J. INDIVIDUAL EMPLOYMENT RIGHTS, Vol. 5(3) 205-216, 1996-97

# SAME-GENDER SEXUAL HARASSMENT: TITLE VII HARASSMENT BY ANY OTHER NAME . . .

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**ABSTRACT**

The initial purpose of this article was to recognize the inherent inconsistency in refusing to acknowledge same-gender sexual harassment as a violation of Title VII. However, as the research progressed and continually led to the arena of sexual orientation harassment, a change in the overall purpose of the article occurred. A review of Title VII's intentions reveals that the overriding concern of the drafters was the eradication of discrimination in employment. In 1964, it became politically correct to afford blacks and women the right to work in an environment free of discrimination. Later, the elderly and disabled became deserving of equal treatment in the workplace. However, with the exception of few early judicial decisions and still fewer recent state legislative enactments, sexual orientation harassment and same-gender sexual harassment have been denied recognition under Title VII. Most recently in *Hopkins v. Baltimore Gas & Electric*, a Maryland District Court held that it was impossible for a male employee to bring a Title VII sexual harassment claim against another male. This article's primary emphasis is to prove that same-gender harassment can be resolved within Title VII's prohibition against employment discrimination. Specifically, the Courts' illogical reasoning that the sex of the aggressor and victim does not play a role in the harassment is far from correct. Whether it be seethingly liberal or just plain honest, a prohibition against same-gender harassment, as well as orientation harassment, would clearly further the purpose of Title VII of creating a discrimination free workplace.

This article begins with an analysis of the development and recognition of sexual harassment as an actionable form of discrimination under Title VII of the Civil Rights Act of 1964. It progresses to an examination of the early cases, holding





doi: 10.2190/56UX-GQAJ-332H-36RU
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Title VII coverage should be extended to include cases of same-gender sexual harassment. In addition, some recent same-gender sexual harassment cases denying recognition of Title VII protection are analyzed. These rulings help develop the inconsistency inherent in a finding that same-gender harassment is not actionable under Title VII. This article addresses the inconsistency of denying Title VII protection to incidents of same-gender harassment, as distinguished from instances of sexual-orientation harassment. Some incidental analyses of sexual-orientation harassment are included, but that topic alone would require far more consideration than this article could accommodate. Finally, the underlying objectives of Title VII are analyzed, and the difficulty of reconciling the recent decisions with those purposes is discussed.

## HISTORY OF SEXUAL HARASSMENT AS SEXUAL DISCRIMINATION

### Background

Title VII of the Civil Rights Act of 1964 states:

> 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 with respect to [her or] his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ; or (2) to limit, segregate, or classify [her or] his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect [her or] his status as an employee, because of such individual's . . . sex [1, §703(a), §2000e-2(a)].

Congress' purpose in enacting Title VII of the act was to provide equal employment opportunities by removing artificial barriers in employment based on an individual's sex, race, color, religion, or national origin [2]. In addition, the Equal Employment Opportunity Commission (EEOC), in an attempt to clarify and enunciate some standards for the growing area of law, promulgated the EEOC Guidelines on Discrimination Because of Sex in 1980 [3].

Growing judicial recognition of sexual harassment as an actionable form of sexual discrimination under Title VII came to bear in 1981 when the sexual harassment complaints received by the EEOC increased by more than 3000 percent [4]. This marked growth was due in large part to, and correlated with, the guidelines published by the EEOC, and the awareness created thereby. Although the EEOC does not possess the regulatory rule-making authority to pass rules that have the effect of law [5], the rules are given great judicial deference because of the commission's expertise in the area (see [2]).

## Law

Sexual harassment law as it exists today is generally divided into two separate, but often overlapping, categories. The first form of harassment is *quid pro quo* harassment. This is the traditional form of harassment that occurs when an employer, or prospective employer, predicates some tangible job benefit on the employee's submission to sexual advances or favors (see [6-8]). A "tangible economic loss" includes termination [7], denial of benefits [9], transfer [10], or poor performance reviews [11]. Because *quid pro quo* harassment is based on the conditioning of an employment benefit in exchange for sexual favors, the harassment can be committed only by a person with the power and authority to make a decision adverse to the employee's job status, benefit application, or promotion.

