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# Married on Saturday and Fired on Monday: *Hively v. Ivy Tech Community College*: Resolving the Disconnect under Title VII

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Note\*

# Married on Saturday and Fired on Monday: *Hively v. Ivy Tech Community College*: Resolving the Disconnect Under Title VII

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\* Shannon M. Bond, J.D. Candidate, 2019, University of Nebraska College of Law; B.S., 2016, Baker University. First and foremost, I would like to thank my parents, Laura and Sonne Bond, for teaching me to work hard and persevere no matter what kind of difficulty or doubt I might face. Thank you also to the rest of my family for all of the support they have so willingly given me. I would also like to thank Baker University Professor Lee Green for preparing and encouraging me to go for my goal of pursuing a legal career. And last, but certainly not least, thank you to all of the dedicated members of NEBRASKA LAW REVIEW who worked so hard to help me improve this Note.

## I. INTRODUCTION

Americans are raised with the fundamental idea that they can live their lives freely and enjoy inalienable rights such as “life, liberty and the pursuit of happiness.”<sup>1</sup> But that is not always the case. Imagine Lisa and Kathy, two women who have been in a happy relationship for fifteen years, but who have been unable to symbolically consecrate that healthy relationship in marriage. Then, imagine their elation upon seeing news headlines on Friday, June 26, 2015, stating that they at last could be legally married in all fifty states.<sup>2</sup> As an expression of their newly recognized constitutional right,<sup>3</sup> Lisa and Kathy get married on Saturday, June 27, 2015.<sup>4</sup> After celebrating Saturday night and finally enjoying their time as a couple on Sunday, June 28, 2015, it is back to work on Monday.

Monday is when this happily married couple’s story abruptly changes. When Kathy’s boss discovers that she had celebrated the *Obergefell* outcome by getting married to Lisa over the weekend, the boss fires Kathy. Her boss may have done so because of religious views,<sup>5</sup> political views, or general outrage for the case’s outcome. Until

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1. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
  2. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) *see, e.g.*, Stephanie Condon, *Supreme Court: Marriage is a Fundamental Right for Gay Couples*, CBS NEWS (June 27, 2015), <https://www.cbsnews.com/news/supreme-court-marriage-is-a-fundamental-right-for-gay-couples/> [https://perma.unl.edu/UX3J-XALN]; Adam Liptak, *Supreme Court Ruling Makes Same-Sex Marriage a Right Nationwide*, N.Y. TIMES (June 26, 2015), <https://www.nytimes.com/2015/06/27/us/supreme-court-same-sex-marriage.html?mcubz=0>; *Plaintiff in Same-Sex Marriage Case Expresses Gratitude*, FOX NEWS (June 26, 2015, 2:04 PM), <http://video.foxnews.com/v/4323930412001/?#sp=show-clips> [https://perma.unl.edu/L8HP-PPSN]; Ariane de Vogue & Jeremy Diamond, *Supreme Court Rules in Favor of Same-Sex Marriage Nationwide*, CNN POLITICS (June 27, 2015, 11:04 AM), <http://www.cnn.com/2015/06/26/politics/supreme-court-same-sex-marriage-ruling/index.html> [https://perma.unl.edu/U8CF-6ETH].
  3. *Obergefell*, 135 S. Ct. at 2608.
  4. Or perhaps the couple got married the same day as the Supreme Court decision. *See* Polly Mosendz, *Here are Some of the First Gay Couples Marry After Supreme Court Decision*, NEWSWEEK (June 26, 2015), <http://www.newsweek.com/meet-first-gay-couples-who-got-married-after-scotus-decision-347618> [https://perma.unl.edu/C68U-N989]; Guardian Staff, *Same-Sex Marriage: Meet the First 12 Lovely Couples to Wed in Holdout States*, GUARDIAN (June 27, 2015), <https://www.theguardian.com/us-news/2015/jun/27/same-sex-marriage-first-couples-marry-states> [https://perma.unl.edu/6HAD-XLMH].
  5. *See* Press Release, Office of the Attorney General, Guidance on Federal Law Protections for Religious Liberty (Oct. 6, 2017) (on file with NEBRASKA LAW REVIEW) (stating that “[r]eligious corporations, associations, educational institutions, and societies . . . have an express statutory exemption from Title VII’s prohibition on religious discrimination in employment,” which allows companies to use religious grounds to discriminate against employees whose beliefs do not align with the company’s religious ideals).

April 4, 2017, this practice was permitted nationwide under Title VII of the Civil Rights Act.<sup>6</sup>

However, the Seventh Circuit ruled otherwise in *Hively v. Ivy Tech Community College (Hively 2)*, which is the subject of this Note.<sup>7</sup> This Note evaluates whether employment discrimination based on sexual orientation is protected under Title VII's prohibition of discrimination based on sex. Part II provides a background of the history, purpose, and effect of Title VII. Part II also outlines the circuit split created by *Hively 2*.<sup>8</sup> Part III analyzes whether existing precedent in the First, Third, Fourth, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits, or alternatively the Seventh and Second Circuits' departure from precedent, is correct. Part III argues that by looking at the broad goals of Title VII and the existing valid claims of discrimination based on gender nonconformity and discrimination based on racial association, the Seventh Circuit correctly decided *Hively 2*. Part III also notes that while the overall outcome was correct, certain aspects of the majority's reasoning were flawed.

This Article proposes that the correct analysis uses interpretations grounded in the established broad goals of Title VII and existing precedent allowing claims of gender nonconformity and associational claims under Title VII. This approach ultimately fulfills Title VII's purpose of protecting employees who are otherwise exercising their constitutional right to associate with whom they desire and "define and express their identity" as they wish, but who face retaliation for expressing those rights in the conditions of their employment or are discharged from their employment.<sup>9</sup> Part III also examines the policy implications of overturning precedent, as the court in *Hively 2* did.<sup>10</sup> Part IV summarizes why this proposed standard offers the best protection for employees and conforms to the purpose of Title VII.

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6. *Hively v. Ivy Tech Cmty. Coll. (Hively 2)*, 853 F.3d 339, 340 (7th Cir. 2017); *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248 (11th Cir. 2017); *Kalich v. AT&T Mobility, LLC*, 679 F.3d 464 (6th Cir. 2012); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285 (3d Cir. 2009); *Medina v. Income Support Div.*, 413 F.3d 1131 (10th Cir. 2005); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999); *Fredette v. BVP Mgmt. Assocs.*, 112 F.3d 1503 (11th Cir. 1997); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138 (4th Cir. 1996); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69 (8th Cir. 1989); *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979).

7. *Hively 2*, 853 F.3d 339 (overruling the Seventh Circuit's three judge panel decision in *Hively v. Ivy Tech Cmty. Coll. (Hively 1)*, 830 F.3d 698 (7th Cir. 2016)).

8. *Id.*

9. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2012); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015).

10. *Hively 2*, 853 F.3d at 349–50; *id.* at 354–55, 357 (Posner, J., concurring).

## II. BACKGROUND

## A. Title VII

1. *Creation and Effect of Title VII*

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer “to fail or refuse to hire or to discharge any individual . . . because of such individual’s race, color, religion, sex, or national origin.”<sup>11</sup> The purpose of Title VII is to protect employees and create equality in the workplace, where there were significant disparities before, by prohibiting discrimination based on race, color, religion, sex, or national origin;<sup>12</sup> and to create the Equal Employment Opportunity Commission, an agency through which employees can seek resolution of discrimination issues.<sup>13</sup> The Civil Rights Act critically expanded employee rights and protection of certain groups of people who were socially disadvantaged, as shown through the enumerated categories, and continues to do so through the interpretive expansions of those categories.

Prior to Congress’s implementation of the Civil Rights Act of 1964, there were many disparities in the workforce generally, as well as within the workplace. Before the enactment of Title VII, it was common to find job listings in newspapers that required applicants to state their marital status, or listings separated into categories of jobs for women and jobs for men.<sup>14</sup> Disparities in employment opportunities were so egregious, especially in the context of race, that civil rights groups held protests and riots across the nation, most notably coming to a climax in the infamous Birmingham riots.<sup>15</sup> These events led President John F. Kennedy to make a statement on June 11, 1963, in an address to the nation, stating:

We are confronted primarily with a moral issue. It is as old as the scriptures and it is as clear as the American Constitution. The heart of the question is whether all Americans are afforded equal rights and equal opportunities, whether we are going to treat our fellow Americans as we want to be

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11. 42 U.S.C. § 2000e-2(a)(1).

12. See 42 U.S.C. § 2000e-2(a).

13. 42 U.S.C. § 2000e-4(a) (2012).

14. See Tamara Lytle, *Title VII Changed the Face of the American Workplace*, SOC’Y FOR HUM. RESOURCE MGMT. (May 21, 2014), <https://www.shrm.org/hr-today/news/hr-magazine/pages/title-vii-changed-the-face-of-the-american-workplace.aspx> [<https://perma.unl.edu/73W9-5FT6>] (noting that “classified ads often spelled out which genders and races could apply for particular jobs”); *Ads from The State Seeking “Male Help” and “Female Help,” June, 1958*, TEACHING AM. HIST. S.C., <http://teachingushistory.org/trove/wantads.htm> [<https://perma.unl.edu/TS53-4U4M>] (last updated 2009); *Gender-Biased Job Opportunities Before WWII*, BROWN U. LIBR., [http://cds.library.brown.edu/projects/WWII\\_Women/RA/NCraig/Jobs.html](http://cds.library.brown.edu/projects/WWII_Women/RA/NCraig/Jobs.html) [<https://perma.unl.edu/6DHM-8SMG>].

15. *Pre 1965: Events Leading to the Creation of EEOC*, EEOC, <https://www.eeoc.gov/eeoc/history/35th/pre1965/index.html> [<https://perma.unl.edu/7RLT-K2A8>].

treated . . . Now the time has come for this nation to fulfill its promise. The events of Birmingham and elsewhere have so increased the cries for equality that no city or state or legislative body can prudently ignore them.<sup>16</sup>

The changes that President Kennedy envisioned in his address were finally realized on July 2, 1964, when Congress passed the Civil Rights Act of 1964.<sup>17</sup>

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer “to fail or refuse to hire or to discharge any individual . . . because of such individual’s race, color, religion, sex, or national origin.”<sup>18</sup> Congress passed Title VII in light of egregious racism in the employment context and the need for legislation that would “close existing gaps” in employment law and protect African Americans as well as other minority groups at risk of employment discrimination by employers.<sup>19</sup> Two days before Title VII passed, Representative Howard Smith proposed that the category of sex be added.<sup>20</sup> He stated that it should be included because it “[would] do some good for the minority sex.”<sup>21</sup> Despite this category being a last-minute addition to the proposed bill,<sup>22</sup> the amendment relating to sex passed by a vote of 168 to 133 in the House of Representatives, which sent the bill to the Senate, where it made amendments unrelated to

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16. *Id.*

17. *Id.*

18. 42 U.S.C. § 2000e-2(a)(1) (2012).

