Title VII of the Civil Rights Act

- Protected categories do not include sexual orientation or gender identity

- But ...
  - Several federal courts have found Title VII includes claims based on sexual orientation, transgender status
  - Discrimination or harassment based on "sex stereotypes" about how a man or woman should behave is "sex" discrimination and violates the law
EEOC Gender Stereotyping

• It is illegal for an employer to deny employment opportunities or permit harassment because:
  o a woman does not dress or talk in a feminine manner.
  o a man dresses in an effeminate manner or enjoys a pastime (like crocheting) that is associated with women.
  o a female employee dates women instead of men.
  o a male employee plans to marry a man.
  o an employee transitions from female to male or male to female.
The Transition Continuum

Personal Evaluation
Preparation For Transition
Real Life Experience
Post Transition

Workplace Transition
Employer Notified
Employee's First Day at Work
In New Gender Presentation
How Should Transgender Employees Be Accommodated?

- “Interactive Process”
- Accounting for Individual Differences
- Managing The Impact on Other Employees
How Should Transgender Employees Be Accommodated?

- Employees are permitted to act in accordance with their gender identity
  - Dress and Grooming
  - Modification of Existing Policies
  - Restrooms and Locker Rooms
  - Name and Pronoun Usage
  - E-Mail Address
  - Internal Documentation
What Obligations Do Employers Have?

- Impact of Policies Against Harassment and Discrimination
- Leave Issues and Time Off Required for Medical Treatment
- Responding to Complaints
- Privacy Concerns
- Respect for Boundaries
What Should Employers Consider?

- Training
- Gender Transition Plan
- Medical Benefits
- Resources Available to the Transitioning Employee and Co-Workers
Culture *and* Behavioral Expectations

Make sure employees understand expectations:

- Respect for diversity and prevention of harassment/discrimination
- Reporting and complaint structure
- Name, pronoun usage for employees undergoing gender transition
- Privacy – employee, co-workers
- What is unacceptable
- Potential consequences
Culture and Facilities Access

Restrooms, Locker Rooms:

- Should permit access according to gender presentation
- Address privacy concerns by minor facilities modifications, as needed
Emerging Issues: Discrimination Based on Gender Identity
Gender Identify Disorders:


- See *Jamal v. Saks & Co.*, 4-14-cv-01782, Docket No. 17 (S.D. Tex.) (*Amicus* brief filed Jan. 22, 2015), following defendant motion to dismiss based on claim that Title VII not apply to transgender individuals (although the case was privately resolved prior to ruling on motion to dismiss)
OSHA Issues Guidelines for Providing Restroom Access to Transgender Employees

BY DENISE M. VISCONTI ON JUNE 2, 2015

Continuing the trend by federal agencies toward greater protections for transgender employees, the Occupational Safety and Health Administration (OSHA) released “A Guide to Restroom Access for Transgender Workers” on June 1, 2015.

Under current federal law, employers are required to provide all employees reasonable access to restroom facilities. Additionally, an employer may not impose unreasonable restrictions on an employee’s use of restroom facilities. It is OSHA’s intent that “employees be able to use toilet facilities promptly” when the need arises to avoid the potential adverse health effects that can occur when restroom access is not immediately available. Hence, employees cannot be limited to using facilities that are an unreasonable distance from their workspace or be required to wait an unreasonably long time to use available facilities.

In its Guide to Restroom Access for Transgender Workers, OSHA provides “model practices” for employers to follow when providing access to restrooms by transgender employees, including:

- All employees should be permitted to use the facilities that correspond with their gender identity. In other words, a person who identifies as male should be permitted to use the men’s restroom, and a person who identifies as female should be permitted to use the women’s restroom.
- Employees should be permitted to determine for themselves the most appropriate (and safest) restroom to use. As such, employers should refrain from requiring or deciding which restroom should be used by a particular employee.
- No employee should be required to use a restroom facility located away or apart from other employees because of their gender identity or transgender status. Doing so may run afoul of the requirements of...
Title VII of the Civil Rights Act of 1964. See 42 U.S.C. § 2000e-2(a)(2) (making it unlawful to “segregate” employees in any way that deprives or tends to deprive them of equal employment opportunities).

Single-occupancy gender-neutral facilities or multi-occupancy unisex facilities may be offered as an option that all employees may choose – but may not be required – to use.

• Employers may not ask employees to provide any medical or legal documentation of their gender identity in order to gain access to gender-appropriate facilities. Nor may an employer condition access to a particular restroom on the employees’ providing documentation demonstrating they have undergone any particular medical procedures. Requiring such documentation in order to access gender-specific facilities is unlawful in many state and local jurisdictions, and may open up the employer to a “gender stereotyping” claim under Title VII, i.e., a claim that the employee was subjected to discrimination based on the employer’s perception that the employee failed to conform to a particular sex stereotype. Moreover, there is nothing in Title VII that permits the conditioning of access to facilities (or to other terms, conditions, or privileges of employment, for that matter) on the completion of a medical procedure – for transgender individuals or any other employee. Hence, an employer’s unilateral determination of when someone has “proven” their gender, and thus may gain access to a particular facility, may provide the factual predicate to a claim of discrimination under Title VII and various state and local laws.

Above all else, OSHA’s Guide to Restroom Access for Transgender Workers provides that, regardless of the physical layout of the employer’s worksite, all employers need to find a solution that is safe and convenient for – and respectful of – all employees, including those employees who are transgender.

Notably, OSHA’s Guide to Restroom Access for Transgender Workers disclaims it is creating any new legal obligations. Rather, as outlined above, it contains “recommendations” as well as descriptions of “mandatory safety and health standards.” OSHA’s Guide to Restroom Access for Transgender Workers also provides a toll-free number and website for those employees who believe their employers are not following OSHA standards. Employees can contact OSHA to make a complaint, which could lead to an on-site inspection of the employer’s premises.

1See 29 C.F.R. 1910.141(c)(1)(i).

WHAT IS TRANSGENDER?

People who identify as transgender are protected by California’s Fair Employment & Housing Act. Our law uses the phrases “sex, gender, gender identity and gender expression.” Gender expression is defined by the law to mean a “person’s gender-related appearance and behavior whether or not stereotypically associated with the person’s assigned sex at birth.”

TWO KINDS OF GENDER TRANSITION

SOCIAL TRANSITION
involves a process of socially aligning one’s gender with the internal sense of self (e.g. changes in name and pronoun, bathroom facility usage, participation in activities like sports teams).

PHYSICAL TRANSITION
refers to medical treatments an individual undergoes to physically align their body with internal sense of self (e.g. hormone therapies or surgical procedures).

FAQ FOR EMPLOYERS

WHAT IS AN EMPLOYER ALLOWED TO ASK?
Employers may ask about an employee’s employment history, and may still ask for personal references, in addition to other non-discriminatory questions. An interviewer should not ask questions designed to detect a person’s sexual orientation or gender identity, including asking about his/her marital status, spouse’s name, or relation of household members to one another. Employers should not ask questions about a person’s body or whether they plan to have surgery because this information is generally protected by the Health Insurance Portability and Accountability Act (HIPAA).

HOW DO EMPLOYERS STILL IMPLEMENT DRESS CODES AND GROOMING STANDARDS?
California law explicitly prohibits an employer from denying an employee the right to dress in a manner suitable for that employee’s gender identity. An employer who requires a dress code must enforce it in a non-discriminatory manner. This means, for instance, that a transgender woman must be allowed to dress in the same manner as non-transgender women, and that her compliance with such a dress code cannot be judged more harshly than non-transgender women.

WHAT ARE THE OBLIGATIONS OF EMPLOYERS WHEN IT COMES TO BATHROOMS, SHOWERS, AND LOCKER ROOMS?
All employees have a right to safe and appropriate restroom and locker room facilities. This includes the right to use a restroom or locker room that corresponds to the employee’s gender identity, regardless of the employee’s assigned sex at birth. In addition, where possible, an employer should provide an easily accessible unisex single stall bathroom for use by any employee who desires increased privacy, regardless of the underlying reason. A private restroom of this type can also be used by an employee who does not want to share a restroom with a transgender coworker. However, use of a unisex single stall restroom should always be a matter of choice. No employee should be forced to use one either as a matter of policy or due to continuing harassment in a gender-appropriate facility.

IF YOU BELIEVE YOU ARE VICTIM OF ILLEGAL DISCRIMINATION, YOU CAN FILE A COMPLAINT WITH THE DEPARTMENT.

To File a Pre-Complaint inquiry you may select one of the following methods:

- Use the Department’s online system at http://www.dfeh.ca.gov
- Call the Communication Center at 800-884-1684 (voice) or 800-700-2320 (TTY)
- Reach us through California’s Relay Service by dialing 711 or by e-mail to contact.center@dfesh.ca.gov
- Use the Pre-Complaint Inquiry form that matches your issue, complete and return it via U.S. mail to any of DFEH’s office locations (www.dfeh.ca.gov/offices.htm)
- E-mail the Pre-Complaint Inquiry form: contact.center@dfesh.ca.gov

If you have a disability that prevents you from submitting a written pre-complaint form online, by mail, or email, the DFEH can assist you by signing your pre-complaint by phone or for individuals who communicate by American Sign Language through the relay system.

To schedule an appointment, contact the Communication Center at 800-884-1684 (voice) or 800-700-2320 (TTY) or by email at contact.center@dfesh.ca.gov

DFEH-163TGR 2016
HHS Final Rule Finds Categorical Exclusions for Health Services Related to Gender Transition Are Generally Unlawful

BY DENISE VISCONTI

The U.S. Department of Health and Human Services (HHS) recently published its **Final Rule** implementing Section 1557 of the Affordable Care Act (ACA), which prohibits discrimination on the basis of, among other grounds, sex in certain health programs and activities. According to HHS's **press release**, the Final Rule and Section 1557 outline individuals' rights, as well as the responsibilities of health insurers, hospitals, and health plans administered by or receiving federal funds, in order to advance protections for underserved, underinsured, and often excluded populations.

Section 1557 is the first federal civil rights law to explicitly prohibit discrimination on the basis of sex in federally funded health programs. Importantly, as outlined in the Final Rule, Section 1557 prohibits the denial of health care or coverage based on gender identity and sex stereotyping. The Final Rule goes into effect on July 18, 2016, unless changes to a health insurance plan or group health plan benefit design are required (in which case the effective date is on the first day of the first plan year beginning on or after January 1, 2017), and is expected to have broad implications for the provision of transgender- and gender transition-related medical treatment.

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2. Section 1557 incorporates other federal laws that explicitly preclude discrimination based on "sex," including Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972, and provides that no one may be excluded from participation in, denied the benefits of, or subjected to discrimination under any health program or activity, any part of which is receiving federal financial assistance, any program or activity that is administered by an Executive Agency, or any entity established under Title I of the Act or its amendments. Any violations of Section 1557 may be redressed using enforcement mechanisms provided for and available under Title VII and/or Title IX.
Background

Many health insurance plans, including Medicaid programs, historically have categorically excluded coverage for any medical treatment related to gender dysphoria or associated with a gender transition. Plans, owners of those plans, and insurance carriers offering health insurance plans often have justified these exclusions, either explicitly or implicitly, by classifying treatments related to a gender transition as cosmetic, elective or experimental in nature. At the same time, the same treatments that were categorically denied for transgender individuals frequently were provided to non-transgender individuals – and covered by most health insurance plans – when prescribed by their physicians.

Insurance carriers and plan administrators traditionally have used two methods to deny coverage for gender transition-related treatment. Prior to the enactment of the ACA, insurance carriers used prior diagnoses of gender dysphoria or Gender Identity Disorder – with which some transgender individuals were diagnosed – to deny such individuals’ application for health care coverage outright.3 Insurance carriers also traditionally included exclusions for transition-related treatment in all health care contracts. Unless a company requested that such exclusions be removed, these blanket categorical exclusions routinely were included in all health care plans and used to deny coverage for treatments related to a gender transition.

Prior to the enactment of the Final Rule and Section 1557, no federal law explicitly prohibited discrimination in healthcare on the basis of sex and there was no explicit federal legal requirement for group or individual insurance plans to cover care related to gender transitions, gender reassignment surgery or related procedures. Likewise, no court had issued a ruling finding either that health insurance plans were required to cover gender transition-related treatment, or that the inclusion of categorical exclusions for medical treatment related to gender dysphoria or associated with gender transition in a healthcare plan violated federal law.

On the state level, following the passage of the ACA, 11 states explicitly prohibited private health insurance plans sold in the state and Medicaid coverage from including exclusions for transition-related care. An additional six states clarified that their state Medicaid program covered transition-related care. But, the remainder of states remained silent on the issue.

In recent years, numerous medical organizations, including the American Medical Association and the World Professional Association for Transgender Health, have issued statements on the medical necessity of gender transition-related health care treatment. In addition, several courts have issued decisions finding transition-related care to be medically necessary. To date, however, such categorical exclusions largely have remained in many health insurance plans unless specifically excluded by state law.

The Final Rule on Nondiscrimination in Health Programs and Activities

In the proposed rule, HHS sought comments on a number of aspects of the Final Rule, including: (i) the proposal that “sex discrimination” include discrimination based on gender identity, (ii) whether there should be an exemption for religious organizations, and, if so, the scope of that exemption, and (iii) the appropriate coverage of the Final Rule and whether it should include all issuers participating in the ACA Marketplace or the Marketplace itself, and/or hospitals and other health care providers. The Final Rule addressed comments on each such issue.

“Sex Discrimination” Includes Discrimination Based On Gender Identity. In the Final Rule, HHS made clear that the provisions prohibiting discrimination on account of “sex” include “gender identity,” which it defines as “an individual’s sense of gender, which may be male, female, neither, or a combination of male and

3 The passage of the ACA invalidated the existence of pre-existing diagnoses as a basis upon which to deny coverage as of January 1, 2014.
female, and which may be different from an individual's sex assigned at birth." The definition also includes "gender expression," i.e., the way an individual expresses their gender identity, whether or not it conforms to social stereotypes associated with a particular gender, as well as those individuals whose gender identity is different from the sex assigned to that person at birth, often referred to as "transgender." According to HHS, this position is consistent with the position taken by courts and federal agencies. Moreover, in response to those comments suggesting that such legal interpretations were misplaced or erroneous, HHS stated as follows:

The fact that there may be circumstances in which it is permissible to make sex-based distinctions is not a license to exclude individuals from health programs and activities for which they are otherwise eligible simply because their gender identity does not align with other aspects of their sex, or with the sex assigned to them at birth. The Department has a responsibility to ensure that health programs and activities of covered entities are carried out free from such discrimination.

