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IS SEXUAL HARASSMENT SEX DISCRIMINATION? STILL AN OPEN QUESTION

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I. INTRODUCTION

Sexual harassment in the workplace is a pervasive problem in American society. Increasing recognition of the issue over the past number of years has meant that the courts have had to place this problem in an appropriate legal framework. Hand-in-hand with this increasing recognition of the problem, there is an evolving school of thought which considers sexual harassment to be a form of discrimination against women.¹ Sexual harassment litigation,

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therefore, has proceeded under the umbrella of discrimination based on sex, which is prohibited by Title VII of the Civil Rights Act of 1964.2 The past ten to twenty years have seen considerable refinement of the legal framework of the problem in terms of definitions of sexual harassment, standards for measurement of what constitutes harassing behavior, and clarification on the issue of employer liability.

While this scenario may appear straightforward, the question as to whether sexual harassment constitutes discrimination on the basis of sex for the purposes of Title VII is complicated. The sexual nature of the behavior has caused some difficulties, leading to a lack of clarity on the part of both the Equal Employment Opportunity Commission (EEOC) and the courts as to whether sexual harassment should automatically constitute sex discrimination, or whether the sex discrimination issue has to be assessed on a case-by-case basis. Furthermore, when assessing individual cases, the courts have had some difficulty, particularly when dealing with same-sex harassment, in deciding when and how sexually harassing behavior fits within the meaning of “discrimination because of sex” for Title VII purposes. These difficulties, common to both the EEOC and to the courts, stem in large part from confusion over the meaning of the word “sex,” from a poor understanding of the motivation underlying sexually harassing behavior which is, unfortunately, a necessary part of the courts’ determinations, and from a lack of easy “fit” between the harasser’s behavior and Title VII law. These difficulties have not been squarely addressed by either the courts or the EEOC.

In an attempt to address the difficulties involved in the consideration of sexual harassment as sex discrimination, I will briefly address some theories about the causation of sexual harassment and examine the EEOC Guidelines on Discrimination Because of Sex, paying particular attention to the section on sexual harassment, focusing on the inconsistencies and lack of clarity within the guidelines. I will then analyze the problems sexual harassment claims have met under Title VII, beginning with male-on-female harassment and moving through homosexual male-on-male harassment to heterosexual male-on-male harassment. I conclude that, while the definition of what constitutes sexually harassing behavior has undergone considerable refinement, the issue as to whether and under what circumstances sexual harassment constitutes sex discrimination has not been clearly answered; philosophically or legally, either by the EEOC or by the courts. In the

absence of a clear answer to this question, the courts have been forced to proceed on a case-by-case basis, probing for motives in order to fit the behavior into a “sex discrimination” model, and using Title VII to serve a purpose for which it is ill-suited.

While legal changes could be made to clarify the issue within the framework of Title VII, I suggest that viewing sexual harassment as sex discrimination is philosophically incorrect, and therefore would not advocate legal changes within the framework of Title VII. Rather, a return to viewing sexual harassment as tortious behavior would be more appropriate. Tort law is a more philosophically apt framework within which to place sexual harassment: conceptualizing sexual harassment as non-consensual personal invasion eliminates the confusion between sexual harassment and sex discrimination, eliminates the difficulties currently encountered in cases of same-sex harassment, and places the blame on the shoulders of the perpetrator. Furthermore, a wider judicial interpretation of tort law, in particular a more relaxed interpretation of what constitutes outrageous conduct and emotional distress would open the way for successful sexual harassment claims under tort law.

II. SOCIAL-SCIENTIFIC APPROACHES TO SEXUAL HARASSMENT

The issue of sexual harassment has in recent years reached the forefront of public attention. A number of social-scientific theories has been put forward in an attempt to explain the causation of sexual harassment in the workplace. Basically, sexual harassment consists of “a wide range of uninvited and unwanted sexually directed behavior of one person toward another in the workplace.” The behavior is widespread and is, in the majority of cases, directed towards women. However, it is not unique to women. In one study of federal employees, an astounding forty-two percent of women and fifteen percent of men reported having been sexually harassed

within the previous twenty-four months. Models proposed to explain the phenomenon include the "natural-biological" model, which proposes that sexual expression at work is a natural expression of attraction between people; the "organizational model" which suggests that hierarchical structures such as those applying in the workplace allow people to use their authority to coerce others into sexual relations or sexual interactions; the "socio-cultural" model positing that the issue "reflects the larger society's differential distribution of power and status between the sexes" with sexual harassment maintaining domination of men over women; and the "sex-role spillover" model which suggests that the carryover of gender-based roles, which are relevant in society as a whole, into the workplace, where they are irrelevant, causes people to behave in stereotypical ways damaging to women.

Catharine MacKinnon became the first person to highlight the issue of sexual harassment of working women and to specifically frame the issue in a sex discrimination context. Her book *Sexual Harassment of Working Women: A Case of Sex Discrimination* provided the impetus to begin filing claims under Title VII. This is the context within which the issue continues to be legally framed. While these theories may aid somewhat in our understanding of the problem, a simplistic explanation for the behavior is not available, a situation which has caused some problems in litigation. Whatever the genesis of the problem, however, it has become apparent that the problem is pervasive, and that it has a marked impact on affected individuals and on organizations.

### III. USEFUL DEFINITIONS

As we proceed, it will become clear that the placement of sexual harassment in the area of sex discrimination law has engendered some confusion over the meaning of words relating to sex:

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6 See notes 1, 4, and 5 supra; see also BARBARA A. GUTEK, SEX AND THE WORKPLACE (San Francisco/London: Jossey-Bass Publishers 1985).
7 MEYER ET AL., SEXUAL HARASSMENT at 14.
8 GUTEK at 15-18.
9 See note 1 supra.
10 MEYER ET AL., SEXUAL HARASSMENT at 9 - 11.
The existence of differing meanings of the word "sex," in particular the male/female meaning and the sexual gratification/sexual activity meaning, has led to some degree of confusion in the minds of both the EEOC and the courts. This is evident in both the EEOC guidelines and in court rulings. Indeed, frequently the two meanings have been conflated and used interchangeably, with a resulting lack of clarity surrounding the relationship between sexually harassing behavior and sex discrimination.

In order to retain clarity as we proceed, it is useful to define some terms used by the courts and the EEOC. The dictionary affords the word "sex" four definitions:

1. either of the two divisions, male or female, into which persons...are divided, with reference to their reproductive functions;
2. the character of being male or female; all the attributes by which males and females are distinguished;
3. anything connected with sexual gratification or reproduction or the urge for these;
4. sexual intercourse.

