Changing Definitions of Sex under Title VII

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I. Introduction

Since Title VII was passed as part of the Civil Rights Act of 1964, more than 50 years ago, American attitudes about sexual minorities have changed dramatically. This change has been hard won by activists, medical professionals, social scientists, and others who have advocated for greater tolerance and inclusion of sexual minorities in society. As is often the case, jurisprudence has slowly but steadily come to reflect changing popular opinion. Federal and state courts, as well as the executive branch, have recently recognized crucial rights for sexual minorities under equal protection principles, including the right to privacy in sexual relations, in Lawrence v. Texas, 539 U.S. 558 (2003), and the right to marriage, in Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

Progress towards full legal equality for sexual minorities has been piecemeal, however, and significant gaps in protection remain. One of the most important gaps has been the exclusion of sexual minorities from Title VII’s prohibition against employment discrimination “because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. §2000e-2(a)(1). For decades, courts and federal agencies have relied upon a blend of plain language statutory construction, congressional intent, and a “common sense” rationale to hold that discrimination “because of sex” does not include discrimination against gay or transgender individuals. Employment discrimination jurisprudence is not impervious to larger trends in society, however, and there is a growing movement to reinterpret Title VII precedent and the very language of the statute to bring sexual minorities within the scope of its protection. In making this doctrinal shift (or, more frankly, reversal), courts and federal agencies have revisited the fundamental question of how to define “sex” itself.


2 For example, according to the public opinion polling company Gallup, the percentage of Americans who find homosexuality “morally acceptable” rose from 38% in 2002 to 63% in 2015. Following this trend, the percentage of American supporting gay marriage rose from 35% in 1999 to 60% in 2015. See Jeffrey M. Jones, Majority in U.S. Now Say Gays and Lesbians Born, Not Made, GALLUP (2015), http://www.gallup.com/poll/183332/majority-say-gays-lesbians-born-not-made.aspx; Justin McCarthy, Record-High 60% of Americans Support Same-Sex Marriage, GALLUP (2015), http://www.gallup.com/poll/183272/record-high-americans-support-sex-marriage.aspx.

II. Definitions of Sex in Medical and Social Science

In asking “what is sex” in the context of the law, it is helpful to start with the clarity of widely accepted definitions currently in use by the medical, social science, and activist communities. In these fields, sex comprises a set of biological and physiological characteristics, such as reproductive organs and hormonal chemistry that all human beings (and most animals) are born with. While the common perception is that there are two sexes, male and female, there is also a third sex, “intersex,” that describes people who are born with physiological characteristics that are both male and female.

Gender comprises a set of socially determined behaviors, attitudes, and norms that are assigned to people based on their sex at the time of birth. As with sex, there are two generally recognized genders, masculine and feminine. In recent times, activists have advocated for the recognition of a wider spectrum of nuanced gender identities within and outside of these two basic categories. A category that has recently gained popular attention is transgender, which describes a person whose experienced/expressed gender does not match the one assigned at birth. Its counterpart is “cisgender,” which describes a person whose sex and gender assigned at birth do match throughout their lives. Another addition to the traditional masculine/feminine binary is “gender fluid,” which describes a person who experiences/expresses both masculine and feminine gender in varying degrees or within different contexts.

Sexual orientation is the nature of one’s emotional and sexual attractions to others, as defined by the biological sex of the partners. Heterosexual people are emotionally and sexually attracted to people of the opposite sex; homosexual people are emotionally and sexually attracted to people of the same sex. Here, as with sex and gender, there is also a push by some to recognize a richer diversity of human behavior than is captured by these binary categories – bisexuality comprises attraction to opposite and same-sex people; asexuality comprises no sexual attraction to others of either sex, etc. In addition to these concepts of sex, gender, and sexual orientation, there is also a growing effort to develop and refine terms that accurately describe the great variety of emotional and sexual connections between people, and how they identify themselves.

It is important to note that the distinctions between and within sex, gender, and sexual orientation are often tied to history and culture. While it might appear that new identities have

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4 The label commonly used in the past, “transsexual,” has recently become a more specific term to describe people who have elected to change their physiological and biological sex characteristics from one sex to another (through surgery, hormone therapy, etc.). Because many transgender people are not able or do not want to undergo these physical changes, the broader, more inclusive term “transgender” is generally preferred. See GLAAD Media Reference Guide - Transgender Issues, GLAAD, http://www.glaad.org/reference/transgender (last visited Mar. 22, 2016) (hereinafter “GLAAD Guide”).