As a result, the Final Rule specifically provides that to deny or limit coverage, deny a claim, or impose additional cost-sharing or other limitations or restrictions on coverage of any health service, is impermissible discrimination when the denial or limitation is due solely to the fact that the individual's sex assigned at birth, gender identity, or gender otherwise recorded by the plan or issuer is different from the one to which such services are ordinarily or exclusively available. Instead, under the Final Rule, coverage for medically appropriate health services must be made available on the same terms and conditions under the plan or coverage for all individuals, regardless of sex assigned at birth, gender identity, or recorded gender. The Final Rule goes further by stating that all health-related insurance plans or other health-related coverage (including Medicaid programs) that currently have explicit categorical or automatic exclusions of coverage for all health services or care related to gender dysphoria or associated with a gender transition are unlawful on their face; in sum, by singling out the entire category of gender transition-related services, such an exclusion or limitation systematically denies services and treatments for transgender individuals and is, by definition, prohibited discrimination on the basis of sex.

**No New Exemptions for Religious Organizations.** After inviting comment on whether the Final Rule should include a religious exemption for health service providers, health plans, or other covered entities with respect to the requirements related to sex discrimination (and in particular with regard to the nondiscrimination provisions relating to gender identity), HHS decided against including a blanket religious exemption in the Final Rule and Section 1557. In so doing, HHS wanted to ensure the Final Rule appropriately protected sincerely held religious beliefs to the extent that those beliefs conflicted with the nondiscrimination provisions of the Final Rule.

In declining to incorporate an exemption for religious organizations, HHS stated the Final Rule would not displace the protections afforded by provider conscience laws, the Religious Freedom Restoration Act (RFRA), or regulations issued under the ACA related to preventive health services. HHS further addressed any concerns raised by religious organizations by stating that application of RFRA was the proper means to evaluate any religious concerns about the Section 1557's requirements. Since RFRA required an individualized and fact-specific inquiry, any requests for exemption from Section 1557 would be made "on a

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5 In so stating, HHS provided that RFRA's requirements - i.e., requiring an evaluation of whether a legal requirement substantially burdened the exercise of religion and, if so, then an evaluation of whether that requirement furthered a compelling interest and was the least restrictive means to further that interest - adequately would protect any assertion by a covered entity that Section 1557 burdened its exercise of religion and, if so, whether there were less restrictive means available.
case-by-case basis, based on a thorough analysis and relying on the extensive case law interpreting RFRA standards."

**Coverage of the Final Rule is Broad.** The Final Rule contains a number of definitions that outline the scope of its coverage. As HHS stated repeatedly in the Final Rule and its accompanying explanations, the nondiscrimination provisions outlined in the Final Rule and Section 1557 of the ACA apply to “every health program or activity, any part of which receives Federal financial assistance provided or made available by [HHS],” as well as “every health program or activity administered by [HHS] and every health program or activity administered by Title I” of the ACA. Those health programs and activities included within the purview of the Final Rule and Section 1557 include all entities engaged in the provision or administration of health-related services, health-related insurance coverage, and other health-related coverage. Such entities include, but are not limited to, hospitals, health clinics, group health plans, health insurance issuers, physicians’ practices, community health centers, nursing facilities, residential or community-based treatment facilities, State Medicaid programs, Children’s Health Insurance Programs, and Basic Health Programs, to name a few. Included within the Final Rule - and of particular import to employers - are the health benefits and health insurance coverage provided to employees and/or their dependents that have been “established, operated, sponsored or administered by, for, or on behalf of one or more employers, whether provided or administered by entities including but not limited to an employer, group health plan third party administrator, or health insurance issuer,” as well as employer-provided or sponsored wellness programs, health clinics, and long-term care coverage. Moreover, to the extent employers contract out their health care plans and coverage to third parties, such contracts will not insulate employers from abiding by the Final Rule. In sum, whether an employer’s health insurance benefits plan is self-funded, an ERISA plan, or is self-managed or managed and administered by a third-party administrator, the plan may come within the purview of the Final Rule and Section 1557.

**Recommendations for Employers**

In light of the Final Rule and Section 1557, employers should consider taking the following steps:

- Review the provisions of the Final Rule and Section 1557 to determine whether and to what extent employer-provided health plans and programs are covered by the nondiscrimination provisions issued by HHS;

- Evaluate whether such employer-provided health plans and programs contain blanket, categorical, or automatic exclusions of coverage for health services or care related to gender dysphoria or is associated with a gender transition; and

- Consult with their benefits group, Plan Administrator, and counsel to determine whether and how to bring any employer-provided health plans and programs into compliance with the Final Rule and Section 1557.
EEOC Rules Discrimination Based on Employee's Sexual Orientation Is Sex Discrimination Under Title VII

BY DENISE M. VISCONTI AND KYLE W. NAGEOTTE ON JULY 20, 2015

The U.S. Equal Employment Opportunity Commission (EEOC or Commission) has issued a potentially groundbreaking decision finding that discrimination based on "sexual orientation" can be brought under Title VII of the Civil Rights Act of 1964 (Title VII). In so ruling, the Commission rejected several circuit court decisions that ruled Title VII does not include protection from discrimination based on sexual orientation.

In this case, the complainant, who was a temporary front line manager at a Federal Aviation Administration (Agency) facility in Miami, Florida, alleged he was not promoted to the permanent front line manager position because he was an openly gay man. The permanent position was never filled.

The Agency never reached a determination on the merits of the claim, and dismissed the complaint on the grounds it had not been raised in a timely fashion as required by EEOC regulations. The complainant subsequently appealed the Agency's decision to the Commission.

The Commission's Decision

On appeal, the Commission found that the claim was timely. While it did not make a determination on the merits of the claim, the Commission did conclude that Title VII forbids discrimination based on one's sexual orientation because it is a form of "sex" discrimination.
The Commission held, "[s]exual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex." In reaching its conclusion, the Commission held "[d]iscrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms. 'Sexual Orientation' as a concept cannot be defined or understood without reference to sex."

In support of its decision, the Commission relied on a number of notable cases, including the U.S. Supreme Court's decision in PriceWaterhouse v. Hopkins, 490 U.S. 228 (1989), which found that discrimination against an individual for failing to conform to gender-based stereotypes violates Title VII.

The Commission rejected previous court of appeals decisions that held that Congress in 1964 did not intend Title VII to apply to sexual orientation and, therefore, Title VII could not be interpreted to prohibit such discrimination. The Commission also rejected other court of appeals decisions that relied on the fact that Congress has debated, but not yet passed, legislation explicitly providing protections for sexual orientation, holding instead:

[t]he idea that congressional action is required (and inaction is therefore instructive in part) rests on the notion that protection against sexual orientation discrimination under Title VII would create a new class of covered persons. But analogous case law confirms this is not true. When courts held that Title VII protected persons who were discriminated against because of their relationships with persons of another race, the courts did not thereby create a new protected class of "people in interracial relationships."

The Commission concluded that allegations of discrimination by the complainant—and any other individual—"on the basis of sexual orientation necessarily state a claim of discrimination on the basis of sex," which the Agency must treat as complaints of sexual discrimination under Title VII. (emphasis added).

Implications for Employers

Because this case arose in the context of federal-sector employment, the decision will be binding on all federal agencies and departments and will have a direct impact on federal government employees.

The Commission's decision appears to represent a significant shift in how the EEOC views claims of discrimination based on sexual orientation. For the 28 states that lack any explicit state-level protections against discrimination on the basis of sexual orientation, this decision has the potential to have a significant impact on employers with 15 or more employees.

The decision appears to be consistent with the Commission's Strategic Enforcement Plan (announced in December 2012 for FY 2013-2016, see http://www.eeoc.gov/eeoc/plan/sep.cfm, which lists "coverage of lesbian, gay, bisexual and transgender..."
individuals under Title VII’s sex discrimination provisions“ as an enforcement priority, and likely will influence the EEOC’s enforcement and litigation activities, both at the Commission level as well as throughout its field offices.

The EEOC’s decision also may be entitled to at least some deference by federal courts. It is likely that the EEOC and plaintiffs will seek to apply this decision and its rationale to public and private employers alike. This is particularly true given the decision was not limited to the specific facts of the case; rather, the EEOC clearly announced a broader interpretation that applies to any individual who has suffered discrimination based on his or her sexual orientation, and affords such individuals recourse under Title VII.

As a result, both public and private employers should review and consider revising their policies and practices to conform to the EEOC’s decision. The policies and procedures that should be reviewed include, but are not limited to:

- Non-discrimination, harassment, and EEO policies;
- Pre-employment screening and background or security clearance policies and procedures; and
- Codes of conduct applicable to employees.

Employers may also want to review any policies that, inadvertently or intentionally, treat employees differently based on their sexual orientation.

Most importantly, employers should take all steps necessary—including training their managers and employees—to guard against possible harassment, discrimination, or retaliation against employees and applicants based on their sexual orientation.

August 8, 2016

VIA ECF AND U.S. MAIL

Clerk of Court
United States Court of Appeals for the Eleventh Circuit
56 Forsyth Street N.W.
Atlanta, GA  30303

Re:  Evans v. Georgia Regional Hospital, et al., No. 15-15234; notice of post-briefing authority pursuant to Fed. R. App. P. 28(j), and corresponding I.O.P. 6

To Whom It May Concern:

Ms. Evans calls the Court’s attention to Hively v. Ivy Tech. Cmty. College, No. 15-1720, 2016 WL 4039703 (7th Cir. July 28, 2016), and Winstead v. Lafayette Cty. Bd. of Cty. Comm’rs, No. 16CV00054-MW-GRJ, 2016 WL 3440601 (N.D. Fla. June 20, 2016).  The inescapable logic of Hively is that a federal court, with no precedent dictating a contrary result, should hold that Title VII covers sexual orientation discrimination.  And that is the holding of Winstead.  Each court expressed complete agreement with one of the three independent arguments for coverage made by Ms. Evans.

Hively  expressed agreement that, because “Title VII protects from discrimination a white woman who is fired for romantically associating with an African-American man, then logically it should also protect a woman who has been discriminated against because she is associating romantically with another woman” because all Title VII classifications “must all be treated equally.”  2016 WL 4039703 at *13.  The court noted the rationale it was “us[ing] to distinguish between gender non-conformity discrimination claims and sexual orientation discrimination claims [may] not hold up under future rigorous analysis,” id. at 14, but held that it “must adhere to the writing of [its] prior precedent.”  Id. at *15.  “Perhaps the writing is on the wall,” the court concluded.  Id.  “It seems unlikely that our society can continue to condone a legal structure in which employees can be . . . discriminated against solely based on who they date, love, or marry.”  Id.

Winstead held that “discrimination on the basis of sexual orientation is necessarily discrimination based on gender or sex stereotypes, and is therefore sex discrimination ,” 2016

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1 Hively misleadingly cited Blum v. Gulf Oil Corp., 597 F.2d 936 (5th Cir. 1979). However, multiple courts, including the district courts in Winstead and this case, have recognized old Fifth Circuit coverage cases as dicta and that the question is open in this circuit.  See Dkt. 4 at 4.
WL 3440601 at *8. As *Winstead* noted, this argument is “persuasive to this Court, as it has been to numerous other courts and the EEOC.” 2016 WL 3440601 at *8.

Sincerely,

/s/ Gregory R. Nevins
Gregory R. Nevins

Cc: Courtney C. Poole, Esq.
Andy Mannich, MPH, Administrator, Georgia Regional Hospital at Savannah
Jamekia Powers
Lisa Clark
Charles Moss
Once again this court is asked to consider whether Title VII of the Civil Rights Act of 1964 protects employees from or offers redress for discrimination based on sexual orientation. This time, however, we do so in the shadow of a criticism from the Equal Employment Opportunity Commission (EEOC) that this court and others have continued to reflexively declare that sexual orientation is not cognizable under Title VII without due analysis or consideration of intervening case law. The EEOC’s criticism has created a groundswell of questions about the rationale for denying sexual orientation claims while allowing nearly indistinguishable gender non-conformity claims, which courts have long recognized as a form of sex-based discrimination under Title VII. After a careful analysis of our precedent, however, this court must conclude that Kimberly Hively has failed to state a claim under Title VII for sex discrimination; her claim is solely for sexual orientation discrimination which is beyond the scope of the statute. Consequently, we affirm the decision of the district court.

I.

Hively began teaching as a part-time adjunct professor at Ivy Tech Community College in 2000. On December 13, 2013, she filed a bare bones pro se charge with the Equal Employment Opportunity Commission (EEOC) claiming that she had been “discriminated against on the basis of sexual orientation” as she had been “blocked from
fulltime [sic] employment without just cause,” in violation of Title VII. (Short Appendix to Appellant’s Brief, 5). After exhausting the procedural requirements in the EEOC, she filed a complaint, again pro se, in the district court alleging that although she had the necessary qualifications for full-time employment and had never received a negative evaluation, the college refused even to interview her for any of the six full-time positions for which she applied between 2009 and 2014, and her part-time employment contract was not renewed in July 2014. In short, she alleged that she had been “[d]enied full time employment and promotions based on sexual orientation” in violation of Title VII, 42 U.S.C. §§ 2000e et seq.

The college’s defense in both the district court and on appeal is simply that Title VII does not apply to claims of sexual orientation discrimination and therefore Hively has made a claim for which there is no legal remedy. The district court agreed and granted Ivy Tech’s motion to dismiss. Hively v. Ivy Tech Cmty. Coll., No. 3:14-CV-1791, 2015 WL 926015, at *1 (N.D. Ind. Mar. 3, 2015).

II.

A.

