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## Relationship Status? It's Complicated: Redefining Sexuality in the Workplace in light of Obergefell and the EEOC

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RELATIONSHIP STATUS? IT'S COMPLICATED:  
REDEFINING SEXUALITY IN THE WORKPLACE IN LIGHT  
OF *OBERGEFELL* AND THE EEOC

PATRICK BAILEY\*

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I. INTRODUCTION

The social agenda of feminism and the capitalistic nature of the American workforce have seldom converged.<sup>1</sup> However, in an attempt to empower women in the workplace and prevent them from being subject to hostile work environments, feminists have agreed with many classical business theorists in positing that the workforce should be a 'sterile' environment, void of any expression of sexuality.<sup>2</sup> As a result of feminist efforts and uncertainty about how to interpret the language in Title VII regarding sex discrimination and how it pertains to sexual harassment,<sup>3</sup> the normative corporate practice has been to eliminate sexual interaction in every way possible.<sup>4</sup> A number of workplaces have policies against vertical or horizontal dating;<sup>5</sup> some go as far as

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1. See Ann Ferguson & Rosemary Hennessy, *Feminist Perspectives on Class and Work*, STAN. ENCYCLOPEDIA OF PHIL., Winter 2010, at 3-11, <http://plato.stanford.edu/archives/win2010/entries/feminism-class/> [https://perma.cc/9KN9-MVA7] (explaining the progression of the workplace and the evolution of feminist theories about the role of women in work settings; namely, that women have been systematically excluded and oppressed because of their perceived status as caregivers not fit for the skilled and intellectual tasks that business demands).

2. Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2063 (2003).

3. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986) (explaining that in order for sexual harassment to be actionable under Title VII, the victim's working conditions must create an abusive working environment).

4. Schultz, *supra* note 2, at 2064.

5. *E.g.*, WALMART, GLOBAL STATEMENT OF ETHICS 13-14 (2017), <https://www.walmartethics.com/uploadedFiles/Content/U.S.%20-%20English.pdf> [https://perma.cc/LC9L-62KM] (noting that relationships between employees and suppliers should be limited to avoid conflicts of interest and that employees should not have relationships with other employees). As discussed

to constrain interactions between male and female coworkers to a strictly public sphere to avoid any implication of inappropriate behavior. As Professor Vicki Schultz notes, businesses and government entities have taken an extreme, prophylactic approach to the apparent strict liability standard of sexual harassment in the workplace.<sup>6</sup>

It is generally known that business entities have complex rules about interpersonal interactions among employees. Anyone who has endured an orientation for a job involving a human resources component has surely noticed that, aside from encouraging workers to report theft or negligence committed by fellow employees, orientations spend a considerable amount of time discussing sexual harassment policies and, at times, even quizzing prospective employees regarding these policies. The popular television sitcom, *The Office*, satirizes this phenomenon throughout the show; it overtly sheds light on the topic of corporate sexual harassment policies in an episode aptly entitled "Sexual Harassment."<sup>7</sup> In the episode, several male characters are depicted making sexist comments that are derogatory to women within earshot of female coworkers and using homophobic slang in the presence of a gay male coworker.<sup>8</sup> One employee resigned because he felt sexually harassed.<sup>9</sup>

Not surprisingly, these antics incited human resources to hold a meeting to revisit the company's sexual harassment policy; the corporation even sent an attorney down to the branch to ensure that the company would not be held liable for sexual harassment.<sup>10</sup> During the ensuing human resources training, the human resources representative makes it clear that office relationships should be immediately disclosed.<sup>11</sup> The manager then goes into a series of hypotheticals regarding office relationships and displays of intimacy in the workplace, covering the right to display pictures of family members on one's desk, overt same-sex relationships in the workplace, and whether it is okay to discuss personal intimacy at work.<sup>12</sup> After speaking with his corporate superior and the company's attorney, the manager comes to the

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herein, vertical dating is the act of dating one's superior, and horizontal dating is the act of dating one's co-worker who has the same level of authority.

6. Schultz, *supra* note 2, at 2101-02 (describing the focus of the "cultural sensitivity approach" that human resources divisions at many corporations observe when addressing sexual harassment. As Schultz notes, "It doesn't matter whether anyone intended to discriminate, as it's all a question of whether someone was offended.")

7. *The Office: Sexual Harassment* (NBC television broadcast Sept. 27, 2005).

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

conclusion that he cannot be friends with his coworkers if he wishes to comply with the corporate sexual harassment policy.<sup>13</sup>

While this episode is designed to be light-hearted commentary about what can happen in a poorly managed company, it illustrates many important points on both sides of the argument about whether or not sexuality has a place in the workplace. Most notably, corporations are terrified of sexual harassment claims and will bend over backwards to ensure that their employees are in compliance with sexual harassment policies.<sup>14</sup> Another criticism of the sexual harassment regime depicted in the episode is that it tends to segregate men and women, preventing them from interacting with each other out of fear of sexual harassment claims and thus subjugating women to lower-status roles with little hope of promotion.<sup>15</sup> The episode also hints that blue collar workers (who are predominantly men) are perceived as crude and more prone to harassing behaviors, as indicated by the manager going to predominantly male workers in the warehouse to learn dirty jokes.<sup>16</sup> The prevailing theme of the episode, and of sexual harassment policies in businesses generally, is that sexuality in the workplace should be strictly monitored and potentially eliminated if possible.<sup>17</sup>

Schultz hypothesizes that if the structure of the workplace were to change to promote systematic gender equality and integration, then the workplace would be more amenable to reasonable displays of sexuality (a trait that she suggests is immutable), and businesses could loosen their policies regarding sexual harassment.<sup>18</sup> She proposes a sliding scale in which the standard of proof that the plaintiff in a sexual harassment case must meet is proportional to the level of sex integration achieved by the company: the more integrated the workplace, the more the plaintiff will have to prove to establish sexual harassment, and vice versa.<sup>19</sup>

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13. *Id.*

14. *See* Schultz, *supra* note 2, at 2064.

15. *Id.* at 2134-35.

16. *The Office: Sexual Harassment* (NBC television broadcast Sept. 27, 2005).

17. *See* Schultz, *supra* note 2, at 2119-31 (discussing the approach that several human resources divisions take to policing intimacy in the workplace); *The Office: Sexual Harassment* (NBC television broadcast Sept. 27, 2005).

