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ARTICLES

SEX: Sexual Orientation, Sex Stereotyping and Title VII

Debbie N. Kaminer

ABSTRACT

The United States Supreme Court recently heard oral arguments in *Altitude Express v. Zarda*, a case that addresses whether Title VII's prohibition of discrimination "on the basis of sex" prohibits sexual orientation discrimination. Relying on three related lines of reasoning, the United States Court of Appeals for the Second Circuit had held that it did. First, sexual orientation discrimination would not have occurred "but for" the employee's sex; second, sexual orientation discrimination relies on the sex-stereotype that individuals should be attracted to individuals of the opposite sex; and third, sexual orientation discrimination is a form of prohibited associational discrimination. This Article opines that the strongest and most compelling of these three arguments is sex stereotyping since gays and lesbians fail to conform to the ultimate stereotype that real men are sexually attracted to women and real women are sexually attracted to men. This stereotype is a means of maintaining anachronistic and outdated gender roles for men and women.

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INTRODUCTION

Title VII of the 1964 Civil Rights Act prohibits employers from discriminating against employees “because of . . . sex”¹ but does not explicitly prohibit discrimination “because of sexual orientation.”² Prior to 2017, federal appellate courts unanimously held that sexual orientation was not included within the “sex” prong of Title VII.³ In 2017, the Seventh Circuit in *Hively v. Ivy Tech Community College*⁴ became the first federal appellate court to hold that Title VII’s prohibition on sex discrimination necessarily encompasses sexual orientation discrimination. More recently,

1. 42 U.S.C. § 2000e-2(a)(1) (1964).

2. At the time of its passage, people did not understand Title VII as prohibiting sexual orientation discrimination. See *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 362 (7th Cir. 2017) (Sykes, J., dissenting) (It is not “even remotely plausible that in 1964, when Title VII was adopted, a reasonable person competent in the English language would have understood that a law banning employment discrimination ‘because of sex’ also banned discrimination because of sexual orientation.”); but see William N. Eskridge, Jr. *Title VII’s Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 YALE L.J. 322, 342 (2017) (“A statute—like Title VII—that has been authoritatively interpreted, amended by Congress on several occasions, and then reinterpreted is a statute where original meaning itself is a dynamic process and involves updating.”).

3. See, e.g., *Kalich v. AT&T Mobility, LLC*, 679 F.3d 464 (6th Cir. 2012); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 289 (3d Cir. 2009); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757 (6th Cir. 2006); *Medina v. Income Support Div.*, 413 F.3d 1131 (10th Cir. 2005); *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701 (7th Cir. 2000); *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138 (4th Cir. 1996); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69 (8th Cir. 1989); *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979).

4. See generally *Hively*, 853 F.3d 339. See also Brian Soucek, *Hively’s Self-Induced Blindness*, 127 YALE L.J. F.115 (2017) [hereinafter Soucek, *Hively’s Self-Induced Blindness*].

the U.S. Court of Appeals for the Second Circuit followed the reasoning of the *Hively* Court in *Zarda v. Altitude Express*.⁵

In reaching this conclusion, both the *Hively* and *Zarda* Courts relied on *Baldwin v. Foxx*, which held that “an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII.”⁶ In *Baldwin*, the EEOC articulated three related lines of reasoning. First, sexual orientation discrimination would not have occurred “but for” the employee’s sex; second, sexual orientation discrimination relies on the sex-stereotype that individuals should be attracted to people of the opposite sex; and third, sexual orientation discrimination is a form of *associational* discrimination because employees are discriminated against based on the sex of the person with whom they associate.⁷

This Article proposes that the strongest and most compelling of these three arguments is sex stereotyping. As the Seventh Circuit explained, a lesbian plaintiff “represents the ultimate case of failure to conform to the female stereotype (at least as understood in a place such as modern America, which views heterosexuality as the norm and other forms of sexuality as exceptional).”⁸ While this Article will address the various court decisions and scholarship on this topic, the primary focus will be the Second Circuit’s decision in *Zarda*, the most recent federal appellate court holding that Title VII prohibits sexual orientation discrimination.⁹

Part I of this Article discusses the but-for and associational discrimination analyses that underpinned the aforementioned holdings in *Baldwin* and *Hively*. Part II discusses the sex stereotyping argument, which I argue is the most persuasive rationale for the inclusion of sexual orientation discrimination under Title VII. While the primary focus of this Article is sexual orientation discrimination, Part II also explains why the sex stereotyping argument would protect all sexual minorities equally.¹⁰

5. 883 F.3d 100 (2d Cir. 2018).

6. *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641, at *5 (E.E.O.C. July 15, 2015) (involving a gay federal employee who alleged he did not receive a promotion because of his sexual orientation).

7. *Id.* at *5–8.

8. *Hively*, 853 F.3d at 346.

