"50 Years Later… Still Interpreting the Meaning of 'Because of Sex' within Title VII and Whether It Prohibits Sexual Orientation Discrimination"

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Disclaimer

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Abstract

50 Years Later… Still Interpreting the Meaning of "Because of Sex" within Title VII and Whether it Prohibits Sexual Orientation Discrimination

A lot of supporters of antidiscrimination laws usually focus on banning racial discrimination. Of course, we understand that opposition to race discrimination has great historical and emotional resonance in a country that has institutionalized racial oppression for hundreds of years, but that is not the only form of discrimination that deserves protection. State and federal laws, including Title VII of the Civil Rights Act of 1964 (Title VII) prohibit discrimination in employment decisions like hiring and firing based on race, religion, color, sex, and national origin. This thesis focuses on the provision of "sex" within Title VII. Although the provision "because of sex" is included in Title VII's protection, there is very little legislative history to determine exactly what Congress intended to include in its prohibition of workplace discrimination "because of sex." With little guidance, courts have been forced to develop their own doctrines in order to determine the scope of Title VII's prohibition on sex discrimination. The U.S. Supreme Court has not directly ruled on this issue, but it is interpreted within employment discrimination law that Title VII legislation does not prohibit discrimination on the basis of sexual orientation.

This thesis discusses how courts have distinguished between discrimination claims based on biological sex and gender-nonconformity, from claims based on sexual orientation, holding that the latter claim is not actionable under Title VII while the former types are actionable. This thesis will further focus on the notion that the "because of sex" provision should protect both heterosexuals and homosexuals from workplace

discrimination and the many avenues we can take to guarantee protection from employment discrimination for all individuals, regardless of your sexual orientation.

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Table Of Authorities

THE DECLARATION OF INDEPENDENCE (U.S. 1776). 2

UNITED STATES SUPREME COURT

Bowers v. Hardwick, 478 U.S. 186 (1986) 59, 60

Boy Scouts of America v. Dale, 530 U.S. 640 (2000) 61, 63

Castaneda v. Partida, 430 U.S. 482, 500 (1977) 36

Chevron U.S.A. Inv. V. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) 46

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 17, 46

Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) 65

I.N.S. v. Cardoza-Fonseca, 480 U.S. 421 (1987) 75

Lawrence v. Texas, 539 U.S. 558 (2003) 63

Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702 (1978) 31

Loving v. Virginia, 388 U.S. 1 (1967) 74, 75

McDonnell Douglas Corp v. Green, 411 U.S. 792 (1973) 12, 13, 16

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

Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983) 22

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

One, Inc. v. Olesen, 355 U.S. 371 (1958) 58

Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) 29

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

Raytheon Co. v. Hernandez, 540 U.S. 44 (2003) 17

Romer v. Evans, 517 U.S. 620 (1996) 60

Texas Dept. of County Affairs v. Burdine, 450 U.S. 248 (1981) 16

Union Bank v. Wolas, 112 S. Ct. 527 (1991) 75

United States v. Windsor, 133 S. Ct. 2675 (2013) 64, 65

COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Barnes v. Cincinnati, 401 F.3d 729 (6th Cir. 2005) 41

Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257 (3d Cir. 2001) 25, 38

Blum v. Gulf Oil Corp., 597 F.2d 936 (5th Cir. 1979) 24

Dawson v. Bumble & Bumble, 398 F.3d 211 (2d Cir. 2005) 25, 83

DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979) 24, 55, 73, 83

Doe v. City of Belleville, 119 F.3d 563 (7th Cir. 1997) 34

EEOC v. Boh Brothers Construction Co. 731 F.3d 444 (5th Cir. 2013) 37, 38

Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011) 41, 43

Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982) 72

Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252 (1st Cir. 1999) 5, 25

Highlander v. K.F.C. Nat'l Management Co., 805 F.2d 644 (6th Cir. 1986) 19

Holloway v. Arthur Andersen & Co., 566 F.2d 659 (9th Cir. 1977) 7, 22

McWilliams v. Fairfax County Bd. Of Supervisors, 72 F.3d 1191 (4th Cir. 1996). 34

Medina v. Income Support Div., N.M., 413 F.3d 1131 (10th Cir. 2005) 38

Nichols v. Azteca Rest. Enters., 256 F.3d 864 (9th Cir 2001) 31, 32, 55

Pedroza v. Cintas Corp., 397 F.3d 1063 (8th Cir. 2005) 38

Puffer v. Allstate Ins. Co., 675 F.3d 709 (7th Cir. 2012) 17

Rene v. MGM Grand Hotel, 305 F.3d 1061 (9th Cir. 2002) 32, 33

Rosa v. Park West Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000) 43

Schroer v. Billington, 577 F. Supp. 2d 293 (D.D.C. 2008) 28, 43, 44

Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. Wash. 2000) 43

Shepherd v. Slater Steels Corp., 168 F.3d 998 (7th Cir. 1999) 38

Simonton v. Runyon, 232 F.3d 33 (2d. Cir. 2000) 5, 25, 36, 55

Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004) 39, 43, 55

Ulane v. Eastern Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984) 26, 27, 30, 56

Vickers v. Fairfield Med. Ctr., 453 F.3d 757 (6th Cir. 2006) 25, 83

William v. Saxbe, 413 F.Supp 654, 657 (D.C. Cir. 1976) 18

Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69(8th Cir. 1989) 5, 24, 55

Yeary v. Goodwill Indus-Knoxville, Inc., 107 F.3d 443 (6th Cir. 1997) 34

DISTRICT COURT CASES

Burns v. The Ohio State University, 14-1190, 2014 Ohio App. LEXIS 1101 70, 71

Goluszek v. Smith, 697 F. Supp. 1452 (N.D. Ill. 1998) 34, 35

Williams v. District of Columbia, 916 F. Supp. 1, 7 (D.D.C. 1996) 35

TerVeer v. Library of Congress, 12-1290 (D.C. March 31, 2014) 67, 68, 69, 70

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION CASES

Campbell v. Espy, Appeal No. 01931703, 1994 WL 652840, at 3 (EEOC July 21, 1994) 42

Casoni v. U.S. Postal Serv., Appeal No. 01840104, 1984 WL 485399, at 3 (EEOC Sept 28, 1984). 42

Castello v. United States Postal Service, EEOC Appeal No. 0120111795 (July 22, 2011) *passim*

Johnson v. Frank, Appeal No. 01911827, 1991 WL 1189760, at 3 (EEOC Dec. 19, 1981) 82

Kowalczyk v. Brown, Appeal No. 01942053, 1996 WL 124832, at 1 (EEOC Dec. 27, 1994) 42

Macy v. Holder, EEOC Appeal No. 0120120821, 2012 WL 1435995, at 1 (EEOC Apr. 20, 2012). 41, 42, 43, 87

Morrison v. Dalton, Appeal No. 01930778, 1994 WL 74696, at 1 (EEOC June 16, 1994) 81

Pritchett v. Sizeler Real Estate Management Co., 67 Fair Empl. Prac. Cas. (BNA) 1377, 1379 (E.D. La. 1995) 35

Veretto v. United States Postal Service, Appeal No. 0120110873 (July 1, 2011) *passim*

Yost v. Runyon, Appeal Nos. 01965505 & 01965383, 1997 WL 655997, at 2 (EEOC Oct 2, 1997) 81

PUBLIC LAWS and BILLS

Alabama, Ala. Code 13A-6-65(a)(3) (1994) 59

Act of March 31, 1933 (Unemployment Relief Act), Public Law 73-5, 48 Stat 22 9

Arkansas, Ark. Code Ann 5-14-122 (1997) 59

Exec. Order No. 8802, 6 Fed. Reg. 1941 (1941-1946) 9

Idaho, Idaho Code 18-6605 (1987) 59

Arizona, Ariz. Rev. Stat. Ann 1-1411 to 1412 (1989) 59

29 C.F.R. pt. 1604 14, 15, 18, 21

STATUTES

2 U.S.C. **§** 1301 50

10 U.S.C.A. § 654 2

42 U.S.C. §1982 2

42 U.S. C. **§** 2000e *passim*

42 U.S.C. § 12111 13, 14

29 U.S. C. § 621 13, 14

29 U.S. C. A. § 206(b) 14

SECONDARY AUTHORITY

15 Am. Jur. 2d. *Job Discrimination* § 5 17

HEARINGS, STATEMENTS

92 CONG. REC. 313 (1946) 10

96 CONG. REC. 2247 (1950) 10

102 CONG REC. 13124-5 (1956) 10

110 CONG. REC. 2,804-05 (1964) 12

110 CONG. REC. 2556 (1964) 12

110 CONG. REC. 6548 (1964) 12

110 CONG. REC. 2,577-84 (1964) 12, 22

BOOKS

JO FREEMAN, THE POLITICS OF WOMEN'S LIBERATION: A CASE STUDY OF AN EMERGING SOCIAL MOVEMENT AND ITS RELATION TO THE POLICY PROCESS 52, 54 (iUniverse Publishers 2000) 15

ROBERT WINTEMUTE, SEXUAL ORIENTATION AND HUMAN RIGHTS: THE UNITED STATES CONSTITUTION, THE EUROPEAN CONVENTION AND THE CANADIAN CHARTER 7, 31 n.84 (Oxford: Oxford University Press 1997) (1995) 60

JOURNALS

Anthony E. Varona & Jeffrey M. Monks, *En/Gendering Equality: Seeking Relief Under Title VII Against Employment Discrimination Based on Sexual Orientation*, 7 WM. & MARY J. WOMEN & L. 67, 72-73 (2000) *passim*

Arthur S. Leonard, *Sexual Minority Rights in the Workplace,* 43 BRANDEIS L.J. 145, 152-53 (2005) 36, 57

Bennett Capers, Note, *Sex(ual Orientation) and Title VII,* 91 COLUM L. REV. 1158, 1179 (1991) 73

Cody Perkins, *Sex and Sexual Orientation: Title VII After Macy v. Holder*, 65 ADMIN. L. REV. 427, 428 (2013). 33

Deborah Epstein, *Can a "Dumb Ass Woman" Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech*, 84 GEO. L.J. 399, 409 n.62 (1996) 11, 12

Eric A. Roberts, *Heightened Scrutiny under the Equal Protection Clause: A Remedy to Discrimination Based on Sexual Orientation*, 42 DRAKE L. REV. 485 (1993) 6

Jeffrey Kramer, Note, *The "Ultimate" Gender Stereotype: Equalizing Gender-Conforming and Gender-Nonconforming Homosexuals Under Title VII*, 2004 U. ILL. L. REV. 465, 483-89 (2009) 30

Robert Stevens Miller, Jr., *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN L. REV. 877 (1967). 11

Mary C. Manemann, *The Meaning of "Sex" in Title VII: Is Favoring an Employee Lover a Violation of the Act?,* 83 N.W. U. L. REV. 612, 639 (1989) 14

Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMAN. 35 (2001) 48

Samuel A. Marcosson, *Harassment on the basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO L.J. 1, 5-6 (1991) 74

Sonya Smalletts, *Oncale v. Sundowner Offshore Services: A Victory for Gay and Lesbian Rights?*, 14 BERKELEY WOMEN'S L.J. 136, 136-37 (1999) 66

Sylvia Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 196 (1988) 66

Toni Lester, *Protecting the Gender Noconformist 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, 116 (1999) 70

Zachary A. Kramer, *Heterosexuality and Title VII*, 103 N.W. U.L. REV. 205 (2009) 73

GOVERNMENT REPORTS

H.R. 1755/S. 815, 113th Cong. *passim*

WEBSITES and INTERNET PERIODICALS

12 States still ban sodomy a decade after court ruling, USA TODAY (April 21, 2014, 6:42 PM), http://www.usatoday.com/story/news/nation/2014/04/21/12-states-ban-sodomy-a-decade-after-court-ruling/7981025/ 63

Andy Towle, *John Boehner: "I see no basis or need' for legislation protecting LGBT people in the workplace*, TOWLEROAD, available at http://www.towleroad.com/2013/11/john-boehner-i-see-no-basis-or-need-for-legislation-protecting-lgbt-people-in-the-workplace.html 55

Christie Malloy and Brad Sears, *Documented Evidence of Employment Discrimination and Its Effects on LGBT People*, Los Angeles: The Williams Institute (2011), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-20111.pdf 4

CIVIL RIGHTS ACTS, THE ORIGINS OF CIVIL RIGHTS LEGISLATION, THE RECONSTRUCTION ERA, THE EMERGENCE OF JIM CROW, http://encyclopedia.jrank.org/articles/pages/6065/Civil-Rights-Acts.html 9

Crosby Burns and Liz Neemann, *Infographic: Gay and Transgender Workers Lack Comprehensive Workplace Benefits*, Center for American Progress (October 18, 2012), http://www.americanprogress.org/issues/lgbt/news/2012/10/18/41907/infographic-gay-and-transgender-workers-lack-comprehensive-workplace-protections/ 49

Deborah J. Vagins, *Working in the Shadows, Ending Employment Discrimination for LGBT Americans*, (2007) https://www.aclu.org/files/pdfs/lgbt/enda_20070917.pdf 46

EEOC's Federal Training & Outreach Division, What Does the Macy Decision Mean for Title VII?, U.S. Equal Emp. Opportunity Commission (June 15, 2012), http://www.eeoc.gov/federal/training/brown_bag_macy.cfm 44

Editorial: The Boy Scouts Fall Short, THE NEW YORK TIMES (January 29, 2013), http://www.nytimes.com/2013/01/30/opinion/the-boy-scouts-fall-short-in-policy-on-gays.html?_r=0 62

Employment Non Discrimination Act Hearing: Brooke Waits, YouTube, uploaded by EdLabor Democrats, September 25, 2007, available at http://www.youtube.com/watch?v=Wq_4sGw1HLg. 5

Employment Non Discrimination Act Hearing: Michael Carney, YouTube, uploaded by EdLabor Democrats, September 25, 2007, available at http://www.youtube.com/watch?v=JlvNHPKKY_U&feature=relmfu 5

GAO, *Sexual Orientation and Gender Identity Employment Discrimination: Overview of State Statutes and Complaint Data*, (2013) http://www.gao.gov/assets/660/656443.pdf 48

Jaime Grant, Lisa Mottet, and Justin Tanis, *Injustice at Every Turn: A Report on the National Transgender Discrimination Survey*, Washington: National Gay and Lesbian Task Force (2011), http://www.thetaskforce.org/downloads/ reports/reports/ntds_summary.pdf 38

Jason Cohen, *How Hate Happens*, HUFFINGTON POST (November 15, 2013, 6:45 PM), http://www.huffingtonpost.com/jason-cohen/how-hate-happens_b_4277964.html 25

Jo Freeman, *How "Sex" Got Into Title VII: Persistent Opportunism as a Maker of Public Policy,* (1991) available at http://www.jofreeman.com/lawandpolicy/titlevii.htm. 10

Julie Pace, *Obama executive omissions leave some allies angry,* GET EQUAL (January 29, 2014) http://www.chron.com/news/politics/article/Obama-executive-omissions-leave-some-allies-angry-5185969.php 86

Laura Westfall, *Looking Beyond DOMA: The Effects of United States v. Windsor on Federal Tax Law,* KSLaw (2013) http://www.kslaw.com/imageserver/KSPublic/library/publication/2013articles/11-5-13_ABA_Tax_NewsQuarterly.pdf 64

Lou Chibbaro Jr., *Sodomy laws remain on the books in 17 states, including Va. and Md.*, WASHINGTON BLADE (April 17, 2013), available at http://www.washingtonblade.com/2013/04/17/sodomy-laws-remain-on-books-in-17-states-including-md-and-va/. 64

Movement Advancement Project, Family Equality Council, and Center for American Progress, *All Children Matter: How Legal and Social Inequalities Hurt LGBT Families* (2011), available at http://action.familyequality.org/site/DocServer/AllChildrenMatterFull Final10212011.pdf?docID=2401 6

Movement Advancement Project, *The Momentum Report– 2009 Edition* (2009), http://www.lgbtmap.org/ file/ momentum-report-2009.pdf 49

National Center for Transgender Equality and National Gay and Lesbian Task Force, *National Transgender Discrimination Survey* (2009), http://transequality.org/ Resources/NCTE_prelim_survey_econ.pdf. 39

NEW STUDY SHOWS RATES OF EMPLOYMENT DISCRIMINATION AGAINST LGB EMPLOYEES SIMILAR IN PUBLIC AND PRIVATE SECTIONS, http://williamsinstitute.law.ucla.edu/ headlines/new-study-shows-rates-of-employment-discrimination -against-lgb-employees-similar-in-public-and-private-sectors/ 84

OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS. HISTORY OF EXECUTIVE ORDER 11246 (U.S. Department of Labor), http://www.dol.gov/ofccp/about/History_EO11246.htm 85

OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, FACTS ON EXECUTIVE ORDER 11246 — AFFIRMATIVE ACTION (U.S. Department of Labor), available at http://www.dol.gov/ofccp/regs/ compliance/aa.htm 85

Paul Schindler, *ENDA Religious Exemption Still a Big Worry* (October 2, 2013), http://gaycitynews.com/enda-religious -exemption-still-a-big-worry/ 52

H.R. 3017, Employment Non-Discrimination Act of 2009: Vandy Beth Glenn, YouTube, uploaded by EdLabor Democrats, September 23, 2009, available at http://www.youtube.com/ watch?v=YuU5d4-s8BM 4

HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/resources/entry/sexual-orientation-and-gender-identity-terminology-and-definitions 3

HUMAN RIGHTS CAMPAIGN, STATEWIDE EMPLOYMENT LAWS AND POLICIES www.hrc.org/statelaws 48

Seth Althauser and Sarah Greenberg, *FAQ: The Employment Non-Discrimination Act*, Center for American Progress (July 19, 2011), http://www.americanprogress.org/ issues/lgbt/news/2011/07/19/ 9988/faq-the-employment- non-discrimination-act/ 49

SCOUTING.ORG, http://www.scouting.org/MembershipStandards Resolution/results.aspx 62

The National Gay and Lesbian Task Force, *State Nondiscrimination Law in the U.S.* http://www.thetaskforce.org/downloads/reports/issue_maps/ non_discrimination_1_12_color.pdf 45

The Williams Institute, *New Study Finds 50% Increase in Number of Top Federal Contractors with Gender Identity Non-Discrimination Policies since 2011* (April 29, 2013) http://williamsinstitute.law.ucla.edu/?p=13586 89

Transcript of April 25, 2012 Meeting, U.S. Equal Emp. Opportunity Commission (2012), http://wwwl.eeoc.gov// eeoc/meeting/4-25-12/transcript.cfm?rendcrforprint=1 46

U.S. Equal Employment Opportunity Commission, http://www.towleroad.com/2013/11/john-boehner-i-see-no-basis-or-need-for-legislation-protecting-lgbt-people-in-the-workplace.html 56

50 Years Later… Still Interpreting the Meaning of 'Because of Sex' within Title VII and Whether It Prohibits Sexual Orientation Discrimination

I. INTRODUCTION

I can remember sitting at my grandparents' kitchen table in Fort Lauderdale, Florida on a Saturday afternoon, looking for something to get into. I was fumbling with pieces of paper that were in front of me and came across a personal letter addressed to my grandfather. The letter did not have my name on it and I knew I was not supposed to read it, but at the time, I was around ten years old and very inquisitive, (some would call it nosey) so I read the letter anyway. As I began to read the letter, something told me to stop reading it because the contents were certainly a personal family matter and none of my business; needless to say, I continued to read it. The letter was from my Aunt, my grandfather's oldest daughter. I didn't see my Aunt that often because after finishing college, she joined the Peace Corps, and moved across the country to California, where she presently resides. She was writing to tell my grandfather that she is a lesbian and she realized her sexual orientation back when she was in high school. My aunt explained that her sexual orientation was the reason she moved so far away from the family, because she wasn't ready to tell everyone and she wasn't ready to deal with the repercussions, whatever they may be. That was twenty-seven years ago.

