

THE MEANING OF "SEX": HOMOSEXUAL AND BISEXUAL HARASSMENT UNDER TITLE VII

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Ever since a Southern Democrat unsuccessfully attempted to scuttle Title VII of the Civil Rights Act of 1964¹ by adding "sex" as a protected classification,² courts have struggled to apply Title VII's prohibition of "discriminat[ion] because of . . . sex"³ to a variety of conduct in the workplace not fully contemplated by Congress. Although the courts have consistently rejected claims for discrimination based on sexual orientation⁴ and have resolved analytic difficulties in recognizing claims for heterosexual harassment,⁵ they have failed to settle questions of the

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1. 42 U.S.C. §§ 2000e-2(1)-(2) (1988) (prohibiting discrimination in employment).
2. See *infra* notes 12 and 13 and accompanying text.
3. 42 U.S.C. § 2000e-2(a)(1) (1988).
4. E.g., *De Santis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979). This result was not inevitable. In prohibiting discrimination because of sex, Congress might have enacted statutory terms that banned discrimination on the basis of sexual orientation even though they had not debated or contemplated the problem. See, e.g., *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977) (Goodwin, J., dissenting) (arguing that a transsexual may be the victim of gender discrimination based on animus toward the postsurgical gender). One can argue that an employer who discharges gay males and lesbian females equally is nonetheless discriminating on the basis of gender. With respect to each discharged male, the supervisor in essence is discriminating against him because he has, or tends to desire, a male lover. Because the employer would not burden a female employee who has or desires a male lover, he arguably treats the homosexual male employee differently because of his gender. See Sam Marcossou, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L.J. 1, 4-5 (1992); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 208 (1994). A similar analysis focusing on relationships with third parties has been used to attack racial discrimination based on interracial relationships, both under the Constitution and Title VII. E.g., *McLaughlin v. Florida*, 379 U.S. 184 (1964) (constitution); *Gresham v. Waffle House*, 586 F. Supp. 1442, 1444-45 (N.D. Ga. 1984) (Title VII). Judicial reluctance to apply such an analysis to sexual orientation discrimination is likely due to continuing social confusion about the invidiousness of sexual orientation discrimination. See, e.g., *infra* notes 26-29 and accompanying text (discussing analytically indefensible judicial reluctance to recognize theoretical validity of disparate impact on men that might result from facially neutral policy against homosexuals). Given that widespread homophobia may lead many employers to discriminate on the basis of sexual orientation in a manner unrelated to an applicant's ability to perform a job competently, courts should not be reluctant to employ a defensible analytic approach in order to bring sexual orientation discrimination within the terms of Title VII.

5. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (recognizing liability for heterosexual harassment based on creation of a hostile environment); *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977) (recognizing liability for heterosexual quid pro quo harassment).

applicability of Title VII to homosexual harassment⁶ and bisexual harassment.⁷ Although legislative history undermines any attempt to bring sexual orientation discrimination within the ambit of sex discrimination,⁸ the other unsettled issues of sex discrimination can be resolved with a consistent analytic approach based on disparate treatment on the basis of gender, regardless of the sexual nature of the discriminatory conduct. Current inconsistency in the case law is attributable to some courts' views regarding the extent to which some forms of gender-based conduct are removed from core legislative concerns about fairness in the workplace,⁹ regardless of analytic similarities to heterosexual harassment and other recognized forms of gender discrimination. These legislative concerns, however, receive specific expression in the statutory requirement that discrimination affect "terms, conditions, or privileges of employment,"¹⁰ and are best addressed through a case-by-case evaluation of gender discrimination in various contexts, rather than through categorical inclusion or exclusion of various patterns of gender-based conduct.

I. LEGISLATIVE HISTORY OF TITLE VII'S PROHIBITION OF SEX DISCRIMINATION

Section 703(a) of Title VII makes it an unlawful employment practice for an employer "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."¹¹ Interestingly, the original House Bill did not include sex among the prohibited bases for discrimination. Instead, in an apparent bid to create sufficient controversy to trigger defeat of the entire civil rights bill, Representative Howard Smith, Chair of the House Rules Committee and

6. Compare *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 451-52 (5th Cir. 1994) (citing *Goluszek v. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988)) (no claim for same-sex harassment) with *Joyner v. AAA Cooper Transp.*, 597 F. Supp. 537 (M.D. Ala. 1983), *aff'd without opinion*, 749 F.2d 732 (11th Cir. 1984) (homosexual harassment was discrimination based on sex).

7. Compare *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977) (dictum) (bisexual harassment would not normally constitute disparate treatment based on gender) with *Chiapuzio v. BLT Operating Corp.*, 826 F. Supp. 1334 (D. Wyo. 1993) (finding disparate treatment based on sex in different kinds of harassing conduct directed by a supervisor to both men and women).

8. See *infra* notes 14-18 and accompanying text.

9. See generally *Cairo v. OH Material Corp.*, 710 F. Supp. 1069, 1071 (M.D. La. 1989) ("the scope of Title VII was never intended to encompass sex classifications having only an insignificant effect on employment opportunities").

10. 42 U.S.C. § 2000e-2(a)(1) (1988).

11. *Id.*

a staunch foe of civil rights legislation,¹² proposed the addition of "sex" to Title VII in a last-minute amendment on the floor of the House of Representatives.¹³

Of course, Representative Smith's effort to sabotage Title VII failed, but the belated amendment left the courts with "little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex.'"¹⁴ Even that minimal legislative history, however, suggests that Smith and the few other Representatives who spoke to the amendment understood the word "sex" in the amended bill to refer to the characteristic of being male or female.¹⁵ Moreover, the legislative history of the 1972 amendments to Title VII clearly reflect congressional intent to put women on an equal economic footing with men.¹⁶ Accordingly, the courts and the Equal Employment Opportunity Commission,¹⁷ the federal agency that helps administer and enforce the provisions of Title VII, have interpreted

12. CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE* 84 (1985).

13. 110 CONG. REC. 2577 (1964); WHALEN & WHALEN, *supra* note 12, at 115-16; Kristi I. Johnson, Note, *Chiapuzio v. BLT Operating Corporation: What Does it Mean to Be Harassed "Because of Your Sex?": Sexual Stereotyping and the "Bisexual" Harasser Revisited*, 79 IOWA L. REV. 731, 735-36 & nn. 37, 38 (1994).

14. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986); see Johnson, *supra* note 13, at 736 nn. 39-41. Arguably, this dearth of legislative history left the courts in no worse position than when called upon to interpret the general language of any bill that eventually raises questions not specifically contemplated by the legislators or upon which legislators expressed different views during debate. See, e.g., *Blanchard v. Bergeron*, 489 U.S. 87, 98 (1989) (Scalia, J., concurring) (decrying the "level of unreality that our unrestrained use of legislative history has attained"); CHARLES R. CALLEROS, *LEGAL METHOD AND WRITING* 18 (2d ed. 1994) (describing judicial ability to support either of two possible interpretations of legislation by selectively citing to portions of legislative history).

15. 110 CONG. REC. 2577-84 (1964); WHALEN & WHALEN, *supra* note 12, at 116-17. In explaining his proposed amendment, Representative Smith spoke facetiously of "our desire to prevent discrimination against another minority group, the women." 110 CONG. REC. 2577. Representative Green apparently feared that Smith would succeed in his aim to scuttle the entire bill; accordingly, she opposed the proposed amendment on the grounds that, though discrimination against women was great, "there has been 10 times as much discrimination against the Negro of this country" and that women could afford to wait for further legislation building on the Equal Pay Act of 1963. *Id.* at 2581. Representative Celler advanced a similar view. *Id.* at 2578. Unlike Representative Green, however, he also expressed doubts about the desirability of gender equality, referring to "the biological differences between the sexes" and the harm that the amendment might visit upon state laws "favorable to women." *Id.* at 2577. Representatives Griffiths, Andrews, and Rivers supported the amendment on the ground that passage of the unamended bill would leave white women in a particularly disadvantaged position. *Id.* at 2578-80, 2583. Others who spoke both for and against the proposed amendment referred similarly to the need, or lack of need, for equal rights for women. *Id.* at 2578, 2580-84.

