



**Sexual Orientation  
and Gender  
Identity Employment  
Discrimination**

**Matthew W. Green Jr**



# Sexual Orientation and Gender Identity Employment Discrimination

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## **About the Author**

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# I. Introduction

This Chapter will address the current protections that are available to lesbian, gay, bisexual and transgender (“LGBT”) individuals who allege they have been victims of employment discrimination.<sup>1</sup> The Chapter’s primary focus will be on federal statutory law, particularly Title VII of the Civil Rights Act of 1964 (“Title VII”). Although the focus here is on federal law, Appendix I to this Chapter lists the states that protect individuals from public and/or private discrimination under state laws.

LGBT employees have argued with mixed results in the courts that discrimination against an individual because of sexual orientation, gender identity or gender expression is also “discrimination because of sex” prohibited by Title VII. As a result, it is necessary to understand what it means under Title VII to discriminate “because of sex,” and how that meaning has evolved. Cases relevant to the issue are included herein. In that regard, while one goal of this Chapter is to serve as a stand-alone resource for anyone interested in this area of the law, the Chapter is intended primarily to be used as an additional resource in an Employment Discrimination or related civil-rights course. The Chapter or parts of it (including the Problems that are scattered throughout) may be used or adapted to supplement other classroom material. It is both assumed and likely that as you review materials contained in this Chapter, you already will have covered certain topics earlier in your course. These topics might include, for instance, burden of proof schemes commonly used to analyze employment discrimination claims, as well as cases discussing “discrimination because of sex,” including sexual harassment, and discrimination because of religion. Although the Chapter includes cases addressing such issues as sex discrimination, some of those cases have been liberally edited. You may of course skip over any case with which you are already familiar (and about which you need no refresher) and only review the Notes, Questions and Problems that may follow.

This Chapter is divided into four parts. Part I provides a brief overview of congressional efforts to enact a statute to protect individuals from employment discrimination on the basis of sexual orientation and gender identity. Part II discusses Title VII and sexual orientation. It first examines why early courts tended to reject arguments that the statute protects individuals on that basis. It then discusses subsequent Supreme Court decisions pertaining to sex discrimination that have resulted in some courts rethinking earlier positions on both sexual orientation and gender identity. Finally, Part III discusses ways in which recent courts have handled sexual orientation discrimination under Title VII. Part IV similarly examines early judicial treatment of claims

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<sup>1</sup> Although this Chapter uses the acronym “LGBT,” advocacy groups and others may also use the acronym LGBTQ. The “Q” often stands for “Queer” or “Questioning.” See e.g., Human Rights Campaign, Glossary of Terms, <http://www.hrc.org/resources/glossary-of-terms>; Lori Grisham, *What Does the Q in LGBT Q Stand for*, USA Today, <https://www.usatoday.com/story/news/nation-now/2015/06/01/lgbtq-questioning-queer-meaning/26925563/>.

brought by individuals alleging discrimination on the basis of their gender identity and/or expression and explores how the law has developed in this area as well.

## II. A Federal Statute Protecting LGBT Employees

In 1974, New York Representative Bella Abzug introduced the Equality Act, which, had it been enacted, would have amended several antidiscrimination statutes, including Title VII, to protect individuals from discrimination on the basis of sexual orientation among other traits. The bill never made it out of committee. *See* Lisa Bornstein & Megan Bench, *Married on a Sunday, Fired on a Monday: Approaches to Federal LGBT Civil Rights Protections*, 22 Wm. & Mary J. Women & L. 31, 47-48 (2015). Over the next two decades, numerous bills were proposed to amend the civil rights statutes to prohibit discrimination on the basis of sexual orientation, but none made it beyond committee either. *See id.*

In 1994, the Employment Non-Discrimination Act (“ENDA”) was introduced in both houses of Congress to protect individuals on the basis of sexual orientation. Rather than to amend existing civil rights laws, ENDA was a stand-alone measure that would have protected individuals against only employment discrimination. According to Chai Feldblum, who serves as an EEOC Commissioner and who drafted the initial version of ENDA, the decision to make the bill a stand-alone that focused exclusively on the workplace was largely prompted by the political realities facing the LGBT community during that period. Chai R. Feldblum, *The Federal Gay Rights Bill: From Bella to ENDA*, in *Creating Change: Sexuality, Public Policy, and Civil Rights 201-02* (John D’Emilio et al. eds., 2000). For instance, Feldblum explains that ENDA was born around the time that President Bill Clinton and gay rights advocates had lost the battle to end the ban on gays in the military. That defeat, which resulted in the now defunct Act known as “Don’t Ask, Don’t Tell,” squelched momentum and “weakened the perceived political power” of gay rights organizations. *Id.* Against that backdrop, the decision to focus only on employment was considered a more feasible goal than to try for a more comprehensive bill. Moreover, other civil rights communities were concerned that opening Title VII to amendments would risk also opening it up to “unfriendly changes.” *See id.* Accordingly, a stand-alone measure, similar to the then recently enacted Americans with Disabilities Act, was favored in lieu of amending existing laws. *See id.*

Although ENDA originally only protected individuals from discrimination because of sexual orientation, a transgender-inclusive ENDA was introduced in the 110<sup>th</sup> Congress in 2006. Controversy stirred regarding the addition and it was taken out before the House voted on the measure. A sexual-orientation only version of ENDA passed in the House in 2007, but not in the Senate. Subsequent versions of ENDA again included transgender protections, but the measure still failed to pass both Houses of Congress at the same time. After the doomed attempt in 2007, ENDA passed the Senate in 2013 but failed to get a vote in the Republican-controlled House. *See generally*, Note, William S. Sung, *Taking the Fight Back to Title VII: A Case for Redefining “Because of Sex” to Include Gender Stereotypes, Sexual Orientation, and Gender Identity*, 84 S.



Cal. L. Rev. 487, 495-498, 501-506 (2011) (detailing early attempts to enact the Equality Act and ENDA).

In 2015, Congress and LGBT-rights advocates abandoned ENDA, and in its place, the Equality Act of 2015 was introduced in both houses of Congress. *See* <https://www.congress.gov/bill/114th-congress/house-bill/3185>. Similar to the earlier version of the Equality Act introduced by Representative Abzug decades prior, the Equality Act of 2015 would have amended existing Civil Rights laws, but this time to protect individuals, among other things, from discrimination on the basis of sexual orientation *and* gender identity. *See id.*

One reason that advocates abandoned ENDA was because of its broad religious exemption, which arguably placed all religiously affiliated non-profit organizations beyond the measure's reach. *See* S.815, 113<sup>th</sup> Cong, § 6 (Exemption For Religious Institution) (2013); H.R. 1755, 113<sup>th</sup> Cong., § (same), <https://www.congress.gov/bill/113th-congress/senate-bill/815/text>; *see also* Ed O'Keefe, *Gay Rights Groups Withdraw Support of ENDA After Hobby Lobby Decision*, 9 (The Washington Post, July 8, 2014, available at [https://www.washingtonpost.com/news/post-politics/wp/2014/07/08/gay-rights-group-withdrawing-support-of-enda-after-hobby-lobby-decision/?utm\\_term=.c04a1f34a92e](https://www.washingtonpost.com/news/post-politics/wp/2014/07/08/gay-rights-group-withdrawing-support-of-enda-after-hobby-lobby-decision/?utm_term=.c04a1f34a92e)). In other words, most religiously-affiliated organizations would have been exempted from ENDA's non-discrimination proscriptions. ENDA differed from Title VII in that regard. Title VII only permits religious institutions to discriminate against individuals on the basis of religion but not on the basis of other protected traits enumerated in the statute. *See* 42 U.S.C. §§ 2000e-1(a), 2000e-2(h)(2). Accordingly, Title VII's religious provisions, for example, would not permit a religious institution to discriminate against individuals on the basis of race or national origin. ENDA, however, would have permitted such entities to discriminate on the basis of sexual orientation.

In 2014, the U.S. Supreme Court decided *Hobby Lobby*, which permitted closely-held for-profit corporations to claim exemption under the Religious Freedom Restoration Act ("RFRA") from federal laws that burdened the religious rights of the corporations' owners. *See Burwell v. Hobby Lobby*, 134 S.Ct. 2751 (2014). Advocates grew concerned that ENDA's already broad religious exemptions coupled with the rights *Hobby Lobby* extended to for-profit organizations promised to swallow whole the anti-discrimination protections ENDA purported to provide. *See* O'Keefe, *supra*. The concern was not without merit. In a suit brought by the EEOC, a federal district court held that although Title VII was violated when an employer fired a male-to-female transgender employee who wanted to dress in accord with her gender identity, RFRA operated as a complete defense to any violation of the employee's statutory rights. *See EEOC v. R.G. & G.R. Funeral Homes, Inc.*, 201 F. Supp.3d 837 (E.D. Mich. 2016). That decision is currently pending appeal. *See EEOC v. R.G. & G.R. Funeral Homes, Inc.*, No. 16-2424 (6<sup>th</sup> Cir., filed Oct. 13, 2016).

Unlike ENDA, the Equality Act expressly provided that RFRA "shall not provide a claim . . . defense . . . or [other] . . . basis for challenging the application or enforcement of [Title VII]." S. 1858, 114<sup>th</sup> Cong. § 1107.Claims (2015); H.R. 3185, 114<sup>th</sup> Cong. § 1107.Claims (2015), <https://www.congress.gov/bill/114th-congress/house-bill/3185/text>. The Equality Act was re-introduced in the 115<sup>th</sup> Congress in May 2017. *See* Dems Re-Introducing LGBT Rights Bill, The

Advocate (May 1, 2017), <http://www.advocate.com/politics/2017/5/01/dems-re-introducing-lgbt-rights-bill>. That measure will face an uphill battle in the current Congress. *See id.* Moreover, until it or similar legislation is enacted, then at least at the federal level, LGBT employees will have to continue to rely on Title VII to fill the gap in statutory protection against employment discrimination.

...

Plaintiffs have long argued that Title VII's prohibition against sex discrimination also bars discrimination on the basis of sexual orientation and gender identity. You may already be familiar with Title VII's legislative history as it pertains to "sex." It bears briefly repeating here. It is not clear what Congress had in mind when it included "sex" as a trait protected by Title VII. The legislative history is sparse. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 63-64 (1986) (noting that there is "little legislative history to guide us in interpreting the Act's prohibition against discrimination based on "sex"). "Sex" was not originally included among the traits protected by Title VII. It was added on the floor of the House by Representative Howard Smith, a Virginia congressman, who opposed Title VII, one day before the House voted on the bill. *See id.* It is commonly understood that the amendment to add "sex" was intended as a poison pill. *See generally* Bornstein & Bench, *supra* at 35-36. During the debate over the sex amendment, neither sexual orientation nor gender identity was ever mentioned. *See e.g.*, I. Bennett Capers, *Sex(ual Orientation) and Title VII*, 91 Colum. L. Rev. 1158, 1168 (1991) ("Nothing in the legislative history suggests that Congress considered whether the word "sex" encompassed sexuality or sexual practices"); *see also* *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662-63 (9<sup>th</sup> Cir. 1977) *overruled by* *Schwenck v. Hartford*, 204 F.3d 1197, 1201-02 (9<sup>th</sup> Cir. 2000) (concluding that Title VII's legislative history demonstrates that Congress did not intend to include "transsexuals" within the prohibition of discrimination "because of sex").

Does the failure of members of Congress to utter the words sexual orientation, transgender or gender identity necessarily mean that those traits fall outside the scope of Title VII's prohibition of "discrimination because of sex?" Early courts universally answered that question in the affirmative. More recently, some courts and the EEOC have determined that the statute does indeed protect individuals from discrimination on these bases although that position is far from being uniform among the courts. It is fair to say that the law in this area is evolving. The following materials explore the murky legal landscape.

### III. Title VII and Sexual Orientation

#### A. Early Judicial Perspectives

*DeSantis v. Pacific Tel. Co., Inc.*  
608 F.2d 327 (9<sup>th</sup> 1978).

CHOY, Circuit Judge:

Male and female homosexuals brought three separate federal district court actions claiming that their employers or former employers discriminated against them in employment decisions because of their homosexuality. They alleged that such discrimination violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and 42 U.S.C. §1985(3). The district courts dismissed the complaints as failing to state claims under either statute. Plaintiffs below appealed. Because of the similarity of issues involved, this court consolidated the appeals at the request of counsel for appellants. We affirm.

##### I. Statement of the Case

###### A. *Strailey v. Happy Times Nursery School, Inc.*

Appellant *Strailey*, a male, was fired by the Happy Times Nursery School after two years' service as a teacher. He alleged that he was fired because he wore a small gold ear-loop to school prior to the commencement of the school year. He filed a charge with the Equal Employment Opportunity Commission (EEOC) which the EEOC rejected because of an alleged lack of jurisdiction over claims of discrimination based on sexual orientation. He then filed suit on behalf of himself and all others similarly situated, seeking declaratory, injunctive, and monetary relief. The district court dismissed the complaint as failing to state a claim under either Title VII or § 1985(3).

###### B. *DeSantis v. Pacific Telephone & Telegraph Co.*

*DeSantis*, *Boyle*, and *Simard*, all males, claimed that Pacific Telephone & Telegraph Co. (PT&T) impermissibly discriminated against them because of their homosexuality. *DeSantis* alleged that he was not hired when a PT&T supervisor concluded that he was a homosexual. According to appellants' brief, "BOYLE was continually harassed by his co-workers and had to quit to preserve his health after only three months because his supervisors did nothing to alleviate this condition." Finally, "SIMARD was forced to quit under similar conditions after almost four years of employment with PT&T, but he was harassed by his supervisors (as well). . . . In addition, his personnel file has been marked as not eligible for rehire, and his applications for employment were rejected by PT&T in 1974 and 1976." Appellants *DeSantis*, *Boyle*, and *Simard* also alleged that PT&T officials have publicly stated that they would not hire homosexuals.

These plaintiffs also filed charges with the EEOC, also rejected by the EEOC for lack of jurisdiction. They then filed suit on behalf of themselves and all others similarly situated seeking

declaratory, injunctive, and monetary relief under Title VII. . . . They also prayed that the district court issue mandamus commanding the EEOC to process charges based on sexual orientation. The district court dismissed their complaint. It held that the court lacked jurisdiction to compel the EEOC to alter its interpretation of Title VII. It also held that appellants had not stated viable claims under . . . Title VII. . . .

### C. Lundin v. Pacific Telephone & Telegraph

Lundin and Buckley, both females, were operators with PT&T. They filed suit in federal court alleging that PT&T discriminated against them because of their known lesbian relationship and eventually fired them. They also alleged that they endured numerous insults by PT&T employees because of their relationship. Finally, Lundin alleged that the union that represented her as a PT&T operator failed adequately to represent her interests and failed adequately to present her grievance regarding her treatment. Appellants sought monetary and injunctive relief. The district court dismissed their suit as not stating a claim upon which relief could be granted. . . .

## II. Title VII Claim

Appellants argue first that the district courts erred in holding that Title VII does not prohibit discrimination on the basis of sexual preference. They claim that in prohibiting certain employment discrimination on the basis of “sex,” Congress meant to include discrimination on the basis of sexual orientation. They add that in a trial they could establish that discrimination against homosexuals disproportionately effects [sic] men and that this disproportionate impact and correlation between discrimination on the basis of sexual preference and discrimination on the basis of “sex” requires that sexual preference be considered a subcategory of the “sex” category of Title VII. . . .

### A. Congressional Intent in Prohibiting “Sex” Discrimination

In *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977), plaintiff argued that her employer had discriminated against her because she was undergoing a sex transformation and that this discrimination violated Title VII’s prohibition on sex discrimination. This court rejected that claim, writing: The cases interpreting Title VII sex discrimination provisions agree that they were intended to place women on an equal footing with men. (Citations omitted.)

Giving the statute its plain meaning, this court concludes that Congress had only the traditional notions of “sex” in mind. Later legislative activity makes this narrow definition even more evident. Several bills have been introduced to amend the Civil Rights Act to prohibit discrimination against “sexual preference.” None have [sic] been enacted into law.

Congress has not shown any intent other than to restrict the term “sex” to its traditional meaning. Therefore, this court will not expand Title VII’s application in the absence of Congressional mandate. The manifest purpose of Title VII’s prohibition against sex discrimination in employment is to ensure that men and women are treated equally, absent a bona fide relationship between the qualifications for the job and the person’s sex. . . .

Following *Holloway*, we conclude that Title VII's prohibition of "sex" discrimination applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference such as homosexuality. . . .

## B. Disproportionate Impact

Appellants argue that recent decisions dealing with disproportionate impact require that discrimination against homosexuals fall within the purview of Title VII. They contend that these recent decisions, like *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), establish that any employment criterion that affects one sex more than the other violates Title VII. They quote from *Griggs*:

What is required by Congress (under Title VII) is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications.

401 U.S. at 431. They claim that in a trial they could prove that discrimination against homosexuals disproportionately affects men both because of the greater incidence of homosexuality in the male population and because of the greater likelihood of an employer's discovering male homosexuals compared to female homosexuals.

