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Walking Title VII's Tightrope: Advice for Gay and Lesbian Title VII Plaintiffs

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Most Americans agree that workers who put in an honest day's work should not be targets of unfair discrimination in the workplace.[1] And so, Title VII of the Civil Rights Act of 1964 affords American workers the right to be free from discrimination in the terms and conditions of their employment because of their race, color, religion, sex, or national origin.[2] This protection does not, however, cover the tens of thousands of gay and

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1. *See* HUMAN RIGHTS CAMPAIGN, DOCUMENTING DISCRIMINATION 5 (2001), *available at* http://www.hrc.org/publications/pdf/DocumentingDiscrimination.pdf (last visited Oct. 28, 2003).

2. *See* Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 2355 (1964) (codified as amended at 42 U.S.C. § 2000e–2 (2000)).

lesbian Americans who suffer harassment in the workplace or even lose their jobs because of their sexual orientation.[3] When faced with claims of sexual orientation discrimination in the workplace, judges in Title VII cases are somewhat sympathetic. For instance, the United States Court of Appeals for the First Circuit stated that "harassment because of sexual orientation . . . is a noxious practice, deserving of censure and opprobrium."[4] And yet, "regardless of how appropriate we think such a law [which would protect against sexual orientation discrimination] is,"[5] "we are called upon . . . to construe a statute as glossed by the Supreme Court, not to make a moral judgment—and we regard it as settled law that, as drafted and authoritatively construed, Title VII does not proscribe harassment simply because of sexual orientation."[6]

Title VII does, however, protect against "discriminat[ion] . . . because of . . . sex."[7] Particularly, it protects against discrimination on the basis of "sex stereotyping," as in the seminal case of Ann Hopkins.[8] Hopkins began working at Price Waterhouse's Office of Government Services in 1977.[9] After completing a two-year effort to secure a $25 million contract with the State Department in 1982, Hopkins was proposed for partnership in the firm.[10] The partners praised Hopkins' character and accomplishments, describing her as an "outstanding professional" who had a "deft touch," a "strong character, independence, and integrity."[11] "On too many occasions, however, Hopkins' aggressiveness apparently spilled over into abrasiveness."[12] All the reviewing partners' negative comments about Hopkins stemmed from her "interpersonal skills."[13] They described her as "macho," saying she "overcompensated for being a woman" and required "a course at charm

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3. *See* HUMAN RIGHTS CAMPAIGN, *supra* note 1, at 5.
4. Higgins v. New Balance Athletic Shoe Co., 194 F.3d 252, 259 (1st Cir. 1999).
5. Webb v. Puget Sound Broad. Co., 1998 WL 898788, at *6 (Wash. Ct. App. 1998).
6. *Higgins*, 194 F.3d at 259.
7. 42 U.S.C. § 2000e–2(a)(1) (2000).
8. Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989).
9. *Id.* at 233.
10. *Id.* at 231, 233-34.

> [District] Judge Gesell specifically found that Hopkins had "played a key role in Price Waterhouse's successful effort to win a multi-million dollar contract with the Department of State." Indeed, . . . "[n]one of the other partnership candidates at Price Waterhouse that year had a comparable record in terms of successfully securing major contracts for the partnership."

Id. at 234 (quoting Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1112 (D.D.C. 1985) (citation omitted)).

11. *Id.* (internal quotation marks omitted).
12. *Id.*
13. *Id.* at 234-35.

school."[14] They objected to her use of profanity as unladylike.[15] However, the *coup de grace* on Hopkins' unfavorable partnership decision was the comment that she should "walk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[16]

The *Price Waterhouse* Court remarked that "[i]n passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees."[17] "The critical inquiry" required by Title VII "is whether gender was a factor in the employment decision *at the moment it was made*."[18] By first nominating Hopkins for a promotion and then denying her that promotion on the basis of its managers' stereotypes of how a woman should behave, Price Waterhouse both praised and damned Hopkins for the very same characteristic—her assertiveness. Title VII forbids employers from behaving in this way. "An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch-22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind."[19] By allowing district courts to consider remarks indicating that the employer's misplaced sex stereotypes played a factor in the employment decision as evidence of sex discrimination in violation of Title VII, the Court afforded Title VII plaintiffs one more avenue for proving a claim of impermissible sex discrimination.[20]

In *Nichols v. Azteca Restaurant Enterprises*, the United States Court of Appeals for the Ninth Circuit extended the holding of *Price Waterhouse* to conclude that effeminate men as well as masculine-acting women may formulate claims of gender stereotyping discrimination

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14. *Id.* at 235.
15. *See id.*
16. *Id.*
17. *Id.* at 239.
18. *Id.* at 241. Title VII forbids discrimination "with respect to [an employee's] compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e–2(a)(1) (2000).
19. *Price Waterhouse*, 490 U.S. at 251.
20. *See id.*

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

Id.

under Title VII.[21] In *Nichols*, Antonio Sanchez, a waiter at the defendant's chain of Mexican restaurants, suffered "a relentless campaign of insults, name-calling, and vulgarities" at the hands of his coworkers.[22] They "repeatedly referred to Sanchez in Spanish and English as 'she' and 'her,'" "mocked Sanchez for walking and carrying his serving tray 'like a woman,' and taunted him in Spanish and English as, among other things, a 'faggot' and a 'fucking female whore.'"[23] His coworkers would do this as often as several times during his shift.[24] The Ninth Circuit found this conduct "at its essence" to reflect "a belief that Sanchez did not act as a man should act,"[25] that this harassment was "because of sex,"[26] and that *Price Waterhouse* "squarely applies"[27] to protect Sanchez against the harassment he suffered while working at Azteca.

Because courts have construed Title VII in this way, gay and lesbian victims of harassment in the workplace must walk a kind of tightrope when attempting to sue their employers under Title VII. The more their complaints tell a story of discrimination because of *sexual orientation*, the more their claims will fail.[28] The more their complaints tell a story of discrimination because of *gender stereotypes*, the more their claims will succeed.[29] As Jeremy Quittner explained:

> [W]hat this means for gay people is that unless you live in a state that specifically prohibits discrimination based on sexual orientation, it's easier to win a same-sex harassment suit if you're in the closet at work. If you're

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21. 256 F.3d 864, 874 (9th Cir. 2001) ("Sanchez [one of three plaintiffs in *Nichols* and the plaintiff whose case prompted the court to issue a precedential opinion] contends that the holding in *Price Waterhouse* applies with equal force to a man who is discriminated against for acting too feminine. We agree.") (citing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 78 (1998)).

22. *Id.* at 870.

23. *Id.*

24. *See id.*

25. *Id.* at 874.

26. *Id.* at 875.

27. *Id.* at 874.

28. *See, e.g.*, Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000) ("The law is well-settled in this circuit and in all others . . . that Simonton has no cause of action under Title VII because Title VII does not prohibit harassment or discrimination because of sexual orientation.").

