RETURN TO GENDER: FINDING A MIDDLE GROUND IN SEX STEREOTYPING CLAIMS INVOLVING HOMOSEXUAL PLAINTIFFS UNDER TITLE VII

*Ryan M. Martin**

I. INTRODUCTION

The United States has certainly come a long way in making the unjust discrimination of minority groups illegal. We have gone from the days when "separate but equal" was the law of the land,[1] to a time where discrimination based on race runs afoul of both the United States Constitution and the law.[2] We have gone from the days when the refusal to admit women into the legal profession was perfectly fine,[3] to a time when discrimination based on one's gender is repugnant to our laws.[4] The trend in this country is certainly moving toward illegalizing overt discrimination against a variety of minority groups, which were once fair game. However, this trend does not apply for one minority group—homosexuals.[5]

Open discrimination against homosexuals is especially notable in the employment context, where a litany of courts has held that federal law does not outlaw discrimination based on an individual's sexual orientation.[6] However, some courts have recently allowed homosexuals recourse for discrimination under a theory granting protection to individuals suffering adverse employment actions because of their gender-nonconforming behavior.[7] Some see this new theory as a way to finally protect sexual minorities in the employment context, while others have criticized the theory as simply "bootstrapping" into federal law protection against discrimination based on one's sexual orientation. This Comment will examine both sides of this growing legal debate and determine to what extent homosexuals should be protected under Title

* Associate Member, 2005–2006 *University of Cincinnati Law Review*.

1. *See* Plessy v. Ferguson, 163 U.S. 537 (1896).

2. *See generally* Brown v. Bd. of Educ. of Topeka, Shawnee County, Kan., 347 U.S. 483 (1954) and 42 U.S.C. § 2000e-2(a)(1) (2000) (Title VII to the Civil Rights Act of 1964).

3. *See In re* Bradwell, 1869 WL 5503 (Ill. Sept. Term, 1869).

4. *See* United States v. Virginia, 518 U.S. 515 (1996).

5. *See generally* Heather C. Brunelli, *The Double Bind: Unequal Treatment for Homosexuals Within the American Legal Framework*, 20 B.C. THIRD WORLD L.J. 201 (2000).

6. *See, e.g.,* Simonton v. Runyon, 232 F.3d 33 (2d Cir. 2000).

7. *See* discussion *infra* Part II.C. for explication of this theory and the case law supporting.

VII[8] and the gender-nonconforming behavior doctrine.

This Comment adds to the body of Title VII literature by synthesizing relevant case law regarding the gender-nonconforming behavior doctrine and closely examining a novel argument asserted by homosexual plaintiffs in cases still under review in United States Circuit Courts of Appeals. Moreover, this Comment develops a new standard that should apply to future Title VII cases involving homosexual and transsexual plaintiffs in order to streamline Title VII jurisprudence.

This Comment will formulate conclusions by synthesizing a thorough review of previous case law concerning Title VII and gender-nonconforming behavior. Part II of this Comment will briefly examine the origins of Title VII, the statute's prohibition on sex discrimination, and the gender-nonconforming behavior doctrine. Part III will examine case law pertaining to the beginnings of Title VII protection based on gender-nonconforming behavior, the evolution of the doctrine, and how some courts have refused to recognize cases expanding those protected under the statute. Finally, Part IV will conclude that the Supreme Court must develop a clear standard for Title VII claims involving homosexual plaintiffs that will allow homosexuals to be able to sustain sex discrimination claims based on clear and convincing evidence that the discrimination they suffered was a result of their gender-nonconforming mannerisms or appearance. Such a standard will provide clear guidance to lower courts and will give proper protection to homosexuals while remaining faithful to the text and legislative history of Title VII.

II. ORIGINS OF "GENDER-NONCONFORMING BEHAVIOR" DISCRIMINATION

Before exploring the case law regarding Title VII and its potential application to protect discrimination based on sexual orientation, this Part first provides the necessary framework for understanding the statute itself, its protection of sex-based discrimination, and the ever-evolving doctrine of gender-nonconforming behavior.[9]

8. 42 U.S.C. § 2000e-2(a)(1) (2000).

9. Gender-nonconforming behavior is actually not part of any formal doctrine in Title VII jurisprudence. Rather, it is one way courts can find that a plaintiff's actions fall within the statute's protections. For the purposes of this Comment, however, the gender-nonconforming concept will be referred to as a "doctrine" for the sake of clarity.

A. Title VII

Title VII of the Civil Rights Act of 1964 provides:

> it shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .[10]

The Supreme Court has held that this provision "evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment."[11] This Comment will focus solely on the statute's prohibition of discrimination based on sex.

B. Sex-Based Discrimination

Since its inception, Title VII's prohibition of discrimination "because of . . . sex"[12] has been the source of much debate.[13] Interestingly, however, the clause itself was almost not included in the statute.[14] A member of Congress added it at the last minute in an effort to sabotage the Civil Rights Act of 1964, the larger piece of legislation that incorporated Title VII,[15] This strategy failed, however, and Congress enacted Title VII, with "sex" as a protected class, the day after the amendment's addition.[16]

The circumstances behind the passage of the "sex" amendment, however, result in virtually no legislative history dealing with this clause and its meaning in Title VII.[17] Such a dearth of legislative history has often hindered sexual minorities in winning protection under the

10. 42 U.S.C. § 2000e-2(a)(1) (2000).

11. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) (quoting Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).

12. 42 U.S.C. § 2000e-2(a)(1) (2000).

13. The purpose of this Comment is to analyze only the debate as to whether and to what extent homosexuals should be protected under Title VII's prohibition of sex discrimination. No other aspect of the clause is pertinent to this Comment.

14. *See* Zachary A. Kramer, *The Ultimate Gender Stereotype: Equalizing Gender-Conforming and Gender-Nonconforming Homosexuals Under Title VII*, 2004 U. ILL. L. REV. 465, 469–70. Apparently, the "sex" clause was added the day before the legislation was to be voted on in the House of Representatives by Howard Smith, a Southern Democrat who opposed the Civil Rights Act. Smith knew that the addition of "sex" as a class would be controversial and hoped it would be enough to destroy the entire bill. *Id.*

15. *Id.*

16. *Id.* The vote was 168–133 in favor of passage. *Id.*

17. *Id. See also* DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 329–30 (9th Cir. 1979).

statute.[18]

Generally, to succeed in a Title VII action for sex discrimination, a plaintiff must show that, (1) he is a member of a protected class; (2) he is competent to perform the job or is performing his duties satisfactorily; (3) he suffered an adverse employment decision or action; and (4) the decision or action occurred under circumstances giving rise to an inference of discrimination based on his membership in the protected class.[19] This Comment focuses on the first inquiry as to who should fall into the protected class of individuals under Title VII's prohibition of discrimination "because of . . . sex."[20]

C. Gender-nonconforming Behavior Discrimination

The gender-nonconforming behavior doctrine was created to fight the harms associated with gender stereotyping. Basically, the theory is invoked when an individual suffers an adverse employment action because he or she does not conform to societal norms of how people of a certain gender should behave.[21] When employers discriminate against employees because their "behavior and demeanor are not consistent with commonly accepted gender stereotypes," some courts have held that they are really discriminating against the employees because of their sex.[22] Thus, the employees can bring a claim under Title VII for sex discrimination.[23] The gender-nonconforming behavior doctrine will be the focus of this Comment, and will be discussed in much more detail below.