9. The United States Supreme Court recently granted certiorari in this case. See *Zarda v. Altitude Express*, 883 F.3d 100 (2d Cir. 2018), cert. granted, 139 S. Ct. 1599 (April 22, 2019) (NO. 17–1623).

10. This Article specifically addresses discrimination based on sexual orientation and the author therefore primarily refers to discrimination against gay and/or lesbian employees. However, as explained in the Article, Title VII’s prohibition on discrimination “because of . . . sex” should be read to prohibit

I. SEXUAL ORIENTATION AS A FUNCTION OF SEX

DISCRIMINATION AND ASSOCIATIONAL DISCRIMINATION

In *Zarda v. Altitude Express*¹¹, a skydiving instructor alleged that his employer, Altitude Express, fired him because he was gay. Zarda often participated in tandem dives, where he was strapped to a client; and in an effort to make female customers more comfortable, he sometimes told them that he was gay.¹² Chief Judge Katzmann's majority opinion¹³ relied on three lines of reasoning in concluding that the sex prong of Title VII includes sexual orientation: (1) sexual orientation discrimination is a function of sex because Zarda would not have faced discrimination if he were a woman attracted to men, (2) the sex prong of Title VII includes associational discrimination, and (3) sexual orientation discrimination is a form of prohibited sex stereotyping.¹⁴ While all of these rationales are convincing, sex stereotyping is the most persuasive rationale for reasons that will be discussed in Part II.

A. *Sexual Orientation as a Subset of Sex Discrimination*

Katzmann's majority opinion concluded that Title VII always prohibits discrimination based on sexual orientation because "sexual orientation discrimination is motivated, at least in part, by sex, and is this a subset of sex discrimination."¹⁵ The majority held that sexual orientation discrimination is always "because of . . . sex"¹⁶ because it is impossible to determine an individual's sexual orientation without first identifying the individual's sex. Because "sexual orientation is a function of sex and because sex is a

discrimination against all sexual minorities, who by definition are not cisgender and heterosexual.

11. 883 F.3d at 100.

12. *Id.* at 107.

13. One year earlier, Judge Katzmann had urged the full Second Circuit to reconsider its precedent holding that Title VII did not prohibit sexual orientation discrimination. *See Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 202 (2d Cir. 2017) (Katzmann, C.J., concurring) (urging "the Court to revisit the central legal issue confronted in *Simonton* and *Dawson* [holding that Title VII does not prohibit sexual orientation discrimination] especially in light of the changing legal landscape that has taken shape in the nearly two decades since *Simonton* issued.").

14. Both the argument that Zarda faced discrimination because he was a man (as opposed to a woman) dating a man, and the associational argument, received eight out of the thirteen votes on the *en banc* panel. *Zarda*, 883 F.3d at 100.

15. *Id.* at 112.

16. *Id.* at 113.

protected characteristic under Title VII, it follows that sexual orientation is also protected.”¹⁷

Similarly, the *Zarda* court explained that under the Supreme Court’s comparative test, the relevant question in sex discrimination cases is whether the employer treated an employee differently “but for that person’s sex.”¹⁸ Therefore, sexual orientation discrimination violates the comparative test because the employer treats a man attracted to men differently from how they treat a woman attracted to men. In other words, but for the employee’s sex—if he were a woman and not a man—the employee would not face an adverse employment action.¹⁹ Applying this logic, *Zarda* argued that, but for his sex, he would still have his job.

In a two-paragraph concurring opinion, Judge Cabranes echoed the above logic: “This is a straightforward case of statutory construction . . . Discrimination against *Zarda* because of his sexual orientation . . . is discrimination because of his sex, and is prohibited by Title VII. This should be the end of the analysis.”²⁰ On the other hand, Judge Lynch’s dissent was particularly skeptical of this argument, opining that sexual orientation discrimination is not sex discrimination simply because it requires “noticing the gender of the person in question.”²¹ Judge Lynch’s reasoning is not persuasive because the discrimination does not simply involve an employer “noticing” the sex of the employee; rather, the discrimination involves an employer acting on what they notice.

Similarly, the *Hively* court recognized that discrimination based on sexual orientation is a function of sex.²² As the concurrence explained, “One cannot consider a person’s homosexuality without also accounting for their sex: doing so would render same [sex] . . . meaningless.”²³ The concurrence also emphasized that Title VII’s text does not require a plaintiff to show that an employer

17. *Id.*

18. *Id.* at 115 (quoting *L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978)). For a general discussion of the comparator test, see Suzanne B. Goldberg, *Discrimination by Comparison*, 120 *YALE L.J.* 728, 736–40 (2011) (discussing the judiciary’s overreliance on comparators in discrimination law).

19. The majority also relied on the Supreme Court’s decision in *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (holding that Title VII applied to male on male sexual harassment since the plaintiff was subjected to abuse and threats “because of sex”).

