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Employment Law - Antidiscrimination - Heading Toward Federal Protection for Sexual Orientation Discrimination?

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EMPLOYMENT LAW—ANTIDISCRIMINATION—HEADING TOWARD FEDERAL PROTECTION FOR SEXUAL ORIENTATION DISCRIMINATION?

I. INTRODUCTION

Imagine that your boss approaches you and states that you are fired because you are a woman. Now imagine a supervisor approaches you and says that you will not receive the promotion because the company requires a less macho, less aggressive female for the position. Imagine that a coworker of the opposite sex persistently makes sexually suggestive comments about you and sometimes touches you inappropriately. Finally, consider your boss of the opposite sex implies that, if you do not accept his sexual advances, you will probably lose your job. If you happen to find yourself in a similar situation you can file suit in federal court and you will likely prevail against your employer for employment discrimination—if you can prove that you were discriminated against because of your sex.[1]

Now imagine that you learn that you were fired because you are gay or sexually nonconforming. In this case, you have no recourse in federal court against your employer.[2] Further imagine that you learn that your supervisor did not give you a promotion because he *thinks* you are gay. Again, you have no recourse in federal court. Now consider that your boss of the same sex tells you that if you do not have sexual relations with him then you are fired. Once again, you have no recourse in federal court. Finally, envision that your coworkers of the same sex constantly make sexually suggestive comments toward you and, even though you are not gay, they touch you in an unwelcomed sexual manner.

You are not entitled to federal relief under any of these circumstances because, according to the federal courts, you were not discriminated against because of your *sex* but rather because of your *sexual orientation.* Sexual

1. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (a landmark employment discrimination case in which the Court recognized the "gender stereotyping" cause of action); Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986) (an example of a successful quid pro quo sexual harassment cause of action). *See also* Christy M. Hanley, Comment, *A "Constructive" Compromise: Using the Quid Pro Quo and Hostile Work Environment Classifications to Adjudicate Constructive Discharge Sexual Harassment Cases*, 73 U. CIN. L. REV. 259, 284–86 (2004) (discussing quid pro quo as it pertains to sexual harassment claims).

2. Federal court venues are advantageous in employment discrimination cases because the plaintiff is entitled to a jury trial and the coveted punitive damages. Civil Rights Act of 1964 § 703, *as amended*, 42 U.S.C. § 2000e-2(a)(1) (2000). Title VII was enacted in 1964 and took effect in July of 1965. It was expanded by the Civil Rights Act of 1991, which creates compensatory and punitive damage remedies for claims of intentional discrimination. The 1991 Act was signed into law on November 21, 1991, and the expanded remedies apply to all conduct occurring after that date.

orientation is a characteristic that is currently not protected from employment discrimination under federal law.[3] As a result, you will assuredly be unable to retain an attorney willing to represent you in federal court because Title VII of the Civil Rights Act of 1964 ("Title VII") does not include protection for discrimination based on an individual's sexual orientation.[4] Even if you can retain an attorney to file suit under Title VII, the court will probably dismiss your case; nearly all employment discrimination claims with a *hint* of sexual orientation are thrown out of federal court.[5]

This note discusses the phenomenon that sexually nonconforming employees—such as gays, lesbians, transsexuals, and transgender persons—are subjected to unequal treatment by the federal courts and the Supreme Court of the United States when the employee brings an employment discrimination claim under Title VII.[6] This unequal treatment occurs because, although courts generally ignore the sexual orientation of a heterosexual claimant, they become overly consumed with the sexual orientation of a homosexual plaintiff.[7] Such precedential decisions permit federal courts to repeatedly use the scapegoat that "sexual orientation is not covered under Title VII,"[8] even though the employer may have also discriminated against an employee on the basis of a protected trait, like race or religion.[9] Thus, federal judges usually dismiss claims brought by gays and lesbians even though their employer may have actually discriminated against them.[10] The original purpose of passing Title VII, however, was to deter employment

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3. *See, e.g.*, Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 69 (8th Cir. 1989).

4. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in 42 U.S.C. §§ 2000e to -2000e-17 (2000)). *See also* Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979) (holding that discharge for homosexuality is not prohibited by Title VII).

5. *See, e.g.*, Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1066 (9th Cir. 2002). The district court originally dismissed the claim based on the fact that the plaintiff believed the harassment occurred because he was gay. *Id.* at 1064. DeSantis v. Pacific Tel. & Tel. Co., Inc., 608 F.2d 327, 329–30 (9th Cir. 1979).

6. *See infra* Part II.

7. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986) (the court did not mention the sexual orientation of the presumed heterosexual claimant; it was irrelevant and assumed); Dawson v. Bumble & Bumble, 398 F.3d 211 (2d Cir. 2005) (the court seemed to become consumed with the lesbian claimant's sexual orientation when analyzing her Title VII sex discrimination claim).

8. *See, e.g.*, Medina v. Income Support Div., 413 F.3d 1131, 1135 (10th Cir. 2005); Bibby v. Phila. Coca-Cola Bottling Co., 260 F.3d 257, 260–61 (3d Cir. 2001); Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138, 143 (4th Cir. 1996); Hopkins v. Balt. Gas & Elec. Co., 77 F.3d 745, 751–52 (4th Cir. 1996).

9. *See* discussion of plural-type claims *infra* Part II.E.

10. *See, e.g.*, *Dawson*, 398 F.3d 211 (2005) (lesbian plaintiff was discriminated against by her employer, but the court denied relief even though she suffered actual employment discrimination).

discrimination in order to *eliminate* it altogether.[11] By dismissing employment discrimination claims and denying an employee relief because of sexual orientation, federal courts further frustrate Congress's primary objective in passing Title VII.[12]

To counterbalance the lack of federal protection for sexually nonconforming employees, many states have enacted statutes that prohibit discrimination based on sexual orientation,[13] and many organizations continue moving toward protecting all persons from discrimination in the workplace.[14] The cumulative effect of this movement toward relief for sexual orientation discrimination may inevitably lead to its protection under Title VII, and such inclusion will ultimately result in working toward the actual goal of eliminating discrimination in the workplace.[15]

This note begins with the history of Title VII of the 1964 Civil Rights Act, including a discussion of relevant cases that have impacted and shaped the jurisprudence of employment discrimination since the passing of the Act.[16] In particular, this note will discuss the Supreme Court's treatment of sexual orientation as it relates to discrimination claims brought by employees under Title VII.[17] This note then explains the two types of sexual orientation claims that employees generally assert under Title VII and how the courts typically dismiss such claims.[18] Next, this note will explore further discrimination against gays and lesbians and the impact it has on the movement toward relieving such discrimination.[19] Finally, this note concludes by focusing on possible solutions to resolve the unequal treatment of

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11. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in 42 U.S.C. §§ 2000e to -2000e-17 (2000)). *See also* Faragher v. City of Boca Raton, 524 U.S. 775, 805–06 (1998).

