COMMENT

Working Out: Conflicting Title VII Approaches to Sex Discrimination and Sexual Orientation

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INTRODUCTION

Imagine Generic Corp., a typical American business which has no policy prohibiting discrimination against sexual orientation.[1] Moreover, assume Generic resides in a state that has no laws protecting gays and lesbians from such discrimination.[2] Now, envision Jane Smith, an employee who has worked at the company for the last five years and has an impeccable personnel file. Oh, and one more thing — Jane is a lesbian.

Although Jane does everything she can to keep her lifestyle a secret, her supervisor harasses her for being a lesbian.[3] He makes derogatory jokes about homosexuals, and uses offensive words such as "dyke" and "fag" whenever Jane is nearby.[4] As time passes, the harassment intensifies. The supervisor leaves pornographic male pictures on Jane's

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[1] Federal law does not require companies to protect gays and lesbians from discrimination in the workplace. *See* 42 U.S.C. § 2000e (1991) (prohibiting discrimination based on race, color, national origin, religion, and sex). *But see* WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 236 (1999) (observing some employers voluntarily added sexual orientation to their non-discrimination policies); HUMAN RIGHTS CAMPAIGN, THE STATE OF THE WORKPLACE FOR LESBIAN, GAY, BISEXUAL AND TRANSGENDERED AMERICANS 6 (2000) (noting since 1996, majority of Fortune 500 companies have included sexual orientation in their nondiscrimination policies).

[2] Only eleven states and the District of Columbia include sexual orientation in their anti-discrimination statutes: California; Connecticut; Hawaii; Massachusetts; Minnesota; Nevada; New Hampshire; New Jersey; Rhode Island; Vermont; and Wisconsin. HUMAN RIGHTS CAMPAIGN, *supra* note 1, at 5; *see also* ESKRIDGE, *supra* note 1, at 356-61 (noting anti-discrimination statutes of many municipalities protect sexual orientation even when their state's statute does not).

[3] This hypothetical represents a typical claim of sexual orientation discrimination and harassment. *See, e.g.*, Hamner v. St. Vincent Hosp. & Health Care Ctr., 224 F.3d 701, 703 (7th Cir. 2000) (noting supervisor harassed plaintiff about his homosexuality); Higgins v. New Balance Athletic Shoe, 194 F.3d 252, 257 (1st Cir. 1999) (reviewing plaintiff's claim co-workers mistreated him because he was gay); Reterrer v. Whirlpool Corp., 729 N.E.2d 760, 760 (Ohio 2000) (hearing on appeal plaintiff's claim co-workers ridiculed him because of his sexual orientation).

[4] *See Hamner*, 224 F.3d at 703 (stating supervisor flipped his wrists whenever plaintiff was nearby); Dillon v. Frank, No. 90-2290, 1992 U.S. App. LEXIS 766, at *2 (6th Cir. Jan. 15, 1992) (noting plaintiff suffered from co-worker's taunts of "fag" and "Dillon sucks dicks"); Montgomery v. Indep. Sch. Dist. No. 709, 109 F. Supp. 2d 1081, 1084 (D. Minn. 2000) (noting plaintiff endured classmates' verbal abuse such as "homo", "queer", and "pansy").

desk.[5] He walks by her desk, telling her she "just needs a real man to show her a good time."

Jane finally complains to Generic's human resources department. Two days later, Jane is fired. Can she sue for sexual harassment? No.[6] Can she sue for retaliation because she was fired for complaining? No.[7] Jane has no legal remedy under current federal employment law.[8] In fact, because her state has no anti-discrimination law protecting gays and lesbians from arbitrary discrimination, she has no legal recourse at all.[9] In other words, Jane has two choices — endure the harassment and ask for her job back, or seek other employment.

In 1964, Congress enacted Title VII of the Civil Rights Act.[10] This statute prohibits employment practices that discriminate against individuals on the basis of their race, color, religion, national origin or sex.[11] Regarding the last category, courts sharply disagree on the proper interpretation of the term "sex."[12] In the absence of legislative guidance,

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[5] *See, e.g.*, Zalewski v. Overlook Hosp., 692 A.2d 131, 131-32 (N.J. Super. Ct. Law Div. 1996) (hearing motion for summary judgment for case in which co-workers placed pornographic pictures and epitaphs in plaintiff's desk).

[6] The supervisor did not harass her because she is a woman, rather he harassed her because she is a lesbian. *See, e.g.*, Spearman v. Ford Motor Co., 231 F.3d 1080, 1085-86 (7th Cir. 2000) (rejecting plaintiff's sexual harassment claim because co-worker harassed him because of his perceived homosexuality, not his sex). The federal statute covering employment discrimination, Title VII, does not protect discrimination on the basis of sexual orientation. *See* 42 U.S.C. § 2000e-2(a) (prohibiting discrimination based on race, color, religion, sex, or national origin); *Hamner*, 224 F.3d at 704 (holding Title VII does not prohibit sexual orientation harassment). Jane's state also has no law protecting against sexual orientation discrimination.

[7] *See* 42 U.S.C. § 2000e-3. A retaliation claim requires a reasonable belief that the opposed employment practice was unlawful. *See* Moyo v. Gomez, 32 F.3d 1382, 1386 (9th Cir. 1994) (holding that plaintiff has valid retaliation claim if reasonably and subjectively believed employer's practice to be unlawful, even though it is not). Federal law has never proscribed discrimination on the basis of sexual orientation. Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000). Hence, it was unreasonable for Jane to believe that such a practice was unlawful. *Hamner*, 224 F.3d at 707.

[8] *See Simonton*, 232 F.3d at 35 (holding Title VII does not proscribe sexual orientation harassment); Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1087 (7th Cir. 1984) (noting federal law does not prohibit discrimination on basis of transsexuality); Smith v. Liberty Mut. Ins., 569 F.2d 325, 328 (5th Cir. 1978) (ruling Civil Rights Act does not forbid discrimination based on sexual preference).

[9] *See* ESKRIDGE, *supra* note 1, at 231-33 (noting federal law offers no protection to gays and lesbians against private employment discrimination).

[10] Pub. L. No. 88-352, 78 Stat. 241, 241-68 (1964) (codified as amended at 42 U.S.C. § 2000e to -17 (1994)).

[11] 42 U.S.C. § 2000e-2(a).

[12] *See, e.g., Simonton*, 232 F.3d at 36 (holding "sex" under Title VII refers to male or female, not sexual affiliation); *Hamner*, 224 F.3d at 704 (defining "sex" under Title VII as biological male or biological female); Hopkins v. Balt. Gas & Elec. Co., 77 F.3d 745, 749 n.1

federal courts traditionally held that sex discrimination does not encompass discrimination based on an individual's sexual orientation.[13] This traditional perspective emphasizes the plain meaning of the term "sex" as one's biological or anatomical sex.[14]

A recent Ninth Circuit opinion challenged this traditional view.[15] The decision suggested that individuals may have an avenue to combat sexual orientation discrimination under Title VII on the basis of sex discrimination.[16] According to the Ninth Circuit, the term "sex" may include one's sexual orientation in addition to biological sex.[17] A minority view, the Ninth Circuit's approach to sex discrimination may recognize the need to protect against sexual orientation discrimination in employment and elsewhere.[18]

This comment proposes that Congress should extend Title VII to prohibit employment discrimination on the basis of sexual orientation. Part I analyzes the history of discrimination against gays and lesbians. Furthermore, it details the legislative background of Title VII, the judicial expansion of sex discrimination, and the efforts to extend protection to

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(4th Cir. 1996) (holding "sex" denotes simply "man" or "woman"); Dillon v. Frank, No. 90-2290, 1992 U.S. App. LEXIS 766, at *11 n.2 (6th Cir. Jan. 1992) (limiting "sex" under Title VII to chromosomal sex). *But see* Schwenk v. Hartford, 204 F.3d 1187, 1201-02 (9th Cir. 2000) (interpreting "sex" to include biological sex and sexual characteristics).

[13] *See* Wrightson v. Pizza Hut of Am., 99 F.3d 138, 143 (4th Cir. 1996) (finding no cause of action under Title VII for sexual orientation discrimination); Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989) (holding Title VII does not prohibit discrimination against homosexuals); *Ulane*, 742 F.2d at 1085 (noting Congress never intended "sex" under Title VII to include anything other than the traditional concept of sex); Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979) (finding Title VII does not proscribe firing employee because of sexual orientation); *see also* Vandeventer v. Wabash Nat'l Corp., 887 F. Supp. 1178, 1181 (N.D. Ind. 1995) (stating it is irrelevant whether harasser is homosexual, so long as harasser treats one sex differently from another). Note, however, that courts have found Title VII to prohibit same-sex sexual harassment committed by a homosexual. *See* Fredette v. BVP Mgmt. Assoc., 112 F.3d 1503, 1505 (11th Cir. 1997) (finding cause of action where homosexual supervisor harassed heterosexual employee); *Wrightson*, 99 F.3d at 139-41 (finding hostile work environment where homosexual employer discriminated against employee of same sex or allowed gay employee to harass same-sex co-worker).

[14] *See, e.g., Ulane*, 742 F.2d at 1085 (defining "sex" as anatomical sex rather than gender); *Dillon*, No. 90-2290, 1992 U.S. App. LEXIS 766, at *11 n.2 (noting "sex" is limited to chromosomal sex).

[15] *Schwenk*, 204 F.3d at 1187, *cited in Simonton*, 232 F.3d at 37.

[16] *Schwenk*, 204 F.3d at 1201-02.

[17] *Id.*; *see Simonton*, 232 F.3d at 37-38 (noting *Schwenk* court suggests Title VII protects persons who fail to conform to gender norms).

[18] *Schwenk*, 204 F.3d at 1201-02 (finding Gender-Motivated Violence Act protects transsexuals because term "gender" includes sexual identity).

gays and lesbians.[19] Part II examines the current state of the law by comparing the conflicting approaches of two circuit courts regarding claims of sexual orientation discrimination.[20] Part III proposes a model solution that suggests that the Supreme Court should add sexual orientation discrimination to sex discrimination under Title VII. This section first argues that an expansive interpretation furthers the legislative purpose in enacting the statute. Second, it contends that Title VII is remedial legislation which requires a broad statutory interpretation by the courts. Finally, this comment addresses the public policy reasons that justify expanding Title VII protection to include sexual orientation.

I. BACKGROUND

The history of discrimination and prejudice against gays and lesbians in the United States raises significant Title VII issues.[21] Title VII of the 1964 Civil Rights Act is the seminal federal anti-discrimination statute in employment law.[22] The statute addresses discrimination based on

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[19] The term "gay" is sometimes used as a universal term to include "lesbian," "bisexual," and "transsexual." Janet Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915, 916 (1989). This paper uses each adjective independently. Therefore, the term "gay" refers only to homosexual men.

[20] *Compare* Hamner v. St. Vincent Hosp. & Health Care Ctr., 224 F.3d 701, 704 (7th Cir. 2000) (restricting Title VII meaning of "sex" to biological sex only), *with Schwenk*, 204 F.3d at 1201-02 (holding "sex" encompasses both biological sex and gender).

[21] *See, e.g.*, Nance v. M.D. Health Plan, Inc., 47 F. Supp. 2d 276, 279 (D. Conn. 1999) (noting gay and lesbian employees go to great lengths to conceal their sexual orientation from co-workers and employer for fear of anti-gay animus). *Compare* 142 CONG. REC. S9986 (daily ed. Sept. 6, 1996) (statement of Sen. Kennedy) (noting closeted gays and lesbians fear discovery by employers while openly gay employees suffer from overt job discrimination), *and* 142 CONG. REC. S10129-30 (daily ed. Sept. 10, 1996) (statement of Sen. Moseley-Braun) (asserting gays and lesbians need protection from workplace discrimination to enjoy stable, healthy, and productive work environment), *with* 142 CONG. REC. S9992 (daily ed. Sept. 6, 1996) (statement of Sen. Hatch) (arguing extending employment protection to include sexual orientation will override moral and religious sensibilities of millions of Americans), *and* 142 CONG. REC. S9998 (daily ed. Sept. 6, 1996) (statement of Sen. Nickles) (arguing extending employment protection to gays and lesbians will compel employers to keep track of employees' sexual preferences and result in increased litigation). *See generally* ESKRIDGE, *supra* note 1, at 231-38 (criticizing absence of sexual orientation from federal employment anti-discrimination law); Chai R. Feldblum, *Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 U. PITT. L. REV. 237, 306-07 (1996) (criticizing Sen. Kassebaum's position that ENDA would extend federal civil rights law for first time to provide protection based on behavior).

[22] 42 U.S.C. § 2000e. Title VII serves as the model for other federal employment statutes and proposed bills. *See* Employment Non-Discrimination Act of 1999, H.R. 2355, 106th Cong. § 12 (1999) (adopting Title VII's procedures and remedies); *see also* DeMarco v.

individual disparate treatment as well as retaliatory discrimination.[23] Traditionally, federal courts have narrowly defined the term "sex" under Title VII, restricting it to a plain meaning interpretation.[24] As a result, no federal court has construed Title VII to proscribe sexual orientation discrimination.[25] However, a recent case suggests a broader interpretation of "sex" within the meaning of Title VII.[26] In that case, the court paralleled its interpretation of the Gender-Motivated Violence Act ("GMVA") to the interpretation of "sex" under Title VII.[27] Currently, federal law does not shield gays and lesbians from discrimination in the workplace.[28] However, recently proposed legislation advocates the

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Holy Cross High School, 4 F.3d 166, 170 (2d Cir. 1993) (using Title VII analysis to determine ADEA applicability to religious institutions). *Compare* 42 U.S.C. § 2000e-5 (outlining Title VII's enforcement provisions), *with* Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-26 (1994) (modeling complaint procedures after Title VII), *and* Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101, 12117(a) (1994) (incorporating Title VII remedies and procedures).

[23] 42 U.S.C. §§ 2000e-2(a) to -3(a); *see* Tex. Dep't of Cmty Affairs v. Burdine, 450 U.S. 248, 253 (1981) (setting forth prima facie case for individual disparate treatment); Payne v. McLemore's Wholesale & Retail Stores, 654 F.2d 1130, 1136 (5th Cir. 1981) (explaining prima facie case for retaliation under Title VII). Title VII also grants a cause of action for disparate impact. 42 U.S.C. § 2000e-2(k); *see* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (outlining prima facie case for disparate impact under Title VII).

[24] *See* Simonton v. Runyon, 232 F.3d 33, 36 (2d Cir. 2000) (defining "sex" as male or female, and not sexual orientation); *Hamner*, 224 F.3d at 704 (interpreting "sex" to mean biological male or biological female, and not sexual orientation); Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984) (construing "sex" to mean anatomical sex only, rather than gender); DeSantis v. Pac. Tel. & Tel., 608 F.2d 327, 329 (9th Cir. 1979) (holding "sex" under Title VII does not encompass sexual orientation); Smith v. Liberty Mut. Ins. Co., 569 F.2d 325, 326 (5th Cir. 1978) (finding "sex" denotes male and female only and does not encompass effeminacy).

