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Joseph Camper

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Sexual Orientation Discrimination Under Title VII

Joseph Camper

Congress' objective in enacting Title VII of the Civil Rights Act of 1964 was to achieve equal employment opportunities for individuals covered under the Act,¹ and for employers to focus on employee qualifications.² Sex discrimination is prohibited under Title VII, and since 1964, the Supreme Court has interpreted this prohibition to cover far more than the decision by an employer not to hire a woman for one job, or a man for another.³ For example, the court has found that the statute's prohibition against sex discrimination protects employees from sexual harassment in the workplace,⁴ including same-sex harassment,⁵ and discrimination based on an employee's failure to conform to gender stereotypes.⁶ Congress has yet to add sexual orientation as a protected category to Title VII, and the Supreme Court has also yet to decide whether sexual orientation discrimination is covered under the statute.⁷ While the majority of federal appellate courts have determined that sexual orientation is not covered,⁸ the Equal Employment Opportunity Commission ("EEOC")⁹ and the Seventh and Second Circuit Courts of Appeals have interpreted the term "sex" in the statute to include sexual orientation.¹⁰

LEGISLATIVE HISTORY PASSING TITLE VII

When Title VII was passed in 1964, Congress did not debate whether to categorically include or exclude sexual orientation discrimination from coverage.¹¹ Representative Howard Smith introduced an amendment adding "sex" to Title VII in an apparent "spirit of satire and ironic cajolery."¹² The amend-

¹ *Griggs v. Duke Power Co.*, 401 U.S. 424, 429 (1971).

² *Price Waterhouse v. Hopkins*, 490 U.S. 228, 243 (1989).

³ *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

⁴ *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986).

⁵ *Oncale*, *supra* note 3.

⁶ *Price Waterhouse*, *supra* note 2 at 241.

⁷ *Evans v. Georgia Reg'l Hosp.*, 850 F.3d 1248, 1251 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 557 (2017)

⁸ *Id.* at 1255-56.

⁹ *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 439764 at 10.

¹⁰ *Hively v. Ivy Tech Cmty. Coll. Of Indiana*, 853 F.3d 339, 341 (7th Cir. 2017).

¹¹ 110 Cong. Rec. 2577-84 (1964).

¹² Francis J. Vaas, *Title VII: Legislative History*, Vol. 7 Boston Coll. L. Rev. 441 (April 1, 1966).

ment was agreed to after a hasty debate.¹³ No hearings were held in either the Judiciary Committee or the Education and Labor Committee.¹⁴ Other representatives believed the amendment would benefit women, but did not support it because the driving motivation behind Title VII was to secure equal treatment for African-Americans.¹⁵ For example, Representative Katharine St. George said that the addition of “sex” would make Title VII “comprehensive,” and help ensure that women have more opportunities, but noted that the bill was primarily for the purpose of ending discrimination against African-Americans.¹⁶ While no representatives mentioned homosexuality when discussing the amendment, this was most likely because homosexuality “was almost invisible in the 1960s.”¹⁷

CURRENT DISCRIMINATION AND A PATCHWORK OF STATE LAWS

Although society has become more accepting of non-heterosexual individuals in recent years,¹⁸ such individuals still experience workplace discrimination due to their sexual orientation.¹⁹ For example, forty-two percent of lesbian, gay, or bisexual employees have experienced workplace discrimination at some point in their lives,²⁰ and twenty-three percent of lesbian individuals have been treated unfairly by an employer.²¹ Sixty-two percent of LGBT employees have heard jokes about lesbian or gay individuals at their workplace.²² Additionally, thirty-six percent of LGBT employees reported not opening up

¹³ *Id.* at 442.

¹⁴ *Id.*

¹⁵ 110 Cong. Rec. 2580-81 (1964).

¹⁶ 110 Cong. Rec. 2580-81 (1964).

¹⁷ *Hively*, supra note 10 (J. Posner concurring).

¹⁸ Hannah Fingerhut, *Support steady for same-sex marriage and acceptance of homosexuality*, PEW RESEARCH CENTER (May 12, 2016), <http://www.pewresearch.org/fact-tank/2016/05/12/support-steady-for-same-sex-marriage-and-acceptance-of-homosexuality/>.

¹⁹ Brad Sears & Christy Mallory, *Documented Evidence of Employment Discrimination & Its Effects on LGBT People*, THE WILLIAMS INSTITUTE 2, 5 (July 2011), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-20111.pdf>.

²⁰ *Id.* at 4.