Although I remember opening that letter, and reading it word for word, I cannot say whether if at the time, I knew exactly what everything meant. At ten years old, all I knew was she was still my aunt and I loved her the same. I also remember that no one in my family ever treated my aunt any different because of her sexual orientation and our love for her never changed. Unfortunately, that's not how everyone reacts to finding out

that his or her family member, friend or loved one is homosexual.[1] Even worse, we live in a society where those same individuals who cannot accept their family members' or loved ones' differences, also cannot accept working with people who are not like them.

Whether the difference is because a person is not the same sex, national origin, color, race or religion; the person is not like them, and therefore they are treated differently. The idea that "all men are created equal," as we first heard from Thomas Jefferson,[2] is a great concept; but, are we all created equal? One could argue that we are equal genetically, but most people would probably admit that we all have different levels of ability and opportunity. Economically, socially, physically, intellectually, politically, can you truthfully say that we all start out on the same playing field…probably not? But we all were born with the same equal rights. Our government, through various laws, should continue to seek to equalize the systematic inequalities that arise from birth.[3]

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[1] The only federal definition for homosexual comes from the repealed discriminatory Don't Ask, Don't Tell policy, under which a "homosexual" is defined as an individual who "attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." Such acts include "any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires." 10 U.S.C.A. §§ 654 (f)(1); (f)(3)(A) (1993) *repealed by* Don't Ask, Don't Tell Repeal Pub. L. 111-321, Dec. 22, 2010, 124 Stat. 3515. Lesbians and bisexuals are encompassed within this definition. 10 U.S.C.A. § § 654 (f)(1)-(2).

[2] The opening of the United States Declaration of Independence states as follows:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

[3] *See* The Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (current version at 42 U.S.C. §1982). The purpose of the Act was to insure that the abolition of slavery was accomplished in fact as well as in theory and to implement protections afforded by the thirteenth amendment.

This need for equality comes from the observation that although we all have the same equal rights, some people are born with unequal opportunities. When these various biases began to affect the parts of our lives that allow us to shelter ourselves, clothe and feed our families, it becomes an issue of national concern. On a job, what should matter is your work, not your race, religion, gender, skin color or your sex or sexual orientation.[4]

Imagine, for a moment, if we lived in a world where employers made employment decisions solely based on our qualifications, as they relate to our jobs. Wouldn't that be a great place to live? If we did not have to worry about an employer not hiring someone solely based on his or her race, religion, sex, and national origin? But, we don't live in that world, and that is exactly why the Civil Rights Act of 1964 (Title VII)[5] was enacted, to prevent employers from making adverse employment decisions for any reason other than our qualifications.

Although it is difficult to eradicate all types of discrimination in the workplace, we must try to discriminate less. The reason this is important is because without employment, a person cannot afford the basic necessities such as food, clothing and shelter; they cannot obtain quality education or afford health care. Individuals should be afforded the equal opportunity to earn a living and to provide for themselves and their

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[4] "Sexual Orientation" is the term used when referring to an individual's physical and/or emotional attraction to the same and/or opposite gender. Heterosexual, bisexual and homosexual are all examples of sexual orientations. A person's sexual orientation is different from a person's gender identity. HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/resources/entry/sexual-orientation-and-gender-identity-terminology-and-definitions (last visited February 4, 2014).

[5] Civil Rights Act of 1964, 42 U.S. C. § 2000e (prohibiting an employer from discriminating against an employee because of race, color, religion, sex or national origin).

dependents. Lesbian, Gay, Bisexual and Transgender (LGBT) employees continue to face widespread discrimination and harassment in the workplace. Studies show that anywhere from 15 percent to 43 percent of lesbian, gay, and bisexual (LGB) people have experienced some form of discrimination and harassment in the workplace.[6] Specifically, 8 percent to 17 percent of LGB workers report being passed over for a job or fired because of their sexual orientation or gender identity; 10 percent to 28 percent received a negative performance evaluation or were passed over for a promotion because they were LGBT; and 7 percent to 41 percent of LGBT workers encountered harassment, abuse, or antigay vandalism on the job.[7]

Let's be clear, all forms of discrimination are wrong. However, workplace discrimination is especially egregious because it threatens the livelihood and economic survival of American workers and their families. The labor market should be focused on skill and talent, not on the race, religion, sex, national origin or sexual orientation of an employee. Vandy Beth Glenn of Atlanta, Georgia, lost her job with the Georgia General Assembly after her boss fired her for being transgender.[8] Brook Waits of Dallas, Texas, was immediately let go after her manager saw a picture on Wait's cell phone of her and

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[6] Christie Malloy and Brad Sears, *Documented Evidence of Employment Discrimination and Its Effects on LGBT People*, Los Angeles: The Williams Institute (2011), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-20111.pdf.

[7] *Id.*

[8] *H.R. 3017, Employment Non-Discrimination Act of 2009: Vandy Beth Glenn*, YouTube, uploaded by EdLabor Democrats, September 23, 2009, available at http://www.youtube.com/watch?v=YuU5d4-s8BM.

her girlfriend kissing on New Year's Eve.[9] Officer Michael Carney was denied reinstatement as a police officer in Springfield, Massachusetts, because he told his supervisors that he was gay.[10] These are just a few examples, but serve as evidence that LGBT people encounter pervasive discrimination and harassment on the job on a day-to-day basis.

The U.S. Supreme Court has not directly ruled on this issue, but it is interpreted within employment discrimination law that Title VII legislation does not prohibit discrimination on the basis of sexual orientation.[11] Why is it still ok for an employer to fire or demote an employee because he or she is lesbian, gay, bisexual or transgender? Since Title VII was enacted, a variety of bills have been offered to either amend Title VII or to enact a freestanding statute that would prohibit discrimination on the basis of sexual orientation.[12] None of these efforts have succeeded. Therefore, private sector employers who openly discriminate on the basis of sexual orientation will not be subject to

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[9] *Employment Non Discrimination Act Hearing: Brooke Waits*, YouTube, uploaded by EdLabor Democrats, September 25, 2007, available at http://www.youtube.com/watch?v=Wq_4sGw1HLg.

[10] *Employment Non Discrimination Act Hearing: Michael Carney*, YouTube, uploaded by EdLabor Democrats, September 25, 2007, available at http://www.youtube.com/watch?v=JlvNHPKKY_U&feature=relmfu

[11] *See, e.g.* Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989) ("Title VII does not prohibit discrimination against homosexuals."); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999) ("Title VII does not proscribe harassment simply because of sexual orientation."); Simonton v. Runyon, 232 F.3d 33, 35 (2d. Cir. 2000) ("Title VII does not prohibit harassment or discrimination because of sexual orientation.").

[12] *See infra* note 87.

liability.[13] The public employers who discriminate on the basis of sexual orientation aren't totally off the hook; they have to deal with federal constitutional challenges under equal protection and due process guarantees of the Fifth and Fourteenth Amendments, but these challenges are rarely successful.[14]

In response to the lack of protection from the federal government, many states, counties, and municipalities have enacted laws extending civil rights coverage to homosexual men and women.[15] Despite the local advances, gays and lesbians have little protection from discrimination in the workplace. There is and there should be a continuous struggle to change employment practices through legal regulation. Regulations will help us determine between an appropriate reason for an employer's decision versus illegal use of prejudicial criteria. Without regulation, we will continue to see a disparity in those families discriminated against. Research confirms that families headed by same-sex couples suffer from significant economic insecurities that are likely related to employment discrimination. Families headed by same-sex couples make on average $15,500 less per year than families headed by opposite-sex couples, according to Census data.[16] Likewise, children being raised by same-sex parents are twice as likely to

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[13] A number of state legislatures have enacted laws apply to both the public and private sector that prohibit sexual orientation-based discrimination in employment. *See* discussion *infr*a Part IV.

[14] Eric A. Roberts, *Heightened Scrutiny under the Equal Protection Clause: A Remedy to Discrimination Based on Sexual Orientation*, 42 DRAKE L. REV. 485 (1993); *But see* case cited *infra* note 197.

[15] *See* discussion *infra* Section VI.

[16] Movement Advancement Project, Family Equality Council, and Center for American Progress, *All Children Matter: How Legal and Social Inequalities Hurt LGBT Families*

live in poverty as children being raised by married opposite-sex parents.[17] LGBT families are facing harsh employment and economic insecurities due to high levels of workplace discrimination. This thesis discusses how courts have distinguished between discrimination claims based on biological sex (i.e. femaleness and maleness)[18] and gender-nonconformity (i.e., femininity and masculinity)[19] from claims based on sexual orientation, holding that the latter claim is not actionable under Title VII while the former types are actionable.[20]

But why are courts so resistant to protecting employees from sexual orientation discrimination? How do you convince a court that the discrimination at issue was based on sex or gender and not the person's sexual orientation? The first part of the paper will give a background of Title VII and will discuss the various types of employment discrimination based on sex and how the federal courts have handled them.

As it stands right now, the courts have accepted claims predicated on the sex-stereotyping theory of sex discrimination,[21] but what happens when a lesbian female is harassed because of her sexual orientation, but she does not openly defy sex stereotypes? She wears makeup to work, high-heeled shoes and behaves very feminine? Case law

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(2011), available at http://action.familyequality.org/site/DocServer/AllChildrenMatterFullFinal10212011.pdf?docID=2401.

[17] *Id.*

[18] Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 (9th Cir. 1977).

[19] *See* discussion *infra* Part III(a).

[20] *See supra* note 11.

[21] *See* discussion *infra* Part III(a).

suggests that if she is not being harassed because she is defying sexual stereotypes, she cannot bring a claim under Title VII "because of sex" provision.[22] What happens when there is no harassment involved in an employment discrimination case, and the employer fires an employee only after finding out his/her sexual orientation? Those individuals do not stand a chance in court, and they do not have a chance to bootstrap their claims onto a sexual harassment case, because no harassment evidence exists.

This thesis will further focus on the notion that the "because of sex" provision in Title VII should protect both heterosexuals and homosexuals from workplace discrimination. This thesis will also discuss the Employment Non-Discrimination Act, its history and the current status of the law. The Employment Non-Discrimination Act has been introduced to Congress to broaden federal employment discrimination protections to include a ban on discrimination based on sexual orientation and gender identity. The last part of the thesis will analyze successes/failures of the specific types of employment discrimination claims brought on the basis of sexual orientation and give suggestions on how plaintiffs could bring successful suits in federal court.

[22] *See* discussion *infra* Part III(a).

II. BACKGROUND

a. *Historical background of Title VII*

To understand the history of the "because of sex" provision of Title VII, it is important that we trace the history of Title VII. Title VII can be traced back to the Unemployment Relief Act of 1933, which provided "[t]hat in employing citizens for the purpose of this Act, no discrimination shall be made on account of race, color, or creed."[23] However, during that time, there were no real enforcement mechanisms of the Act, and the ineffectiveness of the regulations was shown by the exclusion of blacks from new jobs created by defense industries prior to World War II.[24] Additionally, the current President was being pressed by black leaders to sign a meaningful Executive Order that would ban discrimination in these industries.[25] As a result, on June 25, 1941, President Roosevelt signed Executive Order 8802, which established the Fair Employment Practices (FEP) committee with the powers to investigate complaints of discrimination and to take appropriate steps.[26]

Intertwined with the history of fighting racial discrimination, in 1946 and 1950, provisions to prohibit sex discrimination in employment were also proposed in the

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[23] Act of March 31, 1933 (Unemployment Relief Act), Public Law 73-5, 48 Stat 22.

[24] *See* CIVIL RIGHTS ACTS, THE ORIGINS OF CIVIL RIGHTS LEGISLATION, THE RECONSTRUCTION ERA, THE EMERGENCE OF JIM CROW, http://encyclopedia.jrank.org/articles/pages/6065/Civil-Rights-Acts.html (last visited May 7, 2014).

[25] *Id.*

[26] Exec. Order No. 8802, 6 Fed. Reg. 1941, 3109 (1941-1946). In 1943, the authority of the Executive Order was extended to all federal contractors, but its enforcement power was limited to negotiation and moral suasion. The order expired in June 1946.

House.[27] Since that time, efforts were continuously made to try and equate sex and race discrimination.[28] In 1956, Rep. Howard Smith, a Virginia Democrat who had a history of railing against civil rights, voiced his approval of including sex discrimination in the proposed Civil Rights Commission, stating, "if this iniquitous piece of legislation is to be adopted, we certainly ought to try to do whatever good with it that we can."[29] The proposed bill was passed by the House but was sent to the Senate too late to become law.[30] It was reintroduced and passed in the next Congress as part of the 1957 Civil Rights Act, without the sex amendment, and there was no request to renew the amendment.[31]

Before the enactment of Title VII, employers were free to discriminate against individual members of certain classes without any fear of legal repercussions.[32] On March 6, 1961, President Kennedy continued to go forward with the fight against race

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[27] Early in 1946 Rep. Clare E. Hoffman (R. Mich.) introduced H.R. 5216, which included sex, ancestry and union membership as protected classes. It was committed to the Labor Committee where it died. 92 CONG. REC. 313 (1946). On February 22, 1950, Rep. Dwight L. Rogers (D. Fla.) offered a floor amendment to add "sex" to the FEP bill then being debated "so the women of the country will have equal rights with men." No one spoke against it and it passed by a voice vote. 96 CONG. REC. 2247 (1950).

[28] Jo Freeman, *How "Sex" Got Into Title VII: Persistent Opportunism as a Maker of Public Policy,* (1991) available at http://www.jofreeman.com/lawandpolicy/titlevii.htm. In 1956, the National Woman's Party persuaded the House to include sex discrimination in the jurisdiction of the proposed Civil Rights Commission. The mechanism was a floor amendment made by Rep. Gordon McDonough (R. Cal) at the request of his campaign chair, Mary Sinclair Crawford. *Id.*

[29] 102 CONG REC. 13124-5 (July 17, 1956) (statement of Rep. Howard Smith).

[30] Freeman, *supra* note 28.

[31] *Id.*

[32] *See supra* note 24.

discrimination in employment by signing into law an Executive Order requiring all government contractors to pursue affirmative action policies in the hiring of minorities and establishing the President's Committee on Equal Employment Opportunity.[33] Unfortunately, in 1963, President Kennedy began to further recognize the problems of prejudice in the field of employment, where individuals were being fired or not hired solely based on characteristics such as skin color and gender.[34] The bill to address this was sent to the Rules Committee the day before President Kennedy was assassinated; but after President Kennedy's death, the Civil Rights bill finally became a priority with Congress.[35]

For almost the entire life of the bill, Title VII only covered race, religion and nation origin, and did not include sex within its scope.[36] Although passing the bill was now a priority, Rep. Howard Smith subjected intense scrutiny throughout the hearings.[37] It was during these hearings that the idea of adding "sex" to the prohibited discrimination

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[33] Freeman, *supra* note 28.

[34] *Id.* (quoting SPECIAL MESSAGE TO THE CONGRESS ON CIVIL RIGHTS AND JOB OPPORTUNITIES, 248 PUB. PAPERS 483, 488-91 (June 19, 1963)) (stating that African Americans were more than twice as likely to be unemployed as the general populace, and suggesting federal responses to correct the problem.).

[35] *Id.*

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

[37] *See, e.g.,* Deborah Epstein, *Can a "Dumb Ass Woman" Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech*, 84 GEO. L.J. 399, 409 n.62 (1996) (asserting that the amendment adding the "sex" provision to Title VII was proposed by anti-civil rights, conservative legislators in an attempt to defeat the bill entirely).

was proposed by Rep Smith and other members of the rules committee.[38] It is believed that Rep Smith solely proposed the addition of "sex" to Title VII as a ploy because adding "sex" was a perceived threat to the bill.[39] Although Title VII was initially aimed at ending discrimination against African-Americans,[40] Congress ended up drafting Title VII with the broader purpose of eliminating all forms of workplace discrimination, including "sex" discrimination.[41] It has been very difficult determine what was in the mind of Congress because the House debate on the addition of "sex" to Title VII is no more than nine pages long.[42]

Congress passed Title VII to remove discrimination in employment because it hindered productive efficiency and equity.[43] Title VII Section 703(a)(1)[44], provides in relevant part:

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[38] *See* 110 CONG. REC. 2,804-05 (1964).

[39] Epstein, *supra* note 37.

[40] *See* 110 CONG. REC. 2556 (1964) (statement of Rep. Celler) ("The basic purpose of title VII is to prohibit discrimination in employment on the basis of race or color.") 110 CONG. REC. 2581 (1964) (statement of Rep. Green) ("Let us not add any amendment that would place in jeopardy in any way our primary objective of ending that discrimination that is most serious, most urgent, most tragic, and most widespread against the Negroes of our country.")

[41] *See* 110 CONG. REC. 6548 (1964) (statement of Rep. Humphrey) ("Title VII is designed to give Negroes and other minority members a fair chance to earn a livelihood and contribute their talents to the building of a more prosperous America."); 110 CONG. REC. 2583 (1964) (statement of Rep. Kelly) ("Let us recognize that there are many minorities in this country… For their opportunity, we seek to secure these rights under this bill….").

[42] *See* 110 CONG. REC. 2,577-84 (1964).

[43] McDonnell Douglas Corp v. Green, 411 U.S. 792, 801 (1973) ("The broad, overriding interest, shared by employer, employee and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions.").

> It shall be an unlawful employment practice for an employer-
> (1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[45]

Later the non-discrimination principle was extended to other classifications.[46]

Congress viewed Title VII as a sound vehicle "to assure equality of employment opportunities and to eliminate those discretionary practices and devices which [had] fostered racially stratified job environments to the disadvantage of minority citizens.[47] Despite Title VII being created to help disadvantaged minorities, Congress went on to create an entirely new remedial scheme, and the doors of the courthouse did not appear to be open for immediate redress.[48] Within Title VII, Congress created the Equal Employment Opportunity Commission (EEOC) to resolve claims and disputes of

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[44] 42 U.S.C. § 2000e-2.