29. *See, e.g.*, *Nichols*, 256 F.3d at 875 ("Following *Price Waterhouse*, we hold that the verbal abuse at issue occurred because of sex . . . we further hold that the conduct of Sanchez's co-workers and supervisor constituted actionable harassment under Title VII . . . and reverse the district court's contrary conclusion."); *Simonton*, 232 F.3d at 37 ("Simonton next relies on *Price Waterhouse v. Hopkins* . . . to argue that the abuse he suffered was discrimination based on sexual stereotypes, which may be cognizable as discrimination based on sex. We find this argument more substantial than Simonton's previous two arguments, but not sufficiently pled in this case." (citation omitted)).

> out, it's less likely that the court will believe the harassment is based on your gender rather than your sexual orientation.[30]

In 2002, in *Rene v. MGM Grand Hotel*, the Ninth Circuit Court of Appeals allowed Medina Rene's claim of sex discrimination under Title VII to go forward even though most of his complaint alleged that his coworkers harassed him because of his sexual orientation.[31] A three-judge panel affirmed the district court's granting of summary judgment for Rene's employer, MGM Grand Hotel, because "the evidence he present[ed] support[ed] only the claim that he was discriminated against because of his sexual orientation."[32] The court sitting *en banc* reversed, but could not agree on the precise reason why.[33] In Part I of this Article I will discuss the three theories the *en banc* judges relied on to evaluate Rene's claim. In Part II, I consider the implications of these three theories for future gay and lesbian Title VII plaintiffs. Ultimately, I conclude that the Ninth Circuit's decision in *Rene* does not place a safety net under Title VII's tightrope for gay and lesbian plaintiffs, but it does offer some guidance for making it safely through the summary judgment phase of litigation.

I. THE FACTS AND RATIONALES OF THE DECISION IN *RENE*

In December 1993, Medina Rene landed a "plum assignment" as a butler on the twenty-ninth floor of the MGM Grand Hotel in Las Vegas, Nevada.[34] The butlers on the twenty-ninth floor are an "elite, all-male staff" who serve "wealthy and famous guests" such as Barbra Streisand and the Crown Prince of Brunei.[35] However, when his coworkers discovered he was gay, Rene's work life took a turn for the worse. At first they called him names—names like "sweetheart" and "*muñeca*"[36]—but over time the harassment escalated.[37] His coworkers started telling him crude jokes, giving him sexually oriented joke gifts, and forcing him to look at gay pornography while at work.[38] At his deposition, Rene testified that his coworkers would caress him and hug him in the way that they would caress or hug a woman by grabbing at his crotch and poking

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30. Jeremy Quittner, *Left Out of the Law*, THE ADVOCATE, Dec. 10, 2002, at 28.

31. Rene v. MGM Grand Hotel, 243 F.3d 1206, 1207 (9th Cir. 2001) (*Rene I*), *rev'd en banc*, 305 F.3d 1061 (9th Cir. 2002) (*Rene II*), *cert. denied*, 123 S. Ct. 1573 (Mar. 24, 2003).

32. *Id.*

33. *Id.*

34. Quittner, *supra* note 30, at 26.

35. *Id.*

36. *Id. Muñeca* is Spanish for "doll."

37. *See generally Rene II*, 305 F.3d at 1064.

38. *Id.*

their fingers through his clothing at his anus.[39] "I was scared to go into work, but I thought I might lose my job, and my mom was ill," Rene told *The Advocate* magazine in a later interview.[40] Rene put up with this "panoply of markedly crude, demeaning, and sexually oriented activities"[41] at the hands of his coworkers from December 1993 until the hotel fired him in June 1996.[42]

On June 20, 1996, Rene filed a complaint with the Nevada Equal Rights Commission, alleging that MGM Grand had discriminated against him because of his sex.[43] On April 13, 1997, he filed a complaint in the United States District Court for the District of Nevada, alleging that MGM Grand had committed sexual harassment in violation of Title VII.[44] He attached a copy of his complaint to the Nevada Equal Rights Commission.[45] Based on the facts Rene presented, the district court granted MGM Grand's motion for summary judgment, finding that "Title VII's prohibition of 'sex' discrimination applies only [to] discrimination on the basis of gender and is not extended to include discrimination based on sexual preference."[46] An *en banc* panel of the Ninth Circuit eventually disagreed, and advanced three theories to evaluate Rene's claim.

A. Rene's Workplace Was Pervasively Sexual in Nature

Led by Circuit Judge Fletcher, a plurality of judges on the *en banc* panel found that Rene had presented a viable claim of sexual harassment because of the pervasive sexual nature of his workplace.[47] Judge Fletcher

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39. *See id.* (internal quotation marks omitted).
40. Quittner, *supra* note 30, at 26 (internal quotation marks omitted).
41. *Rene I*, 243 F.3d at 1207.
42. *Rene II*, 305 F.3d at 1064.
43. *See id.* Before filing suit in federal court, a person who feels he or she has a claim under Title VII must file a complaint with either the Equal Employment Opportunity Commission (EEOC), or with a similar state agency. *See generally* 29 C.F.R. § 1601.13(a)(1)-(4). If an aggrieved person files his or her complaint with the EEOC, he or she has 180 days after the time of the alleged violation to file a charge. *See id.* § 1601.13(a)(1). If he or she files his or her complaint with the similar state agency, he or she has 300 days after the time of the alleged violation to file a claim with that state agency. *Id.* § 1601.13(b)(1). The state agency then forwards the complaint to the EEOC. After the EEOC receives the complaint, it will investigate the claim to see if there has been a violation of Title VII. *Id.* § 1601.15. The initial right to sue to enforce Title VII rests with the EEOC, but it may decline to sue and instead permit the aggrieved party to sue on his or her own behalf. Once an aggrieved person has notice from the EEOC of the right to sue, he or she must file his or her suit within 180 days after the EEOC issues such a notice. *See id.* § 1601.27; *see also id.* § 1601.28.
44. *See Rene I*, 243 F.3d at 1207.
45. *See id.*
46. *Id.* (citation omitted).
47. *See Rene II*, 305 F.3d at 1064.

seized upon the fact that "Rene's tormentors did not grab his elbow or poke their fingers in his eye. They grabbed his crotch and poked their fingers in his anus."[48] "Such harassment—grabbing, poking, rubbing, or mouthing areas of the body linked to sexuality—is inescapably 'because of . . . sex.'"[49] Because Title VII requires that the discrimination occur "because of" the employee's sex,[50] and because "Title VII forbids severe or pervasive same-sex offensive sexual touching," Judge Fletcher reasoned that Rene had stated a claim for sex discrimination under Title VII.[51]

But Judge Fletcher did not correctly apply the Supreme Court's theory in *Oncale v. Sundowner Offshore Services* to the facts Rene presented.[52] The *Oncale* Court concluded that the fact that the harasser and harassee are of the same sex does not automatically preclude a claim under Title VII.[53] Rather, the *Oncale* Court emphasized that "[w]hatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted '*discrimina[tion]* . . . because of . . . sex.'"[54] The Court "[has] always regarded that requirement as crucial, and as sufficient to ensure that courts and juries do not mistake ordinary socializing in the workplace—such as male-on-male horseplay and intersexual flirtation—for discriminatory 'conditions of employment.'"[55] Indeed, five days after it decided *Oncale*, the Court vacated the United States Court of Appeals for the Seventh Circuit's

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48. *Id.* at 1065.

