

Similar Cases, Different Results: The Perplexing Question of What Constitutes Title VII “Effeminacy Discrimination”

by

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Introduction

What constitutes “effeminacy discrimination” is one of the most perplexing questions arising under Title VII of the 1964 Civil Rights Act.¹ Effeminacy discrimination claims allege that an employee’s co-workers engaged in sexual harassment, a form of sex discrimination,² because he or she did not walk, speak, dress, or behave as they thought a man or woman should.³ Before 1998, there were only a handful of these cases. Most alleged harassment by same-sex co-workers, and at that time same-sex sex discrimination claims were barred in some jurisdictions. In cases that did proceed, the claimant lost virtually every time.⁴ Some courts reasoned that Title VII only guarantees equal job opportunities to men and women and thus does not reach behavior-based discrimination. Other courts saw in these claims an effort to circumvent the fact that the act does not prohibit discrimination based on sexual orientation.⁵ In

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¹ 42 U.S.C. § 2000e-2(a) (2008). This subsection, which applies to employers who have at least fifteen employees and are involved in interstate commerce, provides:

It shall be an unlawful employment practice for an employer-

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or
- (2) 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 race, color, religion, sex, or national origin.

² Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986).

³ See, e.g., Jonathan A. Hardage, Commentary, *Nichols v. Azteca Restaurant Enterprises, Inc. and the Legacy of Price Waterhouse v. Hopkins: Does Title VII Prohibit “Effeminacy” Discrimination?*, 54 ALA. L. REV. 193 (2002). The term “effeminacy discrimination” derives from the fact that the claimants in the early cases were male, and the courts described their claims as claims alleging sex discrimination based on their effeminate behavior. *DeSantis v. Pac. Tel. & Tel. Co., Inc.*, 608 F.2d 327, 332 (9th Cir. 1979); *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 327 (5th Cir. 1978).

⁴ See, e.g., *DeSantis*, 608 F.2d 327; *Smith*, 659 F.2d 325. *Doe v. City of Belleville*, 119 F.3d 563 (7th Cir. 1997), *vacated and remanded*, 523 U.S. 1001 (1998), is the exception; there the court ruled that teenage boys who were harassed because of their feminine appearance and mannerisms stated a claim under Title VII.

⁵ See, e.g., *Simonton v. Runyon*, 232 F.3d 33, 37-38 (2nd Cir. 2000). Several unsuccessful attempts have been made to amend Title VII to prohibit sexual orientation discrimination through a

1998, however, the Supreme Court held that a same-sex sexual harassment claim lies under Title VII,⁶ and thereafter, effeminacy discrimination claimants sued in greater numbers. To make their case, they invoked the gender stereotyping theory of *Price Waterhouse v. Hopkins*,⁷ a 1989 decision holding that sex discrimination occurred when a woman was denied a partnership because she not did act like her co-workers thought women should. The claimants asserted that if their co-workers harassed them due to their gender-nonconforming behavior, they have a sex discrimination claim under *Price Waterhouse*, whether or not their harassers knew or suspected that they were homosexual.

After initial reticence, courts have agreed that the gender stereotyping theory applies in effeminacy discrimination cases, but the result has been a body of inconsistent case law. The homosexual factor has led most courts to wrestle with whether it or the plaintiff's contra-gender behavior accounted for his harassment; in the latter case, he has a Title VII claim, but in the former, he does not. In many cases, relief has been denied under facts almost identical to those in cases in which it was granted. Further complicating matters is the fact that, according to some commentators, society does not view feminine men and masculine women the same way. Whereas women are encouraged to adopt masculine features and may be seen as victims of sex discrimination if they do and are penalized, effeminate men are simply regarded as deviants to whom Title VII does not apply.

This article argues that the courts that have held that one's real or assumed homosexuality should not bar recovery in effeminacy discrimination cases have properly read *Price Waterhouse*, and that a Title VII claim should lie for anyone harassed because of his or her gender non-conformity. For courts to uniformly adopt this approach would bring consistency to the law by obviating the need to engage in the hairsplitting involved in deciding whether a victim was abused because of his sexual orientation or his effeminacy. This would also solve the problem of effeminate men and masculine women not receiving Title VII protection on equal terms.

Part I of this article examines how courts came to interpret "sex" in Title VII as encompassing not just the biological attributes of men and women, but the cultural overlay on them as well. Part II surveys the law of sexual harassment; the context in which effeminacy discrimination claims usually arise. Part III of this article explains why these claims increased after 1998; how courts came to accept the application of the gender stereotyping theory in these cases in principle if not, for the most part, in practice; and why these cases have yielded such a confusing body of law. Not every effeminacy case is discussed or cited; instead, Part III focuses on a sample of federal appellate and district court cases that illustrate the different approaches that have been taken by courts in resolving the issues before them. This part also develops the central argument of this article: Courts should recognize effeminacy discrimination as sex discrimination, regardless of one's sexual orientation and whether he or she is a feminine man or a masculine woman.

succession of proposed Employment Nondiscrimination Acts: S.19, 107th Cong. (2001); S. 2056, 104th Cong. (1996); H.R. 1863, 104th Cong. (1995); and H.R. 4636, 103d Cong. (1994).

⁶ *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998).

⁷ 490 U.S. 228, 250 (1989).

I. The Title VII Prohibition of Discrimination “Because of Sex”: The Shift from the Biological to the Gender-based Interpretation of Sex

Title VII makes it an “unlawful employment practice” for an employer “to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex.”⁸ The act, however, sheds no light on the meaning of sex, and its legislative history is equally unhelpful. As originally drafted, Title VII prohibited discrimination based on race, color, religion, and national origin. A movement to add sex to this list soon began, however, and advocates enlisted the aid of Congressman Smith of Virginia.⁹ He opposed Title VII on the ground that it impermissibly regulated private business, so he agreed to move to amend the bill to include sex because he thought that this addition would be sufficiently controversial to kill the bill.¹⁰ His strategy backfired when the House of Representatives, with little debate, adopted his amendment the next day. Although the Senate debated the bill for months, it also devoted scant attention to the inclusion of sex as a protected class, so Title VII became law without a definition of the term.¹¹

The lack of statutory or legislative guidance on the meaning of sex led to a debate among scholars. Two competing theories emerged. The biological interpretation of sex construes the word narrowly and acknowledges only biological and anatomical distinctions between people.¹² Its supporters argue that it is logical because other Title VII categories (race, color, national origin) are, like biological sex, immutable physical characteristics. The gender-based view of sex is broader; under it, besides biological and anatomical differences, sex includes personality attributes, socio-sexual roles, and behavioral expressions such as masculinity and femininity.¹³ Its advocates assert that focusing only on biological differences ignores “culturally constructed dimensions” and fails to recognize that “biology and culture are all part of one piece” in the way society views men and women.¹⁴ Examples of male qualities are ambitious, analytical, assertive, athletic, competitive, dominant, forceful, individualistic, self-reliant, self-sufficient, and

⁸ 42 U.S.C. § 2000e-2(a)(1).

⁹ Katherine M Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 23 (1995).

¹⁰ Matthew Fedor, *Can Price Waterhouse and Gender Stereotyping Save the Day for Same-Sex Discrimination Plaintiffs Under Title VII? A Careful Reading of Oncale Compels an Affirmative Answer*, 32 SETON HALL L. REV. 455, 460 (2002).

¹¹ *Id.*

¹² Hilary S. Axam & Deborah Zalesne, *Simulated Sodomy and Other Forms of Heterosexual “Horseplay.” Same Sex Sexual Harassment, Workplace Gender Heirarchies, and the Myth of the Gender Monolith Before and After Oncale*, 11 YALE J.L. & FEMINISM 155, 236 (1999).

¹³ *Id.*

¹⁴ Toni Lester, *Protecting the Gender Nonconformist from the Gender Police—Why the Harassment of Gays and Other Gender Nonconformists Is a Form of Sex Discrimination in Light of the Supreme Court’s Decision in Oncale v. Sundowner*, 29 N.M. L. REV. 89, 98 (1999).

strong.¹⁵ Female qualities are affectionate, cheerful, childlike, compassionate, gentle, loyal, sensitive, shy, soft-spoken, sympathetic, tender, understanding, warm, and yielding.¹⁶

The first courts to confront effeminacy discrimination claims adopted the biological view of sex and cursorily rejected the claims. *Smith v. Liberty Mutual Insurance Co.*,¹⁷ decided by the Fifth Circuit Court of Appeals in 1978, involved a black male who argued that Liberty Mutual discriminated against him because of his sex in not hiring him as a clerk. At trial, the company admitted that it rejected his application because it considered him effeminate. After losing there, Smith appealed to the Fifth Circuit, which phrased his argument as follows: “Smith argues that the law forbids an employer to reject a job applicant based on his or her affectional or sexual preference.”¹⁸ Although this characterization implied that Smith was alleging sexual orientation discrimination, the court said that, “the claim is not that Smith was discriminated against because he was a male, but because as a male, he was thought to have those attributes more generally characteristic of females and epitomized in the descriptive ‘effeminate.’”¹⁹ Citing a case that upheld a grooming code barring male employees from wearing their hair longer than shoulder length,²⁰ the court reasoned that an examination of the legislative history of Title VII compelled the conclusion that in proscribing sex discrimination, Congress only meant to guarantee equal job opportunities for men and women. Finding no evidence of a broader mandate, the court stated that it could not “strain” the language of Title VII to reach “situations of questionable application” like this one.²¹

DeSantis v. Pacific Telephone & Telegraph,²² decided by the Ninth Circuit in 1979, consisted of three consolidated cases. Two involved claims by homosexuals that their employers violated Title VII in discriminating against them based on their sexual orientation. The appellate panel disagreed, reasoning that if the act is given its plain meaning, one must conclude that Congress had traditional notions of sex in mind in enacting the law.²³ Thus, the ban on discrimination because of sex must be read as applying “to discrimination on the basis of gender and should not be judicially extended to include sexual preference such as homosexuality.”²⁴ To conclude otherwise would

¹⁵ Sandra Lipsitz Bem, *The Measurement of Psychological Androgyny*, 42 J. CONSULTING AND CLINICAL PSYCHOL. 155, 156-57 (1974).