[45] *Id.* at § 2000e-2(a)(1).

[46] *See, e.g.*, Age Discrimination in Employment Act of 1967, 29 U.S. C. **§** 621 et. seq.; Americans with Disabilities Act of 1990, 42 U.S.C. § 12111 (2009).

[47] McDonnell Douglas, 411 U.S. at 800.

[48] Miller, *supra* note 36.

discriminatory employment practices through compliance, informal voluntary agreements, and informal voluntary employment practices.[49] To enforce these laws, the EEOC has the authority to investigate accusations of discrimination against covered employers that are submitted by an applicant or employee who believes that unlawful discrimination has occurred.[50] Under Title VII, any person who wants to file a lawsuit in court regarding discrimination they faced, instead of going directly to court, must first file a charge with the EEOC.[51]

Although the term sex was now included in Title VII, it is uncertain whether members of Congress fully realized or considered the implications of Title VII's sex discrimination provision at the time it was passed.[52] This uncertainty surrounding Congress's intentions is what forced administrative agencies to develop their own guidelines.[53] Initially, the EEOC still considered the inclusion of sex as a joke,[54] but after

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[49] 42 U.S. C. § 2000e-4. The Equal Employment Opportunity Commission is an independent and bipartisan federal agency that enforces federal laws that make it illegal to discriminate in the workplace. Five Commissioners, who are appointed by the President and confirmed by the Senate, govern it. The laws that the EEOC enforce prohibit discrimination on a variety of personal characteristics, including race, color, religion, sex, national origin, age, disability and genetic information. To enforce these laws, the EEOC has the authority to investigate accusations of discrimination against covered employers that are submitted by an applicant or employee who believes that unlawful discrimination has occurred. 42 U.S. C. § 2000e, et seq; 29 U.S. C. A. § 206(b); 29 U.S.C. §§ 621-634; 42 U.S. C. §§ 12111-12117.

[50] *Id.*

[51] *Id.*

[52] *See* Mary C. Manemann, *The Meaning of "Sex" in Title VII: Is Favoring an Employee Lover a Violation of the Act?,* 83 N.W. U. L. REV. 612, 639 (1989) (stating that Congress provided very little guidance regarding what constitutes discrimination because of sex).

[53] Guidelines on Discrimination Because of Sex, 30 Fed. Reg. 14,926 (Dec. 2, 1965) (codified as amended at 29 C.F.R. pt. 1604) (listing the Equal Employment Opportunity

receiving pressure from the National Organization of Women to enforce Title VII, the EEOC held hearings and finally enacted regulations in 1972.[55] In sum, there is very little legislative history of Title VII to determine exactly what Congress intended to include in its prohibition of workplace discrimination "because of sex" and the small history that does exist, fails to enlighten.[56] Congress amended the Civil Rights Act in 1972 and 1991,[57] however, these amendments have not explained the meaning or intent behind the inclusion of "sex" in Title VII. Therefore, courts have been forced to develop their own doctrines in order to determine the scope of Title VII's prohibition on sex discrimination.

b. ***Proving a case of "sex discrimination" under Title VII***

Since the enactment of Title VII, several different theories of sexual discrimination have developed, including disparate treatment,[58] disparate impact[59] and

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Commission's interpretations of Title VII's prohibitions on discrimination in employment because of sex).

[54] JO FREEMAN, THE POLITICS OF WOMEN'S LIBERATION: A CASE STUDY OF AN EMERGING SOCIAL MOVEMENT AND ITS RELATION TO THE POLICY PROCESS 52, 54 (iUniverse Publishers 2000) (quoting the statement of the EEOC's first executive director that the provision was a ""fluke' that was "conceived out of wedlock.'").

[55] 29 C.F.R. 1604 (2011).

[56] 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. *See* Miller, *supra* note 36 at 882.

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

[58] *See* discussion *infra* Part II(b)(i).

[59] *See* discussion *infra* Part II(b)(i).

sexual harassment.[60] In most employment discrimination cases, the theory is that employers rarely leave evidence of their discriminatory motives or solid proof of employment discrimination. Therefore, to prove a case under Title VII, courts have created a burden-shifting framework that makes it easier for plaintiffs to succeed on an employment discrimination claim. Under the *McDonnell Douglas* burden-shifting framework, to make out a prima facie case under Title VII, plaintiffs must establish (1) membership in a protected class; (2) competency to perform their job; (3) that their employer took an adverse employment action against them; and (4) the existence of circumstances supporting an inference of discrimination.[61] After a plaintiff establishes a prima facie Title VII case, the burden shifts to the employer to provide a "legitimate, non-discriminatory reason" for the employment decision at issue.[62] Once the employer satisfies this requirement, the burden shifts back to the plaintiff to prove by a preponderance of the evidence that the employer's "proffered reasons [were] pretextual."[63] Although this burden-shifting framework makes it easier for plaintiffs to prove their case, it is key for a plaintiff to first establish membership in a protected class.

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[60] *See* discussion *infra* Part II(b)(ii).

[61] McDonnell Douglas, 411 U.S. at 802.

[62] Texas Dept. of County Affairs v. Burdine, 450 U.S. 248, 254 (1981).

[63] *See* Burdine, 450 U.S. at 256.

i. Disparate Treatment/ Disparate Impact

Disparate treatment sex discrimination involves overt or intentional discrimination and occurs when an employer treats one individual (or group) differently from another because of the individual's (or group's) sex.[64] In a disparate treatment theory, a plaintiff must show that he or she was exposed to "disadvantageous terms or conditions of employment that the other sex as not."[65] Conversely, disparate impact sex discrimination can result from facially neutral employment policies and practices, which are applied evenhandedly to all employees, but which have the effect of disproportionately excluding either women or men from employment opportunities.[66] Unlike disparate treatment claims, disparate impact claims do not involve intentional discrimination, which means the plaintiff is not required to prove that he or she is the victim of discriminatory motive or discriminatory intent.[67] For example, testing a particular skill of women only is disparate treatment. Testing all applicants and getting results from that test that eliminate women disproportionately is disparate impact. In response, the employer must show a legitimate reason for the practice.[68] Therefore, the disparate impact doctrine under Title VII prohibits employers from using a facially

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[64] 15 Am. Jur. 2d. *Job Discrimination* § 5.

[65] Anthony E. Varona & Jeffrey M. Monks, *En/Gendering Equality: Seeking Relief Under Title VII Against Employment Discrimination Based on Sexual Orientation*, 7 WM. & MARY J. WOMEN & L. 67, 72-73 (2000).

[66] 15 Am. Jur. 2d. *Job Discrimination* § 6.

[67] *See* Raytheon Co. v. Hernandez, 540 U.S. 44, 52 (2003); Puffer v. Allstate Ins. Co., 675 F.3d 709, 716 (7th Cir. 2012).

[68] *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

neutral employment practice that has an unjustified adverse impact on members of a protected class.[69]

ii. Sexual Harassment

Sexual harassment is simply one particular form of sex-based discrimination, however, Title VII does not contain any textual provision referring expressly to sexual harassment. In 1976, the first time since the enactment of Title VII, a lower federal court recognized that Title VII allowed a sexual harassment cause of action.[70] In 1980, to further support that sexual harassment constitutes a form of sex discrimination actionable under Title VII, the EEOC issued guidelines recognizing that sexual harassment in the workplace is a form of discrimination prohibited by Title VII.[71] Then, finally, in 1986, the Supreme Court confirmed that sexual harassment could form the basis of a sex discrimination claim under Title VII.[72]

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[69] *Id.*

[70] *See* William v. Saxbe, 413 F.Supp 654, 657 (D.C. Cir. 1976) (holding that the retaliatory actions of a male supervisor, taken because the female employee had declined his sexual advances, constituted sex discrimination under Title VII).

[71] 29 C.F.R. 1604.11(a) (1980). The guidelines defined sexual harassment as the following:

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

[72] Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986). To support this conclusion, Vinson pointed primarily to the following Title VII language: "It shall be an

Sexual harassment falls into two categories. The first, most typical sexual harassment case is the conduct commonly referred to as "*quid pro quo*" harassment. A *quid pro quo* claim consists of an allegation that a supervisor made some demand (typically sexual in nature) and either conditioned an employment opportunity on submission to the demand or threatened the employee with a retaliatory employment-related consequence for failure to accede to this demand.[73] When an employee alleges either that he or she submitted to this demand under duress or refused to accede and suffered the consequences, this type of harassment claim falls into the *quid pro quo* category. An example of this behavior is an employee being threatened with being fired in exchange for sexual relations with a superior. *Quid pro quo* harassment directly links an employee's gender to his/her conditions of employment because employers explicitly offer to improve or maintain the employee's conditions of employment in exchange for their sexual favors.[74]

The second form of sexual harassment claim is referred to as a "hostile work environment" claim, which the Supreme Court recognized as falling within the purview

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unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . ." *Id*. at 63 (quoting 42 U.S.C. **§** 2000e-2(a)(1)).

[73] *See, e.g*., Highlander v. K.F.C. Nat'l Management Co., 805 F.2d 644, 648 (6th Cir. 1986). The Highlander court held: To prevail on a quid pro quo claim of sexual harassment, a plaintiff must assert and prove (1) that the employee was a member of the protected class; (2) that the employee was subjected to unwelcome sexual harassment in the form of sexual advances or requests for sexual favors; (3) that the harassment complained of was based on sex; (4) that the employee's submission to the unwelcome advances was an express or implied condition receiving job benefit, or that the employee's refusal to submit to a supervisor's sexual demands resulted in a tangible job detriment; and (5) the existence of respondeat superior liability. *Id.*

[74] *Id.*

of Title VII in *Meritor Savings Bank, FSB v. Vinson*.[75] In *Meritor*, the defendant, a heterosexual male, abused and humiliated the plaintiff, a heterosexual female, and obtained sexual favors from her.[76] During her four-year tenure with the bank, the plaintiff's supervisor raped her, followed her to the bathroom, and fondled her in front of coworkers.[77] To preserve her job, she agreed to have sexual intercourse with her supervisor approximately fifty times during her employment.[78] *Meritor* addressed the scope of "sex" under Title VII and determined that actionable harassment must be sexual in nature.[79] The Court recognized the cause of action based on hostile work environment and said that a situation that "creates a hostile or offensive work environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality."[80]

The Court also declared that action taken against an employee that rendered the workplace hostile or abusive, even if it was accompanied by a tangible job loss such as discharge, denial of promotion, or demotion, affected that employee's terms or conditions of employment.[81] In order to prove a prima facie case of hostile work environment

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[75] Meritor, 477 U.S. at 57.

[76] *Id*. at 60.

[77] *Id.*

[78] *Id.*

[79] *Id*. at 65-68.

[80] *Id.* at 66-67.

[81] *Id.*

sexual harassment under *Meritor*, and thereafter, *Harris v. Forklift Systems*,[82] plaintiffs must establish the following elements: (1) the plaintiff is a member of the protected class; (2) the plaintiff was subjected to unwelcome harassment; (3) the harassment occurred "because of sex;" (4) the conduct affected the terms and conditions of employment; and (5) the employer "knew or should have known about the harassment" and failed to take remedial action.[83]

The unanimous Court recognized both forms of sexual harassment and further held that "unwelcomeness" and not "consent" is the standard for determining whether unlawful harassment had occurred.[84] The Court adopted the EEOC's broad definition of sexual harassment, which includes, "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature to condemn any harassing of a sexual nature, courts must venture beyond the strict biological definition of 'sex.'"[85]

If a plaintiff has established unlawful harassment has occurred, and the conduct affected terms or conditions of employment, there remains the essential requirement that s/he prove that the conduct occurred "because of his/her sex." Although these cases give us clear guidance on the ways in which a plaintiff can prove sexual harassment, they do not clarify how to determine whether the harassment occurred because of the plaintiff's sex.

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[82] 510 U.S. 17 (1993).

[83] *See* Meritor, 477 U.S. at 66-73.

[84] *Id.* at 67.

[85] *Id*. at 65 (quoting 29 C.F.R. 1604.11(a)).

III. THE MEANING OF "BECAUSE OF SEX" DISCRIMINATION

Congress, in drafting Title VII, failed to define exactly what was intended by the word "sex," and therefore left a lot of ambiguity.[86] Based on the limited amount of legislative history, it would seem that the sex provision included in Title VII was added only to protect women.[87] However, many cases have been interpreted to protect more than just women,[88] which is why the provision is so confusing. In a lot of cases, courts have justified limiting the "because of sex" provision by reasoning that Congress had "only the traditional notions of 'sex' in mind" when it passed Title VII.[89] Initially, the courts defined "sex" as merely biological sex, and interpreted the provision to only prohibit discrimination against biological men and women for being a man or being a woman.[90] Despite the number of issues the courts have seen concerning sexual orientation or gender or sexual identity, Congress has yet to amend Title VII to clarify the meaning of the word "sex." Between 1981 and 2013, there were fifty-one proposed bills

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[86] Miller, *supra* note 36 at 234-235 (stating that "little can be gleaned from legislative history of the specific prohibition against sex discrimination").

[87] *See* 110 CONG. REC. 2,577-84 (1964) (showing that every statement made on the House floor regarding the "sex" provision referenced its significance for women).

[88] *See also* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 78 (1998) (noting that Title VII prohibition on sex discrimination protects men as well as women); Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 682-685 (1983) (stating that "male as well as female employees are protected against discrimination").

[89] Holloway, 566 F.2d at 662 (stating that "Congress has not shown any intent other than to restrict the term 'sex' to its traditional meaning" and, therefore, holding that the sole purpose of Title VII is to ensure the equal treatment of men and women.).

[90] *See supra* note 85.

introduced in the United States Senate and the House of Representatives, which attempted to amend Title VII and prohibit discrimination on the basis of sexual orientation, but were unsuccessful.[91] Although Title VII does not specifically provide

[91] Civil Rights Amendments of 1981, H.R. 1454, 97th Cong. (1981); Civil Rights Act of 1981, H.R. 3371, 97th Cong (1981); Civil Rights Amendments Act of 1981, S. 1708, 97th Cong. (1981); Civil Rights Amendments Act of 1983, S. 430, 98th Cong. (1983); Civil Rights Amendments Act of 1983, H.R. 427, 98th Cong. (1983); Civil Rights Amendments Act of 1983, H.R. 2624, 98th Cong. (1983); Civil Rights Amendments Act of 1985, S. 1432, 99th Cong. (1985); Civil Rights Amendments Act of 1985, H.R. 230, 99th Cong. (1985); Civil Rights Amendments Act of 1987, S. 464, 100th Cong. (1987); Civil Rights Amendments Act of 1987, H.R. 709, 100th Cong. (1987); Civil Rights Amendments Act of 1989, S. 47, 101st Cong. (1989); Civil Rights Amendments Act of 1989, H.R. 655, 101st Cong. (1989); Civil Rights Amendments Act of 1991, S. 574, 102nd Cong. (1991); Civil Rights Amendments Act of 1991, H.R. 1430, 102nd Cong. (1991); Civil Rights Amendments Act of 1993, H.R. 423, 103rd Cong. (1993); Civil Rights Act of 1993, H.R. 431, 103rd Cong. (1993); Employment Non-Discrimination Act of 1994, S. 2238, 103rd Cong. (1994); Employment Non-Discrimination Act of 1994, H.R. 4636, 103rd Cong. (1994); Civil Rights Act of 1995, H.R. 382, 104th Cong. (1995); Employment Non-Discrimination Act of 1995, S. 932, 104th Cong, (1995); Employment Non-Discrimination Act of 1995, H.R. 1863, 104th Cong. (1995); Employment Non-Discrimination Act of 1997, S. 869, 105th Cong (1997); Employment Non-Discrimination Act of 1997, H.R. 1858, 105th Cong. (1997); Civil Rights Amendments Act of 1998, H.R. 365, 105th Cong. (1998); Civil Rights Amendments Act of 1999, H.R. 311, 106th Cong. (1999); Employment Non-Discrimination Act of 1999, S. 1276, 106th Cong. (1999); Employment Non-Discrimination Act of 1999, H.R. 2355, 106th Cong. (1999); Civil Rights Amendments Act of 2001, H.R. 217, 107th Cong. (2001); Employment Non-Discrimination Act of 2001, S. 1284, 107th Cong. (2001); Employment Non-Discrimination Act of 2001, H.R. 2692, 107th Cong. (2001); Employment Non-Discrimination Act of 2002, S. 1284, 107th Cong. (2002); Employment Non-Discrimination Act of 2003, H.R. 3285, 108th Cong. (2003); Employment Non-Discrimination Act of 2003, S. 1705, 108th Cong. (2003); Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong. (2007); Employment Non-Discrimination Act of 2007, H.R. 3685, 110th Cong. (2007) (passed by the House, rejected in the Senate); Employment Non-Discrimination Act of 2009, H.R. 3017, 111th Cong. (2009); Employment Non-Discrimination Act of 2009, H.R. 2981, 111th Cong. (2009); Employment Non-Discrimination Act of 2009, S. 1584, 111th Cong. (2009); Employment Non-Discrimination Act of 2011, H.R. 1397, 112th Cong. (2011); Employment Non-Discrimination Act of 2011, S. 811, 112th Cong. (2011); Employment Non-Discrimination Act of 2013, H.R. 1755, 113th Cong. (2013); Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013) (passed in Senate 64-32, awaiting vote in the House).

protection from sexual orientation discrimination in employment, gay and lesbian employees have continuously brought claims under Title VII by classifying sexual orientation discrimination under the "because of" sex provision of Title VII.[92] However, courts have consistently held that Title VII does not offer gay and lesbian employees any protection from employment discrimination.[93] Title VII has yet to be amended, therefore an employee proving he/she was discriminated against because of his/her sexual orientation remains a difficult challenge.

It can be argued that to bring a successful claim of sex discrimination, an employee must prove that he or she was discriminated against because of their maleness or femaleness and not because of a different trait.[94] The employee must establish the adverse employment action was based on his or her sex by providing evidence of situations where similarly situated employees of the opposite sex were not treated the same.[95] Therefore, the employee must establish that the discrimination was "because of sex." The way in which "because of sex" is narrowly defined and interpreted severely

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[92] *See* Williamson, 876 F.2d at 70 (asserting sexual orientation discrimination under Title VII); DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327, 329 (9th Cir. 1979) (arguing Title VII prohibits sexual orientation discrimination as sex discrimination); Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979) (bringing a sexual orientation discrimination claim under Title VII).

[93] See Williamson, 876 F.2d at 70 (refusing to extend Title VII protection to homosexuals); DeSantis, 608 F.2d at 329-30 (holding Title VII inapplicable to sexual orientation discrimination); Blum, 597 F.2d at 938 (finding sexual orientation discrimination not prohibited by Title VII).

[94] Varona & Monks, *supra* note 65 at 72-73.