[25] *Simonton*, 232 F.3d at 35; *Hamner*, 224 F.3d at 704; *Liberty Mut. Ins. Co.*, 569 F.2d at 328; *see also*, Marie Elena Peluso, Note, *Tempering Title VII's Straight Arrow Approach: Recognizing and Protecting Gay Victims of Employment Discrimination*, 46 VAND. L. REV. 1533, 1535 (1993) (noting no court has interpreted Title VII to proscribe sexual orientation discrimination).

[26] *See* Schwenk v. Hartford, 204 F.3d 1187, 1201-02 (interpreting "sex" to include biological sex and gender, or sexual identity), *cited in Simonton*, 232 F.3d at 37; *see infra* pp. 31-32 and note 140 (discussing distinction between sex and gender).

[27] *Schwenk*, 204 F.3d at 1201 n.12; *Simonton*, 232 F.3d at 37; *see* Gender Motivated Violence Act ("GMVA"), 42 U.S.C. § 13981(c) (1994) (creating civil remedy for victims of gender-motivated violence), *overruled by* United States v. Morrison, 120 S. Ct. 1740 (2000).

[28] *See Simonton*, 232 F.3d at 35 (affirming no circuit has recognized cause of action under Title VII for sexual orientation harassment or discrimination); *Hamner*, 224 F.3d at 704 (stating harassment based solely on sexual orientation is not unlawful under Title VII); *Liberty Mutual*, 569 F.2d at 326 (noting Civil Rights Act does not forbid discrimination based on sexual preference); *see also* Samuel A. Marcosson, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L.J. 1, 3 (1992) (recognizing well-settled law that Title VII does not proscribe sexual orientation discrimination).

creation of a cause of action for discrimination based on sexual orientation.[29]

A. History of Discrimination Against Gays and Lesbians

The United States has a long and pervasive history of severe prejudice and hatred toward gay and lesbian individuals.[30] Generally, society has held negative stereotypes and assumptions about homosexuality[31] that, in effect, treat gays and lesbians like second class citizens.[32] In fact, until 1973, the American Psychiatric Association listed homosexuality in its registry of mental illnesses.[33] Despite the delisting, American society continues to regard homosexuality negatively.[34]

Congress has repeatedly discussed and refused to extend the Civil Rights Act to gays and lesbians. H.R. 166, 94th Cong. (1975); H.R. 451, 95th Cong. (1977); H.R. 775, 95th Cong. (1977); H.R. 2074, 96th Cong. (1980); H.R. 1454, 97th Cong. (1982).

[29] Democrats first proposed the Employment Non-Discrimination Act ("ENDA") in 1994, but the bill failed. ENDA of 1994, H.R. 4636, 103rd Cong. (1994). Democrats proposed amended versions of ENDA in 1995, 1996, 1997, and 1999. H.R. 1863, 104th Cong. (1995); S. 2056, 104th Cong. (1996); S. 869, 105th Cong. (1997); H.R. 2355, 106th Cong. (1999).

[30] *See* Peluso, *supra* note 25, at 1554 n.170 (quoting High Tech Gays v. Def. Indus. Sec. Clearance Office, 909 F.2d 375, 377 (9th Cir. 1987) (Canby, J., dissenting)); *see also* EDITORS OF HARVARD LAW REVIEW, SEXUAL ORIENTATION AND THE LAW 1-9 (1990) [hereinafter SEXUAL ORIENTATION] (discussing history of discrimination against gays and lesbians); ESKRIDGE, *supra* note 1, at 57-97 (detailing history of state-sanctioned discrimination against gays and lesbians in criminal justice system, government employment, privacy laws, and First Amendment rights); RICHARD D. MOHR, GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY AND LAW 22-27 (1988) (detailing history of society's negative stereotypes and stigmas about homosexuality). *See generally* ERIC MARCUS, MAKING HISTORY: THE STRUGGLE FOR GAY AND LESBIAN EQUAL RIGHTS (1992) (assembling anecdotes regarding sexual orientation discrimination over last fifty years).

[31] *See* MOHR, *supra* note 30, at 22-27 (giving examples of prevalent anti-gay stereotypes, such as gays are sex-crazed maniacs, and gays are child molesters); *see also* 142 CONG. REC. S9998 (daily ed. Sept. 6, 1996) (statement of Sen. Nickles) (asserting bisexuals are promiscuous by definition, and inferring that gays, lesbians, and bisexuals are poor role models for children).

[32] *See* ESKRIDGE, *supra* note 1, at 205-38 (asserting current legal system regards gays and lesbians as second class citizens by explicitly discriminating against them and refusing them same rights as heterosexuals); *but see Employment Non-Discrimination Act of 1997: Hearing on S. 869 Before the S. Labor & Human Res. Comm.*, 105th Cong. 4 (1997) (statement of Sen. Kennedy) [hereinafter *1997 ENDA Hearing*] (asserting gays and lesbians are not second class citizens).

[33] MOHR, *supra* note 30, at 23 (citing RONALD BAYER, HOMOSEXUALITY AND AMERICAN PSYCHIATRY (1981)). It took twenty years for the American Psychiatric Association to remove homosexuality from the registry of mental illnesses. *See id.* (explaining1950s clinical study by Evelyn Hooker demonstrated psychiatrists could not tell gay files from straight ones).

[34] *See, e.g.*, Nance v. M.D. Health Plan, Inc., 47 F. Supp. 2d 276, 279 (D. Conn. 1999)

Consequently, gays and lesbians have suffered, and continue to suffer from, discriminatory and unequal treatment in nearly every area of their lives.[35] For example, gays and lesbians cannot marry the partner of their choice because no state or federal jurisdiction will recognize same-sex marriages.[36] As a result, they have no right to the health care, insurance, and hospital visitation benefits that married couples enjoy.[37] In fact, some states even criminalize their sexual relationships.[38] Moreover, gays

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(recognizing modern society's sustained homophobia, discrimination, and even fatal violence directed at gays and lesbians); 135 CONG. REC. H3511, H3511-3514 (daily ed. June 29, 1989) (statement of Rep. Dannemeyer) (asserting all homosexuals are promiscuous, sinful, and political); Hate Crimes Statistics Act, 135 CONG. REC. H3179, H3183 (daily ed. June 27, 1989) (statement of Rep. Dannemeyer) (accusing proponents of homosexual agenda of trying to equate homosexuals with heterosexuals).

[35] *See generally* RUTHANN ROBSON, GAY MEN, LESBIANS, AND THE LAW (1995) (noting influence law has on everyday lives of gays and lesbians as well as its influence on social attitudes toward homosexuality); SEXUAL ORIENTATION, *supra* note 30 (criticizing pervasive discrimination against gays and lesbians in criminal justice system, employment, schools, marriage statutes, family law, and immigration laws).

[36] *See, e.g.*, Defense of Marriage Act ("DOMA"), Pub. L. No. 104-199, 110 Stat. 2419 (1996) (prohibiting federal courts from recognizing same-sex marriages); ESKRIDGE, *supra* note 1, at 216 (pointing out DOMA excludes same-sex couples from 1,049 federal statutes involving marriage or spousehood). Thirty-six states have passed similar anti-gay marriage resolutions. Human Rights Campaign, *U.S. States with Anti-Marriage Laws Targeting Same-Sex Couples, available at* http://www.hrc.org/issues/marriage/background/statelaws.asp (last modified June 2001). *But see* VT. STAT. ANN. tit. 15 §§ 1201-07 (Supp. 2001) (creating "civil unions" for same-sex couples mirroring benefits and privileges of heterosexual marriage statutes). Gay and lesbian couples have tried to circumvent the prohibition of same-sex marriages, and give legal status to their relationships, by adopting one another. Heidi A. Sorenson, Note, *A New Gay Rights Agenda? Dynamic Statutory Interpretation and Sexual Orientation Discrimination*, 81 GEO. L.J. 2105, 2124 n.148 (1993) (citing *In re* Adoption of Robert Paul P., 471 N.E.2d 424, 425 (N.Y. 1984) (denying 57 year-old plaintiff's petition to adopt his 50 year-old partner)).

[37] *See* ESKRIDGE, *supra* note 1, at 362-71 (noting no state authorizes or recognizes same-sex marriages). *But see* CAL. FAM. CODE §§ 297-299.6 (West Supp. 2002) (creating registry for same-sex domestic partnerships); VT. STAT. ANN. tit. 15 §§ 1201-07 (creating "civil unions" for same-sex couples that grant them same benefits and privileges afforded to married heterosexual couples); Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (holding excluding same-sex couples from obtaining marriage license constitutes sex discrimination in violation of Hawaii Constitution). In 2001, the California legislature passed AB 25 (effective 01/01/2002), granting to registered same-sex couples several protections that traditionally have been restricted to married couples.

[38] *E.g.*, ALA. CODE §§ 13A-6-60, 13A-6-65(a)(3) (2000) (criminalizing sodomy as misdemeanor); ARK. CODE ANN § 5-14-122 (2000) (criminalizing same-sex sodomy only); FLA. STAT. § 800.02 (2000) (criminalizing sodomy as misdemeanor); TEX. PENAL CODE ANN. § 21.06 (2000) (criminalizing same-sex sodomy only); *see also* Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (upholding Georgia's anti-sodomy law because there is no fundamental privacy right to consensual homosexual sodomy); ESKRIDGE, *supra* note 1, at 328-37 (listing states that continue to maintain anti-sodomy statutes on their books). *But see* Halley, *supra* note 19, at 915-923 (arguing that *Bowers v. Hardwick* is not binding precedent in equal protection jurisprudence). From 1946 to 1961, the government convicted nearly one million

and lesbians do not enjoy federal protection from workplace discrimination based on their sexual orientation.[39] Recently, several states have expanded their anti-discrimination statutes to include sexual orientation.[40] However, Congress has repeatedly refused to afford similar federal protection, leaving gay and lesbian residents of many states entirely unprotected from sexual orientation harassment.[41]

B. The Enactment of Title VII

In 1964, Congress enacted Title VII of the Civil Rights Act.[42] With this remedial statute, Congress intended to create equal opportunities for, and eliminate long-standing discriminatory barriers against, minorities and women in the workplace.[43] At the time of enactment, Congress was particularly intent on eradicating centuries of discrimination against

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gays and lesbians for engaging in consensual adult intercourse, kissing, dancing, or holding hands. ESKRIDGE, *supra* note 1, at 60.

[39] *See* 42 U.S.C. § 2000e-2(a)(1) (1994) (prohibiting employers from discriminating on basis of race, color, national origin, religion, or sex only); Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000) (stating that Title VII does not proscribe harassment or discrimination based on sexual orientation); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999) (holding harassment based on sexual orientation is not unlawful); Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1084 (7th Cir. 1984) (noting that homosexuals do not enjoy Title VII protection); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 (9th Cir. 1977) (stating that Congress did not intend Title VII to include sexual orientation).

[40] *E.g.*, FAIR EMPLOYMENT AND HOUSING ACT, CAL. GOV'T CODE § 12900 (West Supp. 2002) (banning discrimination based on sexual orientation); NEW JERSEY LAW AGAINST DISCRIMINATION, N.J. STAT. ANN. § 10:5 -4 (West Supp. 2001) (prohibiting employment discrimination because of affectional or sexual orientation), *cited in* Zalewski v. Overlook Hosp., 692 A.2d 131, 131-32 (N.J.Super.L. 1996); MINN. STAT. ANN. § 363.03 (West Supp. 2002) (proscribing employment discrimination based on sexual orientation); ESKRIDGE, *supra* note 1, at 356-61 (listing states and municipalities that include sexual orientation in their anti-discrimination employment statutes); HUMAN RIGHTS CAMPAIGN FOUNDATION, *supra* note 1, at 5 (2000) (noting only eleven states and District of Columbia prohibit job discrimination based on sexual orientation).

[41] The 94th Congress considered and rejected three house bills that would expand federal employment protection to gays and lesbians. H.R. 166, 94th Cong. (1975); H.R. 2667, 94th Cong. (1975); H.R. 5452, 94th Cong. (1975). Likewise, the 95th Congress rejected such an expansion seven times. H.R. 451, 95th Cong. (1977); H.R. 2998, 95th Cong. (1977); H.R. 4794, 95th Cong. (1977); H.R. 5239, 95th Cong. (1977); H.R. 7775, 95th Cong. (1977); H.R. 8268, 95th Cong. (1977); H.R. 8269, 95th Cong. (1977).

[42] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (codified as amended at 42 U.S.C. §§ 2000e - 2000e-17 (1994)).

[43] *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (finding Congress wanted to remove artificial, arbitrary, and unnecessary barriers to employment which result in invidious discrimination on basis of protected status); Andrews v. Philadelphia, 895 F.2d 1469, 1483 (3rd Cir. 1990) (noting Congress enacted Title VII to prevent perpetuation of stereotypes and degradation which close employment opportunities to women).

African-Americans.[44] With time, however, Congress extended similar protections to other historically disadvantaged groups via legislation modeled after Title VII.[45]

The inclusion of sex discrimination in Title VII was actually the result of a coup d'etat gone awry.[46] Congressman Howard Smith moved to add sex discrimination to the list of proscribed practices on the bill's last day in the House Rules Committee.[47] A principal opponent of the Civil Rights Act, Smith hoped that by adding employment rights for women, the entire bill would fail.[48] Although at the time Congress was highly motivated to eradicate racial discrimination, it was not similarly focused on protecting women.[49] Nonetheless, the congressman's plan failed and the Civil Rights Act passed, women and all.[50]

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[44] *See Ulane*, 742 F.2d at 1085 (noting 88th Congress was primarily concerned with race discrimination); S. REP. NO. 872, at 8-9 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2355, 2362-63 (articulating goal of eradicating racial discrimination); H.R. REP. NO. 914, at 3-4 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2391-94 (noting most serious discrimination is racial discrimination).

[45] *See, e.g.*, ADEA, 29 U.S.C. §§ 621-34 (Supp. IV 1999) (protecting individuals age 40 or older from age discrimination in workplace); ADA, 42 U.S.C. §§ 12101-213 (1994 & Supp. V 2000)(prohibiting discrimination in employment based on mental or physical disabilities).

[46] *See* 110 CONG. REC. 2577-84, 2718-21 (1964) (statements of Rep. Smith) (proposing addition of sex discrimination to Title VII). A staunch opponent to the Civil Rights Act, Representative Howard Smith proposed the inclusion of sex discrimination in the list of proscribed employment practices, hoping to defeat the entire legislation. *Id.*; *see also* Leo Kanowitz, *Sex-Based Discrimination in American Law III: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963*, 20 HASTINGS L.J. 305, 310-12 (1968) (detailing inauspicious birth of Title VII's prohibition against sex discrimination); Mark Musson, Comment, *Sexual Harassment in the Workplace: The Time Has Come for All Offenders to Personally Suffer the Consequences of Their Actions*, 64 UMKC L. REV. 237, 237-243 (discussing legislative history of "sex" addition to Title VII).