20. *Zarda*, 883 F.3d at 135 (Cabranes, J., concurring).

21. *Id.* at 156 (Lynch, J., dissenting).

22. Kimberly Hively alleged she was denied a fulltime faculty position at Ivy Tech Community College because she was a lesbian. *Hively v. Ivy Tech Cmty. Coll. Of Ind.*, 853 F.3d 339, 341 (7th Cir. 2017).

23. *Id.* at 358 (Flaum, J., concurring).

discriminated solely because of a protected category. Rather, the text of Title VII protects employees in cases where sex was a “motivating factor for any employment practice, even though other factors also motivated the practice.”²⁴ Similarly, the EEOC in *Baldwin v. Foxx* concluded that sexual orientation is always a function of sex.²⁵

While sexual orientation discrimination is certainly discrimination “because of sex,” the primary limitation of this line of reasoning is that it is overly formalistic. The rationale relies on the literal definition of sexual orientation, which always takes account of an individual’s sex. In an insightful essay, Brian Soucek explains how this rationale ignores a crucial point: discrimination based on sexual orientation is substantively sex discrimination because it polices gender norms in order to keep women subordinate to men.²⁶ He further articulates how the very purpose of Title VII was to disrupt these norms and dismantle “constraining gender roles and hierarchies, in the workplace and beyond.”²⁷ Professor Soucek’s essay was specifically about *Hively*, and he emphasizes that the *Hively en banc* panel did not cite a single “gender theorist, legal historian, or gay rights advocate.”²⁸ While the *Zarda* court was somewhat more aware of the sexist and misogynistic roots of sexual orientation discrimination,²⁹ the fact remains that a formalistic approach ignores how sexism and subordination of women are motivating factors in sexual orientation discrimination.³⁰

While this Article specifically addresses discrimination based on sexual orientation, it should be noted that the “because of . . . sex” reasoning applies to other sexual minorities as well. One such example is transgender employees.³¹ As one district

24. 42 U.S.C. § 2000e-2(m) (1964); *see also* Eskridge, Jr., *supra* note 2, at 340 (“As amended in 1991, Title VII provides that an employer can violate the law in mixed-motive cases, so long as one significant ‘motivating factor’ is sex, even if ‘other factors also motivated the practice.’”).

25. *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641, at *5 (E.E.O.C. July 15, 2015) (“‘Sexual orientation’ as a concept cannot be defined or understood without reference to sex.”).

26. Soucek, *Hively’s Self-Induced Blindness*, *supra* note 4, at 121 (“[I]t would be nearly impossible even to glance at the queer and gender theory or antidiscrimination scholarship of the last two decades without encountering the notion that sexual orientation discrimination has something to do with the subordination of women.”).

27. *Id.* at 125; *see also* Cary Franklin, *Inventing the “Traditional Concept” of Sex Discrimination*, 125 HARV. L. REV. 1307 (2012).

28. Soucek, *Hively’s Self-Induced Blindness*, *supra* note 4, at 116.

29. *Zarda*, 883 F.3d at 126.

30. *See* Part I.B for further discussion of the sexist roots of sexual orientation discrimination.

31. The United States Supreme Court recently granted certiorari in a

court explained, it would be illegal for an employer to discriminate against an individual who converts from Christianity to Judaism, even if it does not discriminate against Christians or Jews, but only discriminates against converts.³² This type of discrimination against converts would certainly be discrimination because of religion. Similarly, it would be unlawful for an employer to discriminate against a transgender employee who transitions from male to female, even if the employer does not discriminate against men or women, since this would be discrimination “because of . . . sex.”³³

B. *Sexual Orientation as Associational Discrimination*

In addition to holding that sexual orientation discrimination is always a function of sex, the *Zarda* court also held that sexual orientation discrimination is illegal associational discrimination under Title VII.³⁴ The associational theory of discrimination, first articulated over fifty years ago by the Supreme Court in *Loving v. Virginia*,³⁵ protects a person from discrimination based on the protected characteristics of those with whom she associates. The Second, Fifth, Sixth and Eleventh Circuits have extended the reasoning of *Loving* to hold that plaintiffs can bring associational race discrimination cases under Title VII.³⁶ Relying on its reasoning in *Holcomb v. Iona College*,³⁷ a

case that will consider whether Title VII’s prohibition on discrimination because of sex protects transgender employees. See *EEOC v. R.G. & G.R. Harris Funeral Homes*, 884 F.3d 560 (6th Cir. 2018), cert. granted, 139 S. Ct. 1599 (April 22, 2019) (NO. 17–1623).

32. See *Schroer v. Billington*, 577 F. Supp. 2d 293, 306 (D.D.C. 2008).

33. See Leora F. Eisenstadt, *Fluid Identity Discrimination*, 52 Am. Bus. L.J. 789, 820–21 (2015) (citing *Schroer*, 577 F. Supp. 2d at 305–06).

