

5-22-2020

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Recommended Citation

Nico Ramos, *Zarda and Sexual Orientation Expression: A New High for Title VII Interpretation*, 69 Cath. U. L. Rev. 187 (2020).

Available at: <https://scholarship.law.edu/lawreview/vol69/iss1/11>

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Cover Page Footnote

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ZARDA AND SEXUAL ORIENTATION EXPRESSION: A NEW HIGH FOR TITLE VII INTERPRETATION

Nico Ramos[†]

Imagine the rumble of a plane's single engine as it reaches its desired altitude. You are faced with your most important work responsibility, a task that has a very small margin of error. Your extensive training and certifications have prepared you for this moment; you are about to guide a person on their very first skydive. Tightly strapped to your client, you walk her to the edge of the plane's open dock as she shakes nervously. The sounds of wind require you to scream despite only being inches away from the first timer's ear, "jump on three!" Looking down from 13,000 feet, you thrust both bodies out of the plane. In a nearly 60 second free fall, you haven't forgotten your main responsibility: to ensure that the life attached to you makes it safely back to the hangar. The years of training pays off. Adeptly and with perfect timing, you pull the strap; a specially folded parachute catapults from your back; you firmly grasp the person in front of you so that they are stabilized as the deployed chute drastically reduces the speed at which you were plummeting. After absorbing the one of a kind views, you prepare for landing. Success! Both you and your passenger completed a tandem skydive; she experienced an exhilarating adrenaline rush, and you ensured that she experienced it safely. Now, imagine; two days later, for something that has no relation to your employment record or ability to perform your job, you are fired and left without recourse. For many Americans, this requires no imagination at all. This is exactly what happened to sky diving instructor Donald Zarda. Despite jumping out of planes for a living, the most serious risk Mr. Zarda took before completing a tandem skydive on a warm summer day in 2010 was revealing that he was gay.

Approximately 75 percent of Americans are under the mistaken impression that there are federal anti-discrimination protections for lesbian, gay, bisexual, transgender and queer or questioning (LGBTQ) people.¹ Though nearly 70

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1. ROBERT P. JONES ET AL., A SHIFTING LANDSCAPE: A DECADE OF CHANGE IN AMERICAN ATTITUDES ABOUT SAME-SEX MARRIAGE AND LGBT ISSUES 35 (2013), https://www.prii.org/wp-content/uploads/2014/02/2014.LGBT_REPORT-1.pdf (noting the knowledge of employment

percent of voters support federal laws barring workplace discrimination for gay and transgender people, there are no such federal protections.² States have attempted to remedy the absence of federal law; however, as of 2017, in 28 states, it is permissible to fire individuals based on sexual orientation.³ A gay person can exercise his or her constitutional right to marry, and then subsequently be lawfully fired for exercising it.⁴

Evolving Supreme Court interpretation of Title VII has provided a foundation for a new approach in addressing whether sexual orientation discrimination is protected by Title VII.⁵ A growing number of courts are finding sexual orientation to be a proxy for sex, establishing that negative employment actions based on sexual orientation are a prohibited form of workplace discrimination based on a person's gender.⁶

In *Zarda v. Altitude Express*, the United States Court of Appeals for the Second Circuit directly addressed the issue.⁷ By examining legislative history, Supreme Court rulings, Equal Employment Opportunity Commission (EEOC)

nondiscrimination laws); see *2017 Workplace Equality Fact Sheet: Lesbian, Gay, Bisexual and Transgender (LGBT) Workplace Discrimination at a Glance*, OUT & EQUAL, <http://outandequal.org/2017-workplace-equality-fact-sheet/> (last visited Aug. 21, 2019) (asserting that one quarter of LGBTQ Americans admit they have experienced workplace discrimination once in the past five years); see also Shabab Ahmed Mirza et al., *The State of the LGBTQ Community in the Labor Market: Pre-June 2018 Jobs Day Release*, CTR. FOR AM. PROGRESS (July 5, 2018, 9:01 AM), <https://www.americanprogress.org/issues/economy/news/2018/07/05/453094/state-lgbtq-community-labor-market-pre-june-2018-jobs-day-release/> (indicating studies that job applicants who identify as LGBTQ on their resume are less likely to receive callbacks in comparison to applicants who do not self-identify).

2. JONES, *supra* note 1, at 34.

3. See *2017 Workplace Equality Fact Sheet*, *supra* note 1.

4. Tessa M. Register, *The Case for Deferring to the EEOC's Interpretations in Macy and Foxx to Classify LGBT Discrimination as Sex Discrimination Under Title VII*, 102 IOWA L. REV. 1397, 1398 (2017). See also Lisa Bornstein & Megan Bench, *Advancing LGBTQIA Rights in a Post-Obergefell World: Married on Sunday, Fired on Monday: Approaches to Federal LGBT Civil Rights Protections*, 22 WM. & MARY J. OF WOMEN & L. 31, 42-43 (2015) (suggesting that judicial advances have allowed for Title VII expansion by helping to shift American attitudes on gender roles, gender equality, and sexual orientation with each subsequent case building off the preceding holding).

5. Robert Brookins, *A Rose by Any Other Name . . . The Gender Basis of Same-Sex Sexual Harassment*, 46 DRAKE L. REV. 441, 537 (1998).

6. Eric C. Surette, Annotation, *Discrimination on Basis of Sexual Orientation as Form of Sex Discrimination Proscribed by Title VII of Civil Rights Act of 1964*, 28 A.L.R. FED. 3D 4, § 2 (2018). These approaches in interpreting "because of sex" discrimination are based on interpretive analysis of the term "sex" itself. *Id.* The crux of the argument is that ambiguous text should be read broadly in terms to reach the ultimate goal of the statute and that the Supreme Court has applied a broad application to the term sex. *Id.*

7. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018).

guidance and competing circuit approaches, the court, sitting *en banc*, overruled decades of precedence with a persuasive legal argument that is becoming increasingly utilized by other jurisdictions, establishing sexual orientation discrimination as a cognizable claim under Title VII.⁸

Passed by the 88th Congress, Title VII of the momentous Civil Rights Act of 1964 established protections against invidious workplace discrimination on the basis of race, religion, and sex.⁹ The prohibition against discrimination “because of sex” was a last minute addition to the bill,¹⁰ resulting in a dearth of Congressional intent as to how “because of sex” was to be defined.¹¹ Early Supreme Court cases brought under Title VII utilized a narrow definition of sex discrimination,¹² and in the same spirit, the United States Court of Appeals for the Second Circuit has rigidly interpreted Title VII to exclude sexual orientation discrimination from its many protections, meaning a plaintiff who experienced sexual orientation discrimination was barred from alleging a violation of Title VII.¹³ However, the definition of sex discrimination is not static; it took on a broader meaning after the EEOC held in *Baldwin v. Foxx* that a complaint alleging discrimination based on sexual orientation falls within the Commission’s jurisdiction and that sexual orientation discrimination is discrimination based on sex.¹⁴ The Second Circuit re-examined the issue.¹⁵ By analyzing the Supreme Court’s permissive approach to “because of sex” discrimination in light of changing EEOC policy and divergent circuit

8. *Id.* at 107–08.

9. Surette, *supra* note 6, at § 2.

10. Tiffany L. King, Comment, *Working Out: Conflicting Title VII Approaches to Sex Discrimination and Sexual Orientation*, 35 U.C. DAVIS L. REV. 1005, 1014 (2002).

11. Charly Shane Gilfoil, Note, *More than Just “Sex:” Title VII, The Expanding Meaning of Sex Discrimination, and the Court’s Role in Correcting Injustice*, 19 GEO. J. GENDER & L. 135, 139 (2017); see *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (holding that denying a woman employment due to having a pre-school aged child while not denying a man the same position in employment despite having a pre-school aged child violated Title VII prohibition on disparate treatment of women).

12. Gilfoil, *supra* note 11, at 139.

13. *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), *overruled by Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018).

14. *Baldwin v. Foxx*, 2015 WL 4397641, at *10 (E.E.O.C. July 15, 2015). An Air Traffic Control Specialist in Miami filed a complaint with the EEOC, alleging he was subjected to discrimination for being a gay male, and was not selected for promotion due to his sexual orientation. *Id.* at *1–2. The EEOC accepted the complaint for investigation and held that sexual orientation discrimination requires and impermissible consideration of gender. *Id.*

15. *Zarda*, 883 F.3d at 112–13.

approaches, the Second Circuit, for the first time, recognized sexual orientation discrimination as a cognizable claim under Title VII.¹⁶

This Note examines the implications of *Zarda* in the workplace. Part I provides the relevant prior law leading up to the case by exploring the landscape of Title VII's legislative history and the Supreme Court's evolving approach in interpreting, "because of sex" discrimination. Part I will further examine the EEOC's novel approach to Title VII and its subsequent influence utilized by the Seventh Circuit in *Hively v. Ivy Tech Community College of Indiana*, where a female professor alleged that she was denied promotion because she was in a relationship with a woman—ultimately influencing the Second Circuit's approach.¹⁷ Part II will detail the relevant facts and ultimate holding of the *Zarda* court, including an explanation of the concurrences and dissents. Part III will discuss the reasoning employed by the Second Circuit and analyze the three most utilized approaches in analyzing Title VII, associational, comparative, and gender stereotyping, culminating with an analysis of the best legal argument to successfully extend Title VII protections to sexual orientation.

I. TITLE VII: BACKGROUND

A. Scarce Legislative History

Title VII provides:

It shall be unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise 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; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or . . . adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.¹⁸

At its inception, the provision was intended to foster equal employment opportunities and to do away with historical barriers against minorities and women in the workplace.¹⁹ The prohibition of discrimination "based on sex"

16. Surette, *supra* note 6, at § 2.

17. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2016).

18. 42 U.S.C. § 2000e-2(a) (2012).

19. *Ulane v. Eastern Airlines*, 742 F.2d 1081, 1085 (7th Cir. 1984) (stating that race discrimination was the primary concern of Congress in its enactment).

was added on the last day of the statute's floor debate.²⁰ Opponents of the act believed that the last minute addition of "sex" based prohibitions would defeat the bill due to the controversial nature of federal protections for women in employment.²¹ Ultimately the plan failed and Congress drafted Title VII to include sex discrimination as a necessary component to a broader prohibition on workplace discrimination.²² Congress, for lack of time, failed to define the term, leaving little left for courts to analyze in the context of Congressional intent for elucidating what "because of sex" discrimination means.²³ As a result, early Title VII cases applied a definition of "because of sex" to a narrow set of circumstances most consistent with lawmakers' initial understanding when Title VII was ratified: sex discrimination means the exclusion of women in the workplace, meaning, only women could successfully allege violation of Title VII's sex discrimination prohibitions.²⁴ It did not take long for "instances of unwelcome and unanticipated workplace scenarios"²⁵ to challenge the limits of "because of sex" discrimination's early delineation.²⁶ In a series of decisions from the 1980s, the Court decamped from the original interpretation of Title VII's prohibition of sex discrimination beginning with permitting males to allege "because of sex" discrimination in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*.²⁷

After recognizing that a male can allege sex discrimination, the Court in *Meritor Savings Bank v. Vinson*, again broadened its interpretation of sex to accord with Congress' broader attempt at eliminating multiple forms of discrimination in the workplace.²⁸ Though early cases limited sex discrimination to: 1) denying employment/promotion to women, or 2) preventing employers from implementing policies that benefit one gender over another; the Court began to address how Title VII was to apply in situations of

20. *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977) ("Sex as a basis of discrimination was added as a floor amendment one day before the House approved Title VII, without prior hearing or debate.").

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

22. Major Velma Cheri Gay, *Fifty 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, 67 (2015).

23. King, *supra* note 10, at 1007–08.

24. Gilfoil, *supra* note 11, at 139.

25. *Id.*

26. *Id.*

27. *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 675–76 (1983) (holding that an employer violated Title VII's prohibition by creating benefits that advantaged women employees while disadvantaging men employees).

28. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 63–64 (1986).

sexual harassment.²⁹ Despite Title VII's initial application to protect women from discrimination in the workplace and never once mentioning sexual harassment in the bill itself or floor debate, the Court reasoned that Congressional silence on sexual harassment pertaining to Title VII could not contemplate the extent and reach of the statute's protections, ultimately adding sexual harassment to the broader protections of Title VII's prohibitions on discrimination "because of sex."³⁰

Seven years later, the Court in *Oncale v. Sundowner Offshore Services, Inc.*, again extended "because of sex" to include male on male sexual harassment.³¹ The Scalia opinion found, "no justification in the statutory language or of our precedents" to bar a plaintiff from recovery when the facts indicate that adverse employment treatment was based on the plaintiff's sex.³² This permissive approach taken by the Court has resulted in Title VII claims that were not initially considered during its ratification, yet not explicitly prohibited.³³ The Court has justified its approach, stating that Title VII "evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment."³⁴ *Oncale* directly addressed the Court's interpretation of Congressional intent for the application of Title VII protections:

[M]ale-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.³⁵

29. *Id.* at 64–65.

30. *Id.* A heterosexual male defendant raped, intimidated and exchanged sexual favors in exchange for allowing a female plaintiff to retain her job. *Id.* at 60.

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

32. *Id.* at 79. A male oil-platform crew member, who was physically assaulted, threatened with rape, and was the subject of sexually themed actions by other male crew members, alleged he was discriminated against in his employment because of his sex. *Id.* at 77. The Court found that Title VII permitted a claim of sex discrimination despite the plaintiff and defendant being of the same sex. *Id.* at 79–80.

33. Discrimination based on sex under Title VII is the fourth most common claim of workplace discrimination. See *EEOC Releases Fiscal Year 2017 Enforcement and Litigation Data*, EEOC (Jan. 25, 2018), <https://www.eeoc.gov/eeoc/newsroom/release/1-25-18.cfm> (last visited Aug. 21, 2019) (discovering the more than 25,000 allegations of discrimination based on sex in 2017, alleged sexual harassment in nearly 26% of those complaints).

34. *Meritor Sav. Bank*, 477 U.S. at 64 (quoting *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707, n.13 (1978)).

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

Covering reasonable evils is illustrative of the Court's approach that "has . . . attempted to read ambiguous text consistent with Title VII's broader purposes."³⁶

By 1993, nearly 30 years after Title VII's passage, the definition of sex discrimination had evolved to represent a multitude of nefarious work place scenarios.³⁷ *Harris v. Forklift Systems* added to the evolution by recognizing a second form of sexual harassment: hostile work environment.³⁸ The Court again opted for a broad definition of "because of sex," holding that a hostile work environment contributes to a "discriminatorily hostile or abusive environment"³⁹ and therefore, violated Title VII's prohibition against discrimination "because of . . . sex."⁴⁰

B. Reasonable Comparable Evils: The Permissive Approach to Because of Sex Discrimination and Gender Stereotyping

In a landmark 1989 holding, the Court provided one of the broadest interpretations of Title VII's prohibitions by establishing sex-stereotyping as a form of sex discrimination.⁴¹ In *Price Waterhouse v. Hopkins*, a senior manager at an accounting firm was denied a promotion because she exhibited masculine traits such as: not wearing makeup, acting aggressively, and dressing in non-feminine attire.⁴² The Court looked to precedent,⁴³ and the language of Title VII.⁴⁴ Justice Brennan's opinion interpreted the provision "to mean that gender

36. Henry L. Chambers, Jr., *The Supreme Court Chipping Away at Title VII: Strengthening It or Killing It?*, 74 LA. L. REV. 1161, 1163 (2014). See William R. Corbett, *Babbling About Employment Discrimination Law: Does the Master Builder Understand the Blueprint for the Great Tower?*, 12 U. PA. J. BUS. L. 683, 685 (2010) ("From the beginning, it was an astoundingly ambitious, and perhaps audacious, project. Congress envisioned a tower of law that would elevate people . . . by attempting to eradicate invidious employment discrimination.").

37. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–22 (1993).

38. *Id.* at 18–19.

39. *Id.* at 21.

40. *Id.*

41. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). See King, *supra* note 10, at 1021–23. See also Cody Perkins, Comment: *Sex and Sexual Orientation: Title VII After Macy v. Holder*, 65 ADMIN. L. REV. 427, 432–33 (2013).

42. *Price Waterhouse*, 490 U.S. at 231–35.

43. *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (holding that a differential discriminatory action occurs when "treatment of a person in a manner which but for that person's sex would be different"). The Court further provided that the statute focuses "on fairness to individuals rather than fairness to classes." *Id.* at 709.

44. Providing that it is unlawful for

must be irrelevant to employment decisions.”⁴⁵ The decision further drifted from a one-dimensional interpretation of sex discrimination, reasoning for the broader application that discrimination due to a deviation of “gender norms” or conducting one’s self in a manner that is associated with the opposite gender is a form of sex discrimination for the purposes of Title VII because it takes “gender into account.”⁴⁶

In light of the Supreme Court broadening what it means to discriminate “because of sex,” Congress remained silent, never further narrowing or clearly defining the term in regards to Title VII.⁴⁷ In 1994, Congress passed the Gender-Motivated Violence Act (GMVA), a subsection of the Violence Against Women Act (VAWA), creating a private cause of action for a victim of gender stereotyping.⁴⁸ Although the private cause of action was later struck down by the Supreme Court on separation of powers reasons, it is important to note that Congress codified the term “gender” after the *Price Waterhouse* decision, indicating that Congress accorded with the interpretation.⁴⁹ *Price Waterhouse* marked a further untethering of the restrictive definition given in the earlier Title VII cases.⁵⁰ This decision was not rooted in explicit instruction or legislative history; instead, it echoed “Congress’ intent to forbid employers to take gender

an employer to “fail or refuse to hire or to discharge...or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment,” or to “limit, segregate, or classify . . . in anyway which would deprive . . . any individual of employment opportunities or otherwise adversely affect . . . an employee, *because of* such individual’s sex.”

Price Waterhouse, 490 U.S. at 240 (quoting 42 U.S.C. § 2000e-2(a)). The Court reasoned that “Congress’ intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute.” *Id.* at 239.

45. *Id.* at 240.

46. *Id.* at 244–45.

47. Gilfoil, *supra* note 11, at 140. See Luke A. Boso, *Acting Gay, Acting Straight: Sexual Orientation Stereotyping*, 83 TENN. L. REV. 575, 577 (2016). Sex stereotyping is now becoming used as an evidentiary tool for plaintiffs in sexual orientation discrimination cases. *Id.*

48. See King, *supra* note 10, at 1023–24. See also Schwenk v. Hartford, 204 F.3d 1187, 1201 n.12 (9th Cir. 2000). The Ninth Circuit reasoned that Congress codified the GMVA with full knowledge of the Supreme Court’s definition of sex and gender, denoting an intention to preserve the Court’s reasoning in legislation. *Id.*

49. See King, *supra* note 10, at 1023–24. See also Schwenk, 204 F.3d at 1201 n.12 (citing *Espinoza-Gutierrez v. Smith*, 94 F.3d 1270, 1275 (9th Cir. 1996) (holding that “when Congress adopts language” from court precedent, Congress intends the term to have the same meaning as case law)).

50. Cary Franklin, *Inventing the “Traditional Concept” of Sex Discrimination*, 125 HARV. L. REV. 1307, 1309 (2012).

into account . . . on the face of the statute,”⁵¹ therefore recognizing that “Title VII’s prohibition of sex discrimination must reach situations that were likely not contemplated by the 88th Congress.”⁵²

II. CAUSES OF ACTION: TRADITIONAL APPROACH TO SEXUAL ORIENTATION DISCRIMINATION

A. *Causes of Action*

To establish a cause of action for a violation of Title VII’s prohibition of discrimination, a plaintiff must first “establish membership in a protected class.”⁵³ Though initially addressing the disparate treatment of women in regards to employment opportunities, the Court has now provided that “because of sex” discrimination, can encompass many forms of conduct.⁵⁴ For example, a policy that disparately affects women as opposed to men, or disparate treatment towards an employee because she is female constitutes Title VII violations in the purest form of a *prima facie* case.⁵⁵

Once courts understood Title VII to include sexual harassment, the majority of jurisdictions required a plaintiff to show: (1) he/she was discriminated against because of sex; and (2) that the discrimination was severe to the point of

51. *Price Waterhouse*, 490 U.S. at 239.

52. Gilfoil, *supra* note 11, at 141.

53. Gay, *supra* note 22, at 69 (The overwhelming theory in employment discrimination is that most employers do not leave evidence of their discriminatory intent; therefore, the Supreme Court established a framework, making it easier for a plaintiff to succeed in employment discrimination cases.). Under the *McDonnell Douglas* framework, to establish a *prima facie* case under Title VII, a plaintiff must illustrate 1) membership within a protected class; 2) the professional competency to perform their job; 3) the employer acted adversely to them; and 4) show facts and circumstances that lend support to an inference of discrimination. Gay, *supra* note 22, at 69 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)).

54. *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253–54 (1981) (holding that once a plaintiff has established protected class status for purposes of Title VII, it is then up to the employer to prove by a preponderance of the evidence that the employer had a “legitimate, non-discriminatory reason,” for its action against the employee or applicant); *see also* King, *supra* note 10, at 1014–15.

55. *Burdine*, 450 U.S. at 252–53. Disparate treatment sex discrimination occurs where there is “overt or intentional discrimination” by an employer against a group or individual because of the group or individual’s sex. Gay, *supra* note 22, at 69–70 (finding an employee must show exposure to “disadvantageous terms or conditions of employment that the other sex [has] not.” On the other end of the spectrum, disparate impact sex discrimination causes of action can result from what appears to be facially neutral employment practices that are applied evenly to employees but have a disproportionate impact that excludes women or men of equal employment, and there is no requirement for the plaintiff to show intent.).

“alter[ing] the terms or conditions of . . . employment and created an abusive working environment.”⁵⁶

There are three approaches for a plaintiff to establish a same-sex sexual harassment suit: (1) plaintiff can show harassment was motivated by sexual desire; (2) can show that the accused harasser was motivated by hostility towards the presence of the plaintiff’s sex in the workplace; or (3) can produce evidence that shows a harasser treated men and women differently.⁵⁷ Disparate impact/treatment, sexual harassment, and hostile work environments are not exhaustive; circuits have also recognized a gender stereotyping claim, rooted in the majority opinion in *Price Waterhouse*.⁵⁸ To succeed, a plaintiff must show that the adverse employment action taken by an accused harasser or employer was to punish a plaintiff’s failure to adhere to gender norms.⁵⁹

B. Traditional Approaches to Denying Protections

The traditional approach to denying Title VII protections against sexual orientation has been supported by three viewpoints.⁶⁰ First, courts have provided that Title VII cannot apply because sexuality was not considered when Title VII was passed.⁶¹ Second, courts look to the lack of subsequent legislative action by Congress to include sexual orientation prohibitions.⁶² A third approach warns of the risk of judicial expansion of Title VII because it could create a new protected class.⁶³

Prior to *Zarda*, the Second Circuit adhered to the traditional majority approach, disqualifying employees and applicants who are discriminated against because of their sexuality from showing a cognizable claim of disparate treatment/impact, sexual harassment or hostile work environment.⁶⁴ The Second

56. *Medina v. Income Support Div.*, 413 F.3d 1131, 1134 (10th Cir. 2005).

57. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80–81 (1998).

58. *Surette*, *supra* note 6, at § 5; *see Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989). *See also Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 291–92 (3d Cir. 2009) (finding it unable to distinguish whether a plaintiff was harassed due to his homosexuality or his effeminate nature, the Third Circuit determined he had a cognizable claim under Title VII because there was evidence to suggest that he operated in his work duties with a high voice and feminine walk).

59. *Surette*, *supra* note 6, at § 34.

60. *Register*, *supra* note 4, at 1416–17.

61. *Id.* at 1417.

62. *Id.* at 1418.

63. *Id.*

64. At the time of the *Zarda* decision, several circuits had rulings in place that disallowed sexual orientation as a basis for claims of workplace discrimination, to include the First, Third, Fourth, Sixth, Eighth, and Tenth Circuits. *See Kalich v. AT&T Mobility, LLC*, 679 F.3d 464, 471 (6th Cir. 2012); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 289 (3d Cir. 2009); *Medina v.*

Circuit previously provided that sexual orientation discrimination is not sufficient to establish that an employer acted adversely for failure to act as a stereotypical man or woman.⁶⁵

C. The EEOC and Three Arguments: Associational, Comparative and Gender-Stereotyping

Within the confines of “Title VII, Congress created the [EEOC] to resolve claims and disputes” of discrimination in employment practices.⁶⁶ Due to the uncertainty of legislative intent as to the term “sex” in sex discrimination, federal courts and administrative agencies such as the EEOC have had to resort to their own guidelines and interpretations of Title VII which in turn heavily influence circuit decisions.⁶⁷

In 2016, the EEOC issued a decision in which it determined that a claim “alleging discrimination based on sexual orientation in violation of Title VII of the Civil Rights Act of 1964 lies within the Commission’s jurisdiction.”⁶⁸ The EEOC took a novel approach for the agency and focused the inquiry on whether or not the employer “has ‘relied on sex-based considerations’ or ‘take[n] gender into account’ when taking the challenged employment action.”⁶⁹

This conclusion found support via three approaches employed by the EEOC.⁷⁰ First, there is a comparative argument: sexual orientation discrimination necessarily requires taking a person’s sex into consideration.⁷¹ Second, there is an associational argument: the EEOC found that sexual orientation discrimination is a type of associational discrimination.⁷² The third approach, a gender stereotyping argument, which has become the most successful argument

Income Support Div., 413 F.3d 1131, 1135 (10th Cir. 2005); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *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).

65. *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005).

66. *Gay*, *supra* note 22, at 68 (The EEOC achieves this “through compliance, informal voluntary agreements, and informal employment practices.” To that end, “the EEOC has the authority to investigate accusations of discrimination against covered employers that are submitted by an applicant or employee” Such applicant or employee is required by Title VII to go through the EEOC before filing a lawsuit in court.).

67. *Gay*, *supra* note 22, at 68–69.

68. *Baldwin v. Foxx*, 2015 WL 4397641, at *1 (E.E.O.C. July 15, 2015).

69. *Id.* at *4 (quoting *Macy v. Holder*, 2012 WL 1435995, at *6 (E.E.O.C. Apr. 20, 2012)).

70. *Id.* at *4–5.

71. *Id.* at *5–6.

72. *Id.* at *6–7.

among federal courts,⁷³ adapts the *Price Waterhouse* prohibition on taking “gender into account” and the “comparable evils” framework of *Oncale*.⁷⁴ This argument suggests that sexual orientation discrimination is a form of sex discrimination because it relies on a person failing to adhere to a form of gender stereotyping: men are supposed to date women and women date men.⁷⁵ The EEOC ultimately held that sexual orientation discrimination is inherently discrimination based on gender stereotypes; providing that “[s]exual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee’s sex.”⁷⁶

Baldwin influenced subsequent cases involving alleged sexual orientation discrimination⁷⁷, most notably the comparative approach utilized in *Hively v. Ivy Tech Community College of Indiana*.⁷⁸ In *Hively*, an openly lesbian, part-time adjunct professor who began teaching at Ivy Tech Community College in 2000, “applied for at least six full-time positions between 2009 and 2014.”⁷⁹ These attempts were unsuccessful, and her employment contract was not renewed.⁸⁰ The Seventh Circuit, sitting *en banc* granted her appeal, and formulated a comparative test to determine whether the plaintiff “described a situation in which, holding all other things constant and changing only her sex, she would have been treated the same way.”⁸¹ The Seventh Circuit concluded that had Hively been a man, her employer would not have taken any adverse employment actions for dating a woman; and concluded that she was discriminated against

73. *Id.* at *7. See Raelynn J. Hillhouse, *Reframing the Argument: Sexual Orientation Discrimination as Sex Discrimination Under Equal Protection*, 20 GEO. J. GENDER & L. 49, 87 (2018) (“The gender-stereotyping theory is the most persuasive to federal judges. Seventy-six percent of courts that reasoned that sexual orientation discrimination either is or may be a form of sex discrimination embrace the gender-stereotyping theory.”).

74. *Baldwin*, 2015 WL 439764, at *9.

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.

Id. at 5. The Ninth Circuit interprets “sex” to include one’s biological sex or gender, permitting a gender stereotyping claim—this approach requires the plaintiff to establish that they have experienced adverse employment action due to a failure to exhibit traits associated with their gender. See *Schwenk v. Hartford*, 204 F.3d 1187, 1201–02 (9th Cir. 2000).

75. *Baldwin*, 2015 WL 439764, at *6.

76. *Id.* at *5.

77. *Id.* at *1.

78. *Surette*, *supra* note 6, at §§ 6–7.

79. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 341 (7th Cir. 2017).

80. *Id.*

81. *Id.* at 345.

based on her sex and that “employment discrimination on the basis of . . . sexual orientation . . . [establishes] a case of sex discrimination for Title VII purposes.”⁸² The Seventh Circuit, considering Supreme Court precedent with *Baldwin*, provided that, “[t]he logic of the Supreme Court’s decisions, as well as the common-sense-reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex, persuade us”⁸³ This reasoning became a harbinger, laying a foundation for the Second Circuit’s *en banc* ruling.⁸⁴

III. ZARDA V. ALTITUDE EXPRESS AND NEW HORIZONS

A. Factual Background

Donald Zarda, a gay male, worked as a sky diving instructor for Altitude Express during the summer of 2010.⁸⁵ Zarda, as an instructor, regularly participated in tandem skydives requiring him to be “strapped hip-to-hip and shoulder-to-shoulder with clients.”⁸⁶ During a skydiving instruction with a female client, in an attempt to assuage any discomfort she might experience due to the physical contact associated with the tandem jump,⁸⁷ Zarda told her “he was gay and ha[d] an ex-husband to prove it.”⁸⁸

After the successful tandem dive, the female client informed her boyfriend of Zarda’s comment pertaining to his sexual orientation.⁸⁹ Shortly thereafter, the boyfriend contacted Zarda’s boss who subsequently fired him.⁹⁰ Zarda sued Altitude Express (doing business as Skydive Long Island) and owner Raymond Maynard, alleging discrimination in violation of Title VII and New York law.⁹¹

82. *Id.* at 351–52.

83. *Id.* at 350–51.

84. Surette, *supra* note 6, at § 4.

85. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 108 (2d Cir. 2018).

86. *Id.*

87. *Id.*

88. *Id.* Zarda regularly informed female clients of his sexual orientation when accompanied by a spouse or boyfriend. *Zarda v. Altitude Express*, 855 F.3d 76, 80 (2d Cir. 2017)

89. *Zarda*, 883 F.3d at 108 (stating “the client alleged that Zarda inappropriately touched her and disclosed his sexual orientation to excuse his behavior”).

90. *Id.*

91. *Zarda*, 855 F.3d at 79–80 (stating “Altitude Express . . . contend[ed] that Zarda was fired because he failed to provide an enjoyable experience for a customer . . . Zarda assert[ed] . . . [he] was fired . . . because of his supervisor’s prejudice against homosexuals or because he informed a client about his sexuality”).

B. *The Ride Up: Procedural Posture*

Defendants filed a motion for summary judgment; the trial court granted the defendants' motion, holding that the Second Circuit did not recognize sexual orientation discrimination as a cognizable claim under Title VII.⁹² Zarda appealed the district court's decision requesting that the circuit court reconsider precedent "to hold that Title VII's prohibition on discrimination based on 'sex' encompasses discrimination based on 'sexual orientation.'"⁹³ The Court of Appeals declined the request, "[s]ince a three-judge panel . . . lacks the power to overturn Circuit precedent."⁹⁴

C. *Back-up Parachute: The EEOC and Zarda's Second Wind*

During initial trial proceedings, the EEOC decided *Baldwin*, holding that sexual orientation discrimination is a form of discrimination because of sex.⁹⁵ In light of the EEOC guidance, the Second Circuit reconsidered Zarda's petition and reconvened to reconsider whether Title VII prohibits discrimination based on sexual orientation.⁹⁶ The Second Circuit's *en banc* decision identified sexual orientation discrimination as a subset of sex discrimination based on a failure to adhere to gender norms and ultimately prohibited by Title VII, and thus, a cognizable claim within the jurisdiction of the Second Circuit.⁹⁷ The effect of this decision has been widespread—overruling years of Second Circuit precedence and has influenced decisions in multiple circuits: such as the Fifth, Sixth, and Ninth Circuits.⁹⁸

92. *Id.* at 79.

93. *Id.* at 80.

94. *Id.*

95. *Baldwin v. Foxx*, 2015 WL 4397641, at *5 (E.E.O.C. July 15, 2015).

96. *Zarda*, 883 F.3d at 100.

97. *Id.* at 131–32.

98. *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217–23 (2d Cir. 2005); *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000). Since *Dawson* and *Simonton*, there have been several subsequent lower court decisions in the Second Circuit. See *Cargian v. Breitling USA, Inc.*, 737 F. App'x 41, 41 (2d Cir. 2018); *Daniel v. T&M Prot. Res. LLC*, No. 13 Civ. 4384, 2018 WL 3621810, at *15–16 (S.D.N.Y. July 19, 2018); *Garay v. Manchester Police Dep't*, No. 3:17cv1596, 2018 WL 1997251, at *1–2 (D. Conn., Apr. 27, 2018) (stating that sexual orientation discrimination is prohibited by Title VII). Other circuits have also followed, see *Somers v. Dig. Realty Trust Inc.*, No. 14-cv-05180, 2018 WL 3730469, at *19 (N.D. Cal. Aug. 6, 2018); *Wittmer v. Phillips 66 Co.*, 304 F. Supp. 3d 627, 634 (S.D. Tex. 2018) (holding that transgender status is protected under Title VII); see also *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 574 (6th Cir. 2018) (holding that the EEOC has the jurisdiction to pursue claims of sex discrimination based on transgender identity).

D. Jump On: Legislative Intent

The *Zarda* majority begins its analysis of sexual orientation discrimination by pointing to the Supreme Court’s interpretation of Title VII as a “broad rule of workplace equality”⁹⁹ that attacks “the entire spectrum of disparate treatment,” based on characteristics protected by law,¹⁰⁰ and that “Title VII should be interpreted broadly to achieve equal employment opportunity.”¹⁰¹ Recognizing that this broad interpretation is not a “blank slate” in deciding whether Title VII prohibits sexual orientation discrimination; courts must “construe the text in light of the entirety of the statute as well as relevant precedent.”¹⁰² The Second Circuit is not promoting an interpretation contrary to legislative intent; instead the opinion focuses on Congress’ broader intent to prohibit “impermissible consideration of . . . sex . . . in employment practices.”¹⁰³ Title VII is applied to reach a broad spectrum of sex discrimination because “sex is necessarily a factor in sexual orientation.”¹⁰⁴

E. Jump On: Sexual Orientation as a Function of Sex—Supreme Court Jurisprudence

The *Zarda* majority explores the nature of sexual orientation discrimination by first consulting the dictionary for a definition of sexual orientation.¹⁰⁵ The Second Circuit noted that in order to recognize a person’s sexual orientation, you must first acknowledge the person’s sex and the sex of the person to whom they are attracted.¹⁰⁶ The majority states that “Congress intended to make sex ‘irrelevant’ to employment decisions [and] the Supreme Court has held that Title VII prohibits not just discrimination based on sex . . . but also discrimination based on traits that are a function of sex, such as life expectancy, and non-

99. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 111 (2d Cir. 2018) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993)).

100. *Id.* (quoting *L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707–09 (1978) (holding that having women contribute more to a pension plan because they have a longer life expectancy violates Title VII)).

101. *Id.* (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–36 (1971)).

102. *Id.* at 112.

103. *Id.* (citing 42 U.S.C. § 2000e–2(m) (2012)).

104. *Id.* (“This statutory reading is reinforced . . . because sexual orientation discrimination is predicated on assumptions about how persons of a certain sex can or should be . . .”).

105. *Id.* at 113 (citing *Sexual Orientation*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“The term ‘sexual orientation’ refers to ‘[a] person’s predisposition or inclination toward sexual activity or behavior with other males or females.’”)).

106. *Id.* (quoting *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 358 (7th Cir. 2017) (Flaum, J., concurring) (“One cannot consider a person’s homosexuality without also accounting for their sex: doing so would render ‘same’ [sex] . . . meaningless.”)).

conformity with gender norms.”¹⁰⁷ Application of traits that are a “function” or a “proxy” of sex accords with the Supreme Court’s view that Title VII applies to more than “the principal evil Congress was concerned with” when the statute was enacted in 1964,¹⁰⁸ and that it applies to “reasonably comparable evils.”¹⁰⁹

To reinforce their conclusion, the Second Circuit used a “comparative test”¹¹⁰ that asks, “whether an employee’s treatment would have been different ‘but for that person’s sex.’”¹¹¹ For example, if a lesbian employee successfully performing her duties was denied employment and a male in the same position who was attracted to women received a promotion, sex is part of the consideration because the female employee would not have been denied a promotion “but for” her gender.¹¹² Finally, the Second Circuit utilized the gender stereotyping approach steeped in the logic of *Price Waterhouse*,¹¹³ equating Zarda’s termination for his sexuality as akin to being terminated for not living up to the gender stereotype that men should date women.¹¹⁴

F. Tandem with the Majority: Concurrences

Circuit Judge Dennis Jacobs concurred with the majority in observing that Zarda raised a claim for sex discrimination under Title VII and that sexual orientation is a subset of sex discrimination.¹¹⁵ However, he differed from the majority on multiple jurisdictional matters.¹¹⁶ Circuit Judge Jose A. Cabranes concurred only in the judgement, providing, “Zarda’s sexual orientation is a function of his sex. Discrimination against (him) because of his sexual orientation therefore is discrimination because of his sex, and is prohibited by Title VII. That should be the end of the analysis.”¹¹⁷ Circuit Judge Robert Sack

107. *Id.* at 112 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51 (1989); *L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978); *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971)).

108. *Id.* at 115 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998)).

109. *Id.*

110. *Id.* at 116 (using the Court’s “comparative test” to determine whether a basis for discrimination is a function of sex).

111. *Id.* (citing *Manhart*, 435 U.S. at 711).

112. *Id.* The *Zarda* court echoed the reasoning of the Seventh Circuit in *Hively*, to conclude that, “it follows that sexual orientation discrimination is a subset of sex discrimination.” *Id.* (citing *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 345 (7th Cir. 2017)).

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

114. *Zarda*, 883 F.3d at 133 (Jacobs, J., concurring); see *Price Waterhouse*, 490 U.S. 228, 250–51.

115. *Id.* at 132.

116. *Id.*

117. *Id.* at 135 (Cabranes, J., concurring).

concluded only on the grounds that sexual orientation is a form of gender stereotyping discrimination, (*i.e.*, acting or not acting in a way associated with a person's sex).¹¹⁸

Circuit Judge Raymond Lohier, Jr. concurred in the ultimate holding, stating, "I agree with the majority opinion that there is no reasonable way to disentangle sex from sexual orientation in interpreting the plain meaning of the words 'because of . . . sex.'"¹¹⁹ Judge Lohier dedicated the majority of his concurrence in attacking the dissent's "common meaning of the words" approach.¹²⁰ His concurrence criticized the dissent's plain meaning approach in applying the intent of Congress at the time of the statute's passing because it ignored Supreme Court precedent.¹²¹ He also addressed the dissent's approach in finding a "contemporary" and "public" meaning of sex as a "roundabout search for legislative history."¹²²

G. Free Fall: The Dissent

The dissent begins with Judge Gerald E. Lynch expressing his desire for Congress to pass legislation adding sexual orientation to Title VII protections.¹²³ After, he embarks on a lengthy history of the civil rights movement for African Americans, the pro-women movement and compares it to the history of the LGBTQ rights movement, landing on the premise that the historical intent of

118. *Id.* at 135–36 (Sack, J., concurring).

We are now called upon to address questions dealing directly with sex, sexual behavior, and sexual taboos, a discussion fraught with moral, religious, political, psychological, and other highly charged issues. For those reasons (among others), I think it is in the best interests of us all to tread carefully; to say no more than we must . . .

Id. at 135.

119. *Id.* at 136 (Lohier, J., concurring).

120. *Id.* at 136–37.

121. *Id.* ("Time and time again, the Supreme Court has told us that the cart of legislative history is pulled by the plain text, not the other way around. The text here pulls in one direction, namely, that sex includes sexual orientation.")

122. *Id.* at 137.

123. *Id.* (Lynch, J. & Livingston, J., dissenting).

Speaking solely as a citizen, I would be delighted to awake one morning and learn that Congress had just passed legislation adding sexual orientation to the list of grounds of employment discrimination prohibited under Title VII . . . I am confident that one day—and I hope that day comes soon—I will have that pleasure.

I would be equally pleased to awake to learn that Congress had secretly passed such legislation more than a half century ago—until I actually woke up and realized that I must have been still asleep and dreaming. Because we all know that Congress did no such thing.

Id.

Title VII was to provide protections against workplace discrimination based on race, national origin and religion.¹²⁴

The argument then transitions to addressing the majority's use of "judicial interpretations of Title VII as prohibiting sexual harassment, and allowing hostile work environment claims, in an effort to argue that the expansion they are making simply follows in this line [of reasoning]."¹²⁵ Judge Lynch counters the majority by explaining that the statute's use of race to include all racial groups means that the word sex was to include both men and women.¹²⁶ He addresses sexual harassment and exploitation as being included because it has been an enduring subject of legislative attention, stating "Representative Smith's amendment, both the literal language . . . and the elimination of the social evil at which it was aimed," meaning that the statute must be read to include it.¹²⁷ He reasoned the same for the inclusion of the now established hostile work environment protections.¹²⁸ He then suggests that though sexual orientation discrimination may be immoral or economically inefficient, not everything with those qualities are illegal; therefore until the legislative process deems otherwise, it shall remain legal.¹²⁹

After a lengthy attack on the Majority's linguistic argument,¹³⁰ Judge Lynch distinguishes the holding in *Price Waterhouse*, opining that the type of gender stereotyping that was found to violate Title VII is more similar to the initial purpose that Congress intended and that it involves one sex being systematically disadvantaged over the other.¹³¹ Judge Lynch characterizes Donald Zarda's treatment by his employer as "not just," but counters this by noting that the Constitution protects against discrimination from the government in regards to

124. *Id.* at 137–48.

125. *Id.* at 145–46.

[T]he prohibition of sex discrimination by its plain language protects men as well as women, whether or not anyone who voted on the bill specifically considered whether and under what circumstances men could be victims of gender-based discrimination. That is not an expansion of Title VII, but is a conclusion mandated by its text.

Id.

126. *Id.* at 145–47 ("Sexual exploitation has been a principal obstacle to the equal participation of women in the workplace, and whether or not individual legislators intended to prohibit it . . .").

127. *Id.* at 147.

128. *Id.*

129. *Id.* at 148.

130. *Id.* at 137–57.

131. *Id.* at 157 (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1998) ("An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.")).

the fundamental right to marry, “but it does not promise freedom from discrimination by their fellow citizens.”¹³²

III. ANALYSIS: A SUCCESSFUL DIVE

Zarda is a soundly reasoned Title VII decision;¹³³ it successfully incorporates Supreme Court approaches to legislative interpretation and progressive Title VII reasoning to hold that sexual orientation discrimination is a form of Title VII prohibition.¹³⁴ It is practicable because it does not create a new class of protected persons, nor does it argue that Title VII expressly prohibits sexual orientation discrimination. Instead, the Second Circuit provides a pathway, paved by Supreme Court jurisprudence, to logically conclude that sexual orientation discrimination is a form of discrimination prohibited by Title VII.

A. Tradition: The Weakness of the Legislative Intent Argument

Legislative intent is persuasive. Historically, a majority of courts have excluded sexual orientation from Title VII protections because reasoned that Congress had no initial intent for sexual orientation protections.¹³⁵ The *Zarda* majority address this argument well by focusing on Supreme Court interpretation. Focusing too much on legislative history may not accurately reflect Congressional intent given the nefarious way “sex” was introduced to Title VII. The limited legislative guidance should lead to a broadly construed reading of the text, reflecting the overall intent of Title VII: to eliminate

132. *Id.* at 166.

133. *Pratt v. Haw. Dep’t of Pub. Safety*, Civ. No. 17-00599, 2018 WL 5850177, at *11 (D. Haw. Nov. 8, 2018). See J. Shahar Dillbary & Griffin Edwards, *An Empirical Analysis of Sexual Orientation Discrimination*, 86 U CHI. L. REV. 1, 8–9 (2019). The article praises *Zarda*’s reasoning as it eliminates a defense under this scenario: An African American male with perfect credentials applies for a job while wearing what some would consider women’s clothing and is denied. *Id.* at 15–16. In a case where the motive is ambiguous (*i.e.*, racial vs. sexual orientation discrimination), the employer could deny racial motivation by using the defense that the adverse action was based on perceived sexual orientation. *Id.* See generally Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 14 DUKEMINIER AWARDS 715 (2015). Individuals who appear to be gay but never verify or provide their sexuality have been afforded success in gender stereotyping cases; however gay employees whose sexuality is revealed by preference, association, relationship status or via casual conversation are less meritorious, as many jurisdictions do not permit sexual orientation discrimination as a form of gender stereotyping claims. *Id.* at 741–42, 755–57.

134. John Richards & Brett Janich, *A Practitioner’s Guide to Zarda v. Altitude Express*, LAW 360 (March 5, 2018, 12:23 PM), <https://www.law360.com/articles/1018180/a-practitioner-s-guide-to-zarda-v-altitude-express>. The Second Circuit used three separate constitutional theories established by the Supreme Court: because of sex, sex stereotype, and associational discrimination theories to reach the single conclusion that Title VII prohibits sexual orientation discrimination. *Id.*

135. *Surette*, *supra* note 6, at § 2.

impermissible workplace discriminations. Broad construction is not merely a convenient means to extend protections to LGBTQ employees and applicants; it also aligns with the broad construction approach overwhelmingly utilized by the Supreme Court in Title VII cases. The Supreme Court has recognized that Title VII should apply to “reasonably comparable evils;”¹³⁶ narrowly construing sex by its plain meaning is contrapositive to the Supreme Court’s approach. *Zarda* correctly addresses the broad aims of Congress in striking at an array of workplace discrimination while utilizing Supreme Court precedent as a guide.

The *Zarda* dissent argue for the false dichotomy—that until Congress makes sexual orientation discrimination illegal, it shall be legal—and because Congress has not made it illegal, it further enforces the argument that Title VII does not include sexual orientation discrimination protections. In light of relevant law, this argument is weak. First, there is nothing in the text of Title VII that expressly provides these protections to heterosexuals only.¹³⁷ Second, Congressional inaction as a reason to deny protection to LGBTQ individuals is unpersuasive. Laws uniformly criminalizing domestic violence and the ending of coverture laws developed first from the courts while Congress remained silent.¹³⁸ Why can the Court act prior to Congressional prohibition for some injustices and not others? The dissent’s argument is an unsatisfactory way of answering this crucial question. If one can conclude that sexual orientation discrimination is not prohibited because Congress has not expressly proscribed it, “‘several equally tenable inferences’ may be drawn from such inaction, ‘including the inference that the existing legislation’”¹³⁹ is not a valid indication of whether sex discrimination encompasses sexual orientation.

The *Zarda* dissent makes an attempt to explain the hasty addition of “sex” by providing that because pro-women legislation has been a topic of Congressional debate before ratification and that there was a strong push from interest groups to include the surreptitiously added provision one day before the vote, that it is logical to read Congress’ intent to protect only women from invidious discrimination in the workplace. This, too, conveniently dismisses the fact that sex was not added or proposed by the same special interest groups that the

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

137. *Surette*, *supra* note 6, at § 2.

138. An example of an action that has been universally proscribed in U.S. jurisdictions that was not prohibited by an act of Congress is state withdrawal of coverture laws on constitutional grounds (coverture was the common law term to describe the exemption given to husbands in cases of marital rape; because a woman’s rights were subsumed to her husband’s, a wife could not legally bring a claim for rape). See Lalenya Weintraub Siegel, *The Marital Rape Exemption: Evolution to Extinction*, 43 CLEV. ST. L. REV. 351, 352 (1995). Similarly, the criminalization of domestic violence first had its movement by state and constitutional arguments, not legislative. See Deborah Tuerkheimer, *Criminal Law: Recognizing and Remediating the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 969–71 (2004).

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

dissent credits in having ushered the legislation through. Attempting to use an absence of legislative intent to reason that sexual orientation should not be included ignores the Supreme Court's interpretation and places too much emphasis on the plain text of a provision that was intended to stifle the entirety of protections the Civil Rights Act was intended to provide.

It seems illogical for the dissent to place so much emphasis on the legislative intent while ignoring the history of the statute. In Judge Lynch's rationale for not extending Title VII protections to sexual orientation, which is utilized by a majority of jurisdictions, he suggests that while the Constitution promises protection from discrimination from the government it does not protect from discrimination by fellow citizens. This logic does not work. Despite correctly identifying that the Constitution does not promise protection from discrimination by fellow citizens, it fails to realize that Title VII does just that! It promises a multitude of protections from discrimination by fellow citizens in the workplace.

The *Zarda* dissent argues for the premise that: while Title VII protects individuals from discrimination by fellow citizens in the workplace on the basis of race, religion, gender, and even a lack of conformance to gender stereotypes, it should NOT be extended to include sexual orientation because the Constitution does not explicitly promise it. The Constitution makes no explicit promise of protection from workplace discrimination on the basis of race or religion either; yet those protections are extant under Title VII.

B. Gender Stereotyping

The strongest argument for including sexual orientation discrimination within the protections of Title VII is the prohibition against gender stereotyping. The holding in *Price Waterhouse*, and the reasonably comparable evils approach of *Oncale*¹⁴⁰ are highly persuasive. Denying a promotion to a female because she acts too masculine is impermissible because it necessarily takes her gender into account. Likewise, if an employer fires a male employee for being gay, it is necessarily relying on sex because one cannot disapprove of a person's sexual orientation without first taking into consideration the sex of that person.

The *Zarda* dissent acknowledges Title VII extends to reasonably comparable evils of Congress' intent and argues that the prohibition of gender stereotyping is within the original intent of the statute. Under this reasoning, it would be unlawful to fire a male because his superior believed that he acted too feminine, but it would be permissible to fire him for being gay. There is a fundamental danger in this because as it stands in a majority of jurisdictions, sexual orientation discrimination can be used as a defense against other forms of discrimination. For example, if a lesbian African American is denied promotion due to discrimination, she may assert a claim that she was discriminated against

140. *Oncale*, 523 U.S. at 75.

due to her race and/or gender. The employer could defend against this accusation by simply claiming she was denied because she is gay, creating a lawful defense to an impermissible consideration of race and gender. The Supreme Court has provided a guide to this inconsistency: the extension of Title VII protection to reasonably comparable evils. The majority correctly identifies the inconsistency and construes precedent to establish that firing an employee for being gay is a reasonably comparable evil to firing a female employee for acting too masculine, or terminating an employee based on race, religion or national origin.

IV. CONCLUSION

Zarda is soundly reasoned. The Second Circuit correctly applied *Baldwin*; however, *Baldwin* should serve as only a blueprint. Although the EEOC has been vested by Congress to have the authority to interpret and apply Title VII, courts have inconsistently relied on the agency's decisions. The EEOC often changes guidance on these matters.

The Supreme Court, in *Oncale* and *Price Waterhouse*, established that Title VII covers reasonably comparable evils, and that adverse action in employment matters due to failure to adhere to gender roles is an impermissible consideration of sex. The *Zarda* court's reasoning illustrates the undeniable link between sexual orientation discrimination and impermissible consideration of gender in adverse employment actions. The function of this decision is further illustrated by the subsequent circuit holdings; evidencing a persuasive argument. The value in this approach is that it proscribes sexual orientation discrimination without creating an additional protected class. Linking sexual orientation discrimination to gender stereotyping is a practical method to ensure that people are protected in their employment from characteristics that have no relevance to the job duties they are fulfilling. An employee's sexual orientation has the same correlation to the effectiveness of job performance as does an employee's marital status, race, or national origin. Title VII should be interpreted to fully realize its potential: to strike at discrimination in the work force, eliminating considerations of an employee's life that do not relate to employment. The law should not be read to allow some forms of discrimination and not others when the Supreme Court precedent has soundly interpreted Congress' intent to apply to reasonably comparative evils.