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CLOSING THE LOOPHOLE ON THE 'EQUAL OPPORTUNITY/ BISEXUAL' HARASSER DEFENSE

By Jose Carrillo*

Editor's note: This note contains offensive language for the sole purpose of reflecting alleged statements made by the parties in the cases noted.

Introduction

Harry, a supervisor at *ABC Corporation*, makes sexual advances toward and sexually harasses his male subordinate employee, Paul. The harassment includes physical touching of Paul's buttocks and inner thighs, comments about his appearance, and propositions for sexual favors. Paul, offended by Harry's actions, follows *ABC Corporation's* anti-harassment company policy and informs the human resources department director and several other management officials of Harry's inappropriate and offensive conduct. Despite Paul's efforts to stop Harry's harassment, the harassment increases in frequency and severity. Paul ultimately files a claim of sexual harassment against *ABC Corporation*. No evidence is presented to suggest that Harry made any sexual advances or sexually harassed any other employee. *ABC Corporation* is found liable for Harry's behavior because it failed to take appropriate corrective action to stop the harassment. Paul is awarded compensatory damages for the harassment he endured.

Two months later, Harry is still in the same supervisory capacity at *ABC Corporation*. Harry engages in identical sexual advances and behavior towards Patty, a female subordinate employee. Patty follows the appropriate protocol of reporting the harassment, but management ignores her complaints. Patty files a claim of sexual harassment against *ABC Corporation*. *ABC Corporation* raises the "equal opportunity/bisexual"¹ harasser defense based on Harry's equal harassment of both a man (Paul)

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¹ An "equal opportunity" harasser typically refers to a supervisor who creates a hostile work environment by: "engaging in offensive sexual conduct, irrespective of his or her sexual preference, for both sexes. A "bisexual" harasser is a supervisor who sexually harasses both sexes. The "equal opportunity/bisexual" harassers have puzzled courts because of their disregard for the sex of the victim."

Steven S. Locke, *The Equal Opportunity Harasser as a Paradigm for Recognizing Sexual Harassment of Homosexuals under Title VII*, 27 RUTGERS L.J. 383, 407 (1996).

and now a woman (Patty) in the workplace. Unfortunately, Patty has a problem and is out of luck.²

Similar versions of this scenario primarily existed in the imagination of early sex discrimination jurists and law school professors; however, the “classroom” hypothetical has become a reality in employment discrimination law. The current state of employment discrimination law would likely ensure that Patty’s claim against *ABC*’s Corporation fails. Patty, despite having suffered the same egregious and sexually harassing conduct that Paul endured at the hands of Harry, is unable to prevail under the current analytic legal framework. *ABC* Corporation escapes liability for otherwise unlawful conduct because both sexes are being treated equally, albeit badly. Courts effectively use the protections provided for employees under Title VII of the Civil Rights Act of 1964 (“Title VII”)³ against itself.⁴

This article first presents the legal background and evolution of sexual harassment protection under Title VII.⁵ Next, this article describes the manifestation of the “equal opportunity/bisexual” harasser defense loophole.⁶ Finally, this article analyzes the conceptual issues created by the “equal opportunity/bisexual” harasser and proposes an approach to closing the loophole on the defense.⁷

I. The Evolution of Sexual Harassment Protection Under Title VII

Title VII of the Civil Rights Act provides that employers shall not discriminate against any individual “because of . . . sex.”⁸ Title VII states in part:

It shall be an unlawful employment practice for an employer--to fail or refuse to hire or to discharge any

² This is a common hypothetical in employment law.

³ 42 U.S.C.A. §§ 2000e – 2000e-17 (West 2011).

⁴ Professor Kenji Yoshino states: The embarrassment that bisexuality causes sexual harassment jurisprudence is clear. An individual who would be liable for engaging in certain conduct can evade liability for that conduct by engaging in more of the conduct directed at the opposite sex. I call this the “double for nothing” problem--by doubling the proscribed conduct, the harasser lowers his liability to nothing. This result is so counterintuitive that commentators who usually seem far apart on the political spectrum--such as Robert Bork and Catharine MacKinnon--can agree that this result is anomalous. Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 441 (2000).

⁵ See *infra* Part II.

⁶ See *infra* Part III.

⁷ See *infra* Part IV.

⁸ 42 U.S.C.A. § 2000e-2(a)(1).

