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THE SEVENTH CIRCUIT ATTEMPTS TO NAVIGATE LGBT RIGHTS AFTER OBERGEFELL

SYMONE D. SHINTON*


INTRODUCTION

Non-heterosexual persons\(^1\) have suffered and continue to suffer significant oppression in the United States. Nearly two-thirds of LGBT Americans have reported experiencing discrimination in their personal lives, outside of the workplace.\(^2\) Nearly half have reported

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* J.D. candidate, May 2017, Chicago-Kent College of Law, Illinois Institute of Technology; B.S., International Affairs, Florida State University 2014. I would like to thank Ms. Bridget Keely and Ms. Traci Bennett for inspiring me to write this article and living lives that prove love wins.

\(^1\) This Comment recognizes that gender and sexuality are fluid concepts that occur on a spectrum, and human beings often do not fit neatly into one category. See The Kinsey Scale, KINSEY INSTITUTE INDIANA UNIVERSITY, https://www.kinseyinstitute.org/research/publications/kinsey-scale.php (last accessed Oct. 13, 2016). For the sake of brevity, I will refer to this non-heterosexual community by the term “LGBT.” Please see the following source for an explanation of the term. What Does LGBTQ+ Mean?, OK2BME, http://ok2bme.ca/resources/kids-teens/what-does-lgbtq-mean/ (last accessed Oct. 13, 2016).

\(^2\) Brandon Lorenz, New HRC Poll Shows Overwhelming Support for Federal LGBT Non-Discrimination Bill, HUMAN RIGHTS CAMPAIGN (Mar. 17, 2015),
experiencing discrimination in the workplace.³ And one in ten reported being fired from a job because of their sexual orientation.⁴ This oppression not only impacts LGBT individuals’ social well-being⁵ but their legal rights as citizens.⁶

The gay rights movement formally began on July 27, 1969 at the Stonewall Inn in New York to protest this inequality.⁷ Some of the major goals of the movement were the decriminalization of homosexual acts, the dissemination of accurate information about homosexuality, and, ultimately, equal rights under the laws that protect heterosexuals.⁸ The movement has achieved monumental accomplishments. In 1973, the American Psychiatric Association

³ Id.
⁵ “Institutional and personal hostility toward lesbians and gay men is a fact of life in the United States today.” Gregory M. Herek, Stigma, Prejudice, and Violence Against Lesbians and Gay Men, in Homosexuality: Research Implications for Public Policy 60-80 (John C. Gonsiorek & James D. Weinrich eds. 1991).
declassified homosexuality as a mental disorder. In 1982, the first state enacted legislation outlawing discrimination on the basis of sexual orientation. In 2003, the Supreme Court prohibited laws that criminalize private, consensual sex between homosexuals. In 2004, the first state, Massachusetts, legalized gay marriage. In 2010, Congress repealed “Don’t Ask Don’t Tell.” And in 2015, the Supreme Court declared the right to marry to be a fundamental constitutional right in Obergefell v. Hodges, effectively permitting same-sex couples to legally marry nation-wide.

But Obergefell did not mark the end of the LGBT community’s “liberation struggle.” In the wake of Obergefell, conservatives and religious groups alike celebrated Rowan County, Kentucky, Clerk Kim Davis’ outright defiance to comply with the law by refusing to issue marriage licenses in 2015. The refusal was met with the federal district courts issuing a stay on the marriage licenses, causing the county to give in to pressure and issue licenses[9].

Obergefell v. Hodges, 135 S. Ct. 2584, 2596 (2015) (“Only in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable.”).


Lawrence, 539 U.S. at 558.


“Don’t Ask Don’t Tell,” a military policy enacted by President Clinton, prohibited the participation of openly gay or lesbian members in the military. “Closeted” individuals were permitted to participate, so long as they were not “outed.” Jesse Lee, The President Signs Repeal of “Don’t Ask Don’t Tell”, WHITEHOUSE.GOV (Dec. 22, 2010, 12:35pm), https://www.whitehouse.gov/blog/2010/12/22/president-signs-repeal-dont-ask-dont-tell-out-many-we-are-one.

Obergefell, 135 S. Ct. at 2584.

“My gay and lesbian friends have no illusions that Obergefell marks the end of what one with whom I partied at a gay pride event in Brooklyn last night called their ‘liberation struggle.’” Michael Dorf, Symposium: In Defense of Justice Kennedy’s Soaring Language, SCOTUSBLOG (June 27, 2015 5:08 pm), http://www.scotusblog.com/2015/06/symposium-in-defense-of-justice-kennedys-soaring-language/.
marriage licenses to gay couples.\textsuperscript{16} Private business owners raised religious exercise and free speech defenses to support their refusals to comply with state Anti-Discrimination Acts that protect homosexuals.\textsuperscript{17} And Title VII still permits employers\textsuperscript{18} to lawfully discriminate against non-heterosexual employees.\textsuperscript{19}

This Comment will explore the decades of precedent that forced the hand of the Seventh Circuit in \textit{Hively v. Ivy Tech Community College} to conclude that Title VII still does not prohibit employers from discriminating against employees based on their sexual orientation.\textsuperscript{20} After discussing the backdrop of Title VII, this Comment will review Congress’s historical inaction to intervene on behalf of the LGBT community and protect their status. Finally, this Comment will discuss solutions to the conundrum: the LGBT community is free to get married on Saturday but risk losing their jobs on Monday for the very realization of that right.\textsuperscript{21} As \textit{Hively} was recently vacated and