²¹ Anna Brown, *As Congress considers action again, 21% of LGBT say they faced workplace discrimination*, PEW RESEARCH CENTER (Nov. 4, 2013), <http://www.pewresearch.org/fact-tank/2013/11/04/as-congress-considers-action-again-21-of-lgbt-adults-say-they-faced-workplace-discrimination/>.

²² Deena Fidas & Liz Cooper, *The Cost of the Closet and the Rewards of Inclusion: Why the Workplace Environment for LGBT People Matters to Employers*, HUMAN RIGHTS CAMPAIGN, 15 (May, 2014), http://assets2.hrc.org/files/assets/resources/Cost_of_the_Closet_May2014.pdf.

to co-workers, because they feared being stereotyped,²³ and twenty-three percent said they might not be considered for advancement if they opened up to their co-workers.²⁴ These concerns have led a majority of LGBT employees to hide their orientation at the workplace.²⁵

Further, in most states, lesbian and gay individuals can get legally married, experience workplace discrimination because of their marriage, but have no legal recourse.²⁶ Such a “paradoxical legal landscape” creates uncertainty for employees experiencing sexual orientation discrimination.²⁷ Twenty-two states and the District of Columbia have enacted laws prohibiting sexual orientation discrimination.²⁸ In the other twenty-eight states, employment discrimination on the basis of sexual orientation is still legal.²⁹ Also, three states have enacted laws preventing passage or enforcement of local LGBT nondiscrimination laws.³⁰ For example, North Carolina’s law, passed in March 2016, established a statewide nondiscrimination ordinance that explicitly supersedes any local nondiscrimination measures.³¹ The law’s statewide protections cover race, religion, color, national origin and biological sex — but not sexual orientation or gender identity.³² The Supreme Court’s holding in *Obergefell v. Hodges* allowed individuals across the country to legally marry their same-sex partners.³³ However, many continue to experience workplace discrimination due to their same-sex marriages and sexual orientation.³⁴

RECENT LEGISLATIVE INACTION TO AMEND TITLE VII

The legislative history of Congress’ failure to amend Title VII to prohibit sexual orientation discrimination does not reflect popular support for amend-

²³ *Id.* at 10.

²⁴ *Id.*

²⁵ *Id.* at 9.

²⁶ *Hively, supra* note 10 at 342.

²⁷ *Id.*

²⁸ *LGBTQ+ Resources: Nondiscrimination Laws*, UNIVERSITY OF WISCONSIN SYSTEM (Jan. 18, 2018), <https://www.wisconsin.edu/lgbtq-resources/employment-non-discrimination-laws/>.

²⁹ *Id.*

³⁰ *Id.*

³¹ Camila Domonoske, *North Carolina Passes Law Blocking Measures To Protect LGBT People*, NPR (March 24, 2016), <https://www.npr.org/sections/thetwo-way/2016/03/24/471700323/north-carolina-passes-law-blocking-measures-to-protect-lgbt-people>.

³² *Id.*

³³ *Obergefell v. Hodges*, 135 S.Ct. 2584, 2589 (2015).

³⁴ Sears and Mallory, *supra* note 19 at 4, 5.

ment.³⁵ Instead, the legislative history indicates that Congress' failure is partly due to political partisanship rather than a bi-partisan consensus that the statute should not prohibit sexual orientation discrimination.³⁶ For example, the Equality Act of 2015 was co-sponsored by 176 Democratic representatives but only two Republican representatives.³⁷ Similarly, the Employment Non-Discrimination Act of 2013 was co-sponsored by 198 Democratic representatives but only eight Republican representatives.³⁸ Both bills were referred to committees, but failed to make it to a full vote within the House.³⁹

Despite such legislative inaction, seventy-one percent of Americans, including majorities in all fifty states, support enacting laws that would protect lesbian and gay individuals from workplace discrimination.⁴⁰ Even groups that disapprove of same-sex marriage support workplace protections for lesbians and gays.⁴¹ For example, although sixty percent of Republicans do not support same-sex marriage, sixty-one percent support workplace discrimination protections for lesbian and gay individuals.⁴² Congress' failure to add sexual orientation to Title VII does not demonstrate a consensus,⁴³ because a vast majority of Americans support protecting homosexual employees from workplace discrimination.⁴⁴

³⁵ Betsy Cooper et al., *Beyond Same-sex Marriage: Attitudes on LGBT Nondiscrimination Laws and Religious Exemptions from 2015 American Values Atlas*, PUBLIC RELIGION RESEARCH INSTITUTE (Feb. 18, 2016), <http://www.ppri.org/research/poll-same-sex-gay-marriage-lgbt-nondiscrimination-religious-liberty/>.