18. Schultz, *supra* note 2, at 2191-93.

19. *Id.* at 2173-84 (positing that raising the standard of proof for a plaintiff to bring a sexual harassment claim in integrated workspaces would incentivize employers to attack the structural inequalities that produce sexual harassment; namely, the categorical relegation of women and gender non-conformists to lower-status work positions and restricting their interactions with those in higher positions in the company, who are most often cisgendered—of a gender identity that is congruent with the sex that they were assigned at birth—men).

*Smith v. Millville Rescue Squad*<sup>20</sup> is a prime example of what can go wrong with workplace intimacy. In *Smith*, the plaintiff was allowed to date and subsequently marry a co-worker—specifically, a subordinate.<sup>21</sup> The marriage fell apart after the plaintiff had an affair with another co-worker.<sup>22</sup> The plaintiff was then terminated in anticipation of the disruptive nature and decreased performance that his pending divorce would cause.<sup>23</sup>

This is a somewhat unique case because (as noted above) most employers have policies against such workplace relationships in order to circumvent any potential sex discrimination or sex harassment claims. Many employers will terminate one or both employees upon the discovery of an intimate relationship to avoid the potential for a sex discrimination claim due to preferential treatment or a sexual harassment claim if one of the partners becomes disillusioned with the other if/when the relationship sours.<sup>24</sup> There is also a concern about other employees bringing harassment claims against the dating couple because, due to the ambiguity of Title VII<sup>25</sup> and existing jurisprudence, sexual harassment is a valid cause of action, regardless of the harasser's intent, so long as a reasonable person in the plaintiff's situation would feel harassed.<sup>26</sup>

While Professor Schultz posits a comprehensive and compelling case for the need for sexual expression in the workplace and how to reform business practices to allow it, her work precedes *Obergefell v. Hodges*,<sup>27</sup> and does not address the affect her proposed solution might have on individuals who do not conform with sex and gender norms.<sup>28</sup> Thus, her work does not consider the complications to the current state of the law.

If, under this strict liability standard, the couple in *Smith* were same-sex and they offended a co-worker with their relationship, the co-worker would have a viable claim for sexual harassment under most corporate policies and might have a sex discrimination claim under

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20. No. L-113-08, 2014 WL 2894924 (N.J. Super. Ct. App. Div. June 27, 2014).

21. *Id.* at \*1.

22. *Id.* at \*2.

23. *Id.* at \*9 (“The reason for the termination was the prospect of divorce and its presumed effects, not the spouses’ common employer.”).

24. See Sue Shellenbarger, *Getting Fired for Dating a Co-Worker: Office Romance Comes Under Attack*, WALL ST. J. (Feb. 19, 2004, 12:01 AM), <http://www.wsj.com/articles/SB107714343144933108> [<https://perma.cc/B6EJ-SYMF>] (providing anecdotal and statistical evidence of such policies against office romance).

25. See *infra* Part II.

26. See sources cited *infra* note 29.

27. 135 S. Ct. 2584 (2015).

28. See generally Schultz, *supra* note 2.

Title VII if the co-worker could show that the couple's relationship reasonably created a hostile work environment for the employee. As courts have noted, this is a subjective standard with many contributing factors.<sup>29</sup> Considering the plaintiff's at-will employment status in *Smith*,<sup>30</sup> a typical corporation would have seriously reprimanded or fired him upon discovering his relationship with his wife.

As Professor Schultz discusses, this fear-induced hair trigger to fire employees to avoid sexual harassment claims can lead to further sex segregation in the workplace,<sup>31</sup> thus perverting the intent behind the sex discrimination clause of Title VII. Under the current sexual harassment scheme, employers are incentivized to isolate men and women from each other in the workplace in order to avoid sexual harassment and increase productivity. However, this usually has the effect of keeping women in subordinate positions with little hope for upward mobility.<sup>32</sup> The sexual harassment regime also disadvantages those who do not conform to gender norms because stereotypes about their sexual behavior can create a lower threshold for 'victims' of sexual harassment to feel offended by interactions with them that would otherwise be considered benign (e.g., a gay man puts his hand on a male co-worker's shoulder, or a lesbian female tells a female coworker that she looks cute). Interestingly, the 'victim's' claim could give the alleged offender a colorable claim for sexual orientation discrimination, but this is not a certainty because some courts have refused to acknowledge sexual orientation discrimination as a form of gender discrimination.<sup>33</sup> This small hypothetical is one example of the need for legislation that further clarifies the sex discrimination clause of Title VII.

The *Obergefell* decision, coupled with the finding of the Equal Employment Opportunity Commission (EEOC) that sexual orientation is

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29. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) ("Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted '*discrimina[tion]* . . . because of . . . sex.' . . . [T]he objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'" (citations omitted)); *Dawson v. City of Westchester*, 373 F.3d 265, 272 (2d. Cir. 2004) ("Courts look to the totality of the circumstances in determining whether a plaintiff has established a hostile work environment claim, considering [multiple] factors . . ."); *Barnes v. Costle*, 561 F.2d 983, 994 (D.C. Cir. 1977) (explaining that Congress meant for Title VII to be interpreted liberally in the interest of fairness and equal opportunity).

30. *Smith v. Millville Rescue Squad*, No. L-113-08, 2014 WL 2894924, \*1 (N.J. Super. Ct. App. Div. June 27, 2014).

31. Schultz, *supra* note 2, at 2132.

32. *Id.* at 2131.

33. See, e.g., *Simonton v. Runyon*, 232 F.3d 33, 35 (2d. Cir. 2000) ("The law is well-settled in this circuit and in all others to have reached the question that Simonton has no cause of action under Title VII because Title VII does not prohibit harassment or discrimination because of sexual orientation.").

considered sex-based discrimination under Title VII,<sup>34</sup> will likely lead to more visible same-sex intimacy in the workplace. This will add an entirely new dimension to sex discrimination claims. What would it look like if an openly gay man worked at a company that refused to serve same-sex couples? Presuming that this would offend him or make him feel uncomfortable because of his employer's overt views against the lesbian, bisexual, gay, transsexual, and queer/questioning (LGBTQ) community, would he have a claim for sexual orientation-based harassment? The state of the sexual harassment regime today suggests that he would. Paradoxically, he may be without remedy if his employer fired him for his sexual orientation.<sup>35</sup> The most burning question of course is how the law will develop in light of *Obergefell* and the EEOC's decision in *Baldwin v. Foxx* that sexual orientation is protected from employment discrimination under Title VII.<sup>36</sup>

Section II of this Note discusses the state of the law regarding whether sexual orientation is a protected status under Title VII; Section III examines the state of the modern workplace and predicts how it will react to recent developments in the law; Section IV addresses potential avenues of legal development in the area of sexual orientation harassment; Section V concludes.

