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## AFFILIATIVE DISCRIMINATION THEORY: TITLE VII LITIGATION WITHIN THE SIXTH CIRCUIT

Pierce G. Hand, IV\*

### INTRODUCTION

In *Obergefell v. Hodges*, the Supreme Court of the United States reached a groundbreaking decision by reversing the Court of Appeals for the Sixth Circuit and holding that the Fourteenth Amendment requires states to license and recognize a marriage between two people of the same sex.<sup>1</sup> In reaching this holding, the Court took note of society's changing perspective and remarked that "changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations[.]"<sup>2</sup> The Court further explained, "new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged."<sup>3</sup> As proponents of same-sex marriage celebrate a victory for equal marriage rights, employment practitioners advise that the current cultural shift that led to *Obergefell* "likely signals the arrival of a change in employment law" where sexual orientation discrimination has not been recognized as unlawful.<sup>4</sup> A review of the Sixth Circuit's precedent regarding sexual orientation discrimination within the workplace forecasts, in agreement with practitioners, employment discrimination as the next successful battleground for proponents of lesbian and gay rights.

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\* J.D. Candidate, 2016, Georgia State University College of Law. I would like to thank my mother, Lisa Y. Warner, and my partner, Scot R. Seitz, for their continuous love, support, and encouragement throughout the drafting and publication of this work. I would also like to thank Professors Lauren S. Lucas and Tanya M. Washington for their thoughtful input and inspiration.

1. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607–08 (2015).

2. *Id.* at 2596.

3. *Id.* at 2603.

4. David Wachtel & Karen Tanenbaum, *STRATEGIC PERSPECTIVES—Obergefell v. Hodges and the Future of LGBT Rights in the Workplace*, WOLTERS KLUWER EMP. L. DAILY (CCH), July 14, 2015, 2015 WL 4233773.

Meet Fred Tetro, a Caucasian male and finance manager at a car dealership.<sup>5</sup> After Tetro's boss, the dealership owner, discovered Tetro had a biracial daughter, he began ridiculing and insulting Tetro on different occasions in front of employees and customers.<sup>6</sup> Tetro overheard the owner on a telephone call discussing how he never knew Tetro had a biracial child and how this fact would hurt his dealership and image in the community.<sup>7</sup>

Now, meet Christopher Vickers, a police officer for a medical center who befriended a male doctor and a younger male employee at the medical center.<sup>8</sup> Since Vickers developed these platonic friendships, two coworkers began making homophobic remarks and alleging that Vickers was gay.<sup>9</sup> After learning that Vickers also vacationed with a former male roommate, his coworkers increased the frequency and severity of their harassment: tampering with Vickers's firearm, putting his life in danger during an arrest,<sup>10</sup> constantly referring to him as "fag," and at times "humping" his buttocks to suggest he would enjoy anal sex.<sup>11</sup>

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5. Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc., 173 F.3d 988, 990 (6th Cir. 1999).

6. *Id.* Upon Tetro's biracial daughter visiting him at the car dealership, Tetro's coworker noticed the dealership owner roll his eyes in a derogatory manner and immediately walk away. *Id.* Instead of aiming insults at his biracial daughter, however, the boss ridiculed and insulted Tetro mainly about his weight. *Id.*

7. *Id.*

8. Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 759 (6th Cir. 2006) (stating Vickers befriended a homosexual doctor whom Vickers assisted in an investigation regarding sexual misconduct); Complaint at 16, Vickers v. Fairfield Med. Ctr., No. 2:03-CV-858, 2006 WL 5549247 (S.D. Ohio July 19, 2006) (No. C2-03-858) (stating in August of 2002, Vickers befriended a 17-year-old male employee, named Josh, who aspired to become a police officer and that coworkers referred to Josh as Vickers's boyfriend).

9. Complaint, *supra* note 8, at 15.

10. Complaint, *supra* note 8, at 15–17. Vickers alleged that during an arrest, he discovered his coworkers had previously "double-locked" his handcuffs, requiring a key and two free hands to unlock. *Id.* at 17. Vickers had to temporarily take both his hands off the arrestee, which is dangerous during the apprehension of an arrestee. *Id.*

11. Complaint, *supra* note 8, at 18–20. Alleging almost a year of daily harassment, Vickers claimed the harassment included the following:

impressing the word "FAG" on the second page of Vickers' report forms, frequent derogatory comments regarding Vickers' sexual preferences and activities, frequently calling Vickers a "fag," "gay," and other derogatory names, playing tape-recorded conversations in the office during which Vickers was ridiculed for being homosexual, subjecting Vickers to vulgar gestures, placing irritants and chemicals in Vickers' food and other personal property, using the

What is the difference between Tetro and Vickers? In the Sixth Circuit, Tetro can sue for discrimination under Title VII of the Civil Rights Act of 1964 (Title VII), while Vickers cannot.<sup>12</sup> Title VII prohibits discrimination against employees because of “such individual’s race, color, religion, sex, or national origin.”<sup>13</sup> In the Sixth Circuit, an employee can sue for discrimination under Title VII when he faces a hostile work environment because he affiliates with someone of a certain race—for example, having a biracial daughter—while an employee cannot sue for discrimination when he faces a hostile work environment because he affiliates with someone of a certain sex—for example, having close relationships with other male employees within the workplace.<sup>14</sup> The Sixth Circuit held that Tetro was discriminated against based on his race, even though the “root animus” for the discrimination was prejudice against his biracial child.<sup>15</sup> Here, the Sixth Circuit joins other courts<sup>16</sup> in adopting

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nickname “Kiss” for Vickers, and making lewd remarks suggesting that Vickers provide them with sexual favors.

*Vickers*, 453 F.3d at 759. Vickers also asserted that one of his coworker officers, during handcuff training, handcuffed Vickers and then simulated sex with him while another coworker photographed the incident. *Id.* This photograph was then faxed by one of the officers’ wives to the medical center’s registration center and hung up in the center’s window where several officers, staff, and visitors saw it. *Id.* at 759–60. Other complaints alleged two coworkers repeatedly touched his crotch with a tape measure, grabbed his chest while making derogatory comments, and tried to shove a feminine sanitary napkin in Vickers’s face. *Id.* at 760.

12. *See* 42 U.S.C. § 2000e-2(a) (2012).

13. *Id.* (making it unlawful for any employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin . . .”).

14. *See* *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.*, 173 F.3d 988, 995 (6th Cir. 1999) (“Tetro has stated a claim under Title VII upon which relief can be granted.”); *Vickers*, 453 F.3d at 766 (“Vickers has failed to plead a hostile work environment claim.”).

15. *Tetro*, 173 F.3d at 994. The court reasoned:

If he had been African–American, presumably the dealership would not have discriminated because his daughter would also have been African–American. Or, if his daughter had been Caucasian, the dealership would not have discriminated because Tetro himself is Caucasian. So the essence of the alleged discrimination in the present case is the contrast in races between Tetro and his daughter.

*Id.* at 994–95.

16. *See* *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 513, 519 (6th Cir. 2009). The *Barrett* court held that a reasonable jury could find a Caucasian employee of a Tennessee appliance manufacturing facility stated a claim under Title VII for race discrimination for harassment due to her friendship with black employees: “she received a threat of physical violence for reporting racist language, she was subjected to a regular stream of offensive comments about her relationship with an African-American coworker,

“affiliative discrimination theory”<sup>17</sup>—the idea that a person facing disparate treatment is discriminated against based on that person’s race when the root animus of the discrimination is the race of someone else with whom the person affiliates.<sup>18</sup>

However, in Vickers’s situation—where his coworkers acted hostile toward him because of his friendship affiliation with other male employees<sup>19</sup>—the Sixth Circuit refused to consider this a result

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and the same relationship was allegedly used as a reason to prevent her from applying for improved job positions.” *Id.*; see also *Drake v. Minn. Mining & Mfg. Co.*, 134 F.3d 878, 884 n.3 (7th Cir. 1998) (“[I]n some instances, harassment will be tied inextricably to an employee’s association with individuals of another race.” (citing *Moffett v. Gene B. Glick Co.*, 621 F. Supp. 244, 255 (N.D. Ind. 1985) (“recounting incidents in which the plaintiff, a white woman who was married to a black man, was subjected to anti-black racist statements from her coworkers”))); *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986) (finding failure to hire a white man as an insurance salesman on account of his interracial marriage violated Title VII on the basis of race discrimination because “where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of *his* race”).

17. See *infra* note 18. Scholarly exploration of this theory of discrimination based on affiliation is not unprecedented. It has been discussed using artful terms such as “relational discrimination,” “associative discrimination,” and “third-party associative discrimination.” Victoria Schwartz, *Title VII: A Shift from Sex to Relationships*, 35 HARV. J. L. & GENDER 209, 213 n.25, 222 (2012); Matthew Clark, Comment, *Stating A Title VII Claim for Sexual Orientation Discrimination in the Workplace: The Legal Theories Available After Rene v. MGM Grand Hotel*, 51 UCLA L. REV. 313, 328 (2003); Mark W. Honeycutt II & Van D. Turner, Jr., *Third-Party Associative Discrimination Under Title VII*, 68 TENN. L. REV. 913, 913 (2001). This Note seeks to not only explore the principles of this theory, as done by the aforementioned scholars, but to do so by focusing specifically on two cases within the Sixth Circuit. See *infra* Part II. Focusing on two cases within the same circuit articulates the inconsistencies that result when a circuit court adopts affiliative discrimination theory in one context (race) but not another (sex). Focusing only on two cases also articulates these inconsistencies through fact-to-fact comparison on a smaller, more comprehensible scale. See *infra* Part II. This Note further suggests why the Sixth Circuit should adopt an affiliative discrimination theory for discrimination “because of” sex under Title VII. See *infra* Part III. Whereas the term “relational discrimination” may suggest only family relationships to the exclusion of voluntary social or professional associations and the term “associative discrimination” may connote the First Amendment right to free association, “affiliative discrimination” is used in this Note because it more accurately describes a voluntary connection without a strong degree of association necessary to apply the theory; any degree of affiliation can result in application of the theory. See *infra* note 18.