5 For a list of contemporary vocabulary for sex and gender concepts, see Comprehensive* List of LGBTQ+ Term Definitions, IT’S PRONOUNCED METROSEXUAL, http://itspronouncedmetrosexual.com/2013/01/a-comprehensive-list-of-lgbtq-term-definitions/ (last visited Mar. 22, 2016); see also GLAAD Guide, supra note 4.
emerged overnight, understandings of sex, gender, and sexual orientation have always shifted over time, and have varied drastically in different cultures around the world. Many cultures have long recognized gender fluidity or transgender, for example, as part of the spectrum of sexual identity. More importantly, it is vital to recognize that while we struggle to precisely describe or define these very intimate, subjective aspects of human life, the underlying diversity of experience the words relate to has always existed; it is only the vocabulary that is new.

Social and medical science, and sexual minorities themselves, have been developing definitions for sex, gender, and sexual orientation that are increasingly more precise. This trend has developed in part to better understand and protect people whose sex and/or gender identities do not fit conventional norms, and who often struggle to explain how their appearance, behavior, desires, and/or psychology departs from traditionally recognized categories. In this context, there has been a push by experts and activists to clarify that “sex” is not synonymous with gender, sexual orientation, relationship preferences, etc., although it is obviously related. The law, however, has moved much more slowly to disentangle these concepts, often conflating them or drawing hazy, even inconsistent, distinctions among them.

III. Defining Sex in American Jurisprudence

While social attitudes, politics, and legal doctrine are all generally moving towards increased recognition and protection of sexual minorities, many of whom were either victimized by or simply invisible to mainstream society for most of American history, the law has taken a different path to a more sophisticated conception of sex, gender, and sexuality. Unlike sociology and medicine, which are on a course to develop ever more granular definitions for behavior and identity, legal advocates have had significant success recently in taking the opposite tack by arguing for a more capacious understanding of the fundamental concept, “sex.” Legal doctrine has always been rather imprecise and inept when engaging with sex-related concepts, often with the result (and perhaps motive) of denying legal protections to sexual minorities. As the law moves towards a more inclusive application of equal protection, the focus has not been on emphasizing the distinctions between sex/gender/sexual orientation, but rather on articulating how these concepts are interrelated.

The reason for this is, in part, an accident of history. When Title VII was passed as part of the Civil Rights Act of 1964, legal and popular culture did not yet have a conception of “sex” that distinguished between biological and social factors. Generally speaking, “sex” and “gender” were used interchangeably to categorize people as simply men or women. It was only in the

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6 See Kevin Barry, Brian Farrell, Jennifer Levy & Neelima Vanguri, A Bare Desire to Harm: Transgender People and the Equal Protection Clause, B.C. L. REV. (forthcoming March 2016) (collecting historical sources that recount practices in a wide variety of cultures that we now deem transgender, transvestism, or otherwise non-conforming gender behavior).

7 For an in-depth analysis of this topic, see Francisco Valdes, Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society, 83 CAL. L. REV. 1 (1994). Valdes argues that the conflation of these concepts has historically served to favor heterosexual males, and its “impact on life and law is neither natural, nor neutral, nor benign.” Id. at 8.
decades following the passage of the Civil Rights Act of 1964 that activists, medical experts, social scientists, and theorists articulated distinctions between physical sex, socially determined gender, and sexual orientation. Prior to these developments, the word “sex” was still generally synonymous with “gender,” and there was little acknowledgement of the difference between biology and behavior. Since its inception, then, “sex” in Title VII has always been something of an amorphous term, with meanings that included interrelated but otherwise distinct concepts.

A. Sex and Gender

Because the relationship between sex and gender was muddled at the inception of Title VII, courts have historically been rather careless about parsing the distinction between the two. Twenty-five years after Title VII became law, the Supreme Court articulated a construction of “because of sex” that explicitly included the concept of gender in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). The Court held that “sex stereotyping,” such as punishing a female employee for exhibiting qualities that were deemed inappropriate only because a woman was displaying them (aggressiveness, etc.), was prohibited under Title VII. The Court’s reasoning in Price Waterhouse is somewhat clumsy by modern theoretical standards, setting out a conflation of sex and gender so complete, unconscious, and unexamined that it purported to find “gender” “on the face of the statute,” despite the fact that its own citation clearly indicated that Title VII has no literal reference to gender at all:

Congress’ intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute. In now-familiar language, the statute forbids an employer to “fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment,” or to “limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s ... sex.” 42 U.S.C. §§ 2000e–2(a)(1), (2) (emphasis added). We take these words to mean that gender must be irrelevant to employment decisions.

Price Waterhouse, 490 U.S. at 239–40 (footnote omitted).

8 To the degree that the distinction between sex and gender was acknowledged, it was nearly always done so in relation to an individual whose behavior (i.e., gender) did not comport with their physical sex, and who was therefore labeled as deviant. The notion of the “unnaturalness” of a masculine woman or feminine man is based on the premise that biological sex and conditioned gender should be entirely consistent (female/feminine; male/masculine). See Valdes, supra note 7, at 47–51.