¹⁶ *Id.*

¹⁷ 569 F.2d 325, 326 (5th Cir. 1978).

¹⁸ *Id.*

¹⁹ *Id.* at 327.

²⁰ *Willingham v. Macon Teleg. Publ’g Co.*, 507 F.2d 1084, 1092 (5th Cir. 1975).

²¹ *Smith*, 569 F.2d at 326-27.

²² 608 F.2d 327, 328 (9th Cir. 1979).

²³ *Id.* at 329 (quoting *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662-63 (9th Cir. 1977)).

²⁴ *Id.* at 329-30.

allow plaintiffs to “bootstrap” protection for homosexuals into Title VII.²⁵ The third case involved an effeminacy discrimination claim filed by a male who was fired for wearing an earring. In a brief paragraph, the court, conflating gender-based and sexual orientation discrimination, rejected his claim on the ground that Title VII “does not protect against discrimination because of effeminacy . . . [Such discrimination,] like discrimination because of homosexuality or transsexualism, does not fall within the purview of Title VII.”²⁶

Smith and *DeSantis* are important for several reasons. First, both courts read Title VII narrowly, finding that the sex discrimination ban was enacted only to guarantee men and women equal job opportunities. There was no room in this approach to consider the societal influences that distinguish the ways in which men and women are expected to act, which is the basis for the gender stereotyping theory. This view prevailed until *Price Waterhouse* was decided in 1989. Second, and more crucial from the perspective of effeminacy discrimination claimants, both decisions rested on a flawed premise; one which, it must be stressed, was never explicitly stated and is the product of no thought or analysis. Although *Smith* is not as blatant in this regard as *DeSantis*, both courts obviously thought that an effeminacy discrimination claim is a camouflaged sexual orientation discrimination claim filed by someone seeking to get, indirectly, protection that Title VII does not allow him to obtain directly. It does not follow, however, that effeminate men (or masculine women) must be homosexual; *Smith*, in fact, was a married heterosexual.²⁷ More important, there is no justification for inferring that all effeminacy discrimination claimants are trying to do an end-run around the fact that Title VII does not ban sexual orientation discrimination. Some may be, but it may just as easily be the case that they are legitimately seeking the protection against discrimination based on their sex that Title VII appears to afford.

Eventually, *DeSantis* was overruled,²⁸ and courts substituted the gender-based view of sex for the biological view adopted there. Unfortunately, the faulty premise at the core of that case and *Smith* survived and is responsible for the confusion that now exists in this area of the law. Time and again, courts in effeminacy discrimination cases have reflexively conflated effeminacy and homosexuality and dismissed the claims on the ground that Title VII does not prohibit sexual orientation discrimination. In so doing, they have done violence to *Price Waterhouse*, which does not even hint that its outcome would have been different if the plaintiff had been, or been perceived as, homosexual.

Price Waterhouse involved a female manager who was proposed for partnership. Her colleagues evaluated her work performance positively, calling her an outstanding professional with a strong character, independence and integrity.²⁹ In her drive to succeed, however, she came across as brusque and harsh.³⁰ Partners criticized her

²⁵ *Id.* at 330.

²⁶ *Id.* at 332.

²⁷ *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 326 (5th Cir. 1978).

²⁸ *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 874-75 (9th Cir. 2001).

²⁹ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 233-34 (1989).

³⁰ *Id.* at 234-35.

aggressive behavior, saying she “overcompensated for being a woman” and attacking her use of profanity, not for its content, but “because it’s a lady using foul language.”³¹ One partner said that her chances for partnership would improve if she took a charm school course; walked, talked, and dressed more femininely; and wore make-up and jewelry and had her hair styled.³² In sum, she was in a Catch-22: the aggressive, stereotypically masculine behavior that made her a top producer was seen as inappropriate for a female partner.

After Hopkins was denied a partnership, she resigned and then sued for sex discrimination. At trial, a psychologist asserted that “the partnership selection process . . . was likely influenced by sex stereotyping.”³³ Her testimony focused “not only on the overtly sex-based comments of partners but also on gender-neutral remarks, made by partners who knew Hopkins only slightly, that were intensely critical of her.”³⁴ She added that “Hopkins’ uniqueness (as the only woman in the pool of candidates) and the subjectivity of the evaluations made it likely that sharply critical remarks [even the gender-neutral ones] . . . were the product of sex stereotyping.”³⁵ Based on this evidence, the lower court ruled in Hopkins’ favor, and the District of Columbia Court of Appeals affirmed.³⁶

The Supreme Court affirmed as well. Although the Court granted *certiorari* to determine the respective burdens of proof of a plaintiff and defendant in a mixed-motive case like this one³⁷—Price Waterhouse claimed that it denied Hopkins a partnership because of concerns about her interpersonal skills, not her sex—a majority of the Justices agreed that sex discrimination can be proven via the gender stereotyping theory. A four-Justice plurality stated that Title VII prohibits discrimination, not just because one is a woman, but also because one fails to *act* like a woman, and that an employer who acts based on a belief that a woman cannot be aggressive acts based on gender.³⁸ These Justices added that “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group,” because “in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”³⁹ Concurring in the judgment, Justice O’Connor endorsed this theory in asserting that Hopkins “proved that Price Waterhouse permitted

³¹ *Id.* at 235.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 236.

³⁶ Hopkins v. Price Waterhouse, 825 F.2d 458, 461, 468-69 (D.C. Cir. 1987). The appellate court affirmed the trial court’s determination on the sex discrimination issue, but reversed as to the respective burdens of proof for the parties. For the Supreme Court’s resolution of this conflict, see *Price Waterhouse*, 490 U.S. at 237, 238 n.2, 239-52.

³⁷ *Price Waterhouse*, 490 U.S. at 250.

³⁸ *Id.* (Brennan, J., speaking for Justices Marshall, Stevens, and Blackmun).

³⁹ *Id.* at 251.

stereotypical attitudes towards women to play a significant, though unquantifiable, role in its decision not to invite her to become a partner.”⁴⁰ At this point, Hopkins “had taken her proof as far as it could go,” for she had proved that her failure to conform to the stereotypes of the decision-makers had been a substantial factor in their decision.⁴¹ Although he did not discuss the stereotyping theory, Justice White, who also concurred in the judgment, said nothing indicating his disapproval of it.⁴²

The Court never distinguished the discrimination as based on sex or gender, and in fact used the terms interchangeably, but it did recognize the distinct nature of gender stereotyping as sex discrimination under Title VII. The Price Waterhouse firm, it must be noted, did not insinuate that women as a class were not qualified for partnership, but rather that, to be assessed favorably, women must conform to stereotyped notions of how they should behave. In essence, its position was that to advance in a man’s world, women must act like women. This distinction shows how gender-based discrimination necessarily discriminates because of sex. The Court saw this and widened the realm of proscribed discrimination by acknowledging that gender-stereotyped comments that are determinative in employment decisions afford enough evidence of discriminatory intent to support a claim under the act.

Although the issue of sexual orientation was never raised in the Supreme Court opinions in *Price Waterhouse*, there is not a word in any of them that suggests that their conclusions would have been different if real or perceived homosexuality had been involved. On the contrary, that the Court stressed that the intent of Title VII was to “strike at the entire spectrum” of discrimination resulting from gender stereotyping quite plainly confirms that its conclusions would not have been different. The Justices were confronted with a situation in which a woman suffered discrimination because she exhibited contra-gender qualities, and they dealt with it on its own terms. This fact is at the heart of this article’s contention, which finds ample support in the case law,⁴³ that courts that have rejected *Price Waterhouse*-based effeminacy discrimination claims because the plaintiff’s real or apparent homosexuality caused the mistreatment they suffered have been unfaithful to that decision. In this regard, it must be stressed that the Court has not cast doubt on the viability of this decision in the 19 years since it came down, although it has had ample opportunity to do so. In addition, as will be discussed, while there is some debate among scholars on this issue, the weight of authority supports the view that the Court has not questioned the notion that *Price Waterhouse* may be invoked in effeminacy discrimination cases.

II. Sexual Harassment as Sex Discrimination

Because effeminacy discrimination claims typically arise in a suit for sexual harassment, a brief review of the law in this area is in order. There are two kinds of

⁴⁰ *Id.* at 272 (O’Connor, J., concurring).

⁴¹ *Id.* at 273.

