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SAME-SEX SEXUAL HARASSMENT— IS IT ACTIONABLE UNDER THE CIVIL RIGHTS ACT?

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ABSTRACT

The federal courts are presently divided concerning the issue of whether or not same-sex sexual harassment is actionable under Title VII. Those courts considering such harassment not to be actionable have maintained that sexual harassment was intended by the Civil Rights Act to apply only in situations involving a dominant gender [males] against a vulnerable gender [females], i.e., gender-based discrimination. On the other hand, the courts favoring Title VII coverage have reached their conclusion based upon the fact that the U.S. Supreme Court in *Meritor* did not limit sexual harassment to those situations occurring between males and females, that the EEOC's *Compliance Manual* favors such coverage, and that recent court decisions have repudiated court precedents denying coverage. It is the purpose of this article to review the respective courts' positions and to argue that same-sex sexual harassment should be actionable under the Civil Rights Act.

The 1964 Civil Rights Act makes it an unlawful employment practice for an employer:

> . . . to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's . . sex . . . [1, § 2000e-2(a)(1)].

It has, of course, been well established by the federal courts that sexual harassment is an aspect of sex discrimination [2]. These courts have also determined that

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employer/employee discrimination against homosexuals is not protected by the Civil Rights Act [3]. However, what is not clear is whether or not sexual harassment committed by a person toward an individual of the same gender is actionable. The courts have been divided regarding this issue. Thus, it is the purpose of this article to review competing legal theories dealing with same-sex sexual harassment and to argue such harassment should be covered by the Civil Rights Act.

COURT CASES FAVORING COVERAGE

The earliest case dealing with same-gender sexual harassment was *Wright v. Methodist Youth Services, Inc.* [4]. Methodist Youth Services was a not-for-profit corporation providing social services to minors. Wright, a black male, was employed there from 1976 to 1979. When Wright resisted the homosexual advances of his male supervisor, Hillerman, Wright was terminated. The district court, relying on dicta in *Barnes v. Costle* [5], stated Wright faced a situation, "but for" his sex, he would not have had to endure [4, at 310, citing n. 55 in [5]]. Sex discrimination occurs, the court maintained, whenever "sex is for no legitimate reason, a substantial factor in the discrimination" [4, at 310]. While the court could find no direct precedent for its decision, it concluded that Title VII should be interpreted to encompass same-sex sexual harassment [4, at 310].

Two years after *Wright,* an Alabama federal district court was confronted with a similar fact situation [6]. Joyner was a shop mechanic. While dining at a local drive-in restaurant, Joyner was invited into the terminal manager's automobile. While inside the auto, the terminal manager allegedly placed his hands on Joyner's genitals and requested that Joyner engage in homosexual activities. Joyner complained to the company's chairman of the board. After being confronted with the accusation by the chairman, the terminal manager denied he had engaged in any of the actions attributed to him by Joyner. The terminal manager then told Joyner he would "get him" (Joyner) fired if he could. Thereafter, Joyner was transferred to the position of a pickup-and-delivery driver. He was later laid off, and then terminated after not being recalled to work within a contractually specified time period. This occurred despite the fact that he had made requests to return to work and that a new employee had been hired to fill his former position [6].

The district court utilized quid pro quo harassment analysis to reach a conclusion that Joyner had been a victim of sex discrimination. Specifically, the court noted the plaintiff was a member of a protected class, was subjected to unwelcomed sexual harassment to which members of the opposite sex had not been subjected, that Joyner had not solicited or invited the homosexual overtures, that he made requests to return to work, and that a new employee had been hired to fill the position he formerly had held. It asserted ". . . this Court determines that

unwelcomed homosexual harassment also states a violation of Title VII" [6, at 541].

In *Polly v. Houston Lighting & Power Co.* [7], the district court held same-gender sexual harassment *did* state a cause of action under the Civil Rights Act. It reached this conclusion based on court precedent established by *Joyner* [6, cited at n. 9 [7]] and *Wright* [4, cited at n. 4 [7]], as well as from certain provisions contained in the Equal Employment Opportunity Commission's (EEOC) *Compliance Manual.* Section 615.2(b)(1) of that *Manual* provides that: "a man as well as a woman may be the victim of sexual harassment" [8], while Section 615.2(b)(3) states:

> The victim does not have to be of the opposite sex from the harasser. Since sexual harassment is a form of sex discrimination, the crucial inquiry is whether the harasser treats a member or members of one sex differently from members of the other sex. The victim and the harasser may be of the same sex where, for instance, the sexual harassment is based on the victim's sex . . . and the harasser does not treat employees of the opposite sex the same way.

While the court in *Polly* did not find that the plaintiff had proven that sexual harassment had taken place, it did conclude "that Title VII was intended to apply to claims of harassment based on sex, without regard to the gender of the complainant or the harassing party" [9].

A recent case decided by a district court in Georgia [10] denied a motion for summary judgment to the defendant corporation. A white female, Robin McCoy, claimed she had been the victim of racial discrimination as well as same-sex sexual harassment. A black female coworker on one occasion rubbed her breasts against McCoy's chest and on another occasion rubbed McCoy between her legs and forced her tongue into the plaintiff's mouth. McCoy complained to her supervisor regarding both of these incidents. The district court relied on the U.S. Supreme Court's *dicta* in *Meritor Savings Bank v. Vinson* [2, cited at n. 2 [10]], noting sexual harassment occurs when sexual advances are unwelcomed and create a hostile or offensive working environment. It also pointed out that nothing in the *Meritor* decision suggested that Title VII is limited to heterosexual harassment. The district court further insisted McCoy, in order to establish a prima facie case of sexual harassment, had only to establish she was a member of a protected group, she was subject to unwelcomed sexual harassment, the harassment affected a "term, condition, or privilege," of employment. With respect to the third requirement above, i.e., the sexual harassment was based on sex, the court observed:

> Indeed, under *Henson* [8, cited at n. 14 [10]], sexual harassment of any kind is in fact 'based upon sex' and is considered sex discrimination, except where the harasser is bisexual and subjects men and women to the same treatment.

In sum, the federal district courts have utilized quid pro quo analysis, prior court precedent, and the EEOC's *Compliance Manual* to determine that same-sex sexual harassment is actionable under Title VII.

COURT CASES FINDING SAME-SEX SEXUAL HARASSMENT IS NOT ACTIONABLE

In 1988, a federal district court determined sexual harassment is not actionable when it occurs between members of the same sex [11]. Goluszek, an unmarried male electronic maintenance mechanic, was employed by the H. P. Smith Co., a division of the James River Corporation. He was also a member of the Teamsters, Local 714. Male coworkers asked the plaintiff why he had no wife or girlfriend. They also told him he should get married. After complaining to his supervisor regarding the teasing and receiving no support, Goluszek filed a grievance. Subsequently, his coworkers and supervisor accused the plaintiff of being gay and even poked him in the buttocks with a stick. After he was fired for poor work performance [12], Goluszek filed various charges under Title VII, including a claim of sexual harassment. Nevertheless, the court dismissed his claim, based in part on its interpretation of 42 U.S.C. Sec. 2000e-2(a)(1). It noted:

> The 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 [11, at 1456].

The court appeared to be arguing that sexual harassment is not sex discrimination unless it is perpetrated by males ["the powerful"] against females ["the vulnerable"] [13]. It further stated:

> Title VII does not make all forms of harassment actionable, nor does it even make all forms of verbal harassment with sexual overtones actionable [11, at 1456].

The federal district court for the northern district of Indiana used *Goluszek* as a precedent in making a finding that same-gender sexual harassment is not covered by the Civil Rights Act [14]. In *Vandeventer,* a male plaintiff asserted he had been harassed by another man, a crew or team leader named Tremain Gall. The latter teased the plaintiff that he was a homosexual. Gall asked the plaintiff to go with him to a gay bar, suggested he [plaintiff] should "drop down," that he was a "d_ _ _ sucker," as well as asking whether the plaintiff could perform fellatio without his false teeth. In dismissing the charges, the court stated:

> This court agrees with the *Goluszek* analysis that Title VII is aimed at a gender-based atmosphere; an atmosphere of oppression by a "dominant" gender [cite omitted] [14, at 796].

The Fifth Circuit also had an opportunity to review same-sex sexual harassment in *Garcia v. Elf Atochem North America* [15]. Freddy Garcia, a union member, complained to his steward that the plant foreman [a male] had, on several occasions, approached the plaintiff from behind and grabbed his crotch area. The plant manager reprimanded the foreman and no further incidents occurred. Nevertheless, Garcia filed sexual harassment charges with the EEOC in 1991. The Fifth Circuit overturned the charges, however, noting Title VII addresses only "gender discrimination" [16].

A federal district court in Texas [in the Fifth Circuit], *Myers v. City of El Paso* [17], recently granted summary judgment to the defendants in a sexual harassment case involving two females. Veronica Myers claimed her supervisor, Reyna Sanchez, made comments regarding the size of her breasts, buttocks, hair, and clothing, as well as touching her inappropriately. Adopting the Fifth Circuit's reasoning in *Garcia* and the district court's conclusion in *Giddens,* the court maintained same-gender sexual harassment is not actionable.

Finally, the court in *Hopkins v. Baltimore Gas & Electric Co.* [18], following the decisions in *Vandeventer* and *Garcia,* stated:

> Where, as here, the alleged harasser and the alleged victim are both of the same gender, the language of the statute would be strained beyond its manifest intent were the Court to hold that under these facts there has been discrimination "because of . . . sex" [19].

Thus, at least three district courts and the Fifth Circuit, have maintained that same-sex sexual harassment is not actionable under Title VII, based on their interpretation of the language of 42 U.S.C. Sec. 2000e-2(a)(1), namely that sex discrimination was intended to deal with disparate treatment between men and women, and not between individuals of the same gender.

BISEXUAL AND TRANSSEXUAL HARASSMENT CLAIMS

A few courts have dealt with sexual harassment by bisexual individuals or discrimination against transsexual persons. A bisexual harasser is one who "makes uninvited sexual overtures to both men and women employees" [20]. In one recent case dealing with this type of situation [20], a resident housing manager, Dale Chiapuzio, and his wife, Carla, lived on the premises of Wyoming Technical Institute, a trade school owned by BLT Operating Corporation. Dale's supervisor, Eddie Bell, subjected Dale and Carla to an incessant series of sexually abusive remarks. Bell's supervisor endorsed the behavior. The court reasoned Bell had harassed the plaintiffs because of their gender.

> Where a harasser violates both men and women, it is not unthinkable to argue that each individual who is harassed is being treated badly because of gender [20, at 1337].

While *Chiapuzio* stands for the proposition that sexual harassment by a bisexual coworker or supervisor is actionable under Title VII, an earlier case [8] noted such harassment would not constitute sex discrimination "because men and women are accorded like treatment" [8, at 904]. However, the Federal Circuit [D.C. Circuit] rejected such a notion, stating:

> Only by a *reductio ad absurdum* could we imagine a case of harassment that is not sex discrimination—where a bisexual supervisor harasses men and women alike [21].

Transsexuals are not protected from discrimination pursuant to Title VII [22]. Karen Ulane, a transsexual, brought suit alleging her employer discharged her as a pilot because she ceased being a male and became a female. A transsexual was defined by the court as:

> a physiologically normal person who experiences discomfort or discontent regarding nature's choice of his or her sex and prefers to be the other sex. The condition is generally accompanied by a desire to utilize hormonal, surgical and civil procedures to allow the individual to live in his or her preferred sex role [22, at 1083 (paraphrased in part)].

The Seventh Circuit, in interpreting the meaning of sex discrimination as found in Section 42 U.S.C. Sec. 2000e-2(a)(1), concluded that such discrimination exists only when it is "against women because they are women and against men because they are men" [22, at 1085]. It further noted:

> Had Congress intended more, surely the legislative history would have at least mentioned its intended broad coverage of homosexuals, transvestites, or transsexuals, and would no doubt have sparked an interesting debate. There is not the slightest suggestion in the legislative record to support an all-encompassing interpretation [22, at 1085].

DISCUSSION

At the present time, considerable division exists among the federal courts concerning whether same-sex sexual harassment states a cause of action under Title VII. Only one circuit court, the Fifth, has addressed the issue and it found in the negative, relying on earlier (district) court interpretations of actionable sex discrimination. These courts have held that sex discrimination was intended by Congress to apply only in situations when a more powerful group (males) imposes

its will on a less powerful group (females). Some of these courts relied, in part, on the dicta in *Henson* [8]. However, while the court in *Henson* did not specifically endorse same-sex sexual harassment, it did acknowledge that such harassment could apply to males as well as females [8, at 902]. If either males or females can harass members of the opposite sex, is it a stretch of logic to also include same-gender harassment as a part of sex discrimination?

When Congress included sex as one of the prohibited categories of discrimination in the Civil Rights Act, it was at the suggestion of a congressman who hoped its inclusion would cause that act to be defeated. There was little or no debate in Congress regarding the meaning of sex discrimination. Thus, if the various federal courts, not to mention the U.S. Supreme Court, could derive sexual harassment as sex discrimination, in the absence of clear congressional intent, it is not illogical to consider same-gender sexual harassment as sex discrimination.

Moreover, while there was limited congressional debate regarding the meaning of sex discrimination, Congress did specifically establish the EEOC as the administrative agency charged with the application of the provisions of the Civil Rights Act. Its interpretations of Title VII are to be accorded great weight by the courts, although they are not necessarily bound by such interpretations. The EEOC's *Compliance Manual* clearly includes same-gender sexual harassment as actionable under Title VII. If Congress was not a source for interpretive guidelines regarding sex discrimination, the courts should look to the EEOC, which has unambiguously endorsed as actionable the form of sexual harassment in question.

In addition, the courts' findings that same-gender sexual harassment is not actionable was often based on the precedent set in *Goluszek* [11]. Nevertheless, two earlier courts in *Wright* [14] and *Joyner* [6] recognized such harassment.

It may very well be as Ellen Paul argued:

> The law is supposed to look to acts, whether criminal or tortious, to determine culpability and not to the individual characteristics of the perpetrators: that is precisely what is meant by the rule of law [cite omitted] [23].

Thus, whether the harasser is a male or female, and whether or not the sexual harassment is committed against a member of the same or opposite sex, the courts should look to the nature of the offense and who is responsible for it. Paul, also claimed the Civil Rights Law is not an appropriate vehicle for dealing with sexual harassment cases and suggested a new tort law be created to treat such cases [23].

In the meantime, there may continue to be variation among the courts concerning this issue. Ultimately, the U.S. Supreme Court will be obliged to resolve the inconsistencies in approach. It is hoped they will decide wisely.

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ENDNOTES

1. 42 U.S.C. Sec. 20003, *et seq.* ("Title VII").
2. See for example, *Meritor Savings Bank, FSB v. Vinson,* 106 S. Ct. 2399 (1986) and *Harris v. Forklift Systems,* 114 S. Ct. 367 (1993).
3. See for example, *DeSantis v. Pacific Tel. and Tel. Co.,* 608 F.2d 327 (9th Cir. 1979); *Williamson v. A.G. Edwards and Sons,* 876 F.2d 69 (8th Cir. 1989, *cert.* denied, 110 S. Ct. 1158 (1990); and *Carreno v. Electrical Workers (IBEW), Local 226,* 55 EPD Par. 40,412 (D.C. Kan. 1990).
4. *Wright v. Methodist Youth Services, Inc.,* 511 F. Supp. 307 (N.D. Ill. 1981).
5. *Barnes v. Costle,* 561 F.2d 983 (D.C. Cir. 1977).
6. *Joyner v. AAA Cooper Transportation,* 597 F. Supp. 537 (M.D. Ala. 1983).
7. *Polly v. Houston Lighting & Power Co.,* 825 F. Supp. 135 (S.D. Tex. 1993).
8. See also *Henson v. City of Dundee,* 682 F.2d 897, 902 (11th Cir. 1982) for a similar conclusion.
9. [7] at 137. In *Hannah v. Philadelphia Coca-Cola Bottling Co.,* 61 EPD Par. 42,306 (D.C. Pa. 1991), the court failed to consider whether same-sex sexual harassment was actionable, after determining that the charges were not proven.
10. *McCoy v. Johnson Controls World Services, Inc.,* No. 294-155 (S.D. Ga. 1995).
11. *Goluszek v. Smith,* 697 F. Supp. 1452 (N.D. Ill. 1988).
12. Goluszek had previously received warnings for this same offense.
13. This conclusion runs contrary to that of the circuit courts in *Barnes v. Costle* [5, at n. 5], and *Bundy v. Jackson,* 641 F.2d 934, 942 (D.C. Cir. 1981) at n. 7.
14. *Vandeventer v. Wabash National Corporation,* 867 F. Supp. 790, 796 (N.D. Ind. 1994).
15. *Garcia v. Elf Atochem North America,* 28 F.3rd 446 (5th Cir. 1994).
16. The court relied on *Giddens v. Shell Oil Co.,* 92-8533 (5th Cir. 1993) [unpublished] and *Goluszek* [11] in reaching its decision.
17. *Myers v. City of El Paso,* 1995 U.S. Dist., LEXIS 1337.
18. *Hopkins v. Baltimore Gas & Electric Co.,* 1994 U.S. Dist. LEXIS 18586 (D. Md. 1994).
19. A very recent decision, *Oncale v. Sundowner Offshore Service, Inc.,* 1995 WL 133349 (E.D. La.), also relied on *Garcia* and *Giddens* to grant summary judgment to the defendant employer in a same-sex sexual harassment case. Another case, *Roe v. K-Mart Corp.,* 2-93-2372-18AJ (DC SC 1995), was settled by the parties without a decision.
20. *Chiapuzio v. BLT Operating Corp.,* 826 F. Supp. 1334, 1336 (D. Wyo. 1993).

21. *Bundy v. Jackson* [13, at 942]. The Seventh Circuit recently dismissed an argument as "irrelevant" when the defendants claimed men could be "equally offended" by the treatment of the plaintiff as would females. *Hutchison v. Amateur Electronic Supply, Inc.*, 42 F.3d 1037, 1043 (7th Cir. 1994).
22. *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984). *Cert.* denied, 471 U.S. 1017.
23. Ellen F. Paul., "Sexual Harassment as Sex Discrimination: A Defective Paradigm," 8 *Yale Law & Policy Review* 333, 351 (1990).

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