

SAME-SEX SEXUAL HARASSMENT

JO BENNETT*

| | | |
|------|---|----|
| I. | INTRODUCTION..... | 1 |
| II. | TITLE VII: THE BACKGROUND OF SEXUAL HARASSMENT | 5 |
| | <i>A. The Early Court Cases</i> | 5 |
| | <i>B. Expanding the View of Sexual Harassment</i> | 6 |
| | <i>C. The Meritor Case</i> | 7 |
| III. | SAME-SEX HARASSMENT | 9 |
| | <i>A. Scope of the Problem and Early Case Law</i> | 9 |
| | <i>B. Split in the Courts</i> | 10 |
| | <i>C. Why Same-Sex Sexual Harassment is Actionable</i> | 13 |
| | <i>D. Untenable Distinctions</i> | 15 |
| IV. | GENDER STEREOTYPES | 17 |
| | <i>A. “Appropriate” Roles</i> | 17 |
| | <i>B. Stereotyping of Homosexuals</i> | 20 |
| | <i>C. The Supreme Court and Gender Stereotyping</i> | 23 |
| V. | GENDER STEREOTYPING: A CASE STUDY IN <i>DILLON V.</i> <i>FRANK</i> | 24 |
| | <i>A. A Hostile Environment in the Court</i> | 24 |
| | <i>B. A Case of Stereotyping</i> | 25 |
| VI. | CONCLUSION..... | 28 |

I. INTRODUCTION

In *Price Waterhouse v. Hopkins*,¹ the Supreme Court ruled that a female plaintiff could offer evidence of gender stereotyping to prove a case of sex discrimination under Title VII,² declaring that the days when an employer could cling to prejudicial notions about the sexes had long passed.³ In *Dillon v. Frank*,⁴ the male plaintiff in a Title VII hostile

* Associate, Schnader Harrison Segal & Lewis, Philadelphia, Pennsylvania. J.D., Temple University. The author wishes to thank Temple Law Professor Marina Angel, whose wisdom, insight and prodding made this Article possible; and Molly Kellogg, L.S.W., who assisted in interpreting the social science literature.

1. 490 U.S. 228 (1989).

2. 42 U.S.C. § 2000e-2(a)(1) (1994) (Title VII) makes it unlawful for an employer to discriminate against an employee with respect to her or his terms, conditions or privileges of employment because of the employee’s race, color, religion, sex, or national origin.

3. *Price Waterhouse*, 490 U.S. at 251.

environment sexual harassment claim⁵ argued that he, too, had been victimized by sex stereotyping.⁶

For four years Ernest Dillon, a mail handler at the Postal Service's Bulk Mail Center in Allen Park, Michigan, had endured lewd graffiti, sexual slurs and innuendo, and crude drawings that showed him having sex with other men.⁷ One co-worker beat Dillon so badly that he suffered two black eyes, a bruised sternum, and facial lacerations.⁸ Although the attacker was fired, other co-workers continued to taunt Dillon for three more years before he finally suffered a nervous breakdown.⁹ Dillon, who never spoke at work about his sexual orientation, filed a complaint with the Equal Employment Opportunity Commission.¹⁰ Later, when his appeal was denied, he filed suit in United States district court, losing there as well.¹¹

When he reached the United States Court of Appeals for the Sixth Circuit, the appellate panel repeated a rationale that Dillon had heard before. It ruled that Dillon had been sexually harassed because he was a homosexual,¹² not "because of" his sex¹³ or any stereotypical notions about the proper role of a man.¹⁴

4. 952 F.2d 403 (unpublished table decision), No. 90-2290, 1992 WL 5436 (6th Cir. Jan. 15, 1992). The Sixth Circuit's Local Rule 24 would seem to have favored the publication of the *Dillon* decision either because it established a new rule of law or involved a novel fact situation to an established rule of law. 6th CIR. R. 24(a)(i). The publication also could have been justified because the case discussed a legal or factual issue of continuing public interest. *See id.* at 24(a)(iii). Moreover, the Sixth Circuit has a presumption in favor of publication. *See id.* at 24(b).

5. In a hostile environment action, the employee is asserting that sexual advances or other verbal or physical conduct of a sexual nature unreasonably interfered with work performance or created an intimidating, hostile, or offensive working environment. *See* 29 C.F.R. § 1604.11(a)(3) (1996). In a quid pro quo claim, an employee is alleging that a job benefit was linked to her or his submission to or rejection of a supervisor's unwelcome sexual advance or unwelcome verbal or physical conduct of a sexual nature. *See id.* § 1604.11(a)(1)(2).

6. *Dillon*, 1992 WL 5436, at *5.

7. *See* *Dillon v. Frank*, EEOC Office of Review and Appeals, No. 01900157 (Feb. 14, 1990) (final admin. review).

8. *See id.*

9. *See id.*

10. *See* *Dillon v. Frank*, U.S. Postal Service, Central Regional Office, No. 4-B-0109-8 (Sept. 21, 1989) (final agency determination).

11. *See* *Dillon v. Frank*, No. 90-CV-70799-DT (E.D. Mich. Oct. 16, 1990).

12. *See* *Dillon v. Frank*, 952 F.2d 403 (unpublished table decision), No. 90-2290, 1992 WL 5436, at *6-7 (6th Cir. Jan. 15, 1992). In its ruling, the court followed previous appellate court decisions holding that Title VII did not prohibit discrimination based on sexual orientation. *See also* *Williamson v. A.G. Edwards and Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989); *DeCintio v. Westchester County Med. Ctr.*, 807 F.2d 304, 306-07 (2d Cir. 1986); *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 329-30 (9th Cir. 1979); *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 326-27 (5th Cir. 1978).

Dillon was indeed harassed because of his sexual orientation. However, that harassment violated Title VII since Dillon was treated differently because of his sex, even though that harassment was inflicted by someone of the same gender.¹⁵ This argument flows from social science research linking the disparate treatment of homosexuals to gender stereotyping. This Article contends that courts should recognize these findings as a basis for affording Title VII protection to lesbians and gay men in same-sex sexual harassment cases.¹⁶

Section II of this Article discusses the history and doctrinal basis for sexual harassment claims. It focuses on early cases, in which courts refused to recognize sexual harassment, and on the Supreme Court's landmark decision in *Meritor Savings Bank v. Vinson*.¹⁷ In *Meritor*, the Supreme Court held that hostile environment sexual harassment was sex discrimination within the meaning of Title VII.¹⁸

Section III examines same-sex sexual harassment cases and the split in the federal appellate and district courts on whether such claims constitute a cause of action under Title VII.¹⁹ Particularly in cases

13. See *Dillon*, 1992 WL 5436, at *6-7. To make out a prima facie claim of sexual harassment, a plaintiff must show that she or he was discriminated against because of her or his sex. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66-67 (1986). The plaintiff must also show that the conduct was unwelcome, that it affected a term, condition or privilege of employment, and that the employer was liable for the conduct. See *id.* at 67.

14. See *Dillon*, 1992 WL 5436, at *9.

15. I am equating gender with sex, but, as some commentators rightly point out, gender encompasses more than anatomical sex. See *infra* notes 132-34.

16. I use the term same-sex sexual harassment to mean harassment of a sexual nature in which both perpetrator and victim are of the same gender, i.e., both are either male or female. This paper is limited to same-sex sexual harassment, but the use of the social science research would be equally applicable in opposite-sex sexual harassment cases where the target is homosexual and in gender discrimination claims where there is no sexual harassment.

17. 477 U.S. 59 (1986).

18. *Id.* at 64.

19. For cases recognizing that same-sex sexual harassment is actionable, see *Quick v. Donaldson*, 90 F.3d 1372, 1377-79 (8th Cir. 1996); *Peric v. Board of Trustees of the U. of Ill.*, No. 96-C-2354, 1996 U.S. Dist. LEXIS 13042, at *6 (N.D. Ill. Sept. 4, 1996); *Gerd v. United Parcel Serv., Inc.*, 934 F. Supp. 357, 359 (D. Colo. 1996); *Marciano v. Kash n' Karry Foodstores, Inc.*, No. 94-1657CIV-T-17A, 1996 WL 420879, at *3 (M.D. Fla. July 1, 1996); *Swage v. Inn Philadelphia*, No. 96-2380, 1996 WL 368316, at *2-3 (E.D. Pa. June 21, 1996); *Johnson v. Community Nursing Servs.*, 932 F. Supp. 269, 271-73 (D. Utah 1996); *Waag v. Thomas Pontiac, Buick, GMC, Inc.*, 930 F. Supp. 393, 399 (D. Minn. 1996); *Dixon v. State Farm Fire and Cas. Ins. Co.*, 926 F. Supp. 548, 550-51 (E.D. Va. 1996); *Tietgen v. Brown's Westminster Motors, Inc.*, 921 F. Supp. 1495, 1499-1503 (E.D. Va. 1996); *Rushing v. United Airlines*, 919 F. Supp. 1101, 1106 (N.D. Ill. 1996); *Tanner v. Prima Donna Resorts, Inc.*, 919 F. Supp. 351, 354 (D. Nev. 1996); *Williams v. District of Columbia*, 916 F. Supp. 1, 7-10 (D.D.C. 1996); *Ton v. Information Resources, Inc.*, 70 Fair Empl. Prac. Cas. (BNA) 355, 359-60 (N.D. Ill. 1996); *Ladd v. Sertoma Handicapped Opportunity Program, Inc.*, 917 F. Supp. 766, 767 (N.D. Okla. 1995); *Ecklund v. Fuisz Tech., Ltd.*, 905 F. Supp. 335, 337 (E.D. Va. 1995); *Sardinia v. Dellwood Foods, Inc.*, 69 Fair Empl. Prac. Cas. (BNA) 705,

involving sexual advances, courts have little trouble finding that a plaintiff has been discriminated against because of her or his sex. For example, in *EEOC v. Walden Book Co.*,²⁰ the court reasoned that but for his sex, the plaintiff would not have been targeted for sexual conquest by his homosexual supervisor at the bookstore where he worked.²¹ The plaintiff had shown that his boss did not prey on women.²² In *Goluszek v. Smith*,²³ an influential decision among courts refusing to recognize same-sex sexual harassment, the judge ruled that a male plaintiff verbally taunted by his male colleagues did not have an actionable hostile environment claim because Congress did not intend to proscribe the treatment he endured.²⁴ Section III.C argues that the *Goluszek* court's

708 (S.D.N.Y. 1995); *Easton v. Crossland Mortgage Corp.*, 70 Fair Empl. Prac. Cas. (BNA) 597, 605 (C.D. Calif. 1995); *King v. M.R. Brown, Inc.*, 911 F. Supp. 161, 166 (E.D. Pa. 1995); *Raney v. District of Columbia*, 892 F. Supp. 283, 286-87 (D.D.C. 1995); *Nogueras v. University of Puerto Rico*, 890 F. Supp. 60, 63 (D.P.R. 1995); *Llampallas v. Mini-Circuits Lab, Inc.*, 66 Empl. Prac. Dec. (CCH) ¶ 43,699 (S.D. Fla. 1995); *Griffith v. Keystone Steel and Wire*, 887 F. Supp. 1133, 1136 (C.D. Ill. 1995); *EEOC v. Walden Book Co.*, 885 F. Supp. 1100, 1104 (M.D. Tenn. 1995); *Pritchett v. Sizeler Real Estate Management, Co.*, 67 Fair Empl. Prac. Cas. (BNA) 1377, 1378-79 (E.D. La. 1995); *Blozis v. Mike Raiser Ford, Inc.*, 68 Fair Empl. Prac. Cas. (BNA) 711, 712-13 (N.D. Ind. 1995); *Boyd v. Vonnahmen*, 67 Fair Empl. Prac. Cas. (BNA) 1769 (S.D. Ill. 1995); *Roe v. K-Mart Corp.*, No. 93-2372-18AJ, 1995 WL 316783, at *2 (D.S.C. Mar. 28, 1995); *McCoy v. Johnson Controls World Servs.*, 878 F. Supp. 229, 232 (S.D. Ga. 1995); *Prescott v. Independent Life and Accident Ins. Co.*, 878 F. Supp. 1545, 1549-51 (M.D. Ala. 1995).

