omitted).
57. Id; see also id. at 80 (Thomas, J., concurring) ("In every sexual harassment case, the
plaintiff must plead and ultimately prove Title VII's statutory requirement that there be
contexts. Inferences of the prohibited discrimination are “easy to draw in most male-female sexual harassment situations” and in same-sex cases involving homosexual harassers, Scalia reasoned. In addition, inferences of harassment not motivated by sexual desire may be found where, for instance, a female employee targets another female worker “in such sex-specific and derogatory terms . . . as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace.” Furthermore, in a mixed-sex workplace a plaintiff can offer comparative evidence regarding the differential treatment of men and women. “The critical [...] issue 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.”

The Supreme Court's unisexual and unequal opportunity harassment decisions addressed various issues of Title VII sexual harassment law and policy. The Court's decisions noted the power dynamics and recognized the discriminatory effects and harms of workplace harassment in opposite-sex and same-sex harassment scenarios. As these cases dealt with assertions that female or male employees had been sexed and denied equal employment opportunities by harassers targeting men or (and not men and) women, the gender-comparative “either or” approach made and makes analytical and evidentiary sense.

discrimination because of sex.”) (internal quotation marks and ellipsis omitted).

58. Noting that careful consideration must be given to the “social context in which particular behavior occurs and is experienced by the target,” the Court instructed that the real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.

Id. at 82. For more on the significance of context in sexual harassment cases, law, see Michael J. Frank, The Social Context Variable in Hostile Environment Litigation, 77 NOTRE DAME L. REV. 437 (2002).

59. Oncale, 523 U.S. at 80.

60. Id.

61. Id; see also Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring) (articulating this comparative approach).

There was no final adjudication of the same-sex harassment claim made in Oncale as the parties settled the case following the Supreme Court’s decision. Mary Judice, La. Offshore Worker Settles Sex Suit, Harassment Case Made History in Supreme Court, NEW ORLEANS TIMES-PICAYUNE, Oct. 24, 1998, at C1; Sun Sets on Sundowner, TEX. LAW, Nov. 2, 1998, at 3.
IV. BISEXUAL AND EQUAL OPPORTUNITY HARASSMENT

As discussed in the preceding part, opposite-sex (male-on-female and female-on-male) and same-sex (male-on-male and female-on-female) sexual harassment claims are actionable under and can violate Title VII. Does the statute similarly prohibit bisexual and equal opportunity (male-on-male-and-female or female-on-female-and-male) sexual harassment?

Dicta in lower court decisions issued prior to the Supreme Court’s 1986 decision in Meritor Savings Bank, FSB v. Vinson62 commented on and rejected the notion of actionable harassment involving a bisexual perpetrator’s targeting of both men and women. The United States Court of Appeals for the District of Columbia Circuit, in a footnote in Barnes v. Costle,63 stated:

It is no answer to say that a similar condition could be imposed on a male subordinate by a heterosexual female superior, or upon a subordinate of either gender by a homosexual superior of the same gender. In each instance, the legal problem would be identical to that confronting us now—the exaction of a condition which, but for his or her sex, the employee would not have faced. These situations, like that at bar, are to be distinguished from a bisexual superior who conditions the employment opportunities of a subordinate of either gender upon participation in a sexual affair. In the case of the bisexual superior, the insistence upon sexual favors would not constitute gender discrimination because it would apply to male and female employees alike.64

63. 561 F.2d 983 (1977). In that case the court held that a male supervisor’s sexual advances toward a female subordinate could violate Title VII since “[b]ut for her womanhood, from aught that appears, her participation in sexual activity would never have been solicited” and “she was invited only because she was a woman subordinate to the inviter in the hierarchy of agency personnel.” Id. at 990.
64. Id. at 990 n.55. In her seminal work on sexual harassment Professor Catherine MacKinnon argued that bisexual harassment did not violate Title VII, as the statute “does not concern itself with abuses of human sexuality, only with impermissible differential consequences of the gender discrimination in employment.” CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 203 (1979). “[A] sexual condition that disadvantages both sexes, not one, is probably not sex discrimination — it is merely exploitative, oppressive, and an abuse of power. To draw this conclusion . . . properly creates an affirmative defense.” Id. More recently, however, MacKinnon questioned the Barnes dictum regarding the bisexual harasser. “Given the absence of facts on the question, that court was in no position to recognize that both men and women could be sexually harassed based on their respective sex or gender by the same perpetrator.” Catherine A. MacKinnon, The Logic of Experience: Reflections on the Development of Sexual Harassment Law, 90 GEO. L.J. 813, 821 (2002).
In a subsequent case, *Bundy v. Jackson*, the same court of appeals applied *Barnes* in holding that an employer engages in unlawful sexual harassment when it creates or condones a discriminatory work environment.\(^6\) The court also opined that “[o]nly by a *reductio ad absurdum* could we imagine a case of harassment that is not sex discrimination—where a bisexual supervisor harasses men and women alike.”\(^6\) In the following year the United States Court of Appeals for the Eleventh Circuit agreed with the view that bisexual harassment would not violate Title VII.\(^7\) As stated by that court,

