

2018

## Let's Call it What it is: Sexual Orientation Discrimination is Sex Discrimination Under Title VII

Breanna R. Wexler  
breanna.wexler@gmail.com

Follow this and additional works at: <https://scholarship.law.slu.edu/lj>



Part of the [Law Commons](#)

---

### Recommended Citation

Breanna R. Wexler, *Let's Call it What it is: Sexual Orientation Discrimination is Sex Discrimination Under Title VII*, 63 St. Louis U. L.J. (2018).

Available at: <https://scholarship.law.slu.edu/lj/vol63/iss1/9>

This Note is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in Saint Louis University Law Journal by an authorized editor of Scholarship Commons. For more information, please contact [Susie Lee](#).

## LET'S CALL IT WHAT IT IS: SEXUAL ORIENTATION DISCRIMINATION IS SEX DISCRIMINATION UNDER TITLE VII

### INTRODUCTION

Greater protections for the LGBT+<sup>1</sup> community are being recognized with increasing frequency, especially after the Supreme Court's June 2015 decision in *Obergefell v. Hodges* that legalized same-sex marriage.<sup>2</sup> In direct contrast to this trend, the Trump administration's Department of Justice recently argued as an amicus that employers could fire people for being gay, further arguing that current employment discrimination statutes should not be interpreted to prohibit sexual orientation discrimination.<sup>3</sup> The Justice Department's argument could significantly undermine the Supreme Court's decision on marriage equality because it conflicts with the judiciary's increased protections for the LGBT+ community.<sup>4</sup> The Equal Employment Opportunity Commission has taken the stance opposite the Department of Justice, arguing that LGBT+ employees should be protected from discrimination under the existing law that prohibits employees from being discriminated against on the basis of sex.<sup>5</sup>

Fewer than half the states explicitly prohibit workplace discrimination against LGBT+ workers. However, many states have enacted laws to explicitly protect LGBT+ employees from workplace discrimination.<sup>6</sup> Accordingly, it is clear that we cannot rely on state law alone to protect the LGBT+ community from adverse employment actions in the workplace. Additionally, one survey indicated that seventy-six percent of the adult population believed it *should be*

---

1. The author acknowledges that there are many terms used to refer to the diverse categorizations of non-heterosexual and non-cisgender individuals. "LGBT+" is used here to include all constituencies identifying as non-heterosexual and non-cisgender.

2. 135 S.Ct. 2584 (2015).

3. Chris Riotta, *Trump Administration Says Employers Can Fire People for Being Gay*, NEWSWEEK (Sept. 28, 2017, 3:56 PM), <http://www.newsweek.com/trump-doj-fired-being-gay-lgbt-issues-jeff-sessions-673398> [<https://perma.cc/NW6B-4NLP>]; Brief for the United States as Amicus Curiae Supporting Defendants-Appellees at 1, *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (No. 15-3775), 2017 WL 3277292.

4. Riotta, *supra* note 3.

5. *What You Should Know about EEOC and the Enforcement Protections for LGBT Workers*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, [https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement\\_protections\\_lgbt\\_workers.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm) [<https://perma.cc/7TQC-XHFE>] (last visited Nov. 8, 2018).

6. Currently, twenty-two states protect employees in both the private and the public sector from discrimination on the basis of sexual orientation, while ten states protect only public employees from such discrimination. *In Your State*, LAMBDA LEGAL, <https://www.lambdalegal.org/states-regions/in-your-state> [<https://perma.cc/2G5R-YFNC>] (last visited Nov. 8, 2018).

illegal to discriminate against LGBT+ individuals in the workplace, while sixty-two percent of the population believes it is *already* illegal to discriminate against LGBT+ individuals in the workplace.<sup>7</sup>

Despite these beliefs, there is actually no federal law that explicitly protects this group of individuals. Many argue that sexual orientation should be covered under Title VII's prohibition of sex discrimination.<sup>8</sup> While "sex" refers to the male or female status assigned at birth,<sup>9</sup> sex discrimination has been interpreted as encompassing discrimination based on gender as well.<sup>10</sup> Gender means "the attitudes, feelings, and behaviors that a given culture associates with a person's biological sex."<sup>11</sup> Behaviors that are viewed as incompatible with these expectations constitute gender nonconformity.<sup>12</sup> The Supreme Court ruled three decades ago that employees who experience discrimination based on gender nonconformity are protected under Title VII.<sup>13</sup> This precedent has led courts to apply Title VII's protections to LGBT+ plaintiffs whose dress, appearance, or mannerisms are gender nonconforming.<sup>14</sup> However, many courts are struggling to interpret Title VII's protections as extending to the LGBT+ community in the workplace when obvious gender nonconformity is absent.<sup>15</sup> On the other hand, as this Article will discuss more fully below, courts are also struggling to explain why sexual orientation discrimination is not inherently sex discrimination.<sup>16</sup> After all, gay and lesbian employees by their very nature violate traditional

7. Peter Moore, *Poll Results: Discrimination*, YOUGov (June 18, 2014, 2:56 PM), <https://today.yougov.com/topics/legal/articles-reports/2014/06/18/poll-results-discrimination> [<https://perma.cc/HA3P-XB77>].

8. *Id.*

9. Am. Psychological Ass'n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 AM. PSYCHOLOGIST 832, 862 (2015), <http://www.apa.org/practice/guidelines/transgender.pdf> [<https://perma.cc/37X3-F825>].

10. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989).

11. Am. Psychological Ass'n, *Guidelines for Psychological Practice with Lesbian, Gay, and Bisexual Clients*, 67 AM. PSYCHOLOGIST 10, 11 (2012), <http://www.apa.org/pubs/journals/features/amp-a0024659.pdf> [<https://perma.cc/5W25-8E7F>]. The word "gender" has come to be used synonymously with the word "sex" in the law of discrimination. Mary Ann Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 2 (1995).

12. Am. Psychological Ass'n, *supra* note 11, at 11.

13. *Price Waterhouse*, 490 U.S. at 250–51.

14. *See, e.g.*, *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 457 (5th Cir. 2013); *Lewis v. Heartland Inns*, 591 F.3d 1033, 1042 (8th Cir. 2010); *Nichols v. Azteca Rest. Enter., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001).

15. *See, e.g.*, *Gilbert v. Country Music Ass'n.*, 432 F. App'x 516, 520 (6th Cir. 2011); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 216 (2d Cir. 2005); *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1062 (7th Cir. 2003).

16. *See, e.g.*, *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006) (arguing that finding for the plaintiff would have the effect of de facto amending Title VII to encompass sexual orientation discrimination).

gender norms just by being attracted to others of the same sex.<sup>17</sup> These conflicting interpretations of sexual orientation discrimination have created a split among the federal courts of appeals, resulting in some LGBT+ plaintiffs receiving protection while others receive no protection.

#### DEVELOPMENT OF THE SPLIT

Despite growing support for LGBT+ rights today, this has not always been the case. From 1973 until the early 1990s, seventy to seventy-five percent of American adults believed that homosexuality was “always wrong.”<sup>18</sup> This was due, in large part, to the impact of the AIDS epidemic on attitudes towards homosexuality.<sup>19</sup> Homosexuality was even classified as a mental disorder in the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders (“DSM”) until 1974.<sup>20</sup> It is no surprise, therefore, that courts did not initially interpret LGBT+ individuals as belonging to a protected class under employment law statutes such as Title VII of the Civil Rights Act of 1964 (“Title VII”).

#### TITLE VII

Title VII makes it unlawful for an employer to fail or refuse to hire or to discharge any individual or to discriminate with respect to compensation, terms, conditions, or other privileges of employment because of such individual’s race, color, religion, sex, or national origin.<sup>21</sup> Title VII also makes it unlawful to limit,

17. *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 346 (7th Cir. 2017).

18. Gregory B. Lewis & Marc A. Rogers, *Does the Public Support Equal Employment Rights for Gays and Lesbians?*, in *GAYS AND LESBIANS IN THE DEMOCRATIC PROCESS: PUBLIC POLICY, PUBLIC OPINION, AND POLITICAL REPRESENTATION* 118, 119–20 (Ellen D. B. Riggle & Barry L. Tadlock eds., 1999); Jeni Loftus, *America’s Liberalization in Attitudes Toward Homosexuality, 1973 to 1998*, 66 AM. SOC. REV. 762, 767 (2001); TOM W. SMITH, NAT’L OPINION RES. CTR., ATTITUDES TOWARDS SEXUAL PERMISSIVENESS: TRENDS, CORRELATES, AND BEHAVIORAL CONNECTIONS 3 (1992); Alan S. Yang, *The Polls—Trends: Attitudes Towards Homosexuality*, 61 PUB. OPINION Q., 477, 484–85 (1997); ALAN S. YANG, THE 2000 NATIONAL ELECTIONS STUDY AND GAY AND LESBIAN RIGHTS: SUPPORT FOR EQUALITY GROWS 6 (2001).

19. Loftus, *supra* note 18, at 779; Jacqueline Scott, *Changing Attitudes to Sexual Morality: A Cross-National Comparison*, 32 SOCIOLOGY, 815, 820 (1998).

