Pushing the Boundaries of Sex Discrimination Under Title VII

Does Discrimination "Because of Sex" Cover Gender Identity and Sexual Orientation?

By Patrick D. Smith

As cultural views on sex, gender, and sexual relationships have changed, there is little doubt the federal courts' view of what constitutes discrimination "because of sex" has also evolved and expanded.

When Congress passed Title VII of the Civil Rights Act of 1964, it was generally understood the purpose of the law was to protect female employees from discrimination because they were women. That is, those who were female by nature and biology were entitled to the same terms and conditions of employment as males.

That sex was included as a protected class in Title VII was almost an afterthought to the law's sponsors. Representative Howard Smith of Virginia proposed a floor amendment to the bill just one day before the House voted to approve Title VII. Some have claimed Representative Smith added sex as a protected class in an effort to poison the bill and ensure its defeat. But, there is also evidence Smith was a supporter of women's rights in the workplace, and knowing the bill had enough support to pass (even though he voted against it), Smith wanted women to be protected by the law.

Over the course of its 50 year history, courts have interpreted the phrase "because of… sex" more broadly than the amendment's sponsor probably understood it to mean when Title VII was enacted. For example, in 1971, the Fifth Circuit held Title VII's prohibition of discrimination based upon sex also protected men, ruling that an airline could not hire only women as flight attendants. *See Diaz v. Pan Am. World Airways*, 442 F.2d 385, 388 (5th Cir. 1971). In 1986, the Supreme Court recognized that sexual harassment was a form of sex discrimination that violated Title VII. *See Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). In 1989, the Court found discrimination "because of sex" extended to employment decisions based upon a female employee's behavior that did not conform to gender stereotypes. *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Protection against sexual harassment was later extended to include harassment by an employee of the same sex. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75

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(1998). The willingness of courts to expand the concept of discrimination "because of… sex" to include a variety of conduct and behavior affecting both males and females mirrored changing cultural attitudes towards traditional notions of sex and gender.

Congress has attempted to amend Title VII to add sexual orientation and/or gender identity as protected classes under Title VII. As early as 1974, legislation was introduced in the House to amend the Civil Rights Act to include protection on the basis of sexual orientation. Similar efforts were made in 1994 with a bill known as the Employment Non-Discrimination Act (ENDA). In 2007, gender identity protection was added to ENDA. No version of ENDA has passed both houses of Congress.

To date, no federal circuit court of appeal has extended Title VII to recognize sexual orientation or gender identity as protected classes. Some circuits, however, have been receptive to claims of discrimination by transgendered plaintiffs under the theory they did not conform to gender stereotypes.

The lack of success in persuading Congress to pass ENDA has led to other efforts to recognize sexual orientation and gender identity as protected classes, under Title VII or otherwise. In 2014, President Obama signed Executive Order 13672, which prohibited federal contractors from discriminating on the basis of sexual orientation and gender identity. At least 20 states have added sexual orientation and/or gender identity protections to their civil rights laws. In administrative decisions involving federal sector employees, the EEOC has ruled that both gender identity (*Macy v. Holder*, EEOC DOC 0120120821, 2012 WL 1435995 (April 20, 2012)) and sexual orientation (*Baldwin v. Foxx*, EEOC DOC 0120133080, 2015 WL 4397641 (July 15, 2015)) are covered by Title VII.

To date, no federal circuit court of appeal has extended Title VII to recognize sexual orientation or gender identity as protected classes. Some circuits, however, have been receptive to claims of discrimination by transgendered plaintiffs under the theory they did not conform to gender stereotypes. While no circuit has recognized discrimination based upon sexual orientation, in July 2016, the Seventh Circuit issued a lengthy *dictum* criticizing the failure of Title VII to prohibit sexual orientation discrimination and calling for the Supreme Court or Congress to act. *See Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698 (7th Cir. 2016), *reh'g granted en banc* (October, 11, 2016). On November 30, 2016, the Seventh Circuit sitting *en banc* heard oral argument in *Hively*, but as of the date this article was submitted for publication, no decision had been issued.

The remainder of this article will discuss the significant federal cases that have addressed discrimination on the basis of gender identity and sexual orientation under Title VII. This area of the law is continuing to evolve at a rapid pace. Absent action by Congress, it is likely the U.S. Supreme Court will address these issues in the foreseeable future.

