


3-1-2020

## Dead Hand Vogue

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### Recommended Citation

Anthony M. Kreis, *Dead Hand Vogue*, 54 U. Rich. L. Rev. 705 (2020).

Available at: <https://scholarship.richmond.edu/lawreview/vol54/iss3/3>

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## DEAD HAND VOGUE

*Anthony Michael Kreis* \*

### INTRODUCTION

For decades, courts read employment antidiscrimination laws' prohibition of sex discrimination to exclude gay, lesbian, bisexual, and transgender workers' sexual orientation and gender identity discrimination claims—purportedly because the claims were not linked to employees' status as a man or a woman. And while significant doctrinal developments have afforded some gender-nonconforming persons critical workplace safeguards under sex anti-discrimination laws, many older decisions that deemed sexual orientation and transgender discrimination claims to be outside the ambit of sex discrimination still control. These decades-old precedents all suffer from the same analytical error: a failure to adhere to the principle that *antidiscrimination law does not protect groups; it protects individuals*. Because courts in the 1970s and 1980s focused on groups rather than individuals, judges were able to rely on legislative dead hand as performative analysis to keep LGBTQ people out of the law's workplace protections and reinforce gender variants' second-class status. This Article traces the anti-individualist origins of sex discrimination doctrine that has improperly kept LGBTQ workers outside of antidiscrimination protections and argues that the protective promise of antidiscrimination law is realized most fully when courts take individuals seriously.

This term, the Supreme Court will resolve two contentious and salient issues clouding employment discrimination law: is discrimination motivated by a person's sexual orientation or gender identity "because of sex?" The disposition of three cases before the

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Court will clarify Title VII's scope after a decade-long sea of change in the interpretation of the super-statute,<sup>1</sup> as well as substantive amendments to analogous state antidiscrimination laws to protect gay, lesbian, bisexual, and transgender workers.<sup>2</sup>

Part of that change is attributable to the Equal Employment Opportunity Commission ("EEOC"), which ruled that discrimination against transgender workers because of their status is unlawful in 2012.<sup>3</sup> In 2015, the EEOC determined that sexual orientation discrimination was also actionable under Title VII's existing sex discrimination framework.<sup>4</sup> The Court of Appeals for the Seventh Circuit was the first federal appellate court to decide that sexual orientation discrimination claims are cognizable Title VII sex discrimination actions in 2017.<sup>5</sup> Moreover, though transgender employees scored victories for nearly twenty years under federal law,<sup>6</sup> in 2018 the Court of Appeals for the Sixth Circuit, in a sweeping decision, ruled that Title VII bars an employer from discriminating against an employee because the employee is transitioning or is transgender.<sup>7</sup> Citing federal case law's trajectory, state equal opportunity agencies in Michigan and Pennsylvania issued interpretive statements of state antidiscrimination law that sexual orientation and gender identity discrimination are proscribed types of sex discrimination.<sup>8</sup>

1. *Bostock v. Clayton Cty. Bd. of Comm'rs*, 723 F. App'x 964 (11th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (Apr. 22, 2019) (No. 17-1618); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (Apr. 22, 2019) (No. 17-1623); *EEOC v. G.R. & R.G. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (Apr. 22, 2019) (No. 18-107).

2. See CAL. GOV'T CODE § 12940; COLO. REV. STAT. § 24-34-402; CONN. GEN. STAT. § 46a-60; DEL. CODE ANN. tit. 19, § 711; D.C. CODE § 2-1402.11; HAW. REV. STAT. § 378-2; 775 ILL. COMP. STAT. 5/2-101, 102; IOWA CODE § 216.6; ME. STAT. tit. 5, § 4571; MD. CODE ANN., STATE GOV'T § 20-606; MASS. GEN. LAWS ch. 151B, § 4; MINN. STAT. § 363A.08; NEV. REV. STAT. § 613.330; N.H. REV. STAT. ANN. § 354-A:7; N.J. STAT. ANN. § 10:5-4; N.M. STAT. ANN. § 28-1-7; N.Y. EXEC. LAW § 296; OR. REV. STAT. § 659A.003; 28 R.I. GEN. LAWS § 28-5-7; UTAH CODE ANN. § 34A-5-102; VT. STAT. ANN. tit. 21, § 495; WASH. REV. CODE § 49.60.180; WIS. STAT. § 111.321.

3. *Macy v. Holder*, EEOC Appeal No. 0120120821, 112 FEOR (LRP) 257 (2012).

4. *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 116 FEOR (LRP) 2 (2015).

5. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 340-41 (7th Cir. 2017).

6. See, e.g., *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004) (permitting a transgender employee's discrimination claim to proceed under a theory of sex stereotyping).

7. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 571 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (Apr. 22, 2019) (No. 18-212).

8. MICH. CIVIL RIGHTS COMM'N, INTERPRETATIVE STATEMENT 2018-1 (May 21, 2018) (citing federal gender stereotyping case law); PA. HUMAN RELATIONS COMM'N, GUIDANCE ON DISCRIMINATION ON THE BASIS OF SEX UNDER THE PENNSYLVANIA HUMAN RELATIONS ACT

Though the more inclusive reach of sex discrimination doctrine is fresh, the underlying issues have long percolated in state and federal courts. Since the 1970s, aggrieved workers have insisted that anti-sex discrimination laws also bar sexual orientation and gender identity discrimination. Courts dismissively rejected the initial rounds of litigation making claims to that effect. The stiff judicial resistance relaxed after the Supreme Court ruled in *Price Waterhouse v. Hopkins* that reliance on prescriptive sex stereotyping (individual-level policing of a person's gender conformity) in employment relationships is unlawful. Nevertheless, it took almost three decades after *Price Waterhouse* for courts to rely on the decision and recognize that sexual orientation and gender identity discrimination are forms of sex discrimination prohibited by Title VII.

*What explains these turns in the law?* The law failed to protect gay, lesbian, bisexual, and transgender employees because courts sidestepped a fundamental tenant of antidiscrimination law: the law *does not* protect groups; it protects *individuals*. This Article pinpoints three events that ushered in paradigmatic shifts in LGBTQ rights: the Stonewall Riots, *Price Waterhouse v. Hopkins*, and the EEOC's revised position that sexual orientation and transgender discrimination are sex discrimination, and then examines the individual's evolving place in employment discrimination doctrine over these periods. In early litigation, courts focused on groups rather than individuals and used interpretive tools, namely legislative intent. Here, courts used legislative dead hand as performative analysis to signal that gender nonconformists resided outside the respectable body politic.<sup>9</sup> This Article demonstrates how courts' dispositive invocation of legislative history and intent was possible only because of judges' failure to appreciate the textual requirement that courts evaluate how trait-related discrimination harms individuals. When the Supreme Court reasoned in

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2–3 (Aug. 2, 2018) (acknowledging Pennsylvania law is “interpreted consistently with federal anti-discrimination law”).

9. See Jessica Clarke, *How the First Forty Years of Circuit Precedent Got Title VII's Sex Discrimination Provision Wrong*, 98 TEX. L. REV. ONLINE 83, 87 (arguing that the textual arguments were obscured by prejudices and that “judges laid their biases bare in the texts of their opinions”); Cary Franklin, *Inventing the “Traditional Concept” of Sex Discrimination*, 125 HARV. L. REV. 1307, 1377–78 (2012) (“These decisions clearly reflect changed views about discrimination against sexual minorities in the workplace. The extension of sex-based Title VII protections to gay and transgender workers is the result of developments not in formal logic, but in social logic; courts in the twenty-first century are beginning to develop new understandings of the ways in which discrimination against sexual minorities can reflect and reinforce gendered conceptions of sex and family roles.”) (citation omitted).

*Price Waterhouse v. Hopkins* that Title VII banned prescriptive gender stereotypes, the law took an individualistic turn that aided some LGBTQ plaintiffs by requiring judges to assess the merits of parties' factual claims. Group-centric approaches tempered *Price Waterhouse's* full potential, however, until courts rejected the remnants of anti-individualist frameworks in the administrative invigoration era.

## I. DEAD HAND AND QUEER EXCEPTIONALISM

### A. *The Lost "Such Individual"*

A core statutory command of Title VII and parallelly constructed state antidiscrimination laws is that employers cannot discriminate against *individuals* because of a forbidden classification. Title VII declares that an employer cannot refuse to hire, fire, or otherwise "discriminate against any individual . . . because of such individual's . . . sex. . . ." <sup>10</sup>

The statutory language offers two important lessons. First, because disparate treatment claims brought under Title VII's § 703(a)(1) are about whether an *individual* employee suffered discrimination because of a protected trait, a successful claim need not show that all persons within the protected class similarly suffered. Because employment antidiscrimination law's concern is with individual fairness, practices that do not discriminate against all members of a group, or even against most of them, can still violate Title VII if they take prohibited characteristics into account.