The second form of sexual harassment recognized by the courts is hostile work-environment sexual harassment. In *Meritor Savings Bank v. Vinson* the Supreme Court of the United States held that Mechelle Vinson had been subjected to sexual harassment by her supervisor by his conduct and the "atmosphere" he had created at the workplace [12]. Vinson alleged her supervisor, a white male, had made repeated sexual advances, fondled Vinson's breasts and buttocks in the presence of other employees, exposed himself to her, and raped her [13]. In the end, Vinson claimed to have submitted to her supervisor's sexual demands some forty or fifty times, for fear of losing her position with the bank [13 at 145-146]. Vinson had never followed Meritor Savings' complaints procedure because the process required her to first report to her supervisor, the harasser in this instance [13 at 144].

The district court denied Vinson's claim, finding the relationship was voluntary [13]. The court of appeals for the District of Columbia reversed and remanded the case, holding that Vinson may be able to make a claim of hostile or abusive work environment in violation of Title VII [14 at 145]. The court of appeals noted Vinson might be able to premise the Title VII violation on the theory of hostile environment harassment, which it had recently recognized in *Bundy v. Jackson* [15]. On appeal the Supreme Court affirmed the court of appeals decision, finding that hostile environment sexual harassment is a violation of Title VII [12].

Chief Justice Rehnquist wrote the opinion and reasoned that discrimination based on the sex of the victim created a hostile or abusive work environment in violation of Title VII [12]. The Court also found that when a supervisor sexually harasses an employee on the basis of her sex, the supervisor is discriminating because of the victim's sex [12 at 64]. In essence the Court adopted a "but-for" test—but for the victim's sex, the supervisor would not have harassed the victim [see 16]. Secondly the Supreme Court found that the district court's ruling, based on the voluntariness of the relationship, was not based in law [12 at 68]. The Court held that the fact that "sex-related conduct" was voluntary is not a complete defense to a charge of sexual harassment [12 at 68]. "The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome' " [12 at

68]. This analysis almost seems to remove the objective "voluntariness" analysis and replace it with a subjective "unwelcomeness" analysis [17]. Finally, the Court, quite simply and concisely, held that Vinson need not show a tangible economic loss as part of her proof of hostile environment harassment. Submission to sexual demands in exchange for hiring, promotion, or benefits falls under the protection of Title VII [12 at 68].

The ultimate consideration becomes whether the sexual conduct was severe and pervasive enough to alter the terms and conditions of employment and unreasonably interfere with the individual's work performance or create an intimidating, hostile, or offensive work environment [12 at 66-69]. In addition, the conduct must be unwelcome and based on the gender of the victim [12 at 68]. Lastly, a hostile or abusive environment, in and of itself, can constitute sexual harassment absent proof of a tangible loss by the victim [3 at § 1604.11(a)(3)]. In *Harris v. Forklift Systems, Inc.* the Court adopted a sort of two-part test to determine whether the work atmosphere constituted a hostile work environment [18 at 370]. The test requires that the average reasonable person find the conduct hostile or abusive *and* the victim must subjectively find the environment hostile or abusive [18 at 370]. The requirement that "a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets" [12 at 66, quoting 6 at 902]. Thus hostile environment sexual harassment standards became judicially recognized by the Supreme Court as an actionable form of discrimination under Title VII of the Civil Rights Act of 1964.

That *quid pro quo* homosexual harassment would be actionable is probably beyond dispute because the exchange of sexual favors for work-related benefits would still qualify under the prima facie requirements. However, it is the denial of the protection from hostile environment sexual harassment to instances of same-sex harassment that creates an inconsistency in either the law or the application of Title VII. When justices and judges deny extension of the protection based on congressional intent, according deference and respect due should be given. The problem associated with basing a decision solely on legislative intent is that the search of the legislative record usually degenerates to a witch hunt for the perspective sought to be espoused. However, when the courts seek to justify the denial of protection to same-gender harassment on the premise that such harassment is not sexual discrimination because both parties are members of the same sex, the decisions reached are neither logically consistent with the framework nor purpose of Title VII.