## II. WHAT CONSTITUTES TITLE VII SEX DISCRIMINATION?

Title VII states that:

It shall be an unlawful employment practice for an employer . . .

to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his . . . sex . . . or . . .

to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex . . . .<sup>37</sup>

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34. See *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, at 15 (July 15, 2015), <https://www.eeoc.gov/decisions/0120133080.pdf> [<https://perma.cc/D8PZ-PCJA>].

35. See *Simonton*, 232 F.3d at 35.

36. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602-03 (2015) (holding that same-sex marriage bans violate the Equal Protection and Due Process Clauses); *Baldwin*, EEOC Appeal No. 0120133080, *supra* note 34, at 15 (deciding that sexual orientation discrimination is prohibited under Title VII).

37. Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1)-(2) (2012).

Courts have established that every class in Title VII is equally protected; there is no order or preferential treatment of one class over another.<sup>38</sup> In order to succeed in a Title VII employment discrimination claim, an employee must show that he or she was a member of a protected class and that the employer's hiring or employment practices had a disparate impact on the employee as a member of that class.<sup>39</sup> If the employee succeeds in showing this, the burden shifts to the employer to show that it had a legitimate reason for the decision.<sup>40</sup> If the employer successfully meets this burden, then summary judgment may be granted in his or her favor unless the plaintiff can proffer some evidence that reasonably shows prohibited discrimination.<sup>41</sup> The question of whether or not an employment practice creates a disparate impact is obviously a fact-intensive, case-specific inquiry. Courts have taken several different approaches in establishing tests to determine whether the plaintiff and the class to which it belongs has truly suffered an injury from disparate employment practices,<sup>42</sup> some of which constitute downright victim-blaming.<sup>43</sup>

The sex clause of Title VII—disregarding the fact that it uses masculine pronouns for a class that necessarily involves a binary distinction—is especially murky, and has led to uncertainty as to what exactly Congress sought to protect in enacting Title VII. The dominant rhetoric used in judicial opinions is that the clause against discrimination on the basis of sex is to be seen as prohibiting discriminatory treatment based on sex *and* gender.<sup>44</sup> However, there is much debate about what exactly constitutes sex and gender discrimination.<sup>45</sup>

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38. See *Barnes v. Costle*, 561 F.2d 983, 987 (D.C. Cir. 1977) (noting that the committee report regarding Title VII asserts that all classes should be given equal protection from discrimination).

39. 42 U.S.C. § 2000e-2(k); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 216 (2d Cir. 2005).

40. *Dawson*, 398 F.3d at 216.

41. *Id.*

42. See *Smith v. Millville Rescue Squad*, No. L-113-08, 2014 WL 2894924, at \*4-5 (N.J. Super. Ct. App. Div. June 27, 2014) (using the *McDonnell Douglas* test). *But see Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79-81 (1998) (noting that there are many different approaches to deciding sex discrimination under Title VII, and deciding to use a totality of circumstances approach in deciding whether a workplace is to the point of discriminatory circumstances).

43. *Dawson*, 373 F.3d at 271 (citing the lower court's sentiment that a sensitive female correctional officer is clearly not suited for her work and a woman must expect embarrassment and harassment while working in a prison environment).

44. See *Fabian v. Hosp. of Cent. Conn.*, No. 3:12-cv-1154 (SRU), 2016 WL 1089178, at \*4 (D. Conn. Mar. 18, 2016); *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, *supra* note 34, at 5.

45. See *Smith*, 2014 WL 2894924, at \*4. *But see Oncale*, 523 U.S. at 79-81; *Schultz*, *supra* note 2, at 2090-93 (discussing the various approaches that corporations take to avoid sexual harassment claims due to the ambiguity of sexual harassment law).

Title VII does not define sex or gender; rather, it offers a non-exhaustive list of sex characteristics (primarily pertaining to women) when defining what constitutes discrimination in terms of sex.<sup>46</sup> Black's Law Dictionary defines "sex" as "[t]he sum of the peculiarities of structure and function that distinguish a male from a female organism."<sup>47</sup> Black's defines "gender-based harassment" as "[h]arassment motivated by hostility and intended to enforce traditional heterosexual norms and roles and discourage what is seen as nontraditional behavior."<sup>48</sup> It distinguishes gender-based harassment from gender discrimination, which it categorizes as sex discrimination that is especially geared towards women.<sup>49</sup> In the statutory definition, Black's also establishes that there is an intermediate-scrutiny standard of review for sex (and gender) discrimination claims, meaning that discriminatory practices "must serve an important governmental interest and be substantially related to the achievement of that objective."<sup>50</sup> It goes on to distinguish sex and gender by saying that "[g]ender refers to the psychological and societal aspects of being male or female; sex refers specifically to the physical aspects."<sup>51</sup> This is incredibly vague language for any judge or employer who wishes to better understand what it means to discriminate based on gender.

Although the case involved racial discrimination, *McDonnell Douglas Corp. v. Green* lays the groundwork for all Title VII discrimination actions by establishing a four-part test:

- (i) that [the claimant] belongs to a [class] minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants . . . .<sup>52</sup>

In the line of cases following *McDonnell Douglas*, the Supreme Court has incrementally expanded the scope of the sex clause of Title VII to make for a plaintiff-friendly body of law. *Meritor Savings Bank v. Vinson* held that sexual harassment claims are actionable as discriminatory under Title VII if they amount to a hostile environment.<sup>53</sup> The Court relied on the EEOC decision *Griggs v. Duke Power Co.* to expand

46. Civil Rights Act, 42 U.S.C. § 2000e(k) (2012).

47. *Sex*, BLACK'S LAW DICTIONARY (10th ed. 2014).

48. *Gender-Based Harassment*, BLACK'S LAW DICTIONARY (10th ed. 2014).

49. *Sex Discrimination*, BLACK'S LAW DICTIONARY (10th ed. 2014).

50. *Id.*

51. *Id.*

52. 411 U.S. 792, 802 (1973).

53. 477 U.S. 57, 73 (1986).