⁴² *Id.* at 258 (White, J., concurring).

⁴³ *See, e.g., infra* notes 96-99 and accompanying text.

sexual harassment. The first, *quid pro quo*,⁴⁴ was introduced by Professor MacKinnon in a sex discrimination analysis that gained currency after a federal appeals court adopted it in 1982.⁴⁵ *Quid pro quo* harassment conditions employment benefits on sexual favors.⁴⁶ As explained by MacKinnon, it may take any of four forms. The first involves a proposition, rejection, and retaliation; in the second, the woman complies and does not receive a job benefit; in the third, she complies and benefits; and in the last, she complies, receives fair treatment, and is never harassed again.⁴⁷ The second type of harassment, hostile work environment, was recognized in *Meritor Savings Bank, FSB v. Vinson*.⁴⁸ As defined in the Equal Employment Opportunity Commission guidelines to which the *Meritor* Court referred, this may consist of “unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.”⁴⁹ As the law stands, therefore, whether or not it is directly linked to the grant or denial of a *quid pro quo*, conduct is sexual harassment if it “has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.”⁵⁰ In recognizing these two forms of harassment, the Supreme Court acknowledged not only economic harm to victims, but also the harm to their dignity that results from unwelcome conduct.

The Court has also held that harassment is actionable only if a workplace is permeated with “discriminatory intimidation, ridicule, and insult” that is “sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.”⁵¹ This involves a subjective/objective test: the victim must perceive the work environment as abusive, and a reasonable person must agree.⁵² Mere horseplay or stray offensive utterances are insufficient for a claim.⁵³

These cases and *Price Waterhouse* established that *quid pro quo* and hostile environment sexual harassment are sex discrimination that can be proven via the gender stereotyping theory. In their aftermath, however, victims who claimed stereotyping in

⁴⁴ See generally Eugene Scalia, *The Strange Career of Quid Pro Quo Sexual Harassment*, 21 HARV. J.L. & PUB. POL’Y 307, 308-09 (1998). In *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), the Supreme Court observed that the *quid pro quo* and hostile environment categories are relevant in deciding whether a plaintiff suffered discrimination under Title VII, but that once discrimination is proven, whether an employer is vicariously liable for it depends on whether a “tangible employment action,” such as termination, failure to promote, etc., is involved. *Id.* at 754.

⁴⁵ CATHARINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 32-47 (1979), cited in *Henson v. Dundee*, 682 F.2d 897, 909 (11th Cir. 1982).

⁴⁶ Scalia, *supra* note 44 at 308.

⁴⁷ *Id.* at 309; MACKINNON, *supra* note 45, at 32-33.

⁴⁸ 477 U.S. 57, 64 (1986).

⁴⁹ *Id.* at 65.

⁵⁰ *Id.* at 66-67.

⁵¹ *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

⁵² *Id.* at 21-22.

⁵³ *Meritor*, 477 U.S. at 67.

hostile work environment cases against same-sex co-workers were rebuffed.⁵⁴ One reason was that some federal circuits did not allow same-sex claims at all,⁵⁵ while others permitted them only if the harasser was homosexual and thus was presumably motivated by sexual desire for his victim.⁵⁶ In addition, some courts continued to adhere to the biological view of sex and to conflate effeminacy and sexual orientation discrimination claims.

Keeping in mind that most same-sex sexual harassment cases have been brought by men, it is submitted that another reason why the plaintiffs so often lose these cases involves Professor Case's claim that courts view womanly men more harshly than manly women.⁵⁷ Case asserts that if a woman displays masculine features or a man exhibits feminine ones, discrimination against her is treated as sex discrimination, while his behavior is viewed as a marker for homosexuality and is unprotected.⁵⁸ Indeed, such a man is doubly despised, for manifesting the disfavored qualities and for descending from his masculine gender privilege to do so. The masculine woman is more readily accepted. Wanting to be masculine is understandable; it can be a step up for a woman, as the qualities associated with masculinity are also associated with success.⁵⁹ There is, however, nothing commendable about a man exhibiting feminine qualities. In sum, whereas it is typically assumed that "mannish" women are doing what they must do to get by in a man's world, effeminate men are simply seen as gay. If their co-workers abuse them and they allege sexual harassment, courts routinely dismiss the claims on the ground that the conduct resulted from the belief that they were gay, not from their gender nonconformity.

Professor Franke expanded on this theme, noting that biology operates as a cover for social practices that hierarchize members of the social category "man" over members of the category "woman."⁶⁰ Because Title VII has traditionally been used to remedy that inequity, courts are more cognizant of the plight of women in the social structure. A woman's failure to conform to her gender once in a predominantly male arena is seen as a struggle to adapt to a new environment.⁶¹ The cause of a man's nonconformity is not similarly justified; whereas she is seen as trying to conform, he is simply seen as nonconforming. A court applying Title VII will more readily understand the dilemma of a gender nonconforming female discrimination victim but not empathize with similarly-

⁵⁴ See, e.g., *Dillon v. Frank*, No. 90-2290, 1992 U.S. App. LEXIS 766, at *27-28 (6th Cir. Jan. 15, 1992) (unpublished opinion) (finding the "sex stereotyping" language of *Price Waterhouse* insufficient to sustain a male employee's hostile environment claim).

⁵⁵ See, e.g., *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 451-52 (5th Cir. 1994).

⁵⁶ See, e.g., *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996).

⁵⁷ Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 *YALE L.J.* 1, 2 (1995).

⁵⁸ *Id.* (1995).

⁵⁹ *Id.* at 3.

⁶⁰ Franke, *supra* note 9, at 3.

⁶¹ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

situated males, who are seen as having a social dysfunction, presumably based on sexual orientation, not gender.⁶² In short, a woman who acts like a man is protected from discrimination in recognition of the Catch-22 of an ambitious woman working in a man's world, while a man who acts like a woman is labeled deviant and is not protected.

III. Claiming Effeminacy Discrimination in a Sexual Harassment Case

The 1997 Seventh Circuit ruling in *Doe v. City of Belleville*⁶³ marked the sole instance in the pre-1998 era in which the plaintiffs won an effeminacy discrimination case. Two teenage brothers—one was overweight and the other wore an earring—who were hired by a city for summer work were subjected to verbal and physical abuse by older co-workers, who questioned their gender and sexuality.⁶⁴ Eventually they quit and sued for sexual harassment. The district court granted summary judgment for the city, finding that the plaintiffs did not prove that they were harassed because of their sex,⁶⁵ but the Seventh Circuit reversed. It reasoned that just as Hopkins in *Price Waterhouse* suffered sex discrimination because her personality, clothing, hairstyle, etc., were perceived as unacceptably masculine, a man who is harassed “because his voice is soft, his physique is slight, his hair is long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers’ idea of how men are to appear and behave” is harassed because of his sex.⁶⁶ The court’s decision stands for the proposition that “workplace harassment that is sexual in content is always actionable, regardless of the harasser’s sex, sexual orientation, or motivations.”⁶⁷

In 1998, the Supreme Court held in *Oncale v. Sundowner Offshore Services, Inc.* that same-sex sexual harassment claims are actionable under Title VII.⁶⁸ Given that many effeminacy discrimination claims are filed against same-sex co-workers, *Oncale* provided the impetus for such claims to be filed in greater numbers. With the courts having held that Title VII does not prohibit sexual orientation discrimination, attorneys for these claimants, many of whom were homosexual, saw *Price Waterhouse* as the logical foundation on which to base their claims. Because, after *Oncale*, there was a dispute among some scholars regarding the viability of the gender stereotyping theory in the effeminacy discrimination context, a brief review of that decision is in order.

Oncale involved a male oil rig worker who endured sex-related assaults, including rape threats, by his all-male crewmates.⁶⁹ After his complaints to the company went unheeded, he quit and sued alleging sexual harassment. The district and appeals courts

⁶² See generally Case, *supra* note 57, at 54-57.

⁶³ *Doe v. City of Belleville*, 119 F.3d 563 (7th Cir. 1997), *vacated and remanded*, 523 U.S. 1001 (1998).

⁶⁴ *Id.* at 568-69.

⁶⁵ *Id.* at 567-68.

⁶⁶ *Id.* at 581.

⁶⁷ *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79-80 (1998) (citing *Doe*).

⁶⁸ *Id.* at 82.

⁶⁹ *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118, 118-19 (5th Cir. 1996).

ruled against him on the ground that under Title VII a male has no claim against another male,⁷⁰ but the Supreme Court disagreed. In barring sex discrimination, the Court said, Congress assuredly did not have same-sex harassment in mind, but the word sex is not limited in the act. If conduct meets the Court-defined criteria for sexual harassment it is prohibited by Title VII, regardless of the sex of the victim and actor.⁷¹

To avoid making Title VII a “general civility code” for the workplace, the Court stressed that the act does not reach innocuous differences in how people interact, but instead applies only if a workplace is “permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.”⁷² This depends on the context in which the conduct occurs and common sense. In addition, the victim must have been targeted because of his sex, and this criterion is not met just because the words or conduct involved have sexual connotations; on the contrary, the issue is whether “members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”⁷³

The Court discussed three ways to prove that same-sex harassment was based on sex.⁷⁴ One may show that the harasser acted due to sexual desire for his victim, a route that requires evidence that the harasser was homosexual, because then it may be inferred that he would not have targeted a member of the other sex.⁷⁵ Sexual desire is not an essential element of a sexual harassment claim, however, so one may also prove conduct of such a sex-specific and derogatory nature as to warrant the inference that the harasser was motivated by hostility to the presence of that sex in the workplace.⁷⁶ Finally, one may offer comparative evidence of how the harasser treated both sexes in a mixed-sex workplace to prove that his or her sex was singled out for abuse.⁷⁷ The Court remanded the case to the Fifth Circuit to decide whether, given the all-male nature of his work setting, Oncale suffered discrimination because of his sex.⁷⁸ Eventually, the case settled.