Assuming that appellants can otherwise satisfy the requirement of *Griggs*, we do not believe that *Griggs* can be applied to extend Title VII protection to homosexuals. In finding that the disproportionate impact of educational tests on blacks violated Title VII, the Supreme Court in *Griggs* sought to effectuate a major congressional purpose in enacting Title VII: protection of blacks from employment discrimination. For as the Supreme Court noted in *Philbrook v. Goldgett*, 421 U.S. 707 (1975), in construing a statute, "(o)ur objective . . . is to ascertain the congressional intent and give effect to the legislative will." *Id.* at 713.

The *Holloway* court noted that in passing Title VII Congress did not intend to protect sexual orientation and has repeatedly refused to extend such protection. . . . Appellants now ask us to employ the disproportionate impact decisions as an artifice to "bootstrap" Title VII protection for homosexuals under the guise of protecting men generally.

This we are not free to do. Adoption of this bootstrap device would frustrate congressional objectives as explicated in *Holloway*, not effectuate congressional goals as in *Griggs*. It would achieve by judicial "construction" what Congress did not do and has consistently refused to do on many occasions. It would violate the rule that our duty in construing a statute is to "ascertain . . . and give effect to the legislative will." *Philbrook*, 421 U.S. at 713. We conclude that the *Griggs* disproportionate impact theory may not be applied to extend Title VII protection to homosexuals.

## C. Differences in Employment Criteria

Appellants next contend that recent decisions have held that an employer generally may not use different employment criteria for men and women. They claim that if a male employee prefers males as sexual partners, he will be treated differently from a female who prefers male partners. They conclude that the employer thus uses different employment criteria for men and women and violates the Supreme Court's warning in *Phillips v. Martin-Marietta Corp.*, 400 U.S. 542 (1971):

The Court of Appeals therefore erred in reading this section as permitting one hiring policy for women and another for men . . . .

*Id.* at 544.

We must again reject appellants' efforts to "bootstrap" Title VII protection for homosexuals. While we do not express approval of an employment policy that differentiates according to sexual preference, we note 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. Thus this policy does not involve different decisional criteria for the sexes.

#### D. Interference with Association

Appellants argue that the EEOC has held that discrimination against an employee because of the race of the employee's friends may constitute discrimination based on race in violation of Title VII. . . . They contend that analogously discrimination because of the sex of the employees' sexual partner should constitute discrimination based on sex.

Appellants, however, have not alleged that appellees have policies of discriminating against employees because of the gender of their friends. That is, they do not claim that the appellees will terminate anyone with a male (or female) friend. They claim instead that the appellees discriminate against employees who have a certain type of relationship i.e., homosexual relationship with certain friends. As noted earlier, that relationship is not protected by Title VII. . . . Thus, assuming that it would violate Title VII for an employer to discriminate against employees because of the gender of their friends, appellants' claims do not fall within this purported rule.

#### E. Effeminacy

Appellant Strailey contends that he was terminated by the Happy Times Nursery School because that school felt that it was inappropriate for a male teacher to wear an earring to school. He claims that the school's reliance on a stereotype that a male should have a virile rather than an effeminate appearance violates Title VII.

In *Holloway* this court noted that Congress intended Title VII's ban on sex discrimination in employment to prevent discrimination because of gender, not because of sexual orientation or preference. . . . Recently the Fifth Circuit similarly read the legislative history of Title VII and concluded that Title VII thus does not protect against discrimination because of effeminacy. *Smith v. Liberty Mutual Insurance Co.*, 569 F.2d at 326-27. We agree and hold that discrimination because of effeminacy, like discrimination because of homosexuality . . . or transsexualism (*Holloway*), does not fall within the purview of Title VII.

#### E. Conclusion as to Title VII Claim

Having determined that appellants' allegations do not implicate Title VII's prohibition on sex discrimination, we affirm the district court's dismissals of the Title VII claims.

AFFIRMED.

#### Notes and Questions

1. **Discrimination "because of sex":** According to the Ninth Circuit, what did Congress intend by including the word "sex" in Title VII?
2. **Associational Discrimination:** The court rejected the plaintiffs' argument that their employers engaged in associational discrimination. Why does the court reject that argument? As the court explains (and as discussed in cases set forth later in this chapter), courts have accepted such claims in the context of race. Consider the following Problem:

#### Problem 1

Lori, a white female sales associate at Go-Mart, had received glowing employment evaluations for the six years she had worked for the company. Her supervisors throughout the years had often told Lori that she was destined for management. In year seven of her employment, Lori began dating Mark Johnson, a black male, who visited her one day at work. Several of Lori's coworkers saw Mark and Lori kiss during his visit, and informed management. Go-Mart managers decided to set up an "intervention" whereby they cornered Lori in the break room and told her that while she had real promise, her "particular type of relationship" would hurt her chances to become a manager. Lori responded that her personal business was her own and her relationship did not affect her job performance. The next few weeks were sheer havoc for Lori. Her every move was scrutinized and she was written up for small matters, such as not fastening the top button on her smock despite the absence of any such formal rule in Go-Mart's policy manual. A week later, Go-Mart's store manager fired her allegedly for being impolite to customers. Lori contends that the real reason for her discharge was because of her relationship with Mark.

Lori brings a Title VII race discrimination claim against Go-Mart. The company defends against Lori's claim by arguing that it did not fire Lori because of her race; it did so because of her relationship. Please analyze Lori's claim under Title VII.

Assume that instead of dating Mark, Lori was dating Theresa, and the relationship yielded the same response from Lori's employers. In light of *DeSantis*, would the outcome differ? Should it? What if instead of race or sex, religion was the issue? Assume that Lori, her co-workers and managers are Episcopalians and feel strongly that Episcopalians should date their own kind. Mark is Jewish. Different result from the scenario involving race or sex?

## **B. The Evolving Meaning of “Discrimination Because of Sex”**

Two Supreme Court decisions, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) and *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998) are often considered as having expanded the scope of Title VII's prohibition of “discrimination because of sex.” They undoubtedly have had a profound effect on the way courts have handled Title VII claims brought by LGBT employees alleging discrimination because of their sex, sexual orientation, gender identity or gender expression. Both cases are discussed below.

### **1. Gender Nonconformity**

The court in *DeSantis* rejected the argument by one of the plaintiffs that Title VII had been violated when his employer discriminated against him based on his effeminacy. According to the court “effeminacy, like discrimination because of homosexuality . . . or transsexualism . . . does not fall within the purview of Title VII.” Revisit the court's holding in that regard after reading the following case.



***Price Waterhouse v. Ann B. Hopkins***  
**490 U.S. 228 (1989).**

**Opinion**

Justice BRENNAN announced the judgment of the Court and delivered an opinion, in which Justice MARSHALL, Justice BLACKMUN, and Justice STEVENS join.

Ann Hopkins was a senior manager in an office of Price Waterhouse when she was proposed for partnership in 1982. She was neither offered nor denied admission to the partnership; instead, her candidacy was held for reconsideration the following year. When the partners in her office later refused to repropose her for partnership, she sued Price Waterhouse under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.*, charging that the firm had discriminated against her on the basis of sex in its decisions regarding partnership. Judge Gesell in the Federal District Court for the District of Columbia ruled in her favor on the question of liability, 618 F. Supp. 1109 (1985), and the Court of Appeals for the District of Columbia Circuit affirmed. 263 U.S.App.D.C. 321, 825 F.2d 458 (1987). We granted certiorari to resolve a conflict among the Courts of Appeals concerning the respective burdens of proof of a defendant and plaintiff in a suit under Title VII when it has been shown that an employment decision resulted from a mixture of legitimate and illegitimate motives. 485 U.S. 933, 108 S.Ct. 1106, 99 L.Ed.2d 268 (1988).

**I**

At Price Waterhouse, a nationwide professional accounting partnership, a senior manager becomes a candidate for partnership when the partners in her local office submit her name as a candidate. All of the other partners in the firm are then invited to submit written comments on each candidate—either on a “long” or a “short” form, depending on the partner’s degree of exposure to the candidate. Not every partner in the firm submits comments on every candidate. After reviewing the comments and interviewing the partners who submitted them, the firm’s Admissions Committee makes a recommendation to the Policy Board. This recommendation will be either that the firm accept the candidate for partnership, put her application on “hold,” or deny her the promotion outright. The Policy Board then decides whether to submit the candidate’s name to the entire partnership for a vote, to “hold” her candidacy, or to reject her. The recommendation of the Admissions Committee, and the decision of the Policy Board, are not controlled by fixed guidelines: a certain number of positive comments from partners will not guarantee a candidate’s admission to the partnership, nor will a specific quantity of negative comments necessarily defeat her application. Price Waterhouse places no limit on the number of persons whom it will admit to the partnership in any given year.

Ann Hopkins had worked at Price Waterhouse’s Office of Government Services in Washington, D.C., for five years when the partners in that office proposed her as a candidate for partnership.

Of the 662 partners at the firm at that time, 7 were women. Of the 88 persons proposed for partnership that year, only 1—Hopkins—was a woman. Forty-seven of these candidates were admitted to the partnership, 21 were rejected, and 20—including Hopkins—were “held” for reconsideration the following year. Thirteen of the 32 partners who had submitted comments on Hopkins supported her bid for partnership. Three partners recommended that her candidacy be placed on hold, eight stated that they did not have an informed opinion about her, and eight recommended that she be denied partnership.

In a jointly prepared statement supporting her candidacy, the partners in Hopkins’ office showcased her successful 2-year effort to secure a \$25 million contract with the Department of State, labeling it “an outstanding performance” and one that Hopkins carried out “virtually at the partner level.” Plaintiff’s Exh. 15. Despite Price Waterhouse’s attempt at trial to minimize her contribution to this project, Judge Gesell specifically found that Hopkins had “played a key role in Price Waterhouse’s successful effort to win a multi-million dollar contract with the Department of State.” 618 F. Supp., at 1112. Indeed, he went on, “[n]one of the other partnership candidates at Price Waterhouse that year had a comparable record in terms of successfully securing major contracts for the partnership.” *Ibid.*

The partners in Hopkins’ office praised her character as well as her accomplishments, describing her in their joint statement as “an outstanding professional” who had a “deft touch,” a “strong character, independence and integrity.” Plaintiff’s Exh. 15. Clients appear to have agreed with these assessments. At trial, one official from the State Department described her as “extremely competent, intelligent,” “strong and forthright, very productive, energetic and creative.” Tr. 150. Another high-ranking official praised Hopkins’ decisiveness, broadmindedness, and “intellectual clarity”; she was, in his words, “a stimulating conversationalist.” *Id.*, at 156–157. Evaluations such as these led Judge Gesell to conclude that Hopkins “had no difficulty dealing with clients and her clients appear to have been very pleased with her work” and that she “was generally viewed as a highly competent project leader who worked long hours, pushed vigorously to meet deadlines and demanded much from the multidisciplinary staffs with which she worked.” 618 F. Supp., at 1112–1113.

On too many occasions, however, Hopkins’ aggressiveness apparently spilled over into abrasiveness. Staff members seem to have borne the brunt of Hopkins’ brusqueness. Long before her bid for partnership, partners evaluating her work had counseled her to improve her relations with staff members. Although later evaluations indicate an improvement, Hopkins’ perceived shortcomings in this important area eventually doomed her bid for partnership. Virtually all of the partners’ negative remarks about Hopkins—even those of partners supporting her—had to do with her “interpersonal skills.” Both “[s]upporters and opponents of her candidacy,” stressed Judge Gesell, “indicated that she was sometimes overly aggressive, unduly harsh, difficult to work with and impatient with staff.” *Id.*, at 1113.

There were clear signs, though, that some of the partners reacted negatively to Hopkins’ personality because she was a woman. One partner described her as “macho” (Defendant’s Exh. 30); another suggested that she “overcompensated for being a woman” (Defendant’s Exh. 31); a third advised her to take “a course at charm school” (Defendant’s Exh. 27). Several partners

criticized her use of profanity; in response, one partner suggested that those partners objected to her swearing only “because it’s a lady using foul language.” Tr. 321. Another supporter explained that Hopkins “ha[d] matured from a tough-talking somewhat masculine hard-nosed mgr to an authoritative, formidable, but much more appealing lady ptr candidate.” Defendant’s Exh. 27. But it was the man who, as Judge Gesell found, bore responsibility for explaining to Hopkins the reasons for the Policy Board’s decision to place her candidacy on hold who delivered the *coup de grace*: in order to improve her chances for partnership, Thomas Beyer advised, Hopkins should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.” 618 F. Supp., at 1117.

Dr. Susan Fiske, a social psychologist and Associate Professor of Psychology at Carnegie–Mellon University, testified at trial that the partnership selection process at Price Waterhouse was likely influenced by sex stereotyping. Her testimony focused not only on the overtly sex-based comments of partners but also on gender-neutral remarks, made by partners who knew Hopkins only slightly, that were intensely critical of her. One partner, for example, baldly stated that Hopkins was “universally disliked” by staff (Defendant’s Exh. 27), and another described her as “consistently annoying and irritating” (*ibid.*); yet these were people who had had very little contact with Hopkins. According to Fiske, Hopkins’ uniqueness (as the only woman in the pool of candidates) and the subjectivity of the evaluations made it likely that sharply critical remarks such as these were the product of sex stereotyping—although Fiske admitted that she could not say with certainty whether any particular comment was the result of stereotyping. Fiske based her opinion on a review of the submitted comments, explaining that it was commonly accepted practice for social psychologists to reach this kind of conclusion without having met any of the people involved in the decisionmaking process.

In previous years, other female candidates for partnership also had been evaluated in sex-based terms. As a general matter, Judge Gesell concluded, “[c]andidates were viewed favorably if partners believed they maintained their femin[in]ity while becoming effective professional managers”; in this environment, “[t]o be identified as a ‘women’s lib[b]er’ was regarded as [a] negative comment.” 618 F. Supp., at 1117. In fact, the judge found that in previous years “[o]ne partner repeatedly commented that he could not consider any woman seriously as a partnership candidate and believed that women were not even capable of functioning as senior managers—yet the firm took no action to discourage his comments and recorded his vote in the overall summary of the evaluations.” *Ibid.*

Judge Gesell found that Price Waterhouse legitimately emphasized interpersonal skills in its partnership decisions, and also found that the firm had not fabricated its complaints about Hopkins’ interpersonal skills as a pretext for discrimination. Moreover, he concluded, the firm did not give decisive emphasis to such traits only because Hopkins was a woman; although there were male candidates who lacked these skills but who were admitted to partnership, the judge found that these candidates possessed other, positive traits that Hopkins lacked.

The judge went on to decide, however, that some of the partners’ remarks about Hopkins stemmed from an impermissibly cabined view of the proper behavior of women, and that Price Waterhouse had done nothing to disavow reliance on such comments. He held that Price Waterhouse had unlawfully discriminated against Hopkins on the basis of sex by consciously giving credence and

effect to partners' comments that resulted from sex stereotyping. Noting that Price Waterhouse could avoid equitable relief by proving by clear and convincing evidence that it would have placed Hopkins' candidacy on hold even absent this discrimination, the judge decided that the firm had not carried this heavy burden.

## A

In passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees. Yet, the statute does not purport to limit the other qualities and characteristics that employers *may* take into account in making employment decisions. The converse, therefore, of "for cause" legislation, Title VII eliminates certain bases for distinguishing among employees while otherwise preserving employers' freedom of choice. This balance between employee rights and employer prerogatives turns out to be decisive in the case before us.

Congress' intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute. In now-familiar language, the statute forbids an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment," or 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 ... sex." 42 U.S.C. §§ 2000e-2(a)(1), (2) (emphasis added). We take these words to mean that gender must be irrelevant to employment decisions. To construe the words "because of" as colloquial shorthand for "but-for causation," as does Price Waterhouse, is to misunderstand them.

...

## C

In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman. In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.

...

As to the existence of sex stereotyping in this case, we are not inclined to quarrel with the District Court's conclusion that a number of the partners' comments showed sex stereotyping at work. See *infra*, at 1793-1794. As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for " '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of

men and women resulting from sex stereotypes.’ ” *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707, n. 13, 98 S.Ct. 1370, 1375, n. 13, 55 L.Ed.2d 657 (1978), quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (CA7 1971). An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.

Remarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually relied on her gender in making its decision. In making this showing, stereotyped remarks can certainly be *evidence* that gender played a part. In any event, the stereotyping in this case did not simply consist of stray remarks. On the contrary, Hopkins proved that Price Waterhouse invited partners to submit comments; that some of the comments stemmed from sex stereotypes; that an important part of the Policy Board’s decision on Hopkins was an assessment of the submitted comments; and that Price Waterhouse in no way disclaimed reliance on the sex-linked evaluations. This is not, as Price Waterhouse suggests, “discrimination in the air”; rather, it is, as Hopkins puts it, “discrimination brought to ground and visited upon” an employee. Brief for Respondent 30. By focusing on Hopkins’ specific proof, however, we do not suggest a limitation on the possible ways of proving that stereotyping played a motivating role in an employment decision, and we refrain from deciding here which specific facts, “standing alone,” would or would not establish a plaintiff’s case, since such a decision is unnecessary in this case. But see *post*, at 1805 (O’CONNOR, J., concurring in judgment).

...

In finding that some of the partners’ comments reflected sex stereotyping, the District Court relied in part on Dr. Fiske’s expert testimony. Without directly impugning Dr. Fiske’s credentials or qualifications, Price Waterhouse insinuates that a social psychologist is unable to identify sex stereotyping in evaluations without investigating whether those evaluations have a basis in reality. This argument comes too late. At trial, counsel for Price Waterhouse twice assured the court that he did not question Dr. Fiske’s expertise (App. 25) and failed to challenge the legitimacy of her discipline. Without contradiction from Price Waterhouse, Fiske testified that she discerned sex stereotyping in the partners’ evaluations of Hopkins and she further explained that it was part of her business to identify stereotyping in written documents. *Id.*, at 64. We are not inclined to accept petitioner’s belated and unsubstantiated characterization of Dr. Fiske’s testimony as “gossamer evidence” (Brief for Petitioner 20) based only on “intuitive hunches” (*id.*, at 44) and of her detection of sex stereotyping as “intuitively divined” (*id.*, at 43).

...

Indeed, we are tempted to say that Dr. Fiske’s expert testimony was merely icing on Hopkins’ cake. It takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring “a course at charm school.” Nor, turning to Thomas Beyer’s memorable advice to Hopkins, does it 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

Price Waterhouse also charges that Hopkins produced no evidence that sex stereotyping played a role in the decision to place her candidacy on hold. As we have stressed, however, Hopkins showed that the partnership solicited evaluations from all of the firm's partners; that it generally relied very heavily on such evaluations in making its decision; that some of the partners' comments were the product of stereotyping; and that the firm in no way disclaimed reliance on those particular comments, either in Hopkins' case or in the past. Certainly a plausible—and, one might say, inevitable—conclusion to draw from this set of circumstances is that the Policy Board in making its decision did in fact take into account all of the partners' comments, including the comments that were motivated by stereotypical notions about women's proper deportment.

[The Supreme Court remanded the case so that the court of appeals could reevaluate the case consistent with the standard the Supreme Court established].

### Notes and Questions

1. *Price Waterhouse* was a plurality opinion. However, six justices (the plurality and two separate concurrences) “agreed that [the conduct about which Ann Hopkins complained was] indicative of gender discrimination. . . .” *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11<sup>th</sup> Cir. 2011); see also *Hively v. Ivy Tech Community College*, 853 F.3d 339, 346 & n.2 (7<sup>th</sup> Cir. 2017) (*en banc*) (noting that six justices agreed “that the conduct about which Hopkins complained could support a finding of sex discrimination for purposes of Title VII”). “Sex” refers to “an individual's anatomical and biological characteristics,” while “gender” refers to “socially-constructed norms associated with a person's sex.” See *Smith v. City of Salem, Ohio*, 378 F.3d 566, 573 (6<sup>th</sup> Cir. 2004) (citations omitted). *Price Waterhouse* held that “Title VII barred not just discrimination because of biological sex, but also gender stereotyping—failing to act or appear according to expectations defined by gender.” *Glenn*, 663 F.3d at 1316. For purposes of Title VII, courts use the terms “sex” and “gender” interchangeably and discrimination on either basis is unlawful under the statute. See *Hively*, 853 F.3d at 343 & n.1 (“Many courts, including the Supreme Court, appear to have used “sex” and “gender” synonymously.”).

2. Does *Price Waterhouse* overrule *DeSantis* at least to the extent of the Ninth Circuit's holding that discrimination against men because of their effeminacy does not violate Title VII? In a post-*Price Waterhouse* case, the Ninth Circuit held that it does. In *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864 (9<sup>th</sup> Cir. 2001), the plaintiff had been derided because “he carried his tray like a woman,” refused to have sex with a female coworker and was frequently called sexually derogatory names (e.g., “fucking female whore”). See *id.* at 870, 874-75. The court overruled *DeSantis* to the extent that case conflicted with *Price Waterhouse*. It explained that the Supreme Court's holding that Title VII is violated when an employer discriminates against a woman for acting insufficiently feminine “applies with equal force to a man who is discriminated against for acting too feminine.” See *id.* at 874.

## 2. *Same-Sex Harassment*

### NOTE ON ONCALE

*Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998), is the second case that has greatly influenced the interpretation of Title VII's prohibition of "discrimination because of sex" and the rights of LGBT individuals under the statute. In *Oncale*, the Supreme Court resolved a circuit split regarding whether same-sex sexual harassment was actionable under Title VII. The plaintiff in *Oncale* was male and worked as a roustabout with an all-male crew. He was subjected to pervasive and severe abuse carried out by coworkers, including a sexual assault. Relying on circuit precedent, the district court dismissed his claim and the U.S. Court of Appeals for the Fifth Circuit affirmed.

Prior to *Oncale*, courts addressed the issue of same-sex sexual harassment in one of three ways. Some, like the Fifth Circuit, which decided *Oncale*, held that same-sex sexual harassment was never cognizable under Title VII. Other courts allowed such claims only if the plaintiff could prove the harasser was homosexual and thus the harassing conduct was motivated by sexual desire. Finally, other courts suggested that such claims were viable as long as the harasser's conduct was sexual in nature.

The Supreme Court held that same-sex sexual harassment was cognizable under Title VII as long as the harassment occurred "because of sex." Writing for a unanimous Court, Justice Scalia explained that Title VII's proscription against sex discrimination protects women and men and "evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women." *Id.* at 78. He acknowledged that "male-on-male sexual harassment in the workplace was not the principal evil Congress was concerned with when it enacted Title VII." *Id.* at 79. However, he continued, "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id.* at 79-80 (emphasis added).

The Court suggested three ways in which a plaintiff alleging same-sex sexual harassment might show the discrimination was because of sex. First, courts and juries may draw such an inference where "there [was] credible evidence that the harasser was homosexual." Second, "a trier of fact might reasonably find [sex] discrimination . . . if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace." Finally, "[a] same-sex harassment plaintiff may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace." According to the Court, "[w]hatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue constituted "*discrimina[tion]* ... because of ... sex." *Id.* at 80-81.

*Oncale* has often been cited for the proposition that Title VII is not limited to an interpretation anticipated by legislators in 1964 when the statute was enacted. *See e.g., Hively*, 853 F.3d at 345 ("The Court [in *Oncale*] could not have been clearer: the fact that the enacting Congress

may not have anticipated a particular application of the law cannot stand in the way of the provisions of the law that are on the books. It is therefore neither here nor there that the Congress” that prohibited sex discrimination under Title VII “may not have realized or understood the full scope of the words it chose.”)

Moreover, *Oncale* has also been instrumental to LGBT employees alleging sex discrimination on the basis of sex stereotyping. Although the Supreme Court set forth three bases for showing discrimination is because of sex, the courts that have reached the issue have “held that [these] paths are illustrative, not exhaustive.” *EEOC v. Boh Bros. Construction Co.*, 731 F.3d 444, 455 & n.6 (5<sup>th</sup> Cir. 2013) (*en banc*) (citing cases from other circuits). As you will see in the materials that follow, LGBT plaintiffs alleging sex discrimination, including harassment, have relied on evidence of sex stereotyping to show that alleged discrimination was because of sex.

### **C. Stereotyping and Sexual Orientation**

An issue that has arisen post-*Price Waterhouse* that has affected claims by gay and lesbian individuals is determining what constitutes evidence of “sex stereotyping” or “gender non-conforming behavior” for purposes of Title VII. Ann Hopkins was discriminated against because, according to her employers, she failed to act and appear in ways typically associated with the ways in which women should act and appear. To allege a viable sex discrimination claim, must a plaintiff in Hopkins’s position show that the discrimination was based on the type of observable gender non-conforming behavior at issue in *Price Waterhouse*? If so, what does that mean for gay and lesbian employees? Ann Hopkins was not a lesbian, but she was considered to be “macho” by her employers. Should it have affected her claim had she been a macho lesbian?

“Machoism” aside, should lesbianism alone have sufficed as constituting the type of gender non-conforming behavior an employer is prohibited from considering when making employment decisions? See Matthew W. Green Jr., *Same-Sex and Immutable Traits: Why Obergefell v. Hodges Clears a Path to Protecting Gay and Lesbian Employees From Workplace Discrimination Under Title VII*, 20 J. Gender Race & Justice 1, 24-25 (2017) (noting that “numerous scholars have recognized that one of the prime motivations for discrimination against gays and lesbians is discomfort with the manner in which homosexuality departs from traditional gender roles . . .”); see also Brian Soucek, *Perceived Homosexuals*, 63 Am. U. L. Rev. 715, 726 (2014) (“Following *Price Waterhouse* to its logical conclusion would appear to require that sexual orientation be brought, along with the rest of the spectrum of gender stereotypes, under the protective umbrella of Title VII.”).

The case set forth immediately below and the explanatory material that follow address these issues. They attempt to provide an overview of the way courts have treated claims by employees who allege discrimination because of their gender non-conformity and who are LGB or are perceived to be.



***Brian D. Prowel v. Wise Business Forms, Inc.***  
**579 F.3d 285 (3<sup>rd</sup> Cir. 2009).**

## **OPINION OF THE COURT**

Hardiman, Circuit Judge.

Brian Prowel appeals the District Court’s summary judgment in favor of his former employer, Wise Business Forms, Inc. Prowel sued under Title VII of the Civil Rights Act of 1964 and the Pennsylvania Human Relations Act, alleging that Wise harassed and retaliated against him because of sex and religion. The principal issue on appeal is whether Prowel has marshaled sufficient facts for his claim of “gender stereotyping” discrimination to be submitted to a jury. We also consider whether the District Court erred in granting summary judgment to Wise on Prowel’s religious discrimination claim.

...

### **II.**

Prowel began working for Wise in July 1991. A producer and distributor of business forms, Wise employed approximately 145 workers at its facility in Butler, Pennsylvania. From 1997 until his termination, Prowel operated a machine called a nale encoder, which encodes numbers and organizes business forms. On December 13, 2004, after 13 years with the company, Wise informed Prowel that it was laying him off for lack of work.

#### **A.**

Prowel’s most substantial claim is that Wise harassed and retaliated against him because of sex. The theory of sex discrimination Prowel advances is known as a “gender stereotyping” claim, which was first recognized by the Supreme Court as a viable cause of action in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989).

Prowel identifies himself as an effeminate man and believes that his mannerisms caused him not to “fit in” with the other men at Wise. Prowel described the “genuine stereotypical male” at the plant as follows:

[B]lue jeans, t-shirt, blue collar worker, very rough around the edges. Most of the guys there hunted. Most of the guys there fished. If they drank, they drank beer, they didn’t drink gin and tonic. Just you know, all into football, sports, all that kind of stuff, everything I wasn’t.

In stark contrast to the other men at Wise, Prowel testified that he had a high voice and did not curse; was very well-groomed; wore what others would consider dressy clothes; was neat; filed his nails instead of ripping them off with a utility knife; crossed his legs and had a tendency to shake his foot “the way a woman would sit”; walked and carried himself in an effeminate manner; drove a clean car; had a rainbow decal on the trunk of his car; talked about things like art, music, interior design, and decor; and pushed the buttons on the nale encoder with “pizzazz.”

Some of Prowel’s co-workers reacted negatively to his demeanor and appearance. During the last two years of his employment at Wise, a female co-worker frequently called Prowel “Princess.” In a similar vein, co-workers made comments such as: “Did you see what Rosebud was wearing?”; “Did you see Rosebud sitting there with his legs crossed, filing his nails?”; and “Look at the way he walks.”

Prowel also testified that he is homosexual. At some point prior to November 1997, Prowel was “outed” at work when a newspaper clipping of a “man-seeking-man” ad was left at his workstation with a note that read: “Why don’t you give him a call, big boy.” Prowel reported the incident to two management-level personnel and asked that something be done. The culprit was never identified, however.

After Prowel was outed, some of his co-workers began causing problems for him, subjecting him to verbal and written attacks during the last seven years of his tenure at Wise. In addition to the nicknames “Princess” and “Rosebud,” a female co-worker called him “fag” and said: “Listen, faggot, I don’t have to put up with this from you.” Prowel reported this to his shift supervisor but received no response.

At some point during the last two years of Prowel’s employment, a pink, light-up, feather tiara with a package of lubricant jelly was left on his nale encoder. The items were removed after Prowel complained to Henry Nolan, the shift supervisor at that time. On March 24, 2004, as Prowel entered the plant, he overheard a co-worker state: “I hate him. They should shoot all the fags.” Prowel reported this remark to Nolan, who said he would look into it. Prowel also overheard conversations between co-workers, one of whom was a supervisor, who disapproved of how he lived his life. Finally, messages began to appear on the wall of the men’s bathroom, claiming Prowel had AIDS and engaged in sexual relations with male co-workers. After Prowel complained, the company repainted the restroom.

## **B.**

In addition to the harassment Prowel allegedly experienced because of his sex, he also claims that he was discriminated against because of religion. Specifically, Prowel argues that his conduct did not conform to the company's religious beliefs. When asked at his deposition what those religious beliefs were, Prowel responded: “a man should not lay with another man.”

For a few months during the spring of 2004, Prowel found anonymous prayer notes on his work machine on a daily basis. Prowel also found messages indicating he was a sinner for the way he

lived his life. Additionally, he found a note stating: “Rosebud will burn in hell.” Prowel attributed these notes and comments to Michael Croyle, a Christian employee who refused to speak to Prowel. Moreover, Prowel testified in his deposition that nothing was left on his machine after Croyle left the company.

Another co-worker, Thomas Bowser, stated that he did not approve of how Prowel lived his life. Prowel testified that Bowser brought religious pamphlets to work that stated “the end is coming” and “have you come clean with your maker?”

### C.

Prowel alleges that his co-workers shunned him and his work environment became so stressful that he had to stop his car on the way to work to vomit. At some point in 2004, Prowel became increasingly dissatisfied with his work assignments and pay. Prowel believed he was asked to perform more varied tasks than other male encoder operators, but was not compensated fairly for these extra tasks, even though work piled up on his male encoder.

In April 2004, Prowel considered suing Wise and stated his intentions to four non-management personnel, asking them to testify on his behalf. Prowel allegedly told his colleagues that the lawsuit would be based on harassment for not “fitting in”; he did not say anything about being harassed because of his homosexuality. These four colleagues complained to management that Prowel was bothering them.

On May 6, 2004, General Manager Jeff Straub convened a meeting with Prowel and supervisors Nolan and John Hodak to discuss Prowel’s concern that he was doing more work for less money than other male encoder operators. Prowel’s compensation and workload were discussed, but the parties did not reach agreement on those issues. Straub then asked Prowel if he had approached employees to testify for him in a lawsuit, and Prowel replied that he had not done so. Prowel has since conceded that he did approach other employees in this regard.

On December 13, 2004, Prowel was summoned to meet with his supervisors, who informed him that he was terminated effective immediately for lack of work.

### III.

After exhausting his administrative remedies before the Equal Employment Opportunity Commission, Prowel sued Wise in the United States District Court for the Western District of Pennsylvania, alleging claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and the Pennsylvania Human Relations Act, 43 Pa. Cons.Stat. § 951, *et seq.* (PHRA). Prowel alleged harassment and wrongful termination because of sex. . . . Following discovery, Wise moved for summary judgment and the District Court granted the company’s motion in its entirety. As relevant to this appeal, the District Court held that Prowel’s suit was merely a claim for sexual orientation discrimination-which is not cognizable under Title VII-that he repackaged as a gender stereotyping claim in an attempt to avoid summary judgment. Prowel's religious

discrimination claim failed for the same reason. As for Prowel's retaliation claim, the District Court held that Prowel had a good faith belief that he had engaged in protected activity under Title VII, but that his belief was not objectively reasonable given that his complaint was actually based on sexual orientation discrimination. Prowel filed this timely appeal.

#### IV.

In evaluating Wise's motion for summary judgment, the District Court properly focused on our decision in *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257 (3d Cir.2001), wherein we stated: "Title VII does not prohibit discrimination based on sexual orientation. Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation." *Id.* at 261 (citations omitted). This does not mean, however, that a homosexual individual is barred from bringing a *sex discrimination* claim under Title VII, which plainly prohibits discrimination "because of sex." 42 U.S.C. § 2000e-2(a). As the District Court noted, "once a plaintiff shows that harassment is motivated by sex, it is no defense that it may also have been motivated by anti-gay animus." Dist. Ct. Op. at 6 (citing *Bibby*, 260 F.3d at 265). In sum, "[w]hatever the sexual orientation of a plaintiff bringing a same-sex sexual harassment claim, that plaintiff is required to demonstrate that the harassment was directed at him or her because of his or her sex." *Bibby*, 260 F.3d at 265.

Both Prowel and Wise rely heavily upon *Bibby*. Wise claims this appeal is indistinguishable from *Bibby* and therefore we should affirm its summary judgment for the same reason we affirmed summary judgment in *Bibby*. Prowel counters that reversal is required here because gender stereotyping was not at issue in *Bibby*. As we shall explain, *Bibby* does not dictate the result in this appeal. Because it guides our analysis, however, we shall review it in some detail.

John Bibby, a homosexual man, was a long-time employee of the Philadelphia Coca Cola Bottling Company. *Id.* at 259. The company terminated Bibby after he sought sick leave, but ultimately reinstated him. *Id.* After Bibby's reinstatement, he alleged that he was assaulted and harmed by co-workers and supervisors when he was subjected to crude remarks and derogatory sexual graffiti in the bathrooms. *Id.* at 260.

Bibby filed a complaint with the Philadelphia Commission on Human Relations (PCHR), alleging sexual orientation discrimination. *Id.* After the PCHR issued a right-to-sue letter, Bibby sued in federal court alleging, *inter alia*, sexual harassment in violation of Title VII. *Id.* The district court granted summary judgment for the company because Bibby was harassed not "because of sex," but rather because of his sexual orientation, which is not cognizable under Title VII. *Id.* at 260-61.

On appeal, this Court affirmed, holding that Bibby presented insufficient evidence to support a claim of same-sex harassment under Title VII. Despite acknowledging that harassment based on sexual orientation has no place in a just society, we explained that Congress chose not to include sexual orientation harassment in Title VII. *Id.* at 261, 265. Nevertheless, we stated that employees may-consistent with the Supreme Court's decision in *Price Waterhouse*-raise a Title VII *gender stereotyping* claim, provided they can demonstrate that "the[ir] harasser was acting to punish

[their] noncompliance with gender stereotypes.” *Id.* at 264; accord *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir.2006); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874 (9th Cir.2001); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir.1999). Because Bibby did not claim gender stereotyping, however, he could not prevail on that theory. We also concluded, in dicta, that even had we construed Bibby’s claim to involve gender stereotyping, he did not marshal sufficient evidence to withstand summary judgment on that claim. *Bibby*, 260 F.3d at 264-65.

In light of the foregoing discussion, we disagree with both parties’ arguments that *Bibby* dictates the outcome of this case. *Bibby* does not carry the day for Wise because in that case, the plaintiff failed to raise a gender stereotyping claim as Prowel has done here. Contrary to Prowel’s argument, however, *Bibby* does not require that we reverse the District Court’s summary judgment merely because we stated that a gender stereotyping claim is cognizable under Title VII; such has been the case since the Supreme Court’s decision in *Price Waterhouse*. Instead, we must consider whether the record, when viewed in the light most favorable to Prowel, contains sufficient facts from which a reasonable jury could conclude that he was harassed and/or retaliated against “because of sex.”

[The court set forth the holding and rationale of *Price Waterhouse*.]

Like our decision in *Bibby*, the Supreme Court’s decision in *Price Waterhouse* provides the applicable legal framework, but does not resolve this case. Unlike in *Price Waterhouse*-where Hopkins’s sexual orientation was not at issue-here there is no dispute that Prowel is homosexual. The difficult question, therefore, is whether the harassment he suffered at Wise was because of his homosexuality, his effeminacy, or both.

As this appeal demonstrates, the line between sexual orientation discrimination and discrimination “because of sex” can be difficult to draw. In granting summary judgment for Wise, the District Court found that Prowel’s claim fell clearly on one side of the line, holding that Prowel’s sex discrimination claim was an artfully-pleaded claim of sexual orientation discrimination. However, our analysis-viewing the facts and inferences in favor of Prowel-leads us to conclude that the record is ambiguous on this dispositive question. Accordingly, Prowel’s gender stereotyping claim must be submitted to a jury.

Wise claims it laid off Prowel because the company decided to reduce the number of male encoder operators from three to two. This claim is not without support in the record. After Prowel was laid off, no one was hired to operate the male encoder during his shift. Moreover, market conditions caused Wise to lay off 44 employees at its Pennsylvania facility between 2001 and September 2006, and the company’s workforce shrank from 212 in 2001 to 145 in 2008. General Manager Straub testified that in determining which male encoder operator to lay off, he considered various factors, including customer service, productivity, cooperativeness, willingness to perform other tasks (the frequency with which employees complained about working on other machines), future advancement opportunities, and cost. According to Wise, Prowel was laid off because: comments on his daily production reports reflected an uncooperative and insubordinate attitude; he was the highest paid operator; he complained when asked to work on different machines; and he did not

work to the best of his ability when operating the other machines.

Prowel asserts that these reasons were pretextual and he was terminated because of his complaints to management about harassment and his discussions with co-workers regarding a potential lawsuit against the company. In this respect, the record indicates that Prowel's work compared favorably to the other two male encoder operators. Specifically, Prowel worked on other equipment fifty-four times during the last half of 2004 while a co-worker did so just once; Prowel also ran more jobs and impressions per hour than that same co-worker; and Prowel's attendance was significantly better than the third male encoder operator. Finally, although Wise laid off forty-four workers between 2001 and 2006, it laid off no one in 2003, only Prowel in 2004, and just two in 2005. Although Prowel is unaware what role his sexual orientation played in his termination, he alleges that he was harassed and retaliated against not because of the quality of his work, but rather because he failed to conform to gender stereotypes.

The record demonstrates that Prowel has adduced evidence of harassment based on gender stereotypes. He acknowledged that he has a high voice and walks in an effeminate manner. In contrast with the typical male at Wise, Prowel testified that he: did not curse and was very well-groomed; filed his nails instead of ripping them off with a utility knife; crossed his legs and had a tendency to shake his foot "the way a woman would sit." Prowel also discussed things like art, music, interior design, and decor, and pushed the buttons on his male encoder with "pizzazz." Prowel's effeminate traits did not go unnoticed by his co-workers, who commented: "Did you see what Rosebud was wearing?"; "Did you see Rosebud sitting there with his legs crossed, filing his nails?"; and "Look at the way he walks." Finally, a co-worker deposited a feathered, pink tiara at Prowel's workstation. When the aforementioned facts are considered in the light most favorable to Prowel, they constitute sufficient evidence of gender stereotyping harassment—namely, Prowel was harassed because he did not conform to Wise's vision of how a man should look, speak, and act—rather than harassment based solely on his sexual orientation.

To be sure, the District Court correctly noted that the record is replete with evidence of harassment motivated by Prowel's sexual orientation. Thus, it is possible that the harassment Prowel alleges was because of his sexual orientation, not his effeminacy. Nevertheless, this does not vitiate the possibility that Prowel was also harassed for his failure to conform to gender stereotypes. *See* 42 U.S.C. § 2000e-2(m) ("[A]n unlawful employment practice is established when the complaining party demonstrates that ... sex ... was a motivating factor for any employment practice, even though other factors also motivated the practice."). Because both scenarios are plausible, the case presents a question of fact for the jury and is not appropriate for summary judgment.

In support of the District Court's summary judgment, Wise argues persuasively that every case of sexual orientation discrimination cannot translate into a triable case of gender stereotyping discrimination, which would contradict Congress's decision not to make sexual orientation discrimination cognizable under Title VII. Nevertheless, Wise cannot persuasively argue that *because* Prowel is homosexual, he is precluded from bringing a gender stereotyping claim. There is no basis in the statutory or case law to support the notion that an effeminate *heterosexual* man can bring a gender stereotyping claim while an effeminate *homosexual* man may not. As long as the employee—regardless of his or her sexual orientation—marshals sufficient evidence such that a

reasonable jury could conclude that harassment or discrimination occurred “because of sex,” the case is not appropriate for summary judgment. For the reasons we have articulated, Prowel has adduced sufficient evidence to submit this claim to a jury.

V.

Prowel also argues that the District Court erred when it granted Wise summary judgment on his claim of religious harassment. To survive summary judgment on this claim, Prowel must show: (1) intentional harassment because of religion, that (2) was severe or pervasive, and (3) detrimentally affected him, and (4) would detrimentally affect a reasonable person of the same religion in that position, and (5) the existence of respondeat superior liability. *Abramson*, 260 F.3d at 276-77.

Our review of the record leads to the conclusion that Prowel cannot satisfy the first essential element of his cause of action. Prowel admits that no one at Wise harassed him based on *his* religious beliefs. Rather, Prowel contends that he was harassed for failing to conform to *Wise's* religious beliefs. Title VII seeks to protect employees not only from discrimination against them on the basis of their religious beliefs, but also from forced religious conformity. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 20, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993); *Abramson*, 260 F.3d at 277. Nevertheless, when asked to identify which of Wise's beliefs to which he failed to conform, Prowel could identify just one: “that a man should not lay with another man.” Likewise, in response to Wise's statement of undisputed material facts, Prowel admitted: “the only way in which [he] failed to conform to his co-workers' religious beliefs was by virtue of his status as a gay man.” Finally, over a month after Wise moved for summary judgment, Prowel averred that he suffered religious harassment because: “I am a gay male, which status several of my co-workers considered to be contrary to being a good Christian.”

Prowel's identification of this single “religious” belief leads ineluctably to the conclusion that he was harassed not “because of religion,” but because of his sexual orientation. Given Congress's repeated rejection of legislation that would have extended Title VII to cover sexual orientation, *see Bibby*, 260 F.3d at 261, we cannot accept Prowel's *de facto* invitation to hold that he was discriminated against “because of religion” merely by virtue of his homosexuality.

In support of his argument that the District Court should not have granted Wise summary judgment on his religious harassment claim, Prowel relies upon *Erdmann v. Tranquility Inc.*, 155 F. Supp.2d 1152 (N.D. Cal. 2001). In *Erdmann*, a homosexual employee claimed religious discrimination because his boss insisted that he become heterosexual. *Id.* at 1156. Wholly apart from the fact that it is not binding precedent, *Erdmann* cannot bear the weight Prowel places upon it. Unlike Prowel, Erdmann did not claim Title VII religious harassment based exclusively upon his homosexual status. Rather, the employer in that case insisted that Erdmann convert to the employer's faith and lead the company's daily prayer service. *Id.* at 1158. Prowel has not cited any facts supporting analogous religious coercion.

In sum, the same principle that requires Prowel's gender stereotyping claim to be submitted to the jury requires that his religious harassment claim fail at this stage. As explained above, Prowel's gender stereotyping claim is not limited to, or coextensive with, a claim of sexual orientation

harassment. Accordingly, the jury will have to determine the basis of the harassment. By contrast, Prowel's religious harassment claim is based entirely upon his status as a gay man. Because Prowel's claim was a repackaged claim for sexual orientation discrimination-which is not cognizable under Title VII-we hold that the District Court did not err in granting Wise summary judgment on that claim.

## VI.

For the foregoing reasons, we will vacate the judgment of the District Court . . . and will remand for further proceedings consistent with this opinion.

### Notes and Questions

1. **Sexual Orientation and Title VII:** Every circuit court of appeals that has reached the issue, except one, has held that Title VII does not protect against sexual orientation discrimination. See *Hively v. Ivy-Tech Comm. Coll.*, 853 F.3d 339, 341-42 (7<sup>th</sup> Cir. 2017) (*en banc*) (collecting cases). The court in *Prowel* is in accord but explains that plaintiffs may “raise a gender stereotyping claim” under Title VII “provided they can demonstrate that the[ir] harasser was acting to punish noncompliance with gender stereotypes.” Accordingly, the court stated that the dispositive question is whether Prowel was harassed because of his gender nonconformity, his homosexuality or both. The court opined that the record was unclear on those issues and thus was for a jury to decide. Do you agree with the court that the motivations underlying Prowel’s harassers were unclear?

2. **Sexual Orientation vs. Gender Nonconformity (Status v. Conduct):**

*Prowel* demonstrates one approach courts have taken to analyze claims involving sex stereotyping that are asserted by individuals who are LGB or are perceived to be. In a now vacated opinion, a panel of the U.S. Court of Appeals for the Seventh Circuit recognized that courts have “with limited success, tr[ie]d to figure out how to draw the line between gender nonconformity discrimination, which can form the basis of a legal claim based on sex stereotyping and sexual orientation discrimination, which cannot. See *Hively v. Ivy-Tech Comm. Coll.*, 830 F.3d 698, *vacated on other grounds by* 853 F.3d 339, 346 & n.2 (7<sup>th</sup> Cir. 2017) (*en banc*). For instance, some courts have rejected claims of sex discrimination if they believe that the allegations that indicate sexual orientation discrimination outweigh those that indicate the discrimination occurred because of sex stereotyping. See e.g., *Christiansen v. Omnicom Group, Inc.*, 167 F. Supp.3d 598, 618-21 (S.D.N.Y. 2016), *rev’d*, 852 F.3d 195, 201 (2<sup>nd</sup> Cir. 2017) (although harasser referred to plaintiff as effeminate, the harasser showed multiple examples of anti-gay animus). Other courts have drawn a line although allegations of sex stereotyping and sexual orientation discrimination blur. See e.g., *Burnett v. Union RR Co.*, No. 17-1012017 WL 2731284 (W.D. Pa. June 26, 2017) (finding that plaintiff had sufficiently alleged that he had been “subjected to a hostile work environment because of gender nonconformity” after, among other things, repeatedly being called “fag,” “butthole Burnett,” “hot butt fagot” and being asked whether he “was taking it up the ass”).



Several courts, however, have concluded that it is impossible to draw lines in this area and have declined to try to do so. In other words, for LGB individuals, their sexual orientation, itself, is gender nonconforming and discrimination on that basis is actionable under Title VII. *See e.g., Winstead v. Lafayette Cnty. Bd. of Cnty. Comm'rs*, 197 F. Supp.3d 1334, 1346 (N.D. Fla. 2016) (“[G]ay people, simply by identifying themselves as gay, are violating the ultimate gender stereotype—heterosexual attraction. . . . When a “traditionally masculine” gay man is fired because he is gay, that firing is no less because of sex than when an “effeminate” gay man is fired). *See Terveer v. Billington*, 34 F. Supp.3d 100 (D. D.C. 2014) (denying employer’s motion to dismiss; “Plaintiff has alleged that he is “a homosexual male whose sexual orientation is not consistent with the Defendant’s perception of acceptable gender roles); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp.2d 1212, 1224 (D. Ore. 2002) (denying employer’s motion for summary judgment as a jury could find that the plaintiff (a woman) was harassed and discharged because of a failure to conform to how a woman ought to behave; plaintiff was attracted to other women and her supervisor believed that she should be attracted to and date men).

Still, LGB plaintiffs who fail to conform to gender norms in appearance, mannerisms and behavior in the workplace appear to have greater success pursuing sex discrimination claims based on sex stereotypes than have gender conforming LGB individuals. *See e.g., Evans v. Georgia Regional Hosp.*, 850 F.3d 1248, 1254 (11<sup>th</sup> Cir 2017) (holding that Title VII does not protect against sexual orientation discrimination, but holding that the plaintiff should be allowed leave to amend her complaint to allege that her “decision to present herself in a masculine manner” resulted in adverse employment actions); *Christiansen v. Omnicom Group*, 852 F.3d 195, 201 (2<sup>nd</sup> Cir. 2017) (holding that plaintiff’s gender stereotyping allegations stated a Title VII claim; plaintiff “alleges that he was perceived by his supervisor as effeminate and submissive and that he was harassed for these reasons”); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6<sup>th</sup> Cir.2006) (holding that *Price Waterhouse* was concerned with gender nonconforming characteristics that were readily demonstrable in the workplace, such as appearance or mannerisms; employees are not protected merely because they are perceived to be homosexual); *Nichols v. Azteca Restaurant Enters., Inc.*, 256 F.3d 864, 874 (9<sup>th</sup> Cir. 2001) (holding that consistent with *Price Waterhouse*, harassment based on the perception that a male employee was effeminate occurred because of sex); *see also* Brian Soucek, *Perceived Homosexuals*, 63 Am. U. L. Rev. 715, 726 (2014) (discussing trend among the courts: “In cases involving sexuality, plaintiffs tend to win if and only if they fail to conform to stereotypes in ways seen at work.”).

What are the implications of protecting gay and lesbian employees under Title VII *only if* they fail to conform to gender norms in their behavior or appearance while leaving masculine gay men or feminine lesbians unprotected?

3. **Forced Religious Conformity:** Prowel also alleged religious discrimination. The court explained that “Title VII seeks to protect employees not only from discrimination against them on the basis of their religious beliefs, but also from forced religious conformity.” In a leading case addressing religious conformity, the Seventh Circuit described the prohibition as forbidding an employer from forcing employees “to measure up to [the employer’s] religious expectations.”

*Venters v. City of Delphi*, 123 F.3d 956, 972 (7<sup>th</sup> Cir. 1997) (a plaintiff “need only show that her perceived religious shortcomings . . . played a motivating role in [the employment decision]”).

The court rejected Prowel’s claim of religious discrimination because it was based on his failure to conform to his coworker’s religious views about homosexuality. According to the court, Prowel’s religious claim was an attempt to bootstrap protection for sexual orientation onto Title VII. Do you agree? If an employer is not allowed as a condition of employment to require an employee to live in accord with the employer’s religious views, then should it matter what those views entail? Is Prowel being punished because the religious view pertains to homosexuality? Suppose Prowel’s coworkers held strong religious views about the sanctity of marriage. Suppose also that Prowel is heterosexual and that his employer terminates him after learning that he is involved in an adulterous relationship with a married woman “in violation of God’s command.” Different result than in *Prowel*? See *Sarenpa v. Express Images, Inc.*, No. Civ. 04-15 38 (JRT/JSM), 2005 WL 329455 (D. Minn. Sept. 8, 2005) (addressing religious conformity claim in the context of an extramarital relationship); see also *Terveer v. Billington*, 34 F. Supp.3d 100 (D. D.C. 2014) (addressing religious conformity claim in the context of sexual orientation and disagreeing with *Prowel*).

