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# SAME-SEX MARRIAGE AND TITLE VII

**Stephen F. Befort\* and Michael J. Vargas\*\***

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## INTRODUCTION

On June 26, 2015, in *Obergefell v. Hodges*, the Supreme Court held that state laws prohibiting same-sex marriages violated the equal protection and due process clauses of the U.S. Constitution.<sup>1</sup> This ruling completed one of the swiftest

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

and most dramatic sea changes in public opinion and legal status in recent history. In 2005, ten years earlier, only 36% of adult Americans supported the institution of same-sex marriage,<sup>2</sup> and only one state—Massachusetts—recognized its legality.<sup>3</sup> By 2010, those numbers rose to 42%<sup>4</sup> and six states,<sup>5</sup> respectively. Following the *Obergefell* ruling, 57% of American adults supported same-sex marriage<sup>6</sup> and its legality was established in all 50 states.<sup>7</sup>

But these numbers mask another reality. Opposition to same-sex marriage remains strong and fervent. A Barna Group survey conducted shortly after the Supreme Court's ruling found that 43% of American adults disagreed with the Court's decision.<sup>8</sup> That survey also indicated that 94% of theologically-defined evangelical Christians strongly oppose same-sex marriage.<sup>9</sup> Conservative religious leaders<sup>10</sup> and GOP presidential hopefuls<sup>11</sup> have vowed to continue their opposition to same-sex marriage, despite the *Obergefell* ruling. As Tony Perkins, President of the Christian Family Research Council summarized: "It is folly for the Court to think that it has resolved a controversial issue of public policy. By

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2. Pew Research Center, *Support for Same-Sex Marriage at Record High, but Key Segments Remain Opposed*, (June 8, 2015), available at <http://www.people-press.org/2015/06/08> (hereinafter "Support for Same-Sex Marriage").

3. Freedom to Marry, *History and Timeline of the Freedom to Marry in the United States*, (last updated June 26, 2015), available at <http://www.freedomtomarry.org/pages/history-and-timeline-of-marriage>. See *Goodridge v. Department of Public Health*, 798 N.E. 2d 941 (Mass. 2003).

4. Pew Research Center, *supra* note 2.

5. Marriage Equality USA, *Facts at a Glance*, (last updated July 8, 2015), available at [http://www.marriageequality.org/facts\\_at\\_a\\_glance](http://www.marriageequality.org/facts_at_a_glance).

6. Pew Research Center, *supra* note 2.

7. Marriage Equality USA, *supra* note 5.

8. Barna Group, *Christians React to the Legalization of Same-Sex Marriage*, (July 1, 2015), available at <https://www.barna.org/barna-update/culture/723-christians-react-to-the-legalization-of-same-sex-marriage-9-key-findings#.Vp2r4HhD2FJ>.

9. *Id.*

10. Tamara Audi & Jacob Gershman, *Religious Groups Vow to Fight Gay Marriage Despite Supreme Court*, THE WALL STREET JOURNAL, (last updated June 26, 2015), <http://www.wsj.com/articles/religious-groups-vow-tofight-same-sex-marriage-despite-supreme-court-1435329751>.

11. Fredreka Schouten & Paul Singer, *GOP Presidential Candidates Denounce Gay-Marriage Ruling*, USA TODAY (June 26, 2015), <http://www.usatoday.com/story/news/politics/elections/2016/2015/06/26/supreme-court-gay-marriage-presidential-candidates/29337835/>.

disenfranchising 50 million Americans, the Court has instead supercharged the issue.”<sup>12</sup>

One of the likely battlefields for this opposition is the American workplace. As exemplified by the facts in *Koren v. Ohio Bell Tel. Co.*, supervisors who oppose same-sex marriage may act on that belief by harassing or terminating an employee who has entered into such a union.<sup>13</sup> In that case, the plaintiff, Jason Koren, married in a state that recognized lawful same-sex marriage and adopted his spouse’s last name.<sup>14</sup> Upon returning to work, his supervisor began to harass him because the supervisor could not accept that a man would marry another man, and the employer eventually terminated Koren’s employment.<sup>15</sup> Because federal anti-discrimination law, as embodied in Title VII, does not include “sexual orientation” among its list of protected classes,<sup>16</sup> it is not clear that most federal courts would find such conduct to be unlawful

This Article contends that such conduct properly should be treated as unlawful “sex” discrimination based on two different, but complementary, theories. First, discrimination in response to same-sex marriage involves sex-based stereotyping grounded in the belief that marrying someone of the same sex constitutes gender-nonconforming behavior. Second, such conduct involves actionable relational or associational discrimination akin to a situation in which an employer takes adverse action against a white employee because of the fact that the employee has an African-American spouse.

This Article proceeds as follows: Part I explains the accepted meaning of the terms “sex,” “gender,” and “sexual orientation,” pointing out their relationships and differences in order to create a common language for understanding the analysis throughout the remainder of the Article. Part II explores the development of Title VII’s sex discrimination jurisprudence first as a general matter and then as it relates

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12. Carol Hopkins, *Religious, Conservative Groups Opposed to Gay Marriage Vow to Fight Supreme Court Ruling*, THE OAKLAND PRESS (June 26, 2015), <http://www.theoaklandpress.com/article/OP/20150626/NEWS/150629646>.

13. *Koren v. Ohio Bell Tel. Co.*, 894 F. Supp. 2d 1032, 1034–35 (N.D. Ohio 2012).

14. *Id.* at 1034.

15. *Id.* at 1034–35.

16. Title VII, 42 U.S.C. § 2000(e) (2015).

specifically to cases that the courts have defined as “sexual orientation” cases. Part III chronicles the development of the sex-stereotyping theory as a basis for Title VII liability. Part IV introduces the concept of relational discrimination under Title VII and follows its development in both the race and sex contexts. Finally, Part V argues that employees treated adversely due to being in a same-sex marriage should fall within Title VII’s ban on sex discrimination both by virtue of engaging in gender non-conforming behavior and, more directly, as relational discrimination.

### I. SEX, GENDER, & SEXUAL ORIENTATION

America is a “sex”-based culture, in that most of our cultural expectations, presumptions, and prohibitions are tied to the accident of birth that leaves some with penises and others with vaginas.<sup>17</sup> Once “sex” has been established, “gender” is then built up around it, creating a gloss of cultural meaning and expectations regarding attire, behavior, mannerisms, career tracks, and life goals.<sup>18</sup> As the feminist existentialist Simone de Beauvoir observed, “one is not born a woman, but rather becomes one.”<sup>19</sup> Like “gender,” “sexual orientation” is another extension of and gloss on a person’s “sex” and generally understood to mean the emotional or physical attraction by a person of one sex to members of the same sex, opposite sex, or both.<sup>20</sup>

For the average American, these concepts are aggregated into an expectation that males are masculine and attracted to

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17. Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender & Sexual Orientation to Its Origins*, 8 YALE J.L. & HUMAN. 161, 166, 175 (1996) (comparing America’s sex-based culture to the gender-based culture of ancient Greece as a means of illustrating the differences between the two concepts). The term “sex” is generally understood to mean biological or physical differences, most notably external genital anatomy, though the term can also be used to denote chromosomal differences. There is some discussion in the feminist literature, however, suggesting that “sex” can be understood as social constructed as well. See Judith Butler, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990). While there is some merit to this view, adopting that view would needlessly complicate the matters discussed herein.

18. Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CALIF. L. REV. 1, 6 n.6 (1995).

19. Butler, *supra* note 17, at 1.

20. Valdes, *supra* note 18, at 6 n.7.

females, while females are feminine and attracted to males.<sup>21</sup> Until only recently, judges reaffirmed and institutionalized these expectations, which led to a legally enforced system of gender roles.<sup>22</sup> In response, feminist legal scholars proposed the disaggregation of sex and gender in the law.<sup>23</sup> They pointed out that femininity was not an essential trait of womanhood, but rather a socially constructed one.<sup>24</sup> Yet, because society conflates the two, judgments regarding a person's gender necessarily implicate his or her sex as well.<sup>25</sup> For example, an employer who terminates a male employee for being too effeminate has made a judgment that his gender expression (femininity) is inappropriate *in relation to* his biological sex (male). The termination would, therefore, stem from an expectation that gender and sex ought to be aligned, and therefore implicates *both* sex and gender.

The relationship between “sex” and “sexual orientation” is somewhat more complicated, but no less essential. Sexual orientation is the relationship between an individual's sex and

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21. Valdes, *supra* note 18, at 12.

22. The most famous example of this is Justice Bradley's concurrence in *Bradwell v. Illinois*, where he states:

The civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interest and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things . . . .

83 U.S. 130, 141–42 (1872) (Bradley, J., concurring).

23. See Butler, *supra* note 17, at 8.

24. See Betty Friedan, *The Feminine Mystique* (1963) (chronicling the frustration of women forced into the role of homemaker and mother, and challenging the stereotype that men alone should be the “breadwinners” of the family); see also Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232, 247 (1965) (criticizing newspaper advertisements and state protective laws as based on gender stereotyping women into certain roles).

25. Valdes, *supra* note 18, at 12.

the sex of their romantic or sexual partner.<sup>26</sup> Sexual orientation, therefore, derives its meaning entirely from the existence of sex. Without knowing the sex of both partners, a judgment regarding sexual orientation could not be made.<sup>27</sup> Sex and sexual orientation are also often conflated by the social phenomenon of heterosexism, *i.e.*, the preference for and expectation that males will partner exclusively with females and vice versa. In a way, this too is a cultural gloss on the notion of sex, suggesting that sexual orientation must also be related to gender.<sup>28</sup>

This section is intended to highlight the interrelatedness of these three terms. Professor Valdes illustrates this interconnectedness as the three corners of a triangle, each distinct but still necessarily connected by the “legs” of the triangle.<sup>29</sup> Particularly in the employment discrimination arena, courts have taken an overly narrow view of these concepts.<sup>30</sup> The next section will explore the judicial understanding of “sex” and “sexual orientation” under the rubric of Title VII of the Civil Rights Act of 1964.