The Court did not clarify whether these three routes are the only ways to prove a same-sex sexual harassment claim, and this has caused confusion in the lower courts. Some courts have read the list as exhaustive,⁷⁹ while others have concluded that it was

⁷⁰ *Oncale*, 523 U.S. at 77.

⁷¹ *Id.* at 79-80.

⁷² *Id.* at 78 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)).

⁷³ *Id.* at 80 (quoting *Harris*, 510 U.S. at 25 (Ginsburg, J., concurring)).

⁷⁴ For a discussion of the evidentiary routes to proving same-sex sexual harassment discussed in *Oncale*, see Clare Diefenbach, *Same-sex Sexual Harassment After Oncale: Meeting the “Because of . . . Sex” Requirement*, 22 BERKELEY J. GENDER L. & JUST. 42 (2007).

⁷⁵ *Oncale*, 523 U.S. at 80.

⁷⁶ *Id.*

⁷⁷ *Id.* at 80-81.

⁷⁸ *Id.* at 82.

⁷⁹ Fedor, *supra* note 10, at 468-75.

merely instructive and have recognized gender stereotyping as a fourth route.⁸⁰ It is submitted that the latter view is correct. The *Oncale* Court stated that *whatever evidentiary route* a plaintiff chooses to follow, he must prove that the conduct was not merely tinged with offensive sexual connotations, but actually constituted discrimination because of sex.⁸¹ The italicized phrase suggests that one may choose any path to prove the requisite discrimination. In discussing the second route, moreover, the Court said that, “for example,” one could offer proof that would warrant the inference that the harasser was motivated by hostility to the presence of one sex in the workplace.⁸² This reinforces the belief that the Court did not mean for the illustrations to be all-encompassing. Finally, while they admit to confusion about the full meaning and implications of *Oncale*, commentators generally agree that the Court did not suggest that it considered same-sex sexual harassment victims to be limited to the evidentiary routes listed.⁸³

After *Oncale*, the Supreme Court vacated the decision in *Doe*, whose facts were similar, and remanded the case for reconsideration. The *Doe* court relied on two theories in ruling for the plaintiffs: the harassment to which they were subjected had “explicit sexual overtones,” and they were harassed due to their gender-nonconformity.⁸⁴ In *Oncale*, the Court characterized *Doe* as “suggest[ing] that workplace harassment that is sexual in content is always actionable, regardless of the harasser’s sex, sexual orientation, or motivations.”⁸⁵ Although some commentators have argued that its remand signified that the Court meant to reject both theories, the prevailing view is that it objected to the first one—that sexually explicit conduct is automatically actionable.⁸⁶ Support for this position is found not only in the Court’s language quoted above, but also in its statement that “[w]e have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used

⁸⁰ See, e.g., *Bibby v. Phil. Coca Cola Bottling Co.*, 260 F.3d 257, 262-64 (3d Cir. 2001) (holding that there are other ways of proving harassment “because of sex” besides those set forth in *Oncale*), *cert. denied*, 534 U.S. 1155 (2002); *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 874-75 (9th Cir. 2001) (holding that a plaintiff can prove discrimination “because of sex” through the use of gender stereotypes); *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1009 (7th Cir. 1999) (“[W]e discern nothing in the Supreme Court’s [*Oncale*] decision indicating that the examples it provided were meant to be exhaustive rather than instructive.”).

⁸¹ *Oncale*, 523 U.S. at 81 (emphasis added).

⁸² *Id.* at 81.

⁸³ See, e.g., L. Camille Hebert, *Sexual Harassment as Discrimination “Because of . . . Sex”: Have We Come Full Circle?*, 27 OHIO N.U. L. REV 439, 449 (2001); Mary Coombs, *Title VII and Homosexual Harassment After Oncale: Was it a Victory?*, 6 DUKE J. GENDER L. & POL’Y 113, 119 (1999) (“[The Court] gave some examples of ways in which one could prove discrimination, but made clear that these are only examples.”).

⁸⁴ *Doe v. City of Belleville*, 119 F.3d 563, 576, 580 (7th Cir. 1997), *vacated and remanded*, 523 U.S. 1001 (1998).

⁸⁵ *Oncale*, 523 U.S. at 79.

⁸⁶ Diefenbach, *supra* note 74, at 47-48.

have sexual content or connotations.”⁸⁷ This paper asserts that this interpretation is correct and that, if it has not endorsed the use of the gender stereotyping theory in effeminacy discrimination cases, the Supreme Court has not foreclosed that approach.

With the door open to same-sex sexual harassment claims in all circuits, plaintiffs began invoking the stereotyping theory in the hope that courts would follow the lead of the Seventh Circuit in *Doe*. Early on, courts did not cooperate. The district courts were especially hostile to this tactic. In *Klein v. McGowan*,⁸⁸ for example, the plaintiff’s co-workers called him “homo,” flatulated in his work space, and said that he knew “all about [Vaseline].”⁸⁹ Klein argued that this harassment did not stem from animus toward his perceived homosexuality, but rather that there was a difference between the sexual aspect of his personality and his sexual orientation and that the former was equivalent to his sex for purposes of the “because of sex” analysis.⁹⁰ Without mentioning *Price Waterhouse*, the court rejected this claim. If sex and gender were equivalent, it noted, Title VII would prohibit the harassment of a male because of his effeminate behavior or the perception that he is gay. But they are not the same—sex is immutable, while gender encompasses masculinity and other sexual aspects of one’s personality. In the court’s eyes, Title VII bans discrimination based on sex, not gender; Klein’s “personality” argument, moreover, was essentially a claim that Title VII prohibits harassment based on sexual orientation.⁹¹

In *Dandan v. Radisson Hotel Lisle*,⁹² co-workers called an employee “faggot,” asked “didn’t your boyfriend do you last night,” told him to “take [a tube lubricator] home, you’ll have fun with it,” and criticized him for having feminine mannerisms.⁹³ The court rejected his claim that he suffered sex discrimination because he did not conform to his co-workers’ ideas of how men should act, concluding that this argument has “no precedential underpinning” and that he did not allege facts showing that he was harassed because he is a man.⁹⁴ On the contrary, regardless of whether his co-workers knew or merely suspected that he was homosexual, their comments showed that they treated him as they did because of their dislike of homosexuality.⁹⁵

The federal appeals courts were more receptive to the stereotyping argument, at least in theory. In the first cases, which involved co-workers who abused employees by calling them vulgar names, using high-pitched voices, and gesturing in feminine ways, the First, Second, and Third Circuit Courts of Appeals agreed that the work environments were wretched but declined to address the stereotyping claims because they had not been

⁸⁷ *Oncale*, 523 U.S. at 80.

⁸⁸ 36 F.Supp.2d 885 (D. Minn. 1999), *aff’d*, 198 F.3d 705 (8th Cir. 1999).

⁸⁹ *Id.* at 887.

⁹⁰ *Id.* at 889-90.

⁹¹ *Id.* at 890.

⁹² No. 97 C 8342, 2000 WL 336528 (N.D. Ill. Mar. 28, 2000).

⁹³ *Id.* at *1.

⁹⁴ *Id.* at *4.

⁹⁵ *Id.*

asserted at trial.⁹⁶ In so doing, however, the courts endorsed the concept of basing an effeminacy discrimination claim on *Price Waterhouse*, the plaintiff's sexual orientation notwithstanding. In *Higgins v. New Balance Athletic Shoe, Inc.*, the First Circuit stated that it was no longer an open question that, just as a woman may argue that men harassed her because she did not act feminine, a man may claim that other men abused him for not meeting their notions of masculinity.⁹⁷ More to the point, the Second Circuit, in *Simonton v. Runyon*, aptly noted that the stereotyping theory "would not bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine. But, under this theory, relief would be available for discrimination based on sexual stereotypes."⁹⁸ The Third Circuit, in *Bibby v. Philadelphia Coca Cola Bottling Co.*, observed that

[w]hatever the sexual orientation of a plaintiff bringing a same-sex sexual harassment claim, that plaintiff is required to demonstrate that the harassment was directed at him or her because of his or her sex. Once such a showing has been made, the sexual orientation of the plaintiff is irrelevant. In addition, once it has been shown that the harassment was motivated by the victim's sex, it is no defense that the harassment may have also been partially motivated by anti-gay or anti-lesbian animus. For example, had the plaintiff in *Price Waterhouse* been a lesbian, that fact would have provided the employer with no excuse for its decision to discriminate against her because she failed to conform to traditional feminine stereotypes.⁹⁹

When they confronted the stereotyping claim on its merits, however, many courts ignored these sentiments and fell back on the "effeminacy equals homosexuality" approach. In *Spearman v. Ford Motor Co.*,¹⁰⁰ for example, the plaintiff alleged that his co-workers harassed him by calling him "bitch," "fag," and "pussy-ass" and putting up graffiti implying that he should die of AIDS. He argued that he was mistreated because of stereotyping, for his co-workers "perceived him to be too feminine to fit the male image at Ford."¹⁰¹ The Seventh Circuit panel disagreed. While it acknowledged that sex stereotyping may be evidence of sex discrimination, the court observed that remarks that seem to involve such stereotyping may have been prompted by a factor other than the victim's sex. Considering the sexually explicit language and stereotypical statements in the context of all of the evidence of harassment in the case, the court concluded that some of Spearman's problems resulted from altercations with co-workers over work-related

⁹⁶ *Bibby v. Phil. Coca Cola Bottling Co.*, 260 F.3d 257, 264 (3d Cir. 2001); *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 (1st Cir. 1999).