16. H.R. REP. NO. 238, 92d Cong., 2d Sess. 2 (1971), reprinted in 1972 U.S.C.C.A.N. 2137, 2140-41 (cited in *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977)).

17. Section 705 of Title VII created the Equal Employment Opportunity Commission, a five-member board appointed by the President and invested with statutory power to assist in the enforcement of Title VII and otherwise to help effectuate its policies. 42 U.S.C. § 2000e-4 (1988).

the statutory term "sex" narrowly to encompass only gender rather than any characteristic relating to sexuality or sexual behavior.¹⁸

This narrowing definition of "sex" has not ended controversy over the parameters of Title VII's prohibition of sex discrimination.¹⁹ Whether discriminatory conduct in varying contexts is based on gender may depend on the analytic framework adopted by the factfinder.

II. COMPETING ANALYTIC FRAMEWORKS

This article discusses two forms of gender discrimination relevant to the issues of sexual harassment: group discrimination and individual discrimination. By first analyzing these general patterns, one can better appreciate the courts' treatment of various sexual harassment claims and develop a consistent theory of liability.

A. Group Discrimination

Perhaps the clearest evil addressed by Title VII is systemic discrimination emanating from policies or practices affecting entire groups corresponding to classifications protected by Title VII. Thus, if an employer maintains a formal policy or a consistent practice of summarily rejecting any female applicant for well-compensated jobs in the mechanic's shop, regardless of her qualifications, it obviously is discriminating against female applicants because of their gender. Without question, such

18. *E.g.*, *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367, 371 (1993) (Title VII requires discrimination "because of . . . gender" (emphasis added)). *Id.* at 372 (Ginsburg, J., concurring) ("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."); *De Santis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 329-30 (9th Cir. 1979) ("sex" in Title VII means gender and not sexual orientation); *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085-86 (7th Cir. 1984) ("sex" in Title VII is given narrow interpretation that excludes transsexualism); EEOC Compliance Manual (CCH) § 615.2(b)(3) (1973) ("the crucial inquiry is whether the harasser treats a member or members of one sex differently from members of the other sex").

19. Indeed, the very concept of sex and gender identification may have sociological facets as well as biological ones. *E.g.*, CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 149-58 (1979). For simplicity, this article will assume that gender is biologically determined and easily ascertained. Similarly, engaging in tripolar classification of sexual orientation and sexual activity as heterosexual, homosexual, or bisexual is almost certainly an oversimplification. *See generally* Ruth Colker, *An Embodied Bisexual Perspective*, 7 *YALE J.L. & HUMAN.* 163, 172-79 (1995). For ease of discussion, however, this article addresses real and hypothetical cases in which the orientation of sexual harassment can be easily identified and classified.

disparate treatment violates Title VII²⁰ except in the rare case in which gender is a "bona fide occupational qualification."²¹

A policy having a disparate impact on a class of workers can lead to a less encompassing form of group discrimination.²² For example, minimum height and weight requirements for prison guards or police officers may be set at levels that exclude a small percentage of male applicants but a large percentage of female applicants. Absent a job-related business necessity²³ for the height and weight requirements, such a disproportionate impact on female applicants constitutes gender discrimination in violation of Title VII.²⁴

The same should hold true for a policy that on its surface classifies applicants or employees on a basis not addressed by Title VII but in fact disproportionately burdens members of a protected class. For example, if one assumes that Title VII does not directly prohibit discrimination on the basis of sexual orientation, an employer normally could institute a policy of summarily firing both gay male and lesbian female employees without liability under Title VII.²⁵ Nonetheless, in the exceptional case in which such a policy disproportionately burdens members of a class indisputably protected by Title VII, a basis for liability should be recognized.

For example, if half of an employer's work force were male and most of those male employees were known to the employer to be gay, and if only a small percentage of the female employees were known to the employer to be lesbian, a policy against all identifiable homosexual employees, though otherwise neutral on its face, could disproportionately burden male employees. In this hypothetical, the employer might target sixty percent of the male workforce for discharge while targeting only ten percent of the female workforce.

20. See, e.g., *Rosenfeld v. Southern Pac.*, 444 F.2d 1219 (9th Cir. 1971) (unlawful exclusion of women from position of agent-telegrapher, which sometimes required long hours of work, some of it physically demanding). See also *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969) (unlawful exclusion of women from position of "switchman," which sometimes required lifting heavy objects).

21. 42 U.S.C. § 2000e-2(e) (1988); *Dothard v. Rawlinson*, 433 U.S. 321, 332-37 (1977).

22. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). See also 42 U.S.C. § 2000e-2(k) (Supp. V 1993) (burden of proof).

23. 42 U.S.C. § 2000e-2(k)(1)(A) (Supp. V 1993). *Griggs*, 401 U.S. at 434.

24. *Dothard*, 433 U.S. at 323-32 (height and weight requirement for prison guards); *Blake v. City of Los Angeles Police Dep't.*, 595 F.2d 1367 (9th Cir. 1979) (height and physical abilities test for police officers), cert. denied, 446 U.S. 928 (1980).

25. E.g., *De Santis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979) (Title VII does not prohibit employer from discriminating on the basis of homosexuality, so long as the employer treats gay males and lesbian females equally).

Although such statistics are unlikely, the theoretical basis for liability remains viable.²⁶ The majority of a panel of the Ninth Circuit Court of Appeals rejected such a claim on its face, on the ground that the theory of liability amounted to an "artifice to bootstrap" an unprotected classification into the protection of Title VII.²⁷ Convinced that Congress had not intended to prohibit discrimination on the basis of homosexuality, the panel majority considered the disparate impact theory an attempt to circumvent that limitation.²⁸

The majority may have been unduly influenced, however, by a subconscious reaction to social controversy surrounding gay and lesbian rights. After all, the courts have had no trouble recognizing sex discrimination in the height and weight requirements, even though Title VII does not directly prohibit discrimination on the basis of height or weight.²⁹ They did not regard it as "bootstrapping" to recognize that minimum height and weight requirements could unlawfully burden female applicants disproportionately.

Thus, group discrimination against members of a protected class should be a valid basis for liability under Title VII regardless of whether statutory redress largely benefits persons who also identify with an unprotected class.

B. Individual Discrimination

Title VII clearly extends beyond policies or practices that affect entire classes of workers. The statutory language clearly prohibits discrimination aimed at an individual because of her membership in a protected class:

It shall be an unlawful employment practice for an employer-
(1) to fail or refuse to hire or to discharge any *individual*, or
otherwise to discriminate against any *individual* . . . because of
such *individual's* . . . sex. . . .³⁰

Nonetheless, claims for individual sexual harassment have received mixed treatment in the courts. Although courts now routinely recognize heterosexual harassment as a form of gender discrimination under Title

26. *Id.* at 333-34 (Sneed, J., dissenting).

27. *Id.* at 330.

28. *Id.* at 330-31.

29. See *supra* note 24 and accompanying text.

30. 42 U.S.C. § 2000e-2(a) (1988) (emphasis added).

VII,³¹ early judicial misgivings illustrate many analytic and policy questions that continue to cloud related claims.

