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EN/GENDERING EQUALITY: SEEKING RELIEF UNDER TITLE VII AGAINST EMPLOYMENT DISCRIMINATION BASED ON SEXUAL ORIENTATION

ANTHONY E. VARONA AND JEFFREY M. MONKS*

I. INTRODUCTION

Discrimination against lesbians and gay men often is motivated more by how we violate societal sex and gender norms than it is by the much narrower characteristic of specifically how, and with whom, we have sex. Same-sex sexual expression is just one facet of lesbian and gay identity and expression, which themselves are elements of our *gender* identity and expression. Although it is widely understood that the gender identity and expression of transgendered people (*i.e.*, transsexuals or intersexuals) are what precipitate discrimination against them, it is also true that the gender identity and expression of lesbians, gay men and bisexuals cause much of the discrimination we face.

That sexual orientation is interwoven with gender identity and expression is manifested quite clearly in common instances of anti-gay discrimination and harassment. Many gay boys, long before engaging in same-sex sexual activity, share the experience of being taunted and teased for "acting queer" or "looking like a faggot" simply because they are not as aggressive or masculine-appearing as other boys. These boys are not harassed because of the sex of their intimate partner, of course, but because of how they express their gender. More specifically, they are harassed and bullied because of their failure to conform to the gender

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norms assigned to their sex (*i.e.*, their degree of masculinity if they are male or femininity if they are female).¹

The Stonewall Rebellion, the mid-summer 1969 riots sparked by police harassment of the Greenwich Village, New York City gay bar named the Stonewall Inn, marked the birth of the modern lesbian and gay civil rights movement and mobilized generations of gay people to join the struggle for equality.² Media and eyewitness accounts of the Stonewall Inn police raid, however, reveal that what motivated the police harassment was not that the patrons slept with people of the same sex, but that they were gender nonconforming men.³

The New York Daily News described the Stonewall Inn as "a mecca for the homosexual element in the village" where gay men could "drink, dance and do whatever little girls do when they get together."⁴ Ridiculing the effeminate men and drag queens among the patrons, the Daily News wrote that "[a]ll hell broke loose when the police entered the Stonewall. The girls instinctively reached for each other. . . . Queens, princesses and ladies-in-waiting began hurling anything they could get their polished, manicured fingernails on. . . . The war was on. The lilies of the valley had become carnivorous jungle plants."⁵

Much anti-gay employment discrimination takes the form of gender nonconformity discrimination. As detailed below, many gay people face disparate treatment and harassment on the job solely because their demeanor is not what some employers or co-workers would consider appropriate to gender norms.⁶ A recent example is the case of *Redden v. Contimortgage Corp.*,⁷ in which co-workers subjected a male employee to anti-gay harassment even though he never identified himself as being gay.⁸ Co-

1. See *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1093 (D. Minn. 2000) (holding that long-term harassment of tenth-grade male because of his perceived sexual orientation and gender non-conformity, which included taunts of "faggot," "gay boy," "queer," and "femme boy" and repeated physical threats and assaults, created a claim for sex discrimination under Title IX).

2. See JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970*, at 231-33 (2d ed. 1998) (describing the Stonewall Rebellion and the emergence of a gay community mobilized toward civil rights and equality).

3. See *infra* Part II.B.2.

4. Jerry Lisker, *Homo Nest Raided, Queen Bees Are Stinging Mad*, N.Y. DAILY NEWS, July 6, 1969, reprinted in William B. Rubenstein, *CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW* 66 (2d ed. 1997).

5. *Id.* at 66-67.

6. See *infra* Part II.B.3.

7. No. 99-4535, 1999 WL 1257280 (E.D. Pa. Dec. 22, 1999).

8. *Id.* at *1.

workers concluded that Redden “must be a fag” because he wore jewelry and had an effeminate voice.⁹

Even our culture’s most absurd instances of heterosexism evidence the conflation of sexual orientation with gender identity. Jerry Falwell “outed” Tinky Winky Teletubby, the fictional children’s character, as gay simply because his gender identity did not conform to his sex.¹⁰ As evidence for his assertion, Falwell noted that Tinky Winky dresses in lavender, wears a hat in the shape of a triangle and carries a red purse.¹¹

Because much sexual orientation employment discrimination takes the form of discrimination based on gender identity and expression, this Article examines the current prospects for relying on the sex discrimination prohibition in Title VII of the Civil Rights Act of 1964¹² in combating sexual orientation discrimination in the workplace. Part II provides a background for understanding current judicial interpretations of Title VII’s prohibition on workplace discrimination “because of sex.”¹³ First, we examine the language and legislative history surrounding the inclusion of “sex” as a protected category under Title VII. We then summarize how court interpretations of “because of sex” have evolved since Title VII’s passage to include not only traditional disparate treatment claims by women, but also claims by men, sexual harassment claims (first opposite-sex and then same-sex), and sex stereotyping.

Part III details why Title VII should be interpreted as also prohibiting anti-gay workplace discrimination, and analyzes the courts’ misinterpretation of the difference between “sex” and “gender.” Part IV then determines the current feasibility of using Title VII as a tool to combat anti-gay workplace discrimination by looking at how courts across the country have interpreted “because of sex” in cases involving parties who were either gay or perceived to be gay. This part details how the current state of Title VII is generally hostile to expanding the interpretation of the statute to cover sexual orientation, but that gay employment discrimination victims should continue to bring test cases under Title VII. Finally, part V discusses why regardless of the success of gay plaintiffs under Title VII, enacting the federal Employment Non-Discrimination Act, which would explicitly

9. *Id.*

10. See David Reed, *Falwell Warns Readers That Teletubby Is Gay*, NEW ORLEANS TIMES-PICAYUNE, Feb. 10, 1999, at 13A, 1999 WL 4393574.

11. See *id.*

12. 42 U.S.C. § 2000e-2(a) (1994).

13. *Id.*

prohibit sexual orientation employment discrimination, is essential for achieving equality and workplace fairness for lesbian, gay, bisexual, and transgendered Americans.

II. HISTORY OF TITLE VII'S PROHIBITION ON DISCRIMINATION "BECAUSE OF SEX"

A. *Language and Legislative History of Title VII*

Title VII of the Civil Rights Act of 1964 states: "It shall be an unlawful employment practice . . . for an employer . . . to discriminate against any individual . . . because of . . . race, color, religion, sex or national origin."¹⁴ The enacted version of the law is very similar to the bill that was reported out of committee in November 1963.¹⁵ There is, however, one significant difference—the original bill did not include a ban on sex discrimination.¹⁶

The peculiar and ironic legislative history (or rather lack thereof) behind the inclusion of "sex" as one of the protected categories in Title VII is now a fixture in congressional lore. For almost all of its life as a bill, Title VII only covered race, religion and national origin and in no way included "sex" within its scope.¹⁷ It was not until one day before the Act's passage that Virginia Representative Howard Smith offered an amendment to the bill that would add "sex" as a protected category.¹⁸ Smith's objective was to incorporate a "poison pill" amendment into the bill that would prevent passage of the Civil Rights Act in its entirety.¹⁹ This strategy proved unsuccessful. After very little debate,²⁰ the amendment was approved, and the House of

14. *Id.*

15. Robert Stevens Miller, Jr., *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877, 880 (1967).

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 883 n.34; see also *Price Waterhouse v. Hopkins* 490 U.S. 228, 244 (1989) (explaining that courts could not examine legislative intent, as the addition of "sex" was intended to block the bill's passage); *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984) (same); *Barnes v. Costle*, 561 F.2d 983, 987 (D.C. Cir. 1977) (same); *Rasmusson v. Copeland Lumber Yards, Inc.*, 988 F. Supp. 1294, 1297 (D. Nev. 1997) (same); Stephen S. Locke, *The Equal Opportunity Harasser as a Paradigm for Recognizing Sexual Harassment of Homosexuals Under Title VII*, 27 RUTGERS L.J. 383, 385-86 (1996) (same). Apparently, Smith believed that congressional support for an anti-workplace discrimination statute that included women would be weaker than for one without, and so the Act would fail to pass if "sex" was added. Miller, *supra* note 15, at 883. How and whether this fact should affect interpretation of Title VII is discussed *infra* Part IV.A.1.

20. Miller, *supra* note 15, at 882.

Representatives passed the Civil Rights Act the next day by a vote of 168 to 133.²¹

The bill was then sent to the Senate. Although the Senate debated the bill for several months, there was very little discussion over the addition of "sex" to Title VII or what its ramifications might be.²²

In sum, there is very little in the legislative history of Title VII to illuminate what exactly Congress intended to include in its prohibition of workplace discrimination "because of sex." The history that does exist generally fails to enlighten.²³ Nor is there any clarifying language in the statute itself.²⁴ Although Congress amended the Civil Rights Act in 1972 and 1991,²⁵ these amendments have not clarified the meaning or intent behind the inclusion of "sex" in Title VII.²⁶ With little guidance from Congress, federal courts have been forced to develop their own doctrines in order to determine the scope of Title VII's prohibition on sex discrimination.²⁷

Rarely do courts reach a meaningful consensus on the key elements of the statute. In general, however, Supreme Court decisions follow a trend of allowing more types of sex

21. 110 CONG. REC. 2720 (1964). There was some opposition in the House, however, to the inclusion of sex in the bill, including from Representatives who were generally supportive of civil rights for both women and racial minorities. For example, Representative Edith Green from Oregon, suspecting Smith's true motives, opposed the amendment because she thought it would later "be used to help destroy this section of the bill by some of the very people who today support it." *Id.* at 2581. In fact, it has been observed that there were few members of the House who supported both the sex amendment and the bill as a whole. Miller, *supra* note 15, at 883. It is likely, then, that a sex discrimination statute, introduced as a separate bill, would not have been passed.

22. Miller, *supra* note 15, at 882-83.

23. One notable exception is the rejection by Congress to add the word "solely" to the bill as a modifier for "sex." See 110 CONG. REC. 2728 (1964). Courts interpreted the defeat of this amendment as congressional intent to allow a claim under Title VII even when sex alone is not the motivating factor behind the discriminatory act. *E.g., Barnes*, 561 F.2d at 991. This is referred to as "sex-plus" discrimination and is discussed *infra* Part II.B.3.

24. When Representative Smith proposed the sex amendment, he did not also propose to statutorily define "sex." Instead, he merely inserted the word "sex" in each place that the other protected categories were listed. Miller, *supra* note 15, at 882.

25. See Civil Rights Act Amendments of 1991, Pub. L. No. 102-166, Title I, §§ 105(a), 106, 107(a), 108, 105 Stat. 1074-76 (1991); Civil Rights Act Amendments of 1972, Pub. L. No. 92-261, §§ 8-14, 86 Stat. 109, 109-113 (1972).

26. Some courts do look, however, to the 1972 amendments for guidance on legislative intent. See, *e.g., Austin v. Wal-Mart Stores*, 20 F. Supp. 2d 1254, 1256-57 (N.D. Ind. 1998). Most courts, however, including the Supreme Court, do not usually rely on these amendments to clarify the intent of Congress regarding the meaning of "sex" in Title VII.

27. See, *e.g., Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64-72 (1986) (explaining standard used by courts in Title VII actions).

discrimination claims rather than fewer. Lower federal courts consistently follow these precedents.

B. Evolution of the Meaning of "Because of Sex" in Title VII

1. Disparate Treatment

The most straightforward cause of action under Title VII is disparate treatment. In a disparate treatment case, the plaintiff must simply show that he/she was subjected to disadvantageous terms or conditions of employment that the other sex was not, such as being denied a promotion or terminated.²⁸

When sex discrimination claims were first litigated under Title VII, they were usually brought by women and involved claims of disparate treatment.²⁹ Lower courts, however, also recognized causes of action brought by men claiming discrimination,³⁰ even though it has often been observed that the primary purpose of Title VII was to create equal employment for women.³¹ The Supreme Court finally affirmed the view that Title VII applied to sex discrimination against both men and women in 1983, when it held in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*³² that, under Title VII, "[m]ale as well as female employees are protected against discrimination."³³

28. See, e.g., *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971).

29. See, e.g., *id.* at 1198-99 (holding that imposing "no-marriage" rule for female but not male flight attendants is impermissible disparate treatment under Title VII).

30. E.g., *Rosen v. Pub. Serv. Elec. & Gas Co.*, 477 F.2d 90, 95 (3d Cir. 1973) (holding that a company pension plan that differentiated between men and women solely on the basis of sex, causing male employees to receive reduced annuities, was unlawful); *Diaz v. Pan Am Worldways, Inc.* 442 F.2d 385, 386 (5th Cir. 1971) (ruling that the airline's refusal to hire a male as a flight attendant violated the Civil Rights Act).

31. E.g., *Barnes v. Costle*, 561 F.2d 983, 987. During her time as a women's rights litigator, bringing a number of prominent cases to the Supreme Court, Justice Ruth Bader Ginsburg often represented male plaintiffs, reasoning that laws based on stereotypical assumptions concerning the sexes were damaging to both men and women regardless of the sex of the plaintiff. See Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 9-10 (1995).

32. 462 U.S. 669 (1983).

33. *Id.* at 682. Another cause of action that has developed under Title VII is one involving disparate impact. The Court first recognized this cause of action in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The Court found that the requirement of passing an intelligence test or completing high school as a condition of employment was discriminatory where it causes a substantial number of blacks to be ineligible and is not significantly related to job performance. *Id.* at 431. A disparate impact case is shown where an employer's policy is neutral on its face, but it disproportionately burdens one

2. *Sexual Harassment*

Sexual harassment is another cause of action under Title VII. In order to establish a *prima facie* case of sexual harassment, a plaintiff must show that he/she (1) is a member of a protected class, (2) received unwelcome sexual harassment, (3) based on sex, (4) that affected a term or condition of employment, and (5) the employer knew or should have known about the harassment and did not take steps to correct it.³⁴

Although sexual harassment claims brought under Title VII are commonplace today, many federal district courts initially dismissed these suits in the 1970s as being non-actionable.³⁵ The central argument relied upon by courts denying sexual harassment claims was generally that Congress' intent in enacting Title VII was not to prohibit sexual harassment, but rather "to make careers open to talents irrespective of race or sex."³⁶ Furthermore, it was argued that sexual harassment was not "because of sex" within the meaning of Title VII because the gender lines of harasser and victim could have been switched (or not crossed at all) and, therefore, gender was "incidental" to the claim.³⁷

Higher courts soon reversed these narrow interpretations of "because of sex."³⁸ The *Tomkins* court reasoned that Title VII was meant to invalidate all "artificial, arbitrary, and unnecessary barriers to the employment when the barriers operate invidiously to discriminate on the basis of . . . impermissible classification[s]."³⁹ Furthermore, the harassment was "because of sex" since the female plaintiffs would not have been harassed if they had been men.⁴⁰

protected group in relation to the other. See *id.* at 432. The development of disparate impact litigation, however, will not be explored in this Article because it does not directly concern the meaning of "because of sex."

34. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

35. *E.g.*, *Tomkins v. Pub. Serv. Elec. & Gas. Co.*, 422 F. Supp. 553, 556 (D.N.J. 1976), *rev'd*, 568 F.2d 1044 (3d Cir. 1977) (reinstating Title VII claim of sexual harassment as actionable).

36. *Id.* at 556.

37. *Id.*

38. *E.g.*, *Tomkins*, 568 F.2d at 1044.

39. *Id.* at 1047 n.2 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

40. *Id.* at 1047. It is interesting to note that courts in these cases did not require the plaintiffs to produce any evidence that the harassment was "because of sex," but rather assumed it due to the sexual nature of the abuse. *Id.*

Initially, courts limited sexual harassment protection under Title VII to instances where submission to sexual demands was made a condition of "tangible" employment benefits, or quid pro quo harassment.⁴¹ In 1986, however, following the lead of many circuit courts and the Equal Employment Opportunity Commission (EEOC), the Supreme Court, in *Meritor Savings Bank, FSB v. Vinson*,⁴² held that Title VII also prohibited so-called hostile work environments.⁴³ Rejecting the defendant's argument that Congress only intended to protect employees from "tangible loss[es]" of "an economic character," then-Justice Rehnquist, writing the majority opinion, stated that the language of Title VII "evinces a congressional "intent to strike at the entire spectrum of disparate treatment of men and women" in employment."⁴⁴ This means that if sexual harassment becomes so "severe or pervasive" that it alters the terms or conditions of employment, it is just as much an "arbitrary barrier to sexual equality at the workplace" as is quid pro quo harassment or disparate treatment.⁴⁵

Although all federal courts have recognized opposite-sex sexual harassment claims for some time, until very recently federal courts had taken "a bewildering variety of stances" on the issue of whether same-sex harassment was actionable as sex discrimination under Title VII.⁴⁶ While some circuits allowed same-sex harassment claims,⁴⁷ others allowed them only if the plaintiff could show that the harasser was homosexual, or that a general anti-male animus existed in the workplace.⁴⁸ Still others barred all same-sex harassment claims, regardless of the circumstances.⁴⁹

Among courts that rejected or strictly limited same-sex harassment claims, the justification most often relied upon was again congressional intent. For instance, in the oft-cited case *Goluszek v. Smith*,⁵⁰ the Northern District of Illinois declared

41. *E.g.*, DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION IN THE LAW 231-35 (1989) (describing the development of sexual harassment law from the 1970s through the 1980s).

42. 477 U.S. 57 (1986).

43. *Id.* at 66-67.

44. *Id.* at 64 (citations omitted).

45. *Id.* at 67 (citation omitted).

46. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

47. *E.g.*, *Doe v. City of Belleville*, 119 F.3d 563, 569 (7th Cir. 1997).

48. *E.g.*, *Yeary v. Goodwill Indus.-Knoxville, Inc.*, 107 F.3d 443, 446 (6th Cir. 1997); *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1195 (4th Cir. 1996).

49. *E.g.*, *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 451-52 (5th Cir. 1994).

50. 697 F. Supp. 1452 (N.D. Ill. 1988).

that Congress never intended Title VII to encompass same-sex harassment claims.⁵¹ Citing a student written law review note, the district court stated that "[t]he discrimination Congress was concerned about when it enacted Title VII is one stemming from an imbalance of power and an abuse of that imbalance by the powerful which results in discrimination against a discrete and vulnerable group."⁵² The court concluded that even though the plaintiff "may have been harassed 'because' he is a male,"⁵³ there could be no Title VII claim because there could be no imbalance of power between the sexes when the plaintiff worked in an all-male environment.⁵⁴

In 1998, the Supreme Court again rejected this narrow interpretation of Title VII in *Oncale v. Sundowner Offshore Services, Inc.*⁵⁵ In a unanimous opinion written by Justice Scalia, the Court admitted that same-sex harassment was "not the principal evil Congress was concerned with when it enacted Title VII."⁵⁶ The Court argued, however, that statutes "often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."⁵⁷ Furthermore, since the Court had already recognized that racial minorities can discriminate against members of their own group,⁵⁸ there was no reason to assume that men and women could not discriminate against their own sex as well.⁵⁹ As long as a plaintiff in a same-sex harassment case can show that his/her harassment was "because of sex," he/she has an actionable Title VII claim.⁶⁰

51. See *id.* at 1456.

52. *Id.* (citing Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1451-52 (1984)). Curiously, such a rationale would actually support a finding that Title VII protects gender nonconforming individuals from workplace discrimination since gender nonconformists are a "discrete and vulnerable group" whose adverse treatment is often a result of an imbalance of power.

53. *Goluszek*, 697 F. Supp. at 1455.

54. *Id.*

55. 523 U.S. 75 (1998).

56. *Id.* at 79.

57. *Id.*

58. *E.g.*, *Castaneda v. Partida*, 430 U.S. 482, 500 (1977).

59. *Oncale*, 523 U.S. at 78.

60. Of course, how to apply the "because of sex" standard was the central cause of disagreement among the circuits, and *Oncale* sheds little light on this issue. While the Supreme Court has now made clear that there is no absolute bar to same-sex harassment claims, there is still significant disagreement within the circuits over *which* same-sex harassment claims are valid, particularly in cases involving actual or perceived gay plaintiffs. This issue is discussed in depth *infra* Part IV.C.