Illustrative of this idea is *Phillips v. Martin Marietta Corp.* in which the Supreme Court permitted a claim to proceed after Martin Marietta refused to employ women with preschool-aged children.<sup>11</sup> The company did not reject women applicants wholesale; rather, Martin Marietta hired men with preschool-aged children, but not similarly situated women.<sup>12</sup> Plaintiffs have likewise stated successful claims alleging violations of Title VII because they were unwed mothers,<sup>13</sup> women of child-bearing age,<sup>14</sup> older women,<sup>15</sup>

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10. 42 U.S.C. § 2000e-2(a)(1) (2012).

11. 400 U.S. 542, 544 (1971) (per curiam).

12. *Id.* at 543.

13. *Dolter v. Wahlert High Sch.*, 483 F. Supp. 266, 267 (N.D. Iowa 1980).

14. *Auto. Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 211 (1991).

15. *Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 95–96 (2d Cir. 2010); *DeAngelo v.*

black women,<sup>16</sup> biological fathers,<sup>17</sup> and women who did not take their husband's names.<sup>18</sup> Although Title VII does not enumerate "unwed mothers" or "caregiving fathers" as protected groups,<sup>19</sup> courts have nonetheless affirmed these plaintiffs' claims by appropriately applying Title VII's protections to individual employees harmed by their employers because of sex-linked traits.

Second, Title VII's individual-level focus means that employers are forbidden from using trait-related stereotypes to harm an employee *even if underlying assumptions are true*.<sup>20</sup> This is the warning of *City of Los Angeles v. Manhart*, in which the Supreme Court held that an employer could not make female employees contribute more to a pension fund than men because women, on average, outlive men.<sup>21</sup> The Court emphasized in *Manhart* that because Title VII's "focus on the individual is unambiguous," it requires "fairness to individuals rather than fairness to classes."<sup>22</sup>

### B. *Post-Stonewall Era Sex Discrimination Claims*

In the wake of an emerging civil rights movement for LGBTQ equality after Stonewall, LGBTQ workers who were discriminated against because of their sexual orientation or gender identity took

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DentalEZ, Inc., 738 F. Supp. 2d 572, 574 (E.D. Pa. 2010); *Arnett v. Aspin*, 846 F. Supp. 1234, 1236 (E.D. Pa. 1994).

16. *Jefferies v. Harris Cty. Cmty. Action Assoc.*, 615 F.2d, 1025, 1028 (5th Cir. 1980); *Berndt v. Cal. Dep't of Corrs.*, No. C03-3174, 2005 WL 2596452, at \*7–8 (N.D. Cal. 2005).

17. *Johnson v. Univ. of Iowa*, 431 F.3d 325, 326–27 (8th Cir. 2005).

18. *Allen v. Lovejoy*, 553 F.2d 522, 523 (6th Cir. 1977).

19. *See* 42 U.S.C. § 2000e-2 (2012).

20. *See, e.g., Connecticut v. Teal*, 457 U.S. 440, 455 (1982) ("Congress never intended to give an employer license to discriminate against some employees on the basis of . . . sex merely because [it] favorably treats other members of the employees' group."). The decision in *Teal*, a disparate impact case, emphasized that the use of racially discriminatory devices that harmed individuals was unlawful, even though in the aggregate it failed to produce a racial imbalance. *Id.* For defenses of the congruity of an individualist approach to antidiscrimination and disparate impact, see Stephanie Bornstein, *Unifying Antidiscrimination Law Through Stereotype Theory*, 20 LEWIS & CLARK L. REV. 919, 945 (2016) ("Modern scientific understandings of stereotyping tell us that unlawful biases based on a person's sex, race, or national origin may play a role in employment decision regardless of how the decision maker treats other employees."); Noah D. Zatz, *Disparate Impact and the Unity of Equality Law*, 97 B.U. L. REV. 1357, 1414 (2017) ("Status causation is the matter of ultimate concern. Disparities are useful indicators of status causation, but they are not independently significant. Therefore, when we have particularized evidence of status causation, it does not matter whether, at some greater level of aggregation, no disparity is evident. This implication is exactly the opposite of a theory in which differences at the level of group comparison are the matter of basic concern.")

21. 435 U.S. 702, 704, 711 (1978).

22. *Id.* at 708–09.

to the courts, filing lawsuits against their former employers. However, unlike other injured workers that successfully brought claims under Title VII and state law because of discrimination targeting sex-associated traits, judges rebuffed them. Courts rejected the claims under state and federal law because LGBTQ people were not a group that legislators intended to protect in antidiscrimination laws. By refusing to look at the individual employee and focusing on groups, judges relieved themselves of the responsibility to engage in serious legal analysis and forced group labels on plaintiffs.

When federal courts first decided whether Title VII's ambit included sexual orientation or transgender discrimination claims, judges disregarded the mandate to focus on individuals, excluding LGBTQ workers from the statute's protections. The first federal ruling on whether sexual orientation discrimination is unlawful under Title VII, *Smith v. Liberty Mutual Insurance Co.*, was particularly egregious because it forced an unclaimed group label on the plaintiff to excuse sex stereotyping.<sup>23</sup> Bennie Smith applied for a mail clerk position at Liberty Mutual, but was rejected because the mail room supervisor thought he was too effeminate.<sup>24</sup> After filing a charge with the EEOC, an agency investigation uncovered that Smith's effeminate demeanor was "quite pronounced" and that the hobbies Smith listed on his application, including playing musical instruments, singing, dancing, and sewing, were generally associated with women and thus implicated sex stereotypes.<sup>25</sup>

What should have been a straightforward sex stereotyping case, arising from an allegation that the plaintiff was denied employment because of a social expectation that men should be masculine and not have interests in musical arts and crafting, was transformed into a sexual orientation discrimination cause by Liberty Mutual. When the parties both moved for summary judgment, Smith argued that the "sole issue" was "whether the refusal to hire an applicant based on sexual stereotypes amounts to unlawful discrimination on the basis of sex."<sup>26</sup> Liberty Mutual tried to distract the court from an individual-focused argument, arguing that while

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23. 395 F. Supp. 1098, 1099–1101 (N.D. Ga. 1975), *aff'd*, 569 F.2d 325 (5th Cir. 1978).

24. *Id.* at 1099.

25. 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, 139 (1995).

26. *Id.* at 140.

“the named plaintiff may or may not be homosexual . . . . He was suspected of being such and that is why he wasn’t hired.”<sup>27</sup> The court bought into Liberty Mutual’s group framing and reasoned that because the “intent of the Civil Rights Act” was to ensure “equal job opportunity for males and females” and not nonheterosexuals, Liberty Mutual acted well within its rights.<sup>28</sup>

Ramona Holloway’s contemporaneous gender identity discrimination lawsuit fared no better for similar reasons. Holloway’s sex assigned at birth was male.<sup>29</sup> An accounting firm hired her in 1969 while presenting as a man, but Holloway started hormone therapy the following year.<sup>30</sup> In 1974, Holloway informed her employer she was undergoing sex-reassignment surgery.<sup>31</sup> After Holloway informed her employer about her transition and her employment records were changed to match her new chosen name, Holloway was terminated.<sup>32</sup>

Only the second district court to meet a transgender plaintiff’s sex discrimination claim, the court brushed Holloway’s complaint aside following the lead of the United States District Court for the District of New Jersey in *Grossman v. Bernards Township School District*, which emphasized legislative history at the expense of an analysis focusing on the individual plaintiff’s claim.<sup>33</sup> On appeal, Holloway’s opening brief emphasized an individualist methodology arguing that

Title VII applies to all persons, including those whose gender is not clearly male or female. If the employee is subject to termination because of his or her gender, whether that gender be medically certain or uncertain, then clearly that individual has not been allowed “to continue in employment according to his or her job capabilities.”<sup>34</sup>

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27. *Id.*

28. *Smith*, 395 F. Supp. at 1101.

29. *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 661 (9th Cir. 1977).