49. *Id.* at 1066 (citing Doe *ex rel.* Doe v. City of Belleville, 119 F.3d 563, 580 (7th Cir. 1997)). *See also* Henderson v. Simmons Foods, Inc. 217 F.3d 612, 616 (8th Cir. 2000) (groping the victim and shoving a broom handle into the victim's crotch violates Title VII); Bailey v. Runyon, 167 F.3d 466, 467 (8th Cir. 1999) (grabbing the victim's crotch violates Title VII); Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138, 140 (4th Cir. 1996) (rubbing genitals against the victim's buttocks violates Title VII); Quick v. Donaldson Co., 90 F.3d 1372, 1374 (8th Cir. 1996) (grabbing and squeezing the victim's testicles and flicking his groin violates Title VII). Indeed, the Seventh Circuit in *Doe* "[had] difficulty imagining when harassment of this nature would *not* be, in some measure, 'because of' the harassee's sex—when one's genitals are grabbed . . . it would seem to us impossible to de-link the harassment from the gender of the individual harassed." *Doe*, 119 F.3d at 580.

50. 42 U.S.C. § 2000e–2(a)(1) (2000) ("It shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . *because of* such individual's . . . sex." (emphasis added)).

51. *Rene II*, 305 F.3d at 1067; *see also* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998).

52. 523 U.S. at 75.

53. *See id.* at 79 ("We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII.").

54. *Id.* at 81.

55. *Id.* (quoting 42 U.S.C. § 2000e–2(a)(1) (2000)).

decision in *Doe ex rel. Doe v. City of Belleville*[56] because it disapproved of the Seventh Circuit's holding that "[o]ne may reasonably infer . . . that H. Doe was harassed 'because of' his gender . . . from the *sexual character of the harassment itself*."[57] Other courts have recognized that the Court disapproves of this aspect of *Doe*.[58] In light of the Court's action in *Oncale* and *Doe*, it is no longer sufficient for a Title VII plaintiff to allege that his or her workplace was pervasively sexual in nature in order to make out a *prima facie* claim.

B. Rene's Coworkers Did Not Perceive Him to Conform to Their Stereotype of How "Real Men" Should Behave

A concurring group of judges on the *en banc* panel, led by Judge Pregerson, found that Rene had presented "a case of actionable gender stereotyping harassment."[59] At his deposition, Rene stated that "his co-workers teased him about the way he walked and whistled at him '[l]ike a man does to a woman.' Rene also testified that his coworkers would 'caress [his] butt, caress [his] shoulders' and blow kisses at him 'the way . . . a man would treat a woman.'"[60] For Judge Pregerson, the "conduct suffered by Rene is indistinguishable from the conduct found actionable in *Nichols*."[61] Just as Antonio Sanchez's fellow waiters teased him by acting toward him as if he were a woman,[62] Rene's fellow butlers treated him "in a variety of ways 'like a woman.'"[63] If Sanchez's Title VII claim for gender stereotyping harassment could go forward,[64] so too should Rene's.[65]

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56. 119 F.3d 563 (7th Cir. 1997), *vacated and remanded*, 523 U.S. 1001 (Mar. 9, 1998). *Oncale* was decided on March 4. *Oncale*, 523 U.S. at 75.

57. *Doe*, 119 F.3d at 575 (emphasis added). The Seventh Circuit also was able to infer harassment "because of" sex "from the harassers' evident belief that in wearing an earring, H. Doe [a teenage boy] did not conform to male standards." *Id.*

58. *See, e.g.*, E.E.O.C. v. Trugreen Ltd. P'ship, 122 F. Supp. 2d 986, 990 (W.D. Wis. 1999) ("In *Oncale*, the Supreme Court expressed explicit disapproval of this reasoning [in *Doe*]. The Court characterized *Doe* as standing for the proposition 'that workplace sexual harassment that is sexual in content is always actionable, regardless of the harasser's sex, sexual orientation, or motivation.'") (quoting *Oncale*, 523 U.S. at 79).

59. *Rene II*, 305 F.3d at 1068 (Pregerson, J., concurring).

60. *Id.* (Pregerson, J., concurring).

61. *Id.* (Pregerson, J., concurring).

62. *See* Nichols v. Azteca Rest. Enters., 256 F.3d 864, 870 (9th Cir. 2001).

63. *Rene II*, 305 F.3d at 1068 (Pregerson, J., concurring).

64. *Nichols*, 256 F.3d at 874-75 ("*Price Waterhouse* sets a rule that bars discrimination on the basis of sex stereotypes. That rule squarely applies to preclude the harassment here.").

65. *Rene II*, 305 F.3d at 1069 (Pregerson, J., concurring) ("For the same reasons that we concluded in *Nichols* that '[the] rule that bars discrimination on the basis of sex stereotypes' in *Price Waterhouse* 'squarely applie[d] to preclude the harassment' at issue there . . . I conclude that

Other courts of appeals approve of the gender stereotyping harassment approach, at least in theory. For example, in *Simonton v. Runyon*, the United States Court of Appeals for the Second Circuit commented that "the same theory of sexual stereotyping [as in *Price Waterhouse*] could apply . . . as the harassment [Simonton] endured was based on his failure to conform to gender norms, regardless of his sexual orientation."[66] Simonton, a postal worker in Farmingdale, New York, was "subjected to an abusive and hostile work environment by reason of his sexual orientation."[67] Simonton's coworkers "repeatedly assaulted him with such comments as 'go fuck yourself, fag,' 'suck my dick,' and 'so you like it up the ass?'"[68] They sent copies of *Playgirl* magazine to his home and placed pornographic pictures in his work area.[69] Yet although the Second Circuit approved of the gender stereotyping theory, when faced with the evidence Simonton presented, the court found that "Simonton ha[d] failed to plead sufficient facts for our consideration of the issue."[70] Accordingly, Simonton's claim for sex stereotyping discrimination failed.

