

Title VII & LGBTQ Employment Discrimination: An Argument for a Modern Updated Approach to Title VII Claims

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INTRODUCTION

Kimberly Hively, Matthew Christiansen, and Jameka Evans all had one thing in common. They all asserted that they were subjected to adverse employment actions for being gay.¹ However, their rights to a remedy were anything but similar. The differing outcomes did not originate from different forms of harassment, instead it was simply a byproduct of where they happened to be employed. One of the three was granted the right to seek remedy for discrimination based on her sexual orientation, one was only granted the right to seek remedy for discrimination because he happened to be an effeminate gay man, and the third was simply denied the opportunity to seek any remedy.²

In the past few decades, the LGBTQ³ community has fought for the rights and protections already afforded to other minority identities. Although the LGBTQ community has seen success in some areas, like establishing the right for same-sex couples to marry, there are still areas where LGBTQ individuals are left without recourse from discrimination, including in employment. As of today, the LGBTQ community sees an inconsistent patchwork of employment protections constructed from an array of local and state laws, varying court opinions, and non-binding

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1. See *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 198 (2d Cir. 2017); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 116 (2d Cir. 2018) (describing Kimberly Hively's case).

2. In Kimberly Hively's case, she was allowed to maintain a cause of action under Title VII for discrimination based on her sexual orientation. See *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 352 (7th Cir. 2017) (en banc). Matthew Christiansen was not allowed to maintain a cause of action based on sexual orientation discrimination but was allowed to maintain a cause of action based on the theory that he was terminated in violation of Title VII because, as an effeminate man, he failed to conform to sex-stereotypes associated with being male. *Christiansen*, 852 F.3d at 199. And Jameka Evans' suit was dismissed at pleadings because the court said sexual orientation discrimination could not be a cause of action under Title VII. *Zarda*, 883 F.3d at 108.

3. LGBTQ here means "lesbian, gay, bisexual, transgender and queer", with "queer" used as an umbrella term to describe the limitless identities that exist outside of rigid categories of gender and sexual orientation.

federal agency decisions.⁴

This Note will focus on federal based non-discrimination protection for LGBT⁵ employees under Title VII of the Civil Rights Act of 1964 (“Title VII”).⁶ Currently, under Title VII an employee is allowed to bring suit if they are discriminated against for not conforming to the stereotypes associated with their sex.⁷ While this does offer some protections for queer employees that do not conform to gender norms, there is a current circuit split on whether an employee is allowed to allege discrimination based on their sexual orientation.⁸ Although a legislative amendment to Title VII explicitly designating gender identity and sexual orientation as protected classifications would be ideal, this Note will argue that courts are a more pragmatic way of realizing employment protections for LGBT people.

Part II of this Note examines the history of Title VII, the development of the “sex” based discrimination jurisprudence, and the evolution of LGBT employment protections under Title VII. Part III of this Note evaluates legislative efforts to secure LGBT employment protections and presents the argument that judicial solutions are better fit to address employment discrimination issues for marginalized minorities including LGBT individuals. Part IV summarizes the findings of this Note and highlights future possible developments.

4. Although this Note is focused on protections provided at the federal level, some states and local ordinances provide LGBTQ community members employment protections. *See, e.g.*, OR. REV. STAT. ANN. § 659A.006 (West); *Local Non-Discrimination Ordinances*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/non_discrimination_ordinances/policies (last visited Feb. 25, 2019).

5. Although this Note addresses Title VII applications to the wider LGBTQ community, the history section of this Note does not include the broader spectrum of queer identities because there is not sufficient case law addressing queer identities outside of homosexual orientations and gender identity alignments.

6. Given the diversity of the LGBTQ+ community, this Note cannot hope to address the relationship of all queer identities under Title VII, but attempts to address LGBTQ employment discrimination on a broader level. Nevertheless the proposed solution is sufficiently broad that it could provide some guidance to a range of LGBTQ+ claims.

7. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 231-32 (1989) (plurality opinion).

8. *Compare* Christiansen v. Omnicom Grp., Inc., 852 F. 3d 195, 199 (2d Cir. 2017), *and* Zarda v. Altitude Express, Inc., 883 F.3d 100, 155 (2d Cir. 2018) *with* Evans v. Ga. Reg'l Hosp., 850 F.3d 1248 (11th Cir. 2017).

I. HISTORY

A. Title VII Enactment & Initial Treatment

Title VII of the Civil Rights Act of 1964 made it unlawful for qualifying employers to discriminate because of a person's "race, color, religion, sex, or national origin."⁹ The anti-discrimination provision did not specifically address sexual orientation, gender identity, or gender expression. However, efforts to amend Title VII to add sexual orientation as a protected classification began in 1974.¹⁰ While the text of Title VII appears to be quite simple, the meaning of the words "because of sex" has sparked considerable debate over the years.¹¹ Even the reason why sex was included in Title VII has drawn speculation and debate from commentators since the term was added to the bill at "the last minute on the floor of the House of Representatives."¹² Many scholars believe that the amendment was actually a "joke" in a failed attempt to sabotage the bill, while others maintain that the amendment was the result of deliberate action from feminist movements.¹³ Regardless of the reason sex was added as a protected class to Title VII, the circumstances of its inclusion leaves courts "with little legislative history to guide us in interpreting the Act's

9. 42 U.S.C. § 2000e-2(a).

10. Representative Bella Abzug introduced the Equality Act to the House in 1974, which proposed to amend Title VII to include sexual orientation and marital status as protected classes. The bill was referred to committee but received no further attention. See H.R. 15692, 93d Cong. (1974); William C. Sung, *Taking the Fight Back to Title VII: A Case for Redefining "Because of Sex" to Include Gender Stereotypes, Sexual Orientation, and Gender Identity*, 84 S. CAL. L. REV. 487, 496 (2011).

11. When Title VII was enacted, popular culture generally considered sex as a concrete identity, the separate distinctions between men and women, but over time social science scholars and medical experts have come to view sex, gender, and sexuality as different identities resulting in a divide between the legal jurisprudence and the modern social understanding of the word sex. See Lisa J. Banks & Hannah Alejandro, *Changing Definitions of Sex under Title VII*, 2016 A.B.A. SEC. LAB. & EMP. L.: NAT'L CONF. ON EQUAL EMP. OPPORTUNITY L.

12. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 63, (citing 110 CONG. REC. 2577-84 (1964)).