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 663, 663 n.7; see *Grossman v. Bernards Twp. Bd. of Educ.*, No. 74-1904, 1975 U.S. Dist. LEXIS 16261, at \*10–11 (D.N.J. Sept. 10, 1975) (“In the absence of any legislative history indicating a congressional intent to include transsexuals within the language of Title VII, the Court is reluctant to ascribe any import to the term ‘sex’ other than its plain meaning. Accordingly, the Court is satisfied that the facts as alleged fail to state a claim of unlawful job discrimination based on sex.”), *aff’d*, 538 F.2d 319 (3d Cir. 1976).

34. Appellant’s Opening Brief at 5, *Holloway*, 566 F.2d 659 (9th Cir. 1976) (No. 76-2248) (alterations in original) (quoting *Baker v. Cal. Land Title Co.*, 507 F.2d 895, 896 (9th Cir. 1974)).



Holloway's briefing pierced the veil behind legislative intent's true function in the lower court's decision and *Grossman*, to trade away exacting individual-level analysis for social camouflage:

Neither the trial court in *Grossman*, nor that in the instant appeal, based its decision upon the narrow question of whether "the discharge of an individual (i.e., a transsexual) from employment during the period that that individual is in the process of transformation from male to female [violates] Title VII [sic] . . . ."

Rightly or wrongly the District Court concluded that "employment discrimination based on one's transsexualism neither was, nor was intended to be, proscribed by Title VII, and that there was no support for the proposition that sex discrimination under Title VII was meant to embrace transsexual discrimination as well."<sup>35</sup>

Nevertheless, the Ninth Circuit held that Title VII did not afford Holloway protection because she did not allege ontological sex discrimination and "changes or crossovers between the two polarities of male and female did not have to do with sex, per se; they were merely the result of a personal choice."<sup>36</sup> The majority wrote:

Title VII remedies are equally available to all individuals for employment discrimination based on race, religion, sex, or national origin. Indeed, consistent with the determination of this court, transsexuals claiming discrimination because of their sex, male or female, would clearly state a cause of action under Title VII. Holloway has not claimed to have [been] treated discriminatorily because she is male or female, but rather because she is a transsexual who chose to change her sex. This type of claim is not actionable under Title VII . . . .<sup>37</sup>

Judge Alfred Goodwin, however, dissented precisely because Judge Goodwin recognized that while "Congress probably never contemplated that Title VII would apply to transsexuals," that should not dispositively "limit the right to claim discrimination to those who were born into the victim class."<sup>38</sup> For Judge Goodwin, "[t]he relevant fact is that she was, on the day she was fired, a purported female."<sup>39</sup> In contrast to the majority that relied on Congressional intent vis-à-vis transgender persons, the Goodwin dissent

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35. Appellant's Rebuttal Brief at 1, *Holloway*, 566 F.2d 659 (9th Cir. 1976) (No. 76-2248) (quoting Appellee's Brief at 1, *Holloway*, 566 F.2d 659 (No. 76-2248); Clerk's Record at 145, *Holloway*, 566 F.2d 659 (No. 76-2248)).

36. Sonia K. Katyal, *The Numerus Clausus of Sex*, 84 U. CHI. L. REV. 389, 432 (2017).

37. *Holloway*, 566 F.2d at 664.

38. *Id.* (Goodwin, J., dissenting).

39. *Id.*

focused on Holloway as an individual woman claiming she was terminated because she was a woman in defiance of her employer's sex-based expectations.

The *Holloway* dissent reveals the heavy lifting of group-centric analysis and how it obscures the nuance of individual claims, rendering them easy to dismiss in this period. Although, one judicial coalition amazingly recoiled at the logic of their own individual-level analysis because it meant that gay, lesbian, and bisexual employees could state a claim under state law. The Supreme Judicial Court of Massachusetts reasoned in 1979 that “discrimination against homosexuals could be treated as a species of discrimination because of sex” since “homosexuality is also sex-linked.”<sup>40</sup> However, the court stopped short of interpreting state law as prohibiting sexual orientation discrimination as sex-linked, as the court previously did for pregnancy discrimination,<sup>41</sup> because of the social context in which the Massachusetts Fair Employment Practices Act was enacted and federal courts' exclusion of sexual orientation claims from Title VII.<sup>42</sup> The court, against its better instincts, posited it was appropriate to jettison sexual orientation claims from pregnancy claims, notwithstanding their similarly situated relationship to sex because “we . . . are [not] free to supply our own reading of the statutory language or our own view of what the policy should be.”<sup>43</sup>

In this era, courts avoided rigorous inspection of individual sex discrimination claims by invoking the dead hand of the Eighty-eighth Congress and civil rights proponents in state legislatures. The courts' analyses were performative—each papered over the substance of sex and sex stereotyping claims by imposing a group label on the plaintiffs and then invoking legislative intent to dismiss the entire group out-of-hand.<sup>44</sup> If a court could dismiss the

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40. *Macaulay v. Mass. Comm'n Against Discrimination*, 397 N.E.2d 670, 671 (Mass. 1979).

41. *Mass. Elec. Co. v. Mass. Comm'n Against Discrimination*, 375 N.E.2d 1192, 1198 (Mass. 1978) (citing *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 149 (1976)) (Brennan, J., dissenting) (“Pregnancy is a condition unique to women, and the ability to become pregnant is a primary characteristic of the female sex. Thus any classification which relies on pregnancy as the determinative criterion is a distinction based on sex.”).

42. *Macaulay*, 397 N.E.2d at 671 (“We know that the widespread discussion of sex discrimination in recent years has focused on discrimination between men and women. The uniform interpretation of statutes prohibiting discrimination in employment because of sex has limited the statutes to discrimination between men and women.”).

43. *Id.*

44. A notable exception to this trend was the district court decision in *Ulane v. Eastern*

group, there was no need to look at the individual. This group-centric pattern repeated itself in cases brought by gay, lesbian, bisexual, and transgender workers throughout the 1970s and 1980s, with courts, at times, going as far as lumping all LGBTQ people together to completely exclude sexual minorities from federal and state protections in one fell swoop.<sup>45</sup> This kind of group framework was routinely applied to LGBTQ workers while the sex-plus discrimination doctrine, which stands for the proposition that individual maltreatment is the touchstone of employment antidiscrimination law, became more robust.<sup>46</sup> That this kind of analysis was routinely—and exceptionally—applied to LGBTQ workers is unsurprising because it allowed for a kind of virtue signaling that, as

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*Airlines, Inc.* Here, Judge John Grady analyzed Karen Ulane's transgender discrimination claim with a class-focused approach, but determined that presumptions about legislative intent were insufficient to overcome Title VII's textual command:

I will say now as I said at the time I denied the motion to dismiss that, if I can borrow a phrase, there is not a shadow of a doubt that Congress never intended anything one way or the other on the question of whether the term, "sex," would include transsexuals. The matter simply was not thought of. It was not discussed. Nothing was discussed that we have any record of that would have any relevance to the question before us. But I believe that working with the word that the Congress gave us to work with, it is my duty to apply it in what I believe to be the most reasonable way. I believe that the term, "sex," literally applies to transsexuals and that it applies scientifically to transsexuals.

581 F. Supp. 821, 825, 827 (N.D. Ill. 1983), *rev'd*, 742 F.2d 1081 (7th Cir. 1984).

45. See, e.g., *Ulane*, 742 F.2d at 1085 ("While we recognize distinctions among homosexuals, transvestites, and transsexuals, we believe that the same reasons for holding that the first two groups do not enjoy Title VII coverage apply with equal force to deny protection for transsexuals."); *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 329 (9th Cir. 1979) ("Congress has not shown any intent other than to restrict the term 'sex' to its traditional meaning. Therefore, this court will not expand Title VII's application in the absence of Congressional mandate. The manifest purpose of Title VII's prohibition against sex discrimination in employment is to ensure that men and women are treated equally, absent a bona fide relationship between the qualifications for the job and the person's sex.") (quoting *Holloway*, 566 F.2d at 663, *abrogated by* *Nichols v. Azteca Rest. Enterps., Inc.*, 256 F.3d 864 (9th Cir. 2001)); *Voyles v. Ralph K. Davies Med. Ctr.*, 403 F. Supp. 456, 457 (N.D. Cal. 1975) ("Situations involving transsexuals, homosexuals or bi-sexuals were simply not considered, and from this void the Court is not permitted to fashion its own judicial interdictions."), *aff'd*, 570 F.2d 354 (9th Cir. 1978); *Grossman v. Bernards Twp. Bd. of Educ.*, No. 74-1904, 1975 U.S. Dist. LEXIS 16261, at \*10 (D.N.J. Sept. 10, 1975) ("In the absence of any legislative history indicating a congressional intent to include transsexuals within the language of Title VII, the Court is reluctant to ascribe any import to the term 'sex' other than its plain meaning. Accordingly, the Court is satisfied that the facts as alleged fail to state a claim of unlawful job discrimination based on sex."), *aff'd*, 538 F.2d 319 (3d Cir. 1976); *Sommers v. Iowa Civil Rights Comm'n*, 337 N.W.2d 470, 474 (Iowa 1983) ("[The Iowa] legislature did not consider transsexuals in adding sex as a protected class. . . . [T]he legislature's primary concern was a desire to place women on an equal footing with men in the workplace.").

