BALDWIN, *HIVELY*, AND *CHRISTIANSEN*, OH MY! NAVIGATING THE YELLOW BRICK ROAD OF EMPLOYMENT DISCRIMINATION FOR LGBT PLAINTIFFS[*]

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The vast majority of Americans believe that LGBT people should be treated equally in the workplace. The public is on the right side of history; it's unfortunate that the Supreme Court has refused to join us. . . .[1]

I. INTRODUCTION

In 2009, Kimberly Hively shared a simple goodbye kiss with her girlfriend before heading to work at Ivy Tech Community College.[2] A simple kiss resulted in the school's administration informing Hively that it received a complaint about her "sucking face" with her girlfriend and reminded her about the school's professionalism standards.[3] Over the next six years, Hively applied for several full-time teaching positions but kept being denied before she was finally terminated in 2014.[4] Hively had worked at Ivy Tech for fourteen years and had increased her credentials by

* See THE WIZARD OZ (MGM 1939) (including similar language).

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1. *U.S. Supreme Court Denies Appeal of LGBT Lambda Legal Employment Discrimination Case*, LAMBDA LEGAL (Dec. 11, 2017), https://www.lambdalegal.org/blog/dc_20171211_evans-cert-denied (explaining that the Supreme Court will not be taking up LGBT employment discrimination for the October 2017 term, leaving a circuit split that will cause confusion and quoting Greg Nevins, Employment Fairness Project Director for Lambda Legal).

2. Darran Simon, *Lesbian Plaintiff in Work Discrimination Suit Sticking to Fight*, CNN (Apr. 5, 2017), http://www.cnn.com/2017/04/05/us/lgbt-employees-appeals-court-plaintiff/index.html.

3. *Id.*

4. *Id*.

completing her graduate degree.[5] Hively realized that the refusal to promote her was based on something other than job performance.[6] She pursued legal action for the next few years and achieved a landmark victory in 2017.[7] Hively never intended to be an advocate but has found that her journey has "been less about [her] and more about everybody else who's going to come after [her], who's not going to have to take this long walk."[8]

Hively's story is a legal success for LGBT[9] plaintiffs in employment discrimination cases.[10] However, with successes come obstacles. On October 4, 2017, former Attorney General Jeff Sessions rolled back an Obama-era policy, and Sessions claimed that sex discrimination in employment under Title VII does not include gender identity.[11]

This Article examines the fact that people can theoretically marry whomever they want on Saturday,[12] but have no assurance that they will not be "fired from their jobs on Monday" because the employer does not agree with their choice to marry someone of the same sex.[13] Despite the Equal Employment Opportunity Commission (EEOC) determining that sexual orientation discrimination is Title VII sex discrimination in *Baldwin v. Foxx*

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5. *Id.*

6. *See id.* (Hively said, "It was at that point I knew that it was a bigger issue than even I had imagined it might be.").

7. *Id.*

8. *Id.*

9. The full acronym is LGBTQIA+. *See* Michael Gold, *The ABCs of L.G.B.T.Q.I.A.+*, THE N.Y. TIMES (June 21, 2018), https://www.nytimes.com/2018/06/21/style/lgbtq-gender-language.html (providing a nonexclusive list of terminology concerning gender and sexuality). For the purposes of this Article, LGBT will be used.

10. Simon, *supra* note 2.

11. Andrea Noble, *Jeff Sessions Rolls Back Obama-era Work Protections for Transgender Employees*, WASH. TIMES (Oct. 5, 2017), http://www.washingtontimes.com/news/2017/oct/5/jeff-sessions-rolls-back-obama-era-work-protection/. Under President Barack Obama, Attorney General Eric Holder issued a memo clarifying that the Justice Department will no longer argue that Title VII's prohibition against sex discrimination does not include gender identity (including transgender discrimination). Mem. from Eric Holder, Att'y Gen., Dep't of Justice, to U.S. Att'ys, Heads of Dep't Components, *Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964* (Dec. 15, 2014), https://www.justice.gov/file/188671/download.

12. Obergefell v. Hodges, 135 S. Ct. 2584, 2591–2608 (2015) (reviewing case law on the right to marry and extending the right to marry to include same-sex couples).

13. Tessa M. Register, Note, *The Case for Deferring to the EEOC's Interpretations in* Macy *and* Foxx *to Classify LGBT Discrimination as Sex Discrimination Under Title VII*, 102 IOWA. L. REV. 1397, 1398 (2017).

in 2015,[14] many courts are reluctant to follow the EEOC's lead.[15] In 2017, LGBT plaintiffs experienced a major win in an employment discrimination case when the Second Circuit in *Hively v. Ivy Tech Community College of Indiana*, sitting en banc, recognized sexual orientation discrimination as sex discrimination under Title VII.[16] Chief Judge Katzmann reinforced this position in his concurrence in *Christiansen v. Omnicom Group, Inc*.[17] However, there were some setbacks within the courts.[18] This Article proposes that courts recognize sexual orientation discrimination as sex discrimination under Title VII through deference to the EEOC. However, if unable to convince a court to recognize sexual orientation discrimination as a legal theory for relief, this Article suggests that both the associational theory and failure to conform to gender norms theory based on sexual orientation are avenues for protecting LGBT plaintiffs in employment discrimination cases.

Part II examines the three cases that this Article focuses on: *Baldwin*, *Christiansen*, and *Hively*. Part III discusses Title VII and its history. Part IV analyzes the two main theories used for sex discrimination, and an historical account of how courts used the two theories follows in Part V. Part VI includes LGBT history in the Supreme Court, recent lower court decisions using sexual orientation as a legal theory, and an analysis of sexual orientation discrimination as a theory in sex discrimination cases. Part VII proposes two approaches for successful court resolutions for LGBT plaintiffs in employment discrimination cases. Part VIII concludes by highlighting why interpreting Title VII for LGBT plaintiffs continues to be relevant.

14. Appeal No. 0120133080, 2015 WL 4397641, at *5 (E.E.O.C. July 15, 2015); *infra* pt. II.A and accompanying notes.

15. Jeremy S. Barber, Comment, *Re-Orienting Sexual Harassment: Why Federal Legislation Is Needed to Cure Same-Sex Sexual Harassment Law*, 52 AM. U. L. REV. 493, 500 (2002) (explaining that courts cite two reasons for not extending Title VII to include sexual orientation: (1) sexual orientation falls outside of "Congress's intent in passing Title VII" and (2) the term sex in Title VII precludes sexual orientation based on the "plain meaning rule" of sex); *infra* pt. VI.C and accompanying notes.

16. 853 F.3d 339, 359 (7th Cir. 2017); *infra* pt. II.C and accompanying notes.

17. 852 F.3d 195, 202 (2d Cir. 2017) (Katzmann, C.J., concurring); *infra* pt. II.B and accompanying notes.

18. *U.S. Supreme Court Denies Lambda Legal Appeal of LGBT Lambda Legal Employment Discrimination Case*, *supra* note 1.

II. *UNDERSTANDING* BALDWIN, CHRISTIANSEN, *&* HIVELY

A. *Baldwin*

The EEOC propelled LGBT rights forward in its landmark decision of *Baldwin*.[19] David Baldwin worked as a Supervisory Air Traffic Control Specialist, a temporary position, within the Miami Airport.[20] Baldwin wanted to obtain a permanent position with the airport but was not selected for a permanent position.[21] Baldwin filed a discrimination claim with the agency because he believed that he was not selected for the position because his supervisor (who was involved in the selection process) made negative comments about Baldwin's sexual orientation.[22] The agency dismissed the complaint for failing to file a complaint with the EEOC in a timely manner.[23] However, the EEOC also expressed that "the question is not whether sexual orientation is explicitly listed in Title VII as a prohibited basis,"[24] but whether the employer has taken either sex-based considerations or gender into account when making an allegedly adverse employment decision.[25] The EEOC has also stated that sexual orientation cannot be understood without reference to sex, and this creates an inescapable link between sexual orientation and sex.[26]

The EEOC then provided three legal theories that allow Title VII's ban on sex discrimination to encompass sexual orientation.[27]

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19. *Baldwin*, 2015 WL 4397641. *Cf.* Macy v. Holder, Appeal No. 0120120821, 2012 WL 1435995, at *11 (E.E.O.C. Apr. 20, 2012) (discussing that transgender people have a cognizable action under Title VII for gender stereotyping, and evidence of gender stereotyping is one means of proving sex discrimination).

20. *Baldwin*, 2015 WL 4397641, at *1.

21. *Id.* (explaining that even though Baldwin did not formally apply, the airport automatically considered all temporary positions, such as Baldwin's for permanent status).

22. *Id.* at *2 (noting the supervisor often told Baldwin he was a distraction when he mentioned his male partner and made comments that included, "We don't need to hear about that gay stuff.").

23. *Id.* Baldwin appealed to the Commission, and the Commission determined that Baldwin filed his complaint within the 45-day limitation period since "[t]he standard we apply to determine timeliness is when Complainant *reasonably* should have first suspected discrimination." *Id.* at *3–4.

24. *Id.* at *4.

25. *Id.* at *5–6 (explaining that a sex discrimination allegation based on sexual orientation is sex discrimination under Title VII).

26. *Id.* at *6 (stating that "[d]iscrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms").

27. *Id.* at *5–7 (stating that sex discrimination can occur because of sexual orientation, association with a same-sex partner, and failure to conform to gender norms).

The EEOC stated sexual orientation is not understandable without reference to sex.[28] The EEOC defined associational discrimination based on sex as the employer taking the employee's sex into account by treating him or her differently for association with a person of the same sex.[29] The EEOC also discussed the sex discrimination theory set forth by *Price Waterhouse v. Hopkins*,[30] but it recognized that discrimination against LGBT plaintiffs "on the basis of gender stereotypes often involves far more than assumptions about overt masculine or feminine behavior."[31] The EEOC concluded that a sexual orientation discrimination claim is a sex discrimination claim under Title VII and remanded the claim back to the agency for a determination on the merits of Baldwin's claim.[32]

B. *Christiansen*

Matthew Christiansen sued his employer alleging discrimination in the workplace; in this instance, the allegations were for harassment, due to his failure to conform to gender stereotypes by being an openly gay man.[33] In March 2017, the Second Circuit affirmed the district court's decision dismissing Christiansen's claim of sex discrimination based on sexual orientation,[34] but reversed on grounds of failure to conform to

28. *Id.* at *5. The EEOC referenced the American Psychological Association's definition of sexual orientation and then deduced that sexual orientation is inseparable from sex. *Id.*

29. *Id.* at *6–8 ("Similarly, a heterosexual man who alleges a gay supervisor denied him a promotion because he dates women instead of men states an actionable Title VII claim of discrimination because of his sex.").

30. 490 U.S. 228, 258 (1989) (plurality) (holding that failure to conform to gender norms is a valid theory for relief in sex discrimination claims under Title VII), *superseded by statute as stated in* Burrage v. United States, 571 U.S. 204, 213 n.4 (2014).

31. *Baldwin*, 2015 WL 4397641, at *7 (noting that court decisions often vaguely reference deeper assumptions about gender stereotypes or courts reject LGBT plaintiffs' claim for gender stereotyping because of the thin line between failure to conform to gender norms—an acceptable Title VII action—and sexual orientation—not an acceptable Title VII action in most circuits).

32. *Id.* at *10. The Commission provided the three legal theories for the agency to use in determining the merits of Baldwin's claim. *Id*.