18. *See* discussion *infra* at Part IV for analysis of the rationale used by some courts to narrowly construe Title VII's protections.

19. Farias v. Instructional Sys., Inc., 259 F.3d 91, 98 (2d Cir. 2001).

20. This Comment is not concerned with the intricacies of the different forms of Title VII claims plaintiffs may bring, such as harassment claims versus hostile work environment claims. This Comment is concerned only with the scope of the protected class of individuals under Title VII and to what extent this class should encompass homosexuals.

21. *See* Kramer, *supra* note 14, at 467.

22. *Id.*

23. The lead case creating the gender-nonconforming behavior doctrine, although not by name, is *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). See discussion infra at Part III for detailed examination of *Price Waterhouse*.

III. CASE LAW

A. The Beginnings of Protection: Price Waterhouse and its Aftermath

The United States Supreme Court determined that discrimination based on sex stereotyping is actionable under Title VII in *Price Waterhouse v. Hopkins*.[24] In *Price Waterhouse*, a female candidate for partner at a large accounting firm was denied partnership because she did not conform to feminine stereotypes.[25] The employee produced evidence that corporate management described her as macho and thought that she was in need of "a course in charm school."[26] Moreover, the partners expressed displeasure that the employee was "a tough-talking somewhat masculine hard-nosed [manager]" and a woman who used foul language.[27] The partners further intimated that she would improve her chances for advancement by assuming a more feminine walk, dress, and appearance.[28] The Court determined that "in the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."[29]

Interestingly, however, some lower courts interpreted *Price Waterhouse* only to apply to opposite-sex Title VII claims, and not claims based on same-sex discrimination.[30] This interpretation was put to rest after *Oncale v. Sundowner Offshore Servs., Inc.*[31] The Court in that case held that same-sex sexual harassment was actionable under Title VII so long as plaintiffs can prove they faced discrimination *because of their sex*.[32]

The plaintiff in *Oncale*, a roustabout male working on an oil platform in the Gulf of Mexico, was subjected to humiliating treatment, was

24. Price Waterhouse v. Hopkins, 409 U.S. 228 (1989). Portions of the *Price Waterhouse* decision not affecting the particular issues addressed in this article were superseded by the Civil Rights Act of 1991. *See* 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B) (2000).

25. Price Waterhouse, 409 U.S. at 235.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 250. Lower courts later interpreted this statement as the Court's initial determination that gender-nonconforming behavior is protected under Title VII.

30. *See* Goluszek v. H.P. Smith, 697 F.Supp. 1452 (N.D. Ill. 1988) (holding that same-sex sexual harassment claims are *never* allowed under Title VII). Other courts allowed same-sex claims only when the complainant proved the harasser to be homosexual, for courts believed homosexuality shows that sexual desire motivated the harassing behavior. *See* McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191 (4th Cir. 1996).

31. 523 U.S. 75 (1998).

32. *Id.* at 78.

physically assaulted, and was threatened with rape by other male co-workers.[33] After the United States District Court for the Eastern District of Louisiana granted summary judgment for defendants because Title VII protections did not extend to same-sex discrimination, the Court reversed, holding that Title VII "protects men as well as women."[34]

The Court, reasoning that the extension of Title VII protection to same-sex discrimination resulted from common sense, utilized language found in previous Court decisions regarding racial discrimination among homogenous ethnic groups to find that "it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group."[35] Thus, the Court recognized that, although not the primary intent of Title VII, the statutory prohibition against discrimination based on sex applied equally to same-sex discrimination as opposite-sex discrimination.[36] The critical issue in Title VII sex discrimination claims, 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" and not the gender of either the harasser or harassee.[37]

Following *Price Waterhouse*, federal courts were quick to distinguish between discrimination based on gender-nonconforming behavior, which is prohibited by Title VII, and discrimination based on one's sexual orientation, which is not. For example, in *Nichols v. Azteca Restaurant Enterprises, Inc.,*[38] Antonia Sanchez sued his employer under Title VII.[39] The plaintiff claimed that his suit fell within *Price Waterhouse* because his harassment stemmed from his effeminate nature and nonconformance to his coworker's "views of a male stereotype."[40] In particular, Sanchez claimed that he was referred to as "she" and "her" by his co-workers and that they mocked him for carrying his tray as a woman would.[41] Moreover, Sanchez was called a "faggot" and other names evincing that his co-workers were questioning his sexual orientation on a continuous basis.[42]

33. *Id.* at 77. The Court intentionally refused to discuss the precise details of Oncale's claims "in the interest of both brevity and dignity." *Id.*

34. *Id.* at 78 (citing Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C., 462 U.S. 669, 682 (1983)).

35. *Id.* (quoting Castaneda v. Partida, 430 U.S. 482, 499 (1977)).

36. *Id.* at 79.

37. *Id.* at 80 (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (Ginsburg, J., concurring)).

38. 256 F.3d 864 (9th Cir. 2001).

39. *Id.* at 869.

40. *Id.*

41. *Id.* at 870.

42. *Id.*

The court determined that the evidence presented by Nichols brought his case in line with *Price Waterhouse* because it showed that "the systematic abuse directed at Sanchez reflected a belief that Sanchez did not act as a man should act."[43] Interestingly, however, the court never specifically addressed the taunts that were directed at Sanchez and that seemed to correlate to a belief that he was homosexual. Moreover, the defense did not argue that the discrimination suggested by Sanchez was uncognizable under Title VII because it was based on plaintiff's sexual orientation, not his failure to conform to the male stereotype.[44]

The argument that an employee's claim under Title VII should fail because it was based on sexual orientation discrimination appeared as a defense, however, in *EEOC v. Grief Bros. Corp.*[45] In *Grief Bros*., Michael Sabo, a homosexual man and laborer in the defendant's manufacturing plant, sued his employer and various employees for harassing, emasculating, and humiliating him with public comments and actions questioning his sexual orientation.[46] Sabo alleged that this treatment occurred because he wore an earring and did not take part in sexually explicit discussions about women.[47] But the defense argued that Sabo was an admitted homosexual, and that the discrimination he experienced was based on his sexual orientation and not his gender.[48]

The Court analyzed this defense by compared the facts of the case with those in *Simonton v. Runyon*.[49] In *Simonton*, a male homosexual postal service employee was subjected to repeated harassment. However, the employee's claim was not actionable under Title VII because "[t]he co-workers who repeatedly harassed Simonton knew that he was a homosexual and focused their attacks against him on that basis."[50] Because Simonton suffered from discrimination based on his homosexuality, he could not bring a claim of discriminatory treatment under Title VII.[51]

On the other hand, the court in *Grief Bros.* distinguished *Simonton*, holding that, unlike the plaintiff in *Simonton*, Sabo never told his co-workers that he was a homosexual.[52] More importantly, the harassers

43. *Id.* at 874.
44. *See* Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864 (9th Cir. 2001).
45. No. 02-CV-468S, 2004 WL 2202641 (W.D.N.Y. Sept. 30, 2004).
46. *Id.* at *2.
47. *Id.*
48. *Id.* at *10.
49. 232 F.3d 33 (2d Cir. 2000).
50. *Grief Bros.*, 2004 WL 2202641 at *10.
51. *Simonton*, 232 F.3d at 35.
52. *Grief Bros.*, 2004 WL 2202641 at *10.

never even perceived Sabo to be a homosexual.[53] Based on this evidence, the court concluded that Sabo's claim was rooted in discrimination regarding gender-nonconforming behavior, and thus, allowed him to proceed with his Title VII claim.[54]