For cases where same-sex sexual harassment has been found not to be actionable, see *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138 (4th Cir. 1996); *Mayo v. Kiwest Corp.*, 94 F.3d 641 (unpublished table decision), No. 95-2638, 1996 WL 460769 (4th Cir. Aug. 15, 1996); *Oncale v. Sundowner Offshore Servs.*, 83 F.3d 118, 119-20 (5th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3432 (U.S. 1996); *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1195-96 (4th Cir.), *cert. denied*, 117 S. Ct. 72 (1996); *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 451-52 (5th Cir. 1994); *Giddens v. Shell Oil Co.*, 12 F.3d 208 (5th Cir. 1993) (per curiam) (unpublished); *Dillon v. Frank*, 952 F.2d 403 (unpublished table decision), No. 90-2290, 1992 WL 5436, at *4-7 (6th Cir. Jan. 15, 1992); *Gibson v. Tanks Inc., Util. Serv., Inc.*, 930 F. Supp. 1107, 1108 (M.D.N.C. 1996); *Martin v. Norfolk S. Ry. Co.*, 926 F. Supp. 1044, 1049 (N.D. Ala. 1996); *Fredette v. BVP Management Assoc.*, 905 F. Supp. 1034, 1037 (M.D. Fla. 1995); *Ashworth v. Roundup Co.*, 897 F. Supp. 489, 494 (W.D. Wash. 1995); *Benekritis v. Johnson*, 882 F. Supp. 521, 525-26 (D.S.C. 1995); *Myers v. City of El Paso*, 874 F. Supp. 1546, 1548 (W.D. Tex. 1995); *Carreno v. IBEW Local No. 226*, 54 Fair Empl. Prac. Cas. (BNA) 81, 82-83 (D. Kan. 1990); *Goluszek v. H.P. Smith*, 697 F. Supp. 1452, 1455-56 (N.D. Ill. 1988).

20. 885 F. Supp. 1100.

21. *Id.* at 1103-04.

22. *See id.*

23. 697 F. Supp. 1452.

24. *Id.* at 1456. In other cases alleging hostile environment harassment, courts often conclude that the plaintiffs were not discriminated against "because of" their sex. *See Dillon*, 1992 WL 5436, at *9; *Shermer v. Illinois Dept. of Transp.*, No. 95-3231, 1996 WL 501511, at *3 (C.D. Ill. Aug. 30, 1996); *Gibson v. Tanks Inc., Util. Serv., Inc.*, 930 F. Supp. 1107, 1108 (M.D.N.C. 1996); *Martin v. Norfolk S. Ry. Co.*, 926 F. Supp. 1044, 1049-50 (N.D. Ala. 1996); *Benekritis v. Johnson*, 882 F. Supp. 521, 525 n.6 (D.S.C. 1995); *Hopkins v. Baltimore Gas & Elec. Co.*, 871 F. Supp. 822, 834 (D. Md. 1994), *aff'd* 77 F.3d 745 (4th Cir.), *cert. denied*, 117 S. Ct. 70 (1996); *Polly*

reasoning is flawed and that same-sex sexual harassment is actionable under Title VII. Finally, Section III.D examines the untenable distinction that the courts in *Dillon v. Frank*²⁵ and *Carreno v. IBEW Local No. 226*²⁶ made in distinguishing quid pro quo and hostile environment claims. That distinction is illogical because Title VII either prohibits both types of same-sex sexual harassment or prohibits neither.

Section IV builds an analytical framework for showing how same-sex hostile environment allegations by homosexuals meet a plaintiff's Title VII burden of proving discrimination because of her or his sex. This discussion focuses on social science data that demonstrate the relationship between gender stereotyping and discrimination against gay men and lesbians and Supreme Court jurisprudence on the illegality of gender stereotyping under Title VII. Finally, section V assesses the Sixth Circuit's reasoning in *Dillon*, then applies the analytical framework from Section IV to the facts of the *Dillon* case to conclude that the plaintiff was discriminated against within the meaning of Title VII.

II. TITLE VII: THE BACKGROUND OF SEXUAL HARASSMENT

A. *The Early Court Cases*

Title VII prohibits discrimination based on race, color, religion, sex, or national origin.²⁷ Its prohibition against sex discrimination was added at the eleventh hour in an attempt to scuttle the legislation.²⁸ Consequently, courts have had little guidance in deciding just what Congress meant by the term "sex."

Indeed, courts refused initially to recognize sexual harassment as a form of sex discrimination under Title VII.²⁹ In *Barnes v. Train*,³⁰ the court found that a supervisor's retaliation against a female subordinate who had refused his sexual advances stemmed from "an inharmonious personal relationship."³¹ In *Corne v. Bausch & Lomb, Inc.*,³² the court

v. Houston Lighting & Power Co., 825 F. Supp. 135, 138 (S.D. Tex. 1993); *Carreno v. IBEW Local No. 226*, 54 Fair Empl. Prac. Cas. (BNA) 81, 82 (D. Kan. 1990).

25. 1992 WL 5436.

26. 54 Fair Empl. Prac. Cas. (BNA) 81.

27. See 42 U.S.C. § 2000e-2 (1994).

28. See 110 CONG. REC. 2577-84 (1964) (remarks of Reps. Smith, Tuten, Andrews, and Rivers).

29. See generally Michael D. Vhay, *The Harms of Asking: Towards a Comprehensive Treatment of Sexual Harassment*, 55 U. CHI. L. REV. 328, 329-37 (1988) (discussing why courts initially refused to consider sexual harassment actionable).

30. 13 Fair Empl. Prac. Cas. (BNA) 123 (D.D.C. 1974), *rev'd. sub nom. Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977) (finding discrimination).

31. *Id.* at 124.

found that the supervisor's advances were prompted by a "personal urge" that was distinct from the employer's policies, and that Title VII covered only the latter.³³ Furthermore, allowing harassment suits was "ludicrous" for two reasons: (1) it would open up a floodgate of litigation because all sexual advances would be actionable; and (2) if the conduct was directed equally against men, there would be no violation of Title VII.³⁴ This second concern raises the dilemma of what to do with the bisexual harasser, a conundrum the courts still cannot decipher.³⁵

Williams v. Saxbe,³⁶ however, marked a shift in the courts. When Diane Williams confronted the court with her tale of harassment, it could not turn her away. After Williams rebuffed the sexual advances of her supervisor, he responded with comments, bad reviews, and reprimands.³⁷ Although the court still maintained that nonemployment related encounters were not actionable, it ruled that Williams could pursue her claim because the supervisor, as an agent of the employer, had retaliated against her for not complying with a discriminatory employment condition—his demand for sexual favors.³⁸ This scenario became known as quid pro quo harassment, which occurs when an employee's terms and conditions of employment are tied to the submission to or rejection of the boss' unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature.³⁹

B. *Expanding the View of Sexual Harassment*

The Equal Employment Opportunity Commission (EEOC), the agency charged with enforcing Title VII, further broadened the definition of sexual harassment. Its first set of guidelines on the subject, adopted in

32. 390 F. Supp. 161 (D. Ariz. 1975).

33. *Id.* at 163.

34. *Id.* at 163-64.

35. See *Bundy v. Jackson*, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981); see also *Vinson v. Taylor*, 760 F.2d 1330, 1333 n.7 (D.C. Cir. 1985) (Bork, J., dissenting from denial of rehearing) (questioning whether Congress intended to prohibit any form of sexual harassment, given that the statute would not cover harassment by a bisexual), *aff'd on other grounds sub nom.* *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986); Kristi J. Johnson, Comment, *Chiapuzio v. BLT Operating Corporation: What Does It Mean to be Harassed "Because of" Your Sex?: Stereotyping and the "Bisexual" Harasser Revisited*, 79 IOWA L. REV. 731 (1994) (criticizing the court's attempt to draw a line between a "bisexual" harasser and an "equal opportunity" harasser).

36. 413 F. Supp. 654 (D.D.C. 1976), *rev'd sub nom. on procedural grounds*, *Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978), *on remand*, *Williams v. Civiletti*, 487 F. Supp. 1387 (D.D.C. 1980).

37. See *Williams*, 413 F. Supp. at 655-56.

38. See *id.* at 662.

39. See 29 C.F.R. § 1604.11(a)(1)(2) (1996).

1980, included “hostile environment” sexual harassment.⁴⁰ If an employee endured sexual advances or verbal or physical conduct of a sexual nature that unreasonably interfered with her or his work performance or created “an intimidating, hostile or offensive working environment,” the employee had been sexually harassed.⁴¹ This definition broadened the sweep of discriminatory behavior; not only supervisors but also co-workers could perpetrate the harassment, and the harassment did not have to affect an economic benefit to the employee to be actionable.⁴² The EEOC justified this expansion of protection as an alignment with racial, religious, and national origin harassment law.⁴³ A year later, the Court of Appeals for the District of Columbia adopted the racial harassment analogy to find a hostile environment claim.⁴⁴

C. *The Meritor Case*

In *Meritor Savings Bank v. Vinson*,⁴⁵ the Supreme Court agreed with the EEOC’s approach and held that hostile environment sexual harassment was a form of sex discrimination.⁴⁶ In *Meritor*, a bank teller testified that her boss sexually harassed her for four years, that she had sexual intercourse with him forty to fifty times, that he fondled her in front of co-workers, that he exposed himself, and that on several occasions he raped her.⁴⁷ She submitted to his advances because she feared losing her job.⁴⁸ The Court rejected the bank’s argument that the woman had no Title VII claim because she suffered no economic detriment.⁴⁹ Instead, it recognized the substantial number of decisions and EEOC precedent holding that employees had the right to be free from discriminatory intimidation, ridicule, and insult regardless of whether a tangible benefit was involved.⁵⁰ The Court held that, to make out a prima facie case of sexual harassment, an employee must show that (1) he or she was a member of a protected class (i.e., male or female); (2) the

40. *See id.* § 1604.11(a)(3) (1980).

41. *See id.*

42. *See id.* § 1604.11(d).

43. *See* 45 Fed. Reg. 25024 (1980).

44. *See* *Bundy v. Jackson*, 641 F.2d 934, 944-45 (D.C. Cir. 1981) (adopting the rationale of *EEOC v. Rogers*, 454 F.2d 234 (5th Cir. 1971)). In *Rogers*, the plaintiff alleged that her employer’s discriminatory treatment of its Hispanic clients created a discriminatory and hostile work environment for Hispanic employees. 454 F.2d at 236.

45. 477 U.S. 57 (1986).

46. *Id.* at 64.

47. *Id.* at 60.

48. *See id.*

49. *See id.* at 64.