33. Christiansen v. Omnicom Grp., Inc., 852 F.3d 195, 197–98 (2d Cir. 2017) (detailing that Christiansen experienced harassment from his supervisor in the form of "multiple sexually suggestive and explicit drawings of Christiansen on an office whiteboard" and remarks to Christiansen and to other employees about Christiansen's sexuality).

34. *Id.* at 199–201 (explaining that despite plaintiff's argument to reconsider previous decisions, the court is bound by prior court decisions until overturned via an en banc hearing or by the Supreme Court).

gender norms theory.[35] The standout from this decision, however, is the concurrence from Chief Judge Katzmann.[36] Chief Judge Katzmann's concurrence argued for overturning previous case law forbidding employment discrimination claims under Title VII for sexual orientation.[37]

Chief Judge Katzmann analyzed previous cases explaining how sex discrimination involves a person being at a disadvantage because of sex.[38] Based on case law, Chief Judge Katzmann explained that sexual orientation meets this test.[39] Chief Judge Katzmann stated:

> One could argue in response that a man married to a man is not similarly situated to a man married to woman, but is instead similarly situated to a woman married to a woman. In other words, one might contend that, for comparative purposes, a gay man is not married to a man; he is married to someone of the same sex, and it is other people married (or otherwise attracted) to the same sex who are similarly situated for the purpose of Title VII. In my view, this counterargument, which attempts to define "similarly situated" at a different level of generality, fails to demonstrate that sexual orientation discrimination is not "but for" sex discrimination.[40]

Additionally, Chief Judge Katzmann made the associational theory connection that "if it is race discrimination to discriminate against interracial couples, it is sex discrimination to discriminate against same-sex couples."[41] Finally, Chief Judge Katzmann

35. *Id.* at 199–201 (explaining that "being gay, lesbian, or bisexual" alone does not establish nonconformity to a gender stereotype).

36. *Id.* at 201–07 (Katzmann, C.J., concurring).

37. *Id.* at 199 (expressly writing for the occasion when it makes sense to revisit the central legal issue confronted in *Simonton* and *Dawson*). However, the Second Circuit denied an en banc rehearing for *Christiansen*. *See* Order Denying Petition for Rehearing En Banc., *Christiansen v. Omnicom Grp., Inc.*, https://ecf.ca2.uscourts.gov/n/beam/servlet/TransportRoom (2d Cir. June 26, 2017) (No. 16-748).

38. *Christiansen*, 852 F.3d at 202 (examining *Oncale* and *Manhart* and how the Supreme Court used the "because of" or "but for" test to determine that sex was the reason for the discrimination).

39. *Id.* at 203 (stating that if LGBT plaintiffs "can show that 'but for' their sex . . . they would not have been discriminated against for being attracted to men (or being attracted to women), they have made out a cognizable sex discrimination claim") (internal citations omitted).

40. *Id.* at 203 (explaining that the Supreme Court already rejected an analogous argument in *Loving v. Virginia*).

41. *Id.* at 204 (noting "it makes little sense to carve out same–sex relationships as an association to which [Title VII] protections do not apply" especially since the Supreme Court

addressed the failure to conform to gender norms theory and how it encompasses discrimination based on sexual orientation.[42] Chief Judge Katzmann noted:

> The binary distinction that *Simonton* and *Dawson* establish between permissible gender stereotype discrimination claims and impermissible sexual orientation discrimination claims requires the factfinder, when evaluating adverse employment action taken against an effeminate gay man, to decide whether his perceived effeminacy or his sexual orientation was the true cause of his disparate treatment. This is likely to be an exceptionally difficult task in light of the degree to which sexual orientation is commingled in the minds of many with particular traits associated with gender.[43]

The Second Circuit decided *Christiansen* a little over a week before the Seventh Circuit issued its en banc decision in *Hively*.[44]

C. *Hively*

Kimberly Hively worked as a part-time adjunct professor at Ivy Tech Community College from 2000 to 2014.[45] During her time at Ivy Tech, Hively applied for six full-time positions between 2009 and 2014; however, she did not receive any position and did not have her contract renewed in 2014.[46] Hively received a right to sue letter from the EEOC, but the district court dismissed Hively's complaint.[47] The Seventh Circuit affirmed.[48] In April 2017, sitting en banc, the Seventh Circuit brought its law "into conformity with the Supreme Court's teachings" when it explained that it had the

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previously held same-sex couples cannot be excluded from marriage, a central institution of society).

42. *Id.* at 206 (explaining that failing to conform to a gender stereotype, specifically the one that men should only be attracted to women and that women should only be attracted to men, is a recognizable sex discrimination claim).

43. *Id.* at 205–06 (internal citations omitted).

44. Note that the date of the *Christiansen* decision is March 27, 2017, whereas the date of the *Hively* decision is April 4, 2017.

45. Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 341 (7th Cir. 2017).

46. *Id.* The district court granted the motion to dismiss because Hively failed to state a claim on which relief could be granted, and the circuit court affirmed because binding prior precedent. *Id.* at 343.

47. *Id.* at 341 (addressing a motion to dismiss from Ivy Tech for failure to state a claim for which relief can be granted since sexual orientation is not a protected class under Title VII).

48. Hively v. Ivy Tech Cmty. Coll., South Bend, 830 F.3d 698, 699 (7th Cir. 2016), *rev'd* Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339 (7th Cir. 2017) (en banc).

power to overrule earlier decisions that did not allow employment discrimination cases based on sexual orientation.[49] *Hively* became the first decision by a full circuit court to recognize sexual orientation discrimination as an actionable sex discrimination claim under Title VII.[50] The court explained that "[a]ny discomfort, disapproval, or job decision based on the fact that the complainant—woman or man—dresses differently, speaks differently, or dates or marries a same-sex partner, is a reaction purely and simply on sex."[51]

The Seventh Circuit analyzed the two approaches Hively set forth to support her claim of employment discrimination based on sex.[52] The court stated that associational theory expands to sex discrimination because the essence of the claim involves the plaintiff suffering an adverse action because of sex, race, color, national origin, or religion, and that is what Title VII seeks to eliminate.[53] The court concluded that the line between sexual orientation and gender nonconformity does not exist and that "Hively's claim is no different" than when women were rejected from working in traditionally male-dominated workplaces.[54] The court stated that if Hively had been a man rather than a woman and married to a woman, then Hively would not have experienced discrimination, which fits the "because of" sex standard used in sex discrimination.[55]

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49. *Hively*, 853 F.3d at 343 (recognizing the importance and the shifting of this cultural issue).

50. *See id.* at 350 (acknowledging that contrary authority exists but that the court sitting en banc has the authority to interpret case law considering recent Supreme Court decisions).

51. *Id.* at 347, 349 (emphasizing that it is the plaintiff who suffers the adverse employment action based on a protected class).

52. *Id.* at 345 (determining that either approach results in the same conclusion that sex discrimination occurred).

53. *Id.* at 349 (explaining that the *Price Waterhouse* plurality recognized that the text of Title VII drew no distinction between the different types of discriminations listed).

54. *Id.* at 346. The court also explained that a discriminatory policy does not need to "affect every woman to constitute sex discrimination." *Id.* at 346 n.3.

55. *Id.* at 345–47 (analyzing that it is only the plaintiff's sex that changes to determine if the sex discrimination occurs).

III. TITLE VII

A. Title VII History

Title VII of the Civil Rights Act of 1964 stated that an employer cannot refuse to hire, choose to fire, or discriminate against a person based on that person's "race, color, religion, sex, or national origin."[56] When Congress discussed the passage of the Civil Rights Act, the primary evil it was trying to address was the racial inequality that had plagued the United States for over one hundred years.[57] In fact, a congressman inserted sex into the Civil Rights Act as a way to prevent the statute as a whole from being passed.[58] However, the legislation passed the House and moved to the Senate where few changes occurred.[59] The final statute was signed into law after it was passed by the Senate.[60]

Even though Congress wanted to address racial inequality, the final statute puts discrimination in a broader context to include sex. Initially, sex discrimination typically referred to discrimination when a male received a job instead of a woman who was equally qualified for the position.[61] However, the Supreme Court stated that the statute not only covers what is in the plain language of the statute, but also the congressional intent to "strike at the entire spectrum of disparate treatment of men and women" in employment.[62] The Supreme Court even acknowledged that

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56. Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (a) (2012). Despite revisions to Title VII, this provision remains intact.

57. Jessica Vogele, *Associational Discrimination: How Far Can It Go? Supreme Court of New York, Appellate Division, Second Department,* Chiara v. Town of New Castle *(Decided January 14, 2015)*, 32 TOURO. L. REV. 921, 929–30 (2016).

58. *Civil Rights Act of 1964*, HISTORY, http://www.history.com/topics/black-history/civil-rights-act (last visited Nov. 18, 2018) (hoping to sabotage the bill in the House).

59. *Landmark Legislation: The Civil Rights Act of 1964*, SENATE.GOV, https://www.senate.gov/artandhistory/history/common/generic/CivilRightsAct1964.htm (last visited Nov. 18, 2018).

60. Louis Menand, *How Women Got in the Civil Rights Act: Uncovering the Alternative History of Women's Rights*, THE NEW YORKER (July 21, 2014), https://www.newyorker.com/magazine/2014/07/21/sex-amendment.

61. Phillips v. Martin Marietta Corp., 400 U.S. 542, 543–44 (1971) (determining that only hiring female applicants without preschool-aged children while hiring male applicants with preschool-aged children is sex discrimination).

62. City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978) (quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971)).

courts will interpret statutory prohibitions to cover more than the original issue including similar issues.[63]

In the 1990s, the Civil Rights Act underwent revisions to overrule Supreme Court decisions from the late 1980s.[64] The revisions made it harder for plaintiffs to win employment discrimination suits, including recovering fees and costs when plaintiffs did win the lawsuit.[65] Without clear guidance from the Supreme Court, lower courts have struggled to determine how sexual orientation discrimination fits into Title VII claims of employment discrimination.[66] The Court remains silent regarding whether employment discrimination based on sexual orientation is actionable.[67]

B. The Supreme Court & Title VII Sex Discrimination

Initially, sex discrimination under Title VII was intended to prevent employers from discrimination between men and women, and the Court followed the statute in its most basic form.[68] However, in 1976, the Supreme Court found that California's statute that removed pregnancy as a disability did not violate Title VII.[69] The Court explained that it should never "readily infer that it meant something different from what the concept of

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63. Oncale v. Sundowner Offshore Servs. Inc., 523 U.S. 75, 79 (1998) (discussing that the Court concerns itself with provisions of law and not concerns of legislatures).

64. EEOC: 35th Anniversary, *The Civil Rights Act of 1991*, EEOC https://www.eeoc.gov//eeoc/history/35th/1990s/civilrights.html (last visited Nov. 18, 2018).

65. EEOC: 35th Anniversary, *The Law*, EEOC, https://www.eeoc.gov/eeoc/history/35th/thelaw/ (last visited Nov. 18, 2018) (detailing the laws passed by Congress that relate to the EEOC's purpose).

66. *Compare* Philpott v. N.Y., 252 F. Supp. 3d 313, 314 (S.D.N.Y. 2017) (holding that sexual orientation is cognizable action under Title VII), *with* Grimsley v. American Showa, Inc., No. 3:17-cv-24, 2017 WL 3605440 (S.D. Ohio Aug. 21, 2017) (holding that sexual orientation is not a cognizable action under Title VII).

67. Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 340 (7th Cir. 2017).

68. *See supra* note 58 and accompanying text (noting that the term "sex" was added to Title VII through the amendment process).

69. Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 138–40 (1976) (explaining that employer's benefits not covering pregnancy-related disabilities does not violate Title VII unless there is an indication that the exclusion of pregnancy disability benefits was a pretext for discriminating against women), *superseded by statute as stated in* Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 89 (1983).

discrimination has traditionally meant."[70] Congress rectified the Court's decision with the Pregnancy Disabilities Act of 1978.[71]

In 1989, the Supreme Court held that sex stereotyping considers whether genders can act in nonconformity with gender norms; if an employer uses sex stereotyping in an adverse employment action, then there is sex discrimination under Title VII.[72] The Court also stated at that time that Title VII "on its face treats each of the enumerated categories exactly the same," and principles created with respect to sex discrimination also apply to discrimination based on race, religion, or national origin and vice versa.[73] The Court explained that the plaintiff must prove that gender played a motivating factor in the employment decision, but the defendant can avoid liability by proving that the decision would have been the same regardless of the employee's gender.[74]

It was not until 1998 that the Supreme Court addressed another Title VII sex discrimination case.[75] The Supreme Court held that same-sex harassment is actionable under Title VII, thereby providing LGBT plaintiffs additional remedies for workplace discrimination.[76] The Court also explained, "[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 have sexual content or connotations."[77] The Court additionally stated that the severity of

70. *Id.* at 145 (noting there was no reason for such inference here).

71. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 89 (1983) (explaining that Section 1 of the PDA overruled the *Gilbert* decision when Congress added that section to Title VII in its definitions section).

72. Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989).

73. *Price Waterhouse*, 490 U.S. at 243–45 n.9 (explaining that even though Title VII's legislative history mostly discusses race, the Court does not limit these discussions to the context of race but as to the general meaning of Title VII).

74. *Id.* at 258.

75. *See* Oncale v. Sundowner Offshore Servs. Inc., 523 U.S. 75 (1998) (holding that sexual harassment between same-sex individuals is a valid cause of action under Title VII if the sexual harassment meets the statutory requirements); City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 700, 704 (1978) (granting certiorari "to decide whether [unequal pension contribution requirements] discriminated against individual female employees because of their sex in violation of § 703(a)(1) of the Civil Rights Act of 1964").

76. *Oncale*, 523 U.S. at 82.

77. *Id.* at 80; *see also* Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring) ("The critical issue, Title VII's text indicates, 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.").

the harassment should be judged from a reasonable person standard dependent on all the circumstances.[78]

Even with strides in discrimination cases,[79] no definitive answer exists as to whether sexual orientation discrimination is sex discrimination under Title VII. On September 7, 2017, Lambda Legal petitioned for certiorari in *Evans v. Georgia Regional Hospital* to answer the sole question of whether sexual orientation discrimination is part of Title VII's prohibition on sex discrimination.[80] At the October 27, 2017 conference, the Supreme Court asked for a response from Georgia Regional Hospital and postponed the discussion until after the Court received the response.[81] However, the case received amicus curiae briefs from LGBT activists, businesses, and governments in support of Evans and providing reasons why the Supreme Court should hear the case.[82]

On December 8, 2017, the Supreme Court discussed the petition at its conference, but unfortunately denied certiorari.[83] Even though the case was on the conference docket twice, the Justices only discussed the case in December.[84] However, the Court may have not wanted to take on a complicated case such as *Evans*.[85] The procedural quirk that made this case complicated rested on the fact that Georgia Regional Hospital informed the Court that it did not participate in the lower courts and was not going to participate even if the Supreme Court granted review.[86] Additionally, the Eleventh Circuit decided *Evans* before the *Hively* en banc decision, and *Hively* did not address a circuit split because

78. *Oncale*, 523 U.S. at 81–82 (explaining that a coach slapping his football player on the buttocks would not constitute harassment based on the working environment whereas if a secretary, regardless of sex, experienced a slap on the buttocks at the hands of a supervisor, then that situation would constitute harassment).

79. *Id.* at 79–80; *see also* Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989) ("In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.").

80. Evans v. Ga. Reg'l Hosp. *Case Page*, SCOTUSBLOG, www.scotusblog.com/case-files/cases/evans-v-georgia-regional-hospital/ (last visited Oct. 29, 2018).

81. *Id.*

82. *Id.* (noting that the Supreme Court allowed the submission of these briefs).

83. *Id.*; Evans v. Ga. Reg'l Hosp., 850 F.3d 1248 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 557 (2017).

84. Amy L. Howe, *No New Grants Today*, HOWE ON THE COURT (Dec. 11, 2017), http://amylhowe.com/2017/12/11/no-new-grants-today-3/.

85. *Id.*

86. *Id.* (noting that Lambda Legal responded that the lack of participation should not prevent the Court from hearing the case, but the Justices did not agree).

there was not one when the *Hively* case was decided.[87] As of December 2018, the Supreme Court has not determined if sexual orientation discrimination is employment discrimination under Title VII.[88] Despite this setback for LGBT plaintiffs, the Supreme Court's decision to deny certiorari in *Evans* could be because the Court is waiting to see how other courts rule on the issue.[89] The majority of courts hold that employment discrimination based on sexual orientation is not actionable under Title VII.[90]

IV. ANALYSIS OF DOMINANT LEGAL THEORIES

Two legal theories dominate Title VII discrimination. Part A analyzes the associational theory, and Part B examines the failure to conform to gender norms theory.

A. Associational Theory

Associational theory is the right to associate, either as friends or in a romantic relationship, with whomever one chooses.[91] "[A]ssociational discrimination is not limited to acts; instead, as with all other violations of Title VII, associational discrimination runs afoul of the statute by making the employee's protected characteristic a motivating factor for an adverse employment action."[92] Prior case law explains that the associational theory is

87. Margot Cleveland, *7 Things to Know About the Supreme Court's Refusal to Consider Adding Sexual Politics to Employment Law*, THE FEDERALIST (Dec. 13, 2017), http://thefederalist.com/2017/12/13/7-things-know-supreme-courts-refusal-consider-adding-sexual-politics-employment-law/ (explaining also that the court assumed the allegations to be true in *Evans* because of the stage that the case was at, but in reality, the courts and the public do not know the facts).

88. *Infra* note 265; *U.S. Supreme Court Denies Appeal of LGBT Lambda Legal Employment Discrimination Cases*, *supra* note 1.

89. Allen Smith, *Supreme Court Declines to Clarify Law on Sexual Orientation Discrimination*, SOC'Y FOR HUMAN RES. MGMT. (Dec. 11, 2017), https://www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/Supreme-Court-declines-Title-VII-clarification.aspx.

90. *Compare* Gates v. Cincinnati Bell Tel. Co., 898 F.2d 153 (6th Cir. 1990) (holding that sexual orientation is not actionable under Title VI), *with* Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 350 (7th Cir. 2017) (holding that sexual orientation is sex discrimination under Title VII by having an en banc rehearing to become the only circuit that allows sexual orientation under Title VII sex discrimination as a cause of action).

91. *See* Griswold v. Connecticut, 381 U.S. 479, 483 (1965) (explaining that the right to association is similar to the right of belief and that it "is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means").

92. Zarda v. Altitude Express, Inc., 883 F.3d 100, 128 (2d Cir. 2018).

for associations between two people that need to be more than an acquaintance association but not necessarily marriage.[93] Because associational theory grew out of the seminal marriage case *Loving v. Virginia*, there is a strong connection to same-sex marriage.[94] The freedom to intimate association has long been held to be a constitutional right as "a fundamental element of personal liberty."[95] The Court in *Obergefell* explained that the right to marry is an intimate association.[96] By making this connection, the Court implicitly endorsed the associational theory. Lower courts' use of it in other contexts such as employment discrimination is an appropriate application of the Court's holding.

Even though the Supreme Court recognized the associational theory for same-sex marriages in *Obergefell*, courts had already used the associational theory in the context of social relationships.[97] Social relationships require the plaintiff's association with a person of a protected class to rise to the level that would impute the person's trait to the plaintiff.[98] Additionally, courts recognize that the social relationship can be advocacy for a

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93. Drake v. Minnesota Mining & Mfg. Co., 134 F.3d 878, 884 (7th Cir. 1997) (explaining that an "employee can bring an associational race discrimination claim under Title VII [if] the employee can establish the requisite level of association").

94. 388 U.S. 1, 1–2 (1967).

95. Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984).

96. Obergefell v. Hodges, 135 S. Ct. 2584, 2599–2600 (2015) (citing Loving v. Virginia, 388 U.S. 1, 12 (1967)).

97. *Compare* Reiter v. Ctr. Consol. Sch. Dist., 618 F. Supp. 1458, 1459 (D. Colo. 1985) (holding that the plaintiff had a valid claim for Title VII discrimination based on association with the Hispanic community, a particular national origin), *with* Salazar v. City of Commerce, No. 10-CV-01328-LTB-MJW, 2012 WL 1520124, at *6 (D. Colo. May 1, 2012) (explaining that using the associational theory does not meet the prima facie case for Title VII discrimination for national origin), *aff'd*, 535 F. App'x 692 (10th Cir. 2013). Additionally, the Colorado district court noted:

> To establish a *prima facie* case for discriminatory discharge [based on national origin], [a plaintiff] must first establish that she was of a protected national origin. Second, she must show that she was qualified to perform the job from which she was removed. Third, [she] must establish that she was discharged under circumstances giving rise to an inference of discrimination.

Id. (citing Metoyer v. State of Kansas, 874 F. Supp. 1198, 1202 (D. Kan. 1995) (citations omitted)).

98. *See also* Patterson v. N. Cent. Tel. Coop. Corp., No. 2:11-cv-00115, 2014 WL 5322937, at *8 (M.D. Tenn. Oct. 17, 2014) (explaining that when a plaintiff alleged adverse employment action for receiving negative treatment after recommending an African-American candidate for employment within a company, the record must reveal that the plaintiff associated with the candidate on such a scale to impute the candidate's protected status onto the plaintiff, which did not occur here).

protected class as long as the plaintiff provides substantial evidence of the advocacy relationship.[99] Courts identify that "the basis for discrimination is disapproval and prejudice as to who is permitted to consort with whom."[100] Therefore, even though courts are expanding associational theory to include same-sex married couples, the courts acknowledge additional relationships that can use the associational theory, which can allow long-term same-sex partners the opportunity to use the theory in employment discrimination cases.

Initially, courts pushed back on expanding Title VII to include associational theory discrimination claims.[101] However, courts shifted in their thinking, and case law exhibits the recognized use of associational theory in Title VII race discrimination cases.[102] District courts are starting to recognize that the associational theory logically makes sense to use in terms of sex discrimination.[103] This movement works because the Supreme Court previously expanded theories often associated with race and national origin to sex.[104] Additionally, the Supreme Court acknowledged that "under Title VII a distinction based on sex

99. Morales v. NYS Dep't of Labor, 865 F. Supp. 2d 220, 242–43 (N.D.N.Y. 2012), *aff'd*, 530 F. App'x 13 (2d Cir. 2013) (summary order) (noting that the plaintiff actively volunteered with organizations helping the Hispanic community and raising awareness for Hispanic culture within her job).

100. Zarda v. Altitude Express, Inc., 883 F.3d 100, 133 (2d Cir. 2018) (Jacobs, J., concurring) (explaining that following Supreme Court precedent and circuit precedent demonstrates that "discrimination based on same-sex relationships is discrimination" under Title VII).