[95] *Id.*

affects lesbian, gay, bisexual and transgender individuals.[96] Case law suggests that there is a double standard at work in employment discrimination cases for LGBT employees.[97] In these cases, an employee's sexual orientation becomes a burden because courts are ready to reject otherwise actionable discrimination claims on the theory that such claims are an attempt to bootstrap protection for sexual orientation into Title VII.[98]

LGBT individuals face discrimination in many contexts every day, as victims of hate crimes and other forms of prejudice.[99] However, a lot of courts agree that Title VII's prohibition on discrimination "because of sex" does not cover cases involving discrimination targeted at a plaintiff's sexual orientation.[100] There is no statutory provision for sexual orientation discrimination at the federal level; therefore, lesbian and gay plaintiffs often times lose their sex discrimination and gender-stereotyping claims because of their sexual orientation.[101]

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[96] *See* discussion *infra* Parts III(a),(b),(c).

[97] *See* Meritor, 477 U.S. at 57.

[98] *See e.g.,* Dawson v. Bumble & Bumble, 398 F.3d 211, 217-18 (2d Cir. 2005) ("Like other courts, we have . . . recognized that a gender stereotyping claim should not be used to 'bootstrap protection for sexual orientation into Title VII.'").

[99] Jason Cohen, *How Hate Happens*, HUFFINGTON POST (November 15, 2013, 6:45 PM), http://www.huffingtonpost.com/jason-cohen/how-hate-happens_b_4277964.html

[100] *See, e.g.*, Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 261 (3d Cir. 2001); Simonton, 232 F.3d at 35 (2d Cir. 2000).

[101] *See, e.g.*, Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 763 (6th Cir. 2006); Higgins, 194 F.3d at 259-61.

One of the first cases to address efforts to expand the limits of "because of sex" discrimination under Title VII was a 1984 case involving an Eastern Airlines pilot.[102] Kenneth Ulane began his service in 1968 with Eastern Airlines as a pilot and was fired when he became Karen Ulane.[103] Ulane underwent sex reassignment surgery in 1980 after being diagnosed as a transsexual in 1979.[104] Following the surgery, Ulane was issued a revised birth certificate indicating that he was now female, and the FAA certified her for flight status as a female.[105] The airline was unaware of Ulane's transsexuality, her medical treatments or her psychiatric counseling regarding her transsexualism until she tried to return to work after her surgery.[106] Ulane filed suit against Eastern alleging that her discharge violated Title VII and that she was discriminated against as a female and as a transsexual.[107]

The United States District Court for the Northern District of Illinois ruled that Ulane was fired because she was a transsexual and ruled that discrimination against transsexuals violated Title VII.[108] The district court stated that while the use of the term "sex: did not include sexual preference," it did include "sexual identity" as "a physiological question -- a question of self-perception; and in part a social matter -- a

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[102] Ulane v. Eastern Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984).

[103] *Id.* at 1082.

[104] *Id*. at 1083.

[105] *Id*.

[106] *Id*.

[107] *Id*. at 1082.

[108] *Id*. at 1084.

question of how society perceives the individual."[109] The district court judge concluded that it was reasonable to hold that the word "sex" in Title VII literally and scientifically applied to transsexuals, even if it did not apply to homosexuals or transvestites.[110]

On appeal, the Seventh Circuit relied on two arguments. First, in considering the addition of the word "sex" to Title VII, the court stated that "Congress never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex" and that, following congressional intent, "sex should be given a narrow, traditional interpretation."[111] The court also noted the numerous legislative attempts to include sexual orientation within Title VII's protection, all of which had failed.[112] The Seventh Circuit held that Title VII did not include protection for transsexuals and stated, "if the term 'sex' as it is used in Title VII is to mean more than biological male or biological female, the new definition must come from Congress."[113]

The court further concluded that Eastern had not discriminated against Ulane because she was female, but because she was a transsexual—"a biological male who takes female hormones, cross-dresses, and has surgically altered parts of her body to make it appear to be female."[114] Therefore, because Title VII did not prohibit discrimination against transsexuals, the trial court's decision was reversed and the

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[109] *Id.*

[110] *Id*.

[111] *Id*. at 1085-86.

[112] *Id*. at 1085.

[113] *Id*. at 1087.

[114] *Id*.

Seventh Circuit entered judgment in favor of Eastern Airlines. *Ulane* was one of the first cases to address the limits of "because of sex" thirty years ago, but a lot has changed since 1984. While there is still no definitive meaning of the provision "because of sex," shortly after *Ulane*, the interpretation of "because of sex" provision was expanded to include discrimination not just based on biological sex, but also discriminating against someone for violating gender norms.[115]

a. Sex Stereotyping

Individuals who are homosexual maybe able to prevail under Title VII if an employer discriminates based on the employee's failure to conform to sex stereotypes.[116] In *Price Waterhouse v. Hopkins*, a female employee was denied partnership in an accounting firm, despite the fact that she was the highest performer and her successful work record, because she did not act feminine.[117] The partners in the firm specifically instructed her to act more femininely in order to be considered for partnership in the future.[118] However, the partners' main stated reason for denying Hopkins partnership was that they thought she lacked interpersonal skills.[119] They noted in her reviews that she was abrasive and overly aggressive and that she did not always treat the staff with

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[115] *See* discussion *infra* Part III(a).

[116] *See* Schroer v. Billington, 577 F. Supp. 2d 293 (D.D.C. 2008) (finding that an employer's decision to withdraw a job offer from a transsexual applicant constituted sex stereotyping discrimination in violation of Title VII).

[117] 490 U.S. 228 (1989).

[118] *Id*. at 233-234.

[119] *Id*. at 234-35 ("Virtually all of the partners' negative remarks about Hopkins – even those of partners supporting her – had to do with her 'interpersonal skills.'").

respect.[120] In some of the reviews, there were undertones of sex discrimination when discussing Hopkins' personality.[121] Hopkins was described as "macho," that she "overcompensated for being a woman," and one partner even suggested that she "take a course at charm school."[122] The Court held that Title VII did not permit an employer to evaluate female employees based upon their conformity with the employer's stereotypical view of femininity.[123] Therefore, harassment of an individual for failure to conform to sex stereotypes, even if the animosity towards nonconformance is caused by a belief that such behavior indicates homosexuality, could constitute harassment "because of sex."[124]

Sex-stereotyping, as outlined in *Price Waterhouse*, occurs when the gender the person is commonly associated with (his or her masculinity or femininity) and how the person expresses themselves are not the same. Therefore, to establish a plaintiff was discriminated against under a gender-stereotyping claim, they must establish that they

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[120] *Id.*

[121] *Id*. at 235.

[122] *Id*.

[123] *Id*. at 250-251.

[124] *Id*. at 250 (According to the Court, "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.").

Although the Supreme Court did not expressly recognize that sex stereotyping was sex discrimination until *Price Waterhouse*, the beginnings of a sex stereotyping claim were recognized by the Court in Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971). In Phillips, the Court held that a company policy not to accept applications from women with pre-school age children (when it accepted applications from men with pre-school age children) constituted sex discrimination. The Court ruled that an employer could not have different hiring policies for men and women, and such a distinction was unlawful because it was "based on stereotyped characterizations of the sexes." *Id*. at 545.

were discriminated against because they expressed a gender that is stereotypically inconsistent with their sex.[125] Hopkins was a female who expressed a masculine gender; her co-workers saw her as macho and overly aggressive and they encouraged her to highlight her femininity.[126] The Court saw this as discrimination against "because of sex" and that it reflected Congress's intent that employers not take gender into account at all in making employment decisions.[127] The Supreme Court stated that it did not "require expertise in psychology to know that, if an employee's flawed 'interpersonal skills' can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism."[128]

The Court further stated, "[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 matched the stereotype associated with their group."[129] Similar to the Seventh Circuit's ruling in *Ulane*, the Court looked to congressional intent as a basis for its decision.[130] The Court stated, "in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at an entire spectrum of

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[125] Jeffrey Kramer, Note, *The "Ultimate" Gender Stereotype: Equalizing Gender-Conforming and Gender-Nonconforming Homosexuals Under Title VII*, 2004 U. ILL. L. REV. 465, 483-89 (2009).

[126] *See* Price Waterhouse, 490 U.S. at 235.

[127] *Id*. at 237.

[128] *Id.* at 256.

[129] *Id.* at 250-51.

[130] *See supra* note 111.

disparate treatment of men and women resulting from sex stereotypes."[131] Therefore, the Court held that Title VII prohibits discrimination against individuals who fail to conform to gender stereotypes.[132]

The Court of Appeals for the Ninth Circuit further clarified the meaning of sex stereotyping in *Nichols v. Azteca Rest. Enters.*[133] In *Nichols,* a male employee, Sanchez, was subjected to insults, name-calling and was referred to as "she" and "her."[134] They also mocked him and called him names like "faggot" and said he carried his serving tray "like a woman."[135] Sanchez asserted that the verbal abuse was based on the perceptions that he was feminine, and because he failed to conform to a male stereotype.[136] A three-judge panel unanimously concluded that the plaintiff had stated a claim of actionable sexual harassment using the sex-stereotyping theory.[137] The court held that the holding in *Price Waterhouse* applies with equal force to a man who is discriminated against for acting too feminine.[138] The *Nichols* case seems to show that there is hope for victims of sexual orientation discrimination and they can obtain relief under Title VII merely by

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[131] Price Waterhouse, 490 U.S. at 250-51 (quoting Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 707. n. 13 (1978)).

[132] Price Waterhouse, 490 U.S. at 250-51.

[133] 256 F.3d 864 (9th Cir 2001).

[134] *Id.* at 870.

[135] *Id.*

[136] *Id.* at 874.

[137] *Id*.

[138] *Id.*

showing specific instances of sex stereotyping in the course of the discrimination and citing *Price Waterhouse*.

In another Ninth Circuit case, *Rene v. MGM Grand Hotel*, the court drew upon the precedents of *Price Waterhouse* and *Nichols* to find that harassment because of an employee's sexual orientation is based on gender stereotypes, and it is prohibited under Title VII.[139] In *MGM Grand*, the plaintiff, Medina Rene, was an openly gay male who worked at the hotel as a butler.[140] Rene's co-workers and his supervisor turned his job into a nightmare, subjecting him to forms of verbal and physical harassment on almost a daily basis.[141] They whistled at him, hugged and caressed him offensively, poked their fingers in his anus and grabbed his crotch.[142] They told crude jokes in his presence, forced him to look at pictures of men having sex, and forced him to open sexually oriented joke gifts.[143] MGM Grand discharged Rene in June of 1996 and he sued in federal district court in April 1997, alleging sexual harassment and retaliatory discharge in violation of Title VII.[144]

MGM Grand argued that Rene's claims were based on sexual orientation discrimination and not sex discrimination, and that Title VII offered him no relief.[145]

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[139] Rene v. MGM Grand Hotel, 305 F.3d 1061 (9th Cir. 2002).

[140] *Id*. at 1069.

[141] *Id.*

[142] *Id.*

[143] *Id*. at 1064.

[144] *Id.*

[145] *Id.*

MGM Grand moved for, and was granted, summary judgment against Rene.[146] Rene appealed to the Ninth Circuit on the harassment issue and a three-judge panel affirmed the district court.[147] Rene's case was reheard en banc, and reversed.[148] The Ninth Circuit, en banc, reasoned that Rene's harassment was analogous to *Oncale,* and held that the inference of sex discrimination was present, allowing Rene to state a claim under Title VII.[149]

Under these cases, sex discrimination occurs whenever a person is treated differently in an employment situation because they are not acting in accordance with stereotypes and gender norms of how people of their biological sex should act.[150] After *Price Waterhouse*, many individuals in the LGBT community have tried to argue that discrimination against LGBT people is based either on the stereotype that men should only be attracted to women and women should only be attracted to men, or that people born biologically male or female should identify as that biological gender and express themselves the same way.[151] Under that theory, sexual orientation discrimination would always be "because of sex" and should be prohibited by Title VII.

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[146] *Id.*

[147] *Id.*

[148] *Id*. at 1068. The Supreme Court denied MGM Grand's petition for certiorari on March 24, 2003 and thus established Rene's right to sue.

[149] *Id*.

[150] *See* Cody Perkins, *Sex and Sexual Orientation: Title VII After Macy v. Holder*, 65 ADMIN. L. REV. 427, 428 (2013).

[151] *See* Varona & Monks, *supra* note 65 at 83-84, 89-90.

b. *Same- Sex Sexual Harassment*

While all federal courts have recognized opposite-sex sexual harassment claims, years ago, they had taken a variety of stances on the issue of whether same-sex sexual harassment was actionable as sex discrimination under Title VII.[152] Some circuits allowed same-sex harassment claims,[153] 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.[154] Most of the circuits that rejected the same-sex harassment claims relied on the congressional intent argument.[155] The Northern District of Illinois, in *Goluszek v. Smith*,[156] declared that Congress never intended Title VII to encompass same-sex harassment claims.[157] The district court stated, "[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."[158] The court concluded that there could be no Title VII claim because there could be no imbalance of power between the sexes when the plaintiff

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[152] Oncale, 523 U.S. at 75.

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

[154] *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).

[155] *See* Goluszek v. Smith, 697 F. Supp. 1452 (N.D. Ill. 1998).

[156] *Id.*

[157] *Id*. at 1456.

[158] *Id.* (citing Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1451-52 (1984)).

worked in an all-male environment, even though the plaintiff "may have been harassed 'because' he is a male."[159]

This narrow interpretation of Title VII was finally rejected by the Supreme Court in 1998 in *Oncale v. Sundowner*.[160] Prior to the Supreme Court's ruling in *Oncale*, many courts recognized a cause of action for victims of same-sex sexual harassment utilizing a "but-for" analysis of the claims to determine that there was discrimination based on sex.[161] In *Oncale*, the Court held that Title VII's "because of" sex prohibition extends to instances of workplace sexual harassment, to include "same-sex sexual harassment" and that it bars employers from discrimination on the basis of "sex stereotypes."[162] However, in issuing the ruling, Justice Scalia made sure to comment that same-sex harassment was "not the principal evil Congress was concerned when it enacted Title VII," but that statutes "often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our law rather than the principal concerns of our legislators by which we are governed.[163] Furthermore, the Court noted that since they had already

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[159] Goluszek, 697 F. Supp. at 1455.

[160] Oncale, 523 U.S. at 75.

[161] *See* Williams v. District of Columbia, 916 F. Supp. 1, 7 (D.D.C. 1996) ("The determinative question is… whether the sexual harassment would have occurred but for the gender of the victim."); Pritchett v. Sizeler Real Estate Management Co., 67 Fair Empl. Prac. Cas. (BNA) 1377, 1379 (E.D. La. 1995) ("Same gender harassment is clearly a form of gender discrimination because "but for" the gender of the subordinate, she would have not been subjected to the harassment.").

[162] Oncale, 523 U.S. at 75.

[163] *Id.* at 79.

recognized that racial minorities can discriminate against members of their own group,[164] then why couldn't men and women discriminate against their own sex as well.[165]

The *Oncale* Court gave three ways that plaintiffs in such suits might satisfy Title VII's "because of" sex requirement: first, by offering "credible evidence that the harasser [is] homosexual;"[166] second, by "showing that" the harasser is motivated by general hostility to the presence of [members of the same sex] in the workplace";[167] or third, by providing "direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace."[168] In defining these three ways for a plaintiff to recover, the *Oncale* Court reaffirmed that plaintiffs "must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted "discrimination…because of … sex.'"[169] This makes it clear that Title VII sex discrimination plaintiffs can state causes of action against discriminators who are of the same sex. By contrast, courts have consistently affirmed that Title VII does not prohibit harassment or discrimination because of sexual orientation.[170] This case,

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

[165] Oncale, 523 U.S. at 78.

[166] *Id.* at 80.

[167] *Id.*

[168] *Id.* at 80-81.

[169] *Id.* at 81 (quoting 42 U.S.C. § 2000e-2(a)(1) (2006)).

[170] Simonton, 232 F.3d at 35; *see also* Arthur S. Leonard, *Sexual Minority Rights in the Workplace,* 43 BRANDEIS L.J. 145, 152-53 (2005) ("Courts [have] unanimously concluded that sexual orientation discrimination, as such, is not covered by Title VII.").

coupled with *Price Waterhouse*, creates the perceived possibility of Title VII relief for LGBT employees who suffer workplace harassment based on their sexual orientation.

Most recently in a same sex discrimination case, the Fifth Circuit held in *EEOC v. Boh Brothers Construction Co*.,[171] by an *en banc* majority of ten judges, that harassment based on gender-stereotypes can be actionable harassment "because of sex"' under Title VII.[172] In that case, an ironworker on a bridge-maintenance crew, was subjected to "almost-daily verbal and physical harassment because [he] did not conform to [the supervisor's] view of how a man should act."[173] His supervisor ridiculed him because he used baby wipes instead of traditional toilet paper, called him a "pu—y." "princess," and "fa-ot," stood behind him and simulated intercourse, exposed his penis while waving and smiling and joked about forcing oral sex on him.[174] The Fifth Circuit held the EEOC's claim was cognizable even though (1) there was no evidence the harasser was homosexual or motivated by a sexual desire; (2) there was no evidence the harasser was motivated by the general hostility towards a particular gender in the workplace; and (3) there was no evidence the harasser treated men and women differently.[175] Although the EEOC's evidence did not follow the three evidentiary paths set forth by the Supreme Court for addressing same-sex harassment as articulated in *Oncale*,[176] the Fifth Circuit

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[171] 731 F.3d 444 (5th Cir. 2013).

[172] *Id.* at 445-46.

[173] *Id.*

[174] *Id.*

[175] *Id.* at 458, 461.

[176] Oncale, 523 U.S. at 80-81.

agreed with the Third, Seventh, Eighth and Tenth Circuits in holding that those three evidentiary paths were merely "illustrative, not exhaustive."[177] Therefore, the EEOC could prove that the same-sex harassment was "because of sex" by presenting evidence that the harassment was based on perceived lack of conformity with gender stereotypes.[178] The EEOC did not have to show that the victim was not, in fact, "manly."[179] It was enough to show that the harasser admitted his epithets were directed at the victim's masculinity.[180] This new evidentiary path carved out by the *Boh Bros* court and several other circuits is good news for the LGBT community.

c. Transgender/ Gender Identity

Many transgender workers experience employment discrimination at high rates. A surprising 90 percent of transgender people report some form of harassment or mistreatment on the job or report having taken some action to hide who they are in order to avoid harassment.[181] Almost half of transgender people surveyed also report

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[177] Boh Bros, 731 F.3d at 456; *See, e.g.*, Medina v. Income Support Div., N.M., 413 F.3d 1131, 1135 (10th Cir. 2005) ("These routes, however, are not exhaustive."); Pedroza v. Cintas Corp., 397 F.3d 1063, 1068 (8th Cir. 2005) (describing *Oncale's* list as "non-exhaustive"); Bibby, 260 F.3d at 263-64 (noting the evidentiary routes stated in Oncale and stating: "[b]ased on the facts of a particular case and the creativity of the parties, other ways in which to prove the harassment occurred because of sex may be available"); Shepherd v. Slater Steels Corp., 168 F.3d 998, 1009 (7th Cir. 1999) ("[W]e discern nothing in the Supreme Court's [Oncale] decision indicating that the examples it provided were meant to be exhaustive rather than instructive.").