The word "gender" is considered in the dictionary to be colloquially synonymous with "sex." The word "sexual" is defined as "of, characteristic of, or involving sex, the sexes, the organs of sex and their functions, or the instincts, drives, behavior etc. associated with sex." The word "discriminate" is given three definitions: "(1) to constitute a difference between, differentiate; (2) to recognize the difference between, distinguish; (3) to make distinctions in treatment, show partiality (in favor of) or prejudice (against)." It will be illustrated that in the EEOC guidelines and in many court rulings, these definitions, particularly the definitions of the word "sex," are used interchangeably; definitions (1) and (2) of "sex" are used interchangeably with definitions (3) and (4). This has resulted in legal confusion which has interfered with the clear passage of cases through the courts.

IV. EEOC Definitions of and Confusion about Sexual Harassment

In the absence of a clear understanding of the motivation underlying sexually harassing behavior, but in the face of heightened awareness of the widespread and damaging nature of the problem, Congress and the courts have had to address this issue and place it in a legal context that will give victims redress and aid in elimination of the behavior. As stated above, the legal history of sexual harassment litigation revolves around Title VII of the Civil Rights Act of 1964 (hereinafter “the Act”) which prohibits discrimination on the basis of sex. The Act states that “it shall be unlawful practice for an employer...to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” Unfortunately, the unorthodox method by which the word “sex” came to be added to Title VII—it was suggested as an addition in a last-ditch attempt to scuttle the entire bill—means that discussion about its meaning was minimal. In the absence of legislative history, therefore, the meaning of discrimination based on sex has essentially been carved out de novo over the years through judicial construction.

Guidelines drawn up by the Equal Employment Opportunity Commission, while not legally binding, serve as aids to the courts in interpretation of the Act. The Guidelines on Discrimination Because of Sex, under the circumstances noted above, assume heightened importance, and serve, along with individual cases, to guide the courts in determining how the word “sex” should be interpreted and what constitutes discrimination based on sex. Unfortunately, however, the EEOC, while aiding in clarification of what type of behavior constitutes sexual harassment for legal purposes, has neither clarified whether sexual harassment automatically constitutes sex discrimination, nor has it clarified under what circumstances sexual harassment can be said to constitute discrimination on the basis of sex. This lack of clarity appears to be directly due to the confusion over the meaning of the word “sex,” and has resulted in judicial confusion around the issue in its passage through the courts.

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14 EEOC Guidelines on Discrimination because of Sex, §1604, 29 C.F.R. Ch. XIV, 1996 (hereafter Guidelines).
On reading the sections of the guidelines preceding those dealing with sexual harassment, for example those dealing with sex as a bona fide occupational qualification, discrimination against married women, and relationship of Title VII to the Equal Pay Act, the reader will reach the obvious conclusion that the word "sex" as used in the guidelines means maleness or femaleness; that the phrase "on the basis of sex" or "because of sex" means on the basis of, or because of, maleness or femaleness; and that "discrimination based on sex," alternatively phrased as "sex discrimination," means discrimination against a person or group based on maleness or femaleness. For example, Section 1604.4 states that "an employer's rule which forbids or restricts the employment of married women and which is not applicable to married men is a discrimination based on sex prohibited by Title VII of the Civil Rights Act." It is abundantly clear that "sex" in this case means maleness/femaleness. The use of the word sex in the guidelines does not infer the sex act, sexuality, or any other aspect of the word "sex" other than maleness or femaleness. And, in Section 1604.3 the guidelines state that "[i]t is an unlawful employment practice to classify a job as "male" or "female" or to maintain separate lines of progression or separate seniority lists based on sex." Again, the term "based on sex" clearly does not in any way refer to anything other than maleness or femaleness. This would appear, therefore, to be the definition appropriate to the use of the word "sex" in Title VII.

When we reach the section on sexual harassment, however, the Commission unfortunately brings a degree of confusion to the meaning of the word "sex." First, this section begins with the sentence "[h]arassment on the basis of sex is a violation of Title VII." The inclusion of this sentence at this point can be interpreted in two ways: it can be interpreted as simply representing a reiteration of the fact that discrimination by harassment on the basis of maleness or femaleness is a violation of Title VII, or it can be interpreted to mean that harassment on the basis of sex--now meant in the context of sexual activity, gratification etc.--is a violation of Title VII. Presumably the statute was intended to mean that if harassment that is sexual in content (as defined in the guidelines) is also discriminatory against a person based on his/her maleness or femaleness, then

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15 Guidelines, §§1604.2, 1604.4, and 1604.8.
16 Guidelines, §1604.4.
17 Guidelines, §1604.3.
18 Guidelines, §1604.11, section (a).
it is actionable under Title VII. The lack of clarity, however, unfortunately leaves us without a context in which to interpret the rest of the section.

The guidelines go on to state:

(a)...Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.\(^9\)

For the purposes of the EEOC, therefore, to which the courts accord due deference,\(^20\) this section states that behavior in the workplace of a sexual nature, that meets certain criteria in terms of its detrimental effect on the victim's employment status or workplace environment, is considered to be sexual harassment. Simply stated, workplace harassment that is sexual in content is sexual harassment. This section, therefore, addresses only the definition of sexual harassment, and leaves unanswered the question as to whether sexual harassment automatically constitutes discrimination because of sex. If it does not, then behavior that meets the definition laid out in section (a) above has to be further considered to ascertain if it represents discrimination based on sex.

Section (b) unfortunately sheds little light on this aspect of the problem. It states that “in determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred” (emphasis added).\(^21\) In other words, the behavior shall be placed in context, but only in order to determine whether it truly meets the criteria necessary to be labeled sexual harassment. How to determine whether the behavior constitutes discrimination based on sex has still not been addressed. In concluding section (b) the guidelines state that “the determination of the legality of a particular action will be

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19 Guidelines, § 1604.11, section (a).
20 See, e.g., Henson v. City of Dundee, 682 F. 2d 897 (11th Cir. 1982).
21 Guidelines, §1604.11, section (b).
made from the facts, on a case-by-case basis."22 Again, this may mean legality in terms of defining the behavior as sexual harassment, or legality in terms of determining whether the sexual harassment constitutes discrimination because of sex; it still offers no guidance on the sex discrimination aspect of sexual harassment. The EEOC, therefore, appears to offer no concrete guidelines on this important issue and, indeed, may serve to confuse attempts to answer the question as to whether sexual harassment automatically qualifies as sex discrimination.

While these dissections of the text may appear semantic, the apparent lack of clarity demonstrates a sort of "sexual schizophrenia," a confusion between, on the one hand, discrimination against a person because of her/his maleness or femaleness, and, on the other hand, discrimination solely by virtue of being harassed in a sexual fashion. The two things are not, however, the same. Being harassed in a sexual fashion may or may not automatically imply discrimination on the basis of maleness or femaleness. And, while the EEOC guidelines have aided in clarifying the definition of sexually harassing behavior, they have muddied the waters in terms of whether this behavior constitutes sex discrimination, and have issued no guidelines about how to make this determination. This confusion has been carried through the courts, with judges making ill-informed pronouncements about why they think harassers prey on their victims. Furthermore, the confusion has been highlighted in a particularly undignified fashion by the discussions in the courts revolving around same-sex harassment.