101. *See e.g.*, Ripp v. Dobbs Houses, Inc., 366 F. Supp. 205, 209–10 (N.D. Ala. 1973) (stating that allowing a black man to represent a class of women or a white plaintiff to represent a class of African Americans would destroy Title VII's enforcement method by allowing a plaintiff with no personal incentive a cause of action); Adams v. Governor's Comm. on Postsecondary Educ., No. C80-624A, 1981 WL 27101, at *3 (N.D. Ga. 1981) (following *Ripp* in stating that the language of the statute does not support "a cause of action for discrimination against a person because of his relationship to persons of another race"), *disapproved of by* Parr. v. Woodmen of the World Life Ins., 791 F.2d 888 (11th Cir. 1986).

102. *See* Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 890 (11th Cir. 1986) ("No requirement exists that a plaintiff . . . was discriminated against because of *his* race to allege discrimination based on an interracial marriage."); Whitney v. Greater New York Corp. of Seventh-Day Adventists, 401 F. Supp. 1363, 1366 (S.D.N.Y. 1975) ("Specifying as she does, that she was discharged because she, a white woman, associated with a black [person], her complaint falls within the statutory language that she was 'discharged . . . because of [her] race.'").

103. Boutillier v. Hartford Pub. Schs., 221 F. Supp. 3d 255, 268 (D. Conn. 2016) (making the logical connection that *Holcomb* applies beyond associational theory based on race by saying that it should also extend to "intrasexual association").

104. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986) (explaining that the principle of hostile work environment initially involved race and national origin as reasons for the harassment but that it is natural to expand that to other areas of Title VII).

stands on the same footing as a distinction based on race,"[105] and since the courts identified associational theory as an applicable theory for Title VII race discrimination, the next logical step is to include the associational theory for Title VII sex discrimination.

B. Failure to Conform to Gender Norms Theory

Since the introduction of the failure to conform to gender norms theory in *Price Waterhouse*, courts have struggled to determine if a clear line exists when applying the theory. Courts expect to see a complaint that specifically details observable mannerisms or a lack of masculine or feminine appearance or behavior, but the courts explain that simply pleading sexual orientation discrimination does not satisfy the failure to conform to gender norms theory.[106] Courts draw distinctions between the demeanor and appearance stereotyping of the plaintiff and knowledge about the plaintiff's sexuality as a way to differentiate between failure to conform to gender norms and sexual orientation discrimination.[107] Courts often "define gender stereotyping broadly to encompass all stereotypes observable at work and then ask which came first, the gender stereotyping or the beliefs about the plaintiff's sexuality."[108] Also, courts often require that the nonconformity be seen rather than simply perceived or known by employers.[109] Courts resist describing the failure to conform to gender norms as merely a known or suspected violation of gender stereotypes but are more comfortable when the appearance or mannerisms are presented as ways not conforming to gender norms.[110]

However, the theory does provide plaintiffs a valid Title VII claim when the complaint presents the evidence correctly. For

105. Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris, 463 U.S. 1073, 1084 (1983).

106. Grimsley v. American Showa, Inc., No. 3:17-CV-24, 2017 WL 3605440, at *4 (S.D. Ohio Aug. 21, 2017).

107. Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 AM. U. L. REV. 715, 734 (2014) [hereinafter Soucek, *Perceived Homosexuals*] (noting that the demeanor and appearance of an LGBT plaintiff seems to allow for recovery more than when an LGBT plaintiff is openly gay but does not exhibit the normally recognized appearance and demeanor traits).

108. *Id.* at 737.

109. Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 763 (6th Cir. 2006). The dissent in *Vickers* pointed out that the majority required "an outward workplace manifestation of less-than-masculine gender characteristics." *Id.* at 767 (Lawson, J., dissenting).

110. Soucek, *Perceived Homosexuals*, *supra* note 107, at 766.

example, in *EEOC v. Boh Bros. Construction Co.*, the plaintiff explained that he experienced harassment because his co-workers saw him bring disinfecting hand wipes to a job site and equated that with being feminine or homosexual.[111] The Fifth Circuit held that there was enough evidence to support a gender stereotype claim, and the court allowed the EEOC to rely on the theory.[112] Additionally, courts are allowing plaintiffs to move past the motion to dismiss[113] or summary judgment stage with well-pleaded complaints.[114] A district court in Florida held that at the pleading stage, the plaintiff presented a sufficient showing of disparate treatment by stating that his co-workers "made fun of his appearance, mannerism, gestures, patterns of speech and his seriousness."[115] In *Christiansen*, the appellate court reversed the district court's dismissal of a claim that involved the failure to conform to gender norms; in doing so, the court noted that Christiansen identified instances where his supervisor commented on his mannerisms as a way to prove failure to conform with gender norms.[116]

Even though courts recognize this legal theory, many cases do not move past the pleadings stage. Many plaintiffs fail to present specific instances of how their failure to conform to gender norms adversely affected them: this allows courts to state that sexual orientation is actually the reason for discrimination and to reject any attempt to use the failure to conform to gender norms to

111. 731 F.3d 444, 450–54 (5th Cir. 2013) (en banc) (following *Price Waterhouse* precedent and using remarks at work as evidence that gender played a part in the discrimination that the plaintiff endured).

112. *Id.* at 453.

113. *See* Terveer v. Billington, 34 F. Supp. 3d 100, 105 (D.D.C. 2014) (where a plaintiff sufficiently pled that he was a victim of sex stereotyping to survive the Defendant's motion to dismiss).

114. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (explaining that Title VII plaintiffs must present a prima facie case for discrimination, meet a four-prong test, and the defendant must not be able to rebut the discrimination with a viable, legal reason for the adverse employment action). It is important to note that even though LGBT plaintiffs are experiencing success, they still must meet the substantive aspects of the suit to prevail.

115. Schlegelmilch v. City of Sarasota Police Dep't, No. 8:06CV139T27MAP, 2006 WL 2246147, at *2 (M.D. Fla. 2006).

116. *Compare* Christiansen v. Omnicom Grp., Inc., 852 F.3d 195, 200–01 (2d Cir. 2017) (finding his claims as cognizable under *Price Waterhouse* for gender stereotyping), *with* Magnusson v. County. of Suffolk, 14-CV-3449 (SJF)(ARL), 2016 WL 2889002, at *8 (E.D.N.Y. May 17, 2016) (stating that "plaintiffs may not shoehorn what are truly claims of sexual orientation discrimination into Title VII by framing them as claims of discrimination based on gender stereotypes").

"bootstrap protection for sexual orientation into Title VII."[117] Chief Judge Katzmann's concurrence in *Christiansen* explained "[t]his is likely to be an exceptionally difficult task in light of the degree to which sexual orientation is commingled in the minds of many with particular traits associated with gender."[118] Additionally, employers can use the "defense" of sexual orientation discrimination as a way to defeat the claim of failure to conform to gender norms.[119]

Also, courts often view employment discrimination cases presented by LGBT plaintiffs with suspicion, and courts unfortunately come to conclusions on gender non-conformity claims based solely on the sexual orientation of the plaintiffs.[120] Typically, LGBT plaintiffs who include homosexuality in their complaints, even when pleading failure to conform to gender norms, rarely move past motions to dismiss.[121] Additionally, many courts determine that when plaintiffs plead failure to conform to gender norms, it is actually a claim for sexual orientation

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117. Simonton v. Runyon, 232 F.3d 33, 38 (2d Cir. 2000) *quoted in* Dawson v. Bumble & Bumble, 398 F.3d 211, 218 (2d Cir. 2005), *overruled by* Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018).

118. *Christiansen*, 852 F.3d at 205–06 (Katzmann, C.J., concurring).

119. Brief for Amici Curiae for the States of N.Y., et al., in Support of Petitioner at 12, *Evans v. Ga. Reg'l Hosp., et al.*, www.scotusblog.com/wp-content/uploads/2017/10/17-370-cert-tsac-The-States-of-New-York.pdf (U.S. Oct. 11, 2017) (No.17-370) (explaining that not having sexual orientation as a viable Title VII claim allows employers to "escape liability for conduct that, if applied to a heterosexual individual, would indisputably violate the statute").

120. Camille Patti, Case Note, Hively v. Ivy Tech Community College: *Losing the Battle but Winning the War for Title VII Sexual Orientation Discrimination Protection*, 26 TUL. J. L. & SEXUALITY 133, 140 (2017) (examining the circuit court's decision of *Hively* prior to Seventh Circuit en banc rehearing).

121. *See* Hamm v. Weyauwega Milk Prod., Inc., 332 F.3d 1058, 1067 (7th Cir. 2003) (holding that the plaintiff must present evidence other than the perception that he was homosexual), *overruled by* Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 359 (7th Cir. 2017); Christiansen v. Omnicom Grp., 167 F. Supp. 3d 598, 618 (S.D.N.Y. 2016) (granting the plaintiff's motion to dismiss) (explaining "it is not [the court's] task at the motion to dismiss stage to weigh the evidence and evaluate the likelihood" the plaintiff would succeed on his claim). As noted, the Second Circuit reversed the decision on the motion to dismiss for failure to conform to gender norms. *See also* Grimsley v. American Showa, Inc., No. 3:17-cv-24, 2017 WL 3605440, at *5–7 (S.D. Ohio Aug. 21, 2017) (explaining that the plaintiff included homosexuality in his complaint as a failure to conform to gender norms, but the court noted the complaint lacked specific instances yet allowed the plaintiff fourteen days to amend his complaint).

discrimination.[122] Often, courts only address the plaintiff's failure to conform to gender stereotype claim.[123]

To succeed on a failure to conform to gender norms claim, plaintiffs must properly frame the facts to not appear like a sexual orientation discrimination claim masked as a failure to conform to gender norms claim.[124] The structure of the facts help to resolve the legal fiction in which an effeminate man or masculine woman has a claim in employment discrimination as long as those plaintiffs either are or are believed to be heterosexual.[125] Additionally, heterosexual plaintiffs struggle to meet the standards of the failure to conform to gender norms theory.[126] Courts often do not see a difference in personal grooming standards as sex discrimination.[127] However, makeup requirements for women, and not men, violate the basic principle of discrimination because the requirements feed into a gender-based stereotype that women—not men—typically wear

122. *See* Bibby v. Phila. Coca-Cola Bottling Co., 260 F.3d 257, 257–65 (3d Cir. 2001) (stating "the evidence produced by Bibby . . . indicated only that he was being harassed on the basis of sexual orientation, rather than because of his sex"); Spearman v. Ford Motor Co., 231 F.3d 1080, 1085 (7th Cir. 2000) ("Here, the record clearly demonstrates that Spearman's problems resulted from his altercations with co-workers over work issues, and because of his apparent homosexuality."), *overruled by* Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 359 (7th Cir. 2017).

123. Burnett v. Union R.R. Co., No. 17-101, 2017 WL 2731284, at *4 (W.D. Pa. June 27, 2017) (stating that the plaintiff plead sufficient facts, and the court inferred the plaintiff was subjected to a hostile work environment because he failed to conform to the male stereotype that he be "aggressive, assertive, and non-complaining"). *But see* Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1254–55 (11th Cir. 2017) (recognizing that discrimination based on failure to conform to gender norms is a separate and distinct "avenue for relief under Title VII" whereas sexual orientation is not).

