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# Perceived Homosexuals: Looking Gay Enough for Title VII

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# Perceived Homosexuals: Looking Gay Enough for Title VII

## **Keywords**

Appearance discrimination, Civil Rights Act of 1964. Title VII, Discrimination -- Law & legislation, Assimilation (Sociology) -- Social aspects, LGBT people -- United States -- Legal status, laws, etc., Gender stereotypes -- Psychological aspects, Human sexuality & law

## PERCEIVED HOMOSEXUALS: LOOKING GAY ENOUGH FOR TITLE VII

BRIAN SOUCEK\*

*Under the conventional view of Title VII, gay and lesbian workers can bring discrimination claims based on gender stereotyping but not sexual orientation. This Article analyzes 117 court cases on gender stereotyping in the workplace in order to show that the conventional view is wrong. In cases brought by “perceived homosexuals,” courts distinguish not between gender stereotyping and sexual orientation claims, but between two ways that violations of gender norms can be perceived: either as something literally seen or as something cognitively understood. This Article shows that plaintiffs who “look gay” often find protection under Title VII, while plaintiffs thought to violate gender norms—through known or suspected sexual activity, friendships, hobbies, or choice of partner—almost never win.*

*By privileging appearances over identity, these cases run counter to theories of antidiscrimination law that favor blindness and assimilation, and they upend accounts of “covering” that are widely accepted in discussions of law and sexuality. These cases reverse courts’ usual hostility to appearance claims, especially Title VII challenges to makeup and grooming requirements, as well as courts’ usual sympathy to claims based on activities like child rearing, known to take place outside of work. Meanwhile, on a practical level, these cases threaten to increase the salience of sexual orientation in the workplace; help entrench the stereotypes they are meant to proscribe; and isolate the claims of successful Title VII litigants from the more assimilationist demands made by gay plaintiffs in areas like marriage, adoption, and military service. As courts*

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*have quietly begun granting protection to only the most visible subset of gay workers, this Article asks: at what cost, both to LGBT workers and to ongoing debates over the protections those workers should receive under federal law?*

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“The world [t]hinks through its eyes . . . .”<sup>1</sup>

#### INTRODUCTION

If you look or act sufficiently “gay” at work, you might currently find protection from discrimination in at least half of the nation’s courts of appeals. If, however, your coworkers or employers simply know or think you are gay, you are not only unprotected under federal law, but your claim is that of a “bootstrapper” trying to force sexual orientation into Title VII against the will of Congress.<sup>2</sup>

1. FRIEDRICH SCHILLER, MARY STUART 43 (Peter Oswald, trans., Oberon Books Ltd. 2005) (1800).

2. See, e.g., *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005) (“Like other courts, we have . . . recognized that a gender stereotyping claim should not be used to ‘bootstrap’ protection for sexual orientation into Title VII.” (quoting *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000))); *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 330 (9th Cir. 1979) (“Appellants now ask us to employ the disproportionate impact decisions as an artifice to ‘bootstrap’ Title VII protection for homosexuals under the guise of protecting men generally.”), *overruled by* *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864 (9th Cir. 2001); *Pagan v. Holder*, 741 F. Supp.

Contrary to popular wisdom and most academic theorizing, employment-discrimination law has become, for gays and lesbians, an area not only where “appearances . . . matter,”<sup>3</sup> but in fact where appearances take precedence over knowledge, and one’s look and affect receive more protection than one’s sexual identity. Under federal law as interpreted by an increasing number of federal courts, gay and lesbian workers can be fired, demoted, not hired, or openly harassed because of their sexuality—*unless* the victims of discrimination are sufficiently flamboyant (if male) or butch (if female). These courts protect “actual or perceived sexual orientation”—the words come from legislation repeatedly introduced in Congress<sup>4</sup>—only when an employee’s sexuality is “perceived” through the senses as something that can literally be seen or heard. What it might mean to look or sound “gay,” or what courts seem to think it means, is a question on which this Article will linger.

Title VII, federal law’s chief protection against employment discrimination, does not explicitly prohibit discrimination based on sexual orientation,<sup>5</sup> and judges have almost uniformly declined to enfold sexuality within Title VII’s “sex” prong.<sup>6</sup> But, for the past two decades, courts have recognized Title VII claims by employees who are perceived to violate gender stereotypes.<sup>7</sup> In recent years, gay and lesbian employees have increasingly followed this course, describing themselves as violators of gender stereotypes for the purpose of federal employment-discrimination claims.<sup>8</sup> Under what is now the conventional view of Title VII, gender stereotyping and sexual

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2d 687, 695 (D.N.J. 2010) (“This is a hollow attempt to . . . recast a sexual orientation claim as a gender stereotyping claim. . . . The Court will not permit Plaintiff to bootstrap protection for sexual orientation into Title VII by re-packaging her sexual orientation claim as gender stereotyping.”).

3. *Shaw v. Reno*, 509 U.S. 630, 647 (1993).

4. *See, e.g.*, Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. §§ 4, 9 (as passed by Senate, Nov. 7, 2013).

5. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253–66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2012)).

6. *See* 42 U.S.C. § 2000e-2(a)(1) (protecting workers from discrimination “because of . . . race, color, religion, sex, or national origin.”) For a discussion of courts’ reluctance to view sexuality claims as sex-based claims, see *infra* notes 33–34 and accompanying text.

7. *See infra* Part I.

8. *See, e.g.*, Edward J. Reeves & Lainie D. Decker, *Before ENDA: Sexual Orientation and Gender Identity Protections in the Workplace Under Federal Law*, 20 LAW & SEXUALITY 61, 69–73 (2011) (citing several recent cases, beginning in 1989, in which federal courts held in favor of plaintiffs alleging employment discrimination based on a failure to adhere to traditional gender stereotypes); Kristin M. Bovalino, Note, *How the Effeminate Man Can Maximize His Odds of Winning Title VII Litigation*, 53 SYRACUSE L. REV. 1117, 1118 (2003) (noting “[a] recent surge of cases” that illustrate how courts have become increasingly willing to recognize men’s claims of gender stereotyping).

orientation comprise two categorically different kinds of discrimination claims, and Title VII recognizes only the former.

The conventional view is wrong. The distinction it draws is both conceptually untenable and descriptively inaccurate, as this Article demonstrates through a study of five years' worth of federal district court opinions concerning gender stereotyping, as well as every federal appellate decision that has combined both gender stereotyping and sexuality. From these cases, the distinction that emerges is not between gender stereotyping and sexuality, but between two ways in which violations of gender stereotypes concerning sexuality are perceived: either literally, as something seen or heard, or cognitively, as when we "see" a point<sup>9</sup> or "hear" a concern<sup>10</sup>—that is, when we know or understand something.

To speak of "actual or *perceived* sexual orientation," as the long-stalled Employment Non-Discrimination Act (ENDA) repeatedly does,<sup>11</sup> would seem to use "perceived" in the cognitive sense, referring not to voyeurism but to something known or thought—possibly falsely—about a person's sexual preferences. Surprisingly, though, it is the literal perception of sexuality that pervades recent Title VII case law and, more importantly, that marks those cases in which plaintiffs win. As this Article shows, employees who manifest traits coded as gay in observable ways at work often succeed under Title VII. But when an employee's sexuality is *cognitively* perceived—when coworkers *think* that a man is sleeping with another man or *know* that a woman lives with a female partner—courts refuse to extend Title VII's protections.

Things are different elsewhere in Title VII case law. In cases not involving "perceived homosexuals," known or knowable violations of gender stereotypes—for example, by women known to have small children at home—get no less protection than visible violations.<sup>12</sup>

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9. Cf. HANNAH ARENDT, *THE LIFE OF THE MIND* 110 (Mary McCarthy ed., Harcourt, Inc. 3d ed. 1981) (1971) ("[F]rom the outset in formal philosophy, thinking has been thought of in terms of *seeing*. . ."). Arendt contrasts "the Greek *vision* of the true" with "the Jewish tradition of a God who is heard but not seen." *Id.* at 111.

10. Cf. *Grannis v. Ordean*, 234 U.S. 385, 394 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard.").

11. Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. §§ 4, 9 (as passed by Senate, Nov. 7, 2013) (emphasis added) (proscribing several forms of discrimination based on "actual or perceived sexual orientation or gender identity"); cf. 18 U.S.C. § 249(a)(1) (defining hate crimes as "[o]ffenses involving actual or perceived race, color, religion, or national origin"); 42 U.S.C. § 12102(3) (including both "actual [and] perceived physical or mental impairment" within the Americans with Disabilities Act).

12. Compare *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235, 258 (1989) (plurality opinion) (visual stereotyping about a female employee's observable

The anomalous privileging of appearances solely in cases involving gay and lesbian workers should therefore come as a surprise, and not just because it has not previously been shown in the comprehensive way that this Article attempts. The phenomenon directly contradicts Professor Kenji Yoshino's widely accepted "covering" thesis, which holds that plaintiffs in antidiscrimination cases are more successful the more they downplay their sexuality.<sup>13</sup> More generally, it runs counter to leading theoretical accounts of antidiscrimination law,<sup>14</sup> to well-known (and often criticized) Title VII doctrine disfavoring appearance claims,<sup>15</sup> and, finally, to the law's usual disdain for "mere [a]esthetics."<sup>16</sup> Where the "dominant conception of American antidiscrimination law"<sup>17</sup> speaks in metaphors of blindness<sup>18</sup> and aims

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behavior and appearance), *with* *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 114–15, 125 (2d Cir. 2004) (cognitive stereotyping of mothers). *Back* and other motherhood cases are discussed below. *See infra* Part II.B.

13. *See* Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 850 (2002) (asserting that in both the civil-service employment and custody/visitation contexts, gays and lesbians who kept their homosexuality "discreet" were more likely to keep their jobs or children, compared to those whose homosexuality appeared "open" or "flagrant"); *see also infra* Part IV.A.3. (explaining Yoshino's covering thesis in detail).

14. *See infra* Part IV.A.1 (discussing the metaphor of a "color-blind" Constitution and antidiscrimination law's traditional attempt to transcend visible characteristics in order to make judgments based on individual merit and intrinsic worth).

15. *See infra* Part IV.A.2 (discussing the notorious failures of Title VII challenges to grooming codes, uniform requirements, and other appearance regulations); *see also* DEBORAH L. RHODE, *THE BEAUTY BIAS: THE INJUSTICE OF APPEARANCE IN LIFE AND LAW* 120–22 (2010) (providing a more comprehensive account of the failures of appearance claims under Title VII).

16. *See, e.g.*, *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari) ("[T]he Court has chosen to deregulate the [administration of the death penalty], replacing, it would seem, substantive constitutional requirements with mere esthetics . . ."); *Welch v. Swasey*, 214 U.S. 91, 107 (1909) (describing a Massachusetts Supreme Judicial Court decision "which [held] that the police power cannot be exercised for a merely æsthetic purpose").

Although the Supreme Court once described "[a]esthetic and environmental well-being" as "important ingredients of the quality of life in our society," *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972), the Court's more recent standing cases have listed "mere esthetic interests" as the flimsiest injuries still, perhaps barely, cognizable under Article III, *see, e.g.*, *Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009) (allowing for standing when a harm "affects the recreational *or even the mere esthetic interests* of the plaintiff") (emphasis added). The term "aesthetic" recurs as an insult throughout Justice Thomas's dissent in *Grutter v. Bollinger*, 539 U.S. 306 (2003), in which he labeled a law school's interest in a racially diverse student body "aesthetic" and thus "constitutionally irrelevant" and "ineffective[.]" *Id.* at 354 n.3 (Thomas, J., concurring in part and dissenting in part).

17. Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CALIF. L. REV. 1, 16 (2000) (emphasis omitted). Post does *not* endorse the "dominant conception" he describes, arguing it "do[es] not correspond to the actual shape of the law." *Id.* at 23. This Article provides additional support for Post's descriptive claim.

18. *See, e.g.*, *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) ("Our Constitution is color-blind . . ."); *see also* Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 236 (1971) (discussing antidiscrimination theories that "treat all colors as normative equivalents").

at assimilation,<sup>19</sup> the cases studied in this Article force employers to look even harder at the visible (and often stereotyped) markers of their employees' sexual orientation.

Scholars have not previously confronted the theoretical and doctrinal anomalies raised by these gender stereotyping cases, most likely because the case law itself has not been thoroughly described, at least in the years since gay employees—or a subset of them—began receiving protection under Title VII. The first three Parts of this Article attempt to fill this descriptive gap.

Part I explains the dilemma courts face when considering gender stereotyping claims brought by gay plaintiffs. How can courts “strike at *the entire spectrum* of disparate treatment of men and women resulting from sex stereotypes,”<sup>20</sup> without, as Congress has never explicitly done, writing into federal law protections against stereotypes concerning sexuality? To show what courts have done in the face of this dilemma, Part II offers close readings of two leading appellate opinions—*Prowel v. Wise Business Forms, Inc.*<sup>21</sup> and *Vickers v. Fairfield Medical Center*<sup>22</sup>—which, together, trace the distinction courts have drawn between plaintiffs who “look gay” and those who are merely known or suspected to be gay. Part III generalizes the distinction separating *Prowel* from *Vickers* by examining five years' worth of federal district court opinions regarding gender stereotyping and Title VII, as well as every federal appellate opinion, from any year, involving both gender stereotyping and sexual orientation.

This study of recent case law demonstrates that *Prowel* and *Vickers* reflect a broader trend. In cases involving sexuality, plaintiffs tend to win if and only if they fail to conform to stereotypes in ways seen at work. Claims based on stereotypes involving something known about the plaintiff almost universally fail. In this regard, cases brought by gay or allegedly gay plaintiffs differ significantly from stereotyping cases in which sexual orientation does not arise. In the latter, as Part III shows, known or suspected violations of gender norms are protected almost as often as physically observable ones.

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19. Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of “Don’t Ask, Don’t Tell,”* 108 YALE L.J. 485, 487 (1998) (describing “assimilationist bias” as the judiciary’s withholding of protection from groups characterized by traits that may be changed or hidden, which encourages individual members of these groups to assimilate).

20. *City of L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978) (emphasis added) (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)).

21. 579 F.3d 285 (3d Cir. 2009).

22. 453 F.3d 757 (6th Cir. 2006).



Part IV shifts from the descriptive project to a normative one, first by examining how the case law described in Parts II and III upends standard theories of antidiscrimination law, well-established Title VII doctrine, and prominent claims regarding sexuality and the law. Worse, Part IV demonstrates that these cases threaten harm in practice: they may hurt the very workers employment-discrimination law is meant to protect. Part V briefly revisits these worries in light of ENDA, a bill which would proscribe employment discrimination on the basis of sexual orientation, both actual *and* perceived.<sup>23</sup> The fact that ENDA has protection against “perceived sexual orientation or gender identity”<sup>24</sup> at its heart suggests, somewhat ominously, that even ENDA’s eventual passage might not put to rest the ambiguities that so many courts have chosen to find in law’s metaphors of perception. In the meantime, this Article, with its revisionist account of who is *currently* protected under Title VII, seeks to reshape the assumptions, shared by ENDA’s proponents and opponents alike, regarding the status quo that ENDA seeks to alter.

#### I. THE TITLE VII DILEMMA<sup>25</sup>

Title VII of the Civil Rights Act of 1964 protects workers from discrimination “because of . . . race, color, religion, sex, or national origin.”<sup>26</sup> Sexual orientation and gender identity are not explicitly named among the protected grounds. Since 1974, however, Congress has made several attempts to amend Title VII<sup>27</sup> or, since 1994, to supplement it with an additional statute<sup>28</sup> in order to protect employees’ sexual orientation, whether “real or perceived.”<sup>29</sup> These attempts have

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23. Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. §§ 4, 9 (as passed by Senate, Nov. 7, 2013).

24. *Id.*

25. In an Essay written after this Article but published shortly before it, Ian Ayres and Richard Luedeman offer a similar description of the dilemma lower courts face interpreting Title VII in the wake of *Price Waterhouse*. See Ian Ayres & Richard Luedeman, *Tops, Bottoms, and Versatiles: What Straight Views of Penetrative Preferences Could Mean for Sexuality Claims Under Price Waterhouse*, 123 YALE L.J. 714, 717–18 (2013) (describing what they call the “*Price Waterhouse* dilemma”).

26. 42 U.S.C. § 2000e-2(a)(1) (2012).

27. See, e.g., Equality Act of 1974, H.R. 14752, 93d Cong. (1974) (proposing to amend the Civil Rights Act of 1964, 42 U.S.C. § 2000a(a), to include “sexual orientation” as an additional protected trait). The Equality Act of 1974 marked the first proposal of a federal “gay rights” bill. William C. Sung, Note, *Taking the Fight Back to Title VII: A Case for Redefining “Because of Sex” To Include Gender Stereotypes, Sexual Orientation, and Gender Identity*, 84 S. CAL. L. REV. 487, 495–96 (2011).

28. The most recent attempt is the Employment Non-Discrimination Act of 2013, S. 815.

29. The first reference to “perceived” sexual orientation appeared in 1994, in what was also the first proposed standalone law. See Employment Non-Discrimination Act of 1994, S. 2238, 103d Cong. § 18(12) (1994) (defining “sexual

repeatedly failed in Congress, though the most recent iteration of ENDA won approval in the Senate in November 2013.<sup>30</sup> Gender identity was added to the version of ENDA first proposed in 2007.<sup>31</sup>

In the absence of ENDA or a similar law, the federal courts have almost universally refused to derive protection for sexual orientation from Title VII's "sex" prong. In a well-known 1979 case, *DeSantis v. Pacific Telephone & Telegraph Co.*,<sup>32</sup> the Ninth Circuit held that "Title VII's prohibition of 'sex' discrimination applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference such as homosexuality."<sup>33</sup> Since then, every other circuit to address the issue has agreed: "Title VII does not prohibit harassment or discrimination because of sexual orientation."<sup>34</sup> The fact that Congress has repeatedly failed to

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orientation" to include "lesbian, gay, bisexual, or heterosexual orientation, real or perceived, as manifested by identity, acts, statements, or associations"); see also Jill D. Weinberg, *Gender Nonconformity: An Analysis of Perceived Sexual Orientation and Gender Identity Protection Under the Employment Non-Discrimination Act*, 44 U.S.F. L. REV. 1, 9 n.36 (2009) (noting that all later versions of ENDA incorporated "[p]erceived sexual orientation discrimination").

30. See Employment Non-Discrimination Act of 2013, S. 815. In 1996, a previous version of ENDA came within one vote of passage in the Senate on the very day the Senate passed the Defense of Marriage Act. Weinberg, *supra* note 30, at 9–10 (citing Employment Non-Discrimination Act of 1996, S. 2056, 104th Cong. (1996)).

31. See Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong. § 3(a)(6) (2007); Weinberg, *supra* note 29, at 10.

32. 608 F.2d 327 (9th Cir. 1979), *overruled by* *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864 (9th Cir. 2001).

33. *Id.* at 329–30 (footnote omitted); see also *Smith v. Liberty Mut. Ins. Co.*, 395 F. Supp. 1098, 1101 (N.D. Ga. 1975) ("Whether or not the Congress should, by law, forbid discrimination based upon affectional or sexual preference of an applicant, it is clear that the Congress has not done so." (internal quotation marks omitted)), *aff'd*, 569 F.2d 325 (5th Cir. 1978). In *DeSantis*, the Ninth Circuit literally conflated a sexual orientation claim with a claim of gender non-conforming appearances: decided together with *DeSantis*, whose plaintiff was gay, was a second case, *Strailey v. Happy Times Nursery School, Inc.*, whose plaintiff was fired from his teaching position "because he wore a small gold ear-loop to school prior to the commencement of the school year." *DeSantis*, 608 F.2d at 328. The Ninth Circuit held that "discrimination because of effeminacy, like discrimination because of homosexuality[,] . . . does not fall within the purview of Title VII." *Id.* at 332. The Ninth Circuit has since overruled the latter holding in the wake of *Price Waterhouse*. See *Nichols*, 256 F.3d at 875.

34. *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000) (calling the law "well-settled in this circuit and in all others to have reached the question"); see, e.g., *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 951 (7th Cir. 2002) ("Title VII does not . . . provide for a private right of action based on sexual orientation discrimination. As such, to the extent [the plaintiff] seeks to have this court judicially amend Title VII to provide for such a cause of action, we decline to do so. It is wholly inappropriate, as well as constituting a clear violation of the separation of powers, for this court, or any other federal court, to fashion causes of action out of whole cloth, regardless of any perceived public policy benefit.").

A similar logic, ascribing to Congress's inaction on ENDA an affirmative intent not to extend Title VII's protections, has led courts, until recently, to deny claims brought by transsexual and transgender plaintiffs. Compare *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662–63 (9th Cir. 1977) ("Congress has not shown any

override courts' narrow reading of Title VII has only entrenched that reading further.<sup>35</sup>

Only one federal court has departed from this consensus. In a 2002 harassment case, a magistrate judge in the U.S. District Court for the District of Oregon found it likely that the defendant “would not have acted as she (allegedly) did if Plaintiff were a man dating a woman, instead of a woman dating a woman.”<sup>36</sup> Had that been the case, the court concluded, “then Plaintiff was discriminated against because of her gender.”<sup>37</sup> This opinion has remained a lonely outlier for over a decade.

Alongside the nearly unanimous refusal to recognize sexuality and gender identity claims, another line of cases has offered a far more expansive interpretation of Title VII's sex prong. This series begins with the U.S. Supreme Court's 1989 decision in *Price Waterhouse v. Hopkins*,<sup>38</sup> in which a woman who was denied partnership at her accounting firm claimed that she had been the victim of “sex stereotyping,” and thus, of discrimination “because of sex.”<sup>39</sup> Ann Hopkins, the plaintiff, had been praised as “an outstanding professional” who had secured more major contracts than any of her competitors for partnership.<sup>40</sup> But she was also criticized as an “overly aggressive, . . . tough-talking somewhat masculine hard-nosed” manager.<sup>41</sup> Hopkins received evaluations suggesting that she “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled,” and “take a course at charm school.”<sup>42</sup>

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intent other than to restrict the term ‘sex’ to its traditional meaning.”), *with* Schroer v. Billington, 577 F. Supp. 2d 293, 306–07 (D.D.C. 2008) (complaining that “courts have allowed their focus on the label ‘transsexual’ to blind them to the statutory language” of Title VII), *and* Macy v. Holder, Appeal No. 0120120821, 2012 WL 1435995, at \*11 (EEOC Apr. 20, 2012) (“[I]ntentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination ‘based on . . . sex,’ and such discrimination therefore violates Title VII.”). For a discussion of the meaning of Congressional inaction, see William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67 (1988).

35. See, e.g., *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1086 (7th Cir. 1984) (“Congress has continued to reject these amendments even after courts have specifically held that Title VII does not protect transsexuals from discrimination.”).

36. *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1223 (D. Or. 2002).

37. *Id.*

38. 490 U.S. 228 (1989).

39. *Id.* at 231–32, 241, 250 (plurality opinion) (internal quotation marks omitted).

40. *Id.* at 234.

41. *Id.* at 235.

42. *Id.* (internal quotation marks omitted).

Six members of the Court found considerations like these to be impermissible under Title VII.<sup>43</sup> Writing for four Members of the Court, Justice Brennan broadly declared:

[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for “[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.*”<sup>44</sup>

It is Justice Brennan’s sweeping prohibition of disparate treatment based on stereotypes that makes *Price Waterhouse* such a crucial case for gay workers. Although it took courts some time to realize the full implications of the opinion,<sup>45</sup> *Price Waterhouse*, on its face, makes it illegal to base employment decisions on gender stereotypes, *whatever* those may be.<sup>46</sup> Thus, Title VII’s protections should extend however

43. See *id.* at 231 (plurality opinion) (written by Justice Brennan and joined by Justices Marshall, Blackmun, and Stevens); *id.* at 258 (White, J., concurring in the judgment); *id.* at 261 (O’Connor, J., concurring in the judgment).

44. *Id.* at 251 (second alteration in original) (emphasis added) (quoting *City of L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)). Justices White and O’Connor concurred in the judgment, and neither of their opinions suggests any disagreement with the plurality’s “entire spectrum” language. It is worth noting as well that the “entire spectrum” claim garnered a majority of the Court in *Manhart*, the case which was quoted by Justice Brennan’s *Price Waterhouse* opinion and which was reaffirmed by five justices, with the words “entire spectrum” italicized, in *County of Washington v. Gunther*, 452 U.S. 161, 180 (1981).

45. In 1995, six years after *Price Waterhouse*, Mary Anne Case was still envisioning Title VII protections for effeminate men as a future prospect. See Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 4 (1995) (arguing that Title VII language and case law “already provide the necessary protection to both effeminate men and feminine women, as well as their masculine counterparts,” and that “a reconceptualization of the existing law” could allow courts to enforce such protection if they applied the statute correctly); see also Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 96 (1995) (“Notwithstanding the direction in which *Price Waterhouse* seems to urge equality jurisprudence, many courts are reluctant to relinquish the conventions that femininity belongs to women and that masculinity belongs to men.”).