## EARLY PRECEDENT EXTENDING TITLE VII COVERAGE TO SAME-GENDER HARASSMENT

The early cases that addressed homosexual harassment did so only incidentally through dicta. In *Barnes v. Costle* [19] the court, analyzing a claim of sexual

harassment brought by a female employee against a male supervisor, stated in a footnote:

> 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 [19 at 990 n. 55].

When the first claims of homosexual harassment surfaced in the courts, the judicial response was to apply the then-current sexual harassment analysis [see 20]. In these early cases the courts, relying primarily on the tests that would be adopted by *Meritor Savings*, held an employee who alleged he was terminated because he refused to submit to his male supervisor's requests for sexual favors had made out an actionable Title VII claim [21]. Using the language of *Barnes v. Costle*, the court found the homosexual supervisor had exacted a "condition [of employment] which, but for his . . . sex, the employee would not have faced" [21 at 310]. Further, the court noted the same conditions would not be imposed on a female employee [21 at 310] and therein found the basis for discrimination.

The *Methodist Youth Services* court used a "but-for" test to qualify the finding as discrimination on the basis of gender and not discrimination because of sexual harassment [20, p. 35]. The basis in gender discrimination was evident from other dicta that indicated bisexual harassment would not be actionable because the harassing bisexual supervisor would not be treating the male and female employees differently [6 at 904]. Both sexes of employees would be subjected to the harassment.

Even as recently as 1990 some district courts were finding same-gender sexual harassment actionable. In *Parrish v. Washington Nation Insurance Co.* the court went out of its way to note that unwelcome homosexual advances were actionable under the prohibition against gender discrimination [22]. Harassment of homosexuals, on the other hand, was based on the homosexual's sexual orientation or preference [18 at 35-36, 23]. Here, the "offending conduct is based on the employer's sexual preference and necessarily involves the plaintiff's gender, for an employee of the nonpreferred gender would not inspire the same treatment" [22]. Perhaps in an attempt to stem the growing amount of sexual orientation claims being brought under Title VII or possibly out of an earnest belief that sexual harassment could not, in the eyes of the law, be committed against a member of the same gender, the courts stuck to their guns and refused to find a homosexual could sexually harass a member of his/her sex within the parameters of Title VII. Holdings that would follow would remove even this tenuous foothold of legal recognition extended to homosexuals.

## DENYING TITLE VII PROTECTION TO SAME-GENDER HARASSMENT

In *Garcia v. Elf Atochem North America* the Fifth Circuit Court of Appeals found that Garcia, a male employee of the defendant, could not bring a Title VII sexual harassment claim against a male supervisor alleged to have "grab[bed Garcia's] crotch area and ma[de] sexual motions from behind [Garcia]" [23 at 448]. Other evidence adduced at trial established the same supervisor had been accused of two similar indiscretions with two separate male employees [23 at 448-449]. In affirming the district court's grant of summary judgment for the defendant, the court of appeals relied, rather shorthandedly, on one of its previous unpublished opinions and held 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" [23 at 451-452, quoting 24]. From this reasoning the court concluded Garcia could not make out a sexual harassment claim against another male under Title VII [23 at 452].