3. Sex Stereotyping

Although not a cause of action per se, sex stereotyping is a form of sex discrimination that can occur in the context of either disparate treatment or sexual harassment.⁶¹ Sex discrimination does not always take the form of an employer treating *all* members of one gender adversely. Instead, sometimes an employer will target for discrimination men or women who look or act in a way that the employer believes is appropriate only for members of the opposite sex, while treating equally individuals who conform to the employer's view of traditional gender norms. This practice is known as "sex stereotyping" and has been recognized by the Supreme Court as a form of sex discrimination under Title VII.⁶²

Although the Supreme Court did not expressly recognize that sex stereotyping was sex discrimination until 1989,⁶³ the beginnings of a sex stereotyping claim were recognized in the early 1970s. The seed was planted by the Supreme Court in 1971 in *Phillips v. Martin Marietta Corp.*,⁶⁴ when it first recognized "sex-plus" discrimination as being actionable under Title VII.⁶⁵ In that case, the Court held that a company policy not to accept applications from women with pre-school age

61. Because Title VII requires that an employee be subjected to adverse employment action before he/she can prevail on a discrimination claim, see, for example, *Dobbs-Weinstein v. Vanderbilt Univ.*, 185 F.3d 542, 544 (6th Cir. 1999), the fact that an employer holds sex stereotyping views is not enough to create a cause of action under Title VII. Rather, sex stereotyping becomes sex discrimination when an employer harasses or treats an employee unequally because he/she fails to conform to gender stereotypes. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (recognizing disparate treatment claim based on sex stereotyping theory); *Doe v. City of Belleville*, 119 F.3d 563, 580 (7th Cir. 1997) (recognizing sexual harassment claim based on sex stereotyping theory).

62. E.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989). For a discussion of this case, see *infra* pp. 79-80.

63. *Price Waterhouse*, 490 U.S. 250-51.

64. 400 U.S. 542 (1971).

65. *Id.* at 544. Sex-plus discrimination occurs any time an individual is discriminated against because of her sex in conjunction with another characteristic. *Id.*; see also *Marks v. Nat'l Communications Ass'n, Inc.*, 72 F. Supp. 2d 322, 329 (S.D.N.Y. 1999) (explaining that discrimination based solely on weight does not violate civil rights as long as it is not intertwined with the issue of sex). Common types of sex-plus discrimination include discrimination against individuals of one sex who are married, pregnant, or overweight. E.g., *Phillips*, 400 U.S. at 545 (refusing to hire a woman with young children impermissible); *Frank v. United Airlines, Inc.* 216 F.3d 845, 854 (9th Cir. 2000) (dismissing female flight attendants whose weight is above that of an average small framed woman, and not dismissing men with weight above that of an average small framed man impermissible); *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1197 (7th Cir. 1971) (prohibiting female flight attendants from marrying impermissible). Sex stereotyping is one form of sex-plus discrimination in that it is discrimination based on sex 'plus' one or more gender nonconforming characteristics.

children—when it accepted applications from men with pre-school age children—constituted sex discrimination.⁶⁶ The district court had found that seventy-five to eighty percent of those hired for similar positions were women,⁶⁷ thus showing that the defendant did not discriminate against women in general.⁶⁸ The Court nevertheless held that an employer could not have different hiring policies for men and women.⁶⁹ In a concurring opinion, Justice Marshall emphasized that such a distinction was unlawful because it was “based on stereotyped characterizations of the sexes.”⁷⁰

The Seventh Circuit, in *Sprogis v. United Air Lines, Inc.*,⁷¹ articulated more fully the reasoning underlying the *Phillips* decision. In striking down a company policy that prohibited female flight attendants from being married, the court noted: “The scope of [Title VII] is not confined to explicit discriminations based ‘solely’ on sex. In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”⁷² The Supreme Court affirmed this principle a few years later in *City of Los Angeles Department of Water & Power v. Manhart*,⁷³ when it stated that “[i]t is now well recognized that employment decisions cannot be predicated on mere ‘stereotyped’ impressions about the characteristics of males or females.”⁷⁴

Although explicit recognition of sex stereotyping claims would be a logical continuation of these precedents, some federal appellate courts insisted on reading Title VII narrowly and denied the claims of plaintiffs who were discriminated against for gender nonconformity. For example, in the case of *Smith v.*

66. *Phillips*, 400 U.S. at 545. The Court qualified this holding by stating that such discrimination would be lawful if the distinction could be justified as a “bona fide occupational qualification.” *Id.* at 544. Under Title VII, being a particular sex is a bona fide occupational qualification when it is “reasonably necessary to the normal operation of that particular business or enterprise.” 42 U.S.C. § 2000e-2(e) (1994).

67. *Phillips*, 400 U.S. at 543.

68. *Id.*

69. *Id.*

70. *Id.* at 545 (Marshall, J., concurring).

71. 444 F.2d 1194 (7th Cir. 1971).

72. *Id.* at 1198; see also *Barnes v. Costle*, 561 F.2d 983, 990 (D.C. Cir. 1977) (“It is clear that the statutory embargo on sex discrimination in employment is not confined to differentials founded wholly upon an employee’s gender.”).

73. 435 U.S. 702 (1978).

74. *Id.* at 707. In *Manhart*, the defendant had a pension plan that charged higher monthly payments for female employees than males because mortality tables showed that women lived longer than men. *Id.* at 702. The Court held that the pension plan was discrimination “because of sex.” *Id.* at 712.

Liberty Mutual Insurance Co.,⁷⁵ the Fifth Circuit held that Title VII did not protect men who exhibited traditionally feminine characteristics from employment discrimination.⁷⁶ Bennie Smith was denied a job as a mail room clerk because his interviewer believed him to be "effeminate."⁷⁷

Referring to the lack of a "stronger Congressional mandate," the court argued that the plaintiff was not "discriminated against because he was a male, but because as a male, he was thought to have those attributes more generally characteristic of females."⁷⁸ Disregarding precedent dealing with sex-plus discrimination, the Fifth Circuit in essence held that because only a subset of males, rather than men in general, were subject to adverse treatment, Title VII did not apply.⁷⁹

75. 569 F.2d 325 (5th Cir. 1978).

76. See *id.* at 327. The Ninth Circuit came to a similar conclusion when it held that Title VII did not prohibit a school from firing a male teacher because he wore an earring. *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 331-32 (9th Cir. 1979).

77. *Smith*, 569 F.2d at 326.

78. *Id.* at 327.

79. Similarly, the Fifth Circuit held that Title VII did not prohibit employers from imposing hair length requirements for male employees when it did not impose such requirements on women. *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084, 1091 (5th Cir. 1975) (en banc). A panel of the court of appeals had held that such a policy "treats applicants differently because of a sex stereotype." See *Willingham v. Macon Tel. Publ'g Co.*, 482 F.2d 535, 538 (5th Cir. 1973). In reversing the panel decision, the Fifth Circuit justified its holding by stating that Congress never intended Title VII to have "sweeping implications" and, therefore, should not apply to hair length, which is not an "immutable . . . characteristic." *Willingham*, 507 F.2d at 1090, 1092. Although the EEOC initially took the position that differing hair length requirements were sex discrimination, all federal appellate courts that have ruled on the lawfulness of hair length requirements for men have agreed with the Fifth Circuit in holding that they do not violate Title VII. *Accord*, *Fountain v. Safeway Stores, Inc.*, 555 F.2d 753, 755 (9th Cir. 1977) (holding grooming requirements such as wearing a tie may be applied to only men without violating Title VII); *Barker v. Taft Broad. Co.*, 549 F.2d 400, 401 (6th Cir. 1977) (holding hair length requirements that are shorter for men than for women do not violate Title VII); *Earwood Longo v. Carlisle DeCoppet & Co.*, 537 F.2d 685, 685 (2d Cir. 1976) (same); *Knott v. Mo. Pac. Ry. Co.*, 527 F.2d 1249, 1251 (8th Cir. 1975) (same); *Dodge v. Giant Food, Inc.*, 488 F.2d 1333, 1334 (D.C. Cir. 1973) (same). Although most of these decisions were written in the 1970s, the more recent cases have come to the same conclusion. *E.g.*, *Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1388 (11th Cir. 1998) (holding hair length requirements that are shorter for men than for women do not violate Title VII); *Tavora v. N.Y. Mercantile Exch.*, 101 F.3d 907, 908 (2d Cir. 1996) (same).

In contrast, some courts have held that having a different dress code for men and women is a Title VII violation, at least in some circumstances. See *Carroll v. Talman* 604 F.2d 1028, 1030 (7th Cir. 1979) (holding that the policy requiring women but not men to wear uniforms violates Title VII). In general, a court's determination of whether a particular "grooming code" is discrimination under Title VII turns on whether the court believes the requirement imposes a heavier "burden" on one sex. See *Frank v. United Airlines, Inc.*, 216 F.3d 845, 854 n.9 (9th Cir. 2000). Therefore, a dress code that, for example, required men to wear ties and women to wear skirts would not necessarily be held to violate Title VII. See, *e.g.*, *Fountain*, 555 F.2d at 756.

In 1989, the Supreme Court expressly declared that sex stereotyping was sex discrimination under Title VII in *Price Waterhouse v. Hopkins*.⁸⁰ The plaintiff in *Price Waterhouse*, Ann Hopkins, had been recommended for partnership in the firm, but was ultimately denied promotion even though her record in securing major contracts was better than all of the other partnership candidates.⁸¹ Hopkins alleged that she had been a victim of sex stereotyping.⁸² In support of this allegation, Hopkins presented evidence that other Price Waterhouse partners had stated that she was "macho" and should take "a course at charm school."⁸³ They objected to Hopkins "using foul language" because she was a "lady."⁸⁴ Most important was the advice that Hopkins's employer gave her in order to improve her chances in obtaining a partnership. Hopkins was told by her employer to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" to improve her chances of promotion.⁸⁵

The Supreme Court held that her employer's conduct was unlawful sex discrimination prohibited by Title VII.⁸⁶ In an opinion by Justice Brennan,⁸⁷ the Court first discussed

The implications of both hair length and dress code requirements are obvious for gender nonconforming employees, particularly among those that are transgendered. Most courts have taken the position that differing grooming standards do not constitute sex discrimination because they have "only a negligible effect on employment opportunities." *E.g.*, *Knott*, 527 F.2d at 1252. A strong argument could be made that these holdings contradict Supreme Court holdings that Title VII is meant to strike at all disparate treatment between men and women and that sex stereotyping is impermissible under Title VII. The Supreme Court, however, has yet to decide a case on grooming codes under Title VII.

80. 490 U.S. 228, 249-51 (1989). One commentator has argued that because sex stereotyping "is triggered by the fact that the victim has somehow transgressed the boundaries of . . . culturally-constructed stereotypes about what it means to be a man or a woman in our society[,] . . . it is . . . the ultimate kind of sex discrimination." Toni Lester, *Protecting the Gender Nonconformist from the Gender Police—Why the Harassment of Gays and Other Gender Nonconformists Is a Form of Sex Discrimination in Light of the Supreme Court's Decision in Oncale v. Sundowner*, 29 N.M. L. REV. 89, 103 (1999).

81. *See Price Waterhouse*, 490 U.S. at 234.

82. *Id.*

83. *Id.* at 235.

84. *Id.*

85. *Id.*

86. *Id.* at 258.

87. *Id.* at 228. Brennan wrote for a plurality of four justices. There were two concurring justices and three dissenters who disagreed with the Court's central holding involving burden shifting. However, neither of the two concurring justices took issue with any of the principles regarding the legal relevance of sex stereotyping.

legislative intent, interpreting it broadly and noting that Title VII was meant "to drive employers to focus on qualifications rather than on race, religion, sex or national origin."⁸⁸ The Court then addressed the argument that sex stereotyping was not discrimination "because of sex."

[A]n employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender. . . . [W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they match [the stereotypes associated with their group].⁸⁹

According to the *Price Waterhouse* Court, if an employer discriminates against a member of one gender for exhibiting a particular characteristic (such as aggressiveness) that it would find acceptable in the other gender, that employer has discriminated "because of sex."⁹⁰ Simply put, the Court held that Title VII prohibits discrimination against individuals who fail to conform to gender stereotypes.⁹¹

The Supreme Court has yet to revisit the issue of gender stereotyping,⁹² but since *Price Waterhouse*, lower federal courts have consistently recognized that, at least in cases with very similar facts, sex stereotyping is an impermissible basis for discrimination under Title VII.⁹³

88. *Id.* at 243.

89. *Id.* at 250-51.

90. *Id.*

91. *Id.*

92. It should be noted that the central holding of *Price Waterhouse* involved issues regarding burden shifting and whether an employer can still be held liable under Title VII if it can show that it would have made the same decision in the absence of an unlawful motive. On this issue, the Court held that an employer could avoid liability if it could make this showing. *Id.* at 242-43. In 1991, Congress superseded this holding by amending the Civil Rights Act to provide that once a plaintiff proves that discrimination based on a protected category was at least one motivating factor in the decision, liability is established. See *Borgo v. Goldin*, 204 F.3d 251, 255 n.6 (D.C. Cir. 2000) (establishing such liability). The Court's statements regarding gender stereotyping as sex discrimination, however, were unaffected by the amendments and are still viable. See *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 n.3 (1st Cir. 1999).

93. See, e.g., *Bellaver v. Quanex Corp.*, 200 F.3d 485, 492 (7th Cir. 2000); *Lindahl v. Air Fr.*, 930 F.2d 1434, 1439 (9th Cir. 1991). In *Lindahl*, the female plaintiff was passed over for a promotion after she was told by her supervisor that she was the most qualified for the job. *Lindahl*, 930 F.2d at 1436. The plaintiff's supervisor stated the reason for the pass-over was that the plaintiff got "nervous" and would get "easily upset and lose control." *Id.* at 1439. The Ninth Circuit reversed the district court's granting of summary judgment for the defendant, holding that an employer may not base its

III. WHY ANTI-GAY DISCRIMINATION IS "BECAUSE OF SEX" UNDER TITLE VII

A. *Homophobia as a Form of Sexism*

The argument that discrimination against gay people is the alter ego of sex discrimination is by no means a new one. A number of scholars already have asserted that homophobia/heterosexism is simply another manifestation of misogyny and patriarchal gender norms.⁹⁴

It is without doubt that polar and uneven male/female gender roles in our society are pervasive and deep. From the moment a baby is born and his/her sex is identified and announced (e.g. "It's a Girl!"), he/she is assigned a gender and a correlating set of gender role expectations. Traditionally, dolls and domestic work toys (play ovens and kitchen sets) are assigned to girls. Action figures, building blocks and toy vehicles for boys. Girls are dressed in pretty dresses, while boys are garbed in activewear.

The importance of maintaining physical attractiveness (for the benefit of boys) is emphasized to girls, while boys traditionally are taught to lead, compete, and create for their own benefit. Athleticism, intellectual achievement and sexual conquest are traditionally valued in boys. Nurturing, mothering, domestic skills, and physical attractiveness are valued in girls.

promotion decisions on "stereotypical images of men and women, specifically that women do not make good leaders because they are too 'emotional.'" *Id.*

In *Bellaver*, the female plaintiff had consistently scored in the high or highest ranges on her annual evaluations, but was terminated anyway because she was too "aggressive." *Bellaver*, 200 F.3d at 488. The Seventh Circuit held that an employer may not require an employee to have interpersonal skills that "match stereotyped, unequal ideas about how men and women should behave." *Id.* at 492. Since there was evidence that male employees with similar interpersonal skills were tolerated, there was an issue of fact over whether the defendant had discriminated against the plaintiff "because of sex." *See id.*

94. *See Case, supra* note 31, at 57-61; Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 199-202 (1994); Lester, *supra* note 80, at 89; Samuel A. Marcossan, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L.J. 1, 24 (1992); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 205-07 (1995); I. Bennett Capers, Note, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158, 1159 (1991).

As just one example, a popular retail catalog offers two variations of a children's "bed tent," which is an enclosed bed canopy intended to turn a child's bed into a playspace.⁹⁵ Presumably, one is designed for boys and another for girls. The blue and grey one featuring the young boy model is designed to appear like a space shuttle. The one for girls, which features a girl model, is shaped like a little pink house. The gender expectations could not be clearer or more disparate.

Gay men often are discriminated against because our rejection of the traditional male gender role (*i.e.*, rejection of the domination of women in opposite-sex relationships) undermines male supremacy. We are discriminated against not solely because of how and with whom we have sex, but because of what that sex represents.

Traditionally, a man's power and authority emanate from his sexual dominion over women. To many in society, a man cannot retain these privileges if his love interest is another man. Moreover, to many putatively heterosexual men, the submission of one man unto another man for sexual intimacy is always a violation of male gender norms regardless of the particular mechanics of the encounter (*i.e.*, whether the man in question is a receptive or insertive partner).⁹⁶

It has been argued that gay men are discriminated against because, to varying degrees, they have taken on qualities and behaviors traditionally reserved for women.⁹⁷ Some may view gay men as having degraded themselves by assuming a female role in sex, or simply by refusing the traditional male role of dominating women.⁹⁸ Because all things associated with femininity have traditionally been de-valued, gay men are

95. *Lilly's Kids*, SKYMALL CATALOG, Summer 2000, at 146 (on file with author).

96. *See, e.g.*, Case, *supra* note 31, at 14. According to Professor Case, "for much of Western history an important axis of sexual orientation was . . . that of active/passive or penetrative/receptive. With this as the axis, women together with males who allowed themselves to be penetrated orally or anally were opposed and seen as subordinate to 'active' penetrative males." *Id.* at 14.

97. *Id.* at 61 n.205 (describing the plaintiff in *Goluszek v. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988), as a victim of gender stereotype, tormented by his co-workers for his feminine characteristics and traits).

98. Kara L. Gross, Note, *Toward Gender Equality and Understanding: Recognizing That Same-Sex Sexual Harassment Is Sex Discrimination*, 62 BROOK. L. REV. 1165, 1208 n.223 (1996). In certain cultures, including Anglo-American society, the extent to which a gay man is perceived as masculine or effeminate depends on whether he is (or at least advertises himself) as an active or penetrating male, or a passive or receiving male. *See* EVA CANTARELLA, *BISEXUALITY IN THE ANCIENT WORLD* 112-13, 175-81 (Carmac O. Cuilleannain trans., Yale Univ. Press 1992) (1988); GEORGE CHAUNCEY, *GAY NEW YORK: THE MAKING OF THE GAY MALE WORLD, 1890-1940*, at 81, 84-85 (Flamingo ed., 1995) (1994); Valdes, *supra* note 94, at 56-71.

likewise viewed as inferior. Gay men threaten the patriarchal stronghold because, by declining to participate in the sexual subordination of women and by adopting traditionally feminine characteristics, we blur the gender distinctions upon which male dominance is dependent.

On the other hand, some lesbians threaten to de-polarize the concept of gender by refusing to assume the traditionally passive and subservient feminine norm in favor of a more independent and assertive (*i.e.*, traditionally masculine) affect. Much of society's opprobrium toward lesbians is rooted in a resistance to the idea that women do not have to be dependent on men to succeed and prosper, in their sexuality as well as in other aspects of their lives. Same-sex attraction to women becomes a form of "insubordination" in that "it denies that female sexuality exists or should exist, only for the sake of male gratification."⁹⁹

For both gay men and lesbians, the motivation behind the suppression is preservation of the gender dichotomy upon which female subordination rests.¹⁰⁰ Since animus against homosexuals is based on a desire to preserve gender polarities and to subordinate women, acts that discriminate against gays should be viewed as sex discrimination as well.¹⁰¹

B. Anti-Gay Workplace Discrimination as a Form of Sex Stereotyping

1. All Anti-Gay Discrimination Is Based on Sex Stereotyping

The argument that discrimination against gays is really sex discrimination works not only on a theoretical level, but also should be recognized within the context of Title VII as a form of

99. Gross, *supra* note 98, at 1208 n.223 (citation omitted). Gross also compares anti-gay discrimination to prohibitions on miscegenation. She argues that just as laws against interracial marriages served the purpose of maintaining white supremacy by preserving the black-white distinction, so does condemnation of homosexuality maintain male supremacy by preserving the distinctions between men and women. *Id.* at 1210.

100. See Rachel L. Toker, *Multiple Masculinities: A New Vision for Same-Sex Harassment Law*, 34 HARV. C.R.-C.L. L. REV. 577, 593 (1999).

101. See Case, *supra* note 31, at 47 ("If women were protected for being masculine but men could be penalized for being effeminate, this would . . . send a strong message of subordination to women, because it would mean that feminine qualities, which women are disproportionately likely to display, may legitimately be devalued although masculine qualities may not.").

sex stereotyping. As discussed above, the Supreme Court in *Price Waterhouse* recognized that sex stereotyping is sex discrimination under Title VII.¹⁰² Any time employers "evaluate employees by assuming or insisting that they match the stereotype associated with their group," they have discriminated "because of sex" under the meaning of Title VII.¹⁰³ Although the plaintiff in *Price Waterhouse* was female, the Court wrote the opinion in gender-neutral language; therefore, the reasoning should apply to both men and women who exhibit gender nonconforming characteristics.