20. Position Statement (Retired), Am. Psychological Ass’n, *Homosexuality and Sexual Orientation Disturbance: Proposed Change in DSM-II, 6th Printing, Page 44*, APA Document Reference No. 730008 (1973), <https://dsm.psychiatryonline.org/doi/pdf/10.1176/appi.books.9780890420362.dsm-ii-6thprintingchange> [https://perma.cc/YB85-5JS9]. Homosexual individuals were not the only group targeted by negative public opinion. In 1980, transgender people were officially classified by the American Psychiatric Association as having “gender identity disorder,” leading society to believe that transgenderism was something that needed to be cured. See Susan Stryker, *Transgender Activism*, GLBTQ 4 (2015) [http://www.glbtqarchive.com/ssh/transgender\\_activism\\_S.pdf](http://www.glbtqarchive.com/ssh/transgender_activism_S.pdf) [https://perma.cc/KDS6-MZEX].

21. Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e-2(a) (2012).

segregate, or classify employees or applicants in a way that would deprive them of employment opportunities or that would adversely affect their employment status.<sup>22</sup> Although sexual orientation and gender identity are not explicitly listed as classes protected by Title VII, the statute's sex discrimination provision could encompass these types of discrimination.

#### EARLY CASES

While today the courts distinguish between gender identity and sexual orientation as separate aspects of sexuality, early decisions cashed the constructs together under a general "sexual preference" umbrella.<sup>23</sup> Therefore, the earliest cases that attempted to broaden the scope of Title VII to include LGBT+ as a protected class under the "sex" prong of the statute focused on what is now labeled "gender identity"-based discrimination. *Holloway* was the first to address the issue of whether a transsexual<sup>24</sup> employee could claim Title VII discrimination on the basis of sex. In *Holloway*, the plaintiff began female hormone treatments shortly after she began employment with Arthur Andersen & Co. in 1969.<sup>25</sup> Four years later, she was promoted and decided to inform her supervisor that she was undergoing treatment in preparation for anatomical sex change surgery.<sup>26</sup> Despite informing the plaintiff that she may be more comfortable working at a company where her sex assigned at birth was unknown, Holloway's supervisor gave her a pay raise.<sup>27</sup> However, Holloway was terminated shortly afterward when she requested that her records be changed to reflect her updated first name.<sup>28</sup> The court was hard-pressed to look beyond the explicit text of Title VII, arguing that Congress had only the

22. *Id.*

23. This outlook is consistent with the public's lack of understanding of the difference between the terms "sex" and "gender" in the 1950s to the 1970s, as well as leaders' and organizers' struggle to address the different concerns and identity issues of gay men, women identifying as lesbians, and others identifying as gender variant or nonbinary. See generally Milton Diamond, *Sex, Gender, and Identity over the Years: A Changing Perspective*, 13 CHILD & ADOLESCENT PSYCHIATRIC CLINICS OF N. AM. 591 (2004); Bonnie Morris, *History of Lesbian, Gay, Bisexual, and Transgender Social Movements*, AM. PSYCHOLOGICAL ASS'N, <http://www.apa.org/pi/lgbt/resources/history.aspx> [<https://perma.cc/Y8YU-GTPH>] (last visited Nov. 8, 2018).

24. The term "transsexual" is used in this section because this represents the explicit language used by the courts during this time period. "Transsexual" is now considered an older term and is preferred by some people who have permanently changed, or who seek to change, their bodies through medical interventions such as hormones and/or surgeries. GLAAD Media Reference Guide – *Transgender*, GLAAD, <https://www.glaad.org/reference/transgender> [<https://perma.cc/XH4R-2HJG>] (last visited Nov. 8, 2018).

25. *Holloway v. Arthur & Co.*, 566 F.2d 659, 661 (9th Cir. 1977).

26. *Id.*

27. *Id.*

28. *Id.*

traditional notions of “sex” in mind when the statute was enacted.<sup>29</sup> The court justified its reasoning by stating that several bills had been introduced to amend the Civil Rights Act to prohibit discrimination against “sexual preference,” but that none had been enacted into law.<sup>30</sup> As a result, the court refused to extend Title VII’s application in the absence of further Congressional action.<sup>31</sup>

Around the same time that *Holloway* was decided, LGBT+ plaintiffs attempting to find relief for discrimination based on their sexual orientation under Title VII’s sex discrimination prohibition were equally unsuccessful. In *Smith v. Liberty Mutual Insurance Co.*, the employer refused to hire a male employee because he was “effeminate.”<sup>32</sup> Smith argued that Title VII forbids an employer to reject a job applicant based on his or her affectional or sexual preference, but the Fifth Circuit disagreed, refusing to extend Title VII’s prohibition of sex discrimination without a further Congressional mandate explicitly protecting sexual preference.<sup>33</sup>

One year later, the Ninth Circuit followed the reasoning of *Smith* in *DeSantis v. Pacific Telephone & Telegraph Co.*<sup>34</sup> *DeSantis* encompassed three separate federal district court actions claiming that employers had discriminated against plaintiffs because of their homosexuality.<sup>35</sup> Consistent with other circuits’ attention to the explicit language of the statute, the Ninth Circuit concluded that Congress had only the traditional notions of “sex” in mind.<sup>36</sup> Therefore, it refused to expand Title VII’s prohibition of sex discrimination to discrimination based on sexual orientation.<sup>37</sup>

Six years later, there was a brief glimmer of hope for the transsexual community when the Northern District of Illinois found for a transsexual plaintiff under Title VII.<sup>38</sup> In *Ulane v. Eastern Airlines, Inc.*, the plaintiff, a Vietnam war veteran and licensed pilot, was fired by Eastern Airlines after she returned to work following sex reassignment surgery.<sup>39</sup> The district court determined that the definition of “sex” extends beyond the traditional male-female dichotomy and also includes questions of one’s own self-perception, as well as society’s perception of the individual.<sup>40</sup> Judge Grady went on to state that “sex is not a cut-and-dried matter of chromosomes . . . the term, ‘sex,’ . . .

29. *Id.* at 662.

30. *Holloway*, 566 F.2d at 662.

31. *Id.* at 663.

32. 569 F.2d 325, 326 (5th Cir. 1978).

33. *Id.* at 326–27.

34. *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 329–30 (9th Cir. 1979).

35. *Id.* at 328.

36. *Id.* at 329.

37. *Id.*

38. *Ulane v. E. Airlines, Inc.*, 581 F. Supp. 821, 840 (N.D. Ill. 1983), *rev’d*, 742 F.2d 1081 (7th Cir. 1984).

39. *Id.* at 827.

40. *Id.* at 823.

can be and should be reasonably interpreted to include among its denotations the question of sexual identity,” thereby providing Title VII protections to transsexuals.<sup>41</sup> Consequently, the district court held that regardless of whether Ulane was regarded as a transsexual or as a female, she was discharged by Eastern Airlines because of her sex in violation of Title VII.<sup>42</sup> However, the Seventh Circuit reversed the district court, applying similar analysis to that utilized by the Ninth Circuit in *Holloway*—refusing to define sex in any way other than the rudimentary male-female dichotomy.<sup>43</sup> Specifically, the court stated that the words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder, and that a prohibition against discrimination based on an individual’s sex is not synonymous with a prohibition based on an individual’s sexual identity disorder or discountenance with the sex into which they were born.<sup>44</sup> The court stated that “even if one believes that a woman can be so easily created from what remains of a man, that does not decide this case” because Ulane was discriminated against for her transsexual status rather than for being female.<sup>45</sup>

Courts relied exclusively on this narrow interpretation of Title VII throughout the 1970s and 1980s. However, by the late 1980s, courts began to apply the theory of sex stereotyping as evidence that discrimination against LGBT+ employees was sex discrimination, reasoning that because LGBT+ people may fail to conform to what society’s gender norms would dictate is appropriate, their discrimination was sex discrimination prohibited under Title VII.

#### SEX STEREOTYPES AND SUPREME COURT ACTION

In 1989, the Supreme Court, in a plurality opinion, first accepted sex stereotyping as discrimination under Title VII in *Price Waterhouse v. Hopkins*.<sup>46</sup> Ann Hopkins worked at Price Waterhouse’s Office of Government Services for five years when the partners in her office proposed her as a candidate for partnership—the only woman out of eighty-eight other employees proposed for partnership that year.<sup>47</sup> Some of the partners reacted negatively to Hopkins, describing her as “macho,” “overcompensat[ing] for being a woman,” and

---

41. *Id.* at 825.

42. *Id.* at 840.

43. *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984).

44. *Id.*

45. *Id.* at 1087. This further demonstrates the negative attitudes towards transsexuals during this time period. *See generally* Diamond, *supra* note 23.

46. 490 U.S. 228, 250 (1989) (plurality opinion) *superseded in part by statute on other grounds*, Civil Rights Act of 1991 § 107(a), 42 U.S.C. § 2000e-2(m) (2012), *as recognized in* *Burrage v. United States*, 571 U.S. 204, 213 & n.4 (2014).