V. SEXUAL HARASSMENT IN THE COURTS

I will now turn to address how these issues have played out in the courts through an analysis of sexual harassment claims brought under Title VII. It is important to note that early cases were decided without the benefit of EEOC guidelines, which were not created until 1980, and without the benefit of legal precedent. I will examine relevant cases in three areas: male-on-female sexual harassment which is the most common form, and indeed the form easiest for the courts to recognize as discrimination based on sex; homosexual male-on-male sexual harassment, where discussions of motivation become pronounced in an attempt to bring the behavior under the

22 Guidelines, §1604.11, section (b).
umbrella of Title VII; and heterosexual male-on-male sexual harassment which is the most difficult for the courts to accept as representing discrimination based on sex.

A. Heterosexual Sexual Harassment

In early cases involving heterosexual male-on-female sexual harassment, judicial acceptance of sexual harassment as having employment consequences was a crucial step that allowed the cases to come under the purview of Title VII. Despite more than twenty years of case law under the purview of Title VII, however, the issue as to whether sexual harassment is sex discrimination, or whether each case needs to be assessed in order to demonstrate that discrimination on the basis of sex has occurred, has never been clearly answered. In addition, it has never been made clear whether the sexual nature of the behavior is relevant to the decision regarding sex discrimination. Again, the confusion stems from an inability to separate sexual harassment from sex discrimination, to separate "sex" (maleness or femaleness) from "sex" (sexual activity/gratification). It is clear, however, that the courts now have little difficulty in categorizing male-on-female sexual harassment as sex discrimination.

When examining the passage of male-on-female sexual harassment law through the judicial system, it is useful to include early claims that were rejected by the courts to increase our awareness of how the courts changed the direction of their thinking to incorporate sexually harassing behavior into Title VII law. A representative early case is that of *Come v. Bausch and Lomb, Inc.* Two female plaintiffs were subjected to repeated verbal and physical sexual advances from their supervisor, severe enough to force their resignation. Following the advances they brought a claim under Title VII. Two issues were addressed by the court in this case: the connection between behavior of individuals in the workplace and company/employer policy and whether discrimination on the basis of sex had occurred. The court, turning to previous Title VII cases dealing with employer discrimination on the basis of sex, noted that these cases always involved company policies that were discriminatory, as opposed to the case in question, which involved the behavior of an individual, albeit in the workplace. The judges therefore decided, based on the lack of evidence of a clear policy that discriminated against the plaintiff, that the

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behavior in question was not company-directed policy and therefore did not come under Title VII. Furthermore, even if the behavior was perpetrated by a person in a supervisory capacity, it did not relate to the nature of the employment which also placed it outside the purview of Title VII. Regarding the sex discrimination aspect of the case, the court noted that, since the conduct complained of could equally have been directed at males, it did not constitute discrimination on the basis of sex.

In Tomkins v. Public Service Electric & Gas Co., 1976, a female plaintiff alleged sexual harassment by a male supervisor, with subsequent retaliation by the company following complaints by the plaintiff. Unlike the previous case, Tomkins involved a single incident of sexual harassment in which a supervisor made a vigorous and unwanted sexual advance to the plaintiff. The advances included physical threats and physical restraint which she rebuffed. A complaint led to a transfer of the plaintiff to a lesser position within the company from which she was eventually fired. The judges in this case, using reasoning similar to that used in Corne, concluded that Title VII was "not intended to provide a federal tort remedy for...a physical attack...which just happened to occur in a corporate corridor rather than a back alley." In other words, the lack of company policy directing the behavior placed it outside the purview of Title VII. They also addressed the sex discrimination aspect of the case. While the judges noted the sex of the individual parties in this case, they concluded that the genders could easily have been reversed: that "no immutable principle of psychology compels this alignment of parties," the gender of each [person] being "incidental to the claim." Based on these opinions, the court ruled that "sexual harassment and sexually motivated assault do not constitute sex discrimination under Title VII."

Both cases appear to have the same reasoning for placing the behavior outside the purview of Title VII: the behavior complained of did not represent company policy, and could have been directed against members of either gender. In both decisions, the specific sexual nature of the harassment appears to have been irrelevant to the courts. It is worthy of note, however, that while the sexual nature of the behavior did not influence the decisions of the court in either case, the judges engaged in some peripheral musings which demonstrate a certain amount of confusion

25 Id. at 556.
26 Id. at 556.
regarding the difference between sexual behavior and sexually harassing behavior, and between sexual behavior and behavior that discriminates on the basis of sex. In Corne, the judges opined that the only way to avoid problems if these cases came under Title VII would be to have "employees who were asexual," displaying a poor understanding of the difference between acceptable personal sexual behavior and sexual harassment. In Tomkins, the judges opined that abuse of authority for personal purposes is not sex discrimination within the meaning of Title VII "even when the purpose is sexual," reintroducing the nature of the behavior into the discussion and thereby muddying the waters in the area between sexual behavior, sexual harassment, and sex discrimination.

The case of Williams v. Saxbe, heard in 1976, was the first in which sexual harassment was ruled to be in violation of Title VII. The plaintiff in this case was a woman who refused a sexual advance made by her male supervisor and was subsequently subjected to a barrage of abuse including reprimands and refusal to consider her work. She was eventually terminated for "poor work performance." The court framed the issue around the question whether the "retaliatory actions of a male supervisor, taken because a female employee declined his sexual advances, constitutes sex discrimination within the definitional parameters of Title VII of the Civil Rights Act of 1964." In this case the court did not specifically consider the issue of whether the behavior complained of constituted individual action or employer policy. Rather, they assumed that the behavior created an "artificial barrier to employment" for which the employer was liable. The court then moved on to address more deeply than in previous cases the issue of discrimination on the basis of sex. Rejecting the argument that the behavior in question could not discriminate against only one gender (because both men and women can furnish sexual favors), the judges ruled that it was sufficient to claim that "the rule creating an artificial barrier to employment has been applied to one gender and not the other" (emphasis added). This represents a shift in emphasis from the "could have been" approach used in previous cases to the "has been" approach. The "oppositional" approach to proving gender discrimination is crucial in

27 See Corne, supra note 23, at 164.
28 See Tomkins, supra note 24, at 556.
30 Id. at 657.
31 Id. at 657-8.
32 Id. at 659.
this case: the necessity of having two genders, only one of which is affected, is the key to the
decision that the behavior constituted discrimination on the basis of sex (this will become
important when we analyze decisions in subsequent cases). Again, the specific sexual nature of
the behavior was not addressed in this decision.