The principles regarding sex stereotyping seen in *Price Waterhouse* can also be applied to gay people. This is because gay people, simply by identifying themselves as gay, are violating the ultimate gender stereotype—heterosexual attraction. Since there is a "presumption and prescription that erotic interests are exclusively directed to the opposite sex,"¹⁰⁴ those who are attracted to members of the same sex contradict traditional notions about appropriate behavior for men and women.¹⁰⁵ Just like the plaintiff in *Price Waterhouse*, gays fail to match the stereotype associated with their group and any employment discrimination against a gay person is "because of sex" under Title VII.

Exactly how anti-gay discrimination is "because of sex" becomes clear when one asks whether the employer would still have engaged in discriminatory conduct had the employee been a member of the opposite sex. Specifically, would the employer subject a woman who was sexually attracted to men to the same adverse treatment to which he/she subjected a man also sexually attracted to men? Similarly, would the employer have treated a masculine man in the same manner that he/she may have treated a man who exhibited a feminine affect? Of course, the answer would be no. It is more than likely that the discrimination occurred only because of the employee's sex.¹⁰⁶

102. 490 U.S. 228 (1989). For a discussion of the case see *supra* Part II.B.3.

103. See *Price Waterhouse*, 490 U.S. at 251.

104. Sylvia Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 196.

105. *Id.* Law writes that the stereotype is that "[r]eal men are and should be sexually attracted to women, and real women invite and enjoy the attraction." *Id.*; see also Toker, *supra* note 100, at 600 ("Because heterosexuality is so central to the masculine gender ideal, a man is usually viewed as gender non-conforming if he is anything other than heterosexual.").

106. The Supreme Court of Hawaii adopted a similar view of anti-gay discrimination as sex discrimination. See *Baehr v. Lewin*, 852 P.2d 44, 64 (Haw. 1993) (holding that denying same-sex couples the right to marry was sex discrimination under the Hawaii

2. *Discrimination Against Effeminate Gay Men and Masculine Lesbians Is Primarily Based on Sex Stereotyping*

Although all discrimination against gay people could be considered sex stereotyping per se (based on the idea that being gay itself is gender nonconforming), it is not always the case that gays are discriminated against merely for their sexual attraction or behavior. Rather, much adverse treatment that gay people receive is based on their expression of non-sexual characteristics that stereotypically have been associated with members of the opposite sex.

A 1967 Supreme Court of New Jersey case illustrates the point that gays are often mistreated not because of whom they sleep with, but because they exhibit qualities considered inappropriate for their sex. In *One Eleven Wines & Liquors, Inc. v. Division of Alcoholic Beverage Control*,¹⁰⁷ the Division had either suspended or revoked the alcohol licenses of three different vendors for allowing "apparent homosexuals" to congregate at their establishments.¹⁰⁸ Although no sexual behavior had been observed by the Division at any of the establishments, it revoked the vendors' licenses anyway.¹⁰⁹ In justifying its decision, the Division observed that some of the patrons spoke "in a lisping tone of voice, . . . used limp-wrist movements[,] . . . extended their pinkies in a very dainty manner[,] . . . [and would] swish and sway" when they walked.¹¹⁰ The Division then concluded that "[t]heir actions and mannerisms and demeanor appeared . . . to be males impersonating females, they appeared to be homosexuals

constitution because it denied a marriage license to an individual solely on the basis of the sex of his/her partner). The Supreme Court of Hawaii has since noted, however, that the Hawaiian Constitution has been amended, making the rationale in *Baehr* no longer applicable in Hawaii. *Baehr v. Miike*, No. 20371, 1999 Haw. Lexis 391, at **6-7 (Haw. Dec. 9, 1999); see also *Lawrence v. State*, Nos. 14-99-00109-CR, 14-99-00111-CR, 2000 WL 729417, at *4 (Tex. App. June 8, 2000) (holding that a state law prohibiting same-sex sodomy violates the Texas Equal Rights Amendment because "the same behavior is criminal for some, but not for others, based solely on the sex of the individuals who engage in the behavior").

107. 235 A.2d 12 (N.J. 1967).

108. *Id.* at 13. At the time of this case, a New Jersey regulation stated that alcohol vendors were not to allow "lewdness" or "immoral activities" on their premises and were not to conduct business "in such manner as to become a nuisance." *Id.* at 14. The Division used this rule to revoke alcohol licenses from gay bars. *Id.*

109. *Id.*

110. *Id.* at 15.

commonly known as queers, fags, fruits and other names."¹¹¹ Based on this evidence, the New Jersey Supreme Court held that the Division had not been justified in revoking or suspending the vendors' licenses.¹¹² What is important about this case, however, is not the outcome, but rather the reason the case was brought. What the Division found offensive about the patrons was not necessarily their sexual orientation per se, but rather how they expressed their gender and how, in doing so, they were gender nonconforming.

The harassment that gay youth receive at school also demonstrates the sex stereotyping roots of anti-gay animus. One particularly powerful example is provided by *Montgomery v. Independent School District No. 709*.¹¹³ In that case, a male student named Jesse Montgomery had been harassed by other students "almost daily" from kindergarten all the way through the tenth grade because they perceived him as gay.¹¹⁴ He was taunted with names such as "faggot," "princess," "fairy," "Jessica," "femme boy," "bitch," "queer," and "pansy."¹¹⁵ Other abuse Jesse endured included being super-glued to his seat, being punched and kicked on the playground, being deliberately tripped or knocked down during hockey drills and having trash thrown at him on the bus and in art class.¹¹⁶ On one occasion, another student threw Jesse to the ground and pretended to sodomize him.¹¹⁷

Was Jesse Montgomery subjected to this harassment because of whom he had sex with? Obviously not. As the district judge noted, Jesse's peers had begun harassing him when he was five years old. Therefore:

It is highly unlikely that at that tender age plaintiff would have developed any solidified sexual preference, or for that matter, that he even understood what it meant to be "homosexual" or "heterosexual." The likelihood that he openly identified himself as gay or that he engaged in any homosexual conduct at that age is quite low. It is much more plausible that the students began tormenting him based on feminine personality traits that he exhibited and the

111. *Id.*

112. *Id.* at 19.

113. 109 F. Supp. 2d 1081 (D. Minn. 2000).

114. *Id.* at 1084.

115. *Id.*

116. *Id.*

117. *Id.*

perception that he did not engage in behaviors befitting a boy.¹¹⁸

In short, it was Jesse's gender nonconformity, not his sexual conduct, that led to his adverse treatment.

Anti-gay discrimination based on sex stereotyping is also found in the employment context. In *DeSantis v. Pacific Telephone & Telegraph Co.*,¹¹⁹ one of the plaintiffs was a gay male who had been fired from his position as a nursery school teacher.¹²⁰ He was *not* fired because he was gay, but because he wore a small gold ear-loop earring.¹²¹ Although the plaintiff had been employed by the nursery school for two years (and presumably had been gay the whole time), it was not until the plaintiff wore an earring to work (on a day on which no students were present) that his employer decided to terminate him.¹²² Also, as noted in Part I, co-workers subjected the male plaintiff in *Redden v. Contimortgage Corp.*¹²³ to anti-gay harassment even though he never identified himself as gay.¹²⁴ Co-workers concluded that Redden "must be a fag" based on the fact that he wore a ring on his left hand and had an effeminate voice.¹²⁵ They proceeded to mock the way Redden talked, described him masturbating at his desk and discussed various sexual practices in which they insinuated Redden took part.¹²⁶ In this case, the harassment the plaintiff received was not explicitly a result of his sexual orientation, but because of gender nonconforming characteristics that he exhibited. Redden's co-workers had no idea whether he was gay, but instead harassed him because he wore jewelry and had a high voice.¹²⁷

118. *Id.* at 1090. Not only did school officials fail to put a stop to this behavior, but some of them even helped to facilitate it. For example, Jesse claimed that after he was let off the school bus, the bus driver would wait before pulling away so that students on the bus could open their windows and taunt Jesse as he walked toward his house. See *id.* at 1085 n.5.

119. 608 F.2d 327 (9th Cir. 1979).

120. *Id.* at 328.

121. *Id.*

122. *Id.*

123. No. 99-4435, 1999 WL 1257280 (E.D. Pa. Dec. 22, 1999).

124. *Id.* at *1.

125. *Id.*

126. *Id.* at **1-2.

127. It should be noted that this case was not brought under Title VII or a state discrimination statute, but rather as a tort: intentional infliction of emotional distress. *Id.* at *1. In Pennsylvania, to establish a claim for intentional infliction of emotional distress, the plaintiff must show that the conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society." *Id.* at *2. The court held that the

Similarly, in *Dillon v. Frank*,¹²⁸ the Sixth Circuit rejected a Title VII sex stereotyping claim brought by Earnest Dillon, a Michigan postal worker who was subjected to severe harassment based on his gender nonconformity, including homophobic epithets and physical assaults.¹²⁹ Dillon contended that he was subjected to sex stereotyping because he was not deemed "macho" enough by his co-workers for a man. Despite not disclosing his sexual orientation at work, nor in any court documents or testimony, the court—like his coworkers—assumed Dillon was a gay man because of his effeminacy. Equating gender nonconformity with homosexuality, the Sixth Circuit held that:

Dillon's co-workers deprived him of a proper work environment because they believed him to be homosexual. Their comments, graffiti, and assaults were all directed at demeaning him solely because they disapproved vehemently of his alleged homosexuality. These actions, although cruel, are not made illegal by Title VII.¹³⁰

Similar examples of anti-gay bias based on gender nonconformity are countless. The point is that animus against homosexuals is often based on bias against gender nonconformity.¹³¹ In fact, for many courts, homosexuality and gender nonconformity are seen as interchangeable concepts.¹³² Individuals are frequently labeled—and discriminated against—as gay or lesbian (or more likely as "fag" or "dyke"), not because of sexual behavior, but "because of almost any sign of behavior which does not fit the [gender] stereotype."¹³³

defendant's conduct did not meet this standard. *Id.* at *3. Again, it is not the outcome of the case that is relevant. Rather, this case provides one more example of how anti-gay harassment is grounded in stereotypical views of the sexes.

128. No. 90-2290, 1992 WL 5436 (6th Cir. Jan. 15, 1992).

129. *Id.* at *1.

130. *Id.* at *7.

131. Lester, *supra* note 80, at 116. In fact, Lester argues that gay men "who behave in [a] stereotypical feminine manner" are "subjected to most some of the vehement forms of homophobia." *Id.*

132. See Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 607 (1992) ("[M]any people commonly assume that the set of people who deviate from gender norms is identical with the set of people with homophile tendencies.").

133. *Id.* at 632 (citing DAVID P. MCWHIRTER & ANDREW M. MATTISON, *THE MALE COUPLE: HOW RELATIONSHIPS DEVELOP* 137 (1984) (citing MARC F. FASTEAU, *THE MALE MACHINE* 15 (1974))).

It is fairly simple, then, to see why Title VII should protect effeminate men and masculine women from workplace discrimination. If an employer discriminates against a woman because she wears pants or has short hair, or discriminates against a man because he wears an earring or has a lisp, he/she is trying to suppress conduct that does not conform to his/her notion of appropriate expressions of gender. Furthermore, if it was the man who had short hair, or the woman who had earrings, there would likely be no negative treatment. This demonstrates that discrimination due to effeminacy in men or masculine qualities in women is also "because of sex" within the meaning of Title VII.¹³⁴

C. *Application to Transgendered Individuals*

Until now, our discussion has focused almost exclusively on gay people. Discrimination based on gender identity, however, is also a form of sex stereotyping.¹³⁵ Since transgendered people identify with the biological sex opposite than that which they were born with, they are, by definition, gender nonconforming.¹³⁶ In fact, one could argue that because transgenderism involves issues of gender *identity* rather than *orientation*, discrimination against a transgendered person can be classified as "because of sex" even more easily than for a gay person.¹³⁷ Regardless, there

134. See Case, *supra* note 31, at 34.

135. See PAISLEY CURRAH & SHANNON MINTER, POLICY INST. OF THE NAT'L GAY & LESBIAN TASK FORCE & NAT'L CTR. FOR LESBIAN RIGHTS, *TRANSGENDER EQUALITY: A HANDBOOK FOR ACTIVISTS AND POLICY MAKERS* 8 (2000) available at <http://www.nglrf.org/library/index.cfm>; Symposium, *Queer Law 1999: Current Issues in Lesbian, Gay, Bisexual and Transgendered Law*, 27 FORDHAM URB. L.J. 283, 381 (1999) [hereinafter *Queer Law*].

136. Not all members of the gay and transgender communities agree with this position. Rather, some argue that labeling gay and transgendered individuals as "gender nonconforming" reflects a narrow and restrictive view of "gender" and will only reinforce ideas of gender as a dichotomy. See, e.g., Pamela J. Papish, *Homosexual Harassment or Heterosexual Horseplay? The False Dichotomy of Same-Sex Sexual Harassment Law*, 28 COLUM. HUM. RTS. L. REV. 201, 231 (1996). The response to this argument is that a sex stereotyping theory under Title VII does not suggest that those plaintiffs do not conform to their gender. Instead, it only asserts that they have failed to conform to gender *stereotypes* that the employer holds about men and women.

137. This was the position taken by one federal district court in the 1980s. Judge Grady of the Northern District of Illinois held in *Ulane v. Eastern Airlines, Inc.*, 581 F. Supp. 821 (N.D. Ill. 1983), that the meaning of "sex" in Title VII was not broad enough to include "sexual preference," but that it did encompass "sexual identity." See *id.* at 823. Judge Grady stated that "sex is not a cut-and-dried matter of chromosomes," but that it is both a question of self-perception and how society perceives that individual. *Id.* at 825. Therefore, Title VII should be interpreted as protecting transsexuals from workplace discrimination. *Id.* The Seventh Circuit reversed the district court's decision, holding

is a strong argument that both anti-gay and anti-transgender discrimination are rooted in the same bias against gender nonconformity, and the arguments used to include gay people in Title VII protection can be applied to transgendered individuals as well.

IV. CAN TITLE VII BE USED TO PROTECT GAYS FROM WORKPLACE DISCRIMINATION? JUDICIAL APPLICATION OF "BECAUSE OF SEX" TO GAY PLAINTIFFS

A. *Preliminary Questions*

Regardless of how sound both the theoretical and legal arguments are for classifying discrimination against gays as sex discrimination, little can be accomplished for gay employees unless judges agree that anti-gay discrimination is "because of sex" under Title VII. As noted in Part II.B., courts traditionally have adopted widely diverging views on how "because of sex" should be interpreted.¹³⁸ Application of Title VII to cases involving homosexuality is certainly no exception and currently may be the most controversial area of sex discrimination litigation.

Two issues that invariably affect the chances of success (at least getting past summary judgment) for a gay plaintiff are the court's view of the role of congressional intent in Title VII sex discrimination cases, and the meaning of "sex" as used in the statute.

1. *What Is the Role of Congressional Intent?*

Although the reality may be that Congress had no specific intent when it amended the Civil Rights Act to include a

that Title VII protects neither transsexuals nor homosexuals. See *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084-87 (7th Cir. 1984).

One Ninth Circuit judge came to a similar conclusion in another case, arguing in a dissenting opinion that it should be "irrelevant under Title VII whether the plaintiff was born female or was born ambiguous and chose to become female." *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 664 (9th Cir. 1977) (Goodwin, J., dissenting); see also *Maffei v. Kolaeton Indus. Inc.*, 626 N.Y.S.2d 391, 396 (N.Y. Sup. Ct. 1995) (holding that a New York City sex discrimination ordinance also prohibits discrimination against transsexuals).

138. See discussion *supra* Part II.B.

prohibition on sex discrimination,¹³⁹ no other issue in Title VII jurisprudence has been disagreed upon more by courts. Inferring a very limited intent from Congress, some courts initially denied sex stereotyping and opposite-sex harassment claims in the 1970s because they believed such claims went beyond Congress' purposes.¹⁴⁰ Judges used similar reasoning in the 1990s to deny same-sex harassment claims.¹⁴¹ Other courts, however, broadly interpreted the intent of Congress. In *Barnes v. Costle*,¹⁴² the Court of Appeals for the D.C. Circuit stated:

"Congress chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameter of such nefarious activities. Rather, it pursued the path of wisdom by being unrestrictive, knowing that constant change is the order of our day and that the seemingly reasonable practices of the present can easily become the injustices of the morrow."¹⁴³

According to the court in *Barnes*, "Title VII must be construed liberally to achieve its objectives,"¹⁴⁴ and whether Congress contemplated a particular form of discrimination should not be a relevant consideration.¹⁴⁵ Other courts, noting both the original questionable purpose behind adding "sex" as a protected category in Title VII and the lack of enlightening legislative history, have rejected using congressional intent to determine the scope of Title VII.¹⁴⁶ Presently, all federal courts have recognized that, although sexual harassment and sex stereotyping claims were not specifically contemplated by the Congress that passed the Civil Rights Act, such claims fall within the legislation's basic purposes and are actionable under Title VII.¹⁴⁷

139. *Id.*

140. See *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 327 (5th Cir. 1978) (denying sex stereotyping claim); *Tomkins v. Pub. Serv. Elec. & Gas Co.*, 422 F.Supp. 553, 556 (D.N.J. 1976) (denying a sexual harassment claim), *rev'd*, 568 F.2d 1044 (3d Cir. 1978).

141. See, e.g., *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999).

142. 561 F.2d 983 (D.C. Cir. 1977).

143. *Id.* at 994 (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971)).

144. *Id.*

145. *Id.*

146. See *Tanner v. Prima Donna Resorts, Inc.*, 919 F.Supp. 351, 354 (D. Nev. 1996); see also *Doe v. City of Belleville*, 119 F.3d 563, 572-73 (7th Cir. 1997) ("As for congressional intent, the legislative history suggests that legislators had very little preconceived notion of what types of sex discrimination they were dealing with when they enacted Title VII. . . . It is, ultimately, the plain, unambiguous language of the statute upon which we must focus.").

147. E.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

Notably, when the Supreme Court has relied upon congressional intent in interpreting Title VII, it has construed the intent liberally. In reference to the purposes of Title VII, the Supreme Court has reiterated that "Congress had always intended to protect all individuals from sex discrimination in employment,"¹⁴⁸ that Title VII created a "*broad rule* of workplace equality,"¹⁴⁹ and that it was meant to strike at the "*entire spectrum* of disparate treatment of men and women in employment."¹⁵⁰

In its most recent opinions, the Court has de-emphasized altogether the role of congressional intent in interpreting Title VII. In *Oncale*, the Court stated that statutes are often used to protect against more than just the "principal evil" at which the statute was directed.¹⁵¹ The statute can also be applied to "reasonably comparable evils."¹⁵² Furthermore, "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."¹⁵³ *Oncale* then stands for the principle that a cause of action may be recognized under Title VII even though Congress did not contemplate it when the statute was passed, as long the cause of action is based on a "comparable evil" and is consistent with the statutory language.¹⁵⁴

As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they match the stereotype associated with their group, for "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."

Id. (citations omitted); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (stating that Title VII encompasses sexual harassment because it is an "arbitrary barrier to sexual equality at the workplace") (citations omitted).

148. *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 681 (1983).

149. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993) (emphasis added).

150. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (quoting *Meritor*, 477 U.S. at 64) (emphasis added); see also *Harris*, 510 U.S. at 21 ("[The language in Title VII] 'evinces a congressional intent "to strike at the entire spectrum of disparate treatment of men and women"'") (citations omitted); *Price Waterhouse*, 490 U.S. at 251 (same).

151. *Oncale*, 523 U.S. at 79.

152. *Id.*

153. *Id.*

154. Under this view, anti-gay discrimination should fall within Title VII's prohibitions. As discrimination based on sexual orientation is based on, and contributes to, misogyny, it is a "comparable evil" to discrimination against women (if not the same evil). Furthermore, as will be discussed in the next section, there is nothing inconsistent

Congressional intent, therefore, should not be a barrier to providing gays with protection from workplace discrimination under Title VII. If courts look either to the general rather than the specific purposes of Title VII, thereby encouraging employers to focus on qualifications rather than arbitrary factors, or simply discount legislative intent all together (because it is impossible to determine), including gays under Title VII protection is little more than a continuation of the principles already established.