C. Rene's Coworkers Harassed Him Because He Is Gay

Led by Judge Hug, the dissenting judges on the *en banc* panel found that Rene's claim should not go forward because he did not present a claim of discrimination "because of" "one of the five specified categories of persons named in the statute."[71] This approach follows the Ninth Circuit's reasoning in *DeSantis v. Pacific Telephone & Telegraph*.[72] There, the court concluded that Title VII's "prohibition of 'sex' discrimination applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference [sic] such as homosexuality."[73] Judge Hug noted, "[W]hile societal attitudes toward

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this rule also squarely applies to preclude the *identical harassment* at issue here." (emphasis added)).

66. 232 F.3d 33, 37-38 (2d Cir. 2000).

67. *Id.* at 34 ("The abuse he allegedly endured was so severe that he ultimately suffered a heart attack.").

68. *Id.* at 35.

69. *Id.*

70. *Id.* at 38 (citing Kern v. City of Rochester, 93 F.3d 38, 44 (2d Cir. 1996) ("A conclusory allegation . . . without evidentiary support or allegations of particularized incidents, does not state a valid claim.")).

71. *Rene II*, 305 F.3d at 1070 (Hug, J., dissenting). The five categories are race, color, religion, sex, and national origin. 42 U.S.C. § 2000e–2(a)(1) (2000).

72. 608 F.2d 327 (9th Cir. 1979).

73. *Id.* at 329-30 (footnotes omitted). Common parlance today differs from that of 1979 when *DeSantis* was decided. Today, we speak of sexual *orientation* rather than "sexual preference." Gays and lesbians object to the term "sexual preference" because for them, the sex

homosexuality have undergone some changes since *DeSantis* was decided, Title VII has not been amended to prohibit discrimination based on sexual orientation; this aspect of *DeSantis* remains good law and has been followed in other circuits."[74]

Judge Hug properly began his analysis with the Supreme Court's holding in *Oncale*.[75] The *Oncale* Court held that same-sex harassment can *sometimes* be actionable under Title VII; it did not hold that harassment based on sexual orientation is actionable.[76] *Oncale* set forth three avenues for a same-sex sexual harassment plaintiff to prove that the harassment he or she suffered was "because of" his or her sex. First, if there is "credible evidence that the harasser [is] homosexual," the plaintiff may show that he or she would not have been the target of harassment if he or she were of the opposite sex.[77] Second, if the harasser is motivated by a "general hostility to the presence of women [or men] in the workplace," the plaintiff can show discrimination because of sex.[78] Third, the plaintiff may offer "direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace."[79] However, Judge Hug remarked, "the Supreme Court did not indicate that one of the ways a plaintiff can prove same-sex discrimination is harassment because of sexual orientation."[80] For Judge Hug, because Rene "clearly stated in his deposition that the reason for the harassment was that he was gay,"[81] his claim for sex discrimination under Title VII must fail.[82]

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of their partner is not a matter of "preference"; it is an immutable characteristic not to be easily dismissed by labeling it in that way.

74. *Rene II*, 305 F.3d at 1075 (Hug, J., dissenting); *see, e.g.*, Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999); Wrightson v. Pizza Hut of Am., 99 F.3d 138, 143 (4th Cir. 1996); Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989).

75. *See Rene II*, 305 F.3d at 1074 (Hug, J., dissenting).

76. *See id.* (Hug, J., dissenting).

77. *Oncale*, 523 U.S. at 80.

78. *Id.*

79. *Id.* at 80-81. Judge Hug noted that "Rene cannot avail himself of this route because he worked on the 29th floor of the MGM Grand Hotel, where only men were employed." *Rene II*, 305 F.3d at 1075 (Hug, J., dissenting).

80. *Rene II*, 305 F.3d at 1075 (Hug, J., dissenting).

81. *Id.* (Hug, J., dissenting).

82. *See id.* at 1078 (Hug, J., dissenting) ("Rene's lawsuit was brought solely on the basis that he was harassed in the workplace because of his sexual orientation, which is not actionable under Title VII of the Civil Rights Act; therefore the summary judgment was properly entered."). *But see infra* notes 119-123 and accompanying text.

II. MAKING OUT A TITLE VII CLAIM AFTER *RENE*

What lessons can gay and lesbian Title VII plaintiffs learn from the Ninth Circuit's decisions in *Rene*?[83] Two things are clear. First, Title VII protects against *sex* discrimination, not *sexual orientation* discrimination. Second, one way to state a claim for sex discrimination is to allege gender stereotyping discrimination.[84] Courts generally agree that such a claim is at least theoretically viable.[85] However, courts have been less clear as to the precise quantum of evidence with which the gay or lesbian Title VII plaintiff must come forward in order to survive a motion for a judgment as a matter of law.[86]

A. The Burden of Proof for Gay and Lesbian Title VII Plaintiffs

A gay man or lesbian who alleges gender stereotyping harassment in his or her complaint must take care to include facts that support that claim and exclude facts that do not.[87] Frequently, however, gay and lesbian Title VII plaintiffs allege facts to support a claim of gender stereotyping discrimination *in addition to* facts to support a claim of sexual orientation discrimination.[88] In such cases, it is up to the finder of fact to separate facts relevant to a successful claim from facts irrelevant to a successful claim.[89] In other words, it is up to the finder of fact to reach into this "mixed bag" of facts and pull out a viable claim for sex

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83. *See supra* Part I.A-C.
84. *See supra* notes 6-7 and accompanying text.
85. *See supra* Part I.A-C.
86. *See infra* note 89.
87. *See supra* notes 28-30 and accompanying text.
88. *See id.*
89. A common feature of cases like *Rene*, *Simonton*, and *Bibby* is that in each of them, the district court found as a matter of law that the plaintiff had not stated a viable claim. That is, the court concluded "that there is no genuine issue as to any material fact and that the moving party [typically, the employer] is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); *see also Bibby*, 260 F.3d at 260-61 ("Because Title VII provides no protection from discrimination on the basis of sexual orientation, summary judgment was granted [for the employer] on Bibby's Title VII claim."); *Rene I*, 243 F.3d at 1207 (noting that the district court granted MGM Grand's motion for summary judgment because "Title VII's prohibition of 'sex' discrimination applies only [to] discrimination on the basis of gender and is not extended to include discrimination based on sexual preference."). Sometimes, as in *Simonton*, this comes after a motion to dismiss for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6); *see also Simonton*, 232 F.3d at 34 ("The United States District Court for the Eastern District of New York . . . dismissed Simonton's complaint . . . for failure to state a claim, reasoning that Title VII does not prohibit discrimination based on sexual orientation."). Yet in all these cases, regardless of the precise mechanism by which the district court reached its judgment adverse to the plaintiff, the plaintiff's claim of sex discrimination did not reach a jury or other factfinder.

discrimination instead of an unviable claim for sexual orientation discrimination.[90]

