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The Intersection of Religion and Sexual Orientation in the Workplace: Unequal Protections, Equal Employees

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THE INTERSECTION OF RELIGION AND SEXUAL ORIENTATION IN THE WORKPLACE: UNEQUAL PROTECTIONS, EQUAL EMPLOYEES

*Molly E. Whitman**

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I. INTRODUCTION

RICHARD works with Susan at the telephone company. Richard is a devout Christian who believes, according to the Bible, that homosexuality is a sin. Susan is an openly lesbian woman, and recently, Richard gave her a pamphlet containing Biblical scriptures condemning homosexuality. Susan finds this action deeply, personally offensive, and she fears that Richard will hold her to a double standard or pass her up for promotions because of her sexual orientation. After Susan complains to the human resources department, Richard's supervisor asks him to refrain from speaking to Susan about her sexual orientation, but Richard protests that he has made a personal vow to God to speak the word of God as a "living witness" against homosexuality.¹

The telephone company is in a state that does not have a local statute banning employment discrimination on the basis of sexual orientation. The company has a sexual harassment policy, but the policy does not

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1. See, e.g., *Wilson v. U.S. W. Commc'ns*, 58 F.3d 1337, 1339 (8th Cir. 1995).

touch on religious or sexual orientation discrimination. If the telephone company disciplines Richard, for example, by terminating his employment, could the company be liable in a wrongful termination suit? If the company permits Richard to continue sharing his antihomosexual beliefs, does Susan have any recourse in the law because her employer has ignored her reports of harassment? Or is there some third option, in which the employer must allow Richard some accommodation that satisfies his religious needs but does not create a hostile work environment for Susan?

Most employers are subject to Title VII of the Civil Rights Act of 1964,² the well-known federal law that protects employees from discrimination in their jobs due to their “race, color, religion, sex, or national origin.”³ Although Congress originally intended Title VII to combat racial intolerance in the workplace, these other classes were added to the statute before its passage and today form the basis of the expanding practice area of employment law.⁴ Because Title VII applies to religious employees but not homosexual employees,⁵ the telephone company in the hypothetical may feel that it has more of a duty to protect Richard from discrimination than Susan. In fact, there is no federal law prohibiting employers from making adverse employment decisions regarding their lesbian, gay, bisexual, and transgender (LGBT) employees.⁶ The telephone company faces a difficult decision—if it fails to establish some sort of reasonable accommodation for Richard’s religious practices, it may be subject to a religious discrimination suit. But if the telephone company chooses to permit Richard’s behavior to continue unabated, it risks sacrificing the happiness and productivity of other employees, including Susan, who may find Richard’s religious practices particularly offensive and disruptive.⁷ At the same time, the telephone company wants all of its employees to be happy so that it can have an efficient and productive workplace.

This Comment examines the interaction between sexual orientation and religion in the workplace and how the current state of the law can produce a variety of confusing, contradictory, and often surprising results. Today’s employers seek to promote a diverse workforce to be viable in the global marketplace.⁸ However, because religious employees enjoy a wide variety of statutory protections for their religious practices and be-

2. 42 U.S.C. §§ 2000e–2000e-17 (2006).

3. 42 U.S.C. § 2000e-2(a).

4. H.R. REP. NO. 88-914 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2393, 2401, 2513–17.

5. 42 U.S.C. § 2000e-2(a).

6. See Shawn Clancy, Note, *The Queer Truth: The Need to Update Title VII to Include Sexual Orientation*, 37 J. LEGIS. 119, 126 (2011); Zachary A. Kramer, Note, *The Ultimate Gender Stereotype: Equalizing Gender-Conforming and Gender-Nonconforming Homosexuals Under Title VII*, 2004 U. ILL. L. REV. 465, 471.

7. See Hunter C. Carroll, Note, *Damned if They Do, Damned if They Don't: The Collision Between Religion and the Workplace Has Employers Caught in the Middle*, 20 AM. J. TRIAL ADVOC. 353, 377 (1997).

8. See *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 608 (9th Cir. 2004).

liefs, employers must sometimes compromise to allow potentially irritating or unwelcome conduct in order to provide reasonable accommodations for their religious employees.⁹

Part II of this Comment discusses the evolution of religious discrimination under Title VII. Part III examines how sexual orientation has been excluded from Title VII and the ways in which LGBT plaintiffs have been marginally successful in bringing certain types of gender-discrimination claims. Part IV highlights some of the most influential cases in which religion and sexual orientation have played tug-of-war at work and in the courtroom. Finally, Part V explores various scenarios and how employers are likely to react under the current state of the law. However, because the law leaves many questions unanswered, employers will probably be left feeling confused about how to proceed when confronted with employees whose core ideological values strongly conflict with those of their coworkers.

II. RELIGIOUS DISCRIMINATION UNDER TITLE VII

After Congress enacted the Civil Rights Act of 1964, many debated about how the Act defined “religion.”¹⁰ Courts originally distinguished between religious belief and observance, with many lower courts holding that Title VII required the protection of religious belief but not religious observance.¹¹ The original statute prohibited discrimination based on religion, but it did not require employers to affirmatively provide any accommodation to religious employees.¹² In 1972, following the Equal Employment Opportunity Commission’s (EEOC) issuance of guidelines suggesting that employers should provide reasonable accommodations without undue hardship, Congress enacted the Equal Employment Opportunity Act of 1972 (EEOA).¹³ With a goal of “assur[ing] that freedom from religious discrimination in the employment of workers is for all time guaranteed by law,”¹⁴ the EEOA amended Title VII to require an employer to provide a religious employee with reasonable accommodation for his or her religious observance, provided that the accommodation did not impose undue hardship on the employer.¹⁵ The EEOA explicitly defined “religion” as “all aspects of religious observance and practice, as

9. *Id.* at 607.

10. Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 TEX. L. REV. 317, 361–62 (1997).

11. *Id.* at 362.

12. *See id.* at 363.

13. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (amending the Civil Rights Act of 1964); Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605 (1967).

14. Nantiya Ruan, *Accommodating Respectful Religious Expression in the Workplace*, 92 MARQ. L. REV. 1, 14–15 & n.60 (2008) (quoting 118 CONG. REC. 705–06 (1972) (statement of Sen. Jennings Randolph, “sponsor and chief proponent of the 1972 amendments”)).

15. *See Nottelson v. Smith Steel Workers D.A.L.U.* 19806, 643 F.2d 445, 450 (7th Cir. 1981).

well as belief,”¹⁶ although it did not define what constituted an “observance,” “practice,” or “belief.”

In 1980, the EEOC responded to confusion over the definition of “religion” with its Guidelines on Discrimination Because of Religion.¹⁷ The Guidelines explained that they “do not confine the definition of religious practices to theistic concepts or to traditional religious beliefs,”¹⁸ and “[t]he fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief.”¹⁹ This definition has remained unchanged since 1980.²⁰

An employee seeking to establish a religious discrimination claim under Title VII can bring disparate-treatment, disparate-impact, harassment, or failure-to-accommodate claims against his or her employer.²¹ A prima facie case for individual disparate treatment on the basis of religion must show that an employee (1) “has a bona fide religious belief that conflicts with an employment requirement; (2) informed the employer of this belief” and conflict; and (3) suffered an adverse employment action as a result of failing to comply with this requirement.²² A religious disparate-treatment claim asserts that “some term, condition or privilege of employment” reflects the employer’s intention to discriminate against employees because of their religion.²³ Second, a disparate-impact claim challenges a facially neutral employment practice as having a negative effect on the employee because of his or her religion—these are rare but possible.²⁴ Third, a harassment claim is similar to a disparate-treatment claim.²⁵ Title VII does not apply to claims against fellow employees.²⁶ Religious harassment claims must therefore be against employers and typically feature one of the following scenarios: employees will sue em-

16. Sec. 2(7), § 701(j) (codified as amended at 42 U.S.C. § 2000e(j)).

17. Guidelines on Discrimination Because of Religion, 45 Fed. Reg. 72,610 (Oct. 31, 1980) (codified as amended at 29 C.F.R. § 1605 (2011)).

18. *Id.* at 72,611.

19. 29 C.F.R. § 1605.1 (2011).

20. Engle, *supra* note 10, at 386.

21. See 42 U.S.C. § 2000e-2(a). Specifically, Title VII states that:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

Id.

22. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 65–66 (1986); *Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1084 (6th Cir. 1987).

23. Theresa M. Beiner & John M.A. DiPippa, *Hostile Environments and the Religious Employee*, 19 U. ARK. LITTLE ROCK L.J. 577, 582 (1997).

24. *Id.*

25. *Id.* at 582–83.

26. 42 U.S.C. § 2000e(b) (2006).

ployers for permitting religious employees to engage in conduct that is alleged to harass fellow employees; religious employees who are subjected to inappropriate conduct by fellow employees will sue their employers for failing to protect them from such harassment; or religious employees may feel “harassed based on [their] religious beliefs due to the conduct of coworkers that is not religious in nature” and will sue employers for failing to protect them.²⁷

Finally, the Equal Employment Opportunity Act of 1972 also provided that employers must provide reasonable accommodations to an employee’s or prospective employee’s religious observance unless such accommodations would place undue hardship on the employer.²⁸ A religious accommodation claim is distinct from a disparate-treatment claim. The latter alleges that employees are treated unequally, but the former focuses on whether the employer has complied with its duty to provide reasonable accommodation for an employee’s sincerely held religious beliefs and practices.²⁹ Unlike other classes covered by Title VII, religious employees add a distinct layer of difficulty to employers’ attempts to police workplace discrimination. The statute not only prohibits religious discrimination but also places on employers an affirmative duty to provide reasonable accommodations for employees to practice their religion as long as they do not impose undue hardship on the employer.³⁰ Moreover, Title VII does not provide definitions or even guidelines as to what constitutes a “reasonable accommodation” or “undue hardship.”³¹ Not surprisingly, courts have struggled to interpret these phrases.³²

In 1977, the Supreme Court first addressed this question in *Trans World Airlines, Inc. v. Hardison*, in which the Court examined an airline’s obligation to accommodate its employee’s Sabbatarian religious beliefs.³³ After Hardison’s employer asked him to work during the Sabbath, Hardison suggested that his employer should require him to work only four days a week. The company rejected this proposal (as well as other alternatives that would have inconvenienced it or other employees) and subsequently terminated Hardison’s employment.³⁴ Hardison filed a religious discrimination claim, alleging that the company had failed to provide a reasonable accommodation for his religious beliefs.³⁵ The Supreme Court held that “reasonable accommodation” does not require an

27. Beiner & DiPippa, *supra* note 23, at 594–95.

28. Pub. L. No. 92-261, sec. 2(7), § 701(j), 86 Stat. 103 (codified as amended at 42 U.S.C. § 2000e(j)).

29. Beiner & DiPippa, *supra* note 23, at 582–83.

30. Carroll, *supra* note 7, at 353–54.

31. See Beadle v. Hillsborough Cnty. Sheriff’s Dep’t, 29 F.3d 589, 592 (11th Cir. 1994). In fact, the statute does not define any type of discrimination, presumably to give broad leeway for courts to find a particular practice or policy discriminatory. 42 U.S.C. § 2000e(j).

32. See Beadle, 29 F.3d at 592.

33. 432 U.S. 63, 66 (1977).

34. *Id.* at 68–69.

35. *Id.* at 69.

employer to submit itself to lost efficiency or higher wages.³⁶ In fact, “[t]o require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off” would be an undue hardship.³⁷ The Court refused to “construe the statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath.”³⁸ In other words, if the employer can prove a *real* cost to its operations not “based on theory, assumption, or hypothetical facts,” then courts are likely to relieve the employer of its duty to provide reasonable accommodations.³⁹ The Court has also suggested that reasonable accommodations do not require an employer to violate its collective bargaining agreement.⁴⁰ Employers may also be able to defend against a discrimination claim by showing that they offered a reasonable accommodation but, for whatever reason, the employee refused to accept it.⁴¹

The EEOC’s 1980 Guidelines clarified the reasonable accommodation language in response to confusion over the *Hardison* decision.⁴² The Guidelines explained that if an employer has a range of reasonable accommodations to pick from that do not cause undue hardship, the employer must choose the accommodation that least disadvantages the religious employee.⁴³

Another key case in the analysis of reasonable accommodation and undue hardship is *Ansonia Board of Education v. Philbrook*.⁴⁴ Philbrook was a high school business and typing teacher and a follower of the Worldwide Church of God.⁴⁵ His faith prohibited him from working on designated religious holidays, which occurred about six times per year.⁴⁶ However, Philbrook’s collective bargaining agreement provided leave for only three religious holidays per year and limited the uses of other allotted personal leave days.⁴⁷ Consequently, Philbrook either scheduled hospital visits or worked on holy days.⁴⁸ Finding both arrangements unfavorable, he therefore requested that the school board allow him either to use additional personal leave days for religious observance, his preferred resolution, or allow him to pay for his own substitute teacher and receive his regular pay for additional religious holidays that he took off.⁴⁹ The school board rejected both proposals and discharged Phil-

36. *Id.* at 84.

37. *Id.*

38. *Id.* at 85.

39. Julia Spoor, Note, *Go Tell It on the Mountain, but Keep It Out of the Office: Religious Harassment in the Workplace*, 31 VAL. U. L. REV. 971, 987 (1997); see also *Brown v. Gen. Motors Corp.*, 601 F.2d 956, 961 (8th Cir. 1979).

40. See *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 70 (1986).

41. See *id.* at 69.

42. See 29 C.F.R. § 1605.2 (2011).

43. *Id.* § 1605.2(c)(2)(ii).

44. 479 U.S. at 60.

45. *Id.* at 62.

46. *Id.* at 62–63.

47. *Id.* at 64.

48. *Id.*

49. *Id.* at 64–65.

brook for refusing to comply with the attendance policy. Philbrook thereafter filed a complaint for employment discrimination based on his religion.⁵⁰

Examining whether the school board reasonably accommodated Philbrook's religious requirements, the Supreme Court found that nothing in Title VII requires an employer to accept an employee's proposed accommodations.⁵¹ Instead, an employer can provide any accommodations it chooses, so long as the trier of fact finds it reasonable, to defeat a potential claimant's discrimination claim.⁵²

The *Ansonia* Court determined that *any* accommodation that the employer chooses to provide and a trier of fact finds reasonable defeats the claimant's discrimination claim, even if it is not the accommodation that the claimant sought or desired. The Court held that a reasonable accommodation "eliminates the conflict between [the employee's] employment requirements and religious practices."⁵³ Thus, it provided an explanation to determine whether an accommodation is reasonable. The Court then remanded the case to decide whether the school board's leave policy was in fact a reasonable accommodation.⁵⁴

Even if an employee establishes that he or she has a sincerely held religious belief that conflicts with some employment practice or policy, the employer knew of that conflict, and the employer failed to provide a reasonable accommodation, the employer may still provide an affirmative defense. An employer can argue that it could not reasonably accommodate the employee's religious beliefs due to undue hardship or that the employee rejected the accommodations.⁵⁵

Usually, this type of litigation does not center on whether the employee's conduct is religious in nature, because it is within the court's discretion to decide that question as a matter of law. Instead most litigation centers on whether the employer has provided a reasonable accommodation.⁵⁶ For example, the Fifth Circuit has held that reasonable accommodations fall under two general categories: "(1) an employee can be accommodated in his or her current position by changing the working conditions, or (2) the employer can offer to let the employee transfer to another reasonably comparable position where conflicts are less likely to arise."⁵⁷ While the undue hardship and reasonable accommodation language was intended to create a balance between employee and employer interests, this balance is often upset when the employer must consider the interests of various employees against each other.⁵⁸ At the same time,

50. *Id.*

51. *Id.* at 68.

52. *Id.*

53. *Id.* at 70.

54. *Id.* at 71.

55. *See* Beiner & DiPippa, *supra* note 23, at 600.

56. *See, e.g.,* Wisconsin v. Yoder, 406 U.S. 205, 219 (1972).

57. *Bruff v. N. Miss. Health Servs., Inc.*, 244 F.3d 495, 500 (5th Cir. 2001).

58. *Engle, supra* note 10, at 405.

courts agree that the religious employee must be willing to cooperate with the employer in determining a reasonable accommodation.⁵⁹ The duty to cooperate applies only once the employee has made his or her religious belief known to the employer and the employer has attempted to provide a reasonable accommodation.⁶⁰ Although some courts have found otherwise, most have found that the religious employee is not required to compromise his or her religious beliefs.⁶¹ Interestingly, because of the affirmative duty to provide reasonable accommodation under Title VII, religious discrimination claims are the only Title VII claims that actually require disparate treatment of employees rather than an attempt to eradicate it.⁶²

In 1993, Congress enacted the Religious Freedom Restoration Act (RFRA).⁶³ This Act prohibited federal, state, and local governments from substantially limiting an employee's free exercise of religion absent a showing of a compelling interest for the government action and evidence that the action had been narrowly tailored to meet the compelling interest.⁶⁴ Furthermore, it created "a presumption that government regulation is unconstitutional when it substantially burdens an employee's religious exercise."⁶⁵ While it did not come into play with every Title VII religious discrimination case, the RFRA created a federal claim for "persons whose religious exercise is substantially burdened by government."⁶⁶ This meant that if an employer attempted to defend itself against a failure-to-accommodate claim by stating that it had to comply with a federal, state, or local law, the court would evaluate the claim under an RFRA framework rather than a Title VII framework to determine if the employee had a federal claim.⁶⁷ However, in 1997, the United States Supreme Court held that Congress exceeded its authority provided under Section Five of the Fourteenth Amendment, rendering RFRA unconstitutional.⁶⁸

Some scholars suggest that despite the fact that religious employees have even more protections from discrimination than other employees because of the additional safeguards provided by the Free Exercise and Establishment Clauses, it is relatively easier to prove a hostile work environment claim based on the actions of a religious employee than a claim

59. See, e.g., *Hudson v. W. Airlines, Inc.*, 851 F.2d 261, 266-67 (9th Cir. 1988).

60. See *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1440 (9th Cir. 1993).

61. Debbie N. Kaminer, *Title VII's Failure to Provide Meaningful and Consistent Protection of Religious Employees: Proposals for an Amendment*, 21 BERKELEY J. EMP. & LAB. L. 575, 600 (2000).

62. Engle, *supra* note 10, at 405-06.

63. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *invalidated by City of Boerne v. Flores*, 521 U.S. 507 (1997).

64. *Id.*

65. *Id.* § 3.

66. *Id.* § 2(b)(2).

67. Sidney A. Rosenzweig, Comment, *Restoring Religious Freedom to the Workplace: Title VII, RFRA and Religious Accommodation*, 144 U. PA. L. REV. 2513, 2528 (1996).

68. *City of Boerne*, 521 U.S. at 536.

against a secular, nonreligious employee.⁶⁹ Theresa A. Beiner and John M. A. DiPippa even go so far as to say that the explanation for this phenomenon is “the courts’ preference for religious claims by nonreligious employees over those of religious employees,” in which “nonreligious employees” are “those employees who . . . are motivated by their lack of an organized religious belief or reaction to the beliefs of those identified with such a religion.”⁷⁰ However, this argument is untenable—courts do not simply take the side of the party whose belief system least bothers them. Moreover, although Beiner and DiPippa argue that “courts are reluctant to give way to the religious employee’s practices in the face of resulting time robbing,” their analysis disregards the intent of the law and instead focuses on a perceived secularization of both the courts and the workplace.⁷¹

For example, the authors examine *Wilson v. U.S. West Communications*, a controversial case out of the Eighth Circuit featuring a female Roman Catholic employee named Wilson who wore an anti-abortion pin featuring an eighteen-to-twenty-week-old fetus as part of a vow she made to combat abortion.⁷² The employer noticed that employees were distracted by the button, some of whom went on to make formal complaints, finding the graphic image personally offensive.⁷³ Wilson’s supervisors offered her three accommodations: “(1) wear the button only in her work cubicle, leaving the button in the cubicle when she moved around the office; (2) cover the button while at work; or (3) wear a different button with the same message but without the photograph.”⁷⁴ Wilson refused all three, believing that any accommodation that did not allow her to visibly display the button at all times during work “would break her promise to God.”⁷⁵ After a series of meetings with no resolution, the company terminated Wilson’s employment because she chose to stay home from work for three consecutive days rather than return to work without the button.⁷⁶ Wilson subsequently filed suit for religious discrimination under Title VII.⁷⁷

The district court found that two of the proposed accommodations were not reasonable because they violated Wilson’s religious vow to wear the button at all times as a “living witness” to God, but concluded that the third proposal, covering the button while at work, was a reasonable accommodation.⁷⁸ The court held that Wilson’s vow to wear the button “until there was an end to abortion or until [she] could no longer fight the fight” did not include being a “living witness” as part of a sincerely held

69. See, e.g., Beiner & DiPippa, *supra* note 23, at 577.

70. *Id.* at 580.

71. See *id.* at 601–02.

72. 58 F.3d 1337, 1339 (8th Cir. 1995).

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 1339–40.

77. *Id.* at 1340.

78. *Id.*

religious belief.⁷⁹ On appeal, the Eighth Circuit found that there was no evidence that Wilson's vow required her to be a living witness.⁸⁰ The appellate court summarized the difficult position in which Wilson's actions placed her employer:

Although Wilson's religious beliefs did not create scheduling conflicts or violate dress code or safety rules, Wilson's position would require U.S. West to allow Wilson to impose her beliefs as she chooses. Wilson concedes the button caused substantial disruption at work. To simply instruct Wilson's co-workers that they must accept Wilson's insistence on wearing a particular depiction of a fetus as part of her religious beliefs is antithetical to the concept of reasonable accommodation.⁸¹

Because the court concluded that the employee's vow did not require her to be a living witness, it found that the suggestion to cover her button while at work was a reasonable accommodation.⁸² Therefore, the religious discrimination claim was denied.⁸³ Notably, the court concluded with the strong guidance that "Title VII does not require an employer to allow an employee to impose his religious views on others. The employer is *only* required to reasonably accommodate an employee's religious views."⁸⁴

Beiner and DiPippa argue that the court's decision only reveals its "disdain" for Wilson's religious beliefs and that it "should not have considered the quality of her belief in deciding her case."⁸⁵ But this is exactly what any court must do when considering religious discrimination claims. The first step of the *prima facie* discrimination analysis is to determine that the employee has a bona fide religious belief;⁸⁶ the court does not need to moralize the belief, but it does need to decide if the belief truly exists. If the court does not investigate whether a claimant holds a sincere religious belief, then any employee actions that do not comply with employment standards could hide behind a shield of religious belief. The issue is not, as these authors allege, that the court declined to protect a valid religious belief because it contradicted mainstream values; instead, the court found that being a living witness was not part of Wilson's sincerely held religious beliefs and thus her employer could instruct her to cover the pin.⁸⁷

This Part has discussed how federal law has developed to protect religious and nonreligious employees from religious discrimination in the workplace. Because the definitions of "reasonable accommodation" and

79. *Id.* at 1339–40 (alteration in original) (internal quotation marks omitted).

80. *Id.* at 1340–41.

81. *Id.* at 1341.

82. *Id.* at 1341–42.

83. *Id.* at 1342.

84. *Id.* (emphasis added).

85. Beiner & DiPippa, *supra* note 23, at 603.

86. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 65–66 (1986).

87. *See Wilson*, 58 F.3d at 1341; Beiner & DiPippa, *supra* note 23, at 604.

“undue hardship” are constantly debated and each case hinges on complex facts, it is difficult to determine whether a court will find for an employer or an employee in any given discrimination claim. Title VII works to provide religious employees with a relatively formidable amount of protection from discrimination—arguably more than provided for other protected categories—due to the employer’s additional affirmative duty to provide a reasonable accommodation. Consequently, it is not always clear how an employee’s religious convictions against homosexuality should be handled in the workplace. The next Part examines the protections against discrimination, or lack thereof, that federal law provides for LGBT employees.

III. SEXUAL ORIENTATION DISCRIMINATION: THE (LACK OF) PROTECTION PROVIDED UNDER FEDERAL LAW

While Title VII prohibits employment discrimination “because of . . . sex,”⁸⁸ courts have unwaveringly held that this language does not extend to protection against sexual orientation discrimination.⁸⁹ In fact, the drafters of this portion of the Civil Rights Act of 1964 did not even intend to include “sex” under the enumerated protections.⁹⁰ In an ironic twist, hoping to defeat the bill, Virginia Representative Howard Smith added an amendment to the act to include “sex” as a protected class; however, surely much to Smith’s dismay, Congress passed the amended bill.⁹¹ Because the amendment was introduced just a day before the vote was taken, little legislative history exists to guide courts about how to apply the provision.⁹² Left to their own discretion, courts have tended to interpret the “sex” class narrowly.⁹³ For example, sex discrimination includes discrimination against a person for his or her biological sex but not for his or her sexual preference or orientation.⁹⁴

One way that victims of sexual orientation discrimination have found some relief through the court system is by characterizing the harassment or disparate treatment as discrimination based not on sexual orientation, but rather on sex.⁹⁵ *Oncale v. Sundowner Offshore Services, Inc.* is the seminal case that solidified the existence of same-sex sexual harassment

88. 42 U.S.C. § 2000e-2(a)(1) (2006).

89. See, e.g., *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001); *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 329–30 (9th Cir. 1979), *abrogated by Nichols v. Azteca Rest. Enters.*, 256 F.3d 864 (9th Cir. 2001).

90. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 243 n.9 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994).

91. See Nat’l Archives & Records Admin., *Teaching with Documents: The Civil Rights Act of 1964 and the Equal Employment Opportunity Commission*, NAT’L ARCHIVES, <http://www.archives.gov/education/lessons/civil-rights-act/> (last visited May 26, 2012).