## II. SEX AND SEXUAL ORIENTATION DISCRIMINATION IN THE WORKPLACE

The Civil Rights Act of 1964 makes it “an unlawful employment practice . . . to discriminate against any individual . . . because of his race, color, religion, sex, or national origin . . .”<sup>31</sup> The “sex” provision was added in an amendment, and though it may have been proposed for nefarious purposes, it found sufficient support from both

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26. Valdes, *supra* note 18, at 15.

27. Valdes, *supra* note 18, at 18 (“if the sex and gender components of sexual orientation discrimination are disaggregated from sexual orientation, virtually nothing remains to classify as discrimination “based” on sexual orientation.”).

28. See Zachary A. Kramer, *The Ultimate Gender Stereotype: Equalizing Gender-Conforming and Gender-Nonconforming Homosexuals Under Title VII*, 2004 U. ILL. L. REV. 465, 490 (2004) (“employers and coworkers often harass gay and lesbians in gender based terms because the act of homosexuality . . . is not the behavior that they commonly associate with how a ‘real man’ or a ‘real woman’ is supposed to behave.”).

29. See Valdes, *supra* note 18, at 13.

30. See Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities, and Employment Discrimination*, 43 U. MICH. J.L. REFORM 713, 715, 739–40 (2010).

31. Pub. L. No. 88–352, 78 Stat. 241, 255 (1964) (codified at 42 U.S.C. § 2000(e), *supra* note 16).

conservative and progressive lawmakers to make its way into the final bill.<sup>32</sup> Unfortunately, the scant legislative history and the general lack of knowledge regarding “sex” and “gender” during this time period combined to create no shortage of confusion, debate, and disagreement regarding the scope of the new “sex” provision. This section will explore the evolution of sex discrimination law under Title VII beginning with the decade following its passage and continuing through the recent developments in the treatment of gays and lesbians.

#### A. *The Complicated History of Title VII’s “Sex” Provision*

In the early interpretations of the sex provision, courts tended to limit the ban on sex discrimination to biologically-related distinctions. In *Holloway v. Arthur Andersen & Co.*, for example, the Ninth Circuit Court of Appeals opined that the “manifest purpose” of Title VII was “to ensure that men and women are treated equally.”<sup>33</sup> The *Holloway* court went on to state that the meaning of the term “sex” in Title VII encompassed only “the traditional definition based on anatomical differences.”<sup>34</sup> By focusing on the binary distinction between biological males and females, these courts ignored the broader implications of gender-related nuances with respect to identity and behavior.<sup>35</sup>

In 1976, the Supreme Court adopted and compounded this narrow analysis. In *General Electric Company v. Gilbert*, the Court considered a disability plan that excluded coverage for

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32. The addition of “sex” to the list of protected categories was proposed by Virginia Rep. Howard Smith. The “Smith Amendment” surprised many in the House, as Smith was known as an ardent opponent of women’s rights, which led to the assumption that it was designed as a “poison pill” that would kill the Act. See 110 Cong. Rec. 2581 (statement of Rep. Green). Still, there is evidence that the true motive may have been to protect white women being discriminated against in favor of black women. See *id.* at 2583 (statement of Rep. Andrews). The Amendment also received the strong support of pro-women’s rights lawmakers, who believed the amendment would help free women from legally enforced gender roles and “protective legislation” that kept women in low paying jobs. See *id.* at 2578 (statement of Rep. Griffiths); *id.* at 2580 (statement of Rep. St. George).

33. *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 663 (9th Cir. 1977).

34. *Id.* at 662; see also *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1087 (7th Cir. 1984) (stating that Title VII only prohibits discrimination against “biological male(s) or biological female(s) . . .”).

35. See Thomas Ling, *Smith v. City of Salem: Title VII Protects Contra-Gender Behavior*, 40 HARV. C.R.–C.L. L. REV. 277, 280 (2005); McGinley, *supra* note 30.

pregnancy.<sup>36</sup> Writing for the Court, Justice Rehnquist adopted a narrow anti-classification approach, holding that Title VII is violated only when the effect of a classification is to “discriminate against members of one class or another.”<sup>37</sup> Because the benefits of the disability plan accrued to both sexes, Justice Rehnquist concluded, “as there is no proof that the package is in fact worth more to men than women, it is impossible to find any gender-based discriminatory effect.”<sup>38</sup> Although Congress quickly overturned the decision,<sup>39</sup> the narrow anti-classification approach continues to influence the law through the widespread use of comparators: employees “who are similar to the complainant in all respects but for the protected characteristic . . . .”<sup>40</sup> As a heuristic, the use of comparators is popular because it allows the court to draw the inference that the protected characteristic, being the only difference, must have been the cause of the disparate treatment.<sup>41</sup> Over time, the comparators heuristic morphed into a required element of proving sex discrimination for many

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36. General Elec. Co. v. Gilbert, 429 U.S. 125, 127 (1976).

37. *Id.* at 408 (citing *Washington v. Davis*, 426 U.S. 229, 246–48 (1976)).

38. *Id.* at 409.

39. Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k), *supra* note 16) (“The [term] ‘because of sex’ . . . include[s] . . . because of . . . pregnancy, childbirth, or related medical conditions . . . .”); *Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 678 (1983) (“When Congress amended Title VII in 1978, it unambiguously expressed its disapproval of both the holding and the reasoning of the Court in the *Gilbert* decision.”). Despite the seemingly unambiguous language of Congress and the Supreme Court, some lower courts have continued to hold that conditions related to pregnancy are not covered. *See, e.g., Derungs v. Wal-Mart Stores, Inc.*, 141 F. Supp. 2d 884, 893 (S.D. Ohio 2000) (holding that a ban on breast-feeding was not discrimination “because of sex . . .”).

40. Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 731 (2011); *see also Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 467 (2d Cir. 2001) (“In the run of the mill discrimination cases . . . a plaintiff can make a showing of disparate treatment simply by pointing to the adverse employment action and the many employees who suffered no such fate.”).

41. Goldberg, *supra* note 40, at 744–45 (“because of their utility in producing inferences of discrimination, comparators have emerged as the predominant methodological device for evaluating discrimination claims”). Professor Goldberg also argues that the comparators heuristic fits with traditional “judicial-legitimacy preferences that favor clearly defined and identifiable categories . . .” as well as for analysis that appears to “turn on ‘facts’ rather than normative judgments.” *Id.* at 740; *see also* Suzanne B. Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 COLUM. L. REV. 1955 (2006); Suzanne B. Goldberg, *On Making Anti-Essentialist and Social Constructionist Arguments in Court*, 81 OR. L. REV. 629 (2002).

judges.<sup>42</sup> Though the Supreme Court has never explicitly endorsed such a requirement, some members of the Court have signaled their support for such an approach.<sup>43</sup> This has led to no small amount of scholarly criticism, as the comparators heuristic, though useful, is woefully under-inclusive in light of contemporary understandings of sex and gender.<sup>44</sup>

In 1986, the Court recognized “sexual harassment” as a second form of prohibited discrimination under Title VII,<sup>45</sup> a form of discrimination recognized more than a decade earlier with respect to race discrimination.<sup>46</sup> In *Meritor Savings Bank v. Vinson*, the Court considered the claim of a bank teller, who was sexually harassed by her supervisor and eventually agreed to engage in sexual relations with him.<sup>47</sup> Drawing on a race-gender analogy, the Court concluded: “Sexual harassment

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42. See, e.g., *Holifield v. Reno*, 115 F.3d 1555, 1562 (11th Cir. 1997) (quoting *Coutu v. Martin Cnty. Bd. Of Comm’r*, 47 F.3d 1068, 1073 (11th Cir. 1995) (“plaintiff must show that this employer treated similarly situated employees outside his classification more favorably than herself.”); see also *Paluck v. Gooding Rubber Co.*, 221 F.3d 1003, 1012 (7th Cir. 2000); *Norville v. Staten Island Univ. Hosp.*, 196 F.3d 89, 95 (2d Cir. 1999); but see *Bryant v. Aiken Reg’l. Med. Ctrs., Inc.*, 333 F.3d 536 (4th Cir. 2003) (“[plaintiff] is not required as a matter of law to point to a similarly situated white comparators in order to succeed on a race discrimination claim.”).

43. See *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 611 (1999) (Kennedy, J., concurring) (“one who alleges discrimination must show that she ‘received differential treatment vis-à-vis members of a different group on the basis of a statutorily described characteristic.’”); see also *id.* at 617 (Thomas, J., dissenting).

44. *Goldberg*, *supra* note 40, at 742 (“The judicial default to comparators crowds out not only other heuristics, but also other more textured conceptions of discrimination, all of which is to the detriment of discrimination jurisprudence and theory.”).

45. The court recognizes two forms of sexual harassment: “quid pro quo” harassment and “hostile work environment” harassment. “Quid pro quo” harassment is found where some job-related status is conditioned on acceptance of a sexual advance. See *Barnes v. Costle*, 561 F.2d 983, 990 (D.C. Cir. 1977). “Hostile work environment” harassment is found where an employer creates a work environment so “heavily charged” with sex discrimination “as to destroy completely the emotional and psychological stability of minority group workers.” See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986) (citing *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971)); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22 (1993); *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 766 (1998); see also *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982).

46. See *Rogers*, 454 F.2d at 242 (holding “hostile work environment” claims actionable as race discrimination); *Firefighters Inst. for Racial Equality v. City of St. Louis*, 549 F.2d 506, 514–15 (8th Cir. 1977).

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

which creates a hostile or offensive work environment is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality.”<sup>48</sup> Though the Court has continued to recognize “sexual harassment” claims, this cause of action has been considerably narrowed over the past twenty years.<sup>49</sup>

In 1989, the Supreme Court recognized a third cause of action in the form of the “sex stereotyping” theory of sex discrimination.<sup>50</sup> In *Price Waterhouse v. Hopkins*, a female associate at a large accounting firm was denied a partnership

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48. *Id.* at 66–67 (citing Henson, 682 F.2d at 902.) Race-gender analogies were not uncommon at this time. Professor Murray first used these analogies in her path-breaking law review article challenging the widely held belief that sex discrimination was a less severe problem than race discrimination. See Pauli Murray & Mary O. Eastwood, *supra* note 24. For a more thorough discussion of race-gender analogies in the women’s rights movement see Serena Mayeri, “A Common Fate of Discrimination”: Race-Gender Analogies in Legal and Historical Perspective, 110 YALE L.J. 1045 (2001).