19. On June 19, 1963, President Kennedy sent a message to Congress expressing his approval to “close existing gaps” created by the enactment of discrimination prohibition in twenty-two states and the lack of any protection in all other states or federally. Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 432–33 (1966) (citing 109 CONG. REC. 3245, 11178 (1963)).

20. Representative Smith may have opposed passing the civil rights bill, but proposed this amendment as a potential deterrent to others who would not want to add sex as an enumerated category. ERIC S. DREIBAND & BRETT SWEARINGEN, *THE EVOLUTION OF TITLE VII—SEXUAL ORIENTATION, GENDER IDENTITY, AND THE CIVIL RIGHTS ACT OF 1964*, at 2 (2015) (citing 110 CONG. REC. 2577 (1964)), [http://www.jonesday.com/files/Publication/07f7db13-4b8c-44c3-a89b-6dcfe4a9e2a1/Presentation/PublicationAttachment/74a116bc-2cfe-42d2-92a5-787b40ee0567/dreiband\\_lgbt.authcheckdam.pdf](http://www.jonesday.com/files/Publication/07f7db13-4b8c-44c3-a89b-6dcfe4a9e2a1/Presentation/PublicationAttachment/74a116bc-2cfe-42d2-92a5-787b40ee0567/dreiband_lgbt.authcheckdam.pdf). Others believe that his proposal to add “sex” may have been genuine, given his historical support for women’s equality. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 139 (2d Cir. 2018) (Lynch, J., dissenting) (noting specifically that Representative Smith “had been a longstanding supporter of a constitutional amendment guaranteeing equal rights to women”) (citing TODD S. PURDUM, *AN IDEA WHOSE TIME HAS COME* 196 (2014)).

21. DREIBAND & SWEARINGEN, *supra* note 20, at 2.

22. The proposal to add “sex” to the enumerated categories occurred only hours before the vote took place in the House of Representatives. Cary Franklin, *Inventing the “Traditional Concept” of Sex Discrimination*, 125 HARV. L. REV. 1307, 1317–19 (2012). As a result, the interpretation of Title VII’s prohibition of discrimination “because of sex” has been somewhat inconsistent and unpredictable since there was very little debate and no committee reports or legislative hearings related to the addition of “sex.” *Id.*

the “sex” amendment.<sup>23</sup> Those amendments received a concurrence from the House on July 2, 1964, and President Johnson signed the bill into law.<sup>24</sup>

The inclusion of sex in Title VII has made a marked difference both within the workplace and in work opportunities for women. While only approximately 38% of women participated in the labor force in 1963, within ten years that number increased to 45%.<sup>25</sup> Such a rapid change after the passage of Title VII can be attributed in part to the prohibition of discrimination,<sup>26</sup> which in turn created more employment opportunities and safe work environments for women.<sup>27</sup> These opportunities and safe environments continued to increase throughout the years with the passage of supplementary law such as The Pregnancy Discrimination Act of 1978<sup>28</sup> and judicial interpretative expansions of Title VII.<sup>29</sup> As a result of the increased protections in

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23. Vaas, *supra* note 19, at 442, 446–57.

24. *Id.* at 457.

25. *Women in the Labor Force, Labor Force Participation Rate by Sex, Race and Hispanic Ethnicity*, U.S. DEP’T LAB., [https://www.dol.gov/wb/stats/NEWSTATS/facts/women\\_lf.htm#two](https://www.dol.gov/wb/stats/NEWSTATS/facts/women_lf.htm#two) [<https://perma.unl.edu/T8U4-GRKQ>] [hereinafter *Women in the Labor Force*].

26. Increases of women in the labor force can be attributed to a combination of causes including increases in national productivity and economic growth, “[t]he civil rights movement, legislation promoting equal opportunity in employment, and the women’s rights movement.” Mitra Toossi, *A Century of Change: The U.S. Labor Force, 1950–2050*, MONTHLY LAB. REV., May 2002, at 15, 18.

27. *See, e.g.*, *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544–47 (1971) (Marshall, J., concurring) (per curiam) (“By adding the prohibition against job discrimination based on sex to the 1964 Civil Rights Act Congress intended to prevent employers from refusing ‘to hire an individual based on stereotyped characterizations of the sexes.’”) (citing EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.1(a)(i)(ii)).

28. The Pregnancy Discrimination Act of 1978 was passed as an amendment to Title VII and prohibits discrimination “because of or on the basis of pregnancy, childbirth, or related medical conditions” as a legislative expansion of the enumerated category of “sex.” Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e(k) (2012)). Before the enactment of this statute, discrimination based on pregnancy was held to be permissible. *See Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 128 (1976) (holding that the exclusion of “pregnancy-related disability benefits from General Electric’s employee disability plan” does not violate Title VII).

29. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998) (holding that a claim of sexual harassment by a coworker of the same sex is permitted under Title VII’s protection of sex); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51 (1989) (plurality opinion) (holding that a claim of gender stereotyping discrimination is permitted under Title VII’s protection of sex); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 73 (1986) (holding that an employee’s claim of “hostile environment” sex discrimination is permitted under Title VII’s protection of sex); *City of L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 710–11 (1978) (holding that a claim of discrimination based on longevity calculations in a pension plan is permitted under Title VII’s protection of sex).

accordance with the purpose of Title VII, as of 2015, 57% of women were participating in the labor force.<sup>30</sup>

While Title VII has fulfilled its purpose for many individuals, it has failed to protect a significant portion of the workforce—those who identify with a sexual orientation other than heterosexual.<sup>31</sup> This Note focuses on that portion of the workforce.

## 2. *The Supreme Court's Interpretation of Title VII*

Though the Supreme Court has made many beneficial interpretative expansions to Title VII's prohibition of discrimination based on sex,<sup>32</sup> it has not yet addressed whether sexual orientation discrimination is prohibited as a form of discrimination based on sex.<sup>33</sup> As noted in subsection II.A.1, the addition of the category of sex to Title VII was made within hours of the vote in the House of Representatives.<sup>34</sup> This

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30. *Women in the Labor Force*, *supra* note 25.

31. As of 2011, the number of lesbian, gay, bisexual, or transgender (LGBT) persons in the workforce was greater than eight million people or around 4% of the workforce. Jennifer C. Pizer, Brad Sears, Christy Mallory & Nan D. Hunter, *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 LOY. L.A. L. REV. 715, 719 (2012). However, the number of LGBT persons in the workforce could potentially be much higher than 4% since it is estimated that approximately 53% of LGBT persons may be “closeted” on the job. *HRC Study Shows Majority of LGBT Workers Closeted at the Workplace*, HUM. RTS. CAMPAIGN (May 7, 2014), <https://www.hrc.org/blog/hrc-study-shows-majority-of-lgbt-workers-closeted-on-the-job> [<https://perma.unl.edu/59CF-HJKY>].

32. *See Oncale*, 523 U.S. at 82 (holding that same-sex sexual harassment is unlawful discrimination based on sex under Title VII); *Int'l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 206 (1991) (holding that a policy barring women who were of the age to bear children from performing certain job duties because of a potential harm to the fetus is unlawful discrimination unless it is a bona fide occupational qualification); *Price Waterhouse*, 490 U.S. at 250–51 (plurality opinion) (holding that a claim of gender stereotyping discrimination is permitted under Title VII's protection of sex); *Meritor Sav. Bank, FSB*, 477 U.S. at 73 (holding that a claim of sexual harassment by a coworker of the same sex is permitted under Title VII's protection of sex); *City of L.A., Dep't. of Water & Power*, 435 U.S. at 710–11 (holding that a claim of discrimination based on longevity calculations in a pension plan is permitted under Title VII's protection of sex); *Gen. Elec. Co.*, 429 U.S. at 145–46 (holding that a company-provided insurance plan that covers employees for disability and sickness but does not cover disabilities arising from pregnancy is not prohibited discrimination based on sex); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (per curiam) (holding that discrimination based on sex includes discriminatory hiring qualifications related to other factors such as having young children).

33. However, on June 1, 2018, Altitude Express, Inc. petitioned the U.S. Supreme Court for writ of certiorari in the Second Circuit Court of Appeals' decision in *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018). Petition for Writ of Certiorari, *Altitude Express, Inc. v. Zarda*, 2018 WL 2558416 (No. 17-1623).

34. *See supra* note 22 and accompanying text.



resulted in very little debate on the issue and no committee reports or legislative hearings, thus leaving interpretation of the category to the judiciary.<sup>35</sup> The text of Title VII of the Civil Rights Act does not explicitly protect against discrimination based on sexual orientation.<sup>36</sup> Although the Supreme Court has not yet addressed specifically whether discrimination based on sexual orientation is prohibited as discrimination based on sex, it has vitally expanded the application of Title VII in its landmark cases *Price Waterhouse v. Hopkins*<sup>37</sup> and *Oncale v. Sundowner Offshore Services, Inc.*<sup>38</sup>—both of which could be interpreted by courts to prohibit sexual orientation discrimination, as the Seventh Circuit did.

In *Price Waterhouse*, senior manager Ann Hopkins had been proposed for a position as partner in her accounting firm.<sup>39</sup> At the time of her proposal for the partnership position, only 7 of the 662 partners at the firm were female and Hopkins was the only female out of the 88 employees proposed for partnership that year.<sup>40</sup> Despite her accomplishments and contributions to the firm—attested to by those who proposed her for the position—the firm did not give her the position and instead held her for reconsideration at a later time.<sup>41</sup> Many of her reviews indicated that people did not recommend her for the position because of biases based on sex stereotypes.<sup>42</sup> The Supreme Court held that making an employment decision based on sex stereotypes is a form of impermissible discrimination based on sex under Title VII.<sup>43</sup>

In *Oncale*, employee Joseph Oncale was the target of sex-related harassment from three male coworkers, two of whom also had supervisory authority.<sup>44</sup> After he quit because of the continued harassment, Oncale sued his employer, Sundowner Offshore Services, under Title

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35. See *supra* note 22 and accompanying text.

36. Title VII makes it unlawful “to fail or refuse to hire or to discharge any individual . . . because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1) (2012).

37. *Price Waterhouse*, 490 U.S. 228.

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

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

40. *Id.* at 233.

41. *Id.* at 233–34.