**4. Retaliation:** The district court granted summary judgment in favor of Wise on Prowel’s retaliation claim. To assert such a claim, Prowel had to show that he engaged in protected activity, which may consist of opposing a practice Title VII makes unlawful (e.g., discrimination because of race or sex). See 42 U.S.C. § 2000e-3(a). The courts of appeals have universally held that plaintiffs meet that burden if they show they had a good faith, reasonable belief that the discriminatory practices about which they complain violate the statute. See Matthew W. Green Jr., *What’s So Reasonable About Reasonableness? Rejecting a Case-Law Centered Approach to Title VII’s Reasonable Belief Doctrine*, 62 U. KAN. L. REV. 759, 771 & n.50 (2014). Because sexual orientation is not explicitly protected by Title VII, the district court held that Prowell could not have reasonably believed that discrimination on that basis was unlawful. Why does the Third Circuit reverse the district court with respect to the retaliation claim? Should employees who challenge sexual orientation discrimination in the workplace be protected from retaliation under Title VII? What factors should determine the reasonableness of an employee’s belief about the unlawfulness of challenged conduct? Is it even reasonable to assume that lay employees know which traits are protected by federal law and which are not? See *McCarthy v. R.J. Reynolds Tobacco Co.*, No. CIV. 2:09–2495 WBS DAD, 2011 WL 4006634, at \*4 (E.D. Cal. Sept. 8, 2011) (finding for purposes of a retaliation claim that plaintiffs were reasonable in their belief that sexual orientation discrimination was unlawful under Title VII; noting the “growing gay rights movement in this country” as support for the reasonable belief).

## Problem 2

Christopher Danvers was employed as a security guard at FMC, Inc., where he worked with 15 other male security guards. Christopher alleges that after his coworkers learned that he had

befriended a “male homosexual” he was subjected to harassment. He alleged that his coworkers, among other things, made frequent derogatory comments regarding his sexual preferences and activities; frequently called him a “fag” and questioned his masculinity because of his “special friend”; asked him for sexual favors; repeatedly touched his crotch with a tape measure; shoved sanitary napkins in his face and simulated sex with a stuffed animal and then tried to push the stuffed animal into Danvers’ crotch and backside. On another occasion, he alleged his coworkers handcuffed him, pulled down his pants and simulated sex with him while one of coworkers photographed the incident. The images were later placed in Christopher’s workplace mailbox. Christopher says that his coworkers have repeatedly asked, but that he has refused to answer, whether he is gay.

Christopher comes to you for advice on whether he has an actionable Title VII claim. Please advise him.

### Problem 3

Thomas Lucas worked for ACME, Inc., for several years and while employed there, he enjoyed a cordial relationship with his supervisor Lois Hopscotch. That all seemed to change after Thomas married his partner, Joe Feldman. Lois had a habit of calling her subordinates by their last names and she treated Joe the same way, calling him “Lucas.” After he married, however, Thomas would repeatedly remind Lois that he had taken Joe’s last name and that she should call him “Feldman,” not “Lucas.” Lois ignored his requests to be called by his married name. She told Thomas that she would never refer to him as “Feldman” because she refused to recognize his “so-called marriage” or his name change. “It’s just not natural,” she said. She told him that either he would go by “Lucas” or he’d have to find another job. When Thomas insisted on being called “Feldman,” Lois fired him.

Thomas comes to you for advice on whether he has an actionable Title VII claim. Please advise him.

## **D. Sexual Orientation Discrimination *Is* Sex Discrimination**

*Kimberly Hively v. Ivy Tech Community College of Indiana*

853 F.3d 359 (7<sup>th</sup> Cir. 2017) (*en banc*)

### **Opinion**

WOOD, Chief Judge.

Title VII of the Civil Rights Act of 1964 makes it unlawful for employers subject to the Act to discriminate on the basis of a person’s “race, color, religion, sex, or national origin . . . .” 42 U.S.C. § 2000e-2(a). For many years, the courts of appeals of this country understood the prohibition

against sex discrimination to exclude discrimination on the basis of a person’s sexual orientation. The Supreme Court, however, has never spoken to that question. In this case, we have been asked to take a fresh look at our position in light of developments at the Supreme Court extending over two decades. We have done so, and we conclude today that discrimination on the basis of sexual orientation is a form of sex discrimination. We therefore reverse the district court’s judgment dismissing Kimberly Hively’s suit against Ivy Tech Community College and remand for further proceedings.

## I

Hively is openly lesbian. She began teaching as a part-time, adjunct professor at Ivy Tech Community College’s South Bend campus in 2000. Hoping to improve her lot, she applied for at least six full-time positions between 2009 and 2014. These efforts were unsuccessful; worse yet, in July 2014 her part-time contract was not renewed. Believing that Ivy Tech was spurning her because of her sexual orientation, she filed a pro se charge with the Equal Employment Opportunity Commission on December 13, 2013. It was short and to the point:

I have applied for several positions at IVY TECH, fulltime, in the last 5 years. I believe I am being blocked from fulltime employment without just cause. I believe I am being discriminated against based on my sexual orientation. I believe I have been discriminated against and that my rights under Title VII of the Civil Rights Act of 1964 were violated.

After receiving a right-to-sue letter, she filed this action in the district court (again acting pro se). Ivy Tech responded with a motion to dismiss for failure to state a claim on which relief can be granted. It argued that sexual orientation is not a protected class under Title VII. . . . Relying on a line of this court’s cases exemplified by *Hamner v. St. Vincent Hosp. and Health Care Ctr., Inc.*, 224 F.3d 701 (7th Cir. 2000), the district court granted Ivy Tech’s motion and dismissed Hively’s case with prejudice.

Now represented by the Lambda Legal Defense & Education Fund, Hively has appealed to this court. After an exhaustive exploration of the law governing claims involving discrimination based on sexual orientation, the panel affirmed. *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698 (7th Cir. 2016). It began its analysis by noting that the idea that discrimination based on sexual orientation is somehow distinct from sex discrimination originated with dicta in *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984). *Ulane* stated (as if this resolved matters) that Title VII’s prohibition against sex discrimination “implies that it is unlawful to discriminate against women because they are women and against men because they are men.” *Id.* at 1085. From this truism, we deduced that “Congress had nothing more than the traditional notion of ‘sex’ in mind when it voted to outlaw sex discrimination. . . .” *Doe v. City of Belleville, Ill.*, 119 F.3d 563, 572 (7th Cir. 1997), *cert. granted, judgment vacated sub nom. City of Belleville v. Doe*, 523 U.S. 1001 (1998), *abrogated by Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

...

Almost all of our sister circuits have understood the law in the same way. . . .

...

That is not because the Supreme Court has left this subject entirely to the side. To the contrary, as the panel recognized, over the years the Court has issued several opinions that are relevant to the issue before us. Key among those decisions are *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998). *Price Waterhouse* held that the practice of gender stereotyping falls within Title VII’s prohibition against sex discrimination, and *Oncale* clarified that it makes no difference if the sex of the harasser is (or is not) the same as the sex of the victim. Our panel frankly acknowledged how difficult it is “to extricate the gender nonconformity claims from the sexual orientation claims.” 830 F.3d at 709. That effort, it commented, has led to a “confused hodge-podge of cases.” *Id.* at 711. It also noted that “all gay, lesbian and bisexual persons fail to comply with the sine qua non of gender stereotypes—that all men should form intimate relationships only with women, and all women should form intimate relationships only with men.” *Id.* Especially since the Supreme Court’s recognition that the Due Process and Equal Protection Clauses of the Constitution protect the right of same-sex couples to marry, *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015), bizarre results ensue from the current regime. As the panel noted, it creates “a paradoxical legal landscape in which a person can be married on Saturday and then fired on Monday for just that act.” 830 F.3d at 714. Finally, the panel highlighted the sharp tension between a rule that fails to recognize that discrimination on the basis of the sex with whom a person associates is a form of sex discrimination, and the rule, recognized since *Loving v. Virginia*, 388 U.S. 1 (1967), that discrimination on the basis of the race with whom a person associates is a form of racial discrimination.

...

## II

### A

The question before us is not whether this court can, or should, “amend” Title VII to add a new protected category to the familiar list of “race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a). Obviously that lies beyond our power. We must decide instead what it means to discriminate on the basis of sex, and in particular, whether actions taken on the basis of sexual orientation are a subset of actions taken on the basis of sex. This is a pure question of statutory interpretation and thus well within the judiciary’s competence.

...

Ivy Tech sets great store on the fact that Congress has frequently considered amending Title VII to add the words “sexual orientation” to the list of prohibited characteristics, yet it has never done so. Many of our sister circuits have also noted this fact. In our view, however, it is simply too difficult to draw a reliable inference from these truncated legislative initiatives to rest our opinion

on them. The goalposts have been moving over the years, as the Supreme Court has shed more light on the scope of the language that already is in the statute: no *sex* discrimination.

The dissent makes much of the fact that Congresses acting more than thirty years after the passage of Title VII made use of the term “sexual orientation” to prohibit discrimination or violence on that basis in statutes such as the Violence Against Women Act and the federal Hate Crimes Act. But this gets us no closer to answering the question at hand, for Congress may certainly choose to use both a belt and suspenders to achieve its objectives, and the fact that “sex” and “sexual orientation” discrimination may overlap in later statutes is of no help in determining whether sexual orientation discrimination *is* discrimination on the basis of sex for the purposes of Title VII. See, e.g., *McEvoy v. IEL Barge Servs., Inc.*, 622 F.3d 671, 677 (7th Cir. 2010) (“Congress may choose a belt-and-suspenders approach to promote its policy objectives ...”).

Moreover, the agency most closely associated with this law, the Equal Employment Opportunity Commission, in 2015 announced that it now takes the position that Title VII’s prohibition against sex discrimination encompasses discrimination on the basis of sexual orientation. See *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641 (July 15, 2015). Our point here is not that we have a duty to defer to the EEOC’s position. We assume for present purposes that no such duty exists. But the Commission’s position may have caused some in Congress to think that legislation is needed to carve sexual orientation *out* of the statute, not to put it *in*. In the end, we have no idea what inference to draw from congressional inaction or later enactments, because there is no way of knowing what explains each individual member’s votes, much less what explains the failure of the body as a whole to change this 1964 statute.

Our interpretive task is guided instead by the Supreme Court’s approach in the closely related case of *Oncale*, where it had this to say as it addressed the question whether Title VII covers sexual harassment inflicted by a man on a male victim:

We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII. As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits “discriminat[ion] . . . because of . . . sex” in the “terms” or “conditions” of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.

523 U.S. at 79–80. The Court could not have been clearer: the fact that the enacting Congress may not have anticipated a particular application of the law cannot stand in the way of the provisions of the law that are on the books.

It is therefore neither here nor there that the Congress that enacted the Civil Rights Act in 1964 and chose to include sex as a prohibited basis for employment discrimination (no matter why it did so) may not have realized or understood the full scope of the words it chose. [eds. note: The court set forth other instances in which the Supreme Court recognized Title VII's prohibition

against sex discrimination may be violated in ways that Congress in 1964 may not have anticipated--e.g., sexual harassment and same-sex harassment].

## B

Hively offers two approaches in support of her contention that “sex discrimination” includes discrimination on the basis of sexual orientation. The first relies on the tried-and-true comparative method in which we attempt to isolate the significance of the plaintiff’s sex to the employer’s decision: has she described a situation in which, holding all other things constant and changing only her sex, she would have been treated the same way? The second relies on the *Loving v. Virginia*, 388 U.S. 1 (1967), line of cases, which she argues protect her right to associate intimately with a person of the same sex. Although the analysis differs somewhat, both avenues end up in the same place: sex discrimination.

## 1

It is critical, in applying the comparative method, to be sure that only the variable of the plaintiff’s sex is allowed to change. The fundamental question is not whether a lesbian is being treated better or worse than gay men, bisexuals, or transsexuals, because such a comparison shifts too many pieces at once. Framing the question that way swaps the critical characteristic (here, sex) for both the complainant and the comparator and thus obscures the key point—whether the complainant’s protected characteristic played a role in the adverse employment decision. The counterfactual we must use is a situation in which Hively is a man, but everything else stays the same: in particular, the sex or gender of the partner.

Hively alleges that if she had been a man married to a woman (or living with a woman, or dating a woman) and everything else had stayed the same, Ivy Tech would not have refused to promote her and would not have fired her. . . . To use the phrase from *Ulane*, Ivy Tech is disadvantaging her *because she is a woman*. Nothing in the complaint hints that Ivy Tech has an anti-marriage policy that extends to heterosexual relationships, or for that matter even an anti-partnership policy that is gender-neutral.

Viewed through the lens of the gender non-conformity line of cases, Hively represents the ultimate case of failure to conform to the female stereotype (at least as understood in a place such as modern America, which views heterosexuality as the norm and other forms of sexuality as exceptional): she is not heterosexual. Our panel described the line between a gender nonconformity claim and one based on sexual orientation as gossamer-thin; we conclude that it does not exist at all. Hively’s claim is no different from the claims brought by women who were rejected for jobs in traditionally male workplaces, such as fire departments, construction, and policing. The employers in those cases were policing the boundaries of what jobs or behaviors they found acceptable for a woman (or in some cases, for a man).

This was the critical point that the Supreme Court was making in [*Price Waterhouse v.*] *Hopkins*. . . . And even before *Hopkins*, courts had found sex discrimination in situations where women were resisting stereotypical roles. As far back as 1971, the Supreme Court held that Title VII does not permit an employer to refuse to hire women with pre-school-age children, but not men. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971). Around the same time, this court held that Title VII “strike[s] at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes,” *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971), and struck down a rule requiring only the female employees to be unmarried. In both those instances, the employer’s rule did not affect every woman in the workforce. Just so here: a policy that discriminates on the basis of sexual orientation does not affect every woman, or every man, but it is based on assumptions about the proper behavior for someone of a given sex. The discriminatory behavior does not exist without taking the victim’s biological sex (either as observed at birth or as modified, in the case of transsexuals) into account. Any discomfort, disapproval, or job decision based on the fact that the complainant—woman or man—dresses differently, speaks differently, or dates or marries a same-sex partner, is a reaction purely and simply based on sex. That means that it falls within Title VII’s prohibition against sex discrimination, if it affects employment in one of the specified ways.

...

2

As we noted earlier, Hively also has argued that action based on sexual orientation is sex discrimination under the associational theory. It is now accepted that a person who is discriminated against because of the protected characteristic of one with whom she associates is actually being disadvantaged because of her own traits. This line of cases began with *Loving*, in which the Supreme Court held that “restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.” 388 U.S. at 12. The Court rejected the argument that miscegenation statutes do not violate equal protection because they “punish equally both the white and the Negro participants in an interracial marriage.” *Id.* at 8. When dealing with a statute containing racial classifications, it wrote, “the fact of equal application does not immunize the statute from the very heavy burden of justification” required by the Fourteenth Amendment for lines drawn by race. *Id.* at 9.

In effect, both parties to the interracial marriage were being denied important rights by the state solely on the basis of their race. This point by now has been recognized for many years. For example, in *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888 (11th Cir. 1986), the Eleventh Circuit considered a case in which a white man (Parr) married to an African-American woman was denied employment by an insurance company because of his interracial marriage. He sued under Title VII, but the district court dismissed the complaint on the ground that it failed to describe discrimination on the basis of race. The court of appeals reversed. It held that “[w]here a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of *his* race.” *Id.* at 892. . . .



The fact that we now accept this analysis tells us nothing, however, about the world in 1967, when *Loving* reached the Supreme Court. The dissent implies that we are adopting an anachronistic view of Title VII, enacted just three years before *Loving*, but it is the dissent's understanding of *Loving* and the miscegenation laws that is an anachronism. Thanks to *Loving* and the later cases we mentioned, society understands now that such laws are (and always were) inherently racist. But as of 1967 (and thus as of 1964), Virginia and 15 other states had anti-miscegenation laws on the books. *Loving*, 388 U.S. at 6. These laws were long defended and understood as non-discriminatory because the legal obstacle affected *both* partners. The Court in *Loving* recognized that equal application of a law that prohibited conduct only between members of different races did not save it. Changing the race of one partner made a difference in determining the legality of the conduct, and so the law rested on “distinctions drawn according to race,” which were unjustifiable and racially discriminatory. *Loving*, 388 U.S. at 11. So too, here. If we were to change the sex of one partner in a lesbian relationship, the outcome would be different. This reveals that the discrimination rests on distinctions drawn according to sex.

The dissent would instead have us compare the treatment of men who are attracted to members of the male sex with the treatment of women who are attracted to members of the female sex, and ask whether an employer treats the men differently from the women. But even setting to one side the logical fallacy involved, *Loving* shows why this fails. In the context of interracial relationships, we could just as easily hold constant a variable such as “sexual or romantic attraction to persons of a different race” and ask whether an employer treated persons of different races who shared that propensity the same. That is precisely the rule that *Loving* rejected, and so too must we, in the context of sexual associations.

The fact that *Loving* [and Title VII cases] deal with racial associations, as opposed to those based on color, national origin, religion, or sex, is of no moment. The text of the statute draws no distinction, for this purpose, among the different varieties of discrimination it addresses—a fact recognized by the *Hopkins* plurality. See 490 U.S. at 244 n.9. This means that to the extent that the statute prohibits discrimination on the basis of the race of someone with whom the plaintiff associates, it also prohibits discrimination on the basis of the national origin, or the color, or the religion, or (as relevant here) the sex of the associate. No matter which category is involved, the essence of the claim is that the *plaintiff* would not be suffering the adverse action had his or her sex, race, color, national origin, or religion been different.

