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Civil Rights - Work Environment; Sexual Harassment: Sexual Harassment by a Supervisor of the Same Sex, Is It Actionable

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CIVIL RIGHTS—WORK ENVIRONMENT; SEXUAL HARASSMENT: "SEXUAL HARASSMENT BY A SUPERVISOR OF THE SAME SEX, IS IT ACTIONABLE?"

Equal Employment Opportunity Comm'n v. Walden Book Co., 885 F. Supp. 1100 (M.D. Tenn. 1995)

I. FACTS

The Equal Employment Opportunity Commission [hereinafter EEOC] filed a complaint on December 23, 1993, on behalf of employee, William Newberry, against the Defendant, Walden Book Company.[1] Plaintiff alleged that Newberry was harassed[2] while employed at Walden Book Company by his immediate supervisor, Perry Porch, a homosexual.[3]

In January of 1995, the Defendant filed a motion requesting judgment on pleadings[4] to determine the issue of whether same-sex sexual harassment is actionable under Title VII of the Civil Rights Act of 1964.[5] The District Court denied Defendant's motion, *holding* that same-sex sexual harassment is actionable under Title VII.[6]

II. LEGAL HISTORY

A. TITLE VII AND SEXUAL HARASSMENT

Title VII prohibits employment discrimination against any individual with respect to his or her compensation, terms, conditions or privileges of employment, due to the individual's race, color, religion, sex, or national origin.[7] Title VII specifically applies to employers, their agents,

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1. Brief for Plaintiff-Intervenor at 2, EEOC v. Walden Book Co., 885 F. Supp. 1100, 1100 (M.D. Tenn. 1995) (No. 3-93-1050).

2. Telephone Interview with Katharine Kores, Supervising Trial Attorney, Equal Employment Opportunity Commission, Memphis, Tenn. (Aug. 25, 1995). Examples of the harassment which Porch subjected the plaintiff to included: keeping him after work; inviting him to office parties; exposing him to pictures of homosexual men; inquiring whether plaintiff's nipples were pierced; and pulling him down into lap of Porch. *Id.*

3. EEOC v. Walden Book Co., 885 F. Supp. 1100, 1100 (M.D. Tenn. 1995).

4. Brief for Plaintiff-Intervenor at 2, *Walden* (No. 3-93-1050). Defendant in lieu of motion on pleadings could have filed a motion for summary judgment as the EEOC's complaint stated a generic form of sexual harassment which clearly stated a claim under Title VII. *Id.*

5. *Walden*, 885 F. Supp. at 1100. Title VII of the Civil Rights Act of 1964 is federal statutory law which bars discrimination on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2 (1988).

6. *Walden*, 885 F. Supp. at 1104.

7. 42 U.S.C. § 2000e-2(a)(1). Ironically, sex as a basis of discrimination was added as a floor amendment as a last minute effort to undermine the adoption of the Civil Rights Act of 1964. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 63-64 (1986) (citing 110 CONG. REC. 2577-2584 (1964)); *see also* Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984) (stating that adding the word "sex" to the legislation was an attempt to thwart the adoption of the Civil Rights Act). An argument was made against adding the word "sex" to the Civil Rights Act, as "sex discrimination" is unlike other types of discrimination to justify separate legislation. The argument failed and the bill quickly passed;

employment agencies, or labor organizations,[8] and protects male and female employees equally.[9] The employer may be held responsible for the acts of sexual harassment of fellow employees where the employer or its agent knows or should have known of the conduct, unless the employer takes immediate and appropriate corrective action.[10]

Sexual harassment claims originated out of the passage of the Civil Rights Act of 1964, now commonly known as Title VII.[11] However, courts did not immediately view sexual harassment as discrimination under Title VII.[12] Initially, sex discrimination cases dealt with the disparate treatment of one sex in terms of hiring, firing, promotion, wages, and other tangible benefits.[13] It was not until the mid-1970's that a court held that sexual harassment of an employee by a supervisor violates Title VII.[14] A decade later, the United States Supreme Court in *Meritor Savings Bank v. Vinson*,[15] confirmed that sexual harassment violates Title VII.[16]

However, *Meritor* did not resolve all sexual harassment issues.[17] In *Meritor*, a female employee had been harassed by a male supervisor[18] and consequently courts generally interpret sexual harassment claims to be actionable where male supervisors harass female workers.[19] In

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consequently, there is little legislative discussion on sex discrimination. *Meritor*, 477 U.S. at 63-64 (referring to comments made by Rep. Celler and Rep. Green, 110 CONG. REC. 2577, 2584).

8. 42 U.S.C. § 2000e-2; 29 C.F.R. § 1604.11(c) (1995).

9. *See Meritor*, 477 U.S. at 64 (stating that congressional intent was to eliminate differential treatment of men and women).

10. 29 C.F.R. § 1604.11(d) (stating that where the employer knew or should have known of conduct of non-employees, and failed to take immediate corrective action, liability may also exist); *see also Meritor*, 477 U.S. at 72 (stating that the Supreme Court declines to issue a definitive ruling on employer liability).

11. The Civil Rights Act of 1964, Title VII § 703, Pub. L. No. 88-352, 78 Stat. 255 (codified as amended at 42 U.S.C. § 2000e-2 (1988)).

12. *See, e.g.*, Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161 (D. Ariz. 1975), *vacated*, 562 F.2d 55 (9th Cir. 1977) (declining to apply Title VII relief to a sexual harassment claim).

13. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971).

14. *See, e.g.*, Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976), *rev'd on other grounds sub nom.* Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978) (holding that a supervisor's retaliation against an employee because she had refused his sexual advances violated Title VII).

15. 477 U.S. 57 (1986).

16. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) (finding both quid pro quo and hostile work environment claims are actionable).

17. *Meritor* did not discuss sexual harassment claims made by victims who are homosexuals, transsexuals, and transvestites, and courts generally do not recognize such claims as being based on sex. *See, e.g.*, Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982) (declaring that Title VII does not encompass discrimination against transsexuals); DeSantis v. Pacific Tel. Co., 608 F.2d 327, 329-30 (9th Cir. 1979) (showing that courts have refused to extend Title VII protection to homosexuality for harassment based on the homosexuality); Holloway v. Arthur Anderson & Co., 566 F.2d 659, 662-63 (9th Cir. 1977) (stating that transsexuals and transvestites are not protected from discrimination under Title VII).

18. *Meritor*, 477 U.S. at 60.

19. *See* Baskerville v. Culligan Int'l Co., 50 F.3d 428, 430 (7th Cir. 1995) (stating that in concept, women should be protected from sexual harassment which creates a "hellish" work environment for women).

addition, courts have extended *Meritor* to include sexual harassment of "reverse discrimination" of males by females.[20] However, whether an action can be maintained under Title VII where the harasser is the same sex as the victim remains in flux.[21]

B. TYPES OF SEXUAL HARASSMENT

Interpretation of Title VII as it pertains to sex discrimination claims has evolved into two main types of sexual harassment:[22] quid pro quo and hostile or abusive work environment discrimination.[23]

Under the quid pro quo theory, the plaintiff must show a loss of tangible economic benefits linked to his or her refusal to comply with a supervisor's sexual demands.[24] Quid pro quo harassment may arise from conduct of a single incident.[25]

Hostile or abusive work environment discrimination is defined as a type of harassment that does not affect an economic aspect of the plaintiff's employment, but instead deprives the employee of working in an environment which is free from intimidation, ridicule, and insult.[26]

In order to bring a claim under either theory, a plaintiff must first prove a prima facie case of sex discrimination.[27] The concept of prima

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20. *See id.* (stating, in dicta, that sexual harassment of women by men may be more common, but harassment of men by women, men by men, and women by women should also be actionable in appropriate cases); *see also* Jensen v. Board of County Comm'rs, 636 F. Supp. 293, 299 (D. Kan. 1986).

21. *See, e.g.*, Garcia v. Elf Atochem N. Am., 28 F.3d 446, 451-52 (5th Cir. 1994) (stating that same-sex harassment by a co-worker or supervisor provides no cause of action under Title VII); Goluszek v. Smith, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988) (holding same-sex harassment by a co-worker does not state a claim under Title VII). *Contra* Joyner v. AAA Cooper Trans., 597 F. Supp. 537, 542 (M.D. Ala. 1983) *aff'd mem.*, 749 F.2d 732 (11th Cir. 1984) (finding that a plaintiff had proven a prima facie case of quid pro quo sexual harassment by a supervisor of a manager); Wright v. Methodist Youth Serv., Inc., 511 F. Supp. 307, 310 (N.D. Ill. 1981) (holding that discharge for rejecting homosexual advances by a supervisor of the same-sex is a violation of Title VII).

22. Kathryn R. McKinley, Note, *Changing Our Perspective: Should Washington Adopt The Reasonable Victim Standard of Viewing Hostile Environment Claims?*, 30 GONZ. L. REV. 315, 319-22 (1994-95) (comparing hostile work environment and quid pro quo sexual harassment claims).

23. *Joyner*, 597 F. Supp. at 541-42 (citing Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982)).

24. *See, e.g., id.* at 542 (stating an employee must show a loss of tangible job benefits due to refusal to succumb to a supervisor's sexual demands).

25. Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

26. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986); *see also Rabidue*, 805 F.2d at 620 (showing that as opposed to a quid pro quo claim, which requires only a single incident of harassment, sexually hostile or intimidating environments are created by multiple exposures to offensive conduct). Hostile or abusive work environment discrimination was first recognized by the Court of Appeals of the District of Columbia as actionable under Title VII in 1981. Bundy v. Jackson, 641 F.2d 934, 943-44 (D.C. Cir. 1981). In 1986, in a unanimous decision, the Supreme Court recognized the claim and held that sex based discrimination which creates a hostile or abusive working environment constitutes a violation of Title VII. *Meritor*, 477 U.S. at 73.

27. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (stating that the plaintiff must prove a prima facie case of racial discrimination under Title VII).

facie case means the plaintiff must initially produce adequate evidence to insure a favorable ruling on a motion for directed verdict or a motion to dismiss.[28] Although elements for a prima facie case are similar for both quid pro quo and hostile work environment, they vary slightly and these variances have had a significant impact in the success of same-sex claims under each respectively.[29]

1. Quid Pro Quo Harassment

In order to prove a quid pro quo prima facie case, the plaintiff must show five elements: (1) the employee was part of a protected class; (2) the employee was subjected to unwelcome sexual advances or requests for sexual favors; (3) the harassment was based on sex; (4) submission of the employee to the unwelcome advances or the employee's refusal to submit to the supervisor's sexual demands was an express or implied condition for receiving job benefits or resulted in a tangible job detriment; and (5) employer liability.[30]

The first element is a person must be a member of a protected class.[31] Because "sex" is a protected category, in almost all cases this element requires only that the employee be either male or female.[32]

The second element, unwelcome sexual harassment, is often disputed.[33] Defendants have argued that if a petitioner voluntarily engages in sex-related conduct it should not be considered unwelcome.[34] However, in *Meritor*, the Supreme Court resolved this issue by stating that voluntary engagement in sex-related conduct is not a defense to a sexual harassment claim.[35] The Court in *Meritor* concluded the real question is whether the victim's conduct indicated that the sexual advances were

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28. BLACK'S LAW DICTIONARY 1189-90 (6th ed. 1991). The plaintiff has the burden of proving a prima facie case by a preponderance of the evidence. *See McDonnell Douglas*, 411 U.S. at 802.

29. *See* Debra L. Raskin, *Sexual Harassment in Employment*, C108 A.L.I. A.B.A. 141, 147, 160 (1995).

30. *Id.* at 143 (citing Highlander v. K.F.C. Nat'l Management Co., 805 F.2d 644, 648 (6th Cir. 1986); Henson v. City of Dundee, 682 F.2d 897, 909 (11th Cir. 1982); and other courts with similar tests) (citations omitted).

31. Henson v. City of Dundee, 682 F.2d 897, 909 (11th Cir. 1982).

32. *Henson*, 682 F.2d at 903; *see also* Raskin, *supra* note 29, at 150 (referring to Prescott v. Independent Life & Accident Ins. Co., 878 F. Supp. 1545, 1549 n.2 (M.D. Ala. 1995), which stated that it appears that a party need only to be male or female to be protected). An exception is found where a male alleged an injury from an environment which was sexually hostile to his female supervisors, and that male was found not to be part of a protected group. Raskin, *supra* note 29, at 150 (citation omitted).

33. Raskin, *supra* note 29, at 144.

34. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67-69 (1986) (referring to the lower court's findings).

35. *Id.* at 68.

unwelcome.[36] This question must ultimately be determined on the facts of the particular case.[37]

The third element, that the harassment was based on sex, does not raise a dispute in most heterosexual quid pro quo cases.[38] However, in some same-sex cases[39] and situations involving a bisexual supervisor,[40] it is not always clear that the harassment was based on sex, and therefore, same-sex claims under Title VII are not always recognized.[41]

Ordinarily, to determine whether the harassment was based on sex, courts look at whether the victim would have been harassed "but for" being a member of a certain sex.[42] For example, if a male aims conduct at a female that he would not direct at a male, the conduct is because of her sex. Thus, the claim is actionable because "but for" the victim's sex, she would not have been harassed. However, sexual conduct that is equally offensive to both male and female workers would not necessarily constitute a Title VII violation because both sexes were treated alike.[43]

The fourth element requires that the employee's submission to the unwelcome advances was a condition for receiving job benefits or the employee's refusals to submit resulted in a tangible job detriment.[44] It appears from its plain language that a victim must show a tangible job detriment to prove this element.[45] However, it has been held that an

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36. *Id.*; *see Henson*, 682 F.2d at 903 (using two independent tests to determine whether the conduct is unwelcome). First, the employee must not encourage or solicit the behavior; and second, the employee must find the conduct offensive or undesirable. *Henson*, 682 F.2d at 903.

37. *Meritor*, 477 U.S. at 69 (citing EEOC guideline's requirement of reviewing the record as a whole and the totality of the circumstances).

38. *See* Raskin, *supra* note 29 at 146.

39. *See, e.g.*, Myers v. City of El Paso, 874 F. Supp. 1546, 1548 (W.D. Tx. 1995) (holding that sexual advances of a supervisor of the same-sex fails to establish a claim under Title VII).

40. *See* Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987) (stating that conduct that is equally offensive to both males and females does not violate Title VII); Bundy v. Jackson, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981) (stating that only in the absurd situation of a bisexual supervisor harassing both sexes would there fail to be sex discrimination based on sex). *Contra* Chiapuzio v. BLT Operating Corp., 826 F. Supp. 1334, 1337 (D. Wyo. 1993) (finding that harassment of both genders is not beyond the scope of Title VII).

41. *See* cases cited *supra* note 17.

42. *Bundy*, 641 F.2d at 942 n.7. Same-sex cases brought under quid pro quo harassment generally find that the harassment was based on sex, reasoning that but for the victim's sex, they would not have been harassed. *See* Joyner v. AAA Cooper Transp., 597 F. Supp. 537, 541 (M.D. Ala. 1983), *aff'd mem.*, 749 F.2d 732 (11th Cir. 1984) (finding same-sex harassment is actionable under Title VII); *see also* Wright v. Methodist Youth Serv., Inc. 511 F. Supp. 307, 309-10 (N.D. Ill. 1981) (holding same-sex harassment is based on sex). *But see* Garcia v. Elf Atochem N. Am., 28 F.3d 446, 451-52 (5th Cir. 1994) (stating a same-sex claim is not actionable in hostile work environment action). *Contra* McCoy v. Johnson Controls World Serv., Inc., 878 F. Supp. 229, 232 (S.D. Ga. 1995) (finding that same-sex harassment for hostile work environment is actionable under Title VII).