34. The United States Court of Appeals for the Seventh Circuit was the first federal appellate court to reach this conclusion. See *Hively*, 853 F.3d at 339; see also generally Alex Reed, *Associational Discrimination Theory & Sexual Orientation-Based Employment Bias*, 20 U. Pa. J. Bus. L. 731 (2018) (opining that the but-for and gender stereotyping theories of sexual orientation discrimination are stronger than the associational theory of discrimination).

35. 388 U.S. 1 (1967) (holding that Virginia’s antimiscegenation statutes violated the Equal Protection Clause).

36. *Holcomb v. Iona Coll.*, 521 F.3d 130 (2d Cir. 2008) (plaintiff, a white man, alleged he was fired since his employer disapproved of his marriage to a black woman); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 188 F.3d 278 (5th Cir. 1999) (holding that discrimination based on interracial marriages or association is prohibited by Title VII); *Tetro v. Elliott Popham Pontiac, Oldsmobile Buick, & GMC Trucks Inc.*, 173 F.3d 988 (6th Cir. 1999) (employee alleged employment discrimination because his race was different than that of his daughter); *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888 (11th Cir. 1986) (discrimination based on interracial marriages or associations is illegal race discrimination).

37. *Holcomb*, 521 F.3d at 130.

race discrimination case, the *Zarda* court concluded that associational discrimination claims apply equally to cases of sex discrimination.³⁸ According to the court, if *Zarda*, a man, faced discrimination because he was in a relationship with another man, but a female employee in a relationship with a man would not have faced the same discrimination, then he is a victim of associational discrimination. The court concluded that “sexual orientation discrimination, which is based on an employer’s opposition to association between particular sexes and thereby discriminates against an employee based on their own sex, constitutes discrimination “because of sex.”³⁹

The *Zarda* court defined sexual orientation as a status and rejected the argument that associational discrimination protects only conduct, such as marriage in *Holcomb*.⁴⁰ The court correctly noted that the U.S. Supreme Court had rejected the status/conduct distinction in cases involving sexual orientation discrimination.⁴¹ Scholars have similarly opined that, because Title VII does not distinguish between same-sex conduct and status as an LGBTQ individual, it protects gay and lesbian employees who face sexual orientation discrimination, regardless of their engagement in same-sex conduct.⁴² This is an important point, because commentators have expressed concern that courts might apply the associational argument in an underinclusive manner and thereby fail to protect individuals who experience sexual orientation discrimination when not in a same-sex relationship.⁴³ However, as the *Zarda* court correctly explains, the conduct/status distinction is unavailing in cases involving sexual orientation.

Before reaching its conclusion on associational discrimination, the *Zarda* court touched upon the question of whether associational discrimination based on race is different from associational

38. *Zarda*, 883 F.3d at 125. (“[W]e now hold that the prohibition on associational discrimination applies with equal force to all the classes protected by Title VII, including sex.”).

39. *Id.* at 128.

40. *Id.* at 127.

41. See *Christian Legal Soc. Chapter of Univ. of Cal., Hastings Coll. of Law, v. Martinez*, 561 U.S. 661 (2010) (holding that discrimination based on “unrepentant homosexual conduct” is discrimination based on sexual orientation); *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that laws that target “homosexual conduct” target homosexual individuals).

42. See Michael Kreis, *Against Gay Potemkin Villages: Title VII and Sexual Orientation Discrimination*, 96 TEX. L. REV. Online 1 (2017) (opining that courts should not distinguish between status and conduct); Deborah A. Widiss, *Intimate Liberties and Antidiscrimination Law*, 97 B.U. L. REV. 2083 (2017) (arguing that the artificial distinction between conduct and status should be rejected).

43. See *Reed*, *supra* note 34.

discrimination based on sex. The court responded directly to the argument of certain *amici* that, while racism was the motivation for antimiscegenation statutes, sexism is not the motivation for sexual orientation discrimination. While the majority did cite one article “suggesting that sexual orientation discrimination has deep misogynistic roots,”⁴⁴ it ultimately determined that it did not have to resolve this dispute. As the court explained, even if sexual orientation discrimination does not “evince conventional notions of sexism, this is not a legitimate basis for concluding that it does not constitute discrimination ‘because of . . . sex.’”⁴⁵

The majority is clearly correct that sexual orientation discrimination is associational discrimination because the employee quite literally faces discrimination based on the sex of the person with whom they associate. Similarly, the *Hively* court explained that the *Loving* analogy was applicable because, “[i]f we were to change the sex of one partner in a lesbian relationship, the outcome would be different.”⁴⁶ Notably, this reasoning is essentially the same as the comparator argument made above.⁴⁷ An employer is treating a male employee who is attracted to and “associates” with men differently than it treats a female employee who is attracted to and “associates” with men.⁴⁸ Similarly, under the comparator argument, an employer is treating a male employee attracted to men differently than a female employee attracted to men. As in Part I.A, the flaw with this line of reasoning is that it can be overly formalistic.