This panel could make short shrift of its task and affirm the district court opinion by referencing two cases (released two months apart), in which this court held that Title VII offers no protection from nor remedies for sexual orientation discrimination. Hammer v. Ford Motor Co., 231 F.3d 1080, 1085 (7th Cir. 2000). Title VII makes it “unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual ... because of such individual’s race, color, religion, sex, or national origin” 42 U.S.C. § 2000e-2. This circuit, however, in both Hammer and Spearman, made clear that “harassment based solely upon a person’s sexual preference or orientation (and not on one’s sex) is not an unlawful employment practice under Title VII.” Hammer, 224 F.3d at 704; Spearman, 231 F.3d at 1084 (same). Both Hammer and Spearman relied upon our 1984 holding in Ulane v. Eastern Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984) in which this court, while considering the Title VII claim of a transsexual airline pilot, stated in dicta that “homosexuals and transvestites do not enjoy Title VII protection.” Id. at 1084. In Ulane, we came to this conclusion by considering the ordinary meaning of the word “sex” in Title VII, as enacted by Congress, and by determining that “[t]he phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men.” Id. at 1085. We also considered the legislative history of Title VII, explaining that it was primarily meant to remedy racial discrimination, with sex discrimination thrown in at the final hour in an attempt to thwart adoption of the Civil Rights Act as a whole. Id. Therefore, we concluded, “Congress had a narrow view of sex in mind when it passed the Civil Rights Act.” Id. at 1086. In a later case describing Ulane, we said that at the time of Ulane “we were confident that Congress had nothing more than the traditional notion of ‘sex’ in mind when it
voted to outlaw sex discrimination, and that discrimination on the basis of sexual orientation and transsexualism, for example, did not fall within the purview of Title VII."


*2 Since Hamner and Spearman, our circuit has, without exception, relied on those precedents to hold that the Title VII prohibition on discrimination based on “sex” extends only to discrimination based on a person’s gender, and not that aimed at a person’s sexual orientation. Muhammad v. Caterpillar, Inc., 767 F.3d 694, 697 (7th Cir. 2014) (citing the holding in Spearman, 231 F.3d at 1085); Hamm v. Weyauwega Milk Products, Inc., 332 F.3d 1058, 1062 (7th Cir. 2003) (“The protections of Title VII have not been extended, however, to permit claims of harassment based on an individual’s sexual orientation.”); Schroeder v. Hamilton Sch. Dist., 282 F.3d 946, 951 (7th Cir. 2002) (“Title VII does not, however, provide for a private right of action based on sexual orientation discrimination.”).

The district court, relying on Hamner and two district court cases, thus dismissed Hively’s complaint with prejudice. Hively, 2015 WL 926015, at *3 (citing Hamner, 224 F.3d at 704 (“harassment based solely upon a person’s sexual preference or orientation ... is not an unlawful employment practice under Title VII.”)); Wright v. Porters Restoration, Inc., No. 2:09-CV-163-PRC, 2010 WL 2559877, at *4 (N.D. Ind. June 23, 2010) (“To the extent the Plaintiff may be alleging discrimination based on sexual orientation, the Seventh Circuit has unequivocally held that this type of discrimination is not, under any circumstances, proscribed by Title VII.”); and Hamzah v. Woodmans Food Mkt. Inc., No. 13-CV-491-WMC, 2014 WL 1207428, at *2 (W.D. Wis. Mar. 24, 2014) (“[t]o the extent [plaintiff] claims harassment due to his heterosexuality—that is, his sexual orientation, not his sex—he cannot bring a Title VII claim against [the defendant] for these alleged instances of harassment, and the court will dismiss that claim with prejudice.”)).

We are presumptively bound by our own precedent in Hamner, Spearman, Muhammad, Hamm, Schroeder, and Ulane. “Principles of stare decisis require that we give considerable weight to prior decisions of this court unless and until they have been overruled or undermined by the decisions of a higher court, or other supervening developments, such as a statutory overruling.” Santos v. United States, 461 F.3d 886, 891 (7th Cir. 2006). Our precedent has been unequivocal in holding that Title VII does not redress sexual orientation discrimination. That holding is in line with all other circuit courts to have decided or opined about the matter. See e.g., Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 762 (6th Cir. 2006) (perceived sexual orientation and sexual harassment claim); Medina v. Income Support Div., New Mexico, 413 F.3d 1131, 1135 (10th Cir. 2005); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 261 (3d Cir. 2001); Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999); Hopkins v. Balt. Gas & Elec. Co., 77 F.3d 745, 751-52 (4th Cir. 1996) (noting in a case of same-sex harassment that Title VII does not protect against discrimination based on sexual orientation); U.S. Dep’t of Hous. & Urban
Dev. v. Fed. Labor Relations Auth., 964 F.2d 1, 2 (D.C. Cir. 1992) (assuming without deciding that Title VII does not cover sexual orientation discrimination); Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989); Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979); but see Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1068 (9th Cir. 2002) (gay male employee taunted and harassed by coworkers for having feminine traits successfully pleaded claim of sex harassment under Title VII).

*3 Our holdings and those of other courts reflect the fact that despite multiple efforts, Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation. Moreover, Congress has not acted to amend Title VII even in the face of an abundance of judicial opinions recognizing an emerging consensus that sexual orientation in the workplace can no longer be tolerated. See, e.g., Vickers, 453 F.3d at 764-65 (“While the harassment alleged by [the plaintiff] reflects conduct that is socially unacceptable and repugnant to workplace standards of proper treatment and civility, [the plaintiff’s] claim does not fit within the prohibitions of the law”); Bibby, 260 F.3d at 265 (“Harassment on the basis of sexual orientation has no place in our society. Congress has not yet seen fit, however, to provide protection against such harassment.”); Simonton, 232 F.3d at 35 (harassment on the basis of sexual orientation “is morally reprehensible whenever and in whatever context it occurs, particularly in the modern workplace” but “Congress’s refusal to expand the reach of Title VII is strong evidence of congressional intent in the face of consistent judicial decisions refusing to interpret “sex” to include sexual orientation.”); Higgins, 194 F.3d at 259 (harassment because of sexual orientation “is a noxious practice, deserving of censure and opprobrium” but not proscribed by Title VII); Rene, 243 F.3d at 1209, (Hug, J., dissenting) (same); Kay v. Indep. Blue Cross, 142 F. App’x 48, 51 (3d Cir. 2005) (finding sexual orientation discrimination to be “reprehensible” but not actionable under Title VII); Silva v. Siffard, No. 99-1499, 2000 WL 525573, *1 (1st Cir. Apr. 24, 2000) (“Although we do not condone harassment on the basis of perceived sexual orientation, it is not, without more, actionable under Title VII.”); Christiansen v. Omnicom Grp., Inc., No. 15 CIV. 3440, 2016 WL 951581, at *12 (S.D.N.Y. Mar. 9, 2016) (finding the conduct “reprehensible,” but not cognizable under Title VII). See also Ulane, 742 F.2d at 1084 (“While we do not condone harassment in any form, we are constrained to hold that Title VII does not protect transsexuals, and that the district court’s order on this count therefore must be reversed for lack of jurisdiction.”). In short, Congress’ failure to act to amend Title VII to include sexual orientation is not from want of knowledge of the problem. And as a result, our understanding in Ulane that Congress intended a very narrow reading of the term “sex” when it passed Title VII of the Civil Rights Act, so far, appears to be correct.

To overcome a motion to dismiss, Hively’s complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). In this case, Hively fails to thwart the motion to dismiss for the simple reason that this circuit has undeniably declared that claims for sexual orientation are not cognizable under Title VII. Nor are they, without more, cognizable as claims for sex discrimination under the same statute.
B.

We could end the discussion there, but we would be remiss not to consider the EEOC’s recent decision in which it concluded that “sexual orientation is inherently a ‘sex-based consideration,’ and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII.” *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641, at *5, *10 (July 16, 2015). The EEOC, the body charged with enforcing Title VII, came to this conclusion for three primary reasons. First, it concluded that “sexual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee’s sex.” *Id.* at *5 (proffering the example of a woman who is suspended for placing a photo of her female spouse on her desk, and a man who faces no consequences for the same act). Second, it explained that “sexual orientation discrimination is also sex discrimination because it is associational discrimination on the basis of sex,” in which an employer discriminates against lesbian, gay, or bisexual employees based on who they date or marry. *Id.* at *6-7. Finally, the EEOC described sexual orientation discrimination as a form of discrimination based on gender stereotypes in which employees are harassed or punished for failing to live up to societal norms about appropriate masculine and feminine behaviors, mannerisms, and appearances. *Id.* In coming to these conclusions, the EEOC noted critically that “courts have attempted to distinguish discrimination based on sexual orientation from discrimination based on sex, even while noting that the ‘borders [between the two classes] are ... imprecise.’ ” *Id.* at *8

*4* This July 2015 EEOC decision is significant in several ways. It marks the first time that the EEOC has issued a ruling stating that claims for sexual orientation discrimination are indeed cognizable under Title VII as a form of sex discrimination. Although the holding in *Baldwin* applies only to federal government employees, its reasoning would be applicable in private employment contexts too. And although the rulings of the EEOC are not binding on this court, they are entitled to some level of deference. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971); *Gibson v. Brown*, 137 F.3d 992, 995-96 (7th Cir. 1998), *vacated*, W. v. *Gibson*, 527 U.S. 212 (1999). Based on our holding today, which is counter to the EEOC’s holding in *Baldwin*, we need not delve into a discussion of the level of deference we owe to the EEOC’s rulings. Whatever deference we might owe to the EEOC’s adjudications, we conclude for the reasons that follow, that Title VII, as it stands, does not reach discrimination based on sexual orientation. Although we affirm our prior precedents on this point, we do so acknowledging that other federal courts are...
taking heed of the reasoning behind the EEOC decision in Baldwin. As we will discuss further below, the district courts, which are the front line experimenters in the laboratories of difficult legal questions, are beginning to question the doctrinaire distinction between gender non-conformity discrimination and sexual orientation discrimination and coming up short on rational answers.

In the process of concluding, after thorough analysis, that allegations of discrimination on the basis of sexual orientation necessarily state a claim of discrimination on the basis of sex, the EEOC criticized courts—and pointed particularly to this circuit—that “simply cite earlier and dated decisions without any additional analysis” even in light of the relevant intervening Supreme Court law. Baldwin, 2015 WL 4397641, at *8 n.11. We take to heart the EEOC’s criticism of our circuit’s lack of recent analysis on the issue. Moreover, recent legal developments and changing workplace norms require a fresh look at the issue of sexual orientation discrimination under Title VII. We begin, therefore, with that intervening Supreme Court case—Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989)—and discuss its implication for distinguishing between gender non-conformity claims, which are cognizable under Title VII, and sexual orientation claims, which are not. See Hamm, 332 F.3d at 1065 n.5.

C.

As far back as 1989, the Supreme Court declared that Title VII protects employees who fail to comply with typical gender stereotypes. Price Waterhouse, 490 at 251. In Price Waterhouse, when Ann Hopkins failed to make partner in the defendant accounting firm, the partners conducting her review advised her that her chances could be improved the next time around if she would, among other gender-based suggestions, “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.” Id. at 235. The Supreme Court declared that this type of gender stereotyping constituted discrimination on the basis of sex in violation of Title VII, stating,

[a]s for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.

Id. at 251 (internal citations omitted).

The holding in Price Waterhouse has allowed many employees to marshal successfully the power of Title VII to state a claim for sex discrimination when they have been discriminated against for failing to live up to various gender norms. See, e.g., City of Belleville, 119 F.3d at 580, 582 (finding that a worker who wore an earring and was habitually called “fag” or “queer” made a sufficient allegation of gender-based discrimination to defeat a motion for summary
judgment);\textsuperscript{3} \textit{Bellaver v. Quanex Corp.}, 200 F.3d 485, 492 (7th Cir. 2000) (“the evidence suggests the employer here may have relied on impermissible stereotypes of how women should behave” by criticizing plaintiff’s deficient interpersonal skills while tolerating the same deficiencies in male employees.).

\textsuperscript{5} As a result of \textit{Price Waterhouse}, a line of cases emerged in which courts began to recognize claims from gay, lesbian, bisexual, and transgender employees who framed their Title VII sex discrimination claims in terms of discrimination based on gender non-conformity (which we also refer to, interchangeably, as sex stereotype discrimination) and not sexual orientation. But these claims tended to be successful only if those employees could carefully cull out the gender non-conformity discrimination from the sexual orientation discrimination. \textit{See Hamm, 332 F.3d at 1065} (upholding the grant of summary judgment in the employer’s favor because the plaintiff “himself characterizes the harassment of his peers in terms of ... his sexual orientation and does not link their comments to his sex.”). When trying to separate the discrimination based on sexual orientation from that based on sex stereotyping, however, courts soon learned that the distinction was elusive. \textit{Prowel v. Wise Bus. Forms, Inc.}, 579 F.3d 285, 291 (3d Cir. 2009) (“the line between sexual orientation discrimination and discrimination ‘because of sex’ can be difficult to draw.”); \textit{Dawson v. Bumble & Bumble}, 398 F.3d 211, 217 (2d Cir. 2005) (“it is often difficult to discern when [the plaintiff] is alleging that the various adverse employment actions allegedly visited upon her by [her employer] were motivated by animus toward her gender, her appearance, her sexual orientation, or some combination of these” because “the borders [between these classes] are so imprecise.”); \textit{Centola v. Potter}, 183 F. Supp. 2d 403, 408 (D. Mass. 2002) (“the line between discrimination because of sexual orientation and discrimination because of sex is hardly clear.”); \textit{Hamm, 332 F.3d at 1065 n.5} (“We recognize that distinguishing between failure to adhere to sex stereotypes (a sexual stereotyping claim permissible under Title VII) and discrimination based on sexual orientation (a claim not covered by Title VII) may be difficult. This is especially true in cases in which a perception of homosexuality itself may result from an impression of nonconformance with sexual stereotypes.”); \textit{Id. at 1067} (Posner, J., concurring) (“Hostility to effeminate men and to homosexual men, or to masculine women and to lesbians, will often be indistinguishable as a practical matter.”).