Also in 1995, Francisco Valdes could categorically claim that “stereotype analysis never has been applied successfully to sex/gender stereotypes perceived . . . as implicating . . . sexual orientation.” Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CALIF. L. REV. 1, 316 (1995). At the time, the leading case involving the gender stereotyping of a gay plaintiff was *Dillon v. Frank*, No. 90-2290, 1992 WL 5436 (6th Cir. Jan. 15, 1992), in which the plaintiff “contended that he was . . . not deemed ‘macho’ enough by his co-workers for a man, and that the verbal abuse [he experienced] resulted from this stereotyping.” *Id.* at \*5. Dillon lost, as he failed to show that “his practices” would have been deemed “acceptable in a female.” *Id.* at \*9-10.

46. See, e.g., *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221 (10th Cir. 2007) (interpreting *Price Waterhouse* as “establishing that Title VII’s reference to ‘sex’ encompasses both the biological differences between men and women and gender

widely the spectrum of sexual stereotypes does. For Ann Hopkins, the plaintiff in *Price Waterhouse*, the spectrum included stereotypes about how women should walk, talk, and dress.<sup>47</sup> It also included personality traits such as aggressiveness.<sup>48</sup> Later decisions have proscribed employment actions based on stereotypes not tied to an employee's appearance or behavior at work, such as stereotypes that mothers should remain home with their children.<sup>49</sup> And since Title VII protects both women and men from sex-based discrimination by people of either sex,<sup>50</sup> the stereotypes proscribed by Title VII clearly include those about femininity and masculinity alike.<sup>51</sup>

As may already be clear, the two lines of cases just described lie on a collision course. The gender stereotyping spectrum described in *Price Waterhouse* seems to include the gender stereotype that, as one district court put it, "real men should date women, and not other men."<sup>52</sup> In that court's words:

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discriminations, i.e., discrimination based on a failure to conform to stereotypical gender norms").

47. As Mary Anne Case has sharply observed, the record before the Supreme Court included nothing about Ann Hopkins's actual appearance. Case, *supra* note 45, at 61. Thus, its holding cannot be limited to those who violate gendered appearance norms only to the degree that Hopkins may have. As Case has written: "the Court did not find as a matter of fact that Hopkins's appearance was appropriate for her sex; it held as a matter of law that it constituted sex discrimination for her employer to require that it be so." *Id.* at 49 (footnote omitted).

48. *Price Waterhouse*, 490 U.S. at 234–35 (plurality opinion) (referring to comments made by Hopkins's coworkers that she was at times "abrasive[,]," "unduly harsh," and "impatient").

49. See, e.g., *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 113 (2d Cir. 2004) (holding that "stereotyping about the qualities of mothers is a form of gender discrimination" in an employment-discrimination suit brought by a school psychologist who was fired based on her employer's belief that she, as a new mother, could not devote the necessary time and effort to her career).

50. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78–79 (1998) (holding that Title VII prohibits discrimination against both men and women and that "nothing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant . . . are of the same sex").

51. See generally Case, *supra* note 45 ("[S]hocking though it may be to some sensibilities, not only masculine women such as Hopkins, but also effeminate men, indeed even men in dresses, should already unequivocally be protected under existing law from discrimination on the basis of gender-role-transgressive behavior.").

52. *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002); see also *Rosado v. Am. Airlines*, 743 F. Supp. 2d 40, 58 (D.P.R. 2010) (noting but declining to reach the *Centola* court's equation of homosexuality and gender nonconformity); Silvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 196 ("[H]omosexuality is censured because it violates the prescriptions of gender role expectations. . . . Real men are and should be sexually attracted to women, and real women invite and enjoy that attraction."); Samuel A. Marcossan, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L.J. 1, 25 n.96 (1992) ("*Price Waterhouse* . . . implies that the use of the stereotype that men and women should be heterosexual violates Title VII."); Valdes, *supra* note 45, at 315 ("The Court's broad language [in *Hopkins* and *Manhart*] suggests that a principled and informed application of this stereotype analysis would include stereotypes

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.<sup>53</sup>

Indeed, if sexual stereotypes include societal beliefs that men should be macho, women should be feminine, and everyone should be attracted to the people of the opposite sex, then under *Price Waterhouse*, Title VII should protect not only heterosexual men who are effeminate and women with masculine traits, but gay, lesbian, and transgender employees as well.

This, then, is the dilemma. Following *Price Waterhouse* to its logical conclusion would appear to require that sexual orientation be brought, along with the rest of the spectrum of gender stereotypes, under the protective umbrella of Title VII. But courts have almost universally held that sexual orientation does not fall under Title VII, as shown by Congress’s repeated failure to include it there explicitly.<sup>54</sup> The challenge facing the lower courts since *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.<sup>55</sup>

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that . . . link social gender atypicality with minority sexual orientation.”); I. Bennett Capers, Note, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158, 1183 (1991) (arguing that if a firm refuses a male employee “partnership solely because he engaged in same-sex activity, the firm would be engaging in impermissible sex stereotyping, refusing him partnership because ‘real’ men do not have sex with men”); Zachary A. Kramer, Note, *The Ultimate Gender Stereotype: Equalizing Gender-Conforming and Gender-Nonconforming Homosexuals Under Title VII*, 2004 U. ILL. L. REV. 465, 492 (describing as “the ultimate gender stereotype” the belief that “a person believes his or her gender when that person seeks to engage in a sexual relationship with a person of the same sex”).

53. *Centola*, 183 F. Supp. 2d at 410. Not all courts have adopted this rationale. See, e.g., *Gilbert v. Country Music Ass’n*, 432 F. App’x 516, 520 (6th Cir. 2011) (“For all we know, [the plaintiff] fits every male ‘stereotype’ save one—sexual orientation—and that does not suffice to obtain relief under Title VII.”).

54. Compared to sexual orientation cases, gender identity cases have had far more success under stereotyping theories. See, e.g., *Glenn v. Brumby*, 663 F.3d 1312, 1317–18 (11th Cir. 2011) (agreeing with three courts of appeals and five district courts that have held that “[a]ll persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype”); *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004) (declaring that earlier decisions denying protection to transgender employees were “eviscerated by *Price Waterhouse*”).

55. See, e.g., *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 292 (3d Cir. 2009) (“[Defendant] argues persuasively that every case of sexual orientation discrimination cannot translate into a triable case of gender stereotyping discrimination, which would contradict Congress’s decision not to make sexual orientation discrimination cognizable under Title VII.”).

As Part II and especially Part III show, courts have overwhelmingly resolved this dilemma in one particular way. Before examining this “solution,” however, it is worth looking briefly at two other possible ways out of the Title VII dilemma, if only to show that courts’ preferred course was not inevitable.

The first of these routes would abandon the notion that federal law does not protect gays and lesbians from discrimination based on sexuality. Courts could do this on their own, should they take *Price Waterhouse* and its progeny to their logical conclusion.<sup>56</sup> Courts might find, for example, that Congress’s failure to “correct” the *Price Waterhouse* Court’s broad proscription of gender stereotyping is no less meaningful than Congress’s failure to enact ENDA.

The less controversial way down this route, however, would be for Congress to enact ENDA and do away with the dilemma entirely. Yet some worry that ENDA’s passage might eliminate both horns of the dilemma, not just one: by protecting sexual orientation and gender identity under a new law, codified separately from Title VII’s “sex” protections,<sup>57</sup> ENDA could be interpreted as a repudiation of the gender stereotyping theories that have bridged these concepts thus far. Intersectional claims—those brought by lesbians, for example—could also find themselves in danger of falling between the cracks of the two distinct laws.<sup>58</sup>

These worries aside, ENDA provides the clearest solution to the Title VII dilemma. The point here is not to advocate for ENDA, however. This Article’s intervention into the ongoing debate over ENDA’s passage is more indirect: its descriptive account of recent Title VII case law shows that the pre-ENDA status quo is significantly

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56. See *Centola*, 183 F. Supp. 2d at 410; *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002) (“Cagle repeatedly harassed (and ultimately discharged) Heller because Heller did not conform to Cagle’s stereotype of how a woman ought to behave. Heller is attracted to and dates other women, whereas Cagle believes that a woman should be attracted to and date only men.”).

57. In this regard, ENDA would be like the Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2012)), which added protections against disability discrimination outside of Title VII, rather than the Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k)), which clarified that, within Title VII, “[t]he terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions.”

58. See Jennifer S. Hendricks, *Instead of ENDA, A Course Correction on Title VII*, 103 NW. U. L. REV. COLLOQUY 209, 214 (2008) (“The same fate awaits lesbian plaintiffs if ENDA is passed as a stand-alone statute rather than as a gender amendment to Title VII: if straight women and gay men have fared well, the lesbian plaintiff will lose on both ENDA and Title VII counts. . . . [H]aving separate statutes with separate remedial structures will make it even more important for the factfinder to isolate the claims, parse the evidence more finely, and ignore intersectionality.”). For more on intersectionality, see *infra* note 90.

different than those on either side of the debate seem to realize. Members of Congress have spent nearly forty years debating whether protections like those in ENDA are worth having. Meanwhile, what this Article shows is that protections are *already* being offered by courts to a subset of gay and lesbian workers—a subset that would surely surprise ENDA’s supporters and opponents both, if they only knew.<sup>59</sup>

Coming back, then, to the alternate ways out of the Title VII dilemma: the second of these is to deny the first premise—the notion that Title VII strikes at the entire spectrum of gender stereotyping. This argument takes the form of a *reductio*: if prohibiting the entire spectrum of gender stereotyping leads to the conclusion that employers cannot discriminate against homosexuals, then this understanding of gender stereotyping must be wrong. Or, as Judge Posner, the leading advocate of this solution, has put it: “case law has gone off the tracks in the matter of ‘sex stereotyping’” when it is interpreted to imply “a federally protected right for male workers to wear nail polish and dresses and speak in falsetto and mince about in high heels.”<sup>60</sup> According to Posner, gender stereotyping in *Price Waterhouse* is properly understood as *evidence* of sex discrimination, not itself a “subtype of sexual discrimination.”<sup>61</sup> Thus, while the gender stereotyping of Ann Hopkins might have suggested that illegal sex discrimination was afoot at Price Waterhouse, gender stereotyping would itself be allowed under Title VII in contexts such as single-sex workplaces where, according to Judge Posner, discrimination between the sexes is not possible.<sup>62</sup>

Judge Posner’s approach to gender stereotyping has its critics and vulnerabilities. First, Posner fails to grasp all the ways in which

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59. This issue is discussed more fully *infra* Part V.

60. *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1066–67 (7th Cir. 2003) (Posner, J., concurring).

61. *Id.* at 1067. Justice Brennan’s plurality opinion in *Price Waterhouse* provides some support for Judge Posner’s position:

Remarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually relied on her gender in making its decision. In making this showing, stereotyped remarks can certainly be *evidence* that gender played a part.

*Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality opinion). However, “remarks” play a different role in a failure-to-promote case, such as *Price Waterhouse*, than they do in a harassment case, such as *Hamm*. Where such remarks may simply provide evidence of discrimination in the former, in the latter kind of case they actually constitute the harassment that, if pervasive or severe enough, Title VII prohibits. *See Hamm*, 332 F.3d at 1062 n.3 (suggesting that harassment that is severe enough “to alter the conditions of the victim’s employment and create an abusive working environment” would constitute a Title VII violation (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986))).

62. *Hamm*, 332 F.3d at 1068.



discrimination within a single-sex workforce can be used to keep that workforce single-sex, thereby discriminating against the other sex. As Ann McGinley has argued, “permitting discrimination against effeminate men is a means of enforcing the masculinity of the job which, in turn, creates barriers not only to effeminate men, but also to women who would be interested in the job.”<sup>63</sup> Early Title VII cases brought by married stewardesses<sup>64</sup> provide an example. Airlines that fired flight attendants when they married may have been discriminating among women, not between women and men. But by reinforcing the notion that flight attendants must appear sexually available to (presumably heterosexual) male customers, airlines were also implicitly telling men not to apply for such work.<sup>65</sup>

Judge Posner’s account is hobbled further by his belief that post-*Price Waterhouse* case law only “protects *heterosexuals* who are victims of ‘sex stereotyping’ or ‘gender stereotyping.’”<sup>66</sup> Posner wrongly assumes that because homosexuality is not protected under Title VII, homosexuals must not be either. From this erroneous starting point, Posner draws implications that he rightly finds absurd. Repeating just one of his examples: “If a court of appeals requires lawyers presenting oral argument to wear conservative business dress, should a male lawyer have a legal right to argue in drag provided that the court does not believe that he is a homosexual, against whom it is free to discriminate?”<sup>67</sup> Judge Posner correctly recognizes that if this were the law, employers would be able to establish a defense by introducing evidence of the plaintiff’s homosexuality.<sup>68</sup> A perverse

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63. Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities, and Employment Discrimination*, 43 U. MICH. J.L. REFORM 713, 744 (2010).

64. See Cary Franklin, *Inventing the “Traditional Concept” of Sex Discrimination*, 125 HARV. L. REV. 1307, 1348 (2012) (asserting that “the EEOC found in its first year that complaints of ‘loss of jobs due to marriage or pregnancy’ outnumbered any other type of sex-based complaint,” partly due to the “tenacity” of flight attendants who challenged “airline policies that terminated the employment of stewardesses when they married or reached their early thirties”).

65. Of course, men were also explicitly told not to apply. Pan Am, for example, had a no male flight attendant policy until 1971, when the Fifth Circuit struck it down in *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971), itself a notable gender stereotyping opinion due to its refusal to credit customers’ stereotyped preferences to justify the claim that being female was a “bona fide occupational qualification” for airline flight attendants. *Id.* at 386, 389; see also 42 U.S.C. § 2000e-2(e) (2012) (allowing sex-based employment decisions when “sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business”).

66. *Hamm*, 332 F.3d at 1066 (Posner, J., concurring) (emphasis added).

67. *Id.* at 1067.

68. *Id.*

incentive to launch inquiries into litigants' sexuality would result.<sup>69</sup> An analogous argument—that this kind of inquiry perversely serves to heighten the salience of characteristics that the law and most employers ordinarily try to downplay within the workplace—is made below.<sup>70</sup>

Posner furthermore identifies a second ugly consequence: the “gratuitous disparagement of homosexuals” that results when plaintiffs subjected to gay slurs are pushed towards claiming not only that they are straight, but also that, *because* they are straight, the gay slurs flung at them are particularly insulting.<sup>71</sup> “[A]s if [the slurs] were unwounding when directed at a homosexual male,” Posner empathetically notes.<sup>72</sup> Again, Posner hints at, but does not develop, a theme returned to below: the way current gender stereotyping case law might cause gay and straight employees to emphasize, or even exaggerate, the differences between them.<sup>73</sup>

The absurdities Posner identifies vanish if we remove the premise on which they are built—that gay or lesbian plaintiffs somehow cannot bring gender stereotyping claims. As Parts II and III show, courts throughout the country have rejected Posner's premise in no uncertain terms.<sup>74</sup> But once courts stop precluding homosexuals from bringing gender stereotyping claims, the dilemma returns in full force. So for a third time, we have to ask how Title VII, after *Price Waterhouse*, can protect against the entire spectrum of gender

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69. *Id.* (“Inevitably a case such as this impels the employer to try to prove that the plaintiff is a homosexual (the employer's lawyer actually said at the argument that a plaintiff's homosexuality would be a complete defense to a suit of this kind) and the plaintiff to prove that he is a heterosexual, thus turning a Title VII case into an inquiry into individuals' sexual preferences—to what end connected with the policy of the statute I cannot begin to fathom.”). In fact, this kind of inquiry is already common in Title VII cases, but not for the reason Posner identifies. While Posner discusses the sexuality of the plaintiff, cases in which same-sex harassment is alleged often turn on the sexuality of the *defendant* due to the Supreme Court's holding in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), which permits such claims to succeed “if there [is] credible evidence that the harasser was homosexual.” *Id.* at 80.

70. See *infra* Part IV.A.1; see also Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2063 (2003) (analyzing and challenging “[o]ne of American society's most cherished beliefs[:] that the workplace is—or should be—asexual”).

71. *Hamm*, 332 F.3d at 1067.

72. *Id.* at 1067–68.

73. See *infra* Part IV.B.3.

74. See, e.g., *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 292 (3d Cir. 2009) (“There is no basis in the statutory or case law to support the notion that an effeminate *heterosexual* man can bring a gender stereotyping claim while an effeminate *homosexual* man may not.”); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1063–64 (9th Cir. 2002) (en banc) (plurality opinion) (“[A]n employee's sexual orientation is irrelevant for purposes of Title VII. It neither provides nor precludes a cause of action for sexual harassment. That the harasser is, or may be, motivated by hostility based on sexual orientation is similarly irrelevant, and neither provides nor precludes a cause of action.”).

stereotyping without protecting against the stereotype that, for example, “real men” are attracted to women. The following two Parts describe the unlikely course courts have taken in attempting to escape the Title VII dilemma.

## II. TWO WAYS OF PERCEIVING GENDER STEREOTYPES

In cases brought by perceived homosexuals—and only in those cases—courts have chosen to redefine the gender stereotyping spectrum so as to limit actionable gender stereotyping to behavior and appearances that are observable at work. Having thus narrowed the spectrum, courts are able to treat discrimination based on gender nonconformity *outside* the workplace as non-actionable sexual orientation discrimination. The resulting doctrinal story treats gender stereotyping as something categorically distinct from sexual orientation discrimination.

This distinction cannot hold. It is vulnerable from both sides, as the cases that follow show.<sup>75</sup> On the one hand, beliefs about sexuality often, if not always, involve gender stereotypes regarding who men and women should be attracted to. Courts fence these off from the stereotyping spectrum solely by fiat. As the U.S. Court of Appeals for the Sixth Circuit recently and revealingly wrote: “For all we know, [the plaintiff] fits every male ‘stereotype’ save one—sexual orientation—and that does not suffice to obtain relief under Title VII.”<sup>76</sup>

On the other hand, many of the claims that are allowed to remain on the stereotyping spectrum implicate sexual orientation. As the first case discussed below demonstrates, one of the chief ways in which a worker can violate gender stereotypes is by looking or acting “gay.”<sup>77</sup> And this is not necessarily the same thing as looking or behaving like someone of the opposite gender. To be as crudely stereotypical as some of the cases that follow: A man who speaks with a lisp or obsesses about Liza Minnelli does not exhibit feminine traits. But nor would society see him as stereotypically masculine. Instead, his gender nonconformity, such as it is, stems from being perceived as “gay.”<sup>78</sup>

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75. See *infra* Parts II–III.

76. *Gilbert v. Country Music Ass’n*, 432 F. App’x 516, 520 (6th Cir. 2011).

77. See *supra* Part II.A (discussing *Prowel*, 579 F.3d 285).

78. David Halpern makes a similar point somewhat more vividly:

No one will look at you aghast . . . if you dare to imply that a guy who worships divas, who loves torch songs or show tunes, who knows all of Bette Davis’s best lines by heart, or who attaches supreme importance to fine points of style or interior design—no one will be horrified if you imply that such a man might, just possibly, not turn out to be completely straight.

DAVID M. HALPERIN, *HOW TO BE GAY* 9 (2012).

If the gender stereotypes recognized by courts include stereotypes about looking or sounding gay—and examples of this will multiply in Part III—then the sharp divide between gender stereotyping and sexuality claims that the official doctrinal story insists upon must be illusory. What courts actually exclude from the stereotyping spectrum is not sexuality, but stereotypes about sexuality whose violations are known rather than seen. As the two sections that follow explain, the real distinction is between perception that occurs through the senses and that which is merely known.

A. *Sensible Perception: Prowel v. Wise Business Forms, Inc.*

Before being laid off from his job and becoming a plaintiff in a Title VII suit, Brian Prowel worked for thirteen years at Wise Business Forms in Butler, Pennsylvania.<sup>79</sup> He spent his final seven years at Wise “operat[ing] a machine called a nale encoder, which encodes numbers and organizes business forms.”<sup>80</sup>

According to his deposition testimony, Prowel did not “fit in” with his male coworkers.<sup>81</sup> Whereas his colleagues hunted, fished, drank beer, and liked football,<sup>82</sup>

Prowel testified that he had a high voice and did not curse; was very well-groomed; wore what others would consider dressy clothes; was neat; filed his nails instead of ripping them off with a utility knife; crossed his legs and had a tendency to shake his foot “the way a woman would sit”; walked and carried himself in an effeminate manner; drove a clean car; had a rainbow decal on the trunk of his car; talked about things like art, music, interior design, and decor; and pushed the buttons on the nale encoder with “pizzazz.”<sup>83</sup>

Not coincidentally, Prowel’s coworkers perceived him—accurately—to be gay.<sup>84</sup> The Third Circuit claimed that “Prowel was ‘outed’ at work when a newspaper clipping of a ‘man-seeking-man’ ad was left at his workstation with a note that read: ‘Why don’t you give him a call, big boy.’”<sup>85</sup> Coworkers called Prowel “Princess,” “Rosebud,” or sometimes just “faggot.”<sup>86</sup> They left a feathered tiara

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79. *Prowel*, 579 F.3d at 286.

80. *Id.*

81. *Id.* at 287.

82. *Id.* (offering Prowel’s description of “the ‘genuine stereotypical male’ at the plant,” which he described as “everything I wasn’t”).

83. *Id.*

84. *See id.*

85. *Id.*

86. *Id.*

and lubricant on his male encoder and wrote messages in the bathroom claiming that he had AIDS.<sup>87</sup>

The Third Circuit found sufficient “evidence of harassment based on gender stereotypes” for Prowel to survive summary judgment.<sup>88</sup> Suggesting that a jury would need to apply a mixed-motive analysis, the court pointed to allegations that “Prowel was harassed because he did not conform to Wise’s vision of how a man should look, speak, and act,” not *just* because he was gay.<sup>89</sup>

As its name implies, a mixed-motives analysis prohibits harassment or adverse employment decisions that spring from a mix of motives, legitimate and proscribed.<sup>90</sup> In *Prowel*, sexuality was the legally permissible motive for harassing and firing Brian Prowel; gender stereotyping was the motive forbidden by Title VII.<sup>91</sup> The *Prowel* court considered a second mixed-motive claim as well: sexual orientation discrimination plus religious discrimination.<sup>92</sup> Yet the Third Circuit found those two claims to be coextensive, and dismissed them as a result. Prowel, the court said, had identified only one religious disagreement with his employer: their respective beliefs about homosexuality.<sup>93</sup> Since “Prowel’s religious harassment claim [was] based entirely upon his status as a gay man,” the court dismissed it as “a repackaged claim for sexual orientation discrimination.”<sup>94</sup>

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87. *Id.* at 287–88.

88. *Id.* at 291–92.

89. *Id.* at 292.

90. See 42 U.S.C. § 2000e-2(m) (2012) (making it unlawful for sex to be a “motivating factor for any employment practice, even though other factors also motivated the practice”). For a discussion of the evidentiary requirements for submitting mixed-motive analysis instructions to the jury, see *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98–101 (2003), in which the Court held that, to obtain a § 2000e-2(m) jury instruction, “a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that ‘race, color, religion, sex, or national origin was a motivating factor for any employment practice.’” *Id.* at 101.

Zachary Kramer has described claims such as those brought in *Prowel* as “intersectional discrimination claims.” Zachary A. Kramer, *Heterosexuality and Title VII*, 103 Nw. U. L. Rev. 205, 216–17 (2009) (drawing on the extensive literature regarding claims, such as those brought by black women, in which multiple Title VII categories intersect). See generally Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242–44 (1991) (offering a seminal discussion of intersectionality). It is unclear, however, that intersectionality—which usually refers to two protected characteristics—is the proper description of cases that, as here, involve one protected and one unprotected characteristic.

91. See *supra* note 90 and accompanying text.

92. See *Prowel*, 579 F.3d at 292.

93. *Id.* at 292–93.

94. *Id.* at 293; see also Recent Case, *Third Circuit Issues Split Decision in Case Involving Gay Man’s Harassment Claims—Prowel v. Wise Business Forms, Inc.*, 123 HARV. L. REV. 1027, 1034 (2010) (“[The court’s] dismissal of Prowel’s religious nonconformity claim suggests that it still may not allow claims in which a person

The lesson here is that an employee cannot bring a mixed-motive claim if the illicit motive is coextensive with the permissible one. Prowel's religious discrimination claim highlights the fact that a gender stereotyping claim cannot reduce, without remainder, to a claim about sexuality discrimination. *Prowel* itself, however, presents the opposite situation of a sexuality claim that threatens to reduce to a gender stereotyping claim. Since the *Prowel* court was not entirely clear about this, it is worth analyzing its opinion a bit more closely.