9 While Price Waterhouse was not a unanimous decision, the minority split turned on the issue of whether Title VII mandates a but-for causation standard and took no issue with the sex stereotyping theory set out in the majority opinion. The dissent openly conceded that “Hopkins plainly presented a strong case both of her own professional qualifications and of the presence of discrimination in Price Waterhouse’s partnership process.” Price Waterhouse, 490 U.S. at 295 (Kennedy, J., dissenting).
Later in the opinion, in articulating its holding for the appropriate causation standard under Title VII, the Court approached a description of the relationship between sex and gender, although it did not recognize the two concepts as entirely distinct:

In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman. In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.

Id. at 250 (footnote omitted). In these passages, the Court articulates concepts that are somewhat confusing based on our current understanding of these ideas. First, it ignores the distinction between sex and gender by using these two terms synonymously. Second, the Court coins the term “sex stereotyping” for what is, in essence, our modern concept of gender (behaviors that are expected of an individual based on their biological sex). In *Price Waterhouse* we thus have an evolving awareness that sex and gender interrelate, although the language of the Court had not yet aligned with our modern usage and understanding.

With our more precise contemporary sense of the ideas involved, we can clarify *Price Waterhouse* in this way: “sex stereotyping,” i.e., holding individuals to standards of conduct based on gendered norms, is discrimination “because of sex” because gender itself is defined by the sex of individuals and the behaviors that we expect from them as a result of this biological status. 10 This analysis—that “sex” in Title VII includes related characteristics, identity, or status for which sex is an essential component—has been the emerging legacy of *Price Waterhouse* in a number of more recent EEOC and federal court opinions concerning gender identity and sexual orientation. In the period between increasing protection for sexual minorities throughout law and society, and the inevitable day when the Supreme Court will rule directly on the question of sexual minorities under Title VII, *Price Waterhouse* is fueling the shift towards inclusion in lower courts and agency rulings. It is important to note that this development in the law inexplicably took decades to develop, with many decision-makers declining to extend *Price Waterhouse* to its logical conclusion.

The tribunal making the most active use of *Price Waterhouse* in recent years has arguably been the EEOC, whose evolving Title VII jurisprudence for federal employees illustrates the move towards a more comprehensive definition of “because of sex.” On the question of whether “sex” includes transgender status, for example, the EEOC opined for nearly 30 years that it did not (including numerous cases decided after *Price Waterhouse*). In what appears to be the first EEOC opinion involving a “transsexual” employee, *Casoni v. USPS*, EEOC DOC 01840104,
1984 WL 485399 (Sept. 28, 1984), decided five years before Price Waterhouse, the EEOC held that “nothing in the legislative history of Title VII indicates that such claims were intended to be covered by its provisions.” Even after Price Waterhouse was decided in 1989, the EEOC and numerous federal courts declined for many years to extend the logic of that case’s sex/gender analysis to claims of transgender discrimination.11

In 2012, the EEOC issued a Strategic Enforcement Plan (SEP) that included “coverage of lesbian, gay, bisexual and transgender individuals under Title VII’s sex discrimination provisions,” as one of the agency’s national priorities.12 Just a few months later, the EEOC made good on its promise, now using the broader term “transgender,” in Macy v. Holder, EEOC DOC 0120120821, 2012 WL 1435995 (Apr. 20, 2012). Reaching back past its own more recent precedents to rely heavily on Price Waterhouse, the EEOC held that sex discrimination under Title VII does include discrimination on the basis of gender identity. In taking stock of Price Waterhouse two decades later, Macy observed that the opinion and subsequent federal decisions established that sex and gender are “used interchangeably to describe the discrimination prohibited by Title VII.” Id. at *5. The EEOC noted:

That Title VII’s prohibition on sex discrimination proscribes gender discrimination, and not just discrimination on the basis of biological sex, is important. If Title VII proscribed only discrimination on the basis of biological sex, the only prohibited gender-based disparate treatment would be when an employer

11 Most of the EEOC cases decided between 1984 and 2012 did not offer much in the way of independent rationale for their holdings. See, e.g., Kowalczyk v. Brown, EEOC DOC 01942053, 1994 WL 744529, at *2 (Dec. 27, 1994) (summarily rejecting transsexualism and homosexuality as grounds for sex discrimination claims, with citations to Sixth and Seventh Circuit opinions). These cases often simply cited Ulane v. Eastern Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984), without further elaboration. In Ulane, the Seventh Circuit held that Title VII did not provide discrimination protections to “transsexuals” because Congress did not intend “such a broad sweeping of the untraditional and unusual within the term ‘sex’ as used in Title VII.” Id. at 1086. In reversing the lower court, which had found that transsexual discrimination was “because of sex,” the Ulane court took shifting positions that clearly evinced discomfort with the social implications of protecting sexual minorities. The court first claimed to construe Title VII according to “ordinary, common” meanings of the words in the statute, but then shifted its focus to the legislative intent of the sex discrimination provision without explanation. Citing Congress’ failure to pass amendments to Title VII that specifically established protections for homosexuals and transsexuals (two groups that the court purported to see distinctly while it nonetheless grouped them together throughout), the court determined that Congress had implicitly rejected the extension of Title VII to these individuals. Id. at 1085–86. The Ulane analysis of legislative intent behind sex in Title VII, which rests on the premise that “sex” was added to the statute as a joke or scuttling tactic that merited no serious intent or debate, is almost ubiquitous in legal writing. For a refutation of this standard account, see Robert C. Bird, More Than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act, 3 Wm. & M. J. WOMEN & L. 137 (1997).