Regardless of whether the intent of Congress *should be* a barrier to recognizing Title VII claims based on sexual orientation, courts generally still treat it as one. Congressional intent is often cited in decisions denying relief to gays and other gender nonconformists who bring sex discrimination claims.¹⁵⁵ Gay plaintiffs' chances of even getting past a motion to dismiss will be greatly diminished in courts that consider the *specific* intent of Congress in enacting Title VII to be a dispositive factor in deciding a case, as compared to courts that look either to the general purposes of the Civil Rights Act or downplay the role of congressional intent.¹⁵⁶

with the statute's language and the view that Title VII prohibits workplace discrimination against gays.

155. *E.g.*, *Dillon v. Frank*, No. 90-2290, 1992 WL 5436, at *4 (6th Cir. Jan. 15, 1992); *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982); *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 329 (9th Cir. 1977); *Bibby v. Phila. Coca-Cola Bottling Co.*, 85 F. Supp. 2d 509, 516 (E.D. Pa. 2000). Even courts that acknowledge the similarity between the rejection of sexual harassment claims in the 1970s and the rejection of claims based on sexual orientation today still reject Title VII sexual orientation claims by noting that, although the Supreme Court has recognized sexual harassment claims, it has not done the same for sexual orientation. *See Schoiber v. Emro Mktg. Co.*, 941 F. Supp. 730, 733 (N.D. Ill. 1996). Similarly, even courts that have acknowledged that there is "little legislative history to guide us in interpreting the Act's prohibitions against discrimination based on sex," have nonetheless referred to congressional intent in rejecting Title VII claims based on sexual orientation. *See Simonton v. Runyon*, No. 99-6180, 2000 WL 1575481, at *2 (2d Cir. Aug. 22, 2000).

156. It is quite likely, however, that courts that rely heavily on legislative intent in Title VII sex discrimination cases are using it simply to buttress a conclusion they already made about the desirability of using Title VII to protect gay plaintiffs from workplace discrimination. Therefore, in the absence of an express statutory prohibition against sexual orientation discrimination, these courts would deny claims brought by gay plaintiffs regardless of their actual belief regarding legislative intent, and would find another reason to deny them if the congressional intent reasoning was absent. This is one reason why separate legislation protecting gay people from discrimination, such as the Employment Non-Discrimination Act (ENDA), is needed. *See discussion infra* Part V.

Rejecting the use of legislative intent in favor of using the "plain language" of the amendment has its own problems, as there is also disagreement on what the language actually means.

2. *How Should "Sex" Be Defined? The Judicial Conflation of Sex and Gender.*

Closely related to the issue of congressional intent is the issue of how courts should interpret the word "sex" in Title VII. The question is whether "sex" means only "biological distinctions" or if it extends to the expression of masculinity and femininity. How this debate is resolved is important because if "sex" is determined to include expressions of gender rather than just anatomy, gender nonconforming plaintiffs (including gays) have a greater likelihood of succeeding in Title VII claims. This is because the expression of feminine or masculine traits causes discrimination against gays.

Scholars have argued that a biological/anatomical view of "sex" ignores "culturally constructed dimensions." By failing to account for the socially constructed aspects of sex, this view also fails to acknowledge that "[b]iology and culture are all part of one piece when it comes to how society's ideas about men and women are and should be."¹⁵⁷ Furthermore, since "almost every claim with regard to sexual identity or sex discrimination can be shown to be grounded in normative gender rules and roles,"¹⁵⁸ sex discrimination laws that limit protection to biological distinctions can never be fully effective. A prohibition of discrimination based on "sex" should include a prohibition of discrimination based on masculine and feminine qualities as well.

The Supreme Court appeared to agree with this position, and arguably resolved the debate more than ten years ago in *Price Waterhouse*. By expressly adopting sex stereotyping as a form of sex discrimination, the Supreme Court essentially took the position that Title VII prohibits not just discrimination based on biological distinctions, but also gender expression by an

157. Lester, *supra* note 80, at 98; see also Fajer, *supra* note 132, at 515 n.16 (arguing that the distinction between biological and socially constructed differences is "difficult to make and tends to hide the extent to which most gender differences are at least partially socially constructed"); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 5 (1995) ("Ultimately, there is no principled way to distinguish sex from gender, and concomitantly, sexual differentiation from sexual discrimination.").

158. Franke, *supra* note 157, at 2.

employee. This conclusion is underscored by the Court's use of the word "gender" throughout the opinion.¹⁵⁹ This language choice is important because while "sex" is often defined as referring only to biological distinctions, "gender" also includes "socially constructed differences."¹⁶⁰ If "sex" in Title VII is interpreted as meaning the same thing as "gender," the implication is that Title VII does not only protect against discrimination based on biological sex, but also on any *expression* of gender as well.

Despite these indications by the Supreme Court, courts are still confused over the meaning of "sex" in Title VII. Some jurisdictions, most notably the Seventh Circuit, have followed the Supreme Court's "gender" approach to Title VII. For instance, in *Doe v. City of Belleville*,¹⁶¹ the court of appeals used the words "sex" and "gender" interchangeably, stating that gender under Title VII is defined as "the way in which [an employee] project[s] the sexual aspect of his personality"¹⁶² and there is sex discrimination if an employee is singled out because

159. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989) ("[A]n employer may not take gender into account.") (emphasis added); *id.* at 240 ("We take these words [prohibiting sex discrimination] to mean that gender must be irrelevant to employment decisions.") (emphasis added); *id.* at 250 ("In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive . . . has acted on the basis of gender.") (emphasis added).

160. See Fajer, *supra* note 132, at 650-51. Justice Scalia made this same observation in *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 157 (1994) (Scalia, J., dissenting).

161. 119 F.3d 563 (7th Cir. 1997), *vacated by City of Belleville v. Doe*, 523 U.S. 1001 (1998). After *Doe* was decided by the Seventh Circuit, the case was appealed to the Supreme Court and the Court granted certiorari. In the meantime, the Supreme Court handed down the *Oncale* decision. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998). Subsequently, *Doe* was vacated and remanded back to the Seventh Circuit to be redecided "in light of *Oncale*." *Doe v. City of Belleville*, 523 U.S. 1001, 1001 (1998). This never happened, however, as the parties then reached a settlement. For a discussion of the implications of *Doe* being vacated, see *infra* notes 162, 180.

162. See *Doe*, 119 F.3d at 580. At least some district courts in the Seventh Circuit have continued to follow this view, even after *Doe* was vacated and remanded by the Supreme Court. See, e.g., *Spearman v. Ford Motor Co.*, No. 98-C-0452, 1999 WL 754568, at *6 (N.D. Ill. Sept. 9, 1999) (noting that there is sex discrimination when the employee is "singled out because of the way he projected his gender, or how his gender was perceived by his co-workers"). However, some of the basic premises of *Doe* were undermined recently by *Hamner v. St. Vincent Hospital & Health Care Center, Inc.*, 224 F.3d 701 (7th Cir. 2000). In that case, the court of appeals, in an opinion by Judge Manion (who dissented in *Doe*), held that it was not reasonable for a gay male nurse who was fired after filing a sexual harassment grievance against his employer to believe that he was protected from retaliation by his employer under Title VII. See *id.* at 707. In so holding, *Hamner* both adopted a "sex as biological distinctions" view and rejected *Doe's* suggestion that sex and sexual orientation discrimination were closely linked. See *id.* at 704-07. *Hamner*, however, never cites to *Doe*, or explicitly disagrees with its holding, so it is not clear to what extent the reasoning behind *Doe* is undermined or if district courts will continue to rely on it in the future.

the way in which he/she projects his/her gender does not conform to gender stereotypes.¹⁶³ More recently, the Ninth Circuit, in *Schwenk v. Hartford*,¹⁶⁴ stated that "under *Price Waterhouse*, 'sex' under Title VII encompasses both sex—that is, the biological differences between men and women—and gender," or socially-constructed characteristics.¹⁶⁵ Furthermore, the Ninth Circuit stated that sex and gender are "interchangeable" for purposes of Title VII.¹⁶⁶ The court concluded that "[d]iscrimination because one fails to act in the way expected of a man or a woman is forbidden under Title VII."¹⁶⁷ The Third Circuit also has held that Title VII prohibits sex discrimination based on either biologically-based differences or socially/culturally-based differences.¹⁶⁸ Even courts that have adopted a restricted view of "sex" under Title VII (because of their perception of congressional intent) concede that the meaning of "sex" could be broad enough to include "psychological . . . characteristics" if one limits the analysis to the language of the statute.¹⁶⁹

In contrast, some courts have held that "sex" and "gender" are distinct concepts and, therefore, Title VII should be construed to apply only to biological differences. The first decision to reach this conclusion was *Holloway v. Arthur Anderson & Co.*¹⁷⁰ In *Holloway*, the court held that "sex" was not synonymous with "gender," and that the meaning of sex should be limited to its "traditional meaning."¹⁷¹ *Holloway*, however, was decided twelve years before *Price Waterhouse* and its continuing relevance has been questioned by both courts and commentators alike.¹⁷²

Even after *Price Waterhouse*, however, some courts may still cling to the *Holloway* position. For example, in *Klein v.*

163. *Doe*, 119 F.3d at 580.

164. 204 F.3d 1187 (9th Cir. 2000).

165. *See id.* at 1202.

166. *See id.*

167. *Id.*

168. *E.g.*, *Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 148 (3d Cir. 1999) ("[W]e have not considered 'sex' and 'gender' to be distinct concepts for Title VII purposes.").

169. *Hopkins v. Balt. Gas & Elec. Co.*, 77 F.3d 745, 749 (4th Cir. 1996).

170. 566 F.2d 659 (9th Cir. 1977).

171. *Id.* at 663.

172. *See generally* Kristine W. Holt, Comment, *Reevaluating Holloway: Title VII, Equal Protection, and the Evolution of a Transgender Jurisprudence*, 70 TEMP. L. REV. 283 (1997) (examining how current civil rights statutes, including Title VII, could provide protection for transgendered persons). In fact, the Ninth Circuit (where *Holloway* was decided) recently stated that the *Price Waterhouse* decision effectively overruled *Holloway*. *See Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000).

McGowan,¹⁷³ the court held that "gender" and "sex" were not equivalent for the purposes of Title VII.¹⁷⁴ The court stated that if gender and sex *were* equivalent, then both discrimination based on effeminate behavior and the perception that an employee is gay would be prohibited by Title VII since gender would encompass "'masculinity' and other sexual aspects of a person's personality."¹⁷⁵ The court found that the two concepts were not the same.¹⁷⁶ Consequently, Title VII did not protect either effeminacy or homosexuality.¹⁷⁷

Similarly, in *Higgins v. New Balance Athletic Shoe, Inc.*,¹⁷⁸ a case that *Klein* cited for support, the District Court of Maine noted that "sex" and "gender" are distinct concepts.¹⁷⁹ The court expressed doubt regarding the validity of a Title VII interpretation that would prohibit discrimination based on both biological and social/cultural distinctions.¹⁸⁰ The court never

173. 36 F. Supp. 2d 885 (D. Minn. 1999), *aff'd*, 198 F.3d 705 (8th Cir. 1999).

174. *Id.* at 889-90.

175. *Id.* at 890.

176. *Id.*

177. *Id.* It should be noted that only two months later, the judge that decided *Klein* adopted a significantly broader view of sex in *Breitenfeldt v. Long Prairie Packing Co.*, 48 F. Supp. 2d 1170 (D. Minn. 1999). Although the *Breitenfeldt* decision did not return to a discussion of the meaning of "sex" in Title VII and made no mention of the *Klein* decision, it did state that sexually explicit remarks directed at homosexual behavior created an issue of fact regarding whether harassment had occurred "because of sex." *Id.* at 1176. If "sex" is limited to mean only anatomical sex, such harassment would likely not fall within the purview of Title VII. This change is inexplicable and demonstrates the confusion that courts have had in trying to interpret the "because of sex" requirement.

178. 21 F. Supp. 2d 66 (D. Me. 1998), *aff'd in part*, 194 F.3d 252 (1st Cir. 1999).

179. *Id.* at 75.

180. *Id.* The district court based this doubt on the Supreme Court's decision to vacate and remand *Doe v. City of Belleville* in light of its opinion in *Oncale*. *Id.* at 75 n.9. The district court noted that the court in *Doe* had adopted a "gender approach" to Title VII and opined that the Supreme Court may have vacated the decision because it disagreed with *Doe's* position. *Id.* The Supreme Court, however, did not provide any reasoning as to why it vacated *Doe* (other than it was "in light of *Oncale*") and did not state that it disagreed with any part of the *Doe* holding.

Even if the decision to vacate *Doe* was an expression of disapproval on some level, the district court was in no position to determine with which aspect of the decision the Supreme Court disagreed. *Doe* was a lengthy and complex decision that touched on many Title VII sex discrimination issues. Therefore, any conclusion by the district court in *Higgins* as to what part of *Doe* the Supreme Court disagreed with is mere speculation. It is doubtful that *Doe's* view of the meaning of "sex" had anything to do with the Supreme Court's decision to remand the case, as *Oncale* itself did not address that issue. If the Supreme Court's decision to vacate and remand *Doe* "in light of *Oncale*" was meant to suggest disapproval of that case on some level, it is likely that it would be based on *Doe's* view that all sexually explicit harassment is "because of sex" under Title VII, see discussion *infra* note 284, as it was the only aspect of *Doe* with which the Supreme Court expressly disagreed. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).

actually took a position on the issue, however, as it held that even under a "gender approach," the plaintiff still failed to create an issue of fact.¹⁸¹ Other jurisdictions have similarly held that "sex" should be limited to its "traditional" definition and should apply only to "immutable characteristics."¹⁸² It is important to note, however, that unlike *Schwenk* and *Doe*, the cases adopting the narrow meaning of "sex" failed to address the *Price Waterhouse* decision.

Still other courts are even more confused. They have followed *Price Waterhouse* by using the words "sex" and "gender" interchangeably, but have departed from *Price Waterhouse* by choosing to define "gender" as including only biological distinctions. In *Hopkins v. Baltimore Gas & Electric Co.*,¹⁸³ the Fourth Circuit stated that equating "sex" with "gender" actually *limited* the meaning of "sex" under Title VII, which could otherwise be interpreted as including sexual behavior.¹⁸⁴ Instead, "sex" should be limited to a "man or woman."¹⁸⁵ Many

Furthermore, district courts in the Seventh Circuit have concluded that *Doe* is generally consistent with *Oncale* and remains a viable decision. *Spearman v. Ford Motor Co.*, No. 98-C-0452, 1999 WL 754568, at *6 (N.D. Ill. Sept. 9, 1999).

181. *Higgins*, 21 F. Supp. 2d at 76. The district court decision was then appealed to the First Circuit. The First Circuit affirmed in part and remanded the decision, but did not explicitly discuss its view of the sex/gender debate. *Higgins*, 194 F.3d at 256. However, the First Circuit adopted the view that Title VII prohibited discrimination against both men and women for failing to meet stereotypical expectations of masculinity or femininity, thus suggesting that it would also take the "gender approach." *See id.* at 261 n.4.

182. *See Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 704 (7th Cir. 2000) (citing *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984)) ("Congress intended the term 'sex' to mean 'biological male or biological female,' and not one's sexuality or sexual orientation."); *see also Dillon v. Frank*, No. 90-2290, 1992 WL 5436, at *4 (6th Cir. Jan. 15, 1992). The court in *Dillon* based its opinion on the fact that the drafters placed "sex" in Title VII along side other "immutable" characteristics such as race, color, and national origin. *Id.* Although the court acknowledged that the drafters also included religion, a non-immutable characteristic, it stated that religion was "so deeply rooted for most that it was almost immutable." *Id.* Even accepting this argument, however, would not necessarily lead to a conclusion that sexual orientation or gender identity are not included in the meaning of "sex." They are also, at least arguably as much as religion, "deeply rooted" characteristics.

183. 77 F.3d 745 (4th Cir. 1996).

184. *Id.* at 749 n.1. Courts, such as those in *Hopkins* and *Dillon*, have suggested that in order for gays to be protected under Title VII, "sex" would have to be interpreted as including anything "sexual." *Id.*; *Dillon*, 1992 WL 5436, at *4. Nothing, however, could be further from the truth. One of the main theses of this Article is that anti-gay discrimination often has nothing to do with sexual behavior, but rather is about a strict view of gender roles.

185. *Hopkins*, 77 F.3d at 749 n.1.

courts seem to have taken a similar view that "sex" and "gender" mean the same thing and that both terms refer only to physical characteristics.¹⁸⁶

Unfortunately, the Supreme Court's decision in *Oncale* has not dispelled the confusion in the circuits regarding the meaning of "sex" in Title VII, as the Court wrote *Oncale* in vague terms and failed to express its opinion on the issue.¹⁸⁷ Because of this, there is no less disagreement among the circuits after *Oncale* than there was before. *Oncale*, however, did nothing to undermine the decision in *Price Waterhouse*, so the Court's view of sex discrimination in that case should still be controlling.

Regardless, there still exists an uneven application of *Price Waterhouse*. Whether a court decides to adopt a "gender approach" in defining "sex" has important implications for gay plaintiffs. In fact, a court's view of the meaning of sex could be even more dispositive than its view of congressional intent (though the two are closely linked). Although a gender approach will greatly improve a plaintiff's chances of getting past summary judgment, a biological definition of "sex" by the court means an almost certain adverse ruling.¹⁸⁸

B. Is a Claim Based Explicitly on Sexual Orientation Actionable Under Title VII?

Despite the arguments supporting a view of discrimination, based on sexual orientation as a form of sex discrimination and a lack of congressional intent that would prohibit such a view, federal courts thus far have not been receptive to Title VII claims based on a sexual orientation theory. Currently there are no jurisdictions that recognize a Title VII claim based explicitly on a sexual orientation theory. Claims based on discrimination against transgendered individuals have faced similar treatment.¹⁸⁹ Even courts that have expressed willingness to

186. *E.g.*, *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 451-52 (5th Cir. 1994) (holding that harassment by a male supervisor to a male employee is not covered by Title VII); *Mims v. Carrier Corp.*, 88 F. Supp. 2d 706, 714 (E.D. Tex. 2000) (holding that sexual orientation is not protected under the Civil Rights Act); *Bibby v. Phila. Coca-Cola Bottling Co.*, 85 F. Supp. 2d 509, 516 (E.D. Pa. 2000) (stating that Congress intended "sex" in Title VII to refer to the male/female distinction).

187. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78-80 (1998).

188. *See* discussion and sources cited *supra* note 184.

189. *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984) (rejecting a Title VII claim brought by a transsexual); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (same). *But see Maffei v. Kolaeton Indus., Inc.*, 626 N.Y.S.2d 391, 396

protect gay plaintiffs under other theories still have held that sexual orientation cannot form the basis of a Title VII claim.¹⁹⁰ Likewise, the EEOC, the federal agency responsible for investigating Title VII violations and author of the Title VII compliance manual, has rejected an interpretation of the statute that would extend Title VII protection to discrimination based on sexual orientation.¹⁹¹ There is at least one district court, however, that has suggested that whether Title VII applies expressly to anti-gay discrimination is still an issue subject to reconsideration.¹⁹² In addition, at least one state has recognized sexual harassment claims based on sexual orientation; others have suggested that the possibility is there.¹⁹³

(N.Y. Sup. Ct. 1995) (holding that a city ordinance prohibiting sex discrimination protects transsexuals).

190. *Doe v. City of Belleville*, 119 F.3d 563, 593 (7th Cir. 1997). *Doe* did acknowledge that many scholars have concluded that anti-gay bias should be viewed as a form of sex discrimination. *Id.* at 593 n.27. The court declined to adopt this position, but stated that there is "a considerable overlap in the origins of sex discrimination and homophobia . . . [and] it is not always possible to rigidly compartmentalize the types of bias that [anti-gay] . . . epithets represent." *Id.*

191. See Papish, *supra* note 136, at 207 n.29 ("If a male supervisor harasses a male employee because of the employee's homosexuality, then the supervisor's conduct would not be sexual harassment since it is based on the employee's sexual preference, not his gender . . .") (quoting EEOC COMPLIANCE MANUAL (CCH) § 615.2(b)(3) (1991)). Although the EEOC's interpretations of Title VII are not binding on a court, they "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (citations omitted).

192. *Spearman v. Ford Motor Co.*, No. 98-C0452, 1999 WL 754568, at *6 n.4 (N.D. Ill. Sept. 9, 1999). ("[T]he Seventh Circuit, at present, has decided that discrimination based upon sexual orientation is beyond the reach of Title VII . . . [Anti-gay discrimination] as of yet is not recognized as impermissible under Title VII . . ." (emphasis added) (citation omitted)).

193. See *Hanke v. Safari Hair Adventure*, 512 N.W.2d 614, 616 (Minn. App. 1994) (holding that harassment based on an employee's sexual orientation gave the employee good cause to quit under the state's sex discrimination statute). Although Minnesota currently has a statute expressly prohibiting discrimination based on sexual orientation, no such statute existed when the harassment in *Hanke* occurred. *Id.* at 617 n.1.

In addition, one justice on the Ohio Supreme Court has likewise indicated that "sex" could be interpreted to include "sexual orientation" in the future. In *Retterer v. Whirlpool Corp.*, 729 N.E.2d 760 (Ohio 2000), the court dismissed a claim brought by a gay plaintiff under the state's sex discrimination statute because it was barred by claim preclusion. *Id.* at 760. However, Justice Pfeifer wrote in a concurring opinion that, had the suit been properly brought, it "should have survived summary judgment." *Id.* (Pfeifer, J., concurring). Justice Pfeifer further stated:

This case might have presented the opportunity for us to consider whether discrimination based upon sexual orientation is also actionable under R.C. 4112.02(A) [the state's anti-discrimination statute that prohibits "sex" discrimination]. The abusive behavior that might give

As noted in Part IV.A.1, courts generally rely on the assumption that protecting gay people from discrimination is beyond what Congress intended for Title VII.¹⁹⁴ In addition, some courts note that proposals to amend Title VII to include sexual orientation as a protected category have been offered several times and always been rejected.¹⁹⁵ Often, courts simply cite other jurisdictions that have rejected claims based on sexual orientation and then conclude without reasoning that they will reject such claims as well.¹⁹⁶

Regardless of the justifications given, all courts currently agree that Title VII does not prohibit discrimination based on sexual orientation *qua* sexual orientation. At least today, a plaintiff making a Title VII claim based on a sexual orientation theory has virtually no chance of success.¹⁹⁷ It is important to note that, although *Oncale* did not express disapproval of the various circuit decisions holding that Title VII does not prohibit discrimination based on sexual orientation, it also did not state that such claims are barred. Therefore, in theory at least, the

rise to such a cause of action continues to exist even in this supposedly enlightened day, and certainly it is only a matter of time before the question of sexual-orientation discrimination (and whether it is merely the opposite side of the same sexual-harassment coin) is properly before this court.

Id. at 760-61 (Pfeifer, J., concurring).

194. See *Dillon v. Frank*, No. 90-2290, 1992 WL 5436, at *7 (6th Cir. Jan. 15, 1992) ("Congress designed Title VII to prevent the perpetuation of stereotypes and a sense of degradation which serve to close or discourage employment opportunities for women.") (citation omitted). Courts taking this position have failed to address arguments concerning the connection between bias against gays and "stereotypes," and the "degradation" of women presented in Part III.A, and why specific, rather than general, congressional intent should be used in interpreting the statute.

The damage that a court's heavy reliance on the specific intent of Congress will do to gay plaintiffs cannot be overemphasized. At least one court that took a restricted view of "because of sex" (based on its perception of congressional intent) conceded that, if only the language of the statute is considered, an argument could be made that Title VII prohibits discrimination based on sexual orientation. *Hopkins v. Balt. Gas & Elec. Co.*, 77 F.3d 745, 749 (4th Cir. 1996).

195. *E.g.*, *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 329 (9th Cir. 1979).

196. *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989); *Simonton v. Runyon*, 50 F. Supp. 2d 159, 162 (E.D.N.Y. 1999).

197. Some courts, however, may go out of their way to avoid dismissing a claim based on sexual orientation if the court believes the claim would otherwise be valid. For example, in *Schmedding v. Tnemec Co.*, 187 F.3d 862 (8th Cir. 1999), the Eighth Circuit allowed a plaintiff to delete the phrase "perceived sexual preference" in his complaint and replace it with "sex" so that the plaintiff would have a cognizable Title VII claim. *Id.* at 865.

Supreme Court has left the door open for lower courts to recognize Title VII claims based on sexual orientation.

B. Arguing Anti-Gay Discrimination as Per Se Sexual Stereotyping Under Title VII

Rather than allege discrimination based on sexual orientation in their complaints, some gay plaintiffs have tried to argue that anti-gay discrimination is sex stereotyping per se because it is based on the belief that people can only engage in sexual relations with members of the opposite sex. This argument has not been made in federal court often; when it has, it has been unsuccessful. It was first asserted—and rejected—in *DeSantis v. Pacific Telephone & Telegraph Co.*¹⁹⁸ In *DeSantis*, one of the plaintiffs had been rejected for employment because he was gay.¹⁹⁹ He argued that he would not have been discriminated against for preferring males as sexual partners had he been a woman; therefore, this was impermissible sex-plus discrimination under *Phillips v. Martin-Marietta Corp.*²⁰⁰ because it allowed different employment criteria for men and women.²⁰¹ The Ninth Circuit rejected the argument, stating that the plaintiff was trying to “bootstrap Title VII protection for homosexuals” and that there was no sex discrimination because the employer’s policy applied to both gay men and lesbians.²⁰²

The argument has fared no better in more recent decisions. In *Dandan v. Radisson Hotel Lisle*,²⁰³ the Northern District of

198. 608 F.2d 327 (9th Cir. 1979).

199. *Id.* at 328.

200. 400 U.S. 542, 544 (1971) (“[T]he Court of Appeals erred in . . . permitting one hiring policy for women and another for men . . .”).

201. *DeSantis*, 608 F.2d at 331.

202. *Id.* This reasoning is weak and contradicts the logic behind the prohibition of sex-plus discrimination. As the Supreme Court observed in *City of Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978), “the basic policy of [Title VII] requires that we focus on fairness to individuals rather than fairness to classes.” *Id.* at 709. Therefore, the analysis that a court should go through is whether the *individual* was discriminated against because he/she was a man or a woman, *not* whether an entire group receives discrimination. Even if the employer’s policy did apply to both gay men and lesbians, it would not change the fact that the employer had discriminated against that particular gay man for failing to conform to gender stereotypes.

The Ninth Circuit also rejected a related argument. In addition to his sex stereotyping argument, the plaintiff in *DeSantis* also argued that because there are more gay men than gay women, anti-gay discrimination disproportionately affects men and is, therefore, really sex discrimination. *DeSantis*, 608 F.2d at 329. The court rejected this argument because protecting homosexuals was not part of Congress’ intentions. *Id.* at 330.

203. No. 97-C8342, 2000 WL 336528 (N.D. Ill. Mar. 28, 2000).

Illinois denied the Title VII claim of a man who argued that the anti-gay harassment he received was based on his nonconformity to "co-workers' expectations of what a man should be or how he should live his life."²⁰⁴ The court provided no reasoning for the denial, but simply stated that the argument had "no precedential underpinning."²⁰⁵

Although the argument of anti-gay discrimination as sex stereotyping per se has not been successful, it has not been asserted enough times to conclude that no court would be receptive to hearing it.²⁰⁶ As noted in Part III.B.1, the argument is entirely consistent with the principles set forth in *Price Waterhouse v. Hopkins*.²⁰⁷ Furthermore, there is nothing in *Oncale* to controvert an anti-gay bias as sex stereotyping theory.²⁰⁸ It is likely that most trial courts would be reluctant to be the first to make such a holding, but there is no principled basis for refusing to do so.

C. *Is Discrimination Against Gays Ever Considered Discrimination "Because of Sex?"*

Title VII claims that rely explicitly on a sexual orientation theory or try to characterize all anti-gay discrimination as inherently based on sex stereotyping are likely to be rejected by federal courts, at least for the time being. This does not mean that gay plaintiffs who are discriminated against or harassed have no chance of succeeding on a Title VII claim.

First, it is important to note that, at least in theory, Title VII protects gays from sex discrimination to the same extent it protects heterosexuals.²⁰⁹ If a lesbian woman were rejected from

204. *Id.* at *4.

205. *Id.*

206. In fact, in *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999), the First Circuit implied that it would be open to considering whether employers who discriminate against men for being sexually attracted to other men are sex stereotyping under Title VII. Although the court in *Higgins* refused to consider this argument, it was not because it had no merit, but because the plaintiff had failed to raise that issue at the trial court level. *Id.* at 260.

207. 490 U.S. 228 (1989).

208. Toni Lester argues that *Oncale* actually supports this argument and can be cited at the trial court level in order to present experts testifying "about how stereotyping of male and female sex roles in our society is a form of sex discrimination that leads to gay bashing and the harassment of [gender nonconformists] in general." Lester, *supra* note 80, at 103.

209. See *Tanner v. Prima Donna Resorts*, 919 F. Supp. 351, 355 (D. Nev. 1996) ("Although Title VII does not include a prohibition on discrimination based on sexual orientation, homosexuals are just as protected by Title VII's existing protections as

a position for which she was qualified, based solely on the fact that she was female (rather than a lesbian), she should have a cause of action under Title VII in every jurisdiction. The availability of such relief, however, provides little comfort to gay and lesbian employees who are harassed or discriminated against not simply because they are men or women, but because they are men or women with one or more gender nonconforming characteristic.

As noted in Part III.B.2, anti-gay discrimination often is not based on the victim's actual sexual orientation, but on the perception that his/her mannerisms and appearance are inappropriate for his/her sex (*i.e.*, too "feminine" for men or too "masculine" for women). Because this is a form of gender stereotyping, individuals subject to adverse treatment for this reason should have an actionable discrimination claim under Title VII as stated in *Price Waterhouse*.²¹⁰ Unlike claims based explicitly on a sexual orientation theory, however, claims based on gender nonconformity have sometimes been successful.

Before *Price Waterhouse*, federal courts uniformly held that discrimination against effeminate men was not prohibited by Title VII.²¹¹ Although since *Price Waterhouse*, all federal courts have recognized sex stereotyping as a form of sex discrimination, how courts have applied the principles enunciated in that case, particularly in cases involving issues of homosexuality, has been extremely uneven.

On a conceptual level, there appears to be no reason why *Price Waterhouse* would not apply equally to *all* gender nonconforming employees. The opinion neither limited the types of sex stereotyping that were impermissible nor specifically excluded gays from protection. Some courts have recognized that gender stereotyping applies to more than just the specific fact situation in *Price Waterhouse* and have expressed willingness to use Title VII to protect employees who are gay or perceived to be gay. Others have been extremely reluctant to do so and are much more likely to characterize any Title VII claim

anyone else. . . . Title VII protects all persons, whether male or female, heterosexual or homosexual, from discrimination based on sex.").

210. *Price Waterhouse v. Cooper*, 490 U.S. 228 (1989).

211. See *Desantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 331-32 (9th Cir. 1979); *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 327 (5th Cir. 1978). There is a lack of case law prior to *Price Waterhouse* regarding female employees discriminated against for exhibiting traditionally masculine characteristics.

brought by a gay plaintiff as a sexual orientation claim rather than a sex discrimination claim, particularly when the claim is brought by a man.²¹²

Among courts that have suggested they would recognize all sexual stereotyping as being "because of sex," regardless of whether a claim is brought by gay or heterosexual plaintiffs, is the Seventh Circuit in *Doe*.²¹³ In that case, the court, using *Price Waterhouse* as its model, held that "Title VII does not permit an employee to be treated adversely because his or her appearance or conduct does not conform to stereotypical gender roles."²¹⁴ More specifically, the court stated:

[A] man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he exhibits his masculinity in a way that does not meet his co-workers' idea of how men are to appear and behave, is harassed "because of" his sex.²¹⁵

This prohibition against sex stereotyping extended to harassing a plaintiff for wearing an earring since such harassment is based on the belief that only women should wear jewelry.²¹⁶

The Ninth Circuit in *Schwenk*, also citing *Price Waterhouse*, likewise stated that an employer is prohibited from discriminating against an employee who "fails to act in the way expected of a man or a woman."²¹⁷ Specifically, discrimination against an employee who was biologically male, but whose "appearance and mannerisms were very feminine," would be

212. Of course, such a characterization will inevitably lead to the claim being dismissed since no federal court currently recognizes a Title VII claim based on sexual orientation. For a discussion of why gay males have a diminished chance of success in prevailing on a Title VII claim as compared to lesbians, see *infra* Part IV.E.3.

213. *Doe v. City of Belleville*, 119 F.3d 563, 580 (7th Cir. 1997).

214. *Id.*

215. *Id.* at 581. The court in *Doe* also strongly rejected the defendant's argument that sex stereotyping is only prohibited by Title VII if it is based on personality traits and not on how an employee dresses. *Id.* at 582. The court noted that the Supreme Court in *Price Waterhouse* had found the advice given to Ann Hopkins by the defendant to "dress more femininely, wear make-up, have her hair styled, and wear jewelry" highly probative of sex discrimination. *Id.* at 580-81 (citing *Price Waterhouse v. Hopkins*, 409 U.S. 228, 235 (1989)).

216. *Id.* at 581-82.

217. *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000). The actual holding in *Schwenk* involved an interpretation of the Gender Motivated Violence Act (GMVA), rather than Title VII. *Id.* at 1201. However, the Ninth Circuit noted that the "because of sex" requirement in Title VII and the "because of gender" requirement in the GMVA were proven in the same way. *Id.* at 1200-01. The court then analyzed precedent under Title VII in order to reach its interpretation of GMVA, noting that, "GMVA does parallel Title VII." *Id.* at 1201-02.

unlawful under Title VII.²¹⁸ Under these views, gay employees treated adversely by their employers because they were not sufficiently masculine or feminine would have a cognizable Title VII claim.

Oncale does nothing to contradict these views. In fact, the First Circuit, in *Higgins v. New Balance Athletic Shoe, Inc.*,²¹⁹ has interpreted *Oncale* as extending the *Price Waterhouse* principle, that employers cannot discriminate against women for failing to meet stereotypical expectations of femininity, to also protect men from being discriminated against for failing to meet stereotypical expectations of masculinity.²²⁰

Despite the Supreme Court rulings in both *Price Waterhouse* and *Oncale*, some courts still have chosen to apply the prohibition against sex stereotyping very narrowly.²²¹ For example, in *Mims v. Carrier Corp.*,²²² the Eastern District of Texas completely disregarded *Price Waterhouse* in a case that involved sex stereotyping.²²³ Instead, the court continued to treat *Smith v. Liberty Mutual Insurance Co.*,²²⁴ a case holding that Title VII does not protect effeminate men from discrimination, as controlling precedent.²²⁵ Other courts, while not expressly rejecting sex stereotyping theories, simply re-characterize discrimination based on gender nonconformity as actually based on sexual orientation.²²⁶ In courts taking this

218. *Id.* at 1202. For other courts making similar holdings regarding the scope of impermissible sex stereotyping under Title VII, see *Spearman v. Ford Motor Co.*, No. 98-C0452, 1999 WL 754568, at *6 (N.D. Ill. Sept. 9, 1999) ("Title VII does not permit an employee to be treated adversely because his or her appearance or behavior does not conform to gender stereotypes."); *Rosa v. Park West Bank & Trust Co.*, No. 99-2309, 2000 WL 726228 at *3 (1st Cir. June 8, 2000) (holding that discrimination based on an individual's gender nonconforming clothing is impermissible sex discrimination); *cf.* *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1093 (D. Minn. 2000) (holding that student harassed for failing "to meet masculine stereotypes" stated a claim for sex discrimination under Title IX).

219. 194 F.3d 252 (1st Cir. 1999).

220. *Id.* at 261 n.4. This view of *Oncale* is supported by comments made by Justice Ginsberg during oral argument. Justice Ginsberg suggested that the plaintiff would have a cognizable claim under Title VII if he could show that he was discriminated against because he was not "the right kind of male." See Real Player Audio File: Oral Argument for *Oncale v. Sundowner Offshore Service, Inc.*, 523 U.S. 75, at http://oyez.nwu.edu/cases/cases.cgi?command=show&case_id=1108 (Dec. 3, 1997) [hereinafter Oral Argument].

221. It is not surprising that the same courts which take a more inclusive view of the meaning of "sex" are also more willing to apply *Price Waterhouse* in all sex stereotyping situations rather than only in situations nearly identical factually to those cases.

222. 88 F. Supp. 2d 706 (E.D. Tex. 2000).

223. *Id.* at 713.

224. 569 F.2d 325 (5th Cir. 1978).

225. See *Mims*, 88 F. Supp. 2d at 713.

226. See *Sarff v. Cont'l Express*, 894 F. Supp. 1076, 1081 (S.D. Tex. 1995).

limited view of impermissible sex stereotyping, gender nonconforming employees of any kind (except perhaps women who are "aggressive"), will have little chance of successfully asserting a Title VII claim.

Most courts have not gone this far. Neither are many as openly accepting of gender stereotyping claims as the Seventh Circuit in *Doe*. The challenge gay plaintiffs face, then, is showing that the discrimination they received results from "actionable" sex stereotyping and not anti-gay bias alone.

Oncale states that in all sex discrimination cases, the "critical issue . . . 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."²²⁷ Many courts deciding sex discrimination cases since *Oncale* have quoted this language as being the ultimate test in deciding whether the discrimination was "because of sex."²²⁸ Sex stereotyping would satisfy the *Oncale* test, but there is still inconsistency among the courts in determining how and when sex stereotyping can be shown.

1. Proving That Discrimination Is Based on Sex Stereotyping

Because all federal courts currently agree that discrimination "because of sexual orientation" is not actionable under Title VII, if a court finds that an employee is harassed because he/she is gay, lesbian, or bisexual, the employee's Title VII suit will most likely be dismissed. To avoid this finding, a gay plaintiff would somehow have to show that the employer's discriminatory motive was "because of sex" and not "because of sexual orientation"—an allegation of sex stereotyping typically is not sufficient.²²⁹ Courts across the country have taken a number of positions on how this can and cannot be accomplished.

227. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993)).

228. *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1008 (7th Cir. 1999); *Carassco v. Lenox Hill Hosp.*, No. 99 CIV. 927(AGS), 2000 WL 520640, at *8 (S.D.N.Y. Apr. 28, 2000); *Dandan v. Radisson Hotel Lisle*, No. 97-C8342, 2000 WL 336528, at *4 (N.D. Ill. Mar. 28, 2000); *Mims*, 88 F. Supp. 2d at 714 n.4; *Samborski v. W. Valley Nuclear Servs. Co.*, No. 99-CV00213E(M), 1999 WL 1293351, at *2 (W.D.N.Y. Nov. 24, 1999).

229. See *Simonton v. Runyon*, No. 99-6180, 2000 WL 1575481, at *4 (2d Cir. 2000) (dismissing Title VII claim of gay plaintiff because there was "no basis to infer from the complaint that the harassment Simonton suffered was because of his sex and not . . . because of his sexual orientation"). A mere allegation could be enough in some cases to

a. Gender Stereotyping Remarks or Conduct by the Defendant

Most likely because the plaintiff in *Price Waterhouse* showed that her employer was engaged in sex stereotyping in part through comments made by the partners, courts often focus closely on whether gender stereotyping remarks were made by the defendant. Some courts will treat the absence of such remarks as an absolute barrier to maintaining a Title VII claim based on sex stereotyping.

The court in *Dillon v. Frank*²³⁰ provides an example. The plaintiff claimed he was a victim of sex stereotyping in that he was not "macho" enough for his co-workers.²³¹ The court rejected the claim because there was no evidence that Dillon's co-workers had made any remarks "indicating[] a belief that his practices would be acceptable in a female but unacceptable in a male."²³² Similarly, in *Johnson v. Hondo*,²³³ the court pointed to the plaintiff's failure to show that the defendant "exhibited hostility" to the way the plaintiff expressed his gender or sexuality when it held that the plaintiff failed to create an issue of fact on the gender stereotyping claim.²³⁴

When sex stereotyping remarks are made, the plaintiff has an easier time showing that sex discrimination has occurred. In *Doe*, the defendant's gender stereotyping remarks were seen as conclusive proof that the harassment of the plaintiff was "because of sex."²³⁵ The defendant had asked the plaintiff, "Are you a boy or girl?" thus suggesting that the harassment was based on the plaintiff's gender nonconforming characteristics.²³⁶ Likewise in *Schwenk*, the court relied on the harasser's sarcastic offer to bring the plaintiff "girl stuff" to make her look more

survive a motion to dismiss, but more is certainly needed to avoid summary judgment. See *Shermer v. Ill. Dep't of Transp.*, 171 F.3d 475, 478 (holding that the sex stereotyping claim must fail on summary judgment because plaintiff "produced no evidence other than the allegations in his complaint").

230. No. 90-2290, 1992 WL 5436 (6th Cir. Jan. 15, 1992).

231. *Id.* at *5.

232. *Id.* at *9.

233. 125 F.3d 408 (7th Cir. 1997).

234. *Id.* at 413-14.