Recently, the United States District Court for the District of Maryland granted the defendant's motion for summary judgment [25]. George E. Hopkins claimed he had been the subject of sexual harassment in violation of Title VII [25]. Hopkins, a white male employee of the defendant, alleged he was harassed by his white male supervisor, Ira Swadow [25 at 6-17, 23-25]. Among the allegations made by Hopkins were that Swadow had made improper sexual and explicit comments, made sexually suggestive gestures, and had subjected Hopkins to other inappropriate behavior [25 at 9-11]. Hopkins reported this harassment through the defendant's grievance procedure, and upon investigation the defendant company found his allegations meritless [25 at 15-19]. Following the investigation, Hopkins claimed the harassment took on a retaliatory, yet still sexually motivated, nature [25 at 20-21]. Hopkins then filed a charge of discrimination with the EEOC [25 at 22]. Hopkins did not allege he was subjected to *quid pro quo* sexual harassment, but rather that the continual abuse had created a hostile work environment [25 at 22]. However, prior to the conclusion of the commission's investigation, Hopkins requested and received a right to sue letter from the EEOC [25 at 22].

The district court initially addressed the issue of whether same-gender sexual harassment is actionable under Title VII [25 at 29]. In its analysis the court reviewed the holding in *Meritor Savings Bank* and the recognition of hostile or abusive work environment harassment [25 at 29-34]. The court's review of *Meritor* led it to surmise that Title VII protects employees from having to suffer a work environment fraught with "discriminatory intimidation, ridicule and insult" [25 at 30, quoting 12 at 65]. The opinion then turned to an analysis of harassment that does not rise to the level necessary to constitute a hostile work environment [25 at 33-35]. In its analysis the court went as far as to cite Judge Bork's dissenting opinion in *Vinson v. Taylor*, which stated that the "discrimination which brings a

claim of sexual harassment within the scope of Title VII arises from 'the differentiating libido' of the alleged harasser" [25 at 33, quoting 26 at 1333 n.7. (Bork, J., dissenting from denial of rehearing *en banc*)]. The court also went on to examine the "but-for" test applied in *Meritor Savings*, but ultimately rested on a rather misguided theory of harassment and the *Garcia* decision to find Hopkins' claim barred [25 at 34-36].

The court found it particularly "peculiar" to call harassment of a male by a male, discrimination based on sex [25 at 36]. The harasser in these instances is "really . . . preferring or selecting some one member of his own gender for sexual attention, however unwelcome that attention may be to its object" [25 at 36-37]. The court went on to quote *Chiapuzio v. BLT Operating Corp.* for the proposition that the harasser in same-gender cases obviously does not "despise" the gender of which s/he is a member and likewise the harasser would not seek to harm the group or gender because "he is a member himself and finds others of the group sexually attractive" [25 at 36-37, quoting 27 at 1337 n.1]. But if the inverse statement is made, would not the same logic apply, at least in part, to the heterosexual sexual harassment case? In other words, the female harasser obviously does not despise the male gender to which she is sexually attracted. Additionally, she would not seek to harm the group's members because she finds them sexually attractive. These points will be more fully addressed in the analysis section.

The Maryland district court also relied on *Garcia* and to a large extent actually explained the reasoning behind the one-paragraph response of the Fifth Circuit Court of Appeals [25 at 38-39]. The *Hopkins* court deduced that the *Garcia* court was relying on precedent that requires a "powerful position to impose sexual demands or pressures on an unwilling but less powerful person . . ." to constitute an actionable form of sexual harassment [25 at 39, quoting 28 at 1456]. Therefore, the harasser is discriminating because the "victim is inferior because of [his or her] sex" [25 at 39]. Although recognizing that Goluszek could probably make out a claim under the literal strictures of Title VII, both the *Goluszek* and *Hopkins* courts chose to "adopt . . . a reading of Title VII consistent with the underlying concerns of Congress" [25 at 38, quoting 28 at 1456]. Thus, even after manipulating the tests to fit their answers, both courts would ultimately rest on the "true" congressional intent to justify their holdings.