Importantly, while post-*Price Waterhouse* courts were willing to recognize Title VII discrimination claims based on *gender stereotyping,* claims of discrimination specifically dealing with a plaintiff's sexual orientation were still uncognizable. In fact, many courts expressed concern over claims based on gender-nonconforming behavior, and they indicated that such claims "would not bootstrap protection for sexual orientation into Title VII."[55]

B. Growing Doctrine: Application to Transsexuals

Prior to *Price Waterhouse*, federal appellate courts interpreted Title VII's prohibition of discrimination "because of . . . sex" to include discrimination based only on an individual's anatomical or biological characteristics (having male or female genitals) and not societal norms attached to the male or female gender.[56] Therefore, courts routinely denied Title VII relief to transsexuals who suffered discrimination based on "gender" because they did not conform to social norms of how males or females were supposed to behave.[57] *Price Waterhouse* eviscerated this interpretation when the "Supreme Court established that Title VII's reference to 'sex' encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms."[58] In the wake of this new interpretation, the door opened for transsexuals to bring Title VII suits based not on their status as transsexuals, but on the doctrine of gender-nonconforming behavior.

In *Smith v. City of Salem*, a city firefighter tested the *Price Waterhouse* expansion of gender-nonconforming behavior.[59] Jimmie L.

53. *Id.* When asked whether they thought Sabo was gay, defendants responded with testimony such as, "I don't know, I don't know. I got no [sic] thought on that." Other defendants testified that they did not believe Sabo was in fact gay when they taunted him at work. *Id.*

54. *Id.* at *11.

55. *Id.* at *15.

56. Smith v. City of Salem, Ohio, 378 F.3d 566, 572–73 (6th Cir. 2004).

57. *See* Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982) (failing to allow transsexual to make Title VII claim based on gender-nonconforming behavior because "for the purposes of Title VII the plain meaning must be ascribed to the term 'sex' [only pertaining to anatomical body parts, not behavior] in absence of clear congressional intent to do otherwise."). *See also* Holloway v. Arthur Andersen & Co., 566 F.2d 659, 661–63 (9th Cir. 1977) (same).

58. *Smith*, 378 F.3d at 573.

59. *Id.*

Smith, a transsexual male who was diagnosed with Gender Identity Disorder ("GID"), had been employed by the city of Salem Fire Department for seven years without any negative incidents.[60] After being diagnosed with GID, however, Smith began "expressing a more feminine appearance on a full-time basis" at work.[61] Smith's behavior induced comments from his co-workers, who felt that Smith was not acting "masculine enough" in his position as a city firefighter.[62] Smith discussed his co-workers' conduct with a supervisor who promised to keep the conversation secret.[63] However, the supervisor quickly discussed Smith's disclosures with other city officials who developed a plan to terminate Smith's employment.[64] Smith sued the city under Title VII for sex discrimination based on gender-nonconforming behavior.[65]

The city argued, and the district court held, that Title VII did not protect transsexuals, and that Smith's invocation of sex discrimination under the *Price Waterhouse* standard was simply a ruse.[66] The district court held that sex-stereotyping was simply a term-of-art that was inapplicable to Smith's case because "Title VII does not prohibit discrimination based on an individual's transsexualism."[67]

The appeals court flatly rejected the district court's holding and rationale as clearly inapposite to *Price Waterhouse*'s ruling that sex discrimination encompassed both disparate treatment based on biological differences and gender-nonconforming behavior.[68] Emphasizing the clear holding of *Price Waterhouse* that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group," the court determined that the driving force behind the city's actions was Smith's gender-nonconforming behavior and feminine appearance.[69]

60. *Id.* at 568.

61. *Id.* Smith's exact behavior and choice of attire was not addressed in the text of the case.

62. *Id.*

63. *Id.*

64. *Id.* The plan involved requiring Smith to undergo three psychological evaluations. Supervisors hoped that Smith would not want to endure the evaluations and either resign or refuse to comply with the order from fire department supervisors, which would lead to Smith's termination on grounds of insubordination.

65. *Id.* at 569. Smith's claim also alleged a cause of action for retaliation and discrimination under 42 U.S.C. § 1982.

66. *Id.* at 571.

67. *Id.* Throughout the district court's opinion, the term "sex stereotyping" was always placed in quotation marks and referred to as "the *Price Waterhouse* loophole" and a "'term of art' used by Smith to disingenuously plead discrimination because of transsexualism." *Id.* at 575. The appeals court strongly chastised the district court for insinuating either that stereotyping was not present in the Smith case or the sex stereotyping lacked legal relevance. *Id*.

68. *Id.* at 572–73.

69. *Id*. at 572 (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989)).

Thus, Smith fell within the class of persons protected under Title VII because the discriminatory treatment on the job would not have occurred but for Smith's gender.[70]

The Sixth Circuit quickly reaffirmed the holding and rationale of *Smith* in *Barnes v. City of Cincinnati*.[71] Phillip Barnes, a Cincinnati police officer, sued the city after he was not promoted to sergeant within the department.[72] After working with the Cincinnati Police Department for 17 years, Barnes, a male-to-female pre-operative transsexual, completed and passed a promotional test required to become a sergeant.[73] During the next phase of the promotion process, officers had to go through a "probationary period" in order to allow supervisors within the department to observe the candidate for promotion.[74] Worried that Barnes lacked "command presence," department supervisors soon placed him in a special training program where he was monitored and evaluated by numerous officers on a daily basis.[75] Barnes was the only officer to endure such rigorous training, and one officer even testified that "[t]he purpose of the program was to scrutinize [Barnes] and to document every mistake that he made so that he could be failed on probation."[76]

Barnes claimed that this "special" treatment was really discrimination based on his gender-nonconforming behavior because his status as a transsexual and the fact that he lived as a woman off duty was known throughout the department.[77] Moreover, Barnes "had a French manicure, had arched eyebrows and came to work with makeup or lipstick on his face on some occasions."[78] On one occasion, Barnes was told that he did not appear "masculine" enough for his position and that he needed to act more manly.[79] After Barnes learned that he would not

70. *Id.* at 574. The court stated that "[a]fter *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex. It follows that employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex." *Id.*

71. 401 F.3d 729 (6th Cir. 2005). The Supreme Court has recently denied *cert* in *Barnes.* *See* 126 S.Ct. 624 (2005).

72. *Barnes*, 401 F.3d at 733.

73. *Id.*

74. *Id.*

75. *Id.* at 734.

76. *Id.*

77. *Id.* at 733.

78. *Id.* at 734.

79. *Id.* at 735. The Cincinnati Police Department agreed that this conversation took place prior to Barnes's promotion and probationary period.

receive a promotion, he sued the department for discrimination based on sex stereotyping under Title VII in light of the court's rationale in *Smith*.[80]

At trial, a jury returned a $320,511 verdict for Barnes.[81] The city, however, appealed the ruling and advanced the argument that Barnes, as a transsexual, was not a member of a protected class under Title VII.[82]

The court of appeals, relying on the *Smith* decision, determined that "Barnes established that he was a member of a protected class by alleging discrimination against the City for his failure to conform to sex stereotypes."[83] The evidence Barnes produced at trial, including his high test scores, the fact that he was the only officer put into a special training program, his overt feminine behavior and ambiguous sexuality, and the criticism he received for lacking "command presence" and not being masculine enough for the job, was more than enough to allow a jury to find for him under Title VII.[84]

C. Modern Extension: Application to Homosexuals

The recent line of Sixth Circuit cases recognizing that transsexuals can bring Title VII claims based on gender-nonconforming behavior has affirmed an interpretation of Title VII's prohibition against sex discrimination in terms of societal gender norms instead of biology alone, but some commentators see even further-reaching implications for all sexual minorities, including homosexuals, whether or not they conform to societal gender norms.[85]

1. Gender-nonconforming Homosexuals

Cases recognizing a cause of action under Title VII for discrimination based on a homosexual's gender-nonconforming behavior utilize much of the same rationale found in the holdings of *Smith* and *Barnes*.[86]

80. *Id.* at 737.