This decision led to an appeal in the Tomkins case. The judges, as in the Williams case,
de-emphasized the personal nature of the behavior and concluded that the employer "knowingly
or constructively" made acquiescence to the plaintiff's superior's demands "a necessary
prerequisite to the continuation of, or advancement in, her job." This shift in emphasis allowed
the claim to have "employment ramifications" and to come under the purview of Title VII.

Turning to the question of whether this "condition of employment" was imposed on the plaintiff
because of her gender, thereby constituting discrimination because of sex, the court examined the
various "hypotheticals" put forward by the defense and the lower court judges. Specifically, it
examined the claim that the behavior could just as easily have been directed towards males which
was the basis for earlier rejections of "sexual harassment as sex discrimination" claims. The
judges concluded that these scenarios were irrelevant to the case at hand and that, looking to "the
face of the complaint," the plaintiff had been discriminated against because of her gender. The
"essence of her complaint" was that her "status as a female" was the motivating factor behind the
behavior. Again, the "face" of the complaint--what did happen rather than what could have
happened--and the presence of two genders, only one of which was affected by the behavior, were
the crucial elements in the decision. Summarizing their ruling, however, the judges introduced
some confusion when they reiterated that "Title VII is violated when a supervisor, with the
employer's knowledge, makes sexual advances or demands of an employee, and conditions that
employee's job status on acquiescence" (emphasis added). This synopsis, while now placing
emphasis on the sexual nature of the behavior, is completely devoid of any mention of
discrimination based on sex, shifting the emphasis away from sex discrimination to sexual
behavior and suggesting that the justices were confusing sexual behavior with sex discrimination.

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34 Id. at 1046
35 Id.
36 Id. at 1047.
37 Id. at 1048.
The *Williams* ruling also led to reversal on appeal in the case of *Barnes v. Costle.* This case involved sexually harassing behavior directed from a supervisor to an employee which, when resisted, led to abolition of the plaintiff's job. The lower court ruled that the behavior described in the case did "not evince an arbitrary barrier to continued employment based on [appellant's] sex." The appeals court first noted, using the legislative history of the Equal Employment Opportunity Act of 1972, that it has been "firmly established" that Title VII invalidates barriers "when the barriers operate invidiously to discriminate on the basis of...impermissible classifications" (emphasis added, quoting *Griggs*).

The emphasis in this case, therefore, is on the sex discrimination issue rather than on the issue of employer liability and Title VII purview, which has been taken for granted. Addressing the sex discrimination issue, the court noted that the "discrimination," defined as a difference in treatment, "as portrayed was plainly based on appellant's gender." The discrimination in this case rested, in the minds of the judges, on the fact that submission to sex was "an exaction which the superior would not have sought from any male," a slight shift away from the face of the complaint. While this conclusion necessitated attention to the sexual nature of the behavior and to the motivation behind the behavior, the judges then went on to state that they were very clear that the sexual nature of the behavior was irrelevant:

> the vitiating sex factor thus stemmed not from the fact that what the appellant's superior demanded was sexual activity—which of itself is immaterial—but from the fact that he imposed upon her tenure in her then position a condition which ostensibly he would not have fastened upon a male employee[.]

The court further stated that "but for" her womanhood, the "employee would not have been importuned" and that "absent a showing that the supervisor imposed a similar condition upon a male co-employee," there was true discrimination on the basis of sex.

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39 Id. at 986.
41 See *Barnes, supra* note 37, at 987.
42 Id. at 989.
43 Id.
44 Id. at 989 (n. 49).
45 Id.
46 Id. at 992.
Already, from an analysis of these cases, it is clear that there is a lack of consistency in thinking about sexual harassment; there is a wandering between considering the nature of the behavior relevant or not, a wavering between what did happen and what could have happened, and an uncertainty about how to determine whether discrimination based on sex occurred. A look at the first sexual harassment case to reach the Supreme Court, *Meritor Savings Bank, FSB v. Vinson et al.*,\(^4^7\) throws further light on these issues. While much of the ruling in this case concentrates on the level of harassment that is actionable and on employer liability, I will restrict my analysis to those sections dealing with sex discrimination.

Delivering the opinion in this case, Justice Rehnquist stated that “without question, when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor discriminate[s]’ on the basis of sex” (emphasis added).\(^4^8\) This sentence has only one possible interpretation: it must be proven that the sexually harassing behavior was directed at that person because of his or her sex. Unfortunately, the Justice then went on to state that “the EEOC issued guidelines specifying that ‘sexual harassment,’ as there defined, is a form of sex discrimination prohibited by Title VII.”\(^4^9\) Justice Rehnquist, therefore, appears in this sweeping statement to have declared, in complete contrast to what he had just stated, that sexual harassment is sex discrimination. To further cement this confusion, Justice Rehnquist summed up by holding that “a claim of ‘hostile environment’ sex discrimination is actionable under Title VII” (emphasis added).\(^5^0\) He thus appears to use the phrases sexual harassment and sex discrimination interchangeably. Justice Marshall concurred, stating that “workplace sexual harassment is illegal, and violates Title VII.”\(^5^1\) This opinion, therefore, while clarifying many aspects of sexual harassment law, has left unanswered the question of whether sexually harassing behavior is automatically considered to be a form of sex discrimination or whether discrimination on the basis of sex must be proven in each case.

Somehow the issue of whether the behavior is discriminatory on the basis of sex (i.e. maleness or femaleness), a fundamental aspect of sex discrimination law, seems to have been forgotten, taken for granted, confused, or made on the basis of the confusing EEOC guidelines.


\(^{4^8}\) Id. at 58.

\(^{4^9}\) Id. at 65.

\(^{5^0}\) Id. at 63.

\(^{5^1}\) Id. at 74.
And so, while refinements of the definitions of sexually harassing behavior and employer liability have proceeded apace, the most fundamental issue of all—the question of whether sexually harassing behavior (however defined by the courts and the EEOC) constitutes discrimination on the basis of sex—has never been clearly answered.