prefers a man over a woman, or vice versa. But the statute’s protections sweep far broader than that, in part because the term “gender” encompasses not only a person’s biological sex but also the cultural and social aspects associated with masculinity and femininity.

_id._ at *6. The agency went on to conclude:

When an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment related to the sex of the victim. This is true regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person. In each of these circumstances, the employer is making a gender-based evaluation, thus violating the Supreme Court's admonition that an employer may not take gender into account in making an employment decision.

_id._ at *7 (internal quotation marks and citations omitted).

The _Macy_ opinion thus reflects contemporary distinctions between sex and gender and provides a straightforward analysis of the fundamental concepts involved: because bias against gender identity, i.e., transgender status, is based on attitudes about how people should behave who have been assigned a particular gender at birth based on their biological sex, disparate treatment on this basis is gender discrimination. Under _Price Waterhouse_, gender discrimination is encompassed by sex discrimination, and is therefore prohibited by Title VII. While _Macy_ remains something of an outlier, applicable only to federal employee claims and cited very infrequently since it was issued, the opinion noted recent decisions from the Sixth, Ninth, and Eleventh Circuits that also found that bias against transgender people constitutes sex discrimination under the sex-stereotyping analysis in _Price Waterhouse_. _Id._ at *7–8 (citing _Smith v. City of Salem, Ohio_, 378 F.3d 566 (6th Cir. 2004); _Schwenk v. Hartford_, 204 F.3d 1187 (9th Cir. 2000); _Glenn v. Grumby_, 663 F.3d 1312 (11th Cir. 2011)).

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13 Of the three opinions citing _Macy_ since 2012, only a single case, _Roberts v. Clark Cty. Sch. Dist._, No. 215CV00388JADPAL, 2016 WL 123320, at *8–9 (D. Nev. Jan. 11, 2016), cites _Macy_ for its substantive holding that transgender discrimination is prohibited under Title VII. The EEOC has continued to pursue claims on behalf of transgender employees since _Macy_ was decided. _See Fact Sheet: Recent EEOC Litigation Regarding Title VII & LGBT-Related Discrimination_, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Mar. 1, 2016), http://www.eeoc.gov/eeoc/litigation/selected/lgbt_facts.cfm (noting that the agency had filed four lawsuits on behalf of transgender employees as of March 2015) (hereinafter “EEOC LGBT Fact Sheet”).
It is interesting to note that while the Macy opinion ostensibly grounded its ruling in a purely logical application of Price Waterhouse and the basic concepts of sex and gender, Price Waterhouse had been precedent for 23 years when Macy was decided. In that time, as discussed above, many federal courts and the EEOC itself had not found that Price Waterhouse required the inclusion of transgender status within “sex.”¹⁴ The timing of these developments shows that it is not merely the routine application of precedent that is shaping the emerging definitions of sex. Instead, a growing number of legal decision-makers have revisited relatively longstanding precedent, found that general principles can be transformative (maybe even radical) if taken to their fullest logical extent, and availed themselves of a powerful mechanism for granting the protections of Title VII to certain sexual minorities. While some observers might protest that these developments reveal a willingness to bend the law into whatever ideological direction certain groups might prefer, others may reasonably view the developments as the delayed vindication of important principles.¹⁵

¹⁴ Surprisingly, the Macy opinion failed to acknowledge these prior decisions by the EEOC and federal courts.

¹⁵ In admitting that its conclusion goes farther than the original intention of Congress, Macy relied on Supreme Court authority from Oncale for the principle that the content of a statutory provision must ultimately guide its interpretation:

To be sure, the members of Congress that enacted Title VII in 1964 and amended it in 1972 were likely not considering the problems of discrimination that were faced by transgender individuals. But as the Supreme Court recognized in Oncale v. Sundowner Offshore Services, Inc.:

[S]tatutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits “discrimination . . . because of . . . sex” in . . . employment. [This] . . . must extend to [sex-based discrimination] of any kind that meets the statutory requirements.

523 U.S. at 79–80; see also Newport News, 462 U.S. at 679–81 (rejecting the argument that discrimination against men does not violate Title VII despite the fact that discrimination against women was plainly the principal problem that Title VII's prohibition of sex discrimination was enacted to combat).