81. *Id.* at 733.

82. *Id.* at 737.

83. *Id.*

84. *Id.* at 738.

85. *See* Thomas Ling, Smith v. City of Salem*: Title VII Protects Contra-Gender Behavior*, 40 HARV. C.R.-C.L. L. REV. 277 (2005).

86. *See, e.g.,* Kay v. Independence Blue Cross, No. 02-3157, 2003 WL 21197289 (E.D. Pa. May 16, 2003). These cases look past an individuals' "status" as homosexuals, and instead, look to the behavior they exhibited and the discrimination they suffered as a result of this behavior.

In *Centola v. Potter*,[87] a postal worker brought a Title VII action against the postal service for discrimination based both on his sex and sexual orientation.[88] Stephen Centola, a homosexual who had not disclosed his sexual orientation to his co-workers, had been a postal employee for seven years.[89] During this time, Centola's co-workers repeatedly made derogatory comments to him and left humiliating signs on his desk that "mock[ed] his masculinity, portray[ed] him as effeminate, and impl[ied] that he was a homosexual."[90]

Examples of this treatment included co-workers leaving signs on Centola's desk reading "Heterosexual replacement on Duty;" co-workers asking Centola if he was going to march in the gay parade or if he had contracted the AIDS virus yet; and supervisors disciplining Centola more harshly than other postal employees.[91] Centola continuously filed complaints with supervisors regarding this harassment, but the harassment continued until Centola was terminated in 1998.[92] After he was terminated, Centola filed a Title VII claim against his former employer based on both sex and sexual orientation discrimination.[93]

The court dismissed Centola's discrimination claim based on sexual orientation, stating that "the law is relatively clear that discrimination on the basis of sexual orientation is not barred under Title VII so long as the persons discriminating are not also discriminating on the basis of another prohibited characteristic, such as race or sex."[94] However, the court was quick to determine that Centola could still prevail on his Title VII claim based on sex discrimination if he could produce evidence to show that the postal service acted on social stereotypes pertaining to sex roles in either making employment decisions or allowing for the creation of a hostile work environment.[95]

87. 183 F.Supp. 2d 403 (D. Mass. 2002).

88. *Id.* at 406.

89. *Id.*

90. *Id.*

91. *Id.* at 407. Other examples of this discriminatory treatment including co-workers taping pictures of Richard Simmons on the plaintiff's desk and calling the plaintiff a "sword swallower" and other anti-gay epithets. *Id.*

92. *Id*.

93. *Id.*

94. *Id.* at 408. This reasoning is generally universally accepted by federal courts in light of Congress's indication that sexual orientation is not to be protected under Title VII.

95. *Id.* In so holding, the court discussed prior court of appeals cases that did not allow such an application of the gender-nonconforming behavior doctrine. In these cases, according to the court, the argument could not be raised because plaintiffs had failed to make the argument at the trial court level. The plaintiff in *Centola* based his argument on sex discrimination from the start, so the court of appeals could rule on the issue.

The court held that Centola's claim could proceed because he alleged facts showing that post office supervisors and other employees discriminated against him because he did not fit into "their gender stereotypes of what a man should look like, or act like."[96] Because of this, the fact that most of the discrimination Centola faced seemed to be based on his perceived sexual orientation did not, by itself, destroy his Title VII claim.[97]

Other courts, in holdings similar to *Centola*, have determined that as long as Title VII plaintiffs can show that they were discriminated against for not conforming with gender stereotypes, such plaintiffs do not have to show that "their harassers were not motivated by anti-gay animus."[98] Similarly, a defense that a plaintiff suffered discrimination because he was stereotyped "as acting like a homosexual male and not because he was seen as acting like a woman" will not prevail because it "frames the issue in a misleading fashion."[99] The focus is not on whether an individual was harassed for being "womanly" or "manly" but on whether an individual is discriminated against for not conforming with gender stereotypes, for "[n]othing in Title VII suggests that Congress intended to confine the benefits of that statute to heterosexual employees alone."[100]

2. Gender-Conforming Homosexuals

The case law explained above pertained only to homosexual employees whose behavior did not conform to stereotypical gender roles. However, some courts have hinted, and commentators have argued, that the doctrine of gender-nonconforming behavior should apply equally to homosexual employees who do conform to gender stereotypes.[101]

One commentator, Thomas Ling, seized the majority's statement in *Smith* that "a label, such as 'transsexual,' is not fatal to a sex discrimination claim where the victim has suffered discrimination

96. *Id.* at 409.

97. *See id.* at 410. The court determined that "[a]lthough Centola never disclosed his sexual orientation to anyone at work, if Centola's co-workers leapt to the conclusion that Centola 'must' be gay because they found him to be effeminate, Title VII's protections should not disappear." *Id.*

98. Kay v. Independence Blue Cross, No. 02-3157, 2003 WL 21197289 at *6 (E.D. Pa. May 16, 2003) (quoting Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 265 (3d Cir. 2001)).

99. *Id.*

100. *Id.* (quoting Heller v. Columbia Edgewater Country Club, 195 F.Supp. 2d 1212, 1222 (D. Or. 2002)).

101. *See, e.g.,* Centola v. Potter, 183 F.Supp. 2d 403, 410 (D. Mass 2002).

because of his or her gender non-conformity"[102] in order to argue that the *Smith* rationale should be applied to all sex labels, including homosexuals.[103] Ling argues that the recognition that gender-nonconforming behavior is protected under Title VII combined with the realization that "[e]ffeminacy in men and machismo in women are conceptually intertwined with sexual orientation" makes it only reasonable to conclude that homosexuality in general should also receive Title VII protection.[104]

This argument also appeared in the court's opinion in *Centola.*[105] Although the court held that it did not need to decide on the merits of the argument in order to rule in that case, language from the court's opinion referenced with apparent approval the idea that a homosexual employee who generally conforms to gender stereotypes can still bring a claim under Title VII for the simple fact that they do not conform to the societal norm of dating the opposite sex.[106]

The court stated that a

> harasser may discriminate against an openly gay co-worker, or a co-worker that he perceives to be gay, whether effeminate or not, because he thinks, 'real men don't date men.' . . . Conceivably, a plaintiff who is perceived by his harassers as stereotypically masculine in every way except for his actual or perceived sexual orientation could maintain a Title VII cause of action alleging sexual harassment because of his sex due to his failure to conform with sexual stereotypes about what 'real' men do or don't do.[107]

Similar supporting language appears in other lower court concurring opinions.[108]

This case law has spurred hope among some commentators that sexual minorities will soon have the full protections of Title VII in the near future.[109] However, such hope may be premature. On July 19, 2006, the Sixth Circuit Court of Appeals determined that a homosexual man who otherwise conformed to gender stereotypes could not utilize the gender-nonconforming doctrine. Thus, according to the Sixth

102. Smith v. City of Salem, Ohio, 378 F.3d 566, 575 (6th Cir. 2004).

103. Ling, *supra* note 85, at 285–86.

104. *Id.* at 287.