The Courts' Treatment of Title VII Claims Involving Gender Identity

The first courts to consider Title VII claims brought by plaintiffs seeking protection from discrimination based on their gender identity adopted the position that the plain meaning of the term "sex" did not extend to identification with the opposite sex. Two prominent early decisions held discrimination based on "transsexualism" is not discrimination "because of… sex." *See Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977). In *Holloway*, a biologically male employee of Arthur Andersen brought suit under Title VII, alleging her employer discharged her after she began her transition from living as a male to living as a female. *Id.* at 661. The court relied primarily on the lack of an indication that Congress intended Title VII to apply to transgendered individuals:

> Congress has not shown an intent other than to restrict the term "sex" to its traditional meaning. Therefore, this court will not expand Title VII's application in the absence of Congressional mandate. The manifest purpose of Title VII's prohibition against sex discrimination in employment is to ensure that men and women are treated equally, absent a bona fide relationship between the qualifications for the job and the person's sex.

Id. at 663. The court therefore held that "[a] transsexual individual's decision to undergo sex change surgery does not bring that individual, nor transsexuals as a class, within the scope of Title VII." *Id.* at 664.

Similarly, the *Sommers* case—where a biological male identifying as a female was discharged because she "misrepresented herself as an anatomical female when she applied for the job"—concluded an employee's identification with the opposite sex did not trigger Title VII protection. 667 F.2d at 750. The court reasoned there was no indication Congress intended Title VII to apply to someone who is transgendered. *Id.* Rather, "the major thrust of the 'sex' amendment was towards providing equal opportunities for women." *Id.* Ultimately, the court held, "[b]ecause Congress has not shown an intention to protect transsexuals, we hold that discrimination based on one's transsexualism does not fall within the protective purview of the Act." *Id.* Thus, the premise that "transsexual" status falls beyond what Congress intended the scope of the term "sex" to encompass served as the central basis underlying the early jurisprudence.

The Influence of *Price Waterhouse v. Hopkins*

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) is perhaps best known as the case that established the causation standard in "mixed motive" discrimination cases. Equally as important, however, was the Court's expansion of the concept of sex discrimination to include employment deci-

sions based upon a woman's failure to conform to "sex stereotypes." *Id.* at 248–51. Hopkins was a female senior manager who was denied partnership because the partners believed she did not act sufficiently feminine. The firm advised Hopkins she would have a better chance at being elected partner if she would, among other things, "take a course at charm school," "walk more femininely," "talk more femininely," and "wear makeup." *Id.* at 251. In holding the employer's decision violated Title VII, the Court relied upon its reasoning in a prior case invalidating a requirement that female employees make larger contributions to a pension fund because they have a longer life expectancy. *Id.* (citing *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707 n. 13 (1978)). The Court in *Manhart* held that "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." 435 U.S. at 707 n. 13 (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)). The Court therefore reasoned that "[a]n employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind." *Price Waterhouse*, 490 U.S. at 251. "[W]e are beyond the day," concluded the Court, "when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group." *Id.*

It was also significant the Court in *Price Waterhouse* used the terms "sex" and "gender" interchangeably. In concluding an employer cannot discharge an employee for deviations from "sex stereotypes," for example, the Court held "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of *gender*." *Id.* at 250 (emphasis added). The Court interpreted the words "because of such individual's… *sex*" to mean "*gender* must be irrelevant to employment decisions." *Id.* (emphasis added). According to the Court, "Congress' intent to forbid employers to take *gender* into account in making employment decisions *appears on the face of the statute*." *Id.* at 239 (emphasis added).

The dictionary definition of "gender" refers to the "behavioral, cultural, or psychological traits typically associated with one sex." "Sex," on the other hand, is defined as "either of the two major forms of individuals…that are distinguished respectively as female or male especially on the basis of their reproductive organs and structures." The Court's characterization of Title VII as prohibiting discrimination because of "gender" was another, albeit subtle, means of expanding "sex" discrimination to include decisions based not only a person's biological sex, but also their psychological traits and behavior.