42. *Id.* at 234–37. Hopkins’ reviews included statements that she was “macho,” that she “overcompensated for being a woman,” that she should take “a course at charm school,” that she could improve her chances for the partnership position if she would “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.” *Id.* at 235 (citing Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1117 (1985)).

43. *Id.* at 250–52 (“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.”).

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

VII for discrimination based on sex.<sup>45</sup> The United States District Court for the Eastern District of Louisiana granted summary judgment for Sundowner Offshore Services stating that Oncale did not have a cause of action as a male for sexual harassment by other males in the workplace, and the Fifth Circuit affirmed on appeal.<sup>46</sup> The Supreme Court reversed and remanded the Fifth Circuit's decision, concluding that an employee has a viable claim of sex discrimination under Title VII if the employee was the target of same-sex sexual harassment.<sup>47</sup>

Neither *Price Waterhouse* nor *Oncale* explicitly addressed whether claims of sex stereotyping or same-sex sexual harassment could also apply to discrimination based on one's sexual orientation. Since the Supreme Court answers narrow questions presented, lower federal courts are able to interpret peripheral or related issues, such as whether discrimination based on sexual orientation is included within Title VII's prohibition of discrimination based on sex.<sup>48</sup> Accordingly, the Federal Circuit Courts of Appeal have independently addressed whether sexual orientation is protected under Title VII, as discussed in sections II.B and II.C.

**B. *Hively v. Ivy Tech Community College*, 853 F.3d 339 (7th Cir. 2017)**

In *Hively 2*, the Seventh Circuit Court of Appeals held that discrimination based on sexual orientation is prohibited as a form of sex discrimination under Title VII.<sup>49</sup> It was the first circuit to make this

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45. *Id.*

46. *Id.* In affirming the District Court's decision, the Fifth Circuit followed precedent in *Garcia v. Elf Atochem North America*, where the Fifth Circuit, following its unpublished decision in *Giddens v. Shell Oil Co.*, held that "[h]arassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones." 28 F.3d 446, 451–52 (5th Cir. 1994) (quoting *Giddens*, No. 92–8533, 12 F.3d 208 (5th Cir. Dec. 6, 1993)).

47. *Oncale*, 523 U.S. at 79 ("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 . . .").

48. Article III, Section One of the Constitution vests all judicial power in the Supreme Court "and in such inferior courts as the Congress may from time to time ordain and establish" such as the federal circuit courts. U.S. CONST. art. III, § 1, cl. 1. Section Two extends that judicial power to "all Cases, in Law and Equity, arising under this Constitution [and] the Laws of the United States," which would include Title VII of the Civil Rights Act of 1964. *Id.* art. III, § 2, cl. 1. Thus, inferior federal courts are able to interpret provisions of Title VII unless the Supreme Court has already explicitly interpreted the issue presented.

49. *Hively 2*, 853 F.3d 339, 341 (7th Cir. 2017).

determination.<sup>50</sup> Kimberly Hively identified as homosexual and was an adjunct professor at Ivy Tech Community College in Indiana.<sup>51</sup> She began teaching part-time in 2000 and applied for multiple full-time positions with the college between 2009 and 2014.<sup>52</sup> Ivy Tech rejected Hively for all of the positions for which she applied and ultimately did not ask Hively to return as a professor after her then-existing contract ended in July 2014.<sup>53</sup>

In December of 2013, after Ivy Tech did not offer her a position or renew her contract, Hively filed a pro se charge under Title VII with the Equal Employment Opportunity Commission.<sup>54</sup> In her claim, she stated that she believed she was unsuccessful in her applications for a full time position because she was being discriminated against based on her sexual orientation, which she argued violated her rights under Title VII of the Civil Rights Act of 1964.<sup>55</sup> Hively received her right-to-sue letter and filed her case pro se in district court.<sup>56</sup> The district court granted Ivy Tech's motion to dismiss for failure to state a claim on which relief could be granted because of established precedent in the Seventh Circuit prohibiting Title VII claims based on sexual orientation.<sup>57</sup>

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50. *Id.* at 340–41 (“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. . . . [W]e have been asked to take a fresh look at our position in light of developments at the Supreme Court . . . . [A]nd we conclude today that discrimination on the basis of sexual orientation is a form of sex discrimination.”); *Evans v. Ga. Reg’l Hosp.*, 850 F.3d 1248, 1255–57 (11th Cir. 2017); *Kalich v. AT&T Mobility, LLC*, 679 F.3d 464, 471 (6th Cir. 2012); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285 289–90 (3d Cir. 2009); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005) (“Title VII’s protections . . . do not extend to harassment due to a person’s sexuality”); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 258–59 (1st Cir. 1999); *Fredette v. BVP Mgmt. Assocs.*, 112 F.3d 1503, 1510 (11th Cir. 1997); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996) (permitting a claim of discrimination based on sex where a heterosexual employee was allegedly harassed by his homosexual employer, but acknowledging that relief would not extend to discrimination if the employee were homosexual); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979).

51. *Hively 2*, 853 F.3d at 341.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* A claimant who files a charge with the EEOC alleging discrimination under Title VII will receive a “Notice-of-Right-to-Sue” if he or she has a viable claim, thus allowing the claimant to file a lawsuit in court. *Filing a Lawsuit*, EEOC, <https://www.eeoc.gov/employees/lawsuit.cfm> [https://perma.unl.edu/UV7U-2ZZN].

57. *Hively 2*, 853 F.3d at 341; *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, (7th Cir. 2000); *Spearman v. Ford Motor Co.*, 231 F.3d 1080 (7th Cir. 2000). Hively’s case was dismissed with prejudice. *Id.*

Hively appealed to the Seventh Circuit Court of Appeals, with the assistance of the Lambda Legal Defense & Education Fund.<sup>58</sup> A three-judge panel ultimately affirmed the district court's dismissal according to established precedent in the Seventh Circuit.<sup>59</sup> However, in extensive dicta, Circuit Judge Rovner noted that drawing a line which fails to include Title VII claims based on sexual orientation discrimination, but does include claims based on sex stereotyping discrimination, lacked any logical basis.<sup>60</sup> The three judge panel was ultimately unable to overturn precedent, regardless of its acknowledgement of potential valid claims of a similar nature and administrative support from the EEOC to recognize sexual orientation protection under the enumerated category of sex.<sup>61</sup>

A majority of the Seventh Circuit Court of Appeals judges then voted to rehear the case en banc.<sup>62</sup> Upon rehearing the case, the Seventh Circuit reversed and remanded the decision of the district court, holding 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."<sup>63</sup> The purpose of Title VII is to protect employees from discrimination and create equality in the workplace. Thus, rehearing *Hively 1* en banc in order to overturn precedent and prohibit sexual orientation discrimination was the correct approach.

### C. Circuit Split

The Seventh Circuit Court of Appeals was the first circuit to overturn the consistent precedent of denying claims of sexual orientation discrimination under Title VII. Almost every other circuit has routinely denied claims of sexual orientation discrimination.<sup>64</sup>

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58. *Hively 2*, 853 F.3d at 341.

59. *Hively 1*, 830 F.3d 698, 701 (7th Cir. 2016) ("We are presumptively bound by our own precedent . . .").

60. *Id.* at 704–06 ("For those courts, if the lines between the two are not easily discernible, the right answer is to forego any effort to tease apart the two claims and simply dismiss the claim . . .").

61. *Id.* at 702–03 (acknowledging the EEOC's recently released decision where it held that "sexual orientation is inherently a 'sex-based consideration'" and that discrimination based on sexual orientation is therefore prohibited under Title VII's enumerated category of sex) (quoting *Baldwin v. Foxx*, No. 0120133080, 2015 WL 4397641, at \*5 (E.E.O.C. July 16, 2015)).

62. *Hively 2*, 853 F.3d at 342–43 (noting that while "the panel correctly noted that it was bound by [the Seventh Circuit's] precedents," the court could choose to rehear the case en banc "to overrule earlier decisions and to bring our law into conformity with the Supreme Court's teachings").

63. *Id.* at 351–52. This Note analyzes the most persuasive arguments of the majority, two concurrences, and dissent.

64. *Hively 1*, 830 F.3d at 701; *Evans v. Ga Reg'l Hosp.*, 850 F.3d 1248, 1255–57 (11th Cir. 2017); *Kalich v. AT&T Mobility, LLC*, 679 F.3d 464, 471 (6th Cir. 2012);

For instance, the Eleventh Circuit held in *Evans v. Georgia Regional Hospital* that a claim for sexual orientation discrimination under Title VII could not proceed.<sup>65</sup> The *Evans* decision is typical of how cases similar to *Hively* are handled by courts. The *Evans* plaintiff made a Title VII claim of discrimination against her former employer based on the fact that she was discriminated against (1) because of gender nonconformity and (2) because of her sexual orientation.<sup>66</sup> The plaintiff worked as a security officer at a hospital and alleged that she was “denied equal pay or work, harassed, and physically assaulted or battered,” in part because she did not “carry herself in a ‘traditional woman[ly] manner.’”<sup>67</sup> She identified as a gay woman, and although she did not openly state her sexual orientation, her employer and co-workers noticed that she wore a male uniform, had a short haircut, and wore masculine shoes.<sup>68</sup> After she submitted complaints about the treatment she received, her human resources manager asked her directly about her sexuality.<sup>69</sup> Furthermore, she alleged that she was discriminated against for speaking to her human resources manager about her employer’s discriminatory behaviors.<sup>70</sup>

The magistrate judge assigned to her case issued a “report and recommendation” based on what she had alleged and the list of incidents that she provided.<sup>71</sup> Regarding her sexual orientation discrimination claim, the judge stated that Title VII “was not intended to cover discrimination against homosexuals.”<sup>72</sup> Regarding her gender nonconformity claim, the judge stated that it was “just another way to claim discrimination based on sexual orientation.”<sup>73</sup> After doing a de novo review of her case, the district court adopted the magistrate judge’s recommendation and dismissed her case with prejudice.<sup>74</sup> On appeal, the Eleventh Circuit affirmed the district court’s dismissal of the plaintiff’s sexual orientation discrimination claim because of existing

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*Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285 289–90 (3d Cir. 2009); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 258–59 (1st Cir. 1999); *Fredette v. BVP Mgmt. Assocs.*, 112 F.3d 1503, 1510 (11th Cir. 1997); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979).

65. *Evans*, 850 F.3d 1248.

66. *Id.* at 1251.

67. *Id.*

68. *Id.* (“Although she is a gay woman, she did not broadcast her sexuality. However, it was ‘evident’ that she identified with the male gender, because of how she presented herself—[sic] (‘male uniform, low male haircut, shoes, etc.’).”).

69. *Id.*

70. *Id.*

71. *Id.* at 1251–52.

72. *Id.* at 1252.

73. *Id.*

74. *Id.* at 1253.

precedent in the circuit that does not permit a claim of sexual orientation discrimination under Title VII.<sup>75</sup>

Similarly, the First, Third, Fourth, Fifth, Sixth, Eighth, and Tenth Circuits have all rejected claims of discrimination based on sexual orientation as a subset of sex under Title VII.<sup>76</sup> Courts have continued to rule this way, rejecting any claim related to sexual orientation, because of established precedent prohibiting such claims.<sup>77</sup>

However, there has been a trend toward permitting claims of discrimination based on sexual orientation in the past few years. First, the EEOC announced that it considers sexual orientation discrimination a subcategory of the enumerated category of sex and therefore prohibited it under Title VII.<sup>78</sup> Next, the Second Circuit determined that a person's claim of sexual orientation discrimination was sufficient to withstand dismissal because it presented a plausible claim of sex stereotyping, a decision that it made in light of the evolution of societal understanding of same-sex relationships and Supreme Court cases which have given more protection to homosexual individuals.<sup>79</sup>

Finally, the Seventh Circuit held in *Hively 2* that discrimination based on sexual orientation is a viable claim under Title VII.<sup>80</sup> The Second Circuit Court of Appeals recently took the same action as the Seventh Circuit in *Hively 2* by rehearing *Zarda v. Altitude Express*,

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75. *Id.* at 1255–57. The court reinforced its decision by listing similar decisions by its sister circuits. *Id.* at 1256–57. In the established precedent of *Blum v. Gulf Oil Corp.*, the court held that “[d]ischarge for homosexuality is not prohibited by Title VII.” 597 F.2d 936, 938 (5th Cir. 1979).

76. See cases cited *supra* note 64.

77. See discussion *infra* section III.A.

78. *Baldwin v. Foxx*, No. 0120133080, 2015 WL 4397641 (E.E.O.C. July 15, 2015). Courts are not bound to follow the decisions and guidance of the EEOC, but may grant it deference when hearing cases. Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 *FORDHAM L. REV.* 1937 (2006). Most often, courts will apply the *Skidmore* standard of deference to EEOC interpretations, and since that standard is malleable (containing multiple factors to be weighed by the court), courts usually do not grant deference and reject the EEOC interpretation presented. *Id.* at 1941, 1945 (referring to *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

79. *Christiansen v. Omnicom Group, Inc.*, 852 F.3d 195, 206–07 (2d Cir. 2017) (Katzmann, J., concurring) (“[I]n the context of an appropriate case our Court should consider reexamining the holding that sexual orientation discrimination claims are not cognizable under Title VII.”). The Second Circuit three-judge panel noted that while the plaintiff could not claim sexual orientation discrimination because it was inappropriate for the panel to overturn established precedent, the plaintiff could plausibly allege a claim of sex stereotyping under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). *Id.* at 199–200. The Second Circuit has, indeed, followed through on its statement that it should reexamine its treatment of sexual orientation discrimination under Title VII by rehearing *Zarda v. Altitude Express* en banc, just as the Seventh Circuit did in *Hively 2*. Order Granting Rehearing En Banc, 855 F.3d 76 (2d Cir. 2017).

80. *Hively 2*, 853 F.3d 339, 341 (7th Cir. 2017).

*Inc.*—a case involving a similar claim—en banc on September 26, 2017.<sup>81</sup> In an opinion released on February 26, 2018, the Second Circuit Court of Appeals took the same action as the Seventh Circuit by using the court en banc to overturn established precedent and hold that sexual orientation discrimination is prohibited under Title VII as a form of discrimination based on sex.<sup>82</sup>

Though most circuits have held that there is no viable claim of discrimination based on sexual orientation under Title VII, the trend toward allowing such a claim should continue in the footsteps of the Seventh Circuit in order to advance the purpose of Title VII.

### III. ANALYSIS

The Seventh Circuit correctly held that sexual orientation discrimination is prohibited as a form of discrimination based on sex under Title VII of the Civil Rights Act of 1964. That holding was the correct interpretation of Title VII's overall purpose of protecting employees and creating equality in the workplace by prohibiting discrimination based on five broad enumerated categories: race, color, religion, sex, and national origin.<sup>83</sup> That broad purpose is furthered by protecting employees from sexual orientation discrimination using judicial interpretative expansions that have occurred since the passage of Title VII,<sup>84</sup> as well as the accepted Title VII claims of gender nonconformity (also known as sex stereotyping)<sup>85</sup> and associational discrimination.<sup>86</sup> Furthermore, policy implications weigh in favor of prohibiting sexual orientation discrimination under Title VII in light of the innate nature of one's sexual identity; the historic animus toward those who identify as lesbian, gay, bisexual, or transgendered; and the need for protection from that animus as it continues today.<sup>87</sup>

The proper way for other circuits to align themselves with the Seventh Circuit and standardize the law in order to achieve the broad goal of Title VII is to rehear a case involving a sexual orientation discrimination claim, like *Hively 1*, en banc to overturn established precedent.

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81. *See supra* note 79.

82. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018). The Second Circuit goes on to make it clear that “this Court’s holding that sexual orientation discrimination is a subset of sex discrimination encompasses discrimination based on a person’s attraction to people of the opposite sex, same sex, or both.” *Id.* at 114 n.10.

83. 42 U.S.C. § 2000e-2(a) (2012); *see discussion supra* subsection II.A.1.

84. *See cases cited supra* note 29.

85. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *see discussion infra* section III.C.

86. *See discussion infra* section III.D.

87. *Hively 1*, 830 F.3d 698, 714 (7th Cir. 2016); *see discussion infra* section III.E.

### A. Departure from Precedent

Title VII claims of employment discrimination based on sexual orientation as a subset of sex have repeatedly failed in courts primarily because of established binding precedent in those circuits.<sup>88</sup> Because precedent cannot easily be overruled,<sup>89</sup> claims of employment discrimination based on sexual orientation frequently fail upon the employer's motion to dismiss<sup>90</sup> or motion for summary judgment.<sup>91</sup> When a plaintiff fails to state a claim for relief that is supported by existing law, including previous rulings in the circuit, a court is bound by its own precedent and may not rule otherwise.<sup>92</sup>

Therefore, if precedent is established in a circuit court, courts within that circuit are bound by it.<sup>93</sup> Courts are required to give considerable weight to established precedent in their circuit until it has been overruled by the decision of a superior court<sup>94</sup> or superseded by another legislative development, such as a congressional amendment to the statute.<sup>95</sup> One such supervening development occurred in *Hively 2*—a rehearing en banc of the Seventh Circuit's decision in

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88. See cases cited *supra* note 64.

89. *Hively 2*, 853 F.3d 339, 342–43 (7th Cir. 2017) (stating that the three-judge panel was required to follow precedent “until the writing comes in the form of a Supreme Court opinion or new legislation,” but that a full court has the power to rehear an issue en banc in order to overrule earlier decisions); see also Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 798 (2012) (“However, an entire circuit is not forever bound by a three-judge decision. The en banc procedure allows all active judges to sit and decide a single case. Sitting en banc, circuit judges are not bound by prior panel decisions, but may give some deference to well-entrenched precedent.”).

90. Rule 12(b)(6) of the *Federal Rules of Civil Procedure* is a “defense to a claim for relief,” which can be asserted by motion for “failure to state a claim upon which relief can be granted,” in cases such as ones claiming discrimination based on sexual orientation in jurisdictions where precedent holds that it is not a viable claim under Title VII.

91. Summary judgment under Rule 56 of the *Federal Rules of Civil Procedure* is asserted by motion. FED. R. CIV. P. 56. In cases such as ones claiming discrimination based on sexual orientation in jurisdictions where precedent holds that it is not a viable claim under Title VII, the movant's motion will be granted if he or she shows that there is “no genuine dispute as to any material fact,” which means “the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(a).

92. *Hively 1*, 830 F.3d at 701.

93. *Id.* at 701; see also *Christiansen v. Omnicom Group, Inc.*, 852 F.3d 195, 199 (2d Cir. 2017) (stating that “it [is] ordinarily . . . neither appropriate nor possible for [a panel] to reverse an existing Circuit precedent” (alteration in original) (quoting *Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte Ltd.*, 585 F.3d 58, 67 (2d Cir. 2009))); Mead, *supra* note 89, at 794–98 (describing the “law of the circuit” rule as an applicable subset of horizontal stare decisis for panel rulings within a circuit).

94. *Hively 2*, 853 F.3d at 342 (“Notable in its absence from the debate over the proper interpretation of the scope of Title VII's ban on sex discrimination is the United States Supreme Court.”).

95. *Id.* (citing *Santos v. United States*, 461 F.3d 886, 891 (7th Cir. 2006)).



*Hively 1*, which allowed that circuit to overturn precedent.<sup>96</sup> By using the power of the court en banc, the Seventh Circuit was able to rehear an issue that was dismissed based on established precedent in order to align the law with the purpose of Title VII and what Title VII is designed to protect in the employment context.<sup>97</sup>

Accordingly, the Seventh Circuit established new precedent.<sup>98</sup> Circuit courts should follow the Seventh Circuit's lead by rehearing cases similar to *Hively 1* en banc in order to overturn precedent and properly interpret Title VII to further its purpose of protecting employees from discrimination in the workplace.<sup>99</sup> Otherwise, the Supreme Court will have to judicially resolve the circuit split by hearing a case similar to *Hively 2*<sup>100</sup> or *Zarda*<sup>101</sup> and make a nationally binding decision regarding this Title VII issue. It is unclear how the Supreme Court would resolve this issue, given the significant personnel changes that have taken place in its recent history. However, in light of the interpretive expansions that the Supreme Court has already made in the Title VII context<sup>102</sup> and other decisions expanding rights and protections of same-sex couples,<sup>103</sup> it is possible that the Supreme

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96. *Id.* at 343 (stating that by “recognizing the power of the full court to overrule earlier decisions and to bring our law into conformity with the Supreme Court’s teachings, a majority of the judges in regular active service voted to rehear this case en banc” and ultimately overturning established precedent that discrimination based on sexual orientation was permissible under Title VII).

97. *Id.*

98. *Id.* at 341.

99. On September 26, 2017, the Second Circuit, following in the procedural footsteps of the Seventh Circuit, reheard en banc a three judge panel’s decision in *Zarda v. Altitude Express*, 855 F.3d 76 (2d Cir. 2017) that discrimination based on sexual orientation is not prohibited under Title VII. *See* Order Granting Rehearing En Banc, *supra* note 79. The Second Circuit Court of Appeals was the second circuit to do so, and it reversed the decision of the three judge panel that did not allow a claim of sexual orientation discrimination, thereby aligning with the Seventh Circuit in holding that sexual orientation discrimination is a form of sex discrimination prohibited by Title VII. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018).

100. *Hively 2*, 853 F.3d at 340–42 (noting the Supreme Court’s absence in the discussion of this Title VII issue, but acknowledging that the Supreme Court has published several opinions indicating the support of protections for homosexual individuals and same-sex couples).

101. *See Zarda*, 855 F.3d 76; *see* Brief for Petitioner, *supra* note 33 and accompanying text.

102. For the two most relevant examples of interpretative expansions that support the prohibition of sexual orientation discrimination, *see supra* subsection II.A.2.

103. *See, e.g., Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (holding same-sex couples have a fundamental right to marry under the U.S. Constitution); *Hollingsworth v. Perry*, 570 U.S. 693 (2013) (holding petitioners did not have standing to challenge the United States District Court for the Northern District of California’s decision that eliminating the right of same-sex couples to marry was a violation of due process and equal protection under the Fourteenth Amendment of the U.S. Constitution); *United States v. Windsor*, 570 U.S. 744 (2013) (holding that the

Court would continue that progression by prohibiting sexual orientation discrimination under Title VII's prohibition of discrimination based on sex."

## B. Interpretation

Congress passed Title VII of the Civil Rights Act of 1964 to protect employees from discrimination in the workplace.<sup>104</sup> Congress specified to whom these protections extended by enumerating five broad categories: race, color, religion, sex, and national origin.<sup>105</sup> Despite arguments that "sex" should be interpreted as simply distinguishing between persons who are genetically male and female,<sup>106</sup> the term has been repeatedly expanded through judicial interpretation to reflect the broad purpose of Title VII.<sup>107</sup> Because the Supreme Court has not explicitly ruled on the issue of whether discrimination based on sexual orientation is prohibited under Title VII's protection against sex discrimination,<sup>108</sup> circuit courts have been left to interpret Title VII and apply related Title VII cases to this unresolved issue.<sup>109</sup>

The Seventh Circuit properly interpreted Title VII's category of sex to include protection for those discriminated against because of their sexual orientation. This conclusion is supported by interpretative expansions of what is considered to be discrimination based on sex under Title VII, burdens of proof that enable plaintiffs' access to remedies, as

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Defense of Marriage Act's definitions of "marriage" as only a union between a man and a woman and "spouse" as only a person of the opposite sex were unconstitutional under the due process clause of the Fifth Amendment of the U.S. Constitution).

104. See discussion *supra* subsection II.A.1.

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

106. A common canon of statutory interpretation is to interpret words in light of their common meaning. *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014); *Perrin v. United States*, 444 U.S. 37, 42 (1979). This canon of interpretation is discussed in more detail *infra* subsection III.B.2.

107. See, e.g., *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (holding that a claim of sexual harassment by a coworker of the same sex is permitted under Title VII's protection of sex); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that a claim of gender stereotyping discrimination is permitted under Title VII's protection of sex); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (holding that an employee's claim of "hostile environment" sexual harassment is permitted under Title VII's protection of sex); *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978) (holding that a claim of discrimination based on longevity calculations in a pension plan is permitted under Title VII's protection of sex).

108. See discussion *supra* subsection II.A.2.

109. See generally *Price Waterhouse*, 490 U.S. 228 (holding that a claim of gender stereotyping discrimination is permitted under Title VII's protection of sex); *Oncale*, 523 U.S. 75 (holding that same-sex sexual harassment is unlawful discrimination based on sex under Title VII).

well as the evolution of understanding since 1964 with regard to those who identify as non-heterosexual.

1. *Broad Goal of Title VII*

The purpose of Title VII is to protect employees and create equality in the workplace, where there were significant disparities before, by prohibiting discrimination based on five broad enumerated categories: “race, color, religion, sex, or national origin.”<sup>110</sup> Specific to prohibitions of employment discrimination in Title VII, the five categories are to be interpreted broadly.<sup>111</sup> One piece of evidence of the legislature’s intention of broad interpretation is the burden of proof that the plaintiff bears to prove discrimination based on an enumerated category.<sup>112</sup>

Disparate treatment can be proved either by use of direct evidence or inferential proof.<sup>113</sup> Since direct evidence of discrimination is often not available or accepted, inferential proof is more commonly used in discrimination lawsuits.<sup>114</sup> Two common claims that require inferential proof are disparate treatment claims using the *McDonnell Douglas Corp. v. Green* framework,<sup>115</sup> or mixed motives disparate treatment claims under 42 U.S.C. § 2000e-2(m).

In a disparate treatment claim using the *McDonnell Douglas* framework, plaintiffs have a relatively low burden of proof, which is met if they demonstrate that they (1) belong to the particular class for which they allege they have been discriminated against, (2) applied for the job and were qualified for the position, (3) were rejected despite their qualifications, and (4) after their rejection, the position remained open and the employer continued to seek applicants.<sup>116</sup> Once this is established, the burden shifts to the defendant employer to state a

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110. See 42 U.S.C. § 2000e-2(a); discussion *supra* subsection II.A.1.

111. *Sandoval v. Am. Bldg. Maint. Indus., Inc.*, 578 F.3d 787, 792–93 (8th Cir. 2009) (“Title VII of the Civil Rights act of 1964 is to be accorded a liberal construction in order to carry out the purposes of Congress to eliminate the inconvenience, unfairness and humiliation of . . . discrimination.”) (citing *Baker v. Stuart Broad. Co.*, 560 F.2d 389, 391 (8th Cir. 1977)).

112. For purposes of this Note I am focusing on disparate treatment claims, not disparate impact claims, since those are the types of claims usually brought in sex discrimination and sexual orientation discrimination cases.

113. HAROLD S. LEWIS JR. & ELIZABETH J. NORMAN, *EMPLOYMENT DISCRIMINATION LAW AND PRACTICE* 164–74 (2d ed. 2001). The easiest way for a plaintiff to prove discrimination is by direct evidence such as “epithets or slurs uttered by an authorized agent of the employer, a decisionmaker’s admission that he [or she] would or did act against the plaintiff because of his or her protected characteristic, or, even more clearly, an employer policy framed squarely in terms of race, sex, religion, or national origin.” *Id.* at 165.

114. *Id.* at 179 (“Because direct evidence of intent has . . . been so rarely accepted, courts have recognized alternative ways of establishing unlawful discrimination.”).

115. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

116. *Id.* at 802; see LEWIS, *supra* note 113, at 184–85.

nondiscriminatory reason for its allegedly discriminatory action.<sup>117</sup> If the defendant employer meets its burden of proof, the burden switches back to the plaintiff to show that the employer's reason was merely pretext.<sup>118</sup> By allowing the plaintiff to prove his or her prima facie case with the four simple elements and to rebut the defendant employer's rationale by using circumstantial evidence to prove it is a pretext for an actual discriminatory purpose, plaintiffs are easily able to present their cases and seek relief in court.

In a mixed motives disparate treatment case under Title VII, the plaintiff must "demonstrate[ ] that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."<sup>119</sup> When this burden of proof is met, the burden shifts to the employer to prove that he or she would have taken the action at issue based solely on his or her stated legitimate reason.<sup>120</sup> By clarifying that the employer's discrimination merely has to be a "motivating factor" of the employer's discrimination rather than the sole factor, plaintiffs' access to remedies in these circumstances is much easier to obtain. Furthermore, enabled access to remedies reflects Congress's broad goal of protecting employees from discrimination.

In addition to the legislature's intention to enable access to remedies based on the burden of proof required by parties in a Title VII suit, the Supreme Court has interpreted Title VII protection broadly.<sup>121</sup> In *Oncale v. Sundowner Offshore Services Inc.*, the Supreme Court found that Congress's overall goal of passing Title VII and prohibiting discrimination based on sex was to provide broad protections by "strik[ing] at the entire spectrum of disparate treatment of men and women in employment."<sup>122</sup> In *Oncale*, the plaintiff was sexually harassed and abused by his male coworkers, who also had supervisory roles, and their superiors took no action to stop the sexual

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117. *McDonnell Douglas Corp.*, 411 U.S. at 802.

118. *See id.* at 804–05 (stating further that the plaintiff can use evidence to prove pretext, including evidence of other employees being rehired after acting in the way that—according to the defendant—resulted in the plaintiff not being rehired; "the [employer]'s treatment of [plaintiff] during his prior term of employment; [employer]'s reaction, if any, to [plaintiff]'s legitimate civil rights activities; and [employer]'s general policy and practice with respect to minority employment.").

119. 42 U.S.C. § 2000e-2(m) (2012).

120. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1989) (stating that "[a]n employer may not, in other words, prevail in a mixed-motives case by offering a legitimate and sufficient reason for its decision" and that therefore "[t]he employer instead must show that its legitimate reason, standing alone, would have induced it to make the same decision").

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

122. *Id.* at 78 (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)).

harassment, even after he reported the incidents.<sup>123</sup> The Supreme Court overturned the Fifth Circuit's decision that a male could not have a viable claim of discrimination based on sex against coworkers of the same sex.<sup>124</sup> The Court ruled that discrimination by a male coworker of a male employee is discrimination based on sex even though it was "assuredly not the principal evil Congress was concerned with when it enacted Title VII."<sup>125</sup>

This acknowledgement of original congressional intent in conjunction with the Court's determination that the original intent was not determinative reinforces that the most important concept with which to interpret Title VII is the broad goal of protecting employees from discrimination based on sex. Reading Title VII broadly advances Title VII's purpose of protecting employees from discriminatory behavior and creating equality in the workplace.

## 2. *Broadening Title VII Interpretations*

Title VII's prohibition of discrimination based on sex has been subject to broad interpretive expansions in order to align with the overall purpose of Title VII. These interpretive expansions have been taken despite arguments that they are unsupported by the legislative history of Title VII. Much attention has been drawn to the fact that there is "little legislative history to guide [courts] in interpreting the Act's prohibition against discrimination based on 'sex.'"<sup>126</sup> However, as the Seventh Circuit points out, legislative history is "notoriously malleable."<sup>127</sup>

Furthermore, reliance on legislative history and failed attempts to change a law<sup>128</sup> can draw many different conclusions, including a general lack of a need for a proposed change because the existing law provides sufficient coverage, a lack of desire for a legislative change because a majority of the legislature is content with how courts interpreting the statute understand its provisions, or "irrelevance of the non-enactment, when it is attributable to nothing more than legisla-

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123. *Id.* at 77.