In *Nichols*, the Ninth Circuit allowed Antonio Sanchez's claim of sex discrimination to go forward because the evidence indicated that he "endured an unrelenting barrage of verbal abuse" based on a sex stereotype—because "other Azteca employees habitually . . . referred to him with the female gender, and taunted him for behaving like a woman,"[91] and would do so "at least once a week and often several times a day."[92] In the face of this evidence of sex stereotyping, it was easy for the court to afford less weight to the other evidence Sanchez brought that indicated his coworkers teased him because of his sexual orientation.[93] The court went on to characterize all the evidence Sanchez proffered as discrimination because of sex. "Sanchez was attacked for walking and carrying his tray 'like a woman'—i.e., *for having feminine mannerisms*."[94] Hence, in light of the rule of *Price Waterhouse*, the court allowed Sanchez's claim of sex discrimination to go forward.[95]

By contrast, the United States Court of Appeals for the Third Circuit has concluded that a plaintiff who brings only evidence of harassment based on sexual orientation cannot state a claim for sex stereotyping discrimination. In *Bibby v. Philadelphia Coca-Cola Bottling Co.*, the court considered a gay man's "same-sex sexual harassment claim."[96] Bibby had worked at the Philadelphia Coca-Cola Bottling Company since 1978.[97] In August of 1993, he experienced some medical problems that disrupted his work.[98] He complained to his supervisor, who told him to "just go" to the hospital.[99] He spent some time in the hospital being treated for depression and anxiety, but returned

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90. By this metaphor, I do not mean to suggest that the finder of fact should evaluate the plaintiff's claim blindly.

91. 256 F.3d 864, 872 (9th Cir. 2001).

92. *Id.* at 870.

93. The court also noted that Sanchez's coworkers called him "faggot" in addition to the other epithets they hurled in his direction. *Id.* at 870. Yet this evidence apparently did not hinder his otherwise successful claim for sex discrimination under Title VII. *See id.* at 874-75 (neglecting to mention the anti-gay epithets his coworkers hurled at him).

94. *Id.* at 874 (emphasis added).

95. *Id.* at 875 ("Following *Price Waterhouse*, we hold that the verbal abuse at issue occurred because of sex.").

96. 260 F.3d 257 (3d Cir. 2001).

97. *Id.* at 257.

98. *Id.* It is unclear whether Bibby's medical problems were AIDS related or if Bibby even had AIDS. *See id.* at 259 n.1 ("While Bibby claimed that he was perceived by his employers and his co-workers as having HIV/AIDS, he did not bring a claim for discrimination on the basis of perceived disability under the Americans with Disabilities Act." (citation omitted)).

99. *Id.* at 259.

to work with the permission of his doctor on December 23, 1993.[100] That same day, one of Bibby's coworkers trapped him between some palettes loaded with soda and a wall, shouting "everybody knows you're a faggot" and "everybody knows you take it up the ass."[101] Soon afterward, graffiti of a sexual nature bearing Bibby's name appeared in workplace restrooms.[102] Bibby filed a complaint with the Philadelphia Human Rights Commission (PHRC).[103] After the PHRC gave him permission to sue, Bibby filed a complaint under Title VII in the U.S. District Court for the Eastern District of Pennsylvania.[104]

The district court granted the bottling company's motion for summary judgment, concluding that Bibby had presented a claim for sexual orientation discrimination which is not protected by Title VII.[105] Bibby appealed, and the Third Circuit considered whether Bibby had also presented a claim of gender stereotyping discrimination.[106] The court noted that, following *Oncale*, "[w]hatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted '*discrimina[tion]* . . . because of . . . sex.'"[107] But because he presented only evidence that his coworkers harassed him because he is gay, "Bibby simply failed in this respect" to state a claim of gender stereotyping.[108] "[H]e did not claim that he was harassed because he failed to comply with societal stereotypes of how men ought to appear or behave."[109] Bibby claimed only that his coworkers harassed him because he is gay; hence, the Third Circuit affirmed the district court's finding of summary judgment for the employer.[110]

From *Nichols* and *Bibby*, we see the importance of alleging facts sufficient to make out a *prima facie* claim of gender stereotyping discrimination so as to survive a motion for judgment as a matter of

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100. *Id.* at 260.
101. *Id.*
102. *See id.*
103. *See id.*
104. *See id.*
105. *See id.* at 260-61.
106. *See id.* The court noted that Bibby could present a claim of discrimination "because of" sex in three ways, one of which is "by presenting evidence that the harasser's conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender." *Id.* at 262-63 (citing Simonton v. Runyon, 232 F.3d 33, 37-38 (2d Cir. 2000) (discussing the theory of gender stereotyping but declining to rule on it because the plaintiff there had not presented enough evidence for it to do so)).
107. *Id.* at 264 (quoting Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 81 (1998)).
108. *Id.*
109. *Id.*
110. *See id.* at 265.

law.[111] Like Medina Rene, however, gay men and lesbians are frequently harassed in the workplace *both* because of their sexual orientation *and* because their coworkers perceive them not to conform to some gender stereotype.[112] Thus, we must ask how much evidence of sexual orientation discrimination in the plaintiff's complaint will spoil an otherwise valid claim for sex discrimination because of gender stereotyping under Title VII.

Dissenting on the *en banc* panel in *Rene*, Judge Hug took issue with the conclusion that Rene's claim should go forward, and more specifically with the theory that Rene had stated a claim for "actionable gender stereotyping harassment."[113]

> Judge Pregerson's opinion is based upon gender stereotyping harassment, which was *never* asserted by Rene in the district court and was *not supported by evidence* presented to the district court. In my opinion this is manufacturing a claim for Rene on appeal that was *never advanced by him or supported by evidence* in the district court.[114]

Judge Hug boldly claims, "there was no contention before the district court that the harassment Rene experienced was because he acted effeminately on the job, *or for any reason other than his sexual*

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111. *See supra* Part I.A-B.

112. Indeed, sexual orientation harassment and the "homosexuality taboo" are interrelated. *See generally* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 234-73 (1994) (illuminating the "connection between sexism and the homosexuality taboo").