⁹⁷ *Higgins*, 194 F.3d at 261 n.4.

⁹⁸ *Simonton*, 232 F.3d at 38.

⁹⁹ *Bibby*, 260 F.3d at 265.

¹⁰⁰ 231 F.3d 1080, 1082-83 (7th Cir. 2000).

¹⁰¹ *Id.* at 1085.

issues. Specifically, insults were directed at him to provoke him in arguments about lunch money, personal items, and the timing of lunch breaks.¹⁰² The court also found that in using words such as “bitch,” “gay,” and “fag,” and in comparing Spearman to a drag queen, his co-workers showed hostility toward him because of his sexual orientation, not his sex.¹⁰³

In *Rene v. MGM Grand Hotel [Rene I]*,¹⁰⁴ which is discussed in more detail below, the Ninth Circuit ruled against an avowedly gay waiter whose co-workers called him “sweetheart” and “doll,” blew kisses at him, grabbed his crotch, forced him to look at pictures of naked men having sex, and poked their fingers in his anus through his clothing.¹⁰⁵ Citing the evidentiary routes discussed in *Oncale*, the court found that Rene had not contended that his harassers were gay and therefore could not prove that they were motivated by sexual desire for him; that, because the workplace was male and he was the only one abused, he had failed to establish that his harassers were motivated by hostility to men in the workplace; and that the all-male nature of the workplace defeated his ability to present proof of how members of both sexes were treated in a mixed-sex workplace.¹⁰⁶ In the end, the court concluded, the evidence indicated that Rene’s tormentors acted because of their awareness that he was gay—indeed, the court observed, Rene conceded as much in his deposition—and this was sufficient to affirm the trial court’s dismissal of his claim on summary judgment.¹⁰⁷

The plaintiff won in *Nichols v. Azteca Restaurant Enterprises, Inc.*, another Ninth Circuit decision.¹⁰⁸ Sanchez, a male waiter, endured vulgarities including co-workers calling him “her,” “faggot,” and “fucking female whore,” and saying he carried his tray “like a woman.”¹⁰⁹ The trial court dismissed his harassment complaint on the grounds that his work environment was neither objectively nor subjectively hostile and that the conduct had not been directed at him because of his sex.¹¹⁰ The appeals court disagreed on both counts. Regarding the latter issue, the court, taking a tack diametrically opposed to the one used in *Rene I*, reviewed *Price Waterhouse* and then cited *Higgins* for the proposition that, just as a woman can assert that men discriminated against her because she did not meet stereotyped expectations of femininity, a man can claim that other men discriminated against him because he did not meet stereotyped expectations of masculinity.¹¹¹ The court concluded that the name-calling, which was cast in female terms, was closely linked to gender, because it reflected a belief that he did not act as his

¹⁰²

Id.

¹⁰³

Id. at 1085-86.

¹⁰⁴

243 F.3d 1206 (9th Cir. 2001), *rev’d en banc* 305 F.3d 1061 (9th Cir. 2002), *cert. denied*, 538 U.S. 922 (2003) [hereinafter *Rene I*].

¹⁰⁵

Id. at 1207.

¹⁰⁶

Id. at 1208-09.

¹⁰⁷

Id. at 1209-10.

¹⁰⁸

256 F.3d 864, 869-70 (9th Cir. 2001).

¹⁰⁹

Id. at 870.

¹¹⁰

Id. at 872.

¹¹¹

Id. at 874 (citing *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999)). *See supra* note 96.

co-workers thought men should act.¹¹² Interestingly, while similar epithets were hurled at the victim in *Spearman*,¹¹³ the court did not mention that case, nor did it raise the issue of Sanchez's sexual orientation. Finally, the court disavowed *DeSantis* insofar as it held that discrimination based on a stereotype that a man should have a virile rather than an effeminate appearance does not fall within the purview of Title VII.¹¹⁴

After *Nichols* was decided, the en banc Ninth Circuit Court of Appeals overturned the panel ruling in *Rene v. MGM Grand Hotel [Rene II]*.¹¹⁵ In so doing, the court was all over the map, producing five opinions, with no majority, and with some judges in one group also aligning themselves with those in other groups. The ruling merits extended treatment because it perfectly illustrates the conundrum in which judges find themselves given their perceived need to distinguish between discrimination based on gender stereotyping versus sexual orientation. *Rene II* is also a prime example of the confusion that exists in this area, for in the end, although Rene won, it is difficult to understand exactly why he did.

In the lead opinion, Judge Fletcher stressed the physical, sexual nature of the attacks on Rene, concluding that attacks on body areas linked to sexuality are necessarily "because of sex."¹¹⁶ That Rene thought he was targeted because he is gay did not matter, Fletcher observed; a victim's sexual orientation is irrelevant for purposes of Title VII, as is the fact that his harasser may have been motivated by hostility based on sexual orientation.¹¹⁷ Surveying cases finding a Title VII violation based on the touching of female genitalia, buttocks, and breasts, Fletcher found that whether the plaintiff was lesbian was not a factor; if sexual orientation is irrelevant for a female victim, it must be for a male. If the workplace is hostile to the plaintiff because of his sex, which is plain if there is sexual touching, "why the harassment was perpetrated (sexual interest? misogyny? personal vendetta? misguided humor? boredom?) is beside the point."¹¹⁸ That such touching was involved made it equally irrelevant that Rene's harassers were men, as were Oncale's. Neither Oncale nor Rene had to prove that he was treated worse than the opposite sex, only that he suffered in comparison to other men.¹¹⁹

Concurring, Judge Pregerson, speaking for a judge who joined Fletcher and one other, argued that this was a case of gender stereotyping, regardless of the victim's sexual orientation. The only reason that Rene's co-workers teased him about how he walked, whistled as a man would at a woman, etc., is that they saw him as feminine. Indeed, the conduct, Pregerson said, was indistinguishable from the harassment in *Nichols*. That Rene saw himself as masculine did not matter; what did was how his co-workers viewed him and acted on that perception.¹²⁰

¹¹² *Nichols*, 256 F.3d at 874.

¹¹³ 231 F.3d 1080 (7th Cir. 2000). *See supra* note 99 and accompanying text.

¹¹⁴ *Nichols*, 256 F.3d at 875.

¹¹⁵ *Rene v. MGM Grand Hotel*, 305 F.3d 1061 (9th Cir. 2002) (en banc) [hereinafter *Rene II*].

¹¹⁶ *Id.* at 1065-66.

¹¹⁷ *Id.* at 1063-64.

¹¹⁸ *Id.* at 1066 (quoting *Doe v. City of Belleville*, 119 F.3d 563, 578 (7th Cir. 1997)).

¹¹⁹ *Id.* at 1066-67.

¹²⁰ *Id.* at 1069 (Pregerson, J., concurring).

Dissenting, Judge Hug, the panel decision author, and three other judges disagreed that physical conduct of a sexual nature necessarily establishes a Title VII case. The *Oncale* Court, they noted, did not hold that the physical abuse in that case was actionable; instead, it rejected the Fifth Circuit's holding that same-sex harassment is *never* actionable and remanded the case for a ruling on whether the conduct was directed at *Oncale* because of his sex. Hug also focused on the fact that Fletcher cited *Doe*,¹²¹ in support of the proposition that touching body parts linked to sexuality is *per se* because of the target's sex. After deciding *Oncale*, Hug noted, the Supreme Court remanded *Doe*, and in *Oncale* it observed that some courts "suggest that workplace harassment that is sexual in content is always actionable, regardless of the harasser's sex, sexual orientation, or motivations."¹²² If the Court had agreed with this view, it should have affirmed *Doe*; that it did not do so means that harassment that is sexual in content is not always actionable.¹²³

Examining the ways in which *Oncale* held that a same-sex harassment claim may be proven, Hug found that there was no indication that Rene's abusers were motivated by sexual desire or hostility to the presence of men in the workplace, and that because only men occupied Rene's position, he could not offer evidence of how his harassers treated members of both sexes in a mixed-sex workplace. On the contrary, that Rene's co-workers blew kisses at him, called him "sweetheart" and "doll," made him look at pictures of naked men having sex, and poked their fingers in his anus through his clothing necessarily showed that he was targeted because he is gay.¹²⁴ As for *Nichols*, Hug stressed that whereas Sanchez offered evidence that he was mocked for having feminine mannerisms, Rene made no such argument. According to Hug, only one line in Rene's 100-page deposition raised the stereotyping issue, and it involved his being whistled at; later questions, however, confirmed that the whistling was because he is gay, not because he walked "like a woman." On many occasions in his deposition, moreover, Rene affirmed that his co-workers harassed him only because he is gay.¹²⁵

Two judges who joined Fletcher wrote concurrences. One said he joined because this case parallels *Oncale*, but that he agreed with Hug that Rene did not assert a stereotyping theory and Title VII does not ban sexual orientation discrimination.¹²⁶ The other echoed Fletcher in finding that the attacks targeted at body parts linked to Rene's gender were evidence from which a jury could infer that they were based on Rene's sex. He also agreed with Pregerson that the examples of Rene's being touched and mocked for acting "like a woman" were evidence from which a jury could find harassment based on gender stereotyping.¹²⁷

¹²¹ *Doe v. City of Belleville*, 119 F.3d 563 (7th Cir. 1997), *vacated and remanded*, 523 U.S. 1001 (1998).

¹²² *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

¹²³ *Rene II*, 305 F.3d at 1074 (Hug, J., dissenting).

¹²⁴ *Id.* at 1076.

¹²⁵ *Id.* at 1075.

¹²⁶ *Id.* at 1069-70 (Graber, J., concurring).

¹²⁷ *Id.* at 1070 (Fisher, J., concurring).

All of the principal opinions in *Rene II* are flawed. Judge Fletcher, it is submitted, was correct in asserting that the fact that a sexual harassment claimant is homosexual and that his harasser was motivated by hostility toward homosexuals should not preclude a Title VII claim. In so concluding, Fletcher followed the lead of the *Bibby* and *Simonton* courts. He was incorrect, however, in claiming that physical attacks of a sexual nature are necessarily based on the target's sex. In *Oncale*, the Court stressed that the fact that conduct has sexual overtones does not establish that it was directed at the victim because of his sex, and the Court's remand in *Doe* signified its disagreement with the Seventh Circuit insofar as that court held otherwise.¹²⁸ Indeed, the reasons for harassment that Fletcher cited—vendetta, boredom, misguided humor—show how A could touch male B in areas unique to men, such as his crotch, or C could touch female D's breasts, without doing so because of the sex of B or D. In contrast, A or C could tussle the hair or wrap an arm around the shoulder of B or D—areas not linked to sex—and be found to have done so due to sexual desire for B or D. In sum, when and how one touches another may be probative of whether he did so because of the latter's sex, but it is not dispositive of the issue.

For his part, Judge Hug was incorrect in concluding that harassment cannot be based on the victim's sex if it was motivated by dislike of her homosexuality. Although *Price Waterhouse* dealt with discrimination based on behavior—Hopkins' dress, speech, etc.—there is no basis for concluding that one who is harassed because his lifestyle, presumed sexual practices, choice in partners, etc., do not comport with accepted notions regarding that sex is not just as much a victim of gender stereotyping as Hopkins was. Support for this conclusion can be found in the Court's statements that “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group” and that the intent of Congress in enacting Title VII was to “strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”¹²⁹ These remarks establish that gender stereotyping is sex discrimination, regardless of the claimant's status or what prompted the stereotyping.¹³⁰

Judge Pregerson correctly saw this as a case of gender stereotyping. He unnecessarily quarreled with Judge Hug, however, over whether, as Hug asserted, there was only one line in *Rene*'s deposition that evidenced any stereotyping. On the contrary, Pregerson claimed, *Rene* testified that his co-workers teased him about how he walked, caressed his butt and shoulders and blew kisses at him “the way . . . a man would treat a woman,” hugged him “like a man hugs a woman,” and called him “muneca [doll],” “a word that Spanish men will say to Spanish women.”¹³¹ Pregerson recited this litany of abuse to buttress his contention that this case paralleled *Nichols*,¹³² because both cases

¹²⁸ *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

¹²⁹ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

¹³⁰ See *Heller v. Columbia Edgewater Country Club*, 195 F.Supp.2d 1212, 1223-24 (D. Or. 2002) (finding that evidence that plaintiff “is attracted to and dates other women, whereas [the supervisor] believe[d] that a woman should be attracted to and date only men” supported the conclusion that the plaintiff failed to match her supervisor's stereotype of women).

¹³¹ *Rene II*, 305 F.3d at 1068.

¹³² *Id.* at 1069.

involved harassment based on the victim's effeminate behavior. He would have been on firmer footing if he had conceded that the conduct in the two cases may have had different motives—dislike of Sanchez's effeminacy versus dislike of Rene's homosexuality—and concluded that, under *Price Waterhouse*, gender stereotyping occurs if a harasser targets his victim because of his contra-gender behavior or his contra-gender lifestyle.

In *Smith v. City of Salem*,¹³³ the Sixth Circuit Court of Appeals upheld a gender stereotyping claim filed by a transsexual. After being diagnosed with Gender Identity Disorder, a disjunction between one's sexual organs and sexual identity,¹³⁴ Smith began expressing a more feminine appearance, which evoked comments from co-workers. After he told superiors that his treatment would include a male-to-female transformation, they schemed to use his transsexualism as grounds to fire him. Although he learned of the plan, he was suspended for a policy infraction. The suspension was overturned, and he then sued for sex discrimination. The district court held that he failed to state a gender stereotyping claim and that Title VII protection is unavailable to transsexuals.¹³⁵

The Sixth Circuit held that Smith made out a *prima facie* case of sex discrimination because, as a male, he is protected by Title VII; he was qualified for his job by virtue of having been employed for seven years with no negative events; and he was treated differently than others similarly situated because of his non-masculine behavior and Gender Identity Disorder.¹³⁶ As for the trial court's ruling that his stereotyping claim was a "disingenuous" effort to invoke *Price Waterhouse* as an "end run" around his "real" claim, which was based on his transsexuality, the court noted that *Price Waterhouse* held that discrimination because of sex includes gender nonconforming behavior.¹³⁷ The court observed that some courts have held that transsexuals are not protected by Title VII because Congress never intended for the act to apply to anything other than the usual concept of sex.¹³⁸ These courts differentiated between sex and gender and held that Title VII prohibits only sex discrimination, whereas discrimination against transsexualism is based on gender.¹³⁹ The court stressed, however, that these cases predated *Price Waterhouse*, the logic of which overruled their approach.¹⁴⁰

The court observed that some courts believe that men who act feminine are not engaged in the same activity as women who act that way, but instead are engaged in the different activity of being a transsexual (or homosexual or transvestite). They then find that discrimination against a transsexual is based on his mode of self-identification, not his sex. They superimpose labels such as transsexual or homosexual on a plaintiff, in other words, and legitimize discrimination based on his gender nonconformity by

¹³³ 378 F.3d 566, 578 (6th Cir. 2004).

¹³⁴ *Id.* at 568.

¹³⁵ *Id.* at 568-69.

¹³⁶ *Id.* at 570.

¹³⁷ *Id.* at 571.

¹³⁸ *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1086 (7th Cir. 1984).

¹³⁹ *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 661-63 (9th Cir. 1977).

¹⁴⁰ *Smith*, 378 F.3d at 573-74 (citing *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000)).

formalizing the nonconformity into an unprotected classification.¹⁴¹ This occurred here, the court said. The trial court gave insufficient attention to Smith's claim regarding his contra-gender behavior, accounting for it only insofar as it confirmed his status as a transsexual, which, the court then held, ruled out Title VII protection. The Sixth Circuit explained that this analysis does not square with *Price Waterhouse*, which provides no reason to exclude coverage for contra-gender conduct just because one is transsexual. Discrimination against a transsexual who fails to act like his gender is no different from the discrimination in *Price Waterhouse*. Stereotyping based on gender nonconforming behavior is impermissible, irrespective of its cause; a label, such as "transsexual," is not fatal to a sex discrimination claim if the victim has been harassed due to his gender nonconformity.¹⁴²

Although the conduct in *Smith* was based on Smith's appearance, the court made it plain that it would have regarded Title VII as having been triggered even if he had been abused solely because of his status as a transsexual, apart from whatever behavior he displayed. In so doing, it went a step beyond *Nichols* and *Rene II*, and, in the process, gave full effect to *Price Waterhouse* in the effeminacy discrimination context. Thus far, it is the only court that has gone this far.

After chalking up these victories, the plaintiffs moved back into the "lost" column in *Dawson v. Bumble & Bumble*,¹⁴³ one of the few cases that involve a female. Dawson, a lesbian with masculine features, worked for a hair salon whose employees embodied diverse lifestyles, sexual orientations, and manners of dress; indeed, the salon contended that if there was a norm for its employees, it was nonconformance.¹⁴⁴ After a brief period Dawson was fired, allegedly for poor performance. She claimed, however, that her discharge was motivated by discriminatory animus, for it was repeatedly made clear to her that females rarely attained the position of hair stylist. She also asserted that she was subjected to a hostile work environment in that she was harassed by co-workers because she did not meet the image of women. Specifically, she alleged that the owners told people that they wanted to fire her because of her "dyke attitude" and told her they could not send her outside New York City because "[p]eople won't understand you . . . you'll frighten them."¹⁴⁵ She further argued that gender stereotyping was reflected in the fact that co-workers called her "Donald" and said that she needed to "get f***ed."¹⁴⁶

The district court granted summary judgment to the defendant, primarily on the ground that Dawson's claims derived from stereotypes based on sexual orientation, not gender. In so doing, the court stated that it was difficult to grasp precisely what Dawson was alleging, for in her pleadings and testimony she asserted that she was disparately treated because of how she looked, because she was a woman, because she was not a man, and because she was a lesbian who did not conform to gender norms.¹⁴⁷ The

¹⁴¹ *Id.* at 574.