13. *Compare Rabadue v. Osceola Ref. Co.*, 584 F. Supp. 419, 428 n.36 (E.D. Mich. 1984) (stating "[t]his Court-like all Title VII enthusiasts-is well aware that the sex discrimination prohibition was added to Title VII as a joke by the notorious civil rights opponent Howard W. Smith"), with Robert C. Bird, *More Than A Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137, 138 (1997) (arguing that "the sex discrimination provision was the result of complex political struggles involving racial issues, presidential politics, and competing factions of the women's rights movement").

prohibition against discrimination based on ‘sex.’”¹⁴

The first courts to interpret the “because of sex” provision adopted a narrow, conservative, traditional language interpretation of the statute.¹⁵ Under this narrow interpretation, courts maintained that sex discrimination was only discrimination based on the biological distinction between males and females, and rejected the claims that sex included transsexuals or pregnancy.¹⁶ Similarly, the initial Title VII claims that asserted allegations for discrimination on the basis of sexual orientation were rejected.¹⁷

Some initial arguments employees made seeking protection under Title VII asserted that sexual preference and sex related stereotypes were sufficiently correlated to sex to justify extending the sex classification to include sexual orientation.¹⁸ The correlation argument asserted that since there was an underlying correlation between discrimination based on sexual preference and discrimination based on sex that “sexual preference [should] be considered a subcategory of the “sex” category of Title VII.”¹⁹

The sex stereotype argument asserted that the employees were discriminated against for having an “effeminate” appearance and that type of discrimination violated Title VII’s prohibition of discrimination because it was based on the stereotypes of accepted roles of men and women.²⁰ Courts continued to reject these arguments, relying on congressional inaction as proof that Congress intended to restrict the meaning of sex to the “traditional” meaning, that men and women were treated equally.²¹ And even though some courts recognized that textually

14. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 128 n.31 (2d Cir. 2018).

15. *See, e.g., Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977) (using the plain meaning of the statute and subsequent Title VII legislative activity to determine that Congress intended the word “sex” to be understood “traditionally” for the limited purpose of “plac[ing] women on an equal footing with men,” and holding that “transsexual” discrimination claims were not actionable under Title VII).

16. *See, e.g., id.; see also Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 128 (1976) (holding that an employer’s disability benefits plan does not violate Title VII just because it fails to cover pregnancy-related disabilities).

17. *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979) (holding the plaintiffs’ arguments that they were unlawfully discriminated against under Title VII for being homosexual as an invalid basis for recovery).

18. *Id.*

19. *Id.* at 329.

20. *Id.* at 331.

21. *Id.* at 329.

the word sex could be read much broader, they similarly adhered to the idea that since Congress had not acted to expand the definition, Title VII's sex discrimination prohibition narrowly applied to biological distinctions.²²

B. The Supreme Court Explains the Meaning of Sex

Despite opportunities to do so, the Supreme Court has not yet drawn explicit boundaries on the meaning of Title VII's sex discrimination, and they have not directly addressed whether sexual orientation discrimination is actionable under Title VII.²³ However, in two separate rulings, the Court held that the meaning of sex in Title VII went beyond the mere biological distinctions of the male and female body.²⁴

The first time the Supreme Court specifically addressed the meaning of the word "sex" in Title VII was in *Price Waterhouse v. Hopkins*.²⁵ The Supreme Court, in a plurality opinion, held that Title VII's sex discrimination was not merely targeted at the biological designations between men and women, but instead aimed to "strike at the entire spectrum" of discrimination on the basis of sex, including discrimination on the basis of gender stereotypes.²⁶ The Court found that the plaintiff's claim that she was discriminated against because of her failure to conform to the stereotypes of her gender (including the stereotype that women

22. See *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984) (denying coverage to transsexuals but recognizing that "some may define 'sex' in such a way as to mean an individual's 'sexual identity'").

23. See, e.g., Adam Liptak, *Supreme Court Won't Hear Case on Bias Against Gay Workers*, N.Y. TIMES (Dec. 11, 2017), <https://www.nytimes.com/2017/12/11/us/politics/supreme-court-gay-workers-bias-case.html>.

24. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 236-37 (1989) (Brennan, J., plurality); *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 82 (1998).

25. 490 U.S. 228 (1989). Plaintiff, Ann Hopkins, was a senior manager at Price Waterhouse in 1982 when she was proposed for partnership; the only female candidate out of 88 people. Her candidacy for partnership was placed on hold for reconsideration the following year. *Id.* at 233. When the partners in her office later refused to re-propose her for partnership, she sued Price Waterhouse under Title VII of the Civil Rights Act of 1964, alleging that the firm had discriminated against her on the basis of sex in its decisions regarding partnership. *Id.* at 231-32. At trial she introduced testimony that showed the partners in her firm were put off that she exhibited an aggressive nature, despite her seemingly high quality of work for her clients. *Id.* at 235.

26. *Id.* at 251 (internal citations omitted). Although this opinion was technically only a plurality opinion, lower courts have generally treated it as binding precedent. See *infra* Part I. C.

should not be aggressive and should be more docile) was actionable under Title VII's "because of sex" clause.²⁷

While grappling with the language of the statute, without acknowledging its potential impact, the Court appeared to use the terms gender and sex synonymously.²⁸ While the two may at the time have been considered synonymous, today psychologists consider the two words to have two different meanings; sex being biologically based and gender being a social construction or expression of identity.²⁹

The Supreme Court also recognized a broader meaning of the word sex in *Oncale v. Sundowner Offshore Servs.*³⁰ In holding that Title VII offers protections from same-sex harassment for both men and women, Justice Scalia wrote that the Court was going beyond the original intent of the sex discrimination envisioned by Congress at the time it was enacted, but that it was appropriate in this case to cover evils that were comparable to the principle evil Congress intended to cover with Title VII.³¹

27. *Id.* Hopkins presented evidence that she was denied the promotion in part because other partners at the firm felt that she did not act in an appropriate manner for her gender including comments that she was too macho, too aggressive, and used inappropriate language for a woman. *Id.* at 235.

28. For example, the Court stated "Congress' intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute" *id.* at 239, despite the fact that the term "gender" is not used in Title VII's language at all. One possible explanation for the term transition was to use a less provocative word than sex, as Ruth Bader Ginsburg explained in an interview that she started using gender discrimination in her cases in the 1970s because her secretary cautioned her that using the word "sex" would cause "distracting associations" for the Justices. Catherine Crocker, Ginsburg *Explains Origin of Sex, Gender : Justice: Supreme Court's Newest Member Speaks at her Old Law School and Brings Down the House with her History Lesson About Fighting Bias*, L.A. TIMES (Nov. 21, 1993), http://articles.latimes.com/1993-11-21/news/mn-59217_1_supreme-court.

29. *Gender*, APA DICTIONARY OF PSYCHOLOGY ONLINE (2018), <https://dictionary.apa.org/gender> (last visited Mar. 15, 2019) (defining gender as "the condition of being male, female, or neuter. In a human context, the distinction between gender and sex reflects the usage of these terms: Sex usually refers to the biological aspects of maleness or femaleness, whereas gender implies the psychological, behavioral, social, and cultural aspects of being male or female (i.e., masculinity or femininity)").