46. Sex-plus discrimination occurs when an employer adversely acts against an employee because of a protected trait and an ostensibly neutral characteristic. See *supra* notes 11–18 and accompanying text (discussing sex-plus discrimination claims).

a disfavored group of people, LGBTQ Americans were unworthy of a super-statute's protection because they were unworthy.<sup>47</sup>

### C. *Protecting Self-Actualization as Political Activity*

The judicial decision most protective of nonheterosexual employees' equal opportunity in the same period after Stonewall stands in stark contrast to the dominant anti-individualist approach. In *Gay Law Students Ass'n v. Pacific Telephone & Telegraph Co.*, the California Supreme Court extended the safeguards of the California Labor Code to gay, lesbian, and bisexual persons while rejecting the claim that nonheterosexuals enjoyed antidiscrimination coverage under the California Fair Employment Practice Act.<sup>48</sup>

The California Fair Employment Practice Act, like Title VII, enumerates protected traits that an employer cannot use in an employment decision.<sup>49</sup> Similar to Title VII, California law at the time of *Gay Law Students* did not expressly include sexual orientation among the protected characteristics.<sup>50</sup> Notwithstanding the majority's view that the plaintiffs' sex-association argument had "some appeal," the court declined to accept the association theory because the California legislature "did not contemplate discrimination against homosexuals."<sup>51</sup> Not unlike the Massachusetts Supreme Judicial Court, the California justices glossed over the self-admitted strengths of textual arguments posited by LGBTQ plaintiffs, allowing the anti-individualist dead hand to control the case's disposition. The California high court, just as a handful of federal courts before it, was stuck on a construction of state law oriented toward protecting classes, not individual traits.

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47. The idea that gay, lesbian, and bisexual's purported exclusion from Title VII's protections was indicative of Americans' social contempt for sexual minorities was not lost on Justice Scalia, who wrote in *Lawrence v. Texas*:

So imbued is the Court with the law profession's anti-anti-homosexual culture, that it is seemingly unaware that the attitudes of that culture are not obviously "mainstream"; that in most States what the Court calls "discrimination" against those who engage in homosexual acts is perfectly legal; that proposals to ban such "discrimination" under Title VII have repeatedly been rejected by Congress.

539 U.S. 558, 602–03 (2003) (Scalia, J., dissenting).

48. *Gay Law Students Ass'n v. Pac. Tel. & Tel. Co.*, 595 P.2d 592, 595 (Cal. 1979).

49. *Id.* at 612; see CAL. LAB. CODE § 1420.

50. *Gay Law Students*, 595 P.2d at 612.

51. *Id.*

In 1937, the California legislature adopted legislation that bars employers from “[f]orbidden or preventing employees from engaging or participating in politics or from becoming candidates for public office” or “[c]ontrolling or directing, or tending to control or direct the political activities or affiliations of employees.”<sup>52</sup> Discussing the meaning of “political activities,” the *Gay Law Students* majority explained that the term reaches more than partisan electioneering, but also litigation, symbolic displays, and organizing.<sup>53</sup> After drawing parallels between the civil rights movement for racial equality and the “gay liberation movement,” the majority explained that an employee’s coming out process is a meaningful political act:

A principal barrier to homosexual equality is the common feeling that homosexuality is an affliction which the homosexual worker must conceal from his employer and his fellow workers. Consequently one important aspect of the struggle for equal rights is to induce homosexual individuals to “come out of the closet,” acknowledge their sexual preferences, and to associate with others in working for equal rights.<sup>54</sup>

The California Supreme Court crucially recognized that the act of openly self-identifying as a gay person and a member of the LGBTQ community was a deeply personal decision, an inherent act of political defiance, and a necessary precondition for the advancement of LGBTQ rights. Even though the California legislature was surely not contemplating gay rights activists while cobbling together labor law in 1937, the court was unencumbered by statutorily enumerated traits and concentrated on the effect that homophobic work environments had on individuals. The distinctly individualist approach to workers’ political rights contrasted with the dissenting opinion that drew a distinction between political activism and group membership—for the three dissenters who viewed gay rights and public self-identification as a proxy for group membership, gay activists should not be permitted to avail themselves of state labor law’s protections.<sup>55</sup>

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52. 1937 Cal. Stat. 212 (codified at CAL. LAB. CODE § 1101 (West)).

53. 595 P.2d at 610 (internal quotation marks omitted).

54. *Id.*

55. *Id.* at 613–19 (Richardson, J., dissenting) (“Nowhere in the complaint, from beginning to end, do plaintiffs allege that PT&T’s asserted policy of discrimination is directed toward any of plaintiffs’ *political* activity or affiliations. Rather, plaintiffs contend, and the gravamen of their complaint is, that employment discrimination is based solely on the overt and manifest nature of their sexual orientation itself.”).

During the first wave of litigation after Stonewall, LGBTQ plaintiffs were left out of the federal and state sex discrimination laws' protection. Even when courts conceded the logical soundness of plaintiffs' theories that a person's sexual orientation or gender identity is inextricably linked to their sex, courts declined to recognize LGBTQ discrimination claims as a form of sex discrimination. Rather than evaluate plaintiffs as individuals, courts fell back on legislative history and perfunctory, performative analyses to deny aggrieved LGBTQ persons a workplace discrimination remedy.

## II. GYMNASTICS OF THE DEAD HAND DIVIDE

The prevailing view of the 1970s and 1980s was that gender identity and sexual orientation discrimination claims were not cognizable because “[t]he phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men.”<sup>56</sup> The Seventh Circuit's 1984 decision, for example, in *Ulane v. Eastern Airlines* is a prototypical illustration of how courts in this era—without irony—used the “dearth of legislative history” as proof positive that discrimination of sex-linked traits was not afforded protections if that characteristic was associated with a group identity that Congress failed to specifically address.<sup>57</sup> That approach waned after the Supreme Court teased out the relationship between unlawful sex discrimination, sex stereotyping, and individual-level policing of gender behavior in *Price Waterhouse v. Hopkins*.

### A. Prescriptive Stereotypes and the Individualist Turn

When the Supreme Court decided *Price Waterhouse v. Hopkins* a few years after *Ulane*, the Court emphasized the individualist antistereotyping principle embedded in Title VII: “[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.”<sup>58</sup> In the case of Ann Hopkins, for example, she was locked out of a partnership because decision makers placed a premium on women maintaining their femininity while climbing the corporate

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56. *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984).

57. *Id.* at 1085–86.

58. 490 U.S. 228, 251 (1989).

ladder.<sup>59</sup> Because Hopkins failed to walk, talk, dress, carry, and style herself in a sufficiently feminine manner for her evaluators, she was shut out of a lucrative partnership.<sup>60</sup>

Though the antistereotyping principle long preceded it, *Price Waterhouse* explained the principle's scope. The Supreme Court, in *City of Los Angeles Department of Water and Power v. Manhart*,<sup>61</sup> and *Arizona Governing Committee v. Norris*,<sup>62</sup> held that Title VII's antistereotyping principle bars employers from fashioning policies around sex-based assumptions even if they are generally true, precisely because they are not universally valid.<sup>63</sup> Thus, *Manhart* and *Norris* stand for the proposition that employers cannot use descriptive sex stereotypes—stereotypes that erase individual differences because of generalized assumptions—to discriminate against protected workers. Courts had little trouble applying Title VII's protections for individuals that suffered discrimination because of group-based assumptions.

*Price Waterhouse* was a straightforward application and reaffirmation of the antistereotyping principle. In this sense, the decision was unremarkable because it hardly marks the genesis of Title VII's antistereotyping principle. Yet, *Price Waterhouse* articulated that gendered expectations cannot be used to discriminate against employees because of their personality, behavior, and appearance.<sup>64</sup> Herein lies *Price Waterhouse's* significance: it clarified that prescriptive sex stereotyping, whereby an employer scrutinizes an employee's characteristics for gender conformity, violates the antistereotyping principle as equally as descriptive sex stereotypes.