47. *Id.* at 233.

needing a “course at charm school.”<sup>48</sup> When Hopkins’s candidacy for partner was placed on hold, she was advised to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”<sup>49</sup> A plurality of the Court concluded that Congress’ intent to forbid employers from taking gender into account in making employment decisions appears on the face of the statute, and that “common sense” should not be left at the doorstep when interpreting the statute.<sup>50</sup> The plurality further stated that in the context of sex stereotyping, an 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.<sup>51</sup> In other words, the plurality opinion expanded the meaning of sex discrimination beyond the narrow, strictly biological definition of Title VII’s sex discrimination prohibition and interpreted the statute to strike at the “entire spectrum” of disparate treatment of men and woman resulting from sex stereotypes.<sup>52</sup>

When an employee’s appearance or actions are perceived to be gender nonconforming and serve as the basis for an adverse employment action, this discrimination consistently falls under the *Price Waterhouse* reasoning and is prohibited under Title VII. For instance, the Eighth Circuit used a sex stereotyping theory to find for the plaintiff under Title VII in *Lewis v. Heartland Inns* when Brenna Lewis was deemed not a “good fit” for the front desk, despite receiving positive reviews from her managers and customers.<sup>53</sup> Her supervisor’s stated reasons included that Lewis’ appearance was “slightly more masculine” and that she had an “Ellen DeGeneres kind of look” and lacked the “Midwestern girl look.”<sup>54</sup> Quoting *Price Waterhouse*, the Eighth Circuit concluded that “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”<sup>55</sup>

Sex stereotyping theories have also been used as a basis for sex discrimination in cases where the plaintiff is berated for exhibiting gender nonconformity. For example, in *Nichols v. Azteca Restaurant Enterprises, Inc.*, the plaintiff, a server at one of the defendant’s restaurants, was subjected to a relentless campaign of insults, name-calling, and vulgarities about his feminine

---

48. *Id.* at 235.

49. *Id.*

50. *Id.* at 239, 241.

51. *Price Waterhouse*, 490 U.S. at 250 (plurality opinion).

52. *Id.* at 251. The *Price Waterhouse* decision has not only applied to cases of sexual orientation discrimination, but also to cases involving gender identity. *See Smith v. City of Salem*, 378 F.3d 566, 567–68 (6th Cir. 2004); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 572 (6th Cir. 2018).

53. 591 F.3d 1033, 1035–36 (8th Cir. 2010).

54. *Id.* at 1036.

55. *Id.* at 1042 (quoting *Price Waterhouse*, 490 U.S. at 251).



appearance.<sup>56</sup> Male coworkers and a supervisor repeatedly referred to the plaintiff using the pronouns “she” and “her” and mocked him for walking and carrying his serving tray “like a woman.”<sup>57</sup> The Ninth Circuit held that this verbal abuse occurred because of sex, and applied the *Price Waterhouse* logic found in *Higgins v. New Balance Athletic Shoe, Inc.*, that “just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity.”<sup>58</sup>

In a similar set of circumstances, the Fifth Circuit found in *EEOC v. Boh Brothers Construction Company* that the plaintiff, Woods, was protected under Title VII when his coworkers referred to him with demeaning and vulgar language, such as “princess” and “faggot.”<sup>59</sup> In addition to verbal comments, Woods’ coworkers also took physical actions, such as approaching Woods from behind and simulating intercourse with him.<sup>60</sup> The court reasoned that there was enough evidence to support the conclusion that Woods’ harassment was because of sex.<sup>61</sup> Specifically, Woods’ coworkers thought that Woods was not a “manly-enough man,” and this perception and associated harassment were sufficient to support a Title VII sex discrimination claim on the basis of gender nonconformity.<sup>62</sup>

In other cases, courts have failed to find for employees when an employee’s discrimination was strictly on the basis of sexual orientation stereotypes as opposed to sex stereotypes. Although there is substantial overlap between sexual orientation and gender nonconformity claims, courts have found that certain aspects of a worker’s sexual orientation may create a target for discrimination apart from any issues related to gender.<sup>63</sup> Discrimination may be based on prejudicial or stereotypical ideas about the gay and lesbian lifestyle, such as promiscuity, religious beliefs, spending habits, child rearing, sexual practices, or politics.<sup>64</sup> For instance, in *Hamm v. Weyauwega Milk Products, Inc.*, Hamm was called a “faggot,” “bisexual,” and “girl scout,” and a coworker threatened to snap his neck.<sup>65</sup> Another coworker threatened to “shove [a] water hose up [Hamm’s] ass,” and Hamm stated that management believed he was “that

---

56. 256 F.3d 864, 870 (9th Cir. 2001).

57. *Id.*

58. *Id.* at 874 (quoting *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999)).

59. 731 F.3d 444, 449, 478 (5th Cir. 2013).

60. *Id.* at 449.

61. *Id.* at 457.

62. *Id.*

63. *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 709 (7th Cir. 2016).

64. *Id.*

65. 332 F.3d 1058, 1060 (7th Cir. 2003).

way.”<sup>66</sup> The court found that even after drawing all reasonable inference in Hamm’s favor, his experiences were either related to his coworkers’ disapproval of his work performance or their perceptions of Hamm’s sexual orientation, neither of which fit under the protection of sex discrimination based on gender nonconformity.<sup>67</sup>

The Second Circuit reached a similar conclusion in *Dawson v. Bumble & Bumble*.<sup>68</sup> Dawson was a self-described lesbian female who did not conform to gender norms or meet the stereotyped expectations of femininity.<sup>69</sup> At the hair salon in which she worked, fellow stylists would harass her about her appearance and the fact that she did not conform to the image of a woman, often calling her “Donald” and joking that she was “wearing her sexuality like a costume.”<sup>70</sup> The court concluded that Dawson’s claims of sex stereotyping did not in fact derive from sex stereotypes, but rather from stereotypes based on sexual orientation, and therefore were not cognizable under Title VII.<sup>71</sup>

The same reasoning was used six years later in the Sixth Circuit’s decision in *Gilbert v. Country Music Ass’n*.<sup>72</sup> Gilbert, who worked for the Country Music Association was openly homosexual.<sup>73</sup> While preparing for a show, a union worker called him a “faggot” and threatened to stab him.<sup>74</sup> The particular worker in question was even facing criminal charges for having stabbed several homosexuals elsewhere.<sup>75</sup> Gilbert attempted to raise a claim of sex discrimination under the theory of gender nonconformity, but the court labeled this as a “formulaic recitation” of the elements of a sex stereotyping cause of action, which by itself would not rise to the level of protection under Title VII.<sup>76</sup> Instead, the court determined that Gilbert’s allegations involved “discrimination based on sexual orientation, nothing more.”<sup>77</sup>

*Price Waterhouse* and the cases that followed demonstrated that gender nonconformity can serve as a basis for sex discrimination when an employee faces discrimination on the basis of obvious gender nonconformity, but not when an employee fails to display gender nonconforming behaviors or when discrimination arises primarily on the basis of sexual orientation stereotypes. In other words, employees who experienced discrimination based on apparent

---

66. *Id.* at 1061.

67. *Id.* at 1062.

68. 398 F.3d 211, 216 (2d Cir. 2005).

69. *Id.* at 213.

70. *Id.* at 215.

71. *Id.* at 216.

72. 432 F. App’x 516, 520 (6th Cir. 2011).

73. *Id.* at 518.

74. *Id.*

75. *Id.*

76. *Id.* at 520.

77. *Gilbert*, 432 F. App’x at 520.

gender nonconforming behaviors may be successful on their Title VII sex discrimination claim, whereas those who experience discrimination as a result of purely being homosexual would not. After *Price Waterhouse* and subsequent cases set the standard for sex stereotyping as a theory of sex discrimination under Title VII, the Equal Employment Opportunity Commission (the “EEOC”) published its interpretation of Title VII’s sex discrimination prohibition as applied to cases of gender identity and sexual orientation, and some courts ultimately responded by adopting the agency’s position.

#### EEOC GUIDELINES

The U.S. Equal Employment Opportunity Commission is an administrative agency responsible for the enforcement of Title VII and various other employment discrimination statutes.<sup>78</sup> While the EEOC cannot issue regulations under Title VII with the force of law, it is authorized to issue interpretive or procedural guidance on how employers should comply with the laws it enforces.<sup>79</sup> However, there is some evidence that the Supreme Court defers to the EEOC less frequently than other federal agencies.<sup>80</sup> In addition to publishing interpretive guidance, the EEOC also adjudicates appeals from administrative decisions made by federal agencies on EEOC complaints.<sup>81</sup>

The EEOC interprets and enforces Title VII’s prohibition of sex discrimination as forbidding employment discrimination based on gender identity or sexual orientation, even if allowed by state or local laws.<sup>82</sup> The EEOC explicitly states that it has not recognized any new protected characteristics under Title VII.<sup>83</sup> Rather, the Commission has applied existing Title VII precedents to sex discrimination claims raised by LGBT+ individuals, interpreting the statute’s sex discrimination provision as prohibiting discrimination against employees on the basis of sexual orientation and gender

78. 42 U.S.C. §§ 2000e–2000e-17 (2012) (enforcement authority codified at 42 U.S.C. §§ 2000e-4, e-5, e-12). *See also* Equal Pay Act, 29 U.S.C. §§ 206(d), 209, 211, 213, 215–19, 255–56, 259–60, 262 (2012); Age Discrimination in Employment Act, 42 U.S.C. §§ 621–34 (2012) (enforcement authority codified at 29 U.S.C. § 628); Americans with Disabilities Act, tit. 1, 42 U.S.C. §§ 12111–17 (2012) (enforcement authority codified at 42 U.S.C. § 12117); Rehabilitation Act of 1973 §§ 501, 505, 29 U.S.C. §§ 791, 794, 794a (2012) (enforcement authority codified at 29 U.S.C. § 794(a)(1)).