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 [. . .].⁹

When Title VII of the Civil Rights Act of 1964 was up for passage in Congress, Representative Howard Smith, a staunch adversary of the civil rights legislation, proposed a last minute amendment of “sex” to Title VII in an effort to derail the legislation.¹⁰ Representative Smith’s effort to thwart the enactment of Title VII, fortunately, was unsuccessful. As silly as this historical fact sounds, the same can be said of the “because of sex” standard that courts have struggled to grasp. One of the major difficulties with the causation standard is that it asks a court to decide what the discriminator’s intent is when they are engaging in inappropriate conduct. In early employment discrimination cases, the intent was often clear and direct. Today, the discriminator’s intent is not so obvious.

Notably, Title VII’s language fails to define sex or discrimination, and does not make any mention of sexual harassment. However, the U.S. Equal Employment Commission,¹¹ the preeminent federal agency charged with enforcing the nation’s employment discrimination laws, promulgated guidelines describing conduct constituting “sexual harassment” under the hostile work environment framework.¹² The Commission’s guidelines state that “[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment.”¹³

In *Meritor Savings Bank, FSB v. Vinson*¹⁴, the Supreme Court held that sexual harassment is a form of sex discrimination actionable under Title VII of the Civil Rights Act of 1964.¹⁵ The Court agreed with the Court of Appeals for the Eleventh Circuit that a “plaintiff may establish a violation of Title VII by proving that discrimination based on sex . . . created a hostile . . . work environment” and that sexual harassment is “every bit the arbitrary barrier to sexual equality at the workplace that

⁹ *Id.*

¹⁰ Charles R. Calleros, *The Meaning of “Sex”: Homosexual and Bisexual Harassment under Title VII*, 20 VT. L. REV. 55, 55-56 (1995).

¹¹ 42 U.S.C.A. § 2000e-2(e)(4). See also U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://www.eeoc.gov> (last visited Nov. 27, 2012).

¹² 29 C.F.R. § 1604.11(a) (2011).

¹³ *Id.*

¹⁴ *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

¹⁵ “Without question, when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminate[s]’ on the basis of sex.” *Id.* at 64.

racial harassment is to racial equality. [A] requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.”¹⁶

In order to establish a claim under Title VII against an employer for hostile work environment caused by sexual harassment, the employee must allege and prove the following elements: (1) the employee belongs to a protected group; (2) the employee was subjected to unwelcome sexual harassment; (3) the harassment complained of was because of sex; (4) that the harassment complained of affected a term, condition or privilege of employment; and (5) that the employer knew or should have known of the harassment in question and failed to take prompt, corrective action.¹⁷

The typical sexual harassment case involves a heterosexual male supervisor making unwelcome sexual advances to a female employee. The supervisor’s conduct clearly discriminates against the female employee because of her sex in that the heterosexual male supervisor is not sexually attracted to members of his own gender, and thus directs his harassing conduct only to women.¹⁸ Conversely, in the case of an “equal opportunity/bisexual” harasser, where both male and female employees are harassed, the “because of sex” element is not so clear.

In traditional employment discrimination cases, courts require plaintiffs to prove the “because of sex” element with evidence of disparate treatment of similarly situated individuals.¹⁹ The courts borrowed the “because of sex” element when they extended Title VII’s reach to sexual harassment to determine whether the harasser’s conduct was motivated by the victim’s sex.²⁰ Courts consistently analyze this element by posing the question: Would the plaintiff have been treated differently if she were a man?²¹ This question poses a significant obstacle in “equal opportunity/bisexual” harassment cases as well as in a single-sex work environment.

The Supreme Court, in *Oncale v. Sundowner Offshore Services Inc.*,²² was presented with the question of whether workplace harassment violates Title VII’s prohibition against discrimination “because of sex” when the

¹⁶ See *id.* at 66-67 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)).

¹⁷ *Henson*, 682 F.2d at 902.

¹⁸ Calleros, *supra* note 10, at 61.

¹⁹ Title VII does not require the disparate treatment analysis. See 42 U.S.C.A. §§ 2000e-2000e-17 (West 2011).

²⁰ Locke, *supra* note 1, at 392.