124. Anthony Michael Kreis, *Against Gay Potemkin Villages: Title VII and Sexual Orientation Discrimination*, 96 TEX. L. REV. ONLINE 1, 6 (2017) (presenting a question of "whether the root of the animus harbored against sexual minorities stems from sex stereotypes—not whether all sexual minorities uniformly manifest a particular set of gender nonconforming characteristics"); *see also* Kalich v. AT&T Mobility, LLC, 748 F. Supp. 2d 712, 718 (E.D. Mich. 2010), *aff'd*, 679 F.3d 464 (6th Cir. 2012) (explaining that the Sixth Circuit has drawn a fine distinction between a claim based on sexual orientation and a claim on gender stereotyping, and the plaintiff here failed to plead toward the gender stereotyping that allows for an actionable claim under Title VII but noting that a plaintiff may have a cause of action under Title VII for failing to conform to gender stereotypes by either not being masculine enough as a male or not being feminine enough as a female).

125. *Hamm*, 332 F.3d at 1067 (Posner, J., concurring).

126. Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1105–13 (9th Cir. 2006) (upholding a district court's decision to dismiss a failure to conform to gender norms claim for heterosexual, female plaintiff required to wear makeup as part of work uniform while male employees did not have grooming requirements).

127. *Id.* at 1112. However, Judge Pregerson's dissent argued that the makeup policy feeds into a gender-specific stereotype that "women's faces are incomplete, unattractive, or unprofessional without full makeup." *Id.* at 1116 (Pregerson, J., dissenting).

makeup.[128] Even though the theory of failure to conform to gender norms provided LGBT plaintiffs with avenues for relief from employment discrimination, difficulties continue to exist.

V. HISTORY OF LEGAL THEORIES

A. Associational Theory

This part divides the associational theory into three categories: race, religion, and sex. Originally, the courts used the associational theory for race, but within recent years, courts began to explore the associational theory for other aspects of Title VII discrimination.

1. Race

In *Loving v. Virginia*, the plaintiffs, a white man and black woman, married in Washington, D.C. in 1958.[129] They moved back to Virginia where they settled down and started a family.[130] Virginia law stated that interracial marriages were illegal.[131] The court convicted the couple and required them to leave the state of Virginia in exchange for a suspended sentence.[132] The Supreme Court held that the law prohibiting interracial marriage was unconstitutional, despite Virginia's argument that the law punished both races for their decision to marry each other.[133] The Court explained the freedom to marry has long been recognized as essential to a man's personal right of the pursuit of happiness.[134]

128. Jessica A. Clarke, *Frontiers of Sex Discrimination Law*, 115 MICH. L. REV. 809, 812–13 (2017).
129. 388 U.S. 1, 2 (1967).
130. *Id.*
131. *Id.* at 2–4. These types of statutes were known as anti-miscegenation statutes, which aimed at prohibiting and punishing interracial marriages.
132. *Id.* at 3. The state court judge opined that:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

Id.
133. *Id.* at 10–12 (explaining that the equal application does not protect the statute from the heavy burden of justification under the Fourteenth Amendment).
134. *Id.* at 8–12.

However, the Court did not specifically address whether there is a right to association.[135]

In early cases, courts argued over plaintiffs' use of the associational theory for Title VII race discrimination.[136] In one district court, the plaintiff, a white female, alleged her employer fired her because of a social relationship with a black male.[137] The plaintiff worked for Greater New York Corporation of Seventh–Day Adventists as a typist receptionist and resided in an apartment building owned by the corporation.[138] She experienced "threats and warnings to discontinue the friendship" with the man until the Adventists fired her from her job and evicted her from the apartment.[139] The court recognized that other district courts had come to the opposite conclusion, but the court explained that the plaintiff satisfied the statutory language because she experienced discrimination based upon her race.[140] Struggling with using associational theory for race, one court explained that "[a] Title VII plaintiff with no personal incentive to enforce the Act (or possibly an incentive to subvert it), would destroy the Act's enforcement mechanism."[141] The court held that the party best positioned to bring the action is the aggrieved party, and that did not happen here.[142]

Starting in the 1980s, many courts and the EEOC allowed Title VII claims under the associational theory for race discrimination, which still continues today.[143] Courts use the

135. Hively v. Ivy. Tech. Cmty. Coll. of Ind., 853 F.3d 339, 347 (7th Cir. 2017) (explaining that courts accept "that a person who is discriminated against because of the protected characteristic of one with whom she associates" is being disadvantaged "because of her own traits," which stems from the line of cases starting with *Loving*).

136. Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists, 401 F. Supp. 1363, 1366 n.2 (S.D.N.Y. 1975) (explaining that the case law remains in flux within the courts on whether a plaintiff can bring a Title VII claim based on associational theory).

137. *Id.* at 1366.

138. *Id.* at 1365.

139. *Id.* (noting that the plaintiff experienced these threats starting in September 1968 before the firing and eviction, which occurred in April 1969).

140. *Id.* at 1366–67 (discussing the reading of the statute to be "consistent with the administrative construction of the Act").

141. Ripp v. Dobbs Houses, Inc., 366 F. Supp. 205, 207–09, 210 (N.D. Ala. 1973) (explaining that a white male cannot bring a claim for Title VII race discrimination based on his associations with black co-workers).

142. *Id.* at 210 (believing that "there can be no better insurance of vigorous enforcement of Title VII than the litigant who is genuinely aggrieved by the practices under attack").

143. Holcomb v. Iona Coll., 521 F.3d 130, 131–39 (2d Cir. 2008). Here, the court found that plaintiff's termination from his basketball coaching job was a result of race discrimination due to his interracial marriage. *Id.* at 131. While another coach who was also in an interracial relationship kept his job, the court noted that this fact did not defeat the

associational theory, under which "an employee is subjected to adverse action because an employer disapproves of interracial association, [and] the employee suffers discrimination because of the employee's *own* race."[144] In 1982, Don Parr, a white man, applied for an insurance salesman position with Woodmen of World Life Insurance Company.[145] Parr went through the first interview where the manager gave him the impression that he would be hired.[146] However, Woodmen did not hire Parr after the manager learned that Parr was married to a black woman.[147] The district court held that Parr failed to state a claim upon which relief could be granted.[148] The Eleventh Circuit reversed the district court's decision and followed a lower court's precedent.[149] The court held that if a plaintiff claims "discrimination based upon an interracial marriage or association," then the plaintiff experienced discrimination because of his race.[150] Additionally, the court noted that courts are obliged to give Title VII a liberal construction, and Congress charged the EEOC with interpreting, administering, and enforcing Title VII.[151]

Even though courts allowed married couples to use the associational theory, other associations must meet the requisite level of association needed to use the theory.[152] For example, in *Drake v. Minnesota Mining & Manufacturing Co.*, the plaintiffs, a white married couple, alleged discrimination based on association with black co-workers to whom they offered counseling.[153] The

inference of discrimination, since the employer understood beforehand that the other coach would cost too much to fire. *Id.* at 140.

144. *Id.* at 139 (rejecting a restrictive reading of Title VII simply because Title VII's text only prohibits discrimination based on the individual's race).

145. Parr v. Woodmen of World Life Ins. Co., 791 F.2d 888, 889 (11th Cir. 1986).

146. *Id.* (noting that Parr was an experienced salesman "and was well-qualified for the position").

147. *Id.*

148. *Id.* (reasoning that the only explanation the district court provided was that Title VII does not proscribe the type of discrimination that Parr alleged).

149. *See id.* at 892 (reversing the district court decision); Gresham v. Waffle House, Inc., 586 F. Supp. 1442, 1445 (N.D. Ga. 1984) (allowing a white female to file a Title VII complaint for race discrimination based on her marriage to a black man).

150. *Parr*, 791 F.2d at 892.

151. *Id.* (explaining that the EEOC consistently held that when an employer takes an adverse action against an employee or potential employee because of interracial association, then the employer violates Title VII).

152. Drake v. Minnesota Mining & Mfg. Co., 134 F.3d 878, 881, 884 (7th Cir. 1997) (explaining that the court does not require a "degree of association," but evidence must exist to support inferences of discrimination).

153. *Id.*

court stated that while no objective level of association is required, plaintiffs must present evidence to show they experienced adverse employment actions because of that association.[154]

Courts follow the EEOC's recognition of the associational theory as a valid basis for Title VII race discrimination claims.[155] For example, in *Tetro v. Elliot Popham Pontiac, Oldsmobile, Buick GMC Truck Inc.*, the plaintiff, a white male, worked as a finance manager for a car dealership; the employment went well until the plaintiff's mixed-race child came to visit him one day at work.[156] After that, the general manager and the plaintiff's relationship soured to the point where the plaintiff was terminated.[157] The court allowed recovery under Title VII for discrimination based on association with a third person, the plaintiff's interracial child.[158] In addition to looking at prior precedent, the court also reviewed the purpose of the statute and the interpretation of the government agency to determine that association discrimination is consistent with Title VII.[159]

2. Religion

Even though courts primarily used the associational theory for race, one court used the associational theory for discrimination based on religion.[160] In *Chiara v. Town of New Castle*, the court held that the plaintiff demonstrated membership in a protected class by his marriage to a Jewish woman, and the plaintiff was entitled to recover on a religious discrimination claim under the associational theory.[161] Even though the one case comes from New York state court,[162] it shows that the use of the associational theory for Title VII claims other than race is expanding.

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154. *Id.* at 884 (explaining that plaintiffs did not meet that level by providing counseling and guidance to the co-workers).

155. Tetro v. Elliot Popham Pontiac, Oldsmobile, Buick, and GMC Trucks Inc., 173 F.3d 988, 994 (6th Cir. 1999).

156. *Id*. at 990.

157. *Id.* (detailing a conversation confirmed by two employees where the general manager stated "no one ever told me that he had a mixed-race child and that this was going to hurt [Popham's] image in the community and his dealership").

158. *Id.* at 995.

159. *Id.* at 994–95 (noting the Title VII statute does not mention the words "directly" or "indirectly," making the statute ambiguous).

160. Chiara v. Town of New Castle, 126 A.D.3d 111, 124 (N.Y. App. Div. 2015).

161. *Id.* at 113, 122.

162. *Id.* at 113–30.