B. Sex and Sexual Orientation

While the relationship between sex and gender under Title VII has been complicated by the fact that the two words were used interchangeably for decades, the relationship between sex and sexual orientation in discrimination law has been complicated by an unwillingness to acknowledge any intrinsic connection between the two concepts. This refusal has been based, in part, on deeply held biases against homosexuality and judicial reluctance to protect gay and lesbian employees without explicit instruction from Congress to do so.

The first Supreme Court case addressing sexual orientation in the context of Title VII, Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998), raised the issue under a set of complex factual circumstances that did not squarely require the Court to decide whether “sex” includes sexual orientation per se. The male plaintiff in Oncale worked on an oil rig and had been targeted for intense harassment by other male employees, including physical assault “in a sexual manner” and threats of rape. Id. at 77. In a relatively short opinion, the Court held that same-sex harassment was actionable under Title VII if the plaintiff could show that the harassment was “because of sex.” Oncale thus expanded and contracted the protections of Title VII by rejecting the per se rule barring same-sex harassment claims while simultaneously rejecting the per se rule that sexualized harassment was, in itself, sex discrimination.16

While the take-away headline from Oncale was that same-sex harassment was prohibited by Title VII, the ruling was more limited in its protections of gay and lesbian employees than it seemed at first blush. The Court was careful to avoid expressly protecting employees on the basis of their sexual orientation, and focused instead on the sexual orientation of the harasser (consistent with the sexual desire model of opposite-sex harassment). As such, the opinion fell short of meaningful protections for gay and lesbian employees in two ways. First, the holding in Oncale did not affirmatively recognize any cause of action for the plaintiff if he had been targeted for humiliation and assault in the workplace because he was gay (or perceived to be). Second, setting aside the plaintiff’s sexual orientation, because the Court’s ruling focused on the sexual orientation of the harassers, the decision did not make clear whether the plaintiff could prevail with his Title VII claim if his co-workers actually identified as heterosexual, and had only used the threat of sexual violence as a way to bully him.17

16 Prior to Oncale, most litigants and scholars assumed that sexualized harassment was “because of sex” under Title VII; following the decision, there was a distinct requirement to show that the conduct was motivated by the sex of the plaintiff, separate from its sexual nature. See David S. Schwartz, When is Sex Because of Sex? The Causation Problem in Sexual Harassment Law, 150 U. PENN. L. REV. 1697, 1701 (2002).

17 The extremely scant account of the facts in Oncale suggests that the Court did not want to delve into the specifics of the sexual orientation questions at issue. Single-sex environments that involve harassment and assault raise exceptionally complicated issues of real and perceived gender identity and sexual orientation, and it is perhaps unsurprising that the Court’s analysis was as abstract as possible under the circumstances.
not, and did not purport to, address whether sexual orientation discrimination is sex discrimination.

In the years following *Oncale*, popular opinion about sexual orientation underwent a drastic transformation and the Supreme Court issued a number of landmark decisions that explicitly recognized the privacy interests and marriage rights of gays and lesbians. The Court, however, has yet to make an unequivocal decision as to whether Title VII prohibits discrimination on the basis of sexual orientation. In the absence of such a ruling, courts have arrived at a variety of conclusions.\(^\text{18}\)

Just as the EEOC stepped out ahead of many federal courts on transgender protections under Title VII in *Macy*, the agency has recently taken a strong stance on sexual orientation discrimination in *Baldwin v. Foxx*, EEOC DOC 0120133080, 2015 WL 4397641, at *5 (July 16, 2015). In an exceptionally careful and comprehensive opinion, *Baldwin* held that “sexual orientation is inherently a ‘sex-based consideration,’ and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII.”

\(^{18}\) Compare, *e.g.*, *Glenn v. Brumby*, 663 F.3d 1312, 1316–20 (11th Cir. 2011) (in case decided on equal protection grounds, court notes that Title VII’s sex-discrimination protections extend to transgender people under a sex-stereotyping theory); *Smith v. City of Salem*, 378 F.3d 566, 571 (6th Cir. 2004) (discussing *Price Waterhouse* and holding that homosexual employee properly stated a Title VII sex discrimination claim where he alleged that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind employer’s adverse actions); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874–75 (9th Cir. 2001) (same); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999) (claim for sex discrimination could be grounded in comments targeting gay man for “effeminate behavior,” but dismissing claim because sex stereotyping theory had not been advanced before trial court); with *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1084–85 (7th Cir. 2000) (“Congress intended the term ‘sex’ to mean ‘biological male or biological female,’ and not one’s sexuality or sexual orientation. Therefore, harassment based solely upon a person’s sexual preference or orientation (and not on one’s sex) is not an unlawful employment practice under Title VII.”) (citation omitted); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 265 (3d Cir. 2001) (plaintiff’s claim indicated only that he was being harassed on the basis of his sexual orientation, rather than because of his sex, and the district court properly determined that there was no cause of action under Title VII); *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979) (discharge for homosexuality is not prohibited by Title VII); *Oiler v. Winn–Dixie Louisiana, Inc.*, 2002 WL 31098541 (E.D. La. Sept. 16, 2002) (courts have continued to hold that discrimination on the basis of sexual preference or orientation is not actionable under Title VII because it is not discrimination based on a person’s “sex”); *Mims v. Carrier Corp.*, 88 F. Supp. 2d 706, 714 (E.D. Tex. 2000) (discrimination on basis of sexual orientation not actionable under Title VII, as “[n]either sexual orientation nor perceived sexual orientation constitute protected classes under the Civil Rights Act. Therefore, lacking membership in a protected class, the plaintiff’s claim fails as a matter of law”); *Broadus v. State Farm Ins. Co.*, No. 98-4254CVCSOWECF, 2000 WL 1585257, at *4 n.2 (W.D. Mo. 2000).