In the typical case of sexual harassment, a heterosexual male supervisor or other agent of the employer³² subjects some, but not all, female employees in the workplace to unwelcome sexual advances or demands. This conduct can satisfy the statutory requisite of altering "compensation, terms, conditions, or privileges of employment,"³³ either by conditioning benefits of employment on acquiescence to demands for sexual favors³⁴ or by creating an "abusive working environment."³⁵ Such conduct discriminates on the basis of gender in the sense that the male heterosexual supervisor is not sexually attracted to members of his own gender and thus directs his harassing conduct only to women.³⁶

This pattern of conduct differs from the kind of group disparate treatment described at the beginning of subsection A, above, in two ways. First, the acts of the supervisor, although arguably attributable to the employer for purposes of Title VII liability, presumably reflect his personal proclivities rather than a centralized policy that consistently subjects members of one group to treatment different from that accorded to another. If other supervisors, whether homosexual male, heterosexual female, or bisexual, subject or potentially could subject male employees to unwelcome sexual advances or demands, the cumulative policies of the employer's agents will burden or pose risks to employees of both genders.

Second, a sexually harassing supervisor may direct the harassment not to all members of the opposite sex within his supervisory control, but only to those that he finds sexually attractive. Thus, the supervisor is classifying employees not on the basis of gender in the sense of the group discrimination discussed in section A, above, but on the basis of sexual attractiveness. Although the supervisor finds that characteristic only in female subordinates, and not in males, he does not find it in every member

31. *E.g.*, *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986); *Barnes v. Coste*, 561 F.2d 983 (D.C. Cir. 1977).

32. Title VII imposes liability for discriminatory conduct attributable to the employer. 42 U.S.C. §§ 2000e(b), 2000e-2(a) (1988). General principles of the law of agency apply to the question of whether an employer is liable under Title VII for the actions of its supervisor. *Meritor Sav. Bank*, 477 U.S. at 72; *see also* EEOC Guidelines on Sexual Harassment, 29 C.F.R. § 16.04.11(c)-(e) (employer liability for acts of supervisors, nonsupervisory employees, and nonemployees).

33. 42 U.S.C. § 2000e-2(a)(1) (1988).

34. *E.g.*, *Barnes*, 561 F.2d 983 (quid pro quo harassment).

35. *Meritor Sav. Bank*, 477 U.S. at 67 (quoting *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)); *see also* *Harris v. Forklift Sys.*, 114 S. Ct. 367 (1993) (further defining abusive working environment); *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981) (early recognition of discriminatory work environment claim).

36. *See, e.g.*, *Barnes*, 561 F.2d at 990 n.55 and accompanying text.

of the class of female subordinates.³⁷ Moreover, if a sexual harasser were motivated not so much by sexual attraction, but by a desire to dominate subordinates who demonstrate superior competence and thus cause the supervisor to feel threatened,³⁸ then the link to gender discrimination is even more attenuated. Not only might such a supervisor select fewer than all female subordinates for harassment, he might seek to dominate some male subordinates as well. If the supervisor is heterosexual, he likely will use sexual advances as a means of dominating only the female subordinates, but he might employ analogous means to intimidate or dominate male subordinates.³⁹

In fact, early district court decisions seized upon similar arguments to reject claims of gender discrimination based on heterosexual harassment. In *Barnes v. Train*,⁴⁰ for example, the district court found that the victim of sexual harassment "was discriminated against, not because she was a woman, but because she refused to engage in a sexual affair with her supervisor."⁴¹ And in *Corne v. Bausch & Lomb, Inc.*,⁴² a district court rejected a sexual harassment claim partly on the grounds that it arose out of an individual supervisor's personal proclivities rather than company policy.⁴³

A tri-faceted analytic framework is implicit in the appellate rejection of these rulings and the eventual recognition of heterosexual harassment as gender discrimination. First, this framework adopts the premise that a sexually harassing supervisor may discriminate on the basis of gender even though he treats only some female subordinates differently from his male subordinates. True, if he harasses only those women whom he finds sexually attractive, he has adopted a criterion that serves to limit the pool of potential victims to a subset of the class of female subordinates. Nonetheless, but for their gender, none of those employees would be

37. See Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL'Y REV. 333, 349-50 (1990). See generally *Vinson v. Taylor*, 760 F.2d 1330, 1333 n.7 (D.C. Cir. 1985) (Bork, J., dissenting) ("Congress was not thinking of individual harassment at all but of discrimination in conditions of employment because of gender."), *aff'd on other grounds sub nom. Meritor Sav. Bank*, 477 U.S. 57 (1986).

38. See L. Camille Hébert, *Sexual Harassment is Gender Harassment*, 43 KAN. L. REV. 565, 572-573 (1995).

39. See, e.g., *Chiapuzio v. BLT Operating Corp.*, 826 F. Supp. 1334 (D. Wyo. 1993); see discussion *infra* Part III B.

40. *Barnes v. Train*, 13 Fed. Empl. Prac. Cas. (BNA) 123 (D.D.C. 1974), *rev'd sub nom. Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977).

41. *Id.* at 124.

42. *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161 (D. Ariz. 1975), *vacated and remanded without opinion*, 562 F.2d 55 (9th Cir. 1977).

43. *Id.* at 163.

potential victims of the supervisor's harassment. The heterosexual supervisor would not subject the attractive female subordinates to sexual advances if they were men.⁴⁴

Second, this framework focuses on a complaining victim's harassing supervisor as the generator of relevant practices. It contemplates that the practices of an individual supervisor may be attributed to the employer in some cases even though the supervisor acts independently of the formal policies of the employer, or even directly contrary to them.⁴⁵ More importantly, it implicitly rejects the argument that harassment by an individual supervisor is not gender-based because the sexually harassing practices of several supervisors might combine to create a similarly abusive work environment for all employees.⁴⁶ Admittedly, even this analytic framework might exclude from Title VII liability the joint actions of several supervisors, directed by the employer or to which the employer acquiesced, by which each supervisor targeted only members of one protected class but all supervisors conspired to create an equally sexually harassing working environment for everyone. Ironically, such outrageous collusion might not violate Title VII. Placed in broad context, it equally subjects male and female employees to a company-wide policy that is simply implemented, as are most policies, by individual supervisors. Absent such an unlikely showing, however, the accepted analytic framework appears to isolate the actions of a particular supervisor.

Third, this framework arguably isolates certain kinds of abusive conduct by supervisors. Thus, if a heterosexual supervisor seeks to dominate both male and female subordinates, he might employ unwelcome sexual advances as a means of intimidating female subordinates, while employing some other means, such as unwarranted and profane criticism of work performance, to intimidate male employees. Although such a supervisor has roughly equal desires to dominate both male and female subordinates, and although he employs some means to carry out both of these desires, the analytic framework adopted by the courts arguably finds gender discrimination in the sexual harassment because the supervisor

44. See, e.g., *Bundy*, 641 F.2d at 942; Paul, *supra* note 37, at 347-48 (discussing CATHERINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 189-91 (1979)).

45. See *Meritor Sav. Bank*, 477 U.S. at 72; *but cf.* *Gary v. Long*, 59 F.3d 1391, 1398 (D.C. Cir. 1995) (employer is not liable for its supervisor's sexual harassment if the employer "had adopted policies and implemented measures such that the victimized employee either knew or should have known that the employer did not tolerate such conduct and that she could report it . . . without fear").