43. *Rabidue*, 805 F.2d at 620 (citing Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

44. Henson v. City of Dundee, 682 F.2d 897, 909 (11th Cir. 1982).

45. *Id.* Tangible benefits include such things as raises, promotions, or other benefits. Janet Hughie Smith & Rick Thaler, *Sex Discrimination in the Workplace: Some Guidelines for Employers and Legal Update*, C983 A.L.I. A.B.A. 135, 139-40 (1995).

employee who has not lost material job benefits may still bring a quid pro quo claim.[46]

The fifth element is the existence of employer liability.[47] Generally a standard of strict liability has been applied in cases of quid pro quo harassment.[48] Both EEOC guidelines[49] and caselaw support imposing strict liability on employers for sexual harassment committed by their supervisory employees in quid pro quo cases.[50]

2. *Hostile or Abusive Work Environment*

In a claim for a hostile or abusive work environment, a plaintiff must show five elements to establish a prima facie case: (1) the employee belongs to a protected class; (2) the employee was subjected to unwelcome sexual advances, requests for sexual favors, or other conduct of a sexual nature; (3) the harassment was based on sex; (4) the harassment had the effect of unreasonably altering the victim's work performance creating an abusive working environment; and (5) employer liability.[51]

The first three elements are the same as those for quid pro quo harassment.[52] The fourth element differs as it requires that a defendant's conduct be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.[53] The standard used to determine the fourth element is two part: first, a reasonable person would find the environment objectively hostile or abusive; and second, the victim must subjectively believe that the environment is abusive.[54]

This standard was recently reaffirmed by the Supreme Court in *Harris v. Forklift Systems, Inc.*[55] In *Harris,* the Court stated that a discriminatory or abusive work environment was one which detracts from an employee's job performance, discourages an employee from staying on the job, or keeps them from advancing in their career.[56] The

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46. Karibian v. Columbia Univ., 14 F.3d 773, 778-79 (2d Cir.), *cert. denied,* 114 S. Ct. 2693 (1994).

47. *Henson,* 682 F.2d at 909.

48. Raskin, *supra* note 29, at 147-48 (citations omitted).

49. 29 C.F.R. § 1604.11(c) (1995).

50. *Henson,* 682 F.2d at 909; Bundy v. Jackson, 641 F.2d 934, 947 (D.C. Cir. 1981) (citing EEOC Guidelines which state that an employer is responsible for discriminatory acts of its agents and supervisory employees regardless of whether the employer authorized or knew of the conduct).

51. Smith & Thaler, *supra,* note 45, at 141-42.

52. *Henson,* 682 F.2d at 909; *see also supra* note 29 and accompanying text (discussing the similarities of quid pro quo and hostile work environment elements).

53. Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370 (1993).

54. *Id.*

55. 114 S. Ct. 367, 370 (1993).

56. Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370-71 (1993).

Court in *Harris* stated that determining whether conduct is severe or hostile cannot be found by using a mathematically precise test, but can only be determined by looking at all of the circumstances.[57]

The fifth element of a hostile work environment claim is the employer's liability.[58] Unlike quid pro quo harassment claims, where an employer is strictly liable, in *Meritor*, the Court suggested that in a hostile environment case, employers are not automatically liable for sexual harassment by their supervisors.[59] In effect, this eliminates strict liability for employers in hostile work environment claims.[60] Nonetheless, the Court agreed with the EEOC's interpretation that Congress intended for the court to look to agency principles for guidance, and thus some employer liability exists.[61]

In response to the ruling in *Meritor*, where the Court declined to define employer liability in a hostile environment claim, the Sixth Circuit created a test to determine employer liability.[62] The test requires that a plaintiff prove that the employer, through its agents or supervisory personnel, knew or should have known of the harassment and failed to take prompt and appropriate corrective action.[63] The adequacy of the employer's response to correct the alleged harassment must be evaluated on a case by case basis.[64]

C. SAME-SEX HARASSMENT

The issue of whether same-sex harassment is actionable under Title VII is generally brought before the court on a motion to dismiss for failure to state a claim or by motion for summary judgment.[65] However, cases have been tried in their entirety without the issue being considered separately.[66] At issue in most same-sex sexual harassment cases is the

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57. *Id.* at 371 (listing criteria to be considered, including: frequency of the conduct and its severity; whether it is physically threatening, humiliating, or unreasonably interferes with work performance; and the effect on the employee's psychological well-being).

58. Henson v. City of Dundee, 682 F.2d 897, 909 (11th Cir. 1982).

59. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986) (relying on EEOC Guidelines which suggest that in a hostile environment claim, the basis for finding agency disappears if a victim does not take advantage of procedures set to protect them, and if the employer has no knowledge of the harassment, the employer should be shielded from liability).

60. *Id.*

61. *Id.*

62. Rabidue v. Osceola Ref. Co., 805 F.2d 611, 621 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041-42 (1987).

63. *Id.* (citing Barrett v. Omaha Nat'l Bank, 726 F.2d 424, 427-28 (8th Cir. 1984)) (other citations omitted).

64. *Id.* (referring to Barrett v. Omaha Nat'l Bank, 726 F.2d 424, 427 (8th Cir. 1984)).

65. *See, e.g.*, Wright v. Methodist Youth Serv., Inc., 511 F. Supp. 307, 307 (N.D. Ill. 1981) (moving to dismiss); Polly v. Houston Lighting & Power Co., 803 F. Supp. 1, 3 (S.D. Tex. 1992) (moving for summary judgment).