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\item Title VII defines “employer” as a person “engaged in an industry affecting commerce who has [twenty-five] or more employees for each working day in each of twenty or more calendar weeks in the current or proceeding calendar year, and any agent of such person” excluding the United States, a corporation wholly owned by the United States government, an Indian tribe, any department or agency of the District of Columbia subject by statute to procedures of the competitive service, bona fide private membership clubs that are exempt from taxation under section 501(c) of Title 26. 42 U.S.C. §2000e(b) (2012).
\item Hively v. Ivy Tech Community College, 830 F.3d 698, 717 (7th Cir. 2016), \textit{reh'g en banc granted, opinion vacated}, No. 15-1720, 2016 WL 6768628 (7th Cir. Oct. 11, 2016).
\item \textit{Hively}, 830 F.3d at 714. (“The cases as they stand do, however, create a paradoxical legal landscape in which a person can be married on Saturday and then fired on Monday for just that act. For although federal law now guarantees anyone the right to marry another person of the same gender, Title VII, to the extent it does
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scheduled to be reheard en banc, there is hope that the Seventh Circuit will revisit its conclusions. Nonetheless, courts are justifiably uncomfortable solving this problem, as most traditional tools of statutory interpretation work against extending protections to the LGBT community. This Comment concludes that although the best solution for protecting the LGBT community in the workplace is not piece-meal through the courts, but long-lasting, sweeping change from Congress, the Seventh Circuit should find that discrimination on the basis of sexual orientation is prohibited by Title VII. It should do so on the theory that discrimination on the basis of sexual orientation is discriminating on the basis of one’s failure to live up to their gender norms and stereotypes. Regardless of the Seventh Circuit’s holding, Congress must address this inequality and act by passing The Equality Act. Until Congress does so, LGBT discrimination in the workplace will operate as the modern day “Don’t Ask, Don’t Tell.”

I. TITLE VII JURISPRUDENCE

Title VII of the Civil Rights Act of 1964 prohibits “discrimination on the basis of . . . sex.” But is sexual orientation “sex?” Decades of precedent relying in part on the legislative intent of Title VII have by and large answered that question “no.” While largely uncontroversial in the past, this answer is now difficult to reconcile with Obergefell. The political momentum of treating the LGBT community with full equality under the law has placed this once taken for granted result in great tension.

not reach sexual orientation discrimination, also allows employers to fire that employee for doing so.”).


So how did we get here? Federal courts agree that “sex” discrimination is not “sexual orientation” discrimination, and an employee may legally be discriminated against on the basis of their sexual orientation. But early Supreme Court precedent paved the way for a potential, narrow exception to protect LGBT rights: framing the claim in “gender stereotype” terms. A “gender stereotype” claim is simple in theory: an employee has a claim for “sex” discrimination when they are fired for failing to conform to the stereotypes associated with their sex. For example, a woman who is fired for behaving masculine or a man that is fired for behaving effeminately may state a gender stereotype claim for sex discrimination under Title VII.

But this analysis is complicated when sexual orientation enters the picture. A gay may be protected if he is fired for acting flamboyant or effeminate—contrary to stereotypical male behavior—but not if he is fired for being gay. With support of the EEOC, some district courts have refused to follow what they believe is a meaningless distinction. The Seventh Circuit in *Hively*, however, continued to attempt to separate the two claims, protecting those based on gender stereotypes but not those based upon sexual identity.

**A. Supreme Court Precedent**

In 1989, the Supreme Court decided *Price Waterhouse v. Hopkins*, which held that discriminating against an employee for failing to conform to a gender stereotype is sex discrimination prohibited by Title VII. Of course, *Price Waterhouse* had nothing to do with sexual orientation. The Plaintiff, Ann Hopkins, brought suit after she was refused admission as partner at an accounting firm essentially because she was not feminine enough.

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27 *Id.*
Even though she had recently secured a $25 million contract for the firm and was recommended as performing “virtually at the partner level” already, her superiors were concerned by her “abrasive” and “brusque” personality that was “difficult to work with.” Of course, by “abrasive” her superiors actually meant “macho,” “overcompensated for being a woman,” unladylike, and in need of “a course at charm school.” Indeed, one supervisor advised Ann to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry” if she wanted to improve her chances of partnership in the future.

Stating that under the plain language of Title VII “gender must be irrelevant to employment decisions,” the Court found that discriminating against Ms. Hopkins for failing to conform to stereotypes of what a woman should be squarely falls within the prohibitions of Title VII. In other words, employers cannot discriminate against men for being feminine or women for being masculine. Finding that Ms. Hopkins proved her gender played a motivating part in her employment decision, the Court remanded to determine whether the employer was still not liable because they would have made that decision anyway, irrespective of gender.

In *Price Waterhouse*, the Court affirmed that Congress’s purpose in enacting Title VII was broad and aimed to “strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.” While seeking to preserve employer freedom and choice, Congress hoped to drive employers to focus on employee qualifications rather than on the individual’s identity and immutable

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28 Id. at 234–235.
29 Id. at 235.
30 Id.
31 Id. at 240.
32 Id. at 258. The Court established that after a Title VII plaintiff proves gender played a role, an employer may still evade liability if it can prove by a preponderance of the evidence that it would have made the same decision regardless of gender.
33 Id. at 251 (quoting Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 707, n. 13 (1978)) (emphasis added).
characteristics. The Court stated that as a society we were “beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”

Later, in Oncale v. Sundowner Offshore Services, Inc., the Supreme Court held that sex discrimination consisting of same-sex sexual harassment is actionable under Title VII. Writing for a unanimous court, Justice Scalia acknowledged that same-sex sexual harassment was “assuredly not the principal evil Congress was concerned with when it enacted Title VII.” Even so, “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.” In other words, Title VII need not be limited to apply only to the exact concerns addressed by its enacting legislators. It should be extended to cover “reasonably comparable evils” that fit within the letter of the law.