[178] Boh Bros, 731 F.3d at 456.

[179] *Id.* at 457.

[180] *Id.*

[181] Jaime Grant, Lisa Mottet, and Justin Tanis, *Injustice at Every Turn: A Report on the National Transgender Discrimination Survey*, Washington: National Gay and Lesbian

experiencing an adverse job outcome based on their gender identity.[182] This includes being passed over for a job (44 percent), fired (26 percent), or denied a promotion (23 percent). [183] Additionally, compared to the general population, transgender individuals are four times as likely to have low incomes and twice as likely to be unemployed.[184]

Following *Price Waterhouse*, transgendered employees attempted to use the prohibition against sex stereotyping as a means to achieve some of the legal protections previously denied to them under Title VII.[185] The United States Court of Appeals for the Sixth Circuit issued a decision validating the sex-stereotyping theory of recovery under Title VII for transsexuals.[186] Jimmie Smith, a transsexual lieutenant in the Salem, Ohio fire department, kept his sexual identity a secret for seven years, in that he was really a woman.[187] Eventually, Smith started dressing and acting more feminine at work, and other firefighters started to question him and commented on his changing masculinity.[188] Smith spoke with his supervisor about his condition and told his supervisor that he would

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Task Force (2011), http://www.thetaskforce.org/downloads/reports/reports/ntds_summary.pdf

[182] *Id.*

[183] *Id*.

[184] National Center for Transgender Equality and National Gay and Lesbian Task Force, *National Transgender Discrimination Survey* (2009), http://transequality.org/Resources/NCTE_prelim_survey_econ.pdf.

[185] *See infra* note 186.

[186] Smith v. City of Salem, 378 F.3d 566, 568 (6th Cir. 2004).

[187] *Id.* at 568.

[188] *Id*.

probably undergo a sex change operation.[189] Smith's superior ultimately devised and carried out a plan to get rid of Smith, and Smith brought suit under Title VII for sex discrimination.[190] Smith relied on the *Price Waterhouse* decision and argued that he was discriminated against because he failed to act like a man.[191]

The trial court ruled against Smith, holding that he was trying to disguise what was basically a claim for gender-identity discrimination as a sex-stereotype claim.[192] However, the Sixth Circuit reversed the decision stating that it could see no difference between the "aggressive" female manager in the *Price Waterhouse* case and Smith's situation.[193] Specifically, the court stated:

> After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex. It follows that employers who discriminate against men because they do wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex.[194]

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[189] *Id*.

[190] *Id*.

[191] *Id.* at 571.

[192] *Id.*

[193] *Id.* at 572.

[194] *Id*. at 574.

The Appeals court held that, to the extent that Smith did not conform to what her employer believed males should look and act like, she had sufficiently plead a prima facie case of sex discrimination.[195] Similarly, in *Barnes v. Cincinnati*, a male police officer undergoing gender transition to female was denied a promotion because she acted too femininely in her supervisors' opinions.[196] Additionally, the U.S. Court of Appeals for the Eleventh Circuit reached a similar conclusion on constitutional grounds in a case involving a Georgia state employee who was fired from her job for being transgender.[197] According to the court, '[w]e conclude that a government agent violates the Equal Protection Clause's prohibition of sex-based discrimination when he or she fires a transgender or transsexual employee because of his or her gender non-conformity."[198]

Most recently, the EEOC has held that discrimination against an individual because that person is transgender (known as gender identity discrimination) is discrimination "because of" sex and is therefore covered under Title VII.[199] *Macy v. Holder* has been acknowledged as a ground-breaking decision that significantly alters the political and legal landscape for transgender people, as well as for lesbian, gay and bisexual people.

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[195] *Id*. at 575.

[196] 401 F.3d 729 (6th Cir. 2005).

[197] Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011).

[198] *Id.* at 1320.

[199] See Macy v. Holder, EEOC Appeal No. 0120120821, 2012 WL 1435995, at 1 (EEOC Apr. 20, 2012).

Mia Macy, a former police detective and veteran, is a transgender woman who applied for a job with the Federal Bureau of Alcohol, Tobacco, and Firearms (ATF) in late 2010.[200] Macy was all but officially hired by ATF when she was told the position had been cut due to funding.[201] During her background check, Macy disclosed that she was in the process of transitioning from male to female.[202] It was later discovered that another person filled the same position shortly after Macy was told it was cut due to funding.[203] Macy filed a formal Equal Opportunity Employment complaint with ATF, alleging discrimination in hiring based on sex.[204] When the agency created a separate claim of "discrimination based on gender identity" and failed to identify her claim as sex discrimination, Macy appealed her case to the EEOC.[205]

The EEOC, in reversal of its previous position,[206] declared that Title VII's prohibition of discrimination based on sex included not only "biological sex, but also gender stereotyping—failing to act and appear according to expectations defined by

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[200] Macy, 2012 WL 1435995 at 1.

[201] *Id.* at 2.

[202] *Id.*

[203] *Id.*

[204] *Id.*

[205] *Id*.

[206] See Kowalczyk v. Brown, Appeal No. 01942053, 1996 WL 124832, at 1 n.1 (EEOC Dec. 27, 1994) (holding that withdrawing an offer of employment on the basis of "transsexualism" is not discrimination "because of sex" for Title VII purposes); Campbell v. Espy, Appeal No. 01931703, 1994 WL 652840, at 3 (EEOC July 21, 1994); Casoni v. U.S. Postal Serv., Appeal No. 01840104, 1984 WL 485399, at 3 (EEOC Sept 28, 1984).

gender."[207] The ruling was decided by the full commission and all five bi-partisan Commissioners agreed to its issuance.[208] The EEOC based its ruling on well-established Supreme Court precedent regarding sex-stereotyping and statutory interpretations,[209] as well as on federal court cases involving transgender people from the 1st, 6th, 9th, 11th and DC Circuits.[210]

In *Price Waterhouse*, the Court found that Title VII's provisions were violated when an employer discriminated against an individual for failing to conform to gender-based expectations.[211] The EEOC's decision went even further than *Price Waterhouse*, finding that gender stereotyping is not the only way to prove sex discrimination.[212] They found that valid theories of sex discrimination include actions motivated by, "hostility, a desire to protect people of a certain gender, by assumptions that disadvantage men, by gender stereotypes, or by the desire to accommodate other people's prejudices and discomforts . . . ."[213]

The ruling also clarified that illegal sex discrimination occurs if adverse action taken against an applicant or employee occurs because: (1) a person expresses his or her

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[207] Macy, 2012 WL 1435995 at 1.

[208] *Id.*

[209] Price Waterhouse, 490 U.S. at 228; Oncale, 523 U.S. at 75.

[210] Schroer, 577 F.Supp.2d at 293; Glenn, 663 F.3d at 1312; City of Salem, 378 F.3d at 566; Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. Wash. 2000); Rosa v. Park West Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000).

[211] Price Waterhouse, 490 U.S. at 228.

[212] Macy v. Holder, at 10-11.

[213] *Id.*

gender in a non-stereotypical manner; (2) a person has transitioned gender or is planning to transition gender; or (3) the person is transgender.[214] They explained that each of these three ways are just descriptions of different ways that the gender of the employee played a part in the discriminatory action/decision of the employer. If an employer took into account the employee's gender or sex, the employer took the action "because of sex," which is precisely what Title VII forbids.[215]

The EEOC explained that treating a person differently because the person has changed their sex, or intends to change their sex is unlawful sex discrimination under Title VII, just as discrimination against a person who is of one religion and converts to another is considered a type of religious discrimination.[216] The EEOC made it clear that what really matters is whether the employer took into account the employee's gender when deciding whether or not their identity or conduct was appropriate, if so, then it was sex discrimination.

This decision by the EEOC is a valuable addition to the jurisprudence on transgender people's protections under sex discrimination. The ruling formally opens the doors and services to the EEOC and its 53 field offices to transgender people who are experiencing harassment or discrimination on the job, or in applying for a job, with any employer, public or private, that has 15 or more employees anywhere in the U.S.[217]

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[214] *Id* at 7-9.

[215] *Id*.

[216] *Id.* at 10; This comparison has also been made by at least two federal courts. *See* Glenn, 663 F.3d 1312 (11th Cir. 2011); Schroer, 577 F.Supp. 2d. at 307.

[217] EEOC's Federal Training & Outreach Division, What Does the Macy Decision Mean for Title VII?, U.S. Equal Emp. Opportunity Commission (June 15, 2012),

Additionally, because the EEOC authority is national, the *Macy v. Holder* ruling actually impacts the entire country.[218] Conversely, the federal court cases, which had similar holdings, primarily affected the states in their respective circuits.[219] Therefore, with the *Macy v. Holder* ruling, there is new national access to the real prospect of remedies under Title VII for transgender people living in any of the 34 states that lack clear protections for "gender identity and/or expression."[220]

As a practical matter, *Macy* means that is a transgender person asserts that h/she was subjected to adverse actions based on transgender status by a state or local government, or private-sector employer with 15 or more employees, the EEOC will have to take the complaint and investigate it.[221] If the EEOC finds that there is clear evidence to support the complaint, it will issue a ruling in favor of the transgender employee and try to conciliate.[222] If the employer does not want to resolve thru the EEOC, the employee can then bring the case to federal court under Title VII.[223] While the EEOC

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http://www.eeoc.gov/federal/training/brown_bag_macy.cfm (Commissioner Chai Feldblum explaining that the *Macy* case applies to not only federal employees but to anyone who comes to any EEOC office across the country, from an employer with more than 15 employees to someone who works for a state or local government entity).

[218] *Id.*

[219] *Id.*

[220] The National Gay and Lesbian Task Force, *State Nondiscrimination Law in the U.S.* http://www.thetaskforce.org/downloads/reports/issue_maps/non_discrimination_1_12_color.pdf. (last visited May 5, 2014).

[221] *See supra* note 217. For discrimination claims brought by federal employees, the EEOC can act as a judicial body and issue decisions itself.

[222] *Id*.

[223] *Id.*

ruling in *Macy v. Holder* is wide reaching, it does not definitely determine that Title VII protects all transgender people. The EEOC believes it has no statutory authority and limited power to interpret Title VII.[224] Although lacking the force of law granted by statutory mandate, the EEOC is sill granted some deference by courts when they issue guidelines and adjudicatory decisions.[225] While *Macy v. Holder* is a small victory for the transgender community, ultimately, the U.S. Supreme Court decides what a federal statute means and the Court may eventually be asked whether "sex" within Title VII includes discrimination that transgender people face.

IV. EMPLOYMENT NON-DISCRIMINATION ACT

Jessica is a student at a local community college in San Antonio, Texas and she also worked at a BBQ restaurant.[226] Jessica went to high school with the owner's niece,

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[224] *See, e.g.*, Transcript of April 25, 2012 Meeting, U.S. Equal Emp. Opportunity Commission (2012), http://wwwl.eeoc.gov//eeoc/meeting/4-25-12/transcript.cfm?rendcrforprint=1 (last visited May 8, 2014) ("We are an enforcement agency. We have the authority to issue, amend, and rescind federal procedural regulations. We have no authority to make substantive changes in the law by issuing guidance that goes beyond what is contained in the statutes as interpreted b the courts. Our job is to follow Congressional intent and court interpretations; not make new law.").

[225] *See, e.g.*, Chevron U.S.A. Inv. V. Natural Res. Def. Council, Inc., 467 U.S. 837, 866 (1984) (holding that agency action must be given deference by the courts as long as Congress has not spoken directly on the issue and the agency's construction of the statute is reasonable); Griggs, 401 U.S. at 433-434 ("The administrative interpretation of the Act by the [EEOC] is entitled to great deference [and since] the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress.").

[226] Deborah J. Vagins, *Working in the Shadows, Ending Employment Discrimination for LGBT Americans*, (2007) https://www.aclu.org/files/pdfs/lgbt/enda_20070917.pdf.

who told the owner that Jessica was lesbian.[227] Once Jessica's co-workers found out that she was lesbian, they all started to make fun of her with anti-gay jokes.[228] Her co-workers often told her they were praying for her to "change."[229] Jessica complained to her city councilmember, who contacted the restaurant owner to ask the owner to stop Jessica's co-workers from harassing her.[230] Eventually, Jessica was fired for not putting condiments out in a timely manner.[231] Jessica's life and livelihood would be different today if the Employment Non-Discrimination Act (ENDA or The Act)[232] were the law of the land. Texas is one of the states that do not protect LGBT employees on the basis of sexual orientation, so Jessica has no recourse for being terminated.

A lot of LGBT workers have to make a choice to hide who they are at work in order to support their families at home. Many states, municipalities, and corporations have instituted policies that shield LGBT workers from workplace bias,[233] but LGBT citizens still lack adequate legal protections from employment discrimination. Specifically, there are 22 states (to include D.C.) that have statutes explicitly prohibiting

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[227] *Id.*

[228] *Id.*

[229] *Id.*

[230] *Id.*

[231] *Id.*

[232] H.R. 1755/S. 815, §4, 113th Cong.

[233] *See infra* note 233.

employment discrimination on the basis of sexual orientation.[234] There is an overlap in states protecting individuals from employment discrimination on the bases of sexual discrimination and gender identity, 18 states (to include D.C.) have statutes that explicitly prohibit both sexual orientation and gender identity based employment discrimination,[235] while the remaining four states prohibit discrimination based on sexual orientation only.[236] This means that in the states with no protection, an employer can openly terminate, demote, or otherwise engage in an adverse employment action against an employee on the basis of his or her sexual orientation.[237]

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[234] GAO, *Sexual Orientation and Gender Identity Employment Discrimination: Overview of State Statutes and Complaint Data*, (2013) http://www.gao.gov/assets/660/656443.pdf. The 22 states with explicit statutory provisions with regard to sexual orientation are: California, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, and Wisconsin.

[235] HUMAN RIGHTS CAMPAIGN, STATEWIDE EMPLOYMENT LAWS AND POLICIES www.hrc.org/statelaws (last visited May 20, 2014); California (1992, 2003), Colorado (2007), Connecticut (1991, 2011), Delaware (2009, 2013), District of Columbia (1977, 2006), Hawaii (1991, 2011), Illinois (2006), Iowa (2007), Massachusetts (1989, 2012), Maine (2005), Minnesota (1993), New Jersey (1992, 2007), New Mexico (2003), Nevada (1999, 2011), Oregon (2008), Rhode Island (1995, 2001), Vermont (1991, 2007) and Washington (2006).

[236] *Id.* Maryland (2001), New Hampshire (1998), New York (2003) and Wisconsin (1982).

[237] *See* Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMAN. 35, 50 (2001) (noting that "the absence of a federal law prohibiting employers from discrimination … [based on] sexual orientation means that where no local or state law dictates otherwise, law affirmatively gives employers permission to discriminate openly against gay, lesbian, or transgendered employees, by refusing to grant such employees a remedy for discrimination."). *But see supra* note 217 (EEOC advising an agency employee that, although there is no binding precedent on the subject, the Commission expects to see cases applying *Macy* to sexual orientation in the future and suggesting that agencies address sexual orientation discrimination under Title VII based on *Castello* and *Veretto*).

The above stated policies appear to offer significant protection to many LGBT workers, however, a majority of LGBT workers still lack any legal protection from employment discrimination under state law.[238] Forty-five percent of American workers live in a jurisdiction where they are covered by a non-discrimination policy based on sexual orientation.[239] Only 34 percent of workers live in a jurisdiction where they are covered by a non-discrimination policy based on gender identity.[240] The Employment Non-Discrimination Act would bring uniform protection to all workers under federal law and ensure civic equality for American workers.[241] If passed, the law would require that all Americans be judged in the workplace based on their qualifications, skills, and the quality of their work, and not on job irrelevant characteristics, such as their sexual orientation.[242]

a. *Historical background*

Patterned after Title VII, and introduced in various incarnations in every congressional session since the 103rd Congress,[243] ENDA would prohibit discrimination

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[238] *See infra* note 239.

[239] Movement Advancement Project, *The Momentum Report– 2009 Edition* (2009), http://www.lgbtmap.org/ file/momentum-report-2009.pdf.

[240] *Id.*

[241] Crosby Burns and Liz Neemann, *Infographic: Gay and Transgender Workers Lack Comprehensive Workplace Benefits*, Center for American Progress (October 18, 2012), http://www.americanprogress.org/issues/lgbt/ news/2012/10/18/41907/infographic-gay-and-transgender-workers-lack-comprehensive-workplace-protections/.

[242] Seth Althauser and Sarah Greenberg, *FAQ: The Employment Non-Discrimination Act*, Center for American Progress (July 19, 2011), http://www.americanprogress.org/ issues/lgbt/news/2011/07/19/9988/faq-the-employment- non-discrimination-act/

[243] *See supra* note 91.

based on an individual's actual or perceived sexual orientation[244] or gender identity by public and private employers in hiring, discharge, promotion, compensation, and other terms and conditions of employment.[245] The bill would also protect workers from retaliation.[246] The legislation's prohibited employment practices follows the language of employer malfeasance prohibited by Title VII, which generally makes it unlawful for employers with 15 or more employees to discriminate because of race, color, religion, sex or national origin.[247] Thus, all forms of employment and pre-employment bias would be forbidden.

b. *Title VII vs. ENDA*

Title VII's prohibition against discrimination on the basis of sex has consistently been interpreted to exclude discrimination on the basis of sexual orientation.[248] Although some courts have held Title VII's prohibition against sex discrimination may encompass claims based on gender identity when unlawful gender stereotyping is involved,[249] the courts have not recognized gender identity discrimination on its own to be an unlawful

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[244] *See supra* note 4.

[245] H.R. 1755/S. 815 , §2, 113th Cong.

[246] *Id.*

[247] Like Title VII, ENDA defines "employer" to exclude "bona fide private membership" clubs that qualify for federal tax exemptions. Likewise, most public and private employees would be protected by ENDA, including employees covered by the Government Employee Rights Act of 1991 and the Congressional Accountability Act of 1995. Volunteers who receive no compensation, however, would not be covered under the legislation. 42 U.S. C. §2000e-2, 16; 2 U.S.C. § 1301.

[248] *See* discussion *supra* Part III.