92. *Id.*

93. See *id.*

94. Zachary A. Kramer, *Heterosexuality and Title VII*, 103 Nw. U. L. REV. 205, 213 (2009).

95. Kristin M. Bovalino, Note, *How the Effeminate Male Can Maximize His Odds of Winning Title VII Litigation*, 53 SYRACUSE L. REV. 1117, 1134 (2003).

as actionable under Title VII.⁹⁶ To make out a prima facie sexual harassment claim, the plaintiff must show that he or she “(1) is a member of a protected class, (2) received unwelcome sexual harassment, (3) based on sex, (4) that affected a term or condition of employment, and (5) the employer knew or should have known about the harassment and did not take steps to correct it.”⁹⁷ The Supreme Court noted that that the harassment could be motivated by the harasser’s sexual desire for another employee of the same sex or by general hostility toward the presence of members of the same sex in the workplace.⁹⁸

Perhaps the greatest tool for a homosexual plaintiff to establish a discrimination claim under Title VII is the most recent addition to the recognized same-sex harassment and discrimination claims: the failure to conform to gender stereotypes. The Supreme Court recognized this claim in *Price Waterhouse v. Hopkins*.⁹⁹ In that case a female claimant successfully proved that she was a victim of unlawful sex discrimination because she had been denied a promotion based on her failure to conform to common female stereotypes because she was “macho,” used “foul language,” and did not dress or speak like a “lady” should.¹⁰⁰ Although *Price Waterhouse* did not feature an issue about sexual orientation, the case stands for the premise that harassment or discrimination based on the victim’s perceived failure to comply with gender stereotypes can form the basis for a legally cognizable claim under Title VII. Since *Price Waterhouse*, homosexual employees (or those perceived to be homosexual) have used this gender-stereotype claim with increasing success.¹⁰¹ While the federal courts have held that such claims are actionable under Title VII, it may be difficult for a plaintiff to overcome the allegation that he or she is using this type of claim to “bootstrap” onto the statute—that is, to disguise a sexual orientation discrimination claim as a gender-stereotyping claim.¹⁰² Kristin M. Bovalino notes that “[c]ourts are more receptive to claims of overtly fashioned gender stereotyping,” so

In this Article, I refer to “sex” as the biological designation of a person as male or female, most often associated with the expression of sexual genitalia. “Gender” refers to cultural or socially constructed characteristics and stereotypes that are typically associated with femininity and masculinity. “Sexual orientation” is a person’s sexual interest in a member of the opposite sex, the same sex, or both sexes. See Todd Brower, *Social Cognition “at Work”: Schema Theory and Lesbian and Gay Identity in Title VII*, 18 L. & SEXUALITY 1, 5 n.15 (2009); Clancy, *supra* note 6, at 121.

96. See 523 U.S. 75 (1998).

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

98. *Oncale*, 523 U.S. at 80–81.

99. 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in* *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994).

100. *Id.* at 234–35.

101. See, e.g., *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002); *Doe v. City of Belleville*, 119 F.3d 563, 581 (7th Cir. 1997), *vacated*, 523 U.S. 1001 (1998); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 291–92 (3d Cir. 2009).

102. Bovalino, *supra* note 95, at 1124; Clancy, *supra* note 6, at 129–30; Kramer, *supra* note 6, at 473.

homosexual plaintiffs who otherwise conform to gender stereotypes will have particular difficulty succeeding under this type of claim.¹⁰³

To differentiate between a sexual harassment claim and a gender-stereotype claim, Zachary A. Kramer has outlined the following rule: “If an employer acts upon stereotypes about sexual roles in making employment decisions, or allows the use of these stereotypes in the creations of a hostile or abusive work environment, then the employer opens itself up to liability under Title VII’s prohibition of discrimination on the basis of sex.”¹⁰⁴ Although the gender-stereotype claim currently aids only those plaintiffs who fail to conform—namely, “effeminate men and masculine women, many of whom are gay or lesbian”—it provides a way to establish discrimination “because of sex.”¹⁰⁵ However, employers can survive this loophole by showing that the discrimination was really not because of the failure to conform to gender stereotypes but because of the claimant’s unprotected sexual orientation.¹⁰⁶ Although some scholars have advanced the theory that discrimination on the basis of sexual orientation is just a broad kind of gender-stereotype discrimination because homophobia and heterosexism reflect a “manifestation of misogyny and patriarchal gender norms,” few courts have yet to embrace this theory.¹⁰⁷ This theory asserts that the harasser’s desire to enforce societal gender norms (i.e., heterosexuality) sexual-orientation harassment often motivates; by allowing the gender-stereotype claim to fall under Title VII, some scholars assert courts have essentially already allowed sexual-orientation discrimination claims to fall under Title VII as well.¹⁰⁸

While the boundaries between sex and sexual orientation discrimination are anything but clear, the fact that Title VII does not protect against sexual orientation discrimination does not affect whether a religious individual may harass or discriminate against a homosexual or perceived homosexual because of his or her sexual orientation. Rather, this type of discrimination falls under the “religion” prong of Title VII. Title VII not only protects those practicing a religion from discrimination but also provides a back door to protection for other employees because the employer may be able to claim that any reasonable accommodation would cause undue hardship by creating a hostile environment for the other em-

103. Bovalino, *supra* note 95, at 1131.

104. Kramer, *supra* note 6, at 487.

105. Recent Case, *Nichols v. Azteca Restaurant Enterprises*, 256 F.3 864 (9th Cir. 2001), 115 HARV. L. REV. 2074, 2077, 2079 (2002).

For an in-depth discussion of how transgendered and transsexual plaintiffs have sought protection under the “because of sex” language, see Laura Grenfell, *Embracing Law’s Categories: Anti-Discrimination Laws and Transgenderism*, 15 YALE J.L. & FEMINISM 51 (2003).

106. Recent Case, *supra* note 105, at 2079–80.

107. Varona & Monks, *supra* note 97, at 81–88, 125 & n.318 (noting that while the Seventh Circuit has been one of the most open courts to accept the linkage between gender stereotyping and homophobia, the court retreated from this path in *Hamner v. St. Vincent Hosp. & Health Care Ctr.*, 224 F.3d 701, 704 (7th Cir. 2000), in which it delineated a strong distinction between sex and sexual orientation).

108. See Kramer, *supra* note 6, at 492.

ployees.¹⁰⁹ One of the ways that this type of claim manifests itself is when employees wish to practice their religion at work in a way that offends other employees—in this case, LGBT employees. An employer can demonstrate undue hardship by showing that an accommodation would negatively affect the religious employee's coworkers in some way.¹¹⁰ However, the circuit courts disagree over the relevance of the inconvenience to other employees in the analysis of the reasonable accommodation.¹¹¹

The movement toward allowing LGBT plaintiffs to bring gender-stereotype claims has varied by jurisdiction, although the Seventh Circuit has made some headway:

Presently, the Seventh Circuit, more than any other jurisdiction, has begun to eliminate the barriers traditionally faced by gay plaintiffs in making Title VII claims by de-emphasizing congressional intent, interpreting "sex" to include socially constructed characteristics, and focusing more on the content of the discrimination rather than the specific motive.¹¹²

Outside the courts, private employers are also taking the initiative to introduce broad, zero tolerance antidiscrimination and harassment policies: "As of September 2009, 434 (87%) of the Fortune 500 companies had implemented non-discrimination policies that include sexual orientation, and 207 (41%) had policies that include gender identity."¹¹³ In addition, over twenty states have enacted their own laws prohibiting discrimination because of sexual orientation in employment.¹¹⁴ However, according to the Human Rights Campaign, it is still legal in twenty-nine states to fire someone solely because he or she is lesbian, gay, or bisexual, and it is legal in thirty-four states to fire someone because he or she is transgendered or a transsexual.¹¹⁵

Religious institutions enjoy special protections under the Free Exercise and Establishment Clause of the First Amendment of the Constitution, which states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."¹¹⁶ The Supreme Court has held that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."¹¹⁷ Title VII also provides an exemption for religious corporations and educational institutions "with respect to the em-

109. See Spoor, *supra* note 39, at 998.

110. Kaminer, *supra* note 61, at 617.

111. *Id.* at 621.

112. Varona & Monks, *supra* note 97, at 125.

113. *Who Supports ENDA*, HUMAN RIGHTS CAMPAIGN, http://sites.hrc.org/sites/pas-sendanow/who_supports_ENDA.asp (last visited July 12, 2012).

114. Kate B. Rhodes, *Defending ENDA: The Ramifications of Omitting the BFOQ Defense in the Employment Non-Discrimination Act*, 19 L. & SEXUALITY 1, 2-3 (2010).

115. *Pass ENDA Now Index*, HUMAN RIGHTS CAMPAIGN, <http://sites.hrc.org/sites/pas-sendanow/index.asp> (last visited July 8, 2012).

116. U.S. CONST. amend. I.

117. *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

ployment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.”¹¹⁸ For example, section 702 permits religious organizations to discriminate against individuals in the application for jobs by limiting acceptable employees to those who are members of its own religion, even if the job itself is not religious in function.¹¹⁹

The construction of the First Amendment imposes limitations on the power of states to establish their own antidiscrimination laws.¹²⁰ One article pinpoints the tension between a state’s power to ban discrimination and a religious group’s freedom to practice its beliefs as provided under the First Amendment, which is also the subject of this Comment.¹²¹ For instance, in *Walker v. First Orthodox Presbyterian Church of San Francisco*, the court found that although a local ordinance prohibited discrimination on the basis of sexual orientation, a church did not unlawfully terminate an organist’s employment when it learned of his homosexuality.¹²² Recognizing that the Supreme Court values religious freedom as having a “preferred position in the pantheon of constitutional rights,” the court held that the church was exempt from any liability for discrimination because of the religious nature of the job.¹²³ Thus, the intersection of the Equal Protection Clause, the Free Exercise Clause, and state and federal laws that prohibit sexual orientation discrimination pose a unique legal problem that still has not been resolved.

The First Amendment and the exemption provisions provided in Title VII allow religious employers to discriminate on the basis of religion and certainly on the basis of sexual orientation.¹²⁴ Title VII exempts from its antidiscrimination policies any educational institution that is owned or managed by a religious entity, teaches a particular religious curriculum, or has a bona fide need for an employee to practice a specific religion to adequately perform the functions of the job.¹²⁵ In addition, certain cases will fall under the Free Exercise and Establishment Clauses of the First Amendment and thereby escape analysis under Title VII.¹²⁶

Because the states do not support LGBT employees uniformly, or even in a majority, the best hope for LGBT plaintiffs seeking protection in the workplace may be the Employment Non-Discrimination Act (ENDA),

118. 42 U.S.C. § 2000e-1(a) (2006).

119. See *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 (1987) (“Congress acted with a legitimate purpose in expanding the § 702 exemption to cover all activities of religious employers.”).

120. *Development in the Law: Employment Discrimination, Statutory Protection for Gays and Lesbians in Private Employment*, 109 HARV. L. REV. 1625, 1638 (1996).

121. See *id.*

122. No. 760-028, 1980 WL 4657, at *1–4 (Cal. App. Dep’t Super. Ct. Apr. 3, 1980).

123. *Id.* at *4–5.

124. Ralph D. Mawdsley, *Employment Discrimination on the Basis of Religion: Where Should the Line Be Drawn?*, 111 W.’S EDUC. L. REP. 1077, 1077 (1996).

125. 42 U.S.C. § 2000e-2(e) (2006).

126. See Mawdsley, *supra* note 124, at 1082.

which is “pending federal legislation that would ban employment discrimination based on an individual’s sexual orientation.”¹²⁷ Although ENDA has been proposed in Congress multiple times, its supporters have not yet succeeded in securing its passage.¹²⁸ Most recently, “ENDA was introduced in the 112th Congress on April 6, 2011, by Representative Barney Frank in the House (H.R. 1397) and on April 13, 2011, by Senator Jeff Merkley in the Senate (S. 811),” and it is awaiting review.¹²⁹ ENDA would not only protect employees from adverse employment decisions based on their sexual orientation or gender identity but also on their association with a particular relative or friend who happens to be LGBT.¹³⁰ Notably, while ENDA would seek to extend roughly the same types of protection to LGBT plaintiffs as are afforded to claimants under Title VII for race, national origin, and the like, ENDA also contains considerable exclusions for religious organizations¹³¹ and the military.¹³² Indeed, while religious organizations may be one area of employment in which homosexuals risk being subject to the *most* discrimination, ENDA exempts religious organizations from the duty not to discriminate against LGBT employees or applicants.¹³³ For example, although courts have held that “customer preference” is not a reasonable justification for an employer’s discrimination against an employee, it is unclear whether this kind of justification would be acceptable under ENDA.¹³⁴

One final way homosexual plaintiffs have sought protection from sexual orientation discrimination is through the Equal Protection Clause of the Fourteenth Amendment.¹³⁵ This may apply to public employees subjected to discrimination.¹³⁶ Although courts have yet to find that homosexuals are a suspect class under this Amendment, the Supreme Court in *Romer v. Evans* did apply the Equal Protection Clause to strike down an

127. *Employment Non-Discrimination Act*, ACLU, http://www.aclu.org/hiv-aids_lgbt-rights/employment-non-discrimination-act (last visited July 8, 2012).

128. *See id.*; J. Banning Jasiunas, Note, *Is ENDA the Answer? Can a “Separate but Equal” Federal Statute Adequately Protect Gays and Lesbians from Employment Discrimination?*, 61 OHIO ST. L.J. 1529, 1535–36 (2000).

129. *Pass ENDA Now: Learn More*, HUMAN RIGHTS CAMPAIGN, http://sites.hrc.org/sites/passendanow/learn_more.asp (last visited July 8, 2012).

130. Edward J. Reeves & Lainie D. Decker, *Before ENDA: Sexual Orientation and Gender Identity Protections in the Workplace Under Federal Law*, 20 L. & SEXUALITY 61, 77 (2011).

131. *Employment Non-Discrimination Act*, H.R. 1397, 112 Cong. § 6 (2011). Specifically, section 6 of ENDA provides that, “[t]his Act shall not apply to a corporation, association, educational institution, or society that is exempt from the religious discrimination provisions of title VII of the Civil Rights Acts of 1964 pursuant to section 702(a) or 703(e)(2) of such Act (42 U.S.C. 2000e–1(a); 2000e–2(e)(2)).” *Id.*

132. *Id.* § 7. Section 7 exempts the military from this statute, but with the recent repeal of “Don’t Ask, Don’t Tell,” this provision could be altered or removed from the bill before passage. *Id.*

133. Jasiunas, *supra* note 128, at 1553.

134. *Id.* at 1556.

135. *Id.* at 1540. The Equal Protection Clause states that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend XIV, § 1.

136. *See, e.g., Lovell v. Comsewogue Sch. Dist.*, 214 F. Supp. 2d 319, 320, 325 (E.D.N.Y. 2002).

amendment to Colorado's state constitution as unconstitutional.¹³⁷ The amendment prohibited all state action that sought to protect homosexuals from discrimination.¹³⁸ The Supreme Court found that, indeed, "[h]omosexuals, by state decree, [were] put in a solitary class with respect to transactions and relations in both the private and governmental spheres."¹³⁹ The Court concluded that the main thrust of the amendment was to deny homosexuals the equal protection of the law, which is prohibited by the U.S. Constitution, and thus invalidated the amendment.¹⁴⁰ Although *Romer* did not touch on whether the Equal Protection Clause can be violated when a state discriminates against its employees on the basis of sexual orientation, various state courts have examined this question and answered it in the affirmative.¹⁴¹ On the other hand, many opponents to expanding the rights of LGBT employees, and to LGBT persons in general, do not view homosexuality as a matter of identity but rather of choice (and one that should be corrected, for that matter). For example, one scholar argues that "homosexual behavior is merely one of countless activities left unprotected by antidiscrimination laws."¹⁴²

IV. THE INTERSECTION OF RELIGION AND SEXUAL ORIENTATION IN EMPLOYMENT

Perhaps the most informative case to determine how courts will rule when a religious employee exhibits antihomosexual behavior is *Peterson v. Hewlett-Packard Co.*¹⁴³ In that case, the Ninth Circuit found that a religious employee did not suffer any disparate treatment when he was terminated for displaying antihomosexual scripture in his cubicle.¹⁴⁴ In response to his company's poster display promoting diversity in the workplace, which included gay employees, Peterson, a Christian who believed that homosexuality was prohibited by the Bible, posted two Biblical scriptures in his cubicle that condemned homosexuality.¹⁴⁵ One of the scriptures was a passage from Isaiah describing Sodomites as having "rewarded evil unto themselves;" the other featured a passage from Leviticus stating: "If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination; they shall surely be put to death; their blood shall be put upon them."¹⁴⁶ Although these passages directly contravened Hewlett-Packard's company-wide antiharassment policy, Peterson refused to remove the postings as long as the diversity

137. 517 U.S. 620, 635 (1996).

138. *Id.* at 624.

139. *Id.* at 627.

140. *Id.* at 635.

141. See, e.g., *Quinn v. Nassau Cnty. Police Dep't*, 53 F. Supp. 2d 347, 356–58 (E.D.N.Y. 1999); *Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279, 1290 (D. Utah 1998).

142. Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 NOTRE DAME L. REV. 393, 400 (1994).

143. 358 F.3d 599 (9th Cir. 2004).

144. *Id.* at 601–02, 605.

145. *Id.* at 601–02.

146. *Id.*

posters remained on display, claiming that God and the Bible imposed upon him “a duty to expose evil when confronted with sin.”¹⁴⁷

The Ninth Circuit concluded that the only accommodations that Peterson deemed acceptable to his religious beliefs would have imposed undue hardship on the company; therefore, it denied Peterson’s failure-to-accommodate claim.¹⁴⁸ Peterson stated that he would keep the postings up while Hewlett-Packard displayed the diversity posters, but this proposal would have imposed undue hardship on the company because allowing Peterson to display the hurtful and even violent messages would have violated the company’s antiharassment policy and deprived his coworkers of contractual and statutory rights.¹⁴⁹ On the other hand, removing the diversity posters would have limited the company’s ability to hire and support a diverse workforce, which it viewed as vital to its commercial success.¹⁵⁰ The court concluded that “[w]hile Hewlett-Packard must tolerate some degree of employee discomfort in the process of taking steps required by Title VII to correct the wrongs of discrimination, it need not accept the burdens that would result from allowing actions that demean or degrade . . . members of its workforce.”¹⁵¹

In 2004, the Ninth Circuit held in *Bodett v. CoxCom, Inc.* that an employee terminated for violating her company’s harassment policy by condemning a subordinate’s homosexuality through religious comments did not suffer any disparate treatment.¹⁵² Evelyn Bodett worked for CoxCom and its predecessor for eighteen years, during which time she supervised Kelley Carson, who was openly gay.¹⁵³ While supervising Carson, Bodett made several statements concerning Carson’s homosexuality, including “God’s design for a relationship was between a man and a woman” and “homosexuality is wrong, [and] considered by God to be a sin.”¹⁵⁴ Bodett cautioned Carson that “she would be disappointed if Carson were dating another woman[] but happy if she were dating a man.”¹⁵⁵ CoxCom’s General Harassment Policy and “Corrective Action Policy” stated that “[n]o employee shall harass another employee on the basis of . . . sexual orientation.” Finding a “gross violation” of this policy, CoxCom terminated Bodett’s employment.¹⁵⁶

The Ninth Circuit affirmed, holding that Bodett’s language explicitly violated CoxCom’s harassment policy and no evidence suggested that the company terminated Bodett merely because of her religious beliefs. Furthermore, the court held that Bodett may “freely exercise her First Amendment rights [of free speech and freedom of religion] as long as

147. *Id.* at 602, 606 (internal quotation marks omitted).

148. *Id.* at 607–08.

149. *Id.* at 606–07.

150. *Id.* at 608.

151. *Id.* at 607–08.

152. 366 F.3d 736, 740 (9th Cir. 2004).

153. *Id.*

154. *Id.* at 741 (internal quotation marks omitted).

155. *Id.*

156. *Id.* at 741–42.

such exercise does not infringe on the rights of others by manifesting discrimination prohibited by Cox's harassment policy."¹⁵⁷ This court's holding implicitly supports the idea that other employees may find protection from religious harassment because it infringes on the employer's ability to provide a nonhostile work environment. It is noteworthy, however, that the court acknowledged that Bodett did not raise a claim for failure to provide reasonable accommodations in this case.¹⁵⁸

A 2011 Seventh Circuit case shows that some employers will not tolerate harassment on the basis of sexual orientation even if it arises from the harasser's purported religious belief.¹⁵⁹ Tanisha Matthews sued her former employer for religious discrimination after she was terminated for violating Wal-Mart's Discrimination and Harassment Prevention Policy.¹⁶⁰ Matthews was an Apostolic Christian who believed that homosexuality is a sin and that homosexuals will go to hell.¹⁶¹ During a break in September 2005, Matthews engaged in a discussion about homosexuality with several coworkers, including an openly gay coworker, in which she screamed that "God does not accept gays," "they will 'go to hell,'" and "they should not 'be on earth.'"¹⁶² Wal-Mart's Discrimination and Harassment Prevention Policy stated that employees may not "engag[e] in conduct that could reasonably be interpreted as harassment based on an individual's status, including sexual orientation."¹⁶³ After an investigation, Wal-Mart concluded that Matthews violated this policy with her vitriolic speech and terminated her employment.¹⁶⁴

The district court granted summary judgment in favor of Wal-Mart after finding that Wal-Mart did not discriminate against Matthews because of her religion and that no similarly situated employees were treated differently.¹⁶⁵ Affirming the district court's ruling, the Seventh Circuit acknowledged that Matthews waived any failure-to-accommodate claim by not raising it at the trial stage.¹⁶⁶ However, the court nevertheless analyzed Matthews's claim under this theory, explaining that "employers need not relieve workers from complying with neutral workplace rules as a religious accommodation if it would create an undue hardship."¹⁶⁷ Accommodating Matthews by allowing her to use such clearly harassing language would put Wal-Mart at extreme risk of liability for harassment suits from other employees.¹⁶⁸ Moreover, the court concluded that Matthews was not subject to disparate treatment because although none of the

157. *Id.* at 748.

158. *Id.* at 740.

159. *Matthews v. Wal-Mart Stores, Inc.*, 417 F. App'x 552, 553 (7th Cir. 2011).

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 554.

166. *Id.*

167. *Id.*

168. *Id.*

other employees who participated in the conversation were fired, none of them used language that touched on a person's individual sexual orientation status.¹⁶⁹ Because Matthews could not even support a *prima facie* claim of religious discrimination, the court upheld summary judgment.

On the other hand, in *Buonanno v. AT&T Broadband, LLC*, a plaintiff prevailed on his religious discrimination claim after he was terminated for refusing to sign his employer's Diversity Policy, which was a condition for continued employment.¹⁷⁰ Buonanno was a Christian who followed the literal language of the Bible and believed that the text prohibited him from "approving, endorsing, or esteeming behavior or values that are repudiated by Scripture."¹⁷¹ Although Buonanno was required to sign a company-wide Diversity Policy, he refused because it contained the phrase, "Each person at AT&T Broadband is charged with the responsibility to fully recognize, respect and value the differences among all of us."¹⁷² Buonanno wrote a letter to his Human Resources Manager explaining that although his religious beliefs prevented him from "valu[ing] any differences [that] are contrary to God's word," he would continue to conduct himself in a professional manner and would not discriminate against or harass any individual with whose beliefs or lifestyle he did not agree.¹⁷³ Although testimony during the trial revealed that his chief concern centered around his disagreement with homosexuality, Buonanno never discussed this concern with his managers when he refused to sign the policy.¹⁷⁴ After a series of discussions, the company terminated Buonanno's employment, and he sued for direct religious discrimination and failure to accommodate.¹⁷⁵

The district court found that while Buonanno satisfied the first two elements of the *prima facie* religious discrimination claim—he suffered an adverse employment action and at the time the action was taken, his performance was satisfactory—he could not satisfy the third element. He could not establish "an inference that the employment actions were taken because of a discriminatory motive based upon [his] failure to hold or follow his . . . employer's religious beliefs."¹⁷⁶

However, the court found that Buonanno did establish his *prima facie* failure-to-accommodate claim because he had a bona fide religious belief that conflicted with the requirement to sign the Diversity Policy, he informed AT&T of that conflict, and he was terminated for his failure to comply.¹⁷⁷ Because he had proved his *prima facie* case, the burden shifted to AT&T to show that it offered a reasonable accommodation or

169. *Id.* at 554–55.

170. 313 F. Supp. 2d 1069, 1076–77, 1083 (D. Colo. 2004).

171. *Id.* at 1074.

172. *Id.* at 1074–75.

173. *Id.* at 1075–76.

174. *Id.* at 1076 n.1.

175. *Id.* at 1076.

176. *Id.* at 1080.

177. *Id.* at 1081.

was unable to provide a reasonable accommodation without experiencing undue hardship.¹⁷⁸ AT&T failed to offer any accommodation, nor did Buonanno's managers thoroughly investigate the perceived conflict that he had with the company policy.¹⁷⁹ If they had, they would have discovered that he interpreted the word "value" literally, while the company only required their employees to value their coworkers figuratively.¹⁸⁰ This misunderstanding led the company to believe that Buonanno's beliefs created an undue hardship because allowing employees to selectively accept or deny portions of the Diversity Policy would make uniform enforcement of the policy impossible.¹⁸¹ By not exploring accommodation options, the company violated Title VII.¹⁸² Accordingly, the court awarded Buonanno back pay, lost 401(k) contributions, prejudgment interest, damages for emotional distress, and approximately three years' worth of front pay (compensating him for damage to his earning capacity).¹⁸³

Similarly, in *Phillips v. Collings*, a social service worker named Phillips, whose job involved licensing and assigning foster parents to children, was found to have been discriminated against when his supervisor recommended his termination after he revealed that his religious belief that "homosexuality was an abomination" prevented him from licensing homosexual persons as foster parents.¹⁸⁴ Although Phillips brought a Section 1983 claim rather than a religious discrimination claim under Title VII, this case is still informative because Phillips alleged that his employer should have offered him a reasonable accommodation for his religious beliefs.¹⁸⁵

The court of appeals found that because homosexual couples were only very rarely licensed as foster parents, Phillips's request not to deal with homosexual couples would have had very little impact on his job functions and on the function of the business as a whole.¹⁸⁶ This case is instructive because it reveals that a court will find a failure to accommodate when the employer inflicts an adverse employment action on the employee before exploring reasonable accommodations.¹⁸⁷

In a Fifth Circuit case involving a psychological counselor who declined to advise a homosexual client on her relationship because it would conflict with the counselor's religious beliefs, the court held that accommodating her needs would impose more than a *de minimis* cost on her employer and therefore was an undue hardship.¹⁸⁸ Accordingly, the em-

178. *Id.*

179. *Id.* at 1082.

180. *Id.*

181. *Id.*

182. *Id.* at 1083.

183. *Id.* at 1085-86.

184. 256 F.3d 843, 845-47 (8th Cir. 2001).

185. *Id.* at 846, 850-51.

186. *Id.* at 850.

187. *See id.* at 850-51.

188. *Bruff v. N. Miss. Health Servs., Inc.*, 244 F.3d 495, 497, 503 (5th Cir. 2001).

ployer was not liable for failing to accommodate the counselor.¹⁸⁹ The counselor objected to advising her patient on her homosexual relationship, but the Medical Center explained that because it cannot know all of the characteristics of a patient before he or she is assigned to a counselor, it could not assign patients to Bruff based upon her unwillingness to deal with homosexuals, and that this would most likely risk creating an unbalanced workload for other employees.¹⁹⁰

The jury in the trial court found that Bruff had indeed suffered religious discrimination through the Medical Center's failure to accommodate.¹⁹¹ However, the Fifth Circuit reversed the judgment, finding that although Bruff established her prima facie claim of religious discrimination, she could not prevail on her failure-to-accommodate claim.¹⁹² Bruff's contention that "under Title VII the Medical Center must excuse her from counseling on all subjects of concern at all times" was simply impossible to reasonably accommodate without imposing undue hardship on the employer.¹⁹³ The counselor was given the opportunity to transfer to another division where she could see only Christian patients, which would have been a reasonable accommodation, but she declined this offer and therefore was not entitled to any remedy.¹⁹⁴

V. EMPLOYERS ON THE TIGHTROPE: HOW TITLE VII PROTECTIONS PLAY OUT

So far, this Comment has discussed (1) the historical background of the federal protections—and lack of protections—for religious and homosexual employees and (2) the current state of the law. But how does the contemporary private employer navigate the waters of Title VII when the needs of its employees may often contradict or even outright upset each other?

Returning to the hypothetical at the beginning of this article, let us yet again consider the conflict between Richard and Susan. Richard gave Susan a pamphlet condemning homosexuality as against God's word. The telephone company does not need to understand Richard's religious belief or even be morally aligned with it.¹⁹⁵ But just because Richard's behavior may be characterized as proselytization, this does not automatically mean that the company has no duty to support his needs. For instance, in *Meltebeke v. Bureau of Labor & Industries*, the Oregon Supreme Court held that because an evangelical Christian employer held a sincere belief that he had a "religious duty to tell others, especially non-Christians, about God and sinful conduct,"¹⁹⁶ the employer had an af-

189. *Id.* at 503.

190. *Id.* at 497.

191. *Id.* at 499.

192. *Id.* at 501.

193. *Id.* at 500.

194. *Id.* at 502-03.

195. See *Wisconsin v. Yoder*, 406 U.S. 205, 216-17, 220 (1972).

196. 903 P.2d 351, 353, 363 (Or. 1995) (en banc).

firmative defense to this conduct, despite the discomfort it caused his employee.¹⁹⁷ In Richard's case, if the company decides to terminate his employment, he may have a wrongful termination claim stemming from the company's failure to accommodate his needs. Perhaps the company should attempt to accommodate Richard's needs by allowing him to display the pamphlets in his office, making them free for any interested co-worker to access if he or she so chooses. Or perhaps the telephone company could offer Richard a space where he may discuss his religious convictions with other employees during nonwork time. If the company instead offered Richard the option of discussing his religious beliefs at the end of mandatory meetings, for example, this may create a hostile environment for his fellow employees.¹⁹⁸

On the other hand, the employer may be able to claim that even such seemingly innocuous accommodations impose an undue hardship on its business since the *Hardison de minimis* standard has such a low threshold.¹⁹⁹ The employer could provide evidence that Richard's behavior threatens productivity by distracting or infuriating his coworkers.²⁰⁰ Because the duty to accommodate is a two-way street, where both the employer and the employee must compromise to find a solution that supports the employee's beliefs while preventing the employer from suffering undue hardship, if Richard's convictions are so rigid that no accommodation will properly serve his needs, he will not succeed on a failure-to-accommodate claim.²⁰¹

Meanwhile, under the peculiar nature of the law, Susan may—indirectly—have some relief against the hostile work environment that Richard's behavior has produced. Recall that the Title VII provision prohibiting discrimination on the basis of religion also protects nonreligious employees from religious practices that unduly invade the general work environment. For instance, as the court held in *Wilson v. U.S. West Communications*, even if an employer must reasonably accommodate an employee's religious beliefs, the employee is not thereby free to impose his or her beliefs on others.²⁰² Arguably, Richard's behavior constitutes even greater harassment than the plaintiff's button-wearing in *Wilson* because he is not only displaying his religious beliefs but also forcing them on Susan by giving her the pamphlet.²⁰³ However, because the company (1) is in a state in which no antidiscrimination law protects against sexual-orientation discrimination and (2) does not have its own internal discrimination and harassment policy addressing this issue, the federal religious protections may allow Richard to prevail, while Susan is left to work in an

197. *Id.*

198. *See, e.g.,* *Young v. Sw. Savs. & Loan Ass'n*, 509 F.2d 140, 145 (5th Cir. 1975).

199. *See* *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84–85 (1977).

200. *See* *Wilson v. U.S. W. Commc'ns*, 58 F.3d 1337, 1341–42 (8th Cir. 1995) (noting that imposing one's religious views on unwilling coworkers is not a religious belief that requires accommodation).

201. *See* *Hudson v. W. Airlines, Inc.*, 851 F.2d 261, 266–67 (9th Cir. 1988).

202. 58 F.3d at 1341.

203. *See id.*

environment that is distasteful at best and threatening at worst. The bottom line is that an employer can offer a legitimate business reason, such as the protection of human capital, in order to regulate Richard's behavior, but Susan still lacks any affirmative right to relief should the employer fail to do so.

Next, let's change the fact pattern slightly. Richard is Susan's supervisor. During a performance review, Richard tells Susan that while her job performance has been satisfactory, he hopes that she will embrace heterosexuality because it is God's way. Richard has been continuously pointing out his dissatisfaction with Susan's homosexuality, urging her to read scriptures and visit his church to seek enlightenment. He has not changed his treatment of her, but she has become increasingly uncomfortable and quits, believing that Richard is going to fire her for being a lesbian in any case. Can Susan prevail in a suit against the telephone company, alleging that she suffered a hostile work environment and was constructively discharged?

The Northern District Court of California examined this question in *Erdmann v. Tranquility Inc.*²⁰⁴ Plaintiff Del Erdmann, a gay man who quit his job as a registered nurse, alleged that he was constructively discharged because he had been forced to suffer a hostile work environment by his Mormon employer, who believed that homosexuality was a sin.²⁰⁵ For instance, the employer instructed Erdmann to meet with a supervising nurse, who told him that the company viewed homosexuals as immoral and indecent and that although he was in a monogamous relationship with his partner, he "just better stay in that monogamous relationship or else something bad is going to happen to [him]."²⁰⁶ Erdmann testified that the comments made him scared that he would lose his job.²⁰⁷ Moreover, the employer tried to convince Erdmann to become a heterosexual Mormon so that she would see him in Heaven.²⁰⁸ The accumulation of these and other similar events, such as being led daily in morning prayer, led Erdmann to feel unwelcome and to later resign.²⁰⁹

The district court held that Erdmann satisfied the adverse employment action prong of the Title VII religious discrimination claim, finding that the hostile work environment led to a constructive discharge.²¹⁰ Therefore, the court declined to grant the employer's motion for summary judgment on the religious discrimination claim.²¹¹

Erdmann closely resembles our hypothetical. Although Richard has not made any statements suggesting that Susan would be fired because of

204. 155 F. Supp. 2d 1152, 1159 (N.D. Cal. 2001).

205. *Id.* at 1154.

206. *Id.* at 1156-57.

207. *Id.* at 1157.

208. *Id.*

209. *Id.*

210. *Id.* at 1165.

211. *Id.* at 1167.

her homosexuality, the fact that he has brought up his antipathy toward homosexuality during her performance review suggests that she will likely suffer some adverse employment action in the future, be it the termination of her employment or failure to grant her an otherwise deserved promotion. Depending on the court, Susan may have a hostile-environment claim because Richard's behavior has created a hostile work environment for his subordinate. The Ninth Circuit, for example, evaluates the totality of the circumstances to determine whether "a reasonable person in the employee's position would have felt that he was forced to quit because of intolerable and discriminatory working conditions."²¹² A reasonable person would likely feel that Susan was forced to stop working at the telephone company because of Richard's persistent recommendations that she change her sexual orientation. However, while Susan may have a claim in the Ninth Circuit²¹³ she still has absolutely no federal protection under Title VII.

Let's change our hypothetical again. Now, Richard is again Susan's coworker (not supervisor), and he tells her that he does not like working with her because she is a "dyke" and he finds her homosexuality "unnatural." Richard does not claim that these beliefs are based on any sort of religious conviction, and in fact, Richard considers himself an atheist. Remember, we are in a vacuum—the company does not have an internal antiharassment policy, and that state does not have any laws protecting against sexual-orientation discrimination. Susan complains to her supervisor that Richard is tormenting her, but the supervisor tells her that besides asking Richard to refrain from using such language, his hands are tied. Does Susan have any sort of discrimination claim under federal law?

This is where the holes in Title VII really become apparent. Although a religious employee has many protections under federal law, the cases mostly suggest that an employer does not have to tolerate inappropriate or abusive conduct that creates a hostile environment, especially when it will seriously affect other employees.²¹⁴ But without the protective cloak of the religious discrimination claim, the homosexual plaintiff is left naked. Because Title VII does not cover sexual orientation, Susan's only hope is to bring a gender-discrimination claim, alleging that Richard has harassed her because of her failure to conform to typical female stereotypes.²¹⁵ However, unless Susan has other proof of this claim besides her homosexuality, such as evidence that her masculine wardrobe or distate

212. *Id.* at 1165–66 (internal quotation marks omitted) (citing *Watson v. Nationwide Ins. Co.*, 823 F.2d 360, 361 (9th Cir. 1987)) .

213. *See id.*

214. *See Wilson v. U.S. W. Commc'ns*, 58 F.3d 1337, 1341–42 (8th Cir. 1995).

215. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994); *see also Doe v. City of Belleville*, 119 F.3d 563, 580–81 (7th Cir. 1997), *vacated*, 523 U.S. 1001 (1998); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1223–25 (D. Or. 2002); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 290 (3d Cir. 2009).

for makeup sparks taunting by coworkers, the court is likely to conclude that she is masquerading a sexual orientation discrimination claim as a gender-discrimination claim.²¹⁶ Because an employer can fire an at-will employee for good reason, bad reason, or no reason at all as long as it does not contravene a statutory law or public policy, Susan could actually be fired if her employer decides that her complaining disrupts the workplace more than Richard's language.²¹⁷

Even conduct more egregious than Richard's often receives no punishment under Title VII.²¹⁸ For example, in 2011 the Sixth Circuit held that a homosexual plaintiff could not satisfy his prima facie gender-discrimination claim when a fellow employee repeatedly called him a "faggot" and threatened to stab him and any other homosexuals working with them.²¹⁹ Despite the legitimate threat (supported by the fact that the coworker was facing charges for *actually stabbing* several homosexuals in Atlanta), the plaintiff's union employer never addressed the issue at all and even stopped referring the employee for jobs.²²⁰ The plaintiff brought a gender-discrimination claim, alleging that his coworker harassed him for his failing to conform to male stereotypes, namely by being a homosexual.

As a matter of law, the Sixth Circuit correctly concluded that the plaintiff merely brought "a 'formulaic recitation' of the elements of a sex-stereotyping cause of action."²²¹ Essentially, the court's hands were tied. It acknowledged the ludicrous results stemming from Title VII's omission of LGBT discrimination: "Although many States prohibit sexual-orientation discrimination, federal law and Tennessee law do not."²²² This decision illustrates the moral and equal rights problems that Title VII sometimes produces—the court itself disclosed that while the law may have compelled its holding, it flies in the face of our society's larger concepts of equal protection and dignity for all.

The harassment that Susan suffered at the hands of Richard in our last hypothetical does not even approach the severity and pervasiveness of the harassment that many homosexual (or perceived homosexual) employees often suffer. Therefore, it is highly unlikely that Susan could find any protection whatsoever under federal law, leaving her with very few options—either continue working in the hostile environment or jeopardize her career by seeking other employment, in which there is no guarantee that she will escape harassment.²²³ Moreover, it is possible to imagine

216. See Bovalino, *supra* note 95, at 1124; Clancy, *supra* note 6, at 129–30; Kramer, *supra* note 6, at 473–74.

217. See, e.g., *Hatfield v. Health Mgmt. Assocs. of W. Va., Inc.*, 672 S.E.2d 395, 401 (W. Va. 2008); *Shero v. Grand Sav. Bank*, 161 P.3d 298, 300 (Okla. 2007); *Porterfield v. Mascari II, Inc.*, 823 A.2d 590, 596 (Md. 2003).

218. See, e.g., *Gilbert v. Country Music Ass'n*, 432 F. App'x 516, 518 (6th Cir. 2011).

219. *Id.* at 520.

220. *Id.* at 518.

221. *Id.* at 520.

222. *Id.* (citations omitted).

223. See, e.g., *Moore v. USG Corp.*, No. 2:10CV00066-NBB-SAA, 2011 WL 4386246, at *14–15 (N.D. Miss. Sept. 20, 2011) (holding that despite being regularly subjected to verbal

a situation in which a religious employee creates a hostile work environment for a homosexual employee, or even for employees who support homosexuality and find the religious employee's behavior morally offensive, but in which the religious employee fails to disclose the religious nature of his conduct. If Richard calls Susan a "dyke" because he feels that it is the best way to communicate God's supposed disdain for homosexuality, Susan would have no legal recourse if the telephone company condoned Richard's behavior. However, if the company does choose to discipline Richard, it would probably not be held liable if he brought a disparate-treatment or religious-accommodation claim because the company could justify its action through the legitimate business reason of protecting its human capital by preventing a hostile work environment. On the other hand, if Richard never tells his coworkers of his deeply held religious convictions, or that he is even a Christian for that matter, his employer or a court receiving Susan's discrimination claim could view this as simply sexual-orientation harassment, which is permissible under the law. Even if one does not agree that sexual-orientation discrimination deserves its own protection, it would be nearly impossible to deny that these incongruities in the law create difficulty for employers trying to comply with the law and in creating and enforcing their own internal discrimination and harassment policies.

As one scholar points out, it was not too long ago in our history that employers could freely discriminate against women who got married, became pregnant, or had young children.²²⁴ But the Pregnancy Discrimination Act,²²⁵ an amendment to Title VII, and other federal antidiscrimination laws now prevent discrimination based on child-bearing decisions, which would be virtually unimaginable today. We are not at that point yet with regard to antidiscrimination laws addressing sexual orientation and gender identity. Some scholars still insist that homosexuality, or at least homosexual behavior rather than homosexual identity, is not immutable and therefore does not deserve the same protections as other protected statuses.²²⁶

In one particularly vitriolic article, George W. Dent, Jr. claims that people arguing for the rights of homosexuals intend not simply to prevent discrimination and harassment but to "require people and institutions to accept homosexuality regardless of their religious beliefs."²²⁷ Noble as it may seem, it is unlikely that proponents of a sexual orientation amendment to Title VII have such lofty goals. Nor is forcing anyone to "accept" homosexuality likely to promote the standards of fair and respectful

abuse and threats of physical abuse relating to his homosexuality, the plaintiff could not support a gender-stereotyping claim under the current state of the law).

224. Stephen D. Sugarman, "Lifestyle" Discrimination in Employment, 24 BERKELEY J. EMP. & LAB. L. 377, 387 (2003).

225. *Id.* at 387 & n.38.

226. George W. Dent, Jr., *Civil Rights for Whom?: Gay Rights Versus Religious Freedom*, 95 KY. L.J. 553, 636 (2007).

227. *Id.* at 555.

treatment in the workplace, which purports to be the aim of Title VII.²²⁸ Rather, protecting sexual orientation in the workplace would level the playing field as a humble assertion that LGBT individuals are entitled to the same right to be free of harassment and discrimination in the workplace as religious people who feel that they have been sent as messengers of God to wage war on homosexuality, abortion, or other “moral” issues.²²⁹

This Comment does not suggest that the religious protections that are already in place for employees should be lessened or eliminated. The United States is a country that values religious diversity, and protecting one’s religious rights *should* take precedence over employer rights in many cases. However, without providing equal protections for homosexuals in the workplace, religious convictions may be used as a tool to adversely affect or disadvantage homosexual employees. Not long ago in our nation’s history, some people justified segregation with biblical defenses.²³⁰ With the help of the Civil Rights Act of 1964, society has shifted away from such hostility. Similarly, as is shown by the recent developments towards legalizing gay marriage,²³¹ our society is moving toward general acceptance of homosexuality.²³² But without the aid provided by antidiscrimination laws on a national level, it is harder for homosexuals to gain equality. The sooner the federal government embraces the need for sexual-orientation protections in the workplace, the sooner such discrimination will be eradicated in all areas of life.

VI. CONCLUSION

Despite George W. Dent Jr.’s bald claims that “[m]ost people are repelled by homosexuality” and that “[v]irtually all agree that discrimination based on homosexuality should sometimes be allowed,”²³³ most people observing contemporary America would likely question where he found these statistics. While many Americans believe that homosexuals do not deserve certain rights available to all other Americans, such as the right to marry, this does not automatically translate to an affirmation of discrimination, especially in the workplace. The fact that 87% of Fortune 500 employers have internal antidiscrimination and harassment policies that prohibit discriminatory conduct on the basis of sexual orientation signals a need for protection under federal law.²³⁴ Employers need guidelines and boundaries by which they can regulate their business and

228. See H.R. REP. NO. 88-914 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2513–17.

229. See *Wilson v. U.S. W. Commc’ns*, 58 F.3d 1337, 1341–42 (8th Cir. 1995).

230. Mark Newman, *The Arkansas Baptist State Convention and Desegregation, 1954–1968*, 56 ARK. HIST. Q. 294, 295 (1997).

231. See, e.g., Araminta Wordsworth, *Washington State the Latest to Sign up for Gay Marriage*, NAT’L POST (Feb. 15, 2012, 12:05 PM), <http://fullcomment.nationalpost.com/2012/02/15/washington-state-the-latest-to-sign-up-for-gay-marriage/>.

232. See *id.*

233. Dent, Jr., *supra* note 226, at 631, 642.

234. See *Who Supports ENDA*, *supra* note 113.

maintain a healthy working environment for all employees. Regardless of whether a certain employer agrees with a particular religious belief or homosexual lifestyle, the law does not require agreement for a status to be protected. Rather, the law seeks to eliminate personal preference altogether, such that employees may all have equal opportunity to succeed in the workplace.

Title VII as it stands today produces incongruous and confusing results when religious beliefs and sexual orientation collide in the workplace. Religious employees are entitled to strong protections under the law, but the religious basis for their harassment of other employees may actually provide other employees with claims for religious harassment. On the other hand, the worst kind of harassers—those with true bigotry against others and who have no justification for their actions besides deep-seated prejudices—may actually fly under the radar and continue in their behavior because the law does not specifically prohibit harassment on the basis of sexual orientation. While some states and some employers fill in the gaps with their own statutes and internal policies, such an important basic right should not be left so piecemeal. The federal government must take control to create a uniform policy. Until then, people like Susan will continue to be treated like lesser employees, unworthy of the same protections as their coworkers.

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