105. *Centola*, 183 F.Supp. 2d at 410.

106. *Id.*

107. *Id. See also* Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187 (1988) (arguing that discrimination against homosexuality is ultimately a result of stereotypes involving gender).

108. *See, e.g.,* Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1068 (9th Cir. 2002) (Pregerson, J., concurring).

109. *See* Kramer, *supra* note 14, at 497–98.

Circuit, homosexuality itself is not gender-nonconforming behavior deserving of Title VII protection.[110]

In *Vickers v. Fairfield Medical Center*, Christopher Vickers, a police officer working for the defendant, sued his employer under Title VII for discrimination he suffered in the form of harassing comments aimed at his homosexuality.[111] Vickers had not disclosed his homosexuality to his employer, but his co-workers assumed that he was gay.[112] The defense argued that every alleged discriminatory act Vickers mentioned in his complaint would, at worst, constitute discrimination based on sexual orientation, which Title VII does not cover.[113] Indeed, the plaintiff did not emphasize any discriminatory conduct based on effeminacy, appearance, or other gender-nonconforming behavior in his complaint. Instead, Vickers contended that because his employer knew that he dated men and vacationed with them in destinations known to be popular among the gay community, the court should allow his Title VII claim to proceed.[114]

Basically, Vickers claimed that, in order for his co-workers to believe he was gay, Vickers would have had to exhibit some form of contra-gender behavior, and that such behavior, whatever it was, made the discrimination he suffered protected under the statute.[115] Vickers argued that "it is essentially impossible for anyone to discern another's non-conformity with sex/gender-role stereotypes (whether such non-conformity manifests itself through one's sexual orientation, affectation of contra-gender mannerisms, or gender identity) unless and until one reveals it through some sort of overt behavior."[116] Essentially, in order for Vickers's co-workers to know or assume he was gay, they had to have noticed gender-nonconforming behavior because "sexual orientation is undetectable absent contra-gender or gender-variant behavior of some kind, regardless of whether such is demonstrated or

110. Vickers v. Fairfield Med. Ctr., 453 F.3d 757 (6th Cir. 2006). *See also* Plaintiff's Memorandum in Opposition to Defendants' Motion for Judgment on the Pleadings, Vickers v. Fairfield Medical Center, 2004 WL 1907102 (S.D. Ohio Feb. 25, 2004) (No. C2-03-858) [hereinafter *Vickers' Memo in Opposition*]; Defendants' Joint Memorandum in Reply to Plaintiff's Memorandum in Opposition to Defendants' Motion for Judgment on the Pleadings, Vickers v. Fairfield Medical Center, 2003 WL 23736052 (S.D. Ohio 2003) (No. C2-03-858) [hereinafter *Fairfield's Reply to Vickers' Memo in Opposition*]; Complaint, Vickers v. Fairfield Medical Center, 2003 WL 23736044 (S.D. Ohio 2003) (No. C2-03-858) [hereinafter *Vickers v. Fairfield Complaint*].

111. *Vickers v. Fairfield Complaint*, *supra* note 110, at 10.

112. *Id.* at 17.

113. *See Fairfield's Reply to Vickers' Memo in Opposition*, *supra* note 110.

114. *Vickers v. Fairfield Complaint*, *supra* note 110, at 18.

115. *Vickers' Memo in Opposition*, *supra* note 110.

116. *Id.*

merely inferred by the observer."[117]

The Sixth Circuit, in a 2–1 opinion, rejected Vickers' argument and upheld the district court's dismissal of the case.[118] Central to the court's analysis was its determination that the *Price Waterhouse* court (and other courts deciding cases relating to the gender-nonconforming doctrine) focused on gender-nonconforming characteristics that were readily demonstrable in the workplace – such as mannerisms and appearance.[119] In contrast, the gender-nonconforming behavior Vickers utilized to support his Title VII claim was not readily demonstrable or observable.[120] Instead, as stated above, Vickers argued that "the act of identification with a particular group, in itself, is sufficiently gender-nonconforming such that an employee who so identifies would, by this very identification, engage in conduct that would enable him to assert a successful sex stereotyping claim."[121] Therefore, the court affirmed dismissal stating that recognizing Vickers' claim "would have the effect of *de facto* amending Title VII to encompass sexual orientation as a prohibited basis for discrimination."[122]

D. Rising Tension: Courts Resist Extending the Doctrine

While the Sixth Circuit Court of Appeals in *Smith* and *Barnes*, a few district courts, and some commentators have embraced the argument that the behavior of transsexuals and homosexuals, whether or not it is in conformity with gender stereotypes, should be protected under Title VII under the Supreme Court's holding in *Price Waterhouse*, other courts have fervently disagreed. Relying on the Seventh Circuit Court of Appeals' decision in *Ulane v. Eastern Airlines, Inc.,*[123] these courts hold that the advent of gender-nonconforming behavior cases only confuses the issue, and that Congress has made clear that discrimination based on sexual orientation is not to be protected under Title VII.[124]

117. *Id.*

118. Vickers, 453 F.3d at 763. Important to the court's holding was the Second Circuit's opinion in Dawson v. Bumble & Bumble, 398 F.3d 211 (2d Cir. 2005). For a discussion of this case, see *infra* notes 138–148 and accompanying text. Judge Lawson dissented from the majority because, in his view, Vickers had sufficiently plead facts under Rule 8(a) of the Federal Rules of Civil Procedure to state a Title VII discrimination claim based on the perception that he was not masculine enough for his position. *Id.* at 769 (Dawson, J., dissenting).

119. *Id.*

120. *Id.*

121. *Id.* at 764.

122. *Id.*

123. 742 F.2d 1081 (7th Cir. 1984).

124. *See id.* at 1085–86.

In *Ulane*, the plaintiff pilot was hired by Eastern Airlines as a male in 1968.[125] What the airline did not know, however, was that Ulane was a transsexual seeking male-to-female sexual reassignment surgery.[126] The pilot soon began taking female hormones and grew breasts.[127] In 1980, Ulane underwent sex reassignment surgery.[128] Upon her return to work as Karen Frances Ulane, however, the airline promptly fired her.[129] Ulane claimed that Eastern violated Title VII by discriminating against her both as a female and a transsexual. The district court agreed and reinstated Ulane to her position with back pay and attorneys' fees.[130]

The court of appeals overruled, stating that, absent evidence to the contrary, courts should give words "their ordinary, common meaning" when interpreting congressional statutes.[131] Thus, the Title VII prohibition against discrimination "based on . . . sex" makes unlawful only discrimination "against women because they are women and against men because they are men."[132] Moreover, the dearth of legislative history indicating that Congress even considered discrimination based on sexual identity or orientation combined with the fact that members of Congress have attempted to amend Title VII "to prohibit discrimination based on 'affectational or sexual orientation'" to no avail,[133] reaffirmed the court's view that Title VII's prohibition against discrimination on the basis of sex should be interpreted narrowly.[134] Thus, the court held that Title VII does not prohibit discrimination based on sexual identity disorders or an individual's status as a transsexual.[135]

125. *Id.* at 1082.

126. *Id.* at 1083.

127. *Id.*

128. *Id.*

129. *Id.* The exact reason why Eastern fired Ulane upon her return to work after the sexual reassignment surgery is not clear. However, the case implies that Ulane was fired only because of her sexual reassignment. The opening of Ulane's brief in the case read: "This is a Title VII case brought by a pilot who was fired by Eastern Airlines for no reason other than the fact that she ceased being a male and became a female." *Id.* at 1082. The court does not refute this statement, and instead uses it as proof that Ulane was discriminated against because of her transsexuality, which they hold is not protected under Title VII. *See id.*

130. *Id.*

131. *Id.* at 1085 (citing Perrin v. United States, 444 U.S. 37, 42 (1979)).

132. *Id.*

133. *Id.* at 1085–86.

134. *Id.*

135. *Id.* at 1086–87. As for Ulane's charge that Eastern discriminated against her because she was female, the court concluded that the district court's factual findings were insufficient to support the allegation and that "it is clear from the evidence that if Eastern did discriminate against Ulane, it was not because she is female, but because Ulane is a transsexual." *Id.* at 1087.

The Second Circuit Court of Appeals recently applied the *Ulane* holding to homosexuals claiming discrimination based on gender-nonconforming behavior. In *Dawson v. Bumble & Bumble*,[136] Dawn Dawson sued a hair salon after her employment at the salon was terminated.[137] The plaintiff's brief described Dawson as a "lesbian female, who does not conform to gender norms in that she does not meet stereotyped expectations of femininity and may be perceived as more masculine than a stereotypical woman."[138] Dawson claimed that she was constantly harassed about her masculine appearance, was referred to as "Donald" by co-workers because of her appearance, and was told that she wore her sexuality "like a costume."[139] Her employer, however, produced evidence that her firing was the result of poor performance on the job, not discrimination of any kind.[140]

The district court granted summary judgment for the employer because claims for discrimination based on sexual orientation were not cognizable under Title VII and because, "even assuming that sex stereotyping [based on gender-nonconforming behavior] may give rise to a sex discrimination action, Dawson's claims of sex stereotyping derive not from gender stereotypes, but rather from stereotypes based on sexual orientation, and thus are not cognizable under Title VII."[141]

While not wholly disavowing the holding of *Price Waterhouse* in its decision, the *Dawson* court distinguished the case by holding that claims of discrimination based on gender-nonconforming behavior are less compelling when brought by avowedly homosexual plaintiffs.[142] These kinds of cases, according to the court, make it almost impossible for the finder of fact to determine whether discriminatory conduct was the result of gender-nonconforming behavior, or the plaintiff's homosexuality.[143]

136. 398 F.3d 211 (2d Cir. 2005).

137. *Id.* at 213.

138. *Id.*

139. *Id.* at 215.

140. *Id.* at 213–14. Bumble & Bumble also produced evidence that Dawson was a part of a very rigorous hair stylist program that only about 10–15 percent of employees complete. Moreover, Bumble & Bumble produced evidence that

> Dawson's performance at the Salon was erratic: sometimes she performed well and with an enthusiastic attitude; other times, she did not. Over time, her performance on the Salon floor and in the educational program declined until it was unacceptable. . . . Several clients complained that she had been rude or abrupt with them or rough with their hair—more than with any other assistant.

Id. at 214–15.

141. *Id.* at 216.

142. *Id.* at 218.

143. *Id.* The court stated that "[s]tereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality." *Id.* (citing Howell v. N.

If these concepts were allowed to be blurred, then the concept of gender-nonconforming behavior would effectively produce a cause of action for all discrimination based on sexual orientation.[144] The *Dawson* court recognized this potential outcome and held that "a gender stereotyping claim should not be used to 'bootstrap protection for sexual orientation into Title VII.'"[145] Because of this, and because Dawson failed to proffer sufficient evidence that she suffered discrimination because of her appearance, the court held that her Title VII claim lacked merit.[146]

In *Etsitty v. Utah Transit Authority*,[147] the court questioned the holding and rationale of *Smith v. City of Salem*.[148] Krystal Etsitty was a pre-operative male-to-female transsexual diagnosed with Gender Identity Disorder.[149] During the relevant period, Etsitty took female hormones that changed her outward appearance, but she had not yet undergone a sex change operation, and thus, maintained her male genitalia.[150] In October 2001, Etsitty accepted a position with the Utah Transit Authority ("UTA").[151] At first, Etsitty appeared as a male on the job.[152] However, the plaintiff soon informed her employers that she would be appearing as a female more regularly while at work and that she would soon be undergoing a sex change.[153] A problem soon developed as to which restrooms—male or female—Etsitty would use while working with UTA.[154] Etsitty insisted that she be able to use female bathrooms, while her employer refused to allow this on the job because the plaintiff still had male genitalia.[155] This problem eventually led to Etsitty's termination from UTA with the caveat that she could return to her position after her sex change operation was completed and she no longer had male genitalia.[156] The plaintiff claimed that her termination was the result of illegal discrimination based on sex stereotyping under *Price Waterhouse* and *Smith*.[157] The court held for UTA and explicitly rejected *Smith's* application of the gender-

Cent. Coll., 320 F. Supp. 2d 717, 723 (N.D. Ill. 2004).

144. *Id.*

145. *Id*. (quoting Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000)).

146. *Id.* at 223.

147. 2005 WL 1505610, No. 2:04CV616 DS (D. Utah June 24, 2005).

148. *Id.* at *4–5.

149. *Id.* at *2.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at *3.

nonconforming behavior doctrine to transsexuals.[158]

To reach its holding, the court first determined that the recent legislative history of Title VII made clear that transsexuals did not constitute a protected class under the statute.[159] The court observed that "[s]ince the decision in the *Ulane* case, members of Congress have repeatedly tried to amend Title VII to prohibit discrimination based on sexual orientation, and all of these attempts failed."[160] The court proceeded to explain that from 1981 to 2001, 31 bills had been introduced in Congress to amend Title VII to disallow discrimination "on the basis of affectional or sexual orientation," but none of these bills passed.[161] Like the court in *Ulane*, the *Etsitty* court took this legislative history as clear guidance that Title VII's prohibition against discrimination based on sex should be interpreted narrowly and not cover homosexuals, transsexuals, or anyone discriminated against on the basis of sexual orientation.[162]

More importantly, the court went on to conclude that *Price Waterhouse's* prohibition against discrimination based on sex stereotyping should not be applied to transsexuals.[163] In so holding, the court dismissed the *Smith* court's determination that "discrimination against a plaintiff who is transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman."[164] Because the medical community did not, according to the court, equate transsexualism with failure to conform to gender stereotypes,[165] the court held that "[t]here is a huge difference between a woman who does not behave as femininely as her employer thinks she should, and a man who is attempting to change his sex and appearance to be a woman. Such drastic action

158. *Id.* at *4–5.

159. *Id.* at *3.

160. *Id.*

161. *Id.*

162. *Id.* The court directly quoted *Ulane*'s text for the remainder of this portion of the opinion.

163. *Id.* at *4.

164. Smith v. City of Salem, Ohio, 378 F.3d 566, 575 (6th Cir. 2004).

165. To support it's assertion that the medical community viewed transsexualism separately from merely gender non-conformity, the court cited the American Psychiatric Association's diagnostic manual. *See Etsitty*, 2005 WL 1505610 at *5 ("Gender Identity Disorder can be distinguished from simple non-conformity to stereotypical sex role behavior by the extent andpervasiveness of the cross-gender wishes, interests, and activities. This disorder is not meant to describe a child's nonconformity tostereotypic sex-role behavior as, for example, in "tomboyishness"in girls or 'sissyish' behavior in boys. Rather, it represents a profound disturbance of the individual's sense of identity with regard to maleness or femaleness.") (citing AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 564 (4th ed. 1994)).

cannot be fairly characterized as a mere failure to conform to stereotypes."[166] The court concluded that cases like *Smith* and *Barnes* go too far in recognizing gender-nonconforming behavior to the point where every attempt by an employer to follow social custom or practice associated with a particular gender—a dress code, for example—would be impermissible discrimination based on gender stereotyping.[167] This, according to the court, was never contemplated by the drafters of Title VII, as made clear through the legislative history of the statute.[168]

Overall, while many commentators see decisions like *Smith* and *Barnes* as groundbreaking rulings that may open the door for the protection of all sexual minorities, many lower courts are having a hard time embracing their rationales.[169] As cases like *Vickers* and *Etsitty* move through the system, courts will either fall in line with the Sixth Circuit Court of Appeals or create a split that that United State Supreme Court may have to reconcile.[170]

IV. DISCUSSION

A study of Title VII sex discrimination case law reveals that courts diverge widely in how they apply the gender-nonconforming behavior doctrine to transsexual and homosexual individuals. What is most troubling, however, as the preceding case law demonstrates, is that the decisions in this area are moving toward opposite extremes. One argument would seemingly allow all homosexuals an automatic Title VII sex discrimination claim because they date individuals of the same gender, and thus, behave in a way that does not conform to gender norms.[171] The other argument would not allow *any* homosexuals protection based on gender-nonconforming behavior under Title VII because it is too difficult, if not impossible, to differentiate between discrimination based on an individual's gender-nonconforming behavior and discrimination based on an individual's sexual orientation.[172] Both extremes are misguided. This Part will focus on these unfounded misconceptions and propose a new, uniform standard that should apply to future Title VII cases involving homosexual plaintiffs.

166. *Id.* at *5.

167. *Id.*

168. *Id.* at *6.

169. Dee McAree, *Courts Still at Odds Over Rights of Transsexuals Sixth Circuit Opened Door, But Others Say No*, 181 N.J.L.J. 564 (2005).

170. *Id.*

171. *See, e.g.,* Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1068 (9th Cir. 2002) (Pregerson, J., concurring).

172. *See, e.g.,* Dawson v. Bumble & Bumble, 398 F.3d 211, 216 (2d Cir. 2005).

A. One Extreme: Case Law Recognizing Title VII Protection for Gender-Conforming Homosexuals Allows Too Much Protection at the Expense of Employers

The argument, as discussed in *Vickers* and *Centola*, that the act of dating someone of the same gender should constitute protected gender-nonconforming behavior is misguided for three reasons: it improperly extends the Supreme Court's ruling in *Price Waterhouse* and cases that followed; it is encumbered with numerous practical problems that make the application of the doctrine patently unfair to employers; and it would constitute improper judicial activism by thwarting the legislative intent of Title VII.

1. Reliance on *Price Waterhouse* and Cases that Followed is Misguided When Arguing for the Protection of Gender-Conforming Homosexuals

The flaw in the argument in *Vickers* and the dicta of *Centola* that homosexual employees can demonstrate gender-nonconforming behavior simply by dating individuals of the same gender is not that Title VII would protect homosexuals.[173] The problem is that the argument's underlying reasoning results from a substantial and unsupportable extension of precedent.

For example, the plaintiff in *Vickers* argued that gender-nonconforming behavior can manifest itself in four ways: through mannerisms ("the effeminate man or masculine woman – a'la Ann Hopkins from *Price Waterhouse*"[174]); behaviors ("such as wearing clothing more often associated with the other sex, or, perhaps, which does not outwardly conform to any gender stereotype"[175]); statements ("indicating interests which are considered predominantly associated with the opposite sex"[176]); and actions ("such as engaging in activities traditionally associated with the opposite gender or sex; or, indicating or demonstrating attraction for another of the same sex"[177]). However, a close examination of the cases applying the gender-nonconforming behavior doctrine, from *Price Waterhouse* to *Smith*, proves that only the first two manifestations discussed by *Vickers*, mannerisms and

173. The mere fact that homosexuals could be covered under the gender-nonconforming doctrine is not adverse to the legislative intent of Title VII. If applied accurately, the doctrine does not make homosexuals a protected class under the statute. It merely allows some homosexuals suffering discriminatory treatment based on protected behaviors judicial relief.

174. *Vickers' Memo in Opposition*, *supra* note 110.

175. *Id.*

176. *Id.*

177. *Id.*

behaviors, have been protected as sex discrimination under Title VII precedent—a fact that the Sixth Circuit expressly recognized in rejecting Vickers' claim.[178]

The form of sex discrimination endured by Ann Hopkins in *Price Waterhouse,* as admitted by Vickers, would fall into the "mannerisms" category, for Hopkins's employer and co-workers mistreated her because of her more "masculine" attributes, which her colleagues viewed as inappropriate.[179] The same can be said for the plaintiff in *Nichols*.[180] Moreover, the cases applying the gender-nonconforming behavior doctrine to transsexuals have all involved plaintiffs who faced discriminatory treatment based on their appearance.[181] In fact, none of the cases analyzed in this Comment have allowed a Title VII claim to proceed without evidence that plaintiffs have suffered discrimination based on their overt "masculine" or "feminine" mannerisms or their contra-gender appearance.[182]

The plaintiff in *Vickers*, perhaps recognizing that he did not exhibit the contra-gender behaviors required by precedent, developed two "new" forms of contra-gender behavior that should be covered under Title VII.[183] Basically, Vickers argued that mere statements indicating contra-gender interests and engaging in contra-gender activities like vacationing in Miami Beach with individuals of the same sex, should now also be gender-nonconforming behavior protected by Title VII.[184]

One problem with this argument, of course, is that it finds absolutely no support in the holdings of previous Title VII cases, and it effectively would create a cause of action under Title VII for discrimination based on sexual orientation, which both Congress and the courts have rejected.[185] After all, *heterosexual* males and females can certainly exhibit "feminine" or "masculine" mannerisms and appearance. Thus, Title VII protection based only on mannerisms and appearance is not based completely on one's sexual orientation, and thus, homosexuals would not be made a protected class under the doctrine. On the other hand, defining sex discrimination based on an individual's choice to date

178. *See* Vickers v. Fairfield Med. Ctr., 453 F.3d 747, 763 (6th Cir. 2006).

179. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 253 (1989).

180. *See* Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 872–73 (9th Cir. 2001).

181. *See, e.g.,* Smith v. City of Salem, Ohio, 378 F.3d 566, 572–73 (6th Cir. 2004).

182. These limitations are essential to making the gender-nonconforming behavior doctrine co-exist with the legislative intent of Title VII, for if there were no limitations on what constitutes gender-nonconforming conduct, then the doctrine would effectively make homosexuals a protected class under Title VII—a proposition that many courts have already rejected.

183. *Vickers' Memo in Opposition*, *supra* note 110.