124. *Id.* at 79.

125. *Id.*

126. *Meritor*, 477 U.S. at 64.

127. *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 343 (7th Cir. 2017).

128. The Employment Non-Discrimination Act (ENDA), which, if it had passed, would have explicitly prohibited employment discrimination based on sexual orientation, was first proposed in Congress in 1994 and was proposed for the final time in 2013. *See* Employment Non-Discrimination Act of 1994, S. 2238, 103d Cong. (1994); Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013). The most recent iteration of a bill prohibiting employment discrimination based on sexual orientation is the Equality Act, which would amend the Civil Rights Act of 1964 to remove the word "sex" and insert "sex, sexual orientation, gender identity." H.R. 2282, 115th Cong. § 7 (2017). The Equality Act was introduced in the House of Representatives on May 2, 2017 and is currently pending. *Id.*

tive logrolling or gridlock that had nothing to do with its merits.”<sup>129</sup> Legislative histories can also be a misleading guide in the interpretation of a statute when they are analyzed as part of a bill that does not become law because they do not reflect actual intent of the affirmative law being interpreted.<sup>130</sup> Therefore, the *Hively 2* dissent’s use of newer legislation, including the Violence Against Women Act, which explicitly protects sexual orientation,<sup>131</sup> is not proof that the 1964 Congress’s failure to add protection from discrimination based on sexual orientation to Title VII was intentional. Since Congress’s failure could be interpreted in varying ways, attempting to use legislative histories does not provide insight into Congress’s precise intent or how it would want to treat sexual orientation under Title VII today.

One of the primary arguments against prohibiting sexual orientation discrimination under Title VII’s prohibition of sex discrimination is that those who passed the Civil Rights Act in 1964 did not contemplate sexual preference when they wrote the protection of sex into the Act.<sup>132</sup> The Supreme Court has stated “a fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.”<sup>133</sup> The argument is rooted in the idea that the judiciary should show restraint in interpreting a statute by first looking at the understanding at the time of enactment.<sup>134</sup> People who rely on the original interpretation argument believe the judiciary is “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.”<sup>135</sup>

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129. *Hively 2*, 853 F.3d at 343–44. See Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 376–79 (1987), for a discussion on the practical concerns of using legislative histories in interpreting a statute.

130. See *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (responding to the use of amendments to ERISA effected by the Pension Protection Act in interpreting a prior statute); see also Starr, *supra* note 129, at 376 (“The most compelling and widely discussed concern about the use of legislative history is its potential for manipulation. It is often said that one generally finds in the legislative history only that for which one is looking.”).

131. *Hively 2*, 853 F.3d at 363 (Sykes, C.J., dissenting) (citing 42 U.S.C. § 13925(b)(13)(A)).

132. See *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984).

133. *Perrin v. United States*, 444 U.S. 37, 42 (1979); *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014).

134. *Hively 2*, 853 F.3d at 360 (Sykes, J., dissenting).

135. *Id.* The late Justice Scalia, who was a staunch originalist, believed the Constitution and statutes should be interpreted in light of the meaning at the time of adoption. See Richard F. Duncan, *Justice Scalia and the Rule of Law: Originalism vs. the Living Constitution*, 29 REGENT U. L. REV. 9, 15 (2016) (“The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now.”) (quoting ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 81 (2012)).

Despite those who urge that original intent is the only necessary means of interpreting Title VII, that argument fails to acknowledge how Title VII has repeatedly been broadly construed in light of its overall purpose to protect employees and create equality in the workplace by prohibiting discrimination based on sex. Furthermore, the social and relational underpinnings of people's identification of "sex" was not commonly understood when the Civil Rights Act was enacted in 1964. To quote the great Justice Holmes, "we must consider what this country has become in deciding what that [statute] has reserved."<sup>136</sup> As Circuit Judge Posner points out in his concurrence in *Hively 2*, "homosexuality was almost invisible in the 1960s" and did not become visible until the 1980s when the AIDS epidemic brought it to the forefront of America's attention.<sup>137</sup> Although the 1964 Congress may not have considered sex to include sexual orientation, this omission was due to its lack of awareness and absence of information regarding homosexuality, not an affirmative decision to exclude sexual orientation.

Interpretative expansions of statutory and constitutional law have been commonly accepted as binding law since Blackstone offered his commentaries on the law in 1765.<sup>138</sup> More specifically, many interpretations of Title VII that fall outside of the original narrow reading of the word "sex" have been widely accepted as binding law.<sup>139</sup> Some examples of these interpretive expansions with regard to Title VII discrimination based on sex include the prohibition of sexual

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136. *Missouri v. Holland*, 252 U.S. 416, 433–34 (1920) (arguing furthermore that "the case before us must be considered in the light of our [sic] whole experience and not merely in that of what was said a hundred years ago" in interpreting the Migratory Bird Treaty Act of July 3, 1918 and related regulations); see also *Hively 2*, 853 F.3d at 356–57 (Posner, J., concurring) (paraphrasing Justice Holmes's words to apply to Title VII and the sexual orientation discrimination context).

137. *Hively 2*, 853 F.3d at 353.

138. Judge Posner points out in his concurrence that even the late Justice Scalia, a well-known originalist, was the fifth vote for the majority in *Texas v. Johnson*, 491 U.S. 397 (1989), which held burning the American flag as a political protest is protected under the First Amendment, even though burning a flag is assuredly not what the framers or ratifiers of that Amendment would have considered "speech." *Id.* at 353–54. Judge Posner also highlights in his concurrence the portion of William Blackstone's *Commentaries on the Laws of England* (1765) in which Blackstone noted that even though a medieval law may say "whoever drew blood in the streets should be punished with the utmost severity," the law would assuredly not apply to activities of medical surgeons, even though the legislators had failed to account for them. *Id.* at 352.

139. Circuit Judge Sykes, writing for the dissent in *Hively 2*, cites to The American Heritage Dictionary of the English Language, published in 1969, to emphasize that at the time of enactment, "sex" was understood to be simply "[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." *Id.* at 362–63.

harassment,<sup>140</sup> the prohibition of harassment by same-sex employees,<sup>141</sup> prohibition of discrimination based on gender nonconformity,<sup>142</sup> and prohibition based on actuarial assumptions of a particular sex's lifespan.<sup>143</sup>

In light of the acceptance of interpretative expansions not only in statutory and constitutional law generally, but specifically in Title VII's prohibition of discrimination based on sex, a purely originalist argument about the framers' understanding of the word "sex" is unpersuasive. Furthermore, the broader understanding of what amounts to discrimination based on sex under Title VII, as seen in judicial interpretative expansions since its enactment in 1964, illustrates that courts understand the enumerated category of sex to be a broad category intended to protect as many employees as possible that are facing discrimination in the workplace—not simply employees who are male or female based only on their reproductive functions.<sup>144</sup> Most importantly, an originalist interpretation of Title VII's prohibition of discrimination based on sex would unnecessarily limit that protection to the extent that it would no longer be performing the Act's overall purpose of protecting employees and creating equality in the workplace by "strik[ing] at the entire spectrum of disparate treatment of men and women in employment."<sup>145</sup>

Continuing to interpret sex broadly, as courts have done since Title VII's passing, allows courts to "avoid statutory obsolescence"<sup>146</sup> and further the goals of Title VII. Courts have repeatedly expanded what is protected under Title VII's prohibition of discrimination based on

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

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

142. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) ("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 . . . ."); discussion *infra* section III.C.

143. In *City of Los Angeles, Department of Water and Power v. Manhart*, the Supreme Court analyzed an employment policy that "required its female employees to make larger contributions to its pension fund than its male employees" because "[a]s a class, women live longer than men." 435 U.S. 702, 704 (1978). The Court ultimately held that "[a]n employment practice that requires 2,000 individuals to contribute more money into a fund than 10,000 other employees simply because each of them is a woman, rather than a man, is in direct conflict with both the language and the policy of the [Civil Rights] Act." *Id.* at 711.

144. *Hively 2*, 853 F.3d at 362–63 (Sykes, J., dissenting).

145. *Oncale*, 523 U.S. at 78 (citing *Meritor*, 477 U.S. at 64).

146. *Hively 2*, 853 F.3d at 357 (Posner, J., concurring) ("I would prefer to see us acknowledge openly that today we, who are judges rather than members of Congress, are imposing on a half-century-old statute a meaning of 'sex discrimination' that the Congress that enacted it would not have accepted. This is something courts do fairly frequently to avoid statutory obsolescence and concomitantly to avoid placing the entire burden of updating old statutes on the legislative branch.").



sex, and the Seventh Circuit's decision to protect employees from sexual orientation discrimination in *Hively 2* is an appropriate interpretive expansion that aligns with Title VII's purpose.

### C. Gender Nonconformity Claim

One of the accepted interpretative expansions of Title VII's prohibition of discrimination based on sex is the prohibition of discrimination based on gender nonconformity, also known as sex stereotyping.<sup>147</sup> As the Seventh Circuit in *Hively 2* correctly pointed out, "Hively represents the ultimate case of failure to conform to the female stereotype (at least as understood in a place such as modern America, which views heterosexuality as the norm and other forms of sexuality as exceptional): she is not heterosexual."<sup>148</sup> Thus, as a woman who has relationships with other women rather than men—where a woman who has relationships with men is thought of as "normal" and is more acceptable in social spheres—she is failing to conform to what the stereotypical woman would do. Under the precedent established by the Supreme Court in *Price Waterhouse v. Hopkins*, Title VII prohibits discrimination based on gender nonconformity as a subset of sex discrimination, and plaintiffs like Hively should be successful under such a claim.<sup>149</sup>

However, courts have repeatedly drawn an arbitrary line that allows gender nonconformity claims, but does not allow sexual orientation to be categorized as gender nonconformity.<sup>150</sup> Those courts characterize the attempt to make a gender nonconformity claim because of the claimant's failure to meet the appropriate gender stereotype due to his or her sexual orientation as an attempt to "bootstrap protection for sexual orientation into Title VII."<sup>151</sup> However, this arbitrary distinction leads to odd and inconsistent results in claims that are essentially the same. In effect, "If you look or act sufficiently 'gay' at work, you might currently find protection from discrimination in at least half of the nation's courts of appeals," but on the other hand, if "your coworkers or employers simply know or think you are gay, you are not only unprotected under federal law, but your claim is that of a 'bootstrapper' trying to force sexual orientation into Title VII against

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147. *Price Waterhouse*, 490 U.S. at 251.

148. *Hively 2*, 853 F.3d at 346.

149. *Price Waterhouse*, 490 U.S. at 258.