## ANALYSIS

Setting aside the hostile environment requirement that the harassment be severe and pervasive—the *Hopkins* court found the incidents alleged by Hopkins did not rise to such a level [25 at 23]—a strong case can be made that Title VII offers protection to cases of same-gender sexual harassment. In *Meritor Savings* the Supreme Court found that when a supervisor sexually harasses an employee on the basis of his or her sex, the supervisor is discriminating because of sex [12 at

64]. In other words, but for the victim's sex s/he would not have been treated in this manner. So, in the case where the supervisor is a male homosexual who is harassing a male subordinate, is not the male subordinate being chosen because of his sex? Obviously the male subordinate, Hopkins or whoever, is being sexually harassed because the homosexual supervisor finds the subordinate sexually attractive. Female subordinates of this supervisor would not be subjected to this harassment because the supervisor is basing his harassment on his sexual preference. Simply stated, Hopkins would not have been subjected to this harassment but for his sex.

Additionally, the *Meritor Savings* Court required that the sexual advances, conduct, or statements made by the harasser be unwelcome to the victim [12 at 68]. This level of analysis is apparent from the facts as reported in the case. On more than one occasion Hopkins went to his supervisor and complained of the harassment and often indicated to Swadow, the harasser, that Hopkins believed the comments or actions were inappropriate [25 at 9-15]. These complaints accompanied with Hopkins' filing of a charge of discrimination with the EEOC testify to the unwelcomeness of the actions.

Lastly, *Meritor* stated a showing of a tangible economic loss or injury was not necessary to sustain a claim of hostile work environment sexual harassment [12 at 68]. It is enough that the sexual harassment is severe and pervasive and affects the terms and conditions of employment [3 at § 1604.11(a)(3)]. This could be accomplished in Hopkins' case by the allegations that claimed he was repeatedly subjected to the sexual harassment. This element is linked, in part, to the requirement that the harassment be severe and pervasive enough to create a hostile or abusive environment [see 18 at 370]. Therefore, if the harassment was severe and pervasive, it would affect the conditions of employment. However, in *Hopkins* the court did not find that the sexual epithets and conduct rose to the necessary level.

Additionally, the rationale used in the *Garcia* and *Hopkins* decisions is subject to considerable scrutiny. *Garcia*, and *Hopkins* by citing thereto, relied on the notion that the discriminator in same-gender harassment cases "certainly does not despise the entire group, nor does he wish to harm its member, since he is a member himself and finds others of the group sexually attractive" [25 at 36-37]. But at least one commentator has argued this misconception proceeds from a "flawed definition of discrimination" [16 at 10 n.43]. Courts have repeatedly held the intention of the discrimination is irrelevant: it is enough that the resultant effect of the discrimination treats one sex differently from the other [16 at 10 n.43]. For instance, in *International Union, UAW v. Johnson Controls* the "benign" motive of protecting the fetuses of expectant mothers was irrelevant in light of the fact that the policy discriminatorily affected the pay of the women at the factory [29 at 1203-1204].

Applying this paradigm to the *Hopkins* situation, it becomes readily apparent he was discriminated against because his supervisor did sexually harass him, setting aside the severe and pervasive finding for argument's sake. Because some form of

animus is usually associated with discrimination "does not mean that it always does, or, more importantly, that it is a necessary element of a discrimination claim" [16 at 13]. Proof of Title VII discrimination requires the plaintiff to show an adverse employment action was taken that affected conditions of employment. "Title VII does not punish bad motives, but neither does it reward good motives. It is not about motives, but acts, and [Title VII] compensates the victims of discriminatory acts no matter the motive for them" [16 at 10 n.43].

Perhaps the crux of the controversy behind the denial of Title VII protection to incidents of same-gender sexual harassment arises from the inherent difference in the judicial definitions given to sexual discrimination and gender discrimination. To note, a prohibition against harassment that is gender-based does not explain why sexually offensive harassment constitutes sex discrimination [16 at 15]. This distinction becomes more apparent when the EEOC policy guidelines are analyzed. The EEOC has issued formal regulations aimed at clarifying the standards for sexual conduct that constitutes a hostile work environment [16 at 15 n.59]. Similar explanations have not been given on the subject of how to judge harassing conduct aimed at individuals because of their gender [16 at 15 n.59]. This begs the question: What constitutes sexual harassment? Is it harassment based solely on the gender of the victim? Nonsexual offensive conduct aimed at a female because of her gender is actionable as gender discrimination. Is it harassment that is sexual in nature? Harassment based in sex but not directed at any particular gender is not generally actionable. Or is it gender-based harassment that is sexual in nature [16 at 16]? This definitional controversy can be made more evident by examining a claim brought under Title VII by a female employee alleging to have been subjected to hostile environment sexual harassment.