²¹ *Id.*

²² *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

harasser and the harassed employee are of the same sex.²³ Mr. Oncale alleged that, on several occasions, he was subjected to sexually charged, humiliating actions against him, he was physically assaulted, and he was threatened with rape by his supervisors.²⁴ Specifically, the supervisors raped Mr. Oncale with a bar of soap, pinned Mr. Oncale to the ground, and put their penises on different parts of his body.²⁵

The *Oncale* Court held that sex discrimination consisting of same-sex sexual harassment is actionable under Title VII.²⁶ The Court stated that, to support an inference of discrimination on the basis of sex, a plaintiff may show (1) sexual desire, (2) sex-specific and derogatory terms to make it clear that the harasser is motivated by general hostility of the sex in the workplace, or (3) direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.²⁷ The Court added that whatever the evidentiary route the plaintiff chooses, he or she must always prove the sexually harassing conduct occurred “because of sex.”²⁸ Since *Oncale*, the circuit courts are still divided on the scope of the “because of sex” standard and have consistently applied the comparative evidence (disparate treatment) analysis, despite the fact that *Oncale* did not say that comparative evidence, showing one sex was treated differently from the other, was required.²⁹

II. The ‘Equal Opportunity/Bisexual’ Harasser Defense Loophole

The loophole of the “equal opportunity/bisexual” harasser was first hypothesized by a judge for the District of Columbia Court of Appeals in a footnote of *Barnes v. Costle*,³⁰ which states, “[i]n the case of the bisexual superior, the insistence upon sexual favors would not constitute gender discrimination because it would apply to male and female employees alike.”³¹ Courts have subsequently found that sexually harassing individuals of both sexes was a valid defense under Title VII because the

²³ *Id.* at 76.

²⁴ *Id.* at 77.

²⁵ Zachary A. Kramer, *The Details of Discrimination*, 2 ARIZ. ST. L.J. SOC. JUST. 100, 100 (2011).

²⁶ *Oncale*, 523 U.S. at 79-82.

²⁷ *Id.* at 80-81.

²⁸ *Id.* at 81.

²⁹ Deborah Zalesne, *Lessons from Equal Opportunity Harasser Doctrine: Challenging Sex-Specific Appearance and Dress Codes*, 14 DUKE J. GENDER L. & POL'Y 535, 544 (2007).

³⁰ *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977).

³¹ *Id.* at 990 n.55.

harassing conduct cannot be “because of sex” when men and women are being treated equally.³²

The key case recognizing the “equal opportunity/bisexual” harasser defense is the Seventh Circuit case of *Holman v. Indiana*.³³ Karen Holman and Steven Holman, a married couple working in the maintenance department at the Indiana Department of Transportation (IDOT), alleged that their shop supervisor sexually harassed them in violation of Title VII.³⁴ Karen Holman alleged that her shop foreman sexually harassed her by touching her body, standing close to her, sexually propositioning her, and making sexist comments.³⁵ In the same complaint, Steven Holman alleged that the same shop foreman who sexually harassed Karen also sexually harassed him by grabbing his (Steven’s) head while asking for sexual favors.³⁶

IDOT moved to dismiss the Holmans’ claims of sexual harassment.³⁷ The district court granted IDOT’s motion “because both plaintiffs were alleging sexual harassment by the same supervisor, they both, as a matter of law, could not prove that the harassment occurred ‘because of sex.’”³⁸ The Holmans moved the district court to reconsider its order in light of the *Oncala* decision, but the district court ultimately denied the Holmans’ motion after supplement briefings and dismissed their claims.³⁹ The Holmans appealed the dismissal to the Court of Appeals for the Seventh Circuit.⁴⁰

³² *Zalesne*, *supra* note 29, at 544. *See Bundy v. Jackson*, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981) (noting that only in the rare case of a bisexual supervisor who harasses both men and women could sexual harassment not amount to sex discrimination); *Henson v. City of Dundee*, 682 F.2d 897, 904-05 (11th Cir. 1982) (holding that in “cases in which a supervisor makes sexual overtures to workers of both sexes or where the conduct complained of is equally offensive to male and female workers... the sexual harassment would not be based upon sex because men and women alike are accorded like treatment... [and] the plaintiff would have no remedy under Title VII”); *Holman v. Indiana*, 211 F.3d 399, 404 (7th Cir. 2000) (holding that equal opportunity harassment of employees of both sexes cannot support Title VII sex discrimination claim, as conduct is not “because of sex”); *Lack v. Wal-Mart Stores, Inc.*, 240 F.3d 255, 262 (4th Cir. 2001) (finding no actionable harassment claim where a male supervisor was equally abusive to both men and women).

³³ *Holman*, 211 F.3d 399.

³⁴ *Id.* at 401.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* (citing *Holman v. Indiana*, 24 F. Supp. 2d 909, 910 (N.D. Ind. 1998)).