And so for the last quarter century since \textit{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 under \textit{Price Waterhouse’s} interpretation of Title VII, and sexual orientation discrimination, which is not cognizable under Title VII. As one scholar has stated, “The challenge facing the lower courts since \textit{Price Waterhouse} is finding a way to protect against the entire spectrum of gender stereotyping while scrupulously not protecting against the stereotype that people should be attracted only to those of the opposite gender.” Brian Soucek, \textit{Perceived Homosexuals: Looking Gay Enough for Title VII}, 63 AM. U. L. REV. 715, 726 (2014). As we will describe below, courts have gone about this task in different ways—either by disallowing any claims where sexual orientation and gender non-conformity are intertwined, (and, for
some courts, by not allowing claims from lesbian, gay, or bisexual employees at all), or by trying to tease apart the two claims and focusing only on the gender stereotype allegations. In both methods, the opinions tend to turn circles around themselves because, in fact, it is exceptionally difficult to distinguish between these two types of claims. Discrimination against gay, lesbian, and bisexual employees comes about because their behavior is seen as failing to comply with the quintessential gender stereotype about what men and women ought to do—for example, that men should have romantic and sexual relationships only with women, and women should have romantic and sexual relationships only with men. In this way, almost all discrimination on the basis of sexual orientation can be traced back to some form of discrimination on the basis of gender nonconformity. Gay men face discrimination if they fail to meet expected gender norms by dressing in a manner considered too effeminate for men, by displaying stereotypical feminine mannerisms and behaviors, by having stereotypically feminine interests, or failing to meet the stereotypes of the rough and tumble man. Co-workers and employers discriminate against lesbian women for displaying the parallel stereotypical male characteristics. But even if those employees display no physical or cosmetic signs of their sexual orientation, lesbian women and gay men nevertheless fail to conform to gender norm expectations in their attractions to partners of the same sex. Lesbian women and gay men upend our gender paradigms by their very status—causing us to question and casting into doubt antiquated and anachronistic ideas about what roles men and women should play in their relationships. Who is dominant and who is submissive? Who is charged with earning a living and who makes a home? Who is a father and who a mother? In this way the roots of sexual orientation discrimination and gender discrimination wrap around each other inextricably. In response to the new EEOC decision, one court has bluntly declared that the lines are not merely blurry, but are, in fact, un-definable. See Videckis v. Pepperdine Univ., No. CV1500298, 2015 WL 8916764, at *6 (C.D. Cal. Dec. 15, 2015) (“Simply put, the line between sex discrimination and sexual orientation discrimination is ‘difficult to draw’ because that line does not exist, save as a lingering and faulty judicial construct.”) Whether the line is nonexistent or merely exceedingly difficult to find, it is certainly true that the attempt to draw and observe a line between the two types of discrimination results in a jumble of inconsistent precedents.

*6 For example, some courts attempting to differentiate between actions which constitute discrimination on the basis of sexual orientation and those which constitute discrimination on the basis of gender non-conformity essentially throw out the baby with the bathwater. For those courts, if the lines between the two are not easily discernible, the right answer is to forego any effort to tease apart the two claims and simply dismiss the claim under the premise that “a gender stereotyping claim should not be used to bootstrap protection for sexual orientation into Title VII.” See, e.g., Dawson, 398 F.3d at 218 (citing Simonton, 232 F.3d at 38). In Dawson, a lesbian hair salon assistant alleged that she was discriminated against because she did not conform to feminine stereotypes and because she was gay. Id. at 217. The court expressed concern that the plaintiff had “significantly conflated her claims,” and because the court could not discern whether the allegedly discriminatory acts were
motivated by animus toward her gender or her sexual orientation, it deemed the acts beyond the scope of Title VII and upheld the motion for summary judgment in the salon’s favor. \textit{Id.}.

Several other courts likewise have thrown up their hands at the muddled lines between sexual orientation and gender non-conformity claims and simply have disallowed what they deem to be “bootstrapping” of sexual orientation claims onto gender stereotyping claims. For example, in \textit{Vickers}, 453 F.3d at 764, the Sixth Circuit upheld the dismissal of a gender nonconformity claim brought by an employee whose co-workers perceived him to be gay, because recognition of that claim would have the effect of de facto amending Title VII to encompass sexual orientation as a prohibited basis for discrimination. In all likelihood, any discrimination based on sexual orientation would be actionable under a sex stereotyping theory if this claim is allowed to stand, as all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices.

\textit{Id. See also, Simonton, 232 F.3d at 38} (noting that the \textit{Price Waterhouse} theory could not allow plaintiffs to “bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine.”); \textit{Spearman, 231 F.3d at 1085-86} (ignoring the plaintiff’s claim that he was discriminated against because his co-workers perceived him to be too feminine to fit into the male image of the company, and finding instead that the discriminatory comments were directed solely at the plaintiff’s sexual orientation); \textit{Magnusson v. Cty. of Suffolk}, No. 14CV3449, 2016 WL 2889002, at *8 (E.D.N.Y. May 17, 2016) (“Sexual orientation discrimination is not actionable under Title VII, and plaintiffs may not shoehorn what are truly claims of sexual orientation discrimination into Title VII by framing them as claims of discrimination based on gender stereotypes, as Plaintiff at times attempts to do here.”); \textit{Burrows v. Coll. of Cent. Florida}, No. 5:14-CV-197-OC-30, 2015 WL 4250427, at *9 (M.D. Fla. July 13, 2015) (“Plaintiff’s claim, although cast as a claim for gender stereotype discrimination, is merely a repackaged claim for discrimination based on sexual orientation, which is not cognizable under Title VII.”); \textit{Evans v. Georgia Reg’l Hosp.}, No. CV415-103, 2015 WL 5316694, at *3 (S.D. Ga. Sept. 10, 2015) (“Evans’ allegations about discrimination in response to maintaining a male visage also do not place her within Title VII’s protection zone, even if labeled a ‘gender conformity’ claim, because it rests on her sexual orientation no matter how it is otherwise characterized.”), \textit{report and recommendation adopted, No. CV415-103, 2015 WL 6555440} (S.D. Ga. Oct. 29, 2015); \textit{Pagan v. Holder}, 741 F. Supp. 2d 687, 695 (D.N.J. 2010) (“This is a hollow attempt to amend the Complaint through briefing and recast a sexual orientation claim as a gender stereotyping claim.”), \textit{aff’d, Pagan v. Gonzalez}, 430 F. App’x 170 (3d Cir. 2011).

This line of cases, in which the gender non-conformity claim cannot be tainted with any hint of a claim that the employer also engaged in sexual orientation discrimination, leads to some odd results. As the concurrence in this circuit’s decision in \textit{Hamm} pointed out, “the absurd conclusion follows that the law
protects effeminate men from employment discrimination, but only if they are (or are believed to be) heterosexuals.” Hamm, 332 F.3d at 1067 (Posner, J. concurring). And the concurrence was not merely crying wolf. At least one district court has taken the anti-bootstrapping pronouncements in Dawson and Simonton, supra and declared that when determining whether a claim for gender nonconformity can stand, “the critical fact under the circumstances is the actual sexual orientation of the harassed person. If the harassment consists of homophobic slurs directed at a homosexual, then a gender-stereotyping claim by that individual is improper bootstrapping. If, on the other hand, the harassment consists of homophobic slurs directed at a heterosexual, then a gender-stereotyping claim by that individual is possible.” Estate of D.B. by Briggs v. Thousand Islands Cent. Sch. Dist., No., 715CV0484, 2016 WL 945350, at 8 (N.D.N.Y. Mar. 14, 2016) (internal citations omitted, emphasis in original).

*7 Other courts address the problem of the ill-defined lines between sexual orientation and gender non-conformity claims by carefully trying to tease the two apart and looking only at those portions of the claim that appear to address cognizable gender non-conformity discrimination. See, e.g., EEOC v. Boh Bros. Const. Co., L.L.C., 731 F.3d 444, 457-59 (5th Cir. 2013) (sustaining a jury verdict finding sex discrimination by emphasizing the very specific testimony isolating gender-based discrimination from sexual orientation). But because of the indeterminate boundaries, one is left to wonder whether the court has, in fact successfully separated the two claims. For example, in Prowel, a factory worker who described himself both as gay and effeminate succeeded in defeating summary judgment by proffering just enough evidence of harassment based on gender stereotypes, as opposed to that based on sexual orientation, to satisfy the court that the claim might succeed. Id. 579 F.3d 291-92. Notably, Prowel succeeded because he convinced the court that he displayed stereotypically feminine characteristics by testifying that he had a high voice, did not curse, was well-groomed, neat, filed his nails, crossed his legs, talked about art and interior design, and pushed the buttons
Hively v. Ivy Tech Community College, South Bend, --- F.3d ---- (2016)
2016 WL 4039703

on his factory equipment “with pizzazz.” *Id.* The Third Circuit concluded that a jury could find that “Prowel was harassed because he did not conform to [his employer’s] vision of how a man should look, speak, and act—rather than harassment based solely on his sexual orientation.” *Id.* at 292. But it is not at all clear that the court successfully segregated characteristics based on sexual orientation from those based on gender, or if such a task is even possible. Having a high voice and an interest in grooming, art, interior design and civil language, are not merely attributes associated with women, but also attributes stereotypically associated with gay men. So for purposes of Title VII, should a court deem that pushing a factory button “with pizzazz” is a trait associated with gay men or straight women? It is difficult to know. We can assume that the vast majority of the stereotypes of gay men have come about particularly because they are associated with feminine attributes. The attempts to identify behaviors that are uniquely attributable to gay men and lesbians often lead to strange discussions of sexual orientation stereotypes. For example, one district court concluded that mimicking a gay co-worker with a lisp and “flamboyant” voice is discrimination based solely on sexual orientation and not gender. *Anderson v. Napolitano,* No. 09-60744-CIV, 2010 WL 431898, at *6 (S.D. Fla. Feb. 8, 2010). “[T]he logical conclusion is that his coworkers were lisping because of the stereotype that gay men speak with a lisp. Lisping is not a stereotype associated with women. Thus, again, the coworkers’ actions were not “because of sex,” but because of Anderson’s sexual orientation” *Id.*

Nevertheless, although disentangling gender discrimination from sexual orientation discrimination may be difficult, we cannot conclude that it is impossible. There may indeed be some aspects of a worker’s sexual orientation that create a target for discrimination apart from any issues related to gender. Harassment may be based on prejudicial or stereotypical ideas about particular aspects of the gay and lesbian “lifestyle,” including ideas about promiscuity, religious beliefs, spending habits, child-rearing, sexual practices, or politics. Although it seems likely that most of the causes of discrimination based on 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 it 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.

Because we recognize that Title VII in its current iteration does not recognize any claims for sexual orientation discrimination, this court must continue to extricate the gender nonconformity claims from the sexual orientation claims. We recognize that doing so creates an uncomfortable result in which the more visibly and stereotypically gay or lesbian a plaintiff is in mannerisms, appearance, and behavior, and the more the plaintiff exhibits those behaviors and mannerisms at work, the more likely a court is to recognize a claim of gender non-conformity which will be cognizable under Title VII as sex discrimination. See, e.g., *Rene,* 305 F.3d at 1068 (gay male employee taunted and harassed by co-workers for having feminine traits successfully pleaded claim of sex discrimination under Title VII); *Nichols v. Azteca Rest. Enter., Inc.,* 256 F.3d 864, 874-75 (9th Cir. 2001) (noting that the abuse directed at plaintiff reflected a belief that he
did not act as a man should act—he had feminine mannerisms, did not have sex with a female friend, and did not otherwise conform to gender-based stereotypes—and thus the discrimination was closely linked to gender and therefore actionable under Title VII); Reed v. S. Bend Nights, Inc., 128 F. Supp. 3d 996, 1001 (E.D. Mich. 2015) (lesbian employee “put forth sufficient evidence in support of her allegation that she was discriminated against because she did not conform to traditional gender stereotypes in terms of her appearance, behavior, or mannerisms at work,” where her supervisor testified that she “dressed more like a male” and her “‘demeanor’ was a ‘little more mannish.’”); Koren v. Ohio Bell Tel. Co., 894 F. Supp. 2d 1032, 1038 (N.D. Ohio 2012) (gay man alleged sufficient facts to support a claim of sex discrimination based on his failure to comply with gender norms where he changed his last name to his husband’s and his employer refused to call him by his new name); Centola, 183 F. Supp. 2d at 410 (concluding that plaintiff’s coworkers must have surmised that the plaintiff was gay because they found him to be effeminate); Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212, 1217-20 (D. Or. 2002) (holding that a jury could find that the employer repeatedly harassed, and ultimately discharged, the plaintiff because she did not conform to the employer’s stereotype of how a woman ought to behave, both because she dated other women and because she wore male-styled clothing).

*8 Plaintiffs who do not look, act, or appear to be gender non-conforming but are merely known to be or perceived to be gay or lesbian do not fare as well in the federal courts. In a Sixth Circuit case, for example, the plaintiff, who was not openly gay and, in fact, even in the lawsuit “declined to reveal whether or not he [was], in fact, homosexual” could not defeat a motion to dismiss his Title VII claim because the gender non-conforming behavior which Vickers claims supports his theory of sex stereotyping is not behavior observed at work or affecting his job performance. Vickers has made no argument that his appearance or mannerisms on the job were perceived as gender nonconforming in some way and provided the basis for the harassment he experienced. Rather, the harassment of which Vickers complains is more properly viewed as harassment based on Vickers’ perceived homosexuality, rather than based on gender non-conformity.

Vickers, 453 F.3d at 763.