The Third Circuit's opinion purported to separate discrimination based on gender stereotypes from that based on homosexuality. After surveying Prowel's "demeanor and appearance," the court immediately noted that "Prowel also testified that he is a homosexual"—as if this might surprise readers who have just been told of Prowel's grooming habits and "pizzazz," not to mention the rainbow decal on his car.<sup>95</sup> The opinion then went on to relate the incident in 1997 when Prowel was "outed"—even the court put this in scare quotes—and described how "[a]fter Prowel was outed, some of his co-workers began causing problems for him, subjecting him to verbal and written attacks."<sup>96</sup>

The distinction the court tried to draw, however, between the demeanor- and appearance-based stereotyping that preceded Prowel's "outing" and the sexuality-based discrimination that followed it remains utterly unconvincing. Ordinarily, to "out" someone is to publicize previously unknown information about that person's sexuality. The court claimed that Prowel was outed when someone posted a gay personal ad at his workstation.<sup>97</sup> But here, the court failed to note how the prank in question could have revealed anything about Prowel's sexuality. The man appearing in the classified ad, after all, was not Prowel. If the same ad had been placed on the desk of another worker—one who trimmed his nails with a utility knife and operated machinery without "pizzazz"—it seems unlikely that coworkers would have suddenly suspected *his* sexuality. The so-called "outing" of Prowel only had meaning in a context where Prowel's colleagues had *already* formed beliefs about his sexuality built upon gender stereotypes; it is implausible that the personal ad incident added to or altered those beliefs.

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cannot provide specific evidence of discrimination occurring for reasons entirely distinct from an unprotected status.").

95. See *Prowel*, 579 F.3d at 287.

96. *Id.*

97. See *supra* text accompanying note 85.

This conclusion is bolstered by another omission in the court's opinion: the unanswered question of why Prowel was targeted for "outing" in the first place. Nothing in the opinion suggests that the person who left the newspaper clipping had any privileged knowledge about Prowel or his sexuality. So why was the same-sex personal ad placed at Prowel's workstation rather than at somebody else's? Again, the only explanation to emerge from the opinion is that Prowel's appearance and affect, his visible violation of gender stereotypes, prompted the harassment. Presumably, the anonymous "outer" targeted Prowel for the same reason that coworkers viewed that act as an "outing": because Prowel's failure to conform to gender stereotypes had already spawned beliefs about his sexuality. The so-called outing was really not an outing at all; it was simply another manifestation of his ongoing gender-based harassment. As described by the Third Circuit, the act seems to have reflected coworkers' existing beliefs more than it formed new ones.<sup>98</sup> In Prowel's case, so-called sexuality discrimination reduced entirely to harassment based on gender nonconformity.<sup>99</sup>

Looking in reverse, a second point underscores not how gender stereotyping led to Prowel's outing, but instead what his outing reveals about the content of those gender stereotypes. Prowel's demeanor and appearance, like his grooming, conversation topics, and "pizzazz," all must have been perceived by coworkers as "gay" traits.<sup>100</sup> The court itself confirmed this in a revealing slip. As it described Prowel's various violations of gender stereotypes, the court added that he "had a rainbow decal on the trunk of his car."<sup>101</sup> Rainbow insignia are, of course, symbols of gay pride.<sup>102</sup> That the court found nothing strange about including the decal in its list of details about the way Prowel walked and talked and dressed suggests that it also must have seen the latter traits as indicators of his sexual orientation.

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98. *Prowel*, 579 F.3d at 292.

99. *Cf. Valdes*, *supra* note 45, at 16 ("[T]here is no such thing as discrimination 'based' solely or exclusively on sexual orientation. On the contrary, . . . discrimination deemed based on sexual orientation also and necessarily is based on sex or on gender (or on both).") (footnote omitted).

100. *See generally id.* at 14–15 (describing the conflation of gender and sexual orientation); Yoshino, *supra* note 13, at 844 ("Whatever the source, there is clearly an enduring conventional wisdom that gender atypicality is a marker for homosexuality.").

101. *Prowel*, 579 F.3d at 287.

102. *See The Gay Rainbow Flag*, BBC NEWS, [http://www.bbc.co.uk/ahistoryoftheworld/objects/BGqvwC1MQTOJyteHo\\_c6dw](http://www.bbc.co.uk/ahistoryoftheworld/objects/BGqvwC1MQTOJyteHo_c6dw) (last visited Feb. 9, 2014); Forrest Wickman, *A Rainbow Marriage: How Did the Rainbow Become a Symbol of Gay Pride?*, SLATE (June 26, 2013, 3:09 PM), [http://www.slate.com/articles/life/explainer/2012/06/rainbows\\_and\\_gay\\_pride\\_how\\_the\\_rainbow\\_became\\_a\\_symbol\\_of\\_the\\_glbt\\_movement\\_.html](http://www.slate.com/articles/life/explainer/2012/06/rainbows_and_gay_pride_how_the_rainbow_became_a_symbol_of_the_glbt_movement_.html).

Further, the traits on the Third Circuit's list, while all instances of gender nonconformity,<sup>103</sup> are decidedly not all feminine. To be sure, some are. Prowel's high voice, his "effeminate" walk,<sup>104</sup> his nail filing, and his tendency to cross his legs "the way a woman would sit" all reflect stereotypically female traits.<sup>105</sup> But discussing "art, music, interior design, and decor"; not cursing; keeping a clean car; and appearing well-groomed<sup>106</sup> all depart from masculine stereotypes without thereby becoming stereotypically feminine. The Third Circuit's most vivid descriptor, the "pizzazz" with which Prowel operated his nale encoder,<sup>107</sup> has a similar connotation. It suggests insufficient masculinity, but not necessarily effeminacy—unless "effeminate" is being used as a synonym for "unmanly." To say that a man does something with "pizzazz" is not to say that he does it like a woman. It is to say he acts in a stereotypically gay manner. If Prowel "did not conform to Wise's vision of how a man should look, speak, and act,"<sup>108</sup> this was not (or not entirely) because he looked or acted like a woman. Rather, his gender nonconformity consisted largely of looking or acting in ways seen as gay. This is perceived homosexuality in its literal, sensory form.

A court *might* attempt to separate gender nonconforming traits that suggest sexual orientation from those associated with the opposite sex. In other words, the *Prowel* court might have made its mixed-motive analysis more fine-grained: rather than attempting to separate gender stereotyping from sexual orientation claims, it could have tried to divide stereotyping that was gender-based from stereotyping based on traits coded as homosexual. On remand, Prowel would have been able to rely only on harassment targeting his high voice and other effeminate traits; his "pizzazz" and grooming habits would be irrelevant since they are not stereotypically associated with the opposite gender.

Notably, however, in the five years of federal gender stereotyping cases examined in Part III, courts hardly ever tried to make this sort of distinction. Only two cases do so explicitly. In one, *Anderson v.*

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103. See *Prowel*, 579 F.3d at 291 ("The record demonstrates that Prowel has adduced evidence of harassment based on gender stereotypes."); see also *id.* at 291–92 (listing the violated stereotypes).

104. *Id.* at 291. Given the ambiguity, described below, in the way "effeminacy" is used both to indicate something feminine and as something insufficiently masculine, it may be that Prowel walked not like a stereotypical woman, but rather like stereotypical gay man.

105. See *id.* (contrasting these traits with the traits of "the typical male at Wise").

106. *Id.* at 287, 291.

107. *Id.* at 287.

108. *Id.* at 292.



*Napolitano*,<sup>109</sup> the gay plaintiff had caught his coworkers making fun of him by “lisp[ing] and talking in a stereotypically flamboyant voice.”<sup>110</sup> Noting that nothing in the record suggested that the plaintiff actually lisped, the court went on to decide that even if he did, and even if his coworkers were imitating him, “the logical conclusion is that his coworkers were lisping because of the stereotype that gay men speak with a lisp.”<sup>111</sup> The court reasoned that “[l]isping is not a stereotype associated with women.”<sup>112</sup> The second case is somewhat different, in that it involved a straight female plaintiff harassed by her allegedly lesbian coworker. In *Love v. Motiva Enterprises, LLC*,<sup>113</sup> the plaintiff claimed that she did not “conform to [her boss’s] idea of a liberated, physically fit woman.”<sup>114</sup> The court faulted her, however, for making no allegation that her boss “harassed her for having male traits or mannerisms.”<sup>115</sup> It explained: “[A]ll the circuit cases recognizing same-sex sexual stereotyping claims have involved harassment of men for having feminine traits or mannerisms, or women for having male traits or mannerisms.”<sup>116</sup> As *Prowel* shows, this claim is incorrect; a man can fail to conform to masculine norms in any number of ways that do not count as feminine.

Insofar as *Anderson* and *Love* explicitly equate gender nonconformity with conformity to stereotypes about the opposite gender, these cases are outliers. Far more commonly, courts first define gender stereotyping broadly to encompass all stereotypes observable at work and then ask which came first, the gender stereotyping or the beliefs about the plaintiff’s sexuality.

For example, in a somewhat obscure passage from *Kalich v. AT&T Mobility, LLC*,<sup>117</sup> the U.S. District Court for the Eastern District of Michigan stated:

An employee may maintain an action under Title VII for gender stereotyping, that is, where employment decisions or workplace harassment are based on the perception that the employee is not masculine enough or feminine enough and he or she fails “to conform to [gender] stereotypes.” But that is not exactly what the plaintiff alleges here. Rather, the complaint and the discovery lay

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109. No. 09-60744-CIV, 2010 WL 431898 (S.D. Fla. Feb. 8, 2010).

110. *Id.* at \*6 (internal quotation marks omitted).

111. *Id.*

112. *Id.*

113. No. 07-5970, 2008 WL 4286662 (E.D. La. Sept. 17, 2008), *aff’d per curiam*, 349 F. App’x 900 (5th Cir. 2009).

114. *Id.* at \*9.

115. *Id.* at \*10.

116. *Id.*

117. 748 F. Supp. 2d 712 (E.D. Mich. 2010), *aff’d*, 679 F.3d 464 (6th Cir. 2012).

out a pattern of conduct by [the plaintiff's supervisor] David Rich that is designed to ridicule the plaintiff's effeminate characteristics, which Rich perceived to arise from his homosexuality.<sup>118</sup>

In *Kalich*, the harasser unquestionably viewed the plaintiff as effeminate in the narrow sense of looking or acting stereotypically feminine. The plaintiff's supervisor called him women's names and told him "he looked like a girl."<sup>119</sup> Despite this, the plaintiff lost on summary judgment because his effeminacy was "perceived to arise from his homosexuality."<sup>120</sup>

According to *Kalich's* logic, being perceived as homosexual must be somehow separable from being seen or heard to exhibit certain gay-coded traits. Whereas in *Prowel*, awareness of Brian Prowel's sexuality arose from sensory perceptions of his "unmasculine" behavior and appearance, in *Kalich* "the plaintiff's effeminate characteristics . . . [were] perceived to arise from his homosexuality."<sup>121</sup>

In *Kalich*, "perceived" seems to refer to something other than that which is seen or heard. An explanation of this cognitive, as opposed to sensory, way of perceiving homosexuality emerges from the case the *Kalich* court itself cites: *Vickers v. Fairfield Medical Center*.<sup>122</sup>

#### B. Cognitive Perception: *Vickers v. Fairfield Medical Center*

Christopher Vickers worked as a police officer at the Fairfield Medical Center in Lancaster, Ohio.<sup>123</sup> According to the complaint Vickers filed in 2003, two fellow policemen began harassing him after they learned that he had befriended a gay male medic in the course of an investigation.<sup>124</sup> Harassment increased after the coworkers discovered that Vickers had taken a vacation to Florida with another man.<sup>125</sup> Despite the rumors spread by his colleagues, Vickers, both at work and in the subsequent litigation, "declined to reveal whether or not he is, in fact, homosexual."<sup>126</sup>

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118. *Id.* at 718 (first alteration in original) (citations omitted).

119. *Id.* at 715.

120. *Id.* at 714, 718.

121. *Id.* at 718.

122. 453 F.3d 757 (6th Cir. 2006).

123. *Id.* at 759.

124. Complaint ¶ 15, *Vickers v. Fairfield Med. Ctr.*, No. 2:03-CV-858, 2003 WL 23736044 (S.D. Ohio Sept. 22, 2003). The facts described here are those alleged in Vickers's Complaint. Since, however, the Sixth Circuit affirmed the district court's judgment on the pleadings, it necessarily accepted Vickers's factual allegations as true. *See Vickers*, 453 F.3d at 759, 761.

125. *Vickers*, 453 F.3d at 759.

126. *Id.* at 764.

Vickers's harassment took a variety of forms. Coworkers sabotaged his firearm and handcuffs;<sup>127</sup> sprayed a topical anesthetic on his drinking cup and a chemical irritant on his jacket;<sup>128</sup> rubbed a sanitary napkin on his face and taped it to his coat;<sup>129</sup> impressed the word "FAG" on official forms so that it would appear on the carbon duplicates;<sup>130</sup> accused him of going to gay bath houses;<sup>131</sup> implied that he had sex with a seventeen-year-old male employee;<sup>132</sup> and pretended to have sex with a Barney doll before shoving the doll in Vickers's crotch.<sup>133</sup> Once, after handcuffing Vickers during a training exercise, a coworker simulated anal sex while their boss took pictures, which were later faxed to the Fairfield Medical Center's registration desk.<sup>134</sup> Throughout this period, coworkers referred to Vickers as a "faggot";<sup>135</sup> attached a rainbow sticker to his mailbox;<sup>136</sup> and made jokes about Vickers having "titties,"<sup>137</sup> a heavy menstrual flow,<sup>138</sup> and undescended testicles.<sup>139</sup>

In what the district court described as "artful pleading," Vickers claimed that "his harassment stem[med] not from his real or perceived homosexuality but from 'real or perceived nonconformity with gender norms.'"<sup>140</sup> His complaint equated, or conflated, allegations of homosexuality with questions about Vickers's masculinity.<sup>141</sup> More pointedly, it characterized the defendants as having made "snide comments suggesting that Vickers regularly engaged in non-stereotypical behavior for men, *such as having sex with men rather than women.*"<sup>142</sup>

Recognizing the Title VII dilemma before it, the Sixth Circuit contended that Vickers's stereotyping charge was merely a sexual

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127. *See Complaint, supra* note 124, ¶¶ 21–24.

128. *Id.* ¶ 110.

129. *Id.* ¶ 72.

130. *Id.* ¶ 25.

131. *Id.* ¶¶ 86, 90, 112.

132. *Id.* ¶ 20.

133. *Id.* ¶¶ 91–92.

134. *Id.* ¶¶ 33–37.

135. *Id.* ¶¶ 56, 61, 106.

136. *Id.* ¶ 47.

137. *Id.* ¶ 67.

138. *Id.* ¶ 71.

139. *Id.* ¶ 74.

140. *Vickers v. Fairfield Med. Ctr.*, No. 2:03-CV-858, 2006 WL 5549247, at \*4 (S.D. Ohio July 19, 2006) (quoting *Complaint, supra* note 124, ¶ 250), *aff'd*, 453 F.3d 757 (6th Cir. 2006)).

141. *See Complaint, supra* note 124, ¶ 16 ("Dixon and Mueller began making sexually based slurs and discriminating remarks and comments about Vickers, alleging that Vickers was 'gay' or homosexual, and questioning his masculinity.").

142. *Id.* ¶ 19 (emphasis added).

orientation claim under another name.<sup>143</sup> “[A]ny discrimination based on sexual orientation would be actionable under a sex stereotyping theory if [Vickers’s] claim [were] allowed to stand,” the court claimed, “as all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices.”<sup>144</sup>

Challenged with figuring out how Vickers’s claim could *not* be “allowed to stand” given *Price Waterhouse*, a divided panel began by subtly re-characterizing his actual claim.<sup>145</sup> Rephrased by the majority, Vickers’s allegation was that, “in the eyes of his co-workers, his sexual practices, whether real or perceived, did not conform to the traditionally masculine role.”<sup>146</sup> Instead, the court continued, “in his supposed sexual practices, he behaved more like a woman.”<sup>147</sup>

This characterization of Vickers’s claim already contains the ambiguity that festers into the majority’s holding. The coworkers’ referenced “eyes” are metaphorical, no more tied to literal visibility than Vickers’s perceived, or falsely imputed, sexual orientation. “In the eyes of his co-workers” surely means “in the *minds* of his coworkers”; Vickers’s claim was that coworkers *thought* him to be gay.

Yet two sentences later, the court began treating visibility as something more than mere metaphor. The court claimed that “[t]he Supreme Court in *Price Waterhouse* focused principally on characteristics that were readily demonstrable in the workplace.”<sup>148</sup> Later cases, the Sixth Circuit noted, limited *Price Waterhouse* to instances “where gender non-conformance is demonstrable through the plaintiff’s appearance or behavior.”<sup>149</sup> In support of this, the court cited a 2005 decision from the U.S. Court of Appeals for the Second Circuit, adding its own emphasis to that case’s holding: “an individual may have a viable Title VII discrimination claim where the

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143. *Vickers*, 453 F.3d at 763; *see also supra* Part I (describing the dilemma).

144. *Vickers*, 453 F.3d at 764.

145. *See id.* (asserting that Vickers’s claim attempts to “bootstrap protection for sexual orientation into Title VII” (quoting *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005))).

146. *Id.*

147. *Id.* The court hedged on how exactly Vickers violated gender stereotypes. Despite its language that “all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices,” *id.* at 764, the court also mentioned that “Vickers . . . was only teased about giving, not receiving fellatio, and about receiving anal sex,” *id.* at 763 n.2. The intriguing suggestion here is that Vickers might have run afoul of masculine stereotypes, not just by being perceived as gay, but also by being perceived as the non-dominant partner in his sexual relationships. The *Vickers* court thus considered, but rejected, the distinction between passive and active sexual partners that Ian Ayres and Richard Luedeman have recently suggested as a potential way out of the Title VII dilemma. *See Ayres & Luedeman, supra* note 25, at 716–18 & nn.2–5.

148. *Vickers*, 453 F.3d at 763.

149. *Id.*

employer acted out of animus toward his or her ‘*exhibition* of behavior considered to be stereotypically inappropriate for their gender.’”<sup>150</sup> In quick succession, then, the court limited stereotypes first, to those readily demonstrable in the workplace, then to those demonstrable through appearance or behavior, and finally to those demonstrable through behavior that is *exhibited*. Once behavior was reduced to that which is *exhibited at work*, it too, no less than a worker’s appearance, became limited to that which is seen in the workplace.

With the spectrum of gender stereotyping so limited, Vickers was bound to lose, since neither his appearance nor the behavior he exhibited at work violated gender stereotypes. In the words of the Sixth Circuit:

[T]he 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 non-conforming 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 nonconformity.<sup>151</sup>

Underscoring the ambiguous language of visibility in this passage emphasizes just how much work the ambiguity does. What the court required were appearances literally “perceived” or “observed at work.” Yet Vickers’s “perceived homosexuality” was something different; since the latter was something known rather than seen, the court was able to “view” it, which is to say, think of it, as something separate and unprotected. The court concluded that Vickers’s claim failed not because he had been “classified . . . as a homosexual,” but because he “failed to allege that he did not conform to traditional gender stereotypes *in any observable way at work*. Thus, he [did] not allege a claim of sex stereotyping.”<sup>152</sup>

It is worth pausing to notice the crucial non-sequitur in the passage just quoted. The second sentence drops the qualification of the preceding sentence, which talked of *observable* non-conformance with gender stereotypes. With this omission, “sex stereotyping” claims are defined as—and limited to—claims regarding stereotypes violated in an “observable way at work.” Instead of remaining a subset of

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150. *Id.* (emphasis added by *Vickers* court) (quoting *Dawson*, 398 F.3d at 218). *Dawson* is discussed *infra* Part III.

151. *Vickers*, 453 F.3d at 763 (emphasis added).

152. *Id.* at 764 (emphasis added).

stereotyping claims, claims based on observable violations end up swallowing the whole. Observability thereby becomes, in *Vickers*, a necessary element of sex stereotyping.

In sum, the *Vickers* court was faced with a set of mutually inconsistent propositions: (1) *Price Waterhouse* holds that Title VII protects against the entire spectrum of gender stereotypes; (2) beliefs that men should be attracted to women (and vice versa) count as gender stereotypes; and (3) Title VII does not extend to claims based on sexual orientation. The court rescued itself from this dilemma by redefining *Price Waterhouse's* definition of gender stereotypes to include only stereotypes concerning appearances or behavior observable in the workplace.<sup>153</sup>

Thus, when *Vickers* alleged discrimination based on “perceived nonconformity with gender norms,”<sup>154</sup> it turns out that he was using “perceived” in the wrong sense. *Vickers's* nonconformity was something his coworkers believed; the Sixth Circuit demanded instead that it be something seen.<sup>155</sup> As the dissenter on the panel wrote, the majority required “an outward workplace manifestation of less-than-masculine gender characteristics.”<sup>156</sup>

Two points are worth emphasizing here. First, the distinction between sensory and cognitive perception should not be overstated. Not only are sense perceptions the source of much of our knowledge, but sense perceptions are themselves mental processes.<sup>157</sup> As applied here, coworkers might come to understand that a colleague is gay based on something they see or hear, such as a photo on someone's desk or an overhead phone conversation. These would still count as cognitive perception cases, akin to *Vickers*, for the purposes of this Article. After all, even in *Vickers*, officers must have *seen* *Vickers* with the gay medic or *heard* about his trip to Florida. The point is that coworkers harassed *Vickers* because they came to *know* or *suspect* something about his affective preferences and sexual activity, neither of which were observable at work. Contrast this with *Prowel*, in which colleagues literally saw the violations of gender norms described by the Third Circuit. In short, the distinction between cases like *Prowel* and

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153. *See id.* at 763.

154. Complaint, *supra* note 124, ¶ 250.

155. *See Vickers*, 453 F.3d at 763.

156. *Id.* at 767 (Lawson, J., dissenting). The dissent argued that *Vickers* had made sufficient allegations about gender nonconformity to survive a motion to dismiss on the pleadings. *Id.* at 768. Even so, the dissent's description of gender nonconformity as “less-than-masculine” troublingly suggests a stereotype of its own: masculinity is greater than, not just different from, characteristics not coded as masculine.

157. *See generally* Stanley Coren, *Sensation and Perception*, in 1 HANDBOOK OF PSYCHOLOGY 100, 100–27 (Donald K. Freedheim & Irving B. Weiner eds., 2d ed. 2013).

those like *Vickers* turns on whether someone saw or heard, or merely heard about, the plaintiff's nonconformity with sex stereotypes.

Second, *Vickers*'s limitation of *Price Waterhouse* stereotyping claims to appearances and behavior observable at work is *not* the rule elsewhere in Title VII case law.<sup>158</sup> The *Vickers* court derived this limitation from a 2005 Second Circuit case, *Dawson v. Bumble & Bumble*,<sup>159</sup> in which the court claimed that “[g]enerally speaking, one can fail to conform to gender stereotypes in two ways: (1) through behavior or (2) through appearance.”<sup>160</sup> But even the Second Circuit in *Dawson* discussed at length an earlier application of gender stereotyping theory to mothers of young children in *Back v. Hastings on Hudson Union Free School District*.<sup>161</sup> *Back* involved a school psychologist with small children at home.<sup>162</sup> *Back*'s supervisors alleged that her good performance at work was “just an ‘act’ until [she] got tenure,” after which, they believed, she would spend more time at home.<sup>163</sup> Echoing *Price Waterhouse*, the Second Circuit determined:

it takes no special training to discern stereotyping in the view that a woman cannot “be a good mother” and have a job that requires long hours, or in the statement that a mother who received tenure “would not show the same level of commitment [she] had shown because [she] had little ones at home.”<sup>164</sup>

Importantly, these are *cognitive* stereotypes about mothers. The fact that *Back*'s supervisors thought she was putting on “an act”<sup>165</sup> *proves* that their stereotypes did not derive from her behavior or appearance at work, as the *Dawson* and *Vickers* courts require. As the next Part demonstrates, cognitive stereotypes about mothers have been recognized repeatedly in the federal courts. This makes all the more anomalous the holding in *Vickers* and *Dawson* that an employee's

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158. See Noah D. Zatz, *Beyond the Zero-Sum Game: Toward Title VII Protection for Intergroup Solidarity*, 77 IND. L.J. 63, 111 (2002) (“The bar on enforcing sex- or race-based stereotypes applies regardless of whether the stereotype concerns behavior in or out of the workplace.”).

159. 398 F.3d 211 (2d Cir. 2005); see *Vickers*, 453 F.3d at 763–64 (citing *Dawson* as “instructive” and stating that even though *Vickers*'s sexuality was unknown, his claim was “precisely the kind of bootstrapping that the *Dawson* court warned against”).

160. *Dawson*, 398 F.3d at 221.