³⁹ *Id.* at 401-02.

⁴⁰ *Id.*

The Seventh Circuit affirmed the district court's dismissal, reasoning that prior to and since *Oncale*, Title VII has been "premised on eliminating *discrimination*," and therefore, inappropriate conduct inflicted on both sexes falls outside the purview of Title VII.⁴¹ The Circuit Court went on to declare, "Title VII does not cover the 'equal opportunity' or 'bisexual' harasser ... because such a person is not discriminating on the basis of sex."⁴² The Seventh Circuit read *Oncale* to mean that discrimination in sexual harassment cases is "to be determined on a gender-comparative basis: '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*.'"⁴³ The Circuit Court pronounced that it would be "anomalous *not* to require proof of disparate treatment for claims of sex *discrimination*," and to hold otherwise would change Title VII into a "code of workplace civility."⁴⁴

The Seventh Circuit also rejected the Holmans' contention that sexual harassers will attempt to escape liability by purposefully harassing both sexes as unrealistic.⁴⁵ The Court added that it is unlikely that harassers would be familiar with the intricacies of sexual harassment law and may run the risk of being ostracized, fired, or sued under state law.⁴⁶ However, the Seventh Circuit's reading of *Oncale* to require proof of gender-comparative treatment in all sexual harassment cases is misguided.⁴⁷ In its discussion of *Oncale*, the Seventh Circuit overlooks the two *other* evidentiary routes that the Supreme Court established in that case to support an inference of sex discrimination.⁴⁸

Additionally, some federal courts have allowed claims against "equal opportunity/bisexual" harassers while still satisfying the disparate treatment requirement through an in-depth analysis of the "because of sex" element.⁴⁹ In *Kopp v. Samaritan*,⁵⁰ the plaintiff alleged that her male

⁴¹ *Id.* at 403.

⁴² *Id.* (emphasis omitted).

⁴³ *Id.* (quoting *Oncale v. v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998)).

⁴⁴ *Id.* at 404.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See Shylah Miles, Comment, *Two Wrongs Do Not Make a Defense: Eliminating the Equal-Opportunity-Harasser Defense*, 76 WASH. L. REV. 603, 628-29 (2001) (noting "the Seventh Circuit incorrectly read *Oncale* to require proof of disparate treatment in all cases of sexual harassment").

⁴⁸ *Id.* at 629; see *supra* Part II.

⁴⁹ Miles, *supra* note 47, at 617.

⁵⁰ *Kopp v. Samaritan*, 13 F.3d 264 (8th Cir. 1993).

supervisor subjected her to sexual harassment.⁵¹ The Eighth Circuit, despite noting that female employees and male employees were subjected to harassment by the same supervisor, concluded that the incidents alleged by the female plaintiff primarily involved more women than men, and were of a more serious nature than those involving the male employees.⁵² The Eighth Circuit held that a fact finder could conclude that the supervisor's treatment of women was worse than that of man and therefore prove that the harassment was "because of sex."⁵³

The Ninth Circuit clearly rejected the "equal opportunity/bisexual" harasser defense in *Steiner v. Showboat Operating Co.*⁵⁴ A female plaintiff alleged that her supervisor sexually harassed her by referring to her as "dumb fucking broad," "fucking cunt," and yelled at her to "suck [her customers'] dicks."⁵⁵ Showboat claimed that the plaintiff's supervisor harassed men and women alike and therefore his harassment was not based on her sex.⁵⁶

The Ninth Circuit held that the district court erred in accepting Showboat's contention that the conduct was not sexual harassment because of the equal harassment of the sexes.⁵⁷ The Ninth Circuit reasoned that the harasser was abusive to both men and women, but his abuse of women was more egregious and was laden with references to their sex.⁵⁸ The Court noted, "[i]t is one thing to call a woman 'worthless,' and another to call her a 'worthless broad.'"⁵⁹ The Ninth Circuit further stated that even if the supervisor had subjected both men and women in an equally degrading manner, he would not 'cure' his conduct and that both the men and women of Showboat have viable sexual harassment claims.⁶⁰

III. Closing the 'Equal Opportunity/Bisexual' Harasser Defense Loophole

While the federal courts are inconsistent in their treatment of the "equal opportunity/bisexual" harasser defense, this defense remains good law and employers will, in good legal practice, continue to raise the

⁵¹ *Id.* at 269.

⁵² *Id.*

⁵³ *Id.* at 270.

⁵⁴ *Steiner v. Showboat Operating Co.*, 25 F.3d 1459 (9th Cir. 1994).

⁵⁵ *Id.* at 1461.

⁵⁶ *Id.* at 1463.

⁵⁷ *Id.*

⁵⁸ *Id.* at 1464.

⁵⁹ *Id.*

⁶⁰ *Id.*

defense as a means of escaping liability for sexual harassment of both sexes. Although the courts have overwhelmingly accepted the defense, other courts have realized that American jurisprudence should close the loophole because it fails to protect individuals from sexually offensive conduct in the workplace.

The cause of the problem posed by the “equal opportunity/bisexual” harasser defense is the prevailing conception of discrimination. Under the current approach, in order to be protected by Title VII and entitled to a remedy, one must prove that he or she is being treated differently than a similarly situated employee. This prevailing approach to Title VII is an equality principle, whereby the employer must treat their similarly situated employees equally, and by doing so they are free to treat their employees badly as long as everyone is being treated that way. This problem created by this defense could be easily eliminated, since the comparator analysis is a purely judicial construct and not required by Title VII.

There have been several proposals set forth by commentators and the courts in an attempt to put an end to this “bizarre” result when faced with an “equal opportunity/bisexual” harasser. Commentators have argued for various approaches to close the “equal opportunity/bisexual” harasser defense loophole. Some commentators posit that Congress should enact federal legislation specifically including sexual orientation as a protected class and include sexual harassment as an alternate theory for individuals whose claims fit under both the new legislation and the original language of Title VII.⁶¹ These approaches, although commendable in the case of sexual orientation protection, simply side step the issue of a deeper conceptual problem. The likelihood that the federal government will enact sexual orientation protection, although long overdue, is very slim due to its unpopularity in political discourse. Likewise, the likelihood that an alternate theory of sexual harassment legislation would be enacted is nonexistent because of the fear that federal courts, already burdened with sex discrimination litigation, will be even more overwhelmed with the additional claims of sex discrimination that such legislation may create.

Another commentator suggests that courts should adopt an individual analysis of each claim and consequently reject evidence of disparate treatment in sexual harassment claims.⁶² This approach fails to recognize

⁶¹ Deborah N. McFarland, Note, *Beyond Sex Discrimination: A Proposal for Federal Sexual Harassment Legislation*, 65 *FORDHAM L. REV.* 493, 536-37 (1996) (proposing federal legislation for sexual harassment as an alternate theory). Sandra Levitsky, Note, *Footnote 55: Closing the "Bisexual Defense" Loophole in Title VII Sexual Harassment Cases*, 80 *MINN. L. REV.* 1013, 1037 (1996) (proposing an amendment to Title VII or new federal legislation to include sexual orientation as a protected class).

⁶² Miles, *supra* note 47, at 621.

the importance of the similarly situated comparator. A comparator can provide a fact finder with a wealth of information particularly in the traditional sexual harassment and hostile work environment claims. Besides, discrimination inherently invokes the need to engage in a comparative analysis. We subconsciously apply a comparative analysis in innocuous situations on a daily basis when we decide what to wear in the morning, which route to take to work, and what to eat for lunch.

The correct proposal should be an analytical framework that utilizes the existing evidentiary structure under *Oncale* for proving the “because of sex” element, closes the loophole, and does not open the proverbial floodgates. The framework should have all the aforementioned characteristics, and yet allow individuals with meritorious claims of sexual harassment, like Patty and the Holmans, to recover for the demeaning and sexually offensive acts perpetrated by “equal opportunity/bisexual” harassers that employers fail to remedy.

I propose an approach with a judicially expanded definition of the term “sex” and use it similarly to how the Ninth Circuit used it in *Steiner v. Showboat*.⁶³ In *Steiner*, the supervisor harassed both men and women. The court analyzed the conduct against both sexes using a comparative analysis, and found that the difference in treatment was along the line of sex because the offensive conduct towards the female employees was coupled with words *related to their sex*, such as being called “dumb fucking broad.” To truly close the loophole, courts should expand the definition of the term “sex” beyond male and female. Instead of asking whether the victim was harassed because of his or her sex, the courts should analyze whether the harassment was based on sex, sexuality, sex role or sex stereotypes.⁶⁴

Looking beyond *Oncale*,⁶⁵ once the conduct is tinged with sex-based terms or physical sexual conduct, assuming it is sufficiently severe or pervasive, it fulfills the “because of sex” element irrespective of the way the other sex was treated. *Oncale* was a step in the right direction, but it did not go far enough. In *Oncale*, the Supreme Court asked that an inquiry be made into the sexual desire of the harasser, the harasser’s animus towards the sex, and comparison of the manner in which the harasser treats both sexes. The expanded definition of sex approach, however,

⁶³ See *supra* Part III.