3. Sex

Like associational theory based on religion, associational theory based on sex is in very little case law. However, the courts in *Hively*[163] and *Christiansen*[164] used the theory, which created precedent for future LGBT plaintiffs to use in their claims. Additionally, the EEOC used the associational theory for sex discrimination in *Baldwin.*[165] Courts acknowledge that "[i]t is an unsettled legal question [as to] whether Title VII prohibits gender-based associational discrimination."[166]

B. Failing to Conform to Gender Norms Theory

Title VII's purpose is "to remove discriminatory workplace barriers," and the courts' main goal is to keep Title VII's purpose in mind when hearing employment discrimination cases.[167] In 1989, the Supreme Court did so when confronted with the first Title VII sex discrimination case based on failure to conform to gender norms.[168] In *Price Waterhouse*, Ann Hopkins worked for the Price Waterhouse firm and "was proposed for partnership in 1982" with the firm; however, despite Hopkins' success in securing fruitful contracts for the firm, Hopkins did not receive partnership status.[169] Hopkins believed that the failure to receive partnership status was because her co-workers and superiors perceived that she was too masculine since a partner told Hopkins that, to improve her chance at partnership, she should "walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled, and wear jewelry."[170] The Court

163. *Supra* pt. II.C and accompanying notes.
164. *Supra* pt. II.B and accompanying notes
165. *Supra* pt. II.A and accompanying notes.
166. Gallo v. W.B. Mason Co. Inc., No. 10-10618-RWZ, 2010 WL 4721064, at *1 (D. Mass. 2010) (determining that the plaintiff, a male, failed to state a claim for discrimination based on plaintiff's association with female co-workers).
167. Kristin M. Bovalino, Note, *How the Effeminate Male Can Maximize His Odds of Winning Title VII Litigation*, 53 SYRACUSE L. REV. 1117, 1127 (2003).
168. Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989) (explaining that Congress's intent of Title VII was to forbid employers from taking sex or gender into account when making employment decisions).
169. *Id.* at 231–34.
170. Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1117 (D.D.C. 1985).

agreed with the district court that the partner's comments showed sex stereotyping against Hopkins.[171] The Court held:

> [W]hen a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account.[172]

Despite allowing plaintiffs an avenue for asserting failure to conform to gender norms claims under Title VII, plaintiffs still experience roadblocks in litigation using that avenue. In *Jespersen v. Harrah's Operating Co.*, the plaintiff alleged discrimination by her employer under the failure to conform to gender norms theory for a grooming policy requiring women to wear makeup, which the plaintiff did not follow.[173] The court explained that a policy requiring different standards for male and female employees is not discrimination unless the policy places a greater burden on one gender over another.[174] Even though the majority determined the plaintiff did not have enough evidence for a valid Title VII claim, the dissent sided with the plaintiff in determining that a policy requiring women to wear makeup is a gender-based stereotype.[175]

Additionally, the theory of failure to conform to gender norms[176] intertwines with sexual orientation, which causes an uneven application of the theory in the courts.[177] In *Dawson v. Bumble & Bumble*, the plaintiff alleged her employer fired her

171. *Price Waterhouse*, 490 U.S. at 251. Many of the partners commented on Hopkins's aggressive personality because it conflicted with the fact that she was a woman and should embody feminine characteristics. *Id.* at 235.

172. *Id.* at 258 (explaining that lower courts erred in making the defendant prove by clear and convincing evidence that plaintiff's failure to conform to gender norms did not account for her not receiving the partnership).

173. 444 F.3d 1104 (9th Cir. 2006).

174. *Id.* at 1110 (stating that the plaintiff has a duty to provide evidence to show there is a greater burden on one sex over the other rather than asking the appellate court to take judicial notice).

175. *Id.* at 1116 (Pregerson, J., dissenting) (stating that "a policy contain[ing] sex-differentiated requirements that affect people of both genders cannot excuse a particular requirement from scrutiny").

176. Throughout cases and this Article, *gender stereotyping* and *failure to conform to gender norms* are equal and interchangeable.

177. Bovalino, *supra* note 167, at 1119–20 (focusing on the effeminate man making an employment discrimination claim but highlighting both genders' struggles with this theory in the court system).

because she was a "lesbian female, who does not conform to gender norms in that she does not meet stereotyped expectations of femininity and may be perceived as more masculine than a stereotypical woman."[178] The court explained that the claim for gender stereotyping presents problems to the court because the stereotypes of how people should act "blur into ideas about heterosexuality and homosexuality."[179] The court pointed to numerous cases from other circuits as well as articles about the thin line between sexual orientation and failure to conform to gender norms as evidence.[180] Courts will continue to experience difficulty with this thin line because sexual orientation is not a recognized protected class under Title VII,[181] but failure to conform to gender norms is recognized as a theory for sex discrimination under Title VII.[182]

In *Terveer v. Billington*, the plaintiff alleged that his employer discriminated against him because he is "a homosexual male whose sexual orientation is not consistent with the [d]efendant's perception of acceptable gender roles."[183] The court rejected the government's motion to dismiss because the court found the plaintiff met his burden of stating a failure to conform to gender norms claim.[184] Even though the plaintiff's complaint specifically mentioned homosexuality, the court found that the way the plaintiff worded the complaint was enough to survive a motion to dismiss.[185]

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178. Dawson v. Bumble & Bumble, 398 F.3d 211, 213 (2d Cir. 2005). The court noted that the plaintiff's complaint asserted a variety of reasons for the discrimination between gender and sex. *Id.* at 217. The court also noted that by "alleging discrimination based upon her lesbianism, Dawson cannot satisfy the first element of a prima facie case under Title VII because the statute does not recognize homosexuals as a protected class." *Id.* at 217–18.

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

180. *Id.* at 218–20 (providing citations to cases from various circuit courts discussing the blurry line between sexual orientation discrimination claims and failure to conform to gender norms claims, along with law review articles that provide guidance to LGBT plaintiffs on how to plead employment discrimination claims as recognizable Title VII claims).

181. *Id.* at 218.

182. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (explaining that when writing Title VII, Congress intended to eliminate workplace discrimination based on gender stereotypes).

183. Terveer v. Billington, 34 F. Supp. 3d 100, 116 (D.D.C. 2014) (quoting plaintiff's amended complaint ¶ 55).

184. *Id.* at 116.

185. *Id.* (stating that the complaint provided enough information that the plaintiff experienced a hostile work environment because of failure to conform with male sex stereotypes, despite using language that plaintiff is a homosexual male whose sexual orientation did not conform with defendant's perception of acceptable gender roles).

VI. HOMOSEXUALITY AND THE COURTS

Part A discusses recent Supreme Court victories for LGBT plaintiffs. Part B reviews the use of sexual orientation discrimination by the courts in employment discrimination. Then, Part C analyzes the arguments for and against treating sexual orientation discrimination as sex discrimination under Title VII.

A. The Supreme Court and the LGBT Community

The Supreme Court has advanced LGBT rights with landmark cases over recent years. The Court ruled that a law criminalizing consensual sexual conduct between two members of the same sex was unconstitutional.[186] By striking down this law, which directly targeted the LGBT community, the Court assisted in advancing the movement for LGBT rights.[187]

The Supreme Court then continued by making same-sex partners eligible for a marital exemption from federal estate tax.[188] In *Windsor*, the Court determined that Section 3 of the Defense of Marriage Act (DOMA) was unconstitutional, but the Court failed to discuss the validity of DOMA's Section 2, which allows states the option not to recognize same-sex marriages from other states.[189] Expanding on the *Windsor* decision, the Court ruled in 2015 that all people have a right to marry whomever they want regardless of sex.[190] Even though marriage equality exists, the LGBT community still faces hurdles in other areas of their lives such as employment law.

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186. Lawrence v. Texas, 539 U.S. 558, 577–78 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), and adopting Justice Stevens' dissent from *Bowers* as controlling authority).

187. Matthew W. Green Jr., *Same-Sex Sex and Immutable Traits: Why* Obergefell v. Hodges *Clears a Path to Protecting Gay and Lesbian Employees from Workplace Discrimination Under Title VII*, 20 J. GENDER RACE & JUST. 1, 11–15 (2017) (reviewing how, even though the Court did not distinguish sexual intimacy as a fundamental right in *Lawrence*, the Court analyzed the issue in a way to accord it the same level of protection as a fundamental right).

188. United States v. Windsor, 570 U.S. 744, 749–52 (2013). Marital exemption excludes from taxation "any interest in property which passes or has passed from the decedent to his surviving spouse." *Id.* at 753 (quoting 26 U.S.C. § 2056(a) (1997)).

189. *Id.* at 749–53; *see also* 1 U.S.C. § 7 (1996), *held unconstitutional by* U.S. v. Windsor, 570 U.S. 744 (2013) (defining marriage as between one man and one woman in Section 3).

190. Obergefell v. Hodges, 135 S. Ct. 2584, 2598–2600 (2015) (explaining that the Court is often defined by the time and world, and the world has moved toward equal protection for all couples seeking to take part in the sacred rite of passage seen in marriage).

B. Use of Sexual Orientation Discrimination in the Courts

For years, courts followed the theory that sexual orientation discrimination is not a recognizable action under Title VII based upon Title VII's statutory language.[191] In *Simonton v. Runyon*, the plaintiff alleged discrimination, specifically abuse and harassment, based on sexual orientation.[192] The court held sexual orientation discrimination is not actionable under Title VII as the term "sex" in Title VII refers only to membership in class delineated by gender and not sexual affiliation.[193] The court stated, "[t]he law is well-settled in this circuit and in all others to have reached the question that . . . Title VII does not prohibit harassment or discrimination because of sexual orientation."[194]

However, many courts are starting to recognize sexual orientation discrimination as a valid Title VII claim.[195] Often, the courts are interpreting Title VII protections to not be limited to heterosexual employees but also to encompass homosexual employees.[196] Additionally, courts are disagreeing with precedent[197] and finding that plaintiffs would not have suffered adverse employment action if their sex had been different.[198] Also, courts are recognizing that the state of Title VII law is in flux by

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191. 42 U.S.C. § 2000e-2(a). Title VII only states "sex" as an impermissible form of discrimination and does not refer to sexual orientation within the statute. *Id*.

192. 232 F.3d 33, 34 (2d Cir. 2000).

193. *Id.* at 36 (holding a decision in direct conflict with the Supreme Court decision, *Oncale*, because the plaintiff alleged discrimination based on sexual orientation rather than sex as a male).

194. *Id.* at 35.

195. Most of these cases are occurring in district courts, but as discussed above in Part III.B, circuit courts are starting to address the conflicts that are appearing because of this shift in case law. *See, e.g.*, Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 350 (7th Cir. 2017) (holding that sexual orientation is sex discrimination under Title VII, making it one of the first circuit courts that allows sexual orientation under Title VII sex discrimination as a cause of action).

196. *See, e.g.*, Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002) (acknowledging that if the same circumstance would have occurred to a heterosexual employee, the court would have no trouble stating there is a claim, and the result should not differ simply because the plaintiff is homosexual).

197. *Compare* Bibby v. Phila. Coca-Cola Bottling Co., 260 F.3d 257 (3d Cir. 2001) (stating that the plaintiff brought a Title VII sex discrimination claim under the premise of sexual orientation, and that is not a recognizable claim under Title VII), *with* Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285 (3d Cir. 2009) (holding that the line between sexual orientation and failure to conform to gender norms is blurry at best, but the plaintiff met requirements for the failure to conform to gender norms claim to survive summary judgment phase).

198. EEOC v. Scott Med. Ctr., 217 F. Supp. 3d 834, 836–42 (W.D. Penn. 2016) (relying on the Supreme Court's consistent application of a broad interpretation of the "because of sex" language in Title VII).

allowing discrimination claims based on sexual orientation to survive summary judgment.[199] In a recent case, the plaintiff alleged discrimination based on sexual orientation.[200] The court acknowledged prior precedent not recognizing discrimination based on sexual orientation, but followed Chief Judge Katzmann's concurrence in *Christiansen* and the *Hively* decision in allowing the plaintiff to move forward with his sexual orientation discrimination claim.[201]

However, many courts will often find ways to allow the claims to succeed on other theories rather than going against prior precedent. In one case, the plaintiff alleged discrimination under Title VII based on sex because he was denied spousal health benefits for his same-sex partner.[202] The court reserved ruling on the validity of the Title VII claim but did not grant defendant's motion to dismiss because the plaintiff's amended complaint satisfied the burden of demonstrating the plaintiff alleged disparate treatment based on his sex, not his sexual orientation.[203] Often, courts recognize that homosexuality fits squarely within the failure to conform to gender norms theory.[204] As a result, courts are considering the arguments for both sexual orientation discrimination[205] and failure to conform to gender norms.[206]

On September 16, 2017, the Second Circuit, sitting en banc, heard oral arguments in *Zarda v. Altitude Express*, solely on the issue of whether Title VII's prohibition on sex discrimination

199. Boutillier v. Hartford Pub. Schs., 221 F. Supp. 3d 255, 268–70 (D. Conn. 2016) (noting that circuit cases, U.S. Supreme Court cases, and administrative cases create a paradox of what Title VII covers).

200. Philpott v. New York, 252 F. Supp. 3d 313, 315 (S.D.N.Y. 2017).

201. *Id.* at 316 (denying defendant's argument to follow controlling authority because the court noted the law with respect to this legal question is in flux, and the Second Circuit, or even the Supreme Court, may return to this legal question).

202. Hall v. BNSF Ry. Co., No. C13-2160 RSM, 2014 WL 4719007, at *2 (W.D. Wash. 2014).

203. *Id.* at *3 (explaining "specifically that he (as a male who married a male) was treated differently in comparison to his female coworkers who also married males").

204. Winstead v. Lafayette Cty. Bd. of Comm'rs, 197 F. Supp. 3d 1334, 1346–47 (N.D. Fla. 2016) (denying the employer's motion to dismiss but requiring the plaintiff to provide an amended complaint with more factual evidence about how the plaintiff experienced discrimination based on failure to conform to gender norms).

205. *Id.* at 1343–44 (discussing that recent decisions from the EEOC and other district courts indicate a shift in the law allowing sexual orientation discrimination as a Title VII discrimination claim).

206. *Id.* at 1344–46 (discussing how different courts have interpreted *Price Waterhouse* but finding previous Eleventh Circuit decisions and the EEOC to be persuasive).

includes sexual orientation.[207] At the hearing, Lambda Legal and the EEOC provided arguments for sexual orientation discrimination as a recognizable claim under Title VII, whereas the Department of Justice argued against them.[208] On February 26, 2018, the Second Circuit released its opinion, overruling prior precedent and holding "that Title VII prohibits discrimination on the basis of sexual orientation" as sex discrimination.[209] In the decision, Chief Judge Katzmann stated:

> Because one cannot fully define a person's sexual orientation without identifying his or her sex, sexual orientation is a function of sex. Indeed sexual orientation is doubly delineated by sex because it is a function of both a person's sex and the sex of those to whom he or she is attracted. Logically, because sexual orientation is a function of sex and sex is a protected characteristic under Title VII, it follows that sexual orientation is also protected.[210]

Since this decision widens the split between the circuits, an argument exists for the Supreme Court to decide on the issue of sexual orientation discrimination as Title VII sex discrimination.[211]

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207. 855 F.3d 76 (2d Cir. 2017) (holding that it could not overturn circuit precedent holding that Title VII's prohibition on sex discrimination did not encompass discrimination based on sexual orientation); *Lambda Legal Urges Full Second Circuit to Protect LGBT People from Discrimination at Work*, LAMBDA LEGAL (Sept. 26, 2017), https://www.lambdalegal.org/blog/20170926_lambda-legal-urges-second-circuit-to-protect-lgbt-employees.

208. Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018); *Lambda Legal Urges Full Second Circuit to Protect LGBT People from Discrimination at Work*, *supra* note 207.

209. *Zarda*, 883 F.3d, at 108.

210. *Id.* at 113 (*citing Sexual Orientation*, BLACK'S LAW DICTIONARY (10th ed. 2014)) (using Black Law's definition of homosexuality, heterosexuality, and bisexuality along with the *Hively* decision to detail the connection between sex and sexual orientation).

211. David Lat, *Fast Times at 40 Foley, Second Circuit Drama in* Zarda v. Altitude Express, ABOVE THE LAW (Feb. 28, 2018, 7:17 PM), https://abovethelaw.com/2018/02/fast-times-at-40-foley-second-circuit-drama-in-zarda-v-altitude-express/?rf=1 ("There's now a circuit split, pitting the Second and Seventh Circuits against the Eleventh Circuit, so we could see the Supreme Court eventually step in (although not in *Zarda*, since the defendants said they won't appeal)."); *see also Lambda Legal Presses Fight for Federal LGBT Employment Discrimination Protection in New Appeals Court Case*, LAMBDA LEGAL (Mar. 7, 2018), https://www.lambdalegal.org/blog/20180307_lgbt-employment-discrimination-appeal (filing an appeal in the Eighth Circuit on behalf of plaintiff whose job offer was rescinded after the employer learned he was homosexual).

C. Sexual Orientation Discrimination Analysis

By recognizing sexual orientation discrimination as sex discrimination, the courts benefit the most because there is no gray area. If plaintiffs meet the prima facie case for discrimination, and the defendant cannot overcome the presumption, sexual orientation was the reason for the discrimination.[212] However, both direct evidence and the "stray remarks" doctrine present a challenge to proving a prima facie case of discrimination.[213] Direct evidence consists of facts that prove discrimination on its face without an inference drawn by the factfinder, whereas the stray remarks doctrine is evidence that reveals impermissibly stereotypical beliefs, which are often discounted for evidence purposes.[214] Unfortunately, within society today, the use of phrases such as "that's so gay" are commonplace, and despite the effects on the LGBT community, does not show direct discrimination based upon someone's orientation.[215]

Congress's failure to revise Title VII to include sexual orientation discrimination is the main argument for courts not to recognize sexual orientation discrimination as sex discrimination. In 1991, Congress revised the Civil Rights Act to conform with previous Supreme Court decisions.[216] Most of the revisions focused on damages and the right to a jury trial under Title VII.[217] With the revision, many defendants greatly emphasize that Congress

212. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (determining that a prima facie case of discrimination requires the plaintiff to show that they are a part of a protected class, the plaintiff was qualified for the job, yet despite being qualified, the plaintiff suffered adverse employment action and then was replaced by a person outside of protected class).

213. Stephanie Bornstein, *Unifying Antidiscrimination Law Through Stereotype Theory*, 20 LEWIS & CLARK L. REV. 919, 954–57 (2016).

214. *Id.* at 956 (explaining that stray remarks "do not constitute direct evidence of discrimination when made outside the context of the relevant adverse employment decision (usually temporally) or by someone other than the relevant decision maker, or even if the remarks are considered to be too few or 'isolated'").

215. Christy Strawser, *Study: Phrase 'That's So Gay' Causes Lasting Harm*, CBS DETROIT (Aug. 28, 2012, 2:38 PM), http://detroit.cbslocal.com/2012/08/28/study-phrase-thats-so-gay-causes-lasting-harm/.

216. Donald R. Livingston, *The Civil Rights Act of 1991 and EEOC Enforcement*, 23 STETSON L. REV. 53, 56 (1993) (addressing issues from previous Supreme Court decisions and explaining that Congress's goal is to provide protection to the victims of discrimination).

217. *Id.* at 55.

has still not included sexual orientation.[218] However, the Supreme Court ruled that "[c]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction."[219] Recently, Congress took steps to try and conform the Civil Rights Act with the movement in the courts recognizing sexual orientation discrimination as a claim under Title VII employment discrimination.[220] Also, in *Baldwin*, the EEOC explained that congressional action is not required because sexual orientation is not creating a new class of persons but expands how the term "sex" is applied in cases.[221]

To understand a statute, many courts use a form of textualism by looking at the statute in the present situation rather than asking how it would have been interpreted in the past.[222] Because this provides flexibility in understanding the cultural norms of the present, this form of textualism makes sense for courts to use.[223] The textualist approach used today is often met in dissents with the idea of statutory originalism, which "carve[s] out of the plain text specific applications that individuals at the time (be they Congress or the public) would have opposed."[224] However, although this approach is not new, it will likely not grow because the

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218. Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 344 (7th Cir. 2017) (explaining that it is "too difficult to draw a reliable inference" from curtailed legislative initiatives to rest the court's opinion on them).

219. Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990) (citation omitted) (internal quotation marks omitted).

220. Equality Act, S. 1006, 115th Cong. (2017–2018). However, through research of previous bills, different politicians have introduced the Equality Act in prior years including 2015–2016 and as far back as 1972. *See Legislation Search*, CONGRESS.GOV, https://www.congress.gov/search?q=%7B%22source%22%3A%22legislation%22%7D (last visited Nov. 1, 2018) (finding various bills introduced in the Senate and House for the Equality Act). As stated in *Hively*, there have been numerous attempts by both the House and Senate to add sexual orientation to the Civil Rights Act with no action ever occurring. *Hively*, 853 F.3d at 344.

221. Baldwin v. Foxx, No. 0120133080, 2015 WL 4397641, at *9 (E.E.O.C. July 15, 2015).

222. Brian Soucek, Hively*'s Self-Induced Blindness*, 127 YALE L.J. F. 115, 118 (2017).

223. *But see id.* at 117 (reviewing Judge Sykes's dissent in *Hively*, which argued that there was no remote possibility that anyone would have thought sex discrimination in Title VII would include sexual orientation discrimination at the time the statute was adopted).

224. Katie R. Eyer, Zarda v. Altitude Express: *The Inexorable Progress of LGBT Workplace Equality and the Covert Creep of "Statutory Originalism*,*"* AM. CONST. SOC'Y (Feb. 28, 2018), https://www.acslaw.org/acsblog/zarda-v-altitude-express-the-inexorable-progress-of-lgbt-workplace-equality-and-the-covert.

Supreme Court recognizes the textualist approach, which is not consistent with statutory originalism.[225]

Additionally, courts acknowledge that sometimes there is no singular, coherent intent of Congress that will magically answer what the statute is supposed to mean.[226] By realizing that the term "sex" does not need to fit the traditional meaning but can be interpreted to include the ideas of sexual identity or preference, courts provide LGBT plaintiffs with opportunities to fight against employment discrimination.[227]

VII. SOLUTIONS

Even though the legal theories addressed in this Article are still in their infancy—*Baldwin* only came out in 2015—the best solution is to recognize sexual orientation discrimination as sex discrimination under Title VII. However, in the alternative, LGBT plaintiffs should plead two theories for recovery under Title VII sex discrimination: associational theory and failure to conform to gender norms because of sexual orientation.

A. Recognize Sexual Orientation Discrimination as Sex Discrimination

Until the Supreme Court or Congress decides that sexual orientation discrimination is sex discrimination under Title VII, the best avenue for courts to recognize sexual orientation discrimination is to convince the courts to give deference to the EEOC.[228] The EEOC's decisions are persuasive authority to the courts, and often, the courts rarely analyze what deference is applicable for EEOC decisions.[229] Two reasons prevent the Supreme Court from deferring to the EEOC: the EEOC's subject

225. *Id.* (noting that statutory originalism "represents a new effort to achieve an old, discredited goal: ignoring neutral legal principles to carve out unpopular groups from the law's protections").

226. Fabian v. Hosp. of Cent. Conn., 172 F. Supp. 3d 509, 520 (D. Conn. 2016).

227. *See id.* at 521 (citing Ulane v. Eastern Airlines, Inc., 581 F. Supp. 821, 825 (N.D. Ill. 1983)).