[249] *See* discussion *supra* Part III(c).

employment practice under Title VII.[250] Because Title VII has not been interpreted to protect against employment discrimination on the basis of sexual orientation, ENDA would significantly expand the scope of protection under current employment discrimination law by explicitly prohibiting sexual orientation discrimination.[251]

Like Title VII, the ENDA contains an exception that would make the Armed Forces, which include the Army, Navy, Air Force, Marines and Coast Guard, exempt from the law.[252] ENDA also includes an exemption for religious organizations, which recognizes that the Constitution protects certain employment decisions of religious organizations, understanding that some religious organizations have significant reasons to make employment decisions, even those that take an individual's sexual orientation or gender identity into account.[253] This is consistent with previous congressional efforts to avoid infringing on a religious organization's exercise of religion with respect to its employment practices.[254] Therefore, under those circumstances, LGBT employees of religious organizations will not have protection from sexual orientation and gender identity discrimination.[255] Like Title VII, ENDA "shall not apply to a corporation,

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[250] Varona, *supra* note 65 at 71-72.

[251] However, ENDA should not be construed to invalidate or limit rights under any other federal or state laws. Therefore, ENDA does not appear to alter the current protections that may be available to individuals who are LGBT under Title VII or state law.

[252] H.R. 1755/S. 815 , §7, 113th Cong.; 42 U.S. C. §2000e-16(a). Civilian military employees are protected by Title VII.

[253] H.R. 1755/S. 815 , §2, 113th Cong.

[254] *See supra* note 5.

[255] H.R. 1755/S. 815 , §2, 113th Cong.

association, educational institution or institution of learning, or society that is exempt from the religious discrimination provisions of title VII of the Civil Rights Act of 1964 pursuant to section 702(a) or 703(e)(2) of such Act."[256] This exemption ensures that such organizations would not be required to hire or retain an individual if the organization had objections to the individual's sexual orientation or gender identity. Under this legislation, even religious organizations whose religious teachings do not oppose homosexuality could be permitted to refuse to hire a gay applicant.[257] Which means the Act may actually broaden the religious organizations' ability to discriminate in hiring because the exception goes farther than the Title VII exception, which allows religious employers to discriminate on the basis of religion, but not on the basis of race, color, national origin or sex.[258]

Title VII and ENDA are parallel in many instances, but they do have a few major differences that are worth discussing. These differences may also contribute to the reason Congress refuses to pass the law. One of the main differences between Title VII and ENDA is that under ENDA, an employer would be liable for employment actions that are "based on actual or perceived sexual orientation or gender identity of a person with whom the individual associates or has associated."[259] As you may imagine, trying to

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[256] *Id.* at §6.

[257] *See* Paul Schindler, *ENDA Religious Exemption Still a Big Worry* (October 2, 2013), http://gaycitynews.com/enda-religious-exemption-still-a-big-worry/ (last visited February 9, 2014).

[258] *Id.* Some activists have also stated that enacting ENDA with the current exemption language (allowing hospitals and universities to claim the exemption) could undermine other nondiscrimination laws nationwide. *Id.*

[259] H.R. 1755/S. 815, §4(e), 113th Cong.

prove a person's perceived orientation may be difficult. To the contrary, Title VII does not prohibit discrimination on the basis of any perceived characteristics. Therefore, adding the perceived orientation criteria, it may be hard for courts to develop standards of proof in these types of sexual orientation cases.

There is another major difference that may narrow the evidentiary options available to a plaintiff. Under ENDA, employees are only able to bring disparate treatment claims; therefore, disparate impact claims are not available.[260] Proof of intent to discriminate is required to prove a disparate treatment claim, but is not required to prove a disparate impact claim, which can often be proven through the use of statistics.[261] The Act prohibits the EEOC from compelling collection or requiring production of statistics from covered entities on actual or perceived sexual orientation or gender identity.[262] Under ENDA, a plaintiff would have to prove that an employer intended to discriminate, which is a higher evidentiary threshold than under Title VII.[263] Therefore, neutral employment policies that may disproportionately impact LGBT workers who are covered by ENDA would not be proscribed.

Lastly, the enforcement and remedies of the Act are actually parallel to the enforcement provisions of Title VII. Therefore, the Department of Justice would enforce ENDA against state and local governments and the EEOC would be the administrative

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[260] H.R. 1755/S. 815 , §4(g), 113th Cong.

[261] *See* discussion *supra* Part II(b)(i).

[262] H.R. 1755/S. 815, §2, 113th Cong.

[263] *See* discussion *supra* Part II(b)(i).

enforcement with respect to private employment.[264] Similar to Title VII, the EEOC would have the same authority to receive and investigate complaints, to negotiate voluntary settlements, and to seek judicial remedies as it currently does under Title VII.[265] Additionally, federal courts will possess the same broad remedial discretion under ENDA as they currently possess under Title VII, including the ability to enjoin the unlawful employment practice and to "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other relief as the court deems appropriate."[266]

c. *Current status*

The ENDA represents a pragmatic and measured response to prejudice and discrimination. The legislation has been introduced to Congress regularly since the 1990s, but hasn't passed even with some modest bipartisan support under a Democratic-controlled Congress.[267] Enacting the ENDA will be an important step toward ensuring fairness on the job for LGBT employees. It is important that Congress pass this legislation in order to expand protection of anti-discrimination laws to more Americans. The majority of courts have consistently ruled that sexual orientation is not covered under

[264] H.R. 1755/S. 815, §10, 113th Cong.

[265] *Id.*

[266] 42 U.S. C. §2000e-5(g).

[267] *See supra* note 91.

Title VII,[268] and few federal courts have interpreted Title VII to provide transgender people with some protection from workplace discrimination.[269] In the majority of the jurisdictions, there remains no clear protection against employment discrimination based on sexual orientation or gender identity under federal law.[270] The Act will put LGBT Americans on the same footing as everyone else when it comes to fighting workplace discrimination.

In late 2013, the Senate voted to pass ENDA to ensure that no American is deprived of the opportunity to work merely because of the sexual orientation or gender identity.[271] However, the Speaker of the House, John Boehner, remains unwilling to allow a vote to take place because he fears the result would be frivolous lawsuits and he thinks people are already protected in the workplace.[272]

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[268] Courts have traditionally been unwilling to allow LGBT employees to use Title VII to sue for sexual orientation discrimination. *See* Simonton, 232 F.3d at 36; Williamson, F.2d at 70; DeSantis, 608 F.2d 327, 329-30, overruled on other grounds by Nichols, 256 F.3d at 875.

[269] *See* discussion *supra* Part III(c).

[270] *See* City of Salem, 378 F.3d at 575 (stating that "[s]ex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as "transsexual," is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.").

[271] *See supra* note 91.

[272] "I am opposed to discrimination of any kind, in the workplace and any place else. But I think this legislation that I've dealt with as chairman of The Education & The Workforce Committee… is unnecessary and would provide a basis for frivolous lawsuits. People are already protected in the workplace. I'm opposed to continuing this. Listen, I understand people have differing opinions on this issue, and I respect those opinions. But as someone who's worked in the employment law area for all my years in the State House and all my years here, I see no basis for this legislation." Andy Towle, *John Boehner: "I see no basis or need' for legislation protecting LGBT people in the*

V. ANALYSIS

While the enactment of Title VII was a big step towards equality back in 1964, it has seen very few changes since then.[273] This year, 2014, marks its 50th year in existence, and unfortunately, employment discrimination remains widespread.[274] In 1964, most of the groups that we are discussing today were not even heard of by most of the public. Fifty years ago, the meaning of the term "sex" was not up for debate.[275] The passage of Title VII was during a social climate where a person's sexual orientation was not discussed and the subject remained a secret. But here we are, fifty years later, and those issues are no longer kept in the closet or buried and they are discussed on a daily basis. However, the meaning of the word "sex" still hasn't been clarified legislatively.[276]

Just think for a moment, how we have watched various laws evolve due to changes in our society. Change is necessary to achieve the broad remedial policy goals set by Title VII. Numerous gay men and women experience on-the-job discrimination,

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workplace, TOWLEROAD, available at http://www.towleroad.com/2013/11/john-boehner-i-see-no-basis-or-need-for-legislation-protecting-lgbt-people-in-the-workplace.html.

[273] *See supra* note 57.

[274] U.S. Equal Employment Opportunity Commission, http://www.towleroad.com/2013/11/john-boehner-i-see-no-basis-or-need-for-legislation-protecting-lgbt-people-in-the-workplace.html (last visited June 5, 2014).

[275] Ulane, 742 F.2d at 1085. As observed in *Ulane*, "When Congress enacted the Civil Rights Act of 1964 it was primarily concerned with race discrimination. 'Sex as a basis of discrimination was added as a floor amendment one day before the House approved Title VII, without prior hearing or debate.' [citations omitted]. This sex amendment was the gambit of a congressman seeking to scuttle adoption of the Civil Rights Act. The ploy failed and sex discrimination was abruptly added to the statute's prohibition against race discrimination. [citation omitted]." *Id.*

[276] *See* discussion *supra* Part III.

including harassment everyday,[277] and unless these victims work in states that provide statutory protection against employment discrimination based on sexual orientation,[278] their only recourse may be Title VII. The Supreme Court has now held that the "because of sex" prohibition extends to instances of workplace sexual harassment,[279] same- sex harassment,[280] and it bars employers from discrimination on the basis of sex stereotypes.[281] Conversely, courts have affirmed that Title VII does not prohibit harassment or discrimination because sexual orientation.[282] Notwithstanding, sexual orientation plaintiffs have advanced, with mixed success, different legal theories that analyze sexual orientation discrimination as discrimination "because of sex," which is actionable under Title VII.[283] This section of the thesis explains why some of these theories are correct, and makes recommendations of how the courts should go forward when dealing with sexual orientation plaintiffs.

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[277] *See supra* note 5.

[278] *See supra* notes 234, 235 and 236.

[279] Meritor, 477 U.S. at 66.

[280] Oncale, 523 U.S. at 82.

[281] *See supra* Part III(a).

[282] Leonard, *supra* note 170 at 152-53 ("Courts [have] unanimously concluded that sexual orientation discrimination, as such, is not covered by Title VII.").

[283] *See* discussion *supra* Part III(c) and discussion *infra* Part V(d).

a. The Supreme Court and Gay Rights

Lesbians, gays, bisexuals and transgenders have been treated differently on virtually all social and legal fronts.[284] In contrast to women over the last 40 years, LGBT individuals have seen slow progress in their attempts for equal rights.[285] Although the Supreme Court's record on gay rights issues has been mixed, we are witnessing a clear movement toward gay rights in the United States.[286] In the absence of any national law on sexual orientation discrimination, the Supreme Court decisions on these issues have assumed great importance.

The first Supreme Court decision that affected the LGBT community was over fifty-six years ago.[287] The case dealt with the United States Post Office and the FBI, who deemed One: The Homosexual Magazine, which was a lesbian, gay and bisexual publication, obscene, and as such could bot be delivered via U.S. mail.[288] The publishers of the magazine sued, and lost both the first case and the appeal.[289] The Supreme Court accepted the case and reversed it, marking the first time the Supreme Court ruled in favor of homosexuals. The decision, in its entirety was no more than eight lines and stated,

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[284] *See* discussion *supra* Part III.

[285] *See infra* pp. 60-66.

[286] *See infra* pp. 60-66.

[287] One, Inc. v. Olesen, 355 U.S. 371 (1958).

[288] *Id.*

[289] 241 F.2d 772 (9th Cir 1957).

"The petition for writ of certiorari is granted and the judgment of the United States Court of Appeals for the Ninth Circuit is reversed."[290]

Although *Olesen* was a small victory for lesbian, gay, bisexual and transgender individuals where free press rights was concerned, the LGBT community continued to face discrimination as there remained criminal statutes on the books that prohibited acts of sexual intimacy between same-sex couples.[291] Just twenty-eight years ago, the Supreme Court upheld the constitutionality of sodomy laws in *Bowers v. Hardwick*.[292] In *Bowers*, the plaintiff was arrested in his bedroom for having sex with another man and the Supreme Court ruled 5-4 that the United States Constitution does not guarantee a fundamental right for consenting adults to engage in homosexual acts in private under the Due Process Clause of the Fourteenth Amendment, upholding Georgia law.[293] The Court arrived at its decision by applying the lowest level of constitutional scrutiny and finding a rational basis for sodomy laws. The right to privacy protects intimate marital and familial relations, but the Court said it does not cover gay sodomy because "no connection between family, marriage, or procreation on the one hand homosexuality activity on the other hand has been demonstrated."[294] The *Bowers* case was later

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[290] Olesen, 355 U.S. at 372.

[291] *See. e.g*., Alabama, Ala. Code 13A-6-65(a)(3) (1994); Arizona, Ariz. Rev. Stat. Ann 1-1411 to 1412 (1989); Arkansas, Ark. Code Ann 5-14-122 (1997); Idaho, Idaho Code 18-6605 (1987).

[292] 478 U.S. 186 (1986) (upholding the constitutionality of a Georgia sodomy law, criminalizing oral and anal sex in private between two consenting adults when applied to homosexuals).

[293] Bowers, 478 U.S. at 186.

[294] *Id*. at 191.

scrutinized for mischaracterizing homosexuality as sodomy.[295] The Court made a distinction between homosexual behavior and actions such as birth control, abortion, and interracial marriage.[296] While the Court had previously found that all of these were covered by the right to privacy in the due process clause of the Fourteenth Amendment, according to the Court, homosexual acts were not covered by this clause.[297] This decision was a serious blow to the gay-rights movement and served as foundation for discrimination against gays, lesbians and bisexual individuals.[298]

In contrast to *Bowers*, ten years later, in *Romer v. Evans*, the Supreme Court opened the door to constitutional challenges to other discriminatory criminal and civil laws.[299] In *Romer*, in a 6-3 decision, the Supreme Court struck down, on Equal Protection grounds, an amendment to the Colorado Constitution that prohibited any state or local branch of government from extending "special protections" to

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[295] *See* ROBERT WINTEMUTE, SEXUAL ORIENTATION AND HUMAN RIGHTS: THE UNITED STATES CONSTITUTION, THE EUROPEAN CONVENTION AND THE CANADIAN CHARTER 7, 31 n.84 (Oxford: Oxford University Press 1997) (1995) ("The Court's inconsistent language shows an interesting failure to distinguish between a right of particular persons ('homosexuals') and a right of any person to engage in particular conduct ('homosexual sodomy').").

[296] Bowers, 478 U.S. at 190.

[297] Id.

[298] The *Bowers* decision would later be overturned by the Court in 2003, *see infra* note 304.

[299] 517 U.S. 620 (1996). In 1992, Colorado voters approved Amendment 2, which prohibited or preempted any law or policy "whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitled any person or class of persons to have or claim any minority status, quota preference, protected status or claim of discrimination." *Id.* at 624. The law banned any Colorado municipality from passing a sexual orientation anti-discrimination law.

individuals on the basis of sexual orientation.[300] Applying the rational basis test, the Court determined that a "desire to harm a politically unpopular group cannot constitute a legitimate government interest."[301] The Court noted that Amendment 2 identified homosexuals by name and denied them equal protection across the board.[302] The Court's decision in *Romer* seemed to indicate the Court would accept some equal protection rights for homosexuals, although it might not offer the same protection to sexual orientation discrimination as it would to sex or race.

In another setback to the gay-rights movement, the Supreme Court ruled that the constitutional right to freedom of association allows a private organization like Boy Scouts of America (BSA) to exclude a person from membership when "the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."[303] In a 5-4 decision, the Court ruled the Boy Scouts of America had a constitutional right to ban gays because the organization's opposition to homosexuality is part of its "expressive message" and allowing homosexual as leaders would interfere with that message.[304] Justice Stevens wrote a dissent in

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[300] *Id.*

[301] *Id.* at 634.

[302] *Id.* at 647.

[303] Boy Scouts of America v. Dale, 530 U.S. 640, 648 (2000). The Court reversed a decision of the New Jersey Supreme Court that had determined that New Jersey's public accommodations law required BSA to readmit assistant Scoutmaster James Dale, who had made his homosexuality public and whom the Boy Scouts had expelled from the organization. *Id.*

[304] *Id.* at 661.

which Justices Souter, Ginsburg and Breyer joined.[305] Justice Stevens declared, "[U]ntil today, we have never once found a claimed right to associate in the selection of members to prevail in the face of a State's anti-discrimination law. To the contrary, we have squarely held that a State's anti-discrimination law does not violate a group's right to associate simply because the law conflicts with that group's exclusionary policies."[306] Justice Stevens ended his dissent by noting that serious and ancient prejudices facing homosexuals could be aggravated by the "creation of a constitutional shield."[307] This case allows the Boy Scouts to openly discriminate against homosexuals and stands for the premise that gay youth are no longer welcome in the program, sending a message to both gay and non-gay scouts.[308]

On May 23, 2013, BSA announced the National Council's approval of a resolution to remove the restriction denying membership to youth on the basis of sexual orientation alone.[309] A change for the current membership policy for adult leaders was not under consideration; therefore, the policy for adults remains in

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[305] *Id.* at 663.

[306] *Id*. at 679.

[307] *Id*. at 699-700.

[308] In mid-2012, a secret committee of the BSA reviewed their policy of actively discriminating against lesbians, gays and bisexuals. They decided that it was in the best interest of the organization to continue it unchanged. By this time, acceptance of equal rights for the LGB community had undergone a rapid increase throughout the U.S. *Editorial: The Boy Scouts Fall Short*, THE NEW YORK TIMES (January 29, 2013), http://www.nytimes.com/2013/01/30/opinion/the-boy-scouts-fall-short-in-policy-on-gays.html?_r=0

[309] SCOUTING.ORG, http://www.scouting.org/MembershipStandards/Resolution/results.aspx (last visited June 3, 2014).

place.[310] After this policy change, BSA can no longer claim that discrimination is the core purpose of their association; therefore, state non-discrimination laws should now apply to the Scouts. A new lawsuit today, similar to *Boy Scouts of America v. Dale* might result in a reversal of the U.S. Supreme Court's decision in 2000.

The next important Supreme Court decision in LGBT history is *Lawrence v. Texas*.[311] In 2003, the Supreme Court, 6-3, overruled a Texas sodomy law and voted 5-4 to overturn 1986's *Bowers v. Hardwick* decision.[312] According to the majority opinion by Justice Anthony Kennedy, "The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government."[313] Although this decision was a major victory for gay rights activists, laws that make it a crime for consenting adults to engage in sodomy remain on the books in 12 states.[314] These laws continue to be enforced in several of those states eleven years after the U.S. Supreme Court declared such laws

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[310] *Id.*

[311] 539 U.S. 558 (2003) (This landmark decision struck down the sodomy laws in Texas and, by extension, invalidated sodomy laws in thirteen other states, making same-sex sexual activity legal in every U.S. state and territory).

[312] *Id.*

[313] *Id*. at 592.