235. See *Doe v. City of Belleville*, 163 F.3d 563, 581 (7th Cir. 1997).

236. *Id.*

feminine as evidence that the harassment was based at least partially on gender.²³⁷

At the very least, then, remarks or other conduct by a harasser that explicitly question the victim's masculinity or femininity can go a long way toward showing that sex stereotyping took place. Furthermore, it is possible that some courts will view such remarks as the *only* valid evidence of gender stereotyping and will dismiss the claim in the absence of sex stereotyping remarks. There is no reason, however, that this should be the only way a plaintiff can show sex stereotyping.²³⁸ Although the Supreme Court in *Price Waterhouse* pointed to statements of partners in the firm, there is nothing in the opinion to indicate that one could not prove sex stereotyping by other methods. Many courts since *Price Waterhouse* have so acknowledged.

b. Use of Anti-Gay Epithets and Other Gay-Specific Harassment

Although all courts agree that Title VII does not prohibit discrimination based on sexual orientation, courts do *not* agree upon what effect harassment specifically targeting an employee's real or perceived homosexuality will have on a plaintiff's claim.

Some courts have treated *any* behavior by the defendant that could be characterized as anti-gay (rather than anti-male or anti-female) as fatal to a Title VII claim. *Dillon* provides a typical example of this. In *Dillon*, the harasser called Dillon "a fag" and taunted him by saying, "Dillon sucks dicks."²³⁹ The plaintiff argued, however, that he was not in fact gay; therefore, the harassment was not based on his sexual orientation, but rather on the fact that he was not "macho" enough.²⁴⁰ The court rejected this argument and dismissed Dillon's claim, reasoning that because the harassment was "directed at demeaning him

237. *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000).

238. For instance, in *Dillon* the plaintiff was harassed with comments such as, "Dillon sucks dick." *Dillon v. Frank*, No. 90-2290, 1992 WL 5436, at *1 (6th Cir. Jan. 15, 1992). Two commentators have argued that evidence of gender stereotyping could come from the fact that the plaintiff was being harassed for behavior (performing fellatio) that the defendant considers appropriate for women only. Locke, *supra* note 19, at 404-05; Marcossion, *supra* note 94, at 26.

239. *Dillon*, 1992 WL 5436, at *1.

240. *Id.* at *5.

solely because . . . of his alleged homosexuality," Dillon could not show that he was harassed "because of sex."²⁴¹

More recently, in *Bibby v. Philadelphia Coca-Cola Bottling Co.*,²⁴² the harasser made explicitly anti-gay remarks ("faggot"), as well as remarks demeaning the plaintiff's masculinity in general ("sissy").²⁴³ Despite the "sissy" remark, the court dismissed the possibility that the harassment could have been based on the plaintiff's gender nonconformity rather than his sexual orientation and concluded without justification that the derogatory comments were "clearly targeted at the plaintiff's sexual orientation."²⁴⁴

Sometimes a court will go even further and characterize harassment as anti-gay, even though no explicit references to homosexuality were made. In *Sarff v. Continental Express*,²⁴⁵ for example, part of the harassment the plaintiff received involved putting earrings in his mailbox at work and cutting out pictures from *Cosmopolitan* and *Vogue* and placing them on his desk.²⁴⁶ Although the plaintiff had framed his claim as one of sex discrimination only, the court found it was "indisputable" that the sexual harassment was actually based on homophobia.²⁴⁷

In stark contrast to these holdings, there are some courts that, far from using evidence of explicitly anti-gay harassment to dismiss Title VII claims, have actually stated that *anti-gay harassment can itself be used as evidence to show that the defendant has engaged in sex stereotyping*. Again, the leading case is *Doe*. The *Doe* court recognized that "a homophobic epithet like 'fag' may be as much a disparagement of a man's

241. *Id.* at *7; see also *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 703-07 (7th Cir. 2000) (dismissing Title VII case because the court found that the harassment was because of sexual orientation, not sex). In *Hamner*, the plaintiff was an openly gay male nurse whose supervisor harassed him by "lisping at him, flipping his wrists, and making jokes about homosexuals." *Id.* at 703. The plaintiff argued that this constituted sex discrimination because the harassment was "specifically intimidating to men and their manhood, but not women." *Id.* at 707. The court rejected this argument, stating that it was clear that the harassment was based on the plaintiff's sexual orientation rather than his sex. *Id.*

242. 85 F. Supp. 2d 509 (E.D. Pa. 2000).

243. *Id.* at 511-12.

244. *Id.* at 517.

245. 894 F. Supp. 1076 (S.D. Tex. 1995).

246. *Id.* at 1079.

247. *Id.* at 1081; see also *Dandan v. Radisson Hotel Lisle*, No. 97-C8342, 2000 WL 336528, at *4 (N.D. Ill. Mar. 28, 2000) (reaching a similar conclusion). In that case, an employee was called "fagboy," "fruitcake," and "Tinkerbelle," among other names. *Id.* at *1. Again, the court concluded that "the only reasonable inference" was that the comments were based on the co-workers' perception of the plaintiff's homosexuality. *Id.* at *4.

perceived effeminate qualities as it is of his perceived sexual orientation."²⁴⁸ More recently, *Spearman v. Ford Motor Co.*²⁴⁹ strengthened *Doe*'s holding by recognizing that "continuing comments on an individual's sexual orientation" alone could create a hostile environment under Title VII.²⁵⁰ Although both the *Spearman* and *Doe* courts acknowledged that Title VII does not recognize claims based on sexual orientation, they noted that discrimination can be based on more than one motive.²⁵¹ It follows that just because part of a harasser's motivation is based on the employee's real or perceived sexual orientation, this does not preclude a finding that his/her sex did not also play a role.²⁵² Furthermore, as *Doe* noted, there is much overlap between homophobia and sex discrimination and it is not always possible to separate the two.²⁵³

There are several positions courts take that fall between those in *Dillon* and *Doe*. For instance, some courts may decide that anti-gay harassment neither defeats nor supports a Title VII claim.²⁵⁴ Others have decided that the existence of anti-gay epithets does not automatically defeat a claim under Title VII,

248. *Doe v. City of Belleville*, 119 F.3d 563, 593 (7th Cir. 1997); accord *Carrasco v. Lenox Hill Hosp.*, 99 CIV 927(AGS), 2000 WL 520640, at *8 (S.D.N.Y. Apr. 28, 2000) (holding that an issue of fact existed over whether harassment by co-workers insinuating that the plaintiff was gay was based on sexual orientation or sex).

249. No. 98-C0452, 1999 WL 754568 (N.D. Ill. Sept. 9, 1999).

250. *Id.* at *6 n.4; accord *Patterson v. CBS, Inc.*, No. 94 CIV 2562 KTD, 2000 WL 666337, at *7 (S.D.N.Y. May 22, 2000) (holding that male plaintiff, who had been called derogatory names relating to homosexuality and who received a card with a naked man on it, may have been subjected to a hostile work environment under Title VII); *Breitenfeld v. Long Prairie, Inc.*, 48 F. Supp. 2d 1170, 1176 (D. Minn. 1999) (suggesting that when sexual harassment includes "frequent references to homosexual acts," an inference is created that gender was at least one motivating factor of the harasser); *Samborski v. W. Valley Nuclear Servs. Co.*, No. 99-CV00213E(M), 1999 WL 1293351, at *4 (W.D.N.Y. Nov. 24, 1999) (suggesting that harassment based on sexual orientation is often a pretext for sex discrimination).

251. *Doe*, 119 F.3d at 594 ("The fact that one motive was permissible does not exonerate the employer from liability under Title VII; the employee can still prevail so long as she shows that her sex played a motivating role in the employer's decision.").

252. *Id.* at 593.

253. *Id.* at 593 n.27; see also Robert Brookins, *A Rose by Any Other Name . . . The Gender Basis of Same-Sex Sexual Harassment*, 46 *DRAKE L. REV.* 441, 513 (1998) (arguing that most harassment based on sexual orientation is also based on gender). Therefore, if a defendant wants to avoid liability by asserting that the harassment was really based on anti-gay bias rather than gender bias, the defendant should have the burden of separating out the two kinds of discrimination. *Id.* But see *Hamner v. St. Vincent Hosp. & Health Care Ctr.*, 224 F.3d 701, 704-07 (7th Cir. 2000) (denying that sex discrimination and sexual orientation discrimination are linked).

254. *E.g.*, *Schmedding v. Tnemec, Inc.*, 187 F.3d 862, 865 (8th Cir. 1999); *Quick v. Donaldson*, 90 F.3d 1372, 1379 (8th Cir. 1996); *Blake v. Grede Foundries, Inc.* No. 96-1322-JTM, 1997 WL 157126, at *3 (D. Kan. Mar. 20, 1997).

but that the plaintiff will have to produce evidence that the underlying motivation was gender bias, not animus toward gays.²⁵⁵

Oncale would appear to support the argument that, at the very least, harassment that includes gay-baiting does not automatically defeat a claim. Although the *Oncale* decision did not explicitly address this issue, gay epithets were part of the harassment the plaintiff in *Oncale* received²⁵⁶ and the Court did not suggest such taunts would prevent the plaintiff from succeeding on his claim.

c. *Was the Plaintiff Gay or Only Perceived to Be Gay?*

Another factor that may influence courts in cases where gay epithets were used is whether the victim had identified him/herself to co-workers as gay. A number of courts have held that whether anti-gay harassment is based on an employee's actual or perceived homosexuality is irrelevant to the plaintiff's claim.²⁵⁷ Some courts have used the fact that the plaintiff was not openly gay as an indication that the harassment was based on gender nonconformity.²⁵⁸ The reasoning behind this conclusion is straightforward. If an employee is being harassed for being gay, yet never identified himself as such, what would be the basis for co-workers to conclude that the employee was in fact homosexual? The obvious answer to this is that co-workers labeled the employee as gay because he exhibited gender nonconforming characteristics.²⁵⁹ Following this logic, the court in *Spearman v. Ford Motor Co.*²⁶⁰ held that, even though harassment against an employee included comments suggesting the victim was gay, since the victim had never *identified* himself

255. See *Bibby v. Phila. Coca-Cola Bottling Co.*, 85 F. Supp. 2d 509, 517 (E.D. Pa. 2000); *Metzger v. Compass Group, U.S.A., Inc.*, CIV.A. 98-2386-GTV, 1999 WL 714116, at *8 (D. Kan. Sept. 1, 1999).

256. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 77 (1998).

257. *E.g.*, *Dillon v. Frank*, No. 90-2290, 1992 WL 5436, at *8 (6th Cir. Jan. 15, 1992); *Dandan v. Radisson Hotel Lisle*, No. 97-C8342, 2000 WL 336528, at *4 (N.D. Ill. Mar. 28, 2000).

258. Such a conclusion would be consistent with the argument in Part III.B.2 that anti-gay prejudice has less to do with sexual behavior and more to do with hostility toward "almost any sign of behavior which does not fit the [gender] stereotype." *Fajer*, *supra* note 132, at 607.

259. See *Capers*, *supra* note 94, at 1181 n.101.

260. No. 98-C0452, 1999 WL 754568 (N.D. Ill. Sept. 9, 1999).

as gay to his co-workers,²⁶¹ such harassment must have been based upon the co-workers' perception of the plaintiff "as a man" rather than on his sexual orientation.²⁶² Also, the court in *Carrasco v. Lenox Hill Hospital*²⁶³ noted that, because the harasser knew the victim was married, this made it more likely that the harassment was based on sex rather than sexual orientation.²⁶⁴

The case law suggests that a plaintiff who has received anti-gay harassment is more likely to succeed on a Title VII claim if he is either straight or simply does not give any indication of his sexual orientation. Supporting this view is the fact that in all the Title VII cases involving anti-gay harassment where the plaintiff successfully avoided a motion to dismiss or a motion for summary judgment, a significant proportion of those plaintiffs identified themselves as heterosexual or were silent about their sexual orientation.²⁶⁵

*d. Comparative Evidence That Employees of
Opposite-Sex with the Same Characteristic Would Not Have
Received Same Treatment*

What some courts tend to find most compelling—and what they often find lacking in Title VII claims by gay plaintiffs—is evidence that a “similarly situated” member of the opposite sex did not receive the same adverse treatment that the plaintiff did. Although all courts in the abstract would accept evidence of disparate treatment among the sexes as evidence that discrimination was “because of sex,” the analysis becomes complicated when gay or perceived to be gay employees are involved.

261. *Id.* at *4. The court did not treat as relevant whether or not the plaintiff actually was gay, but only considered whether the plaintiff had told co-workers that he was.

262. *Id.* at *6.

263. 99 CIV. 927(AGS), 2000 WL 520640 (S.D.N.Y. Apr. 28, 2000).

264. *Id.* at *8; see also *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 707 n.5 (7th Cir. 2000) (noting that the plaintiff could have survived summary judgment if he had introduced evidence that his harasser *perceived* him as gay because he was a male nurse).

265. See *Schmedding v. Tnemec, Inc.*, 187 F.3d 862, 865 (8th Cir. 1999); *Doe v. City of Belleville*, 119 F.3d 563, 566 (7th Cir. 1997); *Quick v. Donaldson*, 90 F.3d 1372, 1374 n.1 (8th Cir. 1996); *Carasco*, 2000 WL 520640, at *2; *Fry v. Holmes Freight Lines, Inc.* 72 F. Supp. 2d 1074, 1077 (W.D. Mo. 1999); *Tanner v. Prima Donna Resorts*, 919 F. Supp. 351, 354 (D. Nev. 1996).

For instance, as argued in Part III.B.1, anti-gay discrimination should *always* be considered sex stereotyping because, for example, if a lesbian is fired because her employer disapproves of the fact that she is sexually attracted to women, it would almost invariably have not treated a *man* who was sexually attracted to women in the same adverse way. Many courts, however, insist on applying the test in a less straightforward manner.

The court in *Dillon v. Frank* took a very narrow view of the meaning of "similarly situated."²⁶⁶ Rather than require that the male plaintiff show that a *woman* would not have been adversely treated, the court held that he would have to show that a similarly situated *lesbian* would have been treated differently (even though the plaintiff never acknowledged being gay).²⁶⁷ Under this view, as long as an employer harasses both gender nonconforming males *and* gender nonconforming females, there is no sex discrimination.²⁶⁸

This rigid view of the type of comparative evidence that is needed contradicts the Supreme Court's holding in *Price Waterhouse*.²⁶⁹ In that case there was no requirement that Ann Hopkins show that only women with gender nonconforming characteristics were discriminated against while gender nonconforming men were accepted.

266. *Dillon v. Frank*, No. 90-2290, 1992 WL 5436, at *9 (6th Cir. Jan. 15, 1992); see also *Hamner*, 224 F.3d at 707 n.5 (7th Cir. 2000) (noting that a gay plaintiff could prevail by showing that gay male nurses but not lesbian nurses were discriminated against).

267. *Dillon*, 1992 WL 5436, at *9. One district court in the early 1980s suggested that even if a plaintiff could show disparate treatment of female versus male homosexuals, she still might not have a claim under Title VII since sexual orientation is probably not an "immutable characteristic," and therefore any distinction made on this basis would be permissible under Title VII. *Valdes v. Lumbermen's Mut. Cas. Co.*, 507 F. Supp. 10, 12-13 (S.D. Fla. 1980).

268. Even courts who have ruled favorably for gender nonconforming plaintiffs have taken this view. In *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000), an individual who was biologically male, but was dressed in traditionally feminine attire, sued a bank under the Equal Credit Opportunity Act (ECOA) for refusing to give her a loan application. *Id.* at 214. Like Title VII, the ECOA prohibits discrimination because of sex. *Id.* at 215. In addition, Title VII principles and precedent are used to interpret the ECOA. See *id.*

In *Rosa*, the First Circuit denied the bank's motion to dismiss because it stated it was possible that "Rosa did not receive the loan application because he was a man, whereas a similarly situated woman would have received the loan application." *Id.* at 215-26. The court went on to state that disparate treatment would be shown if "a woman who dresses like a man [is treated] differently than a man who dresses like a woman." *Id.* at 215-16. Like *Dillon*, this case suggests that if the bank discriminated against both "men who dress like women" *and* "women who dress like men," then in the First Circuit's view, there would be no sex discrimination. *Id.*

269. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

The more faithful interpretation of *Price Waterhouse* was taken by *Doe*. The *Doe* court held that disparate treatment between the sexes could be shown by asking: if a member of the opposite sex had the same trait(s) as the plaintiff, would he still have been treated badly?²⁷⁰ This is the same question that courts have asked in all other types of Title VII sex discrimination claims, and there is no principled rationale for why a different standard should be applied simply because the plaintiff is, or is perceived to be, gay.

Furthermore, as in *Price Waterhouse*, this showing of disparate treatment does not necessarily have to be made through direct comparative evidence.²⁷¹ Instead it can simply be inferred from the fact that an employee was harassed for having a trait that does not conform to gender stereotypes and that members of the opposite sex with the same trait would not generally be treated adversely.²⁷²

Finally, *Oncale* suggests that direct comparative evidence is not needed at all. While comparative evidence is one way to create an inference of sex discrimination, it is certainly not the only way.²⁷³ Furthermore, it is important to note that Ann Hopkins, the plaintiff in *Price Waterhouse*, did not have to make such a showing. The fact that her employer had made sex stereotyping remarks was sufficient to enable the fact finder to draw the inference that the discrimination was based on sex.²⁷⁴

*e. Evidence That Plaintiff Actually Possesses
Gender Nonconforming Traits*

A necessary, although probably not sufficient, element of proving that discrimination was due to the employee's gender nonconformity is that the plaintiff does in fact express her

270. See *Doe*, 119 F.3d at 581.

271. *Price Waterhouse*, 490 U.S. at 231.

272. *Doe*, 119 F.3d at 581-82 ("One need only consider for a moment whether [the plaintiffs] gender would have been questioned for wearing an earring . . . if he were a woman rather than a man."); *Carrasco v. Lenox Hill Hosp.*, No. 99 CIV. 927(AGS), 2000 WL 520640, at *8 (S.D.N.Y. Apr. 28, 2000) (noting that sexually harassing comments to male employee for perceived homosexuality could be based on sex because female employees "were likely not exposed" to same comments).

Another way that sex stereotyping could be proven by gay plaintiffs would be to introduce evidence that stereotypically masculine gay men or stereotypically feminine lesbians were not subject to the same adverse treatment. This would demonstrate that the discrimination was based on gender nonconformity rather than sexual orientation. To the authors' knowledge, this method of proof has not been tried before.

273. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).

274. See *Price Waterhouse*, 490 U.S. at 234.

gender in a nonconforming way. Making this showing could be crucial in situations where the harassment itself is ambiguous regarding its specific motive. For instance, in cases in which the harasser uses anti-gay epithets, it will be much more difficult for a factfinder to infer that such harassment is based on sex stereotypes rather than sexual orientation if there is no evidence that, aside from being gay, the employee actually *is* gender nonconforming.²⁷⁵ When this showing can be made, some courts have assumed that the gender nonconforming behavior *would* be considered acceptable if it was exhibited by members of the opposite sex and that it was, in fact, the motivation for the discriminatory conduct. For instance, in *Doe*, the court referred to the plaintiff's wearing of an earring to provide the inference that he was harassed for failing to meet his "co-workers' idea of how men are to appear and behave"—even though no comments were made explicitly regarding the plaintiff's earring.²⁷⁶ In *Schwenk*, the court partially relied on the fact that the plaintiff was a biological male with a feminine appearance to conclude that her harassment was due to the defendant's belief that the plaintiff was a man who "failed to act like" one.²⁷⁷

The simple fact that an employee is in an occupation traditionally held by members of the opposite sex can also be a gender nonconforming characteristic that provides an inference of sex discrimination. In *Samborski v. West Valley Nuclear Services Co.*,²⁷⁸ the plaintiff, a woman working in a mostly male facility, was assumed to be a lesbian and then harassed.²⁷⁹ In rejecting the defendant's argument that the plaintiff's claim was based on sexual orientation, not sex, the court stated, "[I]t takes no leap of logic to infer that [because of] of the traditionally male oriented nature of plaintiff's work in a work' area dominated by male employees, such alleged treatment may have been based on her sex."²⁸⁰ The same inference can be made for men in a

275. For example, in *Simonton v. Runyon*, No. 99-6180, 2000 WL 1575481 (2d Cir. Aug. 22, 2000), the plaintiff attempted to argue for the first time on appeal that a gay postal worker's harassment was based on gender nonconformity, not on sexual orientation. See *id.* at **4-5. Although noting that "*Price Waterhouse* implied that a suit alleging harassment or disparate treatment based upon nonconformity with sexual stereotypes is cognizable under Title VII," the court of appeals rejected the plaintiff's claim because he had pled no facts that he was gender nonconforming. See *id.* at *5.

276. *Doe*, 119 F.3d at 581.

277. See *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000).

278. No. 99-CV00213E(M), 1999 WL 1293351 (W.D.N.Y. Nov. 24, 1999).

279. *Id.* at *1.

280. *Id.* at *4 (alteration in original) (citation omitted). Note that Ann Hopkins, the plaintiff in *Price Waterhouse*, was also a female in a traditionally male occupation. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 231 (1989).

traditionally female occupation who are subject to discrimination. In *Blake v. Grede Foundries, Inc.*,²⁸¹ the plaintiff was a male receptionist whose co-workers harassed him with taunts such as, "Where's your purse?" and "Where's your skirt and pantyhose?" as well as gestures suggesting that Blake was gay.²⁸² The court found that this was enough to state a claim for sex discrimination.²⁸³

Not all courts, however, are willing to infer from an employee's gender nonconforming characteristics that the discrimination he receives is "because of sex" stereotyping. Again, *Dillon* provides an example. Dillon argued that he was discriminated against because he was not sufficiently masculine.²⁸⁴ The court held that even though the plaintiff may have been gender nonconforming, he was required to produce additional evidence that the harassment he received was based on his gender nonconforming characteristics.²⁸⁵ This suggests that, although it is important to stress the gender nonconforming characteristics of an employee, this in itself may not be enough to show that the discrimination was in fact based on sex stereotyping.²⁸⁶

281. No. 96-1322-JTM, 1997 WL 157126 (D. Kan. Mar. 20, 1997).

282. *Id.* at *1.

283. *Id.* at *3. But see *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 708 (7th Cir. 2000) (denying same sex harassment claim brought by male nurse). The court in *Hamner* did note, however, that if the plaintiff had presented evidence that the defendant had disapproved of men being in the nursing profession and harassed them because of this, then the plaintiff could show that he was discriminated against because of sex. See *id.* at 707 n.5. This footnote in *Hamner* seems to keep the door open for gender nonconformity claims in the Seventh Circuit. If the plaintiff can make a strong showing that he was discriminated against because he was gender nonconforming (e.g. being a male in a mostly female profession) rather than just because he was gay, he still has a claim. This shows the importance of how a claim is framed at the pleading stage.

284. *Dillon v. Frank*, No. 90-2290, 1992 WL 5436, at *9 (6th Cir. Jan. 15, 1992).

285. *Id.*

286. It should be noted further that some courts have held that not all disparate treatment based on gender nonconforming characteristics is impermissible under Title VII. The most prominent example involves grooming requirements. Both the Eastern District of Pennsylvania and the Eastern District of New York have held that an employer policy forbidding men, but not women, from wearing earrings is permissible under Title VII. See *Kleinsorge v. Eyeland Corp.*, No. CIV. A. 99-5025, 2000 WL 124559, at *2 (E.D. Pa. Jan. 31, 2000); *Capaldo v. Pan Am. Fed. Credit Union*, No. 86-CV1944, 1987 WL 9687, at *2 (E.D.N.Y. Mar. 30, 1987). The courts' rationale for allowing such policies is that Title VII does not prohibit "minor differences in personal appearance regulations that reflect customary modes of grooming." See *Kleinsorge*, 2000 WL 124559, at *2 (quoting *Knott v. Mo. Pac. Ry. Co.*, 527 F.2d 1249, 1252 (8th Cir. 1975)).

Although the Supreme Court has not ruled on this issue, it also has not stated that some sex-based distinctions are prohibited and some are not. Furthermore, distinguishing between "major" and "minor" sex discrimination goes against the Supreme

2. Other Methods of Proving Discrimination "Because of Sex"

Although proving sex stereotyping is probably a gay plaintiff's best chance of succeeding on a Title VII claim, it is not the only potential method for proving that there has been discrimination "because of sex." Other ways that courts have allowed plaintiffs to create an inference of sex discrimination include showing that the adverse treatment was (1) of a sexually explicit nature,²⁸⁷ (2) based on sexual desire,²⁸⁸ (3) part of an

Court's prior reflections that Title VII prohibits the "entire spectrum" of disparate treatment between men and women. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986).

Regardless of the soundness of the courts' rulings that different grooming standards for men and women are allowed under Title VII, gender nonconforming plaintiffs should be aware that even in jurisdictions where sex stereotyping has been broadly defined, a court may nonetheless hold that such stereotyping is permissible because it only involves "a minor difference in personal appearance."

287. Prior to *Oncale*, some courts held that it could be presumed that any explicit sexual harassment, regardless of the genders of the harasser and victim, was discrimination because of sex. *E.g.*, *Doe v. City of Belleville*, 119 F.3d 563, 579 (7th Cir. 1997) ("[T]he explicitly sexual harassment of a female amounts to sex discrimination in violation of Title VII . . . because her employment is now conditioned upon her willingness to endure harassment that is inseparable from her gender.").

Across the board adoption of this view by courts would no doubt be extremely helpful to gay Title VII plaintiffs. If the number of cases is any indication, discrimination against gay men often takes the form of sexual harassment and is usually perpetrated by other men. This makes establishing a prima facie case under Title VII much more difficult, as many courts refuse to rule that harassment of a male employee by another male employee could be "because of sex." However, this hurdle does not have to be overcome if the "because of sex" inference can be proven by the nature of the harassment itself.

Unfortunately, this view was rejected by the Supreme Court in *Oncale* when it stated that harassment is not "because of sex" "merely because the words used have sexual content or connotations." *Oncale*, 523 U.S. at 80. Therefore, after *Oncale*, the argument that harassment that is sexual in nature is always "because of sex" is probably no longer viable. Courts taking this position prior to *Oncale* have since modified it in an attempt to remain consistent with the Supreme Court. For example, in *Shepherd v. Slater Steels Corp.*, 168 F.3d 998 (7th Cir. 1999), the court held that although Title VII does not prohibit harassment that is simply vulgar or sexual, the context of the sexual harassment could show that the "sexual overlay was not incidental." *Id.* at 1011. The *Shepherd* court was not explicit on how this determination would be made, but concluded that the facts in the present case, which included the harasser exposing himself to the plaintiff and "rubb[ing] himself" into an erection while threatening to sexually assault the plaintiff, would allow a fact finder to infer that the plaintiff could have been harassed because he was a man. *Id.*

environment that is hostile to an entire sex,²⁸⁹ or (4) inflicted solely on one gender.²⁹⁰ As with gender stereotyping, courts have taken a range of positions on the availability of these methods, particularly when the plaintiff is, or is perceived to be, gay.

288. *Oncale* suggested that one way to support an inference of discrimination on the basis of sex when the harasser is of the same sex as the victim would be to show that the harasser was homosexual. *Oncale*, 523 U.S. at 80. This method of proof theoretically should be open to both straight and gay victims of same-sex harassment. Furthermore, some courts have suggested that if there is any evidence at all that same-sex harassment was based on sexual desire, summary judgment on a Title VII claim is improper. *Fry v. Holmes Freight Lines, Inc.*, 72 F. Supp. 2d 1074, 1076 (W.D. Mo. 1999). Potentially, then, a gay plaintiff who was subject to explicit sexual harassment could at least get past summary judgment by alleging that his harasser was also gay.

This strategy is not always successful. See *Johnson v. Hondo*, 125 F.3d 408, 413 (7th Cir. 1997) (holding that mere allegation of a harasser's homosexuality is not enough to create an inference of sex discrimination). Even if such a strategy *would* always be a successful way to survive summary judgment, it would certainly be far from the most desirable. Arguing that same-sex harassment is based on sexual desire has been said to only encourage anti-gay prejudice (by depicting gay people as sexual harassers). In addition, it prevents the usage of other theories (such as sex stereotyping) that would be more consistent with gays' long term goals regarding Title VII interpretation.

289. Some courts before *Oncale* held that only same-sex harassment based on sexual desire was actionable under Title VII, but others held that an employee could only maintain a cause of action under Title VII against a member of the same sex if he/she could show that there existed a workplace environment hostile to the plaintiff's entire sex. *E.g.*, *Goluszek v. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988). Although *Oncale* made clear that a plaintiff in a Title VII case is not required to show an anti-male or anti-female environment, this is still one approach that a plaintiff could take in showing that his/her discrimination was because of sex. See *Oncale*, 523 U.S. at 80.

Such a showing could be made plausibly by a lesbian plaintiff as courts have acknowledged that anti-gay harassment directed at women is likely to be a pretext for sex discrimination. For a gay male plaintiff, however, particularly in an all, or mostly all, male environment, this showing would be almost impossible to make since the harassers themselves are generally male and would be of limited usefulness to gay plaintiffs asserting Title VII claims.

290. In sexual harassment cases, an inference of sex discrimination can sometimes be created simply by an allegation that members of the opposite sex were not subject to the same adverse treatment. See *Quick v. Donaldson*, 90 F.3d 1372, 1378 (8th Cir. 1996). The same would be true for gay and lesbian employees; if they can show that only one sex was harassed, then this may be enough to suggest that the plaintiff was singled out because of her sex. See *Carrasco v. Lenox Hill Hosp.*, 99 CIV.A.927(AGS), 2000 WL 520640, at *8 (S.D.N.Y. Apr. 28, 2000) (stating that comments made by co-workers suggesting that the plaintiff was gay were comments to which female employees "were not likely exposed").

Some courts, however, have stated that evidence that members of only one sex are being subjected to harassment is not sufficient to show that the discrimination was "because of sex" when the work environment is all, or mostly all, male or female. *E.g.* *Klein v. McGowan*, 36 F. Supp. 2d 885, 889 (D. Minn. 1999). Several justices during oral argument for *Oncale* made similar comments. See Oral Argument, *supra* note 218. In unisex environments, this evidentiary route could be closed off to gay plaintiffs.

What is important to remember in all Title VII cases is that there is no one way to prove sex discrimination; any admissible evidence that would allow a reasonable fact finder to infer that the discrimination was "because of sex" is sufficient. Although *Oncale* cited examples of methods that plaintiffs could use to create the inference, it did not state that these were the only methods that could be used.²⁹¹ Courts have interpreted *Oncale* as providing an illustrative, rather than exhaustive, list of evidentiary routes.²⁹²

D. A Note on Severity

Plaintiffs asserting "hostile environment" sexual harassment claims under Title VII not only have to show that the harassment was "because of sex," but also that it was sufficiently severe or pervasive so that it objectively alters the terms or conditions of employment.²⁹³ Although this issue is not directly related to whether gay plaintiffs in general can bring Title VII claims, a court's view of what is "sufficiently severe and pervasive" can be an additional barrier to succeeding on the merits.

As *Oncale* noted, Title VII is not a civility code for the workplace.²⁹⁴ Accordingly, many forms of harassment will not be covered by the statute.²⁹⁵ For instance, "simple teasing" about an employee's homosexuality or gender nonconforming characteristics may not be sufficiently hostile to be actionable under Title VII.²⁹⁶ Even in courts that consider anti-gay

291. See *Oncale*, 523 U.S. at 81 ("Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue . . . constituted 'discrimin[ation] . . . because of . . . sex.'" (emphasis added) (alteration in original)).

292. See *Shepherd*, 168 F.3d at 1009 (noting that *Oncale*'s recitation of three possible methods of showing discrimination because of sex was instructive not exhaustive); *Schmedding v. Tnemec, Inc.*, 187 F.3d 862, 865 n.4 (8th Cir. 1999) (same). But see *Mims v. Carrier Corp.*, 88 F. Supp. 2d 706, 715 (E.D. Tex. 2000).

293. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 63-69 (1986). Obviously, in a disparate treatment case where the employee was terminated, denied a promotion, etc., the plaintiff need not show that the discrimination was severe or pervasive.

294. *Oncale*, 523 U.S. at 80.

295. *Id.*; *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (stating that an offensive epithet is not enough to create a hostile environment).

296. See *Mims*, 88 F. Supp. 2d at 717 (holding that jokes about male plaintiff being in bed with another male not pervasive or severe enough to be actionable under Title VII); *Metzger v. Compass Group U.S.A., Inc.*, No. CIV.A.98-2386-GTV, 1999 WL 714116, at *9 (D. Kan. Sept. 1, 1999) (holding that a comment to female plaintiff by male supervisor telling her to "suck his dick" not severe enough to create a hostile environment); *Klein v. McGowan*, 36 F. Supp. 2d 885, 889 (D. Minn. 1999) (holding that statements by

harassment a form of gender stereotyping, "crude and offensive" comments about an employee's sexual orientation may not create a hostile environment.²⁹⁷ Plaintiffs who received any kind of physical abuse, however, should not have difficulty in satisfying this requirement, as courts have generally assumed that all environments of this type are hostile for the purposes of Title VII.²⁹⁸

E. Litigation Challenges

As the above analysis demonstrates, there is little consistency among courts in Title VII cases, particularly in those cases involving homosexuality. There are vast differences both among the circuits²⁹⁹ and within individual circuits³⁰⁰ in the treatment of gay, or perceived to be gay, plaintiffs. Individual judges have even failed to be consistent with themselves.³⁰¹ These inconsistencies make it difficult to predict how any one

defendant calling plaintiff "homo," telling plaintiff "if I ever find out you're queer, I'll fire you," and expelling flatulence into plaintiff's workspace not severe and pervasive).

297. *Spearman v. Ford Motor Co.*, No. 98-C0452, 1999 WL 754568, at *6 (N.D. Ill. Sept. 9, 1999) (holding that comments directed at plaintiff threatening to "fuck [his] little gay ass up," calling him a "fucking jag-off pussy ass," and commenting that plaintiff was gay and had AIDS over a two-year period not sufficiently hostile to be actionable under Title VII). Furthermore, if and when more gay plaintiffs are able to sustain claims under Title VII, this issue could become increasingly important because claims by heterosexual women are often thrown out for failing to be based on harassment sufficiently hostile.

298. *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 257-58 (1st Cir. 1999) (finding that hostile environment was created where plaintiff had hot cement poured on him and was shaken violently); *Quick v. Donaldson*, 90 F.3d 1372, 1379 (8th Cir. 1996) (holding that employee who claimed defendant grabbed his testicles daily created an issue of fact regarding whether harassment was sufficiently severe or pervasive); *Patterson v. CBS, Inc.*, No. 94 CIV. 2562 KTD, 2000 WL 666337, at *7 (S.D.N.Y. May 22, 2000) ("[H]umiliating sexual touching coupled with . . . sexual remarks could support a conclusion that the environment was hostile."); *Breitenfeldt v. Long Prairie Packing Co.*, 48 F. Supp. 2d 1170, 1176 (D. Minn. 1999) (holding that a reasonable jury could conclude that a hostile environment was created where plaintiff was subjected to "painful physical assault on [his] genitalia"); *Doe v. City of Belleville*, 119 F.3d 563, 582 (7th Cir. 1997) (finding hostile environment was created where plaintiff was grabbed by testicles).

299. *Compare Doe*, 119 F.3d at 607 (holding that sexual harassment of a man by another man is actionable under Title VII), *with Dillon v. Frank*, No. 90-2290, 1992 WL 5436, at *7 (6th Cir. Jan. 5, 1992) (holding that Title VII does not cover verbal harassment aimed at homosexuals).

300. *Compare Dandan v. Radisson Hotel Lisle*, No. 97-C8342, 2000 WL 336528, at *4 (N.D. Ill. Mar. 28, 2000), *with Spearman*, 1999 WL 754568 at *9.

301. *Compare Klein*, 36 F. Supp. 2d at 890 (holding that comments directed at homosexuality could not be "because of sex" under Title VII), *with Breitenfeldt*, 48 F. Supp. 2d at 1175 (holding that comments directed at homosexual behavior were evidence that harassment was "because of . . . sex" under Title VII).

court will rule in the future on these cases with any degree of certainty.

Having made that caveat, however, courts in general have exhibited various trends that allow gay plaintiffs to determine their chances of success and adjust their litigation strategies so that their chances are maximized.

1. Characterize Claim as Being Based on Sex Stereotyping Rather Than Sexual Orientation

No other piece of advice can be stressed more heavily for gay plaintiffs bringing claims under Title VII than to emphasize the sex stereotyping theory as much as possible and de-emphasize any connection that the discrimination has to homosexuality. Identifying as gay significantly decreases a plaintiff's chance of success because courts have a tendency to mischaracterize all Title VII claims brought by openly gay plaintiffs as being based on sexual orientation rather than sex.³⁰²

First, the complaint itself should allege discrimination "because of sex," *not* sexual orientation. If the complaint alleges sexual orientation, the suit will be unlikely to survive even a motion to dismiss; even circuits that are generally accepting of sex stereotyping claims will not recognize a Title VII claim based explicitly on sexual orientation.³⁰³ At the pleading stage, however, little more than an allegation of sex discrimination should be required.³⁰⁴

Second, both at the pleading stage and beyond, gay plaintiffs should cite to *Price Waterhouse*, using that decision to the greatest extent possible to frame their argument. By comparing the treatment received by the plaintiff to that treatment the Supreme Court condemned in *Price Waterhouse*, lower courts will have much greater difficulty in simply dismissing the claim as being based on sexual orientation rather than sex. Specifically, gay plaintiffs should argue that they were

302. See Gross, *supra* note 98, at 1207 n.220.

303. The importance of framing the complaint around a sex stereotyping theory cannot be over-emphasized. In two recent courts of appeals decisions, the courts indicated that they were open to sex stereotyping claims brought by gay plaintiffs, but ultimately denied the claim because the plaintiff had not presented the argument at the district level. See *Simonton v. Runyon*, No. 99-6180, 2000 WL 1575481, at **4-5 (2d Cir. Oct. 23, 2000); *Higgins*, 194 F.3d at 259-60.

304. See *Samborski v. W. Valley Nuclear Servs. Co.*, No. 99-CV00213E(M), 1999 WL 1293351, at *4 (W.D.N.Y. Nov. 24, 1999) ("[At the pleading stage], Title VII demands only that a plaintiff present a plausible legal theory, backed by significantly probative evidence.").

discriminated against for the way they expressed their masculinity or femininity.³⁰⁵ In addition to relying on *Price Waterhouse*, gay plaintiffs should emphasize that nothing in *Oncale* has detracted from *Price Waterhouse* or put limitations on the types of impermissible sex stereotyping.

Finally, gay plaintiffs should present as much evidence as possible indicating they were gender nonconforming and that their employer was motivated to discriminate against them because of their nonconformity. This includes any comments (e.g. "Are you a boy or girl?") or other conduct that expresses hostility toward the way the employee expresses his/her gender. At the same time, plaintiffs generally should not rely on any behavior by the employer specifically targeting homosexuality for support.³⁰⁶

2. *Argue Against Congressional Intent*

Gay plaintiffs suing under Title VII should use *Oncale* and other Supreme Court decisions to emphasize that congressional intent does not prevent courts from recognizing Title VII claims of gender nonconformists. Specifically, plaintiffs should refer to the expansive interpretations the Supreme Court has given to congressional intent, where the majority stated that Title VII is meant to protect "all individuals,"³⁰⁷ that it creates "a broad rule of workplace equality,"³⁰⁸ and that its purpose is to eliminate the "entire spectrum" of sex discrimination.³⁰⁹ *Oncale*, in particular, should be cited to show that Title VII covers all "comparable evils" to those that were the original target of the statute, and that ultimately, it is the language of the statute that controls,

305. Emphasizing gender nonconformity over sexual orientation also allows sympathetic courts, that are nonetheless wary of defying the judicial trend of rejecting Title VII claims based on sexual orientation, to find in favor of gay plaintiffs. Because legislation that would explicitly prohibit employment discrimination has been rejected by Congress in the past, some courts do not want to interpret Title VII in a way that they believe would "bootstrap protection for sexual orientation into Title VII." *Simonton*, 2000 WL 1575481, at *5. Adopting a sex stereotyping theory that would protect only stereotypically feminine gay men or stereotypically masculine lesbians allows these courts to interpret Title VII somewhat expansively without appearing as if they are re-writing a statute.

306. The exception to the rule against relying on anti-gay harassment to support a sex stereotyping claim would be bringing suit in the Seventh Circuit. That circuit has held that anti-gay harassment can be evidence that sex discrimination has occurred under Title VII. See *Doe v. City of Belleville*, 119 F.3d 563, 593 (7th Cir. 1997).

307. *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 681 (1983).

308. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993).

309. *E.g., Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78, (1998).

not the specific intent of Congress.³¹⁰ Furthermore, because *Price Waterhouse* adopted a "gender approach" to interpreting sex, the prohibitions of Title VII should extend to discrimination based on any expression of masculinity or femininity and should not be restricted to biological distinctions only.

3. *Prospects for Lesbians Versus Gay Men*

Since the Supreme Court first recognized sex stereotyping claims in *Price Waterhouse*, lower courts generally have been much more open to claims brought by gender nonconforming women than gender nonconforming men.³¹¹ There could be several reasons for this dynamic.

First, it could simply be that because the plaintiff in *Price Waterhouse* was female, courts are more likely to see as similar other sex stereotyping claims brought by women rather than men. Women are also more likely to be caught in a catch-twenty-two situation that the *Price Waterhouse* Court referred to, in which women are penalized for possessing the very qualities upon which their success in a given field is so dependent.³¹² Decisions after *Price Waterhouse* have alluded to this aspect of the case to distinguish it from claims brought by gender nonconforming men.³¹³

Another reason could be that since discrimination against women is more pervasive than discrimination against men, judges are simply more willing to believe that discrimination against gender nonconforming women is indicative of a bias against women in general.

Legal scholar Mary Anne Case argues that the real reason behind the double standard is more fundamental than the above possibilities would suggest.³¹⁴ Case argues that society devalues qualities associated with women, so male employees who exhibit traditionally feminine characteristics will be less likely to obtain Title VII protection.³¹⁵ Specifically, courts are more likely to

310. *Id.* at 79.

311. For cases where gender nonconforming women have successfully avoided a motion to dismiss, a motion for summary judgment or a judgment as a matter of law, see *Bellaver v. Quanex Corp.*, 200 F.3d 485, 491-92 (7th Cir. 2000); *Lindahl v. Air France*, 930 F.2d 1434, 1439 (9th Cir. 1991); *Samborski v. West Valley Nuclear Services Co.*, No. 99-CV00213E(M), 1999 WL 1293351, at **4-5 (W.D.N.Y. Nov. 24, 1999).

312. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

313. See *Dillon v. Frank*, No. 90-2290, 1992 WL 5436, at **9-10 (6th Cir. Jan. 15, 1992).

314. See Case, *supra* note 31, at 3.

315. *Id.*

characterize discrimination against women with masculine qualities (like the plaintiff in *Price Waterhouse*, Ann Hopkins) as sex discrimination, while characterizing discrimination against men with feminine qualities as sexual orientation discrimination.³¹⁶

Regardless of the reasoning behind the trend, it suggests that lesbians may have significantly greater chances for success in asserting sex stereotyping claims under Title VII than gay men. Furthermore, gay men will need to take even greater precautions to prevent their sex discrimination claims from being recharacterized as sexual orientation claims.

4. *The Disparity Among the Circuits*

The leanings of a particular judge are difficult to predict, even within a specific circuit. In fact, there are marked differences in the approaches various circuits have taken to gender stereotyping claims. Without a doubt, the Seventh Circuit is the jurisdiction in which a gay plaintiff is most likely to prevail. From the beginning of sex stereotyping litigation in the 1970s, the Seventh Circuit has been the leader in recognizing that Title VII prohibits the entire spectrum of discrimination based on sex stereotypes.³¹⁷ Presently, the Seventh Circuit, more than any other jurisdiction, has begun to eliminate the barriers traditionally faced by gay plaintiffs in making Title VII claims by de-emphasizing congressional intent, interpreting "sex" to include socially constructed characteristics, and focusing more on the content of the discrimination rather than the specific motive. Most important, rather than using anti-gay epithets as an excuse to dismiss a Title VII claim, as many courts have done, courts in the Seventh Circuit have generally held that harassment targeting homosexuality can be used as evidence that the defendant engaged in sex stereotyping.³¹⁸ The First, Second, Eighth, and Ninth Circuits have also, to varying degrees, fallen in line behind the Seventh Circuit to accept more claims based on gender stereotyping theories.

316. *See id.*

317. *See Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971).

318. The openness of the Seventh Circuit to Title VII claims brought by gay plaintiffs was diminished somewhat by the recent decision, *Hamner v. St. Vincent Hosp. & Health Care Ctr.*, 224 F.3d 701 (7th Cir. 2000). In that case, it interpreted the meaning of "sex" in Title VII narrowly and denied that sex and sexual orientation discrimination were related. *Id.* at 704 (citing *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1087 (7th Cir. 1984).

In stark contrast to the Seventh Circuit, the Fifth Circuit has vehemently resisted including any claims under Title VII that have not already been explicitly recognized. It still views sex stereotyping claims very narrowly. The Fifth Circuit was one of the first jurisdictions to reject claims brought by effeminate men under Title VII³¹⁹ and was the *only* circuit to categorically deny relief to all plaintiffs alleging same-sex sexual harassment before the Supreme Court's decision in *Oncale*.³²⁰ Courts in the Fifth Circuit still express hostility to gender stereotyping claims by ignoring *Price Waterhouse* in cases involving gender nonconforming plaintiffs and continuing to rely on precedent from the 1970s which refused to recognize Title VII claims brought by effeminate men.³²¹ The Fourth and Sixth circuits also have taken a narrow view of Title VII that will lead to dismissal of Title VII claims brought by gay plaintiffs.³²²

Although plaintiffs may have limited control over the jurisdiction in which they choose to bring suit, gay plaintiffs should be aware of their relative chances of success. Whenever possible, they should file in jurisdictions more accepting of gender-stereotyping claims.

Even in a best case scenario involving a model plaintiff, it is extremely unlikely that Title VII will ever provide comprehensive protection for gays against employment discrimination. There is no jurisdiction that recognizes a Title VII claim based explicitly on sexual orientation discrimination. There is little indication that this will change anytime soon. Although some gay people, particularly those who are gender nonconforming, may be able to survive a motion for summary judgment, there are many more instances in which suits would be dismissed.

Perhaps just as important to consider, if not more so, are the means a gay plaintiff will need to use to maximize her chance of success. Because sexual orientation claims are not recognized, gay plaintiffs will have to downplay their sexual orientation. Even if a gay person is successful in his/her claim, the victory

319. *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 326 (5th Cir. 1978).

320. *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 448 (5th Cir. 1994).

321. *Mims v. Carrier Corp.*, 88 F. Supp. 2d 706, 715 (E.D. Tex. 2000).

322. *See, e.g., McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1195 (4th Cir. 1996) (holding that Title VII only permits same-sex harassment claims where harasser is gay); *Dillon v. Frank*, No. 90-2290, 1992 WL 5436, at *4 (6th Cir. Jan. 5, 1992) (dismissing Title VII claim brought by postal worker perceived to be gay based partially on view that Congress did not intend Title VII to protect gays from discrimination and that the meaning of "sex" in statute should be limited to its "traditional" meaning).

may be a hollow one if it was won by denying his/her identity. This may be a price that many gay plaintiffs are unwilling to pay to get the protection to which they are entitled. It is because of this and other considerations that Congress must pass legislation that *explicitly* prohibits workplace discrimination based on sexual orientation in order to achieve comprehensive protection for gay people against workplace discrimination.

V. THE EMPLOYMENT NON-DISCRIMINATION ACT

With dim prospects for persuading courts to expand their interpretation of Title VII to encompass anti-gay discrimination within the prohibition of discrimination "because of sex," the legislative solution is the better one.³²³ The Employment Non-Discrimination Act of 1999 (ENDA),³²⁴ introduced in the 106th Congress on June 24, 1999, would expressly prohibit employment discrimination on the basis of sexual orientation.³²⁵ ENDA defines "sexual orientation" as "heterosexuality, homosexuality or bisexuality, whether real or perceived."³²⁶ In the 104th Congress, ENDA missed passage in the Senate by one vote.³²⁷

Patterned after Title VII, ENDA provides that a "covered entity" cannot, with respect to employment or an employment opportunity, subject an individual to different standards or treatment, or otherwise discriminate against the individual, on the basis of the individual's real or perceived sexual orientation or that of a person with whom the individual is believed to

323. Courts that have rejected Title VII sexual orientation claims have agreed that Congress must act. For example, a district court in Maine recently stated:

In determining along with numerous other jurisdictions that Title VII does not provide a remedy for discrimination based on sexual orientation, the Court does not in any way condone this serious and pervasive activity in the American workplace. *The intolerable working conditions set forth in the cases denying relief under Title VII for rampant discrimination based on sexual orientation call for immediate remedial response by Congress.*

Higgins v. New Balance Athletic Shoe, Inc., 21 F. Supp. 2d 66, 76 n.10 (D. Me. 1998) (emphasis added).

324. H.R. 2355, 106th Cong. (1999); S. 1276, 106th Cong. (1999). ENDA was first introduced in the 103rd Congress. S. 2238, 103rd Cong. (1994); H.R. 4636, 103rd Cong. (1994).

325. See 140 CONG. REC. S7581 (daily ed. June 23, 1994) (statement of Sen. Kennedy).

326. S. 1276, 106th Cong. §3 (1999).

327. John E. Yang, *Senate Passes Bill Against Same-Sex Marriage*, WASH. POST, Sept. 11, 1996, at A1 ("The Senate overwhelmingly approved legislation yesterday that is designed to prevent gay marriages . . . while narrowly defeating another bill [ENDA] that would have outlawed job discrimination on the basis of sexual orientation.").

associate.³²⁸ The term "covered entity" includes most federal and state employers,³²⁹ as well as private employers. Covered private employers are those entities "engaged in an industry affecting commerce," as defined in section 701(h) of the Civil Rights Act of 1964,³³⁰ that have fifteen or more employees.³³¹

ENDA does not apply to the armed forces,³³² nor to religious organizations, except regarding employment in a position whose duties are dedicated solely to generating unrelated business income subject to federal taxation.³³³ Moreover, ENDA would not apply to employee spousal benefits,³³⁴ explicitly prohibits quotas or any preferential treatment on the basis of sexual orientation,³³⁵ prohibits the EEOC from collecting statistics on sexual orientation from covered entities,³³⁶ and affirmatively disallows disparate impact claims based on a *prima facie* violation of the statute.³³⁷

ENDA has earned widespread endorsements. As of the close of the 106th Congress, ENDA had 37 Senate co-sponsors (including 3 Republicans) and 174 House co-sponsors (including 16 Republicans).³³⁸ President Clinton endorsed ENDA and committed to sign it into law if it passed Congress during his administration.³³⁹

Dozens of major corporations, including Apple Computer, AT&T, Bethlehem Steel, Eastman Kodak, Honeywell, Merrill Lynch, Microsoft, Prudential Insurance, Quaker Oats, RJR Nabisco, Verizon and Xerox have endorsed the bill for passage.³⁴⁰ A large number of church groups and non-profit organizations

328. S. 1276 106th Cong. § 4 (1999); H.R. 2355 106th Cong. § 4 (1999).

329. S. 1276 § 3 (including government employers encompassed by section 717(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16(a) (2000), section 302(a)(1) of the Government Employee Rights Act of 1992, 2 U.S.C. § 1202(1) (2000), and the Congressional Accountability Act of 1995, 2 U.S.C. § 1301 (2000)); H.R. 2355 § 3 (same).

330. 42 U.S.C. § 2000e(h).

331. ENDA, S. 1276 §3(3a).

332. *Id.* § 10(a)(1).

333. *Id.* § 9.

334. *Id.* § 6.

335. *Id.* § 8.

336. *Id.* § 7.

337. *Id.*

338. *Current Legislation*, Human Rights Campaign <http://congress.nw.dc.us/cgi-bin/issue.pl?dir=hrc&command=bills> (last visited Dec. 4, 2000).

339. *See Clinton Backs Bill to Bar Job Bias Against Gays*, CHI. TRIB., Oct. 21, 1995, at 8N, 1995 WL 6257712.

340. *Corporations Endorsing the Employment Non-Discrimination Act (ENDA)* (Human Rights Campaign) <http://www.hrc.org/worknet> (last visited August 20, 2000).

also have endorsed ENDA.³⁴¹ Major civil rights figures, such as Coretta Scott King, have endorsed ENDA. So has former Senator Barry Goldwater, the conservative luminary, who reasoned that “[e]mployment discrimination based on sexual orientation is a real problem in our society. From coast to coast and throughout the heartland, regular hardworking Americans are being denied the right to roll up their sleeves and earn a living. That is just plain wrong.”³⁴²

ENDA would remedy employment discrimination against lesbians, gay men and bisexuals, regardless of whether they are gender nonconforming. At this time, however, ENDA does not explicitly cover transgendered Americans. Because ENDA would cover “perceived as” sexual orientation discrimination, it may provide protection to some transgendered plaintiffs. Many transgendered Americans are discriminated against because they are perceived as being, or actually are, gay, lesbian, or bisexual.

A number of transgendered activists have argued that ENDA should not be passed without explicit coverage of transgendered status or, at minimum, gender identity. These activists also contend that ENDA in its current form (*i.e.*, not including gender identity), not only excludes transgendered Americans from the bill’s scope, but also fails to protect gender nonconforming lesbians and gay men.

In its position paper on ENDA, GenderPAC, a prominent national organization addressing gender identity issues, argues that ENDA as currently worded will protect only those employees fortunate enough to be both gay and gender-normative, while leaving gender-variant gays, lesbians and bisexuals, as well as transgender employees, exposed to substantial risk of workplace discrimination.³⁴³ GenderPAC

341. The American Jewish Committee, the Episcopal Church, the Evangelical Lutheran Church, the Presbyterian Church (USA), the Union of American Hebrew Congregations and the United Methodist Church, among others, have endorsed ENDA. *Churches and Religious Organizations Endorsing the Employment Non-Discrimination Act (ENDA)* (Human Rights Campaign) <http://www.hrc.org/worknet> (last visited August 20, 2000). The American Bar Association, the American Nurses Association, the American Psychological Association, the AFL-CIO, the National Women’s Law Center and People for the American Way, among others, have endorsed ENDA. *See Organizations Endorsing the Employment Non-Discrimination Act (ENDA)* (Human Rights Campaign) <http://www.hrc.org/worknet>. (last visited August 20, 2000).

342. See 142 CONG. REC. S9987 (daily ed. Sept. 6, 1996) (statement of Sen. Kennedy).

343. *Position Paper: Including Gender Protection in ENDA*, GENDERPAC (on file with author).

correctly observes that not all lesbians and gay men are subjected to the same amounts of discrimination and harassment. As evidenced in the cases profiled throughout this article, those whose gender expressions are less aligned with their biological sex tend to be more vulnerable to discrimination.

GenderPAC argues that a gay male employee who is taunted for "feminine" gestures, for example, would have no recourse under ENDA.³⁴⁴ This is because his employer could defend a lawsuit by claiming that the discrimination was based on gender identity and expression discrimination and not sexual orientation discrimination.³⁴⁵

We respectfully disagree with GenderPAC's analysis. The litigation track record in the eleven states³⁴⁶ and scores of counties and cities³⁴⁷ that prohibit sexual orientation employment discrimination is a good indication of what we can expect once ENDA passes. With very few exceptions, state and local laws protect against sexual orientation discrimination, but do not cover gender identity or expression. Under these statutes, there has been no reported case involving an

While ENDA would offer explicit protection to employees from workplace discrimination due to their sexual orientation, it offers no such protection for the way they express their gender.

This approach leaves not only transexual and transgender Americans at risk, but also gays, lesbians, bisexuals and even straight employees whose gender expression is visibly different from the norm; for example, butchy lesbians, effeminate gay men, or straight feminist women considered "too-masculine."

Id.

344. *Id.*

345. *Id.*

346. See CAL. LAB. CODE § 1102.1 (West, Supp. 1997); CONN. GEN. STAT. ANN. § 46a-81c (West 1995); D.C. CODE ANN. §§ 1-2501 to 1-2557 (Michie 1991 & Supp. 1997); HAW. REV. STAT. ANN. § 378-2 (Michie Supp. 1999); MASS. GEN. LAWS ANN. ch. 151B, § 4 (West 1996); MINN. STAT. ANN. § 363.03 (West Supp. 1997); 1997 N.H. Laws 108 (effective Jan. 1, 1998); NEV. REV. STAT. ANN. § 613.330 (Michie 2000); N.J. STAT. ANN. § 10:5-12 (West 1993); R.I. GEN. LAWS §§11-24-2 to 11-24-2.2, 28-5-3, 28-5-5, 28-5-7 (1995 & Supp. 1996); VT. STAT. ANN. tit. 21, § 495 (Supp. 1997); WIS. STAT. ANN. § 111.36 (West 1997). All twelve jurisdictions prohibit discrimination on the basis of sexual orientation in employment and all but California extend this protection to housing. Minnesota and Wisconsin also outlaw sexual orientation discrimination in public and private education.

347. Approximately 170 cities have promulgated ordinances that prohibit public and private employment discrimination on the basis of sexual orientation. Some of the larger cities include New York, Los Angeles, Chicago, Houston, Philadelphia, Detroit, Dallas, San Diego, San Francisco, Atlanta, Boston, Phoenix, Denver, Baltimore, Minneapolis, St. Paul, St. Louis, Kansas City, Portland, Pittsburgh, Milwaukee, San Jose, Cleveland, and Columbus (Ohio). See DENVER, COLO., CITY CODE 28-91 (1990); MINNEAPOLIS, MINN., CODE tit. 7, ch. 139 (1975); PITTSBURGH, PA., CODE tit. 6, ch. 651, § 651.01 art. V (1992).

“effeminate” gay man or “butch” lesbian who was barred from relief because of an employer’s successful exercise of a “gender expression, not sexual orientation” defense.

In addition, such a defense would seem patently pretextual and, therefore, weak. Discrimination based on effeminacy in a gay man or masculinity in a lesbian would almost certainly be “perceived as” sexual orientation discrimination prohibited by ENDA. It also is unlikely that a defendant would be able to successfully argue that he discriminated not on the basis of sexual orientation, but on the basis of gender nonconformity, without running afoul of Title VII.

As discussed above, some courts automatically conflate gender nonconformity with sexual orientation and deny Title VII protection because of that sexual orientation “loophole.” For example, in the cases of Earnest Dillon, Bennie Smith and Strailey, the courts equated the plaintiffs’ perceived effeminacy with homosexuality and refused relief under Title VII. It is highly doubtful that those courts would have used that same “sexual orientation” loophole if ENDA had been in existence at the time. The “sexual orientation loophole” continues to disqualify gender nonconforming gay men and women from Title VII coverage because there is no federal statute prohibiting employment discrimination based on sexual orientation.

ENDA would effectively close the “sexual orientation” loophole in federal civil rights law, and a defendant—faced with both Title VII sex stereotyping and ENDA sexual orientation claims—would have nowhere to hide from liability if the one or both of the claims proved meritorious.

VI. CONCLUSION

There is no shortage of arguments for why and how the prohibition against discrimination based on sex in Title VII of the Civil Rights Act of 1964 should apply to anti-gay discrimination. Because homosexuality violates societal gender norms, lesbians and gay men face discrimination that almost always takes the form of sex stereotyping or sexual harassment based on gender expression. Courts, however, have almost always treated the actual or perceived homosexuality of the plaintiffs as disqualifying them from Title VII relief. Gender nonconformity standing alone, as in the *Price Waterhouse* case, can invoke Title VII relief, but typically not when it is combined with perceived or actual homosexuality.

The predominant judicial view of gender nonconformity, and specifically the scope of Title VII's coverage of sex stereotyping, is excessively narrow. Fundamentally, discrimination against lesbians, gay men, bisexual and transgendered people is discrimination based on gender nonconformity and should be prohibited under Title VII.

As we have shown, courts have made limited progress toward adopting an enlightened understanding of the interplay between sexual orientation and gender expression, and more importantly, the nexus between sex and gender. They have a long way to go, however, before gay and transgendered Americans can rely upon Title VII as recourse for employment discrimination. Moreover, any relief available under Title VII now or in the near future most likely would come at the cost to the plaintiff of "closeting" his/her sexual orientation and settling for limited relief at best. In sexual harassment claims especially, gay plaintiffs are required to satisfy high evidentiary requirements for proving severity and harm, effectively precluding coverage of many forms of anti-gay discrimination.

Of course, the fact that courts have a long way to go to accommodate discrimination faced by gay Americans under Title VII's prohibition against sex discrimination does not mean that attorneys should not continue to bring test cases to help expand the scope of the prohibition. Such litigation is important and should continue. On the other hand, gay Americans cannot afford to be without a federal statute that explicitly prohibits employment discrimination based on sexual orientation. Regardless, and perhaps because of, the slow development of Title VII to redress some of the discrimination faced by gay Americans, the Employment Non-Discrimination Act must become law.