30. 523 U.S. 75 (1998). Plaintiff Joseph Oncale was working for Sundowner Offshore Services, Inc., on a Chevron U.S.A., Inc., oil platform in the Gulf of Mexico in 1991. *Id.* at 77. On several occasions, Oncale was forcibly subjected to sex-related, humiliating actions against him by supervisors and fellow workmen in the presence of the rest of the crew, including being physically assaulted in a sexual manner, and threatened him rape. *Id.* Oncale eventually quit, later stating that he felt that if he didn't leave his job he would be raped. *Id.* Thereafter, he filed suit alleging that he was discriminated against in his employment because of his sex. *Id.* The District Court held that Oncale, a male, had no cause of action under Title VII for harassment by male co-workers, and the Fifth Circuit affirmed. *Id.*

31. The Court stated that the harassment complained of was:

C. Courts Respond to Price Waterhouse & Oncale

Following the Supreme Court's rulings in *Price Waterhouse* and *Oncale*, lower courts altered their narrow interpretation and recognized claims of discrimination based on gender stereotypes. The exact boundaries of what discrimination claims could be raised under the "because of sex" umbrella became a patchwork of varying opinions, but it was clear that following *Price Waterhouse* and *Oncale*, claims could proceed under a broader definition of sex discrimination.³² However, courts continued to reject the argument that Title VII prohibited discrimination on the basis of sexual orientation.³³ In theory a clear line could be drawn between sexual orientation discrimination and sex stereotype discrimination. However, in many situations distinguishing between the two proved difficult. Courts acknowledged the difficulty in determining whether allegations represented discrimination based on an individual not conforming to gendered heteronormative stereotypes (and therefore constituted unlawful gender discrimination) or discrimination

assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.

Id. at 79.

32. See *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) (reasoning that *Price Waterhouse* "eviscerated" the narrow view of sex discrimination and set forth a prohibition of discrimination based on the failure to conform to stereotypical gender norms and holding that Title VII prohibits discrimination against transgender individuals based on gender stereotyping); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008) (finding that discrimination based on the plaintiff's gender transition was actionable under Title VII's "because of ... sex" statutory text); *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) ("[D]iscrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender.").

33. See *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006) (holding that discrimination based on sexual orientation is not prohibited by Title VII); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001); *Simonton 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); *Hopkins v. Balt. Gas & Elec. Co.*, 77 F.3d 745, 751–52 (4th Cir. 1996) (stating that Title VII does not protect against discrimination based on sexual orientation).

based on sexual orientation (and therefore not protected).³⁴

D. A More Direct Approach: The EEOC Weighs In

In 2015, the Equal Employment Opportunity Commission (EEOC) addressed sexual orientation under Title VII and affirmatively stated that sexual orientation was protected under Title VII, in *Baldwin*.³⁵ The EEOC provided three arguments finding Title VII prohibits discrimination on the basis of sexual orientation.³⁶ First, the EEOC, relying on a “but for sex” argument, found that discrimination on the basis of sexual orientation implicated that the employer took the employee’s sex into account because homosexual expressions to a partner are the same as heterosexual expressions to that same partner *but for* the sex of the employee.³⁷ Second, the EEOC reasoned that sexual orientation discrimination is also sex discrimination because it is associational discrimination on the basis of sex.³⁸ Third, the EEOC reasoned that discrimination on the basis of sexual

34. See *Centola v. Potter*, 183 F. Supp. 2d 403, 408 (D. Mass. 2002) (finding it difficult to distinguish the line between discrimination because of sexual orientation and discrimination because of sex since sexual orientation discrimination is often motivated by a desire to enforce heterosexually defined gender norms); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1068 (9th Cir. 2002) (finding that a gay male employee harassed by other employees for having feminine traits was actionable under Title VII because it was based on the employee’s failure to conform to gender norms).

35. *Baldwin*, EEOC Appeal No. 0120133080, 2015 WL 4397641, at *4 (July 15, 2015). David Baldwin was an air traffic control specialist working in Miami, Florida in a temporary managerial position. *Id.* at *1. Baldwin asserted that he was denied promotion to a vacant full time managerial position because he was gay, citing several instances when his supervisor made disparaging remarks when Baldwin mentioned his same-sex partner. *Id.* at *2.

36. *Id.*

37. *Id.* at 5. The EEOC found that discrimination based on sexual orientation necessitates consideration of an employee’s sex. For example, a lesbian employee disciplined for displaying a picture of her female spouse can allege that an employer took a different action against her based on her sex where the employer did not discipline a male employee for displaying a picture of his female spouse. *Id.*

38. *Id.* at 6. The EEOC reasoned that that an employee alleging discrimination on the basis of sexual orientation is naturally alleging that his or her employer took his or her sex into account by treating him or her differently for associating with a person of the same sex. For example, a gay man who alleges that his employer took an adverse employment action against him because he associated with or dated men states a claim of sex discrimination under Title VII; the fact that the employee is a man dating men instead of a woman dating men motivated the employer’s discrimination against him. Similarly, a heterosexual man who alleges a gay supervisor denied him a promotion because he dates women instead of men states an actionable claim. *Id.* This theory of associational discrimination was later further developed in *Hively*, where the majority draws on precedent from the *Loving* line of cases.

orientation is sex discrimination because it necessarily involves discrimination based on gender stereotypes that was expressly prohibited under *Price Waterhouse*.³⁹ In concluding that adverse employment action based on sexual orientation was necessarily linked to the sex discrimination prohibited by Title VII, the EEOC recognized it was directly confronting an issue that courts had previously gone great lengths to bypass.⁴⁰ Since *Baldwin*, the EEOC has filed suits in federal courts,⁴¹ and submitted amicus briefs⁴² to urge courts to adopt its position that Title VII per se prohibits sexual orientation discrimination in the workplace.

*E. The Current Circuit Split*⁴³

Recently, three circuits addressed the issue of whether sexual orientation discrimination, standing on its own, is prohibited by Title VII. Panels for the Second, Seventh, and Eleventh Circuits held that Title VII could not sustain a claim for sexual orientation discrimination standing alone. However, sitting *en banc* the Second and Seventh Circuits overruled their earlier decisions and held that sexual orientation discrimination was actionable under Title VII per se as sex discrimination.⁴⁴

See infra note 62.

39. *Baldwin*, EEOC Appeal No. 0120133080, 2015 WL 4397641, at 8. The EEOC reasoned that inherent in stereotypes of both genders is the assumption that an individual should have romantic relationships with the opposite gender, and therefore by having a homosexual relationship an individual is failing to conform to gender norms. *Id.* For example, the stereotype for women is that they date men, so a woman that dates another woman violates the gender norm for women.

40. *Id.*

41. *See, e.g.*, Complaint, EEOC v. Scott Med. Health Ctr., No. 2:16-cv-00225-CB (W.D. Pa. Mar. 1, 2016) (alleging that a gay male employee was subjected to harassment because of his sexual orientation); Complaint & Demand for Jury Trial, EEOC v. Pallet Cos. d/b/a IFCO Sys. NA, Inc., No. 1:16-cv-00595-RDB (D. Md. Mar. 1, 2016) (alleging that a supervisor harassed a lesbian employee because of her sexual orientation).