[314] *12 States still ban sodomy a decade after court ruling*, USA TODAY (April 21, 2014, 6:42 PM), http://www.usatoday.com/story/news/nation/2014/04/21/12-states-ban-sodomy-a-decade-after-court-ruling/7981025/.

unconstitutional.[315] Most cases in which police and prosecutors enforce sodomy statutes involve gay men arrested by undercover police officers for engaging in or soliciting sex in pars or other public places.[316] Even though the majority of sodomy cases are eventually dismissed,[317] the fact that people are still charged under the law shows that despite ruling from the Supreme Court, discrimination against the LGBT community is still going strong.

In the first case on the issue of gay marriage, the Supreme Court handed a victory to the LGBT community in *United States v. Windsor*.[318] The Court ruled that the 1996 Defense of Marriage Act (DOMA) is unconstitutional.[319] In a 5-4 vote, the court ruled that DOMA violated the rights of gays and lesbians.[320] The Court also ruled that the law interferes with the states' rights to define marriage.[321] The ruling immediately extended many benefits to couples married in the states that allow such unions and it will allow the current administration to broaden other benefits through executive action.[322] Justice

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[315] *Id.*

[316] Lou Chibbaro Jr., *Sodomy laws remain on the books in 17 states, including Va. and Md.*, WASHINGTON BLADE (April 17, 2013), available at http://www.washingtonblade.com/2013/04/17/sodomy-laws-remain-on-books-in-17-states-including-md-and-va/.

[317] *Id.*

[318] 133 S. Ct. 2675 (2013).

[319] *Id.*

[320] *Id.*

[321] *Id.* at 2993.

[322] Laura Westfall, *Looking Beyond DOMA: The Effects of United States v. Windsor on Federal Tax Law,* KSLaw (2013)

Kennedy wrote, "The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and injure those whom the state, by its marriage laws, sought to protect in personhood and dignity," . . ."By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment."[323]

In a second same-sex marriage victory for the LGBT community, the Supreme Court ruled that same-sex marriage opponents in California did not have standing to appeal the lower court ruling that overturned the state's ban, known as Proposition 8.[324] While this ruling will remove some legal battles for same-sex couples wishing to marry in California, it did not directly affect other states.[325] The two rulings leave in place laws banning same-sex marriage around the nation, but the Court did not say whether there was a constitutional right to such unions.

b. It's all "because of sex!"

As discussed in Part II of this thesis, the Supreme Court decisions of *Price Waterhouse* and *Oncale* have expanded Title VII's statutory proscription of discrimination "because of sex" to the point where sex stereotyping is arguably an

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http://www.kslaw.com/imageserver/KSPublic/library/publication/2013articles/11-5-13_ABA_Tax_NewsQuarterly.pdf.

[323] Windsor, 133 S.Ct at 2696.

[324] Hollingsworth v. Perry, 133 S. Ct. 2652 (2013). The case was decided on technical grounds, with the majority saying that it was not properly before the Court and it was powerless to issue a decision because officials in California had declined to appeal a trial court's decision against them, and because the proponents of the ban were not entitled to step into the state's shoes to appeal the decision. *Id.*

[325] *Id*. at 2668.

included prohibition.[326] The sex stereotyping theory should be applied to all LGBT victims, and therefore discrimination based on sexual orientation should also be impermissible sex discrimination under Title VII. When LGBT individuals are discriminated against because of their sexual orientation, it is because the person is violating the gender norm that men should be attracted to only women and that women should be attracted only to men.[327] Therefore, when an LGBT employee is discriminated against on the basis of his/her sexual orientation, they are doing it because the employee is violating the gender norm of being attracted to someone of the opposite sex.[328]

These gender norms start at an early age. Girls are supposed to wear pretty pink dresses, while boys are suppose to wear blue athletic clothing. As toddlers, girls play with dolls and kitchen sets while boys play with action figures and Legos. Nurturing, mothering and physical attractiveness is expected from girls; while athleticism, leadership and intellectual achievement is expected from boys. The result is gay men and women are often discriminated against because of our rejection of the traditional male and female roles. Being gay, lesbian or bisexual goes directly against these assigned gender roles and any mistreatment of LGB individuals should be seen as sex-stereotyping

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[326] *See supra* Part I(a); *see, e.g.*, Sonya Smalletts, *Oncale v. Sundowner Offshore Services: A Victory for Gay and Lesbian Rights?*, 14 BERKELEY WOMEN'S L.J. 136, 136-37 (1999) (discussing the reaction to the *Oncale* decision by the public press and gay and lesbian advocacy groups).

[327] *See supra* note 151.

[328] Varona, *supra* note 65 ("[G]ay 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,' those who are attracted to members of the same sex contradict traditional notions about appropriate behavior for men and women.") (citing Sylvia Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 196 (1988)).

discrimination. A gay woman who is being discriminated against for being a woman who acts masculine and is attracted to women is just as impermissible as the plaintiff in *Price Waterhouse* being discriminated against for being a woman who transgressed gender norms by acting masculine.[329] In *Price Waterhouse*, the Supreme Court already recognized that 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.[330] This reasoning should apply to both men and women who exhibit gender nonconforming characteristics as well.

LGB individuals, simply by identifying themselves as lesbian, gay or bisexual, are violating the ultimate gender stereotype-heterosexual behavior. Similar to the plaintiff in *Price Waterhouse,* LGB individuals fail to match the stereotype associated with their group; therefore, any employment discrimination against a LGB person is "because of sex" under Title VII. Recently, a ruling in the DC Circuit agreed with this premise.

U.S. District Court Judge Colleen Kollar-Kotelly ruled that the plaintiff could go forward in his lawsuit on a Title VII claim after he was fired after his boss found out he was gay.[331] Plaintiff, Peter TerVeer, was hired in February 2008 as a Management Analyst at the Library of Congress's Office of the Inspector General.[332] TerVeer became close to his supervisor's daughter, and in August 2009, the daughter learned that Plaintiff

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[329] 490 U.S. at 228.

[330] *Id.* at 251.

[331] TerVeer v. Library of Congress, 12-1290 (D.C. March 31, 2014) (memorandum opinion denying summary judgment).

[332] *Id*. at 2.

is homosexual.[333] After the supervisor, John Mech, learned of TerVeer's sexuality, TerVeer alleged that Mech no longer gave him detailed instructions for assignments, but would instead give ambiguous instructions without clear communication.[334] Mech also called a meeting to educate TerVeer on Hell and "that it is a sin to be a homosexual . . . [that] homosexuality was wrong [,] and that [TerVeer] would be going to Hell."[335] Four days after the meeting, TerVeer received his annual review.[336] TerVeer felt his review did not accurately reflect his work and was motivated by Mech's religious beliefs and sexual stereotyping.[337] TerVeer reported his complaints to the next line supervisor, Nicholas Christopher, but Christopher did not take any remedial action.[338] In February 2011, Mech issued TerVeer another negative performance evaluation and notified TerVeer he was being placed on a "90-day written warning."[339] Subsequently, TerVeer was denied his within-grade-increase and he initiated a complaint with Equal Employment Opportunity.[340] October 2011, TerVeer filed his formal complaint alleging

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[333] *Id* at 3.

[334] *Id.*

[335] *Id.*

[336] *Id.*

[337] *Id*. at 4.

[338] *Id.* Christopher also told TerVeer that he didn't believe, in his opinion, employees had rights. He did not contact the Library's Equal Employment Opportunity Office—the Office of Opportunity Inclusiveness and Compliance—and he did not advise TerVeer of appropriate complaint procedures.

[339] *Id*. at 5.

[340] *Id.* TerVeer appealed the denial of his within-grade-increase and his appeal was denied by his supervisor, Mech.

discrimination based on religion, sex, sexual harassment and reprisal with the Office of Opportunity Inclusiveness and Compliance.[341]

The government sought to dismiss the claims in TerVeer's lawsuit, including his claim that Title VII's sex discrimination ban protected against discrimination based on his sexual preference.[342] Judge Kollar-Kotelly dismissed some of the claims in the ruling, but she allowed the Title VII claims of sex and religious discrimination to move forward.[343] TerVeer's argued, and the judge agreed, that a person could bring a claim of protection against sexual orientation under Title VII's ban on sex discrimination because an employer views an employee's sexual orientation as "not consistent with … acceptable gender roles."[344] In discussing the Title VII sex discrimination claim, Judge Kollar-Kotelly wrote:

> Plaintiff has alleged that he is "a homosexual male whose sexual orientation is not consistent with the Defendant's perception of acceptable gender roles," that his "status as a homosexual male did not conform to the Defendant's gender stereotypes associated with men under Mech's supervision or at the LOC," and that "his orientation as homosexual had removed him from Mech's preconceived definition of male." As Plaintiff has alleged that Defendant denied him promotions and created a hostile work environment because of Plaintiff's nonconformity with male sex stereotypes, Plaintiff has met his burden of setting forth "a short and plain statement of the claim showing that the pleader is entitled to relief" as

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[341] *Id*. at 6.

[342] *Id.* at 7.

[343] *Id*. at 2.

[344] *Id*. at 21.

> required by Federal Rule of Civil Procedure 8(a). Accordingly, the Court denies Defendant's Motion to Dismiss Plaintiff's sex discrimination claim (Count 1) for failure to state a claim.[345]

Although the decision by Judge Kollar-Kotelly is not a final decision on the merits of TerVerr's claim, the ruling means that if facts support his claim, TerVeer could succeed in his lawsuit on the Title VII claim. Hostility against LGB individuals is often based on bias against gender nonconformity.[346] While this decision is good news for the LGB community within the D.C. Circuit, the same has not been true of sexual orientation claims in other circuits.

As recent as March 25, 2014, a state appeals court in Ohio held that the state's sex discrimination ban did not protect people against sexual orientation discrimination.[347] The plaintiff, Colby Burns, was a resident of veterinary clinical sciences at the Ohio State University College of Veterinary Medicine and brought a lawsuit against her associate professor, Dr. Stephen Birchard.[348] Burns claimed that after Dr. Birchard learned that she was a lesbian, he began treating her differently than other students by excluding her from social and research activities and making vulgar and sexual comments and jokes about

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[345] *Id.*

[346] Toni Lester, *Protecting the Gender Noconformist 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, 116 (1999). Lester argues that gay men, "who behave in [a] stereotypical feminine manner" are "subjected to most some of the vehement forms of homophobia." *Id.*

[347] Burns v. The Ohio State University, 14-1190, 2014 Ohio App. LEXIS 1101. While many states have laws prohibiting workplace discrimination and harassment on the basis of gender identity or sexual orientation, Ohio does not. *See supra* notes 234, 235.

[348] *Id.*

her.[349] Burns also made allegations that Dr. Birchard contacted or communicated with prospective employers, resulting in the cancellation of job interviews, and that he refused to provide Burns a reference to a potential employer.[350] Burns claims that she reported her problems with Dr. Birchard to the College, which investigated, but that Dr. Birchard's conduct continued during and after the investigation.[351] The resident argued that the word sex in Title VII was not limited to gender, and also protected against discrimination on sexual orientation.[352]

The court of appeals ruled that the conduct against the resident, while repugnant, was not actionable as discrimination because the term "sex" under R.C. 4112.02(A) did not encompass sexual orientation.[353] While there are many states that prohibit workplace discrimination and harassment on the basis of gender identity or sexual orientation,[354] Ohio does not. This decision is a prime example of why there needs to be a specific

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[349] *Id.*

[350] *Id*.

[351] *Id*.

[352] *Id*. The court of claims dismissed the resident's claims of sexual discrimination, sexual harassment, retaliation and violation of public policy as insufficient.

[353] *Id*. The resident, incorrectly argued for a change in the law so that sexual orientation could be protected, instead of arguing that the law currently protects sexual orientation. The court responded by saying, "Legislative measures proposing to amend R.C. Chapter 4112 and Title VII to add the term sexual orientation have been, as yet, unsuccessful," and "this claim and this court are not the forum for achieving the change that appellant seeks." *Id*. The court of appeals also ruled that the resident did not demonstrate that a clear public policy against harassment or discipline based on sexual orientation existed at the state level to support her claim of violation of public policy.

[354] *See supra* Part III(c).

protection for LBGT individuals, to protect them from employment discrimination, because after all, it's all because of sex.

c. Did sexual harassment occur…if so, who cares about the sexual orientation of the victim?

Did the harassment of an employee actually occur? If so, who cares if they are heterosexual or homosexual? Why does the sexual orientation of the plaintiff even matter if they can prove that sexual harassment actually occurred? If courts focus on whether the harassment actually occurred, and not the subjective belief of the employer regarding the victim's sexual orientation, we will be more in line with the purpose of Title VII. The Supreme Court has recognized that sexual harassment constitutes a form of sexual discrimination actionable under Title VII.[355] All that is necessary is that the harassment be "sufficiently or severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive work environment.'"[356]

We understand that in 1964 when Title VII was enacted, Congress did not envision "sex discrimination" to mean to protect lesbian, gay, bisexual, and transgender individuals, but during the constitution construction of the Equal Protection Clause, I am sure our forefathers were not thinking of protecting gay marriage at that time either—but the courts have construed it to protect gays ability to get married as well.[357] I am sure it was not easy when the thought of desegregating our school systems was first introduced

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[355] *See supra* note 72.

[356] *See supra* note 72 at 67 (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

[357] *See supra* discussion Part V(a).

to this country, as it was not easy when it was first introduced to this country that men had to work alongside women in various jobs. Times have changed, and with changing times, we have to adapt.

An individual's sexual orientation should be irrelevant for purposes of Title VII discrimination claims, and treated no different than any other trait that is not protected under Title VII, which simply means homosexual individuals should be on the same playing field as heterosexual individuals.[358] Conversely, the Ninth Circuit in *DeSantis v. Pacific Telephone & Telegraph Co*., found that if an employer is treating all homosexuals alike, whether male or female, that it is not discrimination in violation of Title VII.[359] The reasoning is that the employer is treating men and women alike, in that homosexuals of both sexes are treated less favorably than heterosexuals.[360] This argument is flawed and has already been rejected by the Supreme Court when they dealt with the laws

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[358] *See* Zachary A. Kramer, *Heterosexuality and Title VII*, 103 N.W. U.L. REV. 205 (2009) (Kramer suggests that by rendering sexual orientation irrelevant for purposes of Title VII, "the re-oriented approach seeks to put heterosexual employees on equal footing with lesbian and gay employees regarding the legal implications of sexual orientation.").

[359] 608 F.2d at 331 (stating that "whether dealing with men or women the employer is using the same criterion: it will not hire or promote a person who prefers sexual partners of the same sex."). *DeSantis* was a judicial consolidation of three separate actions for appeal. The first involved a nursery school employee who alleged he was fired for wearing an earring to work before the school year began The second involved three gay men who alleged that Pacific Telephone & Telegraph Company either refused to hire them or had constructively discharged them through ongoing harassment. The final case involved a lesbian couple who alleged harassment and discriminatory discharge because of their relationship. The Ninth Circuit's decision precluded relief for these individuals and sent a message to employees and employers everywhere that Title VII did not prohibit harassment or other discrimination against homosexuals or perceived homosexuals.

[360] *See* Bennett Capers, Note, *Sex(ual Orientation) and Title VII,* 91 COLUM L. REV. 1158, 1179 (1991) ("[T]he implication of this reasoning is that an employer who disfavors gay males and not lesbians [or vice versa] may be in violation of Title VII.").

banning interracial marriages.[361] The Court found anti-miscegenation laws to be race discrimination because they "proscribe generally accepted conduct [only] if engaged in by members of different races."[362] Therefore, a black person was penalized for doing something (marrying a white person) for which a white person would not be penalized. If we analyze the sexual orientation argument, it is similar in that discrimination on the basis of sexual orientation is sex discrimination because a man is penalized for doing something (having or at least preferring sexual relations with a man) for which a woman is not penalized.[363] It is ironic that the same argument that was made by the State of Virginia in *Loving,* has been made by individuals who do not want Title VII to cover sexual orientation discrimination.[364]

With regard to sexual orientation, the current argument is that the repeated failure of Congress to amend Title VII proves that Congress did not intend Title VII to prohibit discrimination on the basis of sexual orientation.[365] Similarly, in *Loving*, Virginia felt that the framers of the Fourteenth Amendment did not intend to prevent the states from barring interracial marriage.[366] While the sexual orientation issue has yet to be addressed

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[361] *See* Loving v. Virginia, 388 U.S. 1 (1967). The Court explicitly rejected the argument that laws banning interracial marriages do not constitute racial discrimination because they bar members of each race, equally, from marrying a partner of the opposite sex.

[362] *Id.* at 11.

[363] *See generally*, Samuel A. Marcosson, *Harassment on the basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO L.J. 1, 5-6 (1991).

[364] *See supra* note 359.

[365] *See supra* note 91.

[366] Loving, 388 U.S. at 9.

by the Supreme Court, the Court in *Loving* reasoned that the intent of the framers was "inconclusive."[367] But does it really matter what Congress intended back in 1964? What we can be sure of is that Congress intended to bar employer policies using gender classifications.[368] But did we know that in 1964, Congress would foresee antigay discrimination being included in the "because of sex" provision of Title VII… probably not, but Congress's intent at the time does not matter.[369] It is true that when language is ambiguous, the congressional intent may help in discerning the meaning of the text, but as Justice Scalia has inferred, the words of the statute come first, last and often only.[370]

In this particular situation, did the discriminatory conduct occur "because of the employee's sex?" In other words, in a sexual harassment (involving LGBT victims) situation, does the employer treat men and women differently in the same way that antimiscegenation laws treated blacks and whites differently? Is a woman not penalized for dating or flirting with a man, but a man is penalized for dating or flirting with another man? This is sex discrimination and the notion that employment decisions based on sexual orientation do not constitute sex discrimination is wrong. If you are the victim of sexual harassment, why should your orientation matter? The term "because of sex" in

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[367] *Id.*

[368] *See supra* note 5.

[369] *See* I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring in the judgment) ("Judges interpret the law rather than reconstruct legislators' intentions.)

[370] *See* Union Bank v. Wolas, 112 S. Ct. 527, 531 (1991) (Scalia, J., concurring) (rejecting the argument based on legislative history for a limited scope to statutory language because "[t]he fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to the plain meaning."

Title VII should be a shield to protect all individuals from sex discrimination, irrespective of other considerations, like sexual orientation.

d. *The EEOC has interpreted Title VII correctly*

In the past, courts have ruled that a successful case can be brought by lesbian and gay workers only where there is clear evidence that an employee was targeted because of behaving or appearing insufficiently masculine (as a man) or insufficiently feminine (as a woman), classic gender stereotyping.[371] In two cases, issued twenty-one days apart, the EEOC has recently taken a step away from this approach and towards a *per se* rationale for treating sexual orientation discrimination as a form of sex discrimination.[372]

i. *Veretto v. United States Postal Service*[373]

Jason E. Veretto worked as a Rural Carrier at the United States Postal Service in Farmington, Connecticut.[374] On March 9, 2010, an article appeared in the society section of the Hartford, Connecticut newspaper announcing that he was going to be married to his male partner.[375] Two days later, Veretto alleged that a male coworker (CW1) approached another employee with the newspaper and asked him if he had seen Veretto's wedding announcement.[376] The employee stated not only did he know about the

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[371] *See* discussion *supra* Part III(a).

