



2001

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Recommended Citation

Stephen J. Nathans, *Twelve Years after Price Waterhouse and Still No Success for Hopkins in Drag: The Lack of Protection for the Male Victim of Gender Stereotyping under Title VII*, 46 Vill. L. Rev. 713 (2001). Available at: <https://digitalcommons.law.villanova.edu/vlr/vol46/iss3/7>

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2001]

TWELVE YEARS AFTER *PRICE WATERHOUSE* AND STILL NO
SUCCESS FOR “HOPKINS IN DRAG”*: THE LACK OF
PROTECTION FOR THE MALE VICTIM OF GENDER
STEREOTYPING UNDER TITLE VII

I. INTRODUCTION

In 1989, the United States Supreme Court held that Price Waterhouse’s refusal to promote Ann Hopkins to partnership status because she did not conform to its stereotypical notions of how a woman should look or act was a violation of Title VII’s¹ ban on sex discrimination in employment.² Recently, however, male employees in Ann Hopkins’ shoes have been unsuccessful in their respective Title VII suits.³ Whether Title VII in fact prohibits an employer from discriminating against a male employee because he acts more like a woman is a current issue of debate among courts, and has yet to reach the Supreme Court.⁴

* The phrase “Hopkins in drag” was coined by Professor Case to refer to Ann Hopkins’ male counterpart in *Price Waterhouse v. Hopkins*. See Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 *YALE L.J.* 1, 33 (1995) (using phraseology). For a discussion of the facts in *Price Waterhouse v. Hopkins*, see *infra* text accompanying notes 79-88.

1. 42 U.S.C. § 2000e-2(a)(1) (1994). The text of Title VII provides in pertinent part that: “It shall be an unlawful employment practice for an employer-(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex” *Id.*

2. 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 . . .”). For an in depth discussion of the decision in *Price Waterhouse*, see *infra* notes 79-88 and accompanying text.

3. See, e.g., *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000) (dismissing male employee’s Title VII claim against employer for sexual harassment based on failure to conform to gender norms); *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 707 (7th Cir. 2000) (same); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 (1st Cir. 1999) (same); *Dandan v. Radisson Hotel Lisle*, No. 97C8342, 2000 WL 336528, at *4 (N.D. Ill. Mar. 28, 2000) (same); *Mims v. Carrier Corp.*, 88 F. Supp. 2d 706, 714-15 (E.D. Tex. 2000) (same); *Klein v. McGowan*, 36 F. Supp. 2d 885, 890 (D. Minn. 1999) (same), *aff’d*, 198 F.3d 705 (8th Cir. 1999); see also Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 *YALE L.J.* 1, 50 (1995) (“Those post-*Hopkins* cases that have indirectly considered claims of discrimination against effeminacy in men—cases of workplace harassment of gay men, of cross-dressing by preoperative transsexuals or transvestites, or of less extreme violations of sex-specific grooming policies—have resulted in decisions against the male plaintiffs.”).

4. See, e.g., Jess Bravin, *Courts Open Alternate Route to Extend Job-Bias Laws to Homosexuals*, *WALL ST. J.*, Sept. 22, 2000, at B1, available at 2000 WL-WSJ 26610639

(713)

The issue of whether Title VII protects a male employee from gender stereotyping also becomes increasingly important to male homosexuals as hopes for an amendment to Title VII adding sexual orientation as a protected class grow bleak.⁵ Congress has offered such a measure, known as the Employment Non-Discrimination Act ("ENDA"), on four separate occasions, with the most recent attempt failing by only a single vote.⁶ Nevertheless, the recent inauguration of Texas Governor George W. Bush as the

(noting that issue is "now percolating through the courts" and "U.S. Supreme Court has yet to rule on the precise question"); Reynolds Holding, *New Spin on Sex Discrimination Law*, S.F. CHRON., Nov. 19, 2000, at WB3, available at 2000 WL 6497578 ("But some courts are suddenly suggesting the law covers a closely related concept: whether an employee conforms to a sexual stereotype—whether, for example, a man dresses like a man."); Joanne Wojcik, *Court Limits Title VII Suits: Claim of Bias Against Sexual Orientation Dismissed*, BUS. INS., Sept. 4, 2000, at 1, available at 2000 WL 8171735 (noting "lack of consensus by the federal courts" and that "courts have been struggling with the issue for years" (quoting Jon Davidson of Lambda Legal Defense and Education Fund)).

5. See Reynolds Holding, *supra* note 4, at WB3 (noting that gay men who "flout gender stereotypes with their mannerisms or dress" would benefit from amendment to Title VII).

The brutality that often accompanies gender stereotyping is perhaps best illustrated by the story of Brandon Teena, whose life formed the subject of the award-winning film *Boys Don't Cry*. See Press Release, Lambda Legal Defense and Education Fund, Damages in 'Boys Don't Cry' Murder Argued Before Nebraska Supreme Court (Jan. 11, 2001), at <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=760> (discussing story). Brandon, although born female, was living as a man in Nebraska. See *id.* Two male acquaintances raped Brandon after discovering his physical sex. See *id.* The pair then tracked Brandon down, shooting and killing him. See *id.* Although Brandon was a transvestite, such persons are part of a larger classification termed "transgendered," which applies to anyone "whose appearance is at odds with traditional gender expectations." Deb Price, *People Must Be Free to Be Themselves*, NEW ORLEANS TIMES-PICAYUNE, June 27, 2000, at B5, available at 2000 WL 21267946 (defining term). In another example of the harsh consequences of gender stereotyping, Dwayne Simonton, a postal employee, claimed that the gender harassment he received at work led to a heart attack and forced him to take a \$16,000 pay cut working the graveyard shift at a bagel shop. See Bravin, *supra* note 4, at B1 (quoting Mr. Simonton).

6. See Employment Non-Discrimination Act of 1996, S. 2056, 104th Cong. (1996) (proposing amendment to Title VII which would prohibit workplace discrimination based on sexual orientation); Employment Non-Discrimination Act of 1995, H.R. 1863, 104th Cong. (1995) (same); Employment Non-Discrimination Act of 1994, H.R. 4636, 103d Cong. (1994) (same). Congress' latest attempt to expand Title VII's scope to discrimination on the basis of sexual orientation was introduced by Senator Joseph Lieberman on June 24, 1999. See Gov't Press Release, Joe Lieberman, Statement on the Reintroduction of the Employment Non-Discrimination Act (June 24, 1999), available at 1999 WL 2225512 (noting that only eleven states currently protect employees from workplace discrimination based on homosexual status). This most recent attempt to amend Title VII was also backed by President Clinton, who noted that the last attempt at such an amendment failed to win passage by a mere one vote. See U.S. Newswire, Statement of President Clinton (June 24, 1999), available at 1999 WL 4637140 (urging Congress to pass 1999 amendment into law).

forty-third President of the United States puts a damper on these efforts, as he is a known opponent of the bill.⁷

But even if a bill such as ENDA eventually makes its way into law, the degree of protection afforded victims of male-gender stereotyping under Title VII will still be significant in light of the fact that not all effeminate men are gay.⁸ This Comment therefore explores why male-gender stereotyping claims, brought by homosexual and heterosexual employees alike, have failed under Title VII and suggests what it will take for such actions to succeed in the future.⁹ Part II of this Comment begins with a survey of the history of sexual stereotyping under Title VII.¹⁰ Part III then sets forth possible explanations for why male victims of workplace gender harassment have not been able to benefit from the holding in *Price Waterhouse v. Hopkins*.¹¹ Finally, Part IV concludes that in order to increase the likelihood of success for victims of male-gender stereotyping suing under Title VII, the Supreme Court will need to redefine “sex” under Title VII to include not only biological sex, but gender identity as well.¹²

7. See Bravin, *supra* note 4, at B1 (noting George W. Bush of Texas opposed ENDA during November 2000 presidential election). Bush’s opponent, on the other hand, considered ENDA a top priority. See *id.* (discussing position of Vice President Al Gore).

8. See, e.g., *Simonton*, 232 F.3d at 38 (“[N]ot all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine.”); Case, *supra* note 3, at 57 (noting that femininity and homosexuality in men are “far from perfectly overlapping categories”); cf. Reynolds Holding, *supra* note 4, at WB3 (stating that many gay men “act and look as macho as any heterosexual. Think Rock Hudson.”).

9. This Comment deals exclusively with the problem of gender stereotyping as it faces male employees. With respect to female victims, it has been recognized that:

Price Waterhouse provides women who are discriminated against because of their masculine behavior a valid Title VII claim. Contrastingly, the courts view discrimination against men who exhibit stereotypical feminine behavior as discrimination against homosexuals. These men are disentitled from bringing a Title VII claim. Ironically, this result may provide some lesbians with some degree of Title VII protection while denying protection for some heterosexual males.

Memorandum from the Lambda Legal Defense and Education Fund (Sept. 1, 1997), available at <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=149> [hereinafter *Memo*]. Nevertheless, many points raised in this Comment will be equally applicable to the female victim of gender-based stereotyping.

10. For a discussion of Title VII’s historical treatment of sex-based and gender-based stereotyping, see *infra* notes 13-88 and accompanying text.

11. 490 U.S. 228 (1989). For a discussion of three possible explanations, see *infra* notes 89-144 and accompanying text.

12. For a discussion of what the United States Supreme Court should do to resolve the obstacles confronting the male victim of gender-based stereotyping, see *infra* notes 162-67 and accompanying text. As used throughout this Comment, the term “sex” will refer to the biological differences between men and women, while “gender” will connote the sexual aspect of one’s personality. Courts generally use the terms “sex” and “gender” interchangeably. See Case, *supra* note 3, at 2 (noting “gender” has become synonymous with “sex” in sex discrimination jurisprudence). This conflation has been attributed to Supreme Court Justice Ruth Bader Gins-

II. BACKGROUND

A. *Legislative History of Title VII*

The legislative history behind Title VII of the Civil Rights Act of 1964 does not reveal much about the meaning of its proscription against workplace discrimination "because of . . . sex."¹³ Title VII was originally intended to provide equal employment opportunities for racial and ethnic minorities.¹⁴ One day prior to its passage, however, an amendment was proposed to expand Title VII's prohibition against employment discrimination to discrimination based on "sex."¹⁵ This amendment was subse-

burg, who, while serving as a litigator of Supreme Court sex discrimination cases in the 1970s, used "gender" in place of "sex" because of her concern that the latter term would "conjure up improper images of what occurs in porno theaters." *Id.* at 10. (citing Ruth Bader Ginsburg, *Gender in the Supreme Court: The 1973 and 1974 Terms*, 1975 SUP. CT. REV. 1, 1 n.1). These terms, however, have long had separate meanings:

As most feminist theorists use the terminology, "sex" refers to the anatomical and physiological distinctions between men and women; "gender," by contrast, is used to refer to the cultural overlay on those anatomical and physiological distinctions. While it is a sex distinction that men can grow beards and women typically cannot, it is a gender distinction that women wear dresses in this society and men typically do not.

Id. at 10-11. In other words, gender is "to sex what masculine and feminine are to male and female." *Id.* at 2.

13. *See, e.g.*, *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 662 (9th Cir. 1977) (acknowledging "dearth of legislative history" behind sex provision); *Ulane v. E. Airlines, Inc.*, 581 F. Supp. 821, 822 (N.D. Ill. 1983) (referring to legislative history on sex prohibition as "hardly a gold mine of information"), *rev'd on other grounds*, 742 F.2d 1081 (7th Cir. 1984); Peter F. Ziegler, Note, *Employer Dress and Appearance Codes and Title VII of the Civil Rights Act of 1964*, 46 S. CAL. L. REV. 965, 968 (1973) ("Ascertaining the congressional intent behind Title VII's sex discrimination provision presents a more difficult task than is ordinarily the case in analyzing legislative intent.").

14. *See, e.g.*, *Holloway*, 566 F.2d at 662 ("The major concern of Congress at the time the Act was promulgated was race discrimination." (citing 1964 U.S.C.C.A.N. 2355-2519)); Marie Elena Peluso, Note, *Tempering Title VII's Straight Arrow Approach: Recognizing and Protecting Gay Victims of Employment Discrimination*, 46 VAND. L. REV. 1533, 1537 n.15 (1993) (presuming House committee hearings on Title VII lacked any discussions concerning sex discrimination because Congress intended only to address discrimination based on race and national origin); Ziegler, *supra* note 13, at 965 (noting Title VII originally directed at racial and ethnic discrimination); *see also Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1166 (1971) [hereinafter *Developments*] ("In 1964, it was a commonplace notion that membership in a minority race, religion, or national origin could unfairly hinder a job applicant.").

15. *See, e.g.*, *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 386 (5th Cir. 1971) (noting that sex amendment adopted one day before Title VII's passage). The "sex" amendment was offered by Representative Howard Smith of Virginia. *See* 110 CONG. REC. 2577 (1964) (remarks of Rep. Smith). Smith was an opponent of the Civil Rights Act and was accused of offering the amendment for the purpose of defeating the bill. *See, e.g.*, *Barnes v. Costle*, 561 F.2d 983, 986-87 (D.C. Cir. 1977) (recognizing sex amendment was offered as "a last-minute attempt to block the bill"); *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084, 1090 (5th Cir.

quently adopted, but because of its late addition to Title VII, there was little relevant debate by Congress concerning the amendment's intended scope or potential impact.¹⁶ Congress did, however, reject another amendment which would have limited Title VII's proscription against employment to discrimination based "solely" on sex.¹⁷ While some courts would interpret this decision as evincing Congress' intent that sex discrimination be construed liberally, others would simply rely on Congress' general silence as support for a more narrow application of the sex amendment.¹⁸

1975) (en banc) (noting Rep. Smith opposed Civil Rights Act and attempted to sabotage it by proposing sex amendment); Ziegler, *supra* note 13, at 968 (noting House feared inclusion of "sex" in Title VII was attempt to "defeat or to delay" bill); *see also* 110 CONG. REC. 2581 (1964) (remarks of Rep. Green) (explaining addition of "sex" to Title VII would "clutter up the bill" and destroy main purpose of eradicating racial discrimination). The main argument offered in opposition to the amendment was that sex discrimination was sufficiently different from racial discrimination such that it warranted separate legislative treatment. *See id.* at 2577 (remarks of Rep. Celler). Nonetheless, despite Representative Smith's efforts to defeat the bill, Title VII passed with the sex amendment intact. *See* 42 U.S.C. § 2000e-2(a)(1) (1994) (prohibiting discrimination in employment "because of such individual's . . . sex").

16. *See, e.g., Diaz*, 442 F.2d at 386 (stating that late adoption of sex amendment "engendered little relevant debate" to aid court's interpretation); Peluso, *supra* note 14, at 1537 ("The amendment's hasty introduction and passage leave little history from which to divine the intended boundaries of the concept of 'sex.'"); Ziegler, *supra* note 13, at 968 ("The late introduction of the sex amendment precluded extensive consideration of the scope of its applicability or the broad impact that such an amendment might have on society."); *see also Developments, supra* note 14, at 1167 (noting enactment of sex amendment into law "came without even a minimum of congressional investigation").

One author has recently suggested that the addition of the sex amendment to Title VII was not as spur of the moment as most have characterized it. *See* Robert C. Bird, *More Than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137, 138 (1997) (contending that commentators and judges who view addition of sex amendment as last minute are wrong). According to Bird, Representative Smith was actually approached by the National Woman's Party ("NWP"), a group that had lobbied for an Equal Rights Amendment to the constitution for forty years. *See id.* at 149. The NWP knew that Smith opposed the Civil Rights Bill and suggested that he offer a sex amendment to complicate its passage while simultaneously attempting to advance their own goals. *See id.* Bird also points out that the sex amendment was supported vigorously on the floor of the House by five congresswomen. *See id.* at 155 n.120.

17. 110 CONG. REC. 2728 (1964) (remarks of Rep. Dowdy) (offering "solely" amendment).

18. *Compare Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971) (interpreting Congress' rejection of "solely" as evincing intent to strike at stereotypes), *with Willingham*, 507 F.2d at 1090 (using lack of legislative history behind "sex" amendment as support in rejecting challenge to sex-based grooming policy).

B. *Stereotyping Job Ability Based on Sex*

The first form of sexual stereotyping to be challenged under Title VII as sex discrimination concerned general assumptions about the relative job abilities of the sexes.¹⁹ This category of stereotyping manifested itself in two forms: “explicit” sex discrimination, that is, where the sex of the employee was the sole basis for the action taken by the employer, and “sex-plus” discrimination, that is, discrimination based on the sex of the employee plus some neutral characteristic.²⁰ Both the Equal Employment Opportunity Commission (“EEOC”) and the federal courts were quick to find that stereotypes about one’s ability to perform a job based on his or her sex constituted illegal sex discrimination under Title VII.²¹

1. *The EEOC’s Response to Sex Stereotyping*

In enacting Title VII, Congress created the EEOC and vested it with the power to establish guidelines for implementing the provisions of Title VII.²² The EEOC, in turn, promulgated a set of guidelines addressing various issues in the adjudication of sex discrimination claims.²³ One of those issues is the Bona Fide Occupational Qualification (“BFOQ”), an exception to Title VII’s prohibition against workplace discrimination on the basis of religion, national origin and sex.²⁴ The BFOQ exception essentially allows an employer to hire an employee on the basis of his or her sex if the employer can prove that the employee’s sex is “reasonably neces-

19. See Case, *supra* note 3, at 38 (referring to this stereotyping as “[f]irst generation” sex stereotyping and noting that it took form of “categorical exclusions of all members of one sex”).

20. *Developments, supra* note 14, at 1170-71 (distinguishing between “explicit” and “sex-plus” discrimination). An example of explicit sex discrimination would be refusing to hire a woman for a position simply because she is a woman. See Ziegler, *supra* note 13, at 965-66. An example of “sex-plus” discrimination would be a grooming code which allowed females, but not males, to have long hair. See *id.* at 989. Sex-plus discrimination allows an employer to hide explicit discrimination against one sex by finding a qualification that very few members of that sex could meet. See *Developments, supra* note 14, at 1172.

21. See Case, *supra* note 3, at 39 (discussing EEOC Guidelines on sex stereotyping).

22. See 42 U.S.C. § 2000e-4(a) (1994) (creating EEOC). The Supreme Court has acknowledged that the EEOC’s interpretation of Title VII is “entitled to great deference.” *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971) (concluding that because Title VII and its legislative history support EEOC’s construction, guidelines should be treated as expressing will of Congress).

23. See generally 29 C.F.R. § 1604 (1972) (setting forth guidelines).

24. See 42 U.S.C. § 2000e-2(e) (setting forth BFOQ defense). That section states in pertinent part:

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise

Id.

sary to the normal operation of that particular business or enterprise.”²⁵ In its guidelines on the BFOQ, the EEOC explicitly stated that stereotyped characterizations of the job capabilities of a particular sex would not warrant the application of the BFOQ exception, cautioning instead that employees should be evaluated on the basis of their individual capabilities.²⁶

2. *The Courts' Response to Sex Stereotyping*

The federal courts of appeals also levied an attack on sexual stereotyping concerning the relative abilities of the sexes, which initially appeared in the form of explicit discriminatory policies.²⁷ For example, both the Fifth and Seventh Circuits rejected employers' arguments that their policies restricting women from performing jobs that required the lifting of more than a designated amount of weight constituted a BFOQ.²⁸ In reaching their decisions, both courts cited to the EEOC guidelines requiring that employers consider employees based on their individual capacities and not on characteristics generally attributed to their sex.²⁹

25. *Id.* An example of a situation where sex may qualify for the BFOQ exception is when authenticity or genuineness is a prerequisite for a job, as in the case of a male actor or female actress. See 29 C.F.R. § 1604.1(a)(2). Under the guidelines, however, the preferences of customers, coworkers or clients may not be considered in determining whether the BFOQ exception is applicable. See *id.* at § 1604(a)(1)(iii). This is because such preferences may be based on stereotypes themselves and would thus allow the exception to swallow the rule.

26. See 29 C.F.R. § 1604.2(a)(1)(i)-(ii) (discussing applicability of BFOQ exception). The guidelines state in pertinent part that:

(1) The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception:

(i) The refusal to hire a woman because of her sex based on assumptions of the comparative employment characteristics of women in general. For example, the assumption that the turnover rate among women is higher than among men.

(ii) The refusal to hire an individual based on stereotyped characterizations of the sexes. Such stereotypes include, for example, that men are less capable of assembling intricate equipment; that women are less capable of aggressive salesmanship. The principle of non-discrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.

Id.

27. For an explanation of “explicit” discrimination, see *supra* note 20 and accompanying text.

28. See *Weeks v. S. Bell Tel. & Tel. Co.*, 408 F.2d 228, 236 (5th Cir. 1969) (holding that employer’s “switchman” position which required lifting of more than thirty pounds could not be limited to men only as BFOQ); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 718 (7th Cir. 1969) (holding that employer’s seniority system allowing women to bid only on jobs requiring lifting of less than thirty-five pounds was not BFOQ).

29. See *Weeks*, 408 F.2d at 235 (citing EEOC guidelines on BFOQ); *Bowe*, 416 F.2d at 717 n.4 (same).

In another case concerning a policy of explicit discrimination, *Diaz v. Pan American World Airways, Inc.*,³⁰ a male applicant was rejected for the position of flight cabin attendant because the airline reserved that position to women only.³¹ Pan Am attempted to justify its discriminatory policy under the BFOQ exception, arguing that women were better at performing the “non-mechanical functions” of a flight attendant, which included attending to “the special psychological needs of its passengers.”³² Relying on the EEOC’s pronouncement that customer preference may not form the basis of a BFOQ, the United States Court of Appeals for the Fifth Circuit concluded that Pan Am’s policy would only constitute a BFOQ if “the essence of the business operation could be undermined” by hiring men as flight attendants.³³ Concluding that the role of a flight attendant was merely “tangential” to the airline business, the court held that Pan Am’s hiring policy violated Title VII.³⁴

The courts then confronted the issue of sexual stereotyping in sex-plus cases.³⁵ In *Sprogis v. United Air Lines, Inc.*,³⁶ a female stewardess was terminated pursuant to United’s policy allowing male stewards to be married, but not female stewardesses.³⁷ United argued that its policy did not discriminate on the basis of sex, but merely distinguished between married and single female stewardesses.³⁸ The United States Court of Appeals for the Seventh Circuit rejected United’s argument, noting that “[t]he scope of [Title VII] is not confined to explicit discriminations based ‘solely’ on sex.”³⁹ The court’s conclusion was based in large part upon

30. 442 F.2d 385 (5th Cir. 1971).

31. See *Diaz*, 442 F.2d at 386 (discussing airline’s policy).

32. *Id.* at 387 (explaining employer’s rationale behind exclusionary policy).

33. *Id.* at 388-89 (citing 29 C.F.R. § 1604.1(iii) (1972)). The EEOC guidelines do not allow a BFOQ to be premised on the preferences of co-workers, customers or clients. See 29 C.F.R. § 1604.1(iii). This is obviously due to the fact that such individuals may harbor the very stereotypes Title VII seeks to eliminate.

34. *Diaz*, 442 F.2d at 389 (reversing district court’s judgment).

35. For an explanation of “sex-plus” discrimination, see *supra* note 20 and accompanying text.

36. 444 F.2d 1194 (7th Cir. 1971).

37. See *Sprogis*, 444 F.2d at 1196 (discussing company’s policy). United’s policy was based on complaints it had received from the husbands of stewardesses regarding their wives’ working schedules and irregular hours. See *id.* at 1199. Interestingly, the situation in *Sprogis* had been prophesized by a member of Congress during the limited debates on the sex amendment. See 110 CONG. REC. 2578 (1964) (remarks of Rep. Bass) (expressing concern for female airline employee worried about discrimination because she is about to get married). The remarks of Representative Bass were relied upon by Justice Marshall in another case involving sex-plus stereotyping as support for his contention that Congress did not intend stereotypes concerning proper domestic roles to justify the restriction of employment opportunities. See *Phillips v. Martin-Marietta Corp.*, 400 U.S. 542, 545 n.1 (1971) (per curiam) (Marshall, J., concurring).

38. See *Sprogis*, 444 F.2d at 1197 (arguing that employer’s classification permissibly distinguished between classes of employees within job category of stewardesses rather than between sexes).

39. *Id.* at 1198 (rejecting United’s argument).