Likewise, in Bibby, 260 F.3d at 264, the Third Circuit granted summary judgment against the plaintiff where he “did not claim that he was harassed because he failed to comply with societal stereotypes of how men ought to appear or behave or that as a man he was treated differently than female co-workers. His claim was, pure and simple, that he was discriminated against because of his sexual orientation.” Id. See also Hamm, 332 F.3d at 1063-64 (Hamm’s claim could not survive a motion for summary judgment where his claim was based on speculation by co-workers that he was gay rather than any specifically
alleged gender non-conforming attributes); *Hamner*, 224 F.3d at 705 (upholding judgment as a matter of law for the employer where the plaintiff’s discrimination claim was based only on the fact that his employer knew his status as a gay man and “absolutely could not handle that”); *Johnson v. Honda, Inc.*, 125 F.3d 408, 413–14 (7th Cir. 1997) (concluding that a slew of gay epithets could not sustain a claim of gender discrimination where there was no evidence that the plaintiff failed to conform to male stereotypes); *Simonton*, 232 F.3d at 38 (holding that a plaintiff could not defeat a motion to dismiss based on a gender non-conformity claim under Title VII where he never set forth any claim that he “behaved in a stereotypically feminine manner.”); *Pambianchi v. Arkansas Tech Univ.*, 95 F. Supp. 3d 1101, 1114 (E.D. Ark. 2015) (“Sexual orientation alone cannot be the alleged gender nonconforming behavior that gives rise to an actionable Title VII claim under a sex-stereotyping theory.”). But see *Boutilier v. Hartford Pub. Sch.*, No. 3:13CV1303, 2014 WL 4794527, *2 (D. Ct. Sept. 25, 2014) (allowing claim of lesbian teacher to go forward where the only evidence of gender non-conformity was the fact that she was openly married to a woman because “[c]onstrued most broadly, she has set forth a plausible claim she was discriminated against based on her nonconforming gender behavior.”); *Terveer v. Billington*, 34 F. Supp. 3d 100, 116 (D.D.C. 2014) (the plaintiff defeated the summary judgment motion by alleging that the defendant denied him promotions and created a hostile work environment because of the plaintiff’s failure to conform to male sex stereotypes solely because of his status as a gay man.); *Centola*, 183 F. Supp. at 410 (“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.”)

*9 In sum, the distinction between gender non-conformity claims and sexual orientation claims has created an odd state of affairs in the law in which Title VII protects gay, lesbian, and bisexual people, but frequently only to the extent that those plaintiffs meet society’s stereotypical norms about how gay men or lesbian women look or act—i.e. that gay men tend to behave in effeminate ways and lesbian women have masculine mannerisms. By contrast, lesbian, gay or bisexual people who otherwise conform to gender stereotyped norms in dress and mannerisms mostly lose their claims for sex discrimination under Title VII, although why this should be true is not entirely clear. It is true that “not all homosexual men are stereotypically feminine and not all heterosexual men are stereotypically masculine” as the Second Circuit explained while defending the exclusion of sexual orientation protection under Title VII. *Simonton*, 232 F.3d at 38. But it is also true, as we pointed out above, that all gay, lesbian and bisexual persons fail to comply with the sine qua non of gender stereotypes—that all men should form intimate relationships only with women, and all women should form intimate relationships only with men.

Because courts have long held that Title VII will not support a claim for sexual orientation discrimination per se, many courts have been attempting to dress sexual orientation discrimination claims in the garb of gender nonconformity case law, with the
unsatisfactory results seen in the confused hodge-podge of cases we detail above. This has led some courts toward a more blunt recognition of the difficulty of extricating sexual orientation claims from gender non-conformity claims. Thus the Videckis court’s observation, which noted that “[s]imply put, the line between sex discrimination and sexual orientation discrimination is ‘difficult to draw’ because that line does not exist, save as a lingering and faulty judicial construct.” Videckis, 2015 WL 8916764, at *5. This court long ago noted the difficulty and began to grapple with it in a case involving same-sex sexual harassment:

There is, of course, a considerable overlap in the origins of sex discrimination and homophobia, and so it is not surprising that sexist and homophobic epithets often go hand in hand. Indeed, a homophobic epithet like “fag,” for example, may be as much of a disparagement of a man’s perceived effeminate qualities as it is of his perceived sexual orientation. Observations in this vein have led a number of scholars to conclude that anti-gay bias should, in fact, be understood as a form of sex discrimination.

City of Belleville, 119 F.3d at 593. We had no need to decide the matter directly in that case because we were satisfied that there was adequate proof that the harassment recounted by the plaintiff was animated by his failure to conform to stereotypic gender norms. Id. at 575 (“One may reasonably infer from the evidence before us that [the plaintiff] was

harassed ‘because of’ his gender. If that cannot be inferred from the sexual character of the harassment itself, it can be inferred from the harassers’ evident belief that in wearing an earring, [the plaintiff] did not conform to male standards.”). Nevertheless, by noting the overlay between anti-gay bias and sex discrimination we seemed to have anticipated the EEOC’s path in Baldwin, 2015 WL 4397641, at *10.

Likewise, the Sixth Circuit was on to something when it said, “In all likelihood, any discrimination based on sexual orientation would be actionable under a sex stereotyping theory if this claim is allowed to stand, as all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices.” Vickers, 453 F.3d at 764. The Vickers court thought the solution to the inability to segregate sexual orientation from gender non-conformity claims was to deny all gender non-conformity claims where there was also a claim of sexual orientation discrimination. But the other approach could be to recognize the fact that sexual orientation discrimination is, in fact, discrimination based on the gender stereotype that men should have sex only with women and women should have sex only with 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.” Centola, 183 F. Supp. 2d at 410. As the next paragraph explains, with increasing frequency, the lower courts are beginning to see the false distinction and are turning to this latter approach.
The idea that the line between gender non-conformity and sexual orientation claims is arbitrary and unhelpful has been smoldering for some time, but the EEOC’s decision in Baldwin threw fuel on the flames. Since the EEOC released its decision in Baldwin, stating that “allegations of discrimination on the basis of sexual orientation necessarily state a claim of discrimination on the basis of sex,” Baldwin, 2015 WL 4397641, at *10, more and more district court judges have begun to scratch their heads and wonder whether the distinction between the two claims does indeed make any sense. For example, a district court in the Southern District of New York, noting the holding of Baldwin, the changing legal landscape, and the arbitrariness of distinguishing between gender based discrimination and sexual orientation discrimination, stated:

The lesson imparted by the body of Title VII litigation concerning sexual orientation discrimination and sexual stereotyping seems to be that no coherent line can be drawn between these two sorts of claims. Yet the prevailing law in this Circuit—and, indeed, every Circuit to consider the question—is that such a line must be drawn. Simonton is still good law, and, as such, this Court is bound by its dictates.

Christiansen, 2016 WL 951581, at *14 (“Title VII does not proscribe discrimination because of sexual orientation”) (citing Simonton, 232 F.3d at 36). And as we just noted above, the Eastern District of Virginia has concluded that the distinction [between sexual orientation discrimination and gender discrimination] is illusory and artificial, and that sexual orientation discrimination is not a category distinct from sex or gender discrimination. Thus, claims of discrimination based on sexual orientation are covered by Title VII and Title IX, but not as a category of independent claims separate from sex and gender stereotype. Rather, claims of sexual orientation discrimination are gender stereotype or sex discrimination claims.

Videckis, 2015 WL 8916764, at *5. Likewise, several other district courts have indicated their agreement with the EEOC’s decision in Baldwin, or, at least recognized that the blurring line between gender and sexual orientation claims might require courts to reconsider the long line of precedent distinguishing them. Isaacs v. Felder Servs., LLC, 143 F. Supp. 3d 1190, 1193 (M.D. Ala. 2015) (“This court agrees instead with the view of the Equal Employment Opportunity Commission that claims of sexual orientation-based discrimination are cognizable under Title VII.”); Koke v. Baumgardner, No. 15-CV-9673, 2016 WL 93094, at *2 (S.D.N.Y. Jan. 5, 2016) (“Given the door left ajar by Simonton for claims based on ‘failure to conform to sex stereotypes,’ the EEOC’s recent holding that Title VII prohibits discrimination on the basis of sexual orientation, and the lack of a Supreme Court ruling on whether Title VII applies to such claims, I cannot conclude, at least at this
stage, that plaintiff’s Title VII claim is ‘wholly insubstantial and frivolous.’

In short, the district courts—the laboratories on which the Supreme Court relies to work through cutting-edge legal problems—are beginning to ask whether the sexual orientation-denying emperor of Title VII has no clothes. See Arizona v. Evans, 514 U.S. 1, 23, n.1 (1995) (Ginsburg, J. dissenting) (1995) (“We have in many instances recognized that when frontier legal problems are presented, periods of ‘percolation’ in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court.”)

While this eddy of statutory Title VII sexual orientation decisions has been turning in the lower federal courts, the Supreme Court has been expounding upon the rights of lesbian, gay, and bisexual persons in a constitutional context. Of course, these constitutional cases have no direct bearing on the outcome of litigation under Title VII of the Civil Rights Act, but they do inform the legal landscape that courts face as they interpret “because of sex” in Title VII. In 1996 in Romer v. Evans, 517 U.S. 620 (1996), for example, the Court invalidated, under the Equal Protection Clause, an amendment to Colorado’s Constitution that sought to foreclose any branch or political subdivision of the State from protecting persons against discrimination based on sexual orientation. Next, in Lawrence v. Texas, the Court determined that individuals’ rights to liberty under the Due Process Clause gives them the full right to engage in private consensual sexual conduct without intervention of the government. Id., 539 U.S. at 578 (2003). Then, in 2013, the Supreme Court struck down the Defense of Marriage Act (DOMA), finding that it violated the equal protection guarantee of the Fifth Amendment. United States v. Windsor, 133 S. Ct. 2675 (2013). And finally, two years later, the Supreme Court ruled that under both the Due Process and Equal Protection Clauses of the Fourteenth Amendment, same-sex couples had the right to marry in every state of the Union. Obergefell v. Hodges, 135 S. Ct. 2584, 2696 (2015). We emphasize yet again that none of these cases directly impacts the statutory interpretations of Title VII. The Supreme Court neither created Title VII nor was required to address any issues regarding employment discrimination in considering the issues it chose to address. The role of the Supreme Court is to interpret the laws passed by Congress. And, in fact, in Obergefell, one amicus brief urged the Court to view the same sex marriage debate through the lens of gender discrimination arguing that the state’s permission to marry depends on the gender of the participants. Brief Amicus Curiae of Legal Scholars Stephen Clark, Andrew Koppelman, Sanford Levinson, Irina Manta, Erin Sheley and Ilya Somin, Obergefell v. Hodges, 2015 WL 1048436, *4 (U.S. 2015). In oral arguments Chief Justice John Roberts delved into this realm of questioning wondering whether “if Sue loves Joe and Tom loves Joe, Sue can marry him and Tom can’t. And the difference is based upon their different sex. Why isn’t that a straightforward question of sexual discrimination?” Transcript of oral argument at 62:1-4 Obergefell, 135 S. Ct. at 2584. But despite having considered this option, the Court rejected it for a holding based in the Fourteenth Amendment. The Court did not address the issue of gender nor of workplace discrimination.

*11 The cases as they stand do, however, create a paradoxical legal landscape in which a person can be married on Saturday and then
fired on Monday for just that act. For although federal law now guarantees anyone the right to marry another person of the same gender, Title VII, to the extent it does not reach sexual orientation discrimination, also allows employers to fire that employee for doing so. From an employee’s perspective, the right to marriage might not feel like a real right if she can be fired for exercising it. Many citizens would be surprised to learn that under federal law any private employer can summon an employee into his office and state, “You are a hard-working employee and have added much value to my company, but I am firing you because you are gay.” And the employee would have no recourse whatsoever—unless she happens to live in a state or locality with an anti-discrimination statute that includes sexual orientation. More than half of the United States, however, do not have such state protections: Alabama, Alaska, Arkansas, Arizona, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Virginia, West Virginia, and Wyoming. More importantly, the truth of this scenario would also apply to perceived sexual orientation. And so, for example, an employer who merely has a hunch that an employee is gay can terminate that employee for being gay whether or not she actually is. And even if the employer is wrong about the sexual orientation of the non-gay employee, the employee has no recourse under Title VII as the discharge still would be based on sexual orientation.

In one sense, the paradox is not our concern. Our task is to interpret Title VII as drafted by Congress, and as we concluded in *Ulane*, Title VII prohibits discrimination only on the basis of gender. *Id.*, 742 F.2d at 1085. If we, and every other circuit to have considered it are wrong about the interpretation of the boundaries of gender discrimination under the “sex” prong of Title VII, perhaps it is time for the Supreme Court to step in and tell us so.

As things stand now, however, our understanding of Title VII leaves us with a somewhat odd body of case law that protects a lesbian who faces discrimination because she fails to meet some superficial gender norms—wearing pants instead of dresses, having short hair, not wearing make up—but not a lesbian who meets cosmetic gender norms, but violates the most essential of gender stereotypes by marrying another woman. We are left with a body of law that values the wearing of pants and earrings over marriage. It seems likely that neither the proponents nor the opponents of protecting employees from sexual orientation discrimination would be satisfied with a body of case law that protects “flamboyant” gay men and “butch” lesbians but not the lesbian or gay employee who act and appear straight. This type of gerrymandering to exclude some forms of gender-norm discrimination but not others leads to unsatisfying results.

D.

*12 In addition to the inconsistent application of Title VII to gender non-conformity, these sexual orientation cases highlight another inconsistency in courts’ applications of Title VII to sex as opposed to race. As the EEOC noted in *Baldwin*, when applying Title VII’s prohibition of race discrimination, courts and the Commission have consistently concluded that the statute prohibits discrimination based
on an employee’s association with a person of another race, such as an interracial marriage or friendship. Baldwin, 2015 WL 4397641, at *6. But although it has long been clear that Title VII protects white workers who are discriminated against because they have close associations with African-American partners and vice versa, it has not protected women employees who are discriminated against because of their intimate associations with other women, and men with men.

Since the earliest days of Title VII, the EEOC has taken the position that Title VII, in proscribing race-based discrimination, includes a prohibition on discrimination toward employees because of their interracial associations. See, e.g., Equal Employment Opportunity Comm’n, EEOC Dec. No. 76-23 (1975) (Title VII claim properly alleged where job applicant not hired due to his white sister’s domestic partnership with an African American). The courts that have considered this question agree: Title VII protects employees in interracial relationships. That is to say, courts have concluded that if a white employee is fired because she is dating or married to an African-American man, this constitutes discrimination on the basis of race. Had she been in a relationship with a white man, she would not have faced the same consequences. The rationale is that “where an employee is subjected to adverse action because an employer disapproves of their interracial association, the employee suffers discrimination because of the employee’s own race.” Holcomb v. Iona Coll., 521 F.3d 130, 139 (2d Cir. 2008) (plaintiff claiming that he suffered an adverse employment action because of his interracial marriage has alleged discrimination as a result of his membership in a protected class under Title VII); See also Floyd v. Amite Cty. Sch. Dist., 581 F.3d 244, 249 (5th Cir. 2009) (collecting cases); Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581, 589 (5th Cir. 1998) (white woman dating African-American man), reh’g en banc granted, opinion vacated on other grounds, Williams v. Wal-Mart Stores, Inc., 169 F.3d 215 (5th Cir. 1999), and opinion reinstated on reh’g, Williams v. Wal-Mart Stores, Inc., 182 F.3d 333 (5th Cir. 1999); Drake v. Minnesota Min. & Mfg. Co., 134 F.3d 878, 884 (7th Cir. 1998) (declining to decide whether an employee who advised and counseled African-American co-workers could bring an associational race discrimination claim under Title VII, as it was conceded by the defendant, but noting that other courts have determined that such a claim is available when factually supported); Stacks v. Sw. Bell Yellow Pages, Inc., 27 F.3d 1316, 1327 n. 6 (8th Cir. 1994) (agreeing with district court that claim for discrimination based on interracial relationships was cognizable under Title VII, but finding that plaintiff failed to present sufficient evidence to support the claim); Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 891–92 (11th Cir. 1986) (white man married to African-American woman can state a claim for failure to hire under Title VII); Whitney v. Greater N.Y. Corp. of Seventh–Day Adventists, 401 F. Supp. 1363, 1366 (S.D.N.Y.1975) (white woman alleged viable claim of discrimination based on casual social relationship with African-American man); Gresham v. Waffle House, Inc., 586 F. Supp. 1442, 1445 (N.D.Ga. 1984) (holding that plaintiff has stated a claim under Title VII by alleging that she was discharged by her employer because of her interracial marriage to a black man).

*13 The relationship in play need not be a marriage to be protected. A number of courts
have found that Title VII protects those who have been discriminated against based on interracial friendships and other associations. See, e.g., Blanks v. Lockheed Martin Corp., 568 F. Supp. 2d 740, 744 (S.D. Miss. 2007) (compiling cases in which courts have found viable claims under Title VII where plaintiffs alleged discrimination based on workplace or other associations with members of racial and national origin minority groups); see also McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1118 (9th Cir. 2004) (noting that a white employee who was also targeted for discrimination was not a good comparator to plaintiff as he was targeted because of his close associations with black friends and co-workers); Johnson v. Univ. of Cincinnati, 215 F.3d 561, 574 (6th Cir. 2000) (advocacy on behalf of women and minorities); Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc., 173 F.3d 988, 994 (6th Cir. 1999) (“A white employee who is discharged because his child is biracial is discriminated against on the basis of his race, even though the root animus for the discrimination is a prejudice against the biracial child”); Drake, 134 F.3d at 884 (advising and counseling African-American co-workers); Stacks, 27 F.3d at 1327 (professional relationship with African-American co-worker); Whitney, 401 F. Supp. at 1366 (casual social relationship with African-American).

It is also well established that, unlike equal protection claims that apply differing levels of scrutiny depending on the nature of the class, the classifications within Title VII—race, color, religion, sex, or national origin—must all be treated equally. “The statute on its face treats each of the enumerated categories exactly the same.” Price Waterhouse, 490 U.S. at 244 n. 9. See also Nat’l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 116 n. 10 (2002) (“Hostile work environment claims based on racial harassment are reviewed under the same standard as those based on sexual harassment.”). Consequently, if Title VII protects from discrimination a white woman who is fired for romantically associating with an African-American man, then logically it should also protect a woman who has been discriminated against because she is associating romantically with another woman, if the same discrimination would not have occurred were she sexually or romantically involved with a man. It is true that Hively has not made the express claim that she was discriminated against based on her relationship with a woman, but that is, after all, the very essence of sexual orientation discrimination. It is discrimination based on the nature of an associational relationship—in this case, one based on gender.

E.

A court would not necessarily need to expand the definition of “sex discrimination” beyond the narrow understanding of “sex” we adopted in Ulane, to conclude that lesbian, gay, and bisexual employees who are terminated for their sexual conduct or their perceived sexual conduct have been discriminated against on the basis of sex. Yet, by failing to conform with both superficial and quintessential gender norms, gay, lesbian, and bisexual employees could be seen as facing discrimination comparable to that which Ann Hopkins faced when her supervisors insisted that she live up to the feminine stereotype the supervisors associated with women. “Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.” Price Waterhouse, 490 U.S.
at 251 (emphasis ours). There is no reason to believe that the disparate treatment caused when employees do not live up to the stereotype of how “real” men and women act in their sexual lives should be excluded. As the Supreme Court stated in Oncale, “Statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.” Oncale, 523 U.S. 75 at 79.

*14 Curiously, however, despite Price Waterhouse and Oncale, the Supreme Court has opted not to weigh in on the question of whether Title VII’s prohibition on sex-based discrimination would extend to protect against sexual orientation discrimination. Even in the watershed case of Obergefell, when the Court declared that “laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter,” it made no mention of the stigma and injury that comes from excluding lesbian, gay, and bisexual persons from the workforce or subjecting them to un-remediable harassment and discrimination. Obergefell, 135 S. Ct. at 2602. Perhaps the majority’s statement in Obergefell that “[i]t demeans gays and lesbians for the State to lock them out of a central institution of the Nation’s society” could be read as a forecast that the Supreme Court might someday say the same thing about locking gay men and lesbians for the State to lock them out of a central institution of the Nation’s society” could be read as a forecast that the Supreme Court might someday say the same thing about locking gay men and lesbians out of the workforce—another “central institution of the Nation’s society.” See Id. at 2602. But, as we noted earlier, in the same-sex marriage case, the Court was presented with the opportunity to consider the question as one of sex discrimination but declined to do so and thus far has declined to take any opportunity to weigh in on the question of sexual orientation discrimination under Title VII.

In addition to the Supreme Court’s silence, Congress has time and time again said “no,” to every attempt to add sexual orientation to the list of categories protected from discrimination by Title VII. See Bibby, 260 F.3d at 261 (compiling rejected legislation to add sexual orientation to Title VII).

This circuit has not remained silent on the matter, but rather, as we have described above, our own precedent holds that Title VII provides no protection from nor redress for discrimination on the basis of sexual orientation. We require a compelling reason to overturn circuit precedent. United States v. Lara–Unzueta, 735 F.3d 954, 961 (7th Cir. 2013). Ordinarily this requires a decision of the Supreme Court or a change in legislation. Id. But it is also true that precedent can be overturned when “the rule has proven to be intolerable simply in defying practical workability ... whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine ... or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.” Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–55 (1992). It may be that the rationale appellate courts, including this one, have used to distinguish between gender non-conformity discrimination claims and sexual orientation discrimination claims will not hold up under future rigorous analysis. It seems illogical to entertain gender non-conformity claims under Title VII where the non-conformity involves style of dress or manner of speaking, but not when the gender non-conformity involves the sine qua non of gender stereotypes—with whom a person engages in sexual
relationships. And we can see no rational reason to entertain sex discrimination claims for those who defy gender norms by looking or acting stereotypically gay or lesbian (even if they are not), but not for those who are openly gay but otherwise comply with gender norms. We allow two women or two men to marry, but allow employers to terminate them for doing so. Perchance, in time, these inconsistencies will come to be seen as defying practical workability and will lead us to reconsider our precedent. Id. See also Obergefell, 135 S. Ct. at 2603 (“in interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged.”)

*15 Perhaps the writing is on the wall. It seems unlikely that our society can continue to condone a legal structure in which employees can be fired, harassed, demeaned, singled out for undesirable tasks, paid lower wages, demoted, passed over for promotions, and otherwise discriminated against solely based on who they date, love, or marry. The agency tasked with enforcing Title VII does not condone it, (see Baldwin, 2015 WL 4397641 at **5,10); many of the federal courts to consider the matter have stated that they do not condone it (see, e.g., Vickers, 453 F.3d at 764-65; Bibby, 260 F.3d at 265; Simonton, 232 F.3d at 35; Higgins, 194 F.3d at 259; Rene, 243 F.3d at 1209, (Hug, J., dissenting); Kay, 142 F. App’x at 51; Silva, 2000 WL 525573, at *1); and this court undoubtedly does not condone it (see Ulane, 742 F.2d at 1084). But writing on the wall is not enough. Until the writing comes in the form of a Supreme Court opinion or new legislation, we must adhere to the writing of our prior precedent, and therefore, the decision of the district court is AFFIRMED.

All Citations

--- F.3d ----, 2016 WL 4039703

Footnotes

1 See footnote 2 for an explanation of the abrogation by Oncale.

The Supreme Court’s decision in *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), nominally abrogated the decision in *City of Belleville*, but nothing in the Supreme Court’s decision in *Oncale* called into question this circuit’s holding regarding gender stereotypes and application of the *Price Waterhouse* holding. See *Bibby*, 260 F.3d at 263 n.5 (“Absent an explicit statement from the Supreme Court that it is turning its back on *Price Waterhouse*, there is no reason to believe that the remand in *City of Belleville* was intended to call its gender stereotypes holding into question.”).

The plaintiff in *Estate of D.B. by Briggs* brought a claim under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681, et seq., but “because a Title IX sex discrimination claim is treated in much the same way as a Title VII sex discrimination claim, Title VII jurisprudence therefore applies.” *Estate of D.B.*, 2016 WL 945350, at *8 (citing *Papelino v. Albany College of Pharmacy of Union Univ.*, 633 F.3d 81, 89 (2d Cir. 2011)).

Some of these courts go half a step further and articulate that the sexual orientation claim has no effect whatsoever on the gender non-conformity claim. See *Rene*, 305 F.3d at 1063 (“an employee’s sexual orientation is irrelevant for purposes of Title VII. It neither provides nor precludes a cause of action for sexual harassment.”); *Centola*, 183 F. Supp. 2d at 409-10 (“Centola does not need to allege that he suffered discrimination on the basis of his sex alone or that sexual orientation played no part in his treatment ... if Centola can demonstrate that he was discriminated against ‘because of ... sex’ as a result of sex stereotyping, the fact that he was also discriminated against on the basis of his sexual orientation has no legal significance under Title VII.”).

EXHIBIT 2
This is an employment discrimination case. Plaintiffs Susan Winstead and Deborah Langford sue the Lafayette County Board of County Commissioners (“Board”) for gender discrimination under Title VII of the Civil Rights Act of 1964 (“Title VII”) and the Florida Civil Rights Act. ECF No. 13. Langford also brings suit under a theory of sexual orientation or perceived sexual orientation discrimination. Plaintiffs allege that their co-worker, Leta Hawkins, and Hawkins’s associate, Travis Sullivan, engaged in two related sets of actions directed at Plaintiffs. Hawkins allegedly contacted residents who had been served by Plaintiffs and encouraged them to register unfounded complaints against Plaintiffs. Sullivan allegedly took to harassing Plaintiffs on Hawkins’s behalf in Facebook posts, other internet posts, and on both radio and television.

Plaintiffs allege that the Board failed to adequately protect or defend them from this harassment, and that in fact at least one County Commissioner, Earnest Jones, began to periodically harass Plaintiffs himself. This eventually led Langford to suffer a breakdown, which then led to her departure from the employ of the Board—which she terms a constructive termination.

The Board has filed a motion to dismiss Counts I and II of the First Amended Complaint. ECF No. 15. The Board argues that, as to Count I—gender discrimination—Plaintiffs fail to state a claim. The Board argues that Count II—which relies on a theory of perceived sexual orientation discrimination—fails as a matter of law. The Board does not move for dismissal of Count III.

ORDER DENYING MOTION TO DISMISS

Mark E. Walker, United States District Judge

I

This Court accepts the facts in the light most favorable to the plaintiffs. See Galvez v. Bruce, 552 F.3d 1238, 1239 (11th Cir. 2008). All reasonable doubts about the facts must be resolved in favor of the plaintiffs. Id.

At all pertinent times, Plaintiffs Winstead and Langford were employed by Defendant’s EMS department. ECF No. 13 ¶¶ 7–8. Winstead has worked at the EMS department continually, either full- or part-time, since June of 1994. Id. ¶ 7. Langford began working at the EMS department in 2001, and prior to such date had worked for EMS departments in other counties. Id. At the time of the events giving rise to this case, the two had worked together for a long time. Id. ¶ 8. Prior to mid-2012, neither Winstead nor Langford had received any complaints pertaining to their work for Defendant. Id.

In or around the middle of the year 2012, Leta Hawkins, a part-time EMT at Defendant’s EMS department, began contacting residents who had been serviced by Plaintiffs and encouraged them to register complaints against Plaintiffs. Id. ¶ 10. Hawkins alleged that she resented Plaintiffs because Hawkins had applied for and presumably been denied the positions Plaintiffs held. Id. At around this same time, Travis Sullivan, an associate of Hawkins, allegedly began berating Plaintiffs on Hawkins’s behalf in Facebook posts, other internet posts, and on both radio and television. Id.

Travis Hicks, then the Director of the EMS department, suggested to the Board that public statements of support for Plaintiffs should be issued pending investigation of the complaints. Id. The Board elected not to protect or defend Plaintiffs, apparently largely at the behest of Commissioner Earnest Jones. Id. Plaintiffs allege that they could not lawfully defend themselves from complaints because doing so would necessarily violate privacy protections under the Health Insurance Portability and Accountability Act. Id. ¶ 15.

*2 On or about June 27, 2012, Plaintiffs provided emergency medical care to a citizen suffering from a serious health condition. Id. ¶ 11. Initially, the citizen and
his family demonstrated appreciation for Plaintiffs’ efforts. Id. However, approximately six weeks later, the citizen’s family began registering unfounded complaints against Plaintiffs, including a complaint for rough handling during transport. Id. Plaintiffs allege that the change in the citizen’s family’s opinion of Plaintiffs’ medical care was due to the meddling and intervention of Hawkins. Id.