113. Rene v. MGM Grand, 305 F.3d 1061, 1068 (9th Cir. 2002) (*Rene II*) (Pregerson, J., concurring).

114. *Id.* at 1070-71 (Hug, J., dissenting) (emphasis added). Under Rule 8(f) of the Federal Rules of Civil Procedure, courts must construe the parties' pleadings in civil cases so as to do "substantial justice." *E.g.*, Plunkett v. Abraham Bros. Packing Co., 129 F.2d 419 (6th Cir. 1942) (citing FED. R. CIV. P. 8(f)). In *Plunkett*, the United States Court of Appeals for the Sixth Circuit considered a demand for payment of minimum wages due an employee under the Fair Labor Standards Act. The district court had dismissed the plaintiff's claim because the plaintiff had stated one proper and one improper claim under the Act. The Sixth Circuit reversed. It reasoned that the district court "could have treated that portion of the complaint as immaterial either by striking it, or by allowing it to remain upon the theory that it in no way harmed the defendant." *Id.* at 421 (citing Haddock v. Springfield Yellow Cab Co., 1 F.R.D. 504 (S.D. Ohio 1940)). To do so would have "given recognition" to Rule 8(f), as well as the "humanitarian purposes of the Fair Labor Standards Act, one of which was to eradicate the evils attendant upon low wages in industry." *Id.* (citing Fleming v. Hawkeye Pearl Button Co., 113 F.2d 52 (8th Cir. 1940)). Along the same lines, doing "substantial justice" to a Title VII complaint as required by the Federal Rules of Civil Procedure means making an honest effort to find a Title VII claim in *every* well pleaded complaint. In this way, both trial and appellate judges can effectuate Title VII's purpose of eradicating the "entire spectrum" of sex discrimination in the workplace. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986) (quoting L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 (1978)).

orientation."[115] But the record and the other opinions tend to contradict this contention. In a footnote, Judge Hug claims that "[t]he only evidence . . . to support this contention in the entire record is one line in Rene's deposition of over 100 pages. . . . Furthermore, later questions and answers confirm that the whistling was because he was gay, not because of the way he walked."[116] Yet Judge Fletcher's plurality opinion and Judge Pregerson's concurring opinion both indicate there might have been *more* evidence in the record than merely "one line in Rene's deposition of over 100 pages."[117] Judge Fletcher noted that "Rene gave deposition testimony that he was caressed and hugged and that his coworkers would 'touch [his] body like they would to a woman.'"[118] Judge Pregerson noted that "[t]he repeated testimony that his co-workers treated Rene, *in a variety of ways*, 'like a woman' constitutes *ample evidence* of gender stereotyping."[119]

Because he would affirm the district court's granting of summary judgment for MGM Grand, Judge Hug is apparently arguing that in light of the evidence before him, no reasonable trier of fact would conclude that Rene had made out a claim for gender stereotyping discrimination.[120] But when a district court evaluates a motion for summary judgment, it must "assess[] the evidence to insure that it is at least facially plausible and capable of being accepted by a rational factfinder."[121] If it so concludes, it must deny the motion for summary judgment.[122] In their written opinions, Judges Fletcher and Pregerson disputed Judge Hug's assessment of the amount of evidence Rene brought forward to support his claim of gender stereotyping harassment. "[C]ontrary to a claim in the dissent, there is much more evidence of gender stereotyping in the present case than only 'one line in Rene's deposition of over one hundred [*sic*] pages.'"[123] In light of this discrepancy, a rational factfinder might

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115. *Rene II*, 305 F.3d at 1077 (Hug, J., dissenting) (emphasis added).

116. *Id.* at 1077 n.4 (Hug, J., dissenting). At this point in Rene's deposition, he was discussing an incident where Elisio, another butler, was teasing and whistling at Rene "[l]ike a man does to a woman." *Id.* (Hug, J., dissenting).

117. *Id.* (Hug, J., dissenting).

118. *Id.* at 1064.

119. *Id.* at 1068 (Pregerson, J., concurring) (emphasis added).

120. *Cf.* FED. R. CIV. P. 56(c) ("[Summary] judgment . . . shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.").

121. James Joseph Duane, *The Four Greatest Myths About Summary Judgment*, 52 WASH. & LEE L. REV. 1523, 1561 (1995).

122. *See* JACK H. FRIEDENTHAL, MARY KAY KANE, & ARTHUR R. MILLER, CIVIL PROCEDURE § 9.3, at 460 (3d ed. 1999).

123. *Rene II*, 305 F.3d at 1068-69 n.1 (Hug, J., dissenting).

plausibly accept Rene's claim of sex stereotyping discrimination. Hence, Judge Hug's decision to affirm summary judgment in *Rene* was incorrect. Instead, Judge Hug should have allowed a jury to decide whether "one line in Rene's deposition of over 100 pages" was sufficient evidence to support his allegation of gender stereotyping discrimination.[124]

B. What Kind of Gender Stereotyping Is Actionable Under Title VII?

In order to survive the summary judgment phase of their litigation, not only must gay and lesbian Title VII plaintiffs present more evidence of sex discrimination than of sexual orientation discrimination, but they must also present evidence of a *certain kind* of sex discrimination. In his opinion in *Oncale*, Justice Scalia noted that Title VII's "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils" not necessarily contemplated by Congress at the time it passed the Civil Rights Act of 1964.[125] Since the Court in *Price Waterhouse* has concluded that Title VII protects against gender stereotyping discrimination,[126] the reasoning of *Oncale* must extend to gender stereotyping discrimination of any kind that meets the statutory requirements.[127] In other words, Title VII protects against *any kind* of gender stereotyping which constitutes discrimination *because of* sex.

In order to flesh out this assertion, consider for a moment Title VII's protection against race discrimination in employment in the context of a *racial* stereotype that has existed (and still persists in the minds of some) in this country.[128] Even after 1865, when slavery became illegal in this country,[129] laws that forbade white and black people to marry each other persisted.[130] These anti-miscegenation laws derived from the stereotypical belief, prevalent in the minds of some, that the "miscegenation taboo" operated "as a means of protecting white women

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

125. Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 79 (1998).

126. *See generally* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

127. *Cf. Oncale*, 523 U.S. at 79-80 ("Title VII prohibits 'discriminat[ion] . . . because of . . . sex' in the 'terms' or 'conditions' of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.").

128. *See id.* at 78 ("[I]n the related context of racial discrimination in the workplace we have rejected any conclusive presumption that an employer will not discriminate against members of his own race."). *See generally* Koppelman, *supra* note 112, at 220-34 (discussing in great detail the precise nature of the relationship between racism and anti-miscegenation laws).

129. *See* U.S. CONST. amend. XIII.

130. *See* Loving v. Virginia, 388 U.S. 1, 6 n.5 (1967) (listing various anti-miscegenation laws in effect at the time the Court decided *Loving*).

from black men."[131] In its 1967 decision in *Loving v. Virginia*, the Supreme Court struck down these anti-miscegenation laws as a violation of the Equal Protection Clause.[132] The trial court had upheld the Lovings' conviction under Virginia's anti-miscegenation statute because

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.[133]

When the Virginia Supreme Court upheld the constitutionality of its anti-miscegenation statute, it "concluded that the State's legitimate purposes were 'to preserve the racial integrity of its citizens' and to prevent 'the corruption of blood,' 'a mongrel breed of citizens, and 'the obliteration of racial pride,' obviously an endorsement of the doctrine of White Supremacy."[134] The *Loving* Court rejected this stereotypical reasoning as race discrimination. "There is patently no legitimate overriding purpose *independent of invidious racial discrimination* which justifies this classification."[135]

Yet, up until 1984 it was not clear whether Title VII would protect an employee, who was married to a member of a different race, from discrimination. In *Gresham v. Waffle House, Inc.*, the U.S. District Court for the Northern District of Georgia concluded that Title VII does offer this protection.[136] Waffle House had fired Alene Gresham, a white woman, solely for being married to a black man.[137] Gresham sued, claiming Waffle House had discriminated against her because of her race.