¹⁴² *Id.*

¹⁴³ 398 F.3d 211 (2nd Cir. 2005).

¹⁴⁴ *Id.* at 214.

¹⁴⁵ *Id.* at 215-16.

¹⁴⁶ *Dawson v. Bumble & Bumble*, 246 F.Supp. 2d 301, 307 (S.D.N.Y. 2003).

¹⁴⁷ *Dawson*, 398 F.3d at 217.

Second Circuit agreed, noting that insofar as she argued that her mistreatment was linked to her lesbianism, she had not stated a Title VII claim.

The court said that stereotyping claims present difficult problems for adjudicators when they are raised by avowedly homosexual plaintiffs, because “stereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality.”¹⁴⁸ Signaling that it thought that Dawson was trying to bootstrap protection for sexual orientation into Title VII, the court, from the same circuit that explicitly rejected the bootstrapping rationale in *Simonton v. Runyon*,¹⁴⁹ cited a legal text and a law review article in which the authors, respectively, observed that Title VII claims often fail because the courts found that sexual orientation claims were masquerading as gender stereotyping claims and counseled gay plaintiffs to stress the stereotyping theory and de-emphasize any connection the discrimination may have to homosexuality.¹⁵⁰ The court went on to discuss cases in which courts found that real or perceived homosexuality, not gender stereotyping, accounted for the abuse suffered by the plaintiffs.¹⁵¹ In the end, it found that there was no evidence that Dawson was mistreated due to her appearance and mannerisms; on the contrary, poor performance accounted for her dismissal.¹⁵² In so ruling, the court stressed the diverse nature of the salon environment, saying that it was difficult to accept the notion that a group of nonconformists would subject one of their own to discrimination based on her contra-gender behavior. The court never mentioned *Rene, Nichols, and Smith*.

In *Vickers v. Fairfield Medical Center*,¹⁵³ the plaintiff befriended a homosexual colleague and took another man on vacation; afterward, his co-workers called him “faggot,” remarked on his supposed sexual practices, and abused him physically.¹⁵⁴ He claimed sexual harassment based on stereotyping, arguing that his harassers objected to “those aspects of homosexual behavior in which a male participant assumes what [his harassers] perceive as a traditionally female—or less masculine—role.”¹⁵⁵ To be specific, Vickers alleged that he was only teased about giving, not receiving fellatio, and about receiving anal sex.¹⁵⁶

The Sixth Circuit—the same circuit that construed *Price Waterhouse* so expansively in *Smith v. City of Salem*—ruled against him. The case is unique, however, because of the court’s rationale. After giving lip service to *Price Waterhouse* and to the fact that being homosexual does not preclude one from suing for sexual harassment under Title VII, the majority found that the contra-gender behavior that Vickers argued

¹⁴⁸ *Id.* at 218 (quoting *Howell v. N. Cent. Coll.*, 320 F.Supp.2d 717, 723 (N.D. Ill. 2004)).

¹⁴⁹ 232 F.3d 33, 38 (2nd Cir. 2000). *See supra* note 98.

¹⁵⁰ *Dawson*, 398 F.3d at 218; Lex K. Larson, 10 EMPLOYMENT DISCRIMINATION § 168.10[1] (2nd ed.) (2003) (“masquerading” point); Kristin M. Bovalino, *How the Effeminate Male Can Maximize His Odds of Winning Title VII Litigation*, 53 SYRACUSE L. REV. 1117, 1134 (2003) (“counseling” point).

¹⁵¹ *Dawson*, 398 F.3d at 218-19.

¹⁵² *Id.* at 223-24.

¹⁵³ 453 F.3d 757 (6th Cir. 2006).

¹⁵⁴ *Id.* at 759-60.

¹⁵⁵ *Id.* at 763.

¹⁵⁶ *Id.* at 763 n.2.

supported his claim was not observable; on the contrary, he was harassed because of his perceived homosexuality.¹⁵⁷ *Price Waterhouse* was inapposite because the features that gave rise to the stereotyping theory—how Hopkins walked and talked, her attire, and her hairstyle—were “readily demonstrable in the workplace.”¹⁵⁸ The court added that later cases such as *Dawson* and *Smith* have interpreted that decision as applying only if gender nonconformance is demonstrable through workplace behavior.¹⁵⁹ Because Vickers was harassed due to his co-workers’ perception of his sexual orientation and the role he assumed in sex acts, not because of any observable behavior at the job site, his claim failed. According to the court, to recognize Vickers’ claim would result in the *de facto* amendment of Title VII to include sexual orientation discrimination, “as all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices.”¹⁶⁰ The court added that *Oncale* established three routes by which a plaintiff can establish a hostile environment claim based on same-sex harassment, and Vickers’ claim did not fall in any of these categories.¹⁶¹

The dissenting judge agreed that a distinction must be drawn between cases of gender stereotyping and cases denominated as such that, in reality, seek protection for sexual orientation discrimination.¹⁶² He also said that, while stereotyping may be evidence of sex discrimination, it is not actionable *per se*. He disagreed with the dismissal of this case at the pleading stage, however, because he believed that there were facts on which the plaintiff could have proven discrimination based on his gender nonconformity. In particular, the dissent noted Vickers’ role as a security officer and his co-workers’ comments indicating their belief that the job required “manly men” and that he was too effeminate to be “a real officer.”¹⁶³

Dawson and *Vickers* took the same approach as *Spearman* and *Rene I*. As for the *Vickers* court’s conclusion that *Price Waterhouse* was inapposite because Vickers did not allege gender stereotyping based on demonstrable behavior at the workplace, nothing in *Price Waterhouse* suggests that the Supreme Court had this caveat in mind, and it is crystal clear that the court in *Smith v. City of Salem* did not read *Price Waterhouse* this way. While it is true that all of the effeminacy discrimination cases have involved harassment based on workplace behavior, there is no basis for concluding that, under Title VII as construed in *Price Waterhouse*, an employee forfeits his Title VII protection if he is harassed by co-workers at the job site because of his off-site behavior, harassed off-site because of his on-site behavior, or harassed off-site because of his off-site behavior. Discrimination based on contra-gender behavior (or lifestyle) is sex discrimination, regardless of the circumstances or location in which it occurs.

¹⁵⁷ *Id.* at 763.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 764.

¹⁶¹ *Id.* at 765.

¹⁶² *Id.* at 767 (Lawson, J., dissenting).

¹⁶³ *Id.* at 769.

To summarize, the cases agree that sexual harassment occurs only if the conduct was sufficiently severe or pervasive to alter the conditions of the victim's employment,¹⁶⁴ and that the victim must prove that his harassers acted because of his sex. When, however, a victim asserts that the latter requirement was met because she was abused due to her gender nonconformity, inconsistent outcomes result. As things stand, it is literally the case that whether plaintiffs who are, or are perceived as, homosexual and are subjected to essentially the same conduct have a Title VII claim may turn on the words used by the harassers. In *Nichols*, for example, the court held that the fact that the harassers called Sanchez "doll" and said that he carried his tray "like a woman" signified effeminacy discrimination, whereas the *Spearman* court found that the words "fag" and "pussy-ass" indicated sexual orientation discrimination. Courts may, moreover, reach opposite conclusions where the same word is used. "Faggot," or a variation thereof, was used in *Nichols*, *Spearman* and *Vickers*, but these cases were decided differently.

This chaos is attributable to the fact that courts have used two fundamentally different, and irreconcilable, approaches in deciding these cases. One approach, which is reflected in *Nichols*, *Rene II*, and *Smith*, takes *Price Waterhouse* at face value and regards it as legitimate for a person to claim stereotyping if he suffered discrimination based on his gender-nonconformity, even if he is, or was perceived as, homosexual and his harassers were motivated by hostility toward homosexuals. For these courts, the issue of homosexuality is irrelevant. The other approach, which is seen in *Spearman*, *Rene I*, *Dawson*, and *Vickers*, regards the homosexual factor as not only relevant, but dispositive. In these courts' eyes, effeminacy discrimination claims involve disingenuous efforts to use *Price Waterhouse* to circumvent the fact that Title VII does not prohibit discrimination based on sexual orientation.

In conflating homosexuality and effeminacy, and in concluding that the homosexual factor disqualifies effeminacy discrimination victims from obtaining Title VII protection, the *Spearman* line of cases followed the lead of the 1970's *Smith* and *DeSantis* cases. Contrary to what these cases assert, however, to permit homosexual sexual harassment claimants to invoke the stereotyping theory would not rewrite Title VII to embrace an unprotected group. It is one thing to protect someone from discrimination *because of* his homosexuality, and another to accord Title VII protection to someone who is in one or more of the act's protected classes but also happens to be homosexual. That one is homosexual, in other words, does not alter the fact that he may be Baptist or black. Surely no one would disagree that an employer violates the act if it discriminates against someone because of her religion or race, even if she is a lesbian. Similarly, one who is harassed because he acts feminine, or because her lifestyle is not that of the stereotypical female, is harassed because of sex, and the coincidence of being homosexual does not change that fact. In this regard, it must again be stressed that, just as seemingly effeminate men and masculine women are not necessarily homosexual, masculine men

¹⁶⁴ See, e.g., *EEOC v. Harbert-Yeargin, Inc.*, 266 F.3d 498, 506-07 (6th Cir. 2001); *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1008 (7th Cir. 1999). One commentator has noted that some courts, concerned about finding harassment in innocuous workplace behavior, have mistakenly dismissed sexual harassment claims on the ground that the conduct was not directed at the plaintiff because of his sex, when the reason should have been that the conduct was not sufficiently severe or pervasive to be actionable. See Diefenbach, *supra* note 74, at 64-65.

and feminine women may be in that category.¹⁶⁵ Finally, the proposition that homosexual victims of effeminacy discrimination are necessarily outside the scope of Title VII is not supported by—indeed, is at odds with—*Price Waterhouse*.

There are several possible reasons why some courts continue to take the *Smith-DeSantis* approach. One is intellectual laziness and/or an inability to get beyond the superficial. Instead of analyzing effeminacy claims independently and logically, they reflexively fall back on the simplistic “effeminacy equals homosexuality” approach that was taken in those (at the time) seminal cases. In so doing, they fail to recognize that much has changed since those cases were decided, including the replacement of the biological interpretation of sex with the gender-based view, the recognition by courts and commentators that effeminacy and homosexuality are not necessarily synonymous and the disavowal of *DeSantis* on this point,¹⁶⁶ the holding of other courts that *Price Waterhouse* does not compel the conclusion that homosexuals cannot claim stereotyping, and the recognition by some courts that discrimination against a homosexual can itself be a form of stereotyping, given that the abusive treatment is visited on the victim because he or she does not act, dress, talk, walk, or conduct his life as a “real” man or woman should.

Another reason is that some members of the relatively conservative judiciary now in place may be put off by contra-gender behavior in the workplace, if not by homosexuality itself, and not want to see it accorded legal protection. That most of the effeminacy discrimination cases have involved men compounds this problem. This paper has cited Professors Case and Franke for the proposition that, whereas women who act manly are viewed sympathetically as trying to survive in a man’s world, feminine behavior in men is regarded as a marker for homosexuality, thus earning the male contempt from his co-workers and, in turn, from courts.¹⁶⁷ Professor Zalesne had this to say on the issue:

Male victims of hostile environment harassment by other males tend to be either homosexual, perceived by co-workers as homosexual, or outwardly demonstrate feminine characteristics. In all these situations, arguably, the employee is being harassed because of his gender role identity—that is, the harassment is motivated by the employee’s failure to live up to gender expectations. The same traits or behavior exhibited by a man would not be objectionable to the harasser if displayed by a woman. It is the fact that they are displayed by a man that inspires the harasser’s hostility.¹⁶⁸

¹⁶⁵ See, e.g., *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000) (“[Gender stereotyping] theory would not bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine.”).

¹⁶⁶ The Fifth Circuit has not disavowed *Smith*. As one commentator has noted, however, in light of *Price Waterhouse*, its holding rests on “shaky analytical ground.” Hardage, *supra* note 3, at 218-19.

¹⁶⁷ *Supra* notes 57-62 and accompanying text.

¹⁶⁸ Deborah Zalesne, *When Men Harass Men: Is It Sexual Harassment?*, 7 TEMP. POL. & CIV. RTS. L. REV. 395, 407 (1998).

Case further observed that sexual harassment inflicted on effeminate men may reflect the desire of certain “active” masculine males to drive out of the workplace those they see as contaminating it with the taint of feminine passivity.¹⁶⁹

A third reason involves the slippery-slope concept. Judges may fear that to accord Title VII protection to people harassed because of their mannerisms may open the floodgates to challenges to long-standing employment policies such as grooming codes. The en banc Ninth Circuit dealt with such a challenge in 2006 in *Jespersen v. Harrah’s Operating Co.*,¹⁷⁰ which upheld a policy requiring female bartenders to wear face powder, blush, and mascara, and to keep their hair teased, curled, or styled, and requiring males to keep their hair cut short and nails trimmed and not to wear facial makeup. The majority ruled that no stereotyping issue was raised though it seemed self-evident that in adopting the policy, Harrah’s envisioned an image that it wanted its male and female employees to project. *Jespersen* fits nicely in a long line of decisions in which courts have consistently and forcefully affirmed the right of employers to require employees to meet traditional gender expectations regarding hair length, clothing, makeup, etc.¹⁷¹ That judges look with disdain on the notion that the stereotyping theory should apply in this area is reflected in Judge Posner’s derisive statement that there can hardly be a federally protected right “for male workers to wear nail polish and dresses and speak in falsetto and mince about in high heels, or for female ditchdiggers to strip to the waist in hot weather.”¹⁷²

Even if one agrees that grooming codes do not reflect gender stereotyping, the sexual harassment cases are distinguishable. It is relatively easy for a man to keep his hair short and nails trimmed and to avoid wearing dresses and makeup, and for a woman to wear makeup and keep her hair styled. Accordingly, policies requiring this to be done involve minor intrusions on features that can be easily controlled. By contrast, features such as voice and mannerisms are difficult, if not impossible, to change. Harassment visited on someone because his or her features seem to be those of the opposite sex thus is the type of discrimination based on immutable characteristics that courts have long held deserves Title VII protection.

Conclusion

In recognizing a Title VII sex discrimination claim based on gender stereotyping, the Supreme Court created a remedy for employees who endure conduct that harms their dignity as well as their employment status. After fits and starts, courts have applied the gender stereotyping theory in effeminacy discrimination cases involving sexual harassment, but the result has been a chaotic body of case law in which some courts have felt compelled to make the fine distinction between harassment based on the victim’s real

¹⁶⁹ Case, *supra* note 57, at 6.

¹⁷⁰ 444 F.3d 1104, 1106 (9th Cir. 2006) (en banc).

¹⁷¹ See, e.g., Jon D. Bible, *In a Class by Themselves: The Legal Status of Employee Appearance Policies Under Title VII After Jespersen v. Harrah’s Operating Co., Inc.*, 32 EMP. REL. L.J. 3, 23 (2007).

¹⁷² Hamm v. Weyauwega Milk Prods., Inc., 332 F.3d 1058, 1067 (7th Cir. 2003) (Posner, J., concurring).

or presumed homosexuality versus the harasser's perception that the victim acted like a womanly man or a manly woman.

The effect of the courts' insistence on plunging into this quagmire is that plaintiffs who have been subjected to verbal and physical abuse, but who are or are thought to be homosexual, must engage in an elaborate charade to withstand summary judgment. Fearful that the court will find that they are trying to bootstrap protection against sexual orientation discrimination into Title VII, they must keep quiet about their orientation and speak of their discrimination in veiled terms. This, in turn, causes courts to engage in fine line drawing to determine the true basis for the abuse. Thus, entitlement to Title VII protection may turn on such arcane factors as whether the harasser's words and acts were sufficiently sexual and how gender nonconforming the plaintiff's behavior was. The more nonconforming the victim and the more the harasser's language and behavior indicate that he targeted his victim because of gender nonconformity and not sexual orientation, the more likely it is that the victim's case will be allowed to proceed. Effeminate male plaintiffs, moreover, have a tougher row to hoe than masculine females.

Consistency in this area could be achieved if Congress afforded Title VII protection to sexual orientation discrimination victims, for this would remove the homosexual factor from the "because of sex" analysis. Courts in sexual harassment cases would still have to decide whether the conduct was sufficiently severe or pervasive to be actionable and whether it was directed at the victim because of his or her sex, but they would not have to engage in intricate analyses of the motives of harassers and mannerisms of victims to decide the latter issue. This would also mean that male, female, gender conforming, and gender nonconforming harassment victims would be accorded the same protection. As has been noted, however, several attempts to so amend Title VII have been made, and all have been unsuccessful.¹⁷³ With a Democratic president and Democrats now holding majorities in Congress, another such effort is possible, but one can only wonder whether, given the number of more pressing issues at hand, such as the economy, wars in Iraq and Afghanistan, health care, etc, anyone will be too eager to squander limited capital on attempting to provide homosexuals with statutory protection against discrimination.

The next-best option would be for judges across the board to join the handful of their colleagues who have held that an employee's real or perceived homosexuality does not preclude the application of Title VII in effeminacy discrimination cases alleging gender stereotyping. While this would not accomplish the same result as amending Title VII to protect homosexuals *per se*, it would prevent courts from having to engage in the "effeminacy versus homosexuality" debate and result in equal treatment of men and women. It would also prevent employees who are victims of the gender stereotyping form of sex discrimination from being denied Title VII protection because they are, or seem to be, in an unprotected class. This, in turn, would give full effect to the Supreme Court's pronouncements that Title VII was enacted to "strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes,"¹⁷⁴ and give all

¹⁷³

See supra note 5.

¹⁷⁴

Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989).

employees “the right to work in an environment free from discriminatory intimidation, ridicule, and insult.”¹⁷⁵

¹⁷⁵ *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986).