B. Same-Sex Sexual Harassment

Despite these areas of confusion, the concept that the sexual harassment of a group or a member thereof (female) by a member of another group (male) appears to have been relatively easy for the courts to come to grips with. The concept of harassment of a member of a gender group by another member of the same group as sex discrimination has, however, proven significantly more difficult for the courts to reach a conclusion on and has given rise to much unfortunate theorizing by the courts with respect to motivations underlying sexually harassing behavior. The cases, based on this theorizing, can be divided into two subgroups: homosexual male-on-male harassment and heterosexual male-on-male harassment.

i. Homosexual Male-on-Male Sexual Harassment

In sharp contrast to the courts' eventual willingness to construe male-on-female sexual harassment as sex discrimination, considerably more hand-wringing, and indeed a shift in legal focus, was needed to bring homosexual male-on-male sexual harassment under the wing of Title VII sex discrimination. The judges, in an attempt to bring this behavior under the purview of Title VII, conceptually more difficult because both perpetrator and victim are of the same sex, deemed it necessary to point out that females would not be the objects of sexual desire of homosexual males thereby satisfying themselves that discrimination on the basis of sex had occurred. In these cases, therefore, in contrast to the male-on-female cases, the sexual nature of the behavior and the motivation of homosexual desire underlying the behavior became crucial. A shift, therefore, occurred away from emphasizing the sex discriminatory aspect of the behavior to
emphasizing the sexual motivation underlying the behavior and, again, the two issues became confused.

The first case of same-sex sexual harassment brought under Title VII was in 1981 with Wright v. Methodist Youth Services, Inc. In this case a male worker who resisted the overt homosexual advances of his supervisor had his employment terminated. The court, alluding to previous cases considering sexual harassment as sex discrimination, noted that making a demand of an employee of one gender that would not be made of an employee of the other gender was what constituted sex discrimination. In this case the judges felt the same criteria applied. The demands were placed on a member of one gender and not on members of the other gender—"but for" the plaintiff's sex he would not have been harassed. The fact that the harasser was homosexual, and therefore in the opinion of the judges would not have harassed a female employee in a sexual fashion was critical to their decision. The Title VII claim was upheld.

In 1983 Joyner v. AAA Cooper Transportation was argued. Again, in this case a worker, having rebuffed the homosexual advances of his supervisor, was subsequently denied re-employment after a layoff. The court noted that the plaintiff was subjected to unwelcome sexual harassment "to which members of the opposite sex had not been subjected." In coming to the conclusion that the behavior constituted discrimination based on sex the court relied on the supervisor's "homosexual proclivities," a fact which was critical to the court's assumption that the supervisor would not harass females in a sexual way.

Wrightson v. Pizza Hut of America, Inc. was heard in 1996. In this case a heterosexual male was subjected to sexually harassing behavior by a number of homosexual male fellow employees. Again, the sexual orientation of the parties involved played a major role in the decision. The court, having noted that a requirement of gender difference between harasser and harasssee has no legal basis—"we discern no such requirement in the statute"—went on to state that discrimination occurs on the basis of sex if "but for" the sex of the victim he or she would not have been harassed. In applying this definition to the case under consideration, the judges relied

54 Id. at 542.
55 Id.
57 Id. at 142.
on the fact that the harassers were homosexual to imply that they therefore would not have harassed members of the female gender in such a way. They stated that "but for" the employee's sex he would not have been harassed. Indeed, they specifically included the word "homosexual" in their holding on same-sex sexual harassment, stating that a same-sex sexual harassment claim may lie under Title VII where "the individual charged with the discrimination is homosexual."58

In all these cases, two facets—the fact that the plaintiff was subjected to behavior that members of the opposite sex would not have been, and the fact that the perpetrator was homosexual—together seemed necessary to render the behavior discriminatory on the basis of sex. Placing such emphasis on the sexual preference of the perpetrator, however, represents a move away from the tendency in the male-on-female claims to ignore the nature of the behavior in coming to a decision. It places the sexual nature of the behavior and the perceived motivation underlying the behavior—sexual desire for other males—at the forefront of the decision-making process. Despite the fact that the assumptions made by the courts about homosexuality, the importance or otherwise of the sexual nature of the behavior, the motivation underlying sexually harassing behavior, and the apparent inability of homosexual males to harass females are, to say the least, open to question, the basic shift in perception in these cases from addressing discrimination on the basis of sex to addressing questions of sexuality and the motivation behind harassing behavior has essentially been assumed into law.

ii. Heterosexual Male-on-Male Harassment

Once the courts felt comfortable deciding that homosexual male-on-male sexual harassment constituted sex discrimination, the next hurdle to overcome was the issue of heterosexual male-on-male sexual harassment, necessitating further mental exercise on the part of the courts in an attempt to locate this behavior within or outside the ambit of discrimination based on sex. In the absence of females and in the absence of the requisite desire (homosexual), the lower courts had no choice but to eventually decide that sexual harassment was by definition sex discrimination. This was the only way they could see to bring heterosexual male-on-male sexual

58 Id. at 144.
harassment within the purview of Title VII. Unfortunately, this method of approaching the issue was not corroborated by the Supreme Court which returned to the position that discrimination on the basis of sex (maleness or femaleness) must be proven on a case-by-case basis. The result is that it is still not clear how the issue of heterosexual male-on-male sexual harassment should be approached by the courts.

In 1988, the case of Goluszek v. Smith was brought under Title VII.\(^{59}\) This case involved harassing behavior of a sexual nature which was directed by heterosexual males towards another heterosexual male. The judges in this case adopted a broader approach in deciding the case by focusing on Congressional intent when it enacted Title VII. They felt that the conduct in question was not what Congress intended to cover with Title VII. Congress, the justices opined, intended discrimination to mean action “stemming from an imbalance of power and an abuse of that imbalance by the powerful against a discrete and vulnerable group,” and intended sexual harassment to mean “the exploitation of a powerful position to impose sexual demands or pressures on an unwilling but less powerful person” to mean behavior which “fosters a sense of degradation in the victim by attacking their sexuality,” behavior which is intended to make the victim feel “inferior because of the victim's sex.”\(^{60}\) Based on these considerations, the judges felt that to support a sex discrimination claim the plaintiff would have to prove that he was working in an anti-male environment, a claim that could not be supported since he worked in a male-dominated environment. On this basis his claim was denied.

The case of Garcia v. Elf Atochem North America was tried in 1994.\(^{61}\) In this case, a male employee had been sexually harassed by a foreman. The court addressed the issue of sexual harassment briefly and curtly, stating that “harassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones[...]. Title VII addresses gender discrimination.”\(^{62}\) This statement has two flaws. First, it does not recognize that a person may discriminate against another person of the same gender in a sex-discriminatory way. For example, a woman may refuse to hire women for jobs that require travel because she feels that women should be available for their children. Second, by insisting on


\(^{61}\) Garcia v. Elf Atochem North America, 28 F.3d 446 (5th Cir. 1994).

\(^{62}\) Id. at 451-2.
referring to "sexual overtones," it reflects the prevailing confusion alluded to above about the importance or lack thereof of the nature of the harassment in a sex discrimination claim—the confusion between sexual harassment and sex discrimination.

_McWilliams v. Fairfax County Board of Supervisors_ was heard in 1996. In this case, a learning-disabled male employee was subjected to severe harassment of a sexual nature by his co-workers. The court, "compelled by a commonsense reading of the...language of the statute," did not allow the claim to proceed "for the...fundamental reason that such a claim does not lie where both the alleged harassers and the victim are heterosexuals of the same sex." However, the court allowed that had either the victim or the oppressors been homosexual, the claim could have proceeded. The judges therefore, as in the homosexual male-on-male sexual harassment cases, placed emphasis on both the type of behavior, for sexual preference would be of no relevance unless the sexual nature of the behavior was also relevant, and the motivation behind the behavior. Having highlighted the importance of the sexual aspects of the behavior in homosexual cases, the judges then concluded that sexuality was not a feature in this case, noting that in this instance the behavior may have occurred because of the victim's known or believed prudery, or shyness, or other form of vulnerability to sexually-focused speech or conduct. Perhaps because of the perpetrators' own sexual perversion, or obsession, or insecurity. Certainly, because of their vulgarity and insensitivity and meanness of spirit. But not specifically because of the victim's sex.

The judges apparently decided that sexual behavior, if not motivated, in their opinion, by sexual desire, does not constitute sex discrimination. They did not address how they came to the conclusion that similar types of behavior can have different motivations, depending on the genders of the people involved. To further compound the confusion, the dissenting judge in this case proposed that "Title VII is implicated whenever a person physically abuses a co-worker for sexual satisfaction or propositions or pressures a co-worker out of sexual interest or desire," echoing [source reference]

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63 McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191 (4th Cir. 1996).
64 _Id._ at 1195.
65 _Id._
66 _Id._ at 1196.
67 _Id._ at 1198.
the "fundamentalist" view actually put forward in the Meritor case that if it is sexual behavior and it is harassing, it automatically violates Title VII.

The most in-depth discussion of sexual harassment as sex discrimination came in the case of Doe by Doe v. City of Belleville, Ill. (1997). In this case, a pair of teenage brothers were severely sexually harassed by their male co-workers. The court delivered a detailed opinion which consisted of a number of key points. The opinion began by stating that the EEOC position is that sexual harassment constitutes a form of sex discrimination. As I have discussed above, this is an assumption that, to say the least, is open to question. They then addressed the threshold question for a sex discrimination case—whether the plaintiff was harassed "because of" his/her sex, whether the harassment was "in some way linked to the plaintiff's sex." The judges decided that in cases involving non-sexual behavior and sex discrimination, proof of sex discrimination is necessary. In cases involving sexual behavior, however, "arguably, the content of that harassment in and of itself demonstrates the nexus to the plaintiff's gender that Title VII requires." In other words, sexual harassment is by definition sex discrimination; as the justices believe the EEOC guidelines suggest, gender is "inextricably intertwined with the harassment." They also put forward the intriguing argument that since men and women will perceive sexual harassment differently, it is by definition gender discrimination.

It is interesting to note how much difficulty the courts had in bending heterosexual male-on-male sexual harassment into a form actionable under Title VII. In fact, to do so, they had to assume the position that sexual harassment is by definition sex discrimination—a position that they could reasonably assume based on EEOC guidelines. Again, a recent Supreme Court decision dealing with heterosexual male-on-male sexual harassment should have helped to lessen the confusion. However, the case of Oncale v. Sundowner Offshore Services, Incorporated, et al. does not, unfortunately, serve to eliminate the confusion that clearly permeates the minds of both the courts and the EEOC on the issue of sexual harassment. In this case, the plaintiff, who worked as a roustabout on an oil-rig, was subjected to severely harassing behavior of a sexual

68 See, e.g., Doe by Doe v. City of Belleville, Ill., 119 F.3d 563 (7th Cir. 1997).
69 Id. at 569.
70 Id.
71 Id.
72 Id. at 578.
73 Id.
nature from his presumably heterosexual male supervisors which caused him to resign. Justice Scalia in this case stated “we have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations.”\textsuperscript{75} This statement came in spite of the fact that this is exactly what the Supreme Court did hold in the Meritor case. Justice Scalia went on to state that “the critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed” (emphasis added).\textsuperscript{76} Justice Scalia further clarified the Court’s position by stating that the plaintiff must prove “that the conduct at issue...actually constituted discrimination...because of...sex.”\textsuperscript{77} And so the wheel continues to turn. Sexual harassment is, then is no longer, automatically discrimination based on sex. We continue to need the “oppositional” scenario noted in earlier male-on-female cases, a need to have two genders to compare. In addition, we confront the difficulty of deciding whether was not or would not have been is the appropriate phrase with which to grapple when making judgments on sex discrimination.

VI. UNANSWERED LEGAL AND PHILOSOPHICAL QUESTIONS

The many crucial legal questions that have not been answered either through court rulings or through the EEOC guidelines, therefore, include the following: Is all sexually harassing behavior that meets the criteria outlined in the EEOC guidelines automatically considered to constitute discrimination based on sex as suggested in a number of opinions, and possibly also in the EEOC guidelines? This is the most crucial question, and one that has not been conclusively answered in more than twenty years of litigation. If so, does this mean that the gender of the parties involved is irrelevant? If not, what tests are the courts to use in making the determination of discrimination based on sex? Do both genders have to be present in the workplace? Is it necessary to prove that the behavior was not directed towards members of the opposite sex or that it would not have been directed at members of the opposite sex? What if the working

\textsuperscript{75} Id. at 201.
\textsuperscript{76} Id.
\textsuperscript{77} Id.
environment is essentially dominated by only members of one sex, making proof that the behavior was directed towards members of one gender as opposed to members of the other gender essentially impossible to obtain? What about behavior directed towards members of both sexes? Is the sexual nature of the harassing behavior of relevance, and if so, what exactly is its relevance to a determination of sex discrimination? If the nature of the behavior is not relevant to the determination of sex discrimination, then why accord it a separate section in the EEOC guidelines? Can a victim of workplace behavior that is not sexual in content but nevertheless creates a hostile environment state a claim under Title VII? For example, would a claim exist if a supervisor harassed, demeaned, and degraded someone because he/she had moles on his/her face? Or was knock-kneed? Or had what the supervisor considered to be too many children? Or displayed any other of a number of physical or emotional attributes that the supervisor did not like? And, would such a claim have to include proof of discrimination based on sex? It appears that, despite EEOC guidelines and a mountain of case law, all we can be currently sure of is what can be defined as sexual harassment will vary depending on the line of reasoning used by the courts. The confusion, especially at the Supreme Court level, is unnerving, since it leaves the way open for claims to be subject to attack on a number of fronts.