161. 365 F.3d 107 (2d Cir. 2004). The *Dawson* court ultimately distinguished *Back* on the basis that *Dawson* presented no triable issues of fact that her supervisors were concerned with gender nonconformity, or for that matter, sexuality. See *Dawson*, 398 F.3d at 221–23. It is notable in this regard that *Dawson* also lost her sexual orientation discrimination claims under state and local laws. See *id.* at 219, 221.

162. *Back*, 365 F.3d at 115.

163. *Id.*

164. *Id.* at 120 (alterations in original).

165. *Id.* at 115.

nonconformity with gender stereotypes must be observed at work, not ‘merely’ cognized. Yet this is the requirement that these cases establish for cases brought by gay, or allegedly gay, plaintiffs.

The Second Circuit has complained that, “[w]hen utilized by an avowedly homosexual plaintiff, . . . gender stereotyping claims can easily present problems for an adjudicator.”<sup>166</sup> *Vickers* and *Prowel* together suggest how courts have tried to address those problems. Expanding the inquiry’s scope, the next Part shows that their proposed solutions are by no means unique.

### III. FIVE YEARS OF FEDERAL STEREOTYPING CASES

#### A. *Cases and Method*

This Article focuses on 117 federal gender stereotyping cases from a period from 1992 to 2013. These cases were found by, first, conducting a search of all of the gender stereotyping cases heard in the federal courts over a five-year period. A search for opinions that mentioned “Title VII” along with a phrase such as “gender stereotyping,” “sex stereotyping,” “gender nonconformity” or cognate terms,<sup>167</sup> turned up 204 cases, from which 110 opinions that either were not on topic or had been superseded by a subsequent appellate opinion were removed. Since courts generally look to Title VII precedent when analyzing discrimination “on the basis of sex” under Title IX,<sup>168</sup> cases were included in which plaintiffs brought gender stereotyping claims under Title IX instead of, or in addition to, Title

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166. *Dawson*, 398 F.3d at 218. One district court recently, and unfortunately, transformed these “problems for an adjudicator” into a challenge facing litigants. *See Maroney v. Waterbury Hosp.*, No. 3:10-CV-1415 (JCH), 2011 WL 1085633, at \*2 n.2 (D. Conn. Mar. 18, 2011) (“The Second Circuit has suggested that these gender stereotyping claims may be especially difficult for gay plaintiffs to bring.” (citing *Dawson*, 398 F.3d at 218)).

167. The set of cases was found using the following search string on Westlaw’s “All Federal Cases” database: “title vii” & (“sex! stereo!” “gender stereo!” “gender noncon!”). The date range searched was April 1, 2006, to March 31, 2011. These dates were chosen based on when work on this Article began, not because they have any significance in themselves.

168. *Nelson v. Christian Bros. Univ.*, 226 F. App’x 448, 454 (6th Cir. 2007) (“Generally, courts have looked to Title VII, 42 U.S.C. §§ 2000e, as an analog for the legal standards in both Title IX discrimination and retaliation claims.” (citing cases from five circuits)). Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, tit. IX, §§ 901–907, 86 Stat. 235, 373–75 (codified as amended at 20 U.S.C. §§ 1681–1688 (2012)), prohibits discrimination “on the basis of sex” in “any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a).



VII.<sup>169</sup> Decisions were removed, however, if they failed to address the merits of the gender stereotyping claim at issue, focusing instead on matters such as class certification.<sup>170</sup>

While cases such as *Prowel* and *Vickers* came up in this initial search, leading cases from other circuits predated the search range. In order to ensure that the most important cases involving sexuality and gender stereotyping were included, an additional search was conducted for federal appellate opinions from *any* year that mentioned the previous search terms plus the terms “gay,” “homosexual,” “homosexuality,” or “sexual orientation.” This yielded an additional thirty-nine opinions, twenty-three of which addressed the merits of a plaintiff’s gender stereotyping claim. These twenty-three appellate cases, dating from 1992 to the present,<sup>171</sup> together with the 94 cases decided between 2006 and 2011, yielded the 117 cases studied. As described below, each of these cases was categorized by circuit, as a win or loss for the plaintiff, by type of plaintiff, and by type of stereotype, whether perceptible or cognized.

The set includes cases arising out of every circuit except for the U.S. Court of Appeals for the Federal Circuit.<sup>172</sup> Very few cases, district or appellate, arise out of the U.S. Courts of Appeals for the District of Columbia, the Fourth Circuit, or the Eleventh Circuit. Only two opinions come from the Fourth Circuit (with no district opinions from that circuit), and neither involves issues of sexuality.<sup>173</sup> No opinion in the set comes from the D.C. Circuit, and the only opinion from the Eleventh Circuit involved a transgender, rather

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169. An additional search for the same five years’ worth of gender or sex stereotyping opinions that mentioned Title IX but *not* Title VII did not yield any additional relevant cases.

170. See, e.g., *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010) (en banc), *rev’d*, 131 S. Ct. 2541 (2011). Another important category of cases that were excluded pertained to same-sex harassment that did not involve gender stereotyping. Following *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), plaintiffs in these cases generally have to show that their harasser was motivated either by sexual desire or by hostility to the people of their gender in the workplace. The former route obviously brings up questions about homosexuality, which is why a good number of these cases showed up in this search. But, significantly, it is the *harasser’s* sexuality, not the plaintiff’s that is implicated. These post-*Oncale* cases are thus not among the perceived homosexual cases discussed below.

171. The oldest case in the set is *Dillon v. Frank*, No. 90-2290, 1992 WL 5436 (6th Cir. Jan. 15, 1992). The most recent is *EEOC v. Boh Bros. Construction Co.*, 731 F.3d 444 (5th Cir. 2013) (en banc).

172. There are no Supreme Court cases in the set.

173. See generally *Merritt v. Old Dominion Freight Line, Inc.*, 601 F.3d 289 (4th Cir. 2010) (involving stereotypes about female truckers); *Lettieri v. Equant Inc.*, 478 F.3d 640 (4th Cir. 2007) (involving stereotypes about wives and mothers).

than gay, plaintiff.<sup>174</sup> Yet every other circuit—the First through Third and Fifth though Tenth—has at least one appellate opinion involving both gender stereotyping and sexuality.

Every opinion in the set was characterized as either a win or a loss for the plaintiff. Since most of the decisions involved motions for dismissal or summary judgment, opinions marked as “wins” do not necessarily signal an ultimate victory in the case. A “win” in this context often simply means that the plaintiff was allowed to proceed further; the judge refused to dismiss the case or grant the defendant summary judgment on the plaintiff’s sex discrimination claim.

When considering the different kinds of plaintiffs involved, the cases divide into three main types: (1) those brought by homosexuals, whether actual or perceived;<sup>175</sup> (2) those in which the sexuality of the plaintiff was not discussed (presumably because the plaintiff was an actual or perceived heterosexual);<sup>176</sup> and (3) cases involving transgender plaintiffs.<sup>177</sup> While cases brought by transgender plaintiffs are easy to distinguish from the first two subsets of cases, the distinction between subsets one and two is not always as obvious.

Plaintiffs who are gay, or are thought to be gay, do not always disclose their sexuality.<sup>178</sup> Nor do courts. The subset of cases involving perceived homosexuality has been interpreted broadly to

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174. See *Glenn v. Brumby*, 663 F.3d 1312, 1313–14 (11th Cir. 2011); see also *infra* note 177 and accompanying text.

175. See *infra* Part III.B.

176. See *infra* Part III.C.

177. See, e.g., *Glenn*, 663 F.3d at 1313–14, 1321 (accepting a claim brought by a transgender plaintiff who was fired because her supervisor believed that her gender transition would be “inappropriate” and “disruptive” and would make fellow employees “uncomfortable”); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1218, 1224 (10th Cir. 2007) (rejecting a discrimination claim brought by a transgender plaintiff whose employer worried about her bathroom usage); *Schroer v. Billington*, 577 F. Supp. 2d 293, 300, 305 (D.D.C. 2008) (accepting a claim brought by a transgender plaintiff whose supervisor recoiled when shown a picture of what the employee would look like after transitioning).

In order to avoid conflating the discrimination faced by gay and transgender employees, I have put aside the third subset of cases—those brought by transgender plaintiffs—in order to discuss them more thoroughly in future work. However, it is worth noting that, surprisingly, the trend in transgender cases echoes the findings described below in the perceived homosexuality cases. See *infra* Part III.B. In short, transgender plaintiffs tend to win if their discrimination stems from repulsion at their appearance; they lose if their case turns on something thought about (often obsessively) but not seen—namely, a penis in the women’s bathroom. Compare *Schroer*, 577 F. Supp. 2d at 300, with *Etsitty*, 502 F.3d at 1225.

178. See, e.g., *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006) (indicating that “Vickers has declined to reveal whether or not he is, in fact, homosexual”); cf. *Bovalino*, *supra* note 8, at 1134 (“[G]ay plaintiffs bringing claims under Title VII should emphasize the gender stereotyping theory and de-emphasize any connection the discrimination has to homosexuality.” (quoted disapprovingly in *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005))).

include those where the plaintiff's sexuality was discussed in coded rather than explicit terms. The paradigmatic example of such a case is *Lewis v. Heartland Inns of America, L.L.C.*,<sup>179</sup> in which an employer described the female plaintiff as having "an Ellen DeGeneres kind of look."<sup>180</sup> It would seem obvious that this means she looked like (one stereotype of) a lesbian. Also included in this first subset are cases in which sexuality emerges more from the content of the alleged harassment than from any stated beliefs or revelations about the plaintiff. Gay-tinged slurs are, of course, not always indicative of some belief about the sexuality of their target.<sup>181</sup> Often they are merely all-purpose insults, blunt indications of dislike. However, cases involving gay slurs were included within the first subset if they led the court to grapple with issues of sexual orientation under Title VII.

The remaining, second subset of opinions come closest to the *Price Waterhouse* model: these are the cases in which the gender stereotyping at issue does not raise or suggest questions about homosexuality.<sup>182</sup> These include a number of cases like *Back*, in which stereotypes about parents, normally mothers, lead to adverse employment actions.<sup>183</sup>

Finally, all 117 of the gender stereotyping cases in the set were categorized as involving either perceptible or cognized violations of gender norms. This reflects the difference already described between the stereotyping of *Prowel* and that of *Vickers*.<sup>184</sup> Cases were coded as perceptible stereotyping cases if they involve stereotypes about how the plaintiff appeared or behaved at work. Cognitive cases, by contrast, involve stereotypes related to knowledge or beliefs about the plaintiff.

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179. 591 F.3d 1033 (8th Cir. 2010).

180. *Id.* at 1036.

181. *See, e.g.*, *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 458 (5th Cir. 2013) (en banc) (indicating that the harasser used anti-gay slurs because he considered the plaintiff insufficiently "manly," not because he thought the plaintiff was gay).

182. This is different, of course, from saying that the cases do not raise questions about sexuality. In *Willingham v. Regions Bank*, No. 2:09-cv-02289, 2010 WL 2650727 (W.D. Tenn. July 1, 2010), for example, a private banker in Memphis was fired after she appeared wearing a bikini in *Cruzin' South*, a magazine devoted to motorcycles and custom cars. *Id.* at \*2. Though she claimed to have violated her employer's stereotypical view that women should be conservatively dressed, *id.* at \*3, the plaintiff also could be seen as flaunting her (hetero)sexuality. Significantly, the court relied on *Vickers* in granting summary judgment to the employer, reasoning that the plaintiff had not violated gender stereotypes *at work*. *Id.*

183. *See supra* notes 161–64 and accompanying text for discussion of *Back v. Hastings on Hudson Union Free School District*, 365 F.3d 107 (2d Cir. 2004) and cognitively perceived stereotypes concerning working mothers.

184. *See supra* Part II.A (*Prowel*); Part II.B. (*Vickers*).

*B. Cases Involving Perceived Homosexuality*

*Prowel* and *Vickers* both involved perceived homosexuality, but “perceived” had different meanings in the two cases.<sup>185</sup> *Prowel* looked gay, at least in the eyes of his coworkers and, it seems, the Third Circuit.<sup>186</sup> *Vickers* was thought to be gay.<sup>187</sup> The fact that *Prowel* won and *Vickers* lost is not unusual. Table 1 shows the sharp discrepancy in outcomes between cases involving literally perceptible and cognitively perceived stereotype violations in cases brought by perceived homosexuals.

*Table 1. Discrimination Cases Involving Perceived Homosexuality*

|                      | Plaintiff Wins | Plaintiff Loses |
|----------------------|----------------|-----------------|
| Visible Stereotypes  | 12             | 3               |
| Cognized Stereotypes | 1              | 35              |

*1. Visible stereotypes*

A wide variety of appearances and behaviors seem to violate gender stereotypes in American workplaces. Earrings and certain hairstyles on men are predictable violations.<sup>188</sup> Less expected, perhaps, is an iron worker’s use of “Wet Ones” wipes rather than toilet paper on the job site.<sup>189</sup> A coworker thought that using those wipes was “kind of gay,” “feminine,” or “homo.”<sup>190</sup> In opinions involving sensibly perceptible stereotypes, some plaintiffs’ ways of walking, talking, or gesturing were explicitly compared to those of women.<sup>191</sup> Others,

185. See *supra* Part II.A–B.

186. See *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 287 (3d Cir. 2009); see also *supra* notes 81–84 (describing the characteristics that presumably made *Prowel* “look gay”).

187. *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 759 (6th Cir. 2006); see also *supra* text accompanying notes 124–26 (indicating that coworkers believed that *Vickers*, who never revealed his sexual orientation, was gay because he befriended another gay man).

188. See *Kay v. Independence Blue Cross*, 142 F. App’x 48, 50 (3d Cir. 2005) (earring); *Doe v. City of Belleville*, 119 F.3d 563, 567, 581 (7th Cir. 1997) (earring and long hair), *vacated*, 523 U.S. 1001 (1998); *McMullen v. S. Cal. Edison*, No. EDCV 08-957-VAP (PJWx), 2008 WL 4948664, at \*2 (C.D. Cal. Nov. 17, 2008) (earring and “effeminate” haircut). An earring-wearing male, fired by the Happy Times Nursery School for his effeminacy, was among the losing plaintiffs in *DeSantis v. Pacific Telephone & Telegraph Co.*, one of the best-known sexuality cases pre-dating *Price Waterhouse*. See *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 331–32 (9th Cir. 1979), *overruled by Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864 (9th Cir. 2001).

189. See *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 450 (5th Cir. 2013) (en banc).

190. *Id.* at 450, 457–58.

191. See, e.g., *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1069 (9th Cir. 2002) (en banc) (Pregerson, J., concurring) (noting that the plaintiff was mocked “because he walked ‘like a woman’”); *Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135, 152 (N.D.N.Y. 2011) (discussing that the plaintiff was harassed because his

however, were described not as feminine, but as insufficiently “macho.”<sup>192</sup> For example, colleagues of a municipal employee “made fun of his appearance, mannerism, gestures, patterns of speech and”—somewhat more strangely—“his seriousness” because “he did not fit [Defendant’s] ‘macho’ image.”<sup>193</sup> In another case, “a small, non-muscular man with a disability” had a boss who thought he “was not a ‘real man’ or a ‘manly man.’”<sup>194</sup>

The cases just described all involved male plaintiffs. In fact, of the fifteen visible perception stereotyping cases in this subset, only three were brought by women. Two were successful: a hotel front desk worker who was fired because of her “Ellen DeGeneres kind of look”<sup>195</sup> and an eighth-grade student whose “gothic” dress and friendship with a female classmate attracted harassment.<sup>196</sup> The one female plaintiff who lost presented an unusual case in which not she, but her female harasser, was perceived to be gay.<sup>197</sup> In a particularly unsympathetic opinion, the court first denied the plaintiff’s *Oncala v. Sundowner Offshore Services, Inc.*<sup>198</sup> (same-sex harassment) claim in part because she could not prove that her harasser was a lesbian, despite a declaration that the harasser had said “men did not like her . . . because she was gay or female.”<sup>199</sup> The court treated this as logically

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“expressive gestures and manner of speaking were of a nature stereotypically associated with females”).

192. See, e.g., *Schlegelmilch v. City of Sarasota Police Dep’t*, No. 8:06CV139 T27MAP, 2006 WL 2246147, at \*2 (M.D. Fla. Aug. 3, 2006) (finding that the plaintiff’s allegations were sufficient to state a claim for gender discrimination under Title VII).

193. *Id.* (alteration in original).

194. *Miller v. City of New York*, 177 F. App’x 195, 196 (2d Cir. 2006).

195. See *Lewis v. Heartland Inns of Am., L.L.C.*, 591 F.3d 1033, 1035–36 (8th Cir. 2010) (reversing the district court’s grant of summary judgment to the hotel, which instead sought a “Midwestern girl look”).

196. See *Riccio v. New Haven Bd. of Educ.*, 467 F. Supp. 2d 219, 221–22 (D. Conn. 2006) (denying the defendant’s motion for summary judgment). *Riccio*, a Title IX case, is a difficult opinion to unpack. The defendant claimed that the harassment was based not on gender, but on personal animosity, sexuality, or plaintiff’s “nonconforming type of dress,” *id.* at 225, as if the latter constituted something other than gender nonconformity. The court, meanwhile, misread the holding of *Oncala v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80 (1998) (“We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations.”), and based its decision on the fact that some of the slurs used (“dyke,” “lesbian,” etc.) were gender-specific. See *Riccio*, 467 F. Supp. 2d at 226.

197. See *Love v. Motiva Enters., LLC*, No. 07-5970, 2008 WL 4286662, at \*1 (E.D. La. Sept. 17, 2008).

198. 523 U.S. 75 (1998); see *supra* notes 69, 170 (describing that under *Oncala*, plaintiffs alleging same-sex harassment that did not involve gender stereotyping must show that their harasser’s motivation was animosity to the plaintiff’s gender or sexual desire).

199. See *Love*, 2008 WL 4286662 at \*6–7 & n.17.

disjunctive: it proved only that she was one or the other.<sup>200</sup> The plaintiff's gender stereotyping claim—to which the court then turned—was that she did not conform to her alleged harasser's "idea of a liberated, physically fit woman."<sup>201</sup> Noting, without deciding, that the U.S. Court of Appeals for the Fifth Circuit might not even recognize gender stereotyping claims,<sup>202</sup> the court distinguished individuals' idiosyncratic ideas about gender from "society's general ideas about traits commonly thought to be shared by persons of the same physical type."<sup>203</sup> The court concluded that "[w]hatever [the alleged harasser's] individual ideas may have been about women's liberation and physical appearance, these do not constitute gender stereotypes."<sup>204</sup> In marked contrast to the thoroughly idiosyncratic stereotypes at issue in the *Wet Ones* case, the court in *Love* held that individually held stereotypes are not cognizable under Title VII.<sup>205</sup>

In the other two perceptible stereotype cases in which plaintiffs lost, courts used a somewhat different procedure: in both cases, the courts seemingly weighed harassment based on perceptible stereotypes against harassment based on knowledge or beliefs in order to determine which did more explanatory work overall. The court in *EEOC v. Family Dollar Stores, Inc.*,<sup>206</sup> which involved a retail manager whose harassment drove a teenage employee to quit,<sup>207</sup> was especially explicit about this balancing process. On the one hand, the court admitted that comments made about the plaintiff "arguably implicate[d] gender stereotypes."<sup>208</sup> The store's manager, Michael Garrison had asked why the plaintiff, Kendrick Jones, "walk[ed] like that," called him "half-female," and accused him of "using tampons."<sup>209</sup> The plaintiff's brief, meanwhile went still further:

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200. *Id.* at \*7 ("[T]he alleged statement by [the alleged harasser] indicates she was unliked either because she was gay or because she was female, without confirming whether either of these propositions is true.").

201. *Id.* at \*9.

202. *Id.* The Fifth Circuit has since decided this issue. See *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 456 (5th Cir. 2013) (en banc) (holding that sexual harassment claims, including those brought against a person of the same sex, can be established using evidence of sex stereotyping).

203. *Love*, 2008 WL 4286662, at \*10.

204. *Id.*

205. Compare *Boh Bros.*, 731 F.3d at 456–57 (focusing, in what the court describes as an "intent-based inquiry," on evidence of the harasser's subjective view of the victim in order to determine whether the harassment was "because of . . . sex"), with *Love*, 2008 WL 4286662, at \*10 (distinguishing an individual's biases from a societal stereotype).

206. No. 1:06-CV-2569-TWT, 2008 WL 4098723 (N.D. Ga. Aug. 28, 2008).

207. *Id.* at \*6.

208. *Id.* at \*16.

209. *Id.* at \*5, \*8.

In the warped mind of Garrison, Kendrick did not meet this [sic] expectations of a stereotypical heterosexual male. A heterosexual man should, in Garrison's words, "*get pussy*." A heterosexual male should not walk the way Kendrick walked. A masculine heterosexual male should not be clean cut, shirt tucked-in, pants creased and neat.<sup>210</sup>

All of these were ways in which, according to the plaintiff, his supervisor had perceived him as "appearing gay or effeminate."<sup>211</sup> Once again, being seen as "clean cut" and "neat," like being perceived as "serious,"<sup>212</sup> emerges as a way in which a man can violate masculine stereotypes without thereby fitting feminine stereotypes.<sup>213</sup>

Despite these instances of gender stereotyping, the *Family Dollar* court determined that "the record clearly reflects that the harassment at issue was based *primarily* on Jones's perceived sexual orientation, rather than his gender or gender stereotypes."<sup>214</sup> After considering the instances of harassment as a whole, the court determined that "most" of the comments expressed a belief about the plaintiff's sexual orientation.<sup>215</sup>

In making this determination, the court explicitly followed *Kay v. Independence Blue Cross*,<sup>216</sup> the last of the three "losses" in the visible stereotyping row of Table 1. In *Kay*, a divided panel<sup>217</sup> of the Third Circuit decided that references to the plaintiff's sexual orientation outnumbered insults about his not being a "real man."<sup>218</sup> The appellate opinion failed to mention, as the court below had done, that a coworker viewed the plaintiff as "a 'miss prissy.'"<sup>219</sup> Further, the Third Circuit lumped together the slurs about sexuality with phrases

210. *Id.* at \*9.

211. *Id.* at \*8.

212. *See supra* text accompanying note 193 (describing a serious male plaintiff as insufficiently macho); *cf. Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 287 (3d Cir. 2009) ("Prowel testified that he . . . was very well-groomed; wore what others would consider dressy clothes; was neat; [and] filed his nails . . .").

213. The court in *Love* failed to recognize that possibility. *See supra* notes 113–16 and accompanying text (characterizing *Love*'s failure to allege sexual harassment based on her male mannerisms as fatal to her claim).

214. *Family Dollar*, 2008 WL 4098723, at \*17 (emphasis added).

215. *Id.* at \*16.

216. 142 F. App'x 48 (3d Cir. 2005).

217. *See id.* at 51 (Rendell, J., concurring). Judge Rendell agreed with the district court that gender stereotyping occurred. *See id.* ("The line between discrimination based upon gender stereotyping and that based upon sexual orientation is difficult to draw and in this case some of the complained of conduct arguably fits within both rubrics."). He would have resolved the case in favor of the defendant solely because the harassment was not sufficiently pervasive or regular. *See id.*

218. *Id.* at 50 (majority opinion).

219. *See Kay v. Independence Blue Cross*, No. CIV. A. 02-3157, 2003 WL 21197289, at \*2 (E.D. Pa. May 16, 2003), *aff'd*, 142 F. App'x 48. The district court found "ample evidence" of gender stereotyping. *Id.* at \*5.

such as “fem” and, even more bizarrely, “ass wipe.”<sup>220</sup> While these details may have affected the case’s outcome, so too did Kay’s failure to emphasize his earring.<sup>221</sup> Kay might have been more successful had he explained what it was about his appearance or behavior that caused his coworkers to say, just after his transfer to a new floor<sup>222</sup>: “Did you see that fag that moved up on the floor yesterday?”<sup>223</sup> Presumably, since the workers did not know him yet, they were drawing their assumptions from his *visible* gender non-conformance.

The *Kay* court might also have left this question for trial. That was the solution used in *Prowel*, where the Third Circuit, unlike the district court it reversed,<sup>224</sup> ignored its own earlier opinion in *Kay*. Rather than attempting to weigh the visual versus cognized sources of the anti-gay invective directed at the plaintiff, the *Prowel* court instead treated this issue as a factual matter best left for a jury.<sup>225</sup> This is the approach also followed by the leading appellate cases from the U.S. Courts of Appeals for the Seventh and Ninth Circuits.