[47] *See* MOHR, *supra* note 30, at 138 (characterizing Rep. Smith's last minute motion as "dumb blonde joke"); DAVID R. RICHARDS, WOMEN, GAYS, AND THE CONSTITUTION 231-32 (1998) (calling Smith's motion "ludicrous attempt" to cripple bill's passage); Kanowitz, *supra* note 46, at 310 (noting that Smith moved to add sex discrimination after Judiciary Committee had already approved civil rights bill); Peluso, *supra* note 25, at 1536 (noting originally proposed civil rights bill did not prohibit sex discrimination).

[48] *See* 110 CONG. REC. 2577 (1964) (statement of Rep. Smith) (asserting every woman has right to have her own husband); Kanowitz, *supra* note 46, at 311 (noting efforts by southern legislators to block bill's passage provided substantial reason to doubt Smith's motives); Musson, *supra* note 46, at 237 (explaining bill's opponents hoped that granting "sex" protected status would make bill too controversial); Peluso, *supra* note 25, at 1537 (asserting Smith added sex discrimination to ensure bill's defeat).

[49] *See* 110 CONG. REC. 2577 (1964) (statement of Rep. Smith) (noting Congress had repeatedly defeated bills proposing civil rights protections for women); Kanowitz, *supra* note 46, at 310 (recognizing male-dominated 88th Congress was not eager to prohibit sex discrimination in employment and hiring). Kanowitz doubts that the 88th Congress would have passed a separate bill to protect women's rights in employment. *Id.* at 310.

[50] *See* 42 U.S.C. § 2000e(2)(a) (1994) (prohibiting employment discrimination on basis of

When enacted in 1964, Title VII provided two causes of action for employment discrimination.[51] Section 703 authorized a private cause of action to combat purposeful discrimination against a particular individual, also known as individual disparate treatment.[52] This section proscribed employers from intentionally discriminating against employees or job applicants on the sole basis of race, color, sex, national origin, or religion.[53] Section 704 set forth a second cause of action, which prohibited retaliation.[54] This section proscribes an employer from discriminating against an employee or job applicant simply because that individual opposed an unlawful employment practice.[55]

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sex).

[51] *See* 42 U.S.C. 2000e-2(a) (1994) (granting cause of action for individual disparate treatment); 42 U.S.C. § 2000e-3(a) (1994) (granting cause of action for discrimination based on retaliation). In 1991, Congress amended Section 703 to add a third cause of action to Title VII, known as disparate impact. Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(k) (1994) (outlining disparate impact cause of action). Although not codified until 1991, federal courts recognized claims under this theory twenty years earlier. *See, e.g.*, Connecticut v. Teal, 457 U.S. 440 (1982) (finding employer's facially neutral written exam to be unlawful because of its disparate impact on black employees seeking permanent employment); Dothard v. Rawlinson, 433 U.S. 321, 331 (1977) (ruling Title VII prohibits Alabama's height and weight requirement for prison guards because of its disparate impact on women); Griggs v. Duke Power Co., 401 U.S. 424, 425-26 (1971) (holding policy requiring high school diplomas for employment or promotion disproportionately prevented blacks from advancement, and was therefore unlawful under Title VII). A plaintiff may assert this claim when an employer's policy is not discriminatory on its face, but has a discriminatory effect on a protected group. 42 U.S.C. § 2000e-2(k)(1)(A) (1994). In *Connecticut v. Teal*, the Supreme Court developed a three-part analysis for reviewing disparate impact claims. 457 U.S. at 446-47. First, the plaintiff must show that the facially neutral policy disproportionately affects a protected group. *Id.* Next, the employer must establish that its policy is job-related. *Id.* Third, if the employer meets this burden, the plaintiff must show that the employer's job-related justification is merely pretext for actual discrimination. *Id.* at 447.

[52] *See* 42 U.S.C. § 2000e-2(a) (1994) (prohibiting employers from refusing to hire, fire, limit employment opportunities or otherwise discriminate against individual because of race, color, religion, sex or national origin); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 250-51 (1981) (setting forth prima facie case for individual disparate treatment); Mister v. Ill. Cent. Gulf R.R. Co., 832 F.2d 1427, 1438 (7th Cir. 1987) (finding plaintiff was not victim of individual disparate treatment because he lied on his application).

[53] 42 U.S.C. § 2000e-(2)(a)(1994).

[54] *See* 42 U.S.C. § 2000e-3(a) (prohibiting employer from discriminating against any employee or job applicant because that individual opposed any unlawful employment practice or participated in its investigation); Payne v. McLemore's Wholesale & Retail Stores, 654 F.2d 1130, 1134-35 (5th Cir. 1981) (outlining prima facie case for retaliation claim).

[55] 42 U.S.C. § 2000e-3; *see, e.g., Payne*, 654 F.2d at 1135 (holding employer could not refuse to rehire plaintiff because he opposed employer's unlawful business practice).

1. Individual Disparate Treatment

Section 703 proscribes discrimination against an employee on the basis of a protected status: race, color, religion, national origin, or sex.[56] To violate Title VII under this section, an employer's practice or policy must intentionally discriminate on the basis of a protected status.[57] This kind of discrimination is referred to as individual disparate treatment.[58]

The U.S. Supreme Court set forth the prima facie case for individual disparate treatment in *Texas Department of Community Affairs v. Burdine*.[59] In *Burdine*, the employer terminated Burdine, an experienced female employee, asserting that budgetary cuts required staff reduction.[60] Nonetheless, the employer retained a similarly-situated male employee in Burdine's department.[61] Burdine filed a Title VII action in a federal district court, alleging sex discrimination.[62]

In her complaint, Burdine alleged that her employer terminated her solely because she was a woman.[63] The employer asserted that it terminated Burdine because of its need to reduce its staff and increase efficiency. The employer also contended that Burdine and other employees did not work well together.[64] The district court entered judgment for the employer, finding no evidence of sex discrimination and accepting the employer's explanation.[65] Burdine appealed.

The Fifth Circuit reversed, holding that the employer must prove, by a preponderance of the evidence, a legitimate, nondiscriminatory reason for its action.[66] The appellate court found that the employer failed to meet this burden.[67] The employer appealed to the U.S. Supreme Court.

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[56] 42 U.S.C. § 2000e-2(a).

[57] *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (holding plaintiff has burden of establishing employer's discriminatory intent); Andrews v. Philadelphia, 895 F.2d 1469, 1482 (3rd Cir. 1990) (noting plaintiff must show employer's intentional discrimination to prevail on hostile work environment claim).

[58] 42 U.S.C. § 2000e-2(k); *Burdine*, 450 U.S. at 253-54; McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973).

[59] *Burdine*, 450 U.S. at 253-56.

[60] *Id.* at 251. The employer also terminated two other employees from that department, but the Supreme Court's opinion did not specify their sex. *Id.*

[61] *Id.* The Supreme Court's opinion did not specify whether the male employee had more experience, or was more qualified than Burdine.

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.* at 252.

[67] *Id.*

The Supreme Court reversed. In its reversal, the Supreme Court articulated the three elements of a prima facie case for an individual disparate treatment claim under Title VII.[68] First, the plaintiff must belong to a protected status group, such as race or sex.[69] Second, the plaintiff must be qualified for the position applied for or previously held.[70] Third, the plaintiff must demonstrate that the employer discriminated on the basis of a protected status.[71] Under the Supreme Court's traditional approach, this third prong requires a "but-for" causation test.[72]

To illustrate a typical Title VII claim, consider a qualified lesbian employee who files a sex discrimination claim in federal court, invoking section 703.[73] The court would apply the *Burdine* framework to the individual disparate treatment claim.[74] First, the plaintiff belongs to a protected group based on sex: women.[75] Second, she is qualified for her

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[68] *Id.* at 253. The Court adopted the prima facie case for disparate treatment from the prima facie case for racial discrimination set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In that case, the Court held that proving racial discrimination first required that the plaintiff belong to a racial minority. *Id.* at 802. Second, the plaintiff must have applied and been qualified for a position the employer had available. *Id.* Third, the employer must have rejected the application, despite plaintiff's qualifications. *Id.* Finally, plaintiff must show that after the rejection, the position remained open and the employer continued to seek applicants from similarly-qualified persons. *Id.* at 802.

[69] *Green*, 411 U.S. at 802. Other protected status groups include groups based on national origin, religion, and color. 42 U.S.C. § 2000e-2(a).

[70] *Burdine*, 450 U.S. at 253.

[71] *Id.* To satisfy this element, the plaintiff must establish that the employer intentionally discriminated on the basis of her protected status. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). In contrast, a disparate impact claim asserts that a facially neutral policy disproportionately affects members of a protected group. *Id.* In a disparate impact case, the court infers the employer's discriminatory intent from the disproportionate impact its policy has on a protected group. *Id.*

[72] *See, e.g., Burdine*, 450 U.S. at 250-51 (holding plaintiff needs to show that gender was motivating factor in adverse action and but for gender, result would have been different); Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982) (holding plaintiff must show that but for her sex, she would not have suffered from hostile work environment); Deborah N. McFarland, Note, *Beyond Sex Discrimination: A Proposal for Federal Sexual Harassment Litigation*, 65 FORDHAM L. REV. 493, 508-09 (1996) (explaining "but-for" causation requirement). *But see* Maness v. Star-Kist Foods, Inc., 7 F.3d 704, 708 (8th Cir. 1993) (finding employer may rebut but-for causation if it shows it would have fired employee regardless of protected status).

[73] *See* 42 U.S.C. § 2000e-2(k) (providing cause of action for individual disparate treatment).

[74] *Burdine*, 450 U.S. at 253.

[75] *See* 42 U.S.C. § 2000e-2(a) (prohibiting employers from refusing to hire, fire, or discriminate against individual regarding terms, conditions, or privileges of employment because of sex); *Burdine*, 450 U.S. at 253 (holding that plaintiff must belong to protected group to have valid Title VII claim).

job. Under the traditional approach, the plaintiff's case falls apart at the third prong. She is unable to establish that, but for being a woman, her employer would not have terminated her. Rather, she can only prove that, but for being lesbian, she would still have her job.[76] This is insufficient because the traditional notion of "sex" under Title VII does not encompass sexual orientation.[77]

2. Retaliation

Alternatively, section 704 of Title VII grants a private cause of action for adverse treatment that was motivated by retaliation.[78] A retaliation claim has three elements. First, the plaintiff must establish that he opposed what he reasonably believed to be an unlawful employment practice. Second, he must show that his employer took adverse action against him. Third, the plaintiff must demonstrate a causal connection between his opposition and the adverse action.[79]

To illustrate, assume that a plaintiff who voiced opposition to a company's discriminatory policy against gays and lesbians was subsequently fired.[80] The first element of section 704 requires plaintiffs to demonstrate a subjective and objective belief that the company policy was unlawful.[81] The subjective component requires plaintiffs to establish

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[76] *See* Dandan v. Radisson Hotel Lisle, 2000 WL 336528 (N.D. Ill. 2000) (noting female plaintiff could prevail on sexual harassment claim if she proves harasser's general hostility to women in workplace). Gay men face a similar situation. Like women, men are a protected group under Title VII. *See* Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 78 (1998) (noting Title VII protects men as well as women) (citing Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 682 (1983)). *See* Hamner v. St. Vincent Hosp. & Health Ctr., Inc., 224 F.3d 701, 707 n.5 (7th Cir. 2000) (dismissing sexual harassment claim because plaintiff established defendant's animus toward gay men, but not men as group); Higgins v. New Balance Athletic Shoe, 194 F.3d 252, 259 (1st Cir. 1999) (holding Title VII does not prohibit sexual orientation discrimination).

[77] *See, e.g.*, Simonton v. Runyon, 232 F.3d 33, 37 (2d Cir. 2000) (holding "sex" does not include sexual orientation); Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1087 (7th Cir. 1984) (limiting "sex" to anatomical sex only, not sexual preference); DeSantis v. Pac. Tel. & Tel., 608 F.2d 327, 330 (9th Cir. 1979) (finding "sex" under Title VII does not include sexual preference).

[78] 42 U.S.C. § 2000e-3(a); Payne v. McLemore's Wholesale & Retail Stores, 654 F.2d 1130, 1138 (5th Cir. 1981) (holding failing to re-hire employee because he opposed employment practice is unlawful retaliation); Meeks v. Computer Assocs. Int'l, 15 F.3d 1013, 1021-22 (11th Cir. 1994) (finding employer violated Title VII when retaliated against employee for opposing business practice).

[79] *Payne*, 654 F.2d at 1130; *Meeks*, 15 F.3d at 1018; *Moyo*, 32 F.3d at 1386-87.

[80] *See, e.g.*, Hamner v. St. Vincent Hosp. & Health Ctr., 224 F.3d 701, 704 (7th Cir. 2000) (reviewing plaintiff's claim employer terminated him because he complained about sexual orientation harassment).

[81] *See Moyo*, 32 F.3d at 1386 (holding plaintiff has valid retaliation claim if reasonably

that they actually believed that the law proscribed the employer's conduct.[82] The objective component requires plaintiffs to demonstrate that a reasonably prudent person could plausibly believe the conduct unlawful.[83] The plaintiff's claim would fail at this second prong. Because federal law has never proscribed discrimination based on sexual orientation, no reasonably prudent person could plausibly believe that the company's policy was unlawful.[84] Consequently, because the plaintiff failed to establish the first element of the prima facie case, the second and third elements are irrelevant.[85]

C. Plain Meaning Interpretation

Congress added the category of "sex" to Title VII on the last day of the statute's floor debate.[86] Because its proponents thought the addition would defeat the civil rights bill, Congress neglected to define the term "sex" as it would apply to Title VII.[87] As a result, the 88th Congress left

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and subjectively believed employer's practice to be unlawful, even though it is not); *Meeks*, 15 F.3d at 1017 (finding plaintiff only has to show subjective and reasonable belief that practice was unlawful); *Payne*, 654 F.2d at 1130 (finding that plaintiff showed reasonable and subjective belief that employer's practice constituted unlawful discrimination).

[82] *See, e.g., Hamner*, 224 F.3d at 707 (finding plaintiff subjectively believed supervisor's harassment to be unlawful, even though Title VII does not prohibit sexual orientation harassment); Reed v. A.W. Lawrence & Co., 95 F.3d 1170, 1172 (2d Cir. 1996) (finding plaintiff held good faith belief that employer acted unlawfully); Iannone v. Frederic R. Harris, Inc., 941 F. Supp. 403, 408 (S.D.N.Y. 1996) (holding whether plaintiff had good faith subjective belief that practice was unlawful depends on plaintiff's legal sophistication).

[83] *See, e.g., Hamner*, 224 F.3d at 707 (holding plaintiff must show that reasonable prudent person would have believed practice to be unlawful); *Reed*, 95 F.3d at 1175 (finding plaintiff held reasonable belief vulgar comments regarding gender were an unlawful employment practice); E.E.O.C. v. A. Sam & Sons Produce Co., 872 F. Supp. 29 (W.D.N.Y. 1994) (rejecting plaintiff's retaliation claim because not reasonable to believe impoliteness was unlawful employment practice).

[84] *See, e.g.*, Simonton v. Runyon, 232 F.3d 33, 37 (2d Cir. 2000) (holding sexual orientation discrimination is not unlawful under Title VII); Higgins v. New Balance Athletic Shoe, 194 F.3d 252, 259 (1st Cir. 1999) (stating Title VII does not proscribe harassment because of sexual orientation); *see also Hamner*, 224 F.3d at 707 (rejecting plaintiff's contention he reasonably believed supervisor's harassment based on homosexuality to be unlawful).

[85] Plaintiff must have sufficient evidence supporting a cause of action to survive motion for judgment as a matter of law. Fed. R. Civ. Pro 50(a) (1994).

[86] *See* Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 (9th Cir. 1977) (noting representatives added "sex" as floor amendment one day before voting without prior debate or hearing); Kanowitz, *supra* note 46, at 310-11 (noting Rep. Smith moved to add "sex" discrimination to Title VII on last day); Peluso, *supra* note 25, at 1537 (noting hasty addition of sex discrimination and lack of relevant legislative history).

[87] *See* 42 U.S.C. § 2000e(k) (2002) (defining terms "because of sex" and "on the basis of sex," but not term "sex" itself). Because legislators hastily added the category of "sex" just

little indication of its intent regarding the parameters of sex discrimination in the workplace.[88]

Absent any legislative guidance, most federal courts have narrowly construed the meaning of "sex" under Title VII, restricting it to the plain meaning of the word.[89] Accordingly, the majority defines "sex" as an individual's anatomical or biological characteristics rather than one's sexual identity.[90] Therefore, Title VII prohibits discrimination against a female employee because she is a woman, but not because she is a lesbian.[91] Likewise, a male employee is protected from discrimination because he is a man, but not because he is gay.[92] In other words, Title VII protects gay men and lesbians from discrimination based on their biological sex: male or female. However, federal law does not shield them from discrimination based on their homosexual status.

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before passing the law, perhaps there was little time to qualify it. *See* 110 CONG. REC. 2577-84, 2718-21 (1964) (statements of Rep. Smith) (introducing sex discrimination for first time on last day of floor debate); *see also* Peluso, *supra* note 25, at 1537 (noting there congressional debate on addition of "sex" only fills eight pages of Congressional Record).

[88] *See* FLORYNCE R. KENNEDY & WILLIAM F. PEPPER, SEX DISCRIMINATION IN EMPLOYMENT 18 (1981) (noting Congress conducted little or no investigative research, debates, or discussions regarding "sex" provision of Title VII); Musson, *supra* note 46 at 237-243 (discussing legislative history behind Title VII's definition of "sex").

[89] *See* Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984) (explaining courts adopt plain meaning of words unless Congress defines them otherwise); Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982) (holding courts must give term its plain meaning absent clear legislative intent to define it otherwise).

[90] Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000); *Ulane*, 742 F.2d at 1084-87; *see also* Dobre v. Amtrak, 850 F. Supp. 284, 286 (E.D. Pa. 1993) (interpreting "sex" to mean one's biological characteristics, and "gender" to mean one's sexual identity or socially constructed characteristics).

[91] *Ulane*, 742 F.2d at 1085. This is a slight, but important distinction. Under Title VII, an employer cannot treat all female employees differently than male employees. *Id.* That constitutes sex discrimination. *Id. See also* Spearman v. Ford Motor Co., 231 F.3d 1080, 1081 (7th Cir. 2000) (requiring plaintiff show employer treated male employees differently than female employees). However, if he regards a lesbian employee differently than a male employee, there is no Title VII violation. The traditional approach reasons that it is not sex discrimination if an employer does not regard all female employees, straight and lesbian, differently than male employees. *See, e.g., Spearman*, 231 F.3d at 1087 (denying plaintiff's sex discrimination claim because he failed to show employer treated female employees differently than male employees); *Ulane*, 742 F.2d at 1087 (holding Title VII proscribes employer from discriminating against women because they are women, and against men because they are men).

[92] *See Spearman*, 231 F.3d at 1085-86 (rejecting sexual harassment claim based on plaintiff's sexual orientation and not his sex); *Ulane*, 742 F.2d at 1085 (holding Title VII prohibits discrimination based on biological sex, but not sexual orientation).

D. Expanding the Interpretation of Sex Discrimination under Title VII

Although the federal courts applied the plain meaning rule to sex discrimination cases, plaintiffs continued to challenge this approach.[93] In 1989, the Supreme Court made a landmark decision in *Price Waterhouse v. Hopkins*.[94] In *Price Waterhouse*, the Court expanded sex discrimination under Title VII to encompass discrimination based on sex-stereotyping.[95] According to the Court, sex-stereotyping occurs when an employer discriminates against an individual for failing to exhibit the characteristics expected of their sex.[96] The Court's holding recognized that sex discrimination occurs even when an employer treats an employee differently than other employees of the same sex.[97]

In *Price Waterhouse*, Hopkins was a senior manager at Price Waterhouse when her superiors recommended her for partnership.[98] However, the firm neither offered nor denied partnership to Hopkins. Instead, it placed her recommendation on hold for reconsideration the following year. The next year, her superiors again failed to recommend her for partnership because some partners thought that she acted too masculine.[99] One partner advised her to appear more feminine by

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[93] *See e.g.*, DeSantis v. Pac. Tel. & Tel., 608 F.2d 327, 329 (9th Cir. 1979) (rejecting plaintiff's assertion that sexual orientation discrimination is form of gender discrimination); *Ulane*, 742 F.2d at 1085-86 (disallowing claim that asserted discrimination against transsexuals is sex discrimination); Smith v. Liberty Mut. Ins., 569 F.2d 325, 326-27 (5th Cir. 1978) (rejecting argument that sex discrimination includes sexual preference discrimination); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 661-62 (9th Cir. 1977) (rejecting claim that sex discrimination includes discrimination against transsexuals).

[94] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), *superseded on other grounds by*, 42 U.S.C. 2000e-5(g)(2)(B)(2002).

[95] *Id.* at 255-58 (using gender to determine sex-stereotyping constitutes sex discrimination under Title VII). Sex-stereotyping occurs when an employer discriminates against an individual for failing to exhibit the characteristics expected of a man or woman. *Id.*; Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000); *see also*, Ramona L. Paetzold, *Same-Sex Harassment, Revisited: The Aftermath of Oncale v. Sundowner Offshore Services, Inc.*, 3 EMPLOYEE RTS. & EMP. POL'Y J. 251, 257-59 (discussing common societal sex stereotypes and assumptions when one deviates from them).

[96] *Price Waterhouse*, 490 U.S. at 236-37. For example, men are supposed to be macho, and women, delicate. *Id.*; *see also* Simonton v. Runyon, 232 F.3d 33, 38 (2d Cir. 2000) (noting masculinity is male stereotype, but effeminacy is gay male stereotype); Paetzold, *supra* note 99, at 257 (noting society's assignment of emotion and sensitivity to women, and aggressiveness and autonomy to men).

[97] *Price Waterhouse*, 490 U.S. at 236-37 (noting employer cannot treat feminine women differently than non-feminine women).

[98] *Id.* at 231-33.

[99] *Id.* at 235. In her evaluations, the partners described Hopkins as too "macho" and complained that she "overcompensated for being a woman." *Id.*

styling her hair and wearing makeup and jewelry.[100]

Hopkins filed an individual disparate treatment complaint under Title VII, alleging sex discrimination.[101] The district court found that the firm unlawfully discriminated against Hopkins when it relied on the sex-stereotyped partners' comments. The partners' remarks stemmed from old-fashioned notions of how a woman should behave.[102] The court held that such sex-stereotyping constituted unlawful sex discrimination under Title VII.[103] The firm appealed.

The D.C. Circuit and the Supreme Court affirmed the lower court's decision.[104] The Supreme Court held that an employer who acts on a belief that women should not be aggressive has discriminated on the basis of sex.[105] Congress intended Title VII to eradicate the disparate treatment of men and women that results from sex-stereotyping.[106] Thus, the Court found that the term "sex" under Title VII encompasses both one's biological sex and gender.[107]

Accordingly, an employer is prohibited from discriminating against an employee or applicant based on their biological sex or failure to embody sex-stereotyped characteristics.[108] Thus, in *Price Waterhouse*, the Supreme Court expanded the parameters of sex discrimination beyond its traditional scope.[109] A female plaintiff need not establish that the employer treated all female employees differently than male employees.[110] Under this expansion to Title VII, a plaintiff may also

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[100] *Id.*

[101] *Id.* at 232.

[102] *Id.* at 236-37. The district court based this finding on one partner's comments that female employees should be feminine and are not capable of functioning as senior managers. *Id.* at 236.

[103] *Id.* at 236-37.

[104] *Id.*

[105] *Id.* at 250.

[106] *Id.* at 251 (finding Congress intended to prohibit discrimination on the basis of one's gender).

[107] *Id.* at 258; *see also* Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000) (finding Title VII and GMVA both prohibit "gender" discrimination).

[108] *Price Waterhouse*, 490 U.S. at 258; *see Schwenk*, 204 F.3d at 1202 (stating Title VII prohibits sex-stereotyping).

[109] *Compare Price Waterhouse*, 490 U.S. at 451 (ruling Title VII prohibits sex-stereotyping as sex discrimination), *with* Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000) (holding "sex" under Title VII refers to male or female only, not sexual affiliation), *and* Dillon v. Frank, 1992 U.S. App. LEXIS 766, at *3 n.2 (6th Cir. 1992) (limiting "sex" under Title VII to chromosomal sex).

[110] *Compare Price Waterhouse*, 490 U.S. at 251 (holding employer commits unlawful sex discrimination by treating female employees who do not conform to gender stereotypes differently than other female employees), *with* Spearman v. Ford Motor Co., 231 F.3d 1080,

prevail by demonstrating that she suffered disparate treatment because she does not exhibit the stereotyped characteristics of her sex.[111]

E. The Gender-Motivated Violence Act

In 1994, Congress enacted new civil rights legislation, the Gender Motivated Violence Act ("GMVA"),[112] as a subsection of the Violence Against Women Act ("VAWA").[113] The GMVA granted a federal cause of action to a victim of violent crime that was committed because of gender animus.[114] In May of 2000, the Supreme Court struck down as unconstitutional the private right of action granted by the GMVA.[115] Nonetheless, some of the GMVA constructs, such as the term "gender," are relevant to the interpretation of "sex" under Title VII.[116]

Congress codified the GMVA after the *Price Waterhouse* Court prohibited sex-stereotyping in employment.[117] With the GMVA, Congress adopted much of the *Price Waterhouse* reasoning regarding the term "sex."[118] By adopting the statute after *Price Waterhouse* without further defining "sex," Congress presumably intended statutory and case law language to mean the same thing.[119] Therefore, Congress

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1087 (7th Cir. 2000) (denying plaintiff's sex discrimination claim because failed to show employer treated male employees differently than female employees), *and* Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1087 (7th Cir. 1984) (holding Title VII prohibits discriminating against women because they are women, and against men because they are men).

[111] *See Price Waterhouse*, 490 U.S. at 251 (holding that employer violates Title VII by objecting to aggressive women yet requiring aggressiveness for job position); *see also Schwenk*, 204 F.3d at 1200-02 (using Title VII sex discrimination analysis to find gender-stereotyping includes discrimination based on transsexuality).

[112] 42 U.S.C. § 13981(c), *overruled by* United States v. Morrison, 120 S. Ct. 1740, 1740 (2000).

[113] Pub. L. No. 103-322, 108 Stat. 1902 (codified as amended in scattered sections of 8 U.S.C., 18 U.S.C., and 42 U.S.C.), *amended by* Pub. L. No. 104-294, 110 Stat. 3506, 3507 (codified as amended in scattered sections of 18 U.S.C.).

[114] 42 U.S.C. § 13981(d)(1).

[115] *Morrison*, 120 S. Ct. at 1740 (holding Congress exceeded its authority under section 5 of Fourteenth Amendment).

[116] *Schwenk*, 204 F.3d at 1202 (noting GMVA parallels Title VII interpretation regarding "gender" and "sex" distinction).

[117] The Supreme Court decided *Price Waterhouse* in 1989. *See Price Waterhouse*, 490 U.S. at 251 (holding gender encompasses sex characteristics, and that Title VII prohibits discrimination on either basis). Congress enacted the GMVA in 1994. 42 U.S.C. § 13981(d)(1) (2002)(providing no alternative definition of "gender"); *see Schwenk*, 204 F.3d at 1202 n.12 (holding "gender" in GMVA has same meaning as "gender" in Title VII analysis).

[118] *See* 42 U.S.C. § 13981(d)(1) (lacking strict definition of "gender"); *Schwenk*, 204 F.3d at 1201 n.12 (presuming Congress knew how pre-*Price Waterhouse* courts interpreted "sex" and "gender" and intentionally adopted broader concept of "gender").

[119] *See Schwenk*, 204 F.3d at 1201 n.12 (explaining when Congress adopts language from

intended "sex" to include biological sex and sex-stereotyped characteristics.[120]

F. Efforts to Grant Workplace Protection to Gays and Lesbians

Congress has not remained silent on the issue of discrimination based on sexual orientation. In the late 1970s and early 1980s, liberal members of Congress repeatedly attempted to expand the Civil Rights Act to prohibit sexual orientation discrimination.[121] However, each attempt failed.[122] In 1994, 1995, and 1996, Democrats reintroduced the issue of sexual orientation protection to Congress via the Employment Non-Discrimination Act ("ENDA") and its subsequent amendments.[123] Again, those attempts failed.[124] In 1999, legislators presented the latest version of ENDA to the House of Representatives.[125]

If enacted, ENDA would create a federal cause of action for employees who suffer discrimination on the basis of their sexual orientation.[126] Although it is patterned after Title VII, ENDA differs from the federal law in several ways.[127] For example, ENDA only allows an individual disparate treatment theory of discrimination, while Title VII also authorizes a disparate impact cause of action.[128] Thus, ENDA requires

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case law, it intends statutory language to have case law meaning) (citing Espinoza-Gutierrez v. Smith, 94 F.3d 1270, 1275 (9th Cir. 1996)).

[120] *Schwenk*, 204 F.3d at 1201-02 and n.12.

[121] H.R. 166, 94th Cong. (1975); H.R. 451, 95th Cong. (1977); H.R. 775, 95th Cong. (1977); H.R. 2074, 96th Cong. (1980); H.R. 1454, 97th Cong. (1982).

[122] *Civil Rights Amendments Act of 1979: Hearings on H.R. 2074 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 96th Cong. 6-7 (1980); *Civil Rights Amendments Act of 1981: Hearings on H.R. 1454 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 97th Cong. 1-2 (1982).

[123] ENDA of 1994, H.R. 4636, 103rd Cong. (1994); ENDA of 1995, H.R. 1863, 104th Cong. (1995); ENDA of 1996, S. 2056, 104th Cong. (1996); ENDA of 1997, S. 869, 105th Cong. (1997).

[124] *See* sources cited *supra* note 132. Nonetheless, ENDA's margin of defeat is narrowing. In 1994, ENDA failed in the Senate by only one vote..

[125] H.R. 2355, 106th Cong. (1999).

[126] *Id.*

[127] *Id.* ENDA does not provide a gay or lesbian employee a cause of action for equal employment benefits, such as domestic partnership. *Id.* at § 6. Also, it forbids the EEOC from collecting statistics regarding sexual orientation from employers. *Id.* at § 7. Under Title VII, the EEOC must gather statistics regarding the five protected statuses. 29 C.F.R. § 1602 (2000).

[128] *Compare* H.R. 2355, 106th Cong. § 5 (1999) (granting disparate treatment cause of action), *with* 42 U.S.C. § 2000e-2(a) (authorizing cause of action for intentional discrimination, otherwise referred to as individual disparate treatment) *and* 42 U.S.C. § 2000e-2(k) (codifying cause of action based on disparate impact theory).

the plaintiff to establish that the employer intentionally discriminated on the basis of sexual orientation.[129] In contrast, a disparate impact theory of discrimination under Title VII does not require a plaintiff to prove intent.[130] Instead, the disparate impact plaintiff need only demonstrate that the facially neutral policy disproportionately disadvantaged a protected group, regardless of the employer's intent.[131]

ENDA represents the latest activist effort to extend civil rights to gays and lesbians in the workplace.[132] Although Congress has repeatedly failed to pass it, ENDA continues to gain political support.[133] Because ENDA is not yet law, current federal law affords no specific protection to gays and lesbians from workplace discrimination.

II. STATE OF THE LAW

Since the Supreme Court's decision in *Price Waterhouse*, circuits have adopted different approaches to reviewing sex discrimination cases.[134] In particular, the circuits disagree on the definition of "sex." To understand this split, it is necessary to distinguish the term "sex" from that of "gender."[135]

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[129] *Compare* H.R. 2355, 106th Cong. § 4 (prohibiting employer from discriminating on basis of sexual orientation), *with* 42 U.S.C. § 2000e-2(a) (prohibiting employer from discriminating on basis of race, color, national origin, religion, or sex).

[130] *See* Connecticut v. Teal, 457 U.S. 440, 452 (1982) (finding facially neutral written exam for employees is unlawful because of its disparate impact on black employees); Dothard v. Rawlinson, 433 U.S. 321, 330-31 (1977) (ruling Title VII prohibits Alabama's height and weight requirement for prison guards because of its disparate impact on women); Griggs v. Duke Power Co., 401 U.S. 424, 429-33 (1971) (holding employers cannot use even facially neutral policies if they freeze status quo of prior discriminatory practices).

[131] *See Teal*, 457 U.S. at 445 (finding written exam had disparate impact on black employees); *Dothard*, 433 U.S. at 331 (holding height/weight requirement disproportionately affected female applicants); *Griggs*, 401 U.S. at 429-33 (finding employee assessment tests had disparate impact on black applicants and employees).

[132] H.R. 2355, 106th Cong. (1999).

[133] *See* ENDA, H.R. 4636, 103rd Cong. (1994) (failing in Senate by 50-49 vote); *see also* HUMAN RIGHTS CAMPAIGN, *supra* note 1, at 51 (listing businesses that endorse ENDA).

[134] *See* Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000) (holding "sex" refers to male or female only, not sexual affiliation); Hamner v. St. Vincent Hosp. & Health Ctr., 224 F.3d 701, 707 (7th Cir. 2000) (restricting "sex" to biological male or female only); Hopkins v. Balt. Gas & Elec. Co., 77 F.3d 745, 749 n.1 (4th Cir. 1996) (holding "sex" denotes simply "man" or "woman"). *Cf.* Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000) (defining "sex" as biological sex and gender characteristics).

[135] In reviewing sex discrimination cases, courts often conflate these two terms and use them interchangeably. *See Schwenk*, 204 F.3d at 1202 (stating "sex" and "gender" are synonymous for purpose of Title VII and GMVA analysis); Paetzold, *supra* note 100, at 258 (noting courts often do not distinguish sex from gender, using them reciprocally); Mary Ann C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the*

Although interrelated, "sex" and "gender" have distinct meanings.[136] "Sex" connotes the biological, or physical, characteristics of male and female.[137] These include the genital, hormonal, and chromosomal aspects of male and female bodies. On the other hand, "gender" refers to the socially-constructed characteristics of masculinity and femininity.[138] These characteristics define how society thinks men and women should behave according to their biological sex.[139] For instance, society equates femininity with using makeup, styling one's hair, and wearing jewelry, and equates masculinity with the opposite.[140] In *Price Waterhouse*, the Supreme Court was called upon to decide which definition of "sex" was correct.[141] Accordingly, it held that "sex" under Title VII encompassed both biological sex[142] and gender stereotypes[143] and proscribed discrimination on either basis.[144]

Despite the Supreme Court's holding, some circuits insist that the term "sex" under Title VII encompasses one's biological sex only, and not

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Law and Feminist Jurisprudence, 105 Yale L.J. 1, 2 (1995) (noting courts use "gender" synonymously with "sex" when reviewing discrimination cases).

[136] *See Schwenk*, 204 F.3d at 1202 (distinguishing biological sex from social construction of gender); Rachel L. Toker, Note, *Multiple Masculinities: A New Vision for Same-Sex Harassment Law*, 34 HARV. C.R.-C.L. L. REV. 577, 580 (1999) (pointing out some theorists argue that "sex" apart from "gender" is meaningless).

[137] Bennett Capers, Note, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158, 1160 (quoting L.W. RICHARDSON, THE DYNAMICS OF SEX AND GENDER: A SOCIOLOGICAL PERSPECTIVE 5 (1977); Toker, *supra* note 136, at 580.

[138] *See Schwenk*, 204 F.3d at 1202 (noting masculinity constructs male gender); Capers, *supra* note 146, at 1160 (explaining idea of masculinity and femininity are social, psychological, and cultural constructs); Toker, *supra* note 145, at 581 (noting gender characteristics tell men and women look, behave, and experience all aspects of life).

[139] *See* sources cited *supra* note 138.

[140] *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 237 (1989) (finding employer unlawfully gender-stereotyped female plaintiff when partner told her to act more feminine); *see also* Case, *supra* note 144, at 2-3 (noting society views masculinity as successful and femininity as weakened).

[141] *Price Waterhouse*, 490 U.S. at 250-51.

[142] *See, e.g.*, Tex. Dep't of Cmty Affairs v. Burdine, 450 U.S. 248, 251 (1981) (finding employer discriminated against plaintiff because she is female); Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1087 (7th Cir. 1984) (restricting Title VII to prohibiting discrimination based on biological sex only).

[143] *See, e.g., Price Waterhouse*, 490 U.S. at 250-51 (finding employer unlawfully discriminated against plaintiff for failing to act feminine). *But see* Case, *supra* note 143, at 3 n.3 (pointing out no court has successfully applied *Price Waterhouse* rationale to men displaying stereotypically feminine characteristics).

[144] *Price Waterhouse*, 490 U.S. at 250-1; *see* Schwenk v. Hartford, 204 F.3d 1187, 1201-02 (9th Cir. 2000) (noting GMVA prohibits violent attack motivated by biological sex or gender); Case, *supra* note 144, at 2 (noting Title VII protects female employees who do not conform with feminine stereotype).

one's gender.[145] Those circuits hold that an individual has a cause of action only if the discrimination was based on being a man or woman.[146] Other courts follow the Supreme Court ruling and find sex discrimination whenever an employer discriminates based on one's biological sex or gender.[147]

A. The Traditional Approach: Hamner v. St. Vincent Hospital

Courts applying the traditional approach toward sex discrimination narrowly interpret "sex" under Title VII as referring only to "biological male" or "biological female."[148] For example, in order to assert a sex discrimination claim under Title VII, a male plaintiff must first show that he belongs to a protected group, i.e., men.[149] Next, the plaintiff must demonstrate that the employer treated all male employees differently than the female employees.[150] Under this traditional approach, a plaintiff may not assert a sex discrimination claim by alleging facts of harassment based on sexual orientation, such as homosexuality, bisexuality or

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[145] *See, e.g.*, Spearman v. Ford Motor Co., 231 F.3d 1080, 1087 (7th Cir. 2000) (rejecting plaintiff's sex-stereotyping claim because plaintiff failed to show employer discriminated against him based on his sex); Dillon v. Frank, 1992 U.S. App. LEXIS 766, *3 n.2 (6th Cir. 1992) (defining "sex" as chromosomal sex); Dandan v. Radisson Hotel Lisle, 2000 WL 336528, *4 (N.D. Ill. 2000) (noting Title VII prohibits harassment of men and women because they are men and women, not because of their sexual orientation).

[146] *See Spearman*, 231 F.3d at 1085-86 (rejecting plaintiff's sexual harassment claim because based on his perceived homosexuality); *Ulane*, 742 F.2d at 1085 (holding Title VII only protects discrimination based on biological sex); Smith v. Liberty Mut. Ins., 569 F.2d 325, 326 (5th Cir. 1978) (ruling plaintiff must base sex discrimination claim on biological sex, not sexual preference).

[147] *See Price Waterhouse*, 490 U.S. at 237-38 (interpreting Title VII to proscribe discrimination based on gender stereotyping); Rosa v. Park West Bank & Trust Co., 214 F.3d 213, 214 (1st Cir. 2000) (adopting *Price Waterhouse* analysis in finding that plaintiff had valid sex discrimination claim under Equal Credit Opportunity Act); *Schwenk*, 204 F.3d at 1202 (paralleling "sex" from Title VII analysis to define "gender" of GMVA as socially constructed characteristics of biological sex).

[148] *See, e.g.*, Hamner v. St. Vincent Hosp. & Health Ctr., 224 F.3d 701, 704 (7th Cir. 2000) (explaining Congress did not intend "sex" to include one's sexuality or sexual orientation); *Ulane*, 742 F.2d at 1087 (noting Congress did not intend to protect transsexuality with Title VII).

[149] Title VII protects both men and women. Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 78 (1998); Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 682 (1983); *Schwenk*, 204 F.3d at 1201.

[150] *See Spearman*, 232 F.3d at 1087 (rejecting plaintiff's sex discrimination claim because failed to show employer treated female employees differently than male employees); *Hamner*, 224 F.3d at 706 and n.4 (noting plaintiff did not offer evidence that defendant treated all male nurses differently than all female nurses).

transsexuality.[151]

A recent Seventh Circuit case reinforced the traditional interpretation of sex discrimination under Title VII.[152] In *Hamner v. St. Vincent Hospital*, the plaintiff asserted a Title VII retaliation claim based on his opposition to his supervisor's sexual orientation harassment.[153] The Seventh Circuit rejected Hamner's claim because Title VII does not forbid sexual orientation discrimination.[154]

The plaintiff, Hamner, was a gay male nurse who began working at St. Vincent's Hospital in 1993.[155] From the beginning, Hamner and his supervisor, Edwards, had a poor working relationship.[156] Edwards constantly harassed Hamner about his homosexuality.[157]

In 1996, Hamner filed a written grievance with the hospital, asserting that Edwards continually harassed him because of his sexual orientation.[158] After conducting an investigation, the director sent a letter to Hamner explaining that Edwards recognized that his humor was disrespectful and that he would be more considerate in the future.[159] Three days after sending the letter, the hospital fired Hamner.[160]

Hamner filed a Title VII retaliation claim against the hospital.[161] Upon the hospital's motion, the magistrate judge entered a judgment as a

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[151] *Hamner*, 224 F.3d at 707 (stating Title VII does not proscribe workplace harassment on basis of homosexuality); *Ulane*, 742 F.2d at 1087 (holding Title VII does not protect transsexuals from employment discrimination); DeSantis v. Pac. Tel. & Tel., 608 F.2d 327, 330 (9th Cir. 1979) (holding "sex" under Title VII does protect gays and lesbians).

[152] *Hamner*, 224 F.3d at 701.

[153] *Id.* at 704.

[154] *Id.* at 706.

[155] *Id.* at 703. Hamner's duties required regular interactions with the unit's medical director, Dr. Joseph Edwards. *Id.*

[156] *Id.* For example, Edwards often would not acknowledge or communicate with Hamner. *Id.*

[157] Edwards teased Hamner by flipping his wrists, lisping and making discriminatory jokes about homosexuals. *Hamner*, 224 F.3d at 703.

[158] *Id.*

[159] *Id.*

[160] *Id.* The hospital asserted that it fired Hamner for willful falsification of a hospital document. *Id.* at 704.

[161] *Hamner*, 224 F.3d at 704. Hamner initially filed a sexual harassment claim as well, but the parties stipulated to dismiss it. *Id.* Sexual harassment is one kind of individual disparate treatment claim for sex discrimination under Title VII. 42 U.S.C. § 2000e-2(a); *see* Meritor Sav. Bank v. Vincent, 477 U.S. 57, 73 (1986) (interpreting sex discrimination under Title VII to proscribe sexual harassment). Thus, Hamner's only asserted claim was retaliation because he filed the grievance. *Hamner*, 224 F.3d at 704; *see* 42 U.S.C. § 2000e-3(a) (prohibiting employers from retaliating against employee because of opposition to unlawful employment practice); Payne v. McLemore's Wholesale & Retail Store, 654 F.2d 1130, 1135 (5th Cir. 1982) (outlining prima facie case for retaliation claim).

matter of law for the hospital.[162] The trial judge found that Hamner's hospital grievance was based entirely on his homosexuality.[163] Because sexual orientation harassment is not an unlawful employment practice under Title VII, Hamner could not establish the first element of his retaliation claim: his reasonable belief that the hospital's actions were unlawful.[164] Hamner appealed.[165]

The Seventh Circuit affirmed, holding that a retaliation claim required Hamner to prove that he opposed an employment practice that he reasonably believed to be unlawful.[166] That belief must be both subjectively and objectively reasonable.[167] The Seventh Circuit found that Hamner's belief was subjectively but not objectively reasonable.[168] No reasonably prudent person would believe sexual orientation harassment to be unlawful because Title VII has never proscribed such conduct by the employer.[169] Therefore, Hamner's belief that the hospital acted unlawfully was unfounded and unreasonable.[170]

On appeal, Hamner had also contended that the employment practice he opposed was sexual harassment, rather than sexual orientation harassment.[171] He asserted that Edwards' harassment was intimidating to men as a group, and that Edwards did not similarly harass female employees.[172] However, because Hamner failed to raise this issue at the trial level, the appellate court refused to address it.[173]

Although unable to review the issue on appeal, the Seventh Circuit offered, in dicta, that the sexual harassment claim would be meritless.[174]

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[162] *Hamner*, 224 F.3d at 704. A court may order a judgment as a matter of law if, after hearing plaintiff's case, it finds the evidence insufficient to sustain plaintiff's claim. Fed. R. Civ. Pro 50(a) (1994).