This lends credence to the argument that “sexual orientation” is “sex” and therefore a protected class. But this argument has still not been accepted. Under the current prevailing view of Title VII, employees can bring discrimination claims based on gender stereotyping but not sexual orientation. In other words, if the homosexual employee looks or acts “sufficiently flamboyant (if male) or butch (if female),” they will receive Title VII protection whereas the homosexual employee that does not openly violate traditional gender

34 Id. at 243.
35 Id. at 251.
37 Id. at 79.
38 Id. (emphasis added).
40 Id.
norms will not. The Supreme Court has not directly addressed the specific issue of whether Title VII protections extend to the LGBT community.

B. Federal Court Decisions and the EEOC

1. Seventh Circuit Precedent and Beyond: Protecting “Sex” But Not “Sexual Orientation”

The Seventh Circuit has always excluded the LGBT community from Title VII’s reach. Indeed, it has expressly stated that not only did Congress intend for “sex” to have a “narrow, traditional interpretation” but that Congress even intended to “exclude homosexuals from Title VII coverage.” Time and time again, the Seventh Circuit has made clear that “sex” only encompasses the biological male and female.

In *Hamner v. St Vincent Hospital and Health Care Center*, Gary Hamner, a male nurse, sued his former employer, a hospital, alleging that he was unlawfully terminated under Title VII in retaliation for submitting a sexual harassment grievance. Mr. Hamner alleged that a coworker refused to communicate with him even when necessary for patient care, screamed at him, and openly mocked him by lisping,

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41 Soucek, *supra* note 40; see, e.g., *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1068 (9th Cir. 2002) (recognizing sex discrimination claim of gay male employee who was taunted and harassed for having feminine traits).
42 See, e.g., *Johnson v. Hondo, Inc.*, 125 F.3d 408, 413–14 (7th Cir. 1997) (concluding that a slew of gay epithets could not sustain a claim of gender discrimination where there was no evidence that the plaintiff failed to conform to male stereotypes).
43 *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984) (refusing to extend coverage to transsexuals under Title VII because “sex” does not encompass “sexual identity”) (emphasis added).
44 *Doe by Doe v. City of Belleville, Illinois*, 119 F.3d 563, 572 (7th Cir. 1997).
flipping his wrists, and making jokes about homosexuals. On direct examination at trial, Mr. Hamner’s testimony damned his claim: “[i]t was merely the fact that because I am gay, because that is just who I am, he was opposed to that and he absolutely could not handle that. And, so, it was constant harassment because of my sexual orientation.”

The court found that the employer’s grievance alleged only sexual orientation harassment which is not protected by Title VII, stating “Congress intended the term ‘sex’ to mean ‘biological male or biological female,’ and not one’s sexuality or sexual orientation.”

Similarly, in Spearman v. Ford Motor Company, Edison Spearman sued his current employer, Ford Motor Company, alleging that Ford subjected him to a hostile work environment of sexual harassment. Amongst other things, Mr. Spearman’s coworker called him a “little bitch,” that he hated his “gay ass” and threatened to go to his residence and “f--- his gay faggot ass up.” A coworker wrote graffiti on a bulletin board at work that stated: “Aids kills faggots dead . . . RuPaul, RuSpearman.” But despite the “vulgar and sexually explicit insults” that Mr. Spearman suffered at work, and testimony that Ford indeed embodied a “masculine environment,” Mr. Spearman had no relief under Title VII because his “co-workers maligned him because of his apparent homosexuality, and not because of his sex.”

Relying on this precedent, the next sixteen years of Seventh Circuit precedent consistently refused to extend Title VII protections to the LGBT community. Indeed, every federal court to consider the

46 Id.
47 Id. at 705.
48 Id. at 704 (quoting Ulane, 742 F.2d at 1085).
49 Spearman v. Ford Motor Co., 231 F.3d 1080, 1082 (7th Cir. 2000).
50 Id.
51 Id. at 1083.
52 Id. at 1085.
53 Muhammad v. Caterpillar, Inc., 767 F.3d 694, 697 (7th Cir. 2014); Hamm v. Weyauwega Milk Products, Inc., 332 F.3d 1058, 1062 (7th Cir. 2003) (“The protections of Title VII have not been extended, however, to permit claims of harassment based on an individual’s sexual orientation.”); Schroeder v. Hamilton
matter has found unequivocally found that sexual orientation is not a
protected class under Title VII.\textsuperscript{54} Although courts agree that
“[h]arassment on the basis of sexual orientation has no place in our
society” they refuse to extend such protections to the LGBT
community because “Congress has not yet seen fit [] to provide
protection against such harassment.”\textsuperscript{55}

2. The EEOC’s Evolved Stance: Sexual Orientation
   Discrimination Is Sex Discrimination

   The EEOC recently began pursuing sexual orientation
discrimination claims on the theory that sexual orientation
discrimination is sex discrimination. Dating back fifty years, the
EEOC’s stance previously excluded sexual orientation from claims
protected by Title VII.\textsuperscript{56} But in July 2015, the EEOC in Baldwin v.
Foxx declared that “sexual orientation is inherently a ‘sex-based

\textsuperscript{54} Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 762 (6th Cir. 2006) (perceived
sexual orientation and sexual harassment claim); Medina v. Income Support Div.,
N.M., 413 F.3d 1131, 1135 (10th Cir. 2005); Bibby v. Phila. Coca Cola Bottling Co.,
260 F.3d 257, 261 (3d Cir. 2001); Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir.
2000); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir.
1996) (noting in a case of same-sex harassment that Title VII does not protect
against discrimination based on sexual orientation); U.S. Dep't of Hous. & Urban
Dev. v. Fed. Labor Relations Auth., 964 F.2d 1, 2 (D.C. Cir. 1992) (assuming
without deciding that Title VII does not cover sexual orientation discrimination);
Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989); Blum v.
Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979); \textit{but see} Rene v. MGM Grand
Hotel, Inc., 305 F.3d 1061, 1068 (9th Cir. 2002) (gay male employee taunted and
harassed by coworkers for having feminine traits successfully pleaded claim of sex
harassment under Title VII).