In *Doe v. City of Belleville*,<sup>226</sup> for example, the Seventh Circuit found that a jury might “reasonably infer” gender-based harassment from “the harassers’ evident belief that in wearing an earring, [the plaintiff] did not conform to male standards.”<sup>227</sup> Focusing on abusive

220. See *Kay*, 142 F. App’x at 51.

221. See *id.* at 50–51. In fact, Kay’s brief on appeal may have sabotaged his case by distancing him more generally from certain forms of visible gender nonconformity. The brief took pains to note that Kay “dresses very conservatively and wears his hair short and in keeping with a professional businessperson. [He] has no unusual walking style or gait and does not comport himself in a manner which would attract negative attention to himself.” Brief for Appellant, at 6, *Kay*, 142 F. App’x 48.

222. Brief for Appellant, *supra* note 221, at 8–9.

223. *Kay*, 142 F. App’x at 50.

224. See *Prowel v. Wise Bus. Forms, Inc.*, No. 2:06-cv-259, 2007 WL 2702664, at \*4 (W.D. Pa. Sept. 13, 2007), *rev’d*, 579 F.3d 285 (3d Cir. 2009). Neither court was bound by *Kay*, as *Kay* was issued as a non-precedential opinion. See 3d Cir. LAR 28.3(b) (2011).

225. See *Prowel*, 579 F.3d at 291.

226. 119 F.3d 563 (7th Cir. 1997), *vacated*, 523 U.S. 1001 (1998). Though *Doe* was vacated in light of *Oncale*, courts in the Seventh Circuit consider themselves bound by what one court characterized as *Doe*’s “second rationale, namely that ‘Title VII does not permit an employee to be treated adversely because his or her appearance or conduct does not conform to stereotypical gender roles.’” *Jones v. Pac. Rail Servs.*, No. 00C 5776, 2001 WL 127645, at \*2 (N.D. Ill. Feb. 14, 2001) (quoting *Doe*, 119 F.3d at 580). The district court reasoned that nothing “in the Court’s decision to vacate and remand *Doe* for reconsideration in light of *Oncale* . . . indicate[d] that the Seventh Circuit’s second rationale [was] no longer viable.” *Id.*; see also *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 263 n.5 (3d Cir. 2001) (“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.”).

227. *Doe*, 119 F.3d at 575; see also *id.* at 581 (“[A] man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect



questions about whether the plaintiff was “a boy or a girl,” the court seemed unfazed by the far more frequent slurs that focused on the plaintiff’s sexuality.<sup>228</sup> Such evidence, the court held, “does not establish, as a matter of law, that [the plaintiff] was being discriminated against solely on the basis of his perceived sexual orientation, as opposed to his sex.”<sup>229</sup> The court offered two reasons for this holding: First, sex or gender only needed to be a motivating factor in the harassment, not the sole one.<sup>230</sup> Second, and more relevant here, homophobic and sex discrimination cannot be “rigidly compartmentalized.”<sup>231</sup> “[A] homophobic epithet,” the Seventh Circuit held, “may be as much of a disparagement of a man’s perceived effeminate qualities as it is of his perceived sexual orientation.”<sup>232</sup>

Importantly, nothing in *Doe* suggested that Doe’s harassers had any knowledge about his sexual orientation. In fact, the Seventh Circuit made a point of stating that the plaintiff was “not in fact gay.”<sup>233</sup> Perhaps this explains the difference between *Doe* and *Kay*: what the *Doe* court claimed cannot be compartmentalized is something different from what the *Kay* court tried so hard to put into boxes. In *Kay*, the court separated bias against the plaintiff’s *appearance* (which, as in *Doe*, included an earring) from *knowledge* about his sexuality.<sup>234</sup> In *Doe*, on the other hand, perceived effeminacy and perceived sexual orientation *both* referred to something visual. As the Seventh Circuit aptly summarized *Doe* in a subsequent case: “the harassers in *Doe*

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he exhibits his masculinity in a way that does not meet his coworkers’ idea of how men are to appear and behave, is harassed ‘because of’ his sex.”)

228. *See id.* at 567–68, 575–77 (focusing its analysis on gender discrimination, while at the same time noting that he was frequently harassed due to his sexuality); *see also id.* at 567 (“Dawe, a former Marine of imposing stature, constantly referred to H. as ‘queer’ and ‘fag’ and urged H. to ‘go back to San Francisco with the rest of the queers.’ . . . Dawe soon took to calling H. his ‘bitch’ and said that he was going to take him ‘out to the woods’ and ‘get [him] up the ass.’” (alteration in original)). Though both H. and his twin brother J. were harassed, the Seventh Circuit noted that H. was the main target of the abuse. *See id.* at 567.

229. *Id.* at 593. *But see id.* at 601 (Manion, J., concurring in part and dissenting in part) (stating that “it is not reasonable to infer” that the plaintiff was harassed because he is “male and not female”).

230. *Id.* at 594. *But see* *Stacks v. Sw. Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1326 (8th Cir. 1994) (denying the possibility of a mixed-motive harassment claim, reasoning that “[t]he analysis was designed for a challenge to ‘an adverse employment decision in which both legitimate and illegitimate considerations played a part,’” and “[a]n employer could never have a legitimate reason for creating a hostile work environment.” (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 247 (1989) (plurality opinion))). For a discussion of how courts have applied the mixed-motive analysis in Title VII cases, see *supra* note 90 and accompanying text.

231. *Doe*, 119 F.3d at 593 n.27.

232. *Id.*

233. *Id.* at 592.

234. *See supra* notes 217–23.

expressed and exhibited hostility to the way in which plaintiff H. exhibited his sexuality.”<sup>235</sup>

*Doe* also raises a larger point: courts often cannot determine whether harassment is “because of” an impermissible trait simply by noting the form the harassment takes. Gay slurs are employed in nearly all of the cases discussed in this section, winners and losers both. Faced with slurs that mostly sound the same, courts are forced to ask whether these slurs stem from knowledge about plaintiffs’ sexuality, or merely reflect antipathy towards the plaintiffs’ appearance or affect.

Compare, in this regard, an en banc case from the Ninth Circuit, *Rene v. MGM Grand Hotel, Inc.*,<sup>236</sup> in which the supervisor and coworkers of an openly gay hotel butler blew kisses at him, called him names, and touched him sexually “like they would to a woman.”<sup>237</sup> A concurring opinion and the dissent<sup>238</sup> differed in their interpretations of one key piece of testimony. When asked if one of the harassers had teased him about the way he walked and had whistled at him “like a woman,” the plaintiff responded: “Right. Like a man does to a woman.”<sup>239</sup>

According to Judge Hug’s dissent, “the whistling was because [Rene] was gay, not because of the way he walked.”<sup>240</sup> However, according to Judge Pregerson’s concurrence:

There would be no reason for Rene’s co-workers to whistle at Rene “like a woman,” unless they perceived him to be not enough like a man and too much like a woman. That is gender stereotyping, and

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235. *Johnson v. Hondo, Inc.*, 125 F.3d 408, 413 (7th Cir. 1997) (emphasis added).

236. 305 F.3d 1061 (9th Cir. 2002) (en banc).

237. *Id.* at 1064 (plurality opinion) (quoting the plaintiff’s deposition testimony).

238. The plurality opinion, written by Judge Fletcher and joined by four others, found that Rene had properly alleged harassment because of sex because the assaults he described involved “areas of the body linked to sexuality.” *Id.* at 1066. The dissent by Judge Hug, joined by three other judges, responded that treating all harassment with sexual content as actionable ignores Title VII’s requirement that the harassment occur “because of sex.” *Id.* at 1070, 1075, 1077 (Hug, J., dissenting). As the Supreme Court noted in *Oncale*, “[w]e have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations.” *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998); see also Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1686–87 (1998) (“[M]uch of the gender-based hostility and abuse that women (and some men) endure at work is neither driven by the desire for sexual relations nor even sexual in content.”).

239. *Rene*, 305 F.3d at 1077 n.4 (Hug, J., dissenting).

240. *Id.* Both the dissent and the concurrences agreed that same-sex gender stereotyping would be proscribed by Title VII, as interpreted by the Ninth Circuit in *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864, 874–75 (9th Cir. 2001). See *Rene*, 305 F.3d at 1068 (Pregerson, J., concurring); *id.* at 1070 (Fisher, J., concurring); *id.* at 1077 (Hug, J., concurring).

that is what Rene meant when he said he was discriminated against because he was *openly* gay.<sup>241</sup>

The difference separating Judges Hug and Pregerson is that which separates winning cases from losing ones. Importantly, both looked at the same harassment: male workers whistling at a man as they would to a woman. Yet Judge Hug's dissent found this to be rooted in the workers' knowledge of the plaintiff's sexuality.<sup>242</sup> Judge Pregerson's concurrence instead began with what the workers saw; it underscored the fact that the plaintiff's sexuality was *open*, presumably meaning visible.<sup>243</sup> According to the concurrence, being "*openly* gay" means being *seen* as "not enough like a man and too much like a woman."<sup>244</sup>

The dissenters in *Rene* instead proposed a general principle:

Discrimination in the form of harassment or assault on the job because of a man's activity *outside* the workplace, such as his sexual activities, is not a basis for discrimination based on gender stereotyping of how he is expected to work on the job. A person might conform to all the stereotypes of masculinity on the job yet have a homosexual orientation in his own private life.<sup>245</sup>

The dissenters' proposed distinction is untenable. Rene's sexual orientation was not confined to "his own private life"; rather, his sexuality was known at work, and that knowledge violated "stereotypes of masculinity on the job."<sup>246</sup> The dissent's outside-the-workplace/on-the-job distinction must be understood as the cognitive/visual distinction discussed above.<sup>247</sup> The stereotypes of masculinity at issue in *Rene* were all present at the workplace; what the dissent and the concurrence really disagreed about is whether their violation was primarily known or seen.

## 2. *Cognized stereotypes*

The dissent's reading of the facts in *Rene* provides the model for the thirty-six cases to be considered next: those involving cognized stereotypes. These are cases in which the plaintiff's alleged harassment or adverse employment action stemmed from someone's *knowledge* or *beliefs* about the plaintiff's sexual orientation and, possibly, his or her sexual activity or associations outside the

241. *Rene*, 305 F.3d at 1069 n.2 (Pregerson, J., concurring).

242. *Id.* at 1077 n.4 (Hug, J., dissenting).

243. *See id.* at 1069 n.2 (Pregerson, J., concurring).

244. *Id.*

245. *Id.* at 1072 (Hug, J., dissenting).

246. *See id.*; *see also id.* at 1064 (plurality opinion) (indicating that Rene was "openly gay").

247. *See supra* Part II.

workplace. Plaintiffs do not fare well in these cases. As shown in Table 1, only one plaintiff won in a case of this sort; thirty-five lost.

Part II discussed *Vickers* as a paradigmatic example of a knowledge-based, rather than appearance-based, stereotyping case.<sup>248</sup> In *Vickers*, harassment of the plaintiff stemmed from his colleagues' belief that he was gay, a belief based on their knowledge that Vickers had befriended a gay medic and then gone on vacation with another man.<sup>249</sup> Facts like these are not unique in the cases falling into this group. In *Hamm v. Weyauwega Milk Products, Inc.*,<sup>250</sup> for example, a rumor had spread around the milk plant that the plaintiff, Hamm, was involved in a romantic relationship with another coworker, Zietlow.<sup>251</sup> "Hamm's coworkers thought it odd when Hamm gave Zietlow a boat and let him use his four-wheel vehicle."<sup>252</sup> In *Hamm* as in *Vickers*, knowledge about "suspicious" activity outside of work led to slurs about the plaintiff's sexuality.<sup>253</sup> Hamm was no doubt speaking of cognitive perception when, in his complaint, he bemoaned how he'd grown "so sick of being threatened for what people perceive!"<sup>254</sup>

The court in *Hamm* relied on an earlier Seventh Circuit case, *Spearman v. Ford Motor Co.*,<sup>255</sup> which involved a more specific knowledge claim. The harasser in that case "claimed that his brother-in-law and a coworker told him that they saw [the plaintiff] at gay nightclubs."<sup>256</sup> The harasser in a 2009 district court case had still more specific knowledge: the plaintiff had dated the harasser, his coworker, for three months.<sup>257</sup> Echoing the rainbow decal snuck into

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248. *Supra* Part II.B.

249. *See supra* notes 124–26 and accompanying text.

250. 332 F.3d 1058 (7th Cir. 2003).

251. *Id.* at 1060.

252. *Id.*

253. Hamm likely undercut his cause by the complaints he filed with the Wisconsin Equal Rights Division. As the Seventh Circuit wrote:

In his first complaint to the ERD, [Hamm] explained, "Dean Bohringer believes that me and another individual are gay at work, he constantly refers to me and Jeff Zietlow as faggots. Dean has threatened to kill me, snap my neck for what he thinks to be true." In a note written November 12, 1998, and appended to his deposition, Hamm links judgment of his sexuality by his peers to several of his allegations: "I am single so therefore it would more so [be] believed that I was homosexual, I have had numerous people at the plant pick on me on account of this . . . ."

*Id.* at 1063 (second alteration in original).

254. *Id.*

255. 231 F.3d 1080 (7th Cir. 2000).

256. *Id.* at 1083.

257. *See Ayala-Sepulveda v. Mun. of San German*, 661 F. Supp. 2d 130, 134, 137 (D.P.R. 2009) (finding that "the only allegation of sex stereotyping included in plaintiff's complaint is that the defendants acted upon their perception of Plaintiff as a man who did not conform with the gender stereotypes associated with men in our society" (internal quotation marks omitted)).

*Prowel's* list of gender non-conforming traits,<sup>258</sup> the plaintiff in *Kalich v. AT&T Mobility, LLC* had a blue and yellow bumper sticker from the Human Rights Campaign, a gay-rights organization,<sup>259</sup> on his car; his supervisor would teasingly refer to the emblem as the Swedish flag.<sup>260</sup> In *Wilken v. Cascadia Behavioral Health Care, Inc.*,<sup>261</sup> coworkers saw the plaintiff kissing, hugging, and holding hands with her girlfriend, an employee in a neighboring department.<sup>262</sup> Though *Wilken* might have provided the starkest possible example of literally perceived homosexuality, the plaintiff did not bring a gender stereotyping claim.<sup>263</sup> She succeeded instead on a gender-association claim under Oregon state law.<sup>264</sup>

Not all of the cases in the set reveal such clear sources of knowledge or belief. A seminal opinion from the Second Circuit, *Simonton v. Runyon*,<sup>265</sup> stated simply: “Simonton’s sexual orientation was known to his co-workers.”<sup>266</sup> An early Sixth Circuit case left matters even more mysterious. In *Dillon v. Frank*,<sup>267</sup> the court wrote that, after the plaintiff, Ernest Dillon, had worked as a mail handler for four years, a coworker “began calling Dillon ‘fag,’ and saying that ‘Dillon sucks dicks.’”<sup>268</sup> As with *Kay*,<sup>269</sup> cases like *Dillon* raise questions about what led coworkers to know or suspect the plaintiff’s sexuality. One wonders, yet the record in these cases fails to answer, whether they might have been tipped off by something gender non-conforming in the plaintiff’s appearance or affect.

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258. See *supra* note 102 (indicating that rainbows symbolize gay pride).

259. See *The HRC Story: About Our Logo*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/the-hrc-story/about-our-logo> (last visited Feb. 9, 2014) (describing its logo as “one of the most recognizable symbols of the lesbian, gay, bisexual and transgender community”).

260. *Kalich v. AT&T Mobility, LLC*, 748 F. Supp. 2d 712, 714–15 (E.D. Mich. 2010) (providing these remarks as the main support for its holding that the supervisor’s “comments were targeted toward the plaintiff because [the supervisor] perceived him to be a homosexual”), *aff’d*, 679 F.3d 464 (6th Cir. 2012).

261. No. CV 06-195-ST, 2007 WL 2916482 (D. Or. Oct. 5, 2007).

262. *Id.* at \*5.

263. *Id.* at \*20 n.13.

264. See *id.* at \*22 & n.13 (holding that the plaintiff’s evidence was sufficient to withstand summary judgment under OR. REV. STAT. § 659A.030(1)(a)–(b), which was amended after the alleged discrimination took place to explicitly list sexual orientation as a protected ground).

265. 232 F.3d 33 (2d Cir. 2000).

266. *Id.* at 35. In a similarly under-described set of facts, the plaintiff in *Anderson v. Napolitano*, No. 09-60744-CIV, 2010 WL 431898 (S.D. Fla. Feb. 8, 2010) “alleg[ed] that the Miami Field Office’s acting-Special Agent in Charge ‘learned of Anderson’s sexual orientation a few days after Anderson reported for duty’ and ‘immediately began to shun and isolated him within the office.’” *Id.* at \*1.

267. No. 90-2290, 1992 WL 5436 (6th Cir. Jan. 15, 1992).

268. *Id.* at \*1.

269. See *supra* notes 216–23 (offering conjectures as to what traits led to *Kay*’s harassment).

Plaintiffs' failure to point to any specific gender non-conforming traits leads to the downfall of many of the cases in the set.<sup>270</sup> But, importantly, plaintiffs also tend to lose if they add a stereotyping claim after previously making a sexual orientation claim. Worried about "bootstrapping," courts appear wary of plaintiffs whose story changes over time.<sup>271</sup> Even a plaintiff who had been referred to "as acting and dressing like 'a girl,' 'a pussy' and a 'fag'" and had been told "to 'man up,'" failed in his gender stereotyping claim because he had previously claimed, in a letter to his company's CEO, that "he was

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270. See, e.g., *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 259, 264 (3d Cir. 2001) (affirming summary judgment in the employer's favor because the plaintiff did not show that he was harassed because "he failed to comply with societal stereotypes"); *Johnson v. Hondo, Inc.*, 125 F.3d 408, 410, 413–14 (7th Cir. 1997) (affirming summary judgment for the employer and distinguishing *Doe* on the grounds that in that case, there was no evidence that the harassment came about because of how the plaintiff "exhibited his sexuality"); *Maroney v. Waterbury Hosp.*, No. 3:10-CV-1415 (JCH), 2011 WL 1085633, at \*1–2 (D. Conn. Mar. 18, 2011) (granting a motion to dismiss against a plaintiff who did not allege that he failed to conform with accepted gender roles through his behavior or appearance); *Lugo v. Shinseki*, No. 06 Civ. 13187(LAK)(GWG), 2010 WL 1993065, at \*10 (S.D.N.Y. May 19, 2010) ("[N]o... claim exists here because there is no evidence that [the plaintiff] 'behaved in a stereotypically feminine manner.'" (quoting *Simonton*, 232 F.3d at 38)); *White v. Potter*, No. 1:06-CV-1759-TWT, 2007 WL 1330378, at \*17 n.22 (N.D. Ga. Apr. 30, 2007) ("Plaintiff has not suggested that the gay remarks were based on any sort of gender stereotypes. Instead he merely contends that he was falsely accused of being gay." (citation omitted)).

Other cases in this subset failed because the plaintiffs made purely conclusory claims about gender stereotyping. See, e.g., *Kiley v. Am. Soc'y for the Prevention of Cruelty to Animals*, 296 F. App'x 107, 110 (2d Cir. 2008) (denying relief because the plaintiff made "the conclusory statement that her supervisor made assumptions about her informed by gender stereotypes of what women should look like and act" without explicating how these assumptions "resulted in an adverse employment decision"); *Carter v. Town of Benson*, 827 F. Supp. 2d, 700, 709–10 (W.D. La. June 7, 2010) ("[The plaintiff] has presented only a conclusory allegation and no evidence of how she was perceived by Defendants as not conforming to stereotypical images and expectations or how Defendants espoused stereotypical views.").

Still other cases lacked sufficiently pervasive harassment or adverse employment actions to succeed under Title VII. See, e.g., *Dawson v. Bumble & Bumble*, 398 F.3d 211, 221–22 (2d Cir. 2005) (holding that there was insufficient evidence that the plaintiff's lack of feminine clothing, jewelry, or body features led to adverse employment decisions); *Garside v. Hillside Family of Agencies*, No. 09-CV-6181-CJS, 2011 WL 32582, at \*1, \*14 (W.D.N.Y. Jan. 5, 2011) (contending that "one remark" is insufficient to raise a triable harassment claim); *Miller v. Kellogg USA, Inc.*, No. 8:04CV500, 2006 WL 1314330, at \*2, \*6–7 (D. Neb. May 11, 2006) (finding that the plaintiff failed to demonstrate that the harassment was severe enough to substantiate a prima facie hostile environment claim where a coworker "came from behind [the plaintiff], grabbed his hips, and simulated having sex with him," and where the plaintiff saw graffiti and received anonymous notes referencing the incident, because the plaintiff had described the incident as "definitely horseplay" and did not report the graffiti or notes until he was fired).

271. See *supra* note 2 and accompanying text (providing examples of cases in which courts denied relief to plaintiffs for trying to "bootstrap" sexual orientation discrimination claims under Title VII).

a victim of discrimination because he is [a] ‘gay man in a straight man’s world.’”<sup>272</sup>

A better-known example comes from *Higgins v. New Balance Athletic Shoe, Inc.*,<sup>273</sup> the case that introduced the sexuality-as-stereotyping theory into First Circuit case law. In *Higgins*, the court rejected the plaintiff’s gender stereotyping claim because he had failed to raise it in the court below.<sup>274</sup> Nonetheless, in influential dicta, the court noted for the first time in that circuit that “a man can ground a [Title VII] claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity.”<sup>275</sup>

*Higgins* is exemplary in showing that a plaintiff’s loss can still provide the rule under which future plaintiffs in that circuit might win. *Simonton* plays the same role in the Second Circuit,<sup>276</sup> just as *Vickers* does in the Sixth. Meanwhile, leading cases from the Third,<sup>277</sup> Seventh,<sup>278</sup> Eighth,<sup>279</sup> and Ninth<sup>280</sup> Circuits all feature winning plaintiffs.

This leaves the Tenth Circuit. Its sexuality-as-stereotyping case, *Medina v. Income Support Division*,<sup>281</sup> involved stereotyping based on knowledge rather than appearance and, unsurprisingly, a losing plaintiff: Rebecca Medina, a straight woman who worked with a number of lesbians at the Income Support Division (“ISD”) of New Mexico.<sup>282</sup> Medina claimed that her lesbian supervisor “harassed her because of her failure to comport with gender stereotypes.”<sup>283</sup> As the Tenth Circuit explained, however, “there [was] no evidence—and no claim—that Ms. Medina did not dress or behave like a stereotypical woman.”<sup>284</sup> Rather, the plaintiff “apparently argue[d] that she was

272. See *Swift v. Countrywide Home Loans, Inc.*, 770 F. Supp. 2d 483, 485, 488 (E.D.N.Y. 2011); see also *Turpin v. Good*, No. 1:07-cv-1205-LJM-WGH, 2010 WL 2560421, at \*3 (S.D. Ind. June 24, 2010) (holding that the plaintiffs could not “salvage” their claim by reframing it as one of gender stereotyping once they discovered that Title IX does not cover sexual orientation claims).

273. 194 F.3d 252 (1st Cir. 1999).

274. See *id.* at 260.

275. *Id.* at 261 n.4. As of February 11, 2014, Westlaw’s Headnote for this sentence shows that it has been cited forty-five times.

276. See *supra* notes 265–66 and accompanying text.

277. See *supra* Part II.A (discussing *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285 (3d Cir. 2009)).

278. See *supra* notes 226–35 and accompanying text (discussing *Doe v. City of Belleville*, 119 F.3d 563 (7th Cir. 1997), *vacated*, 523 U.S. 1001 (1998)).

279. See *supra* notes 179–80, 195 and accompanying text (discussing *Lewis v. Heartland Inns of Am., L.L.C.*, 591 F.3d 1033 (8th Cir. 2010)).

280. See *supra* notes 32–33, 236–47 (discussing *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002) (en banc), and *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864 (9th Cir. 2001)).

281. 413 F.3d 1131 (10th Cir. 2005).

282. See *id.* at 1133–34.

283. *Id.* at 1135.

284. *Id.*

punished for not acting like a stereotypical woman *who worked at ISD*—which, according to her, [was] a lesbian.”<sup>285</sup>

Despite the opinion’s “opposite-day” quality—in which gender nonconformity meant *not* looking like a lesbian—the ultimate point was the same as in the other cases examined so far: success required visible nonconformity with stereotypes regarding dress or behavior. Lacking that, the Tenth Circuit’s resolution of the case was no surprise. The court rejected Medina’s hostile work environment claim, construing it to allege that “she was discriminated against because she is a heterosexual,” and holding that “Title VII’s protections . . . do not extend to harassment due to a person’s sexuality.”<sup>286</sup> The Tenth Circuit did not ask, and Medina did not think to tell, how her colleagues came to know that she is heterosexual. On the record before the court, it thus appeared that Medina, like so many gay plaintiffs, had violated stereotypes at her workplace in a purely cognitive rather than literally perceptible manner. Her claim failed as a result.