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131. Koppelman, *supra* note 112, at 230.

> Most people recognized that (at least among whites) the miscegenation taboo tended to be held most strongly by racists, that it tended to reinforce racism, and that it played an important role in the system of white supremacy. They could not, however, be confident of the precise way in which it played this role, since the mechanisms in question took place within people's psyches.

Id. at 222 (footnote omitted). The Court in *Loving v. Virginia*, 388 U.S. 1 (1967), "did not fully explain how the prohibition of interracial marriage was linked to white supremacy, but the existence of the linkage should have been clear to most Americans." *Id.* at 223. This was certainly clear to Chief Justice Warren. *Id.* at 226. Indeed, the Court had recognized the significance of this taboo more than a century earlier in *Dred Scott v. Sanford*. *See* 60 U.S. (19 How.) 393, 409 (1857) (describing the miscegenation taboo as a "stigma, of the deepest degradation . . . fixed upon the whole [black] race.").

132. *Loving*, 388 U.S. at 12.

133. *Id.* at 3.

134. *Id.* at 7.

135. *Id.* at 11 (emphasis added).

136. 586 F. Supp. 1442 (N.D. Ga. 1984).

137. *See id.* at 1443 ("The complaint essentially alleged that she [Gresham] had been discharged from her job with defendant because of her marriage to a black man.").

Waffle House argued that Title VII only forbids "discriminat[ion] against any *individual* . . . because of *such individual's* race."[138] When it fired Gresham, Waffle House argued it was not firing her because of *her own* race, but rather because of the race of her husband, an action which its reading of Title VII does not proscribe.[139] The *Gresham* court explicitly rejected this argument by stating, "clearly, if the . . . plaintiff in the instant case . . . had been black, the alleged discrimination would not have occurred. In other words, according to [her] allegations, *but for* [her] being white, the plaintiff[] in [this case] would not have been discriminated against."[140] The *Gresham* court "[could not] imagine" that the plaintiff could have needed to allege anything else in order to state a claim under Title VII.[141]

By applying the *Loving* rationale to find race discrimination in Waffle House's decision to fire Gresham because she had married a black man, the *Gresham* court concluded that an employer's action based on a *racial stereotype*—the idea that "Almighty God . . . did not intend for the races to mix"[142] through marriage—constituted race discrimination in violation of Title VII.[143] *Gresham* thus stands for the proposition that this sort of but-for race discrimination violates Title VII. Waffle House discriminated against Gresham because of her race in that *but for* her being white, Waffle House would not have fired her because she was married to a black man.

Tracking the *Gresham* court's reasoning, a gay or lesbian plaintiff could allege gender stereotyping discrimination in violation of Title VII. He or she might make the following legal argument in his or her Title VII complaint: "My employer engaged in impermissible sex discrimination against me when my employer fired me for being gay. My employer used a gender stereotype against me in requiring me to prefer opposite-sex partners in order to keep my job or avoid harassment in the workplace. Following *Loving* and *Gresham*, but for my being a man (or woman), my employer would not have fired me for preferring male (or

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138. 42 U.S.C. § 2000e–2(a)(1) (2000) (emphasis added); *see also Gresham*, 586 F. Supp. at 1444 (noting that "[i]n its renewed motion to dismiss, defendant again argues that Title VII does not proscribe discrimination in employment on the basis of an employee's interracial marriage").

139. *Gresham*, 586 F. Supp. at 1444.

140. *Id.* at 1445.

141. *Id.*

142. Loving v. Virginia, 388 U.S. 1, 3 (1967).

143. *See Gresham*, 586 F. Supp. at 1446.

female) partners. This is my *prima facie* case." Would such an argument survive a motion for summary judgment?[144]

There are two main reasons why it might not. First, it is quite likely that a court will reject it as an attempt to bootstrap sexual orientation as a protected class into Title VII.[145] Indeed, the plaintiffs in *DeSantis v. Pacific Telephone & Telegraph* advanced precisely this argument.[146] "They [the plaintiffs] claim[ed] that if a male employee prefers males as sexual partners, he will be treated differently from a female who prefers male partners."[147] The court rejected their argument for a reason quite analogous to the reasoning of the Virginia Supreme Court in *Loving*: "[W]e note that whether dealing with men or women the employer is using the *same criterion*: it will not hire or promote a person who prefers sexual partners of the same sex."[148] At least one other court has arrived at the same conclusion, though without citing *DeSantis*.[149] Therefore, courts will likely treat an argument for protecting sexual orientation discrimination as sex discrimination under Title VII based on the *Loving* analogy as an attempt to bootstrap a protection for sexual orientation into Title VII, and reject it on that basis.

The second and more persuasive reason is that the stereotype of the "homosexuality taboo"[150] is not directly analogous to the kind of gender

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144. This is not the only phase of litigation where gay and lesbian Title VII plaintiffs' cases falter. *See supra* note 89. Nevertheless, my concern is that the jury be allowed to hear the argument, so it must naturally survive all these obstacles.

145. *See* DeSantis v. Pac. Tel. & Tel., 608 F.2d 327, 330 (9th Cir. 1979) ("Appellants now ask us to employ the disproportionate impact decisions as an artifice to 'bootstrap' Title VII protection for homosexuals under the guise of protecting men generally."). The *DeSantis* court appears to be using the term "bootstrap" in a pejorative sense. *But see* Simonton v. Runyon, 232 F.3d 33, 38 (2d Cir. 2000) ("This theory [of gender stereotype discrimination] would 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."). The *Simonton* court's use of the term is less clearly pejorative.

146. 608 F.2d 327 (9th Cir. 1979).

147. *Id.* at 331.

148. *Id.* (emphasis added); *cf. Loving*, 388 U.S. at 7-8 ("[T]he State argues that the meaning of the Equal Protection Clause, as illuminated by statements of the Framers, is only that state penal laws concerning an interracial element as part of the definition of the offense must apply equally to whites and Negroes [*sic*] in the sense that members of each race are punished to the same degree. Thus, the State contends that, because its miscegenation statutes punish equally both the white and Negro [*sic*] participants in an interracial marriage, these statutes, despite their reliance on racial classifications do not constitute an invidious discrimination based upon race."). Yet the *Loving* Court went on to strike down the law at issue there, whereas the *DeSantis* court went on to exclude the plaintiffs' claims from Title VII's coverage.