\textsuperscript{56} Arthur S. Leonard, \textit{Federal Trial Courts Divided Over Title VII Sexual
Orientation Discrimination Claims}, ART LEONARD OBSERVATIONS (June 21, 2016),
http://www.artleonardobservations.com/federal-trial-courts-divided-title-vii-sexual-
orientation-discrimination-claims/.
consideration’’ protected by Title VII.\textsuperscript{57} The decision is an administrative ruling that is not binding on federal courts but is entitled to some level of consideration and deference.\textsuperscript{58}

The complainant, David Baldwin, worked as a Supervisory Air Traffic Control Specialist for the Department of Transportation in Miami, Florida.\textsuperscript{59} He alleged that he was not selected for a permanent management position because of his status as a gay man.\textsuperscript{60} A supervisor with promoting power made several negative comments about his sexual orientation, such as “[w]e don’t need to hear about that gay stuff” in reference to Mr. Baldwin’s mentioning his vacation with his male partner as well as calling Mr. Baldwin “a distraction in the radar room” when Mr. Baldwin discussed his male partner.\textsuperscript{61}

Interpreting \textit{Price Waterhouse} broadly, the EEOC stated that Title VII’s prohibition of sex discrimination “means that employers may not ‘rely upon sex-based considerations’” when making employment decisions.\textsuperscript{62} This protection, the EEOC stated, applies equally to claims brought by lesbians, gays, and bisexuals.\textsuperscript{63} Acknowledging but dismissing decades of precedent to the contrary, the EEOC quoted \textit{Oncale}: “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”\textsuperscript{64} Dismissing the textual argument that Title

\textsuperscript{59} Baldwin, 2015 WL 4397641, at *1.
\textsuperscript{60} Baldwin, 2015 WL 4397641, at *2.
\textsuperscript{61} Baldwin, 2015 WL 4397641, at *2.
\textsuperscript{63} Baldwin, 2015 WL 4397641, at *4.
VII does not explicitly include protections for sexual orientation claimants, the EEOC stated:

[T]he question is not whether sexual orientation is explicitly listed in Title VII as a prohibited basis for employment actions. It is not. Rather, the question for purposes of Title VII coverage of a sexual orientation claim is the same as any other Title VII case involving allegations of sex discrimination—whether the agency has “relied on sex-based considerations” or “taken gender into account” when taking the challenged employment action.65

In other words, sexual orientation cannot be separated from sex. A man is labeled gay and a woman is labeled lesbian because he or she prefers to romantically associate with the same sex.66 Sexual orientation discrimination, then, is inextricably linked to sex and based on sexual stereotypes, assumptions, expectations, and norms. Moreover, sexual orientation discrimination itself is inextricably linked to the employee’s sex. If a business fires a gay man “because of his sexual activities with [another man], while this action would not have been taken against [a woman] if she did exactly the same things with [another man], then [the gay man] is being discriminated against because of his sex.”67 Under this text-based and purposive analysis, claimants need not frame their experiences in *Price Waterhouse* gender-stereotype norms to be protected by Title VII.

The EEOC called out the Seventh Circuit’s Title VII jurisprudence, amongst others, directly criticizing its failure to apply

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66 American Psychological Ass’n, Definition of Terms: Sex, Gender, Gender Identity, Sexual Orientation (Feb. 2011), http://www.apa.org/pi/lgbt/resources/sexuality-definitions.pdf (“Sexual orientation refers to the sex of those to whom one is sexually and romantically attracted.”).

Title VII to include protections against sexual orientation discrimination. The source of its criticism was founded on the Seventh Circuit “simply cit[ing] earlier and dated decisions without any additional analysis” even in light of relevant, intervening Supreme Court law.

3. Dissenting District Courts: Protecting Sexual Orientation Claims

District courts, as “front line experimenters in the laboratories of difficult legal questions,” have also finagled their way into applying Title VII to the LGBT community. In response to the new EEOC decision, one court has bluntly declared that the lines between sex discrimination and sexual orientation discrimination are not merely blurry, but are, in fact, un-definable. Other courts have joined in dissent.

Of the district courts that have found Title VII protects sexual orientation claims, most have followed the EEOC’s reasoning that sexual orientation discrimination is discrimination on the basis of “sex.” For example, although the court ultimately granted summary

68 Baldwin, 2015 WL 4397641, at *8 n.11.
69 Id.
70 Hively v. Ivy Tech Community College, 830 F.3d 698, 703 (7th Cir. 2016).
71 Videckis v. Pepperdine Univ., 150 F. Supp. 3d 1151, 1160 (C.D. Cal. 2015) (“Simply put, the line between sex discrimination and sexual orientation discrimination is ‘difficult to draw’ because that line does not exist, save as a lingering and faulty judicial construct.”).
judgment against the employee for failing to demonstrate the employer’s retaliation was the but-for cause of his termination, a district court in Alabama expressly agreed with the EEOC finding that “sexual orientation-based discrimination [is] cognizable under Title VII.” In another case, a California district court found that two lesbian basketball players stated a “straightforward claim for sex discrimination” by alleging university staff members told them their lesbianism would not be tolerated on the team. Applying the same logic as the EEOC, the court reasoned that sexual orientation discrimination is necessarily sex discrimination because “[i]f Plaintiffs had been males dating females, instead of females dating females, they would not have been subjected to the alleged different treatment.” Sexual orientation discrimination is therefore sex discrimination. The District of Connecticut boldly reached the same conclusion based on the same logic, explicitly disagreeing with the Seventh Circuit’s result in Hively and Second Circuit precedent to the contrary.