In addition to considering these unanswered legal questions, we must also raise philosophical and theoretical questions when contemplating the issue of sexual harassment. We need to address, in a philosophical sense, whether sexual harassment constitutes sex discrimination. Ellen Frankel Paul suggests that the early pioneers of the Title VII cause of action, conceptualized sexual harassment as "a wrong to women as members of an oppressed and legally protected group," brought some "ideological baggage" to the argument that incorrectly resulted in considering the issue as one of sex discrimination as opposed to individual action. The legal gymnastics that need to be undertaken to fit so many cases of sexual harassment into a Title VII framework might lead one to think that Paul is correct. When making an assessment as to whether sexual harassment constitutes sex discrimination, it is useful to ask the question whether sexual harassment would occur in a "gender-free" world. It is not difficult to imagine that it would, for the simple reason that many of the factors contributing to this behavior such as

79 Id. at 348.
hierarchical workplace structures, power, sexuality, sexual desire, hatred, violence, ill-will, contempt, malice, jealousy, etc. would still apply even in a world where gender did not define one’s place in society or in the workplace. Attempting to get at the motivation underlying sexual harassment may also help us in our attempts to answer this question. It could be at least suggested that sexual harassers, rather than discriminating on the basis of membership in a protected group (males or females), instead use sexuality and sexual characteristics as a means with which to harass a person—to find appropriate words with which to harass. In other words, sexuality is a vehicle with which to harass, and does not represent animus towards the gender group or member thereof being harassed. One could debate the finer points of this, but I suggest that, despite the movement of sexual harassment through the courts under the umbrella of Title VII and despite that same-sex harassment is now actionable under Title VII, sex discrimination law is the wrong framework within which to philosophically and legally approach the issue.

VII. ALTERNATIVE LEGAL APPROACHES TO SEXUAL HARASSMENT

Any attempt to find an appropriate legal framework within which to place sexual harassment necessitates confronting complex issues. Current sexual harassment law illustrates what a blunt instrument the law is when dealing with social issues and how poorly many people are served by the law. Current law also illustrates how the law evolves in its attempt to address problems and how troubling and difficult for the plaintiffs that evolution can sometimes be. The current law also highlights the “constitutive” nature of the law (discussed by Abrams),\(^8^0\) the way in which the law, while attempting to eradicate stereotypes, often serves to reinforce them. It forces us to address what we as a society consider to be the appropriate forum for discussions about gender roles and sexuality and attempts to eradicate gender inequalities: the legislature, the courts, the workplace, or some other forum within society at large. It forces us to ask the question whether, in dealing with an issue like sexual harassment, laws should be framed and used in order to provide concrete relief for victims which often involves clinging to and even

reinforcing stereotypes, or whether laws should be framed in a more gender-neutral way.\textsuperscript{81} It forces us to ask whether the inclusion of sexual harassment under Title VII law, while effective in giving people a place to have their claims heard, is in fact the wrong approach to the problem. It also forces us to ask whether, although helpful, it is not in fact writing damaging stereotypes about women, men, and people with sexual preferences that deviate from the norm into law, forcing ill-informed discussions about sexuality to be undertaken by the courts, and shifting emphasis for unacceptable behavior away from the individual perpetrator and onto employers. And, all these questions ultimately force us to consider other possible legal approaches to sexual harassment.

Some scholars have advocated a judicial return to simple "but for" principles to ensure that all forms of sexual harassment are actionable under Title VII. This return would be to simply asking the question "but for the plaintiff's sex (gender) would he/she have been harassed?"\textsuperscript{82} The answer to this question, however, is surely already predetermined in a sexual harassment case. When victims of only one gender have been harassed, an assumption can be made that "but for" that person's gender, he/she would not have been harassed. If members of both sexes were harassed, if members of one gender were harassed by other members of the same gender, or if harassment took place in a workplace dominated by one gender, the answer can still always be that "but for" the individual's gender he/she would not have been harassed (see the Doe opinion).\textsuperscript{83}

The sexual nature of the behavior can be used to make the assumption that the victim was harassed because of his/her sex. This approach is flawed even though it would provide a simple method for deciding claims. There simply is no way to answer the question as to whether a person would have been harassed if he/she were of a different gender, or whether the perpetrator would have harassed people of the other gender if they were available, or indeed, would have harassed them in a different fashion. For example, it is not beyond the bounds of possibility (indeed, it is highly likely) that Mr. Oncale's abusers would have sexually harassed any woman in the vicinity--making it perhaps a false statement to say that but for Mr. Oncale's gender, he would

\textsuperscript{81} For a discussion of this issue, see, e.g., L\textsc{e}s\textsc{i}e F\textsc{r}ied\textsc{m}an G\textsc{o}ld\textsc{m}an (E\textsc{d.}), F\textsc{e}m\textsc{i}n\textsc{i}st J\textsc{u}ri\textsc{s}p\textsc{r}ud\textsc{e}n\textsc{e}: T\textsc{h}e D\textsc{i}ffe\textsc{r}en\textsc{c}e D\textsc{e}bate (R\textsc{o}w\textsc{m}an & L\textsc{i}tt\textsc{l}e\textsc{f}i\textsc{e}ld 1992); see also Abrams, supra, note 78.

\textsuperscript{82} Christopher W. Deering, "Same-Gender Sexual Harassment: A Need to Re-Examine the Legal Underpinnings of Title VII's Ban on Discrimination "because of" Sex", 27 Cumberl\textsc{a}nd L\textsc{a}w R\textsc{e}\textsc{v}i\textsc{e}\textsc{w} 231 (1997).

\textsuperscript{83} Doe, supra, note 66.
not have been harassed. He would fail a crucial part of the court's test, for we would not be able to say whether he was treated differently from members of the other sex. Indeed, even in the absence of women in his workplace, it simply cannot be stated with any degree of certainty that members of the opposite sex would not have been sexually harassed. Similar reasoning applies in the Doe case. This approach to sexual harassment litigation, therefore, while expeditious, is flawed in its conception.

There are a number of other approaches that could be taken to eliminate the current confusion from sexual harassment law. The most obvious, and simplest approach, would be to decree that sexual harassment, as defined by the EEOC, automatically constitutes sex discrimination. This could be achieved through a legislative process, perhaps as an amendment to the Civil Rights Act of 1964. If legislative debate, however, resulted in the conclusion that sexual harassment should not automatically be considered sex discrimination, then the question as to whether sexually harassing behavior has to be separated from other forms of harassing behavior would have to be addressed. Alternatively, deeming sexual harassment to be sex discrimination could be achieved through an executive process via the EEOC. The conclusion that sexual harassment is sex discrimination can already be inferred from the EEOC guidelines, has been assumed by a number of courts, and is accepted by many legal scholars. The conclusion could, however, be written definitively into the EEOC guidelines, from which point it could presumably be applied by the courts. As I have noted above, however, conceptualizing sexual harassment as sex discrimination is philosophically flawed.