there may be cases in which a supervisor makes sexual overtures to workers of both sexes or where the conduct complained of is equally offensive to male and female workers . . . . In such cases, the sexual harassment would not be based upon sex because men and women alike are accorded like treatment . . . [and] the plaintiff would have no remedy under Title VII . . . \(^8\)

Likewise, in an opinion written by then-Judge Robert Bork and joined by then-Judge (now Supreme Court Justice) Antonin Scalia and then-Judge Kenneth Starr, dissenting from the District of Columbia Circuit’s denial of rehearing en banc in the *Meritor* litigation ultimately decided by the Supreme Court,\(^9\) Bork addressed the notion of the bisexual harasser:

It is “discrimination” if a man makes unwanted sexual overtures to a woman, a woman to a man, a man to another man, or a woman to another woman. But this court has twice stated that Title VII does not prohibit sexual harassment by a “bisexual superior [because] the insistence upon sexual favors would . . . apply to male and female employees alike.” . . . Thus, this court holds that only the differentiating libido runs afoul of Title VII, and bisexual harassment, however blatant and however offensive and disturbing, is legally permissible.\(^10\)

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\(^{65}\) 641 F.2d 934, 943 (D.C. Cir. 1981).
\(^{66}\) Id. at 942 n.7 (citation omitted).
\(^{67}\) See *Henson v. City of Dundee*, 682 F.2d 897, 905 (11th Cir. 1982) (holding that sexual harassment is discrimination based on sex but excepting bisexual supervisors).
\(^{68}\) Id. at 904 (citations omitted and bracketed material added).
\(^{70}\) *Vinson v. Taylor*, 760 F.2d 1330, 1333 n.7 (D.C. Cir. 1985) (internal citations omitted); see also *Douglas S. Miller, Rumpole and the Equal Opportunity Harasser (or Judge Bork’s Revenge)*, 20 J. LEGAL PROF. 165 (1995–96) (noting the dissent in *Vinson*, 760 F.2d at 1330 and the irony of bisexual harassers escaping liability).
The view that the harasser of both men and women was beyond the reach of Title VII was not shared by all courts. In *Steiner v. Showboat Operating Company* the court rejected the employer’s argument that a vice president’s harassment of men and women was not actionable.71 While noting that male and female employees had not been similarly abused,72 the court concluded that the vice president could not cure his misconduct by “us[ing] sexual epithets equal in intensity and in an equally degrading manner against male employees...”73 Furthermore, the court continued, “although words from a man to a man are differently received than words from a man to a woman, we do not rule out the possibility that both men and women working at Showboat have viable claims... for sexual harassment.”74

Another case, *McDonnell v. Cisneros*, considered “the specter of the perfectly bisexual harasser—a number 3 on the Kinsey scale of sexual preference—who by definition is indifferent to the sex of his victims and so engages in sexual harassment without discriminating on the basis of sex.”75 The court concluded that the view that the harassment of both males and females cannot constitute sex discrimination “interpret[s] sex discrimination in too literal a fashion.”76 Indeed, “[i]t would be exceedingly perverse if a male worker could buy his supervisors and his company immunity from Title VII liability by taking care to harass sexually an occasional male worker, though his preferred targets were female.”77

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71. 25 F.3d 1459, 1463 (9th Cir. 1994).
72. “The numerous depositions of Showboat employees reveal that [the vice president] was indeed abusive to men, but that his abuse of women was different. It relied on sexual epithets, offensive, explicit references to women’s bodies and sexual conduct.” *Id.* at 1463 (citation omitted). The vice president referred to men as “assholes” and to women as “dumb fucking broads” and “fucking cunts.” *Id.* at 1464. “And while his abuse of men in no way related to their gender, his abuse of female employees... centered on the fact that they were females. It is one thing to call a woman ‘worthless,’ and another to call her a ‘worthless broad.’” *Id.*
73. *Id.*
74. *Id.*; see also *Swinton v. Potomac Corp.*, 270 F.3d 794, 807 (9th Cir. 2001) (holding that the employer’s “status as a purported ‘equal opportunity harasser’ provides no escape hatch for liability”).
76. 84 F.3d at 260.
77. *Id.* (citation omitted).
McDonnell was approvingly cited by the Seventh Circuit in Doe v. City of Belleville. Commenting on a hypothetical bisexual harasser, the court observed that “a man who makes a habit of harassing female co-workers might insulate his employer from liability . . . by occasionally harassing a male worker sexually, even if he preferred to harass women, a prospect that this court has described as exceedingly perverse.” Allowing the harasser to shield the employer in this way had the following consequence, the court opined:

Under this model of sexual harassment, therefore, the viability of a sexual harassment claim turns not on the factors that we have regularly relied upon . . . the content (physical and verbal) of the harassment, its gravity, its effect on the plaintiff, and its effect on the reasonable person . . . but on whether the harasser, by nature, would be sexually interested in only one sex (that of the victim).

Moving from dicta to holding, Chiapuzio v. BLT Operating Corporation rejected an employer’s argument that a Title VII sexual harassment claim could not be maintained where a male supervisor allegedly harassed a married couple. The husband and wife claimed that the supervisor subjected them to sexually abusive remarks, “the majority of which referred to the fact that [the supervisor] could do a better job of making love to” the wife than could her husband. Moving for summary judgment, the employer argued that the supervisory harassment of both male and female employees was not discrimination on the basis of sex.

Concluding that this argument was flawed, the court turned, first, to

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78. 119 F.3d 563, 590 (7th Cir. 1997), vacated and remanded, 523 U.S. 1001 (1998). Doe was vacated by the Supreme Court for reconsideration in light of the Court’s decision in Oncale, discussed supra notes 53–61 and accompanying text. 79. Doe, 119 F.3d at 590; see supra note 78 and accompanying text. But see Pasqua v. Metropolitan Life Ins. Co., 101 F.3d 514, 517 (7th Cir. 1996) (“Harassment that is inflicted without regard to gender, that is, where males and females in the same setting do not receive disparate treatment, is not actionable because the harassment is not based on sex.”); Shepherd v. Slater Steel Corp., 168 F.3d 998, 1011 (7th Cir. 1999) (“The factfinder could infer . . . that . . . harassment was bisexual and therefore beyond the reach of Title VII . . . .”); cf. Pavone v. Brown, No. 97-3200, 1998 U.S. App. LEXIS 30461, at *15 (7th Cir. 1998) (ruling plaintiff’s claim of disability discrimination could not succeed where “supervisors treated all of their employees badly”). 80. 119 F.3d at 590 (citation omitted). 81. 826 F. Supp. 1334, 1337 (D. Wyo. 1993). 82. Id. at 1335. Another plaintiff and his wife also alleged that they were subjected to harassment by the same supervisor. The asserted harassment included the supervisor’s offer of one hundred dollars to the wife if she would sit on the supervisor’s lap. When the husband asked the supervisor to stop the harassment he was fired. Id. The same supervisor allegedly harassed another employee. Id. 83. Id. at 1336.
the Supreme Court's decision in Meritor. Meritor "moved away from a
disparate treatment or 'but for' analysis of gender harassment, and moved
toward the view that gender harassment occurs when unwelcome physical
or verbal conduct creates a hostile work environment."84 "Thus, the
defendant's argument appears to run counter to the standard articulated by
the Supreme Court."85 The court then concluded that the "equal harassment
of both genders does not escape the purview of Title VII ..."86 In
circumstances in which perpetrators harass men and women "it is not
unthinkable to argue that each individual who is harassed is being treated
badly because of gender."87 Characterizing the supervisor in the case
before it as an equal opportunity harasser, the court reasoned that the
"principal flaw in the defendant's argument is that it assumes that if a
harasser harasses both genders equally, it necessarily follows that the
harasser did not harass the employees 'but for' their gender."88 The
supervisor's remarks indicated to the court that "he harassed the plaintiffs
because of their gender and constitute exactly the type of harassment
contemplated to fall within the purview of Title VII."89 Also concerned
about judicial efficiency, the court thought that "[a]n odd and inefficient
result would obtain" if the couple's lawsuit was dismissed, as each plaintiff
could then pursue individual actions against the employer.90

All of which brings us to Holman v. Indiana.91 Steven and Karen
Holman, a married couple, filed a Title VII action alleging that they were
sexually harassed by their male supervisor. Karen Holman alleged that the
supervisor touched her, stood too closely to her, asked her to go to bed with
him, and made sexist comments to her. Steven Holman contended that the
same supervisor grabbed his head and asked for sexual favors and then
retaliated against him for refusing to accede to the supervisor's demands.92
The employer successfully argued to the district court that the action could
not proceed because the Holmans could not prove that they were harassed
because of sex since both alleged sexual harassment by the same
supervisor.93

Affirming the district court's dismissal of the suit94 and relying on

84. Id. (citation omitted).
85. Id.
86. Id. at 1337.
87. Id. (internal quotation marks omitted and citations omitted).
89. Id. at 1338 (citation omitted).
90. Id.
91. 211 F.3d 399 (7th Cir. 2000).
92. See id. at 401.
93. Id.
94. See Holman v. Indiana, 24 F. Supp. 2d 909 (N.D. Ind. 1998), aff'd, 211 F.3d 399
(7th Cir. 2000).
Oncale v. Sundowner Offshore Services, Inc.,\textsuperscript{95} the Seventh Circuit opined that discrimination "is to be determined on a gender-comparative basis: 'The critical issue . . . 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.'\textsuperscript{96} As Title VII addresses and seeks to eliminate discrimination, inappropriate conduct that is inflicted on both sexes, or is inflicted regardless of sex, is outside the statute's ambit. Title VII does not cover the "equal opportunity" or "bisexual" harasser, then, because such a person is not discriminating on the basis of sex. He is not treating one sex better (or worse) than the other; he is treating both sexes the same (albeit badly).\textsuperscript{97}

Whether bisexual and equal opportunity harassment should be prohibited by Title VII "is for Congress to decide . . . It is not the province of federal courts to expand the language of a statute that is clearly limited. Title VII covers only sex discrimination."\textsuperscript{98}

\textsuperscript{95} 523 U.S. 75 (1998), discussed supra notes 53–61 and accompanying text.

\textsuperscript{96} Holman, 211 F.3d at 403 (emphasis added by court and citation omitted) (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998)).

\textsuperscript{97} Id. (citations omitted); accord Lack v. Wal-Mart Stores, Inc., 240 F.3d 255, 262 (4th Cir. 2001) (finding no actionable harassment claim where male supervisor "was just an indiscriminately vulgar and offensive supervisor, obnoxious to men and women alike"); EEOC v. Harbert-Yeargin, Inc., 266 F.3d 498, 520 (6th Cir. 2001) (Guy, J., concurring in part and dissenting in part) ("[I]t is hard . . . to come to grips with the fact that if [the supervisor] had been an equal opportunity gooser, there would be no cause of action here. Yet, that is the fact."); Berry v. Delta Airlines, Inc., 260 F.3d 803, 808 (7th Cir. 2001) ("Inappropriate conduct that is inflicted regardless of sex is outside the statute's ambit . . . and an employer cannot be held liable for creating or condoning a hostile working environment unless the hostility is motivated by gender." (internal quotation marks and citations omitted)); Venezia v. Gottlieb Mem'l Hosp., No. 03C7225, Inc., 2004 WL 555522, at *3 (N.D. Ill. Mar. 18, 2004) ("An 'equal opportunity harasser' is not covered by Title VII").

\textsuperscript{98} 211 F.3d at 405. This determination that the court would not go beyond its understanding of where Congress has pointed brings to mind earlier court decisions concluding that, because Congress did not so intend, sexual harassment did not violate Title VII. That the Congress enacting Title VII in 1964 did not envision that it was addressing and creating a cause of action for such harassment is certainly true. See Ellen Frankel Paul, Sexual Harassment as Sex Discrimination: A Defective Paradigm, 8 Yale L. & Pol'y Rev. 333, 346 (1990) (members of the 1964 Congress "would have been quite surprised to learn that they had contemplated including sexual harassment within the confines of sex discrimination—especially since the term "sexual harassment" did not come into currency until the late 1970s"); Michael C. Dorf, Foreword, The Limits of Socratic Deliberation, 112 Harv. L. Rev. 4, 23 (1998) (stating that the "Congress that enacted Title VII was arguably not even concerned about" sexual harassment). Of course, in its 1986 Meritor decision the Supreme Court made it clear that Title VII prohibits discriminatory sexual harassment. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986).
The plaintiffs and *amicus* Equal Employment Opportunity Commission urged that recognition of the employer’s defense “would be an anomalous result and bad policy . . . .”99 Not so, said the Seventh Circuit. Requiring a showing of discrimination was consistent with Title VII’s purpose of preventing disparate treatment and “is likewise consistent with the statute’s plain language. . . . If anything, it would be anomalous not to require proof of disparate treatment for claims of sex *discrimination* (of which sexual harassment is a subset) . . . .”100 Nor was the court concerned that harassers would intentionally target employees of both sexes as a way of insulating their employers from liability. Harrasers “will [not] know the intricacies of sexual harassment law” and would not run the risk of being fired or sued under state law when seeking to camouflage their intent by manufacturing acts of harassment against females and males.101 The court was also convinced that management attorneys would not advise their clients “to instruct their employees to harass still more people—to commit, in most cases, state law torts—which could subject their clients to lawsuits and themselves to claims of malpractice and charges of professional misconduct.”102 In any event, clients given and following such advice would still be liable, the court reasoned, as a harasser targeting a person in order to avoid Title VII coverage would not be “a bona-fide” equal opportunity harasser.103

*Holman*’s conclusion that the gender-comparative approach utilized in unisexual and unequal opportunity harassment cases must also be applied in bisexual and equal opportunity harasser litigation rests on and is grounded in a flawed and unduly cramped interpretation of Title VII. That the comparative approach is not necessarily the exclusive way of approaching the question of discrimination is illustrated by the Supreme Court’s decision in *Olmstead v. Zimring*,104 a case decided some eleven months before and not mentioned in *Holman*. If actionable discrimination can be found in the absence of comparative evidence, as was done in *Olmstead*, then the argument that an actionable sexual harassment claim can be maintained where a bisexual or equal opportunity harasser goes after

99. 211 F.3d at 403.

100. *Id.* at 404 (citation omitted).

101. *Id.*

102. *Id.* As noted by the court, employees subjected to sexual harassment may turn to tort law in challenging and seeking relief from this behavior. *See, e.g.*, Moffett v. Gene B. Glick Co., Inc., 621 F. Supp. 244, 285 (N.D. Ind. 1985) (allowing employee to recover damages for infliction of emotional distress and wrongful discharge); Ford v. Revlon, Inc., 734 P.2d 580, 584 (Ariz. 1987) (holding employee and employer liable for intentional infliction of emotional distress where supervisor was aware of sexual harassment and failed to stop it).

103. *Holman*, 211 F.3d at 404 (footnote omitted).

men and women should be carefully considered and, in my view, accepted. Accordingly, and if one does not accept the assertion that “discrimination” can only be determined by comparing the employer’s treatment of women and men, the analysis of and result in Holman is questionable. The “either or” gender-comparative approach makes eminent sense in the contexts of opposite-sex or same-sex sexual harassment where the harasser targets men or women. In those situations evidence and inferences of differential treatment, and the question “whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed,” are critical to identifying and separating those who have been sexed and targeted by a harasser from those who have not. As noted earlier, this informative comparison appropriately drives the factual and legal inquiry and can yield information relevant to answering the question whether, because of his or her sex, a plaintiff has been subjected to conduct violative of Title VII.

The gender-comparative approach is not analytically helpful, however, where it is alleged that a harasser has subjected men and women to unlawful treatment; in that setting, the harassment is of the “both and” and not the “either or” variety. Instead of asking whether members of one sex were disadvantaged by harassment while members of the other sex were not, the relevant query is whether complaining employees subjected to bisexual and equal opportunity harassment have been sexed and suffered the adverse consequences of the classification. If the answer to that question is “yes,” all harassed employees, women and (not or) men, have experienced discrimination. Like those who have been subjected to unisexual and unequal opportunity harassment, the targets of bisexual and equal opportunity harassment have been deprived of the right to come to the workplace and pursue their livelihoods free from unwelcomed sex-based mistreatment.

Being unlawfully sexed is the problem to be remedied in all harassment scenarios, for common to all claims is the placement of

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105. On this point, Judge Evans’ concurring opinion in Holman noted that even though the workplace in Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998), was all male,

the court concluded that it would be possible to find harassment—that it would be possible, therefore to find discrimination. If “discrimination” is possible in a single-sex workplace, it might also be possible in some circumstances in which we find an equal opportunity harasser.

Holman, 211 F.3d at 407 (Evans, J., concurring).