⁶⁴ Locke, *supra* note 1, at 414.

⁶⁵ “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.” *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).

focuses on the harm suffered by the victim instead of the conduct engaged by the perpetrator.

Applying this proposed approach with an expanded definition of sex discrimination to the case solidifying the “equal opportunity/bisexual” harasser defense yields, in my opinion, the correct result for both Karen and Steven Holman. Recall that in *Holman v. Indiana*,⁶⁶ the Court of Appeals for the Seventh Circuit held that neither Karen nor Steven could prove that the harassment they endured by their supervisor was “because of sex.”

Under this approach, we analyze whether the Holmans’ harassment was based on sex, sexuality, sex role, or sex stereotypes, to determine if both Karen and Steven were subjected to harassment that was sexually charged. First, we look at the harassment endured by Karen, which included the supervisor touching her body, standing close to her, sexually propositioning her, and making sexist comments.⁶⁷ Then, we review Steven’s allegations that the same shop foreman grabbed his head while asking him for sexual favors.⁶⁸ Clearly Karen’s harassment was based on sex, sexuality, sex role, or sex stereotype because she was sexually propositioned, touched in a sexual manner, and was the recipient of sexist comments. Steven’s harassment was also sex-based because he was asked to engage in a sexual act by the supervisor.

By going through this sex-based analysis of the conduct suffered by each of the claimants, a court would likely find that Karen and Steven Holman both have actionable claims of sexual harassment under Title VII. Due to the fact that the conduct was sex-based, each plaintiff could find recourse under Title VII even when an employer raises an “equal opportunity/bisexual” harasser defense.⁶⁹

Critics might argue that such an approach will burden the courts with even more discrimination claims. However, I contend that the number of claims will not increase because a plaintiff still has to prove all the elements outlined in a sexual harassment claim, and in particular, they still have to prove that it was sex-based or “because of sex.”⁷⁰ This approach

⁶⁶ *Holman v. Indiana*, 211 F.3d 399 (7th Cir. 2000).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ This sex-based approach would also allow a plaintiff to recover in a single sex environment.

⁷⁰ (1) the employee belongs to a protected group; (2) the employee was subjected to unwelcome sexual harassment; (3) the harassment complained of was because of sex; (4) that the harassment complained of affected a term, condition or privilege of employment; and (5) that the employer knew or should have known of the harassment in question and failed to take prompt, corrective action. *Henson v. City of Dundee*, 682 F.2d 897, 902

also prevents a plaintiff from prevailing in a claim against a supervisor who is just a “jerk to everybody.” However, once the “jerk” crosses the line and uses sexually charged comments or behavior against both his male and female subordinate employees, then his conduct violates Title VII of the Civil Rights Act, and the employer should be liable if it failed to meet its legal and moral obligations to stop the harassment. I also posit that this approach towards “equal opportunity/bisexual” harassment would better coalesce with our understanding of race-based harassment. One would not expect a supervisor to make racially charged and offensive epithets towards members of different racial groups without consequence simply because he degrades everyone on the basis of their race. The same should be true in cases where a supervisor harasses men and women with sexually charged commentary and behavior.

IV. Conclusion

Sexual harassment is prevalent in today’s workplace. No one should have to endure sexual abuse in return for having the privilege to work and earn an honest living. Employers and employees should welcome a sensible approach to “equal opportunity/bisexual” harassment cases that will encourage a safe working environment, promote productivity in the workplace, improve the lives of hardworking individuals and protect people like Patty and the Holmans from embarrassment and ridicule.

Using Title VII against itself so that it does not protect anyone is unjust. Sexual harassment undoubtedly leaves lasting effects on its victims and they should be compensated accordingly. Unfortunately, federal courts have made it cumbersome for a truly harmed plaintiff to prevail by keeping the “equal opportunity/bisexual” harasser defense alive. Rather than creating exceptions like the “equal opportunity/bisexual” harasser defense to offensive behavior by bad actors, courts and lawmakers should aim to ferret out discriminatory conduct and eliminate it from the modern workplace.