228. Register, *supra* note 13, at 1420–24.

229. Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 FORDHAM L. REV. 1937, 1945 (2006) (noting that the Court gave *Chevron* deference to only two cases from the EEOC).

matter and the Court's expertise in discrimination.[230] One scholar noted:

> The Court's reluctance to defer to the EEOC may stem from a view that discrimination is a subject of common knowledge, not susceptible to expert analysis. The rationale behind judicial deference to administrative interpretation is, at least to some extent, that the agency offers an expert's opinion on the topic.[231]

However, Congress recognized that workplace discrimination is complex, and "[t]he EEOC is uniquely qualified to identify and record new issues and trends within discrimination claims."[232] Additionally, the Court may be reluctant to relinquish its own professed authority and proficiency in the area.[233] Since the Court publishes only its opinion and not its discussions leading up to its decisions, it is impossible to understand why the Court does not discuss deference.[234] Therefore, plaintiffs should use the argument that deference to the EEOC is warranted "as it is the federal government's sole anti-discrimination agency."[235]

The EEOC's decision to include sexual orientation discrimination as an actionable form of employment discrimination indicates a potential move in the courts because the EEOC is the first step for employment discrimination cases.[236] If the EEOC determines that the person has a valid claim, the EEOC issues a right to sue letter.[237] Since the EEOC's 2015 decision in *Baldwin*,[238] people sued former employers for sex discrimination and were armed with the letters from the EEOC, but unfortunately, courts are not required to defer to the EEOC's prior decisions.[239]

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230. *Id.* at 1951.
231. *Id.*
232. Register, *supra* note 13, at 1420.
233. Hart, *supra* note 229, at 1954 (explaining the federal court's unique role in filling in statutory gaps, individual Justices' role in shaping discrimination law, and the Court's equal protection jurisprudence provides why the Justices feel they are better suited to address employment discrimination than the EEOC).
234. *Id.*
235. Register, *supra* note 13, at 1420.
236. *Filing a Lawsuit in Federal Court*, EEOC, https://www.eeoc.gov/federal/fed_employees/lawsuit.cfm (last visited Nov. 4, 2018).
237. Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 341 (7th Cir. 2017).
238. Baldwin v. Foxx, No. 0120133080, 2015 WL 4397641, at *10 (E.E.O.C. July 15, 2015).
239. *Hively*, 853 F.3d at 344.

Prior case law shows the courts deferring to the EEOC on issues within its purpose as designated by Congress. First, the Supreme Court stated, "[t]he administrative interpretation of the Act by the enforcing agency is entitled great deference."[240] Then, the Supreme Court explained "consistent administrative construction of the Act" is given great weight.[241] However, like Title VII, the Civil Rights Act of 1964, which is at issue in *Trafficante*, included broad language and does not provide a legislative history that is helpful to show the full intent of Congress.[242]

To convince the court to provide deference, LGBT plaintiffs will need to explain the reasons for awarding either *Skidmore*[243] or *Chevron*[244] deference to the EEOC. The difference between determining which deference the court should use is whether the agency action carries the force of law.[245] If the agency action carries the force of law, the plaintiffs need to argue that *Chevron* deference is appropriate for the court to use.[246]

240. Griggs v. Duke, 401 U.S. 424, 433–34 (1971) (explaining that since Title VII and its legislative history support the EEOC's construction, there is a good reason to treat the guidelines of the EEOC as expressing the will of Congress).

241. Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 210 (1972) (using the administrative agency to understand the legislation).

242. *Id.* at 209–10.

243. Skidmore v. Swift & Co., 323 U.S. 134 (1944). The Court developed the multi-factor analysis known as the *Skidmore* deference which stated that "[t]he weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* at 140.

244. Chevron U.S.A. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984). The court stated:

> [When] the court determines [whether] Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. . . . If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Id. at 843–44 (footnotes omitted).

245. Register, *supra* note 13, at 1420 (citing United States v. Mead Corp., 533 U.S. 218, 229 (2001)).

246. *Id.* (explaining that *Baldwin* was the product of a formal administrative adjudication which warrants *Chevron* deference).

The plaintiffs will need to present the two-step process provided in *Chevron*.[247] Following the determination that the EEOC's decisions carry the force of law, the court must first review the agency's interpretation of the statute, which is whether Congress has spoken directly on this issue or if the statute is ambiguous.[248] When determining whether the statute is ambiguous, the court must determine the definition of the term within the statute but also whether Congress left a gap for an administrative agency to fill.[249] The definition of sex has changed throughout time with the courts continuing to expand it.[250] Additionally, Congress intended the EEOC to interpret the terms of Title VII.[251] The second step is to show the court that the agency's interpretation is reasonable by determining whether the agency relied on factors not intended by Congress, failed to consider important aspects, offered an explanation that runs counter to evidence before the agency, or could be so implausible.[252] As seen in *Baldwin*, the EEOC does not rely on factors that Congress would not consider but relies mostly on case law, looking at counterarguments for the issue and providing a well-supported analysis so that courts can understand the reasoning of the EEOC.[253]

Even if the court does not agree to apply *Chevron* deference, the plaintiffs can argue for *Skidmore* deference,[254] which would allow the court to look at EEOC decisions such as *Baldwin* for guidance. *Baldwin* meets *Skidmore* deference because the EEOC provided detailed opinions that showed the agency employed the traditional methods for each side to present evidence, exhibited valid reasoning with citations, and proffered reasonable

247. *Id.*

248. *Id.* (citing *Chevron*, 467 U.S. at 842–43).

249. *Id.* at 1421.

250. *Id.* (discussing how *Price Waterhouse* expanded the definition of sex).

251. *Id.* at 1421–22 (providing three reasons for this conclusion: (1) the EEOC has the ability to handle discrimination cases prior to starting any private litigation; (2) the EEOC's power to interpret Title VII is a central tenant of administrative law—promoting uniformity; and (3) the EEOC has interpretive authority on complex subject matter reserved for administrative agencies).

252. *Id.* at 1422–23 (citing Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

253. *Id.* at 1423.

254. *Id.* at 1424; *but see* Hart, *supra* note 229, at 1945 (explaining that the *Skidmore* standard is an "open-ended and malleable list of persuasive factors [that] lends itself to a transparently results-oriented evaluation").

explanations for the departure from previous positions.[255] Therefore, LGBT plaintiffs have two avenues for explaining to the courts why deference to the EEOC is the most practical option to allow sexual orientation discrimination as a Title VII sex discrimination claim.

B. Alternative Path for LGBT Plaintiffs in Employment Discrimination Cases

If unable to convince the court to give deference to the EEOC and recognize sexual orientation discrimination as an actionable claim under Title VII, the next best solution for LGBT plaintiffs is to use both the associational theory and the failure to conform to gender norms theory to argue that sexual orientation is sex discrimination. By pleading both an associational theory and a theory of failing to conform to gender norms based on homosexual stereotypes, the plaintiff can pursue two different avenues in court that would likely survive a motion to dismiss or motion for summary judgment.

By combining a failure to conform to gender norms theory with reference to sexual orientation, the plaintiff can move past that indistinct line between sexual orientation discrimination and failure to conform to gender norms.[256] This argument has survived a motion to dismiss in the past.[257] As Chief Judge Katzmann stated in *Christiansen*:

> More fundamentally, carving out gender stereotypes related to sexual orientation ignores the fact that negative views of sexual orientation are often, if not always, rooted in the idea that men should be exclusively attracted to women and women should be exclusively attracted to men–as clear a gender stereotype as any.[258]

Additionally, by adding the associational theory, plaintiffs are adding another avenue for the case to move forward in the courts.

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255. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (noting that agency decisions can “constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance”).

256. *Supra* pt. IV.B and pt. VI.C and accompanying notes.

257. *See* Terveer v. Billington, 34 F. Supp. 3d 100, 116 (D.D.C. 2014) (explaining that a former employee of the Library of Congress brought suit alleging sex and religious discrimination under Title VII, and the court denied defendant’s motion to dismiss).

258. Christiansen v. Omnicom Grp., Inc., 852 F.3d 195, 206 (2d Cir. 2017).

This is particularly helpful because under the failure to conform to gender norms, courts dismiss plaintiffs' complaints because they did not plead the stylized version of the theory.[259] Unfortunately, courts are reluctant to allow recovery because the failure to conform to gender norms theory blurs with sexual orientation discrimination.[260] Therefore, by providing the court with two recognized legal theories, LGBT plaintiffs provide courts with alternatives for recovery when the evidence shows blatant discrimination.

Courts have slowly been allowing the associational theory as a means for LGBT plaintiffs to pursue employment discrimination cases.[261] By using the associational theory from *Loving*, there will be pushback on the courts for using the theory for sex discrimination in employment cases rather than for racial classifications.[262] But courts are slowly starting to recognize the use of the associational theory in sex discrimination with two en banc decisions allowing the theory as an avenue for relief.[263] However, acknowledgement of the associational theory by administrative agencies and courts as a valid legal theory for sex discrimination means that the associational theory is going to increase in use for LGBT plaintiffs.

VIII. CONCLUSION

Recognizing sexual orientation as sex discrimination under Title VII continues to be significant because despite the advancement in LGBT rights in recent years, the current Trump

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259. Brief for Amici Curiae for GLBTQ Legal Advocates & Defenders, et al., in Support of Petitioner at 16, *Evans v. Ga. Reg'l Hosp., et al.*, www.scotusblog.com/wp-content/uploads/2017/10/17-370-cert-tsac-GLBTQ-Legal-Advocates-et-al.pdf (U.S. Oct. 2017) (No. 17-370).

260. *Supra* pt. IV.B and pt. VI.C and accompanying notes.

261. *Supra* pt. II.A–C and accompanying notes.

262. *E.g.*, Dep't of Justice, Second Circuit Oral Arguments for Case No. 15-3775, *Zarda v. Altitude Express*, (Sept. 26, 2017) (audio recording at http://www.ca2.uscourts.gov/decisions/isysquery/44fba0d9-1b3e-4ed5-ae05-7b8bff5890d5/59/doc/15-3775%20En%20Banc.mp3) [hereinafter Oral Arguments for Case No. 15-3775]. At oral argument, the Department of Justice (DOJ) relied on *Loving* to distinguish the associational theory between race and sex. The DOJ argued there is a fundamental physical difference between men and women rather than similarly situated people of different races, which is the crux of associational theory. *Id*.

263. *See* Zarda v. Altitude Express, Inc., 883 F.3d 100, 128 (2d Cir. 2018) (explaining that the court did not see any basis for why the associational theory could apply to race and not sex); Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 349 (7th Cir. 2017) (analogizing to *Loving*).

Administration is trying to prevent the progress from moving forward.[264] Even though the Supreme Court did not hear a case in the October 2017 term nor has it granted any current pending petitions[265] about LGBT employment discrimination, LGBT plaintiffs have avenues to explore in the courts. LGBT plaintiffs need to start in the district courts to convince them to either give deference to the EEOC on Title VII claims or to pursue two legal theories—associational theory and failure to conform to gender norms theory—to secure victories.[266] Sometimes, the road may appear to be never ending, but the important thing to remember is how far LGBT plaintiffs have come and to continue working toward equality.

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264. Fred Barbash, *Trump Administration Intervening in Major LGBT Case, Says Job Bias Law Does Not Cover Sexual Orientation*, WASH. POST (July 27, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/07/27/trump-administration-intervening-in-major-lgbt-case-says-job-bias-law-does-not-cover-sexual-orientation (explaining that the Department of Justice submitted a brief for a pending en banc rehearing of *Zarda v. Altitude Express* in support of previous Second Circuit decisions that sexual orientation is not a cognizable action under Title VII)*; see also* Oral Arguments for Case No. 15-3775, *supra* note 262 (where the court specifically asked the Department of Justice why it submitted an amicus brief in this case but failed to do so in the *Hively* case, despite already knowing the answer).

265. *See* John Elwood, *Reschedule Watch (UPDATED)*, SCOTUSBLOG (Nov. 21, 2018, 12:56 PM), http://www.scotusblog.com/2018/11/reschedule-watch-2/ (explaining that the Court has rescheduled the consideration of the *Zarda* petition to another conference date in order to consider other cases that raise correlated issues).

266. *Supra* pt. VII and accompanying notes.