66. Joyner v. AAA Cooper Transp., 597 F. Supp. 537, 538 (M.D. Ala. 1983), *aff'd mem.*, 749

third element under either quid pro quo or hostile or abusive harassment, which requires the plaintiff to prove that the harassment was based on sex.[67] Courts often use the EEOC's guidelines as an aid in making determinations.[68] The EEOC guidelines specifically state that sexual harassment is a violation of Title VII.[69] The EEOC's position is that the victim need not be of the opposite sex from the harasser to be actionable, but rather, the court should determine whether the harasser treats a member or members of one sex differently from members of the other sex.[70]

Same-sex sexual harassment was initially recognized[71] as actionable under Title VII in 1981 in *Wright v. Methodist Youth Services, Inc.*[72] In *Wright*, a male employee was subjected to quid pro quo harassment and dismissed for rejecting the homosexual advances of his supervisor.[73] In *Wright*, the court relied on dicta of two circuit court cases and held that a case of same-sex harassment states a claim under Title VII.[74] The court in *Wright* concluded that the legal problem is the same for a person harassed by a homosexual supervisor as it is for a person harassed by a heterosexual supervisor of the opposite sex.[75]

F.2d 732 (11th Cir. 1984).

67. Pritchett v. Sizeler Real Estate Management Co., 63 U.S.L.W. 2772 (E.D. La. Apr. 25 1995) (Civ.A.No. 93-2351) (stating the third element is crucial in same-sex cases); *see also* Raskin, *supra* note 29, at 151 (stating that it appears that the issue of gender arises more in the context of hostile or abusive harassment rather than quid pro quo).

68. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) (referring to the EEOC guidelines as "a body of experience and informed judgment to which courts and litigants may properly resort for guidance") (citations omitted). The EEOC has been empowered to prevent employment practices which violate Title VII. 42 U.S.C. § 2000e-5(a) (1988). To facilitate this responsibility, the EEOC has issued "Guidelines on Discrimination Because of Sex," which require reviewing the totality of the circumstances to determine whether sexual harassment exists. 29 C.F.R. §§ 1604, 1604.11 (1995).

69. 29 C.F.R. § 1604.11(a). The guidelines state that sexual harassment exists when unwelcome sexual advances, requests for sexual favors, or other conduct of a sexual nature requires submission to or is made a condition of employment or when submission or rejection of such conduct is used as the basis for employment decisions, or unreasonably interferes with the individual's work performance. *Id.* Sexual conduct which creates an intimidating, hostile, or offensive work environment is also considered harassment. *Id.*

70. Waag v. Thomas Pontiac, Buick, GMC, Inc., No. Civ. 3-95-538, 1996 WL 179860 at *6 (D. Minn. Apr. 12, 1996) (citing EEOC Compl. Man. § 615, 2(b)).

71. *See* Wright v. Methodist Youth Serv., Inc., 511 F. Supp. 307, 309-10 (N.D. Ill. 1981) (stating that neither of the parties, nor the court had been able to locate any direct precedent for a same-sex claim under Title VII). *See also* Barlow v. Northwestern Memorial Hosp., 30 Fair Emp. Prac. Cases 223, 224 NO. 79C4474 (N.D. Ill. July 14, 1980) (allowing a claim for race and sex discrimination of a female by a female supervisor).

72. 511 F. Supp. 307 (N.D. Ill. 1981).

73. Wright v. Methodist Youth Serv., Inc., 511 F. Supp. 307, 309-10 (N.D. Ill. 1981).

74. *Id.* at 310 (citing Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981); Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977)).

75. *Id.* (relying on language from *Barnes*, 561 F.2d at 990 n.55).

Subsequently, in 1983, in *Joyner v. AAA Cooper Transportation*,[76] another quid pro quo claim of same-sex harassment was recognized.[77] In *Joyner*, a male employee was asked to engage in homosexual activities by the manager, and was later discharged for refusing.[78] The court in *Joyner* relied in part on *Wright*, but also went through an analysis of the elements of a prima facie case for quid pro quo harassment, and found the complainant had met every element.[79] The rationale for recognizing quid pro quo claims in both *Joyner* and *Wright*, was that the gender of the supervisor is not relevant when a supervisor demands sexual favors of an employee in exchange for advancement.[80]

However, not all federal courts have accepted same-sex claims. Contrary to earlier cases, in 1988, in *Goluszek v. Smith*,[81] the court found that the complainant did not state a cognizable claim of sexual harassment and held that same-sex harassment was not actionable under Title VII.[82] In *Goluszek*, the male victim was subjected to teasing of a sexual nature by male co-workers.[83] The plaintiff filed a hostile work environment claim.[84] The court in *Goluszek* reasoned that Congress did not intend to prohibit same-sex harassment, but was concerned only with correcting discrimination created by an imbalance of power used against discrete and vulnerable groups.[85] In its analysis, the court stated that even though Goluszek may have been harassed because he was male, the harassment did not create an anti-male environment, which was deemed by the court to be a requirement to a Title VII claim.[86]

In 1994, the Fifth Circuit, in *Garcia v. Elf Atochem North America*,[87] directly addressed this issue[88] and, following *Goluszek*, determined that

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76. 597 F. Supp. 537 (M.D. Ala. 1983), *aff'd mem.*, 749 F.2d 732 (11th Cir. 1984).