"Discrimination Because of Sex" Includes Same-Sex Harassment

The expansion of sex discrimination to encompass same-sex behavior occurred in *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). The plaintiff in *Oncale* worked on an oil platform crew, and was forcibly subject to sex-related humiliating actions by co-workers in the presence of the rest of the crew. The critical issue, according to the Court, was "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Id.* Notably, Justice Scalia, writing for the Court, recognized this ruling expanded the textual meaning of "sex" beyond what the sponsors of the law may have intended:

> As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But 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.

Id.

Oncale identified three ways harassment of an employee by someone of the same sex might constitute discrimination "because of sex." First, if the conduct involves explicit or implicit proposals of sexual activity, such an inference would exist in same-sex harassment if the alleged harasser was homosexual. Second, if the harasser was motivated by general hostility to the presence of someone of the victim's sex in the workplace. Third, if the perpetrator harassed employees of the same sex, but not the opposite sex.

From Sex Stereotyping to Gender Identity

The post-*Price Waterhouse* case law addressing gender identity discrimination claims under Title VII may generally be divided into two separate categories. The first recognizes open identification as a member of the opposite sex as a deviation from preconceived gender norms. This category is an extension of the *Price Waterhouse* framework whereby it is unlawful to discriminate against an individual for failing to conform to sex stereotypes. The second category of cases seeks to differentiate between "sex" and "gender" and associates transgender status with one or the other. The cases interpreting "sex" to include "gender identity" hold transgendered status is protected, whereas the cases interpreting "sex" to mean biological sex hold it is not.

The first example of cases falling into the first category is *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000). There, the court reasoned the "logic and language

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of *Price Waterhouse*" compels the conclusion Title VII bars discrimination not only based on an employee's specific biological sex, but also because of his or her failure to conform to the sex stereotypes associated with being male or female. *Id.* at 1201-02. Openly expressing one's identity as a member of the opposite sex is therefore no different from the failure to conform with sex stereotypes in *Price Waterhouse*. *Id.* Additional circuit courts, following this approach, have offered a critique of and departed from the reasoning underlying the pre-*Price Waterhouse* case law:

> Discrimination against the transsexual is then found not to be discrimination "because of… sex," but rather, discrimination against the plaintiff's unprotected status or mode of self-identification. In other words, these courts superimpose classifications such as "transsexual" on a plaintiff, and then legitimize discrimination based on the plaintiff's gender nonconformity by formalizing the nonconformity into an ostensibly unprotected classification.

Smith v. City of Salem, 378 F.3d 566, 574 (6th Cir. 2004); *see also Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) ("The very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior. There is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms.").

The second category of cases adheres to the pre-*Price Waterhouse* analysis differentiating "sex" and "gender." The best example of such a case is *Etsitty v. Utah Transit Auth.*, where the court reasoned as follows:

> [T]here is nothing in the record to support the conclusion that the plain meaning of "sex" encompasses anything more than male and female. In light of the traditional binary conception of sex, transsexuals may not claim protection under Title VII from discrimination based solely on their status as a transsexual.

502 F.3d 1215, 1222 (10th Cir. 2007). The court did suggest, without deciding, that an actionable claim may arise based on discrimination against a transgendered individual for failing to conform to the gender stereotypes of his or her biological sex. *Id.* at 1224.

More recently courts have, even while differentiating "sex" and "gender," held the analysis employed by Etsitty to be too narrow. The court in *Fabian v. Hosp. of Cent. Conn.* reasoned the definition of "sex" extends beyond the biological distinctions between male and female, but also to the social and cultural manifestations associated with a particular biological sex. No. 3:12-cv-1154 (SRU), 2016 WL 1089178, at *13 (D. Conn. March 18, 2016). Similarly, in the context of Title IX, one court concluded dictionary definitions of "sex" did not exclusively rely on a binary division based upon biological sex, and therefore the Department of Health, Education, and Welfare's interpretation of the word "sex" as extending beyond that strict interpretation was not clearly erroneous. *G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 721-22 (4th Cir.), *stay granted pending cert. petition*, 136 S. Ct. 2442 (2016). An unlawful adverse employment action is also made "because of… sex" when motivated by a recent gender reassignment surgery. *See Schroer v. Billington*, 577 F. Supp. 2d 293, 308 (D.D.C. 2008) ("[T]he Library's refusal to hire Schroeer after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was *literally* discrimination 'because of… sex.'").