Title VII sex discrimination to include sexual harassment.<sup>54</sup> *Vinson* is distinguishable from *McDonnell Douglas* in that the Court did not look at a distinct employment action or decision—like hiring, firing, or affecting pay (although the plaintiff's cause of action did stem from her termination)—but rather, the Court looked at the subjective interactions between the plaintiff and defendant and the conditions of the workplace to decide whether a reasonable person would find it to be hostile.<sup>55</sup> The Court noted that an economic or tangible impact was not necessary to have a cause of action for discrimination.<sup>56</sup> As Justice Scalia noted in his concurrence in *Harris v. Forklift Systems, Inc.*, this “objectively hostile” work environment standard, with no requirement that there be a tangible disadvantage, is incredibly vague; it basically leaves the legal question of whether sexual harassment amounts to sex discrimination under Title VII to a jury.<sup>57</sup>

*Oncale v. Sundowner Offshore Services, Inc.*, which determined that same-sex harassment is a form of sex discrimination under Title VII, has set the stage for litigation on the matter of sexual orientation as a protected status under Title VII.<sup>58</sup> The Court in *Oncale* quelled a discrepancy in the law about whether sexual desire for the victim is a necessary component of a sexual harassment claim—in short, the answer is no.<sup>59</sup> The Court attempted to respond to Justice Scalia's displeasure with the subjectivity of the sexual harassment standard by noting that the plaintiff must show, by whichever route preferable, that the alleged conduct was not just offensive, but was actually discriminatory because of sex.<sup>60</sup> The Court also noted that a reasonable jury could distinguish between teasing behavior and conduct that amounts to hostility or abuse from the plaintiff's perspective.<sup>61</sup> Presumably because the aggressors and the victim were of the same sexual orientation, the Court did not address whether sexual orientation was protected under the sexual discrimination clause of Title VII.<sup>62</sup>

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54. *Id.* at 65 (explaining that the EEOC found that sexual harassment is a form of sex discrimination).

55. *Id.* at 64-67.

56. *Id.* at 64.

57. 510 U.S. 17, 24 (1993) (Scalia, J., concurring).

58. 523 U.S. 75, 82 (1998).

59. *Id.* at 80.

60. *Id.* at 81.

61. *Id.* at 82.

62. *See id.* at 80-81

### A. *Is Sexual Orientation Protected Under Title VII?*

The *Baldwin* opinion holds that discrimination against an employee for preferring the same sex is a form of gender discrimination.<sup>63</sup> The logic is that an employer is treating an employee unequally based on his or her counter-normative sexual preference (for example, a gay man being discriminated against because he prefers to be romantically involved with other men). The EEOC considers this to be sex discrimination under Title VII because if the man were a woman who was attracted to men, she would not have been discriminated against.<sup>64</sup> The EEOC clarified that the question of whether sexual orientation is protected by Title VII is not answered by looking to the language of the statute, but rather “whether the agency has ‘relied on sex-based considerations’ or ‘take[n] gender into account’ when taking the challenged employment action.”<sup>65</sup> The exception to this standard is when discrimination is legitimized by an occupation that requires one sex’s set of skills.<sup>66</sup> A second argument the EEOC posits for including sexual orientation discrimination in Title VII is that it is a form of association discrimination, or discrimination based on the employee’s association with a particular group of people, which the EEOC points out is consistently protected with regards to interracial dating and friendships.<sup>67</sup>

It is important to note that the EEOC, while having authority over employers who have at least fifteen regular employees,<sup>68</sup> is an agency, and agency decisions are subject to appeal.<sup>69</sup> Appellate courts have uniformly refused to accept that Title VII protects sexual orientation, and they rely on the fact that Congress has refused to incorporate sexual orientation into Title VII despite several proposals to do so.<sup>70</sup> It appears that sexual orientation as a protected status is in a legal limbo. President Obama issued an Executive Order in 2014 that amended two prior Executive Orders by adding sexual orientation and

63. *Baldwin*, EEOC Appeal No. 0120133080, *supra* note 34, at 15.

64. *Id.* at 6.

65. *Id.* at 5-6 (footnote omitted).

66. *Id.* at 6 n.5.

67. *Id.* at 8.

68. *Coverage of Business/Private Employers*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, [https://www.eeoc.gov/employees/coverage\\_private.cfm](https://www.eeoc.gov/employees/coverage_private.cfm) [<https://perma.cc/Y6S2-JJ9G>] (noting that, to be considered, employees must be employed for at least twenty weeks); *see also Coverage*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/employees/coverage.cfm> [<https://perma.cc/2T2Q-5QRC>].

69. *Appeals*, U.S. COURTS, <http://www.uscourts.gov/about-federal-courts/types-cases/appeals> [<https://perma.cc/L5VF-48L6>].

70. *Kiley v. Am. Soc’y for the Prevention of Cruelty to Animals*, 296 Fed. Appx. 107, 109 (2d Cir. 2008).

gender identity as protected classes against which the federal government cannot discriminate.<sup>71</sup> The administrative state, while widely accepted as legitimate, is the result of a quasi-constitutional compromise that came about during the New Deal.<sup>72</sup> Administrative bodies' powers are paradoxical because they are created through legislation (each agency is created and governed by a statute), but the executive branch appoints agency heads and the administrative state has the power to make rules, regulate, prosecute, and adjudicate. Agencies are given broad discretion to conduct their affairs as they see fit with a low standard of judicial review.<sup>73</sup> This confers the powers of all three governmental branches to an entity that is not democratically accountable, which is contrary to the system of checks and balances achieved through the separation of powers in the federal government.<sup>74</sup>

If the EEOC, Congress, and the courts were aligned in their views about the protection of sexual orientation in employment law, then this distinction would be trivial; however, Congress appears to be opposed to, or at least ambivalent about, including sexual orientation in Title VII.<sup>75</sup> In addition, only one court to date has read sexual orientation into the language of Title VII,<sup>76</sup> perhaps because courts are uncertain about the intent of the legislature. The picture with which we are now faced, to which everyone who has a job or is seeking one is subject, is that the executive branch would like to include sexual orientation and 'gender identity' as a protected class in employment law—a frustratingly ambiguous term without any promulgated definition—while the legislative branch will not further define the sex clause of Title VII, and the judiciary refuses to accept sexual orientation as a protected class at the appellate level. The population is getting three very different messages from the government, and to complicate the matter further, the Supreme Court has been steadily expanding the scope of the sex clause of Title VII.<sup>77</sup> The *Obergefell* decision will make same-sex marriage more prevalent and same-sex relationships will become more

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71. Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 21, 2014).