Some courts have been willing to find that conduct that is not gender-based may still provide an action for sexual harassment. In *Waltman v. International Paper Co.*, the Fifth Circuit Court of Appeals held that Waltman had made out a claim of hostile environment sexual harassment [30]. "Girlie pictures" hanging in lockers, bikini calendars on the common area walls and graffiti not specifically aimed at the Plaintiff were found to create a hostile and abusive work environment in violation of Title VII [30 at 479, 483]. Dissenting Judge Jones noted the majority of the court had extended Title VII protection to instances where the plaintiff was not even the target of the alleged harassment [30 at 484]. This holding and reasoning would seem to all but remove the "but-for" causation requirement set forth in *Meritor Savings* because the gender of the victim is obviously not taken into consideration. Here, the conduct alleged to constitute the hostile environment was not directed at any particular individual.

Thus, the fact the conduct must have some sexual connotations to constitute sexual harassment would appear to be clear [31 at 1363]. A sexually hostile work environment, therefore, would seem to necessarily involve conduct that is sexual in nature [16 at 15-16]. The EEOC guidelines define sexual harassment as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical

conduct of a sexual nature" [3 at § 1604.11(a)]. Therefore, it is at least recognizable that some courts have been willing to weigh the sexual nature of the conduct more heavily than the basis for the discrimination—the basis here being the gender of the victim. Taking this analysis to its logical conclusion, it is difficult to rationalize how homosexual and heterosexual harassment that assault an individual are to be differentiated under Title VII. This is especially true in a hostile environment claim of same-gender sexual harassment cases where the conduct is sexual in nature and directed at a specific individual [see 25]. (It is interesting to note that a similar analogy to sexual orientation harassment can be made to fit within this construct [16 at 16].)

In *Hopkins v. Baltimore Gas & Electric*, Hopkins did not attempt to allege *quid pro quo* sexual harassment, but rather was attempting to state a claim of hostile environment sexual harassment. Whether the "but-for" test is applied or not—a strong argument can and has been made, *supra*, that the harassment of Hopkins was based on his sex—it is readily apparent Hopkins could make a colorable argument that the environment created by his harassing supervisor was sexually abusive and hostile. To that end, Hopkins' claim would state a viable cause of action under the prohibition of sexual harassment in Title VII. The days when "a man or woman [were required to] run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living . . ." [16 at 902] should now be recognized as long gone.

## CONCLUSION

The purpose of this article is to show that same-gender harassment, in general, does fit within the strictures of Title VII. In pursuit of that goal, the tests and standards set forth for sexual harassment claims were applied to same-gender cases. All of the Title VII harassment tests enunciated by the courts have been adopted to further the dual purposes of preventing discrimination and eradicating past discrimination on the basis of sex. In reality, there is no identifiable difference between incidents of harassment by homosexuals or heterosexuals, nor should there be one under Title VII.

Having argued that same-gender harassment is actionable under Title VII, it would be indeed ironic if the first substantive recognition of homosexuality under the federal law found the same-gender harassers liable for sex discrimination. Yet sexual-orientation harassment remains beyond the scope of the "intended protections" of Title VII's authors. But perhaps those who believe every person has a right to work in an atmosphere free of sexual epithets, slurs, and harassment will have to accept this initial liability to achieve the ultimate goal of prohibiting all workplace harassment, orientation harassment included. Whether recognition of same-gender sexual harassment and the slippery slope will slide the courts into the arena of orientation harassment is a gamble at best. However, gay and lesbian

rights advocates should be conscious of the fact that it is far better to lose the battle and win the war.