184. *Id.*

185. *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); *see also supra,* notes 135–36.

someone of the same gender is, on its face, discrimination based on sexual orientation, which courts have conclusively determined does not fall within the parameters of the statute. And because Congress has specifically addressed and defeated amendments to Title VII to allow protection under the statute for discrimination of this kind, a court's extension of Title VII protection to cover such behavior would be nothing more than improper judicial activism.[186]

2. Practical Considerations

The argument that one must recognize gender-nonconforming behavior in order to glean an individual's sexual orientation also suffers from logical deficiencies that make the theory practically unworkable. First, accepting the argument that mere statements of interest in partners of the same sex or the act of dating individuals of the same sex constitute gender-nonconforming behavior would open employers up to a flood of litigation. Such a broad doctrine would act as a quasi-presumption that terminated homosexual employees were discriminated against, giving them the ability to bring Title VII claims against employers for an adverse employment action even if that action had nothing to do with the employee's sexual orientation. Employers would have to expend more time and resources fighting this presumption in court.

Second, proponents of the coverage of all homosexuals under the gender-nonconforming behavior doctrine often support their argument by claiming that effeminacy is closely intertwined with homosexual men and masculinity is closely intertwined with lesbianism.[187] However, this theory only assures the reinforcement of dangerous social stereotypes of sexual minorities. If judges were to allow homosexuals to proceed with their gender discrimination suits because homosexuality is "intertwined" with effeminacy in men or masculinity in women, they would have to implicitly determine that all gay individuals exhibit contra-gender mannerisms or appearance. Certainly, such a determination would be unfounded and uninformed.

186. *See supra* note 132.

187. *See* Ling, *supra* note 85.

B. The Other Extreme: Case Law Eliminating Title VII Protection for All Homosexuals Goes Against Both Precedent and the Spirit of Title VII

The other line of Title VII cases precluding homosexuals from bringing sex discrimination claims based on gender-nonconforming behavior is also an incorrect application of the statute and precedent for two reasons. First, these cases blatantly overlook the overwhelming weight of precedent, including *Price Waterhouse*, which holds that discrimination based on "sex" encompasses gender discrimination, not merely discrimination based on biological differences between males and females. Second, these cases mistakenly perceive sex discrimination as a zero-sum game where discrimination based on sexual orientation cannot co-exist with discrimination based on gender-nonconforming behavior.

1. "Sex" Discrimination Clearly Encompasses Discrimination Based on Gender-Nonconforming Behaviors

Part of the court's rationale that homosexuals cannot seek the protection of the gender-nonconforming behavior doctrine is that the term "sex" used in Title VII "refers to biological sex and nothing more."[188] But, the Supreme Court rejected this thinking in *Price Waterhouse* and its offspring.[189] And, while it is true that some lower court decisions after *Price Waterhouse* defined the term "sex", as it appears in Title VII, as only applying to biological differences between men and women,[190] this conclusion clearly runs against binding Supreme Court authority construing the federal statute as protecting discrimination based both on one's biological makeup and gender. Case law has clearly settled that Title VII claims are no longer limited solely to discriminatory treatment on the basis of gender bias.

2. The Gender-Nonconforming Doctrine Should Apply to Non-Conforming Homosexuals

Perhaps the biggest problem with the holdings in *Dawson* and *Etsitty* is that they refuse to give homosexual employees the same protections that heterosexual employees would receive for discrimination based on the exact same behavior. Under the theories established in these cases,

188. Etsitty v. Utah Transit Authority, No. 2:04CV616 DS, 2005 WL 1505610 at *5 (D. Utah June 24, 2005).

189. *See, e.g., Price Waterhouse,* 490 U.S. at 228.

190. *Id.*

if two employees of a corporation—one openly gay and the other heterosexual—exhibit the same effeminate behavior, the heterosexual employee would have a claim under Title VII while the homosexual employee would not. The rationale behind such a seemingly unjust result would be that it is difficult for an adjudicator to determine if the homosexual employee was discriminated against because of his effeminate behavior or his status as a homosexual. While some cases may indeed present facts that will make such a determination difficult, the courts' response to this dilemma is extreme and unnecessary. Surely, the proper judicial safeguards can be put in place to ensure that discrimination based purely on an individual's sexual orientation is not actionable under Title VII while still allowing homosexuals who have been discriminated against on the basis of previously recognized gender-nonconforming behavior recourse under the statute.

C. The Middle Ground

Clearly, courts across the country are struggling to formulate a single standard to adjudicate Title VII claims based on gender-nonconforming behavior, especially when the plaintiffs involved are homosexual. On the one hand, judges wanting to adhere to the text and legislative intent of Title VII refuse to allow homosexuals to utilize the doctrine. On the other hand, judges wanting to expand the traditional scope of the doctrine to protect more individuals from discrimination in an ever-changing world have discussed the possibility of allowing all homosexuals protection due to their gender-nonconforming behavior. At first blush, these goals seem diametrically opposed to one another. Nevertheless, they need not be mutually exclusive. There is a "middle ground" solution that would allow Title VII protection for some homosexuals while insuring that the text and legislative history of the statute is preserved.

This solution would allow homosexual employees to bring Title VII claims against their employers, just as heterosexual employees can, but only if they can show by clear and convincing evidence that the discrimination they suffered was the result of their gender-nonconforming mannerisms or appearance.[191] This standard rightly

191. In a general way, this standard would look something like the majority holding in *Centola,* which allowed a homosexual plaintiff to proceed with his Title VII claim because he experienced discrimination based on his failure to conform to gender stereotypes. The test developed in this Comment, however, is more specific in defining exactly what constitutes gender-nonconforming behavior for homosexual plaintiffs and developing a more stringent standard, clear and convincing evidence, for such cases in order to allow only proper Title VII plaintiffs to proceed with claims. *See* Centola v. Potter, 183 F. Supp. 2d 403 (D. Mass. 2002). This standard would also closely resemble the

recognizes that homosexuals should not automatically lose Title VII protection merely because of their sexual orientation by allowing them to successfully bring causes of action under Title VII for behavior already protected under Supreme Court precedent. But the standard also protects employers by limiting Title VII protection to mannerisms and appearance, and by creating a high standard of proof—clear and convincing evidence—that potential plaintiffs would have to meet in order to proceed with their claims. This standard will protect employers from frivolous lawsuits but will still allow some recourse for homosexual and transsexual employees under Title VII.[192]

The only hope to gain some level of fairness and consistency in Title VII jurisprudence is for the Supreme Court to grant *certiorari* to one of the gender-nonconforming behavior cases currently making its way through the federal court system and to determine decisively that a clear and convincing evidence standard should be used in all future Title VII cases involving homosexual plaintiffs.

V. CONCLUSION

This country has come a long way in protecting the rights of minority groups, but more needs to be done. Homosexuals are one of the only minority groups in the country that can openly be discriminated against in the employment setting. However, change needs to occur through our elected officials, and not through an improper extension of Title VII. While homosexuals should undoubtedly be a protected class under anti-discrimination statutes, Congress, not the judiciary, is the proper branch to create these protections. In the meantime, an individual's homosexuality should *not* exclude her from protection under the already-established protections of Title VII, such as the gender-nonconforming doctrine. Federal courts should adopt the standard advocated in this Comment in order to provide homosexuals the proper protection under Title VII until Congress finally acts to provide them with the protection they need and deserve.

recent holding in *Vickers*, where the Sixth Circuit held that the gender-nonconforming doctrine cannot be expanded to cover activities that are not "readily demonstrable in the workplace." *See* Vickers v. Fairfield Med. Ctr., 452 F.3d 757, 763 (6th Cir. 2006).

192. The clear and convincing evidence standard would be inapplicable to motions to dismiss under Rule 12 of the Federal Rules of Civil Procedure. To survive these motions, plaintiffs should have to specifically plead discrimination based on gender-nonconforming mannerisms or appearance—not sexual orientation.