49. The courts have limited the “sexual harassment” line in many ways. First, the Supreme Court created an affirmative defense to liability and damages where the employer took reasonable steps to prevent or promptly correct the sexual harassment and the employee failed to take advantage of the preventative or corrective opportunities. See *Faragher*, 524 U.S. at 804; *Ellerth*, 524 U.S. at 771. Second, the lower courts have rigorously construed the requirement that sexual harassment must be “severe and pervasive” in nature. See, e.g., *Duncan v. General Motors Corp.*, 300 F.3d 928, 932, 934 (8th Cir. 2002) (rejecting as insufficiently severe the claims of a female employee whose supervisors maligned her as the president of the “man haters club,” arranged to have her arrested, then took her to a bar and tried to force her to write a list of misogynist statements). Third, a circuit split has also grown around the question of whether to apply the standard to the individual events or the entire situation in the aggregate. Compare *Gross v. Burggraf Const. Co.*, 53 F.3d 1531, 1547 (10th Cir. 1995) (analyzing each instance of alleged discrimination individually to determine if the instance was “severe”) with *Williams v. General Motors Corp.*, 187 F.3d 553, 562 (6th Cir. 1999) (analyzing the “totality of the circumstances” to determine if, in the aggregate, the discrimination was “severe and pervasive”). Fourth, in a particularly troubling development, the courts have also taken it upon themselves to determine whether the sexual harassment was objectively “unwelcome,” a highly dubious requirement that has led to at least one infamous and hugely embarrassing judicial pronouncement. See *Burns v. McGregor Electronic Industries, Inc.*, 807 F. Supp. 506, 508–09 (N.D. Iowa 1992) (concluding that a female employee could not have been objectively offended by her employer’s sexual harassment because she has previously posed naked for a magazine), *rev’d*, 989 F.2d 959 (8th Cir. 1993).

50. Judge Posner questions whether *Price Waterhouse* actually created a separate cause of action or whether the court intended for sex-stereotypes to serve merely as evidence of sex discrimination. *Hamm v. Weyauwega Milk Prod., Inc.*, 332 F.3d 1058, 1068 (7th Cir. 2003) (Posner, J., concurring). Most of the courts reviewing sex discrimination, however, have treated sex stereotyping as a separate cause of action.

because she failed to conform to the feminine image and demeanor expected by her superiors.<sup>51</sup> She was told she should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”<sup>52</sup> Painting with broad strokes, the Court interpreted Title VII “to mean that gender must be irrelevant to employment decisions.”<sup>53</sup> In so doing, the court set aside anti-classification heuristics and adopted a broad view that focused more on the intent of the perpetrator, even when the result does not categorize people into easily distinguishable comparators. Relying on this new understanding, the Court found: “In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”<sup>54</sup> The Court concluded, “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group . . . .”<sup>55</sup>

In 1998, the Court took a step forward and a step back in *Oncale v. Sundowner Offshore Services*.<sup>56</sup> In that case, a male employee was brutally harassed and physically assaulted by his co-workers.<sup>57</sup> The Court held that same-sex sexual

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51. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 234–35 (1989).

52. *Id.* at 235.

53. *Id.* at 240.

54. *Id.* at 250. The lower courts have applied logic similar to this passage from *Price Waterhouse* in a number of recent decisions targeting policies that unfairly prohibit mothers from finding work. *See Chadwick v. Wellpoint, Inc.*, 561 F.3d 38, 48 (1st Cir. 2009) (concluding that a woman who was denied a promotion because she had three children could make a sex-stereotyping claim under Title VII); *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 122 (2d Cir. 2004) (concluding that stereotyping women as “caregivers” can by itself be an impermissible, sex-based motive).

55. *Price Waterhouse*, 109 S.Ct. at 1791. The Court’s use of “gender” and stereotyping, which implicates socially constructed gender, has led to the conclusion by many judges and scholars that “sex” and “gender” are *both* protected under Title VII. However, the Supreme Court has not definitively adopted this position.

56. *Oncale v. Sundowner Offshore Services, Inc.*, 118 S. Ct. 998, 1001–03 (1998).

57. *Id.* at 1001. “Oncale alleges that the harassment included Pippen and Johnson restraining him while Lyons placed his penis on Oncale’s neck, on one occasion, and on Oncale’s arm, on another occasion; threats of homosexual rape by Lyons and Pippen; and the use of force by Lyons to push a bar of soap into Oncale’s anus while Pippen restrained Oncale as he was showering on Sundowner premises.” *Oncale v. Sundowner Offshore Srvs., Inc.*, 83 F.3d 118,

harassment could rise to the level of actionable sex discrimination, resolving a split among the circuit courts.<sup>58</sup> Responding to strict textualist criticisms, the Court stated, “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”<sup>59</sup> This surprising step to expand the coverage of Title VII gave many commentators hope that the Court was opening the door to an even broader interpretation of sex discrimination.<sup>60</sup> Those hopes may have been premature, as the Court also included narrowing language. *Oncale* listed only three ways in which a plaintiff could prove actionable same-sex harassment, leading a few lower courts to conclude that those paths are exclusive.<sup>61</sup>

This brief history offers three insights relevant to discrimination based on sexual orientation and same-sex relationships. First, the use of comparators provides a useful, though imperfect, methodology for determining whether sex discrimination has occurred, and the courts rely heavily, in some cases even exclusively, on this method. Second, another useful heuristic is the use of race-gender analogies, which may reveal discrimination that would normally be veiled by our

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118–19 (5th Cir. 1996).

58. *Compare* *Garcia v. Elf Atochem North America*, 28 F.3d 446, 451–52 (5th Cir. 1994) (holding same-sex sexual harassment unprotected under Title VII); *Goluszek v. H.P. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988); *with* *McWilliams v. Fairfax County Board of Supervisors*, 72 F.3d 1191 (4th Cir. 1996) (holding same-sex sexual harassment actionable only where the harasser is homosexual); *Doe v. Belleville*, 119 F.3d 563 (7th Cir. 1997) (holding same-sex sexual harassment actionable, and applying the same standard as opposite-sex sexual harassment).

59. *Oncale*, 118 S.Ct. at 1002.

60. *See generally* Matthew Fedor, *Can Price Waterhouse and Gender Stereotyping Save the Day for Same-Sex Discrimination Plaintiffs Under Title VII? A Careful Reading of Oncale Compels an Affirmative Answer*, 32 SETON HALL L. REV. 455 (2002).

61. Justice Scalia held that sex discrimination could be shown by (1) “credible evidence that the harasser was homosexual,” (2) “general hostility to the presence of women in the workplace,” or (3) “comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace” (i.e. comparators). *Oncale*, 118 S.Ct. at 1002. This led the Fifth Circuit to conclude that these categories were exclusive. *E.E.O.C. v. Boh Brothers Construction Co.*, 689 F.3d 458 (5th Cir. 2012). There is also a split within the Sixth Circuit on the question of exclusivity. *Compare* *Wasek v. Arrow Energy Services, Inc.*, 682 F.3d 463 (6th Cir. 2012) (assuming that the *Oncale* categories were exclusive); *with* *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) (applying sex stereotyping theory to find transsexuals protected under Title VII).

preconceived notions and prejudices regarding socially constructed gender roles. Third, though the courts have struggled in determining the reach of this cause of action, it is clear that Title VII prohibits the use of sex stereotypes in employment decisions. As discussed below, these three insights are crucial to understanding how and why Title VII should apply to same-sex relationships, but first some discussion is necessary as to how courts have treated sexual orientation under Title VII.

### *B. Sexual Orientation*

In 1984, the Seventh Circuit heard the case of Kenneth Ulane, a decorated veteran who was terminated after having surgery to become female.<sup>62</sup> Illinois District Court Judge Grady's opinion in the case was an early attempt to disaggregate sex and gender, holding, "sex is not a cut-and-dried matter of chromosomes," but involves society's perception of the individual.<sup>63</sup> Unfortunately, the Seventh Circuit was not as progressive, and summarily reversed, holding that "sex" should be given its "ordinary, common meaning."<sup>64</sup> The Court found support for this conclusion in the "dearth of legislative history" and the fact that Congress had attempted and failed to amend Title VII to include "affectational or sexual orientation."<sup>65</sup> Although the case did not involve a homosexual plaintiff, the *Ulane* court's logic has become the foundation for limitations in sex discrimination law relating to sexual orientation and non-conforming gender

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62. *Ulane v. E. Airlines, Inc.*, 581 F. Supp. 821 (N.D. Ill. 1983). Although this case was not about sexual orientation, it is important to remember that during this time there was still substantial bias against all forms of gender non-conforming behavior whether it was homosexuality or "transsexualism," and the courts tended to treat the two as one and the same. See also *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659 (9th Cir. 1977).

63. See *Ulane*, 581 F. Supp. at 825. Judge Grady's prophetic decision has enjoyed something of a renaissance in recent years. Both commentators and judges have looked to that decision, rather than the majority decisions in this and other early transgender cases, as instructive on the proper interpretation of sex discrimination. See generally *Schroer v. Billington*, 424 F. Supp. 2d 203, 212 (D.D.C. 2006) ("it may be time to revisit Judge Grady's conclusion in *Ulane I* that discrimination against transsexuals because they are transsexuals is 'literally' discrimination 'because of . . . sex.'").

64. *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984).

65. *Id.*

identities.<sup>66</sup>

The courts have universally held that sexual orientation is not a protected class under Title VII.<sup>67</sup> For example, in 1979 the Ninth Circuit held in *DeSantis v. Pacific Telephone and Telegraph Co.* that: “Title VII’s prohibition of ‘sex’ discrimination applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference such as homosexuality.”<sup>68</sup> Although the courts do occasionally decry discrimination against gays and lesbians, in the absence of any evidence of discrimination based on some other protected status such as race or sex, they will not hold an employer liable for discrimination under Title VII.<sup>69</sup>

To a certain extent, however, it is perhaps more accurate to say that “homosexuality” is not a protected class. In contrast to the clearly unprotected status of homosexual employees, the courts have utilized Title VII to protect heterosexual employees in two notable instances.