In response to the complaints, Commissioner Jones suggested that Plaintiffs be split up, allegedly based on his opinion that two females should not work together. Id. ¶ 12. Plaintiffs allege that Jones and others then harassed Plaintiffs because of their gender and Langford’s perceived sexual orientation. Id. ¶ 13–14. In particular, Plaintiffs allege that Jones made visits to Plaintiffs’ workplace with the intention of finding Plaintiffs asleep and harassing them. Id. On one occasion, Commissioner Jones allegedly visited Plaintiffs’ workplace during a scheduled shift and threatened to fire Plaintiffs for sleeping during the shift. Id. ¶ 13. Plaintiffs note that, because their shifts were 48 consecutive hours long, there was no policy against sleeping during the time between calls, so long as the required response times were met. Id.

According to Plaintiffs, the Board continued to allow and even encourage the harassment. Id. ¶ 15–17. In August of 2014, Langford suffered a breakdown and left her position. Id. ¶ 18. Plaintiffs claim that this constituted a constructive termination. Id.

In sum, Plaintiffs allege that (1) Defendant discriminated against Plaintiffs by harassing them and allowing the harassment and unfounded complaints to continue, despite knowing that Plaintiffs could not defend themselves; (2) Defendant discriminated against Plaintiff Langford because of her sexual orientation or perceived sexual orientation; and (3) Defendant perpetuated a hostile work environment by harassing and/or allowing Plaintiffs to be harassed based on their gender. Id.

II

A

The Board moves for Count I to be dismissed because Plaintiffs have failed to state a plausible claim for relief for gender discrimination. The Board argues that Count I of Plaintiffs’ complaint is full of bare-bones allegations of discrimination and legal conclusions, not “factual allegations ... such as the names of the similarly situated male employees who were treated differently or the manner in which any such male employees were treated differently.” ECF No. 15, at 9.

Federal Rule of Civil Procedure 8(a) requires pleadings to contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” When deciding a motion to dismiss, courts must “accept[ ] the allegations in the complaint as true and constru[e] them in the light most favorable to the plaintiff.” McCone v. Pitney Bowes, Inc., 582 Fed.Appx. 798, 799 (11th Cir. 2014) (quoting Spain v. Brown & Williamson Tobacco Corp., 363 F.3d 1183, 1187 (11th Cir. 2004)). To survive a motion to dismiss, a complaint’s “[f]actual allegations must be enough to raise a right to relief above the speculative level.” Bell Atl. Corp. v. Twombly, 55 U.S. 544, 555 (2007). A complaint must also contain “sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). “A claim is facially plausible when the court can draw the reasonable inference that the defendant is liable for the misconduct alleged.” McCone, 582 Fed.Appx. at 799–800 (emphasis added) (quoting Iqbal, 556 U.S. at 662) (internal quotation marks omitted).

*3 The requirement that a complaint contain “sufficient factual matter” applies universally to all claims. See id. (applying Iqbal and Twombly to a discrimination claim). However, in the employment discrimination context, neither Iqbal nor Twombly, nor the Federal Rules of Civil Procedure, require a complaint to allege facts establishing each element of a prima facie case under McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), to survive a motion to dismiss. See Swierkiewicz v. Sorema N.A., 534 U.S. 506, 508 (2002) (holding that a complaint need not contain “specific facts establishing a prima facie case of discrimination under the framework set forth by ... McDonnell Douglas”); see also McCone, 582 Fed.Appx. at 801 n.4 (acknowledging that “Twombly effectively overruled Swierkiewicz when it rejected the old standard for dismissal” but that “this had no impact on Swierkiewicz’s statement that a plaintiff is not required to plead a prima facie case of discrimination in order to survive dismissal”). Rather, as the Eleventh Circuit has recently reiterated, the purpose of Rule 8(a)(2)’s pleading requirements is to ensure that defendants receive fair notice of what the claim is and on what grounds it is made. See Palm Beach Golf Center-Boca, Inc. v. John G.
Admittedly, Plaintiffs’ complaint is close to the line. There is little to indicate that the Board’s actions were motivated by Plaintiffs’ status as members of a protected class, other than Commissioner Jones’s “expressed view that two females should not work together.” Moreover, even assuming that the Board acted out of unlawful prejudice towards Plaintiffs’ protected class, there is a dearth of detail as to what, precisely, the alleged discriminatory acts were. It appears that there were two such acts or sets of acts: (1) the Board’s repeated refusal to defend or protect Plaintiffs from false accusations; and (2) Langford’s constructive termination. As for this first set of acts, it’s not clear whether an employer’s refusal to protect its employees from unfair criticism could be deemed “a serious and material change in the terms, conditions, or privileges of employment.” See, e.g., Hyde v. K.B. Home, Inc., 355 Fed.Appx. 266, 269 (11th Cir. 2009) (quotations and citations omitted). And the constructive termination, although certainly a “serious and material change in the terms of employment,” is best read in the context of the complaint as the end-point of an intolerably hostile workplace—that is, it seems much easier to fit into the hostile work environment theory of Count III.

However, even after Twombly and Iqbal, Rule 8(a) is a permissive rule. Plaintiffs have not alleged every element of a prima facie case under McDonnell Douglas, but under Swierkiewicz they need not do so. All Plaintiffs need to do is allege enough factual information to give fair notice to the Board as to what Plaintiffs’ claim is, and what events the claim pertains to. This Court is confident that Plaintiffs have passed that bar. The Board has received fair notice that Count I concerns employment discrimination grounded in events surrounding Leta Hawkins, Travis Sullivan, and Earnest Jones between mid-2014 and August 2014. The discriminatory actions, though not spelled out in detail, are related to (1) the Board’s refusal to protect or defend Plaintiffs from unfounded complaints and (2) the Board’s ratification and condoning of Commissioner Jones’s harassment of Plaintiffs. This information is sufficient to allow the Board to adequately prepare to defend the claim.

As an alternative basis for denying the Board’s motion to dismiss Count I, this Court holds that Count I does not even plead a separate claim for relief, but merely a theory or an “alternative statement of a claim.” See Fed. R. Civ. P. 8(d)(2). And because (1) the Board has not challenged Plaintiffs’ other theory of gender discrimination in Count III and (2) dismissal of a theory—as opposed to a claim—is inappropriate at the motion to dismiss stage, this Court will not dismiss Count I.

*4 “[A] complaint may contain alternative theories, and if one of the theories can survive a Rule 12(b)(6) motion, the district court cannot dismiss the complaint.” Croxland Props. Ltd. P’ship v. Corcoran, 174 F.3d 213, 218 (D.C. Cir. 1999). Whether two counts of a complaint comprise separate theories underlying the same claim or truly separate “claims for relief” is not always clear. See Lloyd Noland Found., Inc. v. Tenet Health Care Corp., 483 F.3d 773, 780 (11th Cir. 2007). But here, it seems obvious that Count I and Count III—which involve nearly identical facts—are just two different theories of relief.

Count I presents one type of discrimination theory, the gist of which is that the Board took various adverse employment actions against Plaintiffs on account of their gender. This is sometimes called (at least in this Circuit) a “tangible employment action” theory. See, e.g., Smith v. City of New Smyrna Beach, 588 Fed.Appx. 965, 975 (11th Cir. 2014). The theory is called by this name because an action taken by an employer must constitute “a serious and material change in the terms, conditions, or privileges of employment” in order to count for purposes of this theory. See, e.g., Hyde, 355 Fed.Appx. at 269 (quotations and citations omitted).

Count III presents a different theory of discrimination, usually referred to as a “hostile work environment” theory. See id. at 271–72. This theory doesn’t require that an employer have taken a single, discrete action amounting to “a serious and material change in the terms, conditions, or privileges of employment.” Rather, a hostile work environment theory “is established upon proof that ‘the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.’” Id. at 271 (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)).

It’s common practice for a plaintiff in an employment discrimination case to refer to both of these theories in the complaint, and there’s good reason for this—early on, before discovery has been conducted, it might not be clear
which theory is more viable. But of course a plaintiff need not refer to either theory in a complaint, because while “[a] complaint must narrate a plausible grievance[,] it need not set out a legal theory or cite authority.” Frank v. Walker, 819 F.3d 384, 387 (7th Cir. 2016) (Easterbrook, J.). And even when a plaintiff does set out a legal theory, dismissal is not proper if some other theory would, under the facts alleged in the complaint, entitle the plaintiff to relief. See, e.g., Dotschay v. Nat’l Mut. Ins. Co., 246 F.2d 221, 223 (5th Cir. 1957) (“[A] complaint is not to be dismissed because the plaintiff’s lawyer has misconceived the proper legal theory of the claim, but is sufficient if it shows that the plaintiff is entitled to any relief which the court can grant, regardless of whether it asks for the proper relief.”). 2

*5 What this all means is that when two theories based on the same facts—and part of a single claim for relief—are presented in a complaint, and a defendant only challenges the sufficiency of the complaint as to one of the theories, the claim cannot be dismissed. And the challenged theory can’t be dismissed, either, because dismissal of theories (as opposed to claims) is inappropriate at the motion to dismiss stage. See BBL, Inc. v. City of Angola, 809 F.3d 317, 325 (7th Cir. 2015) (“A motion to dismiss under Rule 12(b)(6) doesn’t permit piecemeal dismissals of parts of claims; the question at this stage is simply whether the complaint includes factual allegations that state a plausible claim for relief.”) (emphasis in original); see also Campbell v. Dist. of Columbia, 972 F. Supp. 2d 38, 46 n.5 (D.D.C. 2013) (“[B]ecause Ms. Campbell’s claim survives the motion to dismiss stage on at least a ‘stigma or disability’ theory, the Court need not address at this stage whether the complaint alleges that Defendants made a defamatory statement to support a ‘reputation-plus’ theory as well. The Court notes that the allegations in the complaint ... may support such a theory, and Ms. Campbell may have too hastily focused on a ‘stigma or disability’ theory. Regardless, she may take discovery under both theories.”).

This may seem somewhat surprising—after all, hostile work environment theories are routinely disposed of at summary judgment even when tangible employment action theories based on the same facts are allowed to go to a jury. But that’s because “[s]ummary judgment is different. The Federal Rules of Civil Procedure explicitly allow for ‘[p]artial [s]ummary [j]udgment’ and require parties to ‘identif[y] each claim or defense—or the part of each claim or defense—on which summary judgment is sought.’ ” City of Angola, 809 F.3d at 325 (quoting Fed. R. Civ. P. 56(a)) (emphasis in original). This makes sense—by the time summary judgment motions are submitted, discovery is complete and it is (or should be) apparent to the parties which legal theories are viable, so a court should be allowed to narrow the available theories for trial. But at this early stage, a defendant shouldn’t be able to force a plaintiff to “pick a theory” before all the facts are in by moving for partial dismissal of a claim.

Because the Board has moved to dismiss part of a claim, rather than an entire “claim for relief,” this Court will not dismiss Count I. It may turn out that discovery reveals that the facts of this case fit a hostile work environment theory better than a tangible employment action theory, in which case the Board will be likely to succeed on a motion for partial summary judgment. But at this stage, Plaintiffs are entitled to proceed on both theories.

B

The Board argues that Count II should be dismissed with prejudice because actual—and by extension perceived—sexual orientation is not a protected classification under Title VII and because discrimination on the basis of sexual orientation is not discrimination on the basis of sex. The Board cites a litany of case law in support of its position, most notably Fredette v. BVP Management Associates, 112 F.3d 1503, 1510 (11th Cir. 1997), which would of course be controlling precedent for this Court. This Court is ultimately unconvinced by the Board’s argument that Fredette controls this case.

1

Had the Eleventh Circuit actually ruled on the issue of sexual orientation discrimination in Fredette—as the Board suggests it did—its decision would be binding. However, that is not the case. Fredette merely held that “when a homosexual male supervisor solicits sexual favors from a male subordinate ... the male subordinate can state a viable Title VII claim for gender discrimination.” 112 F.3d at 1510. The Fredette court emphasized the “narrowness” of its holding so as to have no implications for “the law regarding discrimination based on sexual orientation.” Id. It thus did not hold that sexual orientation discrimination claims were not actionable as sex discrimination. Though other courts have interpreted Fredette differently, this Court’s interpretation—that Fredette left the issue open—is hardly unique. Compare Mowery v. Escambia Cty. Utils. Auth., No. 3:04cv382, 2006 WL 327965, at *8 (N.D. Fla. Feb. 10, 2006) (characterizing Fredette as not “holding

*6 Without controlling authority from the Eleventh Circuit, the question of whether sexual orientation discrimination claims are cognizable under Title VII is “an open one.” Isaacs v. Felder Servs., LLC, – F. Supp. 3d –, 2015 WL 6560655, at *3 (M.D. Ala. Oct. 29, 2015). And, as evidenced by the cases cited by the parties, courts have answered this “open” question in different ways.

Title VII prohibits discrimination against an employee “because of such individual’s ... sex.” 42 U.S.C. § 2000e–2(a). The Board accurately articulates the fact that courts have in the past held that the term “sex” does not include “sexual orientation.” However, Plaintiffs are correct that the law is currently in a state of flux. See, e.g., Hinton v. Va. Union Univ., – F. Supp. 3d –, 2016 WL 2621967, at *5 (E.D. Va. May 5, 2016) (acknowledging the “evolving state of the law and split district court decisions respecting whether sexual orientation discrimination claims are cognizable under Title VII”); Roberts v. United Parcel Serv., Inc., 115 F. Supp. 3d 344, 348 (E.D.N.Y. 2015) (recognizing that the law regarding workplace behavior is evolving alongside the nation’s understanding of sexual orientation). In particular, several courts have recently found claims of sexual orientation discrimination cognizable under Title VII. See, e.g., Videckis v. Pepperdine Univ., – F. Supp. 3d –, 2015 WL 8916764, at *5–6 (C.D. Cal. Dec. 15, 2015); Isaacs, 2015 WL 6560655, at *3–4.