*Price Waterhouse* reinforced the basic precept that undergirded *Manhart*, *Norris*, *Martin Marietta*, and other rulings that made employers liable for using myths about women's employability to discriminate: Title VII's reach is not limited to ontological discrimination, rather the Act commands employers to refrain from using any gendered stereotypes—descriptive or prescriptive—to discriminate against *individuals*. The animating principles undergirding *Price Waterhouse* now placed plaintiffs like Benny Smith from

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59. *See id.* at 234–35.

60. *See id.* at 235.

61. 435 U.S. 702 (1978).

62. 463 U.S. 1073 (1983) (per curiam).

63. *Id.* at 1704, 1081–84; *Manhart*, at 707–08, 717.

64. *Price Waterhouse*, 490 U.S. at 258.

*Smith v. Liberty Mutual* “squarely within the rule applied in *Hopkins*—to refuse to hire someone simply for displaying ‘characteristics inappropriate to his sex’ is indisputably to engage in impermissible sex stereotyping.”<sup>65</sup> This doctrinal moment was pivotal for LGBTQ workers whose visible gender nonconformity made them the victim of employment discrimination; however, it initiated a riff in the law with nonsensical results.

After *Price Waterhouse*, LGBTQ workers brought sex discrimination claims under Title VII with greater, but still limited, success—notably transgender workers benefitted most from *Price Waterhouse*.<sup>66</sup> Still, sexual orientation discrimination claims were particularly cumbersome for judges to reason through. Adhering to outmoded anti-individualist frameworks, courts permitted plaintiffs’ claims to go forward only if they sufficiently pleaded enough facts that the discrimination was a result of employers acting out against female workers for being too masculine or male workers for being too effeminate, rather than discrimination motivated by the employee’s sexual orientation.<sup>67</sup>

*Price Waterhouse* sex stereotyping claims were viable for effeminate gay men or masculine lesbians, but *Price Waterhouse* did not “bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine.”<sup>68</sup> After *Price Waterhouse*, LGB plaintiffs’ employment discrimination claims were scrutinized in district courts heavily as judges struggled to parse evidence of sexual orientation discrimination with evidence offered in support of sex stereotyping.<sup>69</sup> The hairsplitting required by circuit courts’ precedent resulted in a messy undertaking for judges

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65. 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, 51 (1995) (quoting *Smith v. Liberty Mut. Ins. Co.*, 395 F. Supp. 1098, 1099 n.2 (N.D. Ga. 1975)).

66. See, e.g., *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1251 (11th Cir. 2017) (holding a lesbian plaintiff with masculine traits could pursue a gender nonconformity claim under Title VII despite circuit precedent foreclosing sexual orientation discrimination claims under Title VII).

67. *Id.* at 1254; see also, e.g., *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 198, 201 (2d Cir. 2017) (permitting a sex discrimination claim brought by a gay man alleging he was “perceived by his supervisor as effeminate and submissive and that he was harassed for these reasons”).

68. *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000), *overruled by Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018).

69. See, e.g., *Maroney v. Waterbury Hosp.*, No. 3:10-CV-1415 (JCH), 2011 U.S. Dist. LEXIS 28262, at \*4 n.2 (D. Conn. Mar. 18, 2011); see also *Estate of D.B. v. Thousand Islands Cent. Sch. Dist.*, 169 F. Supp. 3d 320, 332–33 (N.D.N.Y. 2016).



who had to conduct a “lexical bean counting, comparing the relative frequency of epithets such as ‘ass wipe,’ ‘fag,’ ‘gay,’ ‘queer,’ ‘real man,’ and ‘fem’ to determine whether discrimination is based on sex or sexual orientation.”<sup>70</sup> Courts’ attempts to parse out gender roles and sexual orientation was an exercise in futility given the entangled relationship between sexism and homophobia.<sup>71</sup>

In the wake of the newfound attention to Title VII’s antistereotyping principle and the unlawfulness of using prescriptive stereotypes in employment calculations, judges created an unworkable status-conduct dichotomy in Title VII doctrine that preserved the anti-individualist underpinnings of earlier sexual orientation and gender identity discrimination cases. And like before *Price Waterhouse*, courts continued to cite the intent of Title VII’s framers as a reason to exclude sexual orientation claims from the statute’s reach.<sup>72</sup> However, in this period, judges often cited not the dead hand of Congress, but the phantom hand of Congress—reasoning that since Congress failed to enact legislation introduced to expressly protect sexual orientation discrimination, the judiciary was not free to do what Congress had not.<sup>73</sup> The considerable calisthenics judges exercised to parse out stereotypes vis-à-vis gender norms

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70. *Zarda*, 883 F.3d at 121.

71. See generally Zachary A. Kramer, *Of Meat and Manhood*, 89 WASH. U. L. REV. 287, 318 (2011) (“Existing sex discrimination norms fall short . . . because courts have generally failed to understand that an employee can be transgender or gay or vegetarian and still be a gender nonconformist. . . . When a court considers a gender-stereotyping claim, the court should judge the claim based not on the plaintiff’s identity, but on whether the alleged discrimination was motivated by stereotypical gender expectations.”); Anthony Michael Kreis, *Policing the Painted and Powdered*, 41 CARDOZO L. REV. \_\_ (forthcoming 2020) (describing the inextricable relationship throughout legal history between homophobia, sexism, and gender roles).

72. See *Hopkins v. Balt. Gas & Elec. Co.*, 77 F.3d 745, 749 (4th Cir. 1996) (“In the context of Title VII’s legislative history, however, it is apparent that Congress did not intend such sweeping regulation. The suggestion that Title VII was intended to regulate everything sexual in the workplace would undoubtedly have shocked every member of the 88th Congress, even those most vigorously supporting passage of the Act.”); see also *Hammer v. Saint Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 704 (7th Cir. 2000) (“Congress intended the term ‘sex’ to mean ‘biological male or biological female,’ and not one’s sexuality or sexual orientation.”), *overruled by Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017).

73. See *Bibby v. Phila. Coca-Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001) (“Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation.”); *Simonton*, 232 F.3d at 35 (“But we are informed by Congress’s rejection, on numerous occasions, of bills that would have extended Title VII’s protection to people based on their sexual preferences.”), *overruled by Zarda*, 883 F.3d 100; *Horton v. Midwest Geriatric Mgmt., LLC*, No. 4:17CV2324 JCH, 2017 U.S. Dist. LEXIS 209996, at \*8–9 (E.D. Mo. Dec. 21, 2017); *Pambianchi v. Ark. Tech Univ.*, No. 4:13-CV-00046-KGB, 2014 U.S. Dist.

from sexual orientation-related animus was a tortured effort to straddle legislative intent and Title VII's antistereotyping principle. While the years after *Price Waterhouse* signified an important shift towards the individual employee and more rigorous analyses of plaintiffs' claims, judges' underlying commitment to legislative intent worked to obscure individuality and wholesalesly exclude gay, lesbian, and bisexual as a group from antidiscrimination law's protections.

### B. *Mistaken Identity and Res Ipsa Loquitur Stereotyping*

One consequence of the impractical line-drawing produced by the stranglehold of anti-individualist, legislative intent-driven analysis on Title VII's sex stereotyping doctrine is the absurd result produced in mislabeled heterosexual cases. In these scenarios, a heterosexual employee who suffers discrimination because they are falsely perceived as nonheterosexual can state a claim for sex stereotyping, notwithstanding the fact that if they were *actually* gay, lesbian, or bisexual, courts would be more likely to dismiss claims for want of a plausible allegation of sex discrimination.<sup>74</sup>

Judge Richard Posner described the anomaly as "absurd," highlighting how the developed doctrine "protects effeminate men from employment discrimination, but only if they are (or are believed to be) heterosexuals."<sup>75</sup> That raises the disturbing prospect of courts weighing evidence of a plaintiff's sexual orientation. In this vein, Judge Posner predicted that this kind of claim "impels the em-

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LEXIS 187107, at \*4 (E.D. Ark. Mar. 14, 2014) ("Congress has rejected a number of proposed amendments to Title VII to prohibit discrimination on the basis of sexual orientation. The courts are not free to expand Title VII to prohibit discrimination on the basis of sexual orientation.") (citation omitted); *Mowery v. Escambia Cty. Util. Auth.*, No. 3:04CV382-RS-EMT, 2006 U.S. Dist. LEXIS 5304, at \*25 (N.D. Fla. Feb. 10, 2006) ("This Court expresses no opinion on the merits of such views, for the distinction between sex and sexual orientation is not meaningless to Congress. In fact, Congress has specifically and repeatedly rejected legislation that would have extended Title VII to protect an individual from discrimination based on his or her sexual orientation."); *Medina v. Income Support Div.*, No. CIV 03-0533 MCA/RLP, 2004 WL 7337672, at \*4 (D.N.M. June 9, 2004), *aff'd* *Medina v. Income Support Div.*, 413 F.3d 1131, 1132 (10th Cir. 2005).