18. The Sixth and Seventh Circuits, in embracing affiliative discrimination theory, agree that the degree of the association for establishing a claim under the theory is irrelevant (e.g., father/son, wife/husband, friends). See *Barrett*, 556 F.3d at 513 (adopting the Seventh Circuit’s reasoning in *Drake* so that “[i]f a plaintiff shows that 1) she was discriminated against at work 2) because she associated with members of a protected class, then the degree of the association is irrelevant”); *Drake*, 134 F.3d at 884 (“[W]e do not believe that an objective ‘degree of association’ is relevant to this inquiry.”).

19. Vickers served in what appeared to be a mentorship role to one of the younger employees at the medical center that aspired to become a police officer, had a close enough friendship with his former roommate to vacation with him in Florida, and also formed a friendship with one of the male doctors at the hospital. *Vickers*, 453 F.3d at 759; Complaint, *supra* note 8, at 16. “Vickers asserts that he has never discussed his sexuality with any of his coworkers.” *Vickers*, 453 F.3d at 759.

of Vickers's sex, but rather because of his perceived homosexual sexual orientation—a type of discrimination that Congress did not intend to protect according to the Sixth Circuit.<sup>20</sup> However, the Sixth Circuit's aim, to avoid “bootstrap[ping] protection for sexual orientation into Title VII” by not adopting affiliative discrimination theory for sex discrimination cases,<sup>21</sup> conflicts with their own Title VII race jurisprudence and the Supreme Court's decisions in two cases: (1) *Price Waterhouse v. Hopkins*, where the Court interpreted Title VII's prohibition of sex discrimination to include employees not conforming to gender roles (i.e., “sex stereotyping”);<sup>22</sup> and (2) *Oncale v. Sundowner Offshore Services, Inc.*, where the Court held Title VII's prohibition of sex discrimination to include “reasonably comparable evils” that were not the “principal evils” Congress intended to prohibit.<sup>23</sup>

This Note argues that the Sixth Circuit, in order to maintain consistent jurisprudence within its own circuit and with the Supreme Court, should adopt affiliative discrimination theory under sex discrimination in Title VII as it has done with race discrimination.<sup>24</sup>

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20. *Vickers*, 453 F.3d at 763 (holding that because “the gender non-conforming behavior which Vickers claims supports his theory of sex stereotyping is not behavior observed at work or affecting his job performance . . . the harassment of which Vickers complains is more properly viewed as harassment based on Vickers's perceived homosexuality, rather than based on gender non-conformity”). “[A]ny discrimination based on sexual orientation would be actionable under a sex stereotyping theory if this claim is allowed to stand, as all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices.” *Id.* at 764. Although “[h]arassment on the basis of sexual orientation has no place in our society[, c]ongress has not yet seen fit, however, to provide protection against such harassment.” *Id.* at 764–65 (quoting *Bibby v. Phila. Coca-Cola Bottling Co.*, 260 F.3d 257, 265 (3d Cir. 2001)).

21. *Id.* at 764 (“Like other courts, we have therefore recognized that a gender stereotyping claim should not be used to bootstrap protection for sexual orientation into Title VII.”) (quoting *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005)).

22. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

23. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998); Brief for Petitioner, *Oncale*, 523 U.S. 75 (No. 96-568), 1997 WL 458826, at \*6–7. The Court noted that some courts, like the Fifth Circuit in this case, have held that same-sex sexual harassment claims—where the aggressor and victim are of the same sex—are never cognizable under Title VII, while other courts maintain that such claims are actionable only if the plaintiff can prove that the harasser is homosexual, and while still others suggest that workplace harassment that is sexual in content is always actionable, regardless of the harasser's sex, sexual orientation, or motivations. *Oncale*, 523 U.S. at 79.

24. This type of protection has also been extended to national origin. Schwartz, *supra* note 17, at 221–22 (interpreting the court's analysis in *Reiter v. Ctr. Consol. Sch. Dist.* to mean that discriminatory employment practices based on an individual's association with people of a particular race or national origin because of disapproval of such associations due to the individual's own race or national origin are

By addressing this inconsistency, the Sixth Circuit will provide greater protection for sex discrimination, reinforce reliability in Title VII with a uniform interpretation of race and sex discrimination, and help victimized employees make informed decisions in calculating the probability of success in litigating a Title VII sex discrimination claim. Part I of this Note provides a historical account of the treatment of race and sex under Title VII.<sup>25</sup> Part II analyzes the Sixth Circuit's split from its own jurisprudence and the Supreme Court in adopting affiliative discrimination in *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.* while rejecting this theory in *Vickers v. Fairfield Medical Center*.<sup>26</sup> Part III proposes that the Sixth Circuit adopt affiliative discrimination theory for sex discrimination under Title VII in order to resolve this inconsistency, alleviate the difficult task of distinguishing between discrimination based on sex and discrimination based on sexual orientation, and realize the benefits and increased protection to which citizens are statutorily entitled.<sup>27</sup>

## I. BACKGROUND

### A. Race Under Title VII's Liberal Construction

Title VII of the Civil Rights Act of 1964 makes it “an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.”<sup>28</sup> Although Title VII's statutory language explicitly states “because of such individual's race,” the

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prohibited under Title VII (citing *Reiter v. Ctr. Consol. Sch. Dist.*, 618 F. Supp. 1458, 1460 n.1 (D. Colo. 1985) (holding that “discriminatory employment practices based on an individual's association with people of a particular race or national origin” are prohibited under Title VII)).

25. *See infra* Part I.

26. *See infra* Part II.

27. *See infra* Part III.

28. 42 U.S.C. § 2000e-2(a)(1) (2012). The term “race” has been held to prohibit discrimination against white as well as black persons. *See McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976) (“We therefore hold today that Title VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable were they Negroes and Jackson white.”).

Eleventh Circuit, in the 1986 case of *Parr v. Woodmen*, was the first circuit court to broaden the interpretation of this phrase by adopting affiliative discrimination theory and including the race of another person with whom one affiliates.<sup>29</sup>

In *Parr*, a white man claimed that an insurance company did not hire him as a salesman because his wife was black.<sup>30</sup> In resolving the Title VII claim, the Eleventh Circuit found “irrefutable” the logic used in a similar case before the Southern District of New York, *Whitney v. Greater New York Corp. of Seventh-Day Adventists*:

Manifestly, if Whitney was discharged because, as alleged, the defendant disapproved of a social relationship between a white woman and a black man, the plaintiff’s race was as much a factor in the decision to fire her as that of her friend. Specifying as she does that she was discharged because she, a white woman, associated with a black, her complaint falls within the statutory language that she was ‘[d]ischarged . . . because of [her] race.’<sup>31</sup>

The Eleventh Circuit also noted that it was obliged to give Title VII a liberal construction and that it was “the duty of the courts to make sure that the [Title VII] Act works” and is not “hampered by a combination of a strict construction of the statute in a *battle with semantics*.”<sup>32</sup> After *Parr*, other courts, including the Sixth and Seventh Circuits, adopted affiliative discrimination theory for Title VII race claims, allowing citizens to sue for discrimination based on the race of persons with whom they affiliated—e.g., wives, daughters, friends, etc.<sup>33</sup>

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29. Schwartz, *supra* note 17, at 223–24.

30. *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 889 (11th Cir. 1986). The district court dismissed Parr’s action because the text of the statute proscribed discrimination against *his* race and not his wife’s race. *Id.* at 891.

31. *Id.* at 891–92 (quoting *Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363, 1366 (S.D.N.Y. 1975)).

32. *Id.* at 892 (citing *Culpepper v. Reynolds Metals Co.*, 421 F.2d 888, 891 (5th Cir. 1970)).

33. See *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 513, 519 (6th Cir. 2009) (holding a reasonable jury could find a Caucasian employee of a Tennessee appliance manufacturing facility stated a claim under Title VII for race discrimination after being threatened with physical violence due to her friendship with black employees); *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks*,



## B. Sex Under Title VII

### 1. The Road to Actionable Sexual Harassment Claims Under Title VII

Although the central purpose of the Civil Rights Act of 1964 was to prohibit racial discrimination,<sup>34</sup> U. S. Representative Howard W. Smith of Virginia, at the last-minute, led an amendment to include the protected category of “sex.”<sup>35</sup> The principal argument in opposition to the amendment was that “sex discrimination” was sufficiently different from other types of discrimination and ought to receive separate legislative treatment; however, this argument was defeated.<sup>36</sup> Courts lack a detailed legislative history available to interpret what is inclusive of “sex” under Title VII because this amendment passed at the last-minute; thus, a lack of certainty and uniformity exists across jurisdictions.<sup>37</sup> In fact, because sexual harassment was not on the face of the statute, many courts did not acknowledge it as a cause of action until the Supreme Court’s 1986 decision in *Meritor Savings Bank v. Vinson*.<sup>38</sup>

In *Meritor*, a female bank employee engaged in sexual relations with her boss out of fear that if she resisted his propositions, she would lose her job.<sup>39</sup> The Court held that this sexual harassment was

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Inc., 173 F.3d 988, 995 (6th Cir. 1999) (holding Tetro can sue for discrimination under Title VII of the Civil Rights Act of 1964 because he affiliates with someone of a different race—his half black daughter); *Drake v. Minn. Mining & Mfg. Co.*, 134 F.3d 878, 884 n.3 (7th Cir. 1998) (“[I]n some instances, harassment will be tied inextricably to an employee’s association with individuals of another race.” (citing *Moffett v. Gene B. Glick Co.*, 621 F. Supp. 244, 255 (N.D. Ind. 1985))); *Parr*, 791 F.2d at 892 (stating a white man alleging an insurance company failed to hire him as an insurance salesman due to his interracial marriage violated Title VII on the basis of race discrimination because “[w]here a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of his race”).

34. Yesenia Gallegos, Note, *Sexual Harassment of Female Crewmembers: Title VII’s Weaknesses in Protecting Women Employed in the Maritime Industry*, 15 U.S.F. MAR. L.J. 455, 459 (2003) (“The central purpose of the Civil Rights Act of 1964, however, was not to protect women from sex discrimination and sexual harassment but to prohibit and remedy race-based employment decisions.”).

35. *Id.* at 459.

36. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 63–64 (1986) (citing 110 CONG. REC. 2577–84 (1964)).

37. Gallegos, *supra* note 34, at 459–60.

38. *Id.* at 460; *Meritor Sav. Bank*, 477 U.S. 57.