### C. Cases Not Involving Perceived Homosexuality

Among the 117 analyzed cases are forty-nine which do not raise questions about the sexuality of the plaintiff. Though not themselves the focus of this Article, they are important comparators to the cases already discussed. Table 2 shows the outcomes in the subset of cases not involving perceived homosexuality. Strikingly, the results are far more equivocal than those reported in the previous Table.

Table 2. *Discrimination Cases Not Involving Perceived Homosexuality*

|                      | Plaintiff Wins | Plaintiff Loses |
|----------------------|----------------|-----------------|
| Visible Stereotypes  | 11             | 8               |
| Cognized Stereotypes | 12             | 18              |

The first subcategory, the visible-stereotyping cases, includes *Price Waterhouse*’s direct successors. The plaintiffs who successfully brought these cases were women who were told to be more “sweet,”<sup>287</sup> who

285. *Id.*

286. *Id.*

287. See *Collins v. Cohen Pontani Lieberman & Pavane*, No. 04 CV 8983(KMW)(MHD), 2008 WL 2971668, at \*9 (S.D.N.Y. July 31, 2008) (denying summary judgment against the plaintiff where a law firm’s managing partner advised the plaintiff that she “needed to use more ‘sugar’ with any paralegal who was uncooperative”).



were disliked for being “strong” or “aggressive,”<sup>288</sup> or who were suspected of managing “on emotions.”<sup>289</sup> Analogously, a male plaintiff, though in a Title IX case, successfully claimed to have been stereotyped about being “not man enough” to stand up to the bullies at school who had repeatedly assaulted him.<sup>290</sup>

Other cases in the visible-stereotype subcategory center more on appearance than behavior. These include two cases brought unsuccessfully by men with long hair,<sup>291</sup> and one brought successfully by a woman harassed by female coworkers who called her “loose” and made fun of the size of her breasts.<sup>292</sup> Much better-known is *Jespersen v. Harrah’s Operating Co.*,<sup>293</sup> brought by Darlene Jespersen after she was fired, having bartended at Harrah’s Casino in Reno for twenty years, because she refused to comply with newly implemented makeup requirements.<sup>294</sup> In deposition testimony, Jespersen claimed that wearing makeup “would conflict with her self-image,” undermine her “credibility as an individual and as a person,” and hinder her from doing her job.<sup>295</sup>

Split seven to four, an en banc panel of the Ninth Circuit held that an employee’s personal objection to a makeup requirement cannot,

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288. See *Nuskey v. Hochberg*, 657 F. Supp. 2d 47, 58 (D.D.C. 2009) (finding the bank vice president’s alleged statements created a question of material fact precluding summary judgment).

289. See *Jankowsky v. N. Fork Bancorporation, Inc.*, No. 08 Civ. 1858(PAC), 2011 WL 1118602, at \*8 (S.D.N.Y. Mar. 23, 2011) (holding that a note in the plaintiff’s file in which a bank’s district manager questioned whether the plaintiff managed “on emotions,” coupled with testimony that another manager treated men more favorably than women, created legitimate factual questions and thereby precluded summary judgment).

290. See *Doe v. Brimfield Grade Sch.*, 552 F. Supp. 2d 816, 822–23 (C.D. Ill. 2008) (denying the defendant’s motion to dismiss).

291. See *Milligan v. Bd. of Trs.*, No. 09-cv-320-JPG-CJP, 2010 WL 2649917, at \*7, \*14 (S.D. Ill. June 30, 2010) (granting the defendant’s motion for summary judgment where the plaintiff was told that “he would make a very sexy lady [and that] he would look sexy as a girl,” finding that this evidenced a “failure to observe personal boundaries,” not discrimination because of sex), *aff’d*, 686 F.3d 378 (7th Cir. 2012); *Dodd v. Se. Pa. Transp. Auth.*, No. 06-4213, 2007 WL 1866754, at \*1, \*5–6 (E.D. Pa. June 28, 2007) (granting the defendant’s motion to dismiss the plaintiff’s claims of gender discrimination under Title VII where the plaintiff, a male Rastafarian employee, was fired for wearing his hair in a ponytail, finding that employers’ grooming policies generally do not constitute sex-based discrimination).

292. See *Durkin v. Verizon N.Y., Inc.*, 678 F. Supp. 2d 124, 135–36, 140–41 (S.D.N.Y. 2009) (denying the defendant’s motion for summary judgment on the plaintiff’s hostile work environment claim because a genuine issue of material fact remained as to whether the plaintiff’s female coworkers, who harassed the plaintiff regarding her breast size, did so “because of sex”).

293. 444 F.3d 1104 (9th Cir. 2006) (en banc).

294. *Id.* at 1106–08.

295. *Id.* at 1107–08.

by itself, give rise to a sex stereotyping claim.<sup>296</sup> Judge Pregerson, joined by three others, dissented.<sup>297</sup> “The inescapable message” of Harrah’s makeup policy, Pregerson argued, “is that women’s undoctored faces compare unfavorably to men’s, not because of a physical difference between men’s and women’s faces, but because of a cultural assumption—and gender-based stereotype—that women’s faces are incomplete, unattractive, or unprofessional without full makeup.”<sup>298</sup> *Jespersen* is often cited as emblematic of courts’ refusal to take appearance-based claims seriously, a topic discussed more fully in the following Part.<sup>299</sup> Here, I pause only to note one particularly important point: *Durkin v. Verizon, N.Y., Inc.*<sup>300</sup>—the case, already mentioned, in which the plaintiff was sexually harassed because of her breast size<sup>301</sup>—is the only appearance-based case in the “straight plaintiff” subset in which the plaintiff won. Like *Jespersen*, the plaintiffs in every other case lost.

Plaintiffs bringing cognitive-stereotyping claims, the second subcategory of cases, are more successful. Forty percent of straight cognitive-stereotyping plaintiffs won, compared to a three-percent success rate for cognitively perceived homosexuals. These cognitive-stereotyping cases divide into two main groups: (1) those in which the employer harbors descriptive stereotypes about members of a certain gender,<sup>302</sup> and (2) those in which an employer’s knowledge or belief about the employee contrast with some prescriptive stereotype the employer holds.<sup>303</sup> It is the latter group that is most closely

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296. *Id.* at 1112 (“If we were to do so, we would come perilously close to holding that every grooming, apparel, or appearance requirement that an individual finds personally offensive, or in conflict with his or her own self-image, can create a triable issue of sex discrimination.”). The court did emphasize that its holding did “not preclude, as a matter of law, a claim of sex-stereotyping on the basis of dress or appearance codes,” *id.* at 1113; in fact, it suggested an openness to “case[s] where the dress or appearance requirement is intended to be sexually provocative, and tending to stereotype women as sex objects,” *id.* at 1112.

297. *See id.* at 1113 (Pregerson, J., dissenting).

298. *Id.* at 1116.

299. *See, e.g.,* Michael Selmi, *The Many Faces of Darlene Jespersen*, 14 DUKE J. GENDER L. & POL’Y, 467, 479–86 (2007) (analyzing *Jespersen* to show that “the law is generally incapable, or unwilling, to make the fine distinctions necessary to determine the propriety of most appearance codes”). This topic is discussed more fully *infra* Part IV.A.2.

300. 678 F. Supp. 2d 124 (S.D.N.Y. 2009).

301. *See id.* at 127–28; *see also supra* note 292 and accompanying text (discussing *Durkin*).

302. *See, e.g.,* *Breiner v. Nev. Dep’t of Corr.*, 610 F.3d 1202, 1211 (9th Cir. 2010) (female correctional workers “possess an ‘instinct’ that renders them less susceptible to manipulation by inmates”); *Merritt v. Old Dominion Freight Line, Inc.*, 601 F.3d 289, 296–97 (4th Cir. 2010) (women cannot be truck drivers); *Sassaman v. Gamache*, 566 F.3d 307, 309 (2d Cir. 2009) (men have a propensity to sexually harass women).

303. “Descriptive stereotypes” refer to generalizing claims about how people are, such as the claim that women are bad drivers; “prescriptive stereotypes” are beliefs

analogous to the cognitive stereotyping cases discussed above.<sup>304</sup> In those cases too, the stereotypes in question were thoroughly prescriptive ones about what “real” men and women should be—namely, attracted to the opposite sex.<sup>305</sup> Beliefs or knowledge about the plaintiff—cognitive perceptions of his or her sexuality—collided with these prescriptive stereotypes and an adverse employment action or harassment resulted.<sup>306</sup>

As already suggested, plaintiffs frequently win when their cognitively perceived stereotype violation has to do with being a parent. The Second Circuit’s decision in *Back* does not stand alone.<sup>307</sup> In a Fourth Circuit case, the plaintiff was asked during an interview for a promotion “how [her] husband handled the fact that [she] was away from home so much, not caring for the family.”<sup>308</sup> The man interviewing her went on to admit “he had ‘a very difficult time’ understanding why any man would allow his wife to live away from home during the work week.”<sup>309</sup> In a more recent First Circuit case, the plaintiff claimed she was not awarded a promotion after her employer discovered she had young triplets at home.<sup>310</sup> The case turned on the “stereotype that mothers, particularly those with young children, neglect their work duties in favor of their presumed childcare obligations.”<sup>311</sup>

While four of the twelve cognitive stereotyping “wins” in Table 2 involve knowledge about motherhood,<sup>312</sup> the only male caregiver

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about how people should be, such as the belief that a woman’s place is in the home. See Barbara F. Reskin, *The Proximate Causes of Employment Discrimination*, 29 CONTEMP. SOC. 319, 322 (2000) (distinguishing between descriptive and prescriptive stereotypes).

304. See *supra* Part III.B.2.

305. See cases discussed *supra* Part III.B.2 (involving cognitive stereotypes).

306. See *supra* Part III.B.2.

307. See *supra* notes 161–64 and accompanying text (discussing *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107 (2d Cir. 2004), in which an employer held the stereotypical belief that a female employee could not adequately commit to a tenured position because she had children at home).

308. *Lettieri v. Equant, Inc.*, 478 F.3d 640, 643 (4th Cir. 2007) (alterations in original).

309. *Id.*

310. See *Chadwick v. WellPoint, Inc.*, 561 F.3d 38, 41–42 (1st Cir. 2009).

311. *Id.* The claimed stereotype that mothers neglect their duties is descriptive. See *supra* note 303 (clarifying the distinction between descriptive and prescriptive stereotypes). However, there was also evidence in the record that the plaintiff’s boss told her she would be happier “down the road” about the promotion not working out, presumably due to the prescriptive stereotype that mothers should devote their time to children rather than work. See *Chadwick*, 561 F.3d at 42.

312. In addition to *Chadwick* and *Lettieri*, see *Maxwell v. Virtual Education Software, Inc.*, No. CV-09-173-RMP, 2010 WL 3120025 (E.D. Wash. Aug. 6, 2010), and *Matthews v. Connecticut Light & Power Co.*, No. 3:05cv226(PCD), 2006 WL 2506597 (D. Conn. Aug. 29, 2006), both brought by women who alleged that their employer terminated them because of pregnancy.

among the plaintiffs in the cases studied lost, perhaps because he did not make his stereotyping claim explicit.<sup>313</sup> Still, the importance of these parenting cases remains: they provide examples from several circuits of actionable gender stereotyping based on *knowledge* about a plaintiff's activities *outside of work*. This, of course, is exactly what *Vickers* and the other cognitive stereotyping sexuality cases rejected.<sup>314</sup> Whatever *Vickers* and its kin might suggest, there is *no* general rule under Title VII that gender stereotyping must be based on appearances or behavior observable at work in order to be actionable.

Two cases stand as counterexamples to this Article's thesis that courts have required visible stereotype violations only in cases involving perceived homosexuals. Both cases arise out of the Sixth Circuit, and both extend *Vickers*'s holding to presumably heterosexual plaintiffs. These cases thus provide potential ammunition against this Article's claim that *Vickers* creates a special rule for gay plaintiffs under Title VII.

The first of these is *Willingham v. Regions Bank*,<sup>315</sup> a case brought by a female banker who was fired after she appeared on the cover of a motorcycle magazine as "Ms. *Cruzin*' South August 2008."<sup>316</sup> Willingham's employer fired her on account of her appearance in the magazine.<sup>317</sup> Applying *Vickers*, the district court found her termination permissible under Title VII.<sup>318</sup> The crucial fact, the court reasoned, was that the plaintiff's violation of gender stereotypes—her failure to "dress or appear 'conservatively' at all times"—occurred as part of a "non-work-related activity."<sup>319</sup> The court failed to address the

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313. See *Palomares v. Second Fed. Sav. & Loan Ass'n of Chi.*, No. 10-cv-6124, 2011 WL 760088, at \*3-4 (N.D. Ill. Feb. 25, 2011) ("Camarena's familial status as a 'primary caregiver' is not a protected class under Title VII *absent sexual stereotyping*." (emphasis added)). A married couple also brought a Title VII claim after receiving stereotypical comments about expected absences due to their twin babies. *Adler v. S. Orangetown Cent. Sch. Dist.*, No. 05 Civ. 4835 (SCR), 2008 WL 190585, at \*1-2 (S.D.N.Y. Jan. 17, 2008). Their claim failed, however, since the adverse treatment affected both husband and wife equally. See *id.* at \*10 ("By stating claims of discrimination on the basis of two different genders, Plaintiffs have, in effect, undercut their ability to maintain a valid sex discrimination claim for either Mr. or Mrs. Adler.").

314. See *supra* Part II.B (detailing how the *Vickers* court equated sex stereotyping claims exclusively with claims about stereotypes violated in an "observable way at work").

315. No. 2:09-cv-02289, 2010 WL 2650727 (W.D. Tenn. July 1, 2010).

316. *Id.* at \*1.

317. *Id.* at \*1-2 (indicating that supervisors collectively reviewed the magazine and determined that the plaintiff's appearance in the magazine, which contained photos of her in a bikini next to cars and motorcycles, violated the bank's code of conduct).

318. See *id.* at \*3-4.

319. *Id.* The court failed to consider an alternate ground for its decision: that the alleged prescriptive stereotype—that workers should dress conservatively—may not have had anything to do with gender at all, especially in the context of a bank, where conservative dress is generally required of men and women alike.

potentially determinative fact that the bank's prescriptive stereotype regarding conservative dress might not have had anything to do with gender at all—particularly in the context of a bank, where a conservative appearance is often required of men and women alike.<sup>320</sup>

The second case that possibly cuts against this Article's thesis is *Maturen v. Lowe's Home Centers, Inc.*,<sup>321</sup> brought by a male worker who alleged that he was harassed and fired after his wife wrote an email to the store manager expressing complaints about the store.<sup>322</sup> According to the plaintiff, the manager told plaintiff that "he 'should learn to control [his] wife and keep her in her place.'"<sup>323</sup> Hypothesizing a *Price Waterhouse* claim on the *pro se* plaintiff's behalf, the magistrate judge argued: "At most, Plaintiff has averred facts that demonstrate that the store manager held a chauvinistic view that men should control their wives' behavior and that, since Plaintiff was unable to do so, he did not live up to the store manager's conception of masculinity."<sup>324</sup> But even if this were the case, the magistrate judge went on to hold, the stereotype in question would have turned on knowledge about gender non-conforming behavior outside of work.<sup>325</sup> Under the *Vickers* test, *Maturen's* gender stereotyping claim was bound to fail.<sup>326</sup>

A better-pled version of this case reaching the same result would pose a real challenge to this Article's thesis. It would show courts being consistent in culling cases where the gender stereotyping concerned behavior that, while *known* at work, occurred outside the workplace. If, for example, effeminate straight men won their cases but men who were thought not to "wear the pants in the family" did not, the dividing line this Article has traced between *Prowel* and *Vickers*, and their many analogues, would not, in fact, be peculiar to gay claims.

Notably, however, *Maturen* is the *only* Title VII case, out of the 117 studied, in which a man's gender nonconformity did not implicate

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320. See *id.* at \*7 (listing the court's reasons for granting the defendant's motion for summary judgment).

321. No. 06-CV-15126, 2007 WL 3173962 (E.D. Mich. Oct. 26, 2007).

322. *Id.* at \*3.

323. *Id.*

324. *Id.* at \*6 (alteration in original).

325. *Id.* This is only one of several alternative holdings in *Maturen*. The magistrate judge also recommended dismissal because the claim was untimely filed and because the alleged harassment was not severe or pervasive. See *id.* at \*6-7.

326. See *id.* at \*6 (finding that even though the plaintiff may have demonstrated that he did not meet the manager's chauvinistic conceptions of masculinity, this was not enough to assert a claim under *Vickers*).

his sexuality.<sup>327</sup> Astonishingly, there are simply no other cases in which a plaintiff was perceived to violate masculine stereotypes without also being perceived as, or at least labeled, a homosexual.

#### IV. ANALYZING THE TREND

The descriptive story told in Parts II and III leads to a number of conclusions worth summarizing at this point. The first is that gender nonconformity does not equal opposite-gender conformity. Traits not perceived as feminine may be perceived nonetheless as violating masculine stereotypes, and vice versa. For this reason, the purported distinction between gender stereotyping and sexuality claims is unsustainable. Effeminacy in men is perceived as homosexuality, and looking “gay” is perceived as a type of gender nonconformity. Beliefs about homosexuality themselves often, if not always, turn on gender stereotypes. Courts are right, then, to acknowledge that “[s]tereotypical notions about how men and women should behave”—and, I might add, look—“will often necessarily blur into ideas about heterosexuality and homosexuality.”<sup>328</sup>

The cases surveyed in the previous two Parts suggest that rather than trying to separate the gender stereotyping wheat from the homosexual chaff, courts instead distinguish between two types of stereotypes: those violated visibly and those whose violations are cognitively perceived. Or, given the blurring of categories just endorsed, this distinction might be rephrased in terms of sexuality rather than stereotyping. Plaintiffs who “look gay” succeed under Title VII while those merely known or thought to be gay do not.

Courts resist this description. Gender stereotyping, they say, only concerns “appearance or mannerisms on the job.”<sup>329</sup> Thus, Title VII is said not to protect “merely” known or suspected violations of gender stereotypes.<sup>330</sup> This claim is belied, however, by cases in which mothers of young children fall victim to gender stereotypes not because of how they look or act on the job, but because of knowledge

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327. *Doe v. Brimfield Grade School*, 552 F. Supp. 2d 816 (C.D. Ill. 2008), perhaps offers an example under Title IX. In that case, a grade school boy’s classmates perceived him as “not man enough” to stick up for himself and therefore hit him in the testicles several times over the course of a year. *Id.* at 819–20, 823. The court, however, did not raise questions about the plaintiff’s sexuality, whether actual or as perceived by his harassers, *see id.* at 822–23, likely because the plaintiff was so young. *See id.* at 820 n.2 (indicating that the plaintiff was twelve-years old when the harassment began).

328. *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005) (quoting *Howell v. N. Cent. Coll.*, 320 F. Supp. 2d 717, 723 (N.D. Ill. 2004)).

329. *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 763 (6th Cir. 2006).

330. *Id.* at 764.

about facts outside of work.<sup>331</sup> In those cases, stereotypes based on cognitive “perceptions” *do* run afoul of Title VII.<sup>332</sup>

The upshot is that courts treat “perceived homosexuality” cases differently from other Title VII stereotyping cases. If the term “perceived homosexuals” can refer either those *seen* or *thought of* (accurately or not) as gay, courts have protected the former but not the latter. Employment-discrimination claims brought by perceived homosexuals survive dismissal or summary judgment if and only if the perception in question is sensory.

This Part first explains how anomalous this privileging of appearances is within antidiscrimination law. Second, this Part discusses why, or even if, this matters. After all, increased protections for a subset of homosexual employees—those who look or act in ways seen as “gay”—would seem to be a welcome development, at least for anyone who shares the First Circuit’s view that discrimination based on sexual orientation “is a noxious practice, deserving of censure and opprobrium.”<sup>333</sup> Given that some formerly unprotected employees are now receiving protection under Title VII, why should anyone quibble about doctrinal coherence or theoretical purity? Answering that question requires a look at the effects of the distinction courts have drawn and a consideration of the costs incurred when courts make the unusual move of privileging appearance over knowledge.

#### A. *Perceptibility in Context*

##### 1. *The dominant conception*

The emphasis placed on sensory perception in the cases described in Parts II and III is starkly at odds with the rhetoric of blindness that, for better or worse, has long driven antidiscrimination law in the United States.<sup>334</sup> American antidiscrimination law, in what Robert

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331. See, e.g., *Chadwick v. WellPoint, Inc.*, 561 F.3d 38, 41–42 (1st Cir. 2009) (reversing the district court’s dismissal in favor of the employer who allegedly failed to promote the plaintiff due to the “stereotype that women who are mothers . . . neglect their jobs in favor of their presumed childcare responsibilities”).

332. See *supra* notes 153–59 and accompanying text (discussing how women have brought successful stereotyping claims based on a cognitive perception—namely the belief that women with children at home cannot commit to their jobs).

333. *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999). However noxious, the harassment at issue in *Higgins* did not give rise to a cognizable Title VII claim; the First Circuit said that its task was “to construe a statute[,] . . . not to make a moral judgment.” *Id.*

334. See *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (“[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind . . . .”); see also *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 701 n.14 (2007) (plurality opinion) (citing Justice Harlan’s “color-blind” rhetoric

Post describes as its “dominant conception,” traditionally identifies certain proscribed characteristics like race and gender and “speaks as though [they] could be placed behind a screen and made to disappear.”<sup>335</sup> Hoping to transcend these categories, antidiscrimination law requires their invisibility, and thus our blindness. In the Title VII context, “[b]lindness renders forbidden characteristics invisible; it requires employers to base their judgments instead on the deeper and more fundamental ground of ‘individual merit’ or ‘intrinsic worth.’”<sup>336</sup>

The contrast between unseen depths and superficial aesthetics<sup>337</sup> gives the metaphor of blindness its power. If sight distracts people from seeing others as they really are or recognizing their true worth, then blindness becomes a virtue rather than a defect. Of course, all of this trades on the dual meanings of perception traced throughout this Article, for the blindness metaphor is merely the negative of the metaphor of sight as knowledge. Taken literally, it would be absurd to say that *sight* keeps us from *seeing* people as they are. What this really means is that literal (or sensory) perception sometimes keeps us from *knowing* people as they really are. Antidiscrimination law’s blindness requires us to forgo literal sight in order to “see” deeper truths.

The familiarity of these metaphors suggests just how unusual the privileging of perception in gender stereotyping cases really is. As shown above, almost all of the “perceived homosexuals” who survive dismissal or summary judgment are those who were persecuted not “just” because coworkers knew, or thought they knew, something about them, but instead because coworkers literally saw (or heard) them appearing or behaving in ways coded as gay.<sup>338</sup> The ordinary hierarchy of sight and knowledge has thus been turned on its head. In their attempt to evade the Title VII dilemma, courts have focused not on what people “really are”—the unseen depths of their sexual

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and rejecting school districts’ race-conscious school assignment policies); *Parents Involved*, 551 U.S. at 772, 780–82 (Thomas, J., concurring) (arguing for a “color-blind” understanding of the Equal Protection Clause). See generally Reva B. Siegel, *Discrimination in the Eyes of the Law: How “Color Blindness” Discourse Disrupts and Rationalizes Social Stratification*, 88 CALIF. L. REV. 77, 77–78 (2000) (discussing “the blindness trope at the heart of antidiscrimination law”).

335. Post, *supra* note 17, at 16, 39 (emphasis omitted). See generally Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976) (providing a canonical discussion of the dominant conception); Fiss, *supra* note 18 (same). Post does not endorse the dominant conception that he describes. See *supra* note 17.

336. Post, *supra* note 17, at 11.

337. See *supra* note 16 (listing Supreme Court cases in which the Justices have characterized aesthetic interests as flimsy and barely cognizable).

338. See *supra* Table 1 (categorizing wins and losses for plaintiffs’ visible and cognized stereotyping claims involving perceived homosexuality).



identity—but rather on how they look. Metaphorical blindness has been replaced by literal eyesight.

There is a seemingly compelling objection to this claim: namely, Title VII plaintiffs *always* have to be seen as part of a protected class before they can get relief. In other words, the blindness idealized by antidiscrimination law itself presupposes sight. Courts are forced to see a worker's race, for example, in order to determine that discrimination has occurred "because of"<sup>339</sup> race so as to remedy that discrimination and thereby promote a workplace in which race is no longer "seen." How is this any different from courts demanding to see a worker's effeminacy or "pizzazz"?

The objection is correct that antidiscrimination law's proscribed categories always have to be taken into account in order to satisfy Title VII's "because of" requirement. A truly color-blind court would never have the means to recognize that discrimination had occurred because of race. But the ultimate goal of removing discrimination based on a proscribed category like race is, at least according to the dominant conception, to "render[] yet another attribute of employees invisible to their employers."<sup>340</sup> Antidiscrimination law seeks to eliminate society's use of the proscribed categories, thereby lessening their salience and making them less visible.