But not all courts protecting the LGBT community have adopted the EEOC’s sexual orientation is sex position, though, and some continue to frame the claims in gender stereotype terms. Recently, a district court in Florida ruled that discrimination based on perceived sexual orientation was actionable under Title VII. Plaintiffs, Susan Winstead and Deborah Langford, alleged, amongst other things, that coworkers at the Lafayette County Board contacted residents served by plaintiffs and encouraged them to register false complaints against plaintiffs. The coworkers allegedly then harassed the plaintiffs on Facebook, other online forums, and even on radio and television.

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73 Isaacs, 143 F. Supp. 3d at 1193–94 (“This court agrees with the view of the [EEOC] . . .”).
74 Videckis, 150 F. Supp. 3d at 1161.
75 Id.
77 Winstead v. Lafayette County Board of County Commissioners, No. 1:16CV00054-MW-GRJ, 2016 WL 3946922 (N.D. Fl. June 20, 2016).
78 Id. at *1.
79 Id.
The court rejected the EEOC’s position that sexual orientation discrimination is necessarily sex discrimination. Rather, the Florida court found that sexual orientation discrimination fits neatly under *Price Waterhouse’s* gender stereotype claim. The court recognized that the Plaintiffs had stated a claim under gender stereotype theory even if they had not acted “butch.” To arbitrarily reject claims of homosexuals who otherwise conformed to gender norms would be to “misapprehend the nature of animus towards people based on their sexual orientation.” That animus is based on disapproval of behaviors that are disapproved of “precisely because they are deemed to be “inappropriate” for members of a certain sex or gender.”

**C. Congress’s Inaction and State Anti-Discrimination Statutes**

Congress’s inaction has significantly influenced courts’ failure to read Title VII in a manner that protects the LGBT community. Congress is not unaware of the plight of the LGBT community to obtain protection under Title VII. On the contrary, it has considered and rejected amending the Civil Rights Act to add “sexual orientation” innumerable times, dating back as early as 1974. The 1974 Equality

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80 Id. at *6–7 (citing Baldwin v. Foxx, Appeal No. 0120133080, 2015 WL 4397641, at *5 (EEOC July 15, 2015)).

81 Id. at *7.


83 Winstead v. Lafayette County Board of County Commissioners, No. 1:16CV00054-MW-GRJ, 2016 WL 3946922, at *8 (N.D. Fl. June 20, 2016).

84 Id.

85 *Kiley v. American Soc. For Prevention of Cruelty to Animals*, 296 Fed. Appx. 107, 109 (2d Cir. 2008) (concluding based on the numerous bills that have attempted to extend Title VII protection to sexual orientation that Congress did not intend to include sexual orientation protections in Title VII’s current form); *Ulame v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1086 (7th Cir. 1984) (saying that Congress’s failure to amend Title VII “strongly indicates . . . sex should be given a . . . traditional interpretation” that does not encompass sexual orientation).

Act was broadly drafted to protect the LGBT community in all arenas of public life beyond employment.\textsuperscript{87} Due to a variety of social and political factors, it never earned enough support to make it out of the House Committee on Judiciary.\textsuperscript{88} Lawmakers went silent on the issue for about twenty years.

The silence was broken in 1994 with the introduction of the Employment Non-Discrimination Act (ENDA).\textsuperscript{89} ENDA was narrowly focused on prohibiting discrimination in the workplace based on actual or perceived sexual orientation.\textsuperscript{90} But the law failed to pass.\textsuperscript{91} Since ENDA’s introduction, Congress has considered some version of the Act every single session but one.\textsuperscript{92} Congress is currently considering The Equality Act.\textsuperscript{93} Introduced in 2015, it has more congressional support than any of its predecessors.\textsuperscript{94} The Act differs from its predecessors in that it would directly amend The Civil Rights Act to add sexual orientation and gender identity as protected classes.\textsuperscript{95} But the bill has been stuck in the House Subcommittee on the Constitution and Civil Justice since September 8th, 2015.\textsuperscript{96}

\textsuperscript{87} Hunt, \textit{supra} note 86.
\textsuperscript{89} Hunt, \textit{supra} note 86.
\textsuperscript{90} \textit{Id.}
\textsuperscript{91} \textit{Id.}
\textsuperscript{92} \textit{Id.}
\textsuperscript{93} H.R. 3185, 114th Cong. (2015-2016).
\textsuperscript{94} \textit{The Equality Act, HUMAN RIGHTS CAMPAIGN} (last updated Aug. 1, 2016), http://www.hrc.org/resources/the-equality-act.
\textsuperscript{95} \textit{Id.}
Despite vast misconceptions that sexual orientation discrimination is already illegal, the federal government has not prohibited it, and the majority of states lack local anti-discrimination statutes that provide protections for LGBT persons in the workplace. Only twenty-one states currently prohibit discrimination on the basis of sexual orientation, and only eighteen protect transgendered persons. According to the Human Rights Campaign, thirty-two states lack clear and fully inclusive anti-discrimination laws for the LGBT community.

With this legislative background and jurisprudence in mind, we turn to the Seventh Circuit’s decision in *Hively v. Ivy Tech Community College*.

II. HIVELY V. IVY TECH COMMUNITY COLLEGE

Kimberly Hively worked as an adjunct instructor in mathematics at Ivy Tech Community College in Indiana from 2000 to 2013. She excelled in her position, winning the “Adjunct Faculty Award for Excellence in Instruction” on the South Bend campus. Over the course of her five years, she applied repeatedly for permanent positions at the college for which she was qualified. Ivy Tech first rejected her applications before finally refusing to continue her
contract as an adjunct.\textsuperscript{104} She connected the dots between her sexuality and her rejections when she overheard administrators commenting to others about her being in a relationship with another woman.\textsuperscript{105}