50. *See id.* at 65.

sexual conduct was unwelcome and sex-based; (3) the conduct affected a term, condition, or privilege of employment; and (4) the employer was liable.⁵¹ For sexual harassment to be actionable, it must be sufficiently pervasive.⁵² An isolated incident will not suffice.⁵³ The hostility of the environment is measured from the “totality of circumstances,” an EEOC formulation upon which the Court in *Meritor* specifically relied.⁵⁴

Much of the debate after *Meritor* focused on the amount of harm a plaintiff had to prove and from whose view that harm should be measured.⁵⁵ Courts were not always sympathetic to the plight of female plaintiffs.⁵⁶ In *Harris v. Forklift Systems, Inc.*,⁵⁷ the Supreme Court resolved some of the debate in holding that plaintiffs did not have to show that they suffered psychological harm to succeed in a hostile environment claim.⁵⁸ Rather, the plaintiff has met her or his burden so long as a reasonable person would perceive the environment to be abusive and the particular plaintiff actually perceived the environment to

51. *See id.* at 65-67. The Court declined to determine when the employer could be held liable. *See id.* at 72. The EEOC regulations stated that an employer was strictly liable for the acts of its supervisors. *See* 29 C.F.R. § 1604.11(c) (1985). Regarding harassment by a co-worker, an employer was to be held liable when it knew or should have known of the activity. *See id.* § 1604.11(d). The EEOC has steadfastly held to that position. *See id.* § 1604.11(c)-(d) (1996). Arguments over the liability of an employer for sexual harassment are beyond the scope of this article.

52. *See Meritor*, 477 U.S. at 67.

53. *See id.*

54. *Id.* at 65-67, 69.

55. *See* Sarah E. Burns, *Evidence of a Sexually Hostile Workplace: What Is It and How Should It Be Assessed After Harris v. Forklift Systems, Inc.*?, 21 N.Y.U. REV. L. & SOC. CHANGE, 357, 370 (1994-95). A majority of circuits adopted the EEOC formulation of hostile environment harassment and did not require the plaintiff to have actually suffered psychological harm. *See id.* at 370-71. The Sixth and Seventh Circuits, however, adopted stricter proof requirements. *See id.* at 373. For instance, the Sixth Circuit (1) rejected the EEOC’s either-or test and required the plaintiff to prove both that the harassment interfered with job performance and that it created a hostile working environment; (2) required the plaintiff to have already suffered serious psychological harm; (3) rejected the totality of circumstances test; and (4) considered whether the plaintiff had voluntarily entered into that work environment. *See Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 619-20 (6th Cir. 1986).

56. *See Rabidue*, 805 F.2d at 620-21 (concluding that a poster display of nude women did not create a hostile environment because some workplaces were naturally vulgar and it was not the court’s job to magically transform the social mores of American workers). One commentator has pointed out that the overwhelmingly white male judiciary has been an active perpetrator of sexual harassment and less than detached, reflective, and critical in deciding the sex discrimination cases that come before it. *See* Marina Angel, *Sexual Harassment by Judges*, 45 U. MIAMI L. REV. 817, 835 (1991).

57. 510 U.S. 17 (1993).

58. *Id.* at 21.

be hostile.⁵⁹ Indeed, by using the theory of hostile environment, plaintiffs—all women—have made out prima facie claims of abusive sexual harassment where workplaces have been littered with sexually degrading posters,⁶⁰ drawings,⁶¹ jokes,⁶² slurs, insults and innuendo,⁶³ gestures,⁶⁴ and sexual overtures.⁶⁵

III. SAME-SEX HARASSMENT

A. *Scope of the Problem and Early Case Law*

Same-sex sexual harassment constitutes nine percent of the workplace sexual harassment cases.⁶⁶ In *Wright v. Methodist Youth Services, Inc.*,⁶⁷ one of the early same-sex sexual harassment cases, the plaintiff alleged that he had rebuffed his male supervisor's sexual advances for three years before being fired.⁶⁸ In rejecting the defendant's motion to dismiss the Title VII claim, the court reasoned that Wright's case presented the obverse of the typical situation of a male supervisor making a demand of a female employee that would not have been made of a male employee.⁶⁹ In finding an actionable claim, the court took its

59. See *id.* at 20. The Court left undecided whether the standard used should be that of a reasonable man or reasonable woman. See Burns, *supra* note 55, at 393-95. On September 20, 1993, the EEOC proposed using a standard of whether a "reasonable person in the same or similar circumstances would find the challenged conduct intimidating, hostile or abusive. The 'reasonable person' standard includes considerations of the perspective of persons of the alleged victim's race, color, religion, gender, national origin, age, or disability." 58 Fed. Reg. 51266-51267 (1993). The proposed standard was withdrawn a year later after conservative Christian groups flooded the EEOC with comments expressing fears that religion would be removed from the workplace. See Burns, *supra* note 55, at 401 & n.310.

60. See *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1522 (M.D. Fla. 1991).

61. See *Zabkowicz v. West Bend Co.*, 589 F. Supp. 780, 784 (E.D. Wis. 1984).

62. See *Bennett v. New York City Dept. of Corrections*, 705 F. Supp. 979, 986 (S.D.N.Y. 1989).

63. See *Katz v. Dole*, 709 F.2d 251, 254 (4th Cir. 1983); *Porta v. Rollins Envtl. (NJ) Servs. Inc.*, 654 F. Supp. 1275, 1282 (D.N.J. 1987), *aff'd.*, 845 F.2d 1014 (3d Cir. 1988).

64. See *Wall v. AT&T Techs., Inc.*, 754 F. Supp. 1084, 1087 (M.D.N.C. 1990).

65. See *McKinney v. Dole*, 765 F.2d 1129, 1139 (D.C. Cir. 1985); *Bundy v. Jackson*, 641 F.2d 934, 942 (D.C. Cir. 1981).

66. See *Ellen Bravo & Ellen Cassidy, The 9to5 Guide to Combating Sexual Harassment: Candid Advice from 9to5*, NAT'L ASS'N OF WORKING WOMEN 64 (1992). Male-on-female sexual harassment is the most common form of sexual harassment, constituting about ninety percent of the cases. *Id.*

67. 511 F. Supp. 307 (N.D. Ill. 1981); see also *Barlow v. Northwestern Mem'l Hosp.*, 30 Fair Empl. Prac. Cas. (BNA) 223, 224 (N.D. Ill. 1980) (refusing to dismiss a claim by a secretary who alleged that she had been demoted for refusing to succumb to her female supervisor's sexual advances).

68. 511 F. Supp. at 308.

69. See *id.* at 310.

cue from the Court of Appeals for the District of Columbia, which had recognized that heterosexual females and homosexual supervisors could be culprits as well: “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.”⁷⁰

Two years later, a district court in Alabama also considered a male-on-male quid pro quo case.⁷¹ In a nonjury trial, the court found that a laid-off truck driver had not been recalled to his job because he had refused the sexual advances of the terminal manager.⁷² The court concluded that, given the supervisor’s homosexual proclivities, the harassment complained of had occurred because of the plaintiff’s sex.⁷³

B. *Split in the Courts*

Despite these early cases, courts today are split on whether same-sex sexual harassment states a cause of action under Title VII. Among the appellate courts, the Eighth Circuit⁷⁴ has held that same-sex sexual harassment is actionable; the Fifth Circuit⁷⁵ has stated unequivocally that it is not; the Fourth Circuit⁷⁶ has held that same-sex “heterosexual-on-

70. *Id.* (citing *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977)).

71. *See Joyner v. AAA Cooper Transp.*, 597 F. Supp. 537 (M.D. Ala. 1983), *aff’d. without opinion*, 749 F.2d 732 (11th Cir. 1984).

72. *See id.* at 542-44.

73. *See id.* at 542.

74. *See Quick v. Donaldson*, 90 F.3d 1372 (8th Cir. 1996). In *Quick*, the plaintiff alleged that he had been “bagged” about 100 times over the course of two years. *Id.* at 1374-75. Bagging—the intentional grabbing and squeezing of a man’s testicles—was common at the muffler production plant, where men constituted eighty-five percent of the workforce. *See id.* at 1374. The plaintiff also alleged that he had been falsely labeled homosexual and had been assaulted. *See id.* at 1375. The appellate court, in reversing the district court’s summary judgment ruling for the defendant, concluded that because the record showed that only male employees, and not female employees, were bagged, and that other issues were in dispute, Quick had stated a prima facie claim. *See id.* at 1378-80.

75. *See Giddens v. Shell Oil Co.*, 12 F.3d 208 (5th Cir. 1993) (per curiam) (unpublished). In subsequent cases, the Fifth Circuit has held firm. *See Oncale v. Sundowner Offshore Servs.*, 83 F.3d 118, 119-20 (5th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3432 (U.S. 1996); *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 451-52 (5th Cir. 1994).

76. *Compare McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1195-96 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 72 (1996) and *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996). In *McWilliams*, the Fourth Circuit made homosexuality a critical fact in same-sex sexual harassment cases by ruling that to state an actionable claim, the plaintiff must allege and prove homosexuality, either that of the plaintiff’s and/or that of the alleged perpetrator. *See McWilliams* at 1195-96. By adding this element, the appellate court has gone beyond what the Supreme Court has determined to be the prima facie elements. *See supra* note 51 and accompanying text. The Fourth Circuit also ignored the homoerotic nature of the alleged conduct, concluding that the activities involved were nothing more than heterosexual horseplay. *See McWilliams*, 72 F.3d at 1193. The plaintiff had claimed that one of his harassers fondled him. *See*

heterosexual” harassment is barred but “homosexual-on-heterosexual” harassment is not; and the Sixth Circuit⁷⁷ has sidestepped the issue. The District of Columbia,⁷⁸ Second,⁷⁹ Seventh,⁸⁰ and Ninth⁸¹ Circuits have suggested that same-sex sexual harassment is actionable, while the First Circuit has implicitly recognized it as a viable cause of action.⁸²

At the district level, the decisions are likewise mixed. Some courts have declined to decide the issue, instead determining that the plaintiff failed to make out a prima facie case.⁸³ When courts do confront the issue head on, decisions often turn on whether the courts are

id. See also *Mayo v. Kiwest Corp.*, 94 F.3d 641 (unpublished table decision), No. 95-2638, 1996 WL 460769 (4th Cir. Aug. 15, 1996).

77. See *Fleenor v. Hewitt Soap Co.*, 81 F.3d 48, 49-50 (6th Cir. 1996), *cert. denied* 117 S. Ct. 170 (1996) (finding that the plaintiff had failed to show the employer’s liability with regard to one alleged harasser and had failed to satisfy even loose requirements of notice pleading with regard to what conduct the other named harasser allegedly engaged in). Although the *Dillon* case is a same-sex sexual harassment case, the appellate court did not specifically term it as one. See *Dillon v. Frank*, 952 F.2d 403 (unpublished table decision), No. 90-2290, 1992 WL 5436 (6th Cir. Jan. 15, 1992).

78. See *Bundy v. Jackson*, 641 F.2d 932, 942 n.7 (D.C. Cir. 1981); *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977).

79. See *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 148 (2d Cir. 1993) (Van Graafeiland, J., concurring) (“Harassment is harassment regardless of whether it is caused by a member of the same or opposite sex.”).