### III

Today's decision must be understood against the backdrop of the Supreme Court's decisions, not only in the field of employment discrimination, but also in the area of broader discrimination on the basis of sexual orientation. We already have discussed the employment cases, especially *Hopkins* and *Oncale*. The latter line of cases began with *Romer v. Evans*, 517 U.S. 620 (1996), in which the Court held that a provision of the Colorado Constitution forbidding any organ of government in the state from taking action designed to protect “homosexual, lesbian, or bisexual” persons, *id.* at 624, violated the federal Equal Protection Clause. *Romer* was followed by *Lawrence*

*v. Texas*, 539 U.S. 558 (2003), in which the Court found that a Texas statute criminalizing homosexual intimacy between consenting adults violated the liberty provision of the Due Process Clause. Next came *United States v. Windsor*, 133 S.Ct. 2675 (2013), which addressed the constitutionality of the part of the Defense of Marriage Act (DOMA) that excluded a same-sex partner from the definition of “spouse” in other federal statutes. The Court held that this part of DOMA “violate[d] basic due process and equal protection principles applicable to the Federal Government.” *Id.* at 2693. Finally, the Court’s decision in *Obergefell, supra*, held that the right to marry is a fundamental liberty right, protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. 135 S.Ct. at 2604. The Court wrote that “[i]t is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality.” *Id.*

...

We close by noting that we have decided only the issue put before us. Additional complications can be saved for another day, when they are actually involved in the case. Ivy Tech did not contend, for example, that it was a religious institution and the positions it denied to Hively related to a religious mission. See 42 U.S.C. § 2000e-1(a). Nor have we had any occasion to consider the meaning of discrimination in the context of the provision of social or public services. We hold only that a person who alleges that she experienced employment discrimination on the basis of her sexual orientation has put forth a case of sex discrimination for Title VII purposes. It was therefore wrong to dismiss Hively’s complaint for failure to state a claim. The judgment of the district court is REVERSED and the case is REMANDED for further proceedings.

[The concurring opinions by Judge Posner and Judge Flaum are omitted]

SYKES, Circuit Judge, with whom BAUER and KANNE, Circuit Judges, join, dissenting.

...

Respect for the constraints imposed on the judiciary by a system of written law must begin with fidelity to the traditional first principle of statutory interpretation: When a statute supplies the rule of decision, our role is to give effect to the enacted text, interpreting the statutory language as a reasonable person would have understood it at the time of enactment. We are not authorized to infuse the text with a new or unconventional meaning or to update it to respond to changed social, economic, or political conditions.

...

I

...

A

[A]s a matter of interpretive method, I agree with my colleagues that the scope of Title VII is not limited by the subjective intentions of the enacting legislators. Or as Chief Judge Wood puts it in her elegant opinion for the en banc majority, the expectations of the enacting legislators “cannot stand in the way of the provisions of the law that are on the books.”

B

That is where our agreement ends. The en banc majority rests its new interpretation of sex discrimination on a thought experiment drawn from the “tried-and-true” comparative method of proof often used by plaintiffs in discrimination cases. *Id.* at p. 11. The majority also invokes *Loving v. Virginia*, 388 U.S. 1 (1967), the Supreme Court’s historic decision striking down Virginia’s miscegenation laws under the Fourteenth Amendment’s Equal Protection Clause, as well as cases involving sex stereotyping, most prominently *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

But the analysis must begin with the statutory text; it largely ends there too. Is it even remotely plausible that in 1964, when Title VII was adopted, a reasonable person competent in the English language would have understood that a law banning employment discrimination “because of sex” also banned discrimination because of sexual orientation? The answer is no, of course not.

“It is a fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.” *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014) (internal quotation marks omitted). The word “contemporary” as used here means *contemporaneous with the statute’s enactment*, not “contemporary” as in “now.” *Id.* at 876–77; *see also Jackson v. Blitt & Gaines, P.C.*, 833 F.3d 860, 863 (7th Cir. 2016) (citing *Sandifer* and explaining that statutory interpretation “look[s] to the meaning of the word[s] at the time the statute was enacted”). The interpretive inquiry looks to the original public meaning of the statutory text.

Title VII does not define discrimination “because of sex.” In common, ordinary usage in 1964—and now, for that matter—the word “sex” means biologically *male* or *female*; it does not also refer to sexual orientation. *See, e.g., Sex*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1969) (defining “sex” as “[t]he property or quality by which organisms are classified according to their reproductive functions[;] [e]ither of two divisions, designated *male* and *female*, of this classification”); *Sex*, NEW OXFORD AMERICAN DICTIONARY (3d ed. 2010) (defining “sex” as “either of the two main categories (male and female) into which humans and many other living things are divided on the basis of their

reproductive functions”); *Sex*, THE AMERICAN HERITAGE DESK DICTIONARY (5th ed. 2013) (defining “sex” as “[e]ither of the two divisions, female and male, by which most organisms are classified on the basis of their reproductive organs and functions[;] [t]he condition or character of being female or male”).

To a fluent speaker of the English language—then and now—the ordinary meaning of the word “sex” does not fairly include the concept of “sexual orientation.” The two terms are never used interchangeably, and the latter is not subsumed within the former; there is no overlap in meaning. Contrary to the majority’s vivid rhetorical claim, it does not take “considerable calisthenics” to separate the two. The words plainly describe different traits, and the separate and distinct meaning of each term is easily grasped. More specifically to the point here, discrimination “because of sex” is not reasonably understood to include discrimination based on sexual orientation, a different immutable characteristic. Classifying people by sexual orientation is different than classifying them by sex. . . .

...

## C

This commonsense understanding is confirmed by the language Congress uses when it *does* legislate against sexual-orientation discrimination. For example, the Violence Against Women Act prohibits funded programs and activities from discriminating “on the basis of actual or perceived race, color, religion, national origin, *sex*, gender identity, . . . *sexual orientation*, or disability.” 42 U.S.C. § 13925(b)(13)(A) (emphases added). If sex discrimination is commonly understood to encompass sexual-orientation discrimination, then listing the two categories separately, as this statute does, is needless surplusage. The federal Hate Crimes Act is another example. It imposes a heightened punishment for causing or attempting to cause bodily injury “to any person, because of the actual or perceived religion, national origin, *gender*, *sexual orientation*, gender identity, or disability of any person.” 18 U.S.C. § 249(a)(2)(A) (emphases added).

...

This uniformity of usage is powerful objective evidence that sexual-orientation discrimination is broadly recognized as an independent category of discrimination and is *not* synonymous with sex discrimination.

## II

My colleagues in the majority superficially acknowledge *Ulane*’s “truism” that sex discrimination is discrimination based on a person’s biological sex. As they see it, however, even if sex discrimination is understood in the ordinary way, sexual-orientation discrimination *is* sex discrimination because “it is actually impossible to discriminate on the basis of sexual orientation

without discriminating on the basis of sex.”

Not true. An employer who refuses to hire homosexuals is not drawing a line based on the job applicant’s sex. He is not excluding gay men because they are men and lesbians because they are women. His discriminatory motivation is independent of and unrelated to the applicant’s sex. Sexism (misandry and misogyny) and homophobia are separate kinds of prejudice that classify people in distinct ways based on different immutable characteristics. Simply put, sexual-orientation discrimination doesn’t classify people by sex; it doesn’t draw male/female distinctions but instead targets homosexual men and women for harsher treatment than heterosexual men and women.

...

### III

#### A

The majority also draws on *Loving*, the Supreme Court’s iconic decision invalidating Virginia’s miscegenation statutes on equal-protection grounds. This case is not a variant of *Loving*. Miscegenation laws plainly employ invidious racial classifications; they are inherently racially discriminatory. In contrast, sexual-orientation discrimination springs from a wholly different kind of bias than sex discrimination. The two forms of discrimination classify people based on different traits and thus are not the same.

In *Loving*, Virginia tried to defend its antimiscegenation regime by insisting that miscegenation statutes do not actually discriminate based on race because both the black and white spouses in an interracial marriage are punished equally. 388 U.S. at 8 (“[T]he State contends that, because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications[,] do not constitute an invidious discrimination based upon race.”). The Supreme Court made short work of that specious argument: “[W]e deal [here] with statutes containing racial classifications, and the fact of equal application does not immunize the statute[s] from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.” *Id.* at 9.

The Court went on to explain that the “clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States.” *Id.* at 10. The Court continued with this: “There can be no question but that Virginia’s miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races.” *Id.* at 11. After explaining that the “[p]enalties for miscegenation arose as an incident to slavery,” *id.* at 6, and are “designed to maintain White Supremacy,” *id.* at 11, the Court announced its holding: “There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause,” *id.* at 12.

As these passages from the Court’s opinion make clear, *Loving* rests on the inescapable truth that miscegenation laws are inherently racist. They are premised on invidious ideas about white superiority and use racial classifications toward the end of racial purity and white supremacy. Sexual-orientation discrimination, on the other hand, is not inherently *sexist*. No one argues that sexual-orientation discrimination aims to promote or perpetuate the supremacy of one sex. In short, *Loving* neither compels nor supports the majority’s decision to upend the long-settled understanding that sex discrimination and sexual-orientation discrimination are distinct.

...

## B

The majority also relies on cases involving sex stereotyping, most notably the Supreme Court’s decision in *Price Waterhouse v. Hopkins*. More specifically, my colleagues conclude that a claim of sexual-orientation discrimination is indistinguishable from a claim involving sex stereotyping. I disagree. Nothing in *Hopkins* altered the traditional understanding that sexual-orientation discrimination is a distinct type of discrimination and is not synonymous with sex discrimination.

To put the matter plainly, heterosexuality is not a *female* stereotype; it is not a *male* stereotype; it is not a *sex-specific* stereotype at all. An employer who hires only heterosexual employees is neither assuming nor insisting that his female and male employees match a stereotype specific to their sex. He is instead insisting that his employees match the dominant sexual orientation *regardless of their sex*. Sexual-orientation discrimination does not classify people according to invidious or idiosyncratic *male* or *female* stereotypes. It does not spring from a sex-specific bias at all.

...

## C

Neither does *Oncale* compel or support today’s decision. *Oncale* held only that same-sex sexual harassment may, in an appropriate case, support a claim under Title VII *provided* that it “meets the statutory requirements.” 523 U.S. at 79–80. The Court reiterated that in *all* sex-discrimination cases, including sexual-harassment cases, “[t]he critical issue, Title VII’s text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.” *Id.* at 80 (quotation marks omitted).

[I]n authorizing claims of same-sex harassment as a theoretical matter, the Court carefully tethered *all* sexual-harassment claims to the statutory requirement that the plaintiff prove discrimination “because of sex.” Nothing in *Oncale* eroded the distinction between sex discrimination and sexual-orientation discrimination or opened the door to a new interpretation of Title VII.

*Oncale* was not a revolutionary decision. In contrast, today’s decision by the en banc court works a profound transformation of Title VII by any measure.

## D

The majority also finds support for its decision in “the backdrop of the Supreme Court’s decisions ... in the area of broader discrimination on the basis of sexual orientation,” citing *Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003); *United States v. Windsor*, 133 S. Ct. 2675 (2013); and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

But the majority’s position is actually irreconcilable with these cases. First, *Lawrence* was decided solely under the Due Process Clause; it was not an equal-protection case. 539 U.S. at 564. In the other cases, far from collapsing the well-understood distinction between sex discrimination and sexual-orientation discrimination, the Court actually preserved it. The Court assigned these two distinct forms of discrimination to different analytical categories for purposes of equal-protection scrutiny. If sex discrimination and sexual-orientation discrimination were really one and the same, then the Court would have applied the intermediate standard of scrutiny that governs judicial review of laws that classify people by sex. See *United States v. Virginia*, 518 U.S. 515, 531 (1996). It did not do so.

## E

Finally, drawing especially on *Obergefell*, my colleagues worry that adhering to the long-settled interpretation of Title VII “creates ‘a paradoxical legal landscape in which a person can be married on Saturday and then fired on Monday for just that act.’ ” Majority Op. at p. 5 (quoting *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 714 (7th Cir. 2016)). The concern is understandable, but my colleagues conflate the distinction between state action, which is subject to constitutional limits, and private action, which is regulated by statute. The Due Process and Equal Protection Clauses are constitutional restraints on government. Title VII is a statutory restraint on employers. The legal regimes differ accordingly. Any discrepancy is a matter for legislative, not judicial, correction.

\* \* \*

If Kimberly Hively was denied a job because of her sexual orientation, she was treated unjustly. But Title VII does not provide a remedy for this kind of discrimination. The argument that it *should* must be addressed to Congress.

## IV

...  
... It's understandable that the court is impatient to protect lesbians and gay men from workplace discrimination without waiting for Congress to act. Legislative change is arduous and can be slow to come. But we're not authorized to amend Title VII by interpretation. The ordinary, reasonable, and fair meaning of sex discrimination as that term is used in Title VII does not include discrimination based on sexual orientation, a wholly different kind of discrimination. Because Title VII does not by its terms prohibit sexual-orientation discrimination, Hively's case was properly dismissed. I respectfully dissent.

### Notes and Questions

1. *Hively* is the first and to date the only federal appeals court decision recognizing Title VII sexual orientation claims. The court notes that the EEOC reached the same conclusion in 2015 after decades of stating that such claims fell outside the scope of Title VII. *See Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641 (July 15, 2015). As the Seventh Circuit explains, *Baldwin* is not binding on courts. However, some courts have found its reasoning persuasive and have adopted it. *See e.g., Videckis v. Pepperdine University*, 150 F. Supp.3d 1151,1161 (C.D. Cal. 2015) (explaining that its holding recognizing sexual orientation discrimination under Title IX is consistent with *Baldwin*). *But see Hinton v. Virginia Union Univ.*, 185 F. Supp.3d 807, 815017 (E.D. Va. 2016) (refusing to follow *Baldwin*). Although the Supreme Court has yet to speak on the issue, a plaintiff in 2017 filed a petition for *certiorari* with the Court after the Eleventh Circuit rejected her claim that Title VII prohibits employment discrimination on the basis of sexual orientation. *See Evans v. Georgia Regional Hosp.*, 850 F.3d 1248, 1254 (11<sup>th</sup> Cir 2017), *pet. for cert. filed*, (No. 17-370), Sept. 7, 2017.

The EEOC maintains a list of judicial decisions addressing LGBT-related claims under Title VII, which you may find helpful to keep you apprised of the developing law in this area. *See Examples of Court Decisions Supporting Coverage of LGBT-Related Discrimination Under Title VII*, [https://www.eeoc.gov/eeoc/newsroom/wysk/lgbt\\_examples\\_decisions.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/lgbt_examples_decisions.cfm), (last visited Sept. 28, 2017).

2. (“Lambda Legal”) represented the plaintiff in *Hively* on appeal. In several instances, the dissent calls Lambda Legal’s position that sexual orientation is a form of sex discrimination a “creative” and “new” interpretation of the statute. While as we know, courts at one time universally rejected the argument that discrimination because of sexual orientation is discrimination because of sex (recall *DeSantis*), plaintiffs have made these arguments for years. Thus, that interpretation of Title VII is not technically new or novel. Yet, doesn’t Judge Sykes’s broader point hold true? Until recently, courts have rejected the “sexual orientation is sex” argument. Moreover, Congress did not have sexual orientation in mind when it enacted Title VII, a point the majority does not contest. Why does the majority find these facts to be irrelevant to whether Title VII protects against



sexual orientation discrimination? In holding that sexual orientation discrimination is cognizable under Title VII, the majority cites *Oncale* for the proposition that Title VII is not limited to an interpretation anticipated by legislators in 1964 when the statute was enacted. How does Judge Sykes respond to the majority's reliance on *Oncale* for that proposition?

3. Judge Sykes contends that sex and sexual orientation are distinct "immutable" characteristics, and that "powerful objective evidence" of that distinction is the fact that numerous federal and state statutes protect both characteristics, and thus treat them as "independent categor[ies] of discrimination." How does the majority opinion respond to this argument? Which position do you find more persuasive?

4. Judge Sykes says that "sex discrimination is discrimination based on a person's biological sex." She chides the majority for its position that "it is impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex." Rather, according to Judge Sykes, an employer that discriminates against, say, gay men is not discriminating against them because they are men but because they are gay. The employer's target, she argues, is homosexual men, not men because they are men. Do you agree? Can sex and sexual orientation be so easily unpacked or are they inextricably linked?

According to the American Psychological Association ("APA"), "[s]exual acts or attractions are categorized as homosexual or heterosexual according to the biological sex of the individuals involved, relative to each other." See *Obergefell v. Hodges*, Brief of the American Psychological Association, *et al.*, Nos. 14-556, 14-562, 14-571, 14-574, 2015 WL 1004713, at \*10 (2015). The APA also states that "[i]n the United States the most frequent labels [to define sexual orientation include] lesbians (women attracted to women), gay men (men attracted to men), and bisexual people (men or women attracted to both sexes)." See *What is Sexual Orientation*, American Psychological Association, <http://www.apa.org/topics/lgbt/orientation.aspx>, (last visited Sept. 28, 2017).

You may recall that Title VII is violated if discrimination is motivated, in part, by an individual's protected trait. See 42 U.S.C. § 2000e-2(m). Accordingly, the statute does not require that individuals prove that an employer discriminated against them *solely* because of their sex. Assuming if asked why he fired a lesbian employee, the employer responds that he did so "because of her sexual orientation," didn't the employee's sex, in part, motivate the employer's decision? See *Hively*, 853 F.3d at 358-59 (Flaum, J., concurring) (yes). Or does Judge Sykes have the more persuasive argument?

5. The plaintiff in *Hively* invokes *Loving v. Virginia* to support her association claim based on sex. Why do the majority and dissenting opinions part ways on their understanding of whether *Loving* is relevant to the associational issues that arise in this case? Whose argument is more persuasive and why?

6. The court in *Hively* recognizes that in light of recent constitutional cases by the Supreme Court, particularly *Obergefell v. Hodges*, that “bizarre results would ensue under the current regime[;]. . . it creates a paradoxical legal landscape in which a person can be married on Saturday and then fired on Monday for just that act.” While this is undoubtedly true, should those bizarre results have factored into the court’s interpretation of Title VII? How does Judge Sykes respond to the majority’s concern about the bizarre results that would ensue unless the court finds that sexual orientation claims fall within Title VII’s protective scope?

#### Problem 4

Marcia Grady applies for a job as an analyst with Umbridge, Inc. Based on the job description she is well qualified for the position and indeed Umbridge invites her to interview with the company. Mr. Thomas Builders interviews Marcia. During the interview, he praises Marcia’s qualifications and tells her that she seems “right for the job.” Things turn sour after he asks her to tell him a little about herself. Marcia responds that she is happily married to a wonderful woman and that the couple have a two-year old daughter. Mr. Builders immediately responds “that won’t do.” He says that if she has a young child at home, her place is with her child “during its formative years.” He explains that his own wife stayed home with each of their children until they were school age and he expects that any “decent mom would do the same.” He then tells her that he also is not sure that her homosexual relationship would be a “good fit for Umbridge’s image.” He thanks her for coming in but tells her that he “just remembered that the position had already been filled.”

Marcia suspects that the reason she didn’t get the job is because of the details she shared about her personal life. She comes to you for advice. Assume that Builders has no problem hiring women and thus doesn’t discriminate against women because they are women. Assume that courts in your jurisdiction (none of which you are bound to follow) have reached inconsistent results concerning the viability of Title VII sexual orientation claims. However, all courts in your jurisdiction recognize that employers may not engage in sex stereotyping. How would you advise Marcia? For purposes of Title VII, in what ways, if any, would a claim involving her parental status differ from your analysis of her sexual orientation claim?

## **IV. Gender Identity and Expression**

According to the American Psychological Association, “[t]ransgender is an umbrella term for persons whose gender identity [one’s internal sense of being male, female or something else], gender expression or behavior does not conform to that typically associated with the sex to which they were assigned at birth.” “*What Does Gender Mean?*” American Psychological Association, <http://www.apa.org/topics/lgbt/transgender.aspx> (last visited Sept. 28, 2017)); *see also* Jillian Todd Weiss, *Transgender Identity, Textualism, and the Supreme Court: What Is the “Plain*

*Meaning*” of “Sex” in Title VII of the Civil Rights Act of 1964, 18 TEMP. POL & CIV. RTS. L. REV. 573, 589 (2009) (explaining that “transgender” may “denote transsexuals, transvestites, crossdressers, and anyone else whose gender identity or gender expression varies from the dimorphic norm”).

Plaintiffs have long argued that Title VII prohibits discrimination on the basis of transgender status or gender identity. Similar to the approach taken by the court in *DeSantis* regarding sexual orientation, early courts rejected these claims as well. *See e.g., Ulane v. Eastern Airlines*, 742 F.2d 1081, 1085 (7<sup>th</sup> Cir. 1984) (holding that Title VII does not protect employees against discrimination because of homosexuality, transsexuality or transvestitism). As with sexual orientation, *Price Waterhouse* also has changed the legal landscape for employees alleging discrimination on the basis of gender identity or expression. As we shall see, however, some courts and the EEOC have held that employees going through gender transition have other means to show that discrimination is “because of sex” beyond evidence of gender stereotyping.

Several of the cases discussed in this section refer to the plaintiffs involved in those cases as being “transsexual,” i.e., “people whose gender identity is different from their assigned sex [and who] [o]ften . . . alter or wish to alter their bodies . . . to make [them] as congruent as possible with their gender identities.” “*What Does Gender Mean?*,” American Psychological Association, <http://www.apa.org/topics/lgbt/transgender.aspx>. However, unless otherwise indicated, the Notes and explanatory materials use the more inclusive term “transgender” to refer to all individuals whose gender identity, expression or both and their birth sex are incongruent.

## A. Gender Identity and Expression and Sex Stereotyping

*Smith v. City of Salem, Ohio*  
378 F.3d 566 (6<sup>th</sup> Cir. 2004).

Before COLE and GILMAN, Circuit Judges; SCHWARZER, Senior District Judge.

### Amended Opinion

COLE, Circuit Judge.

Plaintiff–Appellant Jimmie L. Smith appeals from a judgment of the United States District Court for the Northern District of Ohio dismissing his claims against his employer, Defendant–Appellant City of Salem, Ohio, and various City officials, and granting judgment on the pleadings to Defendants, pursuant to Federal Rule of Civil Procedure 12(c). Smith, who considers himself a transsexual and has been diagnosed with Gender Identity Disorder, alleged that Defendants discriminated against him in his employment on the basis of sex. He asserted claims pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. § 1983. The district court dismissed those claims pursuant to Rule 12(c). Smith also asserted state law claims for invasion of privacy and civil conspiracy; the district court dismissed those claims as well, having declined to exercise pendent jurisdiction over them.

For the following reasons, we reverse the judgment of the district court and remand the case for further proceedings consistent with this opinion.

### I. BACKGROUND

Smith is—and has been, at all times relevant to this action—employed by the city of Salem, Ohio, as a lieutenant in the Salem Fire Department (the “Fire Department”). Prior to the events surrounding this action, Smith worked for the Fire Department for seven years without any negative incidents. Smith—biologically and by birth a male—is a transsexual and has been diagnosed with Gender Identity Disorder (“GID”), which the American Psychiatric Association characterizes as a disjunction between an individual’s sexual organs and sexual identity. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 576–582 (4th ed.2000). After being diagnosed with GID, Smith began “expressing a more feminine appearance on a full-time basis”—including at work—in accordance with international medical protocols for treating GID. Soon thereafter, Smith’s co-workers began questioning him about his appearance and commenting that his appearance and mannerisms were not “masculine enough.” As a result, Smith notified his immediate supervisor, Defendant Thomas Eastek, about his GID diagnosis and treatment. He also informed Eastek of the likelihood that his treatment would eventually include complete physical transformation from male to female. Smith had approached Eastek in order to answer any questions Eastek might have concerning his appearance and manner and so that Eastek

could address Smith's co-workers' comments and inquiries. Smith specifically asked Eastek, and Eastek promised, not to divulge the substance of their conversation to any of his superiors, particularly to Defendant Walter Greenamyre, Chief of the Fire Department. In short order, however, Eastek told Greenamyre about Smith's behavior and his GID.

Greenamyre then met with Defendant C. Brooke Zellers, the Law Director for the City of Salem, with the intention of using Smith's transsexualism and its manifestations as a basis for terminating his employment. On April 18, 2001, Greenamyre and Zellers arranged a meeting of the City's executive body to discuss Smith and devise a plan for terminating his employment. The executive body included Defendants Larry D. DeJane, Salem's mayor; James A. Armeni, Salem's auditor; and Joseph S. Julian, Salem's service director. Also present was Salem Safety Director Henry L. Willard, now deceased, who was never a named defendant in this action.

...

During the meeting, Greenamyre, DeJane, and Zellers agreed to arrange for the Salem Civil Service Commission to require Smith to undergo three separate psychological evaluations with physicians of the City's choosing. They hoped that Smith would either resign or refuse to comply. If he refused to comply, Defendants reasoned, they could terminate Smith's employment on the ground of insubordination. Willard, who remained silent during the meeting, telephoned Smith afterwards to inform him of the plan, calling Defendants' scheme a "witch hunt."

Two days after the meeting, on April 20, 2001, Smith's counsel telephoned DeJane to advise him of Smith's legal representation and the potential legal ramifications for the City if it followed through on the plan devised by Defendants during the April 18 meeting. On April 22, 2001, Smith received his "right to sue" letter from the U.S. Equal Employment Opportunity Commission ("EEOC"). Four days after that, on April 26, 2001, Greenamyre suspended Smith for one twenty-four hour shift, based on his alleged infraction of a City and/or Fire Department policy.

...

## **II. ANALYSIS**

On appeal, Smith contends that the district court erred in holding that: (1) he failed to state a claim of sex stereotyping; [and] (2) Title VII protection is unavailable to transsexuals. . . .

## 1. *Sex Stereotyping*

Title VII of the Civil Rights Act of 1964 provides, in relevant part, that “[i]t shall be an 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 race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e–2(a).

In his complaint, Smith asserts Title VII claims of retaliation and employment discrimination “because of ... sex.” The district court dismissed Smith’s Title VII claims on the ground that he failed to state a claim for sex stereotyping pursuant to *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). The district court implied that Smith’s claim was disingenuous, stating that he merely “invokes the term-of-art created by *Price Waterhouse*, that is, ‘sex-stereotyping,’ ” as an end run around his “real” claim, which, the district court stated, was “based upon his transsexuality.” The district court then held that “Title VII does not prohibit discrimination based on an individual’s transsexualism.”

Relying on *Price Waterhouse*—which held that Title VII’s prohibition of discrimination “because of . . . sex” bars gender discrimination, including discrimination based on sex stereotypes—Smith contends on appeal that he was a victim of discrimination “because of ... sex” both because of his gender non-conforming conduct and, more generally, because of his identification as a transsexual.

We first address whether Smith has stated a claim for relief, pursuant to *Price Waterhouse*’s prohibition of sex stereotyping, based on his gender non-conforming behavior and appearance. In *Price Waterhouse*, the plaintiff, a female senior manager in an accounting firm, was denied partnership in the firm, in part, because she was considered “macho.” 490 U.S. at 235, 109 S.Ct. 1775. She was advised that she could improve her chances for partnership if she were to take “a course at charm school,” “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.” *Id.* (internal quotation marks omitted). Six members of the Court agreed that such comments bespoke gender discrimination, holding that Title VII barred not just discrimination because Hopkins was a woman, but also sex stereotyping—that is, discrimination because she failed to *act* like a woman. *Id.* at 250–51, 109 S.Ct. 1775 (plurality opinion of four Justices); *id.* at 258–61, 109 S.Ct. 1775 (White, J., concurring); *id.* at 272–73, 109 S.Ct. 1775 (O’Connor, J., concurring) (accepting plurality’s sex stereotyping analysis and characterizing the “failure to conform to [gender] stereotypes” as a discriminatory criterion; concurring separately to clarify the separate issues of causation and allocation of the burden of proof). As Judge Posner has pointed out, the term “gender” is one “borrowed from grammar to designate the sexes as viewed as social rather than biological classes.” Richard A. Posner, *Sex and Reason*, 24–25 (1992). The Supreme Court made clear that in the context of Title VII, discrimination because of “sex” includes gender discrimination: “In the context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.” *Price Waterhouse*, 490 U.S. at 250, 109 S.Ct. 1775. The Court emphasized that “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.” *Id.* at 251, 109 S.Ct. 1775.

Smith contends that the same theory of sex stereotyping applies here. His complaint sets forth the conduct and mannerisms which, he alleges, did not conform with his employers' and co-workers' sex stereotypes of how a man should look and behave. Smith's complaint states that, after being diagnosed with GID, he began to express a more feminine appearance and manner on a regular basis, including at work. The complaint states that his co-workers began commenting on his appearance and mannerisms as not being masculine enough; and that his supervisors at the Fire Department and other municipal agents knew about this allegedly unmasculine conduct and appearance. The complaint then describes a high-level meeting among Smith's supervisors and other municipal officials regarding his employment. Defendants allegedly schemed to compel Smith's resignation by forcing him to undergo multiple psychological evaluations of his gender non-conforming behavior. The complaint makes clear that these meetings took place soon after Smith assumed a more feminine appearance and manner and after his conversation about this with Eastek. In addition, the complaint alleges that Smith was suspended for twenty-four hours for allegedly violating an unenacted municipal policy, and that the suspension was ordered in retaliation for his pursuing legal remedies after he had been informed about Defendants' plan to intimidate him into resigning. In short, Smith claims that the discrimination he experienced was based on his failure to conform to sex stereotypes by expressing less masculine, and more feminine mannerisms and appearance.

Having alleged that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind Defendants' actions, Smith has sufficiently pleaded claims of sex stereotyping and gender discrimination.

In so holding, we find that the district court erred in relying on a series of pre-*Price Waterhouse* cases from other federal appellate courts holding that transsexuals, as a class, are not entitled to Title VII protection because "Congress had a narrow view of sex in mind" and "never considered nor intended that [Title VII] apply to anything other than the traditional concept of sex." *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085, 1086 (7th Cir.1984); *see also Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 661-63 (9th Cir.1977) (refusing to extend protection of Title VII to transsexuals because discrimination against transsexuals is based on "gender" rather than "sex"). It is true that, in the past, federal appellate courts regarded Title VII as barring discrimination based only on "sex" (referring to an individual's anatomical and biological characteristics), but not on "gender" (referring to socially-constructed norms associated with a person's sex). *See, e.g., Ulane*, 742 F.2d at 1084 (construing "sex" in Title VII narrowly to mean only anatomical sex rather than gender); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir.1982) (holding that transsexuals are not protected by Title VII because the "plain meaning" must be ascribed to the term "sex" in the absence of clear congressional intent to do otherwise); *Holloway*, 566 F.2d at 661-63 (refusing to extend protection of Title VII to transsexuals because discrimination against transsexualism is based on "gender" rather than "sex," and "sex" should be given its traditional definition based on the anatomical characteristics dividing "organisms" and "living beings" into male and female). In this earlier jurisprudence, male-to-female transsexuals (who were the plaintiffs in *Ulane*, *Sommers*, and *Holloway*)—as biological males whose outward behavior and emotional identity did not conform to socially-prescribed expectations of masculinity—were denied Title VII protection by courts because they were considered victims of "gender" rather than "sex" discrimination.

However, the approach in *Holloway*, *Sommers*, and *Ulane*—and by the district court in this case—has been eviscerated by *Price Waterhouse*. See *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir.2000) (“The initial judicial approach taken in cases such as *Holloway* [and *Ulane*] has been overruled by the logic and language of *Price Waterhouse*.”). By holding that Title VII protected a woman who failed to conform to social expectations concerning how a woman should look and behave, the Supreme Court established that Title VII’s reference to “sex” encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms.

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. . . .

Yet some courts have held that this latter form of discrimination is of a different and somehow more permissible kind. For instance, the man who acts in ways typically associated with women is not described as engaging in the same activity as a woman who acts in ways typically associated with women, but is instead described as engaging in the different activity of being a transsexual (or in some instances, a homosexual or transvestite). Discrimination against the transsexual is then found not to be discrimination “because of . . . sex,” but rather, discrimination against the plaintiff’s unprotected status or mode of self-identification. In other words, these courts superimpose classifications such as “transsexual” on a plaintiff, and then legitimize discrimination based on the plaintiff’s gender non-conformity by formalizing the non-conformity into an ostensibly unprotected classification. See, e.g., *Dillon v. Frank*, No. 90–2290, 1992 WL 5436 (6th Cir. Jan.15, 1992).

Such was the case here: despite the fact that Smith alleges that Defendants’ discrimination was motivated by his appearance and mannerisms, which Defendants felt were inappropriate for his perceived sex, the district court expressly declined to discuss the applicability of *Price Waterhouse*. The district court therefore gave insufficient consideration to Smith’s well-pleaded claims concerning his contra-gender behavior, but rather accounted for that behavior only insofar as it confirmed for the court Smith’s status as a transsexual, which the district court held precluded Smith from Title VII protection.

Such analyses cannot be reconciled with *Price Waterhouse*, which does not make Title VII protection against sex stereotyping conditional or provide any reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is a transsexual. As such, discrimination against a plaintiff who is a transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman. Sex 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.



Accordingly, we hold that Smith has stated a claim for relief pursuant to Title VII's prohibition of sex discrimination.

Finally, we note that, in its opinion, the district court repeatedly places the term "sex stereotyping" in quotation marks and refers to it as a "term of art" used by Smith to disingenuously plead discrimination because of transsexualism. Similarly, Defendants refer to sex stereotyping as "the *Price Waterhouse* loophole." (Appellees' Brief at 6.) These characterizations are almost identical to the treatment that Price Waterhouse itself gave sex stereotyping in its briefs to the U.S. Supreme Court. As we do now, the Supreme Court noted the practice with disfavor, stating:

In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender. Although the parties do not overtly dispute this last proposition, the placement by Price Waterhouse of "sex stereotyping" in quotation marks throughout its brief seems to us an insinuation either that such stereotyping was not present in this case or that it lacks legal relevance. We reject both possibilities.

*Price Waterhouse*, 490 U.S. at 250, 109 S.Ct. 1775.

### Notes and Questions

1. **Hively revisited:** The court in *Smith* notes that the district court below and other courts had relied on such cases as *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085-1086 (7th Cir. 1984) for the proposition that "transsexuals, as a class, are not entitled to Title VII protection. . . ." See also *Etsitty v. Utah Transit Authority*, 502 F.3d 1215, 1221 (10<sup>th</sup> Cir. 2007) (agreeing with *Ulane* that "discrimination against a transsexual based on the person's status as a transsexual is not discrimination because of sex under Title VII"). However, agreeing with the Ninth Circuit, the Sixth Circuit opines that *Price Waterhouse* has eviscerated the logic of *Ulane* and similar decisions. *Ulane* was decided by the Seventh Circuit, the same court that decided *Hively*, which held that Title VII prohibits sexual orientation discrimination. Considering the reasoning of the majority opinion in *Hively*, do you think if it again addressed the issue of gender identity discrimination, that the court would overrule *Ulane*?

2. **Sex Stereotypes and Transgender Employees:** The Sixth Circuit in *Smith* held that discrimination against Jimmie Smith because of gender nonconformity violated Title VII. He did not lose that protection because he was transsexual. Relying on *Price Waterhouse*, numerous courts have held similarly. See e.g. *Glenn v. Brumby*, 663 F.3d 1312, 1318 & n.5 (11<sup>th</sup> Cir. 2011) (collecting cases); *Lopez v. River Oaks Imaging*, 542 F. Supp.2d 653 (S.D. Tex. 2008) ("Title VII is violated when an employer discriminates against any employee, transsexual or not, because he or she has failed to act or appear sufficiently masculine or feminine enough for an employer;" and collecting cases reaching similar conclusions). But see *Etsitty v. Utah Transit Authority*, 502 F.3d 1215, 1224-26 (10<sup>th</sup> Cir. 2007) (assuming without deciding that a pre-operative transgender

woman had “established a prima facie case under the *Price Waterhouse* theory of gender stereotyping” but rejecting her claim because she failed to show her termination actually stemmed from failing to conform to sex stereotypes).

3. **Transgender Status/Identity or Conduct:** The *Smith* court explained that “discrimination against a plaintiff who is a transsexual—and therefore fails to act and/or *identify* with his or her gender—is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*. . . .” Did the court hold that Jimmie Smith was protected under Title VII because of his transsexual status/identity or because of his gender nonconforming conduct? Would the result in the case have been the same if Smith’s supervisor heard rumors that Smith was transsexual and fired him because of it? The version of *Smith* as it appears in this Chapter is an “Amended Opinion.” The court’s initial opinion had been issued a few months earlier and was subsequently vacated. The initial opinion contained the following paragraph, which was excluded from the Amended Opinion:

Even if Smith had alleged discrimination based only on his self-identification as a transsexual-s opposed to his specific appearance and behavior-this claim too is actionable pursuant to Title VII. By definition, transsexuals are individuals who fail to conform to stereotypes about how those assigned a particular sex at birth should act, dress, and self-identify. *Ergo*, identification as a transsexual is the statement or admission that one wishes to be the opposite sex or does not relate to one's birth sex. Such an admission-for instance the admission by a man that he self-identifies as a woman and/or that he wishes to be a woman-itself violates the prevalent sex stereotype that a man should perceive himself as a man. Discrimination based on transsexualism is rooted in the insistence that sex (organs) and gender (social classification of a person as belonging to one sex or the other) coincide. This is the very essence of sex stereotyping.

*Smith v. City of Salem, Ohio*, 369 F.3d 912 (6<sup>th</sup> Cir. 2004), *vacated and superseded by* 378 F.3d 566 (6<sup>th</sup> Cir. 2004). Isn’t discrimination against a transgender person *per se* unlawful under Title VII because it is based on the sex stereotype that a person’s gender identity and expression should match the sex he or she was assigned at birth? Under that reasoning, individuals designated male at birth *should* identity as male as well as express a masculine behavior and appearance. Similarly, individuals designated female at birth *should* identity as female and express feminine traits? Why do you believe the court deleted this paragraph from the amended opinion?

Although the weight of authority recognizes that Title VII protects transgender individuals, like everyone else, there is disagreement on whether transgender status is protected. *Compare Etsitty v. Utah Transit Authority*, 502 F.3d 1215, 1224-26 (10<sup>th</sup> Cir. 2007) (discrimination based on transsexual status not protected under Title VII but claim based on sex stereotyping regarding how a man or woman “should act or appear” is cognizable) *and Creed v. Family Express Corp.*, No. 3:06-CV-465RM, 2009 WL 35237, at \*6 (Jan. 5, 2009) (“Although discrimination because one’s behavior doesn’t conform to stereotypical ideas of one’s gender may amount to actionable discrimination based on sex, harassment based on sexual preference or transgender status does

not.”) with *Roberts v. Clark County School Dist.*, 312 F.R.D. 594, 605-06 (D. Nev. 2016) (agreeing with position taken by the EEOC that “claims of discrimination based on transgender status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII’s sex discrimination prohibition”).

4. **Americans with Disabilities Act:** Jimmie Smith was diagnosed with Gender Identity Disorder (“GID”). The American Psychiatric Association replaced that term with the term “Gender Dysphoria” in the most recent *Diagnostic and Statistical Manual of Mental Disorders* (“DSM-5”). See *Kothmann v. Rosario*, 558 Fed.Appx. 907, 907 & n.2 (11<sup>th</sup> Cir. 2014) (*per curiam*). The change, in part, was because disorder characterized all transgender people as mentally ill; yet, many transgender people do not suffer distress between their identity and their birth sex and therefore should not all be pathologized. See *id.*; see also Camille Beredjick, *DSM-V to Rename Gender Identity Disorder ‘Gender Dysphoria’*, *The Advocate* (July 23, 2012), <http://www.advocate.com/politics/transgender/2012/07/23/dsm-replaces-gender-identity-disorder-gender-dysphoria>.

Considering that Gender Dysphoria is included in the DSM-V, why didn’t Smith allege discrimination on the basis of disability under the Americans with Disabilities Act? See 42 U.S.C. § 12211(a)-(b).

5. **Dress Codes and Gender Expression:** According to the court in *Smith*:

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.

*Smith*, 378 F.3d at 574.

Does *Smith* hold that employers are prohibited from imposing different dress and grooming standards on men and women in the workplace? If an employer forbids its employees who are men from wearing, say earrings or long hair, while permitting its employees who are women to do so, has the employer violated Title VII? One district court has read *Smith* as holding just that. See *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp.3d 837, 853 (E.D. Mich. 2016) (“It appears unlikely that the *Smith* court would allow an employer . . . to avoid liability for a Title VII sex-stereotyping claim simply by virtue of having put its gender-based stereotypes into a formal policy.”).

Would you agree that forbidding employers from imposing gendered dress and grooming standards would bode well for transgender employees? Employees would then be permitted to dress and appear in the workplace in ways that match their gender identity and the manner in which they choose to express their identity.

You may already have covered the issue of employee dress codes and grooming standards earlier in your course. Although the rationales may differ, most courts have not read *Price Waterhouse* so broadly as to forbid employers from imposing dress and grooming standards although they may contain some gendered distinctions. Compare *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104 (9<sup>th</sup> Cir. 2006) (*en banc*) (rejecting challenge to employer dress and grooming code that required female employee to wear make-up; code did not impose unequal burdens on either men or women and caused no objective harm to the plaintiff) with *Wiseley v. Harrah's Entertainment, Inc.*, No. 2004 WL 1739724, at \*5 (D. N.J. Aug. 4, 2004) (stating that “one's personal appearance and dress is sufficiently within one's control such that it is easily alterable while Title VII aims at policies that specifically discriminate on the basis of immutable characteristics that are a fundamental aspect of that person”).

How do you reconcile *Smith's* reading of *Price Waterhouse* with cases that permit employers to adopt dress and grooming codes that contain gender distinctions? Can they be reconciled?

## **B. An alternative route to protecting transgender employees**

As the previous section explains, numerous courts have held that transgender employees may pursue sex discrimination claims based on their failure to conform to sex stereotypes. Recent authority has considered a more direct route to protecting transgender individuals under Title VII, finding that discrimination based on gender transition is literally discrimination because of sex.

The EEOC adopted this position in *Macy v. Holder*, 2012 WL 1435995 (E.E.O.C. 2012). In that case, Mia Holder applied for a position while still presenting as a man. She alleged that she had almost been assured the job was hers pending a background check. During the hiring process she informed her future employer that she was in the process of transitioning from male to female and shortly thereafter she was informed that someone else had been hired for the position. She filed a complaint alleging discrimination on the basis of “sex,” “gender identity,” and “sex stereotyping.”

Addressing her claim, the EEOC explained that discrimination against transgender individuals violates Title VII's proscription against sex discrimination in a number of ways. First, the EEOC found support for its position in *Price Waterhouse*. *See id.* at \*10. To that end, the EEOC explained that “Complainant could establish a case of sex discrimination under a theory of gender stereotyping by showing that she did not get the job . . . because the employer believed that biological men should consistently present as men and wear male clothing.” *Id.*

In addition, the EEOC explained that a sex discrimination claim would lie where the Complainant proved that the employer would have hired her when it thought she was a man but would not do so after it found out that she was now a woman. *Id.* Such discrimination would not have occurred but for the sex of the individual and the action would violate Title VII without reference to sex stereotyping. *See id.* at 11. In this regard, the EEOC likened sex discrimination to religious discrimination.

Assume that an employee considers herself Christian and identifies as such. But assume that an employer finds out that the employee's parents are Muslim, believes that the employee should therefore be Muslim, and terminates the employee on that basis. No one would doubt that such an employer discriminated on the basis of religion. There would be no need for the employee who experienced the adverse employment action to demonstrate that the employer acted on the basis of some religious stereotype--although, clearly, discomfort with the choice made by the employee with regard to religion would presumably be at the root of the employer's actions. But for purposes of establishing a prima facie case that Title VII has been violated, the employee simply must demonstrate that the employer impermissibly used religion in making its employment decision.

*Id.*

Relying on the aforementioned hypothetical, the EEOC determined that if an employer would have hired an employee who is male but refuses to do so upon finding out the employee is a woman, the employer violates Title VII.

Consistent with an earlier judicial decision, *Shroer v. Billington*, 577 F. Supp. 2d 293 (D.C. 2008) adopting a similar approach to claims by transgender employees, the EEOC relied on yet another religious discrimination hypothetical to demonstrate why discrimination against transsexual employees violates Title VII. According to the *Schroer* court,

[i]magine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only 'converts.' That would be a clear case of discrimination 'because of religion.' No court would take seriously the notion that 'converts' are not covered by the statute. Discrimination "because of religion" easily encompasses discrimination because of a change of religion.

*Id.* (citing *Shroer*, 577 F. Supp. 2d at 308).

In the context of sex, the employer is not absolved by showing that it *would* hire a man or a woman, but not a "convert." The employer has taken the employee's sex into account when making the employment decision. *See id.*; *see also* 42 U.S.C. § 2000e-2(m) (employer violates Title VII where the employer's action is motivated by the employee's "sex"). Do you find the sex-based conversion argument persuasive?

### Problem 5

#### **Sandy**

Jerry Carmichael was hired to work for Hand-Me-Down Thrift Store as an inventory clerk by store manager Tim Hathaway. Jerry's job entailed keeping track of and ordering inventory. Jerry stands 6'2" and weighs 195 lbs., and when he was hired, he presented as a

man. Hand-Me-Down has a strict dress code and grooming policy for its employees. The policy requires both men and women to wear black jeans, white-collared shirts and black shoes. It, however, forbids men from wearing make-up and nail polish although women could wear both. Men are also required to keep their hair no longer than collar-length. Women are permitted to wear their hair longer. Throughout the year, Jerry adhered to the dress code and worked hard, and Tim gave him a favorable employment evaluation at the end of the year.

Prior to joining Hand-Me-Down Jerry was diagnosed with Gender Dysphoria. For some time, he also had been working with a licensed clinical social worker on a plan to transition from male to female and he was at the stage in the process where he wanted to begin wearing feminine attire, presenting as a woman on a full-time basis and going by the name Sandy.

A little more than a year after being hired to work as Jerry, Sandy explained her Gender Dysphoria diagnosis and her transition process to Tim, who responded that while he did not have a problem with any of it, he was not sure that others would understand. Sandy also told Tim that she would adhere to the store's dress and grooming standards for women because it was part of her transition process. Over the next several months, Sandy went to work dressing in women's clothing. She let her hair grow out and it eventually reached shoulder length. She began wearing make-up and polishing her nails red. She also asked that her coworkers call her Sandy and refer to her using female pronouns, which they did for the most part. Sandy also began using the women's bathroom. Hand-Me-Down had two multi-user bathrooms, one designated for women and the other for men. Employees and customers were permitted to use them. To alleviate any potential concerns, Sandy would try to use the bathroom when she was sure no one else was in there. However, that was not always possible. Several times she ran into other female employees or customers in the bathroom. More than once she was greeted with a confused look. Several customers began to complain to Tim that "a man wearing a dress was using the lady's bathroom." Some said that they worried about their safety and would no longer shop at Hand-Me-Down if the bathrooms were now unisex. Tim told Sandy about the complaints and asked her whether she "still had her man parts?" He said that if she hadn't yet had the operation, then she could no longer use the women's bathroom. Instead, she would either have to use the men's bathroom or to use the bathroom at a gas station that was a block away from the store. In addition, Tim also said that he had received complaints about the way Sandy dressed. He told her that she would have to cut her hair so that it was above the collar and also told her to try to look "more manly" or that she would be fired. Tim told her to think about what he had said overnight. When Sandy arrived at work the next day, her hair was still long, she still wore makeup and her nails were polished red. Tim fired her.

Sandy believes that she was discriminated against while working at Hand-Me-Down because she is transgender. She comes to you for advice. What do you tell her?

## Appendix

State	Sexual Orientation	Gender Identity	Statutory Provision <sup>2</sup>
1. California	Yes—P/P <sup>3</sup>	Yes—P/P	Cal. Gov. Code §§12920, 12926, 12940
2. Colorado	Yes—P/P	Yes—P/P	Colo. Rev. Stat. §§24-34-402
3. Connecticut	Yes—P/P	Yes—P/P	Conn. Gen. Stat. §§46a-81c, 46a-60; Public Act 91-58, §3
4. Delaware	Yes—P/P	Yes—P/P	Del. Code. Title 19, §711
5. District of Columbia	Yes—P/P	Yes—P/P	D.C. Code Ann. § 2-1402.11
6. Hawaii	Yes—P/P	Yes—P/P	Haw. Rev. Stat. §378-2
7. Illinois	Yes—P/P	Yes—P/P	775 Ill. Comp. Stat. 5/1-102, 1-103
8. Iowa	Yes—P/P	Yes—P/P	Iowa Code §216.6
9. Maine	Yes—P/P	Yes—P/P	Me. Rev. Stat. Ann. §4572
10. Maryland	Yes—P/P	Yes—P/P	Md. Code §20-606
11. Massachusetts	Yes—P/P	Yes—P/P	Mass. Gen. Law 151B, §4
12. Minnesota	Yes—P/P	Yes—P/P	Minn. Stat. §363A.02, 363A.08
13. Nevada	Yes—P/P	Yes—P/P	Nev. Rev. Stat. §613.330
14. New Hampshire	Yes—P/P	No	N.H. Rev. Stat. §354-A:7
15. New Jersey	Yes—P/P	Yes—P/P	N.J. Stat. §10:5-12
16. New Mexico	Yes—P/P	Yes—P/P	N.M. Stat. Ann. §28-1-7
17. New York	Yes—P/P	Yes—P/P	N.Y. Exec. Law § 296; N.Y. Exec. Law App. §466.13, Executive Order 33
18. Oregon	Yes—P/P	Yes—P/P	Or. Rev. Stat. §§659A.030, 174.100
19. Rhode Island	Yes—P/P	Yes—P/P	R.I. Gen. Law §28-5-7
20. Utah	Yes—P/P	Yes—P/P	Utah Code Ann. §34A-5-106, S.B. 296
21. Vermont	Yes—P/P	Yes—P/P	Vt. Stat. Ann. Title 21, §495
22. Washington	Yes—P/P	Yes—P/P	Rev. Code Wash. Ann. §§49.60.040, 49.60.180
23. Wisconsin	Yes—P/P	No	Wis. Stat. §111.36

<sup>2</sup> There are several states that prohibit employment discrimination on the basis of sexual orientation and/or gender identity in both public and private employment by executive order: Alaska (Administrative Order 195 (2002)); Arizona (Executive Order 2003-22 (2003)); Indiana (Indiana State Government Employment Policy Statement (2004)); Kentucky (Executive Order 2008-473 (2008)); Michigan (Executive Order 2003-24 (2003); Executive Order 2007-24 (2004)); Missouri (Executive Order 10-24 (2010)); Montana (Executive Order 41-2008 (2008); Executive Order 04-2016 (2016)); New Hampshire (Executive Order 2016-04 (2016)); New York (Executive Order 33 (2009)); North Carolina (Executive Order 93 (2016)); Ohio (Executive Order 2007-105 (2007)); Pennsylvania (Executive Order 75-5 (1975); Executive Order 2003-10 (2003)); Virginia (Executive Order 1 (2014)).

<sup>3</sup> P/P indicates statutory employment discrimination protections extend to both private and public employees.