79. Theodore W. Wern, Note, *Judicial Deference to EEOC Interpretations of the Civil Rights Act, the ADA, and the ADEA: Is the EEOC a Second Class Agency?*, 60 OHIO ST. L.J., 1533, 1552 (1999).

80. The Supreme Court deferred to the EEOC’s view fifty-four percent of the time, compared to seventy-two percent of the time for other federal agencies. *Id.* at 1549–50.

81. *About EEOC*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/eeoc/> [<https://perma.cc/2Y4X-YTLF>] (last visited Nov. 9, 2018).

82. U.S. EQUAL EMP. OPPORTUNITY COMM’N, *supra* note 5.

83. *Id.*

identity.<sup>84</sup> The EEOC has ruled in favor of plaintiffs in cases of both transgender discrimination<sup>85</sup> and sexual orientation discrimination<sup>86</sup> on the basis, namely, that claims of discrimination based on gender identity or sexual orientation necessarily state a claim of discrimination on the basis of sex under Title VII.<sup>87</sup> This paper focuses on sexual orientation discrimination specifically because “a person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes.”<sup>88</sup> Thus, while there is a congruence between discriminating against transgender individuals and discrimination on the basis of gender-based behavioral norms,<sup>89</sup> this overlap is not necessarily as apparent or consistent for gay and lesbian individuals.<sup>90</sup> This lack of overlap has resulted in inconsistently applied law for gay and lesbian employees in particular.

As the cases and EEOC Guidelines above illustrate, there is a consistency among the circuits in finding for plaintiffs’ sex discrimination claims when issues of gender nonconformity and sex stereotyping are involved. However, circuits disagree on the extension of Title VII’s protections when the case involves stereotypes based purely on sexual orientation as opposed to sex.

#### SEXUAL ORIENTATION

While LGBT+ plaintiffs could bring claims as sex stereotyping cases, the cases were routinely dismissed if the claims were actually sexual orientation discrimination claims. In other words, courts were unwilling to extend Title VII’s sex discrimination prohibition to cover sexual orientation discrimination *per se*. *Simonton v. Runyon* is one such case.<sup>91</sup> Simonton, a known homosexual male employee of the United States Postal Service, endured a series of explicit and indecent verbal assaults from coworkers.<sup>92</sup> Notes were placed on the wall in the employees’ bathroom with Simonton’s name and the name of celebrities who

84. *Id.*

85. *See, e.g.,* Lusardi v. McHugh, EEOC Decision No. 0120133395, 2015 WL 1607756 (April 1, 2015); Eric S. v. Shinseki, EEOC Decision No. 0120133123, 2014 WL 1653484 (Apr. 16, 2014); Jameson v. Donahoe, EEOC Decision No. 0120130992, 2013 WL 2368729 (May 21, 2013); Macy v. Holder, EEOC Decision No. 0120120821, 2012 WL 1435995 (April 20, 2012).

86. *See, e.g.,* Baldwin v. Foxx, EEOC Decision No. 0120133080, 2015 WL 4397641 (July 15, 2015).

87. U.S. EQUAL EMP. OPPORTUNITY COMM’N, *supra* note 5.

88. Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011).

89. *Id.*; EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 576 (6th Cir. 2018) (“[A]n employer cannot discriminate on the basis of transgender status without imposing its stereotypical notions of how sexual organs and gender identity ought to align.”).

90. *See* Case, *supra* note 11, at 57 (“Feminine gender in men and gay male sexual orientation are far from perfectly overlapping categories, there are effeminate men who are not gay as well as gay men who are not effeminate.”).

91. 232 F.3d 33, 38 (2d Cir. 2000).

92. *Id.* at 34–35.

had died of AIDS.<sup>93</sup> In addition, pornographic photographs were taped to his work area, male dolls were placed in his vehicle, and copies of Playgirl magazine were sent to his home.<sup>94</sup> Simonton's coworkers also hung posters that stated that Simonton suffered from a mental illness.<sup>95</sup> Despite the extreme discrimination Simonton faced, the Second Circuit reasoned that Congress's refusal to expand the reach of Title VII is strong evidence of congressional intent in the face of consistent judicial decisions refusing to interpret "sex" to include sexual orientation.<sup>96</sup> The court further stated that "sex" under Title VII can logically only refer to "membership in a class delineated by gender, rather than sexual activity regardless of gender."<sup>97</sup> The court admitted that Simonton may have found relief under Title VII under a sex stereotyping theory, but that they did not have a basis in the record to surmise that Simonton behaved in a stereotypically feminine manner and that the discrimination he experienced was, in fact, based on his nonconformity with gender norms instead of his sexual orientation.<sup>98</sup>

In an attempt to further distinguish between gender and sexual activity, the Sixth Circuit refused to find for an employee who faced discrimination as a result of his association with another employee at work. In *Vickers v. Fairfield Medical Center*, the male plaintiff befriended a homosexual male doctor.<sup>99</sup> Once his coworkers found out about the friendship, they began to make sexually based slurs and discriminating comments about Vickers, alleging that he was gay and questioning his masculinity.<sup>100</sup> Fellow employees also placed chemicals in Vickers' food, called him vulgar nicknames, and repeatedly grabbed his crotch with a tape measure, among other obscene behaviors.<sup>101</sup> The court did not extend *Price Waterhouse's* gender nonconformity theory to Vickers because the harassment arose based on Vickers' perceived homosexuality and friendship with a known homosexual man as opposed to gender nonconforming behaviors observed at work.<sup>102</sup> The dissent asserted that the majority made an artificial distinction between behavior and appearances in the workplace and private

---

93. *Id.*

94. *Id.*

95. *Id.*

96. *Simonton*, 232 F.3d at 35.

97. *Id.* at 36 (quoting *DeCintio v. Westchester Cty. Med. Ctr.*, 807 F.2d 304, 306–07 (2d Cir. 1986)).

98. *Simonton*, 232 F.3d at 38.

99. 453 F.3d 757, 759 (6th Cir. 2006).

100. *Id.*

101. *Id.* at 759–60.

102. *Id.* at 763.

conduct, arguably because they could not distinguish between sexual orientation discrimination and sex discrimination.<sup>103</sup>

Courts have also refused to allow sex stereotyping theories to serve as a basis for Title VII discrimination for employees who are openly homosexual. In *Evans v. Georgia Regional Hospital*, Evans worked at a hospital as a security officer for over a year until she left voluntarily.<sup>104</sup> While working at the hospital, Evans was denied equal pay or work, harassed, and physically assaulted and battered.<sup>105</sup> Before leaving voluntarily, she was targeted for termination for not carrying herself in a “traditional womanly manner.”<sup>106</sup> Although she did not broadcast her sexuality, it was “evident” because of how she presented herself (having a male uniform, low male haircut, shoes, etc.).<sup>107</sup> Evans asserted that her status as a lesbian supported her claim of sex discrimination because discrimination against someone for her orientation often coincided with discrimination for gender nonconformity.<sup>108</sup> The Eleventh Circuit concluded that Evans did not provide enough facts to suggest that her decision to present herself in a masculine manner led to the adverse employment actions, and it refused to find for Evans on her sexual orientation discrimination claim without sufficient gender nonconformity evidence as consistent with other circuits.<sup>109</sup>

Throughout the beginning of 2017, courts reverted to an essentially pre-*Price Waterhouse* interpretation of Title VII, relying heavily on the narrow interpretations of “sex” in the statute in failing to interpret its protections as extending to sexual orientation discrimination. However, this interpretation changed and broadened once again in the Seventh Circuit’s ruling in *Hively* in April 2017.

#### THE IMPACT OF *HIVELY*

Kimberly Hively began teaching as a part-time adjunct professor at Ivy Tech Community College in 2000.<sup>110</sup> Although Hively met the necessary qualifications for full-time employment and had never received a negative

103. *Id.* at 766–70 (Lawson, J., dissenting). The majority in *Vickers* expressed a concern that finding for *Vickers* would “have the effect of de facto amending Title VII to encompass sexual orientation as a prohibited basis for discrimination.” *Vickers*, 453 F.3d at 764.

104. 850 F.3d 1248, 1251 (11th Cir. 2017).

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 1254.

109. *Evans*, 850 F.3d at 1254, 1256. On September 7, 2017, Lambda Legal Defense and Education Fund, Inc. filed a petition for a writ of certiorari with the Supreme Court of the United States on behalf of Jameka Evans, urging the Supreme Court to interpret Title VII’s ban on sex discrimination broadly as extending to LGBT+ employees. Certiorari was denied on December 11, 2017, leaving the split unresolved. Petition for a Writ of Certiorari at 8–14, *Evans v. Ga. Reg’l Hosp.*, 850 F.3d 1248 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 557 (2017).