Ms. Hively filed a bare-bones pro se charge with the Equal Employment Opportunity Commission (EEOC) claiming she was discriminated against because of her sexual orientation.\textsuperscript{106} After exhausting procedural requirements in the EEOC, she filed a pro se complaint against the school in the district court of Indiana.\textsuperscript{107} Fatal to her complaint, Ms. Hively alleged that she was “denied fulltime employment and promotions based on sexual orientation” in violation of Title VII of the Civil Rights Act.\textsuperscript{108} Ivy Tech filed a motion to dismiss for failure to state a claim because sexual orientation is not recognized as a protected class under Title VII.\textsuperscript{109} Although the court empathized with Ms. Hively’s pro se status and her arguments, the court stated it was “bound by Seventh Circuit precedent” and had no choice but to dismiss the complaint with prejudice.\textsuperscript{110}

On appeal, the Seventh Circuit’s opinion reads like one long exhale. Judge Rovner authored the opinion joined in part by Judge Ripple.\textsuperscript{111} Judge Bauer did not join the judgment.\textsuperscript{112} The court began by noting it could “make short shrift of its task” and simply affirm the district court’s opinion based on clear Seventh Circuit precedent.\textsuperscript{113} Indeed, two cases decided in 2000 made clear that Title VII does not protect claims based on a person’s sexual preference or orientation:

\begin{itemize}
  \item \textsuperscript{104} Id.
  \item \textsuperscript{105} Jaschik, supra note 101.
  \item \textsuperscript{106} Hively v. Ivy Tech Community College, 830 F.3d 698, 698 (7th Cir. 2016).
  \item \textsuperscript{107} Id.
  \item \textsuperscript{108} Hively, 2015 WL 926015, at *1 (emphasis added).
  \item \textsuperscript{109} Id.
  \item \textsuperscript{110} Id. at *3.
  \item \textsuperscript{111} Hively, 830 F.3d at 698.
  \item \textsuperscript{112} Id.
  \item \textsuperscript{113} Id.
\end{itemize}
Hamner and Spearman.\textsuperscript{114} Precedent was unequivocally stacked against Ms. Hively. So, despite compelling policy concerns to find to the contrary, the Seventh Circuit was “presumptively bound by [its] own precedent.”\textsuperscript{115}

But case law was not the only factor that forced the court’s hand. The court was also persuaded by Congress’s utter inaction to correct decades of court’s interpretation of Title VII, despite a consistent trend in public opinion and courts calling for change.\textsuperscript{116} The court chimed in with the slew of other federal courts that have called discrimination on the basis of sexual orientation a “reprehensible,”\textsuperscript{117} and “noxious practice, deserving of censure.”\textsuperscript{118} The court acknowledged the EEOC’s recent shift towards applying Title VII to prohibit sexual orientation discrimination.\textsuperscript{119} But without more, this “writing on the wall” was not enough.\textsuperscript{120}

The court thoroughly described the struggles amongst federal courts to deal with the seemingly unworkable standards of evaluating sexual orientation claims under Price Waterhouse.\textsuperscript{121} But no matter how difficult to disentangle gender discrimination from sexual orientation discrimination, the court refused to conclude it was

\textsuperscript{114} Spearman v. Ford Motor Co., 231 F.3d 1080, 1085 (7th Cir. 2000); Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc., 224 F.3d 701, 704 (7th Cir. 2000).
\textsuperscript{115} Hively, 830 F.3d at 701.
\textsuperscript{116} Id. (“Our holdings and those of other courts reflect the fact that despite multiple efforts, Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation.”).
\textsuperscript{118} Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999).
\textsuperscript{119} Hively, 830 F.3d at 703 (citing Griggs v. Duke Power Co., 401 U.S. 424, 433–34 (1971)).
\textsuperscript{120} Id. at 718.
\textsuperscript{121} Id. at 704–708.
“impossible.”122 Bluntly, the court stated it could not do so “unless or until either the legislature or the Supreme Court says it is so.”123

The court was fully aware of the unjust result that followed from adhering to this line of precedent, calling it “an odd state of affairs” in which Title VII only protects gays, lesbians, and bisexual persons that blatantly, outwardly express their sexuality.124 The effeminate man is protected while the gay man who otherwise conforms to traditional masculine stereotypes is not. Nonetheless, the court exasperatedly concluded that this was not its call to make.125

The Hively opinion has been vacated and scheduled for rehearing en banc.126 In the Seventh Circuit’s own words, it usually only rehears cases en banc to address an intra-circuit split, not involved here, or a “question of exceptional importance.”127 On rehearing, the court will face the same handful of options. The court can again follow the overwhelming precedent that, based on Congress’ original intent and current inaction, Title VII simply does not prohibit sexual orientation discrimination.128 But the court can find for Ms. Hively without disregarding the law by following the EEOC’s recent interpretation that sexual orientation discrimination is necessarily “sex” discrimination.129 More likely, the court could be the first court to definitively interpret sexual orientation claims under the gender stereotype framework set out in Price Waterhouse.130 Because a gender stereotype of women is that they romantically associate with

122 Id. at 709.
123 Id.
124 Id. at 714.
125 Id.
127 Easley v. Reuss, 532 F.3d 592, 594 (7th Cir. 2008).
128 Jones, supra note 126.
men, Ms. Hively was discriminated against on the basis of her sex when Ivy Tech discriminated against her for romantically associating with women. This option seems most likely given the panel’s questions at the en banc hearing. Indeed, counsel for Lambda Legal Defense, Ms. Hively’s representative, based his arguments in Price Waterhouse terms, analogizing that discriminating against a woman because she drives a Harley or has football season tickets is in precisely the same vein as discriminating against her for her attraction to women. The court’s holding will greatly impact current LGBT rights litigation, extending into the Title IX gender identity bathroom litigation as well.

The Seventh Circuit also has the opportunity to address this issue in a similar sexual orientation discrimination claim that was dismissed in the Northern District of Illinois in the wake of Hively: Matavka v. Board of Education. The court initially stayed the case pending the Hively decision, apparently hopeful that the EEOC’s change of position might persuade the Seventh Circuit. The Plaintiff, Lubomir Matavka alleged that while employed at Morton High School his coworkers and supervisors verbally taunted him for his sexual orientation, even hacking into his Facebook account to publicly out him as “interested in ‘boys and men.”