107. See Fiss, supra note 13, at 244.

108. See supra notes 64–103 and accompanying text.
individuals on one side of the line between the harassed and the non-
harassed. A person finding herself or himself on the harassed side of the
line should be entitled to challenge and seek relief from that misconduct;
that they were put there by a unisexual, unequal opportunity, bisexual, or
equal opportunity harasser should not matter. Any person sexed by
sexually harassing behavior should have an independent and not just a
comparative right to statutory protection and a legal remedy. That right
does not and should not depend on whether the harasser targeted men and
women as opposed to men or women – as the harms suffered by the
harassed are the same regardless of the harasser’s interests or orientation,"
the harasser’s actions should not be insulated from legal regulation and
judicial scrutiny.

The aforementioned harms of harassment include the ways in which
harassed employees are run through a gauntlet of sexual abuse as they
pursue work and try to make a living; the harassment-related performance
diminution and job loss and obstruction of career advancement; the
economic and psychological harms of unwelcomed conduct of a sexual
nature; and the assault on employees’ humanity and dignity by a power-
tripping harasser who is enabled by and abuses his or her workplace access
to employee targets. To the extent that the law recognizes a bisexual or
equal opportunity harasser defense, the statutory goal of eliminating or at
least reducing these and other harms and barriers of workplace inequality is
undercut and, as a consequence, the inequalities caused by sexual
harassment can actually be enhanced. This is so because the perpetrator
who harms one man or one woman is covered by, and runs afoul of, the
harassment prohibition, while the perpetrator who goes after at least one
man and at least one woman and an even greater number of employees can
fall outside of the statute’s coverage. More harassment should not place
the harasser and his or her employer in a better, and the harassed in a
worse, legal position.

As illustrated by Holman, this argument for judicial recognition of a
cause of action for bisexual and equal opportunity harassment may appear,
at first glance, to fly in the face of a conventional understanding of
discrimination law. That initial impression should be resisted, however.
Solving the interpretive puzzle addressed in this Essay calls for nuance,
reflection, and a careful assessment of the adaptability of Title VII’s
general antidiscrimination principle. In interpreting Title VII’s “because of
sex” proscription Holman judicially modified the phrase and applied it as

109. I have argued elsewhere that sexual harassment law should focus on the conduct
and not the motivation of the harasser. Ronald Turner, Same-Sex Sexual Harassment: A
Call for Conduct-Based and Gender-Based Applications of Title VII, 5 VA. L. SOC. POL’Y &
L. 151 (1997).
if it stated "because of one but not the other sex." That reading, like the Fifth Circuit's limiting and erroneous "because of the other sex" construction rejected by the Supreme Court in Oncale,\textsuperscript{111} is not self-evidently correct. Notwithstanding the Seventh Circuit's declaration that "Title VII covers only sex discrimination" and that it could not expand the limited language of the statute,\textsuperscript{112} and even though "[s]exual harassment law has been judge made law,"\textsuperscript{113} Holman read the statute in too literal and narrow a fashion.\textsuperscript{114} In doing so, the court gave no consideration to other statutory language pointing away from its holding that bisexual and equal opportunity harassment are not subject to Title VII regulation. Title VII's antidiscrimination prohibition encompasses employer conduct limiting or classifying any worker "or otherwise adversely affect[ing] his status as an employee . . . ."\textsuperscript{115} Each and every "sexed" employee subjected to the limitation, classification, and adverse effects of unlawful sexual harassment, including the victims of bisexual and equal opportunity harassers, should be able to avail themselves of Title VII's protection and remedies.

V. CONCLUSION

Judicial analysis and statutory interpretation should lead to and govern the conclusion reached; a seemingly obvious conclusion should not reflexively prefigure or limit the analysis. This Essay has argued that courts should not dismiss, as a matter of law, claims that employees have been subjected to bisexual or equal opportunity sexual harassment. It is well settled that Title VII's no-sex-discrimination ban prohibits opposite-sex and same-sex harassment committed by unisexual and unequal opportunity harassers of women or men. The statute should also apply to and govern the conduct of the perpetrator who harasses both men and women. This construction and application of Title VII would turn employers of harassers away from the safe harbor of the bisexual and equal opportunity harasser defenses, thereby avoiding the possible inequality-enhancing effects of placing such harassment beyond Title VII's purview.

\begin{itemize}
  \item \textsuperscript{111} See supra notes 53–61 and accompanying text.
  \item \textsuperscript{112} See supra note 98 and accompanying text.
  \item \textsuperscript{113} MacKinnon, \textit{The Logic of Experience}, supra note 64, at 813.
  \item \textsuperscript{114} See McDonnell v. Cisneros, 84 F.3d 256, 260 (7th Cir. 1996), discussed supra notes 75–76 and accompanying text.
\end{itemize}