110. *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 699 (7th Cir. 2016).

performance evaluation, the college refused to interview her for any of the six full-time positions for which she applied between 2009 and 2014.<sup>111</sup> Furthermore, her part-time employment contract was not renewed in 2014.<sup>112</sup> Hively alleged that she had been “denied full-time employment and promotions based on her sexual orientation,” which she argued violated Title VII.<sup>113</sup> The college, in turn, argued that Title VII does not apply to claims of sexual orientation discrimination and that Hively was therefore not entitled to any legal remedy.<sup>114</sup> The court sided with the employer, citing a body of Seventh Circuit precedent binding their decision.<sup>115</sup> Interestingly, the court even cited the pre-*Price Waterhouse* Seventh Circuit *Ulane* case, returning to the plain meaning of the word “sex” as encompassing discrimination against women only because they are women and against men only because they are men.<sup>116</sup> Despite acknowledging that “it is exceptionally difficult to distinguish between [claims of gender nonconformity and claims of sexual orientation],” the court ultimately concluded that it is not impossible and that there may indeed be some aspects of a worker’s sexual orientation that create a target for discrimination apart from any issues related to gender.<sup>117</sup> Because Hively only alleged discrimination based on sexual orientation, the court was bound by its prior precedent in interpreting Title VII as encompassing her discrimination claim in the absence of a Supreme Court opinion or new legislation.<sup>118</sup>

Although it appeared at first that the Seventh Circuit was going to rule in accordance with its own prior precedent in limiting the scope of Title VII claims only to those that sufficiently plead gender nonconformity and sex stereotyping, the plaintiff’s petition for rehearing en banc was granted, and the Seventh Circuit gathered one year later to review the 2016 panel decision.<sup>119</sup> The en banc opinion used the panel’s acknowledgement of the difficulty in separating gender

---

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Hively*, 830 F.3d at 700–01 (citing *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 704 (7th Cir. 2000); *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1085 (7th Cir. 2000) (both holding that harassment based solely upon a person’s sexual preference or orientation, and not one’s sex, is not an unlawful employment practice under Title VII); *Muhammed v. Caterpillar, Inc.*, 767 F.3d 694, 697 (7th Cir. 2014) (citing the holding in *Spearman*, 231 F.3d at 1085); *Hamm v. Weyauwega Milk Products, Inc.*, 332 F.3d 1058, 1062 (7th Cir. 2003) (Refusing to extend Title VII’s protections to claims of harassment based on an individual’s sexual orientation); *Shroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 951 (7th Cir. 2002) (Holding that Title VII does not provide for a private right of action based on sexual orientation discrimination)).

116. *Hively*, 830 F.3d at 700 (citing *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984)).

117. *Hively*, 830 F.3d at 705, 709.

118. *Id.* at 718.

119. *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339 (7th Cir. 2017) (en banc).

nonconformity claims from sexual orientation claims to conclude that sexual orientation claims fall within Title VII's prohibition against sex discrimination if the claim affects employment in one of the statutorily specified ways.<sup>120</sup> In justifying this reasoning, the court concluded that the discriminatory behavior does not exist without taking the victim's biological sex into account.<sup>121</sup> The court stated that "[a]ny discomfort, disapproval, or job decision based on the fact that the complainant— woman or man— dresses differently, speaks differently, or dates or marries a same-sex partner, is a reaction purely and simply based on sex."<sup>122</sup> In other words, the court believed that "Hively represents the ultimate case of failure to conform to the female stereotype (at least as understood in a place such as modern America, which views heterosexuality as the norm and other forms of sexuality as exceptional): she is not heterosexual."<sup>123</sup>

*Hively* was a groundbreaking ruling for LGBT+ employees as the first case that acknowledged that sexual orientation discrimination is sex discrimination. One year after *Hively* was decided, the Second Circuit followed the Seventh Circuit's reasoning when it decided *Zarda v. Altitude Express*.<sup>124</sup> In *Zarda*, Donald Zarda was a homosexual man working for Altitude Express, a skydiving company.<sup>125</sup> Zarda typically informed female customers that he was homosexual so that they would feel more comfortable when they were strapped closely to him while skydiving.<sup>126</sup> However, when a male customer found out about Zarda's disclosure of his homosexuality to his girlfriend, the male customer called Altitude Express and complained about Zarda's behavior.<sup>127</sup> Zarda was subsequently fired, allegedly for failing to provide an enjoyable experience for a customer.<sup>128</sup> Zarda attempted to make a sex stereotyping claim by arguing that his employer criticized him for wearing pink clothes and nail polish at work.<sup>129</sup> The district court concluded that Zarda failed to establish the "requisite proximity" between his termination and his proffered instances of gender nonconformity and granted summary judgment on Zarda's Title VII claim, following the precedent set by *Simonton* on failing to recognize sexual orientation discrimination claims in and of themselves under Title VII.<sup>130</sup> The Second Circuit did not reanalyze this issue on appeal, as it was not alleged by

---

120. *Id.* at 342, 347.

121. *Id.* at 347.

122. *Id.*

123. *Id.* at 346.

124. 855 F.3d 76, 79 (2d Cir. 2017).

125. *Id.*

126. *Id.* at 80.

127. *Id.*

128. *Id.*

129. *Zarda*, 855 F.3d at 81.

130. *Id.*



Zarda.<sup>131</sup> Thus, Zarda could only receive a new trial if Title VII's prohibition of sex discrimination encompassed discrimination based on sexual orientation – a result foreclosed by *Simonton*.<sup>132</sup>

While the Second Circuit panel could not overrule prior precedent, the court granted a rehearing en banc in February 2018 and subsequently did overrule *Simonton*.<sup>133</sup> Sitting en banc, the Second Circuit articulated three theories outlined in the EEOC's decision in *Baldwin* to explain why sexual orientation is sex discrimination.<sup>134</sup> First, sexual orientation discrimination is discrimination because of sex because sexual orientation is defined with explicit reference to sex.<sup>135</sup> In fact, sexual orientation is doubly delineated by sex because it is defined by both a person's sex and the sex of those to whom he or she is attracted.<sup>136</sup> “[B]ecause sexual orientation is a function of sex and sex is a protected characteristic under Title VII, it follows that sexual orientation is also protected.”<sup>137</sup> Second, it is “simply impossible” to disentangle sexual orientation from sex because beliefs about sexual orientation necessarily take sex into consideration.<sup>138</sup> Therefore, it makes no difference that the employer may not believe that its actions are based on sex.<sup>139</sup> Finally, sexual orientation discrimination is a form of associational discrimination.<sup>140</sup> “[I]f a male employee married to a man is terminated because his employer disapproves of the same-sex marriage, the employee has suffered associational discrimination based on his own sex because ‘the fact that the employee is a man instead of a woman motivated the employer’s discrimination against him.’”<sup>141</sup> Based on this reasoning, the Second Circuit concluded that Zarda was entitled to bring a Title VII claim for discrimination based on sexual orientation and remanded the case for further proceedings.<sup>142</sup>

131. *Id.* at 82.

132. *Id.*

133. *Zarda v. Altitude Express*, 883 F.3d 100, 110, 121 (2nd Cir. 2018) (en banc).

134. *Id.* at 113–28; *Baldwin v. Foxx*, EEOC Decision No. 0120133080, 2015 WL 4397641 (July 15, 2015).

135. *Zarda*, 883 F.3d at 113. For instance, a lesbian employee who faces an adverse employment action for displaying a picture of her female spouse can allege discrimination if a male employee does not experience an adverse employment action for displaying a picture of his female spouse. U.S. EQUAL EMP. OPPORTUNITY COMM’N, *supra* note 5 (discussing *Baldwin*, 2015 WL 4397641).

136. *Zarda*, 883 F.3d at 113.

137. *Id.*

138. *Id.* at 122.

139. *Id.*

140. *Id.* at 124. An employee who alleges sexual orientation discrimination is alleging that the employer took the employee’s sex into account by treating him or her differently for associating with a person of the same sex. U.S. EQUAL EMP. OPPORTUNITY COMM’N, *supra* note 5.

141. *Zarda*, 883 F.3d at 125 (quoting *Baldwin v. Foxx*, EEOC Decision No. 0120133080, 2015 WL 4397641, at \*6 (July 15, 2015)).

142. *Zarda*, 883 F.3d at 132.

The en banc rulings in *Hively* and *Zarda* were celebrated wins for the LGBT+ community,<sup>143</sup> but the rulings are not the “be all and end all” of sexual orientation discrimination claims under Title VII. Courts outside the Seventh and Second Circuits are still free to limit the scope of Title VII’s sex discrimination prohibition to include only purely sex-based discrimination and discrimination under theories of sex stereotyping. In other words, an interpretation gap remains between the Seventh and Second Circuits on one end and the remaining circuits on the other.

#### THE REMAINING GAP

*Hively*—and subsequently *Zarda*—broadened Title VII’s sex discrimination prohibition further than any other court had in the past by interpreting it to encompass sexual orientation-based discrimination claims— even without framing the case as a sex stereotyping case. However, this does not mean that LGBT+ employees in other circuits are protected against discrimination under Title VII. Instead, plaintiffs in these jurisdictions must sufficiently plead their LGBT+ discrimination claims as falling under the theory of sex stereotyping in order to make out a prima facie case of sex discrimination under Title VII.<sup>144</sup>

For instance, in *Christiansen v. Omnicom Group, Inc.*, the Second Circuit—the same Circuit that initially failed to find for *Zarda* on his sexual orientation discrimination claim—found for a homosexual plaintiff employee on a sex stereotyping theory just three weeks prior to the *Zarda* panel decision.<sup>145</sup> One primary difference between *Christiansen* and *Zarda* is that *Christiansen*’s complaint alleged multiple instances of sex stereotyping discrimination.<sup>146</sup> While the district court opined that permitting *Christiansen*’s Title VII claim to proceed “would obliterate the line the Second Circuit has drawn, rightly or wrongly, between sexual orientation and sex-based claims,”<sup>147</sup> the appellate division concluded that “gay, lesbian, and bisexual individuals do not have *less* protection under *Price Waterhouse* against traditional gender stereotype discrimination than do heterosexual individuals.”<sup>148</sup> In other words, LGBT+ employees are not automatically exempt from Title VII protections—even outside of the Seventh and Second Circuits—so long as they can prove that acts

143. Rebecca Shafer, *Big Victory for LGBT Rights: Hively v. Ivy Tech*, HARV. C.R.-C.L. L. REV. (April 13, 2017), <http://harvardcrcl.org/big-victory-for-lgbt-rights-hively-v-ivy-tech/> [https://perma.cc/HK6R-3Y26].

144. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989), remains the standard for sex stereotyping claims under Title VII.

145. 852 F.3d 195, 200–01 (2d Cir. 2017).

146. *Id.* at 200.

147. *Id.* (quoting *Christiansen v. Omnicom Grp., Inc.*, 167 F. Supp. 3d 598, 621 (S.D.N.Y. 2016)).

148. *Christiansen*, 852 F.3d at 200–01.

of gender nonconformity are a substantial factor in their experiences of employment discrimination.

In a concurring opinion, Chief Judge Katzmann (joined by Judge Brodie) argued that “sexual orientation discrimination is often, if not always, motivated by a desire to enforce heterosexually defined gender norms.”<sup>149</sup> The concurrence stated that the current approach to sex stereotype claims is unworkable for numerous district courts throughout the country.<sup>150</sup> This is because such cases present fact-finders with the exceptionally difficult task of deciding whether a plaintiff’s perceived masculinity/femininity or a plaintiff’s sexual orientation was the true cause of the disparate treatment—a task made even more challenging when considering the degree to which sexual orientation is commingled with particular traits associated with gender.<sup>151</sup> The concurrence urged the Second Circuit to reexamine its previous decisions holding that sexual orientation discrimination claims are not cognizable under Title VII,<sup>152</sup> which it ultimately did in the *Zarda* en banc opinion.<sup>153</sup> However, Judges Katzmann and Brodie accept that it may be the Supreme Court that ultimately must address the issue once and for all.<sup>154</sup>

Apart from the gender nonconformity framing, employees are currently afforded no protections outside of the Seventh and Second Circuits for sexual orientation discrimination. As a result of *Hively* and *Zarda*, employees working in the Seventh and Second Circuits are now afforded greater protections than those working outside of those circuits. This is leading many to question exactly how Title VII’s sex discrimination prohibition should be interpreted and applied.

#### CORRECT INTERPRETATION

As the analysis to this point shows, the circuits are currently conflicted on the interpretation of Title VII’s sex discrimination protections. The Eleventh Circuit’s ruling for the employer in *Evans* is in direct conflict with the Seventh Circuit’s *Hively* decision, the Second Circuit’s *Zarda* decision, and with the EEOC Guidelines. Furthermore, the employer in *Zarda* has a pending certiorari petition before the Supreme Court.<sup>155</sup> Altitude Express has urged the Supreme Court to “address the growing uncertainty” stemming from both the circuit split and the split between the EEOC and the Department of Justice.<sup>156</sup> In other

149. *Id.* at 195 (Katzmann, C.J., concurring) (quoting *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002)).

150. *Christiansen*, 852 F.3d at 205 (Katzmann, C.J., concurring).

151. *Id.* at 205–06.

152. *Id.* at 207.

153. *Zarda v. Altitude Express*, 883 F.3d 100, 110 (2nd Cir. 2018) (en banc).

154. *Christiansen*, 852 F.3d at 207 (Katzmann, C.J., concurring).

155. Petition for Writ of Certiorari, *Altitude Express Inc. v. Zarda*, No. 17-1623 (filed May 29, 2018).

156. *Id.* at 14, 31.

words, the issue of Title VII protections for LGBT+ employees is ripe for Supreme Court intervention. It is time that the Supreme Court rule on this issue once and for all and call sexual orientation discrimination what it really is: sex discrimination.

#### SEXUAL ORIENTATION DISCRIMINATION SHOULD BE PROTECTED UNDER TITLE VII

The current split in the interpretation of Title VII's application to sexual orientation discrimination is confusing and inconsistent. There are several reasons why the Supreme Court should resolve this ambiguity and rule that sexual orientation discrimination is protected under Title VII. Namely, (1) it is impossible to separate sexual orientation from gender nonconformity, (2) the inclusion of sexual orientation discrimination will make the application of Title VII clearer and easier for courts, (3) a failure to protect employees from sexual orientation discrimination is confusing for employers, and (4) the current state of the law is confusing for and unfair to employees.

1. It is impossible to separate sexual orientation from gender nonconformity.

First, it is patently impossible to separate sexual orientation from gender nonconformity. The Supreme Court extended Title VII's protections to cases of gender nonconformity in 1989 in its *Price Waterhouse* decision.<sup>157</sup> Yet, three decades later, sexual orientation is still not universally protected under the statute despite the fact that it is greatly intertwined with gender nonconformity and relies on the same underlying theory of Title VII protection.<sup>158</sup> In other words, the fact that a plaintiff frames his or her complaint in terms of sexual orientation discrimination instead of gender stereotyping discrimination is "immaterial."<sup>159</sup> Judge Hellerstein of the Southern District of New York stated it best when he said:

[When a] plaintiff has stated a claim for sexual orientation discrimination, "common sense" dictates that he has also stated a claim for gender stereotyping discrimination, which is cognizable under Title VII. . . . I decline to embrace an "illogical" and artificial distinction between gender stereotyping discrimination and sexual orientation discrimination, and in so doing, I join several other courts throughout the country.<sup>160</sup>

Judge Hellerstein's view is consistent with Judges Katzmman and Brodie in their *Christensen* concurrence: "[S]tereotypical notions about how men and women

157. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51 (1989).

158. *See Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 346 (7th Cir. 2017) (en banc) (discussing the fact that homosexuality goes against the established norm of heterosexuality).

159. *Philpott v. New York*, 252 F. Supp. 3d 313, 317 (S.D.N.Y. 2017).

160. *Id.*

should behave will often necessarily blur into ideas about heterosexuality and homosexuality.’ . . . [I]t is logically untenable for us to insist that this particular gender stereotype is outside of the gender stereotype discrimination prohibition articulated in *Price Waterhouse*.”<sup>161</sup>

Despite this reasoning, the same circuit came to a different conclusion just weeks before in the *Zarda* panel decision when it concluded that Zarda failed to establish the requisite proximity between his termination and his failure to conform to gender stereotypes.<sup>162</sup> Sitting en banc, the Second Circuit overruled the panel decision, finding that discrimination on the basis of sexual orientation is sex discrimination.<sup>163</sup> This further evidences the muddled waters between purely sexual orientation claims and gender nonconformity claims and again reaffirms the need to stop trying to draw a line where one does not exist.<sup>164</sup>

Furthermore, an adoption of *Hively*’s interpretation of the cognizability of sexual orientation claims under Title VII would eliminate the practice of finding against an employee for “bootstrapping” their sexual orientation claims with sex stereotype claims. This is precisely why Zarda was initially unsuccessful in proving his discrimination claim—although he alleged both sexual orientation discrimination and discrimination based on sex stereotyping, he failed to effectively prove his case under a theory of sex stereotyping.<sup>165</sup> Theoretically, a court could also go out of its way to focus narrowly on sexual orientation stereotypes as opposed to sex stereotypes to avoid finding for the plaintiff on the basis of sexual orientation discrimination.<sup>166</sup> Such may have been the case for Zarda in his initial case, as he was described as having a “typically masculine demeanor” despite being openly homosexual.<sup>167</sup> If sexual orientation discrimination was covered under Title VII, plaintiffs like Zarda would have a much better chance at proving their case. If heterosexual orientation is a sex stereotype per se, discrimination on the basis of sexual orientation is literally discrimination on the basis of sex. This means that LGBT+ plaintiffs would be left to prove that they have experienced an adverse employment action because of their sexual orientation (as opposed to another reason such as poor

---

161. *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 205 (2d Cir. 2017) (Katzmann, C.J., concurring) (quoting *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005)).

162. *Zarda v. Altitude Express*, 855 F.3d 76, 81–82 (2d Cir. 2017). Courts are also often thought of as singular entities. However, cases such as *Zarda* are panel decisions with different judges, and judges may simply disagree on this fundamental interpretation of failing to conform to sex stereotypes.

163. *Zarda v. Altitude Express*, 883 F.3d 100, 132 (2nd Cir. 2018) (en banc).

164. See *Philpott*, 252 F. Supp. 3d at 317.

165. *Zarda*, 855 F.3d at 81–82.

166. See Jessica A. Clarke, *Inferring Desire*, 63 DUKE L.J. 525, 563–64 (discussing how plaintiff’s harassment claims may fail if the purported harasser is the same sex as the purported victim and does not appear to be stereotypically homosexual).