Congress' decision to reject the amendment to Title VII which would have restricted the statute's prohibitive scope to discrimination based "solely" on sex.⁴⁰ The Seventh Circuit concluded that by rejecting the proposed amendment, "Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."⁴¹ The court therefore held that absent a connection between the no-marriage rule for stewardesses and job performance, the policy was discriminatory.⁴²

A conclusion similar to the one in *Sprogis* was reached by the United States Supreme Court in *Phillips v. Martin-Marietta Corp.*,⁴³ in which it eradicated a sex-plus policy that accepted job applications from men with pre-school-age children but not from women.⁴⁴ The Court held that such a policy violated Title VII unless it could be shown to qualify as a BFOQ.⁴⁵ Justice Marshall, who issued a concurring opinion, argued that to even allow Martin-Marietta the opportunity to prove that its sex-plus policy was a valid BFOQ was to allow employers to hire individuals based on stereotyped characterizations, in direct contravention of the EEOC guidelines.⁴⁶

Not all sex-plus policies, however, were viewed by courts as violative of Title VII. In *Willingham v. Macon Telegraph Publishing Co.*,⁴⁷ a male appli-

40. See *id.* at 1198 n.4 (discussing Congress' rationale for rejecting "solely" amendment). The "solely" amendment was offered by Representative Dowdy. See 110 CONG. REC. 2728 (1964) (remarks of Rep. Dowdy). It has been suggested that in rejecting the "solely" amendment, Congress foresaw the counterproductive effect that Title VII would have on eradicating sex discrimination in employment if it were so limited. See, e.g., *Barnes v. Costle*, 561 F.2d 983, 991 (D.C. Cir. 1977) (stating amendment would have had "debilitating effect" on Title VII); *Sprogis*, 444 F.2d at 1198 n.4 (stating amendment "would emasculate the Act"); *Ziegler*, *supra* note 13, at 969 (noting "solely" amendment would have "weaken[ed]" sex amendment); *Developments*, *supra* note 14, at 1172 (noting amendment faced objections because it would have "emasculated" Act). These suggestions apparently derive from a remark made by Representative Case during the floor debates on the sex amendment. See 110 CONG. REC. 13,825 (1964) (remarks of Rep. Case) (stating addition of amendment "would destroy the bill").

41. *Sprogis*, 444 F.2d at 1198 (adding that "[t]he effect of the statute [Title VII] is not to be diluted because discrimination adversely affects only a portion of the protected class").

42. See *id.* at 1199 (noting that United failed to explain how marriage affects only female flight cabin attendants' ability to meet requirements of that position).

43. 400 U.S. 542 (1971) (per curiam).

44. See *Phillips*, 400 U.S. at 544 (discussing Martin-Marietta's policy). Apparently, the rationale behind Martin Marietta's policy was its concern with the absenteeism and high turnover rate among women with pre-school-age children. See *id.* (Marshall, J., concurring) (discussing family responsibilities that interfere with job performance); see also *Ziegler*, *supra* note 13, at 982 (stating this was assumption of employer).

45. See *Phillips*, 400 U.S. at 544 (stating that Title VII "requires that persons of like qualifications be given employment opportunities irrespective of their sex").

46. See *id.* at 545 (Marshall, J., concurring) (arguing that to allow Martin-Marietta to prove its policy was BFOQ "permits ancient canards about the proper role of women to be a basis for discrimination").

47. 507 F.2d 1084 (5th Cir. 1975) (en banc).

cant claimed that he was denied employment because of an employer's policy prohibiting long hair on men.⁴⁸ Because long hair on female employees was permissible, the plaintiff alleged that the employer was guilty of sex-plus discrimination in violation of Title VII.⁴⁹ Despite the United States Court of Appeals for the Fifth Circuit's acknowledgement of the EEOC's position on stereotypes, the court held that Macon's policy did not violate Title VII.⁵⁰ The court's decision was based largely upon the lack of legislative history clarifying the scope of the sex prohibition, interpreting this to mean that "Congress in all probability did not intend for its proscription of sexual discrimination to have significant and sweeping implications."⁵¹ The court also distinguished the decisions in *Phillips* and *Sprogis* as involving sex-plus distinctions based on fundamental rights, such as marriage and family, noting that a grooming policy on the other hand was "related more closely to the employer's choice of how to run his business than to equality of employment opportunity," which it felt was the goal of Title VII.⁵²

48. See *Willingham*, 507 F.2d at 1086 (discussing plaintiff's Title VII claim). Macon's policy was based on a concern that its business clients associated long hair on men with "counter-culture types" who had recently gained negative publicity for their conduct at a local festival. See *id.* at 1087.

49. See *id.* at 1088 (noting plaintiff's argument that were he female with shoulder length hair, he would not have been denied employment).

50. See *id.* at 1090-92 (explaining Title VII not intended to prohibit policies like Macon's).

51. *Id.* at 1090 (explaining court was reasoning "by way of negative inference" from scant legislative history). For a further discussion of the legislative history behind Title VII's sex provision, see *supra* notes 13-18 and accompanying text.

52. *Willingham*, 507 F.2d at 1091 (discussing decisions in *Phillips* and *Sprogis*). The distinction between the decisions in *Phillips* and *Sprogis* on the one hand, and *Willingham* on the other, has been characterized as one involving "exclusionary" discrimination and "non-exclusionary" discrimination. Ziegler, *supra* note 13, at 984. Because the employers in *Phillips* and *Sprogis* conditioned employment upon the forbearance of a fundamental right, the practical effect of such action was to exclude all or substantially all individuals who could not meet the employment requirement, thus resulting in a loss of employment opportunity. See *id.* (giving marriage and parenthood as examples of fundamental rights). However, because a grooming code such as the one in *Willingham* conditions employment on a "readily alterable" characteristic, i.e. cutting one's hair, the practical effect is not to exclude most individuals from an employment opportunity that they can easily meet. *Id.* (noting employee would not have to sacrifice protected rights). The argument then is that because the legislative history of Title VII indicates only that it was intended to guarantee equal employment opportunity for the sexes, but does not suggest that an employer should be told how to run his or her business, non-exclusionary discrimination does not violate the purpose of the statute. See *id.* at 996 ("If Title VII was intended to eradicate any and all sexual distinctions made by any employer, then Congress should [have] so expressly direct[ed]."); see also *Willingham*, 507 F.2d at 1091 (stating that Congress intended Title VII to guarantee equal job opportunity for both sexes). But see *Developments*, *supra* note 14, at 1172 (explaining that treatment of sex-plus classifications as non-discriminatory is equivalent to judicial addition of word "solely" to Title VII which Congress expressly declined to do). One court relied on the same line of reasoning used in *Willingham* to hold that an appearance standard requiring female newscasters to

3. *The Equal Employment Opportunity Act of 1972*

In 1972, Congress amended Title VII with the Equal Employment Opportunity Act ("EEOA").⁵³ The EEOA's primary effect was the extension of Title VII's substantive protections to federal, state and local employees.⁵⁴ However, the reports of the House Committee on Education and Labor and the Senate Committee on Labor and Public Welfare cited with approval the decisions in *Bowe v. Colgate-Palmolive Co.*,⁵⁵ *Weeks v. Southern Bell Telephone & Telegraph Co.*,⁵⁶ *Diaz* and *Phillips*.⁵⁷ These cases stood for the proposition that employment decisions based solely or in part on the sex of an individual, if ultimately grounded on a sexual stereotype, violated Title VII.⁵⁸ Thus, the consensus had become that Title VII required employers to evaluate prospective and current employees on the basis of their individual capabilities, not stereotypical generalizations about their sex.⁵⁹

look feminine was not a violation of Title VII. See *Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1215 (8th Cir. 1985) (noting that "primary thrust" of Title VII was to discard outmoded stereotypes aimed at distinct employment disadvantages for one sex). Grooming codes are generally permissible under Title VII as long as they are applied equally to both sexes. See, e.g., *Frank v. United Airlines*, 216 F.3d 845, 854 (9th Cir. 2000) ("An appearance standard that imposes different but essentially equal burdens on men and women is not disparate treatment.").

53. See 42 U.S.C. § 2000e-16(a) (1996).

54. See *id.* ("All personnel actions affecting employees or applicants for employment . . . in executive agencies . . . shall be made free from any discrimination based on race, color, religion, sex or national origin."). *Id.* Although the language of the EEOA differs somewhat from that of Title VII, "it is beyond cavil that Congress legislated for federal employees essentially the same guarantees against sex discrimination that previously it had afforded private employees." *Barnes v. Costle*, 561 F.2d 983, 988 (D.C. Cir. 1977) (discussing EEOA of 1972).

55. 416 F.2d 711 (7th Cir. 1969).

56. 408 F.2d 228 (5th Cir. 1969).

57. See H.R. REP. NO. 92-238, at 2141 n.1 (1971) (recognizing that courts "have done much" in area of sex discrimination); S. REP. NO. 92-415, at 8 n.4 (1971) (recognizing that courts voided policies that discriminate based on sex and set legal precedent for dealing with sexual discrimination).

58. For a discussion of the facts and holdings in these cases, see *supra* notes 28-34 & 43-46 and accompanying text.

59. See, e.g., *Baker v. Cal. Land Title Co.*, 507 F.2d 895, 896 (9th Cir. 1974) ("The need which prompted this legislation [Title VII] was one to permit each individual to become employed and to continue in employment according to his or her job capabilities."); *Rosenfeld v. S. Pac. Co.*, 444 F.2d 1219, 1225 (9th Cir. 1971) ("Equality of footing is established only if employees otherwise entitled to the position, whether male or female, are excluded only upon a showing of individual incapacity."); *Donohue v. Shoe Corp. of Am.*, 337 F. Supp. 1357, 1359 (C.D. Cal. 1972) ("[I]n adopting the Civil Rights Act of 1964, Congress intended to attack these stereotyped characterizations so that people would be judged by their intrinsic worth."); H.R. REP. NO. 92-238, at 2141 ("The time has come to bring an end to job discrimination once and for all, and to insure every citizen the opportunity for the decent self-respect that accompanies a job commensurate with one's abilities.").

C. *Stereotyping Gender Based on Sex*

After concluding that employment decisions based upon stereotypical notions of the job capabilities of one's sex constituted impermissible sex discrimination under Title VII, courts dealt with challenges by employees claiming to have been discriminated against for not displaying the personality traits generally associated with their sex.⁶⁰ Courts were much less reluctant, however, to find that this type of stereotyping violated Title VII.

1. *No Protection for the Effeminate Man*

In *Smith v. Liberty Mutual Insurance Co.*,⁶¹ a male applicant was denied employment as a mailroom clerk because a personnel manager considered him to be "effeminate."⁶² Citing to its earlier decision in *Willingham*, the United States Court of Appeals for the Fifth Circuit insisted that in light of the lack of legislative history surrounding the passage of Title VII's sex provision, "the prohibition on sexual discrimination could not be 'extend[ed] . . . to situations of questionable application without some stronger Congressional mandate.'⁶³ Concluding that Smith was discriminated against "not because he was a male, but because as a male, he was thought to have those attributes more generally characteristic of females and epitomized in the descriptive 'effeminate,'" the Fifth Circuit declined to find that Smith had been discriminated against on the basis of his "sex" in violation of Title VII.⁶⁴

60. See Case, *supra* note 3, at 41 (discussing generations of sex stereotyping in employment). Professor Case has characterized this particular category of stereotyping as the third in three generations of sex stereotyping in employment. See *id.* According to Professor Case, "[f]irst generation" stereotyping consisted of the categorical exclusions of one sex from employment opportunities based on assumptions about their relative abilities and which were subsequently outlawed by the EEOC and the courts. *Id.* at 38. "Second-generation" sex stereotyping did not exclude members of one sex categorically, but individually under the assumption that they matched the stereotypes associated with their sex. *Id.* at 40-41. As an example of second-generation stereotyping, Case cites the refusal of the city of El Segundo, California to hire Deborah Lynne Thorne as a police officer because she did not meet its stereotyped view of women. See *id.* at 40 (citing *Thorne v. City of El Segundo*, 726 F.2d 459 (9th Cir. 1983)). Finally, Professor Case contends that "third-generation" sex stereotyping is represented by the cases in which employees were forced to conform to the stereotypes associated with their respective group. *Id.* at 41.

61. 569 F.2d 325 (5th Cir. 1978).