The stronger associational argument stems from the fact that sexual orientation discrimination is about sexism, just as the antimiscegenation statute in *Loving* was about racism.⁴⁹ In his dissent, Judge Lynch attempted to distinguish the *Loving* line of cases explaining that, “[i]n those cases, the plaintiffs alleged that they

44. *Zarda*, 883 F.3d. at 126 (citing Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U.L. REV. 197 (1994)).

45. *Id.* at 127.

46. *Hively*, 853 F.3d at 349; *see also Baldwin*, 2015 WL 4397641, at *6 (E.E.O.C. July 15, 2015) (“[A]n employee alleging discrimination on the basis of sexual orientation is alleging that his or her employer took his or her sex into account by treating him or her differently for associating with a person of the same sex.”).

47. *See supra* Part I.A.

48. *See Soucek*, *Hively’s Self-Induced Blindness*, *supra* note 4, at 119 (“Call this an associational claim if you like, but it is really just the same comparator claim . . .”).

49. At least four courts and twenty scholars have made the point that sexual orientation discrimination is really about sexism and sex-stereotyping. *See id.* at 121 n. 36 (2017).

were discriminated against because the employer was biased—that is, had a ‘discriminatory animus’—*against members of the race with whom the plaintiffs associated.*⁵⁰ Judge Lynch contrasts this with Zarda’s situation wherein there was no allegation that Zarda’s employer had a discriminatory animus towards men. However, in making this distinction, Judge Lynch ignores that the discrimination at issue in *Loving* was not simply about animus towards the race of the person with whom the plaintiff associated. It was also more generally about the races knowing their appropriate place in society and staying in their own lanes.⁵¹ Similarly, as discussed in Part II, sexual orientation discrimination stems from sexism, and the idea that men and women should recognize and maintain their “appropriate” societal roles, with women remaining subordinate to men.⁵² Sexual orientation discrimination is a means of maintaining a gender hierarchy.

Therefore, rather than conclude that associational discrimination applies *even if* sexual orientation discrimination does not stem from sexism, the *Zarda* majority should have emphasized that associational discrimination applies specifically because sexual orientation discrimination is really about sexism and sex stereotyping. Yet, if the substantive rationale for prohibiting associational discrimination is that it is a form of sex stereotyping, then the subsequent analysis should simply focus on how sexual orientation discrimination is a prohibited form of sex stereotyping.

II. SEXUAL ORIENTATION DISCRIMINATION IS PROHIBITED SEX STEREOTYPING

The sex-stereotyping argument is the most compelling argument as to why sexual orientation discrimination is discrimination “because of . . . sex.”⁵³ In 1978, the U.S. Supreme Court held in *Price*

50. *Zarda*, 883 F.3d at 160 (Lynch, J., dissenting).

51. The trial court famously stated in *Loving*: “Almighty God created the races, white, black, yellow, malay and red, and he placed them on different continents . . . he did not intend for the races to mix.” *Loving*, 388 U.S. at 3.

52. *See infra* Part II.

53. *But see* Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1787 (1998) (opining that not all sexual orientation discrimination is based on gender discrimination). *See generally* Brian Soucek, *Queering Sexual Harassment Law*, 128 YALE LAW FORUM JOURNAL 67, 82 (2018) (opining that sex-stereotyping is a compelling argument as to why Title VII prohibits sexual orientation discrimination); Mary Anne Case, *Legal Protections for the “Personal Best” of Each Employee: Title VII’s Prohibition on Sex Discrimination, The Legacy of Price Waterhouse v. Hopkins, and the Prospect of ENDA*, 66 STAN. L. REV. 1333 (2014) (discussing the importance of the sex-stereotyping argument regardless of whether Congress passes ENDA).

*Waterhouse v. Hopkins*⁵⁴ that employers cannot discriminate based on sex stereotypes—that is, how the sexes do or should act.⁵⁵ In *Price Waterhouse*, the employer discriminated against a female employee who was not stereotypically feminine: she did not wear makeup or jewelry and did not dress fashionably. Similarly, employers who discriminate against gay employees discriminate against individuals who fail to abide by the stereotype that “real men” are sexually attracted to women and “real women” are sexually attracted to men. Relying on *Price Waterhouse*, Judge Katzmann’s majority opinion in *Zarda* explains that sexual orientation discrimination is “almost invariably rooted in stereotypes about men and women.”⁵⁶ Similarly, the Seventh Circuit extended the *Price Waterhouse* reasoning to sexual orientation discrimination, explaining, “Hively represents the ultimate case of failure to conform to the female stereotype (at least as understood in a place such as modern America, which views heterosexuality as the norm and other forms of sexuality as exceptional).”⁵⁷