74. See *Schmedding v. Tnemec Co.*, 187 F.3d 862, 864–65 (8th Cir. 1999) (permitting claim alleging discrimination because of "perceived sexual preference" to go forward as a gender stereotyping claim arising from alleged harassment that "included rumors that falsely labeled him as homosexual in an effort to debase his masculinity, not that he was harassed because he *is* homosexual or *perceived* as being a homosexual").

75. *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1067 (7th Cir. 2003) (Posner, J., concurring), *overruled by Hively*, 853 F.3d 339.

ployer to try to prove that the plaintiff is a homosexual . . . [to support] 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. . . ."<sup>76</sup>

Consider recent litigation to this effect. Marykate Ellingsworth was employed at an insurance office where she alleged her supervisor harassed her.<sup>77</sup> For one year, the supervisor degraded Ellingsworth, commenting that she “dresses like a dyke” and ridiculing her intelligence.<sup>78</sup> The supervisor remarked to Ellingsworth's colleagues that Ellingsworth “dresses like a dyke” and has a “lesbian tattoo.”<sup>79</sup> The supervisor forced her to show the tattoo to colleagues and repeatedly spread rumors in the office that Ellingsworth was a lesbian—and effectively so—her coworkers generally believed Ellingsworth was a lesbian.<sup>80</sup> Ellingsworth, however, was in fact a heterosexual in an opposite-sex marriage.<sup>81</sup>

Ellingsworth's employer moved to dismiss her Title VII harassment suit unsuccessfully, arguing that “all of [Ellingsworth's] claims are based upon . . . alleged comments about Ms. Ellingsworth being a lesbian or having the ‘characteristics’ of a lesbian.”<sup>82</sup> Had Ms. Ellingsworth self-identified as a lesbian, her claim may well have been considerably weaker under Third Circuit precedent, but the fact that her sexual orientation was misidentified triggered what was essentially a *res ipsa loquitur* sex stereotyping rule:

To be sure, it is perhaps worse (for defendant's case) that Ms. Ferrier was mistaken in her assumption that Ms. Ellingsworth is gay. The fact that Ms. Ellingsworth is not gay simply reveals that Ms. Ferrier harbored such a strong prejudice and animus as to how women should look, dress, and act, that Ms. Ferrier actually mischaracterized another person's sexual orientation because of this prejudice. Clearly, Ms. Ferrier's animus and pre-conceived gender stereotyping played a

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76. *Id.* Brian Soucek highlighted that the absurd implications for using different lenses for heterosexual and nonheterosexual employees are multifaceted because “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.” Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 AM. U. L. REV. 715, 729–30 (2014).

77. *Ellingsworth v. Hartford Fire Ins. Co.*, 247 F. Supp. 3d 546, 549 (E.D. Pa. 2017).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. Defendants' Memorandum of Law in Support of Their Motion to Dismiss at 6, *Ellingsworth*, 247 F. Supp. 3d 546 (E.D. Pa. 2016) (No. 5:16-CV-03187-LS).

role in her treatment of Ms. Ellingsworth. Otherwise, Ms. Ferrier presumably would not have berated Ms. Ellingsworth in front of her coworkers, called her a “dyke,” and forced her to reveal her “lesbian tattoo.”<sup>83</sup>

While the court’s decision to deny the motion to dismiss was ultimately correct, the idea that Ellingsworth’s claim was strengthened by her heterosexual orientation, since legislative intent purportedly cautions against recognizing sexual orientation discrimination claims under Title VII, is farcical. This analytical regime turns Title VII on its head and creates absurd results by protecting groups, not individuals.

Two years after *Ellingsworth* in another Pennsylvania federal court, a gay plaintiff proffered a complaint containing similar accusations of harassment as brought by Ellingsworth. David Troutman alleged his coworkers viciously abused him. Troutman detailed a litany of slurs made toward him including “faggot,” “fairy boy,” “feminine,” and “pickle splitter.”<sup>84</sup> Among many other forms of humiliation, Troutman asserted that his coworkers tainted new employees by warning them to be “cautious” of Troutman since he was a “flamboyant gay guy.”<sup>85</sup> Citing Third Circuit precedent, the trial court granted the employer’s motion to dismiss on the grounds “that Title VII does not protect against sexual orientation discrimination because Congress rejected legislation expressly including sexual orientation as a protected class.”<sup>86</sup> Troutman’s situation was not altogether different than Ellingsworth’s situation—and fit squarely within Third Circuit precedent.<sup>87</sup> Troutman simply had the misfortune of litigating while gay.

### C. *Unraveling Dead Hand Dominance*

When the Supreme Court decided *Price Waterhouse*, the Court infused new life into Title VII by reaffirming that employers cannot lawfully police an employee’s gender for conformity with sex-based

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83. *Ellingsworth*, 247 F. Supp. 3d at 554.

84. *Troutman v. Hydro Extrusion USA, LLC*, No. 3:18CV2070, 2019 U.S. Dist. LEXIS 87716, at \*2 (M.D. Pa. May 24, 2019).

85. *Id.*

86. *Id.* at \*8–9.

87. *See Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 292 (3d Cir. 2009) (permitting a self-described effeminate gay man’s gender stereotyping claim to proceed where the plaintiff’s alleged harassment may have been motivated by “his sexual orientation, not his effeminacy” or equally probably by “his failure to conform to gender stereotypes”).

expectations. Because of the fact-specific nature of gender nonconformity litigation like *Price Waterhouse*, the law took an important turn towards the individual and drew judges' focus away from the dead hand of a long-gone band of legislators. And, as a consequence of employment antidiscrimination law's individualist turn, many LGBTQ victims of workplace discrimination had viable remedial vehicles under state and federal law to pursue.<sup>88</sup> However, courts tried to harmonize Title VII's antistereotyping feature with its entrenched performative doctrinal group-exclusion bug, which continued to deny many workers the right to be treated as individuals and yielded results that were unpredictable and absurd.

### III. ESCAPING THE GRIP OF ANTI-INDIVIDUALISM

The EEOC in 2015 ruled that sexual orientation discrimination is an actionable form of sex discrimination under Title VII.<sup>89</sup> Some federal courts adopted full-throated the EEOC's view relatively soon thereafter. Two years after the EEOC ruling, the Seventh Circuit was the first federal appellate court to overturn precedent blocking sexual orientation discrimination claims and hold that sexual orientation discrimination claims are valid Title VII sex discrimination actions.<sup>90</sup> At the same time, other appellate courts, including the Fifth and Eleventh Circuits, reaffirmed 1970s-era precedent.<sup>91</sup> The Second Circuit joined the Seventh Circuit the next year, deepening the split among federal appellate courts. The decisions by the Seventh Circuit and Second Circuit, *Hively v. Ivy Tech* and *Zarda v. Altitude Express, Inc.*, reinvigorated Title VII's antistereotyping principle precisely because each court focused on the individual, not groups. These emerging jurisprudential wedges in Title VII doctrine reveal how employment antidiscrimination law

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88. State courts substantially relied on *Price Waterhouse* and integrated its anti-stereotyping principle into state law. See *Nelson v. James H. Knight DDS, P.C.*, 834 N.W.2d 64, 71 (Iowa 2013); *Lie v. Sky Publ'g Corp.*, No. 01-3117-J, 2002 Mass. Super. LEXIS 402, at \*9–10 (Mass. Super. Ct. Oct. 7, 2002); *Lampley v. Mo. Comm'n on Human Rights*, 570 S.W.3d 16, 24–25 (Mo. 2019); *Enriquez v. W. Jersey Health Sys.*, 777 A.2d 365, 371–72 (N.J. Super. Ct. App. Div. 2001); *Behrmann v. Phototron Corp.*, 795 P.2d 1015, 1018 (N.M. 1990); *Arcuri v. Kirkland*, 113 A.D.3d 912, 915 (N.Y. App. Div. 2014); *Graff v. Eaton*, 598 A.2d 1383, 1386 (Vt. 1991); *Gray v. Morgan Stanley DW Inc.*, No. 54347-4-I, 2005 Wash. App. LEXIS 3182, at \*15, 15 n.26 (Wash. Ct. App. Dec. 19, 2005).