46. See *Barnes*, 561 F.2d at 990 n.55 (dictum).

directs that particularly abusive form of harassment only to female subordinates.⁴⁷

Within this framework, one can reach conclusions about the validity of gender discrimination claims for several other types of conduct related to sex in the broadest sense. Preliminarily, although the legislative history of Title VII and scholarly commentary emphasize the need to protect women from discrimination in a male-dominated workforce,⁴⁸ the statute is neutral in its reference to "sex" and thus provides a basis for claims by male subordinates against female supervisors who sexually harass them.⁴⁹

Under this framework, moreover, homosexual harassment is analytically indistinguishable from heterosexual harassment. A harassing homosexual supervisor presumably would direct unwelcome sexual advances or demands only to members of his or her own sex, leaving members of the opposite sex unmolested.⁵⁰ Only the case of the truly bisexual supervisor, to whom gender is irrelevant in the selection of targets of harassment, presents a stark analytic distinction. Though outrageous, his conduct presumably would not constitute gender discrimination if it equally undermined terms or conditions of employment for employees of both sexes.⁵¹

The same analysis should hold true for a supervisor who harasses members of the same sex, and only members of that sex, for reasons other than homosexual attraction. For example, a male supervisor might direct abusive and demeaning speech and conduct toward members of his own sex because he feels a competitive need to maintain superiority over them or because the victims do not conform to the supervisor's stereotypical views about the characteristics that ought to be displayed by males. So long as the supervisor selectively abuses members of his own gender

47. See *Chiapuzio*, 826 F. Supp. 1334, discussed *infra* Part III.B; see also *Zaskowicz v. West Bend, Co.*, 589 F. Supp. 780, 784 (E.D. Wis. 1984) (harassment of a sexual nature directed toward a female employee was gender-based, regardless whether co-workers would have directed equally oppressive harassment of a different kind toward a male with a similar personality).

48. See *supra* notes 15, 16; *MACKINNON*, *supra* note 41, at 174-89.

49. See, e.g., *Gardinella v. General Elec.*, 833 F. Supp. 617 (W.D. Ky. 1993) (liability under state anti-discrimination statute); see also *Anderson v. S.U.N.Y. Health Science Ctr.*, 826 F. Supp. 625 (N.D.N.Y. 1993) (analyzing claim of harassment of male by female but finding insufficient evidence); *Man Wins \$1 Million Sex Harassment Suit*, N.Y. TIMES, May 21, 1993, at A15 (reporting on sexual harassment suits brought by men against male and female supervisors under state and federal laws). Cf. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976) (both Title VII and 42 U.S.C. § 1981 prohibit racial discrimination against white persons, even though pervasive discrimination against African-Americans was the primary impetus for both statutes).

50. E.g., *Barnes*, 561 F.2d at 990 n.55 (dictum); *Wright v. Methodist Youth Servs.*, 511 F. Supp. 307 (N.D. Ill. 1981).

51. E.g., *Barnes*, 561 F.2d at 990 n.55 (dictum).

because of their gender, such behavior is analytically indistinguishable from homosexual harassment driven by sexual desire.⁵² The term "same-sex harassment" serves as a reminder that harassment of members of one's own gender may constitute discrimination on the basis of sex, whether motivated by homosexual desire or nonsexual animus.

Courts, however, have not reacted uniformly to claims of homosexual or bisexual harassment. The varying judicial approaches to these cases reflect policy disagreements about the applicability of the analytic framework for heterosexual harassment to other contexts.

III. CONFRONTING THE PUZZLES

A. Homosexual Harassment

Liability for same-sex harassment should fall neatly within the analytic framework for heterosexual harassment. Because a homosexual supervisor presumably makes sexual advances only toward members of his or her own gender, that supervisor would not target a victim but for that victim's gender. Admittedly, that supervisor probably does not harass all subordinates of the same gender, but perhaps only those that the supervisor finds attractive, or potentially amenable to homosexual relations, or both. Moreover, other supervisors may sexually harass employees of the gender opposite to that of the targets of the homosexual supervisor in question. These considerations, however, do not distinguish the case of homosexual harassment from that of heterosexual harassment.⁵³

Nonetheless, the courts are split between recognizing and rejecting Title VII liability for same-sex harassment.⁵⁴ The last of three decisions

52. See *supra* notes 32-47 and accompanying text.

53. But see *E.E.O.C. v. Walden Book Co.*, 885 F. Supp. 1100, 1102 (M.D. Tenn. 1995) (distinguishing another case partly on the basis that it "involved sexual teasing of a heterosexual male by other heterosexual males rather than sexual harassment of a subordinate by a homosexual supervisor"); *Vandeveter v. Walsh Nat'l Corp.*, 867 F. Supp. 790, 796 (N.C. Ind. 1994) (finding no liability for non-homosexual, same-sex harassment); *Goluszek v. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988) (same).

54. Compare *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 451-52 (5th Cir. 1994) (homosexual harassment is not discrimination because of sex under Title VII); *Benekritis v. Johnson*, 882 F. Supp. 521, 525-26 (D.S.C. 1995) (same); *Myers v. City of El Paso*, 874 F. Supp. 1546 (W.D. Tex. 1995) (same); *Hopkins v. Baltimore Gas & Elec. Co.*, 871 F. Supp. 822 (D. Md. 1994) (same); *Vandeveter*, 867 F. Supp. at 796 (nonsexual same-sex harassment is not discrimination because of sex under Title VII); *Goluszek*, 697 F. Supp. at 1456 (same); *Ryczek v. Guest Servs., Inc.*, 877 F. Supp. 754, 761-62 (D.D.C. 1995) (expressing doubt about wisdom of permitting claim for same-sex harassment, but deciding case on other grounds) with *Walden Book Co.*, 885 F. Supp. 1100 (homosexual harassment is sex discrimination); *Pritchett v. Sizeler Real Estate Mgt.*, 67 Fair Empl. Prac. Cas. (BNA) 1377 (E.D. La. 1995) (same); *Prescott v. Independent Life and Accident Ins. Co.*, 878 F. Supp. 1545,

in 1994 that rejected such claims, *Hopkins v. Baltimore Gas & Electric Co.*,⁵⁵ synthesized previous decisions with similar holdings and thus sets forth reasoning that reflects the mood of those decisions.

In *Hopkins*, George E. Hopkins sued his employer, Baltimore Gas & Electric Company (BG & E) under Title VII for sexual harassment by a male supervisor and for retaliatory discipline and discharge. In his opinion, ruling for BG & E on summary judgment, Senior District Judge Alexander Harvey summarized the material facts that Hopkins supported with documentary evidence:

Plaintiff was employed by defendant BG & E as a Color Photographic Technician from September 3, 1985 until October 19, 1993. During this entire time, plaintiff worked in BG & E's Photographic Services Unit (the "Unit"), and his immediate supervisor was Ira Swadow. Plaintiff alleges that throughout his term of employment with BG & E he was subjected to various forms of harassment by Swadow, including jokes, comments, and gestures of a sexual nature. During the course of discovery in this case, plaintiff has identified over a dozen incidents of alleged "sexual harassment" by Swadow. Plaintiff contends that, when viewed in their entirety, these various incidents demonstrate that Swadow intentionally subjected plaintiff to a sexually abusive and hostile work environment in violation of Title VII.⁵⁶

Dissatisfied with BG & E's responses to his complaints about sexual harassment and other grievances, Hopkins filed a discrimination charge

1549-51 (M.D. Ala. 1995) (same); *McCoy v. Johnson Controls World Servs., Inc.*, 878 F. Supp. 229 (S.D. Ga. 1995) (same); *Joyner v. AAA Cooper Transp.*, 597 F. Supp. 537 (M.D. Ala. 1983) (same), *aff'd without opinion*, 749 F.2d 732 (11th Cir. 1984); *Wright v. Methodist Youth Servs.*, 511 F. Supp. 307 (N.D. Ill. 1981) (same); *Boyd v. Vonnahman*, 67 Fair Empl. Prac. Cas. (BNA) 1769 (S.D. Ill. 1995) (distinguishing *Goluszek v. Smith*, 697 F.Supp. 1452 (N.D. Ill. 1988) and following *Wright v. Methodist Youth Services*, 511 F. Supp. 307 (N.D. Ill. 1981)); *Barnes v. Cosde*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977) (indicating in dictum that homosexual harassment is analytically the same as heterosexual harassment); *Moore v. Northland Evergreen, Inc.*, 59 Empl. Prac. Dec. (CCH) ¶41,702 (Aug. 7, 1991) (ordering trial for homosexual harassment without discussing issue of disparate treatment on basis of gender); *Polly v. Houston Lighting & Power Co.*, 825 F. Supp. 135 (S.D. Tex. 1993) (ruling that homosexual harassment violates Title VII, but finding no gender-based harassment); *Fox v. Sierra Dev. Co.*, 876 F. Supp. 1169, 1175-76 (D. Nev. 1995) (suggesting that homosexual harassment could violate Title VII, but finding no gender-based harassment).

55. *Hopkins*, 871 F. Supp. 822. The only circuit decision rejecting a claim for same-sex harassment did so in the most perfunctory fashion, citing primarily to an unpublished decision of the same circuit. *See Garcia*, 28 F.3d at 451-52 (citing *Giddens v. Shell Oil Co.*, No. 92-8533 (5th Cir. Dec. 6, 1993)). *Garcia* cited secondarily to a district court decision, which more thoughtfully set forth reasoning that is incorporated into the discussion in *Hopkins*. *Garcia*, 28 F.3d at 452 (citing *Goluszek v. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988)).

56. *Hopkins*, 871 F. Supp. at 824.

with the EEOC, which terminated its investigation and gave Hopkins notice of his right to sue in 1993. Within weeks, BG & E abolished the entire Photographic Services Unit, including the positions held by Hopkins and Swadow, as part of an economically motivated reorganization and reduction in workforce. This change allowed BG & E to save \$100,000 to \$200,000 annually by contracting out the Unit's work.⁵⁷

As an alternative holding, the district court found that, despite Hopkins's interpretation of Swadow's conduct, the evidence of sexual harassment was insufficient to permit a reasonable juror to find that Swadow singled him out for mistreatment because of his gender.⁵⁸ In its primary discussion, however, the court generally rejected the model of same-sex harassment as a form of prohibited sex discrimination.⁵⁹

On a purely analytic level, the *Hopkins* court appeared to recognize that the victim's gender is no less significant in homosexual harassment than in heterosexual harassment.⁶⁰ It nonetheless concluded that such harassment did not represent the kind of evil that Congress intended to address when it enacted Title VII. The *Hopkins* court identified that evil as the exploitation of a dominant position in the workplace enjoyed by members of one sex and directed toward members of the opposite sex, fostering a sense of degradation and inferiority in the victims' sex because of their gender.⁶¹ The court found these circumstances absent when "the alleged harasser and the alleged victim are both of the same gender,"⁶² particularly when the victim is "a male in a male-dominated environment."⁶³

It is disturbing that this line of reasoning gained strength and momentum in 1994.⁶⁴ The legislative histories of Title VII and its amendments reflect the fact that Congress was primarily concerned with providing equal opportunities for women in a male-dominated workplace.⁶⁵ Recognition of the predominant form of sex discrimination, however, is

57. *Id.* at 829-30.

58. *Id.* at 835. The court also found insufficient evidence to support Hopkin's charge of retaliatory discharge. *Id.* at 835-37.

59. *Id.* at 831-35.

60. *Id.* at 834 ("a wooden application of the verbal formulations created by the courts would salvage [such a] claim . . .") (quoting *Goluszek v. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988)).

61. *Hopkins*, 871 F. Supp. at 834 (citing primarily *Goluszek v. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988) and *Vandeveter v. Walsh Nat'l Corp.*, 867 F. Supp. 790 (N.C. Ind. 1994)).

62. *Id.* at 834.

63. *Id.* (quoting *Goluszek*, 697 F. Supp. at 1456).

64. In 1995, the pendulum began to swing the other way in the district courts. See *supra* note 54.

65. See *supra* notes 15-16 and accompanying text.

not inconsistent with a desire "to strike at the entire spectrum of disparate treatment of men and women."⁶⁶ Same-sex harassment and heterosexual harassment foster inequality in much the same way.

From a reasonable victim's standpoint, the characteristics of the harassing supervisor are less important than are the supervisor's selection of targets for harassment. If the supervisor selects only members of one gender for harassment, demotion, or any other adverse change in terms or conditions of employment, the disparate treatment is the same. This is true whether the supervisor is male or female, of the same gender as the victim, or of the opposite gender.

Even though a male victim of sexual harassment works in an environment that is generally dominated by male employees, he is nonetheless subject to a particular form of oppression that is specifically directed to him and is not directed to female employees. If Title VII indisputably prohibits the harassment of a male employee by a female supervisor,⁶⁷ then treating the harassment differently simply because the harassing supervisor is male makes little sense. Moreover, from the standpoint of particularized oppression, it makes little sense to treat egregious forms of same-sex harassment motivated by homosexual attraction differently from harassment motivated by heterosexual attraction.⁶⁸

If decisions such as *Hopkins* stand and gain further support, the anomalies will multiply. In light of the significance that the *Hopkins* court placed on the victim's membership in the class of employees who generally dominate the workplace, the court's reasoning would not apply to the case of a female victim of harassment who worked in an environment generally denigrating to women and who was harassed by a female supervisor who contributed to that atmosphere by victimizing only women. In such a case, the *Hopkins* court would have two choices. First, it could abandon what little policy analysis underlies *Hopkins* and extend its ruling of nonliability to any case in which "the alleged harasser and the alleged victim are both of the same gender."⁶⁹ Second, the court could distinguish the case from *Hopkins* by requiring a determination of whether the victim belonged to the gender that generally dominates the workplace in each case of homosexual harassment.

66. *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978).

67. See *supra* note 49 and accompanying text.

68. See *supra* note 53 and accompanying text.

69. *Hopkins*, 871 F. Supp. at 834. This position was unambiguously adopted by the magistrate in *Polly*, 825 F. Supp. at 135 (rejecting magistrate's interpretation of Title VII but finding no gender-based harassment).

Under the first option, a decision to exclude all homosexual harassment from coverage could not be supported on the basis of the victim's association with the dominant gender in the workplace. However, a justification could be advanced on the basis of the manner in which the harasser views the target of his or her harassment. Accordingly, critics of claims for same-sex harassment have pointed out that a homosexual harasser cannot despise the gender represented by the target of the harassment because the harasser shares that gender.⁷⁰

Even if this argument's premise that one cannot despise one's own gender is embraced, the argument's reasoning remains flawed. Although a hateful desire to dominate and oppress members of the opposite gender may drive some heterosexual harassers, other heterosexual harassers presumably harbor a genuine attraction to their victims rather than repulsion for their victims' gender. Their willingness to coerce sexual favors shows the utmost abuse of power and lack of restraint and respect, but not in a way that distinguishes heterosexual from homosexual harassment. Unless courts limit claims for heterosexual harassment to those claims in which the victim proves that the harasser despises members of the opposite sex, the courts will have difficulty justifying rejection of claims for homosexual harassment simply on the basis that the harasser shares the gender of the harassed and thus cannot be motivated by hate for that gender. Otherwise, one would be hard pressed to defend application of Title VII to an African-American supervisor who discriminated against other African-Americans in promotions. Whether he despised his own race or simply sought to accommodate a discriminatory preference of clients of the firm, the result would be the same — disparate treatment on the basis of race.⁷¹

Nor would it be practical or principled to limit claims of homosexual harassment to those in which the victim was not a member of the gender that generally dominated the workplace. Not only is such a factual inquiry difficult or even awkward in many cases but it also ignores the fact that the victim of harassment, although perhaps generally a member of a

70. See, e.g., Paul, *supra* note 37, at 352.

71. Cf. *Walker v. Secretary of Treasury, I.R.S.*, 713 F. Supp. 403 (N.D. Ga. 1989) (light-skinned African-American discriminated against dark-skinned African-American). As one commentator has noted:

An employer who fires an African-American because of the employee's race is equally liable under Title VII whether he is an Imperial Wizard of the Klan with a visceral hatred of minorities or a supporter of the NAACP concerned only that he will lose customers if he continues to employ people of color.

James Weinstein, *First Amendment Challenges to Hate Speech Legislation: Where's the Speech?*, CRIM. JUST. ETHICS, Summer/Fall 1992, at 6, 14.

privileged class in the workplace, is the dominated party in the specific context of the harassment.⁷² With respect to that particular practice or policy, members of the sex opposite to that of the victim enjoy immunity, whatever other hardships they must endure.

Apart from the requirement of gender-based conduct, Title VII requires that harassment be sufficiently severe and pervasive to alter the conditions of employment.⁷³ This requirement can effectively exclude those rare cases in which the victim of harassment is otherwise situated in such a position of privilege and power that the harassment, on balance, is inconsequential without categorically excluding the entire class of claims based on homosexual harassment.

In sum, homosexual harassment fits within the same analytic framework for individual discrimination as does heterosexual harassment,⁷⁴ and policy considerations do not justify treating it differently. Decisions such as the district court opinion in *Hopkins* should be reversed.

B. Bisexual Harassment

The same analytic framework for individual discrimination⁷⁵ that supports claims for gender discrimination based on heterosexual and homosexual harassment should exclude bisexual harassment claims in their simplest, most neutral form. If a bisexual harasser truly is indifferent to gender and is equally prone to harass members of both sexes solely on the basis of other factors, such as sexual attraction to both men and women or a need to dominate competent employees, then he or she is simply not discriminating on the basis of gender or any other classification addressed by Title VII.⁷⁶

At first blush, it seems ironic that a federal statute would regulate egregious conduct that places members of one class of employees at risk but not conduct that places employees of all classes at risk. Some courts have indeed seized upon this "bizarre result" as a means to question the

72. Cf. *Cronin v. United Serv. Stations, Inc.*, 809 F. Supp. 922 (M.D. Ala. 1992) (subordinate is capable of harassing manager); *Prescott*, 878 F. Supp. at 1550 (referring to a white plaintiff's reverse discrimination claim to reject argument that Title VII plaintiffs must be members of subordinate classes in the workplace).

73. *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367, 370 (1993) (interpreting 42 U.S.C. § 2000e-2(a) (1988)).

74. See *supra* Part II.B.

75. See *supra* Part II.B.

76. See, e.g., *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977) (dictum); see also *Vore v. Indiana Bell Tel. Co.*, 32 F.2d 1161 (7th Cir. 1994) (employer not liable for disruptive conduct of African-American employee who bothered everyone equally, exhibiting no racial animus).

entire analytic framework for sex discrimination claims based on individual sexual harassment.⁷⁷

This seeming anomaly, however, is simply an inevitable characteristic of statutory regulation aimed at curbing particular discriminatory practices rather than all practices that poison the workplace. If one shifts from the emotionally powerful arena of coercive sexual conduct to other forms of disparate treatment, the rationality of legislation focused on discrimination is perhaps easier to accept.

For example, no one would argue that Title VII prohibits an employer from reducing all employees' monetary allowance for maintaining their work uniforms, regardless of whether the employer was motivated by economic necessity or a desire to exploit a transitory surplus of labor in the relevant market. In certain circumstances, such a denial might violate the employees' contract rights under state or federal law,⁷⁸ but it does not trigger the terms of a statute designed to rid the workplace of invidious discrimination.⁷⁹ Had the employer instead provided full allowances to all male employees and denied them to women solely on the basis of their gender, then legislation aimed at discriminatory practices, such as Title VII and the Equal Pay Act,⁸⁰ would obviously be implicated.⁸¹

Similarly, a supervisor's sexual harassment of employees of both genders may give rise to liability under state tort or contract law⁸² and

77. *Vinson v. Taylor*, 760 F.2d 1330, 1333 n.7 (D.C. Cir. 1985) (Bork, J., dissenting) ("That bizarre result suggests that Congress was not thinking of individual harassment at all . . ."), *aff'd on other grounds sub nom. Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986); *see also Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975) (claim based on heterosexual harassment was "ludicrous" because equal harassment of men and women would not be prohibited), *vacated and remanded without opinion*, 562 F.2d 55 (9th Cir. 1977); *Ryczek v. Guest Servs., Inc.*, 877 F. Supp. 754, 761-62 (D.D.C. 1995) (anomaly of nonliability for bisexual harassment increases court's doubts about wisdom of recognizing claim for homosexual harassment); Paul, *supra* note 37, at 351-52.

78. *See generally* 29 U.S.C. § 185 (1988) (giving federal courts jurisdiction to enforce collective bargaining agreements); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957) (29 U.S.C. § 185 (1988) authorizes courts to fashion special federal common law to enforce collective bargaining agreements); *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251 (Mass. 1977) (employer breached implied contractual obligation of good faith by firing salesperson to avoid paying bonuses earned by employee).

79. *See, e.g., Burdine v. Texas Dep't of Community Affairs*, 647 F.2d 513, 514-15 (9th Cir. 1981) (both male and female employees were assigned extra duties without pay or promotion).

80. 29 U.S.C. § 206(d) (1988).

81. *See, e.g., Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429 (D.C. Cir. 1976) (gender discrimination in maintenance allowances for uniforms), *cert. denied*, 434 U.S. 1086 (1976).

82. *E.g., Ford v. Revlon*, 734 P.2d 580 (Ariz. 1987) (tort liability imposed on employer for responding inappropriately to an employee's complaints about sexual harassment by a supervisor). *See generally Nave v. Harlan Jones Drilling*, 827 P.2d 1239 (Mont. 1992) (contractor breached contractual duty to provide safe working conditions for employees of subcontractor).

perhaps should be regulated more completely and directly under those laws. However, if the supervisor treats men and women equally poorly, there is no anomaly created by excluding such admittedly outrageous conduct from the application of laws regulating disparate treatment on the basis of gender.

Once this treatment of purely bisexual harassment is accepted, one can explore its limitations. Even a bisexual harasser can run afoul of Title VII if he or she harasses in such different ways or to such different degrees that an employee is subjected to different terms or conditions of employment based on the employee's gender.

To take an obvious example, it seems to be accepted as conventional wisdom, requiring no discussion in the case law, that an employer violates Title VII if its agent sexually harasses only female employees, even though that agent also burdens male employees by disproportionately assigning them to extraordinarily dreary, demeaning, and demanding work on the graveyard shift with no pay premium. The supervisor's stereotyped views may inspire each practice. He may believe women should be available for his sexual gratification and domination and that only males are suited for physically demanding labor at odd hours. Cumulatively, these practices subject all employees to burdensome working conditions. Women are subjected to unwelcome sexual advances or demands, and men are assigned to an unpopular work station more frequently than if all employees rotated through the station.

Nonetheless, it is extremely unlikely that a court would inquire into whether men and women were burdened equally and thus had no claims under Title VII. Perhaps advocates for employers have not vigorously pursued a theory of equal cumulative burdens. Whatever the explanation, the manner in which courts analyze sexual harassment claims suggests that they routinely compartmentalize allegedly discriminatory practices, isolating a particular kind of objectionable policy or practice for analysis.⁸³

Thus, an agent of the employer who subjects only female employees to unwelcome sexual advances and who assigns only men to the least desirable work stations would undoubtedly expose his employer to liability under Title VII for both practices. A court likely would find that the employer discriminated against women with respect to one element of working conditions — unwelcome sexual advances — and that it discriminated against men with respect to a different element of working

83. For an extreme example of such compartmentalization, see *Chiapuzio v. BLT Operating Corp.*, 826 F. Supp. 1334 (D. Wyo. 1993); see *infra* pp. 76-79.

conditions — assignment to undesirable work stations.⁸⁴ A different approach based on the possibility of equal, offsetting cumulative burdens would require an unseemly, if not impossible, inquiry into the degree of undesirability of a male-only work station that would be substantially equal to the qualitatively distinct burden suffered by women exposed to unwelcome sexual advances.

Acceptance of such compartmentalization still leaves questions about the proper limits of judicial isolation of qualitatively similar discriminatory practices. Suppose, for example, that a supervisor directs sexually offensive comments and conduct to both male and female employees. Such harassment could still be discriminatory if the level of harassment directed at members of one gender was significantly greater than that directed toward members of the other gender.⁸⁵ Thus, if the supervisor explicitly requested sexual favors from women while physically fondling them but subjected men only to generally demeaning comments of a sexual nature, then the female targets of the harassment could rightfully charge discrimination based on the substantially greater degradation of their working conditions.

Pressing the limits of such an analysis is the case of *Chiapuzio v. BLT Operating Corp.*⁸⁶ According to the district court's findings on cross-motions for summary judgment, the documentary evidence could support a jury finding that a particularly obnoxious supervisor, Eddie Bell, directed sexually offensive and demeaning remarks to both male and female employees, as well as to the non-employee wife of one of the male employees. Specifically, Bell subjected one married couple employed by the firm, Dale and Carla Chiapuzio, "to an incessant series of sexually abusive remarks, the majority of which referred to the fact that Bell could do a better job of making love to Carla Chiapuzio than Dale could."⁸⁷ Bell also directed "an incessant series of sexual advances" to Christina Vironet, a female employee who was pregnant at the time of the harassment.⁸⁸ Finally, Bell subjected employee Clint Bean and his non-employee wife to "a constant series of sexually abusive remarks,"

84. Cf. *Barcume v. City of Flint*, 819 F. Supp. 631, 646 (E.D. Mich. 1993) (claim of continuing disparate treatment of women could be supported by proof that female police officers "were assigned to work in an undesirable area of the City while males were allowed to rotate in and out of that assignment").

85. Cf. *Loeffler v. Carlin*, 780 F.2d 1365 (8th Cir. 1985) (discharging male postal employee for violating a work rule was discriminatory because two female employees received lesser discipline for substantially similar violations of same rule).

86. *Chiapuzio*, 826 F. Supp. at 1334.

87. *Id.* at 1335.

88. *Id.*

including an offer to pay Clint's wife one hundred dollars if she would sit on his lap.⁸⁹ These findings do not suggest that Bell directed anything other than verbal abuse toward any employee or that he verbally abused members of one gender more frequently than those of the other.

Not surprisingly, in response to the employees' sexual harassment claims under Title VII,⁹⁰ the employer argued that "Bell harassed both male and female employees alike" and therefore did not discriminate on the basis of gender.⁹¹ The district court concluded, however, that "the equal harassment of both genders does not escape the purview of Title VII in the instant case."⁹² It characterized Bell not so much "as a bisexual harasser, but simply as an 'equal-opportunity' harasser whose remarks were gender-driven."⁹³

Specifically, the court found that even though Bell harassed both male and female employees, he harassed the men "because each was male"⁹⁴ and the women because they were female.⁹⁵ The court apparently reasoned that Bell's sexual harassment of the male employees was *qualitatively* different from his harassment of the female employees. Although the court's discussion of the facts is too terse to clearly explain its conclusions, the court evidently found that Bell verbally abused men not by suggesting any inclination to have sexual relations with them but by boasting of his own sexual prowess and denigrating theirs.⁹⁶ In contrast, he verbally abused female employees by expressing his desire to have sexual relations with them.⁹⁷

The court's decision is defensible if this line of reasoning is isolated from other, more clearly flawed lines of argument in the opinion.⁹⁸ By

89. *Id.*

90. The employees also charged that their employer had breached their employment contracts and had retaliated against them for complaining about the harassment. *Id.*

91. *Id.* at 1336.

92. *Id.* at 1337.

93. *Id.*

94. *Id.*

95. *See id.* at 1338 (Bell harassed the plaintiffs "because of their gender").

96. Significantly, the court found that evidence of Bell's actions toward Bean's wife, a non-employee, was relevant not only to help establish a "general work atmosphere," but also to help establish whether Bell intended to harass or harm Bean because of his gender. *Id.* at 1338. Thus, by directing a sexual advance toward Bean's wife, Bell might be viewed as attempting to intimidate or denigrate Bean, his employee.

97. *See Chiapuzio*, 826 F. Supp. at 1338.

98. For example, the district court erroneously concluded that the Supreme Court in *Meritor* "moved away" from the view that Title VII requires disparate treatment based on gender and instead "moved toward the view that gender harassment occurs when unwelcome physical or verbal conduct creates a hostile work environment." *Id.* at 1336 (analyzing *Meritor Sav. Bank v. Vinson*, 477 U.S.

employing an extreme but rational form of compartmentalization, one can challenge the gender-neutrality of such "equal opportunity" harassment by identifying differences in the ways in which the supervisor has abused men and women. Although a supervisor's incessant challenging of a subordinate male's sense of sexual adequacy could poison the atmosphere of the workplace, it is qualitatively different from sexual advances that threaten a female subordinate's sense of sexual security — her expectation of freedom from unwanted sexual relations.⁹⁹ By compartmentalizing each of these kinds of harassment and analyzing them separately, a court can avoid the awkward task of determining whether a supervisor's challenge to a male subordinate's sexual prowess had, or ever could have, an adverse effect on the working conditions for men roughly equal to the effect of unwelcome sexual advances on the working conditions for women. Instead, the court could simply determine whether each kind of harassment was directed only to members of one gender and thus constituted sex discrimination.

Although the *Chiapuzio* approach presses the limits of compartmentalization, it potentially represents more than simply a fiction designed to evade the statutory requirement of discriminatory treatment. To take the analogy of race discrimination, one can imagine an Anglo-American supervisor who holds racial stereotypes and exhibits each as the occasion arises. In the morning, she might refuse to promote a qualified

57, 64-67 (1986)). In fact, the statutory requirement of a gender basis for discrimination is distinct from the requirement that the discrimination be sufficiently pervasive to alter the conditions of employment. See 42 U.S.C. § 2000e-2(a)(1) (1988) (quoted *supra* in text accompanying note 11) (requiring discrimination both "because of . . . sex" and "with respect to . . . conditions . . . of employment"); see also CALLEROS, *supra* note 14, at 19-24 (separately analyzing each of the two statutory requirements for gender discrimination). *Meritor* addressed only the latter requirement.

Second, the court was apparently influenced by its desire to hold the employer accountable for "the most harassing work environments." *Chiapuzio*, 826 F. Supp. at 1338 (citing Christine A. Littleton, *Feminist Jurisprudence: The Difference Method Makes*, 41 STAN. L. REV. 751, 770 (1989)). As discussed in the opening paragraphs of this subsection, however, excluding purely bisexual harassment from Title VII is not anomalous. Even though it reflects potentially more pervasive harm than does heterosexual or homosexual harassment, it does not represent the specific evil of discrimination that Title VII addresses.

Third, the court concluded that dismissing complaints alleging harassment of both men and women would be procedurally inefficient or anomalous because similarly situated male and female plaintiffs could bring their suits separately, thereby increasing their chances of success. *Id.* In a case in which purely bisexual harassment of both men and women is not gender-driven, however, splitting the claims would not help the plaintiffs. Even if the defendant failed to persuade the court to consolidate the cases, the defendant presumably could introduce the evidence of gender neutrality in each of the cases to achieve the same result.

99. Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight*, 47 RUTGERS L. REV. 461, 494 n.136 (1995) (sexual advances often include at least implied threats of rape).

African-American employee to a position of great responsibility because of her racist view that African-Americans generally are undependable and lack initiative. In the afternoon, she might decline to hire a qualified Asian-American applicant to a position requiring candor and confidentiality because of her racist view that Asian-Americans generally are dishonest and untrustworthy. The next day, she might refuse to hire an Anglo-American applicant for a well-paying job requiring heavy lifting because of her paternalistically racist view that members of her own race generally are less suitable than others for performing physical labor. At different times, she might apply different kinds of racial stereotypes to discriminate against members of every reasonably identifiable race¹⁰⁰ with respect to different types of positions.

Cumulatively, this supervisor has burdened members of every race with her racist stereotypes, even her own. She has not, however, acted in a racially neutral fashion. In each specific case, she has discriminated against a person because of his or her race. Thus, Anglo-Americans can charge that they are discriminatorily excluded from relatively high-paying jobs requiring physical labor, just as Asian-Americans can complain that they are discriminatorily excluded from positions of trust and confidence. This is analytically distinct from an employer's decision to cut the length of lunch breaks for all employees on the basis of factors completely divorced from race.

By the same token, a male supervisor who makes unwelcome sexual advances to female employees because of his unrestrained heterosexual desires and his views about the proper role of women might independently verbally demean male employees because of his competitive need to maintain a position of dominance and authority over members of his own gender. In each instance of harassment of a female employee, the supervisor is responding to the employee's womanhood and his views about women. At that moment, the supervisor would not have engaged in that form of harassment but for the employee's gender. The same can be said for the distinct way in which the supervisor harasses men.¹⁰¹

One must ultimately draw a line on the continuum between indisputable disparate treatment on the one hand and neutral practices on

100. On the difficulties of defining race, see *St. Francis College v. Al-Khazraji*, 481 U.S. 604 (1987) (looking to racial classifications recognized at time of enactment of Reconstruction era civil rights act). See generally Luther Wright, Jr., *Who's Black, Who's White, and Who Cares: Reconceptualizing the United State's Definition of Race and Racial Classifications*, 48 VANDERBILT L. REV. 513 (1995); Sharon Begley, *Three is Not Enough*, NEWSWEEK, Feb. 13, 1995, at 67.

101. See, e.g., *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1463-64 (9th Cir. 1994) (supervisor's verbal abuse of female employees was sexual in nature and related to their gender, while his verbal abuse of male employees was more general, not relating to their gender).

the other; a compartmentalization approach threatens to blend one into the other. Purely bisexual advances taken in the same spirit with respect to both men and women would constitute a truly neutral form of sexual harassment. Whether motivated solely by sexual attraction to both male and female employees or by a desire to intimidate both, a bisexual supervisor who directs the same kinds of sexual advances to both men and women presumably acts in a gender-neutral fashion and does not violate Title VII.

By taking compartmentalization to an extreme, one could argue that even in the case of the purely bisexual harasser, men and women are subjected to different kinds of harassment that should be analyzed separately. In such a workplace, men are subjected to unwelcome invitations to engage in homosexual relations, a form of harassment that might be unsettling to homophobic men in a way that is psychologically different, though not necessarily more intense, from the pain and stress visited upon the women as a result of the supervisor's heterosexual advances toward them.¹⁰²

Such an analysis takes compartmentalization too far. It is tantamount to separate treatment of the layoffs of men and women on the basis of an assumption that men suffer a greater sense of loss because they have been socialized to maintain higher expectations about their role as primary breadwinner in a family.

Thus, a purely bisexual harasser, who chooses victims solely on the basis of factors other than gender and directs unwelcome sexual advances in the same manner to both men and women, engages in conduct that is outrageous but not discriminatory. Although its victims might have redress in tort or in contract,¹⁰³ the current terms of Title VII provide no remedy because they address only problems of discrimination.

The *Chiapuzio* approach, however, still allows redress for "equal opportunity" harassment that lends itself reasonably to compartmentalization. Because purely bisexual harassment seems to be exceedingly rare, any gap in Title VII coverage for a supervisor's harassment of members of both sexes may be insubstantial. Moreover, it is unlikely that a purely heterosexual or homosexual harasser would resort to truly bisexual harassment simply to protect his or her employer from liability under Title VII. In many cases, making sexual advances that run contrary to one's own sexual orientation could be as disagreeable to the

102. See generally *Fox v. Sierra Dev. Co.*, 876 F. Supp. 1169, 1174-75 nn. 5-6 (D. Nev. 1995) and accompanying text.

103. See *supra* note 82.

harasser as receiving unwelcome sexual advances is to the target of harassment.

Perhaps more troubling would be the case of an employer's encouragement of, or acquiescence in, the harassment of both men and women by several supervisors. Although an individual supervisor might act on the basis of gender by harassing only members of one sex, the employer's centralized policy of condoning or encouraging the cumulative harassment of men and women by several supervisors would arguably result in a gender-neutral company policy not subject to redress under Title VII.

Although such a result is analytically sound, its policy implications are potentially disastrous. Under current law, an employer may avoid vicarious liability for some sexually harassing acts of its supervisor or nonsupervisory employees if the employer acts quickly and effectively to stop and redress the harassment after learning of it.¹⁰⁴ It would indeed be ironic if an employer could avoid Title VII liability altogether by creating a centralized, gender-neutral company policy requiring harassment of both sexes. Moreover, managers willing to condone such conspiratorial harassment might be more prevalent than individual supervisors willing to engage in purely bisexual harassment. Although potential tort liability in some states could serve as a deterrent to such policies, such reliance on non-uniform state law would not further Title VII's purpose of providing minimum federal standards for the workplace.

This hypothetical case may be no less academic than the "theoretical" case of the purely bisexual supervisor; however, the incentives it raises for counterproductive policies should spur the judiciary or the legislature to act. The judiciary could avoid such an evasion of Title VII by maintaining its apparently accepted practice of compartmentalizing and separately analyzing the harassment of each individual supervisor, thus declining to give effect to the manager's attempt to gender-neutralize the supervisors' actions by unifying them under a central policy.¹⁰⁵

Conclusion

104. See, e.g., *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1992) (standards for avoiding liability for "hostile environment" harassment); *Ryczek*, 877 F. Supp. at 758 n.2 and accompanying text (prompt remedial action can relieve an employer of liability for either supervisory or coworker harassment). *But cf.* *Gardinella v. General Elec. Co.*, 833 F. Supp. 617, 621 (W.D. Ky. 1993) (strict liability for supervisor's "quid pro quo" harassment, in which job benefits are conditioned upon acquiescence to sexual demands).

105. See generally, *Steiner* 25 F.3d at 1464 (suggesting in dictum that the court would not allow a supervisor to "cure" his sexual harassment of women by harassing men in "an equally degrading manner").

Claims of sex discrimination under Title VII based on homosexual harassment should be as universally accepted by the courts as are claims based on heterosexual harassment. The links to gender discrimination presented by these two kinds of claims are equally strong. Moreover, the problem of homosexual harassment is not so remote from the evils that Title VII was enacted to combat that it should be excluded from coverage. On the contrary, same-sex harassment presents the same potential for domination and degradation of an employee on the basis of his or her gender as does heterosexual harassment. Title VII's requirement that gender-based harassment be sufficiently severe and pervasive to affect conditions of employment is sufficient to exclude claims in which the victim is otherwise situated in such a position of privilege and power that the harassment, on balance, is inconsequential.

Conversely, truly bisexual harassment is not disparate treatment prohibited by Title VII. Nonetheless, most cases of "equal opportunity" harassment will support claims by victims of both genders, rather than neither. A manager should not be able to neutralize the heterosexual harassment of male and female supervisors by unifying them under a centralized policy of acquiescence or encouragement. If each supervisor voluntarily engages in harassment on the basis of gender, courts should analyze each supervisor's conduct independently rather than treating that conduct as part of a larger scheme of truly bisexual harassment.