39. *Meritor Sav. Bank*, 477 U.S. at 60.

a form of discrimination on the basis of sex and thus a violation of Title VII by creating a hostile or abusive work environment.<sup>40</sup> The Court reasoned that sexual harassment that creates a hostile environment for members of one sex is a barrier to sexual equality in the workplace similar to how racial harassment acts as a barrier to racial equality.<sup>41</sup>

## *2. The Supreme Court Focuses on the Entire Spectrum of Disparate Treatment: Gender Norms & Same-Sex Harassment*

In 1989, the Supreme Court acknowledged a new form of sex discrimination called “sex stereotyping” in *Price Waterhouse v. Hopkins*.<sup>42</sup> In *Price Waterhouse*, a female partnership candidate in an accounting firm was denied the position because she did not walk, talk, or dress femininely, and did not wear make-up, wear jewelry, or style her hair.<sup>43</sup> The Court held that “an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”<sup>44</sup> The Court reasoned that “assuming or insisting” that employees match the stereotype associated with their sex is prohibited by Title VII, for “Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”<sup>45</sup> *Price Waterhouse* led

40. *Id.* at 66. The Supreme Court also noted that “not all workplace conduct that may be described as ‘harassment’ affects a ‘term, condition, or privilege’ of employment within the meaning of Title VII.” *Id.* at 67 (citing *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971) (stating that “‘mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee’ would not affect the conditions of employment to sufficiently significant degree to violate Title VII”)); *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982) (stating same)). “For sexual harassment to be actionable, it must be sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’” *Meritor Sav. Bank*, 477 U.S. at 67.

41. *Meritor Sav. Bank*, 477 U.S. at 67. The logic was that her boss would not have subjected her to such propositions for sex if she was a man instead of a woman—making the workplace environment hostile for women and not men. *See id.*

42. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51 (1989).

43. *Id.* at 235.

44. *Id.* at 250. Throughout the *Price Waterhouse* opinion, the Court uses the terms “sex” and “gender.” *See generally id.* Early on, the courts defined “sex” as merely biological sex, and interpreted the provision to only prohibit discrimination against biological men and women (mostly women) for being a man or being a woman. Cody Perkins, Comment, *Sex and Sexual Orientation: Title VII After Macy v. Holder*, 65 ADMIN. L. REV. 427, 428 (2013).

45. *Price Waterhouse*, 490 U.S. at 251 (citing *City of Los Angeles, Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

to cases in which Title VII was found to prohibit discrimination against a male employee who walks and carries his tray like a woman<sup>46</sup> or takes the last name of his female spouse because such actions are considered non-gender conforming.<sup>47</sup>

Generally, sexual harassment claims where the parties are of the opposite sex make it easier for courts to infer that the discrimination was “because of” sex, since these claims typically involve explicit or implicit proposals of sexual activity; this made it reasonable to assume that those proposals would not have been made to someone of the same sex.<sup>48</sup> However, courts have struggled to reach this inference where the parties were of the same sex and consequently split on the issue using different approaches.<sup>49</sup> In 1998, less than ten years after *Price Waterhouse*, the Supreme Court resolved this inconsistency in *Oncale v. Sundowner Offshore Services, Inc.* where a male employee of an eight-man oil crew alleged sexual harassment after being subjected to sex-related, humiliating actions against him by male coworkers.<sup>50</sup> The Court found harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.<sup>51</sup>

46. *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 869–70 (9th Cir. 2001).

47. *Koren v. Ohio Bell Tel. Co.*, 894 F. Supp. 2d 1032, 1038 (N.D. Ohio 2012).

48. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).

49. *Oncale*, 523 U.S. at 79 (discussing inconsistencies arise from three different court approaches: (1) Fifth Circuit’s holding that same-sex sexual harassment claims are never cognizable under Title VII, (2) other courts’ holdings that such claims are actionable only if the plaintiff can prove that the harasser is homosexual (and thus presumably motivated by sexual desire), and (3) other courts’ holdings that workplace harassment sexual in content is always actionable, regardless of the harasser’s sex, sexual orientation, or motivations (citing *Doe v. Belleville*, 119 F.3d 563 (7th Cir. 1997); *McWilliams v. Fairfax Cnty. Bd. of Supervisors*, 72 F.3d 1191 (4th Cir. 1996); *Wrightson v. Pizza Hut of Am.*, 99 F.3d 138 (4th Cir. 1996); *Goluszek v. H.P. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988))).

50. *Id.* at 77. Over a number of weeks, Oncale alleged being “sexually assaulted, battered, touched, and threatened with rape by his direct supervisor, John Lyons, and a second supervisor, Danny Pippen, who, as a driller for Sundowner, exercised de facto control over the terms and conditions of Oncale’s employment.” Brief for Petitioner, *supra* note 23, at \*4. “The third individual defendant, Brandon Johnson, [was] a coworker with no apparent supervisory authority . . .” *Id.*

51. *Oncale*, 523 U.S. at 80. Counsel for Oncale argued the sexual harassment aimed at Oncale targeted homosexuality because the harassers knew it would specifically degrade and humiliate Oncale as a male, as opposed to being a female subjected to such harassment. Brief for Petitioner, *supra* note 23, at \*7.

The record confirms that Lyons, Johnson, and Pippen said what they said and did what they did because Joseph Oncale was a male. They used sexual talk and activity to demean and humiliate him. They chose their words and conduct

The Supreme Court acknowledged that Congress did not originally pass Title VII to prohibit same-sex sexual harassment, but stated that “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”<sup>52</sup> The Supreme Court explicitly stated that protection from discrimination based on sex “must extend to sexual harassment of any kind that meets statutory requirements.”<sup>53</sup>

### *3. A New Gender Performance Rule to Exclude Sexual Orientation Under Title VII*

After *Price Waterhouse*, scholars thought homosexual people would have the right to bring cases under Title VII using the sex-stereotyping theory.<sup>54</sup> By definition, attraction to someone of the same sex qualifies a homosexual person as non-conforming to gender norms.<sup>55</sup> However, courts began distinguishing, with much struggle, between whether the harasser was acting because of the victim’s sex or because of the victim’s sexual orientation.<sup>56</sup> This distinction is important because it showed that some courts interpreted Title VII not to protect sexual orientation.<sup>57</sup>

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because Oncale was a man, knowing that such language and conduct would degrade him as a man.

*Id.* Additionally, *Oncale* set out three non-exhaustive ways to establish a claim for same-sex sexual harassment: (1) showing the harasser is homosexual, (2) showing the harasser is motivated by general hostility to the presence of a gender in the workplace, or (3) showing direct comparative evidence on how the harasser treated both sexes in a mixed-sex workplace. *Oncale* 523 U.S. at 80–81; *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1009 (7th Cir. 1999) (“[W]e discern nothing in the Supreme Court’s decision indicating that the examples it provided were meant to be exhaustive rather than instructive.”).

52. Perkins, *supra* note 44, at 433.

53. *Oncale*, 523 U.S. at 80.

54. Perkins, *supra* note 44, at 429. The claim for homosexuals would be that discrimination was based either on the stereotype that men should only be attracted to women or women should only be attracted to men. *Id.*

55. *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006) (“[A]ll homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices.”).

56. *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 478 (5th Cir. 2013).

57. Perkins, *supra* note 44, at 429, 429 n.15 (citing *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 703–07 (7th Cir. 2000); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69 (8th Cir. 1989); and *Sarff v. Cont’l Express*, 894 F. Supp. 1076, 1084 (S.D. Tex. 1995)).

In 2000, the Second Circuit in *Simonton v. Runyon* interpreted Congress's rejection of numerous bills extending protection to individuals based on sexual orientation to justifiably indicate a "strong congressional intent" not to protect sexual orientation under Title VII and employed a gender performance rule to distinguish discrimination because of sex from discrimination because of sexual orientation.<sup>58</sup> The gender performance rule required a male victim of same-sex sexual harassment, because of his perceived or real homosexuality, to behave in a stereotypically feminine manner to show that the harassment was based on nonconformity with male gender norms instead of his sexual orientation.<sup>59</sup>

Six years later, the Sixth Circuit in *Vickers v. Fairfield Medical Center*, in order to objectively<sup>60</sup> determine whether a harasser acted because of the victim's sex or sexual orientation,<sup>61</sup> adopted *Simonton's* gender performance rule and required the victim to present evidence of gender nonconformity by appearance or behavior in the workplace or in a way that affected job performance.<sup>62</sup>

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58. *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000) (citing Employment Nondiscrimination Act of 1996, S. 2056, 104th Cong. (1996); Employment Non-Discrimination Act of 1995, H.R. 1863, 104th Cong. (1995); and Employment Non-Discrimination Act of 1994, H.R. 4636, 103d Cong. (1994)).

We do not have sufficient allegations before us to decide *Simonton's* claims based on stereotyping because we have no basis in the record to surmise that *Simonton* behaved in a stereotypically feminine manner and that the harassment he endured was, in fact, based on his non-conformity with gender norms instead of his sexual orientation.

*Id.* at 38. See also *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085–86 (7th Cir. 1984) (noting Congress has rejected a number of proposed amendments to Title VII to prohibit discrimination based on sexual orientation).

59. *Simonton*, 232 F.3d at 38.

60. *Boh Bros. Constr.*, 731 F.3d at 478–79 ("The only objective way for courts or juries to grasp that a same-sex harasser is acting 'because of' the victim's sex is for the victim (or the harasser) visibly not to conform to gender stereotype.").

61. *Id.* at 478.

62. *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 763 (6th Cir. 2006). *Vickers* did not rely directly on *Simonton* in its opinion for the gender performance rule but actually relied on *Dawson v. Bumble & Bumble*, a case in the Second Circuit stating that an individual may have a viable Title VII discrimination claim where the employer acted out of animus toward the employee's "exhibition of behavior considered to be stereotypically inappropriate for [the employee's] gender." *Id.* at 763 (quoting *Dawson v. Bumble & Bumble*, 398 F.3d 211, 221 (2d Cir. 2005)). However, *Dawson's* interpretation of *Price Waterhouse* is the same as *Simonton's* interpretation—"one can fail to conform to gender stereotypes in two ways: (1) through behavior or (2) through appearance." *Vickers*, 453 F.3d at 763 (quoting *Dawson*, 398 F.3d at 221); *Simonton*, 232 F.3d at 38.

## II. ANALYSIS

Part II will first analyze the conflicting reasoning of the Sixth Circuit’s adoption of affiliative discrimination for “race” in *Tetro* but not for “sex” in *Vickers* under Title VII.<sup>63</sup> Next, Part II will examine the Sixth Circuit’s misapplication of the sex stereotyping theory and gender performance rule in *Vickers* to avoid protecting sexual orientation discrimination and avoid adopting affiliative discrimination theory.<sup>64</sup> Finally, Part II will scrutinize how the Sixth Circuit’s refusal to adopt affiliative discrimination theory departs from the Supreme Court’s precedent in *Oncale* to apply Title VII protection beyond congressional intent against “reasonably comparable evils.”<sup>65</sup>

### A. *The Sixth Circuit’s Refusal to Adopt Affiliative Discrimination Theory for Sex Discrimination in Vickers Conflicts with its Reasoning in Tetro*

#### 1. *The Sixth Circuit’s Adoption of Whitney’s “Irrefutable” Logic*

The backbone of the Sixth Circuit’s reasoning in *Tetro* stems from the Eleventh Circuit’s reliance on *Whitney v. Greater New York Corp. of Seventh-Day Adventists*:

Manifestly, if Whitney was discharged because, as alleged, the defendant disapproved of a social relationship between a white woman and a black man, the plaintiff’s race was as much a factor in the decision to fire her as that of her friend. Specifying as she does that she was discharged because she, a white woman, associated with a black, her complaint falls within the statutory

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63. See *infra* Part II.A. This analysis discusses the Sixth Circuit’s reliance on the Eleventh Circuit’s opinion in *Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists*, canons of statutory construction, and guidance issued by the Equal Employment Opportunity Commission. See *infra* Part II.A.1–2.

64. See *infra* Part II.B.

65. See *infra* Part II.C.

language that she was ‘[d]ischarged . . . because of [her] race.’<sup>66</sup>

*Whitney*’s reasoning, considered “irrefutable” by the Eleventh Circuit, exemplifies the principle underlying affiliative discrimination theory: “[w]here a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of *his* race.”<sup>67</sup> In *Tetro*, a Caucasian plaintiff faced adverse treatment because of his interracial association with his biracial daughter; thus, his adverse treatment was, by definition, because of his race.<sup>68</sup> The Court reasoned further that if *Tetro* had been African-American or his daughter Caucasian, presumably the dealership would not have discriminated against him.<sup>69</sup>

In *Vickers*, similar elements exist for the court to conclude that *Vickers*’s coworkers discriminated against him because of his sex.<sup>70</sup> *Vickers* faced adverse treatment from his fellow police officers because of his same-sex association with medical center employees and his former roommate; thus, his adverse treatment was, by definition, because of his sex.<sup>71</sup> If *Vickers* or his associates had been

66. *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 891–92 (11th Cir. 1986) (quoting *Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363, 1366 (S.D.N.Y. 1975)).

67. *Id.* at 892; *see also Whitney*, 401 F. Supp. at 1366.

68. *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.*, 173 F.3d 988, 994–95 (6th Cir. 1999).

69. *Id.* at 995 (“The net effect is that the dealership has allegedly discriminated against *Tetro* because of his race.”).

70. *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 761 (6th Cir. 2006). While *Vickers* did not raise affiliative discrimination as a theory of sex discrimination but only raised a theory of sex stereotyping before the Sixth Circuit, *Vickers* did claim disparate treatment based on his sex under Title VII and the court effectively rejected affiliative discrimination theory by determining that discrimination based on *Vickers*’s perceived homosexual relationship with other males was not based on *Vickers*’s sex but his perceived sexual orientation (unlike what the court would have likely done in a Title VII race case). *Id.* (“The complaint alleged sex discrimination, sexual harassment, and retaliation in violation of Title VII . . .”).

71. *Id.* at 759.

Once his co-workers found out about the friendship, *Vickers* contends that *Dixon* and *Mueller* “began making sexually based slurs and discriminating remarks and comments about *Vickers*, alleging that *Vickers* was ‘gay’ or homosexual, and questioning his masculinity.” *Vickers* asserts that following a vacation in April 2002 to Florida with a male friend, *Dixon*’s and *Mueller*’s harassing comments and behavior increased.

*Id.* *Vickers* befriended a seventeen-year-old male employee, named *Josh*, who aspired to become a

female, certainly his coworkers would not have discriminated against him with daily homophobic remarks, sexual touching to exemplify homosexual acts, and other hostile treatment related to homosexuality. The “net effect,” as the Sixth Circuit phrased it in *Tetro*, is that the defendants discriminated against Vickers because of his sex.<sup>72</sup> Following *Whitney*’s logic, if Vickers was discriminated against because the defendants disapproved of a social relationship between two males, Vickers’s sex was as much a factor in the decision to discriminate against him as his associate’s sex—this falls within Title VII’s statutory language as an actionable claim.<sup>73</sup>

*2. The Sixth Circuit’s Reliance on Canons of Statutory Construction & Guidance from the Equal Employment Opportunity Commission*

The Sixth Circuit in *Tetro* also found support for applying affiliative discrimination to the protected category of race by relying on the canons of statutory construction and guidance from the Equal Employment Opportunity Commission (EEOC).<sup>74</sup> This same reasoning supports applying affiliative discrimination theory to the protected category of sex in *Vickers*.

*a. Applying the Cardinal Canon of Legislative Purpose*

In *Tetro*, the court found that the absence of words like “directly” or “indirectly” in the statute, concerning how a person may discriminate “because of such individual’s race,” created

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police officer and his coworkers referred to Josh as Vickers’s boyfriend. Complaint, *supra* note 8, at 16.

72. See *Tetro*, 173 F.3d at 995 (“The net effect is that the dealership has allegedly discriminated against Tetro because of his race.”).

73. *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 891–92 (11th Cir. 1986) (quoting *Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363, 1366 (S.D.N.Y. 1975)). For a disparate treatment claim, “showing that discrimination was a ‘motivating’ or ‘substantial’ factor to shift the burden of persuasion to the employer” is sufficient; Congress does not require “but-for causality.” See 42 U.S.C. § 2000e-2(m) (2012) (“[A]n unlawful employment practice is established when the complaining party demonstrates that race color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”); *Burrage v. United States*, 134 S. Ct. 881, 889 n.4 (2014).

74. See *infra* Part II.A.2.a–c.



ambiguity.<sup>75</sup> Consequently, the court applied the “cardinal” canon of statutory construction: interpreting statutes “harmoniously with their dominant legislative purpose.”<sup>76</sup> The Sixth Circuit reasoned that, on its face, Title VII broadly protects “victims of discriminatory animus towards third persons with whom the individuals associate” and its purpose is consistent with the affiliative discrimination alleged by Tetro.<sup>77</sup>

The Sixth Circuit’s determination that the lack of words like “directly” or “indirectly” renders “race” ambiguous means that “sex” is ambiguous because Title VII protected traits of “race” and “sex” are in the same sentence; thus, an inquiry into the legislative purpose is necessary.<sup>78</sup> Before Title VII’s passage, and upon the amendment to the Civil Rights Act of 1964 for the inclusion of the term “sex,” it was argued that “sex discrimination” was sufficiently different from other types of discrimination and ought to receive separate legislative treatment.<sup>79</sup> The defeat of this argument sends a clear message that legislators intended to treat “race” and “sex” in the same manner.

Because the Sixth Circuit determined that Title VII’s legislative history supports a broad construction of “race,” to include Tetro’s claim based on the relationship between his race and the race of his daughter with whom he associates,<sup>80</sup> one could reasonably argue that the legislative history supports a broad construction of “sex” to

75. *Tetro*, 173 F.3d at 995 (citing *Nixon v. Kent Cty.*, 76 F.3d 1381, 1394 (6th Cir. 1996) (Keith, J., dissenting)).

76. *Id.*

77. *Id.* at 994 (“[C]ourts . . . have broadly construed Title VII to protect individuals who are the victims of discriminatory animus towards third persons with whom the individuals associate . . . . Similarly, we find that Tetro has stated a claim upon which relief can be granted under Title VII.”) (citing *Parr*, 791 F.2d at 890; *Chacon v. Ochs*, 780 F. Supp. 680, 680–81 (C.D. Cal. 1991); and *Whitney*, 401 F. Supp. at 1366)).

78. See 42 U.S.C. § 2000e-2(a).

It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin . . . .

*Id.*; see also *Tetro*, 173 F.3d at 995.

79. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 63–64 (1986) (citing 110 CONG. REC. 2577–84 (1964)).

80. See *Tetro*, 173 F.3d at 995.

include Vickers's claims based on the relationship between his sex and the sex of people with whom he associates with. To interpret otherwise is not harmonious with Title VII's dominant legislative purpose and violates the cardinal canon of construction.

*b. Applying "Noscitur a Sociis"—Defining a Word by the Company it Keeps*

When a statutory word is vague or ambiguous, courts may clarify its meaning and intent by referencing the surrounding words or phrases.<sup>81</sup> *Noscitur a sociis*, or "it is known from its associates," is a well-settled statutory canon: "a word may be defined by an accompanying word, and that, ordinarily, the coupling of words denotes an intention that they should be understood in the same general sense."<sup>82</sup> Because the Sixth Circuit has already identified and determined ambiguity exists within Title VII, it is proper to apply *noscitur a sociis* to ascertain the legislative meaning of the term "sex" in the statutory phrase, "because of such individual's sex."<sup>83</sup>

"Race" and "sex" are words that appear, albeit not immediately, within the statute one after the other: "It shall be . . . unlawful . . . to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin . . ."<sup>84</sup> In accordance with *noscitur a sociis*, the coupling of "race," "sex," and other outlined categories denotes a legislative intent to understand these categories in the same general sense.<sup>85</sup> In race discrimination cases like *Tetro*, courts understand the statutory relationship between "because of" and the enumerated word "race" to include a prohibition of discriminatory animus towards the race of third persons with

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81. NORMAN SINGER & SHAMBIE SINGER, SUTHERLAND STATUTES & STATUTORY CONSTRUCTION § 47:16 (7th ed. 2007).

82. *Id.*

83. *Tetro*, 173 F.3d at 995 (citing *Nixon v. Kent Cty.*, 76 F.3d 1381, 1394 (6th Cir. 1996) (Keith, J., dissenting)); SINGER & SINGER, *supra* note 81, § 47:16 ("The maxim *noscitur a sociis* is only a guide to legislative intent . . . and so, like any rule of construction, does not apply absent ambiguity . . .").

84. 42 U.S.C. § 2000e-2(a) (2012) ("It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . .").

85. SINGER & SINGER, *supra* note 81, § 47:16.

whom individuals associate.<sup>86</sup> In sex discrimination cases like *Vickers*, the court must also embrace that proper statutory construction supports a relationship between “because of” and the enumerated word “sex” to include a prohibition of discriminatory animus towards the sex of third persons with whom individuals associate. This equal treatment of “race” and “sex” is also supported by the defeat of the argument among legislators in 1964 that “sex discrimination” was sufficiently different from other types of discrimination upon passing Title VII.<sup>87</sup> Therefore, sex should be understood as encompassing affiliative discrimination along the same line of reasoning given to race.<sup>88</sup>

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86. *Tetro*, 173 F.3d at 995 (citing *Nixon v. Kent Cty.*, 76 F.3d 1381, 1394 (6th Cir. 1996) (Keith, J., dissenting)); see also SINGER & SINGER, *supra* note 81, § 47:16.

87. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 63–64 (1986) (citing 110 CONG. REC. 2577–84 (1964)).

88. Beyond applying affiliative discrimination theory to race, courts have also broadly interpreted “national origin” to embrace affiliative discrimination, consistently holding that Title VII protects an individual who is discriminated against because of his or her relationship with someone of a different national origin. Schwartz, *supra* note 17, at 211. In *Chacon v. Ochs*, a Caucasian woman brought action under Title VII alleging that she was subjected to a hostile work environment because she was married to a Hispanic man. *Chacon v. Ochs*, 780 F. Supp. 680, 680 (C.D. Cal. 1991). The EEOC defines Hispanic as “[a] person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin regardless of race.” U.S. EQUAL EMP. OPPORTUNITY COMM’N, OMB, No. 3046-0007, INSTRUCTION BOOKLET: STANDARD FORM 100, EMPLOYER INFORMATION REPORT EEO-1 (2006), [http://www.eeoc.gov/employers/eo1survey/upload/instructions\\_form.pdf](http://www.eeoc.gov/employers/eo1survey/upload/instructions_form.pdf). Also, the EEOC maintains that “[n]ational origin discrimination involves treating people (applicants or employees) unfavorably because they are from a particular country or part of the world, because of ethnicity or accent, or because they appear to be of a certain ethnic background (even if they are not).” *National Origin Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <http://www.eeoc.gov/laws/types/nationalorigin.cfm> (last visited Nov. 18, 2014). The court in *Chacon* noted that the different jurisdictions that have considered “whether Title VII violations include discriminatory employment practices based on an individual’s association with people of a different national origin” were divided on the issue. *Chacon*, 780 F. Supp. at 681. Ultimately, though, the court relied on the “irrefutable” logic in *Whitney* and held that the better-reasoned decisions recognize such a Title VII violation. *Chacon*, 780 F. Supp. at 681; *Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363, 1366 (S.D.N.Y. 1975). Although the court did not go through a statutory analysis using *noscitur a sociis*, it is evident that it seemed compelled to treat national origin as encompassing affiliative discrimination in a similar manner as the holding in *Whitney* treated race. *Chacon*, 780 F. Supp. at 681; *Whitney*, 401 F. Supp. at 1366.

*c. The EEOC Interprets Title VII to Prohibit Sexual Orientation Discrimination*

Additionally, the Sixth Circuit in *Tetro* supported its decision with guidance from the EEOC.<sup>89</sup> The *Tetro* court noted that the EEOC, charged by Congress to interpret, administer, and enforce Title VII, has consistently held that “an employer who takes adverse action against an employee or a potential employee because of an interracial association violates Title VII.”<sup>90</sup> The Supreme Court has also held that the EEOC’s administrative interpretation of Title VII is entitled to “great deference.”<sup>91</sup> Although the EEOC adopted affiliative discrimination theory for race discrimination cases arising under Title VII at the time *Tetro* and *Vickers* were decided, the EEOC had not found Title VII to prohibit sexual orientation discrimination under Title VII’s purview of sex discrimination.<sup>92</sup> A recent review of EEOC decisions, however, suggests that the Sixth Circuit should also adopt affiliative discrimination theory for sex discrimination cases, especially considering the Supreme Court’s instruction to give “great deference”<sup>93</sup> to administrative interpretations of Title VII.

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89. *Tetro*, 173 F.3d at 994.

90. *Id.* (citing *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986)).

91. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433–34 (1971) (finding good reason to treat the guidelines as expressing the will of Congress where the Commission’s construction is supported by the Act and legislative history); see Rosanna McCalips, Note, *What Recent Court Cases Indicate About English-Only Rules in the Workplace: A Critical Look at the Need for A Supreme Court Ruling on the Issue*, 4 U. PA. J. LAB. & EMP. L. 417, 419–20 (2002) (citing 42 U.S.C. § 2000e-12(a) (2012)).

92. Following the *Tetro* and *Vickers* decisions, “the [EEOC] . . . has made great strides . . . [toward] recognizing in non-binding decisions that discrimination based on sexual orientation falls under sex stereotyping and is therefore covered under Title VII.” Perkins, *supra* note 44, at 430 (citing *Castello v. Donahoe*, Appeal No. 0120111795, 2011 WL 6960810, at \*3 (EEOC Dec. 20, 2011) (holding that Castello alleged a plausible sex stereotyping case which would entitle her to relief under Title VII after being subjected to discriminatory remarks by her manager motivated by the sexual stereotype that having relationships with men is an essential part of being a woman and Castello’s failure to adhere to this stereotype); *Veretto v. Donahoe*, Appeal No. 0120110873, 2011 WL 2663401, at \*3 (EEOC July 1, 2011) (finding a plausible sex stereotyping case where a man alleged he was harassed because he intended to marry another man)). See also *Hitchcock v. Dep’t of Homeland Sec.*, Appeal No. 0120051461, 2007 WL 1393665 (EEOC May 3, 2007). Essentially, the EEOC maintains the view that “when lesbian, gay, and bisexual federal employees allege hostile work environments based on sex-stereotyping, they may be entitled to relief under Title VII.” Verónica Caridad Rabelo & Lilia M. Cortina, *Two Sides of the Same Coin: Gender Harassment and Heterosexist Harassment in LGBQ Work Lives*, 38 LAW & HUM. BEHAV. 378, 386 (2014).

93. *Tetro*, 173 F.3d. at 994 (citing *Griggs*, 401 U.S. at 434).

On July 15, 2015, in *Complainant v. Anthony Foxx*, the EEOC definitively held that discrimination based on sexual orientation is considered sex discrimination within Title VII's statutory meaning and is a violation of the statute.<sup>94</sup> *Foxx* involved a male air traffic controller's allegation that his employer, the Federal Aviation Administration, refused to hire him for a permanent position as a Front Line Manager because he identifies as gay.<sup>95</sup> During the selection process, the complainant claimed that his supervisor "made several negative comments about [c]omplainant's sexual orientation," like stating he did not "need to hear about that gay stuff" when complainant mentioned his partner, and that complainant's male partner was "a distraction in the radar room."<sup>96</sup>

In reversing and remanding its previous decision, and dismissing the complaint on procedural grounds of timeliness, the EEOC on appeal found the claim was raised in a timely fashion and held an employee "alleging that an agency took his or her sexual orientation into account in an employment action necessarily alleges that the agency took his or her sex into account."<sup>97</sup> The agency reasoned:

Discrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms. "Sexual orientation" as a concept cannot be defined or understood without reference to sex. A man is referred to as "gay" if he is physically and/or emotionally attracted to other men. A woman is referred to as "lesbian" if she is physically and/or emotionally attracted to other women. Someone is referred to as "heterosexual" or "straight" if he or she is physically and/or emotionally attracted to someone of the opposite-sex. It follows, then, that sexual orientation is inseparable from and inescapably linked to sex and, therefore, that allegations of sexual orientation discrimination involve sex-

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94. *Complainant v. Anthony Foxx*, Sec'y, Dep't of Transp. (Fed. Aviation Admin.), Appeal No. 0120133080, 2015 WL 4397641, at \*1 (EEOC July 15, 2015).

95. *Id.*

96. *Id.* at \*2.

97. *Id.* at \*5, \*10.

based considerations.<sup>98</sup>

Additionally, the EEOC directly addressed affiliative discrimination theory: “An employee alleging discrimination on the basis of sexual orientation is alleging that his or her employer took his or her sex into account by treating him or her differently for *associating* with a person of the same sex.”<sup>99</sup> The EEOC explained that its “analysis is not limited to the context of race discrimination,” and that Title VII “‘on its face treats each of the enumerated categories—race, color, religion, sex, and national origin —’ exactly the same.”<sup>100</sup> As another finding, the court found that “sexual orientation discrimination also is sex discrimination because it necessarily involves discrimination based on gender stereotypes.”<sup>101</sup>

Similarly, Vickers contended, “the facts alleged in [his] complaint establish[ed], as the district court found, that the discrimination Vickers experienced was motivated by Vickers’[s] perceived homosexuality . . . .”<sup>102</sup> In alleging that his coworkers created a hostile work environment of adverse treatment toward him after taking his perceived sexual orientation<sup>103</sup> into account, the district court and court of appeals should have concluded such action necessarily alleges his coworkers took his sex into account. Acknowledging that Vickers’s sex was taken into account amounts to discrimination because of his sex.

Finally, Vickers also claimed his coworkers were motivated by the stereotype that men should not have close friendships with or mentorship from other men, and thus, coworkers treated Vickers adversely because he did not conform to male stereotypes.<sup>104</sup> Although Vickers never stated that he was homosexual, the

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98. *Id.* at \*5.

99. *Id.* at \*6.

100. *Fox*, 2015 WL 4397641, at \*7 (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 243 n.9 (1989)).

101. *Id.* at \*7.

102. *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 761 (6th Cir. 2006).

103. “[I]ndividuals who are perceived as or who identify as homosexuals are not barred from bringing a claim for sex discrimination under Title VII.” *Id.* at 762.

104. *See supra* note 19 and accompanying text.

calculated sexual harassment based on Vickers's perceived homosexuality sent a message to Vickers that he did not live up to his coworkers' stereotype of a real man—“real' men are attracted to women” and refrain from developing close relationships with other men.<sup>105</sup> The EEOC interprets Title VII to cover this type of treatment as prohibited under the category of “sex” discrimination.<sup>106</sup>

*B. The Sixth Circuit Misapplied the Sex Stereotyping Theory & Gender Performance Rule in Vickers to Avoid Protecting Against Sexual Orientation Discrimination*

Because the Sixth Circuit refused to adopt affiliative discrimination theory in *Vickers* by determining that Vickers's claim was based on sexual orientation and not “sex,” the question arose whether homosexual sexual orientation was protected by sex-stereotyping as gender non-conforming behavior.<sup>107</sup> To decide, the Sixth Circuit adopted and applied *Simonton*'s gender performance rule—a rule not adopted by the Supreme Court—<sup>108</sup> by requiring Vickers to present evidence of not conforming to gender in only appearance or behavior in the workplace.<sup>109</sup> Then, the court solely focused on feminine non-conforming behavior, overlooking other ways in which Vickers, a male, exhibited observable non-gender conforming behavior at work.<sup>110</sup> This allowed the court to conclude

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105. *Vickers*, 453 F.3d at 759 (“Vickers asserts that he has never discussed his sexuality with any of his coworkers.”); Todd Brower, *Social Cognition “At Work”: Schema Theory and Lesbian and Gay Identity in Title VII*, 18 LAW & SEXUALITY 1, 52 n.331 (2009).

106. See Brower, *supra* note 105, at 10 n.43.

107. *Vickers*, 453 F.3d at 761 (“As a result, Vickers argues, his claim is covered under the sex stereotyping theory of liability embraced by the Supreme Court in *Price Waterhouse v. Hopkins* . . .”).

108. The Sixth Circuit in *Vickers* mentions the “Supreme Court in *Price Waterhouse* focused principally on characteristics that were readily demonstrable in the workplace, such as the plaintiff's manner of walking and talking at work, as well as her work attire and her hairstyle,” but then applies a “hard-and-fast” rule that requires the plaintiff to present *only* evidence of appearance or behavior observable in the workplace. *Id.* at 763.

109. See cases cited *supra* note 62 and accompanying text.

110. *Vickers*, 453 F.3d at 763 (focusing on cases where successful plaintiffs behaved or appeared only in a manner of the opposite sex and not in other non-gender conforming ways); see e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989) (female partner candidate described as “macho” and a “tough-talking somewhat masculine hard-nosed” manager); *Barnes v. City of Cincinnati*, 401 F.3d 729, 733 (6th Cir. 2005) (a male-to-female transsexual living as a male while on duty and living as a woman while off duty); *Smith v. City of Salem*, 378 F.3d 566, 568 (6th Cir. 2004) (a transsexual man that began

that Vickers's complaint under sex stereotyping failed to state a claim.<sup>111</sup>

A closer look at the facts of the case reveals that Vickers's behavior was, in fact, nonconforming to his gender as a stereotypical male within the workplace. Vickers alleged that upon developing a close mentorship with a seventeen-year-old male employee who aspired to become a police officer, his coworkers made homophobic remarks and called the younger employee Vickers's "boyfriend."<sup>112</sup> While mentorship is not considered feminine behavior *per se*, Vickers's coworkers clearly viewed men developing close relationships with other young men as non-masculine behavior that did not match their perceptions of how a man should act.<sup>113</sup> The court directly acknowledged that Vickers's coworkers considered these male relationships as him "questioning his masculinity."<sup>114</sup> Vickers further alleged he was harassed about his close friendship with a former roommate with whom he vacationed.<sup>115</sup> This friendship incited coworkers to call him "fag" and increase the frequency and severity of their behavior.<sup>116</sup> Once, Vickers used his former

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"expressing a more feminine appearance on a full-time basis").

111. *Vickers*, 453 F.3d at 763–64.

Vickers has made no argument that his appearance or mannerisms on the job were perceived as gender non-conforming in some way and provided the basis for the harassment he experienced. Rather, the harassment of which Vickers complains is more properly viewed as harassment based on Vickers'[s] perceived homosexuality, rather than based on gender non-conformity.

*Id.* at 763.

112. Complaint, *supra* note 8, at 16 (stating that in August of 2002 Vickers befriended a seventeen-year-old male employee, named Josh, who aspired to become a police officer and that coworkers referred to Josh as Vickers's boyfriend).

113. *See id.* His coworker even referred to him as a "bitch," a pejorative used to refer to feminine men. *Id.* at 37. *See* Michael J. Vargas, *Title VII and the Trans-Inclusive Paradigm*, 32 *LAW & INEQ.* 169, 185 n.102 (2014) ("When applied to women it is easily recognizable as pejoratives such as 'bitch,' but the same language is often used to harass men as well, suggesting that all sexual harassment is primarily an attack on real or perceived feminine characteristics.").

114. *Vickers*, 453 F.3d at 759 ("Once his coworkers found out about the friendship, Vickers contends that Dixon and Mueller 'began making sexually based slurs and discriminating remarks and comments about Vickers, alleging that Vickers was "gay" or homosexual, and questioning his masculinity.").

115. Complaint, *supra* note 8, at 15.

116. *Id.* at 18. Vickers also alleged that during an arrest, he discovered his coworkers had previously "double-locked" his handcuffs, requiring a key and two free hands to unlock. *Id.* at 17. "Double-locked" handcuffs placed Vickers in danger during the apprehension of the arrestee because Vickers had to temporarily take both of his hands off the arrestee. *Id.*



roommate's cellphone to call the medical center and find out what time he had to report to work.<sup>117</sup> His coworker responded to him calling from another man's phone by ridiculing Vickers with homophobic slurs and sending harassing messages to his friend's phone after the conversation.<sup>118</sup> Moreover, Vickers's mentor relationship and friendship with a male doctor began and existed at the medical center workplace, and his close relationship with his former roommate entered the workplace in an observable way (being harassed through his friend's phone by coworkers on duty at work).<sup>119</sup> Nevertheless, the Sixth Circuit was not persuaded that these behaviors were non-conforming to gender in an observable way at work.<sup>120</sup>

The Supreme Court in *Price Waterhouse* did not require that plaintiffs only conform in observable ways, such as behavior or appearance, in the workplace or only in ways representative of the opposite gender to succeed on a sex discrimination claim under Title VII.<sup>121</sup> The Court merely required that the plaintiffs not "match[] the stereotype associated with their group, for . . . 'Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'"<sup>122</sup> The Court focused on the fact that the plaintiff in *Price Waterhouse* was not feminine enough, and the Court held as sufficient any evidence that showed nonconformity with being a stereotypical female.<sup>123</sup> Thus, the conclusion in *Vickers* that *Price Waterhouse*'s theory of sex stereotyping is not broad enough to encompass Vickers's claim for discrimination because of sex is actually the result of a misapplication of the sex stereotyping theory and gender performance rule.<sup>124</sup>

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117. *Id.* at 18.

118. *Id.* at 18–19.

119. *Id.* at 15.

120. *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006).

121. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 251–52 (1989).

122. *Id.* at 251 (quoting *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

123. *Id.* at 235.

124. *See Vickers*, 453 F.3d at 763 ("We conclude that the theory of sex stereotyping under *Price Waterhouse* is not broad enough . . .").

*C. The Sixth Circuit's Refusal to Adopt Affiliative Discrimination Theory for Sex Under Title VII Conflicts with Oncale's Application of Title VII Protection Beyond Congressional Intent Against "Reasonably Comparable Evils"*

The Sixth Circuit held that Vickers's sexual harassment from coworkers was a result of his perceived sexual orientation rather than his sex.<sup>125</sup> The Sixth Circuit also reasoned that allowing Vickers's claim would "bootstrap" sexual orientation into Title VII and improperly amend Title VII *de facto* to encompass sexual orientation against Congress's intent.<sup>126</sup> However, this logic does not comport with the Supreme Court's interpretation in *Oncale* of what should be included under Title VII's prohibition of discrimination because of "sex."<sup>127</sup>

*Oncale* involved a male employee of an eight-man crew on an oil platform who alleged sexual harassment after being forcibly subjected to sex-related, humiliating actions by male coworkers, including name-calling suggesting he was homosexual.<sup>128</sup> The Supreme Court stated that "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII"; however, "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."<sup>129</sup> The Court held as actionable any kind of sexual harassment that met statutory requirements, stating Title VII broadly

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125. *Id.* (holding that because "the gender non-conforming behavior which Vickers claims supports his theory of sex stereotyping is not behavior observed at work or affecting his job performance, . . . the harassment of which Vickers complains is more properly viewed as harassment based on Vickers'[s] perceived homosexuality, rather than based on gender non-conformity").

126. *Id.* at 764–65.

127. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79–80 (1998) ("[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.").

128. *Id.* at 77 (stating coworkers "called him a name suggesting homosexuality"). Over a number of weeks, Oncale alleges being "sexually assaulted, battered, touched, and threatened with rape . . ." Brief for Petitioner, *supra* note 23, at \*4.

129. *Oncale*, 523 U.S. at 79.

prohibits “‘discriminat[ion] . . . because of . . . sex’ in the ‘terms’ or ‘conditions’ of employment.”<sup>130</sup>

Although *Oncale* did not involve a male plaintiff affiliating in close, social relationships with other males in the workplace,<sup>131</sup> it is significant to note that the Supreme Court extended Title VII protection to same-sex sexual harassment while acknowledging this was not the principal evil that Congress was concerned with prohibiting.<sup>132</sup> Before *Oncale*, some courts, like the Fifth Circuit, held same-sex sexual harassment claims were never cognizable under Title VII because gender discrimination<sup>133</sup> was the principal evil Congress intended to prohibit.<sup>134</sup> This is essentially a congressional intent argument similar to the argument made by the Sixth Circuit in *Vickers*,<sup>135</sup> which gauged congressional intent based on the fact that later congresses repeatedly rejected legislation<sup>136</sup> that would have extended Title VII to cover sexual orientation.<sup>137</sup>

130. *Id.* at 79–80.

131. Plaintiffs Vickers and Oncale alleged similar acts of sexual harassment although Oncale did not allege sex stereotyping. Compare Brief for Petitioner, *supra* note 23, at \*4, with Complaint, *supra* note 8, ¶¶ 10.I–J, 10.N. In his complaint, Vickers alleged being subjected to “unwanted offensive touching . . . while [a coworker] simulating performing anal sex on him,” approaches from behind and grabbing of his breast, and multiple touchings of his crotch and genital area. Complaint, *supra* note 8, 5–7.

132. *Oncale*, 523 U.S. at 79.

133. The Court of Appeals for the Fifth Circuit refers to “gender discrimination” as equal treatment of both men and women. See *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 451–52 (5th Cir. 1994), *abrogated by Oncale*, 523 U.S. at 75.

134. *Oncale*, 523 U.S. at 78–79 (discussing the Fifth Circuit’s holding that same-sex sexual harassment claims are never cognizable under Title VII); see also *Garcia*, 28 F.3d at 452 (“‘Title VII addresses gender discrimination.’ Thus, what [male Defendant] did to [male Plaintiff] could not in any event constitute sexual harassment within the purview of Title VII, and hence summary judgment in favor of all defendants was proper on this basis also.”) (citation omitted).

135. *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 765 (6th Cir. 2006) (citing *Bibby v. Phila. Coca-Cola Bottling Co.*, 260 F.3d 257, 265 (3d Cir. 2001) (“Harassment on the basis of sexual orientation has no place in our society. Congress has not yet seen fit, however, to provide protection against such harassment.”)).

136. The Second Circuit noted that “congressional inaction subsequent to the enactment of a statute is not always a helpful guide,” but nevertheless considered this strong evidence of congressional intent. *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000).

137. *Vickers*, 453 F.3d at 765. In the Sixth Circuit’s opinion in *Vickers*, the court relied on the Second Circuit’s decision in *Bibby v. Philadelphia Coca-Cola Bottling Co.* in stating Congress has yet to prohibit harassment based on perceived homosexual sexual orientation. *Id.* (citing *Bibby*, 260 F.3d at 265). *Bibby* reached this conclusion not based on legislative history but the fact that Congress repeatedly rejected legislation that would have extended Title VII to cover sexual orientation. *Bibby*, 260 F.3d at 261.

Thus, not only has the Sixth Circuit erroneously derived this congressional intent to exclude sexual orientation based on legislative inaction and not actual legislative history,<sup>138</sup> but the Supreme Court has already held that Title VII's protection reaches beyond Congressional intent.<sup>139</sup> The Sixth Circuit's rejection of affiliative discrimination theory for sex discrimination under Title VII conflicts with the broad interpretation the Supreme Court has applied in construing discrimination on the basis of sex in *Oncale*.

The Supreme Court states that “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.”<sup>140</sup> If Vickers had been female, certainly his coworkers would not have harassed him for building close relationships with male employees, especially considering the alleged harassment consisted of daily homophobic remarks.<sup>141</sup> Vickers’s discrimination is inherently based on his sex, and the Supreme Court’s holding that Title VII broadly prohibits “‘discriminat[ion] . . . because of . . . sex’ in the ‘terms’ or ‘conditions’ of employment” mandates the Sixth Circuit find Vickers’s claim actionable as discrimination because of sex.<sup>142</sup>

### III. PROPOSAL

The Sixth Circuit effectively avoided adopting affiliative discrimination theory for Title VII sex discrimination by not identifying the cause of the discrimination as sex, but rather as sexual orientation.<sup>143</sup> However, this placed the cause within the ambit of sex stereotyping protection because the court, by its own admission, has

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138. The Supreme Court has held “[c]ongressional inaction lacks ‘persuasive significance’ because ‘several equally tenable inferences’ may be drawn from such inaction, ‘including the inference that the existing legislation already incorporated the offered change.’” *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990).

139. *See Simonton*, 232 F.3d at 35; *see also Oncale*, 523 U.S. at 79.

140. *Oncale*, 523 U.S. at 80 (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

141. *See discussion supra* Part II.A.1; *see also supra* note 11 and accompanying text.

142. *Oncale*, 523 U.S. at 79–80.

143. *See supra* note 70 and accompanying text.

recognized homosexuality is inherently gender non-conforming.<sup>144</sup> Thus, to avoid protecting sexual orientation under Title VII, the Sixth Circuit misapplied the sex stereotyping theory by creating two extra requirements: (1) that plaintiffs only conform in ways observable in the workplace (the gender performance rule), and (2) that plaintiffs non-conform in ways representative of only the opposite gender.<sup>145</sup>

The Sixth Circuit's decision in *Vickers* not only appears unguided by an accurate interpretation and application of Title VII, sex stereotyping theory, and Supreme Court jurisprudence, but by an impetus to not protect sexual orientation under Title VII.<sup>146</sup> This Note proposes that the Sixth Circuit abandon precluding sexual orientation under Title VII by adopting affiliative discrimination theory for sex discrimination in order to resolve the aforementioned inconsistencies in interpretation and application; relieve courts from attempting the difficult task of distinguishing between discrimination because of sex and discrimination because of sexual orientation; and realize the benefits and increased protection to which citizens are statutorily entitled.<sup>147</sup>

#### *A. The Sixth Circuit Should Stop Pursuing the Unreasonable Idea of Precluding Sexual Orientation Under Title VII's "Sex" Category*

The Sixth Circuit should recognize the unreasonableness of separating sexual orientation from protection under *Price*

144. *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006). "[A]ny discrimination based on sexual orientation would be actionable under a sex stereotyping theory if this claim is allowed to stand, as all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices." *Id.*

145. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989). The Supreme Court in *Price Waterhouse* did not impose the requirement that plaintiffs only conform in ways observable (behavior or appearance) in the workplace but only in ways representative of the opposite gender to succeed on a sex discrimination claim under Title VII. *Id.*

146. *See Vickers*, 453 F.3d at 763–66. The Sixth Circuit misinterpreted Title VII by *creating* an inaccurate congressional intent to exclude sexual orientation based on legislative inaction of later congresses and not actual legislative history. *Id.* at 765. The Sixth Circuit also misapplied sex stereotyping theory to exclude sexual orientation protection by creating extra evidentiary requirements for plaintiffs. *See* discussion *supra* Part II.B. Finally, the Sixth Circuit misapplied Supreme Court jurisprudence from *Oncale* that instructs federal courts to apply Title VII protection beyond congressional intent against "reasonably comparable evils" that meet statutory requirements. *Oncale*, 523 U.S. at 79–80; *Vickers*, 453 F.3d at 765.

147. *See infra* Part III.A–B.

*Waterhouse*'s broad interpretation of Title VII discrimination "because of sex." The Sixth Circuit, in its 2006 *Vickers* decision, states clearly why this is unreasonable: "all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices."<sup>148</sup> These sexual practices fail to conform because they occur between members of the same sex.<sup>149</sup>

The Sixth Circuit in *Vickers* inquired about the cause of the discrimination just enough to find prejudice against homosexuality<sup>150</sup> as the "root animus" and not enough to find that the true "essence" of discrimination against homosexuals is their sex.<sup>151</sup> *Black's Law Dictionary* defines "homosexual" as relating to or characterized by sexual desire for a person of the same sex.<sup>152</sup> Creating a hostile work environment for a male employee because he is perceived as being attracted to another male takes into account and hinges on the fact that the employee is male, himself. Thus, the comparison of his sex to his associate's sex is the essence of the discrimination. If he were female, the discrimination would not occur. The relevant inquiry should be whether an enumerated category pertaining to the employee is the essence of the discrimination.

Put differently, it would seem highly unreasonable for the Sixth Circuit to state that a white employee discriminated against because he is married to a black woman has no recourse under Title VII because interracial marriage is not specifically listed as prohibited discrimination within the statute. While interracial marriage might be

148. *Vickers*, 453 F.3d at 764.

149. *Id.* at 763 n.2. In arguing for Title VII protection, *Vickers* alleged he was teased about fellatio and anal sex with males. *Id.*

150. *Id.* at 763 ("[T]he harassment of which *Vickers* complains is more properly viewed as harassment based on *Vickers*'[s] perceived homosexuality, rather than based on gender non-conformity.").

151. *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.*, 173 F.3d 988, 994 (6th Cir. 1999) (holding despite the root animus for the discrimination being a prejudice against the biracial child, the essence of the discrimination is the comparison in races between *Tetro* and his daughter because "[i]f [*Tetro*] had been African-American, presumably the dealership would not have discriminated"). Here, despite the root animus for the discrimination being a prejudice against homosexuality, the "essence" of the discrimination is the comparison of *Vickers*'s sex to his male mentee, the male doctor at the medical center, and his former male roommate. If *Vickers* had been female, presumably his coworkers would not have discriminated against him. *See id.*

152. *Homosexual*, BLACK'S LAW DICTIONARY, 853 (10th ed. 2014).

the motivation for discrimination, the essence of the discrimination is the comparison of the employee's race to his wife's race. If one of them were a different race, no discrimination would occur. The same logic should apply when a male employee is discriminated against because he is perceived to have a romantic relationship with another man. While homosexuality might be the motivation for discrimination, the essence of the discrimination is the comparison of the employee's sex to his perceived mate's sex. If one of them were of a different sex, the discrimination would not occur.

Yet, the Sixth Circuit takes an unreasonable approach in stating that there is no recourse under Title VII because *sexual orientation* is not specifically listed as prohibited discrimination within the statute. This argument is illogical and why the Sixth Circuit's jurisprudence conflicts with *Price Waterhouse*.<sup>153</sup> This notion is even more unreasonable considering the Sixth Circuit's strongest argument, that their opinion is not based on actual legislative history but that later congresses have not amended the statute to specifically list "sexual orientation" as a protected category.<sup>154</sup> Gauging the intent of recent Congresses, however, is an unreasonable method to gauge the intent of Congress when passing Title VII. The Supreme Court has held "[c]ongressional inaction lacks 'persuasive significance' because 'several equally tenable inferences' may be drawn from such inaction, 'including the inference that the existing legislation already incorporated the offered change.'"<sup>155</sup>

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153. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989) (stating "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender"). This leads to the inference that an employer who acts on the basis of a belief that a woman cannot be attracted to other women, or that she must not be, has acted on the basis of gender. See *id.*

154. See *Vickers*, 453 F.3d at 765; 42 U.S.C. § 2000e-2 (2012). Congress similarly has not amended Title VII to include racial orientation (plaintiff's attraction and marriage to a black woman in *Parr v. Woodmen of the World Life Insurance Co.*), interracial friendship, or interracial affiliation, yet these have all been found by different courts to be protected under Title VII. See *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 513, 519 (6th Cir. 2009); *Drake v. Minn. Mining & Mfg. Co.*, 134 F.3d 878, 884 n.3 (7th Cir. 1998); *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986).

155. *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (quoting *United States v. Wise*, 370 U.S. 405, 411 (1962)).

*B. Citizens Will Benefit If the Sixth Circuit Adopts Affiliative Discrimination Theory for “Sex” Under Title VII*

*1. Consistent Jurisprudence That Citizens Can Rely On*

The Sixth Circuit should adopt affiliative discrimination theory for sex discrimination under Title VII to ensure predictable and stable law, which would give citizens a greater sense of security and certainty when litigating claims under Title VII.<sup>156</sup> If courts treated “race” and “sex” uniformly under Title VII, citizens would not have to gamble and guess about how the Court would rule in litigating sex discrimination.<sup>157</sup> When the Sixth Circuit adopted affiliative discrimination for race under Title VII in *Tetro*, the principle of *stare decisis*—which aims to create predictability and preserve stability in the law—required adherence to the same rationale for “sex” under Title VII.<sup>158</sup>

Beyond intra-circuit consistency, adopting this theory would create consistency between the Sixth Circuit’s interpretation of discrimination “because of sex” under Title VII and the Supreme Court’s broad interpretation of the same.<sup>159</sup> The Supreme Court’s *Price Waterhouse* decision instructs courts to provide relief when an employee is subjected to discrimination because they do not conform to sex stereotypes.<sup>160</sup> Affiliative discrimination theory is in accordance with the Court’s policy because it permits relief when a male employee is subjected to discrimination because he does not conform to masculine stereotypes by building close relationships

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156. 21 C.J.S. *Courts* § 194 (2006).

The rule of *stare decisis* is founded largely on considerations of judicial efficiency and sound principles of public policy, to preserve the continuity, predictability and stability of the law . . . . The theory is that when a legal principle is accepted and established . . . security and certainty require that the principle be subsequently recognized and followed . . . .

*Id.*

157. *See id.*

158. *See id.*; *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.*, 173 F.3d 988, 994 (6th Cir. 1999).

159. *See discussion supra* Part II.B.

160. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989) (“[A]n employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”).



with other males in the workplace. The Supreme Court's *Oncale* decision instructs federal courts to provide relief when members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed, even when such discrimination is beyond the principal congressional intent of Title VII.<sup>161</sup> Affiliative discrimination theory is also in accordance with the Court's decision because the theory permits relief when a male employee is subjected to discrimination as a result of maintaining a social relationship with other males when he would not have received such treatment were he female.

## 2. *More Protection Without the Fear of Title VII Becoming a General Civility Code*

Adopting affiliative discrimination theory for sex discrimination under Title VII would also increase protection for citizens while not transforming the statute into a general civility code.<sup>162</sup> A general civility code is a complete prohibition of "all verbal or physical harassment at the workplace."<sup>163</sup> The Supreme Court and the Sixth Circuit maintain that "Title VII is not a 'general civility code' for the workplace [and] it does not prohibit harassment in general."<sup>164</sup> The possible concern, if the Sixth Circuit adopts affiliative discrimination

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161. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

162. *See Oncale*, 523 U.S. at 80. Recognizing liability for same-sex harassment will not transform Title VII into a general civility code for the American workplace, since Title VII is directed at discrimination because of sex, "not merely [conduct] tinged with offensive sexual connotations . . ." *Id.* at 81. Recognizing liability for same-sex harassment also will not transform Title VII into a general civility code for the American workplace because "the statute does not reach genuine but innocuous differences in the ways men and women routinely interact . . . [and] the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances." *Id.*

163. Elizabeth Monroe Shaffer, Comment, *Defining the "Environment" in Title VII Hostile Work Environment Claims: Appellate Courts, Classism, and Sexual Harassment*, 71 U. CIN. L. REV. 695, 700 (2002).

164. *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 766 (6th Cir. 2006) (citing *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1085 (7th Cir. 2000) (finding male employee "who endured threatening and hostile statements, taunting, and graffiti did not establish hostile work environment claim because his coworkers 'maligned him because of his apparent homosexuality, and not because of his sex'"). *See Shaffer, supra* note 163, at 700 ("The [Supreme] Court further explained that Title VII is not a 'general civility code' for the American workplace . . .").

theory for sex discrimination cases, is that Title VII would morph overnight into a general civility code for the American workforce is unfounded for the same reasons enunciated by the Supreme Court's holding in *Oncale* that same-sex sexual harassment was actionable under Title VII: the statute is "directed at discrimination because of sex, not merely conduct tinged with offensive sexual connotations."<sup>165</sup> The Court also pointed out that Title VII "does not reach genuine but innocuous differences in the ways men and women routinely interact" and that there is an additional hurdle to clear in that "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances."<sup>166</sup>

Permitting individuals to sue for discrimination because of sex under affiliative discrimination theory can only happen after the aforementioned hurdles are cleared as well. The plaintiff must still show that the discrimination was because of his sex by alleging facts on par with a male plaintiff being treated adversely as a result of his close affiliation with another male.<sup>167</sup> Additionally, the Court continues to charge the plaintiff with alleging severity beyond simple teasing or roughhousing and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.<sup>168</sup> The Sixth Circuit found the specific harassment alleged by Vickers

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165. *Oncale*, 523 U.S. at 80 (finding no justification in Title VII's language or the Court's precedents for a categorical rule barring a claim of discrimination "because of . . . sex" merely because the plaintiff and the defendant were of the same sex).

166. *Id.* at 81.

167. *See id.*

168. *Id.* at 81–82. The Supreme Court elaborates further on what constitutes severely or pervasively abusive:

In same-sex (as in all) harassment cases, that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. A professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field—even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office. The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.

*Id.*

“unacceptable and repugnant,” the Second Circuit found a case of similarly alleged conduct “appalling persecution,” and the Third Circuit regards harassment on the basis of sexual orientation in general to be conduct that “has no place in our society.”<sup>169</sup> These hurdles not only prevent Title VII’s conversion into a general civility code, but also prevents a flood of litigation in federal courts.

### *3. Entitlement to Partial Protection Where Congress Has Failed to Act*

Another benefit of adopting affiliative discrimination theory for sex under Title VII is affording certain real or perceived homosexual plaintiffs at least partial protection to which they are statutorily entitled.<sup>170</sup> While this Note advocates that sexual orientation discrimination is, indeed, discrimination because of sex under Title VII,<sup>171</sup> it should be acknowledged that adopting affiliative discrimination theory for sex under Title VII is not comprehensive protection for discrimination based on sexual orientation. At the heart of this theory is the idea that an employee is discriminated against based on sex when the employee *affiliates* with someone of the same sex;<sup>172</sup> no protection exists for employees targeted with discrimination simply because the individual is perceived as or identifies as homosexual in the workplace. Therefore, establishing a claim would also require establishing an affiliation or relationship of some type with someone of the same sex.<sup>173</sup> This form of under-protection is why Congress must continue its attempt to pass an Employment Non-Discrimination Act that includes sexual orientation, as it has attempted many times in the past.<sup>174</sup>

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169. *Vickers*, 453 F.3d at 765; *Bibby v. Phila. Coca-Cola Bottling Co.*, 260 F.3d 257, 265 (3d Cir. 2001); *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000).

170. As previously discussed, real or perceived homosexual plaintiffs discriminated against based on their affiliation with persons of the same sex are statutorily entitled to protection under Title VII because jurisprudence and statutory construction support application of affiliative discrimination theory similar to race claims. See discussion *supra* Part II.A.1–2.

171. See *supra* Part III.A.

172. See *supra* note 17 and accompanying text.

173. *Id.*

174. *Simonton*, 232 F.3d at 35 (citing Employment Nondiscrimination Act of 1996, S. 2056, 104th Cong. (1996); Employment Non-Discrimination Act of 1995, H.R. 1863, 104th Cong. (1995); and

The most recent attempt to pass such legislation was a sexual orientation inclusive version of the Employment Non-Discrimination Act that looked promising after passing the U.S. Senate on November 7, 2013, but the bill never passed in the House.<sup>175</sup> Until there is legislative action to amend workplace protections to include sexual orientation discrimination, circuit court adoption of affiliative discrimination theory for sex discrimination under Title VII provides at least some statutory protection for homosexual plaintiffs facing, in the words of the Sixth Circuit, “unacceptable” and “repugnant” treatment in the workplace.<sup>176</sup>

### CONCLUSION

On the heels of the 50th Anniversary of the Civil Rights Act of 1964,<sup>177</sup> it is incumbent to reflect on the broad spectrum of injustice that Title VII was meant to prohibit. Justice Scalia phrased it best when, delivering for the unanimous opinion in *Oncale*, he stated that “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”<sup>178</sup> Title VII does not prohibit *some* discrimination because of sex but “the entire spectrum of disparate treatment.”<sup>179</sup>

Adopting affiliative discrimination theory is an important step in the right direction for the Sixth Circuit in ending the unreasonable

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Employment Non-Discrimination Act of 1994, H.R. 4636, 103d Cong. (1994)); *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085–86 (7th Cir. 1984) (noting Congress has rejected a number of proposed amendments to Title VII to prohibit discrimination based on sexual orientation)); *Rabelo & Cortina*, *supra* note 92, at 386.

175. *Rabelo & Cortina*, *supra* note 92, at 386; Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013).

176. *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764–65 (6th Cir. 2006) (stating “the harassment alleged by Vickers reflects conduct that is socially unacceptable and repugnant to workplace standards of proper treatment and civility”). *See also* *Bibby v. Phila. Coca-Cola Bottling Co.*, 260 F.3d 257, 265 (3d Cir. 2001) (“Harassment on the basis of sexual orientation has no place in our society.”); *Simonton*, 232 F.3d at 35 (“[Harassment on the basis of sexual orientation] is morally reprehensible whenever and in whatever context it occurs, particularly in the modern workplace.”).

177. 42 U.S.C. § 2000e-2(a) (2012).

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

179. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (citing *L.A. Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

notion that real or perceived homosexual sexual orientation is not within the ambit of protection under *Price Waterhouse*'s broad interpretation of Title VII sex discrimination.<sup>180</sup> This step would also give citizens a greater sense of security and certainty when litigating claims under Title VII without the fear of transforming the statute into a general civility code.<sup>181</sup> Finally, in the absence of Congress amending Title VII to include sexual orientation, this step would provide some statutory protection to which some citizens of homosexual sexual orientation are entitled.<sup>182</sup>

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180. *See supra* Part III.A.

181. *See supra* Part III.B.1–2.

182. *See supra* Part III.B.3.