In dismissing the Complaint, the court called the defendants’ conduct “disgusting” and “appalling” but nonetheless not

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131 Jones, supra note 126.
132 Id.
133 See, e.g., Students v. United States Dep’t of Educ., No. 16-cv-4945 2016 WL 6134121, at *17 (N.D. Ill. Oct. 18, 2016) (“Whether or not the court of appeals does so, however, its en banc decision could have an important impact on Plaintiffs' argument about the meaning of the term “sex” in Title VII and, by implication, in Title IX.”).
135 Id. at *4.
136 Id. at *3.
137 Id.
138 Id. at *1.
prohibited by Title VII under Hively. The court discussed the Seventh Circuit’s perhaps misplaced adherence to stare decisis, noting that Brown v. Board of Education, too, required the Court to go against decades of precedent.\footnote{Id. at *2 (citing Brown v. Bd of Educ., 347 U.S. 483 (1954)) (“Stare decisis is not however immutable—perhaps the most noteworthy example of our time has been the unanimous decision of the Supreme Court in [Brown v. Board of Education].”).} Even so, the court noted that uprooting an unjust manner of judicially interpreting the Constitution was “a matter quite different” from changing the established judicial interpretation of “a word contained in congressional legislation.”\footnote{Id.} Matavka has filed an appeal.\footnote{Matavka v. Bd. of Educ. of J. Sterling Morton High Sch. Dist. 201, No. 15 C 10330, 2016 WL 4119949 (N.D. Ill. Aug. 1, 2016), appeal docketed, No. 16-3298 (7th Cir. Aug. 29, 2016).}

Courts’ struggle to apply Title VII inclusively begs the question of whether they are the appropriate branch of government to resolve this issue. From where should we expect change? And from where is change best suited for long-lasting protection for the LGBT community? What branch will remedy the incongruence that “[w]e allow two women or two men to marry, but allow employers to terminate them for doing so[?]”\footnote{Hively v. Ivy Tech Community College, 830 F.3d 698, 717 (7th Cir. 2016)} Ideally, Congress is best suited to resolve this issue. But this solution seems less and less viable as Congress becomes even more partisan, gridlocked, and conservative.\footnote{See James Arkin, Trump Gets a Republican Congress, REAL CLEAR POLITICS (Nov. 9, 2016), http://www.realclearpolitics.com/articles/2016/11/09/trump_gets_a_republican_congress.html.}
III. IMPLICATIONS OF Hively: Congress Must Act

The court in Hively noted that the Supreme Court has consistently expounded on LGBT rights.144 But even though this “informed” the legal landscape of Title VII, it had “no direct bearing” on the outcome of the case.145 Even though “the writing is on the wall,” that writing must come from the Supreme Court or Congress.146 The Panel’s now vacated opinion seemed to emphasize the impossibility of a judicial remedy for expanding LGBT rights under Title VII. Part of this struggle stems from the traditional tools of statutory interpretation, most of which naturally lead to the exclusion of sexual orientation discrimination.

Merriam-Webster defines “sex” in biological terms as “the state of being male or female.”147 From a traditionally textualist perspective, then, discrimination on the basis of ‘sex’ is the classic scenario of refusing to hire a woman because she is a woman. But even an approach based on legislative intent does not provide protections for LGBT community. While it is possible to grab juicy quotes from the legislative history and argue they encompass LGBT rights, it is undisputed that Congress was not concerned with sexual orientation discrimination when it enacted the Civil Rights Act.148 On the
contrary, it is widely known that the word “sex” was added to the Bill in the hopes of destroying its chances of being passed.\footnote{Leonard, supra note 56 (explaining that southern representative Howard Smith of Virginia included the word “sex” in the hopes of sinking the bill).}

Nonetheless, a court could still resolve the issue either by embracing the EEOC’s allegedly text-based position that “sexual orientation is sex” or by following the purposive based theory that swallows sexual orientation claims into gender stereotype claims under \textit{Price Waterhouse}. As Judge Posner noted at the en banc hearing, the meaning of the statute is not “frozen on the day of enactment,” and it is common if not appropriate to interpret a statute differently as times change.\footnote{Jones, supra note 131.} Significant scholarship has been dedicated to encouraging courts to fully embrace sexual orientation discrimination claims under the latter approach.\footnote{See, e.g., Cody Perkins, Comment, \textit{Sex & Sexual Orientation: Title VII After Macy v. Holder}, 65 ADMIN. L. REV. 427, 442 (2013) (“Just as the impermissible discrimination in [\textit{Price Waterhouse}] was directed at the plaintiff for being a woman who transgressed gender norms by acting masculinely [sic], a gay woman who is discriminated against for being a woman who acts masculinely [sic] by having the traditionally male trait of being attracted to women is being discriminated against on the basis of a sex stereotype.”).} The argument that “gay people, simply by identifying themselves as gay, are violating the ultimate gender stereotype—heterosexual attraction” is compelling.\footnote{Anthony E. Varona & Jeffrey M. Monks, \textit{En/Gendering Equality: Seeking Relief Under Title VII Against Employment Discrimination Based on Sexual Orientation}, 7 WM. & MARY J. WOMEN & L. 67, 84 (2000).}

Indeed, Judge Rovner explicitly identified this stereotype in the now vacated opinion.\footnote{Hively, 830 F.3d at 709.}

But there is no guarantee a trip to the Supreme Court would result in a favorable outcome for the LGBT community. Although Justice Kennedy joined the “liberals” in \textit{Obergefell}, \textit{Obergefell} dealt with fundamental constitutional rights under the Equal Protection Clause—an area where Kennedy is known for his expansive, even ethereal,
beliefs. It is not certain he would expand LGBT rights so broadly when ruling on a question of settled statutory interpretation. Scholars have pointed out that Title VII litigation as a whole has stalled or regressed under the Roberts Court, evidencing a “skepticism about the persistence of intentional sex and race discrimination.” Now that present and future Supreme Court vacancies will likely be filled by a republican appointee, it is even less likely this avenue is a productive choice for the LGBT community. Indeed, though most scholars agree that the fundamental right to marry is likely secure, the LGBT agenda as a whole is certainly on shaky grounds. As of this Comment’s writing, every single cabinet member of President-elect Trump affirmatively opposes LGBT rights.