72. See Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 424-25 (1987).

73. For an overview of the different standards of judicial review implemented in the administrative context, see *id.* at 463-74.

74. *Id.* at 446-47.

75. As indicated by the lack of legislation to amend Title VII to include sexual orientation.

76. Memorandum Order at 8, U.S. Equal Emp't Opportunity Comm'n v. Scott Med. Health Ctr., 2:16-cv-00225-CB (W.D. Penn. Nov. 4, 2016), ECF No. 48, <http://files.eqcf.org/cases/216-cv-00225-48/> [<https://perma.cc/GHK3-RXNC>] ("The Court holds Title VII's 'because of sex' provision prohibits discrimination on the basis of sexual orientation.").

77. *Oncale v. Sundowner Offshore Servs., Inc.* 523 U.S. 75, 82 (1998); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 73 (1986); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

visible in the workplace in the coming years without any current safeguards against discrimination in the private sector. While *Obergefell* is the most progressive decision the Supreme Court has made regarding sexual orientation, it is largely based in policy and does not have a strong foundation in legal precedent. The decision also does not address employment law, but simply looks at the right of individuals to marry.<sup>78</sup> The Court decided to frame the right of marriage as a fundamental liberty interest instead of an equal protection issue, thus providing little guidance on the issue of sexual orientation as a protected class.<sup>79</sup> The political climate and the lack of judicial support for sexual orientation as a protected status set a dubious tone for everyone in the workforce.

Using the same *Baldwin* logic,<sup>80</sup> the EEOC has recently decided several cases in favor of employees regarding disparate treatment due to their sexual orientation; however, these decisions are limited in their binding effect.<sup>81</sup> Interestingly, *Baldwin* does not address whether sexual orientation is being classified as a mutable characteristic; however, the EEOC's position that sexual orientation discrimination is sex discrimination because doing so necessarily considers sex may indicate that sexual orientation is considered immutable.<sup>82</sup> Discrimination based on mutable characteristics such as hair length/style, dress, and sometimes weight is not protected under Title VII.<sup>83</sup> The common corporate practice of restricting or eliminating sexuality by labeling it sexual harassment may make sexuality seem like a mutable characteristic, but—as common experience tells us—sexuality is a part of our identity, which is hard to change, and it can be quite difficult for some people to conceal their sexuality. In a place where people spend forty-hours per week for roughly thirty years, it is practically impossible not

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78. The Court provided four principles for extending marriage to same-sex couples: (i) “the right to personal choice regarding marriage is inherent in the concept of individual autonomy[;]” (ii) the right to marriage is fundamental because it is a unique union unrivaled in importance to married people; (iii) marriage is fundamental for familial stability and child-rearing; and (iv) marriage is a cornerstone of tradition and social order. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599-2601 (2015).

79. *See id.* at 2598.

80. *See Baldwin*, EEOC Appeal No. 0120133080, *supra* note 34, at 6-9.

81. *What You Should Know About EEOC and the Enforcement Protections for LGBT Workers*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, [https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement\\_protections\\_lgbt\\_workers.cfm#examples](https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm#examples) [<https://perma.cc/CFW9-9EHC>].

82. *See Baldwin*, EEOC Appeal No. 0120133080, *supra* note 34, at 6.

83. *Jespersen v. Harrah's Operating Co.*, 392 F.3d 1076, 1080 (9th Cir. 2004) (reasoning that Congress did not intend for mutable traits to be afforded protection under Title VII); *Equal Emp't Opportunity Comm'n v. Catastrophe Mgmt. Sols.*, 11 F. Supp. 3d 1139, 1143 (S.D. Ala. 2014) (stating that hairstyles are mutable characteristics and therefore have no protection against discrimination).

to get to know co-workers on a personal level; personal details like vacations, spousal conversations, and dates are pervasive in the workplace. There has been overt hostility in the workplace towards people who do not conform to gender norms, and they often feel that they cannot share elements of their personal lives with their co-workers.<sup>84</sup> If sexual orientation discrimination were protected under Title VII, people who endure such pervasive and systematic hostility would clearly have to go beyond showing that the behavior is offensive, and establish that it actually results in disparate treatment—a vague standard that has been in contention for years.<sup>85</sup> What exactly does it look like to bring a successful claim for sexual orientation discrimination?

### III. THE FUTURE OF THE WORKPLACE

Grace Wong, in a piece titled *One Job, Two Lives: LBGT in the American Workplace*, highlights some difficulties that “closet[ed]” gay and transgendered men face in the workplace.<sup>86</sup> These men explain how hard it is for them to share simple things at work, like vacations they took with their respective significant others, because they do not want to risk the discovery of their sexual orientation and thus experience poor treatment.<sup>87</sup> A transgender man, Brandon, even postulated that those employers to whom he chose to disclose his gender transition discriminated against him in the hiring process.<sup>88</sup> He applied to twenty different companies and was only offered a job by the one to which he did not disclose his transition.<sup>89</sup> It may seem like these men are imagining or exaggerating the hostility of their work environment, but a recent study entitled *Pride and Prejudice: Employment Discrimination Against Openly Gay Men in the United States* validates their hesitation to “come out” in the workplace.<sup>90</sup>

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84. See Tara Siegel Bernard, *Fired for Being Gay? Protections Are Piecemeal*, N.Y. TIMES (May 31, 2013), <http://www.nytimes.com/2013/06/01/your-money/protections-for-gays-in-workplace-are-piecemeal.html> [<https://perma.cc/RX3Q-X8SJ>] (explaining that many people in the LBGTQ community experience social isolation at work from fear of being harassed or fired for sharing their personal lives).

85. See *supra* notes 42-44 and accompanying text (discussing the many different approaches that courts have taken in deciding what constitutes sexual harassment under Title VII).

86. See Grace Wong, *One Job, Two Lives: LBGT in the American Workplace*, CNN (Oct. 30, 2014, 4:46 PM), <http://www.cnn.com/2014/10/30/us/gays-lgbt-corporate-america/> [<https://perma.cc/94E8-TLA6>].

87. *Id.*

88. *Id.*

89. *Id.*

90. András Tilcsik, *Pride and Prejudice: Employment Discrimination Against Openly Gay Men in the United States*, 117 AM. J. SOC. 586, 586-87 (2011) (finding that there is a pattern of discrimination against gay men in the workplace).

This data highlights a dichotomy between closeted gay men and openly gay men in the workplace. However, there are other categories of counter-normative individuals who have a harder time choosing when and how to disclose their sexuality. Schultz touches on the phenomenon of men and women who do not conform to pervasive gender stereotypes.<sup>91</sup> These individuals may be straight or anywhere on the LBGTQ spectrum, but are perceived by their mannerisms and interactions with others to be of a counter-normative sexual orientation. As demonstrated in an episode of *The Office*, there can be a significant amount of banter regarding an individual's sexuality.<sup>92</sup> Individuals who apparently do not conform to gender norms can be singled out and subjected to this banter to the point that it constitutes a hostile work environment.<sup>93</sup> These individuals are in an awkward position in the workplace because they may not feel comfortable disclosing their sexuality or asking their co-workers to stop with the jokes.

There are two apparent approaches that employers can take in response to *Baldwin* and *Obergefell*—a strict ‘don’t ask, don’t tell,’ zero-tolerance policy regarding sexuality in the workplace,<sup>94</sup> or a more systematic, integrative restructuring of heteronormative corporate structures to reduce the feeling of hostility that counter-normative individuals may feel and to curb potential sexual orientation discrimination or sexual harassment claims against them. The current appellate law regarding sexual orientation discrimination and harassment seems to incentivize the first approach,<sup>95</sup> while *Baldwin* and *Obergefell* give employers reason to pause and examine their business model in anticipation of future decisions that could create a cause of action for private sexual orientation discrimination or harassment.

#### A. *Don't Ask, Don't Tell*

The most empirically supported and popular approach to avoid potential sexual harassment or sex discrimination claims is to simply

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91. Schultz, *supra* note 2, at 2142, 2160-62 (explaining that in male-dominated work environments, men and women who do not conform to traditional stereotypes are often harassed by dominant male workers because they threaten their self-image; also showing that co-workers are more likely to perceive otherwise acceptable interactions as sexual harassment from openly gay coworkers).

92. *The Office: Gay Witch Hunt* (NBC television broadcast Sept. 1, 2006) (depicting a slur being directed towards a closeted gay co-worker whose sexual orientation is uncertain).

93. Kristin M. Bovalino, Comment, *How the Effeminate Male Can Maximize His Odds of Winning Title VII Litigation*, 53 SYRACUSE L. REV. 1117, 1120-21 (2003) (describing research about stereotyping and gender profiling in the workplace and how it can have negative effects).

94. Schultz, *supra* note 2, at 2099.

95. *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005) (rejecting a gender stereotyping claim that has been used to “bootstrap” sexual orientation to Title VII protection).

stifle sexual expression in the workplace;<sup>96</sup> employees are encouraged not to date, share their personal lives, use profane language, make suggestive comments, or joke about sexual topics with other employees.<sup>97</sup> Similarly, there are de facto employment norms in place that incentivize LGBTQ employees or job seekers against revealing their sexual orientation in fear of being discriminated against or harassed.<sup>98</sup> The rationale behind this approach is that the murky law regarding sexual harassment that rises to the level of an actionable claim of sex discrimination is like lightning: it is unpredictable, but when it strikes, it is severe.<sup>99</sup>

This policy also has backing because it comports with rational business theorists and feminist ideologists who postulate that sexuality has no business in the workplace because it leads to inefficiency and, according to some feminists, creates an environment oppressive to women because of the male-dominated nature of most workspaces.<sup>100</sup> Optimistically, this strict standard of keeping sexuality out of the workplace is designed with the employee in mind, so that employers can prevent unwelcomed advances from co-workers and supervisors. However, in execution, a zero-tolerance policy against any form of sexuality in the workplace creates a strict liability standard similar to the Salem Witch Trials where employees can point to behavior as innocuous as observing one employee comforting another and claim that they feel harassed or offended by the behavior. Employers then are quick to act and usually end up severely reprimanding or firing the offending parties.<sup>101</sup> The employers are incentivized to punish the alleged offenders to avoid claims against them for condoning sexual harassment or sex discrimination, and the employees are largely at-will<sup>102</sup> with little protection from the disciplinary actions that their employers take. It also has a tendency to isolate the sexes, which can be damaging to women's chances for promotion because they are typically overrepresented in lower-level positions.<sup>103</sup> Cynically, as Schultz's research suggests, employers sometimes use their harassment policies as a sword,

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96. *See, e.g., supra* note 5.

97. Schultz, *supra* note 2, at 2099.

98. *See id.* at 2142, 2160-62 (explaining how the structure and heteronormative environment of most businesses creates an inhospitable situation for people of alternative gender identities and sexual orientations); Tilsik, *supra* note 90, at 586 (describing the regional employment practices of discriminating against applicants who indicate that they are homosexual).

99. Schultz, *supra* note 2, at 2086.

100. *Id.* at 2072-75.

101. *See id.* at 2160-62.

102. *See id.* at 2104-07.

103. *Id.* at 2132, 2135.

getting rid of employees that don't fit in or who are close to retirement or avoiding costly promotions.<sup>104</sup>

### B. *The Integrated Workplace*

Schultz criticizes modern human resources representatives for taking the aforementioned approach to treat the symptoms by stamping out sexuality, rather than focusing on de facto sex segregation in the workplace.<sup>105</sup> She goes on to explain that in male-dominated workplaces, counter-normative men are often subject to harassment by straight men and women can see other women as competition for male-supervisor attention, turning them against each other in the workplace.<sup>106</sup> She points to anecdotal evidence to argue that more integrated environments lead to more productive employees and make interactions less hostile; she says that in workplaces like these, "sex harassment virtually ceases to be a problem."<sup>107</sup>

Although sexual orientation, especially if it can be deemed mutable, may not be analogous to sex in terms of workplace integration, Schultz's logic may be promising for employees who are fearful about revealing their sexual orientation at work. In more integrated environments where people are open about their sexual orientation at all levels of the organization, there would logically be a less hostile environment. Hostile treatment of people of alternative sexual orientations would abate because the aggressors would presumably have co-workers and supervisors that they knew were of the same sexual orientation and who would take offense to such harassment. Aggression would no longer be directed at specific targets, but rather at behavior that could potentially alienate the entire workplace against the aggressors. Schultz notes a rather extreme example of this logic in discussing the work environment of the magazine *Womyn*.<sup>108</sup> This is an environment composed exclusively of women who encourage sexually charged conversations and interactions because they purport that employees are not just co-workers, but sisters.<sup>109</sup> While this workplace is not sexually integrated,<sup>110</sup> it serves as a good example of how employees who do not feel like minorities, tokens, or 'others' will be more comfortable at work and therefore will be far less likely to feel sexually harassed or offended by the conduct of others.