42. *See, e.g.*, Joseph Goldstein, *Discrimination Based On Sex Is Debated in Case of Gay Skydiver*, N.Y. TIMES (Sep. 26, 2017), https://www.nytimes.com/2017/09/26/nyregion/discrimination-based-on-sex-sky-diver-donald-zarda.html?_r=0 (noting the interest division as the EEOC's brief argues for the court to adopt the proposition that sex in Title VII includes sexual orientation while the Department of Justice for the Trump Administration argues against it).

43. This circuit split will likely be resolved soon as the Supreme Court has granted certiorari on this issue in *Altitude Express, Inc. v. Zarda*, 139 S. Ct. 1599 (2019). For a discussion of the circuit court decision in this case see *infra* pp. 374.

44. *Hively v Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339 (7th Cir. 2017) (*en banc*); *Zarda v.*

In *Christiansen v. Omnicom Group Inc.*,⁴⁵ the Second Circuit originally held that the plaintiff's complaint was not cognizable under Title VII for discrimination based on sexual orientation, but it was cognizable as a failure to conform to gender stereotypes. The court did not consider the merits of the arguments for or against allowing sexual orientation discrimination claims under Title VII, holding that the court was bound by a prior panel decision which held sexual orientation was not per se actionable under Title VII.⁴⁶ The concurring opinion and a subsequent district court opinion immediately cast doubt on how long sexual orientation would continue to be precluded insightfully predicting an *en banc* reversal.⁴⁷

The Second Circuit's disallowance of coverage, that was questioned in *Christiansen*, was quickly abrogated by the *en banc* decision in *Zarda v. Altitude Express, Inc.*⁴⁸ In overruling contrary precedent, the Second Circuit recognized the need to readdress the issue since "the legal

Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018) (en banc).

45. *Christiansen v. Omnicom Grp., Inc.*, 852 F. 3d 195 (2d Cir. 2017). Plaintiff, Matthew Christiansen, sued his employer, supervisor, and others affiliated with his company under the Americans with Disabilities Act and Title VII alleging that he was discriminated against at his workplace due to, inter alia, his HIV-positive status and his failure to conform to gender stereotypes. *Id.* at 198. Christiansen's complaint alleged that his direct supervisor engaged in a pattern of humiliating harassment targeting his effeminacy and sexual orientation including suggestive and explicit drawings that were circulated around the office as well as multiple remarks about the connection between effeminacy, sexual orientation, and HIV status. *Id.*

46. When addressing the plaintiff's request to reconsider the previous circuit decision that excluded sexual orientation from Title VII, the court stated that their panel could not overturn the previous panel's decision "until such time as they are overruled either by an *en banc* panel of our Court or by the Supreme Court." *Id.* at 199 (citations omitted).

47. Judge Katzmans's concurring opinion articulates support for an approach to the issue that mirrors the EEOC's decision in Baldwin, and she urges the court to reconsider the issue when the appropriate case presents itself. *Id.* at 201-07 (Katzmann, J., concurring). Judge Katzmans specifically finds convincing that sexual orientation could be a cognizable claim under all three approaches of Baldwin, namely sexual orientation discrimination is 1) cognizable under the traditional notion of sex discrimination, 2) cognizable under an association approach of sex discrimination, and 3) cognizable under a gender discrimination approach of sex discrimination. *Id.* Judge Katzmans similarly uses the EEOC's reasoning for overcoming congressional inaction on the issue, and recognizes that societal understanding of same-sex relationships has change over time. *Id.* at 206. *See also* Philpott v. New York, 252 F. Supp. 3d 313 (S.D.N.Y. 2017) (relying on Judge Katzmans's concurring opinion and holding that sexual orientation discrimination is cognizable under Title VII).

48. *Zarda*, 883 F.3d 100. Fittingly, Judge Katzmans, who called for reconsideration of the Title VII coverage in *Christiansen* wrote the opinion for the *en banc* court.

framework for evaluating Title VII claims has evolved substantially.”⁴⁹ Similar to the EEOC’s approach, the Second Circuit used three different perspectives, in each one reasoning that sexual orientation discrimination was a subset of sex discrimination.⁵⁰ Finding each perspective alone sufficient to allow Title VII coverage, and the three taken together to “amply demonstrate that sexual orientation discrimination is a form of sex discrimination.”⁵¹ In holding that sexual orientation was a subset of sex discrimination, the Second Circuit recognized that the Congress likely didn’t intend to offer protections to sexual orientation when Title VII was enacted, but asserted that “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils.”⁵²

In a decision released 15 days before *Christiansen*, the Eleventh Circuit also addressed whether sexual orientation discrimination was an actionable claim under Title VII in *Evans v. Georgia Reg'l Hosp.*⁵³ Much like the Second Circuit panel in *Christiansen*, the Eleventh Circuit also considered itself to be bound by prior precedent and held that there is no per se sexual orientation action under Title VII.⁵⁴ While the majority opinion quickly dismissed the sexual orientation claim on precedent,

49. *Id.* at 131.

50. *Id.* The first perspective can be categorized as the textual “but for sex” perspective, finding “sexual orientation discrimination is a subset of sex discrimination because sexual orientation is defined by one’s sex in relation to the sex of those to whom one is attracted, making it impossible for an employer to discriminate on the basis of sexual orientation without taking sex into account.” *Id.* The second perspective used gender stereotypes as “[s]exual orientation discrimination is also based on assumptions or stereotypes about how members of a particular gender should be, including to whom they should be attracted.” *Id.* And the third perspective uses an associational lens, reasoning “sexual orientation discrimination is associational discrimination . . . motivated by the employer’s opposition to association between members of particular sexes.” *Id.*

51. *Id.* at 131-32.

52. *Id.* at 132 (citing *Oncale*, 523 U.S. 75).

53. 850 F.3d 1248, 1255 (11th Cir. 2017). Plaintiff, Jameka Evans, filed a claim under Title VII against her employer Georgia Regional Hospital and her supervisors alleging that she was discriminated against, inter alia, because of her sexual orientation and gender non-conformity. *Id.* at 1251. Evans alleged that she was discriminated against on the basis of her sex for failing to carry herself in a traditional womanly manner, and although she did not broadcast her sexuality, she asserted that she was punished because her status as a gay female did not comport with her supervisor’s gender stereotypes. *Id.*

54. *Id.* at 1255. The prior decision *Blum v. Gulf Oil Corp.*, held that discharge for homosexuality is not prohibited by Title VII. 597 F.2d 936, 938 (5th Cir. 1979). Similar to the Second Circuit, the court stated that the precedent could only be overturned by an *en banc* panel or a Supreme Court decision (the court reasoned that *Price Waterhouse* and *Oncale* were not directly contrary to *Blum* and therefore did not overturn it). 850 F.3d at 1255.