There appear to be two theories relied on by courts that have found sexual orientation discrimination claims to be cognizable as sex discrimination claims under Title VII. The first theory, which has been articulated by the Equal Employment Opportunity Commission (“EEOC”) in numerous administrative proceedings, is that sexual orientation discrimination is necessarily sex discrimination. See Baldwin v. Foxx, Appeal No. 0120133080, 2015 WL 4397641, at *5 (EEOC July 15, 2015). According to this theory, “ ‘[s]exual orientation’ as a concept cannot be defined or understood without reference to sex.” Id. To illustrate this, the EEOC provided a hypothetical involving a male and female employee, each of whom keeps a picture of their female spouse on their desk. Id. If the female employee were to be suspended for displaying the photo, and the male employee was not suspended, the female employee could accurately state that she suffered an adverse action that would not have occurred but for her sex. Id.

*7 The analytic argument has a great deal of surface appeal. In the hypothetical laid out in Foxx, it does seem that the fired employee has suffered disparate treatment on account of her sex. But this is only true in the most technical sense; no animus against women or based on stereotypes about women is really behind the discriminatory treatment. See Latta v. Otter, 771 F.3d 456, 495–96 (9th Cir. 2014) (Berzon, J., concurring) (“Employment discrimination ... on the basis of sexual orientation ... [is] primarily motivated by stereotypes about sexual orientation; by animus against people based on their nonconforming sexual orientation; and by distaste for same-sex sexual activity or the perceived personal characteristics of individuals who engage in such behavior.... And th[e]se sorts of restrictions do not turn directly on gender; they do not withhold a benefit, choice, or opportunity from an individual because that individual is a man a woman.”).

Indeed, the flaw in the analytic argument becomes evident when one considers a hypothetical that slightly tweaks the Foxx hypothetical. Imagine now that the female employee is bisexual. She is married to a man, and her co-worker—who we will assume is heterosexual—is married to a woman. Each keeps a picture of their spouse on their desk. The female employee is suspended not for displaying a photo of her spouse, but rather for being bisexual. Unlike the Foxx hypothetical, this hypothetical does not allow for a tidy resolution by switching the parties’ genders. The true nature of sexual orientation discrimination—namely, that it is discrimination based on animus towards certain sexual orientations, not any particular sex or gender—is laid bare.

Despite the EEOC’s decision in Foxx, this Court does not find the analytic argument convincing. It seems to fail to provide a theoretical basis for protecting bisexuals from discrimination, and it fails to tie the proscription on discrimination to animus based on an employee’s gender
or failure to conform to gender stereotypes. However, there is a second theory that is more convincing.

3

The second theory is that sexual orientation discrimination is a cognizable form of sex discrimination because it falls under the category of gender stereotype discrimination. See Foxx, 2015 WL 4397641, at *7 (“In fact, stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women.”) (quoting Centola v. Potter, 183 F. Supp. 2d 403, 410 (D. Mass. 2002)). Gender stereotype discrimination is, of course, a cognizable form of sex discrimination. See Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (plurality opinion) (“We are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”). Indeed, courts have long understood both Title VII and anti-discrimination laws in general to be aimed at least in part at preventing and curing the problem of decisions (employment and otherwise) based on stereotypes. See, e.g., City of Los Angeles, Dep’t of Water & Power v. Manhart, 435 U.S. 702, 707 (1978) (“It is now well recognized that employment decisions cannot be predicated on mere ‘stereotyped’ impressions about the characteristics of males or females.”); see also Weinberger v. Wiesenfeld, 420 U.S. 636, 643 (1975) (“A virtually identical ‘archaic and overbroad’ generalization ... ‘not ... tolerated under the Constitution’ underlies the distinction drawn [in this case], namely, that male workers’ earnings are vital to the support of their families, while the earnings of female wage earners do not significantly contribute to their families’ support.”) (internal citations omitted).

The gender stereotype discrimination theory was endorsed by the Eleventh Circuit in the context of discrimination against transgender people in Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011). The court in Brumby reasoned that “ ‘[t]he very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior.’” Id. at 1316 (quoting Ilona M. Turner, Sex Stereotyping Per Se: Transgender Employees and Title VII, 95 Cal. L. Rev. 561, 563 (2007)). Given the long line of cases holding that “discrimination against plaintiffs because they fail to act according to socially prescribed gender roles” is sex discrimination, the court held that “a government agent violates the Equal Protection Clause’s prohibition of sex-based discrimination when he or she fires a transgender or transsexual employee because of his or her gender non-conformity.” Id. at 1317–20. The Brumby court’s reasoning and holding certainly seem to support the “gender stereotype” theory of sexual orientation discrimination.

*8 However, this theory faces opposition from some courts. Claims of gender stereotyping have been limited to situations where the plaintiff’s divergence from a given gender stereotype is readily apparent in the workplace. See, e.g., Vickers v. Fairfield Med. Cir., 453 F.3d 757, 763 (6th Cir. 2006) (“Later cases applying Price Waterhouse have interpreted it as applying where gender non-conformance is demonstrable through the plaintiff’s appearance or behavior.”). In the same vein, courts have been wary of perceived attempts to “bootstrap” claims for sexual orientation discrimination using a gender stereotype discrimination theory. See, e.g., Simonton v. Runyon, 232 F.3d 33, 38 (2d Cir. 2000). The reason for said opposition, at least as articulated in Simonton, is that “not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine.” Id.

These arguments seem to this Court to misapprehend the nature of animus towards people based on their sexual orientation, actual or perceived. Such animus, whatever its origin, is at its core based on disapproval of certain behaviors (real or assumed) and tendencies towards behaviors, and those behaviors are disapproved of precisely because they are deemed to be “inappropriate” for members of a certain sex or gender. “[G]ay people, simply by identifying themselves as gay, are violating the ultimate gender stereotype—heterosexual attraction. Since there is a presumption and prescription that erotic interests are exclusively directed to the opposite sex, those who are attracted to members of the same sex contradict traditional notions about appropriate behavior for men and women.” Anthony E. Varona & Jeffrey M. Monks, En/Gendering Equality: Seeking Relief Under Title VII Against Employment Discrimination Based on Sexual Orientation, 7 Wm. & Mary J. Women & L. 67, 84 (2000) (internal citations and quotations omitted).

“Just as the impermissible discrimination in [Price Waterhouse] was directed at the plaintiff for being a woman who transgressed gender norms by acting masculinely, a gay woman who is discriminated against for being a woman who acts masculinely by having the traditionally male trait of being attracted to women is being discriminated against on the basis of a sex stereotype.” Cody Perkins, Comment, Sex & Sexual Orientation: Title VII After Macy v. Holder, 65 Admin. L. Rev. 427, 442 (2013) (emphasis added). Whether the person treated differently is otherwise—that is to say, his or her sexuality aside—in conformance with gender
stereotypes does not render the disparate treatment lawful. When a “traditionally masculine” gay man is fired because he is gay, that firing is no less because of sex than when an “effeminate” gay man is fired.

This view—that discrimination on the basis of sexual orientation is necessarily discrimination based on gender or sex stereotypes, and is therefore sex discrimination—is persuasive to this Court, as it has been to numerous other courts and the EEOC. See Foxx, 2015 WL 4397641, at *7–8 (“Sexual orientation discrimination also is sex discrimination because it necessarily involves discrimination based on gender stereotypes.”); see also Videckis, 2015 WL 8916764, at *7 (“Stereotypes about lesbianism, and sexuality in general, stem from a person’s views about the proper roles of men and women—and the relationships between them.”). It also follows naturally from (though it is not compelled by) Brumby, which is binding Eleventh Circuit precedent. Simply put, to treat someone differently based on her attraction to women is necessarily to treat that person differently because of her failure to conform to gender or sex stereotypes, which is, in turn, necessarily discrimination on the basis of sex."

IV

°9 No one doubts that discrimination against people based on their sexual orientation was 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.” See Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79–80 (1998) (holding that Title VII extended to “male-on-male sexual harassment in the workplace”). To hold that Title VII’s prohibition on discrimination “because of sex” includes a prohibition on discrimination based on an employee’s homosexuality or bisexuality or heterosexuality does not require judicial activism or tortured statutory construction. It requires close attention to the text of Title VII, common sense, and an understanding that “[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.” Manhart, 435 U.S. at 707 n.13 (quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971)).

Accordingly,

**IT IS ORDERED:**

1. Defendant’s Motion for Partial Dismissal, ECF No. 15, is DENIED.

2. Defendant must answer the Amended Complaint within 14 days of the entry of this Order.

SO ORDERED on June 20, 2016.

All Citations

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Footnotes

1 It is also, somewhat confusingly, sometimes called a “disparate treatment” theory. See, e.g., Hyde, 355 Fed.Appx. at 268–69. But “disparate treatment” has been at other times used to refer to the entire universe of discrimination theories under Title VII, including hostile work environment theories. See Smith v. City of New Smyrna Beach, 588 Fed.Appx. 965, 975 (11th Cir. 2014). More proof that “legal language is a plague”—one that appears to be mutating in this instance. Blackmon v. Williams, ___ F.3d ___, 2016 WL 3007212, at *18 (7th Cir. May 24, 2016) (Posner, J., concurring in part and dissenting in part).

2 Decisions of the Fifth Circuit handed down prior to October 1, 1981 are binding within the Eleventh Circuit. Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

3 Of course the Fitzpatrick court was entirely correct in stating that “sexual orientation is not a protected class under Title VII.” But “sex” is, and, as explained in this Order, discrimination on the basis of sexual orientation is discrimination because of sex.

4 Neither party mentions Smith v. Liberty Mutual Insurance Co., 569 F.2d 325 (5th Cir. 1978), which is, of course, binding authority on this Court. See Bonner, 661 F.2d at 1207. In Smith, “the claim [wa]s not that [the plaintiff] was discriminated against because he was a male, but because as a male, he was thought to have those attributes more generally characteristic of females and epitomized in the descriptive ‘effeminate.’ ” Smith, 569 F.2d at 327. The court
held that such discrimination was not sex discrimination within the meaning of Title VII, *id.*, and noted in a footnote that “[t]he EEOC itself has ruled that adverse action against homosexuals is not cognizable under Title VII,” *id.* n.1. *Smith* is no longer good law on this point. Its holding vis-à-vis discrimination on the basis of sex stereotyping has clearly been abrogated by subsequent Supreme Court cases. See *infra*. And of course the EEOC has changed course. *See infra*. In short, every pillar supporting the reasoning of the *Smith* court has been knocked down. *Smith* is one of many examples of a parsimonious reading of Title VII failing to stand the test of time. See, e.g., *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976) (holding that disability-benefits plan that failed to cover pregnancy-related disabilities did not violate Title VII), superseded by statute, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-995, 92 Stat. 2076.

This will be referred to as the “analytic argument.” See Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. Rev. 197, 208 (1994).

While the EEOC’s interpretation of Title VII is not binding on this Court, it’s entitled to respect to the extent that it’s persuasive. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *Hinton*, 2016 WL 2621967, at *4 (“The district courts that have decided Title VII claims in the wake of *Foxx* have also given the EEOC’s interpretation of Title VII [Skidmore] deference....”). Nearly every court that has found sexual orientation discrimination claims to be cognizable under Title VII in the last year has cited the EEOC’s decision in *Foxx*. *See Isaacs*, 2015 WL 6560855, at *3; *Videkis*, 2015 WL 8916764, at *8; *Roberts*, 115 F. Supp. 3d at 363. The courts that have held that sexual orientation discrimination claims are not cognizable following *Foxx* have done so largely due to binding circuit precedent to the contrary. *See, e.g., Christiansen v. Omnicom Grp., Inc.*, – F. Supp. 3d –, 2016 WL 951581, at *14 (S.D.N.Y. Mar. 9, 2016) (noting the “futility of treating sexual orientation discrimination as separate from sex-based considerations,” but concluding that the court was bound by precedent to do so); *Hinton*, 2016 WL 2621967, at *3–5 (concluding that the court was bound by *Wrightston v. Pizza Hut of America, Inc.*, 99 F.3d 138 (4th Cir. 1996)). A few courts have ignored or rejected *Foxx*. *See Burrows v. Coll. of Cent. Fla.*, No. 5:14cv197, 2015 WL 5257135, at *2 (M.D. Fla. Sept. 9, 2015) (stating simply that “the Court declines to reconsider in light of the EEOC’s decision”); *Evans v. Ga. Reg'l Hosp.*, 2015 WL 5316694 (S.D. Ga. 2015) (not addressing EEOC’s decision).

As the EEOC also pointed out in *Foxx*, this logic extends to discrimination against employees on account of being straight: “Assume a woman is suspended because she has placed a picture of her husband on her desk but her gay colleague is not suspended after he places a picture of his husband on his desk. The straight female employee could bring a cognizable Title VII claim of disparate treatment because of sex.” *Foxx*, 2015 WL 4397641, at *5.

*Brumby* involved the question of “whether discriminating against someone on the basis of his or her gender non-conformity constitutes sex-based discrimination *under the Equal Protection Clause*,” not Title VII. 663 F.3d at 1316 (emphasis added). But *Brumby* cited and relied on many Title VII cases, and as a general matter the analysis of what types of discrimination constitute *sex* discrimination is the same for claims brought under Title VII and the Equal Protection Clause. *See Snider v. Jefferson State Cnty. Coll.*, 344 F.3d 1325, 1331–32 (11th Cir. 2003) (Barkett, J., concurring in part and dissenting in part) (“[T]here is no difference between the scope of Title VII and the scope of the Equal Protection Clause concerning intentional discrimination in the form of disparate treatment in the public workplace ...”)

Note that the second theory provides a theoretical basis for protecting bisexual employees. If a woman identifies as bisexual and is attracted to both women and men, then her attraction to women violates a gender stereotype and renders discrimination against her to be discrimination based on sex.

This Court acknowledges that numerous Circuit Courts of Appeals have held that discrimination on the basis of sexual orientation is *not* necessarily discrimination based on gender or sex stereotyping. See Ryan H. Nelson, *Sexual Orientation Discrimination Under Title VII After Baldwin v. Foxx*, 72 Wash. & Lee L. Rev. Online 255, 272 n.71 (2015) (collecting cases). However, all of these cases predate the EEOC’s decision in *Baldwin*, and none of them (save *Smith v. Liberty Mutual Insurance Co.*, discussed *supra*) are binding on this Court. In light of *Baldwin* and *Brumby*, this Court is confident that it has reached the correct answer notwithstanding these prior appellate decisions.