Two points should be emphasized regarding sex stereotyping. First, the *Zarda* court explicitly dismissed the argument that sexual orientation discrimination is not prohibited sex stereotyping because it affects both men and women equally.⁵⁸ The court explained that, clearly, the employer in *Price Waterhouse* could not have defended itself by “claiming that it fired a gender-nonconforming man as well as a gender-nonconforming woman.”⁵⁹ That would have been an explicit “admission that the employer ha[d] doubly violated Title VII.”⁶⁰ Similarly, an employer who discriminates “based on assumptions about the gender to which the

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

55. See Zachary R. Herz, Note, *Price’s Progress: Sex Stereotyping and Its Potential for Antidiscrimination Law*, 124 YALE L.J. 396 (2014) (discussing the application of *Price Waterhouse* to antigay discrimination); Kimberly A. Yuracko, *Soul of a Woman: The Sex Stereotyping Prohibition at Work*, 161 U. PA. L. REV. 757, 763 (2013) (“The Court’s prohibition actually encompassed two distinct types of sex stereotyping—ascriptive stereotyping and prescriptive stereotyping.”).

56. *Zarda*, 883 F.3d at 119.

57. *Hively*, 853 F.3d at 346.

58. Judge Lynch’s dissent argued that a “homophobic employer is not deploying a stereotype about men or women to the disadvantage of either sex. Such an employer is expressing disapproval of the behavior or identity of a class of people that includes both men and women.” *Zarda*, 883 F.3d at 158 (Lynch, J., dissenting).

59. *Id.* at 123. It appears that the court is referring to men and women who have gender expressions that are nonconforming, and is not addressing discrimination against nonbinary individuals.

60. *Id.*

employees . . . should be attracted has engaged in sex discrimination irrespective of whether the employer used a double-edged sword that cuts both men and women.”⁶¹

Second, *Price Waterhouse*'s prohibition on sex stereotyping does not prohibit all gender-based requirements for appropriate male and female behavior in the workplace, but rather prohibits those requirements that place an unequal burden on men and women.⁶² It is thus crucial to recognize that LGBT discrimination does in fact place unequal burdens on men and women and reinforces the privileged position of men. A number of scholars have made this point.⁶³ As Professor Soucek explained, homophobia maintains “men's and women's respective spheres, each with its own standards for appearance, affect, activities, occupations and desires . . . Forcing men and women into stereotyped, gender-specific boxes of this sort has long been seen to violate Title VII.”⁶⁴ Judge Lynch's dissenting opinion incorrectly dismisses this theory concluding, “the

61. *Id.*

62. See also Meredith M. Render, *Gender Rules*, 22 YALE J.L. & FEMINISM 133 (discussing lack of agreement as to what constitutes a sex stereotype); see generally Noa Ben-Asher, *The Two Laws of Sex Stereotyping*, 57 B.C. L. REV. 1187, 122–125 (2016) (discussing the equal burdens test and how some forms of sex-stereotyping are prohibited and others are not). The equal burdens test has been an issue in cases upholding different grooming standards for men and women in the workplace. One of the best-known and most controversial cases is *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir. 2006) (upholding Harrah's Casino's sex-specific grooming requirements that required female employees to wear color-coordinated makeup and forbid male employees from wearing makeup at all). The Ninth Circuit contrasted the female plaintiff bartender in Harrah's to the plaintiff in *Price Waterhouse*, concluding that the bartender was not unfairly disadvantaged in comparison to men and that her “objection to the makeup requirement, without more, can [not] give rise to a claim of sex stereotyping under Title VII.” *Id.* at 1110. For a critique of *Jespersen*, see generally Zachary A. Kramer, *Three Tale of Female Masculinity*, 13 NEV. L.J. 458 (2013) (critiquing the current view of equality under sex discrimination law).

63. At least four courts and twenty scholars have made the point that sexual orientation discrimination is really about sexism and sex-stereotyping. See Soucek, *Hively's Self-Induced Blindness*, *supra* note 4, at 121, n. 36. The three-judge panel of the Seventh Circuit, whose decision has since been vacated, also made this point. See *Hively*, 830 F.3d at 706 (“Lesbian women and gay men upend our gender paradigms by their very status—causing us to question and casting into doubt antiquated and anachronistic ideas about what roles men and women play in their relationships.”).

64. See Soucek, *Hively's Self-Induced Blindness*, *supra* note 4, at 123; see also Eskridge, Jr., *supra* note 2, at 370 (“The deepest violation of entrenched gender roles is a woman's romantic partnership or marriage to another woman. It is a blatant violation of the core gender role: the gendered requirement that women are not fulfilled unless they find the right man, marry him, and rear his children in their household.”).

homophobic employer is not deploying a stereotype about men or about women to the disadvantage of either sex.”⁶⁵ This statement is unpersuasive and ignores the extensive literature on the misogynistic roots of homophobia.

Additionally, many courts have relied on *Price Waterhouse* to prohibit discrimination against LGBT employees who engage in gender-deviant behavior while in the workplace.⁶⁶ Therefore, if the law does not protect gay and lesbian employees who behave in a gender-conforming manner while at work, the law has the bizarre result of only protecting those employees that “look gay enough for Title VII.”⁶⁷ As I previously explained, the following situation would result:

If a gay man is the victim of discrimination because he behaves in an effeminate manner and therefore does not conform to the stereotype that men (straight or gay) should be masculine, he could have a cognizable claim based on sex stereotyping. Similarly, if a woman (straight or gay) faces discrimination because she behaves in a stereotypically masculine manner, she could likewise have a valid claim based on sex stereotyping. However, if a gay employee behaves in a gender-conforming manner within the workplace, but her employer happens to learn she is a lesbian and fires her for that reason, she will not have a cognizable Title VII claim.⁶⁸

The *Hively* majority understood this point well, explaining, “[o]ur panel described the line between a gender non-conformity claim and one based on sexual orientation as gossamer-thin; we conclude it does not exist at all.”⁶⁹

This distinction is bizarre because employers usually justify employment discrimination based on some type of business need or cost to the employer.⁷⁰ For example, the Ninth Circuit Court

65. *Zarda*, 883 F.3d at 158 (Lynch, J., dissenting).

66. See Herz, *supra* note 55, at 400.

67. Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 AM. U. L. REV. 175 (2014) (discussing how gay employees who “look gay” are more likely to be protected by Title VII than gay employees who are suspected or known to be gay but do not “look gay”).

68. Debbie N. Kaminer, *Second Circuit to Hear Case On Sexual Orientation Discrimination*, 257:12 N.Y. L.J. at *4 (Jan. 18, 2017), [<https://perma.cc/DL49-9MJP>] [hereinafter, Kaminer, *Second Circuit to Hear Case on Sexual Orientation Discrimination*].

69. *Hively*, 853 F.3d at 346.

70. For example, employers may be permitted to legally discriminate against an employee based on a protected trait if the trait is a BFOQ or “reasonably necessary to the normal operation of that particular business.” 42 U.S.C. § 2000e-2(e) (2012). Similarly, while § 701(j) of the Civil Rights Act of 1964 mandates accommodation of an employee’s religious needs, accommodation is not

of Appeals upheld a casino's sex-specific requirement that female employees wear color-coordinated makeup and male employees wear no makeup since it was based on "commonly accepted social norms and [was] reasonably related to the employer's business needs."⁷¹ Yet, in the case of gay employees who conform to gender norms while at work, there is no plausible business justification for discrimination since the employee is by definition conforming to societal norms. To be clear, I am not arguing that discrimination against individuals who are gender nonconforming during the work day is, or should be, legally permissible. Rather, my point is that in cases where employees do conform to gender norms while at work, employers cannot even rely on the defense of business need. It is therefore striking for a court to hold that employers can discriminate against employees who are gay but who otherwise conform to heterosexual norms during the workday. Perhaps the absurdity of this position was best summed up by Seventh Circuit Judge Richard Posner's rhetorical question during oral arguments in *Hively*: "Who's going to be hurt by giving lesbians and homosexuals a little more job protection?"⁷²

Unfortunately, only six of the thirteen judges on the *Zarda en banc* panel supported the sex-stereotyping argument and agreed that "sexual orientation discrimination is almost invariably rooted in stereotypes about men and women."⁷³ Judge Jacobs's concurring opinion found the sex-stereotyping argument to be particularly troubling, explaining, "anti-discrimination law should be explicable in terms of evident fairness and justice, whereas the analysis employed in the opinion of the Court is certain to be baffling to the populace."⁷⁴ While I certainly agree that the law must be

required if it would cause *undue hardship* to the employer. 42 U.S.C. § 2000e(j) (2012). In such instances, lack of accommodation or discrimination against the religious employee is permissible. See generally Debbie N. Kaminer, *Religious Accommodation in the Workplace: Why Federal Courts Fail to Provide Meaningful Protection of Religious Employees*, 20 TEX. REV. L. & POL. 107 (2015) (discussing unifying principles the courts have relied on in interpreting § 701(j)).

71. *Jespersen*, 444 F.3d at 1104. Interestingly, the policy at issue in this case was not justified by a BFOQ. *Id.*; see also generally Alessandro Botta Blondet, *The Court's Undue Burden: A Look at Jespersen and its Inconsistencies*, 87 U. CIN. L. REV. 523 (2018) (discussing generally the inconsistencies of *Jespersen*); see also William M. Miller, *Lost in the Balance: A Critique of the Ninth Circuit's Unequal Burdens Approach to Evaluating Sex-Differentiated Grooming Standards Under Title VII*, 84 N.C. L. REV. 1357 (2006) (discussing the limitations of *Jespersen's* unequal burdens test).

72. See Kaminer, *Second Circuit to Hear Case on Sexual Orientation Discrimination*, *supra* note 68, at 4.

73. *Zarda*, 883 F.3d at 119.

74. *Id.* at 134 (Jacobs, J. concurring).

understandable to society, as a whole, it is unclear who exactly Judge Jacobs thinks will be baffled by the sex-stereotyping argument. I have taught about sex stereotyping, sexual orientation, and Title VII for years to both graduate and undergraduate business school students at one of the most diverse universities in the United States. My students consistently find the sex stereotyping argument to be the most persuasive rationale for why Title VII prohibits sexual orientation discrimination. While the sex-stereotyping argument might not resonate with a federal appellate court judge, it does make sense to many Americans. Judge Lynch recognizes this in his dissenting opinion, acknowledging that “the most appealing of the majority’s approaches is its effort to treat sexual orientation discrimination as an instance of sexual stereotyping.”⁷⁵

The sex-stereotyping argument also has the advantage of protecting all sexual minorities: because sexual minorities by definition are not cisgender and heterosexual, they do not follow the stereotype of what constitutes appropriate male and female behavior.⁷⁶ Sexual minorities do not follow their prescribed societal role, and thereby failed to maintain a gender hierarchy with women remaining subordinate to men. In recent years, the need to protect all sexual minorities has led to long lists of those entitled to protection. These lists have included strings of initials such as LGBTQIAA+, LGBTTIQQ2SA and, most recently, LGBTQ.⁷⁷ The sex-stereotyping argument helpfully avoids the need to specify which sexual

75. *Id.* at 156 (Lynch, J., dissenting). Judge Lynch’s dissent also emphasizes that, while employment discrimination based on sexual orientation is morally wrong, it is up to Congress to enact legislation prohibiting employment discrimination against gays and lesbians. He summarizes the sordid history of sexual orientation discrimination in the United States, before concluding that, unfortunately, Title VII does not prohibit discrimination based on sexual orientation. Judge Lynch emphasizes, “I would be delighted to awake one morning and learn that Congress had just passed legislation adding sexual orientation to the list of grounds of employment discrimination . . . I am confident that one day—and I hope that day comes soon—I will have that pleasure.” *Id.* at 137. Similarly, the *Hively* dissent explicitly opined, “If Kimberly Hively was denied a job because of her sexual orientation, she was treated unjustly.” *Hively*, 853 F.3d at 372. (Sykes, J., dissenting). Yet the dissent ultimately concludes that the majority decision was “a statutory amendment courtesy of unelected judges.” *Id.* at 360.

76. *See generally* Case, *supra* note 53 (discussing the importance of the sex-stereotyping argument regardless of whether ENDA is passed); Elizabeth M. Glazer, *Sexual Reorientation*, 100 GEO. L.J. 997 (April 2012) (discussing limitations of the law’s current definition of sexual orientation).

77. *See generally* Jonathan Rauch, *It’s Time to Drop the ‘LGBT’ From ‘LGBTQ,’* The Atlantic (January/February 2019), [<https://perma.cc/F7QR-YRW6>] (opining that there should be a new terms that can be used to describe all sexual minorities).

minorities Title VII protects because its rationale inherently applies to all sexual minorities.

CONCLUSION

The U.S. Supreme Court heard oral arguments in *Zarda* on October 8, 2019 and addressed the question of whether Title VII's prohibition on discrimination "because of . . . sex" includes a prohibition on sexual orientation discrimination.⁷⁸ This Article proposes that the answer to this question is clearly 'yes'.

The sex-stereotyping argument is the most compelling argument as to why sexual orientation discrimination is discrimination "because of . . . sex." While sexual orientation discrimination is always a function of sex under both the but-for and associational discrimination arguments explored above, both of these rationales are overly formalistic. Sex-stereotyping, on the other hand, addresses how sexual orientation discrimination is substantively sex discrimination, because it polices gender norms in order to keep women subordinate to men. I fully agree with Judge Jacobs's concurring decision in *Zarda* that antidiscrimination law must be understandable to society as a whole, and the sex-stereotyping argument is the most compelling and persuasive reasoning.

By June 2020, the United States Supreme Court will hand down its opinion on whether Title VII's prohibition on discrimination "because of . . . sex" includes a prohibition on sexual orientation discrimination. The Court should hold that it does. However, if the Court fails to do so, Congress should amend Title VII to explicitly add sexual orientation as a protected category.⁷⁹

78. See *Zarda*, 883 F.3d at 100.

79. While this Article specifically addresses sexual orientation discrimination, Congress should amend Title VII to explicitly protect all sexual minorities in the workplace.