Judge William Pryor's concurrence and Judge Robin S. Rosenbaum's dissent delve into the merits of allowing sexual orientation claims to stand alone under Title VII. Contrary to the view that sexual orientation claims and gender non-conforming claims are becoming blurred together, Judge Pryor argues that they remain two distinct legal claims.⁵⁵ Judge Pryor posits that the Title VII only protects *behaviors* that fail to conform to gender norms, and cannot protect an LGBT person based on *status* alone.⁵⁶ Judge Rosenbaum's dissent argues that discrimination based on sexual orientation necessarily implicates sex discrimination because of the inherent heteronormative stereotyped attraction of a person's sex.⁵⁷ In contrast to Judge Pryor's behavior based requirement, Judge Rosenbaum's focus is more on the employee's identity failing to conform to the employer's stereotypes regardless of whether the employee has actually acted on that identity yet.⁵⁸

Perhaps the most ground-breaking case addressing Title VII's relationship with sexual orientation discrimination was the Seventh Circuit's *en banc* decision that held that sexual orientation discrimination is per se actionable under Title VII, in *Hively v. Ivy Tech Community College of Indiana*.⁵⁹ The *en banc* court reversed the panel's decision and held that employment discrimination based on sexual orientation is actionable under Title VII.⁶⁰ The majority opinion dismissed the defense's

55. *Id.* at 1258.

56. *Id.* at 1259. Pryor relied on *Price Waterhouse and Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (recognizing an employer violated Title VII for adverse action taken against an employee that wished to transition before she had actually transitioned with Judge Pryor concurring). He argued these cases only "concerned behavior, not status, and that current doctrine does not protect on the basis of status alone." *Id.* Judge Pryor further argues assuming people that identify as gay do not conform to gender norms goes too far because it does not account for the "diversity of experiences of gay individuals," including individuals that choose to not date or choose to remain celibate. *Id.*

57. *Id.* at 1261. This echoes the "but for" argument the Second Circuit relied on in *Christiansen*. See *supra* note 50 and accompanying text.

58. Judge Rosenbaum draws this inference from *Glenn*. *Id.* at 1265.

59. 853 F.3d 339, 351-52 (7th Cir. 2017). Plaintiff, Kimberly Hively, was an openly lesbian teaching as a part-time, adjunct professor at Ivy Tech Community College's South Bend campus since 2000. *Id.* at 341. She applied for and was denied at least six full-time positions between 2009 and 2014 and in July 2014 her part-time contract was not renewed. *Id.* Believing that Ivy Tech was spurning her because of her sexual orientation, she filed a pro se charge with the EEOC claiming she was being discriminated against for her sexual orientation in violation of Title VII. *Id.*

60. *Id.* at 351-52. The Seventh Circuit panel to hear the case originally, relied heavily on precedent stating "our precedent holds that Title VII provides no protection from nor redress for discrimination on the basis of sexual orientation." *Hively v. Ivy Tech Cmty. Coll., S. Bend*, 830 F.3d 698, 718 (7th

argument relying on instructive congressional intent, and chose to pursue a more comparative analysis of statutory intent.⁶¹ The majority opinion found sexual orientation fell under “sex” for purposes of Title VII using both the traditional “but for” considering the employee’s sex approach, and the sex-based association approach.⁶²

Judge Posner offered a new analytical framework for finding a per se violation of Title VII for sexual orientation discrimination. In his concurring opinion, Judge Posner applied a unique approach of “judicial interpretive updating” in which he acknowledges that “sex” was not meant to include sexual orientation when the law was enacted, but since society has come to take a more positive view on homosexuality, the court was justified in updating Title VII to include sexual orientation.⁶³ Judge Flaum’s concurrence also found that sexual orientation discrimination was actionable under Title VII, but placed emphasis on the identity of homosexuality as opposed to relational aspects.⁶⁴

In addition to challenging the majority’s application of precedent cases, the dissent articulates two bases of reasoning for denying the extension of

Cir. 2016), as amended (Aug. 3, 2016), *reh'g en banc granted*, opinion vacated, No. 15-1720, 2016 WL 6768628 (7th Cir. Oct. 11, 2016), and on *reh'g en banc sub nom.* *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339 (7th Cir. 2017). The panel noted that the “writing [was] on the wall” that society cannot tolerate this discrimination much longer, and that the “court undoubtedly does not condone” the discrimination, but held that without a Supreme Court opinion or new legislation the court was bound by precedent. *Id.*

61. The majority, similar to EEOC, did not find failed congressional attempts to add sexual orientation to the statute, nor the original intent of the legislators as persuasive, finding that the Supreme Court opinions that broadened the scope beyond “cover[ing] far more than the simple decision of an employer not to hire a woman for Job A, or a man for Job B.” *Id.* at 345.

62. The majority relying on precedent, compared gender non-conforming cases, reasoned that under the traditional “but for” sex approach, “the discriminatory behavior does not exist without taking the victim’s biological sex ... into account.” *Id.* at 346-47. Similarly, under the associational approach, the majority used the *Loving* line of cases as an analogy to reason that “to the extent that the statute prohibits discrimination on the basis of the race of someone with whom the plaintiff associates, it also prohibits discrimination on the basis of the national origin, or the color, or the religion, or (as relevant here) the sex of the associate.” *Id.* at 347-49.

63. *Id.* at 353 (Posner, J., concurring).

64. *Id.* at 359 (Flaum, J., concurring). Judge Flaum’s reasoning uses a textual approach with the definition of homosexuality as being sexually attracted “to individuals of the ‘same sex.’” *Id.* at 358. Judge Flaum concluded that based on the definition of homosexuality, the consideration of an employee’s homosexuality must always take into account (A) the sex of the employee and (B) their sexual attraction to individuals of the same sex, therefore it is impossible to view homosexuality without taking into account the sex of the employee. *Id.*

sexual orientation protections.⁶⁵ First, the dissent argued that the law should be interpreted as a common, reasonable person would at the time it was enacted, and therefore it is unreasonable to conclude that “sex” includes sexual orientation.⁶⁶ Second, the dissent argued, that the majority improperly compared the treatment of a certain heterosexual gender with the homosexual version of the same gender. The dissent argued the proper comparison would be comparing two homosexuals of different genders.⁶⁷

In sum, as of the date of publication of this Note, Title VII appears to apply inconsistently to LGBT individuals across the United States. Although, circuit courts have generally come to a consensus that sex stereotyping claims does not exclude LGBT plaintiffs, discrimination on the grounds of sexual orientation alone varies by circuit. Some circuits, typically citing binding precedent, adhere to the rigid construction that Title VII’s sex classification does not apply to sexual orientation discrimination.⁶⁸ While the EEOC and the only two circuits to address the issue *en banc* have held that Title VII’s “because of sex” antidiscrimination prohibition applies to sexual orientation discrimination as it would apply to sex or gender discrimination.⁶⁹ Authorities granting Title VII protection to sexual orientation generally cite three arguments for concluding that sexual orientation is a logical subset of sex classification. First, the textual “but for sex” argument, reasons that sexual orientation discrimination is a subset of sex discrimination because sexual orientation is defined by one’s sex in relation to the sex of those to whom one in a relationship with, making it impossible for an employer to discriminate on the basis of sexual orientation without taking sex into account.⁷⁰ The

65. *Id.* at 360-74 (Sykes, J., dissenting).