62. *Smith*, 569 F.2d at 326 (discussing facts).

63. *Id.* at 327 (quoting *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084, 1090 (5th Cir. 1975) (en banc)). For a discussion of the facts and the Fifth Circuit's reasoning in *Willingham*, see *supra* text accompanying notes 47-52.

64. *Smith*, 569 F.2d at 327 (stressing that Title VII "intended only to guarantee equal job opportunities for males and females"). Smith also claimed that he was discriminated against on the basis of his "affectional or sexual preference." *Id.* at 326. In response to this argument, the Fifth Circuit pointed out that Title VII does not forbid discrimination on these bases. See *id.* (citing decisions by EEOC and courts holding Title VII does not protect discrimination on basis of homosexuality or transsexuality).

In *Holloway v. Arthur Anderson & Co.*,⁶⁵ an employee of an accounting firm alleged that she had been fired because of her status as a male-to-female transsexual.⁶⁶ Relying in part on the district court's opinion in *Smith*, the United States Court of Appeals for the Ninth Circuit concluded that there was no indication in the legislative history that the term "sex" in Title VII should be extended beyond its "traditional meaning" to include transsexualism.⁶⁷ Nevertheless, the court seemed to overlook the fact that Holloway may have also been the victim of discrimination on the basis of his gender.⁶⁸ For instance, the supervisor who terminated Holloway stated in his affidavit that Holloway's appearance had caused "personnel problems."⁶⁹ In fact, Holloway's supervisor stated explicitly "that Holloway was not terminated because of transsexualism, but 'because the dress, appearance and manner he was affecting were such that it was very disruptive and embarrassing to all concerned.'"⁷⁰ Nonetheless, the Ninth Circuit characterized the sole issue in the case as "whether an employee may be discharged, consistent with Title VII, for initiating the process of sex transformation."⁷¹

In 1979, however, the Ninth Circuit was squarely faced with the issue of whether Title VII prohibited discrimination based on gender stereotyping in *DeSantis v. Pacific Telephone & Telegraph Co.*,⁷² a case better known for its rejection of various arguments that Title VII should prohibit discrimination based on sexual orientation.⁷³ One of the cases consolidated

65. 566 F.2d 659 (9th Cir. 1977).

66. See *Holloway*, 566 F.2d at 661 (discussing facts).

67. *Id.* at 662-63 (citing *Smith*, 395 F. Supp. at 1101).

68. See *id.* at 661 n.1 (discussing statements in supervisor's affidavit).

69. See *id.* (stating these problems came from Holloway's "red lipstick and nail polish, hairstyle, jewelry and clothing, his use of the men's room and his behavior at social functions").

70. *Id.* (noting district court failed to consider these facts).

71. *Id.* at 661. The court insinuated that it might have viewed such conduct as sex discrimination had Holloway changed the nature of her complaint. See *id.* at 664. Holloway's complaint specified that she had been fired for her status as a transsexual. See *id.* at 661. The court went on to state that "transsexuals claiming discrimination because of their sex, male or female, would clearly state a cause of action under Title VII," but noted that Holloway instead alleged discrimination on the basis of her status as a transsexual. *Id.* at 664.

72. 608 F.2d 327 (9th Cir. 1979).

73. See *DeSantis*, 608 F.2d at 330-32 (arguing that Title VII should protect employees from discrimination on the basis of sexual orientation). The appellants in *DeSantis* set forth three arguments in support of their position that Title VII should punish discrimination on the basis of sexual orientation. See *id.* (setting forth these arguments). The first was that because male homosexuals were more prevalent in society, discrimination against homosexuals in general would result in a disparate impact on men, a protected class under the statute. See *id.* at 330 (citing *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)). The court rejected this argument as an attempt to "bootstrap" a class not protected by the statute, i.e., homosexuals, under the guise of a protected class, i.e., men. See *id.* Appellants' second argument was that employers who discriminated against male employees with male sexual partners but not female employees with male sexual partners were impermissibly using

in *DeSantis* concerned a male nursery school teacher who had been fired for wearing an earring.⁷⁴ The school teacher argued that the school's decision to terminate him violated Title VII because it was impermissibly based on the stereotype that a man should have a "virile rather than an effeminate" appearance.⁷⁵ Relying on its earlier decision in *Holloway*, the Ninth Circuit reiterated that Title VII does not protect discrimination on the basis of sexual orientation or preference.⁷⁶ The court also cited *Smith* for the proposition that Title VII does not protect against discrimination based on effeminacy.⁷⁷ The Ninth Circuit therefore concluded that "discrimination because of effeminacy, like discrimination because of homosexuality or transsexualism, does not fall within the purview of Title VII."⁷⁸

2. Price Waterhouse v. Hopkins: *Stereotyping Gender Based on Sex Violates Title VII*

In 1982, Ann Hopkins, then a senior manager at the Washington, D.C. office of the accounting firm Price Waterhouse, was nominated for partnership status.⁷⁹ Because Hopkins was neither admitted to nor denied partnership that year, her candidacy was placed on hold until the following year.⁸⁰ However, when the other partners refused to reconsider Hopkins for partnership in 1983, she sued Price Waterhouse under Title VII, alleging that she had been discriminated against on the basis of her sex.⁸¹ As evidence of sex discrimination, Hopkins offered the evaluations she was given by her fellow partners in 1982 which ultimately led to her

different employment criteria for each sex. *See id.* at 331 (citing *Phillips v. Martin-Marietta Corp.*, 400 U.S. 542 (1971)). Not only did the Ninth Circuit reject this argument as another impermissible attempt to "bootstrap," but it also pointed out that such employers are actually discriminating based on the same criteria: homosexuality. *See id.* Appellants' final argument was that discrimination on the basis of an employee's sexual partner constituted discrimination on the basis of that person's sex. *See id.* (relying on EEOC's policy). In refuting this contention, the court pointed out that employers were not discriminating against employees on the basis of their partners' sex, but on the basis of the homosexual relationship itself, which was not protected under Title VII. *See id.* (adding that appellants did not even allege employers had such policies).

74. *See id.* at 328 (discussing facts of *Strailey v. Happy Times Nursery School Inc.*, 608 F.2d 327 (9th Cir. 1979)).

75. *Id.* at 331 (discussing appellant Strailey's argument).

76. *See id.* at 332 (citing *Holloway*, 566 F.2d 659). For a discussion of the facts and the Ninth Circuit's analysis in *Holloway*, see *supra* text accompanying notes 65-71.

77. *See DeSantis*, 608 F.2d at 332 (citing *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325 (5th Cir. 1978)). For a discussion of the facts and the Fifth Circuit's reasoning in *Smith*, see *supra* text accompanying notes 61-64.

78. *See DeSantis*, 608 F.2d at 332 (relying on *Smith* and *Holloway*).

79. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 231 (1989).

80. *See id.*

81. *See id.* at 231-32. While Hopkins' suit was initiated by the refusal to reconsider her for partnership in 1983, her allegations of sex discrimination pertained exclusively to Price Waterhouse's decision to place her candidacy on hold in 1982. *See id.* at 233 n.1.

candidacy being placed on hold.⁸² Although some evaluations criticized Hopkins' "interpersonal skills," others described her as "macho," and stated that she "overcompensated for being a woman" and that she needed to take "a course at charm school."⁸³ But Hopkins' critical piece of evidence was a statement by a Price Waterhouse representative containing suggestions for how she could improve her chances for partnership in the future, namely that she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."⁸⁴

At trial, Dr. Susan Fiske, a social psychologist, testified that the statements made on Hopkins' evaluations were "likely influenced by sex stereotyping."⁸⁵ Although the validity of Dr. Fiske's opinions were challenged by Price Waterhouse and the dissent, Justice Brennan stated that "[n]or . . . does it require expertise in psychology to know that, if an employee's flawed 'interpersonal skills' can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism."⁸⁶ As for the legal relevance of sex stereotyping, the United States Supreme Court concluded that:

[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."⁸⁷

82. *See id.* at 235.

83. *Id.* at 234-35 (discussing content of evaluations). Criticisms of Hopkins' interpersonal skills were apparently due to her abrasiveness with co-workers and staff. *See id.* at 234. In addition, several partners criticized Hopkins' use of profanity and in response one partner suggested that those partners objected only "because it's a lady using foul language." *Id.* at 235. Another evaluation stated that Hopkins "ha[d] matured from a tough-talking somewhat hard-nosed mgr to an authoritative, formidable, but much more appealing lady ptr candidate." *Id.* Not all of Hopkins' evaluations were critical in nature, however. *See id.* at 234. Hopkins had recently been very profitable for Price Waterhouse, securing a multi-million dollar contract, and was regarded by her co-workers and clients as "an outstanding professional" and "extremely competent, intelligent." *Id.*

84. *Id.* These recommendations were given by Thomas Beyer who spoke on behalf of Price Waterhouse's Policy Board. *See id.*

85. *Id.* (discussing Dr. Fiske's expert testimony).

86. *Id.* at 256 (adding that "[i]t takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring "a course at charm school").

87. *Id.* at 251 (quoting *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978); *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)). It is interesting to note that this statement, relied on in large part by the Supreme Court in *Price Waterhouse*, as well as other courts holding that Title VII prohibits stereotyping based on gender roles, does not specify *which* type of sexual stereotyping Title VII proscribes, i.e., gender stereotyping or job ability. *See, e.g.*, *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1092 (D. Minn.

Thus, the Supreme Court in *Price Waterhouse* proclaimed that sexual stereotyping based on gender roles amounts to discrimination on the basis of sex in violation of Title VII.⁸⁸

III. ANALYSIS

Although the *Price Waterhouse* Court was clear in its pronouncement that stereotyping on the basis of an employee's gender is impermissible sex discrimination under Title VII, male employees have not been able to reap the benefits of that decision when suing for such conduct under Title VII.⁸⁹ Currently, this anomalous result may be attributed to one or more of three factors: 1) the tendency of courts to mistake male-gender stereotyping for sexual orientation discrimination; 2) the Supreme Court's decision in *Oncale v. Sundowner Offshore Services, Inc.*;⁹⁰ and 3) insufficient pleading by plaintiffs. This Section examines the effect that all three factors have had on gender stereotyping claims brought by male plaintiffs under Title VII.

2000) (relying on same statement to hold gender stereotyping impermissible under Title VII and thus under Title IX).

88. See *Price Waterhouse*, 490 U.S. at 250 (stating that employer who acts on basis of belief that women cannot or must not be aggressive has acted on basis of gender).

Aside from its pronouncement that sex stereotyping based on gender roles violates Title VII, *Price Waterhouse* is perhaps better known for addressing the standard of causation in sex discrimination claims under Title VII. See *id.* at 237. That issue concerned the question of how much of a consideration an employee's sex would have to be in the employer's adverse decision to constitute discrimination "because of" sex when an employer made a decision based upon a mix of permissible motives (e.g., employee's lack of interpersonal skills) and impermissible motives (e.g., sex). See *id.* at 237 (discussing standard of causation issue under Title VII). The Court concluded that if the employer could prove by a preponderance of the evidence that it would have made the same adverse decision without taking into account the employee's sex, it could avoid liability under Title VII. See *id.* at 258. This conclusion was later overruled by Section 101 of the Civil Rights Act of 1991, which states that such a showing by the employer may only reduce the award of damages, but not a finding of liability. See Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

89. *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000) (dismissing male employee's Title VII claim against employer for sexual harassment based on failure to conform to gender norms); *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 707 (7th Cir. 2000) (same); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 (1st Cir. 1999) (same); *Dandan v. Radisson Hotel Lisle*, No. 97C8342, 2000 WL 336528, at *4 (N.D. Ill. Mar. 28, 2000) (same); *Mims v. Carrier Corp.*, 88 F. Supp. 2d 706, 714-15 (E.D. Tex. 2000) (same); *Klein v. McGowan*, 36 F. Supp. 2d 885, 890 (D. Minn. 1999) (same), *aff'd*, 198 F.3d 705 (8th Cir. 1999); see also Case, *supra* note 3, at 50 ("Those post-*Hopkins* cases that have indirectly considered claims of discrimination against effeminacy in men—cases of workplace harassment of gay men, of cross-dressing by preoperative transsexuals or transvestites, or of less extreme violations of sex-specific grooming policies—have resulted in decisions against the male plaintiffs."). For a discussion of the holding in *Price Waterhouse*, see *supra* text accompanying notes 86-88.

90. 523 U.S. 75 (1998).

A. *Judicial Conflation of Sexual Orientation and Gender*

Title VII does not prohibit discrimination in the workplace on the basis of sexual orientation.⁹¹ However, because some courts have had a tendency to mistake gender stereotyping for discrimination on the basis of sexual orientation, they have refused to extend protection to victims of the former.⁹² Such confusion may derive from a separation of “sex” and

91. *See, e.g.*, *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1087 (7th Cir. 1984) (holding that Title VII does not prohibit discrimination on basis of sexual orientation). Two reasons have been cited for why Title VII’s prohibition against discrimination “because of sex” does not extend to discrimination on the basis of sexual orientation. *See Bibby v. Phila. Coca-Cola Bottling Co.*, 85 F. Supp. 2d 509, 515-16 (E.D. Pa. 2000) (analyzing meaning of “sex” in Title VII). First, the ordinary common meaning of the term sex refers to the biological distinction between males and females as opposed to sexual activity. *See id.* (quoting *NEW SHORTER OXFORD ENGLISH DICTIONARY* 2801 (Lesley Brown ed., Thumb Index ed. 1993)). Second, the presence of “sex” in Title VII along with other “immutable characteristics” such as race, color and national origin suggest that the term “could only refer to membership in a class delineated by gender, rather than sexual activity regardless of gender.” *Id.* at 516 (quoting *DeCintio v. Westchester County Med. Ctr.*, 807 F.2d 304, 306 (2d Cir. 1986)).

Lending further support to the fact that Title VII was not intended to protect gays and lesbians has been Congress’ repeated failure to pass an amendment to Title VII providing such protection. *See, e.g.*, Employment Non-Discrimination Act of 1996, S. 2056, 104th Cong. (1996); Employment Non-Discrimination Act of 1995, H.R. 1863, 104th Cong. (1995); Employment Non-Discrimination Act of 1994, H.R. 4636, 103rd Cong. (1994). Congress’ latest version of ENDA was introduced by Senator Joseph Lieberman on June 24, 1999. *See Gov’t Press Release, supra* note 6 (noting that only eleven states currently protect employees from employment discrimination based on homosexual status). This measure was supported by President Clinton, who noted that the last ENDA failed to gain approval by only a single vote. *See Statement by President Clinton, supra* note 6 (urging Congress to pass 1999 amendment into law).

Although plaintiffs have crafted various arguments for why Title VII should cover discrimination against homosexuals, they have been rejected as impermissible “bootstrapping.” *See DeSantis v. Pac. Tel. & Tel. Co., Inc.*, 608 F.2d 327 (9th Cir. 1979). For an in depth discussion of the arguments raised in *DeSantis*, see *supra* note 73.

92. *See Case, supra* note 3, at 58 (discussing judicial tendency to conflate effeminacy and homosexuality in men). As Professor Case explains:

The differential pull of feminine gender in males toward sexual orientation may, as suggested above, explain why there have been since Hopkins very few suits by males arguing that sex stereotyping on the basis of effeminacy constitutes sex discrimination, none of them successful. It may be because at the moment it is permissible almost everywhere to discriminate on the basis of sexual orientation that the firing of an effeminate man is overdetermined. Even if it is not permissible to fire him for his effeminacy, it may be permissible to fire him for the sexual orientation that is presumed and may in fact go with it.

Case, supra note 3, at 57. Professor Valdes refers to this phenomenon as the “sexual orientation loophole” in claims of sex discrimination. Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CAL. L. REV. 1, 18 (1995).

“gender” in Title VII jurisprudence.⁹³

The tendency of courts to mistake gender stereotyping for discrimination based on sexual orientation in cases involving Title VII is illustrated by two recent cases.⁹⁴ In *Dandan v. Radisson Hotel Lisle*,⁹⁵ Edward Dandan,

93. See generally Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1 (1995) (arguing that “wrong” of sex discrimination law is its focus upon rigid biological definition of “sex” to exclusion of broader definition encompassing gender role stereotypes.) One court expressly acknowledged the distinction between “sex” and “gender,” yet deliberately continued to use the terms interchangeably. See *Hopkins v. Balt. Gas & Elec. Co.*, 77 F.3d 745, 749 (4th Cir. 1996) (recognizing that “‘gender’ connotes cultural or attitudinal characteristics distinctive to the sexes, as opposed to their physical characteristics”). The Fourth Circuit’s insistence on meshing the two terms was based on its reasoning that Congress intended “sex” in Title VII to refer only to an employee’s status as a “man or woman,” and that using the terms interchangeably imposed a “useful limit” on the term “sex” which might otherwise be interpreted to mean sexual behavior. *Id.* For a discussion of the difference in meaning between the terms “sex” and “gender” and the origin of their confusion, see *supra* note 12.

94. Two cases discussed in the Background Section of this Comment also demonstrate the conflation phenomenon. In *Smith v. Liberty Mutual Insurance Co.*, Bennie Smith sued under Title VII for being denied employment as a mail room clerk because his interviewer deemed him “effeminate.” 569 F.2d 325, 326 (5th Cir. 1978) (discussing facts). Nonetheless, the Fifth Circuit rejected Smith’s claim on the basis that “the Civil Rights Act does not forbid discrimination based on affectional or sexual preference” and that “Congress by its proscription of sex discrimination intended only to guarantee equal job opportunities for males and females.” *Id.* at 326-27 (citing *Willingham v. Macon Tel. Publ’g Co.*, 507 F.2d 1084, 1090 (5th Cir. 1975) (en banc)). Thus, the Fifth Circuit turned what was essentially a claim for discrimination on the basis of failing to conform to gender norms into a claim for discrimination on the basis of sexual preference. See Case, *supra* note 3, at 54 (noting that both district and circuit courts “folded” Smith’s sex stereotyping claim into claim for sexual orientation discrimination).

A more dramatic illustration of this confusion is *Strailey v. Happy Times Nursery School*, a case consolidated with *DeSantis*, in which a school teacher alleged that he was fired for wearing an earring in violation of Title VII. See *DeSantis*, 608 F.2d at 328. However, Strailey found his case consolidated with two others involving discrimination against gays and lesbians. See *id.* at 328-29 (describing other cases). One case, *DeSantis*, concerned a claim by three men that they were denied employment and/or harassed on the job as a result of their homosexual status. See *id.* The other, *Lundin v. Pacific Telephone & Telegraph Co.*, involved two females who alleged that they were terminated due to their known lesbian relationship. See *id.* at 329. The Ninth Circuit even began the opinion by stating that “[m]ale and female homosexuals brought three separate federal district court actions claiming that their employers or former employers discriminated against them in employment decisions because of their homosexuality.” *Id.* at 328 (characterizing actions). Although the Ninth Circuit referred to Strailey’s claim as one based on “a stereotype that a male should have a virile rather than an effeminate appearance,” it ultimately concluded that “discrimination because of effeminacy, like discrimination because of homosexuality or transsexualism, does not fall within the purview of Title VII.” *Id.* at 331-32 (citing *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659 (9th Cir. 1977)); *Smith*, 569 F.2d at 326-27. The practice of courts such as those in *Smith* and *Strailey* to conflate gender and sexual orientation may have accounted for the scarcity of post-*Price Waterhouse* claims by effeminate men, none of them successful. See Case, *supra* note 3, at 57 (raising this point).

95. No. 97C8342, 2000 WL 336528 (N.D. Ill. Mar. 28, 2000).

an assistant bartender, was consistently subjected to comments by his co-employees such as “fruitcake, fagboy, and Tinkerbell,” as well as having his speech patterns and kinetics criticized for being feminine.⁹⁶ Although Dandan was homosexual, this fact was not known to his co-workers, and he therefore argued that the verbal abuse he suffered was due to the fact that he did “not match-up to his co-workers’ expectations of what a man should be or how he should live his life.”⁹⁷ Nonetheless, the United States District Court for the Northern District of Illinois characterized his claim as one for discrimination based on “perceived” sexual orientation which it held was unprotected by Title VII.⁹⁸

In *Klein v. McGowan*,⁹⁹ Josh Klein, a technician in the county sheriff’s office, was subjected to harassment which included co-workers calling him a “homo,” making fun of the car he drove, expelling flatulence in his work space, and his supervisor installing a bell over his work space and ringing it to upset him.¹⁰⁰ Klein maintained that he was entitled to relief under Title VII because he had suffered discrimination based on “the sexual aspect of [his] personality.”¹⁰¹ However, in a statement that clearly reflected its conglomerated view of gender and sexual orientation, the United States District Court for the District of Minnesota concluded that “if gender and sex were equivalent under Title VII, Title VII would prohibit the harassment of a male because of effeminate behavior or the perception that he is gay.”¹⁰²

Although *Price Waterhouse* arguably made the conduct alleged in *Dandan* and *Klein* a violation of Title VII, neither court bothered to discuss the decision.¹⁰³ The only explanation for such an omission, then, is that

96. *Dandan*, 2000 WL 336528 at *1 (discussing facts). Dandan was also exposed to sexually explicit insults such as “didn’t your boyfriend do you last night?”; “shove [a vacuum cleaner hose] up your a**”; “take [a tube lubricator] home, you’ll have fun with it”; “do you want to eat this [pointing to his crotch]? Eat this, Eddie”; “I hate you because you are a faggot.” *Id.*

97. *Id.* at *4 (reciting plaintiff’s argument).

98. *Id.* (citing *Shermer v. Ill. Dep’t of Transp.*, 937 F. Supp. 781, 785 (C.D. Ill. 1996)). It is widely agreed that discrimination on the basis of sexual orientation, actual or perceived, is beyond the purview of Title VII. See *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984) (collecting cases). However, the use of homophobic epithets such as “fag” or “queer” may be as degrading of a man’s perceived effeminate qualities as it is of his perceived sexual orientation. See, e.g., Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 617-33 (1992) (arguing that for this reason anti-gay bias should be recognized as form of sex discrimination); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 Wis. L. Rev. 187 (1988) (same).

99. 36 F. Supp. 2d 885 (D. Minn. 1999).

100. *Klein*, 36 F. Supp. 2d at 887.

101. *Id.* at 889.

102. *Id.* at 890 (noting that Title VII does not prohibit harassment on the basis of sexuality).

103. In fact, the district court went so far as to state that “Dandan does not direct the Court to any support for his argument that Title VII’s protection

neither court was able to draw a distinction between the effeminate behavior of the plaintiffs and their sexual orientation.¹⁰⁴

B. *Oncale v. Sundowner Offshore Services: Proving That Same-Sex Harassment Is "Because of Sex"*

Two years ago, the United States Supreme Court held in *Oncale v. Sundowner Offshore Services, Inc.* that sexual harassment between employees of the same sex is actionable sex discrimination under Title VII.¹⁰⁵ The Court cautioned, however, that in order to prevent Title VII from becoming a "general civility code for the American workplace," plaintiffs alleging harassment by an employee of the same sex must prove that such harassment was inflicted because of their sex.¹⁰⁶ The Court then gave three

stretches so far to envelop harassment based on a person's sexuality, as it is or as perceived." *Dandan*, 2000 WL 336528, at *4. Because of this statement, the district court in *Dandan* was later criticized for failing to "acknowledge the precedential relevance of *Price Waterhouse*." *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1092-93 (D. Minn. 2000). The district court in *Klein* also ignored *Price Waterhouse*, relying instead on the district court's decision in *Higgins v. New Balance Athletic Shoe, Inc.* that "sex" under Title VII does not encompass the immutable characteristic of "gender." *Klein*, 36 F. Supp. 2d at 890 (citing *Higgins v. New Balance Athletic Shoe, Inc.*, 21 F. Supp. 2d 66, 75 (D. Me. 1998)). However, the First Circuit later reversed *Higgins* on the basis of *Price Waterhouse*, noting that "just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity." *Higgins*, 194 F.3d at 261 n.4.

104. This distinction has been expressed by the statement that "not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine." *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000); *accord Case*, *supra* note 3, at 57 (noting that femininity and homosexuality in men are "far from perfectly overlapping categories").

105. *See Oncale v. Sundowner Offshore Servs. Inc.*, 523 U.S. 75, 79 (1998) (discussing circuit split). Although courts were not split on the issue of whether same-sex claims alleging tangible economic loss (e.g., failure to promote or hire) were actionable under Title VII, they were split when it came to same-sex claims alleging sexual harassment. *See id.* The Court nonetheless held that it "[saw] no justification" in the statutory language or its precedents for limiting the application of Title VII to same-sex claims of sexual harassment. *Id.*

106. *Id.* at 80 (addressing concern raised by respondent and amici). In *Meritor Savings Bank v. Vinson*, the United States Supreme Court held that under Title VII, discrimination in an employee's "terms, conditions, or privileges of employment" was not limited just to "'tangible loss' of an 'economic character,'" such as failing to promote, but also encompassed the "'purely psychological aspects of the workplace environment.'" 477 U.S. 57, 64 (1986). Thus, an employee could show that he or she was discriminated against under Title VII if he or she could prove that verbal or physical sexual conduct linked to some protected characteristic "[h]ad the purpose or effect of unreasonably interfering with work performance or creating an intimidating, hostile, or offensive working environment." *Vinson*, 477 U.S. at 65. In *Harris v. Forklift Systems Inc.*, the Court elaborated on the elements of a sexually hostile environment claim, requiring the plaintiff to demonstrate five elements: (1) plaintiff belongs to a protected class; (2) the harassment was unwelcome; (3) the harassment was based on sex; (4) the harassment was severe or pervasive; and (5) the employer knew or should have known of the harass-

examples of how a plaintiff alleging same-sex harassment might demonstrate that such harassment was based on his or her sex.¹⁰⁷ First, a plaintiff could show that proposals of sexual activity were made by a harasser of the same sex who was also homosexual.¹⁰⁸ Second, a plaintiff who could not show that same-sex harassment was motivated by the “sexual desire” of his or her harasser could alternatively demonstrate that they were harassed in such “sex-specific and derogatory terms” as to raise an inference of gender animus.¹⁰⁹ Finally, a plaintiff may prove that same-sex harassment was based on sex by offering comparative evidence of how each sex is treated in a mixed-sex workplace.¹¹⁰ Although these “evidentiary route[s]” are not exhaustive, they have posed particular difficulties for the male victim of gender stereotyping.¹¹¹

Because harassment of a male due to the way in which he projects his sexuality will usually not involve implicit or explicit sexual proposals, the first method of proof in *Oncale* is not helpful when attempting to show that

ment and failed to take remedial action. *See Harris*, 510 U.S. 17, 21-23 (1993). The Court in *Oncale* was thus focusing on the third element required to demonstrate a sexually hostile environment. *See Oncale*, 523 U.S. at 75 (“Title VII is directed at discrimination because of sex, not merely conduct tinged with offensive sexual connotations.”).

The “because of sex” requirement of Title VII is generally interpreted as a “but for” standard. *See, e.g., Harris*, 510 U.S. at 25 (Ginsburg, J., concurring) (“The critical issue, Title VII’s text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”); *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982) (“In proving a claim for a hostile work environment due to sexual harassment . . . the plaintiff must show that but for the fact of her sex, she would not have been the object of harassment.”); *Bundy v. Jackson*, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981) (“[T]he question is one of but-for causation: would the complaining employee have suffered the harassment had he or she been of a different gender?”).

107. *See Oncale*, 523 U.S. at 80-81 (discussing methods of proof).

108. *See id.* at 80. The inference from this showing is that sexual proposals from the homosexual harasser “would not have been made to someone of the same sex.” *Id.* Although this is only one of three possible avenues of proof a plaintiff can take to demonstrate same-sex harassment was based on sex, to many courts this particular method represents the sine qua non of a same-sex harassment claim under Title VII. *See, e.g., Hopkins v. Balt. Gas & Elec. Co.*, 77 F.3d 745, 752 (4th Cir. 1996) (holding that Title VII claim fails because neither harasser nor victim was homosexual); *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1195 & n.5 (4th Cir. 1996) (same); *Ward v. Ridley Sch. Dist.*, 940 F. Supp. 810, 812-13 (E.D. Pa. 1996) (same); *Shermer v. Ill. Dep’t of Transp.*, 937 F. Supp. 781, 784 (C.D. Ill. 1996) (same).

109. *Oncale*, 523 U.S. at 80 (giving example of woman who makes clear to another woman that she is generally hostile to presence of women in workplace).

110. *See id.* at 80-81 (discussing final method of proof).

111. *Id.* at 81 (noting that “[w]hatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted ‘discrimina[tion] . . . because of . . . sex’”).

such harassment was because of sex.¹¹² The other two evidentiary routes suggested by *Oncale* are similarly difficult to demonstrate in a male-on-male harassment situation.¹¹³ For instance, showing that a workplace is infected with a general anti-male animus is a daunting prospect at best, considering that most same-sex harassment between men occurs in all-male work environments.¹¹⁴ This fact also complicates a showing of disparate treatment because it would be difficult, if not impossible, to show how a harasser treats employees of both sexes in a work environment populated entirely by men.¹¹⁵

The debilitating effect of *Oncale* on claims of male-gender stereotyping is best illustrated by the recent case of *Mims v. Carrier Corp.*¹¹⁶ Quentin

112. See, e.g., *Doe v. City of Belleville*, 119 F.3d 563, 581 (7th Cir. 1997) (observing that male who harassed plaintiff in sexually explicit manner for wearing earring and appearing feminine lived with woman and thus might not be sexually interested in plaintiff), *vacated by* 523 U.S. 1001 (1998). Additionally, as Professor Schultz notes:

[O]nce we move away from a sexual-desire paradigm, we can see how harassment is not just a male/female thing, but also something that occurs between men. Men can be threatened by men who are perceived to be gay, and men who aren't married, and men who align themselves with the interests of women, and men who just are perceived to be "wimps."

Ellen Yaroshefsky, *More Than Sex: Why the Courts Are Missing the Point*, Ms., May 1998, at 56, 56 (interviewing Professor Vicki Schultz of Yale Law School about sexual harassment under Title VII).

113. See *Oncale*, 523 U.S. at 80-81 (discussing last two methods of demonstrating that same-sex discrimination is because of sex).

114. See *Doe*, 119 F.3d at 583 n.19 (citing *Gohuszek v. H.P. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988)).

115. See *id.* As the Seventh Circuit stated in *Doe*:

Proof of disparate treatment is also elusive in the same-sex context. How is a plaintiff to show disparate treatment if he is the only individual being harassed, for example? And how could he ever hope to show disparate treatment in a work environment populated entirely by men, as the Does' workplace was?

Id. (citing *Shermer v. Ill. Dep't of Transp.*, 937 F. Supp. 781, 784 (C.D. Ill. 1996); *Vore v. Ind. Bell Tel. Co.*, 32 F.3d 1161, 1164 (7th Cir. 1994)); see also *Shermer v. Ill. Dep't of Transp.*, 937 F. Supp. 781, 784 (C.D. Ill. 1996) ("[I]f a plaintiff is unlucky enough not to have co-workers of the opposite sex, his or her claim is barred."); accord *Memo, supra* note 9 ("However, when the plaintiff works in a single-sex workplace, gender comparisons are problematic.").

116. 88 F. Supp. 2d 706 (E.D. Tex. 2000). Another case illustrating the impact *Oncale* has had on male-gender stereotyping claims brought under Title VII is *Hamner v. St. Vincent Hospital & Health Care Center, Inc.* 224 F.3d 701 (7th Cir. 2000). In *Hamner*, a male nurse alleged that his supervisor's "lisp[ing]" and "flipp[ing] his wrists" towards him constituted impermissible sexual harassment under Title VII. *Hamner*, 224 F.3d at 706. Judge Manion of the Seventh Circuit responded to this argument by stating that:

We have already established from *Hamner's* testimony that he believed that Edwards's gestures evinced his "homophobia," and thus pertained only to *Hamner's* sexual orientation, and not to his sex. And the record contains no evidence to indicate that Edwards's gestures were motivated by a general hostility to men, which would be an example of the type of evidence necessary in this case to sustain *Hamner's* reasonable belief claim.

Mims, who was not homosexual, but was perceived to be by his co-workers, was the recipient of sexually graphic comments and gestures.¹¹⁷ To determine whether this harassment was a result of Mims' sex as required by Title VII, the United States District Court for the Eastern District of Texas consulted the suggested methods of proof in *Oncale*.¹¹⁸ Because the court ultimately concluded that "Mims' deposition testimony fail[ed] to establish same-sex harassment by any of these methods," it entered summary judgment for his employer.¹¹⁹

Id. at 707 (rejecting Hamner's Title VII claim). The Seventh Circuit also noted that "Hamner present[ed] no evidence that he was the only male nurse on the unit, or that Edwards treated male nurses differently than female nurses." *Id.* at 706 n.4. For a further discussion of the decision in *Hamner*, see Darryl Van Duch, *Gays Held Unprotected by Title VII: 7th Circuit Cites Difference Between 'Sex' and 'Sexuality'*, NAT'L L.J., Sept. 2000, at B1 (noting impact of *Hamner*).

Other courts relying on the proffered methods of *Oncale* to determine whether male-on-male harassment was because of sex include the Fourth and Eighth Circuits:

The Fourth Circuit focuse[s] on the harasser's sexual attraction towards the victim. Alternatively, the Eight [sic] Circuit and numerous district courts address their inquiry to the harasser's treatment of one gender compared with the other as well as whether the work environment manifests an animus towards the plaintiff's gender, i.e., is the work environment "anti-male" or "anti-female."

Memo, supra note 9 (discussing methods of proof in same-sex harassment cases).

117. *See Mims*, 88 F. Supp. 2d at 710, 712 (describing offensive behavior). Mims' co-workers subjected him to graphic and offensive body gestures because of their belief that he was engaging in homosexual conduct with a male co-worker. *See id.* at 710.

118. *See id.* at 714-15 (listing three evidentiary methods of *Oncale*).

119. *Id.* at 715 (explaining entry of summary judgement). Specifically, the district court noted that Mims' testimony revealed that his harassers were not homosexual, did not create a general hostility toward men and made homosexual jokes to women as well as men. *See id.*

The harasser who harasses employees of both sexes has come to be known as the "equal opportunity harasser" or "bisexual supervisor." *See, e.g.,* *Hocevar v. Purdue Frederick Co.*, 223 F.3d 721, 737 (8th Cir. 2000) (denying plaintiff's Title VII claim because harasser targeted employees of both sexes); *Ellett v. Big Red Keno, Inc.*, 221 F.3d 1342 (8th Cir. 2000) (same); *Santiago v. Lloyd*, 66 F. Supp. 2d 282, 287 (D.P.R. 1999) (same); *Holman v. Indiana*, 24 F. Supp. 2d 909, 915 (N.D. Ind. 1998) (same). Courts such as the district court in *Mims* have held that due to *Oncale's* emphasis on disparate treatment, a harasser who pursues both males and females indiscriminately cannot be harassing "because of sex." *See Holman*, 24 F. Supp. 2d at 912-13 (noting that according to Supreme Court in *Oncale*, no Title VII violation exists if members of both sexes harassed equally). The Seventh Circuit, which has taken the opposite position, maintains that the fact that a harasser might simultaneously be harassing both a man and a woman does not preclude a finding that such harassment was based on sex, because each sex experiences that harassment differently. *See Doe*, 119 F.3d at 578 (stressing that it is not harasser's motivations which matter in determination of whether harassment was because of sex but experience of victim as it relates to his or her sex). This argument is consistent with the contention that Title VII protects persons, not classes. *See Miller v. Vesta, Inc.*, 946 F. Supp. 697, 706 (E.D. Wis. 1996) (citing *Carson v. Bethlehem Steel Corp.*, 82 F.2d 157, 158 (7th Cir. 1996) ("Title VII protects individuals, not classes.")). One commentator has noted that the equal opportunity harasser principle reads too far into *Oncale*, which did not speak to the phenomenon. *See Catherine J.*

The district court's strict reliance on the evidentiary methods set forth in *Oncale* was not necessary, however, because the Supreme Court in *Oncale* did not intend for these methods to be exhaustive.¹²⁰ Therefore, the district court might have also considered whether the harassment Mims suffered constituted impermissible sex stereotyping under *Price Waterhouse*.¹²¹ On the other hand, Mims may have contributed to this oversight by failing to plead the theory properly in his complaint.¹²²

C. *Insufficient Pleading by Male Victims of Gender Stereotyping Under Title VII*

While some courts have explicitly recognized the applicability of *Price Waterhouse* to male-on-male sex stereotyping claims brought under Title VII, they have rejected such claims for failing to plead an appropriate theory of recovery.¹²³ To date, only a few plaintiffs have been able to plead successfully.¹²⁴

1. *Unsuccessful Attempts*

Male victims of gender stereotyping have demonstrated a tendency to incorporate the issue of sexual orientation into their Title VII claims and have thus met with little success. For instance, in *Simonton v. Runyon*,¹²⁵ a postal worker who had been subjected to a wide array of abuse on the basis of his sexual orientation claimed that he had been harassed on the basis of his sex, relying on *Price Waterhouse*.¹²⁶ Although the United States Court

Lanctot, *The Plain Meaning of Oncale*, 7 WM. & MARY BILL RTS. J. 913, 926 (1999) (pointing out that even in workplace where both sexes experience harassment, various arguments can be made that disparate treatment still exists).

120. See *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 81 (1998) (using non-exhaustive language "[w]hatever evidentiary route the plaintiff chooses to follow").

121. For a discussion of the Supreme Court's treatment of sex stereotyping in *Price Waterhouse*, see *supra* notes 79-88 and accompanying text.

122. See, e.g., *Dandan v. Radisson Hotel Lisle*, No. 97 C 8342, 2000 WL 336528, at *4 (N.D. Ill. Mar. 28, 2000) (noting that plaintiff failed to alert court to support for his argument that Title VII prohibits harassment based on perceived sexuality). For a discussion of complications faced by plaintiffs pleading male gender stereotyping claims, see *infra* notes 123-44 and accompanying text.

123. For a discussion of male-gender stereotyping claims which have failed under Title VII, see *infra* notes 125-37 and accompanying text.

124. For a discussion of male-gender stereotyping claims which have partially succeeded under Title VII, see *infra* text accompanying notes 138-44.

125. 232 F.3d 33 (2d Cir. 2000).

126. See *Simonton*, 232 F.3d at 34-35 (reciting facts and claims). The plaintiff, Simonton, was the recipient of comments such as "go fuck yourself, fag," "suck my dick," "so you like it up the ass?" and "fucking faggot." *Id.* His co-workers also placed his name beside the names of celebrities who had died of AIDS on the employees' bathroom wall; taped pornographic pictures and posters to his work area, including the picture of an erect penis and a poster stating that Simonton was mentally ill because of his "bung hole disorder;" placed male dolls in his vehicle; and sent copies of *Playgirl* magazine to his home. *Id.* at 35. Simonton initially

of Appeals for the Second Circuit recognized the viability of Simonton's theory, it concluded that it had "not [been] sufficiently pled."¹²⁷ Specifically, the court noted that Simonton had failed to allege that the harassment he endured was due to his acting in a stereotypically feminine manner or his non-conformity with male-gender norms as opposed to his sexual orientation.¹²⁸

Further illustrating this tendency in pleading is *Hamner v. St. Vincent Hospital & Health Care Center, Inc.*,¹²⁹ in which a doctor harassed a male nurse by "lisping at him" and "flipping his wrists."¹³⁰ Because Hamner referred to this conduct in his deposition testimony as "homophobia" and failed to assert that he was treated differently because he was a man, the United States Court of Appeals for the Seventh Circuit found that he could not have reasonably believed that he was sexually harassed for purposes of his Title VII retaliation claim.¹³¹ Moreover, in *Higgins v. New Balance Athletic Shoe, Inc.*,¹³² factory workers "us[ed] high-pitched voices [and]

argued that this conduct constituted unlawful harassment on the basis of his sexual orientation, but the Second Circuit rejected this claim, recognizing that Title VII does not prohibit discrimination on the basis of sexual orientation. *See id.* (citing *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085-86 (7th Cir. 1984)); accord *Bibby v. Phila. Coca-Cola Bottling Co.*, 85 F. Supp. 2d 509, 517 (E.D. Pa. 2000) (holding that factory worker harassed on basis of open homosexuality not protected under Title VII).

127. *Simonton*, 232 F.3d at 37 (dismissing Simonton's second argument). The Second Circuit noted that while recognizing the application of *Price Waterhouse* to these situations might serve to protect homosexual men, it "would not bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine." *Id.* at 38. The court did not explain why, however, if *Price Waterhouse* stood for the proposition that workplace discrimination based on sexual stereotypes is impermissible under Title VII, bootstrapping would even be a concern in this instance. For a discussion of the holding in *Price Waterhouse*, see *supra* notes 86-88 and accompanying text.

128. *See Simonton*, 232 F.3d at 37 (noting that record did not support allegations).

129. 224 F.3d 701 (7th Cir. 2000).

130. *Hamner*, 224 F.3d at 703.

131. *See id.* at 704 (noting that Title VII does not protect employees from harassment on account of sexual orientation). The retaliation provision of Title VII provides in pertinent part that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because he has opposed any practice made an unlawful employment practice by [Title VII]." 42 U.S.C. § 2000e-3(a) (1994). Hamner claimed that the defendant terminated him for submitting a sexual harassment grievance in violation of this provision. *See Hamner*, 224 F.3d at 705. Nevertheless, in order for an employee to recover on a retaliation claim, he or she must have had a subjective, as well as an objectively reasonable belief, that the practice he or she was opposing was unlawful. *See id.* at 706-07 (discussing requirements of Title VII retaliation claim). Because Title VII does not reach discrimination on the basis of sexual orientation, the Seventh Circuit held that Hamner could not have objectively believed that his grievance was directed at an unlawful employment practice under the statute. *See id.* at 707 (concluding that no reasonable jury could disagree).

132. 194 F.3d 252 (1st Cir. 1999).

gestur[ed] in stereotypically feminine ways” to harass a co-worker.¹³³ Nonetheless, the plaintiff characterized this conduct as discrimination on the basis of his open sexual orientation.¹³⁴ Because the plaintiff failed to raise a theory of recovery premised on *Price Waterhouse* until his appeal, the United States Court of Appeals for the First Circuit was forced to enter summary judgment for the defendant employer for reasons of fairness.¹³⁵

Interestingly, these cases suggest that the failure by male plaintiffs to successfully plead gender stereotyping causes of action under Title VII may be the result of a conflation similar to that plaguing the courts.¹³⁶ That is, while courts have mistaken claims alleging gender stereotyping for claims alleging discrimination on the basis of sexual orientation, plaintiffs appear to have mistakenly interpreted the term “sex” in Title VII as encompassing sexual orientation.¹³⁷

2. Successful Attempts

Male employees who have premised their Title VII gender stereotyping claims on their sex, as opposed to their sexual orientation, have achieved limited success. For instance, in *Rosa v. Park West Bank & Trust Co.*,¹³⁸ the plaintiff alleged that the defendant bank had refused him a loan application because he was dressed in traditionally feminine attire.¹³⁹ When Rosa subsequently brought suit under the Equal Credit Opportunity Act (“ECOA”) for being denied a credit opportunity on the basis of his sex, the court looked to Title VII case law.¹⁴⁰ Relying on *Price Waterhouse*, the United States Court of Appeals for the First Circuit held that Rosa may have a claim under the ECOA.¹⁴¹ In another successful case,

133. *Higgins*, 194 F.3d at 257.

134. *See id.* at 258 (noting that lower court rejected Higgins’s theory because Title VII does not reach harassment based on sexual orientation).

135. *See id.* at 261 (noting that because Higgins failed to mention gender stereotyping at district court level, “considerations of fairness, institutional order, and respect for trial courts in our hierarchical system of justice all militate strongly in favor of such a rule”).

136. For a discussion of judicial conflation of sexual orientation and gender in cases of male-on-male harassment under Title VII, see *supra* notes 91-104 and accompanying text.

137. Part III of this Comment suggests that the Supreme Court should clarify the meaning of “sex” in Title VII to avoid such confusion.

138. 214 F.3d 213 (1st Cir. 2000).

139. *See Rosa*, 214 F.3d at 214 (noting bank would not provide Rosa with loan application until he “went home and changed” into more traditional male attire).

140. *See id.* at 215 (examining 15 U.S.C. § 1691(a) (1994) and Title VII case law).

141. *See id.* at 216 (remanding for consideration of whether Rosa had claim under ECOA). The court stated that:

It is reasonable to infer that Brunelle told Rosa to go home and change because she thought that Rosa’s attire did not accord with his male gender: in other words, that Rosa did not receive the loan application because he was a man, whereas a similarly situated woman would have received the loan application . . . Indeed, under *Price Waterhouse*, “stereo-

Cox v. Denny's, Inc.,¹⁴² the plaintiff, a preoperative transsexual, claimed that a male co-worker's sexual advances and derogatory name-calling constituted discrimination on the basis of sex.¹⁴³ Noting that Cox did not condition relief on his transsexual status, but rather on his sex, the United States District Court for the Middle District of Florida held that he had made out a claim under Title VII.¹⁴⁴

D. *Reconciling Price Waterhouse and Oncale*

An obvious solution to the obstacles that have prevented the male victim of gender stereotyping from reaping the benefits of *Price Waterhouse* is for courts, as well as plaintiffs, to recognize that "because of sex" in Title VII encompasses gender identity as well as biological sex.¹⁴⁵ If courts would acknowledge this fact, they would be more likely to extend Title VII protection to male plaintiffs complaining of discrimination based on their sexuality, and less likely to assume that such claims are premised on sexual orientation, and thus not cognizable under Title VII.¹⁴⁶ If courts recognized that gender stereotyping is punishable as sex discrimination under Title VII, plaintiffs would not have to rely on theories of recovery related

typed remarks [including statements about dressing more 'femininely'] can certainly be evidence that gender played a part."

Id. at 215-16 (citation omitted).

142. No. 98-1085-CIV-J-16B, 1999 WL 1317785 (M.D. Fla. Dec. 22, 1999).

143. See *Cox*, 1999 WL 1317785 at *1. Cox was called names such as "fag," "punk bitch" and "freak mother fucker." *Id.*

144. See *id.* at *2. The court recognized that "Cox [did] not expressly contend that Frazier harassed him because of his transsexual status. The Complaint alleges discrimination on the basis of 'sex'" *Id.*

145. See Sonya Smallets, *Oncale v. Sundowner Offshore Services: A Victory for Gay and Lesbian Rights?*, 14 BERKELEY WOMEN'S L.J. 136, 144 (1999) ("However, if the 'because of sex' requirement is read to encompass gender, Title VII will provide a remedy to women who are harassed because they are not sufficiently feminine and to men who are harassed because they are not sufficiently masculine").

Attempts to raise a potential application of a Hopkins-style sex-stereotyping analysis to males have focused on issues relating to sexual orientation. See, e.g., Samuel A. Marcossan, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L.J. 1, 24-28 (1992) (noting that sexual nature of anti-gay harassment reflects stereotyping about what male sexual practices are acceptable); David R. Wade, *Women Denied Partnerships Revisited: A Response to Professors Madeh and O'Brien*, 8 HOFSTRA LAB. & EMP. L.J. 81, 120-24 (1990) (noting that after *Price Waterhouse*, burden will be on employer to prove that it discriminated against employee on basis of employee's sexual orientation, not effeminacy or aggressiveness); see also Peluso, *supra* note 14, at 1539 n.32 & 1548 n.125 (noting that *Price Waterhouse* provided protection needed by male homosexual plaintiffs in *Smith* and *DeSantis*); cf. I. Bennett Capers, Note, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158, 1159-66 (1991) (arguing that because discrimination against homosexuals favors passive, dependent women and results in hierarchical polarity between men and women, it constitutes discrimination because of sex).

146. For a discussion of the tendency of courts to conflate gender stereotyping with discrimination based on sexual orientation, see *supra* notes 91-104 and accompanying text.

to sexual orientation, and would thereby increase their chances of success in court.¹⁴⁷ While Congress may have already recognized that “sex” in Title VII encompasses “gender,” the Supreme Court has given mixed signals regarding the issue.¹⁴⁸

For instance, in *Price Waterhouse*, the Supreme Court held that stereotyping based on gender roles violates Title VII.¹⁴⁹ Nine years later in *Oncale*, however, the Court stressed that a plaintiff alleging same-sex sexual harassment under Title VII must prove, by some evidentiary method, that he or she was treated differently than an employee of the opposite sex was or would have been.¹⁵⁰ Because making this showing of disparate treatment is extremely difficult for victims of male-on-male gender stereotyping, *Oncale* placed a significant burden on these plaintiffs’ ability to take advantage of the Court’s holding in *Price Waterhouse*.¹⁵¹

147. For a discussion of the tendency by male victims of gender harassment to premise relief under Title VII on theory of sexual orientation discrimination, see *supra* text notes 125-37 and accompanying text.

148. *Cf. Schwenk v. Hartford*, 204 F.3d 1187, 1192-93 (9th Cir. 2000) (holding that sexual assault of transsexual prisoner constituted violation of Gender Motivated Violence Act (“GMVA”). Noting that a determination of gender motivation under the GMVA parallels an analysis of sex discrimination under Title VII, the Ninth Circuit stated that:

We may presume that Congress, in drafting the GMVA, was aware of the interpretation given by the pre-*Price Waterhouse* federal courts to the terms “sex” and “gender” under Title VII and acted intentionally to incorporate the broader concept of “gender.” . . . We therefore decline to give the term “gender,” as used in the GMVA, a narrow interpretation that would exclude all those, like Schwenk, who do not conform to socially-prescribed gender expectations.

Id. at 1201 n.12.

149. *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 . . .”). The Court’s pronouncement in *Price Waterhouse* has been regarded as overruling earlier decisions holding that Title VII’s prohibition against discrimination because of sex does not extend to discrimination because of gender. *See, e.g., Schwenk*, 204 F.3d at 1201 (“The initial judicial approach taken in cases such as *Holloway* has been overruled by the logic and language of *Price Waterhouse*.”).

150. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (“The critical issue, Title VII’s text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.” (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)). The Court suggested three methods of how a plaintiff might go about establishing the requisite disparity in treatment between the sexes. *See id.* at 80-81 (noting plaintiff could show comparative evidence of treatment in mixed-sex workplace or evidence that harassment was motivated by sexual desire or gender animus).

151. For a discussion of why these methods do not always work in cases of male-gender stereotyping, see *supra* notes 112-15 and accompanying text. The case of *Dillon v. Frank* offers two additional reasons, although not convincing, why the holding in *Price Waterhouse* may not apply to male victims of gender stereotyping. *See Dillon v. Frank*, No. 90-2290, 1992 U.S. App. LEXIS 766, at *9-10 (6th Cir. Jan 15, 1992). *Dillon*, an employee of the U.S. Postal Service, was the recipient of

Illustrating the tension between these two cases was the United States Supreme Court's recent decision to vacate and remand *Doe v. City of Belleville*¹⁵² in light of *Oncale*, in which the United States Court of Appeals for the Seventh Circuit held that "[j]ust as in *Price Waterhouse*, then, gender stereotyping establishes the link to the plaintiff's sex that Title VII requires."¹⁵³ Thus, for claims of male-gender stereotyping to succeed under a *Price Waterhouse* theory of recovery, that decision must be reconciled with *Oncale*.¹⁵⁴

One way to reconcile these two cases is to understand that *Oncale's* emphasis on disparate treatment was a response to the concern that recognizing same-sex harassment as a cause of action under Title VII would turn the statute into a "civility code."¹⁵⁵ As the Court cautioned, "the statute does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the oppo-

such comments as "fag," "Dillon sucks dicks," and "Dillon gives head," as well as a physical assault. *Id.* at *1. Dillon claimed that this treatment was the result of his co-workers deeming him not "macho" enough to be a man, and thus constituted impermissible sex discrimination under Title VII according to *Price Waterhouse*. See *id.* at *5 (discussing Dillon's second argument). The Sixth Circuit dismissed Dillon's claim, however, distinguishing the decision in *Price Waterhouse* on two grounds. See *id.* at *27. First, the court noted that Dillon was not faced with the "Catch-22" situation that confronted Ann Hopkins in *Price Waterhouse*. See *id.* at *10 (citing *Price Waterhouse*, 490 U.S. at 251). As the Court in *Price Waterhouse* explained: "[a]n 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." *Price Waterhouse*, 490 U.S. at 251. Therefore, the Sixth Circuit took it as significant that Dillon's job did not require him to act "like a man." See *Dillon*, 1992 U.S. App. LEXIS 766, at *9. The court also singled out *Price Waterhouse* for involving a "specific management decision" whereas Dillon was alleging that his employer was liable for creating a sexually hostile environment. See *id.* The Sixth Circuit's reliance on the "doubleness of Hopkins' bind [as] dispositive" has been criticized by one commentator as "erroneous." See Case, *supra* note 3, at 62 (discussing *Dillon*). Similarly, the fact that Ann Hopkins was confronted with an adverse employment decision, as opposed to a hostile work environment, did not seem to influence the Supreme Court in holding that discrimination based on sexual stereotypes constitutes a violation of Title VII. See *Price Waterhouse*, 490 U.S. at 258 (holding that Title VII protects against discrimination based on sexual stereotypes). For an explanation of the hostile environment claim under Title VII, see *supra* note 106.

152. 119 F.3d 563 (7th Cir. 1997), *vacated*, 523 U.S. 1001 (1998).

153. *Doe*, 119 F.3d at 581-82 (comparing case to *Price Waterhouse*). In *Doe*, two teenage brothers were subjected to verbal and physical sexual harassment by co-workers and supervisors based on their perceived sexual orientation during a summer job cutting grass for a municipality. See *id.* at 566-67. The Seventh Circuit has yet to comment on *Doe* following its remand by the Supreme Court. See Spearman v. Ford Motor Co., No. 98 C 0452, 1999 WL 754568, at *6 (N.D. Ill. Sept. 9, 1999).

154. For a discussion of the effect that *Oncale* has had on the attempts of male victims of gender stereotyping to recover under *Price Waterhouse*, see *supra* notes 116-19 and accompanying text.

155. See *Oncale*, 523 U.S. at 80 (acknowledging argument of respondents and amici). The Court also pointed out that evaluating harassment in the "social context" in which it occurs would also prevent Title VII from transforming into a general civility code. *Id.* at 81.

site sex.”¹⁵⁶ Therefore, it may not be as important for a male victim of gender stereotyping to show disparate treatment as it would be for him to show that the harassment he suffered was more than “innocuous.”¹⁵⁷ Accordingly, demonstrating that gender stereotyping was “severe or pervasive” might be enough to distinguish real claims of sexual harassment from frivolous ones.¹⁵⁸

Understanding this as the underlying concern of *Oncale*, *Price Waterhouse* can then be read more consistently with that decision: a male victim of gender stereotyping may seek redress under a *Price Waterhouse* theory of recovery as long as he can show, by some means, that the harassment he endured was severe or pervasive. The Seventh Circuit’s decision in *Doe* can also be reconciled with *Oncale*.¹⁵⁹ Although the Supreme Court did not explain its decision to vacate and remand *Doe*, it may have done so because the Seventh Circuit had also held in *Doe* that the sexually explicit nature of harassment is enough to render it sex discrimination.¹⁶⁰ Certainly, one can imagine various scenarios where alleged harassment is sexually explicit but fails to rise to the level punishable by Title VII.¹⁶¹

156. *Id.* at 81.

157. Along this line, one commentator has argued that *Oncale* should be treated simply as a pro-plaintiff opinion, and that “the assorted examples, exhortations, and suggestions that accompany it” should be ignored. See Lanctot, *supra* note 119, at 941 (arguing that *Oncale* should be “tak[en] . . . at face value”) Professor Lanctot reaches this conclusion for four reasons. First, she notes that Justice Scalia, who authored the opinion, has issued several unanimous pro-plaintiff opinions in previous cases dealing with sexual harassment. See *id.* at 927. Second, Professor Lanctot points out that unanimous decisions such as *Oncale* reflect no particular political philosophy. See *id.* at 938 (noting that people should hesitate to give *Oncale* restrictive interpretation based on conservativeness of author). Third, Professor Lanctot emphasizes that Scalia’s approach to sexual harassment jurisprudence has been “fluid.” See *id.* (discussing cases). Finally, and perhaps most significantly, Professor Lanctot stresses that the language used in an opinion may reflect more of a compromise on the bench, rather than the intent of a particular writer. See *id.* at 940 (adding that unanimous opinions especially are products of compromise).

158. Cf. *Spearman*, 1999 WL 754568, at *6 (recognizing plaintiff’s right to relief under *Price Waterhouse* but concluding harassment was not severe or pervasive). For a discussion of the hostile work environment claim under Title VII, see *supra* note 106.

159. See *Doe v. City of Belleville*, 119 F.3d 563, 50-91 (7th Cir. 1997) (holding in part that gender stereotyping is sufficient to meet Title VII’s “because of sex” requirement).

160. See *id.* at 580 (noting that sexual language or assault is inseparable from gender of victim); see also Smallets, *supra* note 145, at 146 (“Since the circuit court [in *Doe*] based its conclusion alternatively on these two arguments, it is unclear what changes the court will need to make in order to conform its opinion to the Supreme Court’s opinion in *Oncale*.”).

161. Although the Supreme Court did not comment on *Doe* when it vacated and remanded the decision, it did state in *Oncale* that “[w]e have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations.” *Oncale*, 523 U.S. at 80.

IV. CONCLUSION

Today, much like Ann Hopkins in 1989, an effeminate male employee may be the target of discrimination because he fails to live up to his co-worker's or supervisor's expectations of how a man should look or act. Unlike Ann Hopkins, however, these plaintiffs are left without any means of recourse due to confusion surrounding the meaning of "sex" in Title VII.¹⁶² Therefore, the Supreme Court should declare once and for all that Title VII's prohibition against discrimination because of "sex" also encompasses discrimination on the basis of gender.¹⁶³

Recognizing that Title VII prohibits gender stereotyping in the workplace would not bootstrap protection for homosexuals under the statute because effeminacy and homosexuality do not go hand in hand.¹⁶⁴ In addition, the requirement that victims of gender stereotyping prove they were treated worse than the opposite sex is inconsistent with the principle that Title VII protects persons, not classes.¹⁶⁵ Most importantly, the fact that a person dresses or acts in a way that diverges from what would be expected, given his or her biological sex, is completely unrelated to that person's ability as an employee.¹⁶⁶ Congress clearly intended to eliminate discrimination in employment on such an arbitrary basis.¹⁶⁷

Stephen J. Nathans

162. For a discussion of the complications of male-gender stereotyping claims under Title VII, see *supra* notes 91-137 and accompanying text.

163. The Supreme Court has already recognized that the purpose of Title VII was to remedy "artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of . . . impermissible classification[s]." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). If there is any doubt as to whether sexual stereotyping is such an impermissible classification, it must be remembered that Title VII is a remedial statute and that "remedial legislation should be construed broadly to effectuate its purposes." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967).

164. See *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000) (noting that this very fact prevents "bootstrap[ing] protection for sexual orientation into Title VII").

165. See *Miller v. Vesta, Inc.*, 946 F. Supp. 697, 706 (E.D. Wis. 1996) (noting that approach that insists harassment is actionable only when members of one gender are victimized is inconsistent with this principle).

166. Along this line, recent works have focused on understanding that the wrong of sexual harassment is that both women and men are forced to conform to gender roles which limit their opportunities. See, e.g., Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1172 (1998) (arguing that wrong of sexual harassment is preservation of masculine norms in workplace); Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 691 (1998) (arguing that wrong of sexual harassment is "sexism" which "feminizes women and masculinizes men, renders women sexual objects and men sexual subjects").

167. While Congress may not have foreseen the plight of the effeminate male employee when it added the "sex" provision to Title VII in 1964, its refusal to restrict Title VII's prohibitive scope to discrimination based "solely" on sex was significant. See 110 CONG. REC. 2728 (1964) (rejecting amendment offered by Rep. Dowdy). The Seventh Circuit interpreted this move as evincing Congress' intent

to “strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.” *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971). The Supreme Court, in turn, relied heavily on this statement in holding that the gender-based evaluations of Ann Hopkins constituted a clear violation of Title VII. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (quoting *Sprogis*). Consistent with this interpretation, Title VII has historically been applied to disqualify employment decisions based on the sex of an employee when that employee’s sex is unrelated to the particular job in question. For a discussion of this historical treatment, see *supra* notes 22-88 and accompanying text.