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## ENDNOTES

1. Pub. L. No. 88-352, §§ 701-718, 78 Stat. 241 (codified at 42 U.S.C. §§ 2000e to 2000e-17 (1982)).
2. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).
3. 29 C.F.R. § 1604.11 (1988). The guidelines were originally promulgated in 1980, but have since been revised.
4. Office of EEOC, Aug. 16, 1988.
5. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975).
6. *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982).
7. *Tomkins v. Public Service Elec. & Gas Co.*, 568 F.2d 1044 (3rd Cir. 1977).
8. *Stringer v. Pennsylvania Dept. of Community Affairs*, 446 F.Supp. 704 (M.D.Pa. 1978).
9. *Sparks v. Pilot Freight Carriers*, 830 F.2d 1554 (11th Cir. 1987).
10. *Broderick v. Ruder*, 685 F.Supp. 1296 (D.D.C. 1988).
11. *Shrout v. Black Clawson Co.*, 46 Fair Empl. Prac. Cas. (BNA) 1339 (S.D. Ohio 1988).
12. *Meritor Savings Bank, FSB v. Vinson*, 447 U.S. 57 (1986).
13. *Vinson v. Taylor*, 23 Fair Empl. Prac. Cas. (BNA) 38 (D.D.C. 1980).
14. *Vinson v. Taylor*, 753 F.2d 141 (1981).
15. *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981).
16. Samuel A. Marcosson, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 Geo. L.J. 1, 12 (1992). Professor Marcosson argues that the but-for test applies equally as well to homosexual advances because the advances are likewise predicated on the gender of the victim.
17. I make this point now to bring to light the fact that both the "but-for" test and the "unwelcomeness" aspect are applicable to the cases of same-gender harassment. The same-gender harassment can obviously be unwelcome, and the discrimination is based on the sex of the victim (a homosexual would not sexually harass a person of the opposite sex). These points are further developed in the analysis section.
18. *Harris v. Forklift Systems, Inc.*, 126 L.Ed. 2d 295, 114 S.Ct. 367 (1993).
19. *Barnes v. Costle*, 562 F.2d 983 (D.C. Cir. 1977).
20. Megan Norris and Mark Randon, *Sexual Orientation and the Workplace: Recent Developments in Discrimination and Harassment Law*, Employee Relations Law Journal, Vol. 9; No. 2; p. 33 (Sept. 22, 1993).

21. *Wright v. Methodist Youth Services, Inc.*, 511 F.Supp. 307 (N.D. Ill. 1981).
22. *Parrish v. Washington National Insurance Co.*, Slip Op. No. 89-C-4515 (N.D. Ill. Oct. 16, 1990).
23. *Garcia v. Elf Atochem North America*, 28 F.3d 446 (5th Cir. 1994).
24. *Giddens v. Shell Oil Co.*, No. 92-8533 (5th Cir. Dec. 6, 1993) (unpublished).
25. *Hopkins v. Baltimore Gas & Elec. Co.*, 871 F.Supp. 822, 1994 U.S. Dist. LEXIS 18586 (D.Md. 1994).
26. *Vinson v. Taylor*, 760 F.2d 1330 (D.C. Cir. 1981).
27. *Chiapuzio v. BLT Operating Corp.*, 826 F.Supp. 1334 (D. Wyoming 1993).
28. *Goluszek v. Smith*, 697 F.Supp. 1452 (N.D. Ill. 1988).
29. *International Union, UAW v. Johnson Controls*, 449 U.S. 187, 111 S.Ct. 1196 (1991).
30. *Waltman v. International Paper Co.*, 875 F.2d 468 (5th Cir. 1989).
31. *But see*, Joshua F. Thorpe, Note, *Gender-Based Harassment and the Hostile Work Environment*, 1990 DUKE L.J. 1361. (Thorpe argues that an employer who allows the workplace to be filled with gender-based harassment not sexual in nature still violates Title VII. However, this argument seems to be directed more toward a form of "judicial" gender harassment than sexual harassment. Again, the semantics of gender versus sex play a role.)

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