Due in part to the unsettled nature of the law in this area, many LGBT advocates have pursued federal legislation with explicit protections for LGBT employees, such as the Employment Non-Discrimination Act and, more recently, the Equality Act, which would remove the issue from judicial interpretation. These efforts are ongoing and it is not yet clear how they will overlap with or disrupt developments related to Title VII interpretation.
EEOC’s view, “‘sexual orientation’ as a concept cannot be defined or understood without reference to sex,” and sexual orientation discrimination is therefore “premised on sex-based preferences, expectations, stereotypes, or norms.” *Id.* Consistent with the trend towards more detailed and more precise theoretical explications of sex and gender, *Baldwin* articulated three descriptions of the “inescapable link” between sex discrimination and sexual orientation discrimination, all of which bring the latter within the protections of the former. *Id.*

First, “[s]exual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee’s sex.” *Id.* The EEOC provided the example of a female employee who displays a photo of her female spouse and is suspended, whereas a male co-worker who does the same thing (displays a photo of his female spouse) faces no discipline. In this scenario, the female employee has been singled out for worse treatment simply because of her sex. This conception of sexual orientation discrimination is not focused on the nature of sexual orientation as an extension of personal identity, or any other theory of sexuality as an innate characteristic. Instead, the analysis is purely disparate treatment-based: two workers who do the very same thing face different consequences because of their sex. And, indeed, the EEOC noted that the same analysis would hold true if the disparate treatment were directed at a straight employee who was disciplined for displaying a photo of a spouse of a certain sex and a gay employee was not. *Id.*

Second, “[s]exual orientation discrimination is also sex discrimination because it is associational discrimination on the basis of sex.” *Id.* at *6. The EEOC drew here on the associational discrimination analysis under Title VII in the context of race discrimination claims where an employee has faced adverse actions for associating with people of a certain race to their employee’s displeasure or disapproval. The EEOC reasoned that same-sex relationships are defined by association with others, and bias against such associations is clearly sex-based if it is derived from reactions to the sex of the people involved.

Third, “[s]exual orientation discrimination also is sex discrimination because it necessarily involves discrimination based on gender stereotypes.” *Id.* at *7. This rationale builds directly on *Price Waterhouse*, which held that Title VII prohibits discrimination related to gender stereotypes about what “feminine” behavior for women and “masculine” behavior for men entails. The EEOC noted that discrimination against gay men and lesbians is “often, if not always, motivated by a desire to enforce heterosexually defined gender norms.” *Id.* at *8 (citing *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002)). Bias against homosexuality is grounded in an idea of what “real” men and women are, or should be, and what behavior is acceptable from each with regards to sexual or romantic desire. Discrimination against gay men and lesbians therefore fits comfortably within the gender stereotyping behavior that the Supreme Court has already acknowledged is prohibited under Title VII.

*Baldwin* explicitly stated that the EEOC was not crafting a new definition of “sex” to “create a new class of covered persons,” but was instead simply applying the underlying principles of sex discrimination in a rational, logical way to the claims of gay and lesbian employees. *Baldwin*, 2015 WL 4397641, at *9. This explanation might simply be a strategic attempt to minimize controversy following the decision, which the EEOC acknowledged is contrary to some district court decisions that have summarily rejected the theory that sexual
orientation discrimination falls within sex discrimination. However, the claim is consistent with the opinion’s analysis. The three grounds of reasoning lay out separate but related (and perhaps occasionally overlapping) bases for the legal conclusion, cast within the existing doctrines of Title VII. The opinion makes no great contortions; if anything, the analysis is exceedingly literal and straightforward. Within Baldwin, any disparate treatment that is based on another person’s conception of what sex or gender should mean constitutes, quite literally, sex discrimination. What pictures an employee may display at her workstation (such as that of her same sex spouse), who she may associate with on her free time (such as a same-sex romantic and/or sexual partner), and what sex/gender she prefers generally for romantic and/or sexual relationships are all distinctions that turn on the sex of the employee, from which a complex set of expectations flow.

Baldwin is not, of course, an exhaustive answer to the question “what is sex” in the law, and has limited precedential authority.\(^{19}\) At its heart, the decision holds that sexual orientation is intrinsically related to one’s sex, because we define orientation on the basis of the sexual identities of the people involved. In coming to this conclusion, the EEOC adhered to the plain language of Title VII and the fundamental concepts involved, and its outcome was consistent with the larger trend towards greater rights and protections for gay and lesbian employees. It is true, however, that the definition of sex under Macy and Baldwin is broader than was contemplated by Congress in 1964, and certainly broader than some courts have found in other cases since then.

In an effort to shape the law in this area, the EEOC has also ramped up its litigation efforts on behalf of sexual minorities in the private sector, as well.\(^{20}\) In March 2016, the EEOC filed lawsuits in federal district courts in Pennsylvania and Maryland, deploying the arguments set out in Baldwin to allege sex discrimination on the basis of sexual orientation.\(^{21}\) The agency is also currently litigating two lawsuits on behalf of transgender employees pending before federal district courts in Michigan and Louisiana.\(^{22}\) At the appellate level, the EEOC has filed numerous amicus briefs in the past two years urging federal circuit courts to adopt its construction of Title VII, including cases before the Fifth and Eleventh Circuits.\(^{23}\)

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\(^{19}\) Although EEOC cases may influence courts considering private Title VII claims, they in no way bind those courts to the conclusion that Title VII prohibits discrimination on the basis of sexual orientation and gender identity. See Burrows v. Coll. of Cent. Florida, 2015 WL 5257135, at *2 (M.D. Fla. Sept. 9, 2015) (denying a motion for reconsideration based on the EEOC’s decision in Baldwin).

\(^{20}\) See EEOC LGBT Fact Sheet, supra note 13.


\(^{23}\) See EEOC LGBT Fact Sheet, supra note 13.
While the litigation efforts of the EEOC are still in their early stages for the most part, at least some federal courts appear receptive to the agency’s position on this issue. The EEOC won a subtle, but promising, victory with a recent amicus brief in Muhammad v. Caterpillar, Inc., 767 F.3d 694, 697 (7th Cir. 2014), as amended on denial of reh’g (Oct. 16, 2014), for example. In Muhammad, a panel of the Seventh Circuit Court of Appeals originally rejected the plaintiff’s Title VII sexual orientation discrimination claim on the grounds that Title VII does not prohibit discrimination on the basis of sexual orientation. When the plaintiff petitioned for rehearing en banc, the EEOC wrote an amicus brief arguing that, at a minimum, the panel should remove references to the conclusion that Title VII’s prohibition of discrimination on the basis of sex does not include discrimination on the basis of sexual orientation. The brief argued that the court’s conclusion on this issue was based on precedents overruled by Price Waterhouse. According to the EEOC, Price Waterhouse rejected the narrow definition of sex that characterized decisions from earlier Title VII cases involving sexual orientation. Although the panel chose not to rehear the case, it amended the original opinion by removing its original rulings regarding the scope of Title VII coverage. The amendment of the opinion indicates that the Seventh Circuit was responsive to the arguments made by the EEOC and willing to leave open a question that it had otherwise been inclined to answer in the negative.

As the EEOC continues to pursue an aggressive litigation and amicus strategy on the issue of protection for sexual minorities, two things become increasingly clear. First, with prodding from the agency, some federal courts will almost certainly come to adopt the agency’s current interpretation of Title VII to recognize sexual orientation and gender identity discrimination under the law. Second, following the sea change towards a more protective Title VII that has already occurred at the EEOC and is building momentum in the federal judiciary, the Supreme Court will soon weigh in to determine the reach of “sex” in the statute.

IV. The Limitations of Sex Discrimination under Title VII Going Forward

If the recent trends in lower courts and the EEOC portend the future of Title VII doctrine, and Price Waterhouse is leveraged on behalf of an ever more inclusive antidiscrimination doctrine, the question arises of where Title VII’s “because of sex” language will hit its logical limit. How attenuated can a characteristic be from biological sex and still come within Title VII’s protective reach? In the context of sexual orientation, for instance, is an asexual employee who openly identifies as having no sexual attraction to individuals of any sex or gender discriminated against “because of sex” if her supervisor believes asexuality is unnatural and terminates her? Under the recent application of Price Waterhouse in Macy and Baldwin, that employee might prevail with a Title VII claim if she can show that her supervisor’s animus was based on the sex stereotype that a “real woman” (or “real man”) must be sexually attracted to others. The argument is cogent, but does not fit as neatly into the Price Waterhouse approach as the standard transgender or homosexuality analysis.

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Even further attenuated might be a case involving an employee who engages in sexual relationships that are non-traditional, not by virtue of the sex or gender of the others involved, but because of the nature of the relationship itself — an openly polyamorous employee, for example, or perhaps even an employee who has non-consensually non-exclusive sexual partners (i.e., someone who is “cheating” on a spouse or partner). If a supervisor learns of this behavior and takes an adverse action against the employee, or if a co-worker engages in harassment because she believes the behavior is immoral, unnatural, or otherwise offensive, has the employee suffered discrimination “because of sex”? Does “because of sex” include not only gender and sexual orientation, but sexual activity? Even with a broader interpretation of *Price Waterhouse* gaining traction, the answer is likely no. While “sex” in everyday speech can be shorthand for sexual activity, the distinction between sex-as-identity and sex-as-sexual activity has historical and conceptual significance that courts are not likely to abandon. Discrimination law has long distinguished between immutable characteristics and what might be deemed preferences or practices. The categories protected by Title VII—race, color, religion, sex, or national origin—are each immutable, involuntary, or spiritual in character. And while gender identity and sexual orientation both fit at least one of these criteria, mere sexual activity, on its own, does not. Even under a broad reading of Title VII, a plaintiff who faced adverse action or harassment because of sexual activity would have no *per se* protections under the statute, and could prevail on a sex discrimination claim only by showing that his or her treatment was different than that of other employees of another sex, and/or was related to sex stereotypes about appropriate sexual behavior for people of a particular sex.

In sum, the most reasonable and realistic limit to the definition of “sex” under Title VII is those characteristics that relate to identity, and are defined themselves in relation to a person’s physiological sex. Under current understandings in medicine, social science, and human rights advocacy, these characteristics include any and all gender identities and sexual orientations. This more robust, more logical interpretation of “sex” remains rooted in the text of the statute and the anti-discrimination principles of Title VII.

V. Conclusion

In light of *Baldwin* and *Macy*, it is clear that the most significant expansion of the legal definition of “sex” occurred not in the 21st century, but at the close of the 20th, with the 1989 ruling in *Price Waterhouse*. The consequences of that expansion were perhaps unforeseen, but have followed quite naturally from the language and concepts that the Court used then. Today, there is no shortage of discussion from scientific and activist communities about the important distinctions between sex and gender. At the time *Price Waterhouse* was decided, however, the understanding of these concepts was less sophisticated, and the Court accepted the notion that sex stereotyping (encompassed today within the concept of gender) could comprise sex discrimination with almost no discussion. Because the link between sex and gender was established with a minimum of rhetoric or ideological angst, there is little in the opinion to prevent contemporary legal actors from filling in these broad ideas with the full spectrum of sex and gender identities that we are gradually learning to recognize, define, and protect. If sex discrimination means any negative disparate treatment that relates to someone’s perception of an employee’s sex or gender—including what they are allowed to do, how they should behave and dress, who they should engage with in sexual or romantic relationships, etc.—there is no logical
basis for leaving any sexual or gender identity outside the bounds of protection because these distinctions are, like the ones we have already accepted, undoubtedly sex and/or gender “based.”

Title VII’s plain language allows for and arguably invites and/or requires a broad reading of the word sex because of its prohibition on discrimination “because of sex.” To the extent that one’s sex provides the basis for a whole slew of other identity labels—feminine, masculine, transgender, homosexual, heterosexual, asexual, etc.—these concepts are inextricably linked to sex, in the most basic sense. Indeed, our very idea of gender or sexual orientation only has meaning “because of sex,” in relation to the perception of and attitudes about biological or physiological sex.

While these connections might strike some observers as too philosophical, or too far removed from the original intention of Congress, or even from popular opinion, the relationship between these ideas appears reasonable. In the last few decades, the Supreme Court, the EEOC, and various federal and state courts have, as a general trend, steadily moved towards a more protective approach to sexual minorities, and towards a more holistic understanding of how sex is the crucial conceptual origin for gender and sexual orientation. In effect, jurisprudence is moving towards the principle that biases that are fundamentally related to a person’s sex, whether directly or indirectly through gender or sexual orientation, violate the spirit of equal protection, and the principles of anti-discrimination laws. A good faith reading of this fundamental concept naturally results in the expansion of claims that courts are willing to recognize.

Whether the law has improperly “expanded” its definition of sex, or has just become more sophisticated about understanding the way that sex anchors other characteristics of identity, is debatable. In terms of equal rights, equal protection, and equal dignity in the workplace and under the law, the trend is undeniable. And it arguably has not come from the abandonment of common sense or traditional statutory construction. Beginning with Price Waterhouse, it has come, instead, from a desire to accurately understand how sex necessarily manifests in many different ways in our social relationships with each other, which is on balance a more just and intellectually honest approach.