[163] *Hamner*, 224 F.3d at 704.

[164] *Id.* at 707.

[165] *Id.* at 704.

[166] *Id.* at 706-07.

[167] *Id.* at 706-07; *see also* Spearman v. Ford Motor Co., 231 F.3d 1080, 1086 (7th Cir. 2000) (finding plaintiff's belief unreasonable that sexual orientation harassment was unlawful).

[168] *Hamner*, 224 F.3d at 707.

[169] *Id.*

[170] *Id.*

[171] *Id.* Hamner argued that the harassment was based on sex-stereotyping. *Id.*; *see* Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (ruling sex discrimination also precludes discrimination based on gender stereotypes).

[172] *Hamner*, 224 F.3d at 707. The Seventh Circuit noted that Hamner offered no evidence that Edwards held a general hostility toward men. *Id.* Hamner may have prevailed if he had established that Edwards' conduct exhibited a general hostility toward all male nurses, not just gay nurses. *Id.* at 707 n.5.

[173] *Id.* at 707.

[174] *Id.*

Title VII distinguishes discrimination based on one's biological sex rather than one's sexuality by prohibiting the former and not the latter.[175] Hamner based his company grievance entirely on his homosexuality.[176] Therefore, he had no Title VII claim.[177] Alternatively, had Hamner based his grievance on sex-stereotyping, his complaint may have survived under the *Price Waterhouse* analysis.[178] Nonetheless, the Seventh Circuit adhered to the traditional and narrow interpretation of the term "sex."[179]

B. The Ninth Circuit Approach: Schwenk v. Hartford

In contrast to the Seventh Circuit, the Ninth Circuit embraces a broader definition of "sex" to include one's biological sex as well as one's gender.[180] According to the Ninth Circuit, Title VII plaintiffs may establish sex discrimination based on biological sex.[181] Alternatively, plaintiffs may prevail by establishing that they suffered adverse action because they failed to exhibit the stereotypical characteristics of their gender.[182]

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[175] *Id.* at 704 (citing Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1087 (7th Cir. 1984)); *see also* Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000) (stating Title VII protects against sex discrimination not discrimination based on sexual orientation); Spearman v. Ford Motor Co., 231 F.3d 1080, 1086 (7th Cir. 2000) (holding Title VII prohibits sex discrimination based on biological sex, but not sexual orientation).

[176] *Hamner*, 224 F.3d at 705.

[177] *Id.* at 705.

[178] *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (holding Title VII prohibits sex-stereotyping as sex discrimination). However, it is unlikely Hamner would have prevailed with that strategy either. *See Spearman*, 231 F.3d at 1087 (rejecting plaintiff's claim because discrimination directed at sexual orientation only); *Hamner*, 224 F.3d at 707 (holding in dicta that court cannot sustain Title VII claim where discrimination directed solely at sexual orientation).

[179] *Hamner*, 224 F.3d at 1087.

[180] *See* Schwenk v. Hartford, 204 F.3d 1187, 1201-02 (9th Cir. 2000) (defining "sex" as biological and socially constructed gender expectations), *cited in Simonton*, 232 F.3d at 37. The Ninth Circuit holds that the terms "sex" and "gender" are interchangeable for the purposes of these two acts. *Id.* Other courts distinguish the two: "sex" encompasses the biological and anatomical characteristics while "gender" describes one's sexual identity or socially-constructed characteristics. *Id.* at 1201; *see Ulane*, 742 F.2d at 1084 (defining "sex" under Title VII as anatomical sex only, not gender); Smith v. Liberty Mut. Ins. Co., 569 F.2d 325, 330 (5th Cir. 1978) (noting "sex" does not include gender characteristics, such as effeminacy).

[181] *Schwenk*, 204 F.2d at 1201-02; *see also* DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 330 (9th Cir. 1979) (holding "sex" under Title VII does not cover sexual preference); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 661-63 (9th Cir. 1977) (noting Title VII requires discrimination because of biological sex).

[182] *See Price Waterhouse*, 490 U.S. at 250 (holding Title VII bars discrimination based on plaintiff's failure to act like stereotypical woman); *Schwenk*, 204 F.2d at 1201-02 (noting society imputes masculinity to males and femininity to females); Higgins v. New Balance

In *Schwenk v. Hartford*, the Ninth Circuit held that the Gender Motivated Violence Act ("GMVA")[183] prohibits violence motivated by an animus toward transsexuality.[184] The *Schwenk* court paralleled the interpretation of "gender" under the GMVA to that of "sex" under Title VII, using the sex-stereotyping analysis in *Price Waterhouse*.[185] Accordingly, it held that discrimination based on one's transsexuality constitutes gender discrimination.[186]

In *Schwenk*, the plaintiff was a preoperative male-to-female transsexual[187] who was incarcerated at an all-male state penitentiary.[188] Although anatomically a male, Schwenk psychologically identified as a female.[189] Schwenk was soft-spoken, feminine, had long hair and wore makeup.

The defendant, Robert Mitchell, was a prison guard who heard rumors that Schwenk was a homosexual.[190] Shortly after arriving at Schwenk's unit, Mitchell made several unsolicited sexual advances toward Schwenk.[191] The harassment quickly accelerated to physical and sexual assault.[192]

Athletic Shoe, Inc., 194 F.3d 252, 261 n.4 (1st Cir. 1999) (stating Title VII protects plaintiffs who do not meet stereotyped expectations of their sex).

[183] The GMVA is a subchapter of the Violence Against Women Act ("VAWA"). 42 U.S.C. § 13981(c) (2001); VAWA, Pub. L. No. 103-322, 108 Stat. 1902 (codified as amended in scattered sections of 8 U.S.C., 18 U.S.C., and 42 U.S.C.), *amended by* Pub. L. No. 104-294, 110 Stat. 3506, 3507 (codified as amended in scattered sections of 18 U.S.C.).

[184] *Schwenk*, 204 F.3d at 1200 . *But see Ulane*, 742 F.2d at 1087 (construing "sex" under Title VII to not include transsexuality); *Holloway*, 566 F.2d at 661-63 (recognizing transsexuality as part of gender, yet noting that Title VII only encompasses biological sex).

[185] *Price Waterhouse*, 490 U.S. at 251; *Schwenk*, 224 F.3d at 1201-02.

[186] *Schwenk*, 204 F.3d at 1202.

[187] Although Schwenk had not undergone a sex-change operation, she considered herself to be a woman. *Id.* at 1193.

[188] *Id.*

[189] *Id.*

[190] *Id.* Still, Schwenk referred to herself as a pre-operative transsexual to Mitchell and other prison guards, and asked to be called "Crystal" instead of "Douglas". *Id.*

[191] *Id.* Mitchell's inappropriate conduct included obscene and threatening comments, simulations of oral sex, and demands that Schwenk perform sexual acts with him. *Id.*

[192] *Id.* Mitchell repeatedly assaulted Schwenk. In one instance, he grabbed Schwenk and groped her buttocks after she refused to have sex with him. *Id.* Another night, Mitchell entered Schwenk's cell, unzipped his pants and demanded oral sex. Again, Schwenk refused. *Id.* at 1194. Next, Mitchell shut the cell door, forced Schwenk face forward against the bars, and began grinding his penis into her buttocks while making derogatory remarks. *Id.* Then, Mitchell suddenly stopped, zipped his pants and quickly left. *Id.*

Schwenk sued Mitchell for violation of the GMVA.[193] Schwenk contended that she was traumatized by Mitchell's physical attack and threats.[194] Mitchell moved for summary judgment, asserting that Schwenk failed to state a claim under the GMVA.[195] Specifically, Mitchell argued that Schwenk did not allege that the attack was motivated by gender, but rather by transsexuality.[196] He asserted that transsexuality is not part of Schwenk's gender; instead it is a component of a psychiatric illness known as gender dysphoria.[197] Therefore, Mitchell claimed, the GMVA is inapplicable because the attack was not motivated by gender or a gender animus.[198] The district court denied Mitchell's motion for summary judgment, and he filed an interlocutory appeal.[199]

The Ninth Circuit also denied Mitchell's motion for summary judgment, holding that Schwenk properly asserted a claim of gender-motivated violence under the GMVA.[200] The Court distinguished "gender" from "sex", defining "gender" as an individual's sexual identity or socially-constructed characteristics.[201] For example, male-to-female transsexuals, such as Schwenk, assume a feminine appearance and name and do not conform to the socially-prescribed expectations of the male gender.[202] Schwenk alleged that her transsexuality, a gender characteristic, motivated Mitchell's attack.[203] As such, Mitchell's attack

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[193] *Id.* at 1192. Schwenk also sued under Section 1983 and for violation of the Eighth Amendment right to be free from cruel and unusual punishment. *Id.*

[194] *Id.* at 1194. This paper uses feminine pronouns when referring to Schwenk because that is how the Ninth Circuit refers to male-to-female transsexuals. *Id.* at 1192 n.1.

[195] *Id.* at 1195.

[196] *Id.*; *see* GMVA, 42 U.S.C. § 13981(d)(1) (2001) (requiring plaintiff to establish crime was motivated, at least in part, by animus toward victim's gender).

[197] *Schwenk*, 204 F.3d at 1200. Gender dysphoria is the medical term for transsexualism, and considered to be a psychiatric illness. *Id.*; *see also* Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984) (holding Title VII does not outlaw discrimination against persons with sexual identity disorder).

[198] *Schwenk*, 204 F.3d at 1200.

[199] *Id.* at 1195.

[200] *Id.* at 1202.

[201] *Id.* at 1201 (citing Dobre v. Amtrak, 850 F. Supp. 284, 286 (E.D. Pa. 1993)) (finding "sex" encompasses both biological sex and gender, and gender encompasses sexual identity). This distinction is important because many courts use the terms "sex" and "gender" interchangeably. *See, e.g.*, Vandeventer v. Wabash Nat'l Corp., 887 F. Supp. 1178, 1181 n.1 (N.D. Ind. 1995) (defining meaning of sex under Title VII as gender, not behavior or characteristics); Case, *supra* note 143, at 2 (noting discrimination law uses "sex" and "gender" synonymously).

[202] *Schwenk*, 204 F.3d at 1201 n.12; *see* Capers, *supra* note 145, at 1160 (noting society expects males to be masculine). *See generally* Case, *supra* note 143, at 7-8, 46-57 (discussing society's hostility toward effeminate men).

[203] *Schwenk*, 204 F.3d at 1202. In this context, it does not matter that Schwenk had not

violated the GMVA because it was gender-motivated.[204]

The Ninth Circuit used the Title VII sex-stereotyping rationale of *Price Waterhouse* to broadly interpret the term "gender" under the GMVA.[205] The *Schwenk* court asserted that the statutes are similar because they both prohibit discrimination on the basis of gender or sex.[206] The Ninth Circuit went one step further than *Price Waterhouse*, however, when it held that "gender" encompasses one's sexual identity, i.e. transsexuality, under the GMVA.[207] The Ninth Circuit reasoned that Schwenk failed to conform to the socially-constructed gender expectations of men.[208] Her outward behavior and inward identity conformed to gender stereotypes of femininity, rather than masculinity.[209]

C. From Title VII to GMVA: What Is the Meaning of Sex?

In *Schwenk*, the Ninth Circuit interpreted the meaning of "gender" under the GMVA by analogizing it to the definition of "sex" under Title VII.[210] In *Price Waterhouse*, the Supreme Court held that "sex" under Title VII includes biological sex and gender expectations.[211] Despite this holding, many federal courts continue to restrict the definition of "sex" under Title VII to biological sex only.[212]

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yet undergone sex reassignment surgery. The Ninth Circuit accepted Schwenk as a transsexual since she considered herself to be female, preferred to live and dress as a female, and wanted to obtain female anatomy. *Id.* at 1193 n.4.

[204] *Id.* at 1202.

[205] *See id.* at 1200-02. (asserting Congress intended to adopt *Price Waterhouse* "sex" definition when it used same case law language in new statute).

[206] *Id.* at 1202. Regardless of a court's definition of "sex", *Price Waterhouse* held that discrimination based on biological sex or sex-stereotyping constitutes sex discrimination under Title VII. Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989).

[207] *Schwenk*, 204 F.3d at 1202.

[208] *Id.*

[209] Schwenk's outward behavior conformed with the socially-constructed characteristics of femininity in her dress, walk, and speech. *Id.* at 1193. Likewise, Schwenk stated that she had psychologically identified as a female since adolescence. *Id.*

[210] *Id.* at 1200-02.

[211] *See Price Waterhouse*, 490 U.S. at 240 (holding Title VII prohibits discrimination based on sex stereotypes); *Schwenk*, 204 F.3d at 1202 (defining "gender" under GMVA as socially-constructed characteristics of one's biological sex).

[212] *See, e.g.*, Spearman v. Ford Motor Co., 231 F.3d 1080, 1085-86 (7th Cir. 2000) (rejecting plaintiff's claim that co-workers harassed him for being too effeminate because harassment was not directed toward plaintiff's sex); Dandan v. Radisson Hotel Lisle, 2000 WL 336528, *1 (N.D. Ill. 2000) (finding co-worker's harassment of plaintiff regarding his feminine speech patterns did not amount to sexual harassment claim under Title VII).

Congress enacted the GMVA in 1994, five years after the *Price Waterhouse* decision.[213] However, the GMVA does not define the term "gender".[214] Accordingly, the Ninth Circuit in *Schwenk* presumed that when Congress adopts specific language from case law, it intends that language to have the same meaning in the statute.[215]

The *Schwenk* court held that because Congress adopted the GMVA after *Price Waterhouse*, both the GMVA and Title VII prohibit discrimination based on gender and sex.[216] The Ninth Circuit found that gender encompasses transsexuality as a sexual identity.[217] Because Schwenk acted, dressed, and believed herself to be a woman,[218] she did not conform with society's expectations that men should be masculine.[219] Thus, the Ninth Circuit suggested, in dicta, that the sex discrimination proscribed by Title VII would include discrimination based on one's transsexuality or sexual orientation.[220]

III. MODEL SOLUTION

Although the Ninth Circuit approach moves the law in the right direction, it is insufficient to afford gays and lesbians meaningful protection from workplace discrimination.[221] Instead, the Supreme Court should explicitly expand sex discrimination under Title VII to include sexual orientation. Three primary reasons dictate this expansion. First,

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[213] 42 U.S.C. § 13981 (1994); *Price Waterhouse*, 490 U.S. at 228.

[214] 42 U.S.C. § 13981(d).

[215] *Schwenk*, 204 F.3d at 1202 n.12; *see* Russello v. United States, 464 U.S. 16, 23 (1983) (presuming Congress intentionally omitted limiting language from previous statute); Espinoza-Gutierrez v. Smith, 94 F.3d 1270, 1275 (9th Cir. 1996) (presuming Congress intended language it adopts from case law to retain its meaning in statute).

[216] *Schwenk*, 204 F.3d at 1202 n.12.

[217] *Id.* at 1202.

[218] *Id.* at 1193.

[219] *Schwenk*, 204 F.3d at 1202; *see also* Capers, *supra* note 145, at 1160 (explaining society expects men to be masculine); Case, *supra* note 143, at 2-3 (asserting society views masculinity as successful, thus society perceives effeminate men as weak).

[220] *Schwenk*, 204 F.3d at 1202. In *United States v. Morrison*, the Supreme Court ruled that the GMVA was unconstitutional because Congress had exceeded its section 5 powers under the Fourteenth Amendment. 120 S. Ct. 1740, 1748 (2000). The GMVA is still relevant for the purpose of this paper's analysis, however, because it demonstrates Congress's willingness to adopt a broader definition of gender.

[221] For instance, the *Schwenk* Court's gender-stereotyping analysis might still leave the straight-acting gay male and feminine lesbian without protection from discrimination. *See* Simonton v. Runyon, 232 F.3d 33, 38 (2d Cir. 2000) (pointing out not all gay men are stereotypically effeminate, nor all heterosexual men stereotypically masculine). Therefore, gays and lesbians who conform to the social expectations of their gender would still be subject to discrimination based on their sexual orientation. *Id.*

protecting gays and lesbians from workplace discrimination is consonant with the fundamental legislative purpose underlying Title VII.[222] Second, Title VII is a remedial statute, requiring the Court's broad interpretation.[223] Finally, public policy demands the eradication of the deep hate and prejudice historically directed toward gays and lesbians.[224]

A. Expanding Title VII is Consonant with Congressional Intent

Congress enacted the Civil Rights Act of 1964 with the broad goal of eradicating significant areas of discrimination nationwide.[225] In particular, Title VII's aim was to create equal opportunities for minorities in the employment arena.[226] To effectuate this goal, Title VII targeted the long-standing discriminatory barriers against minorities in the labor force.[227] Although Congress was primarily targeting racial inequality at the time of Title VII's enactment,[228] Congress eventually afforded employment protection to other disadvantaged groups through similar legislation.[229]

Extending Title VII protection to gays and lesbians via sex discrimination furthers the statute's overall goal of eradicating long-term

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[222] Title VII is a subchapter of the Civil Rights Act of 1964. 42 U.S.C. § 2000e. One of the Act's paramount concerns was eradicating significant areas of discrimination nationwide. H.R. REP. NO. 914, at 3 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2393-94. *See also* ESKRIDGE, *supra* note 1, at 233 (arguing Title VII policies support statutory protection for gays and lesbians); Capers, *supra* note 145, at 1179 (contending excluding sexual orientation from Title VII protection results in unfair and inconsistent application).

[223] *See Schwenk*, 224 F.3d at 1202 n.12 (noting Title VII and GMVA are remedial statutes); Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984) (recognizing Title VII is remedial statute); *see also* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479 (1987) (asserting remedial statutes require dynamic interpretation).

[224] *See supra* pp. 8-10 (discussing history of discrimination against gays and lesbians).

[225] H.R. REP. NO. 914, at 3.

[226] *Id.* at 11.

[227] Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971); *see also* Andrews v. Philadelphia, 895 F.2d 1469, 1483 (3rd Cir. 1990) (noting Congress enacted Title VII to prevent perpetuation of stereotypes and degradation which close employment opportunities).

[228] *See Ulane*, 742 F.2d at 1085 (noting Congress was primarily concerned with racial discrimination when it enacted Civil Rights Act); H.R. REP. NO. 914, at 3 (stating eliminating racial discrimination is primary goal of Civil Rights Act); S. REP. NO. 872, at 8 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2355, 2362 (recognizing bipartisan goal of eradicating racial discrimination).

[229] The Civil Rights Act of 1964 also prohibited discrimination based on color, national origin, religion, or sex. 42 U.S.C. § 2000e-2(a). In 1967, Congress extended similar rights to older Americans with the Age Discrimination in Employment Act. 29 U.S.C. § 621. In 1990, Congress expanded civil rights legislation with the Americans with Disabilities Act. 42 U.S.C. § 12101.

discrimination in the workplace.[230] Many courts have recognized that this country's history is replete with prejudice, hatred, and stereotyping toward gays and lesbians.[231] Gays and lesbians feel the acute effects of such animus in the employment arena, where employers may terminate their jobs solely on the basis of their sexual orientation.[232] Thus, courts should expand Title VII to include sexual orientation to preserve the chief principle behind the statute: guaranteeing the right to employment opportunities free from arbitrary discrimination.[233]

When Congress enacted the remedial Title VII in 1964, its express purpose was to eradicate long-term invidious discrimination in the workplace.[234] However, because sex discrimination was a last-day addition to the statute, there is little legislative guidance regarding its intended scope.[235] Thus, courts have been left to their own devices in interpreting the circumstances to which the prohibition applies.[236] As such, courts initially found that the term "sex" referred only to biological sex, not gender.[237] Accordingly, Title VII's prohibition of sex discrimination only proscribed an employer from treating women as a

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[230] *See* H.R. REP. NO. 914, at 3 (stating Act's principle goal is eradication of significant areas of discrimination nationwide); 142 CONG. REC. S10129, S10133 (daily ed. Sept. 10, 1996) (statement of Sen. Hatfield) (asserting goal of anti-discrimination laws is to ensure employers judge employees based on quality of work); 142 CONG. REC. S10129, S10134 (daily ed. Sept. 10, 1996) (statement of Sen. Kennedy) (discussing natural progression of extending employment protections for racial minorities, men and women, persons with disabilities, and finally, gays and lesbians).

[231] *See, e.g.*, Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of cert.) (noting gays and lesbians have historically been object of pernicious and perpetual hostility); Watkins v. United States Army, 875 F.2d 699, 724 (9th Cir. 1989) (Norris, J., concurring) (asserting discrimination suffered by gays and lesbians is as pernicious and intense as other protected classes, such as aliens and national origin); High Tech Gays v. Def. Indus. Sec. Clearance Office, 909 F.2d 375, 377 (9th Cir. 1987) (Canby, J., dissenting) (noting lesbians and gays have been object of deepest prejudice and hatred in society).

[232] *See* 142 CONG. REC. S9986 (daily ed. Sept. 6, 1996) (statement of Sen. Kennedy) (recognizing gay and lesbian employees fear reprisal, demotion, or even termination because of their sexual orientation).

[233] H.R. REP. NO. 914, at 8.

[234] *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (explaining Title VII targeted long standing discriminatory barriers against minorities in workforce); H.R. REP. NO. 914, at 3 (stating bill's purpose was to eradicate minority discrimination).

[235] *See supra* notes 42-50 and accompanying text (discussing history of "sex" addition to Title VII).

[236] *See supra* notes 42-50 and accompanying text (discussing legislative history of sex discrimination).

[237] Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000); Hamner v. St. Vincent Hosp. & Health Ctr., 224 F.3d 701, 704 (7th Cir. 2000); Hopkins v. Balt. Gas & Elec. Co., 77 F.3d 745, 749 n.1 (4th Cir. 1996) ().

group differently than men as a group.[238]

Since the enactment of Title VII in 1964, however, the courts have gradually broadened the reaches of sex discrimination to effectuate the statute's overall purpose. The 88th Congress never investigated the issues of sexual harassment,[239] sex-stereotyping,[240] or same-sex harassment[241] when it debated the parameters of Title VII.[242] Nonetheless, the U.S. Supreme Court has interpreted the statute's prohibition of sex discrimination to consider these actions unlawful employment practices.[243] The Supreme Court justified this expansion as consonant with Title VII's overall purpose, which was to eliminate arbitrary discrimination and barriers in the workplace.[244] Following this rationale, extending Title VII protection to gays and lesbians under the umbrella of sex discrimination should be the Court's next logical step.[245]

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[238] *See* sources cited *supra* note 247.

[239] *See* Meritor Sav. Bank v. Vincent, 477 U.S. 57, 65-73 (1986) (holding sex discrimination under Title VII precludes *quid pro quo* sexual harassment). *Quid pro quo* harassment exists when an employer conditions employment benefits on the performance of sexual favors by the employee. *Id.* In *Harris v. Forklift Systems, Inc.*, the Supreme Court recognized a second type of sexual harassment, hostile work environment. 510 U.S. 17, 18 (1993). A hostile work environment exists when an employer so severely and pervasively harasses the employee that the harassment alters the conditions of employment. *Id.* at 21-22.

[240] *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989) (holding Title VII prohibits discrimination based on employee's failure to conform to socially constructed characteristics).

[241] *See* Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 78-79 (1998) (holding Title VII proscribes same-sex harassment under umbrella of sex discrimination).

[242] The 88th Congress did not discuss or investigate much of anything regarding the implications of adding "sex". *See* Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 (9th Cir. 1977) (explaining legislators added "sex" to Title VII in last minutes); Kanowitz, *supra* note 46, at 311 (noting southern Republicans added "sex" on last day of floor debate); Peluso, *supra* note 25, at 1537 (pointing out only eight pages in Congressional Record discuss sex amendment).

[243] *See Oncale*, 523 U.S. at 75 (interpreting Title VII to proscribe same-sex harassment); *Price Waterhouse*, 490 U.S. at 228 (construing Title VII broadly to proscribe discrimination based on sex-stereotyping); *Meritor*, 477 U.S. at 65 (extending Title VII to prohibit sexual harassment).

[244] H.R. REP. NO. 914, at 3 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2393, 2395. Note that Congress codified the *Meritor* and *Price Waterhouse* holdings in the Civil Rights Act of 1991. Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C. §§ 2000e to -16 (1994)).

[245] *See 1997 ENDA Hearing*, *supra* note 32, at 4 (statement by Sen. Kennedy) (stating that it is time to expand employment protection to gays and lesbians); ESKRIDGE, *supra* note 1, at 238 (asserting that courts or legislature need to extend protection from employment discrimination to gays and lesbians).

B. Title VII Requires the Court's Broad Interpretation

Opponents of Title VII's expansion argue that courts should adhere to the original legislative intent of the statute.[246] In 1964, Congress did not consider prohibiting workplace discrimination based on sexual orientation.[247] It merely prohibited discrimination on the basis of race, color, national origin, religion, or sex.[248] Historically, when Congress has intended to afford workplace protection to a new group, it expressly does so by statutory enactment.[249] For example, Congress extended employment protection to older workers in the Age Discrimination in Employment Act of 1967.[250] Likewise, Congress prohibited discrimination based on an employee's disability in the American with Disabilities Act of 1990.[251] Since Title VII's enactment, however, Congress has repeatedly declined to extend such protection to gays and lesbians.[252] Accordingly, opponents argue that Congress has never intended to safeguard gays and lesbians from employment discrimination.[253] Indeed, critics argue that if courts were to incorporate sexual orientation into Title VII via sex discrimination, they would contravene the statute's clear legislative intent.[254] In other words, the courts would be making new

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[246] *See* Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984) (looking to legislative intent of 88th Congress to determine reaches of sex discrimination); Earl M. Maltz, Article, *Rhetoric and Reality in the Theory of Statutory Interpretation: Underenforcement, Overenforcement, and the Problem of Legislative Supremacy*, 71 B.U. L. REV. 767, 769-771 (1991) (discussing traditionalist argument courts should first look to legislative intent when interpreting statutes).

[247] *See* Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000) (noting Congress did not consider including sexual orientation in Title VII); Hamner v. St. Vincent Hosp. & Health Ctr., 224 F.3d 701, 707 (7th Cir. 2000) (finding legislative intent of Title VII was not prohibition of employment discrimination based solely on sexual orientation); *Ulane*, 742 F.2d at 1085 (interpreting legislative intent as narrowly defining "sex" to mean biological only).

[248] 42 U.S.C. § 2000e-2(a).

[249] *See e.g.*, ADEA, 29 U.S.C. § 620 (1994) (extending protection to individuals over 40 years of age); ADA, 42 U.S.C. § 12101 (1994) (prohibiting employment discrimination based on disability).

[250] Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. § 620).

[251] Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. § 12101).

[252] *See supra* notes 129-41 and accompanying text (describing history of failed attempts to extend employment protection to gays and lesbians).

[253] *See* Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000) (arguing Congress's refusal to expand Title VII to include sexual orientation makes clear Congress did not want "sex" to include sexual orientation); Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984) (asserting Congress never intended Title VII to proscribe sexual orientation discrimination or harassment).

[254] *See* 2 Emp. Prac. Guide (CCH) ¶ 6493 (1976) (finding no congressional intent to include sexual practices in definition of sex), *quoted in* CATHARINE A. MACKINNON, SEXUAL

law, rather than enforcing the existing law.[255] Such judicial activism, critics argue, would usurp the separation of powers doctrine.[256] Courts should remain within the boundaries of interpreting the law and should not trespass on Congress's authority to create the law.[257]

Opponents of Title VII expansion are correct in that the 88th Congress never considered prohibiting discrimination based on sexual orientation.[258] However, Title VII is a remedial statute and should not be so narrowly construed as to defeat its overall purpose.[259] Generally, courts construe ambiguous language in remedial statutes liberally to effectuate the legislature's overall curative goals.[260]

Some scholars assert that this requires the Supreme Court to consider the current social, political, and legal context of the statute.[261] First, Congress has an express overall purpose when it drafts remedial legislation.[262] Congress's objective in enacting Title VII was to eradicate

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HARASSMENT OF WORKING WOMEN 204 (1979).

[255] *See Ulane*, 742 F.2d at 1086 (stating that if court extended Title VII to include sexual orientation, it would be creating, rather than reviewing, legislation). *But see* Eskridge, *supra* note 223, at 1498-99 (criticizing formalist argument courts have absolutely no lawmaking power).

[256] *See* Thomas Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1 (1985) (arguing that separation of powers doctrine delegates all lawmaking power to legislative branch, leaving none to judicial branch); *see also* IRVING J. SLOAN, HOMOSEXUAL CONDUCT AND THE LAW 22 (1987) (arguing Congress is only appropriate government body to extend Title VII protections to gays and lesbians).

[257] *See Simonton*, 232 F.3d at 35 (asserting legislature is only branch that should extend Title VII protection to include sexual orientation); *Ulane*, 742 F.2d at 1086 (stating courts must leave duty of creating laws to legislature).

[258] *See Simonton*, 232 F.3d at 35 (noting Congress did not consider including sexual orientation in Title VII); *Ulane*, 742 F.2d at 1085 (recognizing Title VII's original drafters did not contemplate extending protection to transsexuals).

[259] Schwenk v. Hartford, 204 F.3d 1187, 1201 n.12 (9th Cir. 2000).