The case law described in Part III produces the opposite result. Appearances never lose their salience if courts only allow gay and lesbian plaintiffs to succeed on discrimination claims when their sexuality manifests itself through visible nonconformity with gender stereotypes. Employers and workers would always have to remain on the watch for visible markers of homosexuality, if only to know who is and is not protected. Imagine a human resources (HR) department worried about the company's legal liability for firing, failing to hire, or allowing the harassment of a homosexual employee. Under current case law, HR workers would be well-advised to consider whether the employee "looked gay." The employee's look and affect determines the legality of the company's actions. Companies need to know whether their employee is a Vickers or a Prowel.

The difference between this outcome and the color-blind ideal stems from the fact that, with regard to traits such as race, differential treatment is proscribed no matter what race the employee is.<sup>341</sup> The

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339. See 42 U.S.C. § 2000e-2(a)(1) (2012) (protecting workers from discrimination "because of" a proscribed trait).

340. Post, *supra* note 17, at 12.

341. Affirmative action policies and disparate impact claims provide the obvious, and important, exceptions to this assertion. Insofar as both are opposed, however, by those enamored with the ideal of color-blindness, the latter would accept the

law does not allow employers to discriminate against whites but not Hispanics, or blacks but not Asians. Imagine, counterfactually, a law that only protected Hispanics. In that world, the question of whether one is Hispanic would become even *more* salient than it is presently—especially to those who wanted to follow the law. As this Article demonstrates, this is precisely the state of affairs for perceived homosexuals. Employers are allowed to discriminate against “unmarked” homosexuals but not those who are marked or visible. The result: were Title VII to achieve all of its ends, race would become irrelevant in the workplace; the perceptible markers of homosexuality, on the other hand, would become even more salient—a necessary focus of law-abiding employers’ attention.

## 2. *Appearance discrimination*

The dominant conception’s tendency to privilege inner worth over outer appearances comes at a price: those discriminated against on the basis of their appearance often find little sympathy from courts, which have tended to give such discrimination no more weight than they give the “mere” appearances themselves. This has long been the case under Title VII, a fact that can be seen even in a joking exchange enshrined in the law’s legislative history: when asked by a colleague whether it would “be considered . . . discrimination if a person wished to employ a good-looking stenographer instead of an unattractive stenographer,” a Senator replied, “I have always tried to exercise that kind of discrimination in my hiring practice.”<sup>342</sup>

There is admittedly some tension here with the ideal of blindness just described.<sup>343</sup> If antidiscrimination law aims for a metaphorical blindness in the workplace, it would make sense for it to *prevent* employers from acting on the basis of workers’ appearances. Yet the belief underlying antidiscrimination law—that appearances are superficial and mask one’s inner worth—cuts the other direction as

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statement above as a normative matter, if not a descriptive one. The point here is merely to contrast the logic of the case law described in Parts II and III with the logic that is otherwise thought to dominate American antidiscrimination law. That said, the fact that Title VII has been interpreted and amended to allow for affirmative action and disparate impact suits—neither of which are race-neutral or color-blind—may give reason, when considered alongside the case law this Article describes, to question the descriptive accuracy of the widespread assimilationist or trait-blind understanding of federal employment-discrimination law. I thank Bill Eskridge for challenging me on this point.

342. 110 CONG. REC. 9026 (1964).

343. Robert Post analyzes this tension at length in his discussion of a proposed “anti-lookism” ordinance in Santa Cruz, California, which “would prohibit discrimination against persons on the basis of ‘personal appearance.’” See Post, *supra* note 17, at 2.

well. More often than not, it leads courts to wonder why they should get involved in a matter of no deep importance.<sup>344</sup> Unlike race or gender, where one side (the prejudiced discriminator) insists on seeing difference and the other side (the discriminatee) wants color or gender blindness, appearance discrimination involves sight on both sides. Harrah's Casino wants Darlene Jespersen to start wearing makeup; Jespersen wants to come to work appearing as she has for the previous twenty years.<sup>345</sup> Faced with employers and employees who both care about something that courts find "trivial,"<sup>346</sup> courts have largely abdicated the field.<sup>347</sup> Which is to say, employers have won.

A recent book-length study of appearance discrimination offers as examples of unsuccessful claims: "Muslim men who refuse to shave, Muslim women who wear headscarves, Jewish men who wear yarmulkes, and African American women who braid their hair."<sup>348</sup> Similarly, "[g]rooming codes that require women to wear makeup or skirts, prevent men from wearing earrings, and restrict transsexuals' ability to alter their gender identity" also have survived challenge.<sup>349</sup> In all of these cases, courts downplayed the importance of appearance in comparison to some weightier underlying "identity."<sup>350</sup> As a district court wrote in one of the most widely discussed of these cases, *Rogers v. American Airlines, Inc.*,<sup>351</sup> an employer's regulation of its workers' hair styles "has at most a negligible effect on employment opportunity. . . .

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344. See generally RHODE, *supra* note 15, at 99–100 (noting that "[m]ost courts regard matters of grooming as relatively insignificant concerns, partly because they reflect voluntary characteristics that victims of bias have the power to change" and that "[f]ederal judges on both sides of these issues have denounced them as trivial").

345. See *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1117 (9th Cir. 2006) (en banc) (Kozinski, J., dissenting) ("Jespersen did introduce evidence that she finds it burdensome to wear makeup because doing so is inconsistent with her self-image and interferes with her job performance."); see also *supra* notes 293–98 and accompanying text (describing *Jespersen*).

346. *Jespersen*, 444 F.3d at 1118 (Kozinski, J., dissenting) (criticizing Harrah's "decision to let go a valued, experienced employee who had gained accolades from her customers, over what, in the end, is a trivial matter"). For the majority, "the subjective reaction of a single employee" to Harrah's grooming policy was not enough to merit the law's protection. *Id.* at 1113 (majority opinion).

347. See generally RHODE, *supra* note 15, at 100–01 (indicating that "judges have been frustrated by plaintiffs who clutter up the courts with claims that high school hair styles have 'constitutional significance'" (quoting *Holsapple v. Woods*, 500 F.2d 49, 52 (7th Cir. 1974) (per curiam) (Pell, J., concurring))).

348. RHODE, *supra* note 15, at 99 (arguing that, even though most courts find grooming matters insignificant, "individuals see such self-expression as central to their personal beliefs and religious, racial, or ethnic affiliations"); see also RUTHANN ROBSON, *DRESSING CONSTITUTIONALLY: HIERARCHY, SEXUALITY, AND DEMOCRACY FROM OUR HAIRSTYLES TO OUR SHOES* 81–88 (2013) (describing the reasons why private employers have near-absolute power over employees' work attire).

349. RHODE, *supra* note 15, at 99–100.

350. See *id.* at 100.

351. 527 F. Supp. 229, 231 (S.D.N.Y. 1981).

It concerns a matter of relatively low importance in terms of the constitutional interests protected by the Fourteenth Amendment and Title VII, rather than involving fundamental rights . . . .”<sup>352</sup>

Against this backdrop, the privileging of appearances in the cases discussed in Part III becomes all the more surprising. Consider the contrast between those cases and *Rogers*, which involved an African-American airline operations agent who had been told not to wear her hair in “corn row” braids at work.<sup>353</sup> Dismissing *Rogers*’s sex and race discrimination claims, the court distinguished braids from Afros, which the court noted might be protected under Title VII.<sup>354</sup> According to the court, braids are an easily changed artifice that is only “socioculturally associated” with race, while Afros are natural and immutable.<sup>355</sup> The result is the exact opposite of the cases in Part III, in which sociocultural associations—visible stereotypes—were precisely what mattered to the courts. We need not essentialize sexuality or settle debates about “nature versus nurture” in order to feel that Prowel’s clothing choices, clean car, discussion topics, and even his “pizzazz” were less “natural” or “immutable” than his sexual orientation.<sup>356</sup> Yet the *Prowel* court, like the courts in *Vickers*, *Dawson*, *Rene*, and others, offered the possibility of protection from appearance-based stereotypes rather than those concerning Prowel’s and other plaintiffs’ affective preferences.<sup>357</sup>

None of this is to suggest that courts have been justified in trivializing appearance claims under Title VII. Nor is it to suggest that Prowel did not deserve the protection he received for his appearance and affect, however anomalous that protection may be within ordinary Title VII doctrine. The worry I raise, and return to in the following section, stems not from the fact that certain appearance claims have succeeded, but from the fact that, in cases brought by homosexuals, *only* such claims have succeeded. Surprisingly, the distinction courts have drawn threatens to revive the kind of status-conduct distinction regarding homosexuality that the Supreme Court

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352. *Id.* at 231.

353. *Id.*

354. *Id.* at 232.

355. *Id.*

356. *See supra* Part II.A (discussing *Prowel v. Wise Bus. Forms*, 579 F.3d 285 (3d Cir. 2009)).

357. *See Prowel*, 579 F.3d at 287; *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 763 (6th Cir. 2006); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218, 221 (2d Cir. 2005); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1069 (9th Cir. 2002) (en banc) (plurality opinion).

has seemingly disclaimed.<sup>358</sup> More surprising still, courts do so not to protect status—that which the discarded distinction was meant to privilege—but, instead, to protect conduct.<sup>359</sup>

### 3. *Covering*

The alleged immutability of Afros as compared to braids, as well as the former privileging of status over conduct, both highlight another driving concern of antidiscrimination law: protecting people from treatment based on traits beyond their control.<sup>360</sup> The distinction between immutable and chosen traits provides additional support for courts' acceptance of appearance and grooming rules. The deep unfairness of penalizing employees for traits, like race or gender, that are largely beyond their control seems lessened when the traits are chosen.<sup>361</sup> Appearances are seen to be the result of choices, and, as just discussed, trivial choices at that.<sup>362</sup>

Kenji Yoshino has influentially argued, however, that this refusal to protect chosen appearances incentivizes certain choices about appearance.<sup>363</sup> In short, it gives those whose appearance or behavior would subject them to discrimination a strong push toward assimilation.<sup>364</sup> In Yoshino's words: "[C]ourts will not protect mutable traits, because individuals can alter them to fade into the mainstream, thereby escaping discrimination. If individuals choose not to engage in that form of self-help, they must suffer the consequences."<sup>365</sup>

This "assimilationist bias"<sup>366</sup> in antidiscrimination law works hand-in-hand with the law's ideal of blindness; to stop seeing something,

358. See generally *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2990 (2010) ("Our decisions have declined to distinguish between status and conduct in this context.").

359. See *id.* ("While it is true that the law applies only to conduct, the . . . law is targeted at more than conduct. It is instead directed toward gay persons as a class." (quoting *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring in the judgment))). See generally Francisco Valdes, *The Status/Conduct Distinction and Sexual Orientation: Exploring a Constitutional Conundrum*, 50 GUILD PRAC. 65 (1993) (suggesting litigation strategies that would help sexual minorities make use of courts' former emphasis on status over conduct).

360. See Post, *supra* note 17, at 34 ("It seems to be important that grooming and dress codes regulate voluntary behavior, for courts tend to conceptualize employees who present themselves in ways that violate established gender grooming and dress conventions as asserting a 'personal preference' to flout accepted standards." (quoting *Earwood v. Cont'l Se. Lines, Inc.*, 539 F.2d 1349, 1351 (4th Cir. 1976))).

361. See RHODE, *supra* note 15, at 99.

362. See *supra* Part IV.A.2.

363. See Kenji Yoshino, *The Pressure To Cover*, N.Y. TIMES (Jan. 15, 2006), <http://www.nytimes.com/2006/01/15/magazine/15gays.html?pagewanted=all&r=0> (discussing five seminal cases in which courts have declined to protect plaintiffs from "covering" demands).

364. *Id.*

365. *Id.*

366. See Yoshino, *supra* note 19, at 487; Yoshino, *supra* note 13, at 779.

one can either close one's eyes or cover things up. Antidiscrimination law demands both. As Yoshino describes it: "[T]he law's dominant reaction to difference has been to instruct the mainstream to ignore it and the outsider group to mute it."<sup>367</sup> This Article has already shown how courts' focus on appearances in sexuality cases sits awkwardly with the ideal of blindness.<sup>368</sup> These cases are no less unusual for the way they implicitly reject the demand that outsider groups mute their differences.

"Covering demands," as Yoshino calls them, are pressures on outsiders to refrain from flaunting their difference; someone who covers makes it "easy for those around her to disattend her *known* stigmatized trait."<sup>369</sup> Covering differs from "passing," whereby gays and lesbians "present [themselves] to the world as straight,"<sup>370</sup> in somewhat the same way as sensory perception differs from cognitive perception. *Passing* turns on what others know; someone who passes does not want to be perceived (that is, thought of) as gay.<sup>371</sup> To *cover* one's sexuality is instead to downplay it; to help others ignore or forget what they know.<sup>372</sup> Thus, covering often involves making something that is known less visible. It primarily affects visual rather than cognitive perception.<sup>373</sup>

Discussing examples of coverable traits, Yoshino notes that "[e]ffeminate men and masculine women are often assumed to be homosexual, suggesting that gender and orientation are bundled in popular consciousness—to be gender atypical is to be orientation atypical and vice versa."<sup>374</sup> Yet Yoshino asserts that "[e]veryone knows the flaunting homosexual will generally get less sympathy than the discreet one."<sup>375</sup> Surveying employment and parenting cases, Yoshino argued in 2002 that "[i]ndividuals whose homosexuality, even if avowed, was 'discreet' or 'private' kept their jobs or children," while "[t]hose whose homosexuality was 'notorious' or 'flagrant' were not

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367. KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 182 (2006).

368. See *supra* Part IV.A.1.

369. Yoshino, *supra* note 13, at 837, 909 (maintaining that covering demands "appear[] to be the mildest assimilationist demand"). Yoshino inherited the term "covering" from Erving Goffman, who noted that there were three ways people who are different can assimilate: by covering (downplaying), passing (hiding), or converting (altering). See *id.* at 772 (citing ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 50–51, 102–04 (1963)).

370. *Id.* at 772.

371. See *id.*

372. *Id.*

373. There are ways of cognitively covering, however, as when a gay employee downplays talk of her partner or her weekend activities in order to "fit in." For examples, see *id.* at 845–48 (detailing different covering strategies).

374. *Id.* at 844.

375. YOSHINO, *supra* note 367, at 101; accord Yoshino, *supra* note 13, at 850.

so fortunate.”<sup>376</sup> The survey of cases in Parts II and III of this Article points to the exact opposite conclusion. In those cases, “flagrant” gays like Prowel and Rene received protection, while those, like Vickers, who were more discreet saw their cases dismissed. In recent Title VII case law, the more pizzazz the better.

The demand that “individuals act according to the stereotypes associated with their group” is a phenomenon Yoshino himself identifies and opposes; he calls it “reverse-covering.”<sup>377</sup> But Yoshino writes of his

sense—admittedly impressionistic—that the dominant group more routinely requires reverse covering in the sex/gender context than in the orientation or race contexts. This may be because stereotypically feminine traits are more likely to be valued as appropriate to at least some spheres of life. The stereotypically feminine attributes of nurture, empathy, intuition, and so forth, were and are valued in the domestic sphere. In contrast, there are fewer spheres in which traits stereotypically associated with homosexuals or racial minorities are valued.<sup>378</sup>

Writing in 2006, Yoshino noted “only one legal context in which such reverse-covering demands have been made [of gays and lesbians]—the immigration context, in which gay asylum seekers have to prove they are ‘gay enough’ to establish a colorable fear of persecution.”<sup>379</sup>

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376. YOSHINO, *supra* note 367, at 101; *see also* Yoshino, *supra* note 13, at 776 (“As time progresses, I posit that more and more discrimination against gays will take the form of covering demands, rather than taking the historical forms of categorical exclusion or ‘don’t ask, don’t tell.’”).

377. YOSHINO, *supra* note 367, at 23.

378. Yoshino, *supra* note 13, at 910. It may also be that reverse covering is required of women not because stereotypically feminine traits are valued in domestic spheres, but rather because this exaggerates differences between men and women in the workplace, thereby reinforcing self-perceptions of masculinity prized by male workers whose dominant status is threatened by moves toward gender equality. *See generally* McGinley, *supra* note 63, at 721–25 (explaining the dominance of masculinity in the workplace and the ways in which it is perpetuated). I am grateful to Vicki Schultz for pointing this out to me.

379. YOSHINO, *supra* note 367, at 93. The reference to asylum law suggests an important comparison that only underscores the strangeness of the Title VII cases described in this Article. In asylum cases, applicants generally must show that they have a well-founded fear of persecution on the basis of some protected ground. *See* 8 U.S.C. §§ 1101(a)(42), 1158(b)(1)(B) (2012). The literal visibility of one’s sexuality—the extent to which refugees’ behavior or appearance allows others to perceive them as gay—is relevant to their chance of being persecuted. Put simply, a flamboyant man is more likely than a stereotypically masculine one to be targeted for persecution by those looking to target homosexuals. Thus, requiring literal visibility may prove relevant to asylum law’s future-looking, “well-founded fear” criterion, though it is potentially objectionable for other reasons. *See* Fadi Hanna, Case Comment, *Punishing Masculinity in Gay Asylum Claims*, 114 YALE L.J. 913, 915–16 (2005); Brian Soucek, Comment, *Social Group Asylum Claims: A Second Look at the New Visibility Requirement*, 29 YALE L. & POL’Y REV. 337, 344–45 (2010). By contrast, the relevance of visibility to Title VII claims, where alleged discrimination has already

This Article shows that as a descriptive matter, Yoshino's observations about reverse covering are no longer accurate in the Title VII context. His theory cannot account for courts' recent reliance on appearances and their pressure on gays to reverse cover.

Yoshino's analysis of covering thus presents a third tension with the case law described in this Article. To recall, the first was that the privileging of visibility in sexuality discrimination cases runs counter to the dominant conception of American antidiscrimination law, which valorizes blindness as a way of valuing inner worth over outer appearances.<sup>380</sup> Those who endorse the dominant conception or adopt its rhetoric—and I do neither here—will be hard-pressed to justify the line (visibly) drawn in the sexuality cases.

The second tension was one of doctrine: ordinarily, appearance discrimination goes largely unprotected, since appearances are often seen as (1) superficial and (2) chosen rather than immutable.<sup>381</sup> Recent victories for plaintiffs who are seen as gay—and thus have appearance discrimination claims of a sort—thereby stand out from the surrounding case law. Given courts' frequent disparagement of appearance-based claims, their recent sympathy for visible, and only visible, signs of homosexuality is baffling.

Finally, Yoshino offers a descriptive doctrinal account and a prescriptive theory both of which are in tension with the cases collected in this Article. Where Yoshino finds an assimilationist bias in antidiscrimination law,<sup>382</sup> these cases show covering to be a sure path to a failure. And insofar as these cases promote reverse covering, they fail Yoshino's normative demands as well, for he sees covering and reverse covering as equal threats to individual autonomy.<sup>383</sup> Just as someone who downplays his or her sexuality fails to act authentically, so too does someone who feels pressure to conform to, or even play up, behaviors stereotypically associated with one's sexuality.<sup>384</sup> Reverse covering pressures are like minstrelsy in

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occurred, is entirely unclear. Given this crucial difference, it is not possible to extrapolate from asylum—Yoshino's one example of courts making reverse covering demands on homosexuals—in order to explain the reverse covering demands currently being made in Title VII cases.

380. See *supra* Part IV.A.1.

381. See *supra* Part IV.A.2; see also Yoshino, *supra* note 363 (pointing out cases in which courts have allowed discrimination based on mutable characteristics but failed to allow discrimination based on immutable characteristics).

382. See *supra* note 366.

383. See YOSHINO, *supra* note 367, at 191 (“I am equally opposed to demands that individuals reverse cover, because such demands are also impingements on our autonomy, and therefore on our authenticity.”).

384. Cf. *id.* at 147 (“In response to white demands that African-Americans ‘act white,’ some African-Americans have developed a culture of ‘acting black.’”).



their demand that a group conform to stereotypes and thereby appear and act in ways chosen not by themselves but by a dominant group, allowed to sit back and watch.

Were it not for worries of this sort, it might be tempting to dismiss these cases' tensions with existing theory and doctrine, or to ignore the fact that no court has ever provided a reasoned explanation for drawing a line between cognitive and sensory stereotypes regarding homosexuals. After all, no matter their reasoning, courts have been granting *some* gay and lesbian employees protections that were previously lacking under Title VII. Protecting some workers, even on dubious grounds, might well seem preferable to forgoing protection altogether in the name of theoretical purity.

Yet we might feel otherwise if the dividing line that courts have drawn around the protected subset of workers induced broader harms. Yoshino's work suggests the possibility that, by encouraging reverse covering, courts might be endangering the autonomy of those they purport to protect.<sup>385</sup> The worry is that courts are saving plaintiffs from gender stereotyping only by forcing them into even more narrow stereotypes. The following section argues that this is only one of the potential harms the courts' current line-drawing might cause, both in the workplaces that Title VII directly regulates and in society at large.

#### B. *The Effects of Perceptibility*

The Title VII dilemma described in Part I has prompted courts to search for some way to avoid equating the gender stereotyping of perceived homosexuals with sexual orientation discrimination. But even once we recognize why courts might want to stop short of fully writing sexuality into Title VII, the question remains: Why have courts drawn the particular line that they have? Why have they privileged appearances in cases brought by plaintiffs perceived as gay—and solely in those cases?

If antidiscrimination law is a "social practice that acts on other social practices," as Robert Post argues in his "sociological account" of antidiscrimination law, then the relevant question is how the practice that has arisen in Title VII case law promises to transform the "social identities" of the gay and lesbian employees it touches.<sup>386</sup> As Post writes, "[t]he sociological account does not ask whether 'stereotypic impressions' can be eliminated *tout court*, but rather how the law

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385. *Id.* at 93; *see also supra* note 379 and accompanying text.

386. *See* Post, *supra* note 17, at 31 (emphasis omitted).

alters and modifies such impressions.”<sup>387</sup> For Post, then, it comes as no surprise that courts are not actually busy striking out “the entire spectrum” of gender stereotyping.<sup>388</sup> The challenge is to articulate the principles that guide, or should guide, what interventions courts *do* make into the social practice of gender stereotyping.<sup>389</sup> Instead of seeking blindness, we need to look instead at the ways the law changes how we see.

The question of courts’ motivation in drawing the line between visible and cognized stereotypes can thus be more usefully phrased as a question about effects. Instead of psychologizing about judges, we can instead look at the likely effects of their judgments.<sup>390</sup> Phrasing the question in terms of effects rather than intentions allows us to consider further the worry raised at the end of the last section: that the line of cases discussed in Parts II and III might prove not just theoretically or doctrinally peculiar, but actually harmful in practical terms. The subsections below trace three ways in which the appearance/cognition distinction that drives courts’ gay stereotyping decisions might embody, or even reinforce, the homophobia that courts presumably hoped to counteract. Courts have recently begun extending Title VII’s protections to a certain portion of gay and lesbian plaintiffs, but at what cost?

### 1. *Sidestepping disgust*

Viewed against a longstanding philosophical tradition in which the intellect has routinely been ranked above the senses,<sup>391</sup> courts’

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387. *Id.*

388. *See id.* at 36 (emphasis omitted) (“If the point of antidiscrimination law is to transform existing social practices, then courts must ask what purpose the law expects to accomplish by such transformations. The dominant conception systematically obscures this question. If the aim of the law is not in fact to strike ‘at the *entire spectrum* of disparate treatment of men and women resulting from sex stereotypes,’ then what is it?” (footnotes omitted) (quoting *Cnty. of Washington v. Gunther*, 452 U.S. 161, 180 (1981))); *cf. id.* at 27 (describing the goal of striking out the entire spectrum of stereotyping as “merely obfuscatory”).

389. *See id.* at 31 (“In contrast to the dominant conception, the sociological account accepts the inevitability of social practices. But precisely because of this acceptance, the account requires that principles be articulated that will guide and direct the transformation of social practices.”).

390. If intent can be presumed from the natural consequences of an act, *Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring), the question of courts’ intent in this area may prove equivalent to the question of what effect the cases I study will likely have.