12. Courts maintain that Congress's intent is clear because it has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation. The current Congress, however, is not necessarily recognizing the core purpose of passing Title VII in the first place. *See Bibby*, 260 F.3d at 261 (3d Cir. 2001).

13. Twenty-four states prohibit public employment discrimination based on sexual orientation, and seventeen states prohibit private employment discrimination based on sexual orientation. *See* Barbara Osborne, *"No Drinking, No Drugs, No Lesbians": Sexual Orientation Discrimination in Intercollegiate Athletics*, 17 MARQ. SPORTS L.J. 481, 489–90 (2007).

14. *See* Lambda Legal, http://www.lambdalegal.com (last visited Aug. 11, 2009); National Gay and Lesbian Task Force, Nondiscrimination, http://www.thetaskforce.org/issues/nondiscrimination (last visited Aug. 11, 2009).

15. The stated purpose of Title VII. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in 42 U.S.C. §§ 2000e to -2000e-17 (2000)).

16. *See infra* Part II.

17. *See infra* Part II.D.

18. *See infra* Part II.E.

19. *See infra* Part II.F.

straight claimants over gay and lesbian claimants, thus, fulfilling the purpose of Title VII.[20]

II. BACKGROUND

A. Sex Discrimination

When Congress passed the Civil Rights Act of 1964, it became 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."[21] As codified, the statute does not define what "sex" means, nor does it discuss sexual orientation.[22] In order to prevail on a standard sex discrimination claim under Title VII, a plaintiff must prove each element of the statute—a daunting task for many employees.[23] In order to have a prima facie case of employment discrimination, the plaintiff must prove: that the employer took an adverse employment action against the employee;[24] that the employer took the employment action *because of* a protected trait;[25] and that such trait is the employee's race, color, religion, sex, or national origin.[26] The "because of" provision is the causation element where the plaintiff must show, for example, that she was fired because

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20. *See infra* Part III.

21. 42 U.S.C. § 2000e-2(a)(1) (2000).

22. 42 U.S.C. § 2000e(k) (defining what "because of sex" means, which appears limited to pregnancy, childbirth, or related medical conditions).

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

24. An adverse employment action correlates to the statutory language "with respect to his compensation, terms, conditions, or privileges of employment . . . ." 42 U.S.C. § 2000e-2(a)(1) (2000). *See, e.g.*, Anduze v. Fla. Atl. Univ., 151 F. App'x 875, 879 (11th Cir. 2005). An adverse employment action only includes *adverse* actions from the employer, such as getting fired or laid-off, not receiving a promotion, not getting hired or re-hired, a hostile work environment, revoking a pension plan, eliminating insurance benefits, reduction of wages, etc. It generally does not include trivial employment actions, such as getting switched to a smaller office, receiving a slower computer, or having the refrigerator in the office kitchen removed (even if the trivial action was because of race, for instance). *See* Storey v. Burns Int'l Sec. Servs., 390 F.3d 760, 764 (3d Cir. 2004) (finding no evidence of discriminatory animus and no adverse employment action when an employee was terminated for refusing to remove confederate flag stickers from his lunch box and pickup truck).

25. 42 U.S.C. § 2000e-2(a)(1). "Because of" is the causation element—a difficult hurdle for many plaintiffs. *See* David S. Schwartz, *When Is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1709–14 (2002).

26. 42 U.S.C. § 2000e-2(a)(1).

of her biological sex and not because she was insubordinate, repetitively late, or the like.[27]

B. The Legislative History of Title VII

In 1964, Congress enacted Title VII of the Civil Rights Act with the intent to eliminate discrimination in the employment sector.[28] Title VII partly provides that it is unlawful for an employer to discriminate against any individual on the basis of the employee's sex.[29] There exists, however, minimal legislative history of what "sex" actually means under the statute.[30] This has contributed to more controversy and confusion over what Congress intended to protect when "sex" was included in the language of the Act.[31]

What is known, however, is that merely days before the House of Representatives was prepared to vote on the Civil Rights Act, the chairman of the House Rules Committee (Howard Smith) proposed an amendment to add the trait "sex" to the list of prohibited bases for unlawful employment discrimination.[32] Some believe that the main reason for the amendment was to provide equal opportunities for women.[33] It was widely known, however, that Smith was a strong advocate against the entire bill, and the amendment was his last-minute attempt to block it completely.[34] Nonetheless, the bill became law and now the courts are left to construe the interpretation of "sex" as enacted in Title VII.[35]

Because of the lack of legislative history, courts construe "sex" narrowly and rule favorably only if discrimination claims are purely based on sex, such as the typical case of male-to-female sexual harassment.[36] As a

27. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1988) ("When . . . an employer considers both gender and legitimate factors at the time of making a decision, that decision was 'because of' sex . . . .'").

28. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in 42 U.S.C. §§ 2000e to -2000e-17 (2000)).

29. *See* 42 U.S.C. § 2000e-2(a)(1).

30. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

31. *See, e.g.*, Holloway v. Arthur Andersen & Co., 566 F.2d 659 (9th Cir. 1977) (discussing numerous cases and theories surrounding the intent behind "sex" as included in the language of Title VII).

32. *See* Nicole Anzuoni, *Gender Non-Conformists Under Title VII: A Confusing Jurisprudence in Need of a Legislative Remedy*, 3 GEO. J. GENDER & L. 871, 880–81 (2002). *See also* Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984) (noting that the "sex amendment was the gambit of a congressman seeking to scuttle adoption of the Civil Rights Act.").

33. *See, e.g.*, Baker v. Cal. Land Title Co., 507 F.2d 895, 897 (9th Cir. 1974); Rosenfeld v. S. Pac. Co., 444 F.2d 1219, 1225 (9th Cir. 1971).

34. *See* Barnes v. Costle, 561 F.2d 983, 986–87 (D.C. Cir. 1977).

35. *See Ulane*, 742 F.2d 1081, 1085 (7th Cir. 1984) ("The ploy failed and sex discrimination was abruptly added to the statute's prohibition against race discrimination.").

36. *See, e.g.*, EEOC v. V & J Foods, Inc., 507 F.3d 575 (7th Cir. 2007).

result, when an individual brings a sex discrimination claim under Title VII and the individual's sexual orientation is mentioned (or perhaps later becomes an issue), courts have repeatedly dismissed such cases because sexual orientation is simply not a protected trait under the plain language of Title VII.[37]

C. Sex, Gender, and Sexual Orientation

It is important to distinguish and resolve any misconceptions about the differences between sex, gender, and sexual orientation. Federal courts generally consider "sex" to mean individual biological and physical characteristics, which are simply a person's maleness or femaleness.[38] Additionally, sex also means "the physical attributes of bodies, specifically the external genitalia."[39] Gender, on the other hand, is considered to include individual cultural expressions of femininity and masculinity.[40] Gender is further defined as an individual's social identity, as related or unrelated to sex, encompassing culturally traditional masculine or feminine characteristics or traits.[41] The physical and social distinctions between sex and gender are often confused when the terms are used as equivalents, generally because of carelessness or, perhaps, because of litigation strategy.[42] Courts, nonetheless, use the two terms interchangeably when discussing the actual sex of a plaintiff, further muddling the distinction in the context of a claim brought under Title VII.[43]

Contrary to its common cultural usage, the terms "sexual orientation" do not merely identify whether one is heterosexual or homosexual; rather, the term denotes the apparent or actual inclinations of sexual or affectional interests or desires among humans toward members of the same sex, the

37. *See* Simonton v. Runyon, 225 F.3d 122 (2d Cir. 2000) (affirming lower court's dismissal of the complaint for failure to state a claim under Title VII; the complain alleged harassment because of plaintiff's sexual orientation).

38. *See* Spearman v. Ford Motor Co., 231 F.3d 1080, 1084 (7th Cir. 2000) (citations omitted) ("Congress intended the term 'sex' to mean 'biological male or biological female,' and not one's sexuality or sexual orientation.").

39. *See* Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender & Sexual Orientation to Its Origins*, 8 YALE J.L. & HUMAN. 161, 164 (1996).

40. *See* Hilary Charlesworth, *Feminist Methods in International Law*, 93 AM. J. INT'L L. 379, 379 (1999).

41. *See* Francine T. Bazluke & Jeffrey J. Nolan, "Because of Sex": The Evolving Legal Riddle of Sexual vs. Gender Identity, 32 J.C. & U.L. 361, 367 (2006).

42. *See* Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 21–22 (1995).

43. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 241–45 (1989) (using the terms "gender" and "sex" interchangeably).

other sex, or both sexes.[44] Sexual orientation typically includes, but is not necessarily limited to, individuals who may be heterosexual, homosexual, bisexual, transgender,[45] or transsexual.[46] The courts, however, typically perceive the terms "sexual orientation" to include *only* those persons who may be homosexual.[47] As previously defined, though, every individual has a sexual orientation, whether it is interest or desire in a person of the same sex, the other sex, or in both sexes.[48]

Although the distinctions between sex, gender, and sexual orientation seem straightforward, the law of sex discrimination has reflected a great deal of confusion among the differences and legal effects of the terms.[49] As noted above, sex discrimination case law tends to use sex and gender as interchangeable concepts to refer to whether an employee is male or female.[50] For example, in *Price Waterhouse v. Hopkins*,[51] the Supreme Court referred to sex and gender as the same concept throughout the opinion as it pertained to the plaintiff's femaleness.[52] Treatment of the terms as equivalents is possibly one reason for the confusion of what sex and gender should mean when analyzing a sex discrimination claim.

D. The Supreme Court's Interpretation of Title VII

1. *Because of Sex*

Meritor Savings Bank v. Vinson[53] was the first sexual harassment case brought before the Supreme Court under Title VII.[54] In this groundbreaking

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44. *See* Valdes, *supra* note 42, at 23.

45. Transgender has been defined to include "gender variant people who have not necessarily sought to alter their bodies but nonetheless feel a disjunction between their biologically and socially gendered selves." Anna Kirkland, *Victorious Transsexuals in the Courtroom: A Challenge for Feminist Legal Theory*, 28 LAW & SOC. INQUIRY 1, 2 (2003).

46. *See id.* (defining transexuals as people who so identify themselves and who seek to alter their physiological gender status through surgery or hormones in order to bring it into line with their social and emotional gender status).

47. *See* Erin E. Goodsell, *Toward Real Workplace Equality: Nonsubordination and Title VII Sex-Stereotyping Jurisprudence*, 23 WIS. J.L. GENDER & SOC'Y 41, 46 (2008).

48. *See* Valdes, supra note 42, at 23.

49. *See* Schwartz, supra note 25, at 1706.

50. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 241–45 (1989) (using the terms "gender" and "sex" interchangeably); *see also* Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 10 (1995) (suggesting that the Court's common usage of "gender" in sex discrimination cases results largely from Ginsburg's efforts to substitute the word gender in order to "ward off distracting [i.e., sexual] associations" with the word "sex").

51. 490 U.S. 228 (1989).

52. *Id.* at 241–45.

53. 477 U.S. 57 (1986).

case, the Court expanded the meaning of Title VII's language and established that sexual harassment that creates a hostile work environment is another form of unlawful employment discrimination.[55] The plaintiff, Michelle Vinson, was a federal bank employee that prevailed on a sexual harassment claim against the bank and her boss, Sidney Taylor.[56] Taylor hired Vinson when she was nineteen-years-old as a teller-trainee; he treated her in a fatherly way and did not attempt sexual advances toward her during the training period.[57] Soon after her training was complete, Taylor took Vinson out to dinner and invited her to a motel to have sex.[58] Vinson declined the proposal, but claimed that she was afraid of losing her job if she continued to refuse Taylor's advances; she eventually agreed, however, to have sexual relations with him.[59] She asserted that Taylor made repeated demands for sexual favors at her workplace, and she estimated that over the following several years they had intercourse about forty to fifty times, sometimes at work.[60] Vinson also alleged that Taylor raped her on many occasions.[61] Approximately four years after being hired, and soon after Michelle Vinson started dating another man, she notified Taylor that she was taking sick leave for an indefinite period; the bank later discharged her for excessive use of that leave.[62]

The Court held that Taylor created a hostile work environment through sexual advances and encounters with Vinson, which amounted to sexual discrimination because Vinson's "conditions of employment"[63] were significantly worse than those of her coworkers because of her sex.[64] In its reasoning, the Court relied upon the Equal Employment Opportunity Commission guidelines and concluded that Taylor created a hostile work environment that amounted to unlawful discrimination under the language of Title VII.[65]

The terms "sexual harassment" do not appear in the language of Title VII, but, as seen in *Vinson*, the Court read the terms into the statute by rul-

54. *See* Theresa M. Beiner, *Sexy Dressing Revisited: Does Target Dress Play a Part in Sexual Harassment Cases?*, 14 DUKE J. GENDER L. & POL'Y 125, 127 (2007).

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

56. *Id.* at 60–62.

57. *Id.* at 60.

58. *Id.*

59. *Id.*

60. *Id.* Vinson testified that Taylor "fondled her in front of other employees, followed her into the women's restroom when she went there alone, exposed himself to her, and even forcibly raped her on several occasions." *Id.*

61. *Meritor*, 477 U.S. at 60.

62. *Id.*

63. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000).

64. *See Meritor*, 477 U.S. at 73.

65. *Id.* at 65. The Court further noted that employees have the right to work in an environment free from sexual harassment under Title VII. *Id.*

ing that employers are prohibited from creating a hostile work environment where the harassment is severe and pervasive enough to affect the employee's "conditions of employment."[66] Although that case was strictly a male-to-female sexual harassment case, it is important to note that at no point in its decision did the Court discuss the sexual orientation of either Taylor or Vinson, whether heterosexual or homosexual, their sexual orientations were assumed as heterosexual; it was a nonissue.[67]

2. *Stereotyping Based on Sex/Gender*

In the landmark case of *Price Waterhouse v. Hopkins*,[68] the Supreme Court expanded the meaning of sex under Title VII and held that sex includes harassment directed at an employee when the employee fails to conform to traditional stereotypes of being a male or female.[69] *Price Waterhouse* involved a woman named Ann Hopkins—a senior manager at the large accounting firm—who brought suit against the partners for discriminating against her by refusing to reconsider her for partnership.[70] The partners originally showcased Hopkins's "[two-year] effort to secure a [twenty-five] million [dollar] contract with the Department of State, labeling it 'an outstanding performance' and one that Hopkins carried out 'virtually at the partner level.'"[71] At the same time, however, some partners judged her for being "overly aggressive" and "macho," suggesting that she "overcompensated for being a woman."[72] One partner advised Hopkins that she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" if she wanted to improve her chances at partnership.[73] The Supreme Court held that Hopkins was not necessarily discriminated against because of her sex, but that she was unlawfully discriminated against because she failed to conform to the characteristics expected of her as a woman.[74] As a result of such a holding, employees that are discriminated against for not conforming to a male or fe-

66. *Id.* at 67 (quoting Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982) (holding that 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")).

67. *See Meritor*, 477 U.S. 59.

68. 490 U.S. 228 (1989).

69. *Id.* at 250 (propounding a new cause of action under Title VII known as gender stereotyping).

70. *Id.* at 231–32. Approximately one percent of the partners at the firm were women. Id. at 233.

71. *Id.* at 233.

72. *Id.* at 234–35.

73. *Id.* at 235.

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

male stereotype can bring a Title VII claim for being discriminated against "because of" his or her sex.[75]

In *Price Waterhouse*, the Court expanded Title VII's meaning of "sex" to include, not only a person's sex at birth, but also masculine or feminine behavior, appearance, and other characteristics.[76] That particular aspect of the holding in *Price Waterhouse* has not registered well with lower courts, however, which continue to maintain that the traditional meaning of discrimination "because of sex" is limited to a person's actual, biological sex at birth.[77]

3. *Same-Sex Sexual Harassment*

Approximately one decade later, the Supreme Court further expanded the scope of sex discrimination in *Oncale v. Sundowner Offshore Services, Inc.*[78] when it held that same-sex sexual harassment was cognizable under Title VII.[79] In that case, a male employee named Joseph Oncale—working with an all-male crew on an oil rig in the Gulf of Mexico[80]—alleged that he was discriminated against because of his sex, violating his Title VII rights.[81] Joseph Oncale claimed that his coworkers and his supervisor threatened him with rape, and he claimed on one occasion that he was held by one employee while a second employee placed his penis on Oncale's neck.[82] He further alleged that he was restrained by a co-worker in the shower while another coworker forced a bar of soap into his anus.[83] Oncale stated that he was harassed because he was effeminate and because he failed to meet the stereotypical behavior and characteristics of what a man *should* be.[84] Oncale continually asserted that he was a married heterosexual male with two children.[85] Thus, because the parties' sexual orientation was never an issue

75. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 57 (1986).

76. *See Price Waterhouse*, 490 U.S. at 258.

77. *See* Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1086 (7th Cir. 1984) ("[W]e decline in behalf of the Congress to judicially expand the definition of sex as used in Title VII beyond its common and traditional interpretation.").

78. 523 U.S. 75 (1998).

79. *Id.* at 79.

80. *Id.* at 77.

81. *Id.*

82. *See* Oncale v. Sundowner Offshore Services, Inc., 83 F.3d 118, 118–19 (5th Cir. 1996).

83. *Id.*

84. *See* Brief of Petitioner-Appellant at 27–28, Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998).

85. In his Supreme Court brief, Oncale wrote:

> Can there be any treatment more demeaning and objectively harassing to a married, heterosexual male with two children than to be subjected to sexual taunts, sexual touching and physical, sexual assault by other men with whom he must

in this case, the Court did not view Oncale's claim as one of sexual orientation but rather as a sexual harassment claim.[86] The Court unanimously held that Title VII prohibits *this* type of same-sex sexual harassment because it was "objectively offensive as to alter the 'conditions' of the victim's employment."[87]

Gay rights activists deemed the Supreme Court's holding in *Oncale* as a victory for homosexuals because, in their view, the case set precedent for gays and lesbians to bring same-sex sexual harassment claims under Title VII.[88] But the holding in *Oncale* fell short of such realization.[89] The Court did, however, provide three scenarios in which a plaintiff might prevail on a claim of same-sex sexual discrimination.[90] None of the scenarios included a situation in which the victim is homosexual or transgender or otherwise implicate the victim's nonconforming sexual orientation.[91] Consequently, the lower courts are left to determine whether same-sex sexual harassment also encompasses harassment based on the victim's sexual orientation.[92]

E. Sexual Orientation Claims

1. *Two Types of Claims*

Employees generally bring two types of sexual orientation discrimination claims. The first claim is what this note refers to as a "singular" claim, when a plaintiff asserts that his employer discriminated against him solely because of his sexual orientation.[93] Clearly, under the current language of Title VII sexual orientation is not included as a protected trait, and claims

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work in a closely confined work space on the Outer Continental Shelf of the United States?

Id.

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

87. *Id.* at 81.

88. *See* Nailah A. Jaffree, Note, *Halfway Out of the Closet: Oncale's Limitations in Protecting Homosexual Victims of Sex Discrimination*, 54 FLA. L. REV. 799, 817 (2002) (citing Press Release, American Civil Liberties Union, Supreme Court Says Same-Sex Harassment Illegal ¶ 4 (Mar. 4, 1998) (available at http://www.aclu.org/news/n030498b.html).

89. *See* Jaffree, *supra* note 88, at 817.

90. *Oncale*, 523 U.S. at 80–81.

91. The scenarios include: (1) if the harasser was homosexual and presumably motivated by sexual desire; (2) the harasser used sex-specific terms indicating hostility to women in the workplace; and (3) the harasser treated men and women differently in the workplace. *Id.*

92. *See, e.g.*, Bibby v. Phila. Coca-Cola Bottling Co., 260 F.3d 257, 259 (3d Cir. 2001) (holding that the plaintiff failed to state a cause of action under Title VII when he alleged that he was sexually harassed because of his sexual orientation).

93. *See* Medina v. Income Support Div., 413 F.3d 1131, 1133 (10th Cir. 2005) (rejecting discrimination claim based on plaintiff's heterosexuality because an employee's sexual orientation is not protected by Title VII).

based solely upon sexual orientation discrimination are repeatedly dismissed in federal court.[94]

The second claim a plaintiff might bring is what this note refers to as a "plural" claim, which is an employment discrimination claim premised upon two or more character identity traits.[95] A plural claim, for example, is when an employee brings a Title VII discrimination claim against the employer for getting fired because of two or more identity traits, such as race and sexual orientation.[96] The employee in that case has an actionable claim for being fired because of his race, but he does not have an actionable claim for getting fired because he is gay, for example.[97] But, as stated above, a federal court is likely to dismiss such a claim because it becomes overly consumed with the fact that the claimant is gay.[98] An even more challenging plural claim is one in which a female employee brings a claim for not getting promoted because she is female *and* lesbian.[99] Because of the interconnectedness of being female (her sex) and being lesbian (her sexual orientation), she will likely have a difficult time convincing most federal courts that she was actually discriminated against because of her sex and not because of her sexual orientation.[100] When an employee brings a plural-type claim in federal court, the courts commonly assert that the plaintiff is attempting to "bootstrap" protection from sexual orientation discrimination onto a cognizable claim under Title VII.[101]

Currently, the only way a plaintiff might have a chance to succeed on a plural-type sex discrimination claim is under a gender-stereotyping cause of action,[102] which is premised upon the theory that the employee was discri-

94. *See id.*; 42 U.S.C. § 2000e-2 (2000).

95. *See, e.g.*, Dawson v. Bumble & Bumble, 398 F.3d 211 (2d Cir 2005) (a case of employment discrimination because of gender *and* sexual orientation); Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 CONTEMP. LEGAL ISSUES 701, 702 (2001) (discussing the theory of intersectionality, which is equivalent to the concept of "plural" claims).

96. *See* Gowri Ramachandran, *Intersectionality as "Catch 22": Why Identity Performance Demands Are Neither Harmless Nor Reasonable*, 69 ALB. L. REV. 299, 309–10 (2006) (discussing the treatment of claims brought under Title VII when two or more character identity traits intersect).

97. *See* 42 U.S.C. § 2000e-2 (protected traits are limited to race, color, religion, sex, or national origin).

98. *See supra* note 7.

99. *See Dawson*, 398 F.3d 211, 213 (2d Cir. 2005). Dawson, the plaintiff, claimed that she suffered discrimination on the basis of sex, sex stereotyping, and sexual orientation in violation of federal law, but her claims were nonetheless denied.

100. *See id.*; Kristin M. Bovalino, *How the Effeminate Male Can Maximize His Odds of Winning Title VII Litigation*, 53 SYRACUSE L. REV. 1117, 1134 (2003) (counseling "gay plaintiffs bringing claims under Title VII [to] emphasize the gender stereotyping theory and de-emphasize any connection the discrimination has to homosexuality.").

101. *See Dawson*, 398 F.3d at 216 (2d Cir. 2005); Simonton v. Runyon, 232 F.3d 33, 38 (2d Cir. 2000).

102. *See* Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004) (holding that a transgender

minated against because of her gender nonconformity.[103] Few courts recognize this theory, however, and thus far have only recognized it in the context of transsexuals that were discriminated against because of their gender nonconformity and not because of their sexual orientation.[104]

2. *"Bootstrapping" Identity Traits*

As mentioned above, many courts deny plural-type sex discrimination claims when, as the courts have concluded, the plaintiff had attempted to bootstrap protection for sexual orientation discrimination that is otherwise not afforded by Title VII.[105] This happened to be the case in *Dawson v. Bumble & Bumble*.[106] Dawn Dawson was an assistant at a prestigious, high-end hair salon in Manhattan.[107] She claimed that she was denied a promotion and was fired for being a gender-nonconforming lesbian woman.[108] Her coworkers made offensive comments to her such as "[she] needed to have sex with a man," and that she was "wearing her sexuality like a costume." Dawson further alleged that two stylists wanted to fire her because of her "dyke" attitude.[109] In a final meeting with Dawson, the salon manager informed her that she was terminated because she seemed unhappy and because of the way she dressed and wore her hair.[110] The manager further stated that she could not send Dawson to any salon location outside of New York City because people would not understand her and because she would "frighten them."[111] The Second Circuit ultimately held that "Dawson's claims of sex stereotyping [were] derive[d] not from gender stereotypes, but rather from stereotypes based on sexual orientation, and thus are not cognizable under Title VII."[112] The court recognized, like other courts, that a

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city fire department employee, who was born male and subsequently was diagnosed with gender identity disorder, can bring an actionable sex discrimination claim under Title VII).

103. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (propounding the gender stereotyping cause of action, which makes it unlawful for an employer to discriminate against an employee because he fails to conform to stereotypical expectations of his gender).

104. *See, e.g.*, Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005); Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004); Schroer v. Billington, 424 F. Supp. 2d 203 (D.D.C. 2006).

105. *See, e.g.*, *Dawson*, 398 F.3d 211.

106. 398 F.3d 211 (2d Cir. 2005).

107. *Id.* at 213.

108. *See id.* Dawson described herself as a lesbian female who does not conform to gender norms and femininity, and may be perceived as more masculine than a stereotypical woman.

109. *Id.* at 215.

110. *Id.*

111. *Id.* at 215–16.

112. *Dawson*, 398 F.3d at 216.

gender stereotyping claim cannot be used to "bootstrap protection for sexual orientation into Title VII."[113]

Just like Dawson, a homosexual plaintiff who alleges an actionable discrimination claim based on sex will generally be denied relief because the courts accuse plaintiffs of bringing such claims as an attempt to bootstrap an additional discrimination claim based on sexual orientation.[114] Thus, when those employees have suffered some form of actual discrimination—whether because of a protected trait or sexual orientation or both—they are continuously denied the benefits of Title VII protection that their heterosexual counterparts enjoy.[115] It is important to remember the intended purpose of Title VII: to eliminate employment discrimination.[116]

F. Other Discrimination

Additional instances of discrimination exist within employment law and certain areas of society that contribute toward prohibiting discrimination based on sexual orientation. It has been hypothesized that gay and lesbian employees suffer a wage gap as a form of employment discrimination.[117] Studies have shown that gay men face a wage penalty relative to heterosexual men, while lesbian women enjoy a wage advantage relative to heterosexual women.[118] In a recent study, Antecol, Jong, and Steinberger[119] found that "lesbian women earned more than heterosexual women irrespective of marital status, while gay men earned less than their married heterosexual counterparts but more than their cohabitating heterosexual counterparts."[120]

Sheila Hatami and David Zwerin discuss the growing sexual orientation discrimination in the field of education, and they opine that educators should reflect their population in certain characteristics.[121] They argue that

113. *Id.* at 218 (quoting Simonton v. Runyon, 232 F.3d 33, 38 (2d. Cir. 2000)).

114. *See, e.g.*, *Dawson*, 398 F.3d at 211; *Simonton*, 232 F.3d at 38; *Bovalino*, *supra* note 100, at 1134 (counseling "gay plaintiffs bringing claims under Title VII [to] emphasize the gender stereotyping theory and de-emphasize any connection the discrimination has to homosexuality.").

115. *See supra* note 93.

116. *See supra* note 11.

117. *See* Heather Antecol, Anneke Jong & Michael Steinberger, *The Sexual Orientation Wage Gap: The Role of Occupational Sorting and Human Capital*, 61 INDUS. & LAB. REL. REV. 518, 518–21 (2008) (citing numerous studies and papers on the sexual orientation wage gap).

118. *See id.* The magnitude of the penalty or advantage varies across studies.

119. *Id.* at 518.

120. *Id.*

121. Sheila Hatami & David Zwerin, *Educating the Masses: Expanding Title VII to Include Sexual Orientation in the Education Arena*, 25 HOFSTRA LAB. & EMP. L.J. 311, 313 (2007).

Title VII has been improperly interpreted by the federal courts and needs to be re-examined and expanded to include sexual orientation discrimination in order to protect the fundamental rights of all citizens, particularly in the field of education.[122]

A somewhat related issue is sexual orientation discrimination experienced by collegiate athletes. In 1996 at Pennsylvania State University, basketball coach Maureen Portland had an anti-gay policy that was characterized as "no drinking, no drugs, no lesbians."[123] As a result, Jennifer Harris—a promising young athlete[124]—was cut from the team after her sophomore year because the coach suspected that she was a lesbian that was brainwashing her teammates.[125] Harris subsequently filed suit against the coach, seeking relief for a pattern and practice of discrimination on the basis of race, gender, and sexual orientation.[126] The parties were unable to resolve the dispute in a court ordered mediation session; they eventually settled the case in February of 2007. The settlement remains confidential.[127]

Same-sex marriage has recently become a popular political and moral debate among society, scholars, and throughout organizations in many states.[128] This is possibly because "opposition to marriage for same-sex couples is part of a socially conservative philosophy that holds that sexual activity is only appropriate within (heterosexual) marriage."[129] Many plaintiffs in same sex-marriage cases argue that the holding and reasoning of *Loving v. Virginia*[130] (and other Supreme Court marriage cases)[131] support

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122. *Id.* at 315.

123. Osborne, *supra* note 13, at 481. *See also* Claire Williams, *Sexual Orientation Harassment and Discrimination: Legal Protection for Student-Athletes*, 17 J. LEGAL ASPECTS SPORT 253, 253 (2007).

124. Jennifer Harris was a highly talented high school basketball player garnering recognition as an All-American by McDonald's, WBCA, Parade Magazine, and Nike. *See* Osborne, *supra* note 13, at 481.

125. *Id.* at 482 (citing Harris' First Amended Complaint at 13, Harris v. Portland, No. 1:05-CV-2648, 2006 WL 1317125 (M.D. Pa. 2006)). *See* Penn State Reprimands, Fines Coach Portland, Associated Press (Apr. 18, 2006), http://sports.espn.go.com/ncw/news/story?id=2412730 (last visited Aug. 11, 2009). Harris asserts she is not gay; the discrimination and harassment lawsuit was focused on her perceived sexuality. Id.

126. *Williams*, *supra* note 123, at 253–54.

127. *Id.* at 254.

128. *See, e.g.*, Helen M. Alvaré, *The Turn Toward the Self in the Law of Marriage & Family: Same-Sex Marriage & Its Predecessors*, 16 STAN. L. & POL'Y REV. 135, 186–91 (2004); William C. Duncan, *In Whose Best Interests: Sexual Orientation and Adoption Law*, 31 CAP. U. L. REV. 787 (2003); Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 835–40 (1997).

129. Deborah A. Widiss, Elizabeth L. Rosenblatt & Douglas NeJaime, *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J.L. & GENDER 461, 463 (2007).

130. 388 U.S. 1 (1967) In *Loving*, the Supreme Court held that the right to marry is fun-

the notion that the right to marry is a fundamental right, requiring a higher standard of appellate review when determining the constitutionality of laws against same-sex marriage.[132] Most courts disagree and, through application of a lower standard of review, have concluded that there is no substantive due process violation by denying same-sex marriage.[133] This is mostly because case law stands for the proposition that the fundamental right to marry is limited to the traditional definition of the institution of marriage, requiring spouses to be of different sexes.[134]

This topic requires more discussion beyond the scope of this article, but it is briefly discussed because the social pressure of the issue of gay marriage may inevitably be a factor that could lead the Supreme Court or Congress to consider inclusion of federal sexual orientation protection in the workplace.

III. PROPOSAL

A. Freedom from Discrimination

Proponents of including sexual orientation as a protected class under Title VII have argued that freedom from any form of discrimination is a natural right inherent to all individuals,[135] especially in a country premised upon safeguarding individual rights and ensuring freedom from oppression. Although Congress passed the groundbreaking Title VII of the Civil Rights Act of 1964 in an attempt to eliminate discrimination in the workplace,[136] sexually nonconforming employees continue to suffer discrimination without any recourse in federal court.[137] Opponents of such inclusion, however, argue that under a plain reading of Title VII, sexual orientation is not a pro-

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damental and struck down a state law banning interracial marriage as unconstitutional.

131. *See, e.g.*, Turner v. Safley, 482 U.S. 78 (1987) (holding that prisoners enjoy a constitutional right to marry); Zablocki v. Redhail, 434 U.S. 374, 384, 406 (1978) (holding that individuals who owe child support cannot be denied the opportunity to marry because the right to marry is fundamental under the United States Constitution).

132. *See, e.g.*, Conaway v. Deane, 932 A.2d 571, 619 (Md. 2007) (stating that gay litigants rely on Loving, inter alia); Lewis v. Harris, 908 A.2d 196, 210 (N.J. 2006) (noting that plaintiffs rely on *Loving* "to support their claim that the right to same-sex marriage is fundamental").

133. *See, e.g.*, Baehr v. Lewin, 852 P.2d 44, 57 (Haw. 1993).

134. *Id.*

135. *See, e.g.*, John G. Culhane, *Review of Sexual Orientation and Human Rights*, 16 WISC. INT'L. L.J. 579, 581 (1998).

136. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

137. *See, e.g.*, Dawson v. Bumble & Bumble, 398 F.3d 211, 215 (2d Cir. 2005) (the plaintiff suffered discrimination, but her case was dismissed).

tected class and is not actionable in federal court.[138] Which side has the more sound argument? Opponents of including sexual orientation in Title VII might have the more logical argument because the statute clearly does not include or even mention sexual orientation. But which side is *right* in terms of promoting equality and eliminating discrimination? Which side is in accordance with the purpose of Title VII? Regardless of which side you happen to align with, the answer lies in the fact that a certain class of employees is subjected to open, hostile employment discrimination, and the federal courts are continually denying relief to those employees because of their sexual preferences.

A corollary situation, for example, would be if Congress passed a bill that made it unlawful for an employer to discriminate against an employee because of obesity to eliminate weight discrimination in the workplace. Then over the following decades, the courts interpret the statute properly and made it unlawful to discriminate because of obesity, but then deny relief for discrimination because of anorexia (even though both, of course, would be a form of weight discrimination). Although this example seems academic and improbable, it illustrates what is happening in the federal courts with regard to Title VII: deny relief to some and allow it for others, even though actual employment discrimination has occurred. It is borderline ignorant, and perhaps even inadvertently hypocritical, for federal courts to disregard the overarching purpose of enacting Title VII and to deny gay and lesbian employees relief from employment discrimination.

This article proposes that one of three events must occur in order to provide proper relief to employees discriminated against because of their sexual orientation. The first (and maybe the most probable) would be for Congress to pass legislation that prohibits discrimination based on sexual orientation. The second event would be if the Supreme Court read the characteristic of a person's sexual orientation into the language of Title VII, as either encompassed within the statutory definition of sex or as read into other language of the statute.[139] Third, and possibly the least politically controversial, would be if the Supreme Court (and federal courts) disregarded the employee's sexual orientation altogether when analyzing an employment discrimination claim.[140] This last solution could be difficult for

138. The definition of "because of sex" at 42 U.S.C. § 2000e-k (2000) does not include a reference to sexual orientation.

139. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986) (reading "sexual harassment" into the statutory language of "conditions of employment."). *See supra* Part II.D.1.

140. *See* Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1066 (9th Cir. 2002) (holding that the sexual orientation of the male plaintiff in a male-to-male sexual harassment case was irrelevant because the sexual orientation of a female victim in the typical sexual harassment case is always irrelevant).

courts to implement, however, because of the interconnectedness of sex, gender, and sexual orientation.

Although it may be implausible to predict whether any of the three events would occur, or whether any solution is more likely to occur than the others, each option is worth discussing in order to determine whether the courts (and society) could fulfill the ultimate goal of Title VII: to eliminate discrimination in the workplace.

1. *Legislation*

Although federal law does not currently afford relief for discrimination based on sexual orientation, the District of Columbia and twenty states now have laws that prohibit discrimination because of a person's sexual orientation.[141] Such prohibition is generally in areas of employment, housing, or public accommodations.[142] At least in those states, a plaintiff can bring a state claim against the employer for discrimination based on gender or sexual orientation, which is obviously not a colorable claim under federal

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141. California, Colorado, Connecticut, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, Wisconsin, and the District of Columbia. Seven states prohibit discrimination only on the basis of sexual orientation. The remaining thirteen states cover sexual orientation and gender identity. Directory M, Sexual Orientation Discrimination in the Workplace, http://articles.directorym.com/Sexual_Orientation_Discrimination_in_the_Workplace_-a951701.html (last visited Aug. 11, 2009). *See also* Nancy J. Knauer, *LGBT Elder Law: Toward Equity In Aging*, 32 HARV. J.L. & GENDER 1, 35 n. 231 (2009):

[t]welve states and the District of Columbia have laws prohibiting discrimination on account of sexual orientation and gender identity. These states are: California, Colorado, Illinois, Iowa, Maine, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington. Eight additional states prohibit discrimination on account of sexual orientation. These states are: Connecticut, Hawaii, Maryland, Massachusetts, Nevada, New Hampshire, New York, and Wisconsin.

142. *Id.* For example, a New York statute provides the following:

> "[i]t shall be an unlawful discriminatory practice: (a) For an employer or an employee or agent thereof, because of the actual or perceived age, race, creed, color, national origin, *gender*, disability, marital status, partnership status, *sexual orientation* or alienage or citizenship status of any person, to refuse to hire or employ or to bar or to discharge from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges of employment."

NYC ADMIN. CODE § 8-107 (1) (a)-(d) (emphasis added). The New York Code defines gender to include "actual or perceived sex and shall also include a person's gender identity, self-image, appearance, behavior or expression, whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the legal sex assigned to that person at birth." NYC ADMIN. CODE § 8-102(23) (2006) (emphasis added).

law.[143] The result is a lack of national uniformity in this area of employment law, allowing for continued discrimination in the remaining thirty states with no relief to gay and lesbian employees in state or federal courts.

Since 1994, Congress has made repeated unsuccessful attempts to pass the Employment Non-Discrimination Act (ENDA).[144] The bill is an effort to prohibit discrimination because of an employee's sexual orientation.[145] ENDA defines the scope of sexual orientation to include homosexuality, heterosexuality, or bisexuality.[146] The bill, however, only covers *intentional* discrimination claims directed toward an individual employee's sexual orientation, but it does not cover *unintentional* (or hidden) discrimination that would affect an entire class of employees on the basis of sexual orientation.[147] The original bill failed to pass the Senate in 1996 and was put back on the calendar in 2002; it has yet to pass through Congress.[148] Even if the bill were to eventually become federal law, it would likely be subjected to the "congruence and proportionality" test spelled-out in *City of Boerne v. Flores*,[149] which could inevitably defeat the law if a more conservative court heard the matter.

Considering the current political landscape and controversy of expanding gay rights, it seems unlikely that Congress will pass the bill in the near future. Nonetheless, it is possible that, with a new administration in the White House and the cooperation of more liberal-minded members of Congress, sexual orientation discrimination may eventually become an unlawful employment practice through legislation such as ENDA.

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143. *See* 42 U.S.C. § 2000e-2 (2000).

144. Employment Non-Discrimination Act, H.R. 2015, 110th Cong. (2007).

145. *See id.*

146. *See id.* § 3(a)(9).

147. *See id.* § 4(g). "Intentional" discrimination is commonly referred to as a "disparate treatment," when the employer intentionally discriminated *only* against the employee because of a protected trait. Conversely, "unintentional" discrimination is commonly referred to as a "disparate impact," when the employer has a facially-neutral employment pattern or practice that affects an entire class of individuals because of a protected trait (e.g., an employment policy that requires new employees to possess a high school diploma to work picking apples). The requirement is unlawful because it is not related to business necessity and because it generally has a disparate impact on certain groups of minorities (which must be proved by statistics). *See, e.g.*, Zachair, Ltd. v. Driggs, 965 F. Supp. 741 (D. Md. 1997).

148. *See* the proposed Employment Non-Discrimination Act of 2001, S. 1284, 107th Cong. (2001). The current version of the bill is available at http://thomas.loc.gov/home/gpoxmlc110/h2015_ih.xml.

149. 521 U.S. 507, 508 (1997) (imposing the requirement of "congruence and proportionality" between the injury Congress seeks to prevent or remedy and the means it adopts to prevent such injury).

2. *Reading Sexual Orientation into Title VII*

The Supreme Court sometimes reads new meaning into existing statutory language, particularly when it is consistent with congressional intent and purpose.[150] For example, as discussed above with *Hopkins*, the Court expanded the meaning of sex under Title VII to include not only a person's sex at birth but also masculine or feminine behavior, appearance, and other characteristics.[151] This language does not appear in the definition of "sex" under Title VII, yet the Court likely included such language because there was actual employment discrimination.[152] The Court, therefore, seemed to take the liberty of expanding the definition of the term "sex" in order to prevent the inequitable result of employment discrimination that was not covered by federal law at that time.

It is more evident in the *Vinson* decision that the Court is willing to read certain language into Title VII.[153] The Court in *Vinson* read the terms "sexual harassment" into the language of Title VII ("conditions of employment") because the employer's conduct affected an employee's conditions of employment through his continual sexual contact with the employee.[154] Under a plain reading of Title VII, it is unmistakable that Congress did not include, or perhaps even contemplate, whether sexual harassment was unlawful when it drafted the Act.[155] But just as in *Dawson*, the Court in *Vinson*—twenty-two years after the Act was passed—incorporated additional unlawful conduct into the language of Title VII that did not originally appear in the Civil Rights Act of 1964.[156]

Dawson and *Vinson* are merely two examples of the Court's willingness to expand statutory definitions and incorporate additional, unlawful discriminatory conduct under Title VII that was otherwise not originally drafted in the statute. The federal courts' staunch approach to repeatedly holding that Title VII does not cover a person's sexual orientation is logically flawed because an individual's sex or gender identity becomes unmistakably intertwined with that person's sexuality, sexual behavior, and sexual preference. In many situations, it may be nearly impossible to determine,

150. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

151. *See id.* at 228.

152. *See id.*

153. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986); *supra* Part II.D.1.

154. *Meritor*, 477 U.S. at 67. *See also* 42 U.S.C. § 2000e-2(a)(1) (providing that it is an unlawful employment practice for an employer to discriminate against any individual with respect to his *conditions of employment* because of such individual's sex).

155. *See* 42 U.S.C. § 2000e-2(a)(1); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

156. *Meritor*, 477 U.S. at 67.

for example, whether an employee was discriminated against because she is lesbian, female, or both.

Federal courts continue to use the strict definition of sex as meaning a person's maleness or femaleness, furthering the unequal treatment and discrimination in the workplace, which is exactly what Congress wanted to remedy by enacting Title VII. The question remains whether the courts will ever incorporate sexual orientation into the definition of "sex," or perhaps, whether they would broaden the reading of Title VII to encompass any discrimination that is connected to or intersects with a person's sex or gender.

3. *Disregarding Sexual Orientation Altogether*

A less controversial solution might be for the courts to disregard a plaintiff's sexual orientation when analyzing a claim for employment discrimination. When a gay plaintiff's sexual orientation is either alluded to or discussed in the complaint or answer, most federal courts will generally grant an employer's motion for summary judgment.[157] But when a straight plaintiff brings an employment discrimination claim, the plaintiff's sexual orientation is irrelevant and almost never an issue.[158] This is likely because society and the courts typically presume that an employee is straight unless that person claims (or appears) to not conform to sexual orientation stereotypes. The solution to this particular unequal treatment is to disregard a plaintiff's sexual orientation altogether.

Such solution could be difficult to implement in certain situations because, when an employee is fired because she is a female and a lesbian, it is nearly impossible to disregard her sexual orientation because the claim is partially premised upon, and completely connected to, her sexual orientation. It seems as though another step is needed here, such as making the argument (as previously mentioned) that her sexual orientation should somehow be covered under Title VII because of the interconnectedness of her sex and her lesbianism. The catch twenty-two is that, as soon as an employee argues that her sexual orientation should be covered by federal law, she allows her orientation to become the issue, and federal courts would likely dismiss her case (which of course clears the docket of a potentially heated controversial matter).

In sexual harassment cases, however, it appears much easier to disregard a plaintiff's sexual orientation because the key element required in proving a sexual harassment claim is to show that the harassment was se-

157. *See, e.g.*, Dawson v. Bumble & Bumble, 398 F.3d 211, 216 (2d Cir. 2005).

158. *See, e.g.*, *Meritor*, 477 U.S. 57 (not discussing the harasser's or the victim's sexual orientation). *But see* Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1063–64 (9th Cir. 2002) (disregarding the sexual orientation of the victim and the harasser).

vere and pervasive enough to affect conditions of employment.[159] Fortunately, some courts follow the holding that the sexual orientation of the harasser and the harassed is *immaterial* (but only in the context of sexual harassment).[160] In a same-sex sexual harassment case, for example, the Seventh Circuit in *Doe v. City of Belleville*[161] seemed to disregard the sexual orientation of the employees and harassers when it noted that, "[t]he fact that the . . . harassers are not gay—a fact that some courts view as dispositive—is, in our view, immaterial."[162] In *Rene v. MGM Grand Hotel, Inc.*,[163] another same-sex harassment case, the Ninth Circuit disregarded the sexual orientation of the plaintiff by holding that the plaintiff's sexual orientation was irrelevant because the harassment was "sexual in nature."[164] The court further noted that the plaintiff's sexual orientation neither provides nor precludes a cause of action.[165] Although ignoring a plaintiff's sexual orientation is apparently feasible with sexual harassment cases, it seems equally infeasible with other sex discrimination claims brought under Title VII because of the nature of the cause of action and because a person's sex is sometimes inseparable from that person's sexual orientation in litigation.

IV. CONCLUSION

Recent court acceptance of hearing discrimination claims brought by sexually nonconforming claimants is an indicator of the federal courts possibly expanding Title VII's coverage to protect gay and lesbian employees. We are surrounded by additional indicators that individual states, private companies, and society have embarked on a movement to protect citizens from all forms of employment discrimination, regardless of sexual behavior or preference. The cumulative effect of this movement toward relief for sexual orientation discrimination may inevitably lead to the inclusion of sexual orientation protection under Title VII.

Of the three proposed solutions, it seems unlikely that any will occur in the near future because of the resulting political and societal fall-out of ex-

159. *See Rene*, 305 F.3d at 1063–64.

160. *See* Doe v. City of Belleville, 119 F.3d 563, 566 (7th Cir. 1997). *But see* McWilliams v. Bd. of Supervisors, 72 F.3d 1191 (4th Cir. 1996); Wrightson v. Pizza Hut of Am., 99 F.3d 138 (4th Cir. 1996) (holding that there must be evidence that the harasser is homosexual for an employee to bring a same-sex sexual harassment claim), *abrogated by* Oncale v. Sundowner Offshore Svcs., Inc., 523 U.S. 75 (1998).

161. 119 F.3d 563, 566 (7th Cir. 1997).

162. *Id.* at 566.

163. 305 F.3d 1061 (9th Cir. 2002) (en banc).

164. *See id.* at 1066.

165. *Id.* at 1063–64.

panding gay rights. But that does not mean that we should abandon optimism and perseverance to prevent the unequal application of the law and injustice against employees as outlined in this note. And with such continued unequal treatment in employment discrimination law, something must occur if we desire to strive for adherence to the original intent of Title VII of the Civil Rights Act: eliminating discrimination in the workplace.

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