[372] Veretto v. United States Postal Service, Appeal No. 0120110873 (July 1, 2011); Castello v. United States Postal Service, EEOC Appeal No. 0120111795 (July 22, 2011).

[373] Veretto, 2011 WL 2663401 at 1.

[374] *Id*.

[375] *Id.*

[376] *Id.*

wedding, but he had been invited, and planned to attend.[377] CW1 "became extremely upset and began, at once, yelling about [Veretto] and the wedding and the fact that [Veretto] was marrying another man."[378]

Three weeks later, Veretto had a minor dispute with CW1's wife, who worked next to him, and CW1 intervened into Veretto's work area, bumping his chest into Veretto's chest, and trapping him.[379] Throughout the assault, CW1 threatened Veretto, saying, "I will beat you, you fucking queer."[380] After the incident, CW1 was removed from the workplace for three months.[381] Once CW1 returned to the workplace, Veretto asked that CW1 be reassigned to another location, but management did not act on his request.[382]

The Agency dismissed Veretto's formal complaint for failure to state a claim, stating that Veretto's complaint was based on his sexual orientation, not his gender, and therefore he had not asserted a claim under Title VII.[383] On appeal, Veretto argued that he was asserting a claim of sex discrimination under Title VII.[384] Veretto argued that if

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[377] *Id.*

[378] *Id.*

[379] *Id.*

[380] *Id.*

[381] *Id*.

[382] *Id.*

[383] *Id.* at 2. The Agency also dismissed the March 2010 incidents as untimely raised with the EEO counselor, noting Complainant's initial request for counseling was on July 22, 2010, more than 45 days from the latest March incident.

[384] *Id.*

he had been a woman marrying a man, CW1 would not have been upset or motivated to take action against him.[385] In its decision, the EEOC said that while the Agency was correct that Title VII's prohibition of discrimination does not cover sexual preference or orientation as a basis, that it does prohibit sex-stereotyping discrimination.[386] The EEOC reasoned that CW1 was motivated by the sexual stereotype that marrying a woman is an essential part of being a man, and became upset when Veretto did not adhere to this stereotype.[387] The EEOC reversed the dismissal decision of the Agency and remanded for further processing, noting that CW1's actions were motivated by is attitudes about stereotypical gender roles in marriage.[388]

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[385] *Id.* With regards to the timeliness issue, Veretto argued that he thought Agency management had taken the appropriate action to protect him from CW1 until he reappeared in the workplace on July 6. Veretto asserts that he initiated EEO counseling shortly thereafter, well within 45 days.

[386] *Id.* at 3. The EEOC has also made it clear that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the complainant can prove no set of facts in support of the claim which would entitle the complainant to relief.

[387] *Id.* at 3.

[388] *Id.* The EEOC also concluded that the Agency erred in dismissing the March incidents as untimely raised. The EEOC explained that a complainant alleging a hostile work environment will not be time barred if all acts constituting the claim are part of the same unlawful practice and at least one act falls within the filing period. In this case, the Agency's decision to return CW1 to the workplace and deny Verreto's request that he be transferred to another facility occurred in July 2010, well within the 45-day limitation period. Therefore, the EEOC determined that Verreto's entire claim, including the March 2010 incidents, was timely raised.

ii. *Castello v. United States Postal Service*[389]

Castello worked as a mail handler at the Agency's Processing and Distributing Center in New Orleans, Louisiana.[390] On December 28, 2010, Castello filed an EEO complaint alleging that the Agency subjected her to harassment when the Manager of the Distribution Operations stated, "Cece [Castello] gets more pussy than the men in the building."[391] The Agency determined that Castello was alleging harassment on the basis of sexual orientation and dismissed her complaint for failure to state a claim.[392] On appeal, the Commission affirmed the Agency's dismissal of Castello's complaint based on harassment due to his sexual orientation, but determined that Title VII does prohibit sex-stereotyping.[393] The EEOC said:

> We find that Complainant [Castello] has alleged a plausible sex stereotyping case which would entitle her to relief under Title VII if she were to prevail. Complainant alleged that she was subjected to a hostile work environment when [a supervisor] made an offensive and derogatory comment about her having relationships with women. Complainant has essentially argued that [the supervisor] was motivated by the sexual stereotype that having relationships with men is an essential part of being a woman, and made a negative comment based on Complainant's failure to adhere to this stereotype. In other words, Complainant alleged that [the

[389] Castello, 2011 WL 6960810.

[390] *Id*. at 1.

[391] *Id.*

[392] *Id.*

[393] *Id*. at 2.

supervisor's] comment was motivated by his attitudes about stereotypical gender roles in relationships.[394]

iii. Analysis of EEOC's decisions

While these two cases are not precedential and do not constitute the official policy of the agency, they could bring about a substantial change to the current legal system for lesbian and gay workers.[395] These two cases indicate that the EEOC intends to allow claims based on sexual orientation under a sex stereotyping theory under Title VII. In *Vereto v. Donahoe*, the Office of Federal Operations found that discrimination against a man for marrying another man was a valid sex stereotyping claim because it dealt with stereotypes about gender roles in marriage.[396] Similarly, in *Castello v. Donahoe*, the Office of Federal Operations found that discrimination against a woman for being attracted to other women was a valid stereotyping claim under Title VII.[397] The stereotype is that women should only be attracted to men and only have relationships with men.

These two opinions, while binding on the parties involved, do not have the precedential weight of actual Commission decisions and agencies are not required to

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[394] *Id*. at 2-3.

[395] Not all appeals of federal sector employment discrimination go before the full Commission, therefore, not all decisions have the same precedential and binding effect of the agencies. *See supra* note 217 (stating that only thirty to fifty cases actually go before the full Commission per year, and only these cases have precedential effect on future federal sector cases).

[396] Veretto, 2011 WL 2663401, at 3.

[397] Castello, 2011 WL 6960810, at 2-3.

adopt their interpretations of federal law.[398] The only truly binding authority comes from the thirty to fifty cases that actually make their way to the full Commission each year.[399] Both of these cases are signs that the full Commission may be ready to rule that discrimination against lesbian, gay and bisexual people is also properly understood as discrimination based on sex. However, the EEOC's treatment of sexual orientation is somewhat convoluted right now. There is already binding precedent from the Commission that "Title VII's prohibition of discrimination based on sex does not include sexual preference or sexual orientation."[400] Although the decisions in *Veretto* and *Castello* are contrary to binding precedent, they indicate the EEOC intends to allow Title VII claims based on sexual orientation under a sex stereotyping theory.[401] One of the EEOC Commissioner's during a training session indicated that agencies should begin to treat discrimination based on sexual orientation as cognizable under Title VII.[402] There is

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[398] *See supr*a note 217.

[399] *Id.*

[400] Johnson v. Frank, Appeal No. 01911827, 1991 WL 1189760, at 3 (EEOC Dec. 19, 1981); *see also* Morrison v. Dalton, Appeal No. 01930778, 1994 WL 74696, at 1 (EEOC June 16, 1994) (holding that harassment in the form of one coworker informing other coworkers that complainant was gay and had been observed kissing another man was not based on his sex, but rather his sexual orientation, and was therefore not impermissible discrimination "due to sex" under Title VII); *see also* Yost v. Runyon, Appeal Nos. 01965505 & 01965383, 1997 WL 655997, at 2 (EEOC Oct 2, 1997) (holding that discrimination based on sexual orientation was not prohibited by Title VII).

[401] *See supra* note 217 (stating *Castello* and *Veretto*, while not binding, reflect the EEOC's intention to find that discrimination on the basis of sexual orientation is impermissible discrimination "based on sex" under Title VII).

[402] *See id.* (showing EEOC Commissioner Chai Feldblum advising an agency EEO employee that, although there were no binding precedent on the subject, she expects to see cases applying *Macy* to sexual orientation in the future, and so it would be smart for

still no official guidance of binding precedent from the EEOC to clear up this point, but this is, without a doubt, the right road to follow. Most EEOC decisions are treated as indications of what will constitute "good practice" in the future, and these decisions should be treated the same.[403] The EEOC should issue official guidance to the agencies that discrimination based on sexual orientation is impermissible sex discrimination under Title VII.

d. What Next?

Why does there need to be new legislation to protect one's sexual orientation from discrimination at the workplace? Job performance should determine whether you get hired, fired or promoted—not your sexual preference. The issue of workplace discrimination should be important to every American. In terms of economic security, discrimination contributes to job instability, employee turnover, and unemployment, which eventually affect us all.

How can discrimination "because of sex" not include discrimination based on sexual orientation? Isn't sexual orientation discrimination based on stereotypes about how men and women "should" behave? About who is the right partner for a person of a certain sex? Doesn't the sexual orientation harassment usually take place because the employee failed to satisfy expectations of masculinity or femininity? However, given the existence of federal precedent refusing to extend Title VII to discrimination based on

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agencies to treat discrimination based on sexual orientation as "because of sex" under Title VII).

[403] *See id.*

sexual orientation,[404] the EEOC needs to put out official guidance and issue a binding decision that LGBT people are covered under Title VII. Rather than attempting to wring meaning from sparse verbiage of Title VII's legislative history, or lack thereof, it may be more useful to supplement Title VII with EEOC guidelines to determine whether sexual orientation is protected under Title VII.

A second option would be to pass the Employment Non-Discrimination Act. Congress has had the courage and vision to enact laws that ban discrimination based on other protected classes—now, with ENDA, we have the opportunity to expand the law a little further. With ENDA, we can ensure that everyone can enter and succeed in the workplace without regard to sexual orientation and gender identity. More than likely, EDNA will not pass in the current 113th Congress, so EDNA's sponsors will need change the religious exemption language in the current draft of the law.[405] The language provides religiously affiliated groups, including hospitals and universities, with more leeway to discriminate than is customary in civil rights legislations.[406] If that language is amended, maybe there is a chance it may pass with the next Congressional session.

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[404] *See, e.g.,* Vickers, 435 F.3d at 764-65 (holding that discrimination on the basis of sexual orientation cannot be found to be because of sex under a sex stereotyping theory); Dawson, 398 F.3d at 217-18 (distinguishing between sex stereotypes and stereotypes based on sexual orientation to find no Title VII discrimination); DeSantis, 608 F.2d at 331 (holding that discrimination against a man for being attracted to another man is not impermissible under Title VII because it treats men and women equally).

[405] *See* discussion *supra* Part IV.

[406] *See* discussion *supra* Part IV.

In addition to the religious exemption language, Speaker of the House, John Boehner's concern is that signing EDNA would bring about frivolous lawsuits.[407] His argument is not supported. The GAO collected the number of complaints filed in states that prohibit sexual orientation discrimination and found relatively few employment discrimination complaints based on sexual orientation and gender identity.[408] The need for protection against employment discrimination is real and there is no indication that a flood of litigation will ensue.[409]

People may wonder whether we still need ENDA in light of the various state and local laws that provide protection from employment discrimination. The answer is YES, ENDA is still needed. As a federal law, it would add strength to the recent rulings holding that Title VII protects transgender employees,[410] it would educate employers and the community about these rights, and it would make it clear that gender-conforming gay,

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[407] *See supra* note 272.

[408] *See supra* note 234. Data is from 2007 through 2012. *See also* NEW STUDY SHOWS RATES OF EMPLOYMENT DISCRIMINATION AGAINST LGB EMPLOYEES SIMILAR IN PUBLIC AND PRIVATE SECTIONS, http://williamsinstitute.law.ucla.edu/headlines/new-study-shows-rates-of-employment-discrimination-against-lgb-employees-similar-in-public-and-private-sectors/ (last visited May 10, 2014). The study found that sexual orientation complaint filings are slightly lower for employees in the public sector when compared to the private sector. The filing rate for state and local employees is 3 for every 10,000 LGB employees compared to 4 for every 10,000 LGB employees in the private sector. There is not enough data to do a similar analysis of gender identity discrimination complaints and federal employees are not covered by these state anti-discrimination statutes.

[409] *Id.* The Williams Institute report also confirmed that employment discrimination filings on the basis of sexual orientation, race and sex are similar. When looking at all sectors, 4 race discrimination complaints were filed for every 10,000 people of color employees, 4 sexual orientation complaints for every 10,000 LGB employees and 5 sex discrimination complaints for every 10,000 female employees.

[410] *See* discussion *supra* Part III(c).

lesbian and bisexual persons are also protected. If a federal law like ENDA is not passed, it is possible that the U.S. Supreme Court could reverse the federal courts holding that transgender employees are protected by Title VII, and reverse the progress of the LGBT community that has been created by the lower courts.[411]

What other steps can be taken… the President of the United States can take a significant step toward combating discrimination against our country's LGBT workers. The President can issue an executive order that prohibits federal contractors from discriminating at all levels of employment based on sexual orientation and gender identity. Specifically, the president can either issue a separate executive order or amend a current executive order to prohibit federal contractors from discriminating in employment on the basis of sexual orientation and gender identity. Past presidents, from both political parties, have used their power as the chief executive to prohibit companies doing business with the federal government from discriminating against employees based on certain non-work related characteristics.[412] For example, Title VII was built upon executive orders signed by Presidents Franklin D. Roosevelt and Dwight D. Eisenhower.[413] Currently, Executive Order 11246 prohibits federal contractors from discriminating on the basis of race, color, religion, sex, or national origin.[414] However, no existing policy explicitly

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[411] *See* discussion *supra* Part III(c).

[412] OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS. HISTORY OF EXECUTIVE ORDER 11246 (U.S. Department of Labor), http://www.dol.gov/ofccp/about/History_EO11246.htm (last visited February 2014).

[413] *Id.*

[414] OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, THE EXECUTIVE ORDER 11246 (U.S. Department of Labor), available at http://www.dol.gov/compliance/laws/comp-eeo.htm (last visited February 2014)

prohibits these businesses from discriminating against employees based on their sexual orientation or gender identity.

In President Obama's most recent State of the Union address, he mentioned various executive orders he would be willing to sign, in the absence of congressional action—but he failed to mention signing any executive order to prohibit discrimination by federal contractors on the basis of sexual orientation and gender identity.[415] Some gay rights advocates believe that President Obama's declining to sign the executive order means he is "actively choosing to permit discrimination against LGBT workers."[416] If the President amended the current Executive Order 11246 to include nondiscrimination policies based on sexual orientation and gender identity that would provide major protection to a large number of LGBT Americans.[417] Currently, federal contractors legally bound to comply with Executive Order 11246 employ 22 percent of all U.S. civilian workers (or approximately 28 million individuals).[418] The President has the authority and should use that authority to issue such an order, guaranteeing protection to millions of LGBT employees.

Finally, the United States Supreme Court can hand down a decision that interprets the "sex" provision within Title VII to encompass all gay, lesbian and transgender

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[415] Julie Pace, *Obama executive omissions leave some allies angry,* GET EQUAL (January 29, 2014) http://www.chron.com/news/politics/article/Obama-executive-omissions-leave-some-allies-angry-5185969.php

[416] *Id.*

[417] *See infra* note 415.

[418] OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, FACTS ON EXECUTIVE ORDER 11246 — AFFIRMATIVE ACTION (U.S. Department of Labor), available at http://www.dol.gov/ofccp/regs/ compliance/aa.htm (last accessed February 2014).

discrimination cases The EEOC's ruling in *Macy v. Holder* has figured out what the Supreme Court, Congress and the President have not been able to. Simply put, if employers are faced with an EEOC investigation that is actually taken seriously by an agency that views discrimination against transgender people as illegal, they are far more likely to mediate, give people their jobs back and stop harassment that is occurring on the job. The EEOC has helped to change the workplace environment, however in order to protect LGBT people across the country, laws and policies plainly protecting LGBT people are still necessary. Until the Supreme Court rules, other courts may give the ruling significant respect, but it is not guaranteed that the Supreme Court will agree with the EEOC.

Rather than waiting for the Supreme Court to provide an affirmation that Title VII protects not only transgender people, but lesbian, gay and bisexual people as well, we need Congress to enact specific protections into federal law. This is the most secure means of providing protection. Additionally, while the *Macy v. Holder* ruling is very important for the LGBT community, it does not answer a lot of questions that are often answered by laws and their interpretive regulations and guidance. Such questions as those relating to dress codes and what constitutes harassment sex-segregated facilities. A federal law is likely to answer these type of questions. While the *Macy* decision is ground-breaking, and provides avenues for relief for the LGBT community, efforts to pass laws and policies a the local, state and federal levels must continue in full force. The simple fact is that the *Macy* ruling will never have the full force like the language of a statute has. We must use all legal and policy tools in an attempt to end this discrimination once and for all. Strong, clear laws and policies that cover both sexual

orientation and gender identity are amongst the strongest tools that may be utilized to stop this discrimination.

VI. CONCLUSION

Today, in the land of the free and home of the brave, there is still no piece of federal legislation that protects citizens from being fired or denied job opportunities based solely on who they are and who they love. No American should be deprived of the opportunity to work merely because of his/her sexual orientation or gender identity. Likewise, it is wrong to deny employment to individuals who can perform the job, just because of their sexual orientation. "All men are created equal" is what this country was founded on and every American should be allowed an equal opportunity to earn a living and provide for their family.

Although Title VII does not specifically prohibit discrimination based on sexual orientation or gender identity, some of the cases discussed throughout this thesis indicates that courts are giving sex discrimination a broader application than has previously existed. Congress has not made any changes in the language of the law; however, courts are now showing an increased willingness to afford protection from discrimination based on sexual orientation and gender identity. The workplace is changing, as is the law, and each drive the other. We do not know where the trend of gender identity claims will go, but employers should make their employment decisions based upon valid business factors and legitimate reasoning and not base upon biases and stereotypes.

Passing employment discrimination laws that protect LGBT citizens in *every* state across this great nation is something that is long overdue. Regardless of whether it's

through Title VII's current language or through new legislation, employers should be aware that the federal trend appears to be in favor of protecting sexual orientation and gender identity in the workplace. Many companies, including some of our nation's most profitable, already have employment nondiscrimination policies like this in place.[419] Furthermore, with public opinion easing on issues like same-sex marriage, prohibitions on workplace discrimination involving sexual orientation and gender identity seem poised to follow. There is no uncertainty about what our next step needs to be, and we cannot afford to be apathetic in a common-sense fight for human rights.

[419] The Williams Institute, *New Study Finds 50% Increase in Number of Top Federal Contractors with Gender Identity Non-Discrimination Policies since 2011* (April 29, 2013) http://williamsinstitute.law.ucla.edu/?p=13586 (last visited May 21, 2014) (Stating that over ninety percent of the country's largest companies now prohibit discrimination based on sexual orientation and nearly 80% prohibit discrimination based on gender identity, according to a new study from UCLA's Williams Institute).