77. Joyner v. AAA Cooper Transp., 597 F. Supp. 537, 542 (M.D. Ala. 1983), *aff'd mem.*, 749 F.2d 732 (11th Cir. 1984).

78. *Id.* at 538-40.

79. *Id.* at 541-42.

80. Prescott v. Independent Life & Accident Ins. Co., 878 F. Supp. 1545, 1550-51 (M.D. Ala. 1995) (citing *Joyner*, 597 F. Supp. at 542; Wright v. Methodist Youth Serv., Inc., 511 F. Supp. 307, 310 (N.D. Ill. 1981)).

81. 697 F. Supp. 1452 (N.D. Ill. 1988).

82. Goluszek v. Smith, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988) (citing Rabidue v. Osceola Ref. Co., 805 F.2d 611, 623 (6th Cir. 1986) (Keith, J., dissenting), *cert. denied*, 481 U.S. 1041 (1987)).

83. *Id.* at 1453.

84. *Id.*

85. *Id.* at 1456. However, this finding was based on an academic commentary, not on the legislative record. *Id.* (citing Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1451-52 (1984)).

86. *Id.* at 1456 (citing Rabidue v. Osceola Ref. Co., 805 F.2d 611, 623 (6th Cir. 1986) (Keith, J., dissenting), *cert. denied*, 481 U.S. 1041 (1987)).

87. 28 F.3d 446 (5th Cir. 1994).

88. Garcia v. Elf Atochem N. Am., 28 F.3d 446 (5th Cir. 1994); *see also* Mayo v. Kiwest Corp., 898 F. Supp. 335, 337 (E.D. Va. 1995) (stating that the Fifth Circuit is the only circuit to directly address the issue as of August, 1995). In January 1996, the Fourth Circuit also ruled on this issue.

same-sex harassment is not actionable.[89] In *Garcia*, a male employee alleged sexual harassment by a male plant foreman (but not the victim's supervisor) who on several occasions grabbed Garcia's crotch and made sexual motions from behind.[90] When Mr. Garcia reported the conduct, the foreman was reprimanded and warned that he would be terminated if the conduct continued.[91] Like *Goluszek*, *Garcia* was a hostile work environment case as there were no sexual demands made.[92]

In *Garcia*, the Fifth Circuit reasoned that the complainant failed to satisfy the prima facie element of employer liability.[93] The court supported its opinion by quoting a holding in an unpublished opinion[94] 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.'"[95]

The weight of authority of *Garcia*[96] has been disputed. Some courts find the comments on same-sex harassment as a holding,[97] while other authorities refer to these comments as dicta.[98] Regardless, many courts have relied heavily on both *Goluszek* and *Garcia* when ruling that same-sex harassment is not actionable.[99] For example, in January, 1996, the Fourth Circuit, in *McWilliams v. Fairfax County Board of Supervi-*

McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1195 (4th Cir. 1996) (holding that same-sex hostile environment cases where both the harassers and victim are heterosexual fail to state a claim for sexual harassment).

89. *Garcia*, 28 F.3d at 448.

90. *Id.*

91. *Id.*

92. *Id.* at 448-49 (describing the work environment of Garcia).

93. *Id.* at 451 (affirming the judgment of the district court and stating the employer can only be held liable if he knew or should have known of the harassment and failed to take prompt remedial action reasonably calculated to end the harassment).

94. *Garcia*, 28 F.3d at 451 (citing Giddens v. Shell Oil Co., No. 92-8533 (5th Cir. Dec. 6, 1993) (unpublished)).

95. *Id.* (quoting Giddens v. Shell Oil Co., No. 92-8533 (5th Cir. Dec. 6, 1993) (unpublished)).

96. *Id.* at 446.

97. Benekritis v. Johnson, 882 F. Supp. 521, 525 (D.S.C. 1995) (stating that *Garcia* found harassment by male supervisor against male subordinate was not cognizable under Title VII); EEOC v. Walden Book Co., 885 F. Supp. 1100, 1101 (M.D. Tenn. 1995) (stating that *Garcia* adopted the holding that same-sex harassment is not cognizable under Title VII); Oncale v. Sundowner Offshore Serv., Inc., 67 Fair Empl. Prac. Cases (BNA) 769 No.Civ.A. 94-1483 (E.D. La. Mar. 24, 1995) *aff'd*, No. 95-30510, 1996 WL 223627 (5th Cir. May 20, 1996) (disagreeing with the plaintiff's argument that *Garcia's* holding was merely dicta); Hopkins v. Baltimore Gas & Elec., 871 F. Supp. 822, 833 (D. Md. 1994) *aff'd on other grounds*, 77 F.3d 745 (4th Cir. 1996) (finding that *Garcia* flatly held that sexual harassment by the same gender does not state a claim under Title VII).

98. Pritchett v. Sizeler Real Estate Management Co., 63 U.S.L.W. 2772 (E.D. La. Apr. 25, 1995) (Civ.A.No. 93-2351) (concluding that *Garcia* with minimal explanation, has stated in dicta that Title VII is inapplicable to instances of same-sex harassment); *see also* Raskin, *supra* note 29, at 153 (referring to *Garcia* opinion as dicta).