89. *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 116 FEOR (LRP) 2 (2015).

90. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 351–52 (7th Cir. 2017).

91. *Wittmer v. Phillips 66 Co.*, 915 F.3d 328, 330 (5th Cir. 2019); *Bostock v. Clayton Cty. Bd. of Comm'rs*, 723 F. App'x 964, 964–65 (11th Cir. 2018).

is more protective of workers against trait-based decision making when the law works to safeguard the rights of individuals.

#### A. *Bypassing Labels for the Individual*

The Seventh Circuit and Second Circuit were the first courts to overturn their own longstanding precedents foreclosing sexual orientation discrimination claims under Title VII, on the theory that sexual orientation discrimination is a subset of sex discrimination. Contrary to every appellate court before,<sup>92</sup> the Seventh Circuit held that Title VII's sex discrimination protections extended to sexual orientation discrimination and embraced three frameworks for proving sex discrimination to support the majority's holding: comparative analysis, sex stereotyping, and associational discrimination. In *Zarda v. Altitude Express, Inc.*, a majority of the Second Circuit sitting en banc adopted the associational discrimination theory, but the other two approaches persuaded only a plurality.

In applying the comparative method, the plaintiff's sex is changed to isolate whether an employer making an adverse employment decision took the plaintiff's protected characteristic into consideration. Thus, if an employer mistreats a female worker because she has an intimate relationship with another woman, but the employer would not mistreat the employee if she had a substantially similar relationship with a man, the causation of that discrimination is the employee's sex.<sup>93</sup> Hively argued, for example, that if she was a man in a relationship with a woman, she would

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92. See *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Bibby v. Phila. Coca-Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001); *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Hopkins v. Balt. Gas & Elec. Co.*, 77 F.3d 745, 751–52 (4th Cir. 1996); *U.S. Dep't of Hous. & Urban Dev. v. Fed. Labor Relations Auth.*, 964 F.2d 1, 2 (D.C. Cir. 1992); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) (per curiam); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979) (per curiam).

93. A similar application of Title VII was used in *Hall v. BSNF Railway Co.*, in which an employer denied healthcare benefits to married same-sex couples otherwise provided to married opposite-sex couples. No. C13-2160 RSM, 2014 U.S. Dist. LEXIS 132878, at \*6–12 (W.D. Wash. Sept. 22, 2014). The company moved to dismiss the Title VII sex discrimination claim, arguing that the thrust of the plaintiff's case was really about sexual orientation discrimination, which is not expressly proscribed by federal law. *Id.* at \*2. The court denied the motion to dismiss, noting that “[p]laintiff alleges disparate treatment based on his sex, not his sexual orientation, specifically that he (as a male who married a male) was treated differently in comparison to his female coworkers who also married males.” *Id.* at \*8–9.

not have been denied a promotion to a full-time position or a contract extension.<sup>94</sup> The Seventh Circuit held that Hively's argument "describe[d] paradigmatic sex discrimination" because if her allegations were true, Ivy Tech "disadvantage[ed] her *because she is a woman*."<sup>95</sup>

Not unrelated to the comparative method is the associational discrimination framework. When an employee states an association discrimination claim, the employee alleges that an employer unlawfully took into account a protected trait of a person to whom they have a close relationship. Forms of associational discrimination might include, for example, disparate treatment because of a family member's disability or disparate treatment because of protected traits attributed to friends or spouses.<sup>96</sup> In sexual orientation discrimination cases, the plain textual application of Title VII and the associational framework essentially work hand-in-hand. If an individual is discriminated against because of an intimate relationship with a person of the same sex, the discriminatory act takes the employee's sex into account, as well as the sex of their romantic partner. This argument line was persuasive to judges on the Seventh Circuit and Second Circuit deciding sexual orientation discrimination claims. Notwithstanding the indistinguishable analytical components of a plain application of Title VII's statutory text and an associational framework in the sexual orientation discrimination context, the associational analysis speaks to the problem with employing group-centric analyses some judges have endorsed for employment discrimination doctrine.

### B. *Against the Individual*

Writing the dissent in *Hively*, Judge Diane Sykes proffered a point later repeated by other appellate judges,<sup>97</sup> that sex discrimination cannot include sexual orientation discrimination because

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94. *Hively*, 853 F.3d at 345.

95. *Id.*

96. Unlike Title VII's analytical framework, the Americans with Disabilities Act expressly protects employees from discrimination because of their relationship or association with a disabled person or an individual who is regarded as having a disability. See 42 U.S.C. § 12112(b)(4) (2012) (prohibiting employers from "excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association").

97. See *Wittmer v. Phillips 66 Co.*, 915 F.3d 328, 339 (5th Cir. 2019) (Ho, J., concurring) (arguing that *Price Waterhouse* does not support the proposition that stereotypes against gays, lesbians, and bisexuals are not per se unlawful because "under *Price Waterhouse*, sex

antigay animus does not disproportionately burden men or women in the aggregate.<sup>98</sup> Judge Skyes wrote:

For the comparison to be valid as a test for the role of sex discrimination in this employment decision, the proper comparison is to ask how Ivy Tech treated qualified gay men. If an employer is willing to hire gay men but not lesbians, then the comparative method has exposed an actual case of sex discrimination. If, on the other hand, an employer hires only heterosexual men and women and rejects all homosexual applicants, then no inference of sex discrimination is possible, though we could perhaps draw an inference of sexual-orientation discrimination.<sup>99</sup>

The *Hiveley* dissenters and proponents of the dissent's reasoning fall into the same analytical trap that captured courts throughout 1970s and 1980s—by failing to appreciate the way individuals suffer from stereotypes, judges relied on group labels to a fault. The folly of the group-centric focus would create undesirable results in other sex and race discrimination claims, like discrimination against parents or individuals in interracial relationships.

### 1. Sex-Differentiated Stereotypes and Parenthood

Consider, for example, a workplace decision maker that hews to a view of heterosexual marriage tethered to the Victorian Era market-family divide. For this person, the home is a place of feminine virtue where a woman's "natural" inclination to care for children and a woman's "innate" drive to dedicate herself to housework thrives. The husband's role, as a masculine man, is to enter the rough world of the market—to sell his labor for wages and become the family's breadwinner. With this decision maker's ideology of the family, there are strict silos of gender roles for men and women.

While considering candidates for an internal promotion, this decision maker reviewed files and culled from the pile a mother with

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stereotyping is actionable only to the extent it provides evidence of favoritism of one sex over the other"); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 158 (2d Cir. 2018) (Lynch, J., dissenting) ("[T]he homophobic employer is not deploying a stereotype about men or about women to the disadvantage of either sex. Such an employer is expressing disapproval of the behavior or identity of a class of people that includes both men and women. That disapproval does not stem from a desire to discriminate against either sex, nor does it result from any sex-specific stereotype, nor does it differentially harm either men or women vis-à-vis the other sex.") (citation omitted), *cert. granted*, *Altitude Exp., Inc. v. Zarda*, 139 S. Ct. 1599 (Apr. 22, 2019) (No. 17-1623).

98. *Hiveley*, 853 F.3d at 366.

99. *Id.* at 366–67 (Sykes, J., dissenting).



young children and a single father, who were otherwise qualified. The decision maker refuses to promote these two employees because he believes women cannot be dedicated to their work and to their small children simultaneously. Thus, he has impermissibly relied on a descriptive stereotype of women to deny an employment opportunity.<sup>100</sup> But, he also declined to promote the man with small children—not because he does not believe that a man cannot be dedicated to a job if he has small children at home, but because he believes men should not be caregivers and wants to lean on male employees for their flexibility from familial obligations. Here too, the decision maker made a calculation based on stereotypes.<sup>101</sup>

In the aggregate, the *Hively* dissent adherents' logic might dictate that the two decisions do not reflect a disproportionately burden on men or women and are, consequently, lawful. Indeed, one could claim that the discriminatory force directed at parents of small children is all about familial status—not any sex-linked trait. But in this scenario, both employees have been harmed by a sex stereotype about the role of parents and the family. While each employee has been discriminated against because of their status as a parent, the stereotypes manifested differently. So, too, is the case where an employee is discriminated against because of a sex-based expectation that men should only have relationships with women, and women should exclusively be intimate with men. Stereotypes linked to homophobia are different when applied to men versus women, but the focus on groups obscures this just as grouping the hypothetical's two employees as "parents" would hide the underlying stereotypes at play. Only when courts take the individual seriously does this relationship between the employee and stereotyping surface.