80. See *Baskerville v. Culligan Int’l Co.*, 50 F.3d 428, 430 (7th Cir. 1995) (commenting that “sexual harassment of women by men is the most common kind, but we do not mean to exclude the possibility that sexual harassment of men by women, or men by other men, or women by other women would not also be actionable in appropriate cases”).

81. See *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1463-64 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 733 (1995).

82. See *Morgan v. Massachusetts Gen. Hosp.*, 901 F.2d 186, 192-93 (1st Cir. 1990). In *Morgan*, the plaintiff alleged that a male co-worker asked him to dance, stood behind the plaintiff while he was mopping floors and caused the plaintiff to bump into the co-worker, and “peeped” at his private parts in the men’s restroom. *Id.* at 193. The court held that the conduct complained of was not sufficiently severe or pervasive to be actionable. See *id.*

83. See *Wenner v. C.G. Bretting Mfg. Co.*, 917 F. Supp. 640, 647 (W.D. Wis. 1995) (finding that the harassment was not severe and pervasive enough to alter the conditions of plaintiff’s employment); *Quick v. Donaldson Co.*, 895 F. Supp. 1288, 1295 (S.D. Iowa 1995) (concluding that the physical conduct alleged was not prompted by the plaintiff’s gender), *rev’d*, 90 F.3d 1372 (8th Cir. 1996); *Vandeventer v. Wabash Nat’l Corp.*, 887 F. Supp. 1178, 1182 (N.D. Ind. 1995) (rejecting claim because the conduct complained of—obscene language directed at the plaintiff—did not give rise to actionable sexual harassment). In an earlier decision, the *Vandeventer* court had rejected the plaintiff’s claim, concluding that same-sex harassment was not actionable. *Vandeventer v. Wabash Nat’l Corp.*, 867 F. Supp. 790, 796 (N.D. Ind. 1995). It softened its position after the plaintiff asked the court to reconsider its decision given recent changes in case law. See *Vandeventer*, 887 F. Supp. at 1179-81. See also *Ryczek v. Guest Servs. Inc.*, 877 F. Supp. 754, 762 (D.D.C. 1995) (finding that the plaintiff, a student in a cooperative program, had not shown that a term or condition of employment had been affected); *Parrish v. Washington Nat’l Ins. Co.*, No. 89-C-4515, 1990 WL 165611, at *4 (N.D. Ill. Oct. 16, 1990) (rejecting claim because the alleged conduct had not been sufficiently pervasive).

considering a claim where sexual advances are involved or where sexual epithets, graffiti, gestures, or other similar behavior allegedly cause a hostile environment.⁸⁴ When confronted with a case involving allegations of obvious sexual advances, the courts are more receptive to plaintiffs.⁸⁵ Many have adopted the rationale of *Wright*,⁸⁶ finding that, but for the plaintiff's sex, he or she would not have been harassed.⁸⁷

Plaintiffs alleging a hostile environment that does not involve overt sexual advances, however, have found little relief.⁸⁸ In *Goluszek v.*

84. See *infra* note 88 and cases cited therein.

85. See *Peric v. Board of Trustees of the U. of Ill.*, No. 96-C-2354, 1996 U.S. Dist. LEXIS 13042 (N.D. Ill. Sep. 4, 1996); *Swage v. Inn Philadelphia*, Civ. No. 96-2380, 1996 WL 368316 (E.D. Pa. June 21, 1996); *Dixon v. State Farm Fire and Cas. Ins. Co.*, 926 F. Supp. 548 (E.D. Va. 1996); *Johnson v. Community Nursing Servs.*, 932 F. Supp. 269 (D. Utah 1996); *Waag v. Thomas Pontiac, Buick, GMC, Inc.*, 930 F. Supp. 393 (D. Minn. 1996); *Tietgen v. Brown's Westminster Motors, Inc.*, 921 F. Supp. 1495 (E.D. Va. 1996); *Rushing v. United Airlines*, 919 F. Supp. 1101 (N.D. Ill. 1996); *Tanner v. Prima Donna Resorts, Inc.*, 919 F. Supp. 351 (D. Nev. 1996); *Ladd v. Sertoma Handicapped Opportunity Program, Inc.*, 917 F. Supp. 766 (N.D. Okla. 1995); *Williams v. District of Columbia*, 916 F. Supp. 1 (D.D.C. 1996); *Ton v. Information Resources, Inc.*, 70 Fair Empl. Prac. Cas. (BNA) 355 (N.D. Ill. 1996); *King v. M.R. Brown, Inc.*, 911 F. Supp. 161 (E.D. Pa. 1995); *Raney v. District of Columbia*, 892 F. Supp. 283 (D.D.C. 1995); *Nogueras v. University of Puerto Rico*, 890 F. Supp. 60 (D.P.R. 1995); *Llampallas v. Mini-Circuits Lab, Inc.*, 66 Empl. Prac. Dec. (CCH) ¶43,699 (S.D. Fla. 1995); *Griffith v. Keystone Steel and Wire*, 887 F. Supp. 1133 (C.D. Ill. 1995); *EEOC v. Walden Book Co.*, 885 F. Supp. 1100 (M.D. Tenn. 1995); *Boyd v. Vonnahmen*, 67 Fair Empl. Prac. Cas. (BNA) 1769 (S.D. Ill. 1995); *Roe v. K-Mart Corp.*, No. 93-2372-18AJ, 1995 WL 316783 (D.S.C. Mar. 28, 1995); *McCoy v. Johnson Controls World Servs.*, 878 F. Supp. 229 (S.D. Ga. 1995); *Prescott v. Independent Life and Accident Ins. Co.*, 878 F. Supp. 1545 (M.D. Ala. 1995). But see *Gibson v. Tanks Inc., Util. Serv., Inc.*, 930 F. Supp. 1107 (M.D.N.C. 1996).

86. *Wright v. Methodist Youth Servs., Inc.*, 511 F. Supp. 307 (N.D. Ill. 1981).

87. See *Rushing*, 919 F. Supp. at 1106-07; *Griffith*, 887 F. Supp. at 1137; *Walden Book*, 885 F. Supp. at 1103-04; *Boyd*, 67 Fair Empl. Prac. Cas. at 1770; *Roe*, 1995 WL 316783, at *2; *Prescott*, 878 F. Supp. at 1551. In *Walden Book*, a jury awarded the plaintiff \$75,000 in compensatory damages and \$1.6 million in punitive damages. 1995 Daily Lab. Rep. (BNA) No. 98, at D-17 (May 22, 1995). *Roe* and *K-mart* later settled the case for an undisclosed amount of money. See Richard Shumate, *K-mart Settles Suit*, PHILADELPHIA GAY NEWS, July 28, 1995, at 1.

88. See *Shermer v. Illinois Dept. of Transp.*, 937 F. Supp. 781 (C.D. Ill. 1996); *Martin v. Norfolk S. Ry. Co.*, 926 F. Supp. 1044 (N.D. Ala. 1996); *Ashworth v. Roundup Co.*, 897 F. Supp. 489 (W.D. Wash. 1995); *Benekritis v. Johnson*, 882 F. Supp. 521 (D.S.C. 1995); *Oncale v. Sundowner Offshore Servs.*, 67 Fair Empl. Prac. Cas. (BNA) 769 (E.D. La. 1995), *aff'd* 83 F.3d 118 (5th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3432 (U.S. 1996); *Hopkins v. Baltimore Gas & Elec. Co.*, 871 F. Supp. 822 (D. Md. 1994), *aff'd* 77 F.3d 745 (4th Cir. 1996), *cert. denied* 117 S. Ct. 70 (1996); *Carreno v. IBEW Local No. 226*, 54 Fair Empl. Prac. Cas. (BNA) 81 (D. Kan. 1990); *Goluszek v. H.P. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988).

But see *Sardinia v. Dellwood Foods, Inc.*, 69 Fair Empl. Prac. Cas. (BNA) 705, 708-10 (S.D.N.Y. 1995) (holding that a male plaintiff alleging a hostile environment claim based on sexually explicit comments from his male supervisors had stated a claim under Title VII). The district court has since certified to the Second Circuit on interlocutory appeal the issue of whether same-sex sexual harassment is actionable under Title VII. See *Sardinia v. Dellwood Foods, Inc.*, No. 94-5458, 1995 WL 710205 (S.D.N.Y. Dec. 1, 1995); *Gerd v. United Parcel Serv., Inc.*, 934 F.

H.P. Smith,⁸⁹ co-workers teased the plaintiff for not having a wife or girlfriend, asked him whether he had gotten any “pussy,” showed him pictures of naked women, accused him of being a homosexual or bisexual,⁹⁰ poked him in the buttocks with a stick, and made other sexual comments.⁹¹ Although the court found that one might conclude that Goluszek had been harassed because of his sex,⁹² it said that the defendant’s conduct was not what Congress had in mind in enacting Title VII.⁹³ Rather, the court reasoned, Title VII was designed to correct an imbalance of power in the workplace.⁹⁴ Goluszek was a man in a male-dominated environment; he had no claim because the conduct complained of did not create an anti-male environment.⁹⁵ The *Goluszek* reasoning has gained favor in other courts.⁹⁶

C. *Why Same-Sex Sexual Harassment is Actionable*

The *Goluszek* reasoning is flawed. To figure out what a statute means one must start not with legislative intent, but with the words of the

Supp. 357, 359 (D. Colo. 1996) (holding same-sex claim actionable where plaintiff alleged that his supervisors made sexually explicit comments and squeezed and slapped his buttocks).

89. 697 F. Supp. 1452 (N.D. Ill. 1988).

90. *Id.* at 1453-55. Goluszek’s sexual orientation was unclear. His psychiatrist said that the plaintiff had come from an “unsophisticated background,” had led an “isolated existence” and had had “little or no sexual experience.” *Id.* at 1453. Goluszek had never been married and had always lived with his mother. *Id.*

91. *Id.* at 1453-54.

92. *See id.* at 1456. The court’s reasoning that the “because of” requirement had been met was nonsensical. It based this finding on the fact that the employer had reacted differently to complaints of harassment made by women than the complaint made by Goluszek, stating: “a fact-finder could reasonably conclude that if Goluszek were a woman H.P. Smith would have taken action to stop the harassment, that such action would have stopped the harassment and that the harassment was pervasive and continuous from the time Goluszek began until he was fired.” *Id.* The “because of” requirement focuses on whether the harassment began in the first place because of the complainant’s sex. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 59, 65-67 (1986).

93. *See* 697 F. Supp. at 1456. The defendant did not make this argument; the court raised the issue and then decided the case on this basis. *See id.* The court’s reliance on congressional intent is not persuasive. As pointed out previously, the prohibition against sex discrimination was added at the last minute. *Supra* note 28 and accompanying text. At best, discerning congressional intent would be a guess. *See* 110 CONG. REC. 2577-84 (1964) (remarks of Reps. Smith, Tuten, Andrews, and Rives).

94. *See Goluszek*, 697 F. Supp. at 1456.

95. *See id.*

96. *See Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 452 (5th Cir. 1994); *Wrightson v. Pizza Hut of Am., Inc.*, 909 F. Supp. 367, 368 (W.D.N.C. 1995); *Ashworth v. Roundup Co.*, 897 F. Supp. 489, 493 (W.D. Wash. 1995); *Hopkins v. Baltimore Gas & Elec. Co.*, 871 F. Supp. 822, 834 (D. Md. 1994); *Benekritis v. Johnson*, 882 F. Supp. 521, 526 (D.S.C. 1995). The *Goluszek* decision also has been criticized. *See Sardinia v. Dellwood Food, Inc.*, 69 Fair Empl. Prac. Dec. (BNA) 705, 708-09 (S.D.N.Y. 1995).

text.⁹⁷ The text of Title VII does not limit discrimination to opposite-sex harassment.⁹⁸ Further, by concluding that it knew what Congress intended, the *Goluszek* court assumed the role of a clairvoyant, because there is no indication in the legislative history what Congress had in mind when it prohibited sex discrimination.⁹⁹ According to *Goluszek*, “[T]he discrimination Congress was concerned about when it enacted Title VII is one stemming from an imbalance of power and an abuse of that imbalance by the powerful which results in discrimination against a discrete and vulnerable group.”¹⁰⁰ Two points undermine this reasoning. First, courts faced with same-sex harassment claims have pointed out that reverse discrimination claims are cognizable under Title VII.¹⁰¹ Second, the Supreme Court in *Meritor* mentioned twice that men as well as women were protected from sex discrimination.¹⁰² With Title VII, “Congress intended to strike at the entire spectrum of disparate treatment of men and women.”¹⁰³

Moreover, the EEOC states in its Compliance Manual that same-sex sexual harassment is actionable under Title VII: “[T]he crucial inquiry is whether the harasser treats a member or members of one sex differently from members of the other sex.”¹⁰⁴ Not only has the agency held in cases before it that same-sex harassment is actionable,¹⁰⁵ but, in *EEOC v. Walden Book Co.*,¹⁰⁶ it sued on behalf of a bookstore employee

97. See 2A Sands, SUTHERLAND STATUTORY CONSTRUCTION § 47.01 (5th ed. 1992).

98. 42 U.S.C. § 2000e-2(a)(1) (1994).

99. See 110 CONG. REC. 2577-84 (remarks of Reps. Smith, Tuten, Andrews, and Rivers).

100. *Goluszek*, 697 F. Supp. at 1456. The court relied on a law review article in its analysis. *Id.* The article, however, did not deal with congressional intent, nor did the author argue that same-sex sexual harassment was not actionable. See Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1449 (1984). In fact, the author noted that the definition of sexual harassment “can encompass the harassment of men by women, or the harassment of men or women by members of the same sex. This Note, however, uses the term ‘sexual harassment’ to describe only harassment of women by men, because [of] the historically inferior position of women in a male-dominated work force.” *Id.* at 1449 n.1.

101. See *Swage v. Inn Philadelphia*, Civ. No. 96-2380, 1996 WL 368316 (E.D. Pa. June 21, 1996); *Ton v. Information Resources, Inc.*, 70 Fair Empl. Prac. Cas. (BNA) 355, 359-60 (N.D. Ill. 1996); *King v. M.R. Brown Inc.*, 911 F. Supp. 161, 167 (E.D. Pa. 1995); *EEOC v. Walden Book Co.*, 885 F. Supp. 1100, 1103 (M.D. Tenn. 1995).

102. *Meritor Sav. Bank v. Vinson*, 477 U.S. 59, 64, 67 (1986).

103. *Id.* at 64. As pointed out in text accompanying note 28, Congress added the prohibition against sex discrimination at the last minute.

104. EEOC Compl. Man. (BNA) § 615.2(b)(3) 615:0004 (June 1987). The Compliance Manual contains agency guidelines and interpretations of Title VII and is used by EEOC lawyers in prosecuting claims.

105. See *DePaul v. United States Postal Serv.*, EEOC Appeal No. 01912729 (Feb. 28, 1992).

106. 885 F. Supp. 1100, 1100 (M.D. Tenn. 1995). A jury later found for the plaintiff. See 1995 Daily Lab. Rep. (BNA) No. 98, at D-17 (May 22, 1995).

who claimed that his male boss had sexually harassed him. Courts finding same-sex sexual harassment actionable have cited the administrative agency's position with approval.¹⁰⁷ These courts' reasoning is logical: a man whose male boss seeks sexual favors in return for job benefits is in the same position as a woman being targeted by her male supervisor.¹⁰⁸ This conclusion is consistent with the case law's determination that Title VII addresses gender-based discrimination.

D. Untenable Distinctions

*Carreno v. IBEW Local 226*¹⁰⁹ and *Dillon v. Frank*¹¹⁰ represent yet a third line of same-sex sexual harassment cases. While these courts recognized the validity of the male-on-male quid pro quo claims, they distinguished the male-on-male hostile environment claims before them as not actionable.¹¹¹ The courts' distinction is flawed because Title VII forbids both quid pro quo and hostile environment sexual harassment. The *Carreno* and *Dillon* courts short-circuited the required inquiry in a sexual harassment claim by holding that the plaintiffs had been harassed because of their homosexuality or perceived homosexuality, not because of their gender.¹¹²

In *Carreno*, the plaintiff's co-workers began harassing him after he divorced his wife and began living with a man.¹¹³ The harassment included verbal and physical assaults.¹¹⁴ Although the plaintiff did not

107. See *Peric v. Board of Trustees of the U. of Ill.*, No. 6-C-2354, 1996 U.S. Dist. LEXIS 13042, at *8-9 (N.D. Ill. Sep. 4, 1996); *Swage v. Inn Philadelphia*, Civ. No. 96-2380, 1996 WL 368316, at *2 (E.D. Pa. June 21, 1996); *Johnson v. Community Nursing Servs.*, 932 F. Supp. 269, 271 (D. Utah 1996); *Waag v. Thomas Pontiac, Buick, GMC, Inc.*, 930 F. Supp. 393, 400 (D. Minn. 1996); *Tanner v. Prima Donna Resorts, Inc.*, 919 F. Supp. 351, 355 (D. Nev. 1996); *Ladd v. Sertoma Handicapped Opportunity Program, Inc.*, 917 F. Supp. 766, 767 (N.D. Okla. 1995); *Raney v. District of Columbia*, 892 F. Supp. 283, 287 (D.D.C. 1995); *Blozis v. Mike Raisor Ford, Inc.*, 896 F. Supp. 805, 806 (N.D. Ind. 1995); *Roe v. K-Mart Corp.*, No. 93-2372-18AJ, 1995 WL 316783, at *1 (D.S.C. Mar. 28, 1995). As the EEOC is the agency charged with enforcing Title VII, courts owe deference to its interpretation of the statute. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975).

108. The court in *Roe* commented that any other conclusion could open up Title VII to attack on equal protection grounds. See 1995 WL 316783, at *2 n.2.

109. 54 Fair Empl. Prac. Cas. (BNA) 81 (D. Kan. 1990).

110. 952 F.2d 403 (unpublished table decision), No. 90-2290, 1992 WL 5436 (6th Cir. Jan. 15, 1992).

111. See *Carreno*, 54 Fair Empl. Prac. Cas. (BNA) at 83 n.2; *Dillon*, 1992 WL 5436, at *5.

112. *Carreno*, 54 Fair Empl. Prac. Cas. (BNA) at 82; *Dillon*, 1992 WL 5436, at *7.

113. *Carreno*, 54 Fair Empl. Prac. Cas. (BNA) at 81.

114. See *id.* at 82. The harassment included comments such as "Mary" and "faggot" that were addressed to the plaintiff. See *id.* at 81. The plaintiff also alleged that his genitals and buttocks had been caressed and that he had been grabbed and held from behind while co-workers simulated sexual intercourse or sodomy. See Samuel A. Marcossou, *Harassment on the Basis of*

base his discrimination claim on his sexual orientation,¹¹⁵ the court nonetheless viewed his claim that way because “[e]very derogatory comment made to the plaintiff related to his homosexuality.”¹¹⁶ The court rejected the plaintiff’s argument that same-sex hostile environment claims were actionable because male-on-male quid pro quo claims had been found actionable.¹¹⁷

In *Dillon*, the plaintiff tried the same tack. He analogized his treatment to that of female plaintiffs who clearly had stated a cause of action for hostile environment sexual harassment¹¹⁸ and directed the court’s attention to the male-on-male quid pro quo cases.¹¹⁹ Dillon argued these cases stood for the proposition that all extremely hostile work environments were proscribed, and that it was irrelevant that his harassers had predicated their treatment of him on their belief that he was homosexual.¹²⁰ Dillon argued that the abuse he endured occurred solely because he was a man and that therefore he had stated an actionable Title VII claim.¹²¹ At oral argument, Dillon raised a second point: that he had

Sexual Orientation: A Claim of Sex Discrimination Under Title VII, 81 GEO. L.J. 1, 1 (1992) (citing the Plaintiff’s Response to Defendant Local Union No. 226’s Motion for Summary Judgment at 5). Marcossou argues that the “because of” requirement in sexual harassment claims should be eliminated in favor of a focus on the sexual nature of the conduct. *See id.* at 11-32. Adopting an analogy from anti-miscegenation laws, Marcossou also contends that employment discrimination on the basis of sexual orientation is sex discrimination. *See id.* at 4-6. For a detailed analysis of the link between anti-miscegenation laws and discrimination against lesbians and gay men, see Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145 (1988).

115. *See Carreno*, 54 Fair Empl. Prac. Cas. (BNA) at 82.

116. *Id.* at 83.

117. *See id.* at 83, n.2. The plaintiff relied on *Joyner v. AAA Cooper Transp.*, 597 F. Supp. 537 (M.D. Ala. 1983), *aff’d. without opinion*, 749 F.2d 732 (11th Cir. 1984) and *Wright v. Methodist Youth Servs., Inc.*, 511 F. Supp. 307 (N.D. Ill. 1981). But the court rejected his argument, stating: “[T]hese cases are distinguishable from the present case because they both involve sexual harassment under the quid pro quo paradigm while the present case involves harassment under the hostile environment paradigm.” *Id.*

118. *See Dillon v. Frank*, 952 F.2d 403 (unpublished table decision), No. 90-2290, 1992 WL 5436, at *5 (6th Cir. Jan. 15, 1992). The plaintiff cited *Wall v. AT&T Techs., Inc.* 754 F. Supp. 1084 (M.D.N.C. 1990) (male co-workers rated women on a one to ten scale according to the size of their breasts); *Bennett v. New York City Dep’t. of Corrections*, 705 F. Supp. 979 (S.D.N.Y. 1989) (sexual advances, coarse sexual humor, sexual graffiti, and nonconsensual sexual touching); *Porta v. Rollins Envtl. Serv. (NJ) Inc.*, 654 F. Supp. 1275 (D.N.J. 1987), *aff’d.*, 845 F.2d 1014 (3rd Cir. 1988) (sexually offensive and threatening notes and graffiti); and *Zabkowitz v. West Bend Co.*, 589 F. Supp. 780 (E.D. Wis. 1984) (vulgar insults and sexually oriented drawings).

119. *See* 1992 WL 5436, at *4. The plaintiff cited *Parrish v. Washington Nat’l Ins. Co.*, No. 89-C-4515, 1990 U.S. Dist. LEXIS 13934 (N.D. Ill. Oct. 16, 1990), *Joyner*, 597 F. Supp. at 537 and *Wright*, 511 F. Supp. at 307. *Id.*

120. *See Dillon*, 1992 WL 5436, at *5.

121. *See id.*

been stereotyped by his co-workers as not “macho” enough.¹²² Dillon pointed the appellate court to *Price Waterhouse v. Hopkins*,¹²³ in which the Supreme Court had allowed evidence of sex stereotyping in a Title VII claim.¹²⁴

The Sixth Circuit was not persuaded. While it found Dillon’s analogy to the male-on-female hostile environment cases “appealing,” it adopted the reasoning of *Carreno*, finding that Dillon had been harassed because he was perceived to be a homosexual.¹²⁵ The appellate court likewise rejected Dillon’s sex-stereotyping argument, concluding that because *Price Waterhouse* dealt with a specific employment decision,¹²⁶ the Supreme Court did not mean that stereotyping evidence could be used in a sexual harassment case.¹²⁷ Even assuming that such evidence was admissible, there had been no evidence of stereotyping in Dillon’s treatment.¹²⁸

IV. GENDER STEREOTYPES

A. “Appropriate” Roles

Although Title VII prohibits discrimination based on sex,¹²⁹ courts have construed “sex” to mean “gender.”¹³⁰ The two do not mean the same thing—gender carries a cultural imprint that labels characteristics as masculine or feminine.¹³¹ Children are taught early on that there is more than an anatomical difference between a boy and a girl. These distinctions are reinforced as children grow and learn what is “appropriate” for their gender.¹³² Gender-based expectations are

122. *See id.*

123. 490 U.S. 228 (1989).

124. *Id.* at 250-52.

125. *See Dillon*, 1992 WL 5436, at *6-7.

126. *See id.* at *9.

127. *See id.*

128. *See id.*

129. *See* 42 U.S.C. § 2000e-2 (1994).

130. *See* *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662-63 (9th Cir. 1977).

131. *See generally* Note, *Patriarchy is Such a Drag: The Strategic Possibilities of a Postmodern Account of Gender*, 108 HARV. L. REV. 1973, 1976-78 (1995) (noting that homosexuals illustrate that gender is not naturally divined, but rather performative, and thus drawing into question the “essence” of what it is to be male or female).

132. A grass-roots feminist organizer has pointed out the social pressure to conform to one’s gender:

It is not by chance that when children approach puberty and increased sexual awareness they begin to taunt each other by calling these names: “queer,” “faggot,” “pervert.” It is at puberty that the full force of society’s pressure to

pervasive. This bipolar view of gender draws its strength in local, state, and federal law, in marriage, in the church, and in the family.¹³³ Feminist writer Judith Butler has noted:

The social constraints upon gender compliance and deviation are so great that most people feel deeply wounded if they are told that they exercise their manhood or womanhood improperly. In so far as social existence requires an unambiguous gender affinity, it is not possible to exist in a socially meaningful sense outside of established gender norms.¹³⁴

The ideal man is career-oriented, aggressive, individualistic, rational; the ideal woman is nurturing, affectionate, emotional, and sexy.¹³⁵ Men and women who meet these ideals are rewarded; those who do not are punished.¹³⁶

These gender expectations are driven by social institutions and legal rules that presume, and promote, heterosexuality.¹³⁷ Dress codes, employer benefit policies, workplace “scripts” for casual conversations about one’s personal life, and the public display of family pictures are simple examples of the pervasiveness of heterosexuality.¹³⁸ Challenges to these norms are met with backlash. The mere specter of same-sex marriage has prompted defensive measures on the part of state

conform to heterosexuality and prepare for marriage is brought to bear. Children know what we have taught them, and we have given clear messages that those who deviate from standard expectations are to be made to get back in line. The best controlling tactic at puberty is to be treated as an outsider, to be different must be made to suffer loss. It is also at puberty that misogyny begins to be more apparent, and girls are pressured to conform to societal norms that do not permit them to realize their full potential. It is at this time that their academic achievements begin to decrease as they are coerced into compulsory heterosexuality and trained for dependency upon a man, that is, for economic survival.

SUZANNE PHARR, HOMOPHOBIA: A WEAPON OF SEXISM 17 (1988).

133. See Sylvia Law, *Homosexuality and the Social Meaning of Gender*, WIS. L. REV. 187, 195 (1988).

134. I. Bennett Capers, Note, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158, 1161 (quoting Judith Butler, *Variations on Sex and Gender*, in FEMINISM AS CRITIQUE 128, 132 (Seyla Benhabib & Drucilla Cornell eds., 1987)).

135. See, e.g., Law, *supra* note 133.

136. *Id.* See *infra* notes 173-179 and accompanying text, discussing *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

137. See Law, *supra* note 133, at 196.

138. *Id.*

legislatures and the U.S. Congress to protect the quintessential heterosexual institution from homosexual infection.¹³⁹

The imposition of sexual orthodoxy denies lesbian and gay identity a public role and grants preferential status to heterosexual identity.¹⁴⁰ This heterosexual presumption is a brand of cultural and legal homophobia¹⁴¹ that sanctions condemnation and discrimination.¹⁴² The Supreme Court has denied homosexuals a right to privacy;¹⁴³ homosexuals cannot marry,¹⁴⁴ they are denied custody of their own children,¹⁴⁵ and they are routinely targets of vicious assaults.¹⁴⁶

139. A challenge to Hawaii's marriage laws by three same-sex couples prompted 15 states to adopt legislation that would ban same-sex marriages. See John E. Yang, *Senate Passes Bill Against Same-Sex Marriage*, WASH. POST, Sept. 11, 1996, at A1. In the Defense of Marriage Act, passed September 10, 1996, Congress defined marriage as only that relationship between a man and a woman, voted to deny federal benefits to any same-sex couple whose union ultimately was recognized by a state, and told the states that they were not bound by the Full Faith and Credit Clause of the U.S. Constitution to honor a same-sex marriage legitimized by any other state. *Id.* On the same day, the Senate defeated a bill that would have barred job discrimination based on sexual orientation. *Id.*

140. See Cheshire Calhoun, *Sexuality Injustice*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y, 241, 249-62 (1995).

141. See Stephen F. Morin & Ellen M. Garfinkle, *Male Homophobia*, 34 J. SOCIAL ISSUES, 29, 30 (1978). At the individual level, homophobia is an irrational fear of homosexuals rather than a cultural attitude. See *id.* at 31-32. Studies posit that motivations for homophobia at the individual level stem from anxiety over one's own sexual impulses, either homosexual or heterosexual. See *id.* at 34-35.

142. See Law, *supra* note 133.

143. See *Bowers v. Hardwick*, 478 U.S. 186, 190-91 (1986) (upholding a Georgia sodomy law and refusing to grant homosexuals the fundamental rights of privacy that are encompassed in the U.S. Supreme Court's jurisprudence on family, marriage, and procreation).

144. See *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971). But see *Baehr v. Miike*, Civ. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996) (holding that Hawaii's statute denying same-sex couples the right to marry violated the equal protection clause of the state constitution). See also Carrie G. Costello, *Legitimate Bonds and Unnatural Unions: Race, Sexual Orientation, and Control of the American Family*, 15 HARV. WOMEN'S L.J. 79 (1992) (discussing the control of social minorities through control of the family).

145. See *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995); *Newsome v. Newsome*, 256 S.E.2d 849 (N.C. 1979); *Spence v. Durham*, 198 S.E.2d 537 (N.C. 1973). However, New York's highest court and a New Jersey appellate court have recently ruled that a homosexual may adopt a partner's child. See James Dao, *New York's Highest Court Rules Unmarried Couples Can Adopt*, N.Y. TIMES, Nov. 3, 1995, at A1; *Court Lets N.J. Lesbian Adopt Partner's Twins*, PHILADELPHIA INQUIRER, Oct. 28, 1995, at B2.

146. The Klanwatch Project of the Southern Poverty Law Center reported that hate crimes nationwide increased by twenty-five percent from 1993 to 1994. See Robert Moran, *House Panel Urged to Adopt Expanded Hate Crime Legislation*, PHILADELPHIA INQUIRER, Aug. 29, 1995, at B3. Of all hate crimes, homophobia was the motive for one-quarter of the assaults and nearly two-thirds of the homicides. See *id.* See also *A Month of Hate*, ADVOCATE, Nov. 1, 1991, at 42-48 (documenting 127 gay-bashing incidents across the nation in August 1991).

B. *Stereotyping of Homosexuals*

Research shows that heterosexuals' attitudes toward homosexuals are bound up in gender expectations.¹⁴⁷ Simply, homosexuals are despised because they do not comport to their "appropriate" gender roles. In their analysis of the myriad studies on homophobia, Stephen F. Morin and Ellen M. Garfinkle noted that the data support the thesis that cultural learning on appropriate sex roles is a "powerful force associated with fear, dread, and hatred of homosexuals, particularly male homosexuals."¹⁴⁸ An earlier study by Morin showed that the best predictor of homophobia was a belief in the traditional family structure, one featuring a dominant father and a submissive mother, followed by traditional beliefs about women.¹⁴⁹

Two types of studies—attitudinal and behavioral—have sought to measure cultural homophobia. In an attitude survey, researcher Alan Taylor devised a questionnaire listing fifty-four traits to assess the stereotypes of gay men and lesbians, the differences between such stereotypes, and the relationship of such stereotypes to stereotypes of heterosexual men and women.¹⁵⁰ Gay men were rated significantly different from heterosexual men on forty-seven of fifty-four items, while lesbians were rated significantly different from heterosexual women on forty-five of fifty-four items.¹⁵¹ When these results were viewed from a cross-gender approach, gay men were rated more feminine than lesbians and lesbians were rated more masculine than gay men on forty-eight of

147. See *infra* notes 150-161 and accompanying text.

148. Morin & Garfinkle, *supra* note 141, at 31.

149. See *id.* (citing Stephen F. Morin & S. Wallace, *Traditional Values, Sex-Role Stereotyping, and Attitudes Toward Homosexuality*, Paper Presented at the Meeting of the Western Psychological Association (April 1976)). See also A.P. MacDonald, Jr. & Richard G. Games, *Some Characteristics of Those Who Hold Positive and Negative Attitudes Toward Homosexuals*, 1 J. HOMOSEXUALITY 9, 19 (1974) (finding a positive correlation between the adherence to traditional sex roles and negative attitudes toward homosexuality and positing that the stigmatization of homosexuality reduces confusion over sex roles); Jim Millham & Linda E. Weinberger, *Sexual Preference, Sex Role Appropriateness and Restriction of Social Access*, 2 J. HOMOSEXUALITY 343, 354 (1977) (finding a high correlation between negative attitudes toward homosexuals and traditional sex-role distinctions).

150. See Alan Taylor, *Conceptions of Masculinity and Femininity as a Basis for Stereotypes of Male and Female Homosexuals*, 9 J. HOMOSEXUALITY 37, 44 (1983). The traits listed were from the Personality Attributes Questionnaire developed by J.T. Spence, R. Helmreich and J. Stapp in 1974. See *id.* at 43. The traits were listed according to the "feminine" pole/"masculine" pole (i.e., very submissive/very dominant), and the respondents were asked to rate heterosexual men, heterosexual women, male homosexuals and female homosexuals according to their perception of each group. See *id.* at 44-48.

151. See *id.* at 49.

the fifty-four items.¹⁵² The conclusion is clear: homosexuals are viewed as sex-role deviants.¹⁵³ On the whole, gay men were viewed as less rational,¹⁵⁴ analytical,¹⁵⁵ assertive,¹⁵⁶ competitive,¹⁵⁷ and leader-like¹⁵⁸ than heterosexual men. Lesbians were viewed as less affectionate¹⁵⁹ and emotional¹⁶⁰ than heterosexual women.¹⁶¹

Likewise, behavioral studies have demonstrated negative reactions toward homosexuals. Both male and female heterosexuals were less willing to work with a homosexual than with someone who shared their sexual orientation.¹⁶² Studies using placement of stick figures and

152. *See id.*

153. *See id.*

154. Some of the listed traits that corresponded to rationality include: cries very easily/never cries, goes to pieces under pressure/does not to pieces under pressure, never hides emotions/always hides emotions, feelings easily hurt/feelings not easily hurt, excitable in a major or minor crisis/not excitable in a major or minor crisis, very emotional/not emotional. *See id.* at 46-48.

155. Some of the listed traits that corresponded to analytical skills include: not able with mechanical things/able with mechanical things, not intellectual/very intellectual, dislikes math and science/likes math and science, not skilled in business/very skilled in business. *See id.*

156. Some of the listed traits that corresponded to assertiveness include: not self-confident/very self-confident, very quiet/very loud, not aggressive/very aggressive, very timid/not at all timid, feels inferior/feels superior, very passive/very active. *See id.*

157. Some of the listed traits that corresponded to competitiveness include: not ambitious/very ambitious, not good at sports/good at sports, not competitive/very competitive. *See id.*

158. Some of the traits that corresponded with leadership skills include: never sees/always sees self running the show, very submissive/very dominant, not independent/very independent, never acts as a leader/always acts as a leader. *See id.*

159. Some of the listed traits that corresponded to affection include: very helpful to others/not helpful to others, expresses tender feelings/never expresses tender feelings, very kind/not at all kind, likes children/dislikes children, very considerate/not at all considerate, warm in relations with others/cold in relation with others. *See id.*

160. Some of the listed traits that corresponded to emotions include: cries very easily/never cries, never hides emotions/always hide emotions, feelings easily hurt/feelings not easily hurt, very emotional/not emotional. *See id.*

161. Although Taylor's study was conducted in Aberdeen, Scotland, it is reflective of other studies about Western culture's perception of homosexuals. *See* S.B. Gurwitz & M. Marcus, *Effects of Anticipated Interaction, Sex and Homosexual Stereotypes on First Impressions*, 8 J. APPLIED SOC. PSYCHOL. 47 (1978) (showing that gay men were considered less aggressive and less strong and to be poorer leaders, more gentle and more passive than heterosexuals); Michael D. Storms, *Attitudes Toward Homosexuality and Femininity in Men*, 3 J. HOMOSEXUALITY 257 (1978) (finding that sexual deviance and sex-role deviance were key factors in the hatred of homosexual men, with masculine gay men most despised); Mary Riege Laner & Roy H. Laner, *Personal Style or Sexual Preference? Why Gay Men Are Disliked*, 9 INT'L REV. MOD. SOC. 215 (1979) (implicating both sex-role deviance and sexual deviance in dislike of gay men); Mary Riege Laner & Roy H. Laner, *Sexual Preference or Personal Style? Why Lesbians Are Disliked*, 5 J. HOMOSEXUALITY 339 (1980) (implicating both sex-role deviance and sexual deviance in views about lesbians).

162. *See* Millham & Weinberger, *supra* note 149, at 349. The subjects filled out a questionnaire that included inquiries about their sexual orientation. *See id.* at 346. They were then give a condensed questionnaire filled out by "targets." *See id.* at 346-47. In the first interaction, the

chairs have duplicated this finding.¹⁶³ Research also has demonstrated that men are more homophobic than women.¹⁶⁴ A common thread in the literature is that a gay man's violation of the male sex role is the crucial determinant of men's harsher attitudes toward homosexuals.¹⁶⁵ As sociologist Gregory Lehne has noted, a male-dominated society objects to gay men because they threaten to fragment the male role, which in turn could lead to less male dominance and power.¹⁶⁶ Thus, because the male sex role is more valued in society than the female sex role, gay men are subject to much harsher condemnation than lesbians.¹⁶⁷ This finding reinforces the argument that negative attitudes toward male homosexuals is merely another manifestation of sexism against women.¹⁶⁸

The conclusion to be drawn from this research is that someone who sexually harasses a member of her or his own gender, particularly a victim who is homosexual or perceived to be homosexual, demonstrates

subjects and targets made personal disclosures. *See id.* at 347. After this first interaction, the subjects were asked to express their willingness to meet with the target in a second interaction involving cooperation. *See id.* at 349.

163. *See* Morin & Garfinkle, *supra* note 141, at 37 (citing A. Wolfgang & J. Wolfgang, *Exploration of Attitudes Via Physical Interpersonal Distance Toward the Obese, Drug Users, Homosexuals, Police and Other Marginal Figures*, 27 J. CLINICAL PSYCHOL. 510 (1971)) (measuring interpersonal distance using stick figures, participants placed themselves farther from marijuana users, drug addicts, obese people, present homosexuals, and past homosexuals, in that order); Stephen F. Morin, K. Taylor & S. Kielman, *Gay is Beautiful at a Distance*, Paper Presented at the Meeting of the Canadian Psychological Association (June 1976) (finding that participants seated themselves farther from a "psychologist" wearing a "gay and proud" button than from a psychologist wearing no button).

164. *See id.* at 39-41. Studies that measure penile volume changes illustrate heterosexual men's classical fear reactions to homosexual men. *See id.* at 32-33. In one study in which participants viewed male and female nudes, homosexual men and heterosexual men both responded to their preferred pictures with increased penile volume. *See id.* (citing N. McConaghy, *Penile Volume Changes to Moving Pictures of Male and Female Nudes in Heterosexual and Homosexual Males*, 5 BEHAV. RES. & THERAPY 43 (1967)). Homosexual men responded no differently to pictures of naked women than to neutral pictures. *See id.* at 33. Heterosexual men, however, had decreased penile volume when looking at pictures of naked men. *See id.*

165. *See id.* at 39-40. (citing Darrell J. Steffensmeier & Renee Hoffman Steffensmeier, *Sex Differences in Reactions to Homosexuals: Research Continuities and Further Developments*, 10 J. SEX RES. 52 (1974)).

166. *See* Gregory Lehne, *Homophobia Among Men*, in FORTY-NINE PERCENT MAJORITY: THE MALE SEX ROLES 66, 77-78 (Deborah David & Robert Brannon eds., 1976).

167. *See* Morin & Garfinkle, *supra* note 141, at 39-40.

168. *See id.* at 40-41. *See also* Pharr, *supra* note 132, at 18-19:

Gay men are perceived also as a threat to male dominance and control . . . because their breaking rank with male heterosexual solidarity is seen as a damaging rent in the very fabric of sexism. . . . When gay men break ranks with male roles through bonding and affection . . . they are perceived as not being 'real men,' that is, as being identified with women, the weaker sex that must be dominated.

anti-female or anti-male bias, which is exactly the kind of bias that Title VII was intended to prohibit. Thus, if a lesbian or gay man can demonstrate that the sexually harassing conduct was prompted by and reflective of gender stereotypes, then she or he has shown the discrimination occurred “because of” her or his sex.

C. *The Supreme Court and Gender Stereotyping*

Title VII is designed to knock down long-held stereotypes about men and women. In its jurisprudence, the Supreme Court has been inconsistent on the subject. In *Phillips v. Martin Marietta Corp.*,¹⁶⁹ the Court suggested in a per curiam opinion that if an employer could show that conflicting family obligations were “demonstrably more relevant to job performance for a woman than for a man,” an employer could refuse to hire the woman.¹⁷⁰ Writing separately, Justice Marshall observed: “I fear . . . the Court has fallen into the trap of assuming that the Act permits ancient canards about the proper role of women to be a basis for discrimination.”¹⁷¹

But seven years later, in striking down a Los Angeles water department policy requiring women to make higher pension contributions than men, the court recognized that “[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”¹⁷² And in *Price Waterhouse v. Hopkins*,¹⁷³ the Supreme Court ruled that direct evidence of stereotyping could be used to prove sex discrimination.¹⁷⁴ Ann Hopkins was up for promotion at the Big Eight accounting firm.¹⁷⁵ The partners’ written evaluations of her were replete with stereotypical comments: one described her as “macho,” another advised her to take a charm school

169. 400 U.S. 542 (1971).

170. *Id.* at 544. In *Phillips*, Title VII’s bona fide occupational qualification exception was not the issue before the court. *Id.* Rather, the court’s holding was limited to a finding that the defendant had been improperly granted summary judgment. *Id.* Cf. *Dothard v. Rawlinson*, 433 U.S. 321, 336 (1977) (holding that Alabama’s refusal to hire female prison guards was a bona fide exception because women guards in contact positions in a maximum security male penitentiary would pose a substantial security problem linked to the sex of the prison guard).

171. 400 U.S. at 545 (Marshall, J. concurring).

172. *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978) (quoting *Sprogis v. United Air Lines*, 444 F.2d 1194, 1198 (7th Cir. 1971)).

173. 490 U.S. 228 (1989).

174. *Id.* at 251. The vehicle for that evidence was the plaintiff’s expert witness, who testified that the comments of the female plaintiff’s male bosses were likely influenced by sex stereotyping. *Id.* at 235.

175. *See id.* at 231.

course.¹⁷⁶ A supporter wrote that she “ha[d] matured from a tough-talking somewhat masculine hard-nosed mgr to an authoritative, formidable, but much more appealing lady ptr candidate.”¹⁷⁷ The male partner who delivered the bad news to Hopkins about her rejection said she should “walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled, and wear jewelry.”¹⁷⁸ In concluding that the evidence was admissible to prove discrimination, the Court said: “As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”¹⁷⁹

V. GENDER STEREOTYPING: A CASE STUDY IN *DILLON V. FRANK*

A. *A Hostile Environment in the Court*

Despite the Supreme Court’s pronouncement on sex stereotyping, homosexual plaintiffs are not accorded the same treatment as heterosexual plaintiffs in Title VII cases. Courts consistently refuse to recognize that the discrimination of homosexuals is based on improper gender stereotyping.¹⁸⁰

In filing his complaint, Ernest Dillon never stated his sexual orientation nor argued it as the basis of his Title VII claim.¹⁸¹

176. *See id.* at 235.

177. *See id.* (quoting Def’s Ex. 27).

178. *See id.* (quoting Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1117 (1985)).

179. *Id.* at 251.

180. *See* Dillon v. Frank, 952 F.2d 403 (unpublished table decision), No. 90-2290, 1992 WL 5436, at *9 (6th Cir. Jan. 15, 1992); Carreno v. IBEW Local No. 226, 54 Fair Empl. Prac. Cas. (BNA) 81, 82-83 (D. Kan. 1990). Likewise, the EEOC does not recognize that the discrimination of homosexuals is based on improper gender stereotyping. The agency’s position is that homosexuals are not protected. *See* EEOC Compl. Man. 615.2(b)(3) 615:0004 (BNA) (June 1987). At the same time, however, the EEOC recognizes that Congress intended to prevent employers from making decisions “based on stereotyped characterizations of the sexes.” *See* 29 C.F.R. § 1604.2 (a)(1)(ii) (1996). This Article is limited to same-sex sexual harassment, but the idea that the harassment of homosexuals stems from improper stereotyping would be applicable to all sex discrimination cases. *See* Capers, *supra* note 134, at 1179-84.

181. *See* Complaint, Dillon v. Frank, No. 90-70799, 1990 WL 358586 (E.D. Mich. 1990). An administrative law judge’s recommendation of a finding of discrimination was reversed by a final agency decision, which concluded that the harassment was based on Dillon’s sexual orientation. No. 4-B-0109-8, at 2, U.S. Postal Service’s Central Regional Office (Sept. 21, 1989) (final agency determination). The EEOC Office of Review and Appeals upheld the final agency determination. Dillon v. Frank, Appeal No. 01900157, at 1, EEOC Office of Review and Appeals (Feb. 14, 1990) (final admin. review). The administrative law judge apparently concluded that people perceived to be homosexual were protected under Title VII, although complainants who argued that Title VII protected them because they were homosexual would not be entitled to relief. *See* Dillon v. Frank, No. 4-B-0109-8, tr. at 117 (Hearing before Administrative Law Judge Henry

Regardless, given the content of the remarks directed at him, the trial court¹⁸² and the Sixth Circuit¹⁸³ viewed the case as one of sexual orientation. At oral argument, Dillon's lawyer contended that Dillon's perceived sexual orientation was irrelevant and that his client had been subjected to the harassment relating to homosexuality solely because he was a man.¹⁸⁴ He contended that his client had been a victim of sex stereotyping.¹⁸⁵

Rather than characterize the issue as one of stereotyping, the Sixth Circuit framed the issue as one of homosexuality.¹⁸⁶ It rejected the suggestion that the sex stereotyping evidence admissible in *Price Waterhouse v. Hopkins*¹⁸⁷ was applicable in a sexual harassment case: "*Price Waterhouse* was not a hostile environment case. It involved a specific management decision and the plaintiff's allegation 'that gender played a part in a particular employment decision.'"¹⁸⁸

B. *A Case of Stereotyping*

The *Dillon* court's distinction of sex stereotyping evidence in an employment decision case and in a sexual harassment case is disingenuous. Sexual harassment is sex discrimination as surely as an illegal employment decision based on sex is sex discrimination.¹⁸⁹ The court's own definition of sex stereotyping underscores this point.¹⁹⁰ But,

Perez, Jr., June 29, 1989). The judge did draw on same-sex quid pro quo cases in making his recommendation. *See id.* at 118.

182. *See* *Dillon v. Frank*, No. 90-70799 (E.D. Mich. Oct. 16, 1990).

183. *See Dillon*, 1992 WL 5436, at *7.

184. *See id.* at *5.

185. *See id.*

186. *Id.* at *6-7. By framing the issue as one of homosexuality, the court followed other circuits in holding that Title VII did not prohibit discrimination based on sexual orientation. *See* *Williamson v. A.G. Edwards and Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989); *DeCintio v. Westchester County Med. Ctr.*, 807 F.2d 304, 306-07 (2d Cir. 1986); *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 329-30 (9th Cir. 1979); *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 326 (5th Cir. 1978).

187. 490 U.S. 228 (1989).

188. *Dillon*, 1992 WL 5436, at *9. At least two courts have allowed expert testimony about stereotyping in sexual harassment cases. *See* *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 880-81 (D. Minn. 1993); *Robinson v. Jacksonville Shipyards Inc.*, 760 F. Supp. 1486, 1502, 1523 (M.D. Fla. 1991).

189. *See* *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986).

190. The court defined "sex stereotyping" as "the assigning of certain behavioral characteristics as appropriate for women or for men, but not for the other sex. Sex stereotyping is illegal when it is the basis for discriminating against members of a protected class with respect to the terms and conditions of employment." *Dillon*, 1992 WL 5436, at *5 n.3. *Meritor* held that sexual harassment is the discrimination of members of a protected class (i.e., male or female) with respect to the terms and conditions of employment. 477 U.S. at 63-67.

even accepting the Sixth Circuit's distinction, other courts understood early on that the sexual harassment of women stemmed from gender stereotyping.¹⁹¹

The epithets directed at Dillon were rooted in the gender stereotyping of men, in his case because he did not live up to the "appropriate" male role. For four years Dillon endured lewd graffiti, sexual slurs,¹⁹² and crude drawings of him having sex with men.¹⁹³ One employee beat him up in a restroom, blackening both of his eyes, bruising his sternum, and ripping a gash into his forehead that took six to eight stitches to close.¹⁹⁴ After that employee was fired, two other co-workers picked up the harassment until, three years later, Dillon suffered a nervous breakdown.¹⁹⁵ Dillon had pleaded with his bosses to do something, but, apart from firing the one harasser because of the vicious attack, they did nothing to stop the verbal harassment.¹⁹⁶ One boss said that if Dillon were a real man, he would fight back.¹⁹⁷ Although Dillon had not told anyone at work about his sexual orientation,¹⁹⁸ one supervisor said Dillon stood out: "[M]aybe his mannerisms are different. . . . a little softer than most men's. . . . Everyone was always BS'ing each other, talking this way about a woman and that way, but it never came from Dillon, and I guess they noticed it."¹⁹⁹ During a safety talk, one co-

191. See *Bundy v. Jackson*, 641 F.2d 934, 945 (D.C. Cir. 1981) ("How then can sexual harassment, which injects the most demeaning sexual stereotypes into the general work environment and which always represents an intentional assault on an individual's innermost privacy, not be illegal?"); *Williams v. Saxbe*, 413 F. Supp. 654, 658 (D.D.C. 1976) (rejecting the defendant's argument that *only* sex stereotyping provided a basis for a Title VII claim), *rev'd. sub nom. Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978) (on procedural grounds), *on remand*, *Williams v. Civiletti*, 487 F. Supp. 1387 (D.D.C. 1980). See also *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1502-05 (M.D. Fla. 1991) (finding persuasive expert testimony on sex stereotyping in a hostile environment claim).

192. These sexual slurs included "Dillon sucks dicks," "Dillon is a fag," and "Dillon has AIDS." *Dillon v. Frank*, Appeal No. 01900157, at 2, EEOC Office of Review and Appeals (Feb. 14, 1990) (final admin. review).

193. See Frank Bruni, *Gay Pride Goes to Court: Detroit Man Charges Sexual Harassment*, DETROIT FREE PRESS, June 21, 1990, at F1.

194. See *Dillon*, Appeal No. 01900157, at 2, EEOC Office of Review and Appeals.

195. See *id.* at 2-3. Dillon suffered from depression, anxiety, and paranoia. See *id.* at 3. He has since returned to the Postal Service, but at a different worksite. Telephone interview with Ernest Dillon (Sept. 30, 1995). Dillon said that his attorney was so frustrated after the case that he left the United States to attend medical school in the Caribbean. See *id.*

196. See *Dillon*, 1992 WL 5436, at *6.

197. See *Dillon*, Appeal No. 01900157, EEOC Office of Review and Appeals.

198. Telephone interview with Ernest Dillon (Sept. 30, 1995).

199. Bruni, *supra* note 193. This supervisor held three talks with employees about the harassment of Dillon. See *Dillon v. Frank*, No. 4-B-0109-8, tr. at 121, Hearing before Administrative Law Judge Henry Perez, Jr. (June 29, 1989). For his efforts, he was called a "faggot lover" and "fag." See *id.*

worker had called out: “All fags on this side of the room, and all men on the other side of the room.”²⁰⁰ Dillon was on the side of the room the co-worker had designated for “fags.”²⁰¹ In the view of co-workers and at least one supervisor, Dillon lacked the appropriate traits of a man.

Although the Sixth Circuit’s definition of sex stereotyping seemingly indicated its understanding of the concept, the court was nonetheless blind to the stereotyping in the case before it.²⁰² In *Price Waterhouse*,²⁰³ Ann Hopkins was denied promotion because she was too macho and not feminine enough.²⁰⁴ In *Dillon v. Frank*,²⁰⁵ Ernest Dillon was sexually harassed because he was too feminine and not masculine enough. Dillon was discriminated against because he was a man as clearly as Ann Hopkins was discriminated against because she was a woman. Absent his “softer mannerisms,” Dillon’s co-workers would have found him unremarkable.²⁰⁶ Additionally, the sexual comments of Dillon’s harassers reflected their belief that it was inappropriate for a man to engage in sex with another man. The court said that Dillon had not shown that similarly situated women would have been treated any differently: “[H]e has not argued that a lesbian would have been accepted at the Center, nor has he argued that a woman known to engage in the disfavored sexual practices would have escaped abuse.”²⁰⁷ The court’s statement is credible only if Dillon’s harassers did not believe that women perform oral sex on men, or if his harassers would likewise taunt a woman, as they did Dillon, for performing fellatio.²⁰⁸ Both assumptions defy common sense.

The court found that Dillon had met three of the four elements in establishing a *prima facie* case of sexual harassment. The court agreed that Dillon had shown that the harassment was unwelcome, was clearly sexual in nature,²⁰⁹ and had seriously affected his psychological well-

200. See *Dillon*, Appeal No. 01900157, at 2, EEOC Office of Review and Appeals.

201. See *id.*

202. See *Dillon v. Frank*, 952 F.2d 403 (unpublished table decision), No. 90-2290, 1992 WL 5436, at *5 n.3 (6th Cir. Jan. 15, 1992).

203. 490 U.S. 228 (1989).

204. See *supra* notes 173-179 and accompanying text.

205. 952 F.2d 403 (unpublished table decision), No. 90-2290, 1992 WL 5436 (6th Cir. Jan. 15, 1992).

206. See *supra* note 199 and accompanying text.

207. 1992 WL 5436, at *9 (footnote omitted).

208. One commentator has pointed out that the court “assumed the posture of the ostrich, sticking its judicial head in the sand to ignore the world.” See Marcossou, *supra* note 114, at 26.

209. The EEOC Guidelines do not distinguish between homosexual and heterosexual conduct. See 29 C.F.R. § 1604.11(a) (1995). Implicit in its recognition that same-sex harassment states a cause of action is that sexual conduct of a homosexual nature is actionable. See EEOC

being.²¹⁰ His employer knew about the harassment, yet did nothing to stop it: “It appears undeniable that Dillon was denied the ‘condition’ of employment at issue in hostile environment cases, a workplace where each employee is treated with appropriate dignity and respect.”²¹¹ What the court failed to find, and wrongly so, was that Dillon had been discriminated against because he was a man.

VI. CONCLUSION

In *Dillon v. Frank*, the Sixth Circuit recognized the validity of quid pro quo same-sex sexual harassment actions but rejected the hostile environment claim before it, ruling that the male plaintiff had been discriminated against by his male co-workers, not because he was a man, but rather because he was perceived to be a homosexual. In ruling against the plaintiff, the court rejected evidence of sex stereotyping and concluded that even if such evidence was permissible, the plaintiff had not been a victim of stereotyping. The *Dillon* court’s ignorance of the sexual stereotyping of homosexuals reflects the court’s and society’s insistence upon demeaning the lives of gay men and lesbians and perpetuating traditional notions both of sex roles and of the dominance of men. Courts should rethink their position that Title VII does not fully protect gay men and lesbians from sexual harassment on the job. If judges looked past society’s standards on “appropriate” gender roles, they would find that the discrimination of homosexuals is based on impermissible stereotypes that violate Title VII.

Compl. Man., § 615.2(b)(3) 615:0004 (BNA) (June 1987). In *Robinson v. Jacksonville Shipyards, Inc.*, the offensive environment included posters depicting women engaged in lesbian sex. 760 F. Supp. 1486, 1496, 1501 (M.D. Fla. 1991).

210. See *Dillon*, 1992 WL 5436, at *6.

211. *Id.*