167. *Zarda*, 855 F.3d at 80–81.

performance or failure to follow company policy) to receive protection under Title VII's sex discrimination provision.<sup>168</sup>

The EEOC's analysis (as applied in the *Zarda* en banc opinion) of the immense overlap of the two concepts also demonstrates that sexual orientation discrimination is sex discrimination. In *Baldwin v. Foxx*, the EEOC held that a claim of discrimination on the basis of sexual orientation necessarily states a claim of discrimination on the basis of sex under Title VII under three theories.<sup>169</sup> First, discrimination on the basis of sexual orientation necessarily involves treating an employee differently because of his or her sex.<sup>170</sup> Second, sexual orientation discrimination is associational discrimination.<sup>171</sup> The EEOC's third reason for concluding that sexual orientation discrimination is sex discrimination echoes that of the Seventh Circuit's decision in *Hively*—sexual orientation discrimination necessarily involves discrimination based on gender stereotypes, including employer beliefs about the person to whom the employee should be attracted.<sup>172</sup> This is reminiscent of Chief Judge Wood's statement in *Hively* that the plaintiff represented the "ultimate" case of a failure to conform to the female stereotype because she was not heterosexual.<sup>173</sup>

2. The inclusion of sexual orientation discrimination will make the application of Title VII clearer and easier for courts.

Courts are currently split as to whether sexual orientation discrimination is included under Title VII because it is unclear how the sex discrimination provision should be interpreted. While some argue that it should only include clear cases of sex discrimination and gender nonconformity,<sup>174</sup> others argue that sexual orientation discrimination and gender nonconformity are essentially one and the same.<sup>175</sup> Absent consistent protections for sexual orientation discrimination, gay and lesbian employees would be forced to litigate their claims under the guise of "gender nonconformity" to receive statutory

168. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (discussing the plaintiff's initial burden of establishing a prima facie case of employment discrimination).

169. *Baldwin v. Foxx*, EEOC Decision No. 0120133080, 2015 WL 4397641, at \*10 (July 15, 2015).

170. U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 5. See *supra* note 135 and accompanying text.

171. U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 5. See *supra* note 140 and accompanying text.

172. U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 5.

173. *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 346 (7th Cir. 2017).

174. See *Zarda v. Altitude Express*, 855 F.3d 76, 81 (2d Cir. 2017); *Christiansen v. Omnicom Grp., Inc.*, 167 F. Supp. 3d 598, 622 (S.D.N.Y. 2016).

175. See *Hively*, 853 F.3d at 346; *Philpott v. New York*, 252 F. Supp. 3d 313, 317 (S.D.N.Y. 2017).

protection.<sup>176</sup> That is, LGBT+ employees would need to demonstrate that they experienced discrimination because of gender nonconformity in their mannerisms, appearance, or behavior to receive statutory protection.<sup>177</sup> However, numerous district courts throughout the country have “found this approach to gender stereotype claims to be unworkable.”<sup>178</sup> Instead of a successful route to claiming Title VII protection, the result is a “contradictory” and “confused hodgepodge of cases.”<sup>179</sup> In other words, the gender nonconformity litigation approach does not work for plaintiffs, and it does not work for courts.

Additionally, the existing protection for gender nonconformity claims under *Price Waterhouse* is not always a workaround solution for LGBT+ employees. Gender nonconformity claims are especially difficult for gay plaintiffs to bring<sup>180</sup> and even harder for district courts to adjudicate.<sup>181</sup> This likely explains why Zarda’s case has been litigated four times and now has a pending certiorari petition before the Supreme Court.<sup>182</sup> As a result, “litigants and courts should not be required to cram cases involving discrimination based on sexual orientation into this box.”<sup>183</sup> Instead, they should have a more direct route to achieving Title VII protection.

A finding that Title VII encompasses sexual orientation discrimination claims, on the other hand, will take the guesswork out of the analysis. In other words, courts would not have to determine whether a plaintiff’s sexual orientation claim overlaps enough with gender nonconformity to warrant protection because the standard simply would be that it does. Instead, courts would be left to determine whether the discrimination claim meets the remaining criteria of a Title VII sex discrimination claim<sup>184</sup> as opposed to grappling with

176. Petition for a Writ of Certiorari at 18–19, *Evans v. Ga. Reg’l Hosp.*, 850 F.3d 248 (11th Cir. 2017) (No. 17-370).

177. *Id.* at 18.

178. *Christiansen v. Omnicom Grp.*, 852 F.3d 195, 205 (2d Cir. 2017) (Katzmann, C.J., concurring).

179. *Hively*, 853 F.3d at 342, 350.

180. *Maroney v. Waterbury Hosp.*, No. 3:10-CV-1415 (JCH), 2011 WL 1085633, at \*2 n.2 (D. Conn. Mar. 18, 2011).

181. Petition for a Writ of Certiorari at 19, *Evans*, 850 F.3d 248 (No. 17-370).

182. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc); *Zarda v. Altitude Express*, 855 F.3d 76, 81 (2d Cir. 2017); *Zarda v. Altitude Express, Inc.*, No. CV-10-4334, 2015 WL 8547638 (E.D.N.Y. Oct. 28, 2015); Petition for Writ of Certiorari, *Altitude Express Inc. v. Zarda*, No. 17-1623 (filed May 29, 2018).

183. Petition for a Writ of Certiorari at 19, *Evans*, 850 F.3d 248 (No. 17-370).

184. A plaintiff can establish a Title VII claim under a theory of disparate treatment or disparate impact. For disparate treatment, a plaintiff must create a presumption that the employer unlawfully discriminated against the employee, though the facts that must be proven to establish a prima facie case vary somewhat. In general, a plaintiff must prove (1) that he or she is a member of a protected class under Title VII (sex), (2) that the discriminatory act took place (e.g., refusal to hire, failure to promote, sexual harassment, paid less), and (3) that the discrimination was because of sex. For

whether the plaintiff is even a member of a protected class to begin with. A finding consistent with *Hively* and *Zarda* would allow this question to be answered more straightforwardly.

Additionally, the current confusion would not disappear if courts continue to side with employers. The confusion lies not with the competing interpretations of appellate circuits, but rather with the attempt to disentangle sex stereotypes from sexual orientation stereotypes. This will only be resolved if the Supreme Court rules that sexual orientation discrimination is sex discrimination.

3. A failure to protect employees from sexual orientation discrimination is confusing for employers.

The current state of the law is also leaving employers unsure of their legal obligations,<sup>185</sup> and this confusion will only be perpetuated if sex stereotyping is kept distinct from sexual orientation because courts will continue to find sometimes for employers and other times for employees, sometimes on nearly identical facts. A company that has offices throughout the United States should be able to advise management, train supervisors, and inform employees of their rights in the same way, yet the current state of affairs precludes such clarity.<sup>186</sup>

A finding that sexual orientation discrimination is not sex discrimination, which would still leave open the opportunity to litigate claims under a gender nonconformity theory of sex discrimination under Title VII,<sup>187</sup> would not clear this blurred standard. Instead, this would essentially send the message to employers that it is lawful to discriminate against an LGBT+ identifying employee who conforms to their birth sex, but not an LGBT+ identifying employee who exhibits obvious gender nonconformity.<sup>188</sup> Imagine the implications on diversity training programs, which would come to suggest that supervisors should exercise extra caution in making decisions regarding gender nonconforming employees, but not employees who are known to identify as LGBT+ but otherwise appear to conform to their birth sex.

---

disparate impact, the plaintiff must show (1) that the employer has a procedure or practice which is a barrier to employment opportunities, (2) for member of a protected class (e.g., sex), and (3) that barrier had an adverse impact on that protected class, originally set out in race-based discrimination cases such as *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) and *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975), and later applied to sex discrimination cases in *Dothard v. Rawlinson*, 433 U.S. 321 (1977). See Susan M. Omiliam & Jean P. Kamp, 1 SEX-BASED EMP. DISCRIMINATION § 11:10 (2018).

185. Petition for a Writ of Certiorari at 15, *Evans*, 850 F.3d 248 (No. 17-370).

186. *Id.* at 16.

187. For instance, while an effeminate gay man will likely be protected under Title VII, a non-effeminate gay would probably not be. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51 (1989).

188. See Case, *supra* note 11, at 4.



Alternatively, an extension of Title VII protections to LGBT+ identifying employees would increase not only the law's clarity, but also its predictability. A finding that sexual orientation is protected under Title VII would allow companies to function more consistently. It would allow companies to update their workplace policies in recognition of Title VII protections of sexual orientation and would better inform training programs targeted at inclusion and fair treatment of all employees, regardless of their behaviors or preferences.

4. A failure to protect employees from sexual orientation discrimination is confusing for and unfair to employees.

A finding that sexual orientation discrimination is not sex discrimination would not only leave employers confused, it would also leave employees in a difficult position, forcing them to choose between protection or potential discrimination.<sup>189</sup> The current state of sexual orientation discrimination law leaves employees in a difficult position as to whether or not they can feel secure in revealing their sexual orientation out of fear of discrimination or unfair treatment.<sup>190</sup> In fact, in some states, LGBT+ employees can now legally get married one day, and legally get fired the next.<sup>191</sup> Additionally, LGBT+ employees who are entitled to insurance and other forms of employment benefits for their spouses might exercise caution in revealing their marital status to their employer out of fear of revealing their sexual orientation and subjecting themselves to termination on that basis.<sup>192</sup>

In addition to facing a greater potential for termination, LGBT+ employees are also typically paid less and have fewer employment opportunities than their heterosexual coworkers.<sup>193</sup> LGBT+ employees, particularly those exposed to discrimination, are also at risk for poorer physical and mental health—especially in jurisdictions where sexual orientation stigma and economic disadvantages run highest.<sup>194</sup> A decision from the Supreme Court clarifying that Title VII's prohibition of sex discrimination also encompasses sexual orientation discrimination would ease the burdens associated with identifying as LGBT+.<sup>195</sup>

189. See Petition for a Writ of Certiorari at 15, *Evans*, 850 F.3d 248 (No. 17-370).

190. *Id.*

191. Gene Robinson, *State of LGBT Rights: Married on Sunday, but Fired on Monday*, DAILY BEAST (Dec. 14, 2014, 6:45 AM), <https://www.thedailybeast.com/state-of-lgbt-rights-married-on-sunday-but-fired-on-monday> [https://perma.cc/G94V-PTC5].

192. See Petition for a Writ of Certiorari at 15, *Evans*, 850 F.3d 248 (No. 17-370).

193. Brad Sears & Christ Mallory, *Employment Discrimination Against LGBT People: Existence and Impact*, in GENDER IDENTITY AND SEXUAL ORIENTATION DISCRIMINATION IN THE WORKPLACE: A PRACTICE GUIDE ch. 40-13 (Christine Michelle Duffy ed., 2014).

194. *Id.* See also AMIRA HASENBUSH ET AL., WILLIAMS INST., THE LGBT DIVIDE: A DATA PORTRAIT OF LGBT PEOPLE IN THE MIDWESTERN, MOUNTAIN, AND SOUTHERN STATES 1, 1–7, (2014), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-divide-Dec-2014.pdf> [https://perma.cc/YY6R-B744].

195. Petition for a Writ of Certiorari at 20, *Evans*, 850 F.3d 248 (No. 17-370).

The law will only continue to be applied unfairly and inconsistently if the Supreme Court finds that sexual orientation discrimination is distinct from sex discrimination. Currently, some employees are eligible for Title VII protections, while others are not, solely as a result of which jurisdiction's law is applied in their case. For instance, a gay person living in Michigan and working in Michigan can be fired at any time based on his sexual orientation.<sup>196</sup> However, if the gay person lives in Michigan and works in Indiana, he will enjoy greater job security, as Indiana is within the Seventh Circuit that decided *Hively*.<sup>197</sup>

Similarly, if an employee living in a Seventh or Second Circuit state has a job opportunity or a promotion opportunity in a non-Seventh or non-Second Circuit state, the employee would have to choose between advancing their career while foregoing Title VII protection or remaining in their current position in the protected jurisdiction.<sup>198</sup> Federal law should not put people in such a situation.<sup>199</sup>

Furthermore, this issue will only be resolved if the Supreme Court agrees with the *Hively* and *Zarda* decisions because plaintiffs will still be free to allege sexual orientation discrimination under a gender stereotyping theory per *Price Waterhouse v. Hopkins*.<sup>200</sup> In other words, the law would ultimately protect gay and lesbian employees who exhibit obvious gender nonconformity in their mannerisms, appearance, and behavior, but not those who appear to conform to their birth sex.<sup>201</sup> Conversely, "plaintiffs who do not look, act, or appear to be gender nonconforming but are merely known to be or perceived to be gay or lesbian do not fare as well in the federal courts."<sup>202</sup> This was precisely the case in *Vickers*, where the plaintiff was admonished for his perceived homosexuality, but did not display enough gender nonconforming behaviors at work to successfully claim Title VII protection.<sup>203</sup> Unfortunately, *Vickers* is not alone; in one study, the plaintiff lost in thirty-five cases that involved only "cognized" (i.e., "invisible") gender nonconforming behaviors and only won in one case.<sup>204</sup> When contrasted with visible stereotypes, the plaintiff won twelve times and only lost in three instances.<sup>205</sup> According to some scholars, the "ultimate gender stereotype" is committed when homosexual employees are discriminated against for failing to conform to gender expectations, and it is argued that both gender

---

196. *Id.* at 15.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51 (1989).

201. Petition for a Writ of Certiorari at 18, *Evans*, 850 F.3d 248 (No. 17-370).

202. *Id.* (quoting *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 710 (7th Cir. 2016)).

203. *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006).

204. Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 AM. U. L.R. 715, 748 tbl. 1 (2014).

205. *Id.*

conforming and gender nonconforming individuals should be equalized under Title VII.<sup>206</sup>

As a result, if sexual orientation discrimination is not covered under Title VII, plaintiffs would still likely experience different results depending on the extent to which their LGBT+ status is gender nonconforming. This is especially concerning given that identifying as LGBT+ in and of itself is already seen as gender nonconforming<sup>207</sup> and given that acceptance of LGBT+ status in the U.S. continues to vary by region.<sup>208</sup> LGBT+ employees – particularly those who are not obviously gender nonconforming – may feel compelled to remain in jurisdictions that are more receptive to a finding of gender nonconformity in LGBT+ discrimination cases or risk facing adverse employment actions simply as a result of their sexual orientation. A finding that sexual orientation discrimination is covered under Title VII would be a notable first step in circumventing these inevitably inconsistent applications of the law.

Also, a plaintiff's ability to even bring a discrimination claim in the first place rests largely on the information they provide to the EEOC or a state agency at the outset of the complaint process. Sixty-two percent of the adult population already thinks it is against federal law to discriminate against LGBT+ individuals in the workplace,<sup>209</sup> and the current state of the law demonstrates that trained lawyers are not clear on the law either. If judges and lawyers are confused, it is unlikely a lay employee will know how to frame the facts of their discrimination claim when they file a charge with the EEOC or a state agency. The partially automated intake process may not even provide the employee with the requisite form if they do not answer the screening questions in a way that clarifies that Title VII has been violated,<sup>210</sup> further encouraging the inconsistent application of employment discrimination law by allowing some plaintiffs to proceed to the next step of the complaint process while leaving others with absolutely no recourse.

Unfortunately, the current legal landscape “sends a strong message that it is acceptable to discriminate against employees based on their constitutionally protected love for a person of the same sex.”<sup>211</sup> This contrasts with the primary

206. Zachary A. Kramer, Note, *The Ultimate Gender Stereotype: Equalizing Gender-Conforming and Gender-Nonconforming Homosexuals Under Title VII*, 2004 U. ILL. L.R. 465, 465 (2004).

207. *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 342, 346 (7th Cir. 2017).

208. HASENBUSH ET AL., *supra* note 194, at 5–7.

209. Moore, *supra* note 7.

210. See, e.g., *Discrimination Complaint Assessment*, MO. DEP'T OF LABOR & INDUS. RELATIONS, [http://apps.labor.mo.gov/mohumanrights/File\\_Complaint/assessment.asp](http://apps.labor.mo.gov/mohumanrights/File_Complaint/assessment.asp) [https://perma.cc/AA45-Z82B] (last visited Nov. 9, 2018).

211. *Petition for a Writ of Certiorari at 21, Evans v. Ga. Reg'l Hosp.*, 850 F.3d 248 (11th Cir. 2017) (No. 17-370).

objective of Title VII: to avoid harm.<sup>212</sup> Furthermore, studies demonstrate that workplace discrimination subsides when legal rules clearly prohibit it.<sup>213</sup> The Supreme Court has the power to decide whether this country will continue to send the message that discrimination against LGBT+ employees is okay.

#### CONCLUSION

While protections for the LGBT+ community are on the rise, employment discrimination law continues to lag. The Supreme Court ruled three decades ago that discrimination claims based on a theory of gender nonconformity are protected under Title VII's sex discrimination prohibition. However, courts were then left to determine whether sexual orientation discrimination should be afforded the same protections under Title VII. This question has proven to be far less clear, resulting in inconsistently applied law across the United States. If the inconsistency persists, the Supreme Court should intervene and rule once and for all that sexual orientation discrimination is protected under Title VII, since there is always some level of gender nonconformity present in sexual orientation discrimination cases. Courts should cease attempts to draw a distinction between sexual orientation and gender nonconformity where no distinction logically exists and should side with the Courts of Appeals for the Second and Seventh Circuits in interpreting that sexual orientation discrimination is prohibited under Title VII. This will result in a clearer standard, more consistently applied law, and greater fairness for employees across the country.

BREANNA R. WEXLER\*

---

212. *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998) (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975)).

213. See Laura G. Barron & Michelle Hebl, *The Force of Law: The Effects of Sexual Orientation Antidiscrimination Legislation on Interpersonal Discrimination in Employment*, 19 PSYCHOL., PUB. POL'Y & L. 191, 200-02 (2013).

\* J.D., 2018, Saint Louis University School of Law, concentration in Labor & Employment Law and staff member on the Saint Louis University Law Journal; Ph.D., 2017, Industrial/Organizational Psychology, University of Missouri-St. Louis. I am currently employed as an Industrial/Organizational Psychologist working with the analysis, reporting, and interpretation of first-, mid-, and executive-level leadership testing and assessment data at Development Dimensions International (DDI), a leadership development consulting firm headquartered in Pittsburgh, Pennsylvania. I have a passion for employment discrimination research and conducting validation studies that test for and reduce adverse impact in the employee selection process. I would like to thank my advisor, Professor Marcia McCormick, for her insights and guidance in writing this article.