The Executive Branch under President Obama has done all it can do to protect the LGBT community in the near future. Long before Obergefell, President Obama received pressure to bar discrimination against LGBT persons in employment through executive order. In


158 Chris Johnson, More Pressure on Obama to Bar Workplace Discrimination, WASHINGTON BLADE (Mar. 30, 2012 at 7:48 am EDT),
2014, President Obama signed an Executive Order prohibiting federal contractors from discriminating against LGBT members in the workplace. Obama correctly stated that the order would make the government “just a little bit fairer”—indeed, the President lacks the authority to impact the private sector. And it is doubtful that President Trump has LGBT rights on his agenda.

The root of the problem lies in Title VII itself. No branch is better suited to address incongruences within the Act than the creators. Congress must act and clarify whether or not sexual orientation is “sex discrimination” under Title VII. Even though Congress has failed to do so for over twenty years, there simply does not exist a better solution than a change in the legislation.

The opportunity has arisen again. Senator Jeff Merkley and Representative David Cicilline introduced The Equality Act in July of 2015. The Act would amend the Civil Rights Act of 1964 to include sexual orientation and gender identity among protected classes. More than 80 corporations have signed on in support of the bill, including big names like Amazon, American Airlines, Coca-Cola, Facebook, and Google. But, the bill is currently sitting before the

http://www.washingtonblade.com/2012/03/30/more-pressure-on-obama-to-bar-workplace-discrimination/.

David Hudson, President Obama Signs a New Executive Order to Protect LGBT Workers, WHITEHOUSE.GOV (July 21, 2014 at 3:00 PM ET), https://www.whitehouse.gov/blog/2014/07/21/president-obama-signs-new-executive-order-protect-lgbt-workers.

Id.


Cicilline became the fourth openly gay member of Congress in 2010.

Steinmetz, supra note 4.


Subcommittee on the Constitution and Civil Justice, where it has remained for over a year.\footnote{166}

The bill states explicitly that “discrimination can occur on the basis of the sex, sexual orientation, gender identity . . . of an individual.”\footnote{167} The bill recognizes the history of discrimination against LGBT in the workplace: “Workers who are LGBT, or are perceived to be LGBT, have been subjected to a history and pattern of persistent, widespread, and pervasive discrimination on the bases of sexual orientation and gender identity by private sector employers and Federal, State, and local government employers.”\footnote{168} Finally, the bill explicitly approves of the EEOC’s recent and “correct[]” interpretation of Title VII to protect LGBT persons and rejects conflicting case law that has refused to do so.\footnote{169}

Polling indicates that federal protections for the LGBT is in large part a bipartisan issue.\footnote{170} A 2015, pre-\textit{Obergefell} survey showed that voters across party lines support the bill by a margin of 69 to 27.\footnote{171} Within these margins, even a majority of Republican citizens support the bill.\footnote{172} Sixty-four percent of voters said they would be less likely to support their member of Congress if he or she opposed the bill.\footnote{173} Congress has no excuse to sit on their hands or vote on party lines on this issue. In directly amending the Civil Rights Act itself, Congress members cannot object to the bill out of fear and speculation of what a new set of rights would mean for employers.\footnote{174} Literally the exact same protections that have applied to race, religion, sex, ethnicity, and

\footnotesize{\footnotesize{\begin{itemize}
\item\footnote{166}{H.R. 3185, 114th Cong. (2015).}
\item\footnote{167}{H.R. 3185, 114th Cong. § (2)(1).}
\item\footnote{168}{H.R. 3185, 114th Cong. § (2)(7).}
\item\footnote{169}{H.R. 3185, 114th Cong. § (2)(8),(9).}
\item\footnote{170}{Lorenz, \textit{supra} note 2.}
\item\footnote{171}{Lorenz, \textit{supra} note 2.}
\item\footnote{172}{Lorenz, \textit{supra} note 2 (51% in favor to 43% against).}
\item\footnote{173}{Lorenz, \textit{supra} note 2.}
\item\footnote{174}{Steinmetz, \textit{supra} note 4 (“. . . [T]he Equality Act will ‘literally be extending the exact same protections [in Title VII]’ [that] other classes already have.”).}
\end{itemize}}}
national origin for over fifty years would be extended to the LGBT community. Similarly, the same religious exemptions would apply.

Regardless of how the Seventh Circuit rules in *Hively*, Congress must act to provide protections for LGBT employees against this invidious discrimination. This Comment remains hopeful that the Seventh Circuit is ready to step out as the first court to definitively interpret sexual orientation discrimination under the gender stereotype framework set forth by *Price Waterhouse*. Hopefully, this will set the tone for more federal circuits to break away from slavishly following old methods of interpreting Title VII. But until Congress provides this protection, LGBT employees may only hope to be lucky enough to live in a state that protects him or her through its local anti-discrimination law or a federal circuit that has decided to interpret Title VII expansively. This result simply cannot be squared with the norms and values largely embraced by society and recognized by the Supreme Court in *Obergefell v. Hodges*.\(^{175}\)

\(^{175}\) Obergefell v. Hodges, 135 S. Ct. 2584, 2593 (2015) ("The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity.").