First, heterosexual employees are protected from homosexual supervisors, even when the harassment is triggered not by attraction or sex, but by the heterosexual status of the employee.<sup>70</sup> In *Wrightson v. Pizza Hut of America*,

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66. See *Ulane*, 742 F.2d 1081; see also *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1084 (7th Cir. 2000) (“Congress intended the term ‘sex’ to mean ‘biological male or biological female,’ and not one’s sexuality or sexual orientation.”); *Siminton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000) (“we are informed by Congress’ rejection, on numerous occasions, of bills that would have extended Title VII’s protection to people based on their sexual preferences.”); *Etsitty v. Utah Transit Authority*, No. 2:04CV616 DS, 2005 WL 1505610 (D. Utah 2005) (“Title VII does not prohibit discrimination based on an individual’s transsexualism”), *aff’d on other grounds*, 502 F.3d 1215 (10th Cir. 2007).

67. See, e.g., *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999) (“[it is] settled law that, as drafted and authoritatively construed, Title VII does not proscribe harassment simply because of sexual orientation.”).

68. *DeSantis v. Pacific Telephone and Telegraph Co.*, 608 F.2d 327, 329–30 (9th Cir. 1979) (citations omitted).

69. See e.g., *Hamner v. St. Vincent Hosp. & Health Care Center*, 224 F.3d 701 (7th Cir. 2000); *Siminton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999) (“We hold no brief for harassment because of sexual orientation; it is a noxious practice, deserving of censure and opprobrium . . . [but] Title VII does not proscribe harassment simply because of sexual orientation.”); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69 (8th Cir. 1989).

70. See, e.g., *Yeary v. Goodwill Industries-Knoxville, Inc.*, 107 F.3d 443 (6th Cir. 1997); *Wrightson v. Pizza Hut of America*, 99 F.3d 138 (4th Cir. 1996); *Johnson v. Community Nursing Services*, 985 F. Supp. 1321 (D. Utah 1997); *Pritchett v. Sizeler Real Estate Management Co.*, Civ. A. No. 93-2351, 1995 WL

a young heterosexual male was sexually harassed when his homosexual co-workers discovered his sexual orientation.<sup>71</sup> The court found that his sex was the “but for” cause of the harassment because no women were subjected to the same harassment.<sup>72</sup> The court, however, overlooked the fact that no homosexual men were similarly harassed, and the harassment was triggered, not by sex, but by the discovery that the employee was heterosexual.<sup>73</sup> Thus, sexual orientation, rather than sex, was clearly the motivating factor for the harassing conduct. Conversely, when the harassment is perpetrated by a bisexual or heterosexual supervisor, the courts are rarely so protective of the employee victim.<sup>74</sup> The Supreme Court has

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241855 (E.D. La. 1995). The Supreme Court approved of this “homosexual supervisor” avenue in *Oncale*. See *Oncale v. Sundowner Offshore Svcs.*, 118 S.Ct. 998, 1002 (1998). Unfortunately, the decision also forced judges into the uncomfortable position of having to pass judgment on the sexual orientation of defendants. See *Shephard v. Slater Steels Corp.*, 168 F.3d 998 (7th Cir. 1999) (discussing at length whether evidence of mock flirtations and defendant “rubbing himself into an erection” could constitute “credible evidence” of homosexuality). As a result there arose a circuit split on the question of what constitutes “credible evidence” of homosexuality. Compare *La Day v. Catalyst Technology, Inc.*, 302 F.3d 474 (5th Cir. 2002) (holding that “credible evidence” includes either evidence of desire toward the plaintiff or evidence of propositions made to other employees of the same sex); *Cherry v. Shaw Coastal, Inc.*, 668 F.3d 182 (5th Cir. 2012) (same) with *Dick v. Phone Directories Co., Inc.*, 397 F.3d 1256 (10th Cir. 2005) (holding that only evidence of sexual attraction toward plaintiff could suffice as “credible evidence”).

71. *Wrightson v. Pizza Hut of America*, 99 F.3d 138, 139–40 (4th Cir. 1996).

72. See *id.* at 143.

73. When the Pizza Hut hired a new male employee the homosexual employees would “attempt to learn” the sexual orientation of the new employee. *Id.* at 139. Only after the homosexual employees discovered that Wrightson and other new employees were heterosexual did the harassment begin, and this harassment was perpetrated by the homosexual employees against the heterosexual employees. *Id.*

74. The “bisexual” or “equal opportunity” harasser has become a classic defense to a sex discrimination charge. The defense is based on the assumption that even if the supervisor engages in severe, pervasive, and unwelcome sexual harassment, no liability will attach so long as he or she treats *all* employees in the same manner. See, e.g., *Holman v. Indiana*, 211 F.3d 399 (7th Cir. 2000). This is a classic, and heavily criticized, hole in the anti-classification approach to discrimination law. See, e.g., Mark McCullough, *One is a Claim, Two is a Defense: Bringing an End to the Equal Opportunity Harasser Defense*, 67 U. PITT. L. REV. 469 (2005); Kyle Mothershead, *How the “Equal Opportunity” Sexual Harasser Discriminates on the Basis of Gender Under Title VII*, 55 VAND. L. REV. 1205 (2002); David S. Schwartz, *When is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697 (2002); Shylah Miles, Comment, *Two Wrongs Do Not Make a Defense: Eliminating the Equal-Opportunity-Harasser Defense*, 76 WASH. L. REV. 603 (2001).

since approved this double standard in *Oncale*.<sup>75</sup>

Second, heterosexuality as a sexual orientation is often presumed and automatically subsumed into traditional sex discrimination analysis.<sup>76</sup> On the other hand, same-sex harassment triggers a variety of defensive analytical mechanisms designed to prevent gays and lesbians from raising “sexual orientation” claims.<sup>77</sup> In *Meritor*, for example, which involved opposite sex harassment, the court discerned impermissible sexual harassment without once mentioning the sexual orientation of the employee, even though it could easily have been argued that the harassment resulted not from the female employee’s sex, but from her supervisor’s perception as to her sexual orientation, *i.e.*, her potential willingness to engage in sexual activity with someone of the supervisor’s gender.<sup>78</sup> On the other hand, courts often fixate on a plaintiff’s homosexual orientation to assume the absence of gender-based discrimination.<sup>79</sup>

Thus, heterosexuality enjoys a privileged status under Title VII. Heterosexuality is often treated as part and parcel with “sex,” while homosexual plaintiffs are denied the same assumption and must prove both that they were discriminated because of their sex and *not* because of their sexual orientation.<sup>80</sup> This double standard creates an artificially high barrier for LGBT plaintiffs in Title VII cases, a barrier which we must address in arguing that discrimination against legal same-sex marriages, although arguably a subset of sexual orientation related cases, should nonetheless be covered within

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75. See *Oncale v. Sundowner Offshore Svcs., Inc.*, 118 S.Ct. 998, 1002 (1998).

76. Kramer, *supra* note 28.

77. See Carolyn Grose, *Same-Sex Sexual Harassment: Subverting the Heterosexist Paradigm of Title VII*, 7 YALE L. J. & FEMINISM 375, 393 (1995) (“the courts’ explicit and consistent refusal to apply Title VII to cases of harassment or discrimination on the basis of homosexuality, while the rhetoric of sexual harassment law suggests that employees are protected from harassment which targets their sexuality, they are in reality protected only from harassment which targets their heterosexuality”) (emphasis omitted).

78. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66.

79. See Zachary A. Kramer, *Heterosexuality and Title VII*, 103 NW. U. L. REV. 205, 229-32 (2009).

80. See Bennett Capers, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158, 1159 (1991); Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1062 (1992); see also Grose, *supra* note 77, at 393.

the current Title VII paradigm. However, the more conventional avenue of “sex-stereotyping” is also available to protect LGBT Americans who enter into legal same-sex marriages, and it is to this principle that we now turn.

### III. SEX-STEREOTYPING DISCRIMINATION

Despite this rejection of “sexual orientation” as a protected class, most courts still allow gay and lesbian plaintiffs to maintain claims based on sex or race without having their sexual orientation automatically defeat those claims.<sup>81</sup> However, this has created some difficulty for the courts as society’s evolving understanding of sex and sexual orientation can make it hard to distinguish between gender claims and sexual orientation claims.<sup>82</sup> Many gay men find themselves subjected to anti-gay barbs not because they are gay, but because they fail to conform to the strictures of masculinity.<sup>83</sup> At the same time, many heterosexual men are subjected to anti-gay epithets, not because they fail to conform, but as a means of emasculation.<sup>84</sup> These behaviors illustrate the

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81. See *Doe v. City of Belleville, Ill.*, 119 F.3d 563, 575 (7th Cir. 1997) (“We have never made the viability of sexual harassment claims dependent upon the sexual orientation of the harasser, and we are convinced that it would be both unwise and improper to begin doing so.”); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1222–23 (D. Or. 2002) (“Nothing in Title VII suggests that Congress intended to confine the benefits of that statute to heterosexual employees alone. . . . If an employer subjected a heterosexual employee to the sort of abuse allegedly endured by Heller . . . the evidence would be sufficient to state a claim for violation of Title VII. The result should not differ simply because the victim of the harassment is homosexual.”).

82. See *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006) (“In all likelihood, any discrimination based on sexual orientation would be actionable under a sex stereotyping theory if this claim is allowed to stand, as all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices.”); see also *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217 (2d Cir. 2005) (“it is often difficult to discern when Dawson is alleging that the various adverse employment actions allegedly visited upon her by Bumble & Bumble were motivated by animus toward her gender, her appearance, her sexual orientation, or some combination of these”).

83. See McGinley, *supra* note 30, at 716 (“Masculinities research demonstrates that much harassing behavior directed at gays and transsexuals occurs because of sex or gender . . . [t]he victim is harassed because he or she . . . is perceived to be insufficiently masculine to continue in the job.”).

84. See Hilary S. Axam & Deborah Zalesne, *Simulated Sodomy and Other Forms of Heterosexual “Horseplay.” Same Sex Sexual Harassment, Workplace Gender Hierarchies, and the Myth of the Gender Monolith Before and After Oncale*, 11 YALE, J.L. & FEMINISM 155, 196–97 (1999) (“the derision directed at these males who project an insufficiently masculine sexuality frequently includes

interrelated nature of gender and sexual orientation. This interrelatedness defies the rigid distinctions demanded by courts' current sex discrimination jurisprudence that distinguishes between actionable gender discrimination and permissible sexual orientation discrimination. Sex-stereotyping theory offers an alternative avenue for plaintiffs that is not quite as black and white.

Following *Price Waterhouse*, Title VII plaintiffs began to allege sex-stereotyping claims to challenge adverse actions taken in response to gender non-conforming behavior. In general, these claims invoked Title VII's sex provision citing a discrepancy between an employee's expressed gender behavior as compared to the employee's biological or anchor gender.<sup>85</sup>

The Ninth Circuit's decision in *Nichols v. Azteca Restaurant*<sup>86</sup> exemplifies this trend. That case involved the claim of a male restaurant employee who was referred to as a "female whore" and told that he carried his tray "like a woman."<sup>87</sup> The Ninth Circuit reviewed its earlier *DeSantis* decision and concluded that it was no longer good law in light of *Price Waterhouse*.<sup>88</sup> The court then applied the sex stereotyping theory and found that the harassment was "closely linked to gender" and actionable under Title VII.<sup>89</sup> *Price Waterhouse*, *Nichols*, and a few other cases<sup>90</sup> gave advocates hope that the sex-stereotyping route might offer gay and lesbian employees some protection from anti-gay harassment in the workplace.<sup>91</sup>

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epithets or comments insinuating that the target is homosexual."). One need not be a feminist scholar or queer theorist to recognize that sexual orientation is often used as a stand in for sex-based oppression, particularly in all-male environments. The use of anti-gay slurs such as "fag," "faggot," or "queer," serve to emasculate the target, implicitly suggesting that they are feminine or insufficiently masculine. *See, e.g.*, *Bianchi v. City of Philadelphia*, 183 F. Supp. 2d 726, 736 (E.D. Pa. 2002); *E.E.O.C. v. Family Dollar Stores, Inc.*, Civ. A. No. 1:06-CV-2560-TWT, 2008 WL 4098723 (N.D. Ga. 2008).

85. *See Kramer, supra* note 28, at 485–86.

86. *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864 (9th Cir. 2001).

87. *Id.* at 870.

88. *Id.* at 875.

89. *See id.* at 874.

90. *See, e.g.*, *Rene v. MGM Hotel, Inc.*, 305 F.3d 1061, 1068 (9th Cir. 2002) (Pregerson, J., concurring); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212 (D.Or. 2002); *Centola v. Potter*, 183 F. Supp. 2d 403 (D. Mass. 2002).

91. *See Olivia Szwalbnest, Discriminating Because of "Pizzazz": Why*

In spite of decisions like *Nichols*, courts for many years had a difficult time ascertaining the appropriate dividing line between protected gender non-conforming behavior and the unprotected status of sexual orientation, even in cases of sex-stereotyping.<sup>92</sup> As a result, courts, in practice, were more apt to reject stereotyping claims when asserted by gay, lesbian, or transgender plaintiffs than when asserted by straight plaintiffs or plaintiffs whose sexual orientation was unknown.<sup>93</sup> In essence, some courts treated the former group of plaintiffs as if their status automatically trumped their gender non-conforming behavior.<sup>94</sup>

The most common analytical method for rejecting sex-stereotyping claims asserted by homosexual and transsexual employees has been for courts to resort to the “anti-bootstrapping” principle.<sup>95</sup> In *Dawson v. Bumble & Bumble*,

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*Discrimination Based on Sexual Orientation Evidences Sexual Discrimination Under the Sex-Stereotyping Doctrine of Title VII*, 20 TEX. J. WOMEN & L. 75, 90–91 (2011) (arguing that sexual orientation is a trait that should itself be treated as protected gender non-conforming behavior); *but see* Ryan M. Martin, Comment, *Return to Gender: Finding a Middle Ground in Sex Stereotyping Claims Involving Homosexual Plaintiffs Under Title VII*, 75 U. CIN. L. REV. 371, 392–94 (2007) (arguing that the fact that an employee is dating someone of the same gender should not be protected as gender non-conforming behavior).

92. *See* McGinley, *supra* note 30, at 738–39 (stating that “the cases demonstrate that drawing this line is virtually impossible.”).

93. *See* Zachary A. Kramer, *Of Meat and Manhood*, 89 WASH. U. L. REV. 287, 304 (2011) (“if a claim makes any mention of homosexuality, then it is a sexual orientation claim and must fail. And because the cultural stigma attached to homosexuality is so overwhelming, the deck is stacked against lesbian and gay employees who seek to raise gender-stereotyping claims, as courts tend to view their sex discrimination claims through the lens of homosexuality.”); *see, e.g.*, *Kay v. Indep. Blue Cross*, 142 Fed. Appx. 48, 2005 WL 1678816 (3d Cir. 2005) (concluding that attacks on his gender non-conformity, such as taunts about not being a “real man” because he wore an earring, were really discrimination based on sexual orientation and not sex.).

94. *See* Kramer, *supra* note 28, at 304 (stating that “[o]nce a court identifies an employee as gay or lesbian, the court makes itself hyperaware of the employee’s homosexuality, thereby enabling the employee’s homosexuality to swallow all other aspects of the employee’s identity.”).

95. *See* *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006) ; *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217–18 (2d Cir. 2005); *DeSantis v. Pacific Tel. & Tel. Co., Inc.*, 608 F.2d 327, 330 (9th Cir. 1979) (“Appellants now ask us to employ the disproportionate impact decisions as an artifice to ‘bootstrap’ Title VII protection for homosexuals under the guise of protecting men generally”); *but see* *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000) (“explaining how *Price Waterhouse* “would not bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine.”).

for example, a homosexual female employee was referred to as “Donald,” told she needed to “have sex with a man,” and informed that her non-conforming appearance was a “costume.”<sup>96</sup> Despite these rather obvious examples of sex stereotyping, the Second Circuit found the record “devoid” of evidence of sex discrimination.<sup>97</sup> The court reasoned that “stereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality,” but rather than acknowledging that sexual orientation could be protected in those instances, the court created an artificial distinction, stating, “gender stereotyping claim[s] should not be used to bootstrap protection for sexual orientation.”<sup>98</sup>

Just as the specter of homosexuality tends to cloud the judicial lens with respect to stereotyping claims, some courts also have been unable to look beyond male gender stereotypes in cases involving the sexual harassment of gay men. In *Hamm v. Weyauwega Milk Products*, the Seventh Circuit applied a “horseplay” exception to shield the employer of an all-male workplace from the sex discrimination claim of an employee.<sup>99</sup> In *Hamm*, a male employee whose co-workers suspected that he was gay was referred to as “girl scout,” accused of having a sexual relationship with a co-worker, mocked as potentially interested in sexual relations with other male employees, and threatened with sexual assault.<sup>100</sup> Unable to see beyond the gendered preconception that “sexually explicit remarks among male coworkers may be simply expressions of animosity or juvenile provocation,” the court held that “it is difficult to separate many of Hamm’s complaints from the significant amount of horseplay that occurred.”<sup>101</sup> Because the “horseplay” exception is itself based

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96. *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218–19 (2d Cir. 2005).

97. *See id.* at 221.

98. *Id.* at 218.

99. *Hamm v. Weyauwega Milk Products, Inc.*, 332 F.3d 1058, (7th Cir. 2003). The “horseplay” exception is particularly popular as a means of excusing sexually explicit and sometimes even abusive conduct in all-male employment situations. The exception is based on the idea that it is socially acceptable for men to “behave badly” in the workplace. Because, all of this “bad behavior” is simply expected of men, it cannot possibly be because of sex. *See, e.g.*, *E.E.O.C. v. Harbert-Yeargin*, 266 F.3d 498 (6th Cir. 2001); *Johnson v. Hondo, Inc.*, 125 F.3d 408 (7th Cir. 1997).

100. *Id.* at 1060–61.

101. *Id.* at 1063–64.

on stereotypes regarding acceptable male activity, particularly in the workplace, it has been heavily criticized in legal commentary.<sup>102</sup>

The Sixth Circuit's 2004 decision in *Smith v. City of Salem*<sup>103</sup> represented a major turning point in sex-stereotyping jurisprudence. In that case, Smith, a biologically male firefighter, was diagnosed with Gender Identity Disorder. After the diagnosis, Smith began "expressing a more feminine appearance on a full-time basis."<sup>104</sup> Smith's behavior resulted in comments from co-workers, who felt that Smith was not acting "masculine enough."<sup>105</sup> Smith discussed these comments with a supervisor and informed the supervisor that Smith's treatment eventually would include a physical transformation from male to female.<sup>106</sup> The supervisor discussed the situation with other managers who devised a plan to require Smith to undergo three psychological

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102. See Axam & Zalesne, *supra* note 84, at 157–58 ("sexual exploitation, domination, intimidation, and abuse of men by other men constitutes a long-overlooked form of gender discrimination that asserts the dominance of the masculine over the feminine and thus reflects and perpetuates deeply-rooted patterns of gender inequality. Such conduct focuses intensely on portraying the target as a passive, feminized recipient of the harasser's aggressive stereotypically masculine sexual advances. As a result, the conduct echoes and enforces entrenched notions of male dominance in which power is identified and allocated based on the possession of stereotypically masculine physical and behavioral characteristics such as larger physical size, superior physical strength, aggressiveness, and sexual assertiveness."); McGinley, *supra* note 30, at 725 ("[b]y openly abusing men who do not conform to gender stereotypes, men police the social and gender order at work, reinforcing the definition of certain jobs as 'masculine' and closed to non-conforming men and most women."). The courts' willingness to see "deeper" motivations in sexually charged language is somewhat perplexing. Since the courts appear willing to look past the superficial, it stands to reason that they could also look just one step deeper still to discover that the use of these terms, though not immediately motivated by "sex," still evince a hostility to "sex" or "women" or both, and have the practical effect of making the workplace a more hostile environment. See L. Camille Hebert, *Sexual Harassment is Gender Harassment*, 43 U. KAN. L. REV. 565, 574 (1995) ("sexual epithets often directed at women, such as 'cunt' and 'bitch,' clearly reflect the gender-based nature of the animus that motivate them."). Thus, the courts' "horseplay" jurisprudence seems to be nothing more than an effort to cherry-pick those motivations convenient to their conclusion, while ignoring others.

103. *Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir. 2004). See Ling, *supra* note 35, at 285 (stating that "*Smith* upturns rigid sex categories and allows both sexes to participate in the full range of gender expressions").

104. *Id.* at 568.

105. *Id.*

106. *Id.*

interviews in the hope of pressuring Smith into resigning.<sup>107</sup> Smith sued the city under Title VII for sex discrimination based on gender-nonconforming behavior. The district court ruled that Smith's status as a transsexual precluded such a claim.<sup>108</sup>

The appeals court rejected the district court's ruling as well as its logic. The court criticized those decisions that elevated status over behavior and held that "a label, such as 'transsexual,' is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity."<sup>109</sup> The court then went on to find that Smith's claim fit squarely within the zone of forbidden sex-stereotyping:

After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex. It follows that employers who discriminate against men because they do wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex.<sup>110</sup>

Since the *Smith* decision, most courts have ruled that sexual orientation or transgender status does not automatically defeat a sex-stereotyping claim.<sup>111</sup> A number of decisions, in fact, have held that a plaintiff's sexual orientation should have no bearing at all on the validity of a claim based on gender nonconformity.<sup>112</sup>

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107. *Id.* at 568–69.

108. *Id.* at 569, 574.

109. *Smith*, 378 F.3d at 575.

110. *Id.* at 574.

111. *See, e.g.*, *E.E.O.C. v. Boh Bros. Construction, Co.*, 731 F.3d 444 (5th Cir. 2013); *Glenn v. Bumbry*, 663 F.3d 1312 (11th Cir. 2012); *Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285 (3rd Cir. 2009); *Koren v. Ohio Bell Telephone Co.*, 894 F. Supp.2d 1032 (N.D. Ohio 2012); *Schroer v. Billington*, 577 F. Supp.2d 293 (D.D.C. 2008); *see also* *Macy v. Holder*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (EEOC, April 20, 2012) (EEOC ruling that a transgender job applicant could maintain a complaint against a federal agency both under a sex-stereotyping theory and as a matter of direct sex discrimination); *but see* *Etsitty v. Utah Transit Authority*, 502 F.3d 1215 (10th Cir. 2008) (ruling that discrimination against a transsexual employee because of that employee's status does not constitute sex discrimination under Title VII).

112. *See, e.g.*, *Glenn v. Bumbry*, 663 F.3d 1312, 1318 (11th Cir. 2012) (stating that "[a]ll persons, whether transgender or not, are protected from discrimination

Some commentators have argued that homosexuality is itself a gender non-conforming trait and therefore discrimination against all homosexuals should be subsumed under the sex stereotyping theory.<sup>113</sup> Stated another way, this theory posits that because society expects males to be attracted to females and vice versa, heterosexuality is a gender stereotype. Therefore, discrimination against homosexuals is discrimination because they fail to conform to an expectation attached to their sex, *i.e.*, the expectation that they are attracted to the opposite sex.<sup>114</sup>

Two federal district court decisions have arguably adopted this line of thought. In *Heller v. Columbia Edgewater Country Club*, a lesbian chef was harassed by her supervisor for having a relationship with another woman.<sup>115</sup> Her supervisor would ask her, “[d]o you wear the dick in the relationship?” and “[a]re you the man?”<sup>116</sup> In denying the employer’s motion for summary judgment, the U.S. District Court for Oregon held that:

[A] jury could find that [the supervisor] repeatedly harassed (and ultimately discharged) Heller because Heller did not conform to [the supervisor’s] stereotype of how a woman ought to behave. Heller is attracted to and dates other women, whereas [her supervisor] believes that a woman should be attracted to and date only men.<sup>117</sup>

The U.S. District Court for Massachusetts, in *Centola v. Potter*, made a similar observation, opining, “stereotypes about homosexuality are directly related to our stereotypes about the

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on the basis of gender stereotype”); *Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285, 292 (3<sup>rd</sup> Cir. 2009) (stating “[t]here is no basis in the statutory or case law to support the notion that an effeminate *heterosexual* man can bring a gender stereotyping claim while an effeminate *homosexual* man may not”); *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) (stating that “if Centola can demonstrate that he was discriminated against ‘because of . . . sex’ as a result of sex stereotyping, the fact that he was also discriminated against on the basis of his sexual orientation has no legal significance under Title VII.”).

113. See Kramer, *supra* note 28, at 468; Szwalbneest, *supra* note 91, at 90–91.

114. Such an approach would alleviate a key deficiency of relying on the *Price Waterhouse* line of cases to achieve protection for gays and lesbians, namely that not all homosexuals are gender non-conforming in their dress or behavior. Kramer, *supra* note 28, at 468.

115. *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002).

116. *Id.* at 1217.

117. *Id.* at 1224.

proper roles of men and women . . . [t]he gender stereotype at work here is that “real” men should date women, and not other men.”<sup>118</sup>

The Equal Employment Opportunity Commission (EEOC), in two administrative decisions involving federal employees, similarly has adopted a broad view of what constitutes prohibited sex discrimination. In *Macy v. Holder*, the EEOC ruled that the term “sex” in Title VII encompasses both biological sex and gender, and that an employer who discriminates because a person is transgender necessarily “has engaged in disparate treatment ‘related to the sex of the victim.’”<sup>119</sup> Similarly, in *Complainant v. Foxx*, the EEOC stated:

[W]e conclude 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. A complainant alleging that an agency took his or her sexual orientation into account in an employment action necessarily alleges that the agency took his or her sex into account.<sup>120</sup>

Although these cases may be groundbreaking, they currently represent a decidedly minority view among the federal courts.

Thus, the prevailing reach of the sex-stereotyping theory of sex discrimination can be summarized as follows: while the status of being homosexual or transgender is not a protected class, individuals who engage in gender non-conforming appearance or behavior - regardless of being straight or gay - are protected by Title VII’s sex provision.

#### IV. RELATIONAL DISCRIMINATION<sup>121</sup> IN THE WORKPLACE

##### A. *Relational Race Discrimination*

Between 1973 and 1985, a split developed among the U.S.

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118. *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002).

119. *Macy v. Holder*, EEOC Appeal No. 0120120821, 2012 WL 1435995 at \*6–7 (EEOC, April 20, 2012)

120. *Complainant v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641 at \*6 (EEOC, July 15, 2015).

121. This Article uses the term “relational” discrimination instead of the more traditionally recognized “associational” or “associative” discrimination. Associational discrimination has taken on a broader meaning in the Title VII case law, including claims where the spouse of an employee in retaliation for protected

district courts regarding the question of whether discrimination based on an interracial marriage created a cognizable claim under Title VII.<sup>122</sup> In *Ripp v. Dobbs Houses*, a district court in Alabama concluded that such discrimination was not prohibited under Title VII.<sup>123</sup> The court reasoned that the language of the statute required that the discrimination be on account of “*individual’s race*” and, thus, where an employer discriminates not because of the employee’s race, but because of the race of the employee’s spouse, Title VII did not apply.<sup>124</sup> In *Whitney v. Greater N.Y. Corp. of Seventh Day Adventists*, a district court in New York rejected this argument, instead holding that the claim was cognizable.<sup>125</sup> The court reasoned “if Whitney was discharged because, as alleged, the defendant disapproved of a social relationship between a white woman and a black man, the plaintiff’s race was as much a factor in the decision to fire her as that of her friend.”<sup>126</sup> In short, the employee’s race is implicated because the discrimination is based on that race being “different from the race of the people [she] associated with.”<sup>127</sup>

When the issue finally percolated up to the Eleventh Circuit, the court sided with the “irrefutable” logic of the New York district court.<sup>128</sup> In *Parr v. Woodman of the World Life Insurance Company*, a white applicant was rejected from a position after he made it known to the employer that he was

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activity. This is a different scenario from the employer who discriminates because of the employee’s protected status *in relation to* the protected status of their spouse. Thus, a few scholars have begun referring to this latter form as relational discrimination as opposed to associative discrimination in recognition of these two different concepts. See generally Victoria Schwartz, *Title VII: A Shift From Sex to Relationships*, 35 HARV. J.L. & GENDER 209 (2012).

122. Compare *Ripp v. Dobbs Houses, Inc.*, 366 F. Supp. 205 (N.D. Ala. 1973) (holding discrimination based on interracial relationships uncovered); *Adams v. Governor’s Comm. On Postsecondary Educ.*, No. C80–624A, 1981 WL 27101 (N.D. Ga. 1981) (same); with *Reiter v. Center Consolidated Sch. Dist.*, No. 26–JT, 618 F. Supp. 1458 (D. Colo. 1985) (holding interracial relationships protected); *Gresham v. Waffle House, Inc.*, 586 F. Supp. 1442 (N.D. Ga. 1984); *Whitney v. Greater N.Y. Corp. of Seventh Day Adventists*, 401 F. Supp. 1363 (S.D.N.Y. 1975).

123. *Ripp v. Dobbs Houses, Inc.*, 366 F. Supp. 205, 215 (N.D. Ala. 1973).

124. *Id.* at 208–10.

125. *Whitney v. Greater New York Corp. of Seventh-Day Adventists*, 401 F. Supp. 1366–67 (S.D.N.Y. 1975).

126. *Id.* at 1366.

127. *Reiter v. Center Consolidated Sch. Dist.*, No. 26–JT, 618 F. Supp. 1458, 1460 (D. Colo. 1985).

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

married to a black woman.<sup>129</sup> The court reviewed the split in the district courts, as well as prior decisions under section 1981—where the court had found interracial relationships covered<sup>130</sup>—and concluded that *Whitney* provided the most compelling analysis. The court reasoned that Congress' intent to eradicate race discrimination ought not to be hampered by “a combination of a strict construction of the statute in a battle with semantics.”<sup>131</sup> The Second, Fifth, Sixth, and Tenth Circuits have all reached the same conclusion.<sup>132</sup> Not a single court in the past thirty years has held otherwise.<sup>133</sup>

The concept of relational discrimination is not limited to interracial marriage. It applies more broadly to any discrimination where the employee is targeted because of his race *in relation to* the race of someone else. In *Tetro v. Elliot Popham Pontiac, Oldsmobile, Buick & GMC Trucks*, for example, the Sixth Circuit reviewed the case of a car dealer who was terminated after his biracial daughter came to visit him at work.<sup>134</sup> The Court found that “the dealership has been charged with reacting adversely to Tetro because of Tetro’s

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129. *Id.* at 889.

130. Section 1981 states: “All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.” 42 U.S.C. § 1981. Prior to *Parr*, the Second, Third, Fourth, and Fifth Circuits had concluded that discrimination based on interracial relationships was prohibited under this Act. See *Liotta v. National Forge Co.*, 629 F.2d 903 (3d Cir. 1980); *Fiedler v. Marumscio Christian Sch.*, 631 F.2d 1144 (4th Cir. 1980); *Faraca v. Clements*, 506 F.2d 956 (5th Cir. 1975); *DeMatteis v. Eastman Kodak Co.*, 511 F.2d 306 (2d Cir. 1975). In *Parr*, the Eleventh Circuit officially adopted this conclusion as to section 1981, 791 F.2d at 890.

131. *Parr*, 791 F.2d at 892 (quoting *Culpepper v. Reynolds Metal Co.*, 421 F.2d 888, 891 (5th Cir. 1970)).

132. *Holcomb v. Iona College*, 251 F.3d 130, 139 (2d Cir. 2008); *Tetro v. Elliot Popham Pontiac, Oldsmobile, Buick & GMC Trucks, Inc.*, 173 F.3d 988, 994–95 (6th Cir. 1999); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156F.3d 581, 589 (5th Cir. 1998); *Patrick v. Miller*, 953 F.2d 1240, 1249–50 (10th Cir. 1992).

133. The District of Columbia Circuit has criticized the conclusion that section 1981 covered interracial relationships arguing that it may create a standing issue. *Fair Emp. Council of Greater Wash. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1279 n.4 (D.C. Cir. 1994). However, they are alone in their criticism, and even if the D.C. Circuit were eventually vindicated, the Title VII and section 1981 are not automatically coextensive.

134. *Tetro v. Elliot Popham Pontiac, Oldsmobile, Buick & GMC Trucks*, 173 F.3d 988, 990 (6th Cir. 1999).

race in relation to the race of his daughter.”<sup>135</sup> In the court’s view, “[t]he net effect is that the dealership has allegedly discriminated against Tetro because of his race.”<sup>136</sup> Therefore, Title VII prohibits discrimination based on the protected status of the employee in relation to the protected status of another individual.

### B. *Relational Sex Discrimination*

Many cases categorized as “sexual orientation” cases in the case law and commentary may actually be better understood as relational sex discrimination cases. The *Heller* decision discussed in the preceding section illustrates how anti-gay harassment can be based not simply on anti-gay animus, but also on animus toward same-sex relationships. As the court noted in that case, “a jury could find [the supervisor] repeatedly harassed (and ultimately discharged) Heller because . . . Heller is attracted to and dates other women, whereas [her supervisor] believes that a woman should be attracted to and date only men.”<sup>137</sup>

The impact of relational discrimination is demonstrated by the facts, often overlooked, in a number of sexual orientation cases.<sup>138</sup> In *Prowel v. Wise Business Forms, Inc.*, an effeminate male employee was subjected to anti-gay harassment including being called “princess,” “rosebud,” and “faggot,” along with a litany of other threatening and hostile statements.<sup>139</sup> However, the discrimination also took on a relational tone when Prowel was accused of having sexual relations with other male employees, and a co-worker said to him “a man should not lay with another man.”<sup>140</sup> Whether because the attorney did not focus on the relational statements, or because the court chose to ignore them, the decision focused instead on the sex-stereotyping aspects of the claim.<sup>141</sup>

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135. *Id.* at 995.

136. *Id.*

137. *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224 (D.Or. 2002).

138. *See, e.g.*, *Lundin v. Pacific Telephone & Telegraph*, 608 F.2d 327 (9th Cir. 1979) (holding against female plaintiff who was terminated for being in a same-sex relationship).

139. *Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285, 287 (3d Cir. 2009).

140. *Id.* at 288.

141. *Id.* at 292.

In some cases, however, the same-sex relationships are, in fact, the root of the discrimination, rather than simply one factor among many. In *Valadez v. Uncle Julio's*, a lesbian server was in a relationship with a female co-worker, when her supervisor began asking to have a “tag team” with the employee and her partner.<sup>142</sup> The court focused on the “uninvited sexual solicitations” as creating a claim for traditional sexual harassment,<sup>143</sup> but the employer’s motivation, which is supposed to be the primary concern of Title VII analysis, appears to have been based as much on a fetishized view of lesbian relationships as it was based on his desire for sex with the employee. In *Ayala-Sepulveda v. Municipality of San German*, a male plaintiff was similarly engaged in a sexual relationship with a male co-worker.<sup>144</sup> When that relationship ended the co-worker publicly denied ever being in a relationship with the plaintiff and began to threaten him with violent reprisal for “fabricating” the relationship.<sup>145</sup> The discrimination this employee faced was rooted not in his sexual orientation per se, but in the fact that he had engaged in a relationship with another man. The violent response of his partner only strengthens the conclusion that the discrimination was “because of sex.” It is extremely unlikely that the plaintiff would have been subjected to such harassment if he were female; rather it was because the plaintiff was *male* that his partner responded so violently in defense of his masculinity.

The EEOC expressly recognized a relational or associational claim of sex discrimination in *Complainant v. Foxx*, an administrative decision involving a federal employee.<sup>146</sup> In that case, the complainant alleged that he was not selected for a permanent position because of his sexual orientation. The decision explained that an employee can state a claim of sex discrimination by showing that the employer’s conduct was motivated by the sex of another person with whom the employee was associating. Drawing an explicit analogy to

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142. *Valadez v. Uncle Julio's*, 895 F.3d 1008, 1011 (N.D. Ill. 1995).

143. *Id.* at 1014.

144. *Ayala-Sepulveda v. Municipality of San German*, 661 F.2d 130, 134 (D.P.R. 2009).

145. *Id.*

146. *Complainant v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641 (EEOC, July 15, 2015).

the race context, the decision concluded that “Title VII similarly prohibits employers from treating an employee or applicant differently than other employees or applicants based on the fact that such individuals are in a same-sex marriage or because the employee has a personal association with someone of a particular sex.”<sup>147</sup>

These cases illustrate that real or perceived same-sex relationships are often the focal point of sexually charged discrimination. Although most courts have attempted to resolve these cases by looking to existing theories of sex discrimination, such a practice ignores an important factor and consequently one that reveals the inherently sex-based characteristic of the discrimination. Although same-sex relationships in the form of marriage are now recognized as lawful, incidents of discrimination such as these are likely to remain an issue. Thus, we must reconcile the legalization of same-sex marriages with not only the long history of judicial skepticism toward sexual orientation discrimination claims under Title VII but also the long accepted principle that relational discrimination is prohibited under Title VII.

## V. PROTECTING SAME-SEX MARRIAGES UNDER TITLE VII

### A. *Same-Sex Marriage Discrimination as Sex-Stereotyping*

When an employee experiences discrimination because of their same-sex marriage, sex stereotyping is almost certain to be at the core of the discrimination, or at the very least it will be implicated by the discriminatory behavior, words, and actions. This reality is illustrated by the circumstances in *Koren v. Ohio Bell*, where a gay employee was discriminated against when he entered into a legal same-sex marriage.<sup>148</sup> Koren and his partner had traveled to Massachusetts, where they applied for and entered into a legal marriage.<sup>149</sup> The two then returned to Ohio, where both were employed.<sup>150</sup> Upon his return Koren received a legal name change, adopting his husband’s surname.<sup>151</sup> When he returned to work at Ohio Bell,

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147. *Id.* at 9.

148. *See Koren v. Ohio Bell*, 894 F. Supp. 2d 1032 (2012).

149. *Id.* at 1034.

150. *See id.*

151. *Id.*

his supervisor became hostile toward Koren, objecting to his marriage.<sup>152</sup> As part of the course of harassment to which Koren was subjected, his supervisor refused to acknowledge his new surname and continued to call him by his prior name.<sup>153</sup> The court held that adopting a partner's surname is a traditionally feminine practice, and that the employer's adverse reaction could be actionable as sex stereotyping.<sup>154</sup>

The *Koren* decision offers a blueprint for fitting same-sex marriage within the protective ambit of the sex-stereotyping theory. Traditional marriage involves a union between one male and one female, and opposite sex marriage represents gender-conforming behavior.<sup>155</sup> In contrast, same-sex marriage, with or without an accompanying change in a spousal surname, constitutes gender non-conforming behavior. As such, an employer's adverse treatment of an employee because of a same-sex marriage violates the sex-stereotyping principle established in *Price Waterhouse* and constitutes sex discrimination for purposes of Title VII.

The act of same-sex marriage also goes well beyond status and involves behavior that, even if now lawful, runs counter to long-held societal expectations. Unlike some workplace perceptions, hostility to same-sex marriage cannot be confused with—or consumed by—an employee's unprotected homosexual status. Given the now-recognized distinction between status and behavior<sup>156</sup> and given that same-sex marriage clearly involves a behavior that goes significantly beyond a person's status as homosexual, same-sex marriage fits comfortably on the behavior side of the well-established legal divide under Title VII.

#### *B. Same-Sex Marriage Discrimination as Relational Sex Discrimination*

Protecting individuals on the basis of sexual orientation as a relational concept under Title VII may be difficult since gays and lesbians not in same-sex relationships would find it hard

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152. *Id.*

153. *Koren v. Ohio Bell*, 894 F. Supp. 2d 1032 (2012).

154. *Id.* at 1038.

155. See, e.g., Ryan T. Anderson, *Marriage: What It Is, Why It Matters, and the Consequences of Refining It*, available at <http://www.heritage.org/research/reports/2013/13>.

156. See *supra* note 109 and accompanying text.

to prove “relational” discrimination, not to mention that it would naturally raise the “bootstrapping” concerns that have so worried the federal judiciary. However, protecting individuals in same-sex marriages is a different matter entirely, as it involves a specific and identifying relationship, the objections to which are derived entirely from the sex of the individuals involved. The relational dimensions of same-sex marriages, therefore, require that they be protected under Title VII’s widely accepted prohibition of relational discrimination. This conclusion is further supported by the two analytical heuristics most often utilized by the Supreme Court: the race-gender analogy and the comparators heuristic.

### 1. *The Race-Gender Analogy*

It is clear that discrimination based on different protected classes often bear similarities that illuminate the discriminatory character of the acts.<sup>157</sup> The clear and unequivocal intent of the Civil Rights Act was to “eradicate race discrimination” and to “strike at the entire spectrum of disparate treatment of men and women.”<sup>158</sup> In outlawing relational discrimination, the Eleventh Circuit held that this goal ought not to be hampered by “a combination of strict construction of the statute in a battle with semantics.”<sup>159</sup> The invidious nature of discrimination against legally married same-sex couples is that doing so allows employers to police the private decisions of male and female employees in their selection of intimate partners, a selection process that implicates deeply held beliefs regarding a person’s sex and gender. It was clear in 1967 that such conduct would amount to discrimination if the policing involved the race of the partner, and it is no less true today that it amounts to discrimination when the policing involves the sex of a married

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157. *See, e.g., Doe v. City of Belleview, Ill.*, 119 F.3d 563, 579 (7th Cir. 1997) (“If an African American is repeatedly subjected to racial slurs and talk of lynching by his co-workers, we typically do not ask, ‘But was he singled out because of his race?’ . . . we understand that the harassment, perpetrated through the vehicle of race, is discriminatory and injurious in and of itself, even if his harassers wanted to make his life miserable for reasons altogether unrelated to the color of his skin.”)

158. *L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978).

159. *Parr v. Woodman of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986) (quoting *Culpepper v. Reynolds Metal Co.*, 421 F.2d 888, 891 (5th Cir. 1970)).

partner.<sup>160</sup> In short, looking at discrimination because of a same-sex relationship as compared to an interracial relationship reveals that in either case, such discrimination would have the “net effect” of perpetuating, rather than eradicating, differential treatment based on a protected status.

As discussed above, a number of courts have recognized that discrimination based on same-sex relationships is often part and parcel of discrimination “because of sex.”<sup>161</sup> In *Heller*, the employee in a same-sex relationship was bombarded with inappropriate questions such as “[d]o you wear the dick in the relationship?” and “[a]re you the man?”<sup>162</sup> These questions are saturated with hostility to gender non-conformity, revealing, as so often is the case, that discrimination because of sexual relationships is based on sex or gender stereotypes, which act to perpetuate gender hierarchies that disadvantage women and gender non-conforming men. In *Hamm*, the hostility of the environment to women and effeminate men is even clearer, where an employee was threatened with physical violence for simply having a close friendship with another man.<sup>163</sup> Instances like these make clear that discrimination based on same-sex relationships is often part of a systematic effort to police gender norms, preserve the masculine identity of the workplace, and protect the masculine identities of the male employees and managers. Thus, permitting employers to police the decision of an employee’s romantic partner only reinforces an environment that is hostile to all but the most gender conforming men, a result that inimical to the goals Title

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160. Mr. Theodore Schroeder, argues that this discrimination is based on the sex of the partner rather than the sex of the employee, and, therefore, is not protected. See Theodore A. Schroeder, *Fables of the Deconstruction: The Practical Failures of Gay and Lesbian Theory in the Realm of Employment Discrimination*, 6 AM. U. J. GENDER & L. 333, 366 (1998). However, this view was rejected in the relational line of cases as too narrow a view. The proper, and logical, interpretation is that the discrimination is not based solely on the race (or sex) of the spouse, but on the relationship between the employee’s race (or sex) and the spouse’s race (or sex). The employee’s protected status is an essential element of the discrimination. Indeed, the author’s failure to recognize that this was the prevailing interpretation greatly undermines his challenge to contemporary feminist scholarship.

161. See notes 137-147 and accompanying text.

162. *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1217 (D. Or. 2002).

163. *Hamm v. Weyauwega Milk Products, Inc.*, 332 F.3d 1058, 1060 (7th Cir. 2003).

## VII.

Where the discrimination is based not merely on a same-sex relationship, but on a legally recognized same-sex marriage, the connection to impermissible relational discrimination becomes even clearer. In *Koren*, the animus did not take on the usual anti-gay epithets, but rather the simple refusal to recognize the same-sex marriage.<sup>164</sup> In such a case, the discrimination is based not on the sexual orientation of the employee, but on the fact that he was a man who chose to engage in a lawful marital relationship with another man. As the EEOC recognized in *Complainant v. Foxx*, this is relational discrimination in its simplest and clearest form.<sup>165</sup>

Ultimately, discrimination based on same-sex relationships has the effect of reinforcing gender stereotypes, perpetuating sex discrimination, and making the workplace unsafe for all but a few gender conforming men. This undoubtedly falls within the “spectrum of disparate treatment” envisioned by the courts, and it mirrors the experiences of the men and women who challenged social resistance to interracial marriages. As such, same-sex marriages should be afforded the same protection that was extended to interracial couples.

## 2. *The Comparators Heuristic*

The comparators heuristic requires that the courts compare the employees’ treatment to that of other employees “who are similar to the complainant in all respects but for the protected characteristic.”<sup>166</sup> In *Koren*, a comparator would, therefore, be a female employee who married a man and took the surname of her husband. As the court in *Koren* notes, the comparator’s scenario is the socially accepted norm.<sup>167</sup> Thus,

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164. See *Koren v. Ohio Bell*, 894 F. Supp. 2d 1032, 1037–38.

165. *Complainant v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641 at 9 (EEOC, July 15, 2015). In the broader realm of employment law, most states have recognized a public policy exception to the employment at-will rule that protects employees who exercise a statutory right, such as filing for workers compensation benefits, from retaliatory dismissal. See Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 BOSTON COL. L. REV. 351, 381–82 (2002). As a matter of policy, an employee who exercises the statutory right to enter into a lawful same-sex marriage also should be shielded from bias that operates to interfere with the enjoyment of that statutory right.

166. Goldberg, *supra* note 40, at 731.

167. *Koren*, 894 F. Supp. 2d at 1038.

even though the opinion does not reveal the treatment of female employees, it is not a stretch to assume that they would not be treated with the hostility that Koren experienced. More often than not, therefore, a comparators analysis will heavily favor a gay or lesbian employee who is discriminated because they choose to enter into a same-sex relationship.

### 3. *Addressing Calls for a Broader Application*

Professor Victoria Schwartz recently argued that all sexual orientation is inherently relational discrimination.<sup>168</sup> She asserts, “sexual orientation is an inherently relational concept . . . if a female is discriminated against for being a lesbian, she is discriminated against for her sex (female) in relation to her sexual relationships with others (female).”<sup>169</sup> Schwartz further contends that protection for sexual orientation should extend beyond relationships that actually exist at the time of the discriminations, arguing “an employer who is motivated by animus . . . likely is so motivated regardless of the specific status of that employee’s relationships.”<sup>170</sup> Schwartz is likely correct, but it is doubtful that the courts will recognize her argument any time soon. The current Title VII regime is based on the intent of the perpetrator,<sup>171</sup> and gay and lesbian plaintiffs making use of Schwartz’s argument could have a hard time making their case without pointing to specific relationships of which the employer was aware. Furthermore, as we have noted above, anti-gay epithets can also be used as a means of discriminating against gender non-conformity or as a means of emasculation. Though both of these uses should be prohibited as “because of sex,” neither can reasonably be characterized as relational in nature.

Whatever the argument for a broader view of relational discrimination, adverse action taken in response to same-sex marriage, a specific and identifiable action that is inextricably

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168. Schwartz, *supra* note 121 at 211–12.

169. Schwartz, *supra* note 121 at 248.

170. Schwartz, *supra* note 121 at 249.

171. *Centola v. Potter*, 183 F. Supp. 2d 403, 411 (D. Mass. 2002) (“Title VII is clear that it is the harassers’ discriminatory animus and mental state that are crucial to determining whether Title VII outlaws the harasser’s conduct . . . Thus, while [the plaintiff]’s impression of why his fellow workers took these actions against him is relevant, it is not conclusive.”).

tied to a person's sex, clearly is based upon the relationship and the sex of the two marital parties. Protecting such a relationship is not a giant leap, but a reasoned extension of the protection afforded to interracial couples.

#### CONCLUSION

Much of sex discrimination law has become very complicated and unpredictable. Against this murky landscape, the proper treatment of same-sex marriages under Title VII is simple and clear. Recognizing that discrimination based on same-sex marriages is sex discrimination requires, at most, only a basic understanding of the gender make up of those relationships and the common sense application of existing and widely accepted theories of Title VII liability. Discrimination based on a same-sex marriage clearly qualifies as sex-stereotyping retaliation in response to gender non-conforming behavior. Since such discrimination is also based on the sex of one partner in relation to the sex of the other, it is also classic relational discrimination. With same-sex marriage now lawful, the courts will not be able to avoid incorporating these relationships into employment discrimination law for much longer. A common sense application of the current Title VII regime demands that same-sex couples receive protection under Title VII.