391. This tradition extends, famously, from PLATO, SYMPOSIUM (Benjamin Jowett trans., Project Gutenberg 2008) (c. 360 B.C.E.), available at <http://www.gutenberg.org/files/1600/1600.txt> (praising those who, “beholding beauty with the eye of the mind,” are able “to bring forth, not images of beauty, but realities”), and ARISTOTLE, DE ANIMA (ON THE SOUL), bk. II, at 155–88 (Hugh Lawson-Tancred, trans., Penguin Books 1986) (c. 350 B.C.E.) (describing the nutritive powers of plants, the perceptive

privileging of that which is seen over that which is thought may appear counterintuitive. It makes more sense, however, when the thing being thought concerns sex, and particularly gay sex. The so-called “ick factor”<sup>392</sup> often associated with thoughts of gay sex arises “not because [people] can’t imagine it, but because they can and do.”<sup>393</sup> And insofar as resistance to equal rights for gays and lesbians may be motivated by disgust at their sexual practices,<sup>394</sup> such disgust does not come from seeing effeminate body language or a butch hairstyle; it derives from the thought of what two men or two women might do in bed.<sup>395</sup> Subordinating thought to vision thus allows courts, like employers and their straight workers, to avoid the disgust that these thoughts apparently provoke.<sup>396</sup>

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powers of animals, and the power of thought possessed by humans), through RENÉ DESCARTES, *MEDITATIONS ON FIRST PHILOSOPHY* (1641), reprinted in RENÉ DESCARTES, *MEDITATIONS ON FIRST PHILOSOPHY WITH SELECTIONS FROM THE OBJECTIONS AND REPLIES* 22–23 (John Cottingham, trans., 1986) (“I now know that even bodies are not strictly perceived by the senses or the faculty of imagination but by the intellect alone, and that this perception derives not from their being touched or seen but from their being understood; and in view of this I know plainly that I can achieve an easier and more evident perception of my own mind than of anything else.”). For examples of courts’ tendency to disparage appearances, see *supra* note 16.

392. See MICHAEL NAVA & ROBERT DAWIDOFF, *CREATED EQUAL: WHY GAY RIGHTS MATTER TO AMERICA* 5 (1994) (“The revulsion many men and women feel at the thought of sexual activity between people of their own sex remains a formidable obstacle on the path to gay rights. This revulsion, which we call the Ick Factor, equates distaste with immorality.”); see also Ariel Levy, *Prodigal Son*, *NEW YORKER*, June 28, 2010, [http://www.newyorker.com/reporting/2010/06/28/100628fa\\_fact\\_levy](http://www.newyorker.com/reporting/2010/06/28/100628fa_fact_levy) (quoting former governor and presidential candidate Mike Huckabee’s argument against gay marriage: “We can get into the ick factor, but the fact is two men in a relationship, two women in a relationship, biologically, that doesn’t work the same”). This “ick factor” is not unique to heterosexuals envisioning homosexual sex. For a description and analysis of the revulsion felt by some gay men at female bodies and sexuality, see Eric Rofes, *The Ick Factor: Flesh, Fluids, and Cross-Gender Revulsion*, in *OPPOSITE SEX: GAY MEN ON LESBIANS, LESBIANS ON GAY MEN* 44, 44–45 (Sara Miles & Eric Rofes eds., 1998).

393. NAVA & DAWIDOFF, *supra* note 392, at 5.

394. See MARTHA C. NUSSBAUM, *FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW* 2 (2010) (asserting that “the politics of disgust” have lessened but not disappeared in recent years); Paul Rozin et al., *Disgust*, in *HANDBOOK OF EMOTIONS* 757, 757 (Michael Lewis et al. eds., 3d ed. 2008) (stating that “[f]or North Americans, elicitors of disgust come from nine domains,” one of which is sexual behavior); William N. Eskridge, Jr., *Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion*, 57 *FLA. L. REV.* 1011, 1013–14 (2005) (advocating a rejection of a “politics that trades on appeals to disgust and contagion” to limit the rights of homosexuals).

395. See WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 211 (1999) (“[L]ike the racist, many homophobes view objects of their hatred as dirty people whose fantasized disgusting conduct justifies imagined or acted-out violence against them.”).

396. It is worth remembering here, again, that courts do *not* reject cognitive-stereotyping claims when the thoughts at issue surround motherhood. See *supra* Part III.C.

Mary Anne Case has described courts' receptivity, even twenty years ago, to claims made by gays whose partners were dead, severely disabled, or imprisoned.<sup>397</sup> What those plaintiffs shared were "long-term relationships from which the sexual aspect ha[d] perforce been removed."<sup>398</sup> The opinions in *Prowel* and *Vickers* reveal a similar dynamic. Strangely, it is *Prowel*, the admitted homosexual, who emerges from his case's statement of facts largely desexualized. His crossed legs, clean car, and talk of culture<sup>399</sup> reflect pop culture's vision of a stereotypical gay best friend—*Will & Grace*'s Jack<sup>400</sup>—rather than a fully sexual being. On the contrary, *Vickers*, despite never revealing his sexuality, is suggestively described as vacationing with another man in Florida, where their unseen activities are left to the imagination.<sup>401</sup>

Tobias Barrington Wolff recently described the way that society, and courts in particular, have treated gay sex as something not to be talked about:

It is not merely incidental that the castigation of same-sex intimacy in Western cultural history has been accompanied by the urgent command that such intimacy never be discussed—that it was 'a crime not fit to be named,' 'the very mention of which is a disgrace to human nature,' as Blackstone and Chief Justice Burger would have it.<sup>402</sup>

For Wolff, not mentioning same-sex intimacy is part of a larger effort to efface it altogether—to pretend that it does not exist.<sup>403</sup>

Indeed, the very language of courts' opinions joins this effort, even in cases that provide protection to gay plaintiffs. One of employment-discrimination law's most progressive recent developments, the conclusion that sexual orientation is "irrelevant for purposes of Title VII,"<sup>404</sup> itself restates the fiction that these cases

397. Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643, 1659–61 (1993).

398. *Id.* at 1644.

399. *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 287 (3d Cir. 2009).

400. See AMIN GHAZIANI, *THE DIVIDENDS OF DISSENT: HOW CONFLICT AND CULTURE WORK IN LESBIAN AND GAY MARCHES ON WASHINGTON* 201 (2008) (quoting a psychologist's description of the TV character Jack as "narcissistic, shallow, Cher-loving, boy-chasing, fashion-obsessed, showtune-singing . . .—a sturdy stereotype if there ever was one").

401. See *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 759 (6th Cir. 2006).

402. Tobias Barrington Wolff, *Civil Rights Reform and the Body*, 6 HARV. L. & POL'Y REV. 201, 209 (2012) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 197 (1986) (Burger, C.J., concurring)).

403. See *id.*

404. *Vickers*, 453 F.3d at 762 (quoting *Rene v. MGM Grand, Inc.*, 305 F.3d 1061, 1063 (9th Cir. 2002) (en banc) (plurality opinion)).

have nothing to do with homosexuality. Cases like *Prowel* discuss winning claims in terms of gender stereotyping even when those stereotypes are inescapably coded as “gay.”<sup>405</sup> Doing so allows them to sidestep the disgust engendered by thoughts of gay sex. By focusing on appearances rather than sexual behavior outside of work, courts create an appearance of their own. They make it look as if they have not used employment-discrimination law to force employers to stomach the presence of employees who provoke their disgust. The line of cases discussed in Part III makes it look as though, barring Congressional intervention, gays and lesbians will remain unprotected under Title VII; meanwhile, something else—nonconformity with gender stereotypes—allows a few plaintiffs, who just happen to be gay, to win their cases. This, of course, is a fiction, for all the reasons already claimed. But it is a fiction that reenacts the “erasure” of gay sexuality that Wolff has described as the very “strategy around which antigay and anti-transgender policies are structured.”<sup>406</sup>

## 2. *Divorcing Title VII from broader gay rights efforts*

Courts’ emphasis on appearances and affect does more than sidestep potentially uncomfortable thoughts about homosexuality. It also segregates Title VII case law from broader efforts being made in the courts on behalf of gay rights.

One fact is inescapable in the cases described in Part III: courts have failed to protect what some have called “normal” gays,<sup>407</sup> that is to say, those who are the most assimilationist or “straight acting.”<sup>408</sup> It is striking that in Title VII cases, courts have failed to support the very subset of gays who have elsewhere made the most pressing demands on judges to move ahead of the political branches on gay rights issues.<sup>409</sup> By rewarding gay litigants in Title VII cases when they differ visibly from the “normal,” courts disconnect employment-discrimination

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405. *Prowel*, 579 F.3d at 292; see cases cited *supra* Part III.B.1.

406. Wolff, *supra* note 402, at 211, 220 (“For antagonists who find the mere thought of gay sexuality overwhelming and invasive, erasure is the only answer . . .”).

407. Of course this freighted term gets its content largely, if not exclusively, through societal stereotypes. That is the whole point. Having acknowledged this, I remove the scare quotes going forward.

408. See YOSHINO, *supra* note 367, at 60, 77 (defining “normals” as “openly gay individuals who embrace a politics of assimilation” and contrasting them with “queers” who “emphasize their difference from the mainstream”). Compare ANDREW SULLIVAN, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY 198–99 (1995) (promoting an assimilationist approach to gay rights), with MICHAEL WARNER, THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE 54–55 (1999) (critiquing assimilation as conformity to heterosexual norms).

409. See *infra* notes 410–13.

claims from broader equality arguments being made elsewhere in the law, particularly in areas like marriage and parenthood.

Consider in this connection Yoshino's description of "the public face of gay rights": the "straight-acting"<sup>410</sup> men and, I might add, the long-partnered lesbian couples often presented as plaintiffs in gay rights litigation. As Yoshino observes, "progay litigation and public relations are driven by the same imperative—present gays as identical to straights in all ways except orientation, as if conducting a controlled experiment."<sup>411</sup>

In litigation for same-sex marriage, against the Defense of Marriage Act and, previously, "Don't Ask Don't Tell," or on behalf of adoption rights for gays and lesbians, gay individuals or couples seek equal inclusion in a mainstream institution: marriage, the military, and parenthood.<sup>412</sup> Given that in each of these cases, the plaintiffs made assimilationist demands, it is hardly surprising that litigators would present plaintiffs who already look the part. At heart, these cases share the logic of the dominant conception of antidiscrimination law.<sup>413</sup> They aim for an equality which is at the same time an erasure of difference. By presenting gays and lesbians who are otherwise identical to heterosexuals, these cases comprise part of a larger project to make people stop "seeing" others through the lens of sexuality.

The recent Title VII cases clearly have no place in this project. As this Article has shown, the case law under Title VII has the exact opposite effect: it encouraged employers and fellow employees to see people, literally, in terms of their sexuality. The plaintiffs who have won their gender stereotyping claims are those whose "otherness" is literally visible. They are gays and lesbians who flaunt, not ones who might be mistaken for "normal." They are precisely *not* the plaintiffs of gay rights litigation in general.

By recognizing and protecting appearances, courts have found a way to grant employment-discrimination claims brought by gays and lesbians without treating those claims as identity-based. Courts have protected a group united not by their sexual orientation so much as by their look and manner. And in doing so, courts have isolated their

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410. YOSHINO, *supra* note 367, at 80.

411. *Id.*

412. *See, e.g.*, United States v. Windsor 133 S. Ct. 2675, 2682–83 (2013) (constitutional challenge to the federal government's limitation of marriage to opposite-sex partnerships); Witt v. Dep't of the Air Force, 527 F.3d 806, 809 (9th Cir. 2008) (constitutional challenge to the military's "Don't Ask, Don't Tell" policy); Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 806–07, 809 (11th Cir. 2004) (constitutional challenge to a Florida statute that prohibited gays and lesbians from adopting children).

413. For a description of this dominant conception, see *supra* Part IV.A.1.

Title VII judgments from broader legal fights in which judges are asked to say that gays and lesbians are, but for their sexual orientation, otherwise indistinguishable from the majorities who enjoy broader rights.

### 3. *Creating difference*

Even more troubling than these potential political effects are the pressures these cases place on workers and workplaces. By protecting appearance and affect, courts provide incentives for gay employees to flaunt. Yoshino, as we have seen, worries that this will lead to inauthenticity.<sup>414</sup> But the problems run still deeper.

Critics of Yoshino, and of diversity-based theories of antidiscrimination law in general, have argued that worries about inauthenticity require some positive account of authenticity, one that does not itself rely on stereotypes about what it means to be a member of a particular group.<sup>415</sup> Vicki Schultz has alleged that diversity proponents too often assume that “authentic” group differences are exogenous to the workplaces regulated by Title VII; instead, she argues, differences among groups are in many ways *produced within* the workplace (and, of course, other institutions as well).<sup>416</sup>

According to what Schultz terms the “disruption model” of antidiscrimination law, discrimination consists of “assigning individuals to dichotomous in-groups and out-groups, and making that group status salient in a particular institutional context.”<sup>417</sup> The law’s goal, she argues, should be to “disrupt this process of creating differences.”<sup>418</sup>

Troublingly, the approach taken by courts in the cases discussed in this Article actually contributes to, rather than disrupts, the production of difference in the workplace. By incentivizing workers to flaunt and requiring employers to attend to gay-coded appearance and affect, courts reinforce the perceived differences separating gay and straight employees. They promote a state of affairs, in fact, in which those differences are literally made visible.

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414. See YOSHINO, *supra* note 367, at 190–91.

415. See, e.g., Martha Nussbaum, *The Prohibition Era*, THE NEW REPUBLIC (Mar. 20, 2006), <http://www.ntr.com/article/the-prohibition-era> (reviewing YOSHINO, *supra* note 367).

416. See Vicki Schultz, *Antidiscrimination Law as Disruption: The Emergence of a New Paradigm for Understanding and Addressing Discrimination* 9–10 (May 2010) (unpublished manuscript) (on file with author); see also RICHARD THOMPSON FORD, *RACIAL CULTURE: A CRITIQUE* 4 (2005) (arguing against antidiscrimination theorists who promote a right to “cultural difference” or “identity correlated traits”).

417. Schultz, *supra* note 416, at 22.

418. *Id.* at 21.

Schultz writes of practices that “assign[] notions of what it means to be a member” of a particular group and then “structur[e] material benefits and social interactions in such a way as to confirm the existence of such presumed group-based differences.”<sup>419</sup> It is hard to think of a better description of what courts have done in cases like *Prowel*. In the perceptible stereotyping cases described in Parts II and III, courts offer a list of traits, which, if exhibited in an “observable way at work,”<sup>420</sup> lead to the material benefits offered by Title VII.

The problem is not just that, in order to receive protection from stereotyping, workers have to conform to stereotypes catalogued in court opinions like *Prowel*. The problem is also that by encouraging this practice, courts widen the gap even further, and more visibly, between in-groups and out-groups in American workplaces.

#### 4. *Parallels to the forms of homophobia*

William Eskridge has described three mutually reinforcing forms that homophobic prejudice often takes.<sup>421</sup> In its hysterical guise, homophobes think of gays and lesbians as dirty people doing disgusting things.<sup>422</sup> As an obsessional prejudice, homophobes fear that gays are conspiring against them, seeking advantage.<sup>423</sup> In its narcissistic form, homophobes put homosexuals in the category of “the Other,” a group whose differentness helps the homophobe define her or his own sexual identity.<sup>424</sup> These three forms of homophobia correspond tightly—and troublingly—to the three worries just canvassed.<sup>425</sup>

First, disgust.<sup>426</sup> Thoughts of unseen sexual acts not only drive homophobia in its hysterical form, but perhaps also help to explain why courts have taken such anomalous refuge in appearances in cases involving homosexuality. Even if squeamishness about gay sex does not *motivate* courts’ reasoning in these cases, the opinions themselves continue a history in which gay sexuality is treated as unmentionable. The opinions’ insistence on categorizing the claims as instances of gender stereotyping rather than sexuality simply reenacts this silencing.

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419. *Id.* at 12.

420. *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006).

421. ESKRIDGE, *supra* note 395, at 211 (describing how homophobia resembles other forms of prejudice in its hysterical, obsessional, and narcissistic qualities (citing ELISABETH YOUNG-BRUEHL, *THE ANATOMY OF PREJUDICES* 32–36, 157–58 (1996))).

422. *Id.* (stating that homophobia echoes racial prejudice in this regard).

423. *Id.* (analogizing homophobia to anti-Semitism).

424. *Id.* (correlating this form of prejudice with sexism).

425. *See supra* Part IV.B.1–3.

426. *See supra* Part IV.B.1.



Second, by privileging the subset of Title VII plaintiffs who are visibly at odds with those generally bringing assimilationist gay rights claims,<sup>427</sup> courts appear responsive to worries, expressed most often in marriage debates, that gays and lesbians are conspiring for “special rights.”<sup>428</sup> Separating the progress made by a certain type of gay plaintiff in employment-discrimination law from that being made elsewhere in the law allows courts to sidestep the concerns of those who see protections like those enshrined in ENDA as a stepping-stone to same-sex marriage.<sup>429</sup> Doing so may minimize backlash, but insofar as ENDA-like protections *are* a stepping-stone to broader gay rights, courts may be hampering that movement. Moreover, the concerns of conspiracy theorists—those who see gays and lesbians as conspiring for rights<sup>430</sup>—are reinforced and even embodied by the many courts that write of homosexuals trying to “bootstrap” their way into Title VII.<sup>431</sup>

Finally, by incentivizing perceptible differentiation, courts contribute to the “othering” of gays and lesbians.<sup>432</sup> This worry is perhaps the most troubling one of all, for it suggests that by granting a subset of gays and lesbians protection under Title VII, courts might actually be bolstering perceived differences between gay and straight workers, increasing rather than disrupting the salience of sexual orientation in the workplace, and reinforcing an us-versus-them mentality in which balkanized factions of workers compete in what is seen as a zero-sum game.<sup>433</sup>

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427. See *supra* Part IV.B.2.

428. See Jonathan Goldberg-Hiller & Neal Milner, *Rights as Excess: Understanding the Politics of Special Rights*, 28 LAW & SOC. INQUIRY 1075, 1083 (2003) (describing attempts to characterize gay marriage litigation as “a blatant power grab by a powerful special interest group” (internal quotation marks omitted)).

429. See, e.g., Letter from the U.S. Conference of Catholic Bishops to the U.S. Senate Comm. on Health, Educ., Labor, & Pensions (July 9, 2013), *available at* <http://www.usccb.org/issues-and-action/human-life-and-dignity/labor-employment/upload/joint-letter-on-enda-senate-help-2013-07-09.pdf> (“We have already seen state Supreme Courts repeatedly rely on state-level ENDAs as a basis for creating a state constitutional right to same-sex ‘marriage.’”).

430. See, e.g., Curtis M. Wong, *GLAAD, HRC and Other LGBT Advocacy Groups Are an Evil Conspiracy, Bryan Fischer Claims*, HUFFINGTON POST (Oct. 23, 2013, 4:07 PM), [http://www.huffingtonpost.com/2013/10/23/bryan-fischer-glaad\\_n\\_4151335.html](http://www.huffingtonpost.com/2013/10/23/bryan-fischer-glaad_n_4151335.html) (referencing a column written by the senior analyst of the American Family Association).

431. See *supra* note 2 (referencing cases in which courts characterized plaintiffs as trying to “bootstrap” sexual orientation discrimination claims into Title VII’s protections).

432. See *supra* Part IV.B.3.

433. See generally Zatz, *supra* note 158 (arguing against a conception of Title VII that would see groups as locked in antagonistic relationships wherein discrimination against the other group creates advantages for one’s own).

## CONCLUSION: ENDA AND THE FUTURE

If the case law as it currently stands poses the threats just described, what is to be done? In one sense, this is the least interesting question of this Article, for the answer is obvious. Were the House of Representatives to join the Senate in passing ENDA<sup>434</sup> or a similar law, the Title VII dilemma would dissolve, having lost its second premise: Congress's failure to explicitly protect sexual orientation. Passing ENDA would offer gay and lesbian workers protection from discrimination that the First Circuit has called a "noxious practice, deserving of censure and opprobrium,"<sup>435</sup> that the Second Circuit has castigated as "morally reprehensible whenever and in whatever context it occurs,"<sup>436</sup> and even the Ninth Circuit's dissenters in *Rene* described as "appalling and deeply disturbing."<sup>437</sup>

This Article's goal has not been to argue for ENDA, however. In fact, the preceding argument enters that debate only indirectly. The Article's aim has been instead to correct the standard story told about gay workers and Title VII to show that, in cases involving perceived homosexuality, courts have settled on a strange and unstable compromise: protecting only those who look or act sufficiently "gay" at work. This is a result that should come as a surprise to most, for it belies the conventional wisdom that sexuality claims uniformly fail under federal employment-discrimination law. Moreover, it runs counter to standard theoretical and doctrinal stories about the role of appearances within antidiscrimination law in general.

What this discussion shows is that courts, faced with the Title VII dilemma, yet uncomfortable with the treatment some gays and lesbians experience in the workplace, have crafted a largely unnoticed, de facto ENDA of their own. It is an ENDA that no imaginable Congress would pass. And as Part IV suggested, it is quite possibly an ENDA that we should not want.

What makes this Article an indirect intervention into the ongoing debate over the real ENDA is its revelation that the choice facing Congress is not, as the standard story would have it, between ENDA

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434. The most recent version is the Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (as passed by Senate, Nov. 7, 2013).

435. *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999).

436. *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000). The Third Circuit has also chimed in. *See Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 265 (3d Cir. 2001) ("Harassment on the basis of sexual orientation has no place in our society.").

437. *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1078 (9th Cir. 2002) (en banc) (Hug, J., dissenting). The dissent rejected the plaintiff's claim, stating it was not the court's role "to make a moral judgment," but rather to construe the law as written by Congress. *Id.* (quoting *Higgins*, 194 F.3d at 259).

and a status quo in which gays and lesbians get no protection under Title VII. That description of the status quo is simply no longer true. In the federal courts today, “visible” homosexuals—those who look or act sufficiently gay in the eyes of coworkers and courts—often already do get protection.

I do not know, frankly, how this revised understanding of the status quo might affect the debate over ENDA were it better understood. Would conservatives still want to preserve the status quo under Title VII if they knew that employers can discriminate against assimilationist gays, but not ones who flaunt? Would liberals redouble or relax their efforts for full protection, knowing that some protection is already on offer, but that this might, in some ways, be worse than no protection at all? It is quite possible that the current state of the law in this area is one that no party in the debate would choose. That is an important point to realize as the choice between ENDA and the status quo continues to be debated.

This Article’s argument also raises a warning about ENDA itself. ENDA proscribes employment discrimination based on “actual or perceived sexual orientation or gender identity”<sup>438</sup>—where “sexual orientation” is defined as “homosexuality, heterosexuality, or bisexuality,”<sup>439</sup> and “gender identity” is defined as “the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual’s designated sex at birth.”<sup>440</sup>

These provisions make clear that, after ENDA’s passage, cases like Brian Prowel’s<sup>441</sup> could proceed directly as sexuality discrimination claims rather than claims of gender stereotyping. Or, depending on how courts treat gender stereotyping claims after ENDA, someone like Prowel could perhaps bring an intersectional claim as an effeminate gay man. Whether courts will continue reading “sex” in Title VII expansively once sexuality and gender identity (including gender-related appearance and mannerisms) are covered elsewhere in federal law is an open question, however. Perhaps Prowel’s intersectional claim would not be sex (Title VII) plus sexual orientation (ENDA), but rather sexual orientation and gender identity, both as covered under ENDA.

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438. S. 815, § 4.

439. *Id.* § 3(a)(10).

440. *Id.* § 3(a)(7).

441. *See supra* Part II.A (discussing *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285 (3d Cir. 2009)).

But what about Christopher Vickers?<sup>442</sup> Were he actually gay, Vickers's claim would indisputably be covered under ENDA.<sup>443</sup> But even though Vickers was thought to be gay, his actual sexuality was never revealed either at work or in court.<sup>444</sup> Read straightforwardly, ENDA would seem to protect Vickers through the phrase "actual *or perceived* sexual orientation," repeated thirteen times in the bill.<sup>445</sup> This should be read to mean that ENDA protects employees from discrimination based on what others *think* their sexual orientation to be. That is to say, "perceived sexual orientation" in ENDA undoubtedly concerns thought, not vision.

This is the very assumption proven wrong, however, in *Vickers* and the many cases like it. Current Title VII case law more often offers a *literalist* reading of perception instead, however bizarre the results.<sup>446</sup> Were ENDA's language about "perceived sexual orientation" read literally, employees would be protected if they were gay, or if they were not gay but looked gay. Yet Vickers and others merely thought to be gay might still fall through the cracks. This may sound absurd, but it is only slightly stranger than the current state of affairs in which gay employees must look or act sufficiently gay to receive protection under Title VII. The pervasiveness of perceptibility in ENDA makes it all the more possible that courts' literal reading of perception could linger. As so often with questions of visibility, we might just have to wait and see.

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442. See *supra* Part II.B (discussing *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757 (6th Cir. 2006)).

443. Or rather, a claim like his would be covered if it alleged conduct that occurred after ENDA went into effect.

444. See *supra* text accompanying note 126.

445. See S. 815 §§ 4, 9 (emphasis added).

446. In this regard, Title VII case law is not alone. For a parallel example in asylum law, see Brian Soucek, *Copy-Paste Precedent*, 13 J. APP. PRAC. & PROCESS 153, 153–54, 158–59 (2012), and Soucek, *supra* note 379, which both criticize courts' literalist understanding of persecuted groups' so-called "social visibility" in the context of asylum law. For a further discussion of this parallel, see *supra* note 379.