[260] *See* Almero v. INS, 18 F.3d 757, 762 (9th Cir. 1994) (citing courts need to broadly construe remedial legislation); Debra R. Volland, *Recent Case, A Quick Case for Including Same-Sex Harassment Under Title VII*, 20 HARV. J.L. & PUB. POL'Y 615, 619 (1997) (arguing courts should interpret remedial statutes broadly). *But see Ulane*, 742 F.2d at 1086 (noting courts should liberally construe remedial statutes, but without exceeding reasonable bounds); Justice Antonin Scalia, *Essay: Assorted Canards of Contemporary Legal Analysis*, Eleventh Sumner Canary Lecture (Oct. 24, 1989), *in* 40 CASE W. RES. L. REV. 581, 581-86 (1990) (criticizing maxim that courts should liberally construe remedial statutes).

[261] Eskridge, *supra* note 223, at 1479; Seth F. Kreimer, *The Source of Law in Civil Rights Actions: Some Old Light on Section 1983*, 133 U. PA. L. REV. 601, 611 (1985) (noting Supreme Court considers modern social and political realities when interpreting remedial statutes). *See, e.g.*, Smith v. Wade, 461 U.S. 30, 92-94 (1983) (O'Connor, J., dissenting) (asserting court should consider remedial statute's current policy context rather than rely on legislative history alone).

[262] Eskridge, *supra* note 223, at 1479.

arbitrary discrimination in the workplace.[263] However, the drafters of remedial legislation cannot predict all of the possible circumstances to which the statute might apply.[264] For instance, the original drafters did not predict sexual harassment, sex-stereotyping, nor same-sex harassment when drafting Title VII.[265]

Secondly, part of the remedial statute may be ambiguous because the legislature did not clearly articulate its intent regarding that particular section.[266] This is especially true when there is little or no legislative history regarding the drafting of the section in question.[267] Courts have repeatedly acknowledged that the sparse legislative history behind Title VII's sex discrimination clause has made it difficult to interpret its scope.[268]

Consequently, courts should not interpret remedial statutes by scrutinizing an ambiguity in a particular section. Instead, courts should promote the overall purpose of the legislation in consideration of current societal circumstances.[269] When interpreting what constitutes "sex", courts should look to Title VII's overall purpose of eradicating discrimination in the workplace.[270] Thus, courts should interpret the

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[263] *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (explaining Title VII targeted long standing discriminatory barriers against minorities in workforce); H.R. REP. NO. 914, at 3 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2393, 2394 (stating that bill's purpose was to eradicate minority discrimination).

[264] Eskridge, *supra* note 223, at 1488-94 (arguing court had to determine whether Title VII prohibited voluntary affirmative action plans because statute does not specifically address it) (citing United Steelworkers v. Weber, 443 U.S. 193 (1979)); Volland, *supra* note 271, at 619-22 (arguing Congress never considered whether Title VII prohibits same-sex discrimination).

[265] *See* Simonton v. Runyon, 232 F.3d 33, 36 (2d Cir. 2000) (noting Congress did not consider including sexual orientation in Title VII); *Ulane*, 742 F.2d at 1085 (recognizing Title VII's original drafters did not contemplate extending protection to transsexuals).

[266] Eskridge, *supra* note 223, at 1480.

[267] *Id.* For example, a lack of legislative deliberation regarding the definition of "sex" under Title VII has left federal courts to their own devices when interpreting its meaning. *See supra* notes 42-50 and accompanying text (discussing dearth of legislative history had left courts on their own to interpret "sex").

[268] *See Simonton*, 232 F.3d at 35 (noting Congress did not define "sex" when drafting Title VII); *Ulane*, 742 F.2d at 1085 (recognizing Title VII's original drafters did not contemplate furthest possible meaning of "sex").

[269] Eskridge, *supra* note 223, at 1479-80. Eskridge explains that in interpreting the Constitution and common law, courts look to many factors, i.e., historical background, stare decisis, and current societal facts. *Id.* at 1479. This dynamic interpretation is the most appropriate approach to remedial statutes because as time passes, the legal and constitutional context of the statute will change. *Id.* at 1480.

[270] Eskridge, *supra* note 223, at 1480; *see* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (noting Congress wanted to remove artificial, arbitrary, and unnecessary barriers to employment which result in invidious discrimination on basis of protected status); H.R.

statute broadly to prohibit sexual orientation discrimination.

C. *Public Policy and Fundamental Fairness Demand the Extension of Title VII Protection to Gays and Lesbians*

The Supreme Court should interpret Title VII to prohibit sexual orientation discrimination as a matter of public policy.[271] Throughout American history, gays and lesbians have suffered from invidious discrimination and unequal treatment in the workplace and other areas.[272] As with race, federal law should proscribe employers from considering sexual orientation a legitimate factor in determining an employee's worth.[273] This is consonant with the public policy that individuals should not be penalized because of an arbitrary trait, such as race, ethnicity, or sex.[274]

A prevalent argument against expanding Title VII to protect sexual orientation is that expansion would open the floodgates of litigation.[275]

REP. NO. 914, at 3 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2393 (stating purpose of act is to eradicate prevalence of discrimination).

[271] *See generally* William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007 (1989) (arguing courts should give greater weight to contemporary public values when interpreting statutes); Sorenson, *supra* note 36, at 2110 (arguing courts should consider public values in statutory interpretation) (citing Eskridge, *supra* note 223, at 1480). *But see* Maltz, *supra* note 256, at 778-81 (arguing separation of powers doctrine limits court's ability to consider public policy in statutory interpretation).

[272] *See* High Tech Gays v. Def. Indus. Sec. Clearance Office, 909 F.2d 375, 377 (9th Cir. 1987) (Canby, J., dissenting) (recognizing history of prejudice and hatred suffered by gays and lesbians); ESKRIDGE, *supra* note 1, at 233 (noting 16 to 46 percent of gay and lesbian employees reported significant discrimination in obtaining or retaining jobs) (citing M.V. LEE BADGETT, ET AL., PERVASIVE PATTERNS OF DISCRIMINATION AGAINST LESBIANS AND GAY MEN: EVIDENCE FROM SURVEYS ACROSS THE UNITED STATES (Nat'l Gay and Lesbian Task Force Policy Inst., 1992)).

[273] *See* H.R. REP. NO. 92-238, at 5 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2141 (asserting every citizen deserves opportunity for self-respect that accompanies job); 142 CONG. REC. S10129, S10130 (daily ed. Sept. 10, 1996) (statement of Sen. Moseley-Braun) (asserting sexual orientation, like race and gender, bears no relation to merit, talent, or abilities).

[274] *See 1997 ENDA Hearing*, *supra* note 32, at 25 (statement of Chai Feldblum, Assoc. Prof. of Law, Georgetown Univ. L. Ctr.) (asserting Americans have intuitive sense that law should protect individuals from unfair and arbitrary discrimination in workplace); Eskridge, *supra* note 271, at 1008 (offering public value that people should not be penalized because of arbitrary characteristic).

[275] *See, e.g.*, *1997 ENDA Hearing*, *supra* note 32, at 4 (statement of Sen. Kennedy) (noting ENDA opponents argue bill invites excessive litigation); 142 CONG. REC. S10129, S10130 (daily ed. Sept. 10, 1996) (statement of Sen. Kassebaum) (arguing more lawsuits and litigation will not promote greater tolerance for gays and lesbians in workplace); 142 CONG. REC. S9992 (daily ed. Sept. 6, 1996) (statement of Sen. Hatch) (arguing passing ENDA would result in litigation bonanza); ESKRIDGE, *supra* note 1, at 234 (noting some employers

Accordingly, frivolous lawsuits claiming sexual orientation discrimination would overwhelm the nation's courthouses.[276] Moreover, extending Title VII protection to gays and lesbians would leave employers in a precarious position.[277] To protect themselves from liability, employers would have to ask their employees about their sexual orientation, thereby invading employees' privacy.[278] Thus, expanding Title VII to gays and lesbians would not create a more tolerant workplace; it would only frustrate the employer-employee relationship.[279]

However, expanding Title VII to ban sexual orientation discrimination will not open the floodgates of litigation.[280] Several state legislatures have already expanded their civil rights statutes to protect against such discrimination.[281] Moreover, some municipalities afford protection to gays and lesbians even when their state does not.[282] Theses states and municipalities have not suffered from frivolous lawsuits clogging their courtrooms.[283]

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fear opening floodgates to frivolous and costly lawsuits).

[276] *See* 142 CONG. REC. S9992 (daily ed. Sept. 6, 1996) (statement of Sen. Hatch) (asserting passing ENDA would cause logistical difficulty for federal courts). *But see* ESKRIDGE, *supra* note 1, at 234-38 (arguing that passing ENDA would not significantly increase number of complaints filed in federal courts).

[277] *See* 142 CONG. REC. S9998 (daily ed. Sept. 10, 1996) (statement of Sen. Nickles) (asserting employers will not know how to protect themselves from liability).

[278] *See* 142 CONG. REC. S10129, S10130, 10135 (daily ed. Sept. 10, 1996) (statements of Sen. Kassebaum & Sen. Nickles) (asserting asking about one's sexual orientation is only way employers could avoid liability under ENDA).

[279] *See id.* at S10131 (statement of Sen. Kassebaum) (arguing granting gays and lesbians cause of action for discrimination will divide workplace).

[280] *1997 ENDA Hearing*, *supra* note 32, at 4 (statement of Sen. Kennedy); *see* ESKRIDGE, *supra* note 1, at 234 (noting states with inclusive anti-discrimination statutes have not suffered from excessive litigation as result of statute).

[281] *See, e.g.*, Fair Employment and Housing Act of 1992, CAL. GOV'T CODE § 12920 (West Supp. 2001) (adding sexual orientation to list of protected statuses); New Jersey Law Against Discrimination, N.J. STAT. ANN. §§ 10:5-1 to -42 (West 1999) (prohibiting employment discrimination based on sexual orientation); Minnesota Human Rights Act, MINN. STAT. § 363.03 (Supp. 2002) (proscribing employers from discriminating on basis of sexual orientation). As of 2000, eleven states and the District of Columbia prohibit sexual orientation discrimination in both the public and private employment sectors: California (1979); Connecticut (1991); Hawaii (1991); Massachusetts (1989); Minnesota (1993); Nevada (1999); New Hampshire (1997); New Jersey (1991); Rhode Island (1995); Vermont (1991); and Wisconsin (1982). HUMAN RIGHTS CAMPAIGN, *supra* note 1, at 5; ESKRIDGE, *supra* note 1, at 356-61. Other states prohibit sexual orientation discrimination in the public sector only, i.e., Oregon (1993), New York (1983), and Washington (1985). *Id.*

[282] ESKRIDGE, *supra* note 1, at 356-61.

[283] *Id.* at 234.

The nation's capital provides a good example. In 1977, the District of Columbia enacted the Human Rights Act, which proscribed employment discrimination on the basis of sexual orientation.[284] The Human Rights Act is largely modeled after Title VII.[285] Of the 2,535 discrimination complaints filed between 1990 and 1995, only 100 (approximately 4%) concerned sexual orientation discrimination.[286] Employer compliance is one reason for the lack of litigation.[287] Despite assertions to the contrary,[288] employers have complied with anti-discrimination statutes without any significant burden.[289]

Interpreting Title VII to protect gays and lesbians would neither overburden employers nor result in excessive litigation.[290] Many employers have voluntarily added sexual orientation to their companies' non-discrimination policies, noting that it has improved employer-employee relations.[291] Likewise, a national policy proscribing sexual orientation discrimination would signal to employers and gay and lesbian employees that anti-gay animus is unacceptable at the workplace. A national policy would not incite frivolous litigation, instead it would foster the development of a more tolerant workplace.[292]

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[284] D.C. CODE ANN. § 2-1402.11 (2001). The Human Rights Act affords more protection than federal law by also prohibiting employment discrimination on the basis of personal appearance and family responsibilities. *Id.* at § 2-1401.01.

[285] *See* Howard Univ. v. Green, 652 A.2d 41, 45 (D.C. Cir. 1994) (noting Title VII legislation is analogous to Human Rights Act). Title VII also serves as the model for other states' anti-discrimination statutes that prohibit sexual orientation discrimination. *See, e.g.*, Voluntary Ass'n of Religious Leaders, Churches, & Organs. v. Waihee, 800 F. Supp. 882, 886 (D. Haw. 1992) (recognizing similarity between Hawaii anti-discrimination law and Title VII.

[286] ESKRIDGE, *supra* note 1, at 234-35.

[287] *See 1997 ENDA Hearing*, *supra* note 32, at 4 (statement of Sen. Kennedy); ESKRIDGE, *supra* note 1, at 235 (noting employers have conformed with state anti-discrimination statutes); HUMAN RIGHTS CAMPAIGN, *supra* note 1, at 6 (listing Fortune 500 companies that include sexual orientation in their companies' non-discrimination policies).

[288] *See supra* note 285 (predicting passing ENDA will result in floods of litigation by aggrieved gays and lesbians).

[289] *See* ESKRIDGE, *supra* note 1, at 236 (citing JAMES W. BUTTON, ET AL., PRIVATE LIVES, PUBLIC CONFLICTS 113-16, 123-28 (1994)) (finding sexual orientation claims make up less than 5% of discrimination claims).

[290] *See id.* at 234-38 (noting voluntary company policies and state enactments of anti-discrimination statutes has not resulted in excessive litigation).

[291] *Id.*

[292] *1997 ENDA Hearing*, *supra* note 32, at 4 (statement of Sen. Kennedy) (noting American public support for extending employment protection rights to gays and lesbians); ESKRIDGE, *supra* note 1, at 237 (noting anti-discrimination laws change society's focus from hysterical and narcissistic stereotypes to appreciation of similarity and diversity).

CONCLUSION

Currently, federal law does not protect gays and lesbians from employment discrimination on the basis of their sexual orientation.[293] Although Title VII is a remedial statute, a majority of federal circuits insist on narrowly restricting the statutory definition of "sex" to biological sex only.[294] As a result, these courts have consistently precluded gays and lesbians from combating sexual orientation discrimination under Title VII.

A recent Ninth Circuit decision, however, suggests that sex discrimination under Title VII may be a viable avenue for sexual orientation discrimination claims.[295] The Supreme Court has not addressed this recent circuit conflict. Regardless, statutory interpretation doctrine and public policy reasons dictate the appropriateness of extending Title VII protection against arbitrary employment discrimination to gays and lesbians.[296]

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[293] *See* 42 U.S.C. § 2000e-2(a) (1994) (failing to extend protected status to sexual orientation); ESKRIDGE, *supra* note 1, at 231-33 (noting federal law offers no protection to gays and lesbians against employment discrimination).

[294] *See supra* notes 91-119 and accompanying text (demonstrating courts' reluctance to broaden meaning of "sex").

[295] Schwenk v. Hartford, 204 F.3d 1187, 1201-02 (9th Cir. 2000).

[296] *See* Eskridge, *supra* note 223, at 1479 (asserting courts should consider current social, political, and cultural circumstances when interpreting old statutes); Eskridge, *supra* note 271, at 1008 (arguing courts should look to current public values when interpreting statutes).