99. *See, e.g., Hopkins*, 871 F. Supp. at 833-34 (stating *Garcia* is the only reported appellate opinion to directly address same-sex harassment and referring to *Goluszek* as the basis of the *Garcia* decision); *see also* Myers v. City of El Paso, 874 F. Supp. 1546, 1548 (W.D. Tex. 1995) (stating that the Fifth Circuit decision in *Garcia* clearly shows that Title VII does not allow a claim for same gender discrimination) (citations omitted).

sors,[100] relied on *Garcia* to hold in a same-sex hostile work environment case that no claim existed under title VII.[101]

III. CASE ANALYSIS

The sole issue determined in *Walden Book* was whether same-sex harassment is actionable under Title VII.[102] The issue came before the court prior to trial on a motion for judgment on the pleadings.[103] This was a case of first impression for federal district courts in the Sixth Circuit.[104]

The *Walden* court produced several reasons to sustain a claim under Title VII.[105] Of significance was the court's determination that the legal basis for same-sex discrimination is consistent with male on female sexual discrimination.[106] In determining that the concept of sexual harassment is not limited to opposite sex discrimination, the court cited the Supreme Court's analysis in *Meritor*, stating "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminates' on the basis of sex."[107]

Also relevant in the *Walden* court's analysis was the court's recognition of cases of reverse discrimination.[108] Since reverse discrimination has been recognized, the court reasoned that discrimination against the majority is actionable; and as such, it would be unfair not to recognize a same-sex claim.[109]

Finally, in finding that a same-sex claim is actionable, the court in *Walden* relied on *McDonnell Douglas Corp. v. Green*,[110] in which the Supreme Court implied that Title VII applies in varying discrimination contexts by instructing courts to modify the standard for establishing a prima facie case to accommodate differing discrimination contexts.[111]

Although the court in *Walden* recognized that some courts had found that same-sex harassment was not actionable under Title VII, it found the reasoning of these courts to be illogical.[112] The *Walden* court

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100. 72 F.3d 1191 (4th Cir. 1996).
101. McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1196 (4th Cir. 1996).
102. EEOC v. Walden Book Co., 885 F.Supp 1100, 1101 (M.D. Tenn. 1995).
103. *Id.* at 1100.
104. *Id.* at 1101.
105. *Id.*
106. *Id.* (citing Wright v. Methodist Youth Serv., Inc., 511 F. Supp. 307, 310 (N.D. Ill. 1981)).
107. *Walden*, 885 F. Supp at 1102 (citing Meritor Sav. Bank v. Vinson, 477 U.S. 57, 63 (1986)).
108. *Id.* at 1103 (citations omitted).
109. *Id.* (citations omitted).
110. 411 U.S. 792 (1973).
111. *Walden*, 885 F. Supp. at 1103 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.13 (1973)).
112. *Id.* at 1102-03. One reason another court had for not recognizing the claim was that Title VII was meant to prohibit an atmosphere of oppression by a dominant gender, therefore a male in a

stated the plain meaning of Title VII's phrase prohibiting discrimination based on sex "implies that it is unlawful to discriminate against women because they are women and against men because they are men."[113] Accordingly, the court reasoned that when a homosexual supervisor makes offensive sexual advances to a subordinate of the same sex, and not to employees of the opposite sex, it is certainly a situation where, "but for" the subordinate's sex, he or she would not have been subjected to that treatment.[114] Thus the court in *Walden* found that same-sex sexual harassment was actionable under Title VII.[115]

IV. IMPACT

Through 1995 district courts continue to be split on the issue of whether same-sex sexual harassment is a violation of Title VII.[116] The trend emerging appears to be that many courts are recognizing quid pro quo claims, but failing to recognize hostile environment claims.[117] The rationale for this split appears to be based on two policies. The recognition of quid pro quo stems from the idea that it would be absurd to exempt homosexuals from the laws which would punish heterosexuals for the same conduct.[118]

Alternatively, courts are finding it difficult to recognize hostile environment claims arguing that it is not the type of conduct Congress intended to sanction when enacting Title VII.[119] Courts in this vein, adopt the *Goluszek* rationale, finding that Congress was only concerned with discrimination stemming from an imbalance and abuse of power used against a discrete and vulnerable group.[120] Consequently, these courts deduce that it is necessary for a male to prove an anti-male

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male dominated workplace would not be protected. *Id.* (citing Goluszek v. Smith, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988)).

113. *Id.* at 1103.

114. *Id.* at 1104.

115. *Id.*

116. Elizabeth Pryor Johnson & Michael A. Puchades, *Same Gender Sexual Harassment: But is it Discrimination Based on Sex?*, 69 FLA. B.J. 79, 80-81 (1995).

117. *See, e.g.*, Prescott v. Independent Life Ins. Co., 878 F. Supp. 1545, 1545 (M.D. Ala. 1995) (recognizing a quid pro quo same-sex harassment claim). *Contra* Benekritis v. Johnson, 882 F. Supp. 521, 525-26 (D.S.C. 1995) (failing to recognize a same-sex hostile environment claim).