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104. *Id.* at 2104-07.

105. *Id.* at 2136-40.

106. *Id.* at 2143.

107. *Id.* at 2144.

108. *Id.* at 2145-47.

109. *Id.* at 2145.

110. *Id.* at 2146.

While Schultz's proposal to integrate workplaces to make them more equal and welcoming is ideal in practice, it would take a systematic restructuring of human resources training, arbitration policies, incentive plans, and hiring practices for employers nationwide. Heteronormative ideology is still the norm in society and the workplace.<sup>111</sup> There would certainly be backlash among employers and employees, and there may even be a new class of claims for reverse sexual orientation discrimination as employers give preference to applicants with counter-normative sexual orientations in the hiring process in an attempt to integrate their workplaces and get ahead of any claims of sexual orientation discrimination. As it stands, courts have considered claims against harassment based on a person's counter-normative gender, but they refuse to validate related claims about sexual orientation discrimination.<sup>112</sup> With the exception of a few unique workplaces, the uncertainty that *Obergefell* and *Baldwin* cast on the legal status of sexual orientation under Title VII will likely cause employers to buckle down and continue to police sexuality for fear of being liable for discrimination. This would give employers yet another tool with which to dismiss employees that they simply want to let go: they could just claim that the employee was being hostile towards a co-worker of a different sexual orientation. Conversely, employers may not adapt their employment practices at all and, in light of *Obergefell*, may subject people of alternative sexual orientation to increased hostility and future sexual harassment claims for otherwise innocuous behavior after revealing that they are of an alternative sexual orientation. It is these individuals who are truly in a paradox in the workplace and could benefit from legislation clarifying what sexual orientation discrimination looks like under Title VII.

#### IV. POTENTIAL LEGAL DEVELOPMENTS

Somewhat of a legal quagmire surrounds the issue of sexual orientation.<sup>113</sup> Since it has not yet gained firm footing as a protected status under Title VII, it is not clear whether sexual orientation is a mutable

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111. See Jane Ward & Beth Schneider, *The Reaches of Heteronormativity: An Introduction*, 23 GENDER AND SOC'Y 433, 437-38 (2009) (noting the insidious effects that pervasive heteronormativity has on all facets of life in American culture). *But see* Human Rights Campaign, CORPORATE EQUALITY INDEX 2018 2 (analyzing the trend towards acceptance of LBGTQ culture in corporate policies despite "all out assaults . . . from the highest levels of government").

112. *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005) (rejecting a gender stereotyping claim that has been used to "bootstrap" sexual orientation to Title VII protection); Bovalino, *supra* note 93, at 1118-20.

113. See *supra* Section II.A.

characteristic. Unlike haircuts, make-up, and weight, sexual orientation is a characteristic that does not have any one indicator. It is also not obvious whether it changes over time and, if it does, the degree of control that we have over it.<sup>114</sup> It is often difficult to determine a person's sexual orientation based on outward characteristics and casual interactions. Some heterosexual individuals may be presumed to be LBGTQ by behavior unrelated to sexuality that places them in that category based on the observer's stereotypes and past experiences.<sup>115</sup> However, presuming that sexual orientation is a part of sexuality, some employers treat it as if it is a mutable, or at least concealable, trait by disallowing its expression at work.<sup>116</sup> It is odd that gender stereotype discrimination—treating employees poorly because of perceived deviations from gender norms—is actionable but sexual orientation discrimination is not; it is very hard to separate those two concepts. Non-conforming men and women in the workplace are usually thought to be gay and are treated as such.

Schultz proposes a sliding scale burden of proof that correlates with the level of integration that an employer achieves.<sup>117</sup> That is, the more integrated the workplace, the higher the standard of proof that the plaintiff must show in a claim for sexual harassment.<sup>118</sup> The same logic can be applied to sexual orientation. She also suggests providing people who bring sexual harassment causes of action the presumption that the complained-of behavior was sufficiently severe.<sup>119</sup> This would make frivolous or vindictive sexual harassment claims easier to file, and it would increase the expense of litigation. While Schultz's approach could easily be applied to sexual orientation discrimination claims, it does not address the fact that it is easier for employers to just outright ban interactions of a sexual nature to avoid liability. Under Schultz's model, employers with more segregated work environments would be incentivized to further isolate sexes to try to avoid sexual harassment claims. Schultz claims that her approach, as it is

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114. See Schultz, *supra* note 2, at 2138 (“At the simplest level, theorists caution, sexuality is not a biological essence that resides in an individual's body, but is instead a relational phenomenon that is created within social networks.”).

115. *Id.* (“[S]exuality cannot even be understood to be embodied in a specific activity or set of practices, but is instead a ‘diverse and diffuse process’ that managers and employees actively construct within the larger constraints of organizational structure.”).

116. See *Dawson*, 398 F.3d at 215 (describing the alleged comments that the lesbian plaintiff endured at her workplace about her appearance and attitude, including that she needed to have sex with a man); Baldwin, EEOC Appeal No. 0120133080, *supra* note 34, at 11-12; Schultz, *supra* note 2, at 2142, 2160-62.

117. Schultz, *supra* note 2, at 2172-75.

118. *Id.* at 2174-76.

119. *Id.* at 2175.

geared towards sexual harassment that does not include sexual orientation, would not require legislation.<sup>120</sup> However, many courts refuse to find sexual orientation as a protected status.<sup>121</sup> So, for the purposes of addressing sexual orientation discrimination and harassment, legislation is likely needed.