66. The dissent finds it unreasonable to include sexual orientation within the meaning of sex because dictionary definitions and “ordinary meanings” of the word “sex” to an average English speaker do not include sexual orientation. *Id.* at 362-63. Furthermore, the dissent finds it persuasive that later enactments passed by congress have included “sexual orientation” and “sex” implying that they are in fact separate terms. *Id.*

67. The dissent argues that a person that is discriminating against gays and lesbians alike regardless of their gender purely for being homosexuals is only engaging in homophobia (and therefore not actionable under Title VII) and not sexism (which would be actionable under Title VII). *Id.* at 365.

68. *See Evans v. Georgia Reg’l Hosp.*, 850 F.3d 1248 (11th Cir. 2017); *see also Senegal v. Yum! Brands, Inc.*, No. CV H-18-1734, 2019 WL 448943, at *2 (S.D. Tex. Feb. 5, 2019) (holding Title VII does not protect against discrimination based on sexual orientation).

69. *See supra* notes 35, 14, and 2.

70. *See e.g., Zarda*, 883 F.3d at 131.

2019] An Updated Approach to Title VII Claims 307

second argument applies gender stereotypes, since sex stereotypes include assumptions or stereotypes about how members of a particular gender should be, including heteronormative views about whom they should be attracted to.⁷¹ And the third associational argument, reasons that sexual orientation discrimination is prohibited as associational discrimination because it's motivated by the employer's opposition to the employee's personal association among members of particular sexes.⁷²

II. HOW TO ACHIEVE LGBT PROTECTION

A. The Problem

Many courts and scholars have recognized that sexual orientation and gender identity have no relationship with workplace performance,⁷³ and yet individuals that identify as LGBT continue to face higher rates of employment related discrimination than their cis-gendered, heterosexual peers.⁷⁴ Such discriminatory environments affect more than just a person's ability to get and retain a job. Studies have shown that compared to heterosexual peers, LGBT people have higher rates of mental and physical health disparities in part due to discriminatory work environments.⁷⁵ Unfortunately, as the above history shows, attempts to remedy harmful employment discrimination against LGBTQ employees have only

71. *Id.*

72. *Id.*

73. See Brad Sears & Christy Mallory, ., Documented Evidence of Employment Discrimination & Its Effects on LGBT People, THE WILLIAMS INST., 2 (2011), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-2011.pdf> (citing to numerous court and scholar opinions that hold that LGBTQ identities have no actual relationship with the employee's ability to perform their job).

74. A collection of national surveys showed that of the LGB respondents: 18% had experienced employment discrimination in applying for and/or in keeping a job because of their sexual orientation, 10% were fired or denied a promotion because of their sexual orientation, and 58% reported hearing derogatory comments about sexual orientation and gender identity in their workplaces. *Id.*

75. Jennifer C. Pizer, Brad Sears, Christy Mallory, & Nan D. Hunter, *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 LOY. L.A. L. REV. 715, 738-42 (2012). "The 'minority stress model' suggests that prejudice, stigma, and discrimination create a social environment characterized by excess exposure to stress, which, in turn, results in health disparities for sexual minorities compared with heterosexuals." *Id.* at 738.

succeeded in a limited number of instances.⁷⁶ While some LGBT employees may be able to obtain a remedy from discrimination under Title VII if they can argue their circumstances fall under the sex-stereotyping caselaw,⁷⁷ the sex-stereotyping claim is far too limited to provide all of the vulnerable members of the LGBTQ community protection. And although residents of the Seventh and Second Circuits may, for the time being, sue for discrimination against homosexuals,⁷⁸ residents elsewhere may permissibly be terminated simply for being gay.

Furthermore, other queer identities and sexualities are left with even less certainty about what their legal rights are regarding employment. For example, bisexuals and asexuals do not easily fit into the sex-stereotyping claims, nor can they confidently rely on the Seventh or Second Circuits reasonings for per se coverage. To illustrate this point, consider the following hypothetical. Suppose a bisexual man is currently in a relationship with a woman, but is terminated when his employer finds out about his sexuality. As a man currently in a relationship with a woman, he would appear to be comporting with the heteronormative sex-stereotype that men should date women. Furthermore, under the associational view, he could not allege that he was terminated because of the sex he is currently romantically involved with because their respective sexes again comport with traditional values. It is unclear how even in the Second or Seventh Circuits his identity would matter to a court if his current relationship mimicked a heteronormative one.⁷⁹ The artificial partition of his identity and his current state of romantic involvement produces a strange predicament, where as a bisexual he would move in and out of legal protection as he entered relationships with partners of differing

76. See *supra* notes 44, 53, and 59.

77. Although the Supreme Court has not explicitly addressed sex-stereotype discrimination in the context of transgender employees so it is not guaranteed.

78. See *infra* Part I.B.

79. While some might doubt that a bisexual person with a partner of the opposite sex would be discriminated against, studies have shown that bisexuals face discrimination at higher rates including discrimination within the queer community from gays and lesbians. See Kim Parker, *Among LGBT Americans, Bisexuals Stand Out When It Comes to Identity, Acceptance*, FACT TANK, Feb. 20, 2015, available at <http://www.pewresearch.org/fact-tank/2015/02/20/among-lgbt-americans-bisexuals-stand-out-when-it-comes-to-identity-acceptance/>; see also Eric Ethington, *New report highlights discrimination against bisexuals by both gays and straights*, LGBTQ NATION, Mar. 15, 2011, available at <https://www.lgbtqnation.com/2011/03/new-report-highlights-discrimination-against-bisexuals-by-both-gays-and-straights/>.

genders. The current legal framework leads to similar confusion when considering other identities like asexuality or polyamorists. Even the textual “but for sex” argument does not appear to protect these identities that are vulnerable to discrimination because of their relationships, independent of the employee’s sex. How does a court begin to evaluate whether something falls outside sex-stereotypes when there is no other partner, or when there are multiple partners? Using a dichotomous view of sex stereotypes to grant or deny protection from discrimination is antiquated, and it is insufficient to grant vulnerable identities protection that continue to emerge (or become more visible) as society evolves.

B. Legislative Remedy?

Some activists and judges, including the dissent in *Hively* and the concurrence in *Evans*, argue that whether Title VII provides a remedy for sexual orientation discrimination must be addressed through legislative action.⁸⁰ Congressional efforts to amend Title VII to add sexual orientation as a distinct protected class can be traced as far back as 1974.⁸¹ However, that initial attempt to add sexual orientation as a protected class to Title VII, as well as the numerous attempts since in nearly every legislative session, have been unsuccessful.⁸² The argument that Title VII must be legislative amended to add LGBT protected classifications is supported by the classical canon that substantive changes in statutory based law should come in the form of legislation and not through judicial activism.⁸³ Amending Title VII to include sexual orientation and gender identity

80. *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 361 (7th Cir. 2017) (Sykes, J., dissenting); *Evans v. Georgia Reg’l Hosp.*, 850 F.3d 1248, 1261 (11th Cir. 2017) (Pryor, J., concurring); see also Ryan Thoreson, *Why the US needs the Equality Act*, HUMAN RIGHTS CAMPAIGN, Mar. 16, 2019, <https://www.hrw.org/news/2019/03/16/why-us-needs-equality-act> (arguing that even if Title VII covers sexual orientation, federal legislation is a better means of clarifying the law and protecting LGBT people).

81. See H.R. 15692, 93d Cong. (1974); William C. Sung, *Taking the Fight Back to Title VII: A Case for Redefining “Because of Sex” to Include Gender Stereotypes, Sexual Orientation, and Gender Identity*, 84 S. CAL. L. REV. 487, 496 (2011).

82. *Evans.*, 850 F.3d at 1261 (collecting proposed legislative actions that attempted to add sexual orientation as a protected class to Title VII).

83. See e.g., *Hively*, 853 F.3d at 361 (Sykes, J., dissenting) (arguing that LGBT protection inclusion in Title VII must come from elected representatives, and not the judicial branch).

would quickly provide clarity and uniformity for employees and employers across the U.S. For example, a masculine gay man that was discriminated against by their employer based on his sexuality would no longer have to fear whether the court would accept the proxy argument that their particular homophobic discrimination was actually discrimination based on their failure to conform to gender norms.

Additionally, the administrative burden placed on Congress and the courts would be relatively low. The legislature would not have to draft new administrative procedures or new remedies as they would merely be allowing the vulnerable class to utilize the already well-established system under Title VII. And although there may be an increase in the number of plaintiffs that are able to seek remedy in the courts with the widening of the protected classification, the burden on the courts would not be substantial as it would simultaneously simplify suits that already attempt to bring the same claims under proxy legal constructs that attempt to mold the discrimination into sex-stereotyping claims. Furthermore, for originalists, a legislative amendment satisfies the preference that social policy advancement is more appropriate for Congress and not for courts.

Alternatively, another option for protecting LGBTQ employees from workplace discrimination would be for Congress to pass a standalone anti-discrimination bill. A clear example of this type of legislation is the Employment Non-Discrimination Act (“ENDA”) proposed in the 103rd Congress.⁸⁴ ENDA came on the heels of the Americans with Disabilities Act,⁸⁵ which successfully used standalone legislation to provide anti-discrimination protection to classes not directly covered under Title VII. Similar to amending Title VII, a bill like ENDA would satisfy the textualist view leaving discretion of social progress to the legislature. It would also help clarify the rights of employees and set a unified national standard. However, as a standalone piece of legislation, it does not have the same benefit of the low administrative burden of implementation that is possible through amending Title VII. Although ENDA was structured to

84. See Employment Non-Discrimination Act of 1994, H.R. 4636, 103d Cong. (1994); Employment Non-Discrimination Act of 1994, S. 2238, 103d Cong. (1994).

85. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 and 47 U.S.C.).

parallel Title VII enforcement and remedies,⁸⁶ actual enforcement procedures and court decisions would not have the forty-year precedent of Title VII to actually ensure the bill is enacted as the legislators intended. Furthermore, as ENDA shows, a standalone legislative effort is far more susceptible to compromises that render it ineffective.⁸⁷ Although admirable for attempting to advance LGBTQ rights, the standalone bills have suffered from the same lack of Congressional support as Title VII amendments. For example, the Employment Nondiscrimination Act of 2013 that would have prohibited employment discrimination on the basis of sexual orientation or gender identity never even made it passed committee referral.⁸⁸

At first glance, an amendment to Title VII to incorporate LGBTQ protected classifications would be the ideal route to protect employees. However, every day spent waiting for Congress to act unnecessarily subjects vulnerable members of our population to wrongful discrimination. Although a bill to amend Title VII was introduced in the House of Representatives in May of 2017, the bill did not even get a committee vote.⁸⁹ In fact, none of the bills proposed in the last ten years that addressed LGBT employment discrimination passed.⁹⁰ Furthermore, President Trump's administration has repeatedly taken actions against LGBT interests,⁹¹ making it highly probable that Trump would veto any expansion of protection passed by Congress.

While some might attribute the failure to institute employment protections of LGBTQ employees as the will of the people, public sentiment contradicts this argument. A 2014 study showed “[m]ore than 7-in-10 (72%) Americans favor laws protecting gay and lesbian people from

86. JODY FEDER & CYNTHIA BROUGHNER, CONG. RESEARCH SERV., R40934, SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION IN EMPLOYMENT: A LEGAL ANALYSIS OF THE EMPLOYMENT NON-DISCRIMINATION ACT (ENDA) (2013).

87. See Sung, *supra* note 10, at 508, 510 (highlighting ENDA's weaker ability to protect LGBT minorities due to the “expansive religious exemptions” and the inability to bring disparate impact claims).

88. S. 815, 113th Cong. (2013).

89. H.R. 2282, 115th Cong. (2017).

90. See *A History of Federal Non-Discrimination Legislation*, HUMAN RIGHTS CAMPAIGN (Oct. 20, 2017), <https://www.hrc.org/resources/a-history-of-federal-non-discrimination-legislation>.

91. See, e.g., *Trump's Record of Action Against Transgender People*, NATIONAL CENTER FOR TRANSGENDER EQUALITY, (Feb. 27, 2019) available at <https://transequality.org/the-discrimination-administration>.

job discrimination, compared to less than one-quarter (23%) who oppose.⁹² Congress has been historically prejudiced against the LGBTQ community in spite of growing tolerance and understanding by the public, Congress's only response has been to curb the rights of LGBTQ people, evidenced by legislation like the Defense of Marriage Act.⁹³ For example, polls show that public support for legal recognition of gay marriage reached a majority as far back as 2011 and continued to grow over the years,⁹⁴ but no Congressional action to legalize gay marriage ever made it close to a vote.⁹⁵ In reality, the impetus of Congress to act in the interests of the LGBTQ community is not surprising considering the disproportionately low number of federal legislators that identify as LGBT.⁹⁶ Similarly, state legislatures cannot be relied on for a relief. The majority of state legislatures have failed to pass laws that would protect LGBT employees from discrimination, leaving only a patchwork of protection across the US.⁹⁷

C. Judicial Remedy?

Considering Congress's history of failing to keep up with social science advances and the evolution of American culture, courts must be willing

92. Robert P. Jones, Daniel Cox, & Juhem Navarro-Rivera, *A Shifting Landscape: A Decade of Change in American Attitudes about Same-sex Marriage and LGBT Issues*, PRRI (Feb. 26, 2014), <http://www.prrri.org/research/2014-lgbt-survey/>.

93. The Defense of Marriage Act (DOMA) (Pub. L. 104–199, 110 Stat. 2419, enacted September 21, 1996, 1 U.S.C. § 7 and 28 U.S.C. § 1738C) (ruled unconstitutional by the Supreme Court).

94. Justin McCarthy, *U.S. Support for Gay Marriage Edges to New High*, GALLUP (May 15, 2017), <http://news.gallup.com/poll/210566/support-gay-marriage-edges-new-high.aspx>.

95. A proposed bill to repeal the Defense of Marriage Act was introduced in both the House and the Senate, but neither made it further than committee referral. *See* H.R. 2523, 113th Cong. (2013); S. 1236 113th Cong. (2013).

96. Exact proportions are difficult to quantify for LGBT populations as relevant data. However, a 2017 Gallup poll that showed 4.1% of respondents self-identified as LGBT, and yet in 2017 there were only seven of the 535 congressional members (or 1.3%) that publicly identify as LGBT. *See* Gary J. Gates, *In U.S., More Adults Identifying as LGBT*, GALLUP (Jan. 11, 2017), <http://news.gallup.com/poll/201731/lgbt-identification-rises.aspx>.

97. As of 2017, only twenty states and the District of Columbia have employment non-discrimination laws covering sexual orientation and gender identity, with two more states have laws covering sexual orientation only. Furthermore, three states have passed laws that prevent local governments from passing or enforcing non-discrimination laws. *See Non-Discrimination Laws, MOVEMENT ADVANCEMENT PROJECT* (Oct. 20, 2017), available at http://www.lgbtmap.org/equality-maps/non_discrimination_laws.

2019] An Updated Approach to Title VII Claims 313

enforce the spirit of Title VII by extending the antidiscrimination protections to historically marginalized and vulnerable people subjected to wrongful prejudice. The Supreme Court's decisions in *Oncale* and *Price Waterhouse* reinforce the idea that in order to strike out evils like discrimination courts may be called to challenge the rigidity of terms once thought definite, like the meaning of sex.⁹⁸ Decisions that followed incrementally expanded the scope of protection as society's understanding of underlying prejudicial biases evolved. However, attempting to fit modern understandings of identities into antiquated terms used over half a century ago misses the point.

The core purpose of Title VII was to protect the fundamental right for a person to work and provide for themselves without baseless discrimination.⁹⁹ The provision's list of protected classes were some of the identities most subjected to discrimination at the time of the enactment, to the extent that the legislators at the time must have felt were worthy of protecting. However, viewing the list of race, color, religion, sex, or national origin as an exhaustive list of identities deserving of protection misplaces the wisdom of the drafting legislators and the spirit of the law. Title VII was enacted to protect marginalized employees that had a history of being discriminated against and to combat the evils Congress saw in the employment setting.¹⁰⁰ The wisdom of Congress providing a vehicle to combat rampant discrimination, should not imply that Congress was just as wise in selecting what groups were included and worthy of protection. The classes expressly included surely did not include all minorities that were wrongly discriminated against at the time of enactment, but rather the minorities that the legislators were willing to defend. It is not surprising that LGBTQ identities were not included as protected classes since at that time any non-heteronormative identity was publicly demoralized and taboo.¹⁰¹

It is the proposition of this Note that in the absence of Congressional will to act, rather than attempting to redefine the classes enumerated in the

98. See *supra* notes 31 and 24.

99. Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. L. REV. 431 (1966).

100. *Id.*

101. In fact, homosexuality was considered a pathological illness by the American Psychiatric Association until 1973. See Jack Drescher, *Out of DSM: Depathologizing Homosexuality*, 5 BEHAV. SCI. 565 (2015).

text of Title VII, courts should apply an approach akin to Judge Posner's "judicial interpretive updating" to enforce the spirit of the law. This Note is by no means arguing for the judiciary to act on its own will without restraint. Instead, with respect to the narrow issue of what identities can seek recovery for baseless discrimination, courts should be enabled to recognize coverage for vulnerable identities that are closely related to those enumerated categories, but that don't neatly fit within them. Courts historically have conducted similar analysis with regard to applying differing levels of scrutiny to equal protection claims.¹⁰² Under this approach, courts should seek to serve the spirit of the law protecting marginalized groups from wrongful discrimination with a modern lens that considers current disadvantaged identities. And as long as the courts utilize similar factors used for determining suspect classifications, the extension or protections should avoid unfair judicial abuse (like granting protective status to the minority class of billionaires) because only those that are truly disadvantaged would be entitled protective status. While this approach may reach the same outcome for some identities as attempting to redefine the term "sex" in Title VII, it goes further to allow protection for other marginalized identities that may fall outside the obsolete sexual and gender binaries. In particular, this approach would enable courts to squarely address minority identities like bisexuality and asexuality and extend clear legal coverage even though their identity is not based on the sex of them and their partners.¹⁰³

This approach, while bold, is consistent with Supreme Court precedent. In *Price Waterhouse*, the Court's expansion of protection to prohibit sex-stereotyping under Title VII was supported by social science advancements that illustrated the harmful nature of it.¹⁰⁴ *Price Waterhouse*

102. See, e.g., Caroline Marschilok, et. al., *Equal Protection*, 18 GEO. J. GENDER & L. 537, 542-43 (2017) (noting that courts have used factors including history of discrimination, immutability of the identity, and disadvantaged positions in the political process in order to determine which classifications should be considered suspect for equal protection analysis).

103. Under the EEOC/*Hively* reasoning, a court may find that these identities fall under a more gender non-conforming behavior because they do not conform to the stereotype of being attracted only to the opposite sex, but it is unclear since both decisions relied on multiple prongs including the sex of the employee and their partners. At the very least a more liberal approach allows for courts to take a more honest and straight forward approach.

104. The American Psychological Association played an active role in providing analysis and briefs to the trial court and the Supreme Court in understanding the background of the study of sex-

2019] An Updated Approach to Title VII Claims 315

shows the Court's willingness to step in as societal understanding of social norms evolve and reveal harmful discrimination that has no justification in the workplace.

CONCLUSION

Federal courts should adopt a more liberal allowance for claims under Title VII for discrimination against LGBTQ employees. A person's LGBTQ identity should never be permissible grounds for discrimination in employment. The irreversible harm to LGBTQ individuals reaches far beyond earning a paycheck. Without judicial intervention, LGBTQ employees are left with an inconsistent patchwork of protections that results in disparate deliverance of justice across the country. Courts should be enabled to approach Title VII employment discrimination cases with an adaptable modern lens that is better able to recognize the advancements in social understandings of identities and the groups subjected to wrongful discrimination. Courts are well equipped and have experience analyzing potential classes of identities for characteristics of vulnerability and should be able to exercise the narrow authority to extend protected status in the true spirit of anti-discrimination law. Congress has proven unwilling and ineffective at protecting the rights of members of the LGBTQ community in the past and legislative remedy currently appears illusory at best. Thus, it falls on the courts to see that the spirit of Title VII is enforced and the evils of discrimination against LGBTQ employees is eradicated.

stereotyping and its relevance for the case. See Susan T. Fiske et al., *Social Science Research on Trial: Use of Sex Stereotyping Research in Price Waterhouse v. Hopkins*, 46 AM. PSYCHOLOGIST 1049 (1991).