³⁶ See e.g., Equality Act of 2015, H.R. 3185, 114th Cong. (2015) (Amends the Civil Rights Act of 1964 to include sex, sexual orientation, and gender identity among the prohibited categories of discrimination) <https://www.congress.gov/bill/114th-congress/house-bill/3185>. Employment Non-Discrimination Act of 2013, H.R. 1755, 113th Cong. (2013) ("Prohibits employment discrimination on the basis of actual or perceived sexual orientation or gender identity by covered entities") <https://www.congress.gov/bill/113th-congress/house-bill/1755>.

³⁷ Co-sponsors, H.R. 3185, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/house-bill/3185/cosponsors>.

³⁸ Co-sponsors, H.R. 1755, 113th Cong. (2013), <https://www.congress.gov/bill/113th-congress/house-bill/1755/cosponsors>.

³⁹ Actions Overview, H.R. 3185, 114th Cong., <https://www.congress.gov/bill/114th-congress/house-bill/3185/all-actions>; Actions Overview, H.R. 1755, 113th Cong., <https://www.congress.gov/bill/113th-congress/house-bill/1755/all-actions>.

⁴⁰ Cooper et al., *supra* note 35.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Hively*, *supra* note 10 at 344.

⁴⁴ Cooper et al., *supra* note 35.

BALDWIN V. FOXX

Against this background, the EEOC, the agency entrusted by Congress to enforce Title VII, has determined that sexual orientation discrimination is prohibited by Title VII.⁴⁵ In *Baldwin v. Foxx*, the male complainant alleged that his employer did not select him for a position, because he was gay.⁴⁶ He alleged that his supervisor, who was involved in the selection process for the position, made several negative comments about his sexual orientation, such as saying, “We don’t need to hear about that gay stuff,” when the complainant spoke of his same-sex partner.⁴⁷

The agency found that sexual orientation as an idea cannot be understood without reference to sex.⁴⁸ Since an individual is considered “homosexual” when he or she is physically and/or romantically attracted to someone of the same sex, and an individual is considered “heterosexual” if he or she is physically and/or romantically attracted to someone of the opposite-sex,⁴⁹ “sexual orientation is inseparable from and inescapably linked to sex.”⁵⁰ The agency held that when an employee alleges sexual orientation discrimination under Title VII, the question is not whether sexual orientation is explicitly listed in the statute as a prohibited basis for employment actions, but whether the employer relied on sex-based considerations or took sex into account when it took the challenged employment action.⁵¹ Therefore, an employer, who has taken an employment action based on an employee’s sexual orientation, has taken the employee’s sex into account in its decision.⁵² According to the EEOC, an employee alleging sexual orientation discrimination has stated a claim of sex discrimination under Title VII.⁵³ Also, sexual orientation discrimination “necessarily” involves discrimination on the basis of gender stereotypes, because

⁴⁵ *Baldwin*, *supra* note 9 at 10.

⁴⁶ *Id.* at 2.

⁴⁷ *Id.*

⁴⁸ *Id.* at 5.

⁴⁹ See, e.g., *Definition of Terms: Sex, Gender, Gender Identity, Sexual Orientation*, AMERICAN PSYCHOLOGICAL ASSOCIATION, (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”).

⁵⁰ *Baldwin*, *supra* note 9 at 5.

⁵¹ *Id.* at 4.

⁵² *Id.* at 5.

⁵³ *Id.* at 10.

sexual orientation discrimination is “often, if not always, motivated by a desire to enforce heterosexually defined gender norms.”⁵⁴

HIVELY V. IVY TECH COMMUNITY COLLEGE OF INDIANA

Similarly, the Seventh Circuit Court of Appeals recently found that sexual orientation discrimination is a form of sex discrimination, gender non-conformity discrimination, and association discrimination.⁵⁵ First, the court found that sexual orientation discrimination is a form of sex discrimination, because such discrimination treats otherwise similarly-situated people differently because of their sex.⁵⁶ In *Hively*, the openly lesbian plaintiff believed her employer did not hire her for any of the positions she applied to and did not renew her current contract, because of her sexual orientation.⁵⁷ She then brought a claim for sexual orientation discrimination under Title VII.⁵⁸

The Seventh Circuit isolated the significance of the plaintiff's sex to the employer's decision, and found that the plaintiff described “paradigmatic sex discrimination,” because she alleged that if she had been a man living with, dating, or married to a woman, and everything else remained the same, including the sex of the partner, the employer would not have refused to promote her, and would not have fired her.⁵⁹ The fundamental question in the Seventh Circuit's counterfactual was not whether a lesbian woman is treated better or worse than gay men, because such a comparison changes the protected characteristic at issue, sex, for both the plaintiff and her partner.⁶⁰ Rather, the correct question is whether the plaintiff's sex played a role in the employment decision.⁶¹

Second, the court found that no line exists between a gender nonconformity claim and a sexual orientation claim.⁶² The court held that the lesbian plaintiff, alleging sexual orientation discrimination, represented 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 normal and

⁵⁴ *Baldwin*, *supra* note 9 at 7, 8 (quoting *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002)).

⁵⁵ *Hively*, *supra* note 10 at 346, 349.

⁵⁶ *Id.* at 346.

⁵⁷ *Id.* at 343.

⁵⁸ *Id.*

⁵⁹ *Id.* at 345.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 346.

other forms of sexuality as exceptional): she is not heterosexual.”⁶³ Her claim is no different from claims brought by women rejected for jobs in traditionally male dominated workplaces.⁶⁴ Such women were discriminated against by employers policing the boundaries of what behavior they considered acceptable for women.⁶⁵ Any disapproval or job decision based on the fact that an employee, woman or man, “marries a same-sex partner, is a reaction purely and simply based on sex.”⁶⁶

Third, the court in *Hively* found that sexual orientation discrimination is a form of association discrimination by relying on the opinions in cases involving discrimination against an employee due to his intimate association with a partner of a different race.⁶⁷ For example, when a plaintiff experiences an adverse employment action based on his interracial marriage or association, he experiences discrimination because of his own race.⁶⁸ In *Holcomb v. Iona College*, the court found that an employer may violate Title VII by taking action against an employee because of the employee’s association with a person of another race.⁶⁹ Similarly, a plaintiff, who alleges employment discrimination based on his interracial marriage or association, by definition states a claim of discrimination under Title VII because of his own race.⁷⁰ In *Parr v. Woodmen of World Life Insurance Company*, the court found that it makes no difference whether the plaintiff specifically alleges in his complaint that he has been discriminated against because of his race.⁷¹ Accordingly, the court in *Hively* found that the lesbian plaintiff suffered association discrimination, because the text of Title VII makes no distinction between the prohibited characteristics.⁷²

ZARDA V. ALTITUDE EXPRESS

On February 26, 2018, the Second Circuit Court of Appeals also found that sexual orientation discrimination is a form of sex discrimination.⁷³ In *Zarda v. Altitude Express*, the court, using similar reasoning as the Seventh

⁶³ *Id.*

⁶⁴ *Id.*; see *Price Waterhouse*, 490 U.S. at 241 (an accounting firm).

⁶⁵ *Hively*, *supra* note 10 at 346.

⁶⁶ *Id.* at 347.

⁶⁷ *Id.* at 349.

⁶⁸ *Holcomb v. Iona Coll.*, 521 F.3d 130, 139 (2d Cir. 2008).

⁶⁹ *Holcomb*, *supra* note 68 at 139.

⁷⁰ *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986).

⁷¹ *Id.* (italics are original in the opinion).

⁷² *Hively*, *supra* note 10 at 349.

⁷³ *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 132 (2d Cir. 2018).

Circuit in *Hively*, found sexual orientation discrimination to be prohibited under Title VII.⁷⁴ For example, the Second Circuit found the *Hively* court correctly determined that sexual orientation is a function of sex by comparing a female and male employee who both exhibit the trait at issue, being attracted to women.⁷⁵ The court also found that sexual orientation discrimination is based on sex stereotypes, because beliefs about sexual orientation necessarily involve considerations of sex.⁷⁶ The court noted that district courts have “resorted to lexical bean counting” between derogatory terms to decide whether discrimination was based on sexual orientation discrimination or sex discrimination.⁷⁷

OTHER FEDERAL CIRCUITS

The majority of other federal circuits have opposed expanding Title VII to cover sexual orientation discrimination.⁷⁸ Yet, most of the majority opinions in those cases do not discuss the issue as thoroughly as the *Hively* and *Zarda* opinions, and they also rely decades-old circuit precedent.⁷⁹ For example, the First Circuit in *Higgins v. New Balance Athletic Shoe, Inc.*, relied on a now 29-year-old opinion, which itself did not discuss Title VII’s coverage of sexual orientation, in finding that the statute does not prohibit sexual orientation discrimination.⁸⁰ Yet, Judge William Pryor, concurring in *Evans v. Georgia Regional Hospital*, addressed the EEOC’s holding in *Baldwin v. Foxx* that sexual orientation discrimination is a form of gender non-conformity discrimination.⁸¹ Judge Pryor found that sexual orientation discrimination does not fall under gender non-conformity discrimination, because the discrimination at issue in *Price Waterhouse*, involved the behavior of the female plaintiff, not her status as a woman.⁸² Additionally, Judge Pryor found that sexual orientation discrimination cannot, by definition, constitute gender nonconformity discrimination, because such a definition implies that all lesbian and gay individ-

⁷⁴ *Id.* at 116, 118.

⁷⁵ *Id.* at 116-17, 118.

⁷⁶ *Id.* at 122.

⁷⁷ *Zarda, supra* note 73 at 121.

⁷⁸ *Evans, supra* note 7 at 1255-56.

⁷⁹ See *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006) (relying on a one sentence explanation that it was evident from the language of the statute that Title VII does not cover sexual orientation); see also *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999).

⁸⁰ *Higgins, supra* note 79 at 259.

⁸¹ *Evans, supra* note 7 at 1258.

⁸² *Id.*

uals behave the same way and have the same interests, and it ignores the diversity of experiences among homosexual individuals.⁸³

PROGRESSIVE LEGAL COMMENTARY

The American Civil Liberties Union of Illinois is a non-partisan, non-profit organization dedicated to protecting the liberties of Illinoisans guaranteed by the U.S. Constitution, the state Constitution, as well as state and federal human rights laws.⁸⁴ The organization accomplishes its goals through litigation, lobbying, and education.⁸⁵ Ghirlandi Guidetti is an attorney in the organization's LGBT & HIV Project.⁸⁶ Guidetti believes that the Supreme Court should decisively address whether sexual orientation is covered under Title VII, because federal courts are not uniformly interpreting the statute.⁸⁷ This lack of uniformity results in federal law only protecting some LGBTQ individuals.⁸⁸ "If you aren't in one of those circuits and you experience discrimination because of your sexual orientation, your recourse under federal law may be limited and may depend on whether you can show that the discrimination against you was motivated by gender stereotyping, rather than your sexual orientation," says Guidetti.⁸⁹ Additionally, he believes the type of reasoning employed by Judge Pryor in *Evans* is misplaced, because "[c]ourts shouldn't compel LGBTQ individuals who have been subjected to discrimination because of who they are to walk an imaginary tightrope pulled between gender nonconformity discrimination and sexual orientation discrimination."⁹⁰ According to Guidetti, "[i]t all comes down to the fact that people who are gay or lesbian necessarily defy gender-stereotypes," and that gender nonconformity discrimination has been interpreted to be prohibited by the statute.⁹¹

⁸³ *Id.*

⁸⁴ ACLU-Illinois, *About Us*, <https://www.aclu-il.org/en/about/about-us>.

⁸⁵ *Id.*

⁸⁶ Ghirlandi Guidetti, *No One Should Have to Fear Using the Restroom*, ACLU-ILLINOIS (June 20, 2016), <https://www.aclu-il.org/en/news/no-one-should-have-fear-using-restroom>.

⁸⁷ Email Interview with Ghirlandi Guidetti, ACLU-Illinois Attorney (Feb. 23, 2018) (noting these are the opinions of Guidetti, and not necessarily those of the ACLU).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

CONCLUSION

The current status of and possible solutions for lesbian, gay, and bisexual individuals, who experience workplace discrimination, are unclear. The Seventh and Second Circuits, as well as the EEOC, have all found that sexual orientation discrimination is, in fact, a form of sex discrimination.⁹² However, the other federal circuits rely on past precedent, and many state legislatures have yet to prohibit sexual orientation discrimination or actively oppose doing so.⁹³ Considering this country's foundational separation of powers principle, the proper channel for amending Title VII to include sexual orientation is through Congress, not the federal judiciary. However, in an era of Congressional dysfunction and polarization,⁹⁴ legislative amendment to Title VII seems unlikely, especially considering Congress' repeated failure to amend the statute to include sexual orientation.⁹⁵ Therefore, it will be up to the federal courts and state legislatures to ensure that lesbian and gay individuals have protections from workplace discrimination.

⁹² *Hively*, *supra* note 10 at 341, *Zarda*, *supra* note 73 at 132, *Baldwin*, *supra* note 9 at 10.

⁹³ *Evans*, *supra* note 7 at 1255-56, *LGBTQ+ Resources: Nondiscrimination Laws*, *supra* note 28, *Zarda*, *supra* note 73 at 116.

⁹⁴ Sheryl Gay Stolberg and Nicholas Fandos, *As Gridlock Deepens in Congress, Only Gloom Is Bipartisan*, N.Y. TIMES (Jan. 27, 2018), <https://www.nytimes.com/2018/01/27/us/politics/congress-dysfunction-conspiracies-trump.html>.

⁹⁵ See e.g., Actions Overview, H.R. 3185, 114th Cong., *supra* note 39.