In some respects, both the *G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.* and *Fabian v. Hosp. of Cent. Conn.* decisions indicate courts have come full circle in their analytical approach to discrimination cases involving transgendered individuals. In each of those cases, the courts relied on the plain wording of the statute, but concluding sex discrimination is broad enough to encompass discrimination based on gender identity.

In total, six federal circuit courts of appeal have adjudicated the merits of a Title VII claim asserted by a transgendered individual. The Sixth, Ninth, and Eleventh Circuits all hold Title VII prohibits discrimination against a transgendered employee on the basis of the reasoning announced in *Price Waterhouse*. *See Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011). In the Seventh, Eighth, and Tenth Circuits, there is no such Title VII protection for transgendered individuals. *See Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007). Both the *Ulane* and *Sommers* decisions, however, were decided pre-*Price Waterhouse*, and the continued force of those opinions is therefore uncertain.

Title VII and Sexual Orientation

As of the date this article was submitted for publication, federal circuit courts of appeal have uniformly rejected claims that sexual orientation is a protected class under Title VII. Whether the plaintiff alleges disparate treatment or harassment, if the adverse or hostile conduct is based upon the plaintiff's sexual orientation, courts have held Title VII provides no relief. *See, e.g.*, *Hively v. Ivy Tech Cmty. Coll.,* 830 F.3d 698, 708 (7th Cir. 2016), *reh'g granted en banc* (Oct. 11, 2106) (relying on past circuit precedent to hold Title VII does not address sexual orientation discrimination); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006) ("[R]ecognition of Vickers' claim would have the effect of *de facto* amending Title VII to encompass sexual orientation as a prohibited basis for discrimination."); *Medina v. Income Support Div., N. M.,* 413 F.3d 1131, 1135 (10th Cir. 2005) ("Title VII's protections… do not extend to harassment due to a person's sexuality."); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001) (affirming decision of district court granting summary judgment to defendant where plaintiff claimed he was harassed on the basis of his sexual orientation); *Simonton v. Runyon*, 232 F.3d 33, 37 (2d Cir. 2000) (declining to recognize "discrimination because of sexual orientation" as "discrimination based on sex."); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999) ("Title VII does not proscribe harassment simply because of sexual orientation."); *Hopkins v. Balt. Gas & Elec. Co.*, 77 F.3d 745, 751–52 (4th Cir. 1996) ("Title VII does not prohibit conduct based on the employee's sexual orientation…."); *U.S. Dep't of Hous. & Urban Dev. v. Fed. Labor Relations Auth.*, 964 F.2d 1, 2 (D.C. Cir. 1992) (recognizing, in *dicta*, that Title VII does not protect sexual orientation); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) ("Title VII does not prohibit discrimina-

tion against homosexuals."); *DeSantis v. Pacific Tel. & Tel Co., Inc*. 608 F.2d 327, 330 (9th Cir. 1979)(Title VII does not prohibit discrimination based upon homosexuality); *Blum v. Gulf Oil Corp*., 597 F.2d 936, 938 (5th Cir. 1979) ("Discharge for homosexuality is not prohibited by Title VII….").

These courts have drawn a line between sexual orientation-based discrimination and discrimination based upon gender non-conformity; the latter being actionable, while the former is not. Likewise, the courts distinguish between harassment of an employee based on the employee's sexual orientation, and harassment of an employee by a person of the same sex. The latter is actionable if it is based upon sex, regardless of the victim's sexual orientation. The former, on the other hand, is not actionable because it depends on the victim's sexual orientation, but is not necessarily based on sex.

In practice these distinctions can be confusing and difficult to apply. Some have complained the attempt to draw lines between gender non-conformity discrimination, same-sex harassment, and sexual orientation discrimination and harassment are arbitrary and not justified in light of the courts' evolving views of sex discrimination. This criticism came to a head in the EEOC's *Baldwin v. Foxx* administrative decision. In *Baldwin*, the Commission ruled that a person alleging sexual orientation discrimination alleges discrimination on the basis of sex under Title VII, effectively recognizing sexual orientation as a protected class.