The most obvious reason for courts' hesitation to read sexual orientation into Title VII is that, according to the legislative history, the sex clause was added at the last minute in an attempt to keep the legislation from being passed entirely.<sup>122</sup> The climate of the legislature at the time of Title VII's enactment was such that it was not laughable to attempt to defeat a bill guaranteeing freedom from discrimination in employment by adding women as a protected class.<sup>123</sup> It is no wonder that there is little elaboration as to what the sex clause means in Title VII. Some argue that Congress's failure to adopt proposed amendments to Title VII aimed at expanding the sex clause to sexual orientation is an indication that it does not intend for sexual orientation to be protected.<sup>124</sup> However, it is telling that the EEOC—a product of the administrative state, which was designed to be more efficient than the legislature—and the executive branch have both come to the conclusion that sexual orientation should be a protected status in employment law.<sup>125</sup> *Obergefell* was a big step forward for the private rights of same-sex couples. The legal landscape is ideal for a focus on legislation that would grant sexual orientation protected status under Title VII. Before this year, LGBTQ interest groups were diffuse in their focus; considerable efforts were geared toward the judiciary as a mechanism through which same-sex couples could be granted rights privately, through marriage equality, and in the work place.<sup>126</sup> Now, however, these groups can focus on lobbying the legislature to amend Title VII.

It may be that the most practical legal avenue in light of the current legal status of sexual orientation in the workplace is to frame sexual orientation discrimination under the theory of gender stereotyping discrimination.<sup>127</sup> As Bovalino notes, men who are perceived to be effeminate and are discriminated against or harassed in the workplace have viable claims for gender discrimination under Title VII; however, their

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120. *Id.* at 2181.

121. *See* Wong, *supra* note 86 (noting that, as of 2014, employers could legally discriminate against gay workers in twenty-nine states).

122. Bovalino, *supra* note 93, at 1122-23.

123. *See id.*

124. *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000).

125. *Baldwin*, EEOC Appeal No. 0120133080, *supra* note 34, at 15; Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 21, 2014).

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

127. *See* Bovalino, *supra* note 93, at 1118-20.

claims are less certain if they are perceived to be, or actually are, homosexuals because courts then think that they are trying to bootstrap a sexual orientation claim onto a gender discrimination claim.<sup>128</sup> For some reason, gender-non-conforming women do not have such difficulty in successfully bringing claims of gender discrimination or harassment.<sup>129</sup> This is an interesting paradox, because the stereotypical homosexual male is thought to be effeminate. It appears that employers have an affirmative defense in response to discrimination and harassment claims brought by effeminate men, gay or not: that they are actual or perceived homosexuals and therefore are legally discriminated against on the basis of their sexual orientation. Essentially, if an individual felt discriminated against or harassed based on his or her sexual orientation, that person would have to file a claim for gender harassment or discrimination and hope that the court does not bar it based on their actual or perceived homosexual orientation; in order to achieve justice and ensure that they are comfortable and safe in their own place of employment, these individuals would have to lie about who they are.

## V. CONCLUSION

The most apparent route for achieving the protected status of sexual orientation under Title VII in the current legal atmosphere is to do so through legislation. Currently, private employers are free to discriminate against or harass employees on the basis of sexual orientation. They can fire or mistreat employees with impunity as long as they stay within the scope of sexual orientation. Conceivably, if an employer did not have any policies against sexual harassment that would ban such behavior, they could condone slurs towards LBGTQ employees and prevent those employees from such practices as displaying pictures of their families or talking about their personal lives. They could fire these employees for disclosing, overtly or inadvertently, their sexuality. Imagine being a person of an alternative sexual orientation and hearing your employer openly condemning your lifestyle with no potential legal recourse for the discomfort and hostility that you would suffer as a result. While this is an extreme example, there are businesses that have blatantly refused to serve same-sex couples;<sup>130</sup> while this is not discriminatory against employees, it is hard to imagine that it would not make LBGTQ employees feel uncomfortable and potentially harassed or discriminated against at work. It is hard to reconcile

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128. *Id.*

129. *Id.* at 1118.

130. *See, e.g.,* Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013) (considering the discriminatory conduct of a photography company refusing to photograph a same-sex wedding).

the fact that an applicant who is not hired because he or she does not conform to gender stereotypes has a legitimate Title VII claim, yet there is no legal recourse available for a person who does not conform to heteronormative beliefs about sexuality and is denied a job because of their counter-normative orientation.

The Court in *McDonnell Douglas* laid the groundwork for Title VII claims in stating that “[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.”<sup>131</sup> Since that decision, courts have held that Title VII should apply to promote equality in the workplace and to ensure that every employee remains free from “the ‘entire spectrum of disparate treatment of men and women in employment.’”<sup>132</sup> The *Baldwin* court recognized that drawing a distinction between gender and sexual orientation discrimination is analogous to prohibiting racial discrimination but allowing for discrimination based on an employee’s interracial relationships—a concept that it notes was stricken down.<sup>133</sup> However, *Oncale* is the closest that the Supreme Court has come to deciding that sexual orientation is protected under Title VII.<sup>134</sup> In that decision, the Court reasoned that the question of whether an environment amounts to discrimination is one that is left for the jury, and because the jury presumably has had work experience, its members will have an understanding that sexual harassment claims have a low, plaintiff-friendly threshold.<sup>135</sup>

With the momentum of *Obergefell*, *Baldwin*, and President Obama’s Executive Order, the legal atmosphere is primed for an expansion of Title VII so that employers and employees can have stable ground on which to stand when it comes to the increased presence of openly LGBTQ employees in the workplace. The current state of Title VII sex discrimination does not only affect members of the LGBTQ community; all participants in the workplace are subject to the seemingly arbitrary and underdeveloped legal principle. It does not make sense to have a system whereby employees can be fired on a hair trigger under the guise of sexual harassment (because it is a strict liability offense with no scienter requirement) for conduct that does not amount to harassment, but, by the same token, to deny a class of people the ability to bring legitimate sexual discrimination claims because of

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131. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973).

132. Anthony E. Varona & Jeffrey M. Monks, *EnGendering Equality: Seeking Relief Under Title VII Against Employment Discrimination Based on Sexual Orientation*, 7 WM. & MARY J. WOMEN & L. 67, 92 (2000) (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998)).

133. *Baldwin*, EEOC Appeal No. 0120133080, *supra* note 34, at 8.

134. *See Oncale*, 523 U.S. at 82 (holding that same-sex sexual harassment is actionable, and it does not have to be motivated by desire). *But see* Memorandum Order, *supra* note 76, at 8 (holding that the sex clause of Title VII applies to sexual orientation discrimination).

135. *See Oncale*, 523 U.S. at 81.

their sexual orientation. The law needs clarity beyond a totality of circumstances approach; we need legislative qualification for what it looks like to be sexually harassed and discriminated against under Title VII.