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100. See, e.g., *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (reversing summary judgment on a claim arising from an employer "not accepting job applications from women with pre-school-age children" because of sex stereotypes about family obligations).

101. See *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (describing "[s]tereotypes about women's domestic roles [as being] reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men," leading employers to deny parental leave to fathers). See generally Stephanie Bornstein, *The Law of Gender Stereotyping and the Work-Family Conflicts of Men*, 63 HASTINGS L.J. 1297 (2012) (describing the historical development of sex discrimination doctrine and male caregiver stereotyping).

## 2. The *Loving* Analogy

The law's protection for individuals in interracial marriages is also inconsistent with the anti-individualist approach taken in the *Hively* dissent and other similarly reasoned opinions. Consider the leading case on employment antidiscrimination and interracial marriage, *Parr v. Woodmen of the World Life Insurance Co.*<sup>102</sup> Parr, a white man, applied to a position at an insurance agency that did not employ or sell insurance to African-Americans.<sup>103</sup> The agency rejected Parr upon learning he was in an interracial marriage.<sup>104</sup> The district court granted the company's motion to dismiss concluding Parr was not discriminated against because of *his* race.<sup>105</sup> The circuit court reversed on appeal, holding that

Title VII proscribes race-conscious discriminatory practices. It would be folly for this court to hold that a plaintiff cannot state a claim under Title VII for discrimination based on an interracial marriage because, had the plaintiff been a member of the spouse's race, the plaintiff would still not have been hired.<sup>106</sup>

In other words, Title VII's protections applied because the employer took the applicant's race into account when denying an employment opportunity.

The *Parr* rationale does not square with anti-individualist approaches to employment discrimination doctrine. Under a group-centered analysis, the employer in *Parr* did not disproportionately burden one racial group over another and should therefore have no liability. All persons, no matter their racial group, were equally harmed by a rule that barred interracial relationships among employees. The Supreme Court instructed that this cannot be in *Loving v. Virginia*.<sup>107</sup> Virginia argued in *Loving* that the Commonwealth's antimiscegnation law did not run afoul of constitutional protections because "members of each race are punished to the same degree."<sup>108</sup> The Commonwealth thus represented to the justices that "despite [Virginia law's] reliance on racial classifications," it failed to "constitute an invidious discrimination based

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102. 791 F.2d 888 (11th Cir. 1986).

103. *Id.* at 889.

104. *Id.*

105. *Id.*

106. *Id.* at 892.

107. 388 U.S. 1 (1967).

108. *Id.* at 7–8.

upon race.”<sup>109</sup> The Court rejected that proposition, making clear that denying a right on “account of race” is a racial classification even when the burdens of the classification fall equally on racial groups.<sup>110</sup>

The principle derived from *Loving* and *Parr* is that the individual matters because if group assessments are the hallmark of antidiscrimination doctrine, the more diversity of harm an entity can inflict on protected persons, the less likely the discriminatory actor will be held to account. This cannot be. Thus, the question must always be whether the individual has suffered discrimination because of a protected trait, not whether a discriminator burdens everyone equally because of a protected trait.

#### a. The New Dead Hand Vogue

Not all jurists subscribe to the idea that *Loving* should figure into the analytical calculus whatsoever. Judge Sykes’s dissent in *Hively* strongly rejected the notion that a *Loving* analogy should apply because “*Loving* rests on the inescapable truth that miscegenation laws are inherently racist. They are premised on invidious ideas about white superiority and use racial classifications toward the end of racial purity and white supremacy.”<sup>111</sup> The history of white supremacy thus plays a critical role in the anti-individualist approach because the racist underpinnings of antimiscegenation laws are, for the approach’s proponents, different than opposition to same-sex relationships, which the *Hively* dissenters proffer “is not inherently *sexist*” insofar that the opposition purportedly does not “promote or perpetuate the supremacy of one sex.”<sup>112</sup>

Scholarship challenges the assertions made by the *Hively* and *Zarda* dissenters about the relationship between homophobia and sexism.<sup>113</sup> Nevertheless, that white supremacy was the motivation

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109. *Id.* at 8.

110. *Id.* at 11–12.

111. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 368–69 (7th Cir. 2017) (Sykes, J., dissenting).

112. *Id.* at 368.

113. See, e.g., Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994) (arguing that misogyny and masculinity’s supremacy undergirds antigay animus); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 187 (1988) (same); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1019 n.227 (1984) (“There is a deep, complex interrelationship between sexist and homophobic attitudes in a patriarchal society.”).

behind antimiscegenation laws is not relevant because Title VII is not concerned about whether an employer's consideration of an employee's protected trait is racist or sexist, but whether an employer disparately treated an employee because of a protected characteristic. For this reason white employees can bring Title VII race discrimination claims,<sup>114</sup> sex discrimination claims are cognizable when brought by men,<sup>115</sup> and black employees can bring race discrimination claims on allegations of interracial mistreatment<sup>116</sup>—all of which do not necessarily implicate racism or sexism.

This pushback, however, is little more than a newly fangled attempt to double down on a group-centric analysis and repackage legislative intent. While Congress was primarily concerned about dismantling Jim Crow and vestiges of white supremacy when it enacted Title VII, that does not override the applicability of Title VII to various forms of trait-based discrimination suffered by persons belonging to historically dominant groups or inflicted by individuals belonging to historically disadvantaged groups.

Faced with a claim of intraracial discrimination, one court plainly drew the connection between white supremacy as a primary matter of congressional concern and the straightforward application of the statute, reasoning that “it is not impossible for one black person to discriminate against another black person *on the basis of race or color*” notwithstanding the fact that within the “legislative history of this statute, it is most difficult to discern any specific contemplation of intraracial discrimination.”<sup>117</sup>

The only way a court can attempt to distinguish the logic of *Loving* from the logic of same-sex associational claims, is to make *Loving* exceptional. And the only way to deem the analytical tools embedded in *Loving* as limited to combat white supremacy is to say that Title VII must focus on the power dynamics between groups—*at the expense of individuals*—and only when problematic power dynamics align with what was at the forefront of legislators' moti-

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114. See, e.g., *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976) (permitting a claim where white employee terminated for misconduct alleged similarly situated black employees were not terminated).

115. See, e.g., *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (holding same-sex sexual harassment actionable under Title VII).

116. *Ross v. Douglas Cty.*, 234 F.3d 391, 393 (8th Cir. 2000).

117. *Hansborough v. City of Elkhart Parks & Recreation Dep't*, 802 F. Supp. 199, 202–03 (N.D. Ind. 1992).

vation. Such a one-off approach to antidiscrimination law diminishes the individual worker and undermines a basic rule that, as a general matter, no protected trait is entitled to more robust protections under antidiscrimination statutes than any other.<sup>118</sup> Though it could be confused for something new, *Loving* exceptionalism is the same anti-individualist, dead hand performative analysis of old. It only acquired a patina with age.

### CONCLUSION

When deciding whether sexual orientation and transgender discrimination claims are cognizable sex discrimination claims under Title VII, the Supreme Court's understanding of what "because of sex" means will be tested as much as the Justices' commitment to Title VII's command that employers may not discriminate against individuals. As the history of sex discrimination doctrine reveals, the law can do significant damage to the civil rights of protected persons when a court looks over the aggrieved person and imposes group labels on the individual for the effect of rendering all persons similarly situated to a plaintiff vulnerable and without recourse. The Supreme Court must not lose the individual amongst the crowd and reject arguments favoring the exclusion of LGBTQ people from Title VII's sex discrimination protections that are grounded in anti-individualist theories of discrimination.

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118. See *Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1083–84 (1983) (per curiam) (“[U]nder Title VII a distinction based on sex stands on the same footing as a distinction based on race . . . .”); see also Anthony Michael Kreis, *Against Gay Potemkin Villages: Title VII and Sexual Orientation Discrimination*, 96 TEX. L. REV. ONLINE 1, 10 (2017) (discussing the equal footing principle for sex, religion, and race discrimination claims).