The EEOC identified three legal bases for recognizing sexual orientation discrimination in the absence of a legislative amendment or Supreme Court precedent. First, the Commission contends "sexual orientation discrimination is based on sex-based preferences, assumptions, expectations, stereotypes, or norms." 2015 WL 4397641, at *5. The very concept of sexual orientation is based upon a person's sexual attractions, and therefore cannot be defined or understood without reference to "sex." Therefore, according to the EEOC, sexual orientation is "inseparable from and inescapably linked to sex." *Id.* Under this view, allegations of sexual orientation discrimination necessarily involve sex-based considerations.

Second, the EEOC contends sexual orientation discrimination is associational discrimination on the basis of sex. "For example, a gay man who alleges that his employer took an adverse employment action against him because he associates with or dates men states a claim for sex discrimination under Title VII; the fact that the employee is a man instead of a woman motivated the employer's discrimination against him." *Id*. at *6. In other words, "an 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." *Id.* (emphasis in original). The EEOC compared such discrimination to associational race discrimination courts have long recognized. *Id.* (citing *Floyd v. Amite County School Dist*., 581 F.3d 244, 249 (5th Cir. 2009); *Holcomb v. Iona Coll*., 521 F.3d 130, 138 (2d Cir. 2008))

Third, the EEOC determined sexual orientation discrimination is based on gender stereotypes, which are actionable under *Price Waterhouse*. According to the EEOC, gender stereotypes involve more than assumptions about over-masculine or feminine behavior: "Sexual orientation discrimination and harassment '[a]re often, if not always, motivated by a desire to enforce heterosexually defined gender norms." *Id.* at *8 (quoting *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002)).

Even though Commission decisions are not binding on the federal courts, the *Baldwin* decision is influencing the view of courts on this issue. Most notably, in *Hively v. Ivy Tech Comm. College*, issued July 28, 2016, a panel of the Seventh Circuit, while affirming the dismissal of a sexual orientation discrimination claim, issued a lengthy *dictum* that questioned the continuing viability of the precedent barring such claims. The plaintiff in *Hively* was a part-time adjunct professor at a community college. She alleged she had the necessary qualifications for full-time employment and had never received a negative evaluation. But, she claimed, the college refused to interview her for any of the six full-time positions for which she applied, and in 2014 her part-time adjunct contract was terminated. The plaintiff alleged she was denied full-time employment and terminated because of her sexual orientation, in violation of Title VII. She did not allege she was discriminated against because she was female, or any other form of sex discrimination the courts have recognized. The district court granted the college's motion to dismiss on the ground that Title VII does not apply to sexual orientation discrimination and therefore the plaintiff did not state a claim for which relief could be granted.

In the introductory paragraph of the Seventh Circuit's opinion, the court stated "[o]nce again this court is asked to consider whether Title VII…protects employees from or offers redress for discrimination based on sexual orientation." 830 F.3d 698, 699. The Seventh Circuit had twice rejected such claims in 2000, and continued to affirm those precedents in 2002, 2003, and most recently in 2014. In a relatively short opinion (about three-and-a-half pages), the three-judge panel affirmed the district court's decision on the same grounds.

These courts have drawn a line between sexual orientation-based discrimination and discrimination based upon gender non-conformity; the latter being actionable, while the former is not.

What made the opinion noteworthy, however, was the eleven page *dictum* that followed the decision of the court. Judge Rovner, joined by Judge Bauer (but not Judge Ripple), wrote:, "[w]e could end the discussion there, but we would be remiss not to consider the EEOC's recent decision [*Baldwin v. Foxx*] in which it concluded that 'sexual orientation is inherently a sex-based consideration' and an allegation of discrimination based upon sexual orientation is necessarily an allegation of sex discrimination under Title VII.'" *Id*. at 702. Judge Rovner seemed sensitive to what she characterized as the EEOC's criticism of the federal circuits generally on this sub-

ject, and of the Seventh Circuit in particular. The EEOC's criticism centered on how the courts addressing the question of sexual orientation discrimination had merely affirmed dismissals of such claims based on prior precedent, without any additional analysis of intervening Supreme Court law and changing workplace norms. Interestingly enough, the intervening Supreme Court opinion in question was none other than *Price Waterhouse v. Hopkins.*

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Judge Rovner noted that, since *Price Waterhouse*, "courts have been haphazardly, and with limited success, trying to figure out how to draw the line between gender norm discrimination, which can form the basis of a legal claim…and sexual orientation discrimination, which is not cognizable under Title VII." *Id.* at 705. The judge argued that discrimination on the basis of sexual orientation is essentially the same as discrimination based upon a person's failure to conform to gender norms. A person with same sex orientation, she wrote, fails to comply with "the quintessential gender stereotype about what men and women ought to do." *Id.* In particular, that person fails to comply with the view that men should have romantic and sexual relationships only with women, and women only with men. According to Judge Rovner, "[l]esbian 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 should play in their relationships." *Id.* at 706.

Because, as Judge Rovner stated, "almost all discrimination on the basis of sexual orientation can be traced back to some form of discrimination on the basis of gender nonconformity," so the roots of sexual orientation discrimination and gender discrimination "wrap around each other inextricably." *Id.* at 705, 706. As a result, Judge Rovner determined it is difficult to draw a line between them, and the efforts of courts to do so as resulted in a jumble of inconsistent precedents." *Id.* at 706.

While acknowledging it may be difficult to disentangle gender discrimination from sexual orientation discrimination, Judge Rovner acknowledged "we cannot conclude it is impossible." *Id.* at 709. "Although it seems likely that most of the causes of discrimination based upon sexual orientation ultimately stem from employers' and co-workers' discomfort with a lesbian woman's or a gay man's failure to abide by gender norms, we cannot say that is must be so in all cases. Therefore we cannot conclude that the two must necessarily be coextensive unless or until either the legislature or the Supreme Court says it is so." *Id.*

Where Do We Go from Here?

Citizens may disagree whether the federal courts or Congress is the most appropriate branch to determine the boundaries of legal protections in the workplace. Regardless of one's view of the separation of powers on this subject, as cultural views on sex, gender, and sexual relationships have changed, there is little doubt the federal courts' view of what constitutes discrimination "because of sex" has also evolved and expanded.

One way or the other, the trend appears to favor recognition of sexual orientation and gender identity as protected classes under Title VII. Cases are pending in the second and eleventh circuits on the issue whether a plaintiff may sue for sexual orientation discrimination under Title VII. *See Christiansen v. Omnicom Group, Inc.* (2d Cir. No. 16-748); *Burrows v. The College of Central Florida* (11th Cir. No. 15-14545). On October 11, 2016, the Seventh Circuit granted a petition for re-hearing *en banc* in *Hivley*, and heard oral argument on November 30, 2016.A split on this issue in these cases, or from cases still pending in the district courts in other circuits, will make the issue ripe for Supreme Court review. It is also possible Congress could act to amend Title VII to identify gender identity and sexual orientation expressly as protected classes under the law, or specifically exclude them.

Protection from employment discrimination based upon sexual orientation and gender identity, however or whenever it occurs, is likely to give rise to other controversies on this subject. There are situations in which the employment rights of individuals who are homosexual or transgendered may conflict with other protected rights of co-employees and even employers. For example, *In Cruzan v. Special Sch. Dist. No. 1*, 294 F.3d 981, 984 (8th Cir. 2002), a female employee alleged the employer's policy allowing a transgender female (biological male) to use the women's restroom created a hostile work environment and discriminated against her on the basis of religion. The court granted summary judgment to the employer because the evidence was not sufficient to show a hostile work environment and because the employee did not notify the employer of her religious objections. But, this case left the door open for such claims based upon different facts.

More recently, a district court in the Eastern District of Michigan granted summary judgment to a funeral home that terminated a transgender female (biological male) who was willing to comply with the female, but not the male, dress code. The court held enforcement of Title VII in these circumstances was not allowed by the Religious Freedom Restoration Act because it imposed a substantial burden on the owner's sincerely held religious belief that a person's sex is a "God-given gift" and people should not deny or attempt to change their sex. *EEOC v. R.G. & G.R. Harris Funeral Homes*, Case No. 14-13710, 2016 WL 4396083, at *15 (E. D. Mich. Aug. 18, 2016), *appeal docketed*, No. 16-2424 (6th Cir. Oct. 13, 2016).

Employer's counsel must recognize that discrimination "because of sex" includes a great diversity of legal claims and theories, and such claims continue to evolve at a rapid pace. At the same time, counsel must be sensitive to how the expanding the rights of one class may lead to conflicts with other protected classes. Navigating these complexities will continue to present challenges for employers and their counsel the foreseeable future. FD