149. *See* Smith v. Liberty Mut. Ins. Co., 569 F.2d 325, 327 (5th Cir. 1978) (holding that the plaintiff's claim that he was discriminated against for being too "effeminate" "could not be 'extend[ed] . . . to situations of questionable application without some stronger Congressional mandate'") (quoting Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1090 (5th Cir. 1975)).

150. *See generally* Koppelman, *supra* note 112.

stereotyping found to be actionable in the *Price Waterhouse* line of cases. In *Price Waterhouse*, Ann Hopkins' managers "reacted negatively to Hopkins' personality because she was a woman. One partner described her as 'macho' . . . another suggested that she 'overcompensated for being a woman' . . . a third advised her to take 'a course at charm school.'"[151] None of them suggested that Hopkins might have been a lesbian, nor did any of them suggest that she did not fit their image of femininity because she might have preferred women as sex partners.[152] The stereotypes Hopkins's managers used to decide not to promote her reflected their assessment of her *superficial mannerisms* and nothing more.[153]

The court in *Nichols v. Azteca Restaurant Enterprises* began with the reasoning in *Price Waterhouse* and likewise focused heavily on the beliefs and actions of Sanchez's harassers.[154] "At its essence, the systematic abuse directed at Sanchez reflected a belief that Sanchez did not act as a man should act."[155] Sanchez's coworkers teased him about the way he walked and the way he carried his serving tray. They "repeatedly reminded Sanchez that he did not conform to their gender-based stereotypes, referring to him as 'she' and 'her.'"[156] They did not berate him because of the gender of his sex partners, nor did they suggest to him that their stereotype of masculine behavior incorporated sleeping with women.[157] In other words, the *Nichols* court focused on Sanchez's *superficial mannerisms* and nothing more to find that he had made out a claim for sex discrimination under Title VII.

The Second Circuit implicitly agrees with the *Nichols* court's assumption that sex stereotype discrimination rests upon the harassers' assessment of the plaintiffs' superficial mannerisms and nothing more. In *Simonton v. Runyon*, the court remarked that "relief would be available for discrimination based upon sexual stereotypes" because "not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine."[158] Using the terms "masculine" and "feminine" in this way is not consistent with using a

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151. Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989).

152. *See generally id.*

153. *See id.* at 250 ("[A]n employer who acts on the basis of a belief that a woman cannot [appear] aggressive, or that she must not [appear aggressive], has acted on the basis of gender.").

154. 256 F.3d 864 (9th Cir. 2001).

155. *Id.* at 874.

156. *Id.*

157. They did, however, "deride[] [him] for not having sexual intercourse with a waitress who was his friend." *Id.* Since the court does not indicate whether Sanchez is gay, we cannot be certain that his co-workers meant this statement to impugn his heterosexuality.

158. 232 F.3d 33, 38 (2d Cir. 2000).

rationale analogous to that in *Loving*. The *Loving* analogy for gay men and lesbians is that traditional sex stereotypes force men to prefer only women as sex partners, and vice versa.[159] The *Simonton* court apparently means to state that not all homosexual men are stereotypically feminine *in their mannerisms*, just as not all heterosexual men are stereotypically masculine *in their mannerisms*. Sadly, therefore, courts may not be ready to accept the homosexuality taboo as a sex stereotype against which Title VII protects gay men and lesbians.

As construed by modern courts then, Title VII protects gay men and lesbians against discrimination to the extent that they can state claims of gender stereotyping discrimination based on their coworkers' reactions to their superficial mannerisms and nothing more. Title VII will clearly not protect them if they claim that their employer discriminated against them because of their sexual orientation or that their co-workers harassed them because of their sexual orientation. Nor will courts welcome the argument that *any* discrimination against gay men and lesbians is sex discrimination because of the stereotype of the homosexuality taboo, even though they would certainly welcome an analogous argument in the context of race discrimination based on the stereotype of the miscegenation taboo.

III. CONCLUSION

Because federal law lacks specific protections against sexual orientation discrimination in the workplace, gay and lesbian American workers are uniquely vulnerable to harassment in the workplace.[160] Repeated attempts to amend Title VII to include sexual orientation as a protected class have failed.[161] In floor debate, Senator Joseph Lieberman

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159. *See, e.g.*, Koppelman, *supra* note 112, at 235 ("The recognition that in our society homosexuality is generally understood as a metaphor for failure to live up to the norms of one's gender resembles the recognition that segregation stigmatizes blacks, in that both are 'matters of common notoriety, matters not so much for judicial notice as for the background knowledge of educated men who live in the world.'") (quoting Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 426 (1960)).

160. "If sexual orientation is to be a separate category of protection under Title VII, this is a matter for Congress to enact." Rene v. MGM Grand Hotel, 305 F.3d 1061, 1076 (9th Cir. 2002) (*Rene II*) (Hug, J., dissenting).

161. The most recent attempt to amend Title VII in this way came in 2001. Section 504 of the Employment Nondiscrimination Act of 2001 would have made it an "unlawful employment practice" for an employer to "discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment of the individual, because of such individual's sexual orientation." Employment Non-discrimination Act of 2001, S. 19, 107th Cong. § 504 (2001); *cf.* 42 U.S.C. § 2000e–2(a)(1) (2000) (forbidding employers to "discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment of the individual, because of such individual's . . . sex"). Though twenty-seven

indicated he cosponsored the Employment Non-Discrimination Act of 2001 because "[b]y guaranteeing that American workers cannot lose their jobs simply because of their sexual orientation, this bill would extend the bedrock American values of fairness and equality to a group of our fellow citizens who too often have been denied the benefit of those most basic values."[162] Discrimination on the basis of sexual orientation

> takes an unacceptable toll on America's definition of itself as a land of equality and opportunity, as a place where we judge each other on our merits, and as a country that teaches its children that anyone can succeed here as long as they are willing to do their job and work hard.[163]

Yet "regardless of how important . . . such a law is"[164]—in spite of numerous judges' claims that sexual orientation discrimination is "unfortunate and distasteful,"[165] a "noxious practice, deserving of censure and opprobrium"[166]—judges continue to rebuff gay and lesbian Title VII plaintiffs' attempts to recover for acts of discrimination against them on the basis of their sexual orientation. They do this despite the fact that there is a clear avenue for them to recognize such claims—as sexual stereotyping based on society's pervasive taboo against homosexuality. Until Congress amends Title VII to afford them more substantial protection against discrimination, gay and lesbian Title VII plaintiffs must continue to walk along Title VII's tightrope if they wish to use that law to redress their claims of sex(ual orientation) discrimination in the modern American workplace.

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senators cosponsored the legislation, the bill failed to garner majority support. *See also* Oiler v. Winn-Dixie La., Inc., Civ.A-00-3114, 2002 WL 31098541, *4 n.53 (E.D. La. Sept. 16, 2002) (listing thirty-one Congressional attempts between 1981 and 2001 to extend Title VII protection to sexