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The Institutionalized Othering of Sexual Minorities in Sex Discrimination Suits

Tyler Wolfe†

INTRODUCTION

A majority of courts misinterpret Supreme Court precedent when analyzing sex discrimination claims brought by queer plaintiffs. Based on a fear of expanding Title VII to proscribe discrimination based on sexual orientation, these courts use a plaintiff’s queerness to discredit their claims of sex discrimination. This method of discrediting claims brought by queer plaintiffs institutionally “others” sexual minorities and prevents them from exercising their legal rights.

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However, a minority of courts have shown a commitment to applying the principles of Title VII equally to sexual minorities and cisgender, heterosexual plaintiffs. These courts correctly interpret Supreme Court precedent, and they work to ensure “that all people are welcome and feel that they belong in the society.” In line with this minority approach, this article will argue that discrimination based on sexual orientation is inherently discrimination based on sex because sexual minorities—merely by existing—depart from stereotypical notions of gender and sexuality.

Part I of this Article briefly describes the history of sex discrimination under Title VII. It examines the legislative history of Title VII and describes landmark Supreme Court precedent that clarifies and broadens the scope of sex discrimination. Part II describes how a majority of courts interpret Title VII’s prohibition of sex discrimination in relation to gender identity, gender expression, and sexual orientation. Part III examines the way that courts “other” sexual minorities by holding queer plaintiffs to a different standard than heterosexual plaintiffs. Additionally, Part III analyzes a common fear among courts of creating a new protected class for sexual minorities under Title VII. Part IV examines decisions from a minority of courts that have held that discrimination based on sexual orientation is inherently discrimination based on sex stereotypes. Lastly, Part V discusses the Supreme Court’s denial of certiorari in a case concerning whether Title VII protects sexual minorities from sex discrimination. This Article concludes that Title VII’s prohibition of sex discrimination is applied inconsistently to sexual minorities due to a majority of courts misinterpreting Supreme Court precedent.

In this Article, the term “sexual orientation” will be used to describe “a person’s sexual and emotional attraction to another person and the behavior and/or social affiliation that may result from this attraction.” This Article will use the terms “queer” and “sexual minority” when referring to individuals who identify their sexual orientation as something other than heterosexual. The word “queer” historically has been used as a slur against sexual and gender minorities. However, in recent decades the LGBT community has reclaimed the word “as an umbrella term to refer to all sexual and gender minorities.”

The term “gender identity” will be used to describe “a person’s deeply felt,
inherent sense of being a girl, woman, or female; a boy, a man, or male; a blend of male or female; or an alternative gender” (e.g., genderqueer, gender nonconforming, gender neutral). This Article will use the term “non-binary” when describing “any gender identity that does not squarely fit into the male or female binary classifications.” The term “gender expression” will be used to describe “an individual’s presentation—including physical appearance, clothing choice and accessories—and behavior that communicates aspects of gender or gender role . . . [but] may or may not conform to a person’s gender identity.” “Gender nonconforming” will be used when referring “to a person who does not conform to societal expectations assigned to gender, especially in terms of masculinity and femininity.” Further, a “sex stereotype” is a traditional notion of gender performance and expression, such as aggression being associated with masculinity and submissiveness being associated with femininity.

I. HISTORY OF SEX DISCRIMINATION UNDER TITLE VII

Title VII of the Civil Rights Act of 1964 states that it is “an unlawful employment practice . . . for an employer . . . to discriminate against any individual . . . because of . . . race, color, religion, sex, or national origin.” When interpreting a statute, courts often look to the statute’s legislative history for guidance. However, there is little legislative history concerning Title VII’s definition of “sex.” “Sex” was added as a protected class under Title VII just one day before the legislature voted to pass the Civil Rights Act. As a result, courts have experienced difficulty when attempting to define who exactly is included within Title VII’s classification of “sex.”

In the early years of Title VII litigation, some courts interpreted the classification of “sex” narrowly. They refused to condemn types of discrimination that were not explicitly mentioned in the Act or its legislative history.
history, such as discrimination based on sex stereotypes and discrimination by men against men. The Supreme Court, however, resolved much of this inconsistency in *Price Waterhouse v. Hopkins*, where the court held that sex stereotyping is evidence of sex discrimination. The plaintiff, Ann Hopkins, alleged that her employer violated Title VII’s prohibition of sex discrimination by refusing to consider her as a candidate for promotion because she was a woman. Hopkins offered evidence that the partners in her office believed a woman should act a certain way, and that they refused to consider her for promotion because she did not match the stereotypes they associated with the “proper behavior of women.” The partners described Hopkins as “masochistic,” said she was “overcompensated for being a woman,” and criticized her use of profanity because she was a “lady using foul language.” One of the partners even told Hopkins that she could improve her chances for partnership if she walked, talked, and dressed “more femininely.” Based on the evidence of sex stereotyping, the court concluded that Hopkins proved that gender played a motivating part in the defendant’s employment decision.

The *Price Waterhouse* decision revolutionized the ways in which courts interpret sex discrimination under Title VII because it demonstrates the complexity of Title VII’s “because of sex” prohibition. In explaining the concept of sex stereotyping, the Supreme Court used an example, stating: “an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.” Before *Price Waterhouse*, courts recognized that it was blatant sex discrimination for an employer to refuse to promote an employee solely because she was a woman. However, after *Price Waterhouse*, courts must also recognize that it is sex discrimination for an employer to refuse to promote a woman because she does not conform to sex stereotypes (e.g., punishing women for being aggressive or “masochistic”).

16. See generally *Ulane*, 742 F.2d at 1081; *DeSantis*, 608 F.2d at 328-29; *Smith*, 569 F.2d at 326-27.
18. Id. at 235.
19. Id. at 237.
20. Id. at 235.
21. Id.
22. Id. at 258.
25. See *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981) (stating that Title VII prohibits an employer from refusing to promote a woman because of her sex, but Title VII does not “demand that an employer give preferential treatment to women”).
26. See generally *Price Waterhouse*, 490 U.S. 228; see also Kimberly A. Yuracko, *Gender Nonconformity & the Law*, 5 (Yale University Press, 2016) (noting that “[w]hile the Supreme Court had previously held that it was an actionable form of sex discrimination to penalize a female employee based on stereotypical assumptions about how women actually behave, this
The Court further clarified sex discrimination in *Oncale v. Sundowner Offshore Services, Inc.* nine years after its decision in *Price Waterhouse*.

On *Oncale*, the Court held that “sex discrimination consisting of same-sex sexual harassment is actionable under Title VII.” The plaintiff, a man named Joseph Oncale, quit his job “due to sexual harassment and verbal abuse.” On multiple occasions, Oncale’s supervisors—who were also men—sexually assaulted him and threatened him with rape. The Supreme Court ultimately held that “nothing in Title VII necessarily bars a claim of discrimination ‘because of . . . sex’ merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex.”

Prior to the decision in *Oncale*, some courts refused to condemn same-sex sexual harassment as sex discrimination because same-sex sexual harassment was “not the principal evil Congress was concerned with when it enacted Title VII.” However, the Court refuted this reasoning in *Oncale*, stating: “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils.” By this reasoning, the Court acknowledged that sex discrimination can occur between parties of the same sex, because such discrimination is reasonably comparable to the discrimination that occurs between parties of differing sexes.

In *Oncale*, the Court also clarified the level of deference given to congressional intent. First, it “described the purposes of Title VII as a means for Congress to protect all individuals from sex discrimination in employment, and to strike at the entire spectrum of disparate treatment of men and women in employment.” Second, the Court “de-emphasized the role of congressional intent” when it stated that Title VII should be used to “protect against more than . . . the ‘principal evil’ at which the statute was directed” because the “provisions of our laws” govern us, rather than the “principle concerns of our legislators.” Thus, even if the principle concern of Congress was only to protect women from the discriminatory conduct of men, *Oncale* demonstrates that such intent should not govern whether the statute applies to “reasonably comparable evils” (e.g., same-sex sexual harassment). This decision demonstrates the breadth of potential protections under Title VII.

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28. Id. at 82.
29. Id. at 77.
32. Id.
33. Id.
34. See id.
35. Bovalino, see note 12, at 1124-25 (citing *Oncale*, 523 U.S. at 79).
36. Id. (internal quotations omitted).
37. Id.
38. See id.
II. APPLYING THE SEX STEREOTYPING PRINCIPLE TO LGBTQ+ PLAINTIFFS

The sex stereotyping principle under *Price Waterhouse* has revolutionized the way in which courts analyze sex discrimination claims in cases with transgender (trans) plaintiffs. A majority of courts have found that discrimination based on gender identity is discrimination based on sex, because gender nonconformity is necessarily a departure from sex stereotypes. Thus, many trans plaintiffs have been successful in bringing sex stereotyping discrimination suits against their employers.

On the other hand, a majority of courts apply *Price Waterhouse*’s sex stereotyping principle too narrowly in cases concerning sexual minorities. These courts fail to acknowledge that sexual minorities depart from sex stereotypes simply by being queer. They use a plaintiff’s queer identity against them by linking their sex discrimination claims to their sexual orientation as a way to bypass Title VII protections. Thus, many queer individuals—or those merely perceived as queer—have been unsuccessful in their sex stereotyping claims simply because of their queer identities. In contrast, when heterosexual plaintiffs are unsuccessful in their sex stereotyping claims, it is not because of their heterosexual identity. Rather, it is often due to a lack of evidence substantiating the defendant’s sex stereotyping.

A. Prohibiting Discrimination Based on Gender Identity

The Supreme Court’s decisions in *Price Waterhouse* and *Oncale* paved the way for protections for many trans individuals under Title VII. Prior to these decisions, many courts refused to rule in favor of trans plaintiffs in Title VII cases. For example, in *Holloway v. Arthur Anderson & Co.*, the Ninth Circuit affirmed a district court’s holding that “transsexualism was not encompassed within the definition of ‘sex.’” The court pointed out that “Congress has not

39. See Part II.a.
40. See Part II.b.
41. See Part II.c and Part III.a.
42. See Part II.c.
43. See, e.g., *Weinstock v. Columbia University*, 224 F.3d 33, 44-45 (2d Cir. 2000) (holding that describing a female employee as “nice” and “nurturing” was insufficient evidence to prove discrimination based on sex stereotypes); *Galdieri-Ambrosini v. National Realty & Development Corp.*, 136 F.3d 276, 290 (2d Cir. 1998) (holding that an employer requiring a female secretary to perform traditional secretarial duties such as typing, copying, and scheduling appointments was insufficient to permit an inference of discrimination based on sex stereotypes).
45. Id. at 516 (citing *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 661 (9th Cir. 1977)).
shown any intent other than to restrict the term ‘sex’ to its traditional meaning.”

However, after Price Waterhouse and Oncale, all circuit courts that have heard the issue have held that discrimination against a trans individual due to their nonconformance with sex stereotypes is discrimination based on sex. For example, in Smith v. City of Salem, the Sixth Circuit stated that “the approach in Holloway . . . has been eviscerated by Price Waterhouse.” The court held that trans individuals are protected under Title VII because “[s]ex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination.”

However, it is important to note that some courts, to the detriment of trans plaintiffs, treat bathroom access as a separate issue from sex stereotyping discrimination. For example, in Etsitty v. Utah Transit Authority, the Tenth Circuit held that Title VII’s prohibition of sex discrimination does not extend to employment decisions that are based on a trans employee’s use of restrooms that align with their gender identity. The plaintiff—a trans woman—was fired from her job as a bus operator because the defendant “was concerned the use of women’s public restrooms by a biological male could result in liability for [the defendant].” The court held that “such a motivation constitute[d] a legitimate, nondiscriminatory reason for [the plaintiff’s] termination under Title VII.” This holding is incredibly problematic for trans plaintiffs because it disregards their gender identity and reduces their identity to the biological sex they were assigned at birth. Thus, in courts that follow this reasoning, trans plaintiffs are required to show evidence of sex stereotyping discrimination that is separate from being denied bathroom access.

Additionally, some courts are hesitant to strike down grooming and

46. Holloway, 566 F.2d at 661.
47. See, e.g., Whitaker v. Kenosha Unified School District No. 1 Board of Education, 858 F.3d 1034, 1048 (7th Cir. 2017) (holding that “[b]y definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth”); Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011); Barnes v. City of Cincinnati, 401 F.3d 729, 733, 747 (6th Cir. 2005); Smith v. City of Salem, 378 F.3d 566, 573 (6th Cir. 2004); Rosa v. Parks W. Bank & Trust Co., 214 F.3d 213, 215-16 (1st Cir. 2000); Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000).
48. City of Salem, 378 F.3d at 573.
49. Id. at 575.
50. 502 F. 3d 1215, 1224-25 (10th Cir. 2007).
51. Id. at 1219, 1224.
52. Id. at 1224; see also Michaels v. Akal Security, Inc., No. 09-cv-01300-ZLW-CBS, 2010 WL 2573988, at *4 (D. Colorado 24 June 2010) (stating that regardless of “[h]owever far Price Waterhouse reaches, this court cannot conclude it requires employers to allow biological males to use women’s restrooms. Use of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes.”).
53. See Michaels, No. 09-cv-01300-ZLW-CBS, 2010 WL 2573988, at *4 (noting that “Etsitty precludes [a gender stereotyping claim] based solely upon restrictions on [the plaintiff’s] usage of certain bathrooms. Instead, under Price Waterhouse, [the plaintiff] is required to show pretext.”); Id. at *4, n. 49 (noting that “[a] plaintiff demonstrates pretext by showing either that a discriminatory reason more likely motivated the employer or that the employer’s preferred explanation is unworthy of credence”).
appearance policies that adhere to the gender binary, even though these policies exclude and erase non-binary individuals.\textsuperscript{54} For example, in \textit{Jespersen v. Harrah’s Operating Company}, the Ninth Circuit upheld a casino’s grooming and appearance policy that required “women to wear some facial makeup” and prohibited men from wearing any.\textsuperscript{55} The plaintiff refused to wear makeup because “wearing it would conflict with her self-image.”\textsuperscript{56} In upholding the policy, the Ninth Circuit emphasized that its decision does not “preclude, as a matter of law, a claim of sex stereotyping on the basis of dress or appearance codes.”\textsuperscript{57} However, the court stated that this particular grooming and appearance policy survived the plaintiff’s suit because it did not require the plaintiff “to conform to a stereotypical image that would objectively impede her ability to perform her job requirements.”\textsuperscript{58} Thus, the court ruled in favor of the employer because it did not consider the grooming and appearance policy to be unreasonable, and there was “no evidence of a stereotypical motivation on the part of the employer.”\textsuperscript{59}

This interpretation of grooming and appearance policies is problematic because it finds policies reasonable even when they ignore individuals who do not identify as male or female. The grooming and appearance policy in \textit{Jespersen} was constrained to only the gender binary, leaving no room for individuals whose gender identity is something other than male or female, is somewhere in-between male and female, or is a mixture of both male and female (e.g., individuals who identify as non-binary, gender queer, gender variant, etc.).\textsuperscript{60}

Despite these egregious inadequacies in the application of Title VII to bathroom access and grooming policies, courts have applied Title VII more consistently and favorably for plaintiffs in the context of gender identity than in the context of sexual orientation.\textsuperscript{61}

\textbf{B. Prohibiting Discrimination Based on Gender Expression}

Following the precedent set in \textit{Price Waterhouse}, some courts have held in favor of queer plaintiffs—and plaintiffs who are perceived as queer—when their gender expression departs from traditional sex stereotypes. For example, in

\textsuperscript{54} See Yuracko, note 26, at 6 (stating that some “gender benders . . . remain outside the law’s protection and continue to be subject to their employer’s gender conformity demands”); Hanssen, note 6, at 286 (stating that “[t]he gender binary, as a system, divides members of society into two sets of gender roles and gender identities based on one’s reproductive organs. In a binary system, transgression of gender norms or expectations is condemned.”).

\textsuperscript{55} 444 F.3d 1104, 1105 (9th Cir. 2006). Notably, the plaintiff in this case did not identify as non-binary; but the holding in this case is still harmful to non-binary individuals because the court upheld a strictly binary grooming policy. Id. at 1113.

\textsuperscript{56} Id. at 1107-08.

\textsuperscript{57} Id. at 1113.

\textsuperscript{58} Id.

\textsuperscript{59} Id. (noting that “in commenting on grooming standards, the touch-stone is reasonableness”).

\textsuperscript{60} See id. (noting that “[t]he standards also included grooming requirements that differed to some extent for men and women”) (emphasis added).

\textsuperscript{61} See Part II.b and Part II.c.
Nichols v. Azteca Restaurant Enterprises, Inc., the court held that an effeminate man was protected under Title VII when his coworkers harassed him for not acting stereotypically masculine. The plaintiff was harassed for not having sex with women, for having feminine mannerisms, and for walking like a woman. The court held that the harassment stemmed from the plaintiff’s gender nonconforming behavior, since he did not conform to sex stereotypes associated with men.

Further, in Koren v. Ohio Bell Telephone Co., a district court denied the defendant employer’s motion for summary judgment, since the plaintiff brought sufficient evidence of sex stereotyping discrimination to create a genuine dispute as to material facts. The court stated that the plaintiff failed to conform to traditional gender norms because he “chose to take his [male] spouse’s surname—a ‘traditionally’ feminine practice—and his co-workers and superiors observed that gender non-conformance when [he] requested to be called by his married name [at work].” The court reasoned that the plaintiff’s sex stereotyping claim survived the defendant’s motion for summary judgment because the plaintiff departed from gender norms in a way that was “observable” at work. In other words, according to this court’s reasoning, a queer plaintiff can only succeed on a sex stereotyping claim if they depart from sex stereotypes in a way that is observable by co-workers, such as through mannerisms or style of dress.

However, many courts have been unwilling to find in favor of queer plaintiffs under a sex stereotyping theory—even if plaintiffs depart from traditional gender norms in the workplace. For example, in Kay v. Independence Blue Cross, a plaintiff was harassed by coworkers who said he was not a “real man” because his ear was pierced, circulated a flyer calling for his removal because he was a “queer,” and left him voicemails calling him “faggot” and “fem.” The court held that the plaintiff was not protected under Title VII because the discrimination was motivated by “perceived sexual orientation” rather than by sex stereotypes. In the court’s opinion, the coworkers’ descriptions of the plaintiff as “fem” and not a “real man” proved the discrimination was motivated by his sexual orientation, rather than his departure from sex stereotypes.

The preceding cases demonstrate that some courts treat non-traditional
gender expression as a potential source of protection for queer plaintiffs under *Price Waterhouse*’s sex stereotyping theory, whereas other courts do not. Yet even the courts that treat non-traditional gender expression as a hook for applying sex stereotyping principles fail to protect sexual minorities as a group. Their emphasis on gender expression as a way for queer plaintiffs to successfully bring a sex stereotyping claim only protects sexual minorities whose observable characteristics in the workplace depart from traditional gender norms. A masculine gay man or feminine lesbian, under this approach to sex stereotyping, would not be protected by Title VII if they were discriminated against due to an unobservable characteristic related to their sexual orientation (e.g., who they have relationships with outside of work).

Thus, this interpretation of sex stereotyping is inadequate because it fails to protect sexual minorities as a group by hinging Title VII protection on characteristics that not all queer people express. All sexual minorities should be protected under Title VII’s prohibition of sex discrimination because “[queer] people, simply by identifying themselves as [queer], are violating the ultimate gender stereotype—heterosexual attraction.”

**C. Prohibiting Discrimination Based on Sexual Orientation**

Even after the landmark decisions in *Price Waterhouse* and *Oncale*, most courts refuse to extend Title VII’s “because of sex” language to sexual orientation. For example, in *Rene v. MGM Grand Hotel, Inc.*, the Ninth Circuit held that “discrimination on the basis of sexual orientation does not subject an employer to liability under Title VII” because such discrimination, “no matter how


74. Anthony E. Varona & Jeffrey M. Monks, “En/Gendering Equality: Seeking Relief Under Title VII Against Employment Discrimination Based on Sexual Orientation,” *7 William and Mary Journal of Women and the Law* 67, 84 (2000); see also Kramer, see note 73, at 490 (noting that “there is an ultimate gender stereotype involved in sexual orientation-based harassment, such that employers and coworkers often harass gays and lesbians in gender-based terms because the act of homosexuality—namely, engaging in same-sex sexual relations—is not the behavior that they commonly associate with how a ‘real man’ or a ‘real woman’ is supposed to behave”); Ilona M. Turner, “Sex Stereotyping Per Se: Transgender Employees and Title VII,” *95 California Law Review* 561, 571, n. 66 (2007) (stating that “[i]t is possible to construct a convincing argument that all discrimination based on sexual orientation is really discrimination based on a gay person’s failure to conform to the gender stereotype that women should date men and men should date women”).

75. See, e.g., *Evans v. Georgia Regional Hospital*, 850 F.3d 1248, 1255 (11th Cir. 2017); *Kalich v. AT&T Mobility, LLC*, 679 F.3d 464, 471 (6th Cir. 2012); *Medina v. Income Support Division*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285, 290 (3d Cir. 2009); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Wrightson v. Pizza Hut of America, 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).
unfortunate and distasteful [it] may be, simply does not fall within the purview of Title VII.\textsuperscript{76} The plaintiff brought suit against his employer due to harassment he faced for being a gay man.\textsuperscript{77} His coworkers and supervisor touched him inappropriately and forced him to view explicit images of naked men having sex.\textsuperscript{78} When asked about the basis of the discrimination, the plaintiff “affirmed that his co-workers harassed him only because he was gay."\textsuperscript{79} Thus, the court held that the harassment was not a prohibited basis of discrimination under Title VII.\textsuperscript{80}

However, even when queer plaintiffs bring claims of sex discrimination without alleging discrimination based on sexual orientation, courts often link their sex discrimination claims to their sexual orientation in a way that harms plaintiffs’ chances of success.\textsuperscript{81} For example, in \textit{Prowel v. Wise Bus. Forms, Inc.}, the Third Circuit refused to substantiate the claims of the plaintiff—a gay man—under Title VII.\textsuperscript{82} The plaintiff brought a gender stereotyping claim against his employer, alleging that his employer failed to take action when his coworkers routinely harassed him for not conforming with gender norms.\textsuperscript{83} His coworkers called him names such as “Princess,” “Rosebud,” and “faggot.”\textsuperscript{84} They harassed him for sitting with his legs crossed, filing his nails, and walking effeminately.\textsuperscript{85} They even went as far as to make comments such as, “[t]hey should shoot all the fags” and “Rosebud will burn in hell.”\textsuperscript{86} The court analogized this case to \textit{Price Waterhouse}, stating that, “[u]nlike in \textit{Price Waterhouse}—where [the plaintiff’s] sexual orientation was not at issue—here there is no dispute that [the plaintiff] is homosexual. The difficult question, therefore, is whether the harassment he suffered . . . was because of his homosexuality, his effeminacy, or both.”\textsuperscript{87} Even though the plaintiff never claimed sexual orientation discrimination, the court brought his queer identity into its analysis, reasoning that “the line between sexual orientation discrimination and discrimination ‘because of sex’ can be difficult to draw.”\textsuperscript{88} Thus, the court concluded that the plaintiff’s sex stereotyping claim should be submitted to a jury because the “record is ambiguous” concerning the

\begin{thebibliography}{99}
\bibitem{76} 305 F.3d 1061, 1075 (9th Cir. 2002) (citing DeSantis \textit{v. Pacific Telephone and Telephone Co.}, 608 F.2d 327, 329-30 (9th Cir. 1979)).
\bibitem{77} Id. at 1064.
\bibitem{78} Id.
\bibitem{79} Id. at 1077.
\bibitem{80} Id. at 1078.
\bibitem{82} 579 F.3d at 293.
\bibitem{83} Id. at 287-88.
\bibitem{84} Id. at 287.
\bibitem{85} Id.
\bibitem{86} Id.
\bibitem{87} Id. at 290-91.
\bibitem{88} Id. at 291.
\end{thebibliography}
actual type of discrimination suffered by the plaintiff.89

Courts are even reluctant to protect heterosexual plaintiffs who are perceived as queer. For example, in Vickers v. Fairfield Medical Center, the Sixth Circuit held that Title VII does not protect individuals from “harassment based on being perceived as homosexual.”90 The plaintiff—a police officer who did not disclose his sexual orientation—investigated a sexual misconduct claim made by a gay man.91 Because the plaintiff assisted and befriended a gay man, his coworkers perceived him as queer.92 They wrote “FAG” on his report forms, asked him for sexual favors, handcuffed and sexually assaulted him, photographed the sexual assault, and faxed the images of the sexual assault to multiple of the plaintiff’s coworkers.93 Despite the relentless sexual harassment suffered by the plaintiff, the court held that the harassment was “based on [the plaintiff’s] perceived homosexuality, rather than based on gender non-conformity.”94 Thus, the court held that the plaintiff did not have a claim under Title VII.95

Additionally, recall Kay v. Independence Blue Cross, where the plaintiff was harassed by coworkers when they said he was not a “real man” and called him a “queer,” “faggot,” and “fem.”96 Much of this harassment stemmed from the plaintiff’s choice to wear an earring, which his coworkers perceived as a feminine accessory.97 Yet, the court held that the plaintiff was not protected under Title VII because the discrimination was motivated by “sexual orientation bias” rather than by sex stereotypes.98

Why did the courts decide not to protect the plaintiffs in Vickers, Kay, and Prowel? In Vickers, the plaintiff was sexually assaulted by his coworkers.99 Sexual assault is widely accepted as sexual harassment under Title VII,100 and same-sex sexual harassment is an actionable offense under Oncale.101 In Kay, the plaintiff

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89. Id. The court noted that even if the harassment suffered by the plaintiff was due to his sexual orientation, rather than his effeminacy, he still could have been harassed for his failure to conform with gender stereotypes. Id. This acknowledgement is a step in the right direction; however, the true problem in this case is that the plaintiff’s sexual orientation factored into the court’s analysis in a way that harmed the plaintiff’s likelihood of success. Even though the plaintiff did not claim that his discrimination was based on sexual orientation, the court decided to consider whether it was. Heterosexual plaintiffs do not need to overcome this hurdle when they bring claims of sex stereotyping discrimination. Thus, this hurdle “others” sexual minorities by making it more difficult for them to exercise their legal rights under Title VII.

90. 453 F.3d at 761.
91. Id. at 759.
92. Id.
93. Id. at 759-60.
94. Id. at 763.
95. Id. at 766.
96. 142 Federal Appendix at 51.
97. Id. at 50-51.
98. Id. at 51.
100. Rene, 305 F.3d at 1065 (stating that “[p]hysical sexual assault has routinely been prohibited as sexual harassment under Title VII”).
101. 523 U.S. at 79.
was harassed for departing from sex stereotypes by wearing an earring—a traditionally feminine accessory. Under *Price Waterhouse*, this form of sex stereotype-based harassment would seem to fall within Title VII’s “because of sex” prohibition. However, both the *Vickers* and the *Kay* courts refused to protect the plaintiffs under Title VII. Instead, the courts linked the plaintiffs’ sex discrimination claims to their perceived sexual orientation as a way to invalidate them, demonstrating that many courts treat sex stereotyping claims differently—and unfavorably—when they are brought by queer plaintiffs. In *Prowel*, much of the harassment suffered by the plaintiff was because he sat with his legs crossed, filed his nails, and walked effeminately. Further, the plaintiff was derogatorily called names such as “Princess” and “Rosebud.” Such harassment seems to be inextricably linked to sex stereotypes based on traditional notions of masculinity. Yet, the court grappled with the plaintiff’s queer identity, stating that “it is possible that the harassment [the plaintiff alleged] was because of his sexual orientation.” Had the plaintiff been heterosexual, would the court still have factored his sexual identity into its analysis?

### III. Courts “Other” Sexual Minorities in Title VII Suits

There is a clear inconsistency in the ways in which courts apply sex discrimination law under Title VII in cases with queer plaintiffs. This inconsistency leads to the “othering” of sexual minorities. Courts “other” sexual minorities by finding against them in cases that likely would have had positive outcomes had the plaintiffs been heterosexual or not perceived as queer. Professors John Powell and Stephen Menendian define “othering” as “a set of dynamics, processes, and structures that engender marginality and persistent inequality across any of the full range of human differences based on group identities.” “Othering” institutionalizes group-based differences through laws—or in this instance, the application of laws—that “restrict access to communal resources” and “maintain group-based advantages.” Professors Powell and Menendian acknowledge ways in which sexual minorities have been “othered,” such as through marriage laws, exclusionary gender norms, and anti-
gay ballot initiatives.\textsuperscript{112} While the article does not explicitly mention courts’ application of Title VII as a mechanism of “othering,” the mechanism nonetheless falls within their definition of what it means to be “othered.”\textsuperscript{113}

In juxtaposition with the concept of “othering,” Powell and Menendian discuss “belongingness,” a term which “entails an unwavering commitment to not simply tolerating and respecting difference but to ensuring that all people are welcome and feel that they belong in the society.”\textsuperscript{114} This concept of fostering belongingness is called the “circle of human concern,” which Powell and Menendian frame as “the only sustainable solution to the problem of othering.”\textsuperscript{115}

### A. Courts “Other” Sexual Minorities by Holding Them to a Different Standard Than Heterosexual Plaintiffs

Courts often “other” sexual minorities by linking their discrimination claims to their sexual orientation in order to deflake the claims under Title VII.\textsuperscript{116} For example, in \textit{Mims v. Carrier Corp.}, the court concluded that the plaintiff, Mims, did not have a claim for sexual harassment in the workplace under Title VII because he was not a member of a protected class.\textsuperscript{117} The plaintiff brought suit against his employer, alleging that his employer intentionally allowed his coworkers to direct sexual remarks and graphic body gestures toward him.\textsuperscript{118} However, the court ruled against him, claiming that Mims was not a member of a protected class because “[n]either sexual orientation nor perceived sexual orientation constitute protected classes under the Civil Rights Act.”\textsuperscript{119} Here, the court “others” Mims by defining his class identity in terms of sexual orientation instead of sex. Rather than framing Mims as a man, the court frames Mims as a homosexual. While the former is undisputedly recognized as a protected class under Title VII,\textsuperscript{120} the latter is not.\textsuperscript{121} The court reduces Mims’ identity to just one characteristic and fails to recognize that individuals have intersectional identities. Mims is not just a man or a perceived homosexual—he is both. The court “others”

\begin{itemize}
\item \textsuperscript{112} Id. at 18, 21.
\item \textsuperscript{113} Id. at 17.
\item \textsuperscript{114} Id. at 32.
\item \textsuperscript{115} Id. at 18.
\item \textsuperscript{116} Valdes, see note 81, at 18 (noting that “sexual orientation is used strategically both by defendants and decisionmakers . . . to (re)characterize, at will, a plaintiff’s sex and gender discrimination claim as involving only permissible sexual orientation discrimination. In this way, a sexual orientation loophole that ratifies sex and gender discrimination is created and activated.”).
\item \textsuperscript{117} 88 F. Supp. 2d at 713-14.
\item \textsuperscript{118} Id. at 710.
\item \textsuperscript{119} Id. at 714.
\item \textsuperscript{120} Hamm v. Weyauwega Milk Products, Inc., 332 F.3d 1058, 1062 (7th Cir. 2003) (stating that the “protections of Title VII extend to both women and men”); \textit{Oncale}, 523 U.S. at 78, 118 (holding that “Title VII’s prohibition of discrimination ‘because of . . . sex’ protects men as well as women”).
\item \textsuperscript{121} See cases cited in note 75.
\end{itemize}
Mims by ignoring his protected status, disregarding his intersectional identity, and using his perceived sexual orientation as a means to bypass any claim of sex discrimination that he may have had.

In contrast, the court in *Wrightson v. Pizza Hut, Inc.* held that the plaintiff, a heterosexual man, had a cognizable sex discrimination claim under Title VII because he was harassed due to his protected status as a “male.”122 The plaintiff in *Wrightson* was sexually harassed by queer coworkers who directed sexual advances toward him, attempted to pressure him into having same-sex intercourse, and touched him in sexually provocative ways.123 The court held that the plaintiff had a cognizable sex discrimination claim because “he would not have been harassed but for the fact that he is a male.”124 Had the plaintiff in *Mims* been a heterosexual male whose sexual orientation was never called into question—like the plaintiff in *Wrightson*—the court may have been more likely to hold that he was a member of a protected class because he is a man.

The decisions in *Mims* and *Wrightson* demonstrate how some courts hold sexual minorities to a different standard than heterosexual plaintiffs. In *Wrightson*, the defendants moved to dismiss the plaintiff’s Title VII claim by stating that the discrimination was because of the plaintiff’s sexual orientation—because he was heterosexual—and not because of his sex.125 In response, the court stated that the mere fact that the plaintiff had alleged discrimination “because of sex” was alone sufficient to withstand the defendant’s motion to dismiss.126 Further, the court reasoned that a Title VII cause of action remains legitimate even if “the discrimination against the employee is not ‘solely’ because of the employee’s sex, as long as the employee’s sex was a cause of the discrimination.”127 Here, the court demonstrates a willingness to find in favor of a heterosexual plaintiff, even when the parties dispute whether the discrimination was based on sexual orientation.128 Many courts refuse to extend this analysis to sexual minorities, as demonstrated by *Mims*, *Vickers*, and *Kay*, where the plaintiffs’ actual or perceived status as sexual minorities was fatal to their sex discrimination claims.129

However, in *Franchina v. City of Providence*, the First Circuit created a rule that mitigates the risk of courts harmfully linking a plaintiff’s sex discrimination claim to their sexual orientation as a way to invalidate the claim under Title VII.130 The First Circuit held that queer plaintiffs can bring “sex-plus claims under Title VII where, in addition to the sex-based charge, the ‘plus’ factor is the plaintiff’s

122. 99 F.3d at 143.
123. Id. at 139-40.
124. Id. at 143.
125. Id.
126. Id. at 143-44.
127. Id. at 144 (emphasis added).
128. Id. at 143-44.
129. See 453 F.3d at 763; 142 Fed. App’x at 50-51; 88 F. Supp. 2d at 714.
130. See 881 F.3d 32, 54 (1st Cir. 2018).
status as a gay or lesbian individual.” The plaintiff in *Franchina*, a lesbian woman, brought suit against the defendant for the relentless harassment she suffered at the hands of her coworkers over the course of five years. Her coworkers regularly referred to her as a “cunt,” “bitch,” and “lesbo.” Additionally, the plaintiff was spit on, shoved, and had body matter flung at her by a male subordinate. The city argued that the plaintiff did not have a triable claim of sex discrimination because Title VII does not proscribe discrimination based on sexual orientation, and the plaintiff “inappropriately blurred the line between sex and sexual orientation discrimination.” In response, the First Circuit held that sexual orientation can be a “plus-factor” in a sex-plus claim if the plaintiff “also demonstrates that he or she was discriminated at least in part because of his or her gender.” This decision may help to ensure that queer plaintiffs do not have their sex discrimination claims invalidated on the basis of their status as sexual minorities. However, the decision creates harmful precedent because it states that discrimination based solely on sexual orientation is not sex discrimination under Title VII.

**B. Courts Fear Creating a New Protected Class for Sexual Minorities**

The Sixth Circuit and Second Circuit have both stated that Title VII should treat sexual minorities differently, or else courts would “bootstrap protection for sexual orientation into Title VII.” In *Vickers*, the Sixth Circuit held that it could not rule in favor of the plaintiff without “de facto amending Title VII to encompass sexual orientation as a prohibited basis of discrimination.” The plaintiff did not disclose his sexual orientation to his coworkers. His coworkers, who believed the plaintiff was gay, sexually harassed and assaulted him. The court acknowledged that the harassment and assault were based on the plaintiff’s failure to conform to sex stereotypes because “all homosexuals, by definition, fail to conform to traditional gender norms.” However, despite the court’s

131. Id.
132. Id. at 43-44.
133. Id. at 37.
134. Id. at 37, 42.
135. Id. at 33-5-4.
136. Id. at 54.
137. Id. (noting that in *Higgins v. New Balance Athletic Shoe, Inc.*, the First Circuit “concluded that Title VII does not proscribe harassment based solely on one’s sexual orientation. While that may be true, [the court does not] believe that *Higgins* forecloses a plaintiff in [the First] Circuit from bringing sex-plus claims under Title VII where, in addition to the sex-based charge, the ‘plus’ factor is the plaintiff’s status as a gay or lesbian individual.”).
138. *Vickers*, 453 F.3d at 763-64; *Dawson*, 398 F.3d at 218 (quoting *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000)).
139. 453 F.3d at 764.
140. Id. at 759.
141. Id. at 759-60.
142. Id. at 764.
acknowledgement that the discrimination was because of sex stereotypes, it refused to rule in favor of the plaintiff because it feared creating precedent that would prohibit discrimination based on sexual orientation under Title VII.\textsuperscript{143} Had the plaintiff not been perceived as queer—as was the case in Wrightson—the court may have been more likely to hold in favor of the plaintiff, as it would no longer fear extending Title VII protections to sexual minorities.

In Dawson v. Bumble & Bumble, the Second Circuit held that the plaintiff, a lesbian woman, did not have a cognizable sex discrimination claim under Title VII.\textsuperscript{144} The plaintiff, Dawn, described herself as a lesbian “who does not conform to gender norms in that she does not meet stereotyped expectations of femininity and may be perceived as more masculine than a stereotypical woman.”\textsuperscript{145} Dawn’s coworkers harassed her by calling her “Donald” to purposely misgender her and told her that she “needed to have sex with a man.”\textsuperscript{146} In analyzing her claim, the court stated that when a plaintiff is homosexual, “gender stereotyping claims . . . present problems for an adjudicator” because “[s]tereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality.”\textsuperscript{147} Thus, the court held in favor of the defendant because “a gender stereotyping claim should not be used to ‘bootstrap protection for sexual orientation into Title VII.’”\textsuperscript{148}

Even in Dawson, where the plaintiff was harassed because of her nonconformance with sex stereotypes, the court refused to find protections for the plaintiff because she was a lesbian.\textsuperscript{149} This decision demonstrates the double standard applied to sexual minorities in sex discrimination suits under Title VII. Had Dawn been a heterosexual woman, her sex stereotyping claim would not have presented “problems for an adjudicator.”\textsuperscript{150} Thus, if she were not queer, the court may have been more likely to hold that she was discriminated against due to her nonconformance with sex stereotypes.

The courts in the preceding cases expressed a fear that if they substantiated a queer plaintiff’s sex stereotyping claims, they would essentially be holding that sexual orientation discrimination is per se sex stereotyping discrimination.\textsuperscript{151}

\textsuperscript{143} Id.
\textsuperscript{144} 398 F.3d at 222-23, overruled by Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018) (holding that discrimination based on sexual orientation is a form of discrimination based on sex). Even though Dawson was overruled by the Second Circuit’s recent decision in Zarda, the Dawson decision remains relevant because it was the Second Circuit’s leading precedent in this area of the law for thirteen years.
\textsuperscript{145} Id. at 213.
\textsuperscript{146} Id. at 215.
\textsuperscript{147} Id. at 218 (quoting Howell v. North Central College, 320 F. Supp. 2d 717, 723 (N.D. Illinois 2004)).
\textsuperscript{148} Id. (quoting Simonton, 232 F.3d at 38).
\textsuperscript{149} Id. at 222-23.
\textsuperscript{150} See id. at 218.
\textsuperscript{151} See Vickers, 453 F.3d at 764; Dawson, 398 F.3d at 218 (noting that “[w]hen utilized by an avowedly homosexual plaintiff, however, gender stereotyping claims can easily present
Recall *Vickers*, in which the court expressed this fear when it stated that “recognition of [the plaintiff’s] claim would have the effect of *de facto* amending Title VII to encompass sexual orientation as a prohibited basis for discrimination.” The court further reasoned that “any discrimination based on sexual orientation would be actionable under a sex stereotyping theory if [the plaintiff’s claim was] allowed to stand, as all homosexuals, by definition, fail to conform to traditional gender norms.” In *Vickers*, the court essentially concedes that queer individuals *per se* defy sex stereotypes. Yet, despite this concession, the court refused to recognize as valid the plaintiff’s claim of sex stereotyping discrimination. In coming to such a conclusion, the court perpetuated the institutionalized “othering” of queer plaintiffs by recognizing that they depart from sex stereotypes while simultaneously thwarting their ability to exercise their legal right to bring a claim of sex stereotyping discrimination.

IV. **A MINORITY OF COURTS INTERPRET TITLE VII CORRECTLY BY HOLDING THAT SEXUAL ORIENTATION DISCRIMINATION IS *PER SE* SEX DISCRIMINATION**

While most courts mentioned thus far are reluctant to admit it, discrimination based on sexual orientation is inherently discrimination based on sex stereotypes. The sex stereotyping theory under *Price Waterhouse* should encompass discrimination based on sexual orientation because queer individuals violate the ultimate gender stereotype of exclusive heterosexual attraction. While a majority of courts do not adopt this reasoning, a minority of courts—including the Equal Employment Opportunity Commission (EEOC), the Second Circuit, the Seventh Circuit, and a few district courts—have found this line of reasoning persuasive.

In *Winstead v. Lafayette County Board of County Commissioners*, a district court held that “sexual orientation discrimination is a cognizable form of sex problems for an adjudicator. This is for the simple reason that ‘[s]tereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality.’” (emphasis added), overruled by *Zarda*, 883 F.3d 100 (2d Cir. 2018).

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152. 453 F.3d at 764.
153. Id.
154. See id.
155. Id. at 765.
156. See Varona & Monks, see note 74, at 84 (noting that “those who are attracted to members of the same sex contradict traditional notions about appropriate behavior for men and women. Just like the plaintiff in *Price Waterhouse*, gays fail to match the stereotype associated with their group and any employment discrimination against a gay person is ‘because of sex’ under Title VII.”).
discrimination because it falls under the category of gender stereotype discrimination."158 Here, the plaintiff was discriminated against by her coworkers due to her perceived sexual orientation.159 The defendant moved to dismiss the plaintiff’s claim because “sexual orientation is not a protected classification under Title VII.”160 The court denied the defendant’s motion because animus toward sexual minorities is “based on disapproval of certain behaviors (real or assumed) and tendencies . . . [that] are deemed to be ‘inappropriate’ for members of a certain sex or gender.”161 In other words, discrimination based on sexual orientation is discrimination based on sex stereotypes.162

Further, the EEOC has supported the theory that sexual orientation discrimination is sex discrimination under Title VII. In Baldwin v. Foxx, the EEOC concluded that “sexual orientation is inherently a ‘sex-based consideration,’ and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII.”163 Because sexual orientation is “inseparable from and inescapably linked to sex,” the EEOC reasoned that sexual orientation discrimination “is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms.”164 The EEOC later argued this position on behalf of a plaintiff in EEOC v. Scott Medical Health Center, asserting that sexual orientation discrimination is sex discrimination under Title VII because animus against sexual minorities is rooted in “sex stereotypes and gender-role norms.”165 The court agreed, holding that there is “no meaningful difference between sexual orientation discrimination and discrimination because of sex.”166

After Winstead, Baldwin, and Scott Medical, the Seventh Circuit became the first circuit court to hold that discrimination based on sexual orientation is discrimination based on sex.167 In Hively v. Ivy Tech Community College of Indiana, the Seventh Circuit used two separate routes to reach the conclusion that it is “impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex.”168 The plaintiff, a lesbian woman, brought suit against her employer because she believed she was “blocked from fulltime employment” because of her sexual orientation.169 First, the court applied the comparative method to determine whether the plaintiff would have suffered

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158. 197 F. Supp. 3d at 1344.
159. Id. at 1337-38.
160. Id. at 1342.
161. Id. at 1346.
162. Id.
164. Id.
165. See Plaintiff’s Brief in Opposition to Defendant’s Rule 12(b)(1) and 12(b)(6) Motion to Dismiss at 10, EEOC v. Scott Medical Health Center, P.C., 217 F. Supp. 3d 834 (W.D. Pennsylvania 2016).
166. Scott Medical Health Center, 217 F. Supp. 3d at 839-40.
167. See Hively, 853 F.3d at 351-52.
168. Id. at 351.
169. Id. at 341.
discrimination had she been male rather than female.\textsuperscript{170} In other words, the court analyzed whether the plaintiff would have still suffered discrimination if she were a male in a relationship with a female rather than a female in a relationship with a female.\textsuperscript{171} Under this analysis, the court held that discrimination based on sexual orientation cannot exist “without taking the victim’s biological sex . . . into account” because policies that discriminate on the basis of sexual orientation are “based on assumptions about the proper behavior for someone of a given sex.”\textsuperscript{172}

Second, the \textit{Hively} court reached the same conclusion by analogizing discrimination based on sexual orientation to associational discrimination based on race.\textsuperscript{173} Specifically, the Seventh Circuit analyzed the Supreme Court’s application of race-based discrimination in \textit{Loving v. Virginia}.\textsuperscript{174} In \textit{Loving}, the Supreme Court held that miscegenation laws discriminate on the basis of race because “[c]hanging the race of one partner made a difference in determining the legality of the conduct.”\textsuperscript{175} The Seventh Circuit applied this analysis in the context of discrimination on the basis of sexual orientation by stating that if they “were to change the sex of one partner in a lesbian relationship, the outcome would be different.”\textsuperscript{176} Thus, discrimination based on sexual orientation “rests on distinctions drawn according to sex.”\textsuperscript{177}

Less than one year after the Seventh Circuit’s decision in \textit{Hively}, the Second Circuit concluded in \textit{Zarda v. Altitude Express, Inc.} that discrimination based on sexual orientation is a form of discrimination based on sex.\textsuperscript{178} In \textit{Zarda}, the plaintiff, a gay man, brought suit against his former employer for firing him due to his status as a sexual minority.\textsuperscript{179} The court used three separate means of analyzing the issue to come to the conclusion that sexual orientation discrimination is a subset of sex discrimination.\textsuperscript{180} First, the court looked to the language of Title VII and used the comparative method to hold that sexual orientation is inherently a function of sex.\textsuperscript{181} The court stated that “[b]ecause one cannot fully define a person’s sexual orientation without identifying his or her sex, sexual orientation is a function of sex.”\textsuperscript{182} Thus, “because sexual orientation is a function of sex and sex is a protected characteristic under Title VII, it follows that

\begin{itemize}
  \item \textsuperscript{170} See id. at 345-47.
  \item \textsuperscript{171} Id. at 345.
  \item \textsuperscript{172} Id. at 346-47.
  \item \textsuperscript{173} See id. at 347-49.
  \item \textsuperscript{174} Id. at 348-49.
  \item \textsuperscript{175} Id. at 348 (citing \textit{Loving v. Virginia}, 388 U.S. 1, 6 (1967)).
  \item \textsuperscript{176} Id. at 349.
  \item \textsuperscript{177} Id.
  \item \textsuperscript{178} 883 F.3d 100 (2d Cir. 2018).
  \item \textsuperscript{179} Id.
  \item \textsuperscript{180} Id.
  \item \textsuperscript{181} Id. at 112.
  \item \textsuperscript{182} Id. at 113.
\end{itemize}
sexual orientation is also protected.\footnote{183} The court then cited the Seventh Circuit’s use of the comparative method in \textit{Hively} as evidence that discrimination based on sexual orientation is discrimination based on sex since an “employee’s treatment would have been different” if they were a member of the opposite sex.\footnote{184}

Second, the court used the sex stereotyping framework under \textit{Price Waterhouse} to hold that “sexual orientation discrimination is rooted in gender stereotypes and is thus a subset of sex discrimination.”\footnote{185} The court stated that “the line between sex discrimination and sexual orientation discrimination is ‘difficult to draw’ because that line does not exist save as a lingering and faulty judicial construct.”\footnote{186} Thus, the court concluded “that when, for example, ‘an employer . . . acts on the basis of a belief that men cannot be attracted to men, or that they must not be,’ but takes no action against women who are attracted to men, the employer ‘has acted on the basis of gender.’”\footnote{187}

Third, the court analogized to race-based associational discrimination claims to conclude that sexual orientation discrimination constitutes discrimination because of sex.\footnote{188} Similar to the Seventh Circuit’s associational discrimination analysis in \textit{Hively}, the Second Circuit pointed to \textit{Loving v. Virginia} and other race-based associational discrimination cases to support its holding that Title VII proscribes employment decisions that are “predicated on [an employer’s] opposition to romantic association between particular sexes.”\footnote{189} After analyzing sexual orientation discrimination through these three separate lenses, the court stated that all three perspectives are individually sufficient to support its conclusion and that “together they amply demonstrate that sexual orientation discrimination is a form of sex discrimination.”\footnote{190}

Each of the preceding courts analyzed \textit{Price Waterhouse} and \textit{Oncale} correctly when they determined that discrimination based on sexual orientation is discrimination based on sex. In coming to this conclusion, these courts looked past the “bootstrapping” concerns of other courts and saw that protecting sexual minorities under Title VII was necessary because sexual orientation discrimination is \textit{per se} sex discrimination.\footnote{191} Through this analysis, these courts shift the
paradigm of Title VII application from “othering” sexual minorities to creating a sense of belongingness and inclusion for sexual minorities at an institutional level. In light of Oncale—in which the Supreme Court stated that “statutory prohibitions often go beyond the principal evil [considered by Congress] to cover reasonably comparable evils”—this analysis of sex discrimination is a logical extension of Title VII’s “because of sex” prohibition. It extends the purview of sex discrimination to cover the “reasonably comparable evil[]” of discrimination based on sexual orientation.

V. THE SUPREME COURT HAS REFUSED TO DECIDE TITLE VII’S APPLICABILITY TO SEXUAL MINORITIES

In September 2017, an LBGTQ+ legal organization, Lambda Legal, submitted to the Supreme Court a petition for a writ of certiorari to argue a case concerning Title VII’s application to sexual minorities. The case, Evans v. Georgia Regional Hospital, comes from the Eleventh Circuit, where the court held that “[d]ischarge for homosexuality is not prohibited by Title VII.” Following this decision, Lambda Legal petitioned for the Eleventh Circuit to hear the issue between sexual orientation discrimination and discrimination because of sex”); Winstead, 197 F. Supp. 3d at 1346 (Finding that “discrimination on the basis of sexual orientation is necessarily discrimination based on gender or sex stereotypes, and is therefore sex discrimination”); Baldwin, Appeal No. 0120133080, 2015 WL 4397641, at *5 (stating that “sexual orientation is inherently a ‘sex-based consideration,’ and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII”).

192. See powell & Menendian, note 2, at 32.
193. See Oncale, 523 U.S. at 79.
194. See id.; Zarda, 883 F.3d 132 (noting that “[a]lthough sexual orientation discrimination is ‘assuredly not the principal evil that Congress was concerned with when it enacted Title VII,’ ‘statutory prohibitions often go beyond the principle evil to cover reasonably comparable evils.’ Oncale, 523 US at 80. In the context of Title VII, the statutory prohibition extends to all discrimination ‘because of . . . sex,’ and sexual orientation discrimination is an actionable subset of sex discrimination.”).
195. See generally Petition for a Writ of Certiorari, Evans v. Georgia Regional Hospital, 850 F.3d 1248 (11th Cir. 2017). Lambda Legal’s involvement in Evans was “part of a national effort to establish and enforce employment discrimination protection for all LGBT people and everyone living with HIV.” Lambda Legal, 47 Businesses, States, EEOC and Civil Rights Groups Urge Federal Court to End Sexual Orientation Employment Discrimination, https://www.lambdalegal.org/blog/20180314_horton-amicus-briefs [https://perma.cc/3V8K-U5PL]. As part of this national effort, Lambda Legal has been involved in four cases concerning LGBT employment discrimination in 2017 and 2018: (1) Evans, (2) Hively, (3) Zarda, and (4) Horton v. Midwest Geriatric Management. Id. While circuit courts have already concluded Evans, Hively, and Zarda, the Eighth Circuit has not yet heard oral argument in Horton. Id. On March 7, 2018, Lambda Legal filed a brief with the Eighth Circuit on behalf of Mark Horton, “a gay man whose job offer from a St. Louis-based health management organization was withdrawn after the company’s owners learned” of Horton’s status as a sexual minority. Id. Horton “is the fourth federal appeal in Lambda Legal’s quest to secure the discrimination protections of Title VII of the Civil Rights Act of 1964 for lesbian, gay, and bisexual workers.” Id.
196. 850 F.3d 1248, 1255 (11th Cir. 2017) (citing Blum, 597 F.2d at 938).
The court denied Lambda Legal’s petition, which prompted Lambda Legal to petition for a writ of certiorari from the Supreme Court. On December 11, 2017, the Supreme Court denied Lambda Legal’s petition for certiorari. Had the Court granted certiorari, the case could have resulted in one of four outcomes.

First, the Supreme Court could have taken an approach similar to that of the courts in Vickers and Dawson. In doing so, the Court would state that discrimination based on sexual orientation is not a form of sex discrimination. Further, the Court would hold that the discrimination in this case was actually sexual orientation discrimination masquerading as sex stereotyping discrimination; hence, the Court would claim that it could not hold in favor of the plaintiff without de facto amending Title VII to prohibit discrimination against sexual minorities. Thus, the Court would hold that the plaintiff did not have a cognizable sex discrimination claim under Title VII. A decision such as this would be problematic for queer individuals in two ways: (1) it would create a universal rule that sexual orientation discrimination is not sex discrimination, and (2) it would allow courts to continue linking queer plaintiffs’ sex discrimination claims to their status as sexual minorities as a way to invalidate their claims under Title VII. This approach is an incorrect interpretation of sex discrimination because it does not acknowledge that queer individuals depart from sex stereotypes simply by being queer.

Second, the Supreme Court could have taken an approach similar to that of the courts in Nichols and Koren. Through this approach, the Court again would hold that sexual orientation discrimination is not a form of sex discrimination. However, the Court would recognize that queer plaintiffs can succeed in sex
stereotyping claims if their gender expression departs from traditional gender norms in an observable way in the workplace. While this approach would be a step in the right direction, it would still fail to protect sexual minorities as a group because not all queer individuals express their gender in a non-traditional manner. Thus, the rule created from a decision such as this would only protect individuals who depart from traditional gender roles in their gender expression (e.g., effeminate gay men and masculine lesbians). It would not protect queer individuals who express their gender in ways that conform with traditional gender norms (e.g., masculine gay men and feminine lesbians). Additionally, this approach would leave open the possibility of courts harmfully associating a queer plaintiff’s gender expression with their sexual orientation, as was the case in Prowel and Kay. Such association would likely further courts’ inconsistent application of Title VII to sexual minorities. Some courts—following Nichols and Koren—would hold in favor of queer plaintiffs in cases of non-traditional workplace gender expression, whereas other courts—following Prowel and Kay—would consider whether the discrimination suffered by a queer plaintiff was truly based on gender expression, or whether it was actually rooted in animus concerning the plaintiff’s sexual orientation. Thus, this approach would perpetuate Title VII’s inconsistent application in cases with sexual minorities. This approach would also continue to “other” sexual minorities by holding them to a different standard than heterosexual plaintiffs.

Third, the Supreme Court could have taken an approach similar to the approach taken by the First Circuit in Franchina. In doing so, the Court would hold that discrimination based solely on sexual orientation is not proscribed by Title VII. However, the Court would mitigate the impact of this conclusion by

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204. See id. at 1038; Nichols, 256 F.3d at 874-75 (holding that an effeminate man was protected under Title VII when his coworkers harassed him for not acting stereotypically masculine).

205. See Prowel, 579 F.3d at 290-91 (noting that “[t]he difficult question, therefore, is whether the harassment [the plaintiff] suffered. . . was because of his homosexuality, his effeminacy, or both. As this appeal demonstrates, the line between sexual orientation discrimination and discrimination ‘because of sex’ can be difficult to draw.”); Kay, 142 F. App’x at 51 (stating that “the only reasonable reading of this record compels the conclusion that the reprehensible conduct Kay alleges was motivated by sexual orientation bias rather than gender stereotyping”).

206. See Koren, 894 F. Supp. 2d at 1038; Nichols, 256 F.3d at 874-75.

207. See Prowel, 579 F.3d at 290-91; Kay, 142 F. App’x at 51.

208. See Part III.a. Sexual minorities would face the additional hurdle of proving that the discrimination they suffer is truly based on their gender expression rather than their sexual orientation. It is highly unlikely that a heterosexual plaintiff would need to overcome this same barrier. For example, a court likely would not consider an undisputedly heterosexual male’s sexual orientation when deciding whether the plaintiff suffered sex stereotyping discrimination for being effeminate. However, courts would often consider whether discrimination against an effeminate gay man was truly based on his gender expression, or whether it was due to animus based on his sexual orientation.

209. See Franchina, 881 F.3d at 54.

210. See id. (noting that in Higgins v. New Balance Athletic Shoe, Inc., the First Circuit “concluded that Title VII does not proscribe harassment based solely on one’s sexual orientation. While
stating that sexual orientation could be considered as a “plus” factor when a plaintiff brings a “sex plus” discrimination claim consisting of a more traditional form of sex discrimination in addition to a claim of sexual orientation discrimination. While a decision such as this would help resolve some of the inconsistent application of Title VII sex discrimination law in cases with queer plaintiffs, it would still fail to recognize that discrimination based on sexual orientation is per se discrimination based on sex. This approach is an incorrect interpretation of sex discrimination because it would maintain the “faulty judicial construct” of treating sex discrimination claims and sexual orientation discrimination claims as separate problems. Thus, under this approach, sexual minorities would continue to be “othered” in cases where a plaintiff suffers discrimination solely because of their status as a sexual minority.

Fourth, the Supreme Court could have taken an approach similar to that of the courts in Zarda, Hively, Winstead, Baldwin, and Scott Medical. Under this approach, the Court would hold that discrimination based on sexual orientation is necessarily discrimination based on sex. This approach would protect sexual minorities as a group under Title VII and shift the current legal paradigm from “othering” sexual minorities to creating a sense of belongingness and inclusion for queer individuals. This is the correct interpretation of sex discrimination under Title VII because it recognizes that sexual minorities, merely by existing, violate “the ultimate gender stereotype” of “heterosexual attraction.” However, due to the Supreme Court’s denial of certiorari, the state of the law will remain as it is now: inconsistent, and with a majority of courts failing to protect sexual minorities.

that may be true, [the court does not] believe that Higgins forecloses a plaintiff in [the First] Circuit from bringing sex-plus claims under Title VII where, in addition to the sex-based charge, the ‘plus’ factor is the plaintiff’s status as a gay or lesbian individual.”

211. Id.
212. See Zarda, 883 F.3d at 122 (noting that the “line between sex discrimination and sexual orientation discrimination is ‘difficult to draw’ because that line does not exist save as a lingering and faulty judicial construct”) (citations omitted).
213. See id. at 113 (stating that “because sexual orientation is a function of sex and sex is a protected characteristic under Title VII, it follows that sexual orientation is also protected”); Hively, 853 F.3d at 350-51 (noting 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 that the time has come to overrule our previous cases”); Scott Medical, 217 F. Supp. 3d at 839-40 (stating that there is “no meaningful difference between sexual orientation discrimination and discrimination ‘because of sex.’”); Winstead, 197 F. Supp. 3d at 1344 (holding that “sexual orientation discrimination is a cognizable form of sex discrimination because it falls under the category of gender stereotype discrimination”); Baldwin, 2015 WL 4397641, at *5 (holding that “sexual orientation is inherently a ‘sex-based consideration,’ and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII”).
214. See Part IV.
215. See id.; Varona & Monks, see note 74, at 84.
CONCLUSION

The state of the law concerning Title VII’s applicability to sexual minorities is inconsistent. A majority of courts have failed to recognize that queer individuals depart from sex stereotypes per se. On the other hand, a minority of courts have interpreted Title VII correctly by holding that sexual minorities intrinsically depart from sex stereotypes. The precedent set by this minority of the courts works to shift the current legal paradigm from “othering” sexual minorities to including and creating space for sexual minorities at an institutional level. These courts actively participate in the “circle of human concern” by showing an “unwavering commitment to not simply tolerating and respecting difference but to ensuring that all people are welcome and feel that they belong in the society.”

The Supreme Court should take the next available opportunity to join the minority of courts in the “circle of human concern.” Sexual minorities deserve the same protections under Title VII as heterosexual plaintiffs. Until then, courts will continue to apply Title VII principles inconsistently in cases with queer victims of sex discrimination, allowing sexual minorities to be sexually harassed, assaulted, and fired without recourse.

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216. See Parts II.c, III.a, and III.b.
217. See Part IV.
218. See id.
219. See Powell & Menendian, see note 2, at 32.
220. See id.