150. See *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218–19 (2d Cir. 2005); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762–65 (6th Cir. 2006). *But see* *Terveer v. Billington*, 34 F. Supp. 3d 100, 115–16 (D.D.C. 2014) (allowing the plaintiff's claim to survive a motion to dismiss for failure to state a claim, primarily because of the low hurdle required at the motion to dismiss stage of a trial, under a theory that discrimination based on sexual orientation was discrimination based on gender nonconformity).

151. *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000).

the will of Congress.”<sup>152</sup> This distinction effectively makes the way one looks or acts legally more important than the actual fact of one’s sexual preferences, which in practice means that appearances are given more protection than one’s actual sexual orientation or personal identity.<sup>153</sup>

The Seventh Circuit properly interpreted the nature of discrimination based on sexual orientation as being discrimination based on a failure to conform to gender norms in finding that Hively could support a claim based on gender nonconformity under Title VII.<sup>154</sup> The court in *Hively 2* found support from the arguments and dicta in *Hively 1*. Though the three-judge panel in *Hively 1* did not have the ability to overturn precedent of its own accord and ultimately held that Hively’s claim could not stand,<sup>155</sup> it acknowledged that cases holding that employees are not protected from discrimination based on sexual orientation under Title VII are difficult to understand in light of the prohibition of discrimination based on failure to conform to gender norms—the two are so similar as to render an attempt to distinguish the two untenable.<sup>156</sup> Furthermore, claims of discrimination based on sexual orientation and gender nonconformity are indistinguishable because “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.”<sup>157</sup>

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152. Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 AM. U.L. REV. 715, 716 (2014). The Second Circuit, in overturning precedent and holding that sexual orientation discrimination is prohibited under Title VII, similarly addresses the “unworkability” of its precedent and the inability of lower courts to make a meaningful distinction between “gender stereotypes that support an inference of impermissible sex discrimination and those that are indicative of sexual orientation discrimination.” *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 121 (2d Cir. 2018). The court notes that “a woman might have a Title VII claim if she was harassed or fired for being perceived as too ‘macho’ but not if she was harassed or fired for being perceived as a lesbian.” *Id.* (quoting *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 524 n.8 (D. Conn. 2016)).

153. Soucek, *supra* note 152, at 717.

154. *Hively 2*, 853 F.3d 339, 346–47 (7th Cir. 2017).

155. *Hively 1*, 830 F.3d 698, 702 (7th Cir. 2016).

156. *See id.* at 704–06.

157. *Id.* at 711. However, in his concurring opinion in *Zarda v. Altitude Express*, Circuit Judge Jacobs argues that there is no valid claim of sex stereotyping because “[s]tereotypes are generalizations that are usually unfair or defective,” which is distinguishable from sexual orientation discrimination because “[h]eterosexuality and homosexuality are both traits that are innate and true, not stereotypes of anything else.” *Zarda*, 883 F.3d at 134 (Jacobs, J., concurring). This view of sex stereotyping ignores the negativity with which discriminating employers in these sexual orientation discrimination cases impose stereotypes upon employees. Employers who are taking the adverse action against the employee or treating the employee differently as a direct result of his or her sexual orientation are doing so because they have formed a stereotype about who a man or woman should form a

The three-judge panel in *Hively 1* looked to an Equal Employment Opportunity Commission (EEOC) decision for guidance<sup>158</sup> as to the distinction between gender nonconformity claims and sexual orientation claims under Title VII.<sup>159</sup> Relying on *Price Waterhouse's* determination that employers may not rely upon sex-based considerations in the making of their employment decisions,<sup>160</sup> the EEOC in *Baldwin v. Foxx* ruled that because “[d]iscrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms,” sexual orientation is therefore protected as a claim of discrimination based on gender nonconformity under Title VII.<sup>161</sup>

As the court in *Hively 1* pointed out, the EEOC had three reasons for this conclusion, two of which are relevant to a gender nonconformity claim:

(1) “sexual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee’s sex.”<sup>162</sup>

(3) sexual orientation discrimination is based on failure to conform to gender stereotypes about “appropriate masculine and feminine behaviors, mannerisms, and appearances.”<sup>163</sup>

The Seventh Circuit in *Hively 2* went further than the panel in *Hively 1* with regard to the distinction between claims of discrimination based on sexual orientation and claims based on gender nonconformity. While *Hively 1* pointed out that courts trying to distinguish the two types of claims create inconsistent precedents because they are attempting to create a distinction where the claims are essentially the same,<sup>164</sup> the Seventh Circuit in *Hively 2* held that the distinction is nonexistent.<sup>165</sup> It explained that *Hively's* claim is precisely the

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relationship with, noticed an employee who did not conform to that stereotype because of their innate sexual orientation, and taken adverse action because of their perception of what is “right”—effectively implying that the employee’s actions and behaviors are morally “wrong.” For that reason, such generalizations and impositions are inherently “unfair.”

158. The court acknowledged that “although the rulings of the EEOC are not binding on this court, they are entitled to some level of deference.” *Hively 1*, 830 F.3d at 703 (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 433–34 (1971)).

159. *Id.* at 702 (noting that the EEOC’s conclusion that an allegation of discrimination based on sexual orientation amounts to an allegation of sex discrimination).

160. *Baldwin v. Foxx*, No. 0120133080, 2015 WL 4397641, at \*4 (E.E.O.C. July 15, 2015) (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239, 241–42 (1989)).

161. *Id.* at \*5.

162. *Hively 1*, 830 F.3d at 703 (citing *Baldwin*, 2015 WL 4397641, at \*5–7) (internal quotations omitted).

163. *Id.*

164. *Id.* at 705 (stating that courts create inconsistent results by “turn[ing] circles around themselves because, in fact, it is exceptionally difficult to distinguish between” the two claims).

165. *Hively 2*, 853 F.3d 339, 346 (7th Cir. 2017).

same as claims brought by women who were not considered for employment in traditionally male roles, such as fire departments, construction, and policing.<sup>166</sup> In those cases, the employers who were found to have violated Title VII were effectively defining what they believed were proper jobs and behaviors of women or men who applied for those jobs.<sup>167</sup>

Hively, like the claimant in the *Baldwin v. Foxx* EEOC case, claimed she was discriminated against because of her sexual orientation.<sup>168</sup> Because she was a woman who had relationships with other women, she failed to conform to gender stereotypes for appropriate feminine behaviors, specifically by failing to be a heterosexual female with a male partner. This discrimination is more broadly based on her sex because of her failure to conform to the acceptable actions of a “normal” female. According to this claim, if she conformed to the actions of a stereotypical woman and had relationships with men instead of women, her employer would not have discriminated against her and she would have been considered for the job.<sup>169</sup> This is a valid claim of discrimination based on sex under Title VII and other circuits should follow the Seventh Circuit in determining so.

#### D. Associational Claim

The Seventh Circuit correctly held that the prohibition of discrimination based on sex under Title VII includes discrimination against a person based on with whom he or she associates. Hively claimed her employer discriminated against her because of her sexual orientation.<sup>170</sup> In addition to the concept that she was not conforming to the stereotype of how a “normal” woman should act, dress, and live her life,<sup>171</sup> she was also failing to associate with the type of person she “should be” associating with according to societal norms—a man. Her failure to associate with a man, since she was homosexual and not heterosexual, was why her employer did not consider her for a position, which thus constituted discrimination based on sex.

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166. *Id.*

167. *Id.*

168. *Id.* at 341.

169. Since her case was dismissed on the employer’s motion to dismiss, this is the threshold determination in viewing the facts most favorably to Hively, the plaintiff. *Hively v. Ivy Tech Cmty. Coll.*, No. 3:14-cv-1791, 2015 WL 926015, at \*2 (N.D. Ind. Mar. 3, 2015) (“In ruling on a motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6), the court must draw all reasonable inferences that favor the plaintiff, construe the allegations of the complaint in the light most favorable to the plaintiff, and accept as true all well-pleaded facts and allegations in the complaint.”); FED. R. CIV. P. 12(b)(6).

170. *Hively 2*, 853 F.3d at 341.

171. *See* discussion *supra*, section III.C.

As the Seventh Circuit points out, an associational claim found its roots in the landmark Supreme Court decision *Loving v. Virginia*, where the Court held that “restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.”<sup>172</sup> Where the Seventh Circuit falls short in using *Loving* to support Hively’s associational argument is that it fails to acknowledge that *Loving* was a constitutional claim based on race, inapplicable to Hively’s statutory Title VII claim.<sup>173</sup> The Court’s constitutional analysis of a racist miscegenation state law is significantly different from a court’s analysis of a statutory Title VII claim.

However, Hively’s associational discrimination argument does not fail because of the Seventh Circuit’s misapplication of *Loving* to her Title VII claim. Courts have permitted an associational argument under Title VII. Specifically, discrimination based on racial association has been prohibited under Title VII.<sup>174</sup> In *Parr v. Woodmen of the World Life Insurance Company*, a white employee was denied employment because he was married to an African American woman.<sup>175</sup> After his claim was initially dismissed for failure to claim discrimination based on race, the Eleventh Circuit reversed, holding 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.”<sup>176</sup> Similarly, in *Holcomb v. Iona College*, a white employee was fired because he was married to an African American woman.<sup>177</sup> The Second Circuit held “that an employer may violate Title VII if it takes action against an employee because of the

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172. *Hively 2*, 853 F.3d at 347 (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967)).

173. *See id.* at 356 (Posner, J., concurring) (stating that *Loving* is a “decision we should avoid in ascribing present meaning to Title VII”); *id.* at 367–68 (Sykes, C.J., dissenting) (stating that *Loving* cannot be used to validate Title VII as a protection for sexual orientation because miscegenation laws “are inherently racially discriminatory” and sexual orientation discrimination “is not inherently sexist”).

174. *See, e.g.*, *Holcomb v. Iona Coll.*, 521 F.3d 130 (2d Cir. 2008); *Tetro v. Elliott Popham Pontiac*, 173 F.3d 988, 993–95 (6th Cir. 1999) (reversing the United States District Court for the Middle District of Tennessee’s grant of summary judgment for the defendant employer and holding that Title VII does provide a remedy for “individuals who are the victims of discriminatory animus towards third persons with whom the individuals associate”); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 589 (5th Cir. 1998), *vacated in part on other grounds by Williams v. Wal-Mart Stores, Inc.*, 182 F.3d 333 (5th Cir. 1999); *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888 (11th Cir. 1986); *Chacon v. Ochs*, 780 F. Supp. 680 (C.D. Cal. 1991); *Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363 (S.D.N.Y. 1975).

175. *Parr*, 791 F.2d at 889.

176. *Id.* at 892; *see also Hively 2*, 853 F.3d at 347–48 (citing *Parr*, 791 F.2d at 892) (making the case that discrimination based on sexual orientation is sex discrimination under the associational theory by comparing application of the associational theory to cases of racial discrimination).

177. *Holcomb*, 521 F.3d at 131–32.

employee's association with a person of another race"<sup>178</sup> and that "where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's *own* race."<sup>179</sup>

Circuit Judge Sykes argued in her dissent, however, that while *Loving's* "equal-protection holding extends to Title VII racial-discrimination claims because those claims share the same contextual foundation," the same type of application cannot be done for Title VII claims of discrimination based on sex.<sup>180</sup> Despite Judge Sykes's argument, courts have made it clear that Title VII claims of discrimination based on race and sex are to be treated the same, and thus, the associational argument may be used in the sex discrimination context.<sup>181</sup> Title VII does not itself create any distinctions between its enumerated categories.<sup>182</sup> Because the enumerated categories are treated equally, claims used to prohibit discrimination based on race should be equally applied to similar claims of discrimination based on sex, color, national origin, and religion.

Accordingly, if one applies the associational argument from *Parr* and *Holcomb* to *Hively's* case, the outcome should read, respectively: "Where a plaintiff claims discrimination based upon [a homosexual] marriage or association, [s]he alleges, by definition, that [s]he has

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178. *Id.* at 132; *Hively 2*, 853 F.3d at 348.

179. *Holcomb*, 521 F.3d at 139; *Hively 2*, 853 F.3d at 348.

180. *Hively 2*, 853 F.3d at 368–69 (Sykes, C.J., dissenting).

181. *See* *Price Waterhouse v. Hopkins*, 490 U.S. 228, 243 n.9 (1989) ("[O]ur specific references to gender throughout this opinion, and the principles we announce, apply with equal force to discrimination based on race, religion, or national origin."); *Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62, 69 n.6 (2d Cir. 2000) ("[T]he same standards apply to both race-based and sex-based hostile environment claims."); *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 929 (9th Cir. 1982) ("[T]he standard for proving sex discrimination and race discrimination is the same."); *Horace v. City of Pontiac*, 624 F.2d 765, 768 (6th Cir. 1980) ("Both cases concern Title VII cases of race discrimination, but the same standards and order of proof are generally applicable to cases of sex discrimination."); *see also* *Baldwin v. Foxx*, No. 0120133080, 2015 WL 4397641, at \*7 (E.E.O.C. July 15, 2015) ("This analysis is not limited to the context of race discrimination. Title VII 'on its face treats each of the enumerated categories' – race, color, religion, sex, and national origin – 'exactly the same.'" (quoting *Price Waterhouse*, 490 U.S. at 243 n.9)). *But see* *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 63–64 (1986) (arguing that Title VII's prohibition of discrimination based on sex is not the main concern of Title VII because, since it was passed in 1964, the Civil Rights Act was primarily intended to combat racial issues in the United States and furthermore, since the enumerated category of sex was "added to Title VII at the last minute on the floor of the House of Representatives," it is asserted that the racial associational argument under Title VII cannot be transferred and applied to a sex associational argument under Title VII (citing 110 CONG. REC. 2577–2584 (1964))).

182. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2012); *Baldwin*, 2015 WL 4397641, at \*7.

been discriminated against because of [*her*] [sex,]”<sup>183</sup> and “where an employee is subjected to adverse action because an employer disapproves of [homosexual] association, the employee suffers discrimination because of the employee’s *own* [sex].”<sup>184</sup> By simply using the *Parr* and *Holcomb* holdings and appropriately substituting “homosexual” for “interracial” and “sex” for “race,” courts hearing a sex association argument under Title VII will come to the same conclusion—discrimination based on sexual orientation as seen through one’s association with a person of the same sex is prohibited under Title VII.

### E. Policy Implications

Permitting discrimination based on sexual orientation in the workplace “create[s] a paradoxical legal landscape in which a person can be married on Saturday and then fired on Monday for just that act;”<sup>185</sup> because, although *Obergefell v. Hodges* now guarantees anyone the right to marry another person of the same gender, Title VII, in almost all circuits except the Seventh Circuit and Second Circuit, also allows employers to fire that employee for exercising that right.<sup>186</sup> This could render the very right granted in *Obergefell* moot because if exercised, the person must face the risk that he or she could be fired or not hired precisely for that reason.

While some states have anti-discrimination statutes that explicitly include sexual orientation, over half of U.S. states do not, including Alabama, Alaska, Arkansas, Arizona, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri,<sup>187</sup> Montana, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee,

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183. *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986); *Hively 2*, 853 F.3d at 347–48.

184. *Holcomb*, 521 F.3d at 139; *Hively 2*, 853 F.3d at 348.

185. *Hively 1*, 830 F.3d 698, 714 (7th Cir. 2016).

186. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

187. Although Missouri does not have a statute explicitly prohibiting employment discrimination based on sexual orientation, it does have a statute mirroring Title VII. MO. REV. STAT. § 213.055.1(1)(a) (1986) (“It shall be an unlawful employment practice . . . [f]or an employer . . . to discriminate against any individual . . . because of such individual’s race, color, religion, national origin, sex, ancestry, age or disability . . .”). Relying on this statute, the Missouri Court of Appeals recently reversed a grant of summary judgment to an employer, ruling that sexual orientation is included in the statute’s prohibition of discrimination based on sex, citing to *Price Waterhouse* and its prohibition of sex stereotyping, just as in *Hively 2*. *Lamplery v. Mo. Comm’n on Human Rights*, No. WD80288, 2017 WL 4779447, at \*3 (Mo. Ct. App. Oct. 24, 2017) (“If an employer mistreats a male employee because the employer deems the employee insufficiently masculine, it is immaterial whether the male employee is gay or straight. The prohibition against sex discrimination extends to all employees, regardless of gender identity or sexual orientation.”).

Texas, Virginia, West Virginia, and Wyoming.<sup>188</sup> Accordingly, most Americans are not protected from discrimination based on sexual orientation. This lack of protection goes directly against the purpose of Title VII—to create equality in the workplace, where there were significant disparities before, by prohibiting discrimination based on sex.<sup>189</sup>

The protection against discrimination based on sexual orientation is especially important in light of the innate nature of one’s sexual identity and preferences<sup>190</sup> and the horrific history of treatment of people who identify as homosexual. This point is highlighted in The American Psychiatric Association’s (APA) amicus brief filed in *Obergefell v. Hodges*.<sup>191</sup> The brief notes that at the time the first *Diagnostic and Statistical Manual of Mental Disorders* (DSM) was published in 1952, homosexuality was considered a mental disorder.<sup>192</sup> This categorization was not changed in the DSM until 1973,<sup>193</sup> well after the passage of the Civil Rights Act.

In the modern era, statutes like the Religious Freedom Restoration Act (RFRA) and associated guidelines may in practice make discrimination against homosexual employees easier by rationalizing it through religious beliefs.<sup>194</sup> Specifically, a recently released memorandum from the Office of the Attorney General states that “[r]eligious corporations, associations, educational institutions, and societies . . . have an express statutory exemption from Title VII’s prohibition on religious discrimination in employment,” which in practice means that “religious organizations may choose to employ only persons whose beliefs and conduct are consistent with the organizations’ religious precepts.”<sup>195</sup> Thus, an employer could use RFRA or the Religion Clauses of the Constitution to discriminate against a homosexual employee on the basis of contrary religious beliefs, thus circumventing Title VII’s prohibition of sexual orientation discrimina-

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188. *Hively 1*, 830 F.3d at 714.

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

190. Brief of the American Psychological Association et al. as Amici Curiae in Support of Petitioners at 8–9, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1004713 (“Most gay men and lesbians do not experience their sexual orientation as a voluntary choice”).

191. *Id.* at 1.

192. *Id.* at 7.

193. *Id.* at 8.

194. See Press Release, Office of the Attorney General, *supra* note 5.

195. *Id.* at 6. *But see* The Equality Act, H.R. 2282, 115th Cong. § 9 (2017) (the proposed Equality Act, discussed *supra* note 128, states that RFRA “shall not provide a claim concerning, or a defense to a claim under, a covered title, or provide a basis for challenging the application or enforcement of a covered title,” meaning that an employer would not be able to invoke RFRA as a rationale for the employer’s discrimination of an employee).



tion as a subset of sex.<sup>196</sup> Permitting discrimination because of religious rationales is a particularly egregious violation of Title VII given that each enumerated category in Title VII is to be placed on equal footing and to be of equal importance.<sup>197</sup> This allowance is contrary to the purpose of Title VII of protecting employees and creating equality in the workplace by prohibiting discrimination based on sex, including all of the interpretive expansions, and it increases the need for protection of LGBT employees in the workplace.

In addition to social stigma that continues today, the history of maltreatment of homosexual populations renders protection of that population especially important—somewhat similar to the clear and urgent need to legislatively protect African Americans in 1964, which led to the passing of the Civil Rights Act. Limiting these protections to the context of marriage would lead to the paradoxical landscape as described by the court in *Hively 2*. These protections should also be applied to the employment context under Title VII, as the Seventh Circuit did in *Hively 2*.

#### IV. CONCLUSION

The Seventh Circuit correctly held that Title VII prohibits discrimination based on sexual orientation. Protecting employees from discrimination based on their sexual orientation fits squarely within Title VII's broad purpose of protecting employees from discriminatory behaviors of employers who are inherently in a position of power over their employees. Circuit courts have incorrectly prohibited such a claim based merely on the precedent of an untenable distinction between claims of sexual orientation discrimination and gender nonconformity discrimination. In addition to drawing a line where one does not exist in reality, claims of sexual orientation discrimination are viable associational discrimination claims under Title VII.

Accordingly, other circuits should follow the Seventh Circuit's example in rehearing issues similar to *Hively's* en banc in order to overturn precedent that is not in line with the overall purpose of Title VII—promoting equality in the workplace, where there were significant disparities before, by prohibiting discrimination based on sex. Alternatively, if precedent continues to be followed in the other circuits and this difference in the application of Title VII between circuits persists, the Supreme Court should hear this issue and resolve it in favor of those who are discriminated against in the workplace because of their sexual orientation. An individual should be able to get married

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196. See Press Release, Office of the Attorney General, *supra* note 5.

197. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 243 n.9 (1989) (“[O]ur specific references to gender throughout this opinion, and the principles we announce, apply with equal force to discrimination based on race, religion, or national origin.”).

on Saturday and not have to worry about being fired on Monday for the exercise of that constitutional right.