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# SPLIT OVER SEX: FEDERAL CIRCUIT COURTS AND EXECUTIVE AGENCIES SPLIT OVER SEXUAL ORIENTATION DISCRIMINATION UNDER TITLE VII

*Darria Turner*<sup>+</sup>

Title VII of the U.S. Civil Rights Act of 1964 provides that it shall be unlawful for public and private employers with 15 or more employees “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 . . . .”<sup>1</sup> Since its enactment, neither Congress nor the Supreme Court has definitively stated whether sex discrimination based on sexual orientation is protected under Title VII. Because Congress and the Supreme Court have not explicitly provided for its protection, claims of sex discrimination based on sexual orientation are generally not cognizable under Title VII.<sup>2</sup> For this reason, many courts have routinely held that the protections of Title VII do not extend to claims based on sexual orientation discrimination.<sup>3</sup> Recently however, three circuits were faced with claims of sex discrimination based on sexual orientation and were compelled to decide whether to follow or reverse court precedent and allow discrimination claims based on sexual orientation to be heard.<sup>4</sup>

In March 2017, in *Evans v. Georgia Regional Hospital*,<sup>5</sup> the Eleventh Circuit ruled 2-1 that Title VII does not cover discrimination based on sexual orientation. It held that binding precedent in *Blum v. Gulf Oil Corp.*,<sup>6</sup> which established that “[d]ischarge for homosexuality is not prohibited by Title VII . . . . [.]” foreclosed such an action.<sup>7</sup> In April 2017, the Second Circuit also held that sexual orientation was not covered under Title VII in *Zarda v. Altitude Express*,

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1. 42 U.S.C. §§ 2000e–e-17 (2012).
2. CHARLES R. RICHEY, 1 MANUAL ON EMPLOYMENT DISCRIMINATION AND CIVIL RIGHTS ACTIONS IN THE FEDERAL COURTS § 1:64 (2018).
3. See *Zarda v. Altitude Express, Inc.*, 855 F.3d 76, 80 (2nd Cir. 2017), *overruled by*, 883 F.3d 100 (2d Cir. 2018); *Anonymous v. Omnicom Grp., Inc.*, 852 F.3d 195, 198 (2d Cir. 2017); *Evans v. Ga. Reg’l Hosp.*, 850 F.3d 1248, 1255 (11th Cir. 2017).
4. See *Zarda*, 855 F.3d at 79–80; *Evans*, 850 F.3d at 1250; *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 340–41 (7th Cir. 2017).
5. 850 F.3d 1248, 1250 (11th Cir. 2017).
6. 597 F.2d 936, 938 (5th Cir. 1979).
7. *Id.* at 1255 (quoting *Blum*, 597 F.2d at 938).

*Inc.*<sup>8</sup> However, in *Hively v. Ivy Tech Community College of Indiana*,<sup>9</sup> after a rehearing en banc, the Seventh Circuit held that Title VII does provide protection against discrimination based on sexual orientation. Following the Seventh Circuit's reversal, the Second Circuit agreed to rehear *Zarda* en banc, which overruled its current precedent and added to the circuit split on this issue.<sup>10</sup>

This split has also created tension between the United States Department of Justice (DOJ) and the Equal Employment Opportunity Commission (EEOC).<sup>11</sup> These agencies have taken opposing views on the *Zarda* rehearing.<sup>12</sup> The DOJ argues that discrimination based on sexual orientation is not sex discrimination under Title VII.<sup>13</sup> Conversely, the EEOC argues that "sexual orientation discrimination is, by definition, discrimination 'because of . . . sex,' in violation of Title VII."<sup>14</sup>

This Comment will explore the history of workplace sex discrimination cases based on sexual orientation under Title VII, how the current circuit split should be resolved, and the impact these cases will have on lesbian, gay, bisexual, and transgender (LGBT) sexual orientation discrimination in the workplace. Part I will discuss the history and evolution of sex discrimination under Title VII. It will begin with the enactment of the legislation and then will discuss how judicial interpretation of sex discrimination has changed through case law and administrative guidance.

Part II will examine the current circuit split on whether Title VII's protection against sex discrimination includes sexual orientation. It will first discuss how each of the circuits interpret sexual orientation discrimination under Title VII, then analyze the basis upon which each circuit holds that sexual orientation is or is not protected by Title VII. Lastly, in Part III, this Comment will argue that judicial interpretation should evolve to include sexual orientation in cases of protection from sex discrimination under Title VII. This Comment will argue that the EEOC and the Seventh Circuit's interpretation is the appropriate resolution for sexual orientation under Title VII. It will also discuss how the conflicting arguments from federal agencies, coupled with no guidance from Congress or the Supreme Court, could potentially lead to a myriad of workplace discrimination issues if the judiciary fails to resolve the conflict.

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8. 855 F.3d 76, 82 (2nd Cir. 2017), *overruled by*, 883 F.3d 100 (2d Cir. 2018)

9. 853 F.3d 339, 351–52 (7th Cir. 2017).

10. *Zarda*, 855 F.3d at 82, *overruled by*, *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018).

11. See Brief for the United States as Amicus Curiae at \*15–16, \*21, *Zarda v. Altitude Express, Inc.*, 855 F.3d 76 (2d Cir. 2017) (No. 3775).

12. *Id.* at 15; En Banc Brief of Amicus Curiae Equal Employment Opportunity Commission in Support of Plaintiffs/Appellants and in Favor of Reversal at 22–23, *Zarda v. Altitude Express, Inc.*, 855 F.3d 76 (2d Cir. 2017) (No. 15-3775) [hereinafter Brief of Amicus Curiae EEOC].

13. Brief for the United States as Amicus Curiae, *supra* note 11, at 1.

14. Brief of Amicus Curiae EEOC, *supra* note 12, at 5.

I. WHAT IT MEANS TO BE DISCRIMINATED AGAINST “BECAUSE OF . . . SEX”<sup>15</sup>

A. *Sex Discrimination is Brought Within Title VII’s Purview*

Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, prohibits as an “unlawful employment practice,” discrimination “against any individual with respect to . . . compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”<sup>16</sup> This legislation began by President John F. Kennedy making appeals to Congress to enact legislation regarding civil rights.<sup>17</sup> President Kennedy’s proposed civil rights legislation sought to emphasize voting rights, public accommodations, employment discrimination, and education to counter the “growing moral crisis in American race relations.”<sup>18</sup> However, President Kennedy’s concern did not include discrimination because of sex.<sup>19</sup> Yet when Title VII of the Civil Rights Act of 1964 was enacted, it included discrimination “because of . . . sex.”<sup>20</sup>

Representative Howard Smith introduced the amendment just two days before the bill moved from the House to the Senate, without prior hearing or debate.<sup>21</sup> Smith opposed the civil rights legislation, so adding sex discrimination was his effort to block it.<sup>22</sup> However, his effort failed and sex discrimination fell within the purview of impermissible actions under Title VII.<sup>23</sup> Notably, Representative Martha Griffith began to advocate for Smith’s amendment because she believed that not adding “sex” to the bill would leave white women unprotected.<sup>24</sup> Following Griffith’s comments, four other representatives also raised the argument that white women would be left behind.<sup>25</sup> This support of Smith’s

15. 42 U.S.C. § 2000e-2(a)(1) (2012).

16. *Id.*

17. See President John F. Kennedy, *Special Message to the Congress on Civil Rights* (Feb. 28, 1963), [www.presidency.ucsb.edu/ws/?pid=9581](http://www.presidency.ucsb.edu/ws/?pid=9581); see also President John F. Kennedy, *Special Message to the Congress on Civil Rights and Job Opportunities* (June 19, 1963), [www.presidency.ucsb.edu/ws/?pid=9283](http://www.presidency.ucsb.edu/ws/?pid=9283).

18. Kennedy, *Special Message to the Congress on Civil Rights and Job Opportunities*, *supra* note 17.

19. *Id.*

20. 42 U.S.C. § 2000e-2.

21. 110 CONG. REC. 2577 (1964) (introductory statement of Rep. Smith). Representative Smith voted against final passage of the bill. See *H.R. 7152. Civil Rights Act of 1964. Adoption of a Resolution (H. Res. 789) Providing For House Approval of the Bill as Amended by the Senate.*, GOVTRACK (July 2, 1964), [www.govtrack.us/congress/votes/88-1964/h182](http://www.govtrack.us/congress/votes/88-1964/h182).

22. See *Barnes v. Costle*, 561 F.2d 983, 986–87 (D.C. Cir. 1977) (noting that Representative Smith proposed the amendment as “a last-minute attempt to block the bill”).

23. See 110 CONG. REC. 2804–05.

24. *Id.* at 2578. Representative Griffith stated that “I rise in support of the amendment primarily because I feel as a white woman when this bill has passed . . . that white women will be last at the hiring gate.” *Id.*

25. *Id.* at 2583 (statements of Representatives Tuten, Pool, Andrews, and Rivers).

amendment seemingly interfered with his plan to derail the entire bill.<sup>26</sup> The debate closed and Smith's amendment passed in the House twice.<sup>27</sup> It first passed by a vote of 168 to 133,<sup>28</sup> then by a vote of 290 to 130.<sup>29</sup>

*1. Congress Fails to Define Scope and Meaning of Sex Discrimination*

Since the amendment was included at the tail end of the legislative process, there is no substantive legislative history defining the scope and meaning of sex discrimination.<sup>30</sup> Though the EEOC has provided little guidance on the application of "because of sex" within Title VII, one of the reasons Congress created the EEOC was to interpret and enforce the prohibition of sex discrimination.<sup>31</sup> To enforce these laws, the EEOC was given the authority to investigate accusations of discrimination against covered employers that are submitted by an applicant or employee who believes that unlawful discrimination has occurred.<sup>32</sup> The EEOC also provides guidelines on how the laws and regulations apply.<sup>33</sup> Though the guidelines are "not controlling upon the courts by reason of their authority, [they] do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."<sup>34</sup> However, the EEOC's initial guidance focused primarily on protection of the "woman worker."<sup>35</sup> This could be because many of the

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26. *Id.*

27. *Id.* at 2584, 2804–05.

28. *Id.* at 2584.

29. *Id.* at 2804–05.

30. *Meritor Savs. Bank v. Vinson*, 477 U.S. 57, 63–64 (1986). The Court in *Meritor Savings Bank v. Vinson* noted:

The prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives. The principal argument in opposition to the amendment was that "sex discrimination" was sufficiently different from other types of discrimination that it ought to receive separate legislative treatment. This argument was defeated, the bill quickly passed as amended, and we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on "sex."

*Id.* (internal citations omitted); *see also* *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 143 (1976) (stating that "[t]he legislative history of Title VII's prohibition of sex discrimination is notable primarily for its brevity").

31. 42 U.S.C. § 2000e-4 (2012). The Equal Employment Opportunity Commission (EEOC) is an independent and bipartisan federal agency that enforces federal laws that make it illegal to discriminate in the workplace. *Id.* It is governed by five Commissioners, who are appointed by the President and confirmed by the Senate. *Id.*

32. *See id.*

33. *EEOC Subregulatory Guidance*, EQUAL EMP'T OPPORTUNITY COMM'N, <https://www.eeoc.gov/laws/guidance/index.cfm> (last visited Feb. 18, 2018).

34. *Gilbert*, 429 U.S. at 141–42.

35. Guidelines on Discrimination Because of Sex, 30 Fed. Reg. 14,926–27 (Dec. 2, 1965) (codified as amended at 29 C.F.R. pt. 1604) (listing the Equal Employment Opportunity

commissioners did not believe that sex categorically was a legitimate addition to the legislation.<sup>36</sup>

Consequently, without Congress's guidance on the definition of "sex" under Title VII, courts were inclined to interpret it narrowly.<sup>37</sup> In many cases, courts rationalized that Congress's limited discussion on the "because of sex" provision meant that Congress had "only the traditional notions of 'sex' in mind" when passing the bill.<sup>38</sup> Therefore, courts defined "sex" as biological sex and interpreted the provision to only prohibit discrimination against biological men and women for being a man or being a woman.<sup>39</sup> Over time, however, courts began interpreting "sex" in Title VII more broadly.<sup>40</sup>

### B. Evolution of Discrimination Because of "Sex" Under Title VII

After Title VII's enactment, cases alleging discrimination because of "sex" were tried throughout the U.S. court system. The earlier cases tended to focus on "sex" primarily from a biological standpoint.<sup>41</sup> In *Phillips v. Martin Marietta Corp.*,<sup>42</sup> a female job applicant filed suit under Title VII alleging that she was discriminated against because of sex. In this case, the employer informed her that they were not accepting job applications from women with school-aged children, despite accepting applications from men with school-aged children.<sup>43</sup>

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Commission's interpretations of Title VII's prohibitions on discrimination in employment because of sex).

36. CYNTHIA HARRISON, ON ACCOUNT OF SEX: THE POLITICS OF WOMEN'S ISSUES 1945–1968 187 (1989).

37. See *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084–87 (7th Cir. 1984) (finding that the lack of legislative history means that the sex provision does not forbid discrimination based on transsexuality); *Gilbert*, 429 U.S. at 145–46 (holding that Title VII's sex provision does not protect against discrimination because of pregnancy); *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 386 (5th Cir. 1971) (noting that there is little legislative history to assist courts with the judicial interpretation of the sex provision).

38. *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662–63 (9th Cir. 1977) (holding that the sole purpose of Title VII is to ensure the equal treatment of men and women because "[c]ongress has not shown any intent other than to restrict the term 'sex' to its traditional meaning"); see also *De Santis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 329–30 (9th Cir. 1979).

39. See *Holloway*, 566 F.2d at 662 n.4; see also *Ulane*, 742 F.2d at 1085.

40. See discussion *infra* Section I.B.

41. *Holloway*, 566 F.2d at 622 n.4; see *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978) (maintaining that actions based on sex stereotypes are discriminatory); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (holding that distinctions based on sex may not be discriminatory if they are relevant to "bona fide occupational qualification[s]"); *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 386, 388–89 (5th Cir. 1971) (indicating that the law was intended to fight prejudices based on sex, so the qualifications that discriminate must be "necessary to the business").

42. 400 U.S. 542, 543, 547 (1971) (Marshall, J., concurring) ("When performance characteristics of an individual are involved, even when parental roles are concerned, employment opportunity may be limited only by employment criteria that are neutral as to the sex of the applicant.").

43. *Id.* at 543 (majority opinion).

The Supreme Court held that Title VII's anti-sex discrimination provisions were applicable to an employer's refusal to accept applications from women, but not men.<sup>44</sup>

Similarly, in *Diaz v. Pan American World Airways, Inc.*,<sup>45</sup> a man applied for a position as a flight attendant with Pan American Airlines. He was not selected based on Pan American's policy of only hiring women for the flight attendant position.<sup>46</sup> The court held that Title VII protections applied to men as well as women.<sup>47</sup> Soon after *Phillips* and *Diaz*, the Supreme Court in *City of Los Angeles Department of Water & Power v. Manhart*,<sup>48</sup> delineated what discrimination "because of" one's sex is under the statute. The Court wrote:

There are both real and fictional differences between women and men. It is true that the average man is taller than the average woman; it is not true that the average woman driver is more accident prone than the average man. Before the Civil Rights Act of 1964 was enacted, an employer could fashion his personnel policies on the basis of assumptions about the differences between men and women, whether or not the assumptions were valid.

It is now well recognized that employment decisions cannot be predicated on mere "stereotyped" impressions about the characteristics of males or females. Myths and purely habitual assumptions about a woman's inability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less.<sup>49</sup>

### 1. Courts Slowly Expand the Definition of "Because of Sex"

Following this case, courts slowly began to expand the definition of "because of sex" discrimination under Title VII. One of the first cases to attempt to expand this definition was the 1984 case, *Ulane v. Eastern Airlines, Inc.*<sup>50</sup> Kenneth Ulane was an Eastern Airlines pilot for over 10 years before he was fired after he underwent sex reassignment surgery and became Karen Ulane.<sup>51</sup> After her surgery, Ulane received a revised birth certificate indicating her sex as female, and the Federal Aviation Administration certified her for flight status as a female.<sup>52</sup> The airline was unaware of Ulane's transsexuality

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44. *Id.* at 544.

45. 442 F.2d 385, 386 (5th Cir. 1971) (stating that "[i]n attempting to read Congress' intent in these circumstances . . . it is reasonable to assume, from a reading of the statute itself, that one of Congress' main goals was to provide equal access to the job market for both men and women").

46. *Id.*

47. *Id.* at 388-89.

48. 435 U.S. 702, 704 (1978).

49. *Id.* at 707.

50. 742 F.2d 1081, 1085-87 (7th Cir. 1984).

51. *Id.* at 1082-83.

52. *Id.* at 1083.

until she tried to return to work after her surgery.<sup>53</sup> After she was discharged in 1981, Ulane filed suit against Eastern Airlines alleging that it violated Title VII because she was discriminated against both as a female and as a transsexual.<sup>54</sup> The federal district court found that Ulane was fired because she was a transsexual in violation of Title VII.<sup>55</sup> The district court indicated that while the term “sex” did not incorporate “sexual preference[,]” it did incorporate “sexual identity.”<sup>56</sup>

On appeal, the Seventh Circuit reversed the district court’s decision.<sup>57</sup> The Seventh Circuit noted that while some may find that “sex” means “sexual identity[,]” under the principle of statutory construction, words should be given their plain, ordinary meaning.<sup>58</sup> The court highlighted that in Title VII, the plain, ordinary meaning of “sex” is that “it is unlawful to discriminate against women because they are women and against men because they are men.”<sup>59</sup> The court also noted that:

The words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder, *i.e.*, a person born with a male body who believes himself to be female, or a person born with a female body who believes herself to be male; a prohibition against discrimination based on an individual’s sex is not synonymous with a prohibition against discrimination based on an individual’s sexual identity disorder or discontent with the sex into which they were born. The dearth of legislative history on *section 2000e-2(a)(1)* strongly reinforces the view that that section means nothing more than its plain language implies.<sup>60</sup>

The court further concluded that if Eastern Airlines discriminated against Ulane, it was not because she was female, but because she was a transsexual, which is not a violation of Title VII.<sup>61</sup> Though this case did not successfully expand the definition of “because of sex[,]” it was subsequently expanded to include sexual harassment.<sup>62</sup>

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53. *Id.*

54. *Id.* at 1082.

55. *Id.* at 1084.

56. *Id.*

57. *Id.* at 1087.

58. *Id.* at 1085.

59. *Id.*

60. *Id.* at 1085–86 (stating that “[c]ongress never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex” and “sex should be given a narrow, traditional interpretation . . .”).

61. *Id.* at 1087.

62. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72–73 (1986).



## 2. Discrimination "Because of Sex" Includes Sexual Harassment

In 1986, the Supreme Court recognized for the first time that sexual harassment was discrimination "because of sex" under Title VII.<sup>63</sup> Mechelle Vinson was an employee of Meritor Savings Bank where she was sexually harassed by an executive of the bank.<sup>64</sup> She was discharged for "excessive absenteeism" after she took sick leave because of the harassment she experienced.<sup>65</sup> Following her discharge, Vinson brought a Title VII action against both Taylor and the bank, alleging that Taylor harassed her because of her sex.<sup>66</sup> The EEOC guidelines specified that "sexual harassment . . . is a form of sex discrimination prohibited by Title VII."<sup>67</sup> Relying on those guidelines, the Court held that Title VII affords employees protection from sexual harassment.<sup>68</sup> The Court also noted that "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex."<sup>69</sup> Just a few years after *Vinson*, the Court seemed to embrace similar logic as the district court in *Ulane*, finding that "sex" necessarily included "sexual identity."<sup>70</sup>

In *Price Waterhouse v. Hopkins*,<sup>71</sup> Ann Hopkins was a senior manager in an accounting firm who was denied partnership because other partners thought she did not act how a woman should act. Several partners suggested that she was "overly aggressive, unduly harsh," "macho[.]" and that she "overcompensated for being a woman."<sup>72</sup> The partners also expressed that she would have a better chance at partnership if she were "to take a course at charm school . . ." "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."<sup>73</sup> The Court held that the firm discriminated against Hopkins because of "sex" as the partners engaged in "sex stereotyping."<sup>74</sup> The Court stated that:

[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at

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63. *Id.*

64. *Id.* at 59–60.

65. *Id.* at 60.

66. *Id.*

67. *Id.* at 65.

68. *Id.*

69. *Id.* at 64.

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

71. 490 U.S. 228, 231–32, 237–38 (1989).

72. *Id.* at 235.

73. *Id.*

74. *Id.* at 257–58.

the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”<sup>75</sup>

After *Price Waterhouse*, more courts began to recognize Title VII protections in cases of sex stereotyping.<sup>76</sup> Courts also began to acknowledge that discrimination because of “sex” could be perpetrated by someone of the same sex.<sup>77</sup>

In *Oncale v. Sundowner Offshore Services, Inc.*,<sup>78</sup> Joseph Oncale worked on an eight-man oil platform crew. After Oncale was forcibly subjected to humiliating sex-related actions by colleagues in the presence of the rest of the crew, including physical assaults in a sexual manner and threats of rape, he filed a claim of sex discrimination against his employer.<sup>79</sup> The Court found that nothing in Title VII prevents one from bringing a claim of discrimination because of sex when both parties are of the same sex.<sup>80</sup> In the unanimous opinion, Justice Scalia defended the Court’s interpretation of the statute by noting that:

As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.<sup>81</sup>

Though this case did not expand the definition of “sex” to include sexual orientation, many cases were filed and tried on that basis.<sup>82</sup> However, courts were still reluctant to grant judgment in favor of plaintiffs because several other courts held that Title VII does not prohibit sexual orientation discrimination.<sup>83</sup> Further, Congress had neither added sexual orientation as a protected trait nor defined discrimination because of “sex” to include sexual orientation discrimination.<sup>84</sup>

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75. *Id.* at 251.

76. Arthur S. Leonard, *Sexual Minority Rights in the Workplace*, 43 BRANDEIS L.J. 145, 153–58 (2004/2005).

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

78. 523 U.S. 75, 77 (1998).

79. *Id.*

80. *Id.* at 79.

81. *Id.*

82. Leonard, *supra* note 76, at 152–53.

83. *Id.* “[C]ourts having unanimously concluded that sexual orientation discrimination . . . is not covered by Title VII . . . tend to reject those harassment cases that are premised solely on anti-gay motives.” *Id.*

84. Velma Cheri Gay, “50 Years Later . . . Still Interpreting the Meaning of ‘Because of Sex’ Within Title VII and Whether It Prohibits Sexual Orientation Discrimination”, 73 A.F. L. REV. 61, 93 (2015).

C. *EEOC's Interpretation of Sexual Orientation Discrimination under Title VII*

Much like the courts, until recently, EEOC decisions uniformly ruled that sexual orientation discrimination was not prohibited sex discrimination under Title VII.<sup>85</sup> Appeals heard by the Commission based on sexual orientation before 2015 were routinely dismissed for failure to state a claim.<sup>86</sup>

1. *Before 2015: EEOC Says Sexual Orientation Not Protected under Title VII*

In *Morrison v. Department of the Navy*,<sup>87</sup> Richard Morrison filed a complaint with the agency alleging discrimination based on his sex when his male co-worker told other employees he was gay; someone in the parking lot had seen him making out in a car with a man; and he was dying from AIDS.<sup>88</sup> The agency dismissed the complaint and Morrison requested EEOC's reconsideration of the decision.<sup>89</sup> The EEOC found that sex discrimination under Title VII did "not apply to cases which raise issues regarding an individual's perceived sexual preference or orientation."<sup>90</sup> The EEOC also noted that "[t]he federal courts have clearly expressed their opinion that claims of sex discrimination brought by homosexuals or those individuals perceived as homosexuals, are not within the purview of Title VII."<sup>91</sup> Similarly, in *Angle v. Department of Agriculture*, the EEOC found that Angle's claim of discrimination because of his perceived sexual orientation was not a valid claim under Title VII.<sup>92</sup> For this reason, plaintiffs could not successfully pursue a sexual orientation discrimination claim unless they "failed to conform to gender stereotypes."<sup>93</sup>

2. *2015: EEOC Reverses Course—Sexual Orientation Now Protected under Title VII*

In 2015, however, the EEOC reversed course on its longstanding history of agreeing with the courts in *Baldwin v. Foxx*.<sup>94</sup> David Baldwin filed a formal

85. Brief for the United States as Amicus Curiae, *supra* note 11, at \*8, \*11–12.

86. *See Gay*, *supra* note 84, at 106.

87. No. 05930964, 1994 WL 746296, at \*1 (June 16, 1994).

88. *Id.*

89. *Id.* at \*1–2.

90. *Id.* at \*3.

91. *Id.*; *see De Santis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 329–30 (9th Cir. 1979); *see also*, *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979).

92. *Angle v. Veneman*, No. 01A32644, 2004 WL 764265, at \*2 (Apr. 5, 2004). The EEOC has consistently held that discrimination based on sexual orientation is not actionable under Title VII. *See also*, *Barbagallo v. Henderson*, No. 01980167, 2001 WL 802788, at \*3 (July 5, 2001); *Marucci v. Caldera*, No. 01982644, 2000 WL 1637387, at \*1 (Oct. 27, 2000).

93. Camille Patti, *Hively v. Ivy Tech Community College: Losing the Battle but Winning the War for Title VII Sexual Orientation Discrimination Protection*, 26 TUL. J.L. & SEXUALITY 133, 136 (2017).

94. No. 0120133080, 2015 WL 4397641, at \*1 (July 16, 2015).

complaint with the EEOC against his employer, alleging that he was not promoted to a full-time air traffic controller at the Miami International Airport because he is gay.<sup>95</sup> Despite the consensus among the federal circuit courts that Title VII did not cover sexual orientation discrimination, the EEOC issued an opinion recognizing that sexual orientation discrimination is sex discrimination, and therefore within the scope of Title VII.<sup>96</sup> The EEOC found that “[s]exual orientation” as a concept cannot be defined or understood without reference to sex.<sup>97</sup>

The EEOC reasoned that Title VII protects against sexual orientation discrimination for three reasons: (1) “because it necessarily entails treating an employee less favorably because of the employee’s sex[.]”<sup>98</sup> (2) “because it is associational discrimination on the basis of sex[.]”<sup>99</sup> and (3) because it involves gender stereotyping, which has already been declared to be sex discrimination.<sup>100</sup> The EEOC also noted an inherent discrepancy in the courts definition of “sex” under Title VII.<sup>101</sup> Courts routinely had held that Congress in 1964 did not intend Title VII to apply to sexual orientation; yet in *Oncale*, the Supreme Court found that statutory provisions can be legitimately stretched, even absent congressional action, to cover “reasonably comparable evils.”<sup>102</sup> Since *Baldwin*, the EEOC has updated its guidance to include the prohibition of sexual orientation discrimination under Title VII.<sup>103</sup>

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95. *Id.* at \*2.

96. *Id.* at \*10.

97. *Id.* at \*13. “*Sexual orientation* refers to the sex of those to whom one is sexually and romantically attracted.” *Id.* (quoting *Definitions Related to Sexual Orientation and Gender Diversity in APA Documents*, APA, <http://www.apa.org/pi/lgbt/resources/sexuality-definitions.pdf> (last visited Oct. 31, 2018)). “It follows, then, that sexual orientation is inseparable from and inescapably linked to sex and, therefore, that allegations of sexual orientation discrimination involve sex-based considerations. One can describe this inescapable link between allegations of sexual orientation discrimination and sex discrimination in a number of ways.” *Id.* at \*14.

98. *Id.*

For example, assume that an employer suspends a lesbian employee for displaying a photo of her female spouse on her desk, but does not suspend a male employee for displaying a photo of his female spouse on his desk. The lesbian employee in that example can allege that her employer took an adverse action against her that the employer would not have taken had she been male. That is a legitimate claim under Title VII that sex was unlawfully taken into account in the adverse employment action.

*Id.* at 14–15.

99. *Id.* at \*17. The EEOC determined that since “Title VII ‘on its face treats each of the enumerated categories’—race, color, religion, sex, and national origin —‘exactly the same[.]’” associational sex discrimination should also be prohibited. *Id.* at \*19.

100. *Id.* at \*20.

101. *Id.* at \*24.

102. *Id.* at \*25.

103. *What You Should Know About EEOC and the Enforcement Protections for LGBT Workers*, EQUAL EMP’T OPPORTUNITY COMM’N, [https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement\\_protections\\_lgbt\\_workers.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm) (last visited Nov. 1, 2018).

*D. Federal Courts of Appeals' Interpretation of Sexual Orientation  
Discrimination under Title VII*

While the EEOC has made the effort to expand the definition of “sex” to include sexual orientation, most federal appellate courts have not followed suit.<sup>104</sup> The courts readily acknowledge that it is tough to make a distinction between sex and sexual orientation; nevertheless, they separate sexual orientation claims into two categories.<sup>105</sup>

*1. Gender Stereotyping*

The first category is sex discrimination based on gender stereotyping, in which courts have held there is Title VII protection.<sup>106</sup> Following the decision in *Price Waterhouse*, plaintiffs have a better chance of surviving summary judgment on this type claim.

In *Nichols v. Azteca Restaurant Enterprises, Inc.*, the Ninth Circuit found that a male waiter had a cognizable sex discrimination claim after he was harassed by his male coworkers, who teased that he walked and carried his tray “like a woman,” called him by female pronouns, and insulted him with vulgar female terms, all because he did not conform to the stereotypical notions of a man.<sup>107</sup> The Eighth Circuit similarly held that a front desk clerk with a “slightly more masculine” and “tomboyish” appearance survived summary judgment when she was fired despite great performance, because she did not have the “pretty, . . . Midwestern girl look” that her new supervisor wanted.<sup>108</sup>

*2. Sexual Orientation Discrimination*

The second category is sexual orientation discrimination where it is held that there is no protection under Title VII.<sup>109</sup> The facts in these cases are usually

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104. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 340–41 (7th Cir. 2017) (finding that almost all circuits have defined “sex” in the same way) (citations omitted); *Kalich v. AT&T Mobility, LLC*, 679 F.3d 464, 471 (6th Cir. 2012); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 290 (3d Cir. 2009); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217 (2d Cir. 2005); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Fredette v. BVP Mgmt. Assocs.*, 112 F.3d 1503, 1510 (11th Cir. 1997); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979).

105. *Sexual Orientation and Gender Identity Discrimination Under Title VII*, PRACTICAL LAW LABOR & EMP’T, Practice Note W-007-8106.

106. *Id.*

107. *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874–75 (9th Cir. 2001); *see also* *Anonymous v. Omnicom Grp., Inc.*, 852 F.3d 195, 200–01 (2d Cir. 2017) (holding that an openly gay employee survived a motion to dismiss when he was harassed by his supervisor, who perceived him to be effeminate and submissive).

108. *Lewis v. Heartland Inns of Am., L.L.C.*, 591 F.3d 1033, 1036, 1041 (8th Cir. 2010).

109. *Sexual Orientation and Gender Identity Discrimination Under Title VII*, *supra* note 105.

analogous to the claims in the gender stereotype cases, yet plaintiffs generally do not survive summary judgment based on precedent.<sup>110</sup>

In *Simonton v. Runyon*, a male postal worker filed suit under Title VII after suffering repeated abuse and harassment from his co-workers, who were aware of his sexual orientation.<sup>111</sup> The Second Circuit dismissed Simonton's complaint for failure to state a claim, reasoning that Title VII does not prohibit discrimination based on sexual orientation.<sup>112</sup> Likewise, in *Blum v. Gulf Oil Corp.*, the Fifth Circuit affirmed the district court's finding that discharge for homosexuality is not prohibited by Title VII when an employee in the customer account department filed a suit for wrongful termination based on his sexual preferences.<sup>113</sup>

Much like the Second and Fifth Circuits, the Seventh Circuit also found "harassment based solely upon a person's sexual preference or orientation (and not on one's sex) is not an unlawful employment practice under Title VII."<sup>114</sup> In *Hamner v. St. Vincent Hospital & Health Care Center, Inc.*, the Seventh Circuit affirmed the dismissal of a male nurse's Title VII claim alleging he was fired because he filed a grievance for harassment based on his sexual orientation.<sup>115</sup> In *Spearman v. Ford Motor Co.*, a utility employee's claim of sexual orientation discrimination was dismissed because the court held the problems that "resulted from his . . . apparent homosexuality" were not protected under Title VII.<sup>116</sup>

### 3. *The Seventh Circuit is the First Circuit to Reverse Course on Sexual Orientation Discrimination*

Since 2000, the Seventh Circuit has relied on both *Hamner* and *Spearman* as precedent to hold that "harassment based solely upon a person's sexual preference or orientation (and not on one's sex) is not an unlawful employment practice under Title VII."<sup>117</sup> In 2017, the Second, Seventh, and Eleventh Circuits

110. *See id.*

111. *Simonton v. Runyon*, 232 F.3d 33, 34 (2d Cir. 2000). Simonton was routinely verbally assaulted with comments such as "go fuck yourself, fag," "suck my dick," and "so you like it up the ass?" *Id.* Notes were placed on the wall in the employees' bathroom with Simonton's name and the name of celebrities who had died of AIDS. *Id.* Pornographic photographs were taped to his work area, male dolls were placed in his vehicle, and copies of Playgirl magazine were sent to his home. *Id.* Pictures of an erect penis were posted in his work place, as were posters stating that Simonton suffered from mental illness as a result of "bung hole disorder." *Id.* There were repeated statements that Simonton was a "fucking faggot." *Id.*

112. *Id.* at 36; *see also* FED. R. CIV. P. 12(b)(6).

113. *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979).

114. *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1084 (7th Cir. 2000); *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 704 (7th Cir. 2000).

115. *Hamner*, 224 F.3d at 704, 708.

116. *Spearman*, 231 F.3d at 1082, 1085.

117. *Spearman*, 231 F.3d at 1084; *Hamner*, 224 F.3d at 704. Both the *Hamner* and *Spearman* courts relied upon the Seventh Circuit's 1984 case *Ulane v. Eastern Airlines, Inc.*, which stated in dicta that "homosexuals and transvestites do not enjoy Title VII protection." *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984); *see also Spearman*, 231 F.3d at 1084 (supporting the

heard and dismissed sexual orientation discrimination claims.<sup>118</sup> The Seventh Circuit became the first circuit to follow the EEOC in reversing its stance on sexual orientation discrimination under Title VII.<sup>119</sup> The other circuits, as well as the U.S. Department of Justice, continue to insist that Title VII does not provide protection for sexual orientation discrimination claims.<sup>120</sup>

## II. BUT DOES “SEX” MEAN SEXUAL ORIENTATION?

### A. Federal Courts of Appeals’ Split Over Whether “Sex” Includes Sexual Orientation

#### 1. Eleventh Circuit: *Evans v. Georgia Regional Hospital*

In 2015, Jameka Evans, a security officer at Georgia Regional Hospital (Georgia Regional), was “denied equal pay or work, harassed, and physically assaulted or battered.”<sup>121</sup> Evans alleged that the chief of security repeatedly closed a door on her in a rude manner, that she experienced scheduling issues and a shift change, and that a less qualified individual was promoted as her supervisor.<sup>122</sup> She also claimed that her new supervisor scrutinized and harassed her and that someone had tampered with her equipment.<sup>123</sup> When Evans filed a complaint to human resources about the harassment, the senior human resources manager conducting the internal investigation asked her about her “sexuality.”<sup>124</sup> Evans then filed a complaint against Georgia Regional alleging that she was discriminated against because of her sexual orientation.<sup>125</sup>

Evans believed she was targeted for termination based on her sex because she is a “gay female” and does not carry herself in a “traditional woman[ly] manner.”<sup>126</sup> Evans also provided that it is “‘evident’ that she identif[ies] with

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conclusion that Title VII was meant to apply to discrimination against women because of their sex (citing *Ulane*, 742 F.2d at 1085)); *Hamner*, 224 F.3d at 704, 707 (empowering the holding that sexual orientation is not a classification protected under Title VII) (citing *Ulane*, 742 F.2d at 1085).

118. See *Zarda v. Altitude Express, Inc.*, 855 F.3d 76, 79–80 (2d Cir. 2017), *rehearing en banc*, 883 F.3d 100 (2d Cir. 2018) (affirming the lower court’s verdict in favor of the defendants); *Anonymous v. Omnicom Grp., Inc.*, 852 F.3d 195, 197, 201 (2d Cir. 2017) (reversing the lower court’s dismissal of plaintiff’s claims, but affirming the lower court’s judgment in all other respects); *Evans v. Ga. Reg’l Hosp.*, 850 F.3d 1248, 1250 (11th Cir. 2017) (affirming the lower court’s dismissal of plaintiff’s claims in part, and vacating and remanding in part); *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 699 (7th Cir. 2016) (affirming the lower court’s dismissal of plaintiff’s claims despite criticism from the legislative body).

119. *Hively*, 853 F.3d at 341.

120. See *Zarda*, 855 F.3d at 82; *Anonymous*, 852 F.3d at 200–01; *Evans*, 850 F.3d at 1250; Brief for the United States as Amicus Curiae, *supra* note 11, at \*33.

121. *Evans*, 850 F.3d at 1250–51.

122. *Id.* at 1250.

123. *Id.*

124. *Id.*

125. *Id.* at 1250–51.

126. *Id.* at 1251.

the male gender[] because she present[s] herself” as such by wearing a “male uniform, low male haircut, shoes, etc.”<sup>127</sup> The Eleventh Circuit affirmed dismissal of the case holding that binding precedent set forth in *Blum* foreclosed sexual orientation claims under Title VII.<sup>128</sup> The court offered no additional reasoning why sex does not include sexual orientation; however, it held that sex does include gender non-conformity.<sup>129</sup> In this case, the EEOC, supporting Evans, argued that the statement in *Blum* concerning the viability of a sexual orientation claim “is dicta and not binding precedent.”<sup>130</sup> The court disagreed with the EEOC, noting the statement in *Blum* directly addressed the sexual orientation claim and was not dicta.<sup>131</sup>

Evans and the EEOC also argued that the Supreme Court decisions in *Price Waterhouse* and *Oncale* support a finding that sexual orientation discrimination is covered under Title VII, but this was not persuasive to the court.<sup>132</sup> It noted that even if claims for gender non-conformity and same-sex discrimination can be brought under Title VII, that does not allow them to depart from *Blum* and find that sexual orientation is actionable.<sup>133</sup> The court also reasoned that “*Price Waterhouse* and *Oncale* are neither clearly on point nor contrary to *Blum*[,]” nor do they specifically address whether sexual orientation discrimination is prohibited by Title VII.<sup>134</sup> Therefore, it analyzed “that *Blum* is binding precedent that has not been overruled by a clearly contrary opinion of the Supreme Court or of this Court sitting en banc.”<sup>135</sup>

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127. *Id.*

128. *Id.* at 1255; see *Offshore of the Palm Beaches, Inc. v. Lynch*, 741 F.3d 1251, 1256 (11th Cir. 2014) (noting “[u]nder our prior precedent rule, we are bound to follow a binding precedent in this Circuit ‘unless and until it is overruled by this court en banc or by the Supreme Court’”); see also *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979) (holding that “[d]ischarge for homosexuality is not prohibited by Title VII or Section 1981”).

129. *Evans*, 850 F.3d at 1254–55 (holding that “the lower court erred because a gender non-conformity claim is not ‘just another way to claim discrimination based on sexual orientation,’ but instead, constitutes a separate, distinct avenue for relief under Title VII”).

130. *Id.* at 1254; see also *Blum*, 597 F.2d at 938 (holding that “[d]ischarge for homosexuality is not prohibited by Title VII or Section 1981”).

131. *Evans*, 850 F.3d at 1255 (noting that “[e]ven if *Blum* is read as disposing of the sexual orientation claim for another reason, an alternative reason does not render as dicta this Court’s holding that there is no sexual orientation action under Title VII”).

132. *Id.* at 1256.

133. *Id.*; see also *Randall v. Scott*, 610 F.3d 701, 707 (11th Cir. 2010) (explaining that the court is bound by prior holdings, quoting precedent that “[w]hile an intervening decision of the Supreme Court can overrule the decision of a prior panel of our court, the Supreme Court decision must be clearly on point”); *NLRB v. Datapoint Corp.*, 642 F.2d 123, 129 (5th Cir. 1981) (stating “[w]ithout a clearly contrary opinion of the Supreme Court or of this court sitting en banc, we cannot overrule a decision of a prior panel of this court”).

134. *Evans*, 850 F.3d at 1256.

135. *Id.*



## 2. *Second Circuit: Zarda v. Altitude Express Inc.*

In 2010, a couple purchased tandem skydives at Altitude Express, a type of skydiving where the instructor is tied to the back of the client during the jump.<sup>136</sup> Donald Zarda, the instructor for the female client, informed her that he was gay to ease any discomfort because he was strapped tightly to her.<sup>137</sup> After the couples skydived, the male client called Altitude Express to complain about Zarda's behavior.<sup>138</sup> Zarda was fired shortly thereafter.<sup>139</sup> Zarda alleged that "he was fired from his job as a skydiving instructor because of his sexual orientation."<sup>140</sup>

He sued his former employer, Altitude Express, asserting the discrimination he faced was in violation of Title VII.<sup>141</sup> The district court held that the "defendants were entitled to summary judgment on Zarda's Title VII claim because Second Circuit precedent holds that Title VII does not protect against discrimination based on sexual orientation."<sup>142</sup> In his appeal, Zarda requested the Second Circuit to revisit the precedent set in *Simonton*, but the court declined.<sup>143</sup> Similar to the Eleventh Circuit, the Second Circuit affirmed dismissal of his case offering no additional analysis beyond its binding precedent.<sup>144</sup> The court further noted that while his sexual orientation claim was not protected, a gender-nonconformity claim could have been pursued since that is actionable under Title VII.<sup>145</sup>

## 3. *Seventh Circuit: Hively v. Ivy Tech Community College*

Kimberly Hively, an adjunct professor at Ivy Tech Community College, applied for several full-time positions at the college over the course of five years.<sup>146</sup> Despite having never received a negative evaluation as an adjunct and being qualified for a full-time position, the school rejected Hively's applications without giving her an interview.<sup>147</sup> The school then refused to renew her part-time contract.<sup>148</sup> Subsequently, Hively filed a sexual orientation discrimination

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136. *Zarda v. Altitude Express, Inc.*, 855 F.3d 76, 80 (2d Cir. 2017), *overruled by Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018).

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 79.

141. *Id.*

142. *Id.*

143. *Id.* at 80–81 (reasoning that the three-judge panel lacks the power to overturn the circuit precedent).

144. *Id.*

145. *Id.* at 82.

146. *Hively v. Ivy Tech Cmty. Coll.*, No. 3:14-cv-1791, 2015 WL 926015, at \*1 (N.D. Ind. Mar. 3, 2015) [hereinafter *Hively I*].

147. *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 699 (7th Cir. 2016) [hereinafter *Hively II*].

148. *Id.*

claim against the school alleging that she was denied employment because of her sexual orientation.<sup>149</sup>

The United States District Court for the Northern District of Indiana dismissed the claim citing circuit precedent that “sexual orientation is not recognized as a protected class under Title VII.”<sup>150</sup> Hively appealed, but the United States Court of Appeals for the Seventh Circuit held the dismissal of the claim was proper as claims for sexual orientation are beyond the scope of Title VII.<sup>151</sup> However, unlike the Second and Eleventh Circuits, the Seventh Circuit offered an analysis beyond circuit precedent.<sup>152</sup>

*a. EEOC’s Baldwin Decision Prompts in Depth Look at “Because of Sex”*

The EEOC’s *Baldwin* decision prompted the Seventh Circuit to take a more comprehensive look at discrimination “because of sex.”<sup>153</sup> The court began its analysis by noting there is an inconsistency in the court system resulting from recognition that discrimination because of sex includes gender non-conformity but not sexual orientation claims.<sup>154</sup> The court then acknowledged the difficulty courts have in separating the two types of claims.<sup>155</sup> The court explained that “Title VII protects gay, lesbian, and bisexual people, but frequently only to the extent that those plaintiffs meet society’s stereotypical norms about how gay men or lesbian women look or act” but those “who otherwise conform to gender stereotyped norms in dress and mannerisms mostly lose their claims for sex discrimination under Title VII.”<sup>156</sup> Because the distinction in “sex” is difficult

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149. *Hively I*, 2015 WL 926015, at \*1.

150. *Id.* at \*3.

151. *Hively II*, 830 F.3d at 699–701.

152. *See generally id.* at 699–713 (considering the EEOC’s recent decision along with decisions from other circuit courts).

153. *Id.* at 702.

154. *Id.* at 704.

155. *Id.* at 704–05, 709 (7th Cir. 2016); *see Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 291 (3d Cir. 2009) (“[T]he line between sexual orientation discrimination and discrimination ‘because of sex’ can be difficult to draw.”); *see also Dawson v. Bumble & Bumble*, 398 F.3d 211, 217 (2d Cir. 2005) (“[I]t is often difficult to discern when [the plaintiff] is alleging that the various adverse employment actions allegedly visited upon her by [her employer] were motivated by animus toward her gender, her appearance, her sexual orientation, or some combination of these” because “the borders [between these classes] are so imprecise . . .”); *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1065 n.5 (7th Cir. 2003) (“We recognize that distinguishing between failure to adhere to sex stereotypes (a sexual stereotyping claim permissible under Title VII) and discrimination based on sexual orientation (a claim not covered by Title VII) may be difficult. This is especially true in cases in which a perception of homosexuality itself may result from an impression of nonconformance with sexual stereotypes.”); *Centola v. Potter*, 183 F. Supp. 2d 403, 408 (D. Mass. 2002) (“[T]he line between discrimination because of sexual orientation and discrimination because of sex is hardly clear.”).

156. *Hively II*, 830 F.3d at 711.

to make, it leads to inconsistent decisions.<sup>157</sup> Despite identifying the inconsistent results from the current definition of sex and the overlap between sexual orientation and gender non-conformity, the court refused to change its stance.<sup>158</sup> Instead, the court simply acknowledged the EEOC's position on sexual orientation after *Baldwin* and reasoned that absent a congressional amendment or Supreme Court action, only its own precedent was binding.<sup>159</sup> Not satisfied with the results of the appeal, Hively petitioned for and was granted a rehearing en banc.<sup>160</sup>

*b. En Banc Seventh Circuit and Second Circuit Reverse Their Holdings*

Sitting en banc, the Seventh Circuit, relying on the same analysis of the three-judge panel, reversed its holding and circuit precedent, becoming the first appellate court to split with other circuits.<sup>161</sup> The en banc court first noted that determining whether actions taken “because of sex” included sexual orientation was a question of statutory interpretation within its purview.<sup>162</sup> The court expressed that it could not simply rely on the legislative history when the Supreme Court has added to the definition of sex discrimination.<sup>163</sup> Finding that no line exists between the gender nonconformity claims and those based on sexual orientation, the court accepted the argument that sexual orientation discrimination is sex discrimination.<sup>164</sup>

Following the reversal of *Hively*, the Second Circuit agreed to rehear *Zarda* en banc.<sup>165</sup> The Second Circuit joined the Seventh Circuit in the current split by

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157. *Id.* at 705.

158. *Id.* at 703, 718.

159. *Id.* at 703.

160. *Hively v. Ivy Tech Cmty. Coll.*, No. 15-1720, 2016 WL 6768628, at \*1 (7th Cir. Oct. 11, 2016).

161. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 350–52 (7th Cir. 2017).

162. *Id.* at 344–45. The court stated “[o]ur interpretive task is guided instead by the Supreme Court’s approach in the closely related case of *Oncale*, where it had this to say as it addressed the question whether Title VII covers sexual harassment inflicted by a man on a male victim:”

We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of *Title VII*. As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted *Title VII*. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits “discriminat[ion] . . . because of . . . sex” in the “terms” or “conditions” of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.

*Id.* (citing *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79–80 (1998)).

163. *Id.* at 344–45.

164. *Id.* at 346.

165. *Zarda v. Altitude Express, Inc.*, 855 F.3d 76 (2nd Cir. 2017), *overruled by*, *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018).

“conclud[ing] that sexual orientation discrimination is motivated, at least in part, by sex and is thus a subset of sex discrimination.”<sup>166</sup> After the rehearing was granted, the EEOC and DOJ both weighed in on the sexual orientation discrimination case; however, they fell on opposite sides, creating yet another split.<sup>167</sup>

*B. Federal Agencies Split Over Whether “Sex” Includes Sexual Orientation*

*1. EEOC: There Can Be No Sexual Orientation Discrimination Without Considering “Sex”*

The EEOC, the executive agency charged by Congress with interpreting and enforcing Title VII, weighed in on the *Zarda* appeal in support of finding that sexual orientation is discrimination “because of sex” under Title VII.<sup>168</sup> In its brief, the EEOC argued that sexual orientation discrimination claims necessarily involve impermissible consideration of a plaintiff’s sex, gender-based associational discrimination, and sex stereotyping.<sup>169</sup> The EEOC notes that sexual orientation discrimination requires the employer to take the employee’s sex, as well as the sex of his or her partners, into account, which is exactly what Title VII prohibits.<sup>170</sup>

Further, it asserted that sexual orientation discrimination treats individuals differently based on the sex of those with whom they associate, similar to individuals who face discrimination based on the race of their partners, which has been held to be a violation of Title VII.<sup>171</sup> Much like the en banc Seventh Circuit, the EEOC also argued that sexual orientation discrimination should be prohibited because those claims are “at heart based on gender stereotypes” and trying to separate the two is “unworkable and leads to absurd results.”<sup>172</sup> However, the DOJ took the opposite position of the EEOC, despite the fact that both are executive agencies.<sup>173</sup>

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166. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 112 (2d Cir. 2018) (reversing the long-standing precedent of *Simonton* and *Dawson* following the analyses of the Seventh Circuit in *Hively* and the EEOC in its amicus brief).

167. See Brief for the United States as Amicus Curiae, *supra* note 11, at \*1 (submitting that the court should reaffirm its precedent); see also Brief of Amicus Curiae EEOC, *supra* note 12, at \*1 (stating that these claims fall within Title VII’s prohibition against discrimination on the basis of sex).

168. Brief of Amicus Curiae EEOC, *supra* note 12, at \*1.

169. *Id.* at \*1.

170. *Id.* at \*7–8; see also *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 358 (7th Cir. 2017) (Posner, J., concurring) (“Fundamental to the definition of homosexuality is the sexual attraction to individuals of the ‘same sex.’ . . . One cannot consider a person’s homosexuality without also accounting for their sex: doing so would render ‘same’ and ‘own’ meaningless.”).

171. Brief of Amicus Curiae EEOC, *supra* note 12, at \*13–20.

172. *Id.* at \*13, 20.

173. Brief for the United States as Amicus Curiae, *supra* note 11, at \*22–23.

## 2. DOJ: The EEOC is Wrong and Does Not Speak for the United States

The DOJ weighed in because it is tasked with enforcing Title VII against state and local government employers and has a “substantial and unique interest in the proper interpretation of Title VII.”<sup>174</sup> In its brief, the DOJ began by asserting that “the EEOC is not speaking for the United States and its position about the scope of Title VII is entitled to no deference beyond its power to persuade.”<sup>175</sup> It then set forth three arguments why sexual orientation discrimination is not discrimination because of sex in violation of Title VII.<sup>176</sup> The first argument asserts that sex discrimination is not prohibited unless men and women are treated unequally.<sup>177</sup> The DOJ provided that the word “sex” means male or female and “sex discrimination” under Title VII means that similarly situated employees of different sexes are treated differently.<sup>178</sup> Therefore, unless employers discriminate between members of one sex and “similarly situated” members of the opposite sex, there is no violation under Title VII.<sup>179</sup> Similar to the Eleventh Circuit, the DOJ’s second argument was primarily based on precedent.<sup>180</sup> It asserted that the long history of not protecting sexual orientation discrimination under Title VII, as well as congressional inaction in adding sexual orientation to the definition of “because of sex,” necessarily means that the definition should not be expanded.<sup>181</sup> Finally, it argued that the reasoning advanced by the EEOC and the Seventh Circuit is not persuasive enough to overcome Congress’s inaction in this case.<sup>182</sup>

### III. “BECAUSE OF SEX” SHOULD INCLUDE SEXUAL ORIENTATION

#### A. How Statutory Interpretation of “Sex” Should Have Evolved

Since Title VII was passed more than 50 years ago as part of the Civil Rights Act of 1964, societal attitudes regarding sexuality have evolved dramatically.<sup>183</sup> Activists from the LGBT community as well as their allies have worked tirelessly to advocate for equality, tolerance, and inclusion in our society. While there has been some progress toward equality for the LGBT community, protection under Title VII’s prohibition against employment discrimination has not made significant progress. Since Title VII’s enactment, courts and federal agencies relied upon the plain meaning of sex, the lack of legislative history,

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174. *Id.* at \*1.

175. *Id.*

176. *See id.* at \*2–22.

177. *Id.* at \*2–6.

178. *Id.* at \*2–4.

179. *Id.*

180. *Id.* at \*4–21.

181. *Id.* at \*6–15.

182. *Id.* at \*15–21.

183. 1964, EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/eeoc/history/35th/milestones/1964.html> (last visited Nov. 2, 2018).

congressional intent, and “precedent” to hold that discrimination “because of sex” does not include sexual orientation discrimination.<sup>184</sup> Over time, the courts expanded the definition of “because of sex” to include sexual harassment, gender non-conformity, and same-sex sexual harassment,<sup>185</sup> but after *Oncale*, the courts should have also expanded the definition to protect against sexual orientation discrimination.

When Title VII was enacted, it is said that the legislators were not considering prohibiting sexual orientation discrimination.<sup>186</sup> However, the Supreme Court asserted that “statutory prohibitions often go beyond the principal evil [the law was passed to address] to cover reasonably comparable evils.”<sup>187</sup> When looking at the number of cases filed in federal courts by employees for pervasive discrimination based on their sexual orientation or perceived sexual orientation, it is clear that sexual orientation discrimination is an evil that should be protected against. Instead, there is an apparent unwillingness to acknowledge sexual orientation discrimination beyond discussing how precedent prohibits review of these claims. Further, deeply held biases against homosexuality have allowed for very limited protection for LGBT employees.

#### B. *Why the EEOC, Seventh Circuit, and Second Circuit Got It Right*

The EEOC, the Seventh Circuit, and Second Circuit all took the position that it was time to stop allowing employers to discriminate against employees based on their sexual orientation.<sup>188</sup> This was the right decision for several reasons. Discrimination itself has negative consequences for employees including, but not limited to, financial instability, decreased morale and productivity, and the creation of physical and mental issues.<sup>189</sup> By restricting LGBT individuals from bringing forth claims of sexual orientation discrimination, courts allow employers to inflict those consequences on LGBT individuals without repercussions.

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184. See, e.g., *Dillon v. Frank*, No. 90-22290, 192 WL 5436, at \*4 (6th Cir. Jan. 15, 1992) (“[W]e believe that only discrimination based on being male or female is prohibited by Title VII, and that the cases proscribing hostile environment sexual harassment are not to the contrary, we affirm the district court.”); *Powell v. Read’s, Inc.*, 436 F. Supp. 369, 371 (D. Md. 1977) (holding that a complaint did not state a cause of action because Title VII focused on discrimination because of the status of sex or because of sexual stereotyping, rather than on discrimination due to a change in sex).

185. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 73 (1986).

186. Brief for the United States as Amicus Curiae, *supra* note 11, at \*10.

187. *Oncale*, 523 U.S. at 79 (holding that sex discrimination consisting of same-sex sexual harassment is actionable under Title VII).

188. See *supra* Sections I.C.2, II.A.3, II.A.3.b.

189. See generally *Wizsom Powell Hammond et al., Workplace Discrimination and Depressive Symptoms: A Study of Multi-Ethnic Hospital Employees*, 2 RACE & SOC. PROBLEMS 19 (2010) (studying the effects of workplace discrimination on hospital employees); *Neslie A. Etheridge, Effects of Discrimination in the Workplace*, U.S. ARMY (Feb. 12, 2015), [https://www.army.mil/article/142799/effects\\_of\\_discrimination\\_in\\_the\\_workplace](https://www.army.mil/article/142799/effects_of_discrimination_in_the_workplace).

No one should have to live and work in fear of discrimination for who they are. Yet LGBT employees are often unable to be themselves and must hide their lives while at work out of fear that they may face adverse actions without legal recourse. By finding that sexual orientation is discrimination because of sex, the EEOC, Seventh Circuit, and Second Circuit have opened an avenue previously foreclosed to the LGBT community. This provides an opportunity for members of the LGBT community to seek and receive relief when they suffer adverse employment actions.

### C. *The Battle of the Agencies Could Muddy the Waters*

Generally speaking, the Executive branch agencies are expected to be in sync. Yet the EEOC and DOJ oppose one another in defining what is discrimination “because of sex” under Title VII in regards to sexual discrimination. Both agencies are tasked with enforcement of Title VII,<sup>190</sup> so the differing opinions lead to the potential for confusion in deciding future claims of sexual orientation discrimination under Title VII.

Some states have enacted laws that protect LGBT individuals from sexual orientation discrimination.<sup>191</sup> However, there are still states that do not subscribe to equality for the LGBT community.<sup>192</sup> Without further guidance, there will likely be courts subscribing to the EEOC’s definition and others to the DOJ’s definition. This will likely lead to more inconsistent court opinions, much like the inconsistent gender non-conformity claims. For this reason, guidance is needed from Congress or the Supreme Court.

In the past, members of Congress tried repeatedly to enact legislation to protect employees from sexual orientation discrimination, but the attempts failed.<sup>193</sup> Instead of attempting to enact separate legislation, Congress should explicitly define sex to include sexual orientation to eliminate any confusion in the courts. Yet Congress’s history of inaction in this area makes it unlikely that it will weigh in. However, the Supreme Court *has* acted to eliminate discrimination faced by the LGBT community, and should act further to eliminate any confusion and resolve the definition of sex.<sup>194</sup>

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190. Civil Rights Act of 1964, Pub. L. No. 88-352, § 705, 78 Stat. 241, 258, 259 (1964) (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.).

191. *Sexual Orientation Discrimination*, WORKPLACE FAIRNESS, <https://www.workplacefairness.org/sexual-orientation-discrimination#3> (last visited Feb. 18, 2018).

192. *See id.*

193. William C. Sung, Note, *Taking the Fight Back to Title VII: A Case for Redefining “Because of Sex” to Include Gender Stereotypes, Sexual Orientation, and Gender Identity*, 84 S. CAL. L. REV. 487, 495–98 (2011) (tracing the history of the legislation attempting to address employment discrimination, in particular the Civil Rights Act of 1964, the Equality Act of 1974, and the Employment Non-Discrimination Act).

194. Christianna Silva, *All the Times the Supreme Court Has Ruled on LGBT Rights*, NEWSWEEK (Nov. 23, 2017, 2:38 PM), <http://www.newsweek.com/all-times-supreme-court-has-ruled-lgbt-rights-720883>.

Given the courts progress toward equality for LGBT individuals,<sup>195</sup> they should take the position that sexual orientation discrimination is discrimination “because of sex.” In *Obergefell v. Hodges*, the Court identified same-sex sexual intimacy as a fundamental right and recognized that sexual orientation is both immutable and a “normal expression of human sexuality . . . .”<sup>196</sup> *Obergefell* lays even more groundwork for the Court to expand the definition of “because of sex” to protect workers from sexual orientation discrimination. Following its own guidance, the Court should resolve the split by finding that, despite not being the evil Congress intended to eradicate, sexual orientation is nevertheless an evil that should be prohibited under Title VII.

#### IV. CONCLUSION

Many arguments can be made for why and how the prohibition against discrimination based on sex should include sexual orientation discrimination. Because heterosexuality is considered the societal norm, LGBT individuals face discrimination that generally involves sex stereotyping or gender non-conformity. Following *Price Waterhouse*, courts allowed gender non-conformity claims to proceed under Title VII. However, courts have tried to draw a line between distinguishing sex stereotyping or gender non-conformity claims from sexual orientation claims using sexual orientation as a basis for not allowing LGBT plaintiffs relief under Title VII. However, as the EEOC, Seventh Circuit, and Second Circuit have noted, gender non-conformity is at the root of all sexual orientation claims and, by proxy, discrimination that takes this into account is discrimination because of sex. As such, the Supreme Court should allow LGBT individuals access to Title VII as recourse for employment discrimination because of their sexual orientation.

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195. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015); *United States v. Windsor*, 570 U.S. 744, 747 (2013); *Lawrence v. Texas*, 539 U.S. 558, 560 (2003); *Romer v. Evans*, 517 U.S. 620, 635 (1996).

196. *Obergefell*, 135 S. Ct. at 2596.