118. Pritchett v. Sizeler Real Estate Management Co., 63 U.S.L.W. 2772 (E.D. La. Apr. 25, 1995) (Civ.A.No. 93-2351).

119. *See* Mayo v. Kiwest Corp., 898 F. Supp. 335, 337-38 (E.D. Va. 1995) (holding that same sex discrimination is not actionable under Title VII); Ashworth v. Roundup Co., 897 F. Supp. 489, 491-94 (W.D. Wash. 1995) (holding that same sex harassment by supervisor was not actionable under Title VII); *Benekritis*, 882 F. Supp. at 525-26 (failing to recognize a same gender hostile environment claim under Title VII); Myers v. El Paso, 874 F. Supp. 1546, 1548 (W.D. Tx. 1995) (holding that female employee failed to establish Title VII claim because employer was of the same gender).

120. Goluszek v. Smith, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988) (citing Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1451-52 (1984)).

working environment.[121] Of interest, is that under this analysis virtually no one in an environment dominated by a persons of the same-sex could ever prove a hostile work environment claim.[122]

The *Walden* decision follows the recent trend, complimenting and expanding the reasons for recognizing quid pro quo sexual harassment. Yet, unlike other holdings in same-sex litigation, the *Walden* court's opinion has special significance. Rather than relying on decisions based on unpublished opinions as the Fifth Circuit did in *Garcia,*[123] or twisting a dissenting circuit court decision[124] as the court in *Goluszek* did,[125] the decision in *Walden* is based on principles of law defining sexual harassment which have been recognized by the Supreme Court.[126] Moreover, the court's analogy of comparing same-sex harassment to reverse discrimination actions contributes common sense and logic to ordinarily "legal-based" opinions, demonstrating that it would be unjustifiable to allow reverse discrimination cases but not same-sex sexual harassment cases under Title VII.[127]

Although *Walden* is a lower court opinion, only five circuit courts have dealt with the issue, and these courts are split.[128] Consequently, the numerous district court opinions on the topic play a strong role in determining the future of same-sex claims and *Walden* thus has the potential to have a significant impact on future decisions.

Walden has already had an impact on several lower courts. One court reconsidered its view that same-sex harassment is not actionable, stating that there have been material changes or refinements in the law,[129]

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121. *Id.* (citing Rabidue v. Osceola Ref. Co., 805 F.2d 611, 623 (6th Cir. 1986), (Keith, J. dissenting), *cert. denied*, 481 U.S. 1041 (1987)).

122. *Id.*

123. *Id.* (citing Giddens v. Shell Oil Co., No. 92-8533 (5th Cir. Dec. 6, 1993) (unpublished)).

124. Rabidue v. Osceola Ref. Co., 805 F.2d 611, 623-28 (6th Cir. 1986) (Keith, dissenting opinion), *cert. denied*, 481 U.S. 1041 (1987)).

125. Goluszek v. Smith, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988).

126. EEOC v. Walden Book Co., 885 F. Supp 1100, 1100-01, 1103 (M.D. Tenn. 1995) (following Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370-71 (1993)); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 63 (1986); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.13 (1973)).

127. *Id.* at 1103.

128. *See* Baskerville v. Culligan Int'l. Co., 50 F.3d 428, 430 (7th Cir. 1995) (stating in dicta that sexual harassment by persons of the same sex may be actionable in appropriate cases); Bundy v. Jackson, 641 F.2d 934, 942-43 n.7 (D.C. Cir. 1981) (stating in dicta that sexual harassment may be gender discrimination when a homosexual supervisor harasses an employee of the same gender). *But see* McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1195-96 (4th Cir. 1996) (refusing to recognize a same-sex hostile environment claim where both alleged harassers and victim were heterosexual); Garcia v. Elf Atochem N. Am., 28 F.3d 446, 451-52 (5th Cir. 1994) (finding same-sex sexual harassment in a hostile environment case not actionable); Morgan v. Massachusetts Gen. Hosp., 901 F.2d 186, 192-94 (1st Cir. 1990) (reviewing facts in a same-sex hostile environment claim which failed to rise to the level of harassment to be actionable under Title VII).

129. *See* Vandeventer v. Wabash Nat'l Corp., 887 F. Supp. 1178, 1179-81 (N.D. Ind. 1995) (suggesting that previously, in Vandeventer v. Wabash Nat'l Corp., 867 F. Supp. 790, 796 (N.D. Ind. 1994), the judge's earlier ruling that same-sex harassment is not actionable under Title VII may have

and others have chosen to cite *Walden* as the rationale for recognizing a claim.[130] These decisions are important as they give courts new ideas and alternative views to circuit decisions.[131]

Therefore, the *Walden* court's decision to find same-sex sexual harassment actionable under Title VII is significant for two reasons. Alone, it offers a new way of analyzing same-sex cases, and as one of many district court opinions, the decision acts as another brick in the growing wall of cases which recognize that same-sex harassment is a violation of an employee's civil rights.

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been overbroad).

130. Raney v. District of Columbia, 892 F. Supp. 283, 287 (D.D.C. 1995); Ecklund v. Fuisz Technology, Ltd., 905 F. Supp. 335, 338 (E.D. Va. 1995); Sardinia v. Dellwood Foods, Inc., 64 U.S.L.W. 2329 (S.D.N.Y. Nov. 1, 1995) (No. 94 Civ. 5458); Williams v. District of Columbia, 916 F. Supp. 1, 9 (D.D.C. 1996).

131. Pritchett v. Sizeler Real Estate Management Co., 63 U.S.L.W. 2772 (E.D. La. Apr. 25, 1995) (Civ.A.No. 93-2351) (refusing to follow the *Garcia* Circuit Court decision, and has held that same-sex harassment should be actionable).