Short of decreeing sexual harassment to automatically constitute sex discrimination, and in light of the confusion exhibited by both the EEOC and the courts in the area of sexual harassment, it would seem that any modification to the law which would separate these two forms of "sex"--discrimination and harassment--from each other might also help in clarifying the issues surrounding sexual harassment law. There are two ways this could be achieved. One method

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84 Oncale, supra, note 72.
85 Doe, supra, note 66.
would be to remove the sexual aspects of the behavior from consideration of harassment sex discrimination claims, to simply designate that harassing behavior in the workplace is actionable under Title VII if it discriminates because of sex. This would eliminate troubling confusions between sexual behavior and discrimination based on sex and eliminate ill-informed discussions by the courts regarding gender roles, gender stereotypes, sexual desire and sexuality. It would, however, open up a myriad of offensive workplace behavior types to action based on discrimination because of sex under Title VII.

Another approach to eliminating the confusion between sexual harassment and sex discrimination would be to create gender-neutral sexual harassment laws, to eliminate the sex from the opposite side of the coin, to remove sexual harassment law from Title VII and discrimination because of sex. Ellen Frankel Paul has suggested this possibility, crafted as a “tort of sexual harassment,” patterned after the tort of intentional infliction of emotional distress.87 Sexual harassment tort law, Paul believes, would remove the “group-rights” approach from the law and concentrate more on an individual rights perspective, return responsibility for harassing conduct from the employer to the perpetrator, and remove the issue of individual behavior from federal intervention.88 This type of gender-neutral sexual harassment tort law, however, begs the question as to why we need specific laws dealing with sexual harassment as opposed to other forms of workplace harassment, whether there is not a place somewhere in the artillery of the law for gender-neutral and sex-free harassment laws.

While any or all of the legal approaches outlined above might serve to eliminate confusion in the courts and aid cases in their passage, none of them, apart from Paul, really addresses the philosophical difficulty surrounding the consideration of sexual harassment as sex discrimination. I suggest that, in the pursuit of gender-neutral, sex-free laws that allow people to be free of harassment, sexual or otherwise, a return to vigorous pursuit of claims under existing tort law is the most appropriate approach. Tort causes of action in sexual harassment cases could lie for outrage or intentional infliction of emotional distress, along with possible actions for battery, assault, invasion of privacy, and unjust dismissal.89 Pursuing any of these courses of action would

87 See Paul supra note 76.
88 Id.
89 Mark McLaughlin Hager, Harassment as a Tort: Why Title VII Hostile Environment Liability Should Be Curtailed, 30(2) CONNECTICUT LAW REVIEW 376 (1998).
eliminate the confusion currently existing between sexual harassment and sex discrimination. This would be achieved first by eliminating the philosophically troubling issue of sex discrimination from the legal framework and second by eliminating the confusion currently surrounding the sexual nature of the behavior, while not in any way denying legal acknowledgment of the damaging nature of sexually harassing behavior. Furthermore, this approach would eliminate the legal difficulties currently encountered by people harassed by members of their own sex. It would place punishment on the shoulders of the perpetrator, where it belongs, and this in turn would act as a strong deterrent to harassing behavior.

Hager, who believes that the essence of sexual harassment is "non-consensual personal invasion," which he considers inherently tortious, addresses some of the issues involved in addressing sexual harassment under tort law. The Restatement (Second) of Torts § 46 (1966) defines outrageous conduct as follows: "Outrageous Conduct Causing Severe Emotional Distress: (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress and if bodily harm to the other results, for such bodily harm." Hager notes that the courts to date have interpreted outrageous conduct very narrowly, and indeed, a number of cases demonstrate that the courts do interpret this law extremely narrowly and exclude sexual harassment as a cause of action. He suggests, however, that the courts could relax the definition of "outrageousness" to mean "malicious indifference," and relax the definition of severe emotional distress to incorporate milder forms of emotional distress. Sexually harassing behavior, therefore, would become actionable under these tort laws, with the severity of distress standing "as an index of damages but not as a threshold to actionability."

In pursuing tort claims in this fashion, however, a change needs to occur in the minds of the judiciary regarding the emotionally distressing tortious nature of sexual harassment. I suggest that, since this change has essentially already occurred over the years under Title VII law with

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90 Id.
91 Id. at 382.
92 Id. at 432, (citing Restatement (Second) of Torts §46 (1966)).
93 See, e.g., Haehn v. City of Hoisington, 702 F. Supp. 1526 (1988); EEOC v. General Motors Corporation, 713 F. Supp. 1394 (1989). However, there is at least one sexual harassment case where an outrage claim was allowed to proceed (see Laughinghouse v. Risser, 754 F. Supp. 836 (1990)).
94 Hager at 433.
95 Id. at 433.
definitions of hostile environment and reasonable person/woman standards, a return to bringing cases under tort law should allow this attitude regarding the seriousness of sexual harassment to flourish in the area of tort law. This attitudinal change would open the way for victims of sexual harassment to be compensated, regardless of their sex, and for sexual harassers to be punished for their behavior, regardless of their sex. While awaiting this attitudinal change, it would be possible to use what Hager describes as the “catch-all” tort, Section 870 of the Restatement (Second) of Torts:

One who intentionally causes injury to another is subject to liability to the other for that injury, if his conduct is generally culpable and not justifiable under the circumstances. This liability may be imposed although the actors' conduct does not come within a traditional category of tort liability.

Tort law is philosophically more suited to the issue of sexual harassment than sex discrimination law. It is reasonable to think that an informed and thoughtful return to the use of tort law in sexual harassment would eliminate essentially all of the “sexual” confusion noted above when dealing with sexual harassment under the umbrella of Title VII. Furthermore, the increase in awareness and understanding of the damaging nature of sexual harassment, now so embedded in Title VII law, could be similarly applied to tort law, thus dramatically increasing its usefulness in the area of sexual harassment. This approach would represent the most fair and gender-equitable legal response to the problem of sexual harassment.

VIII. CONCLUSION

Sexual harassment is a pervasive and poorly understood phenomenon in our society. Legally, sexual harassment claims have been filed under Title VII based on discrimination because of sex. While initial cases mainly involved male harassers and female victims, recent years have seen an increase in the number of same-sex sexual harassment claims filed under Title VII.

96 See supra notes 3 and 14.
97 Hager at 432, (citing Restatement (Second) of Torts §870 (1966)).
Despite EEOC guidelines and more than twenty years of legal precedent, the legal question as to whether and under what circumstances sexual harassment constitutes discrimination because of sex has yet to be clearly answered. The philosophical question as to whether sexual harassment constitutes sex discrimination has also not been squarely addressed. A reassessment of the issue, framed in both legal and philosophical terms, leads to the conclusion that tort law, which can be reinterpreted by the courts in the light of increased awareness of the pervasive and damaging nature of sexually harassing behavior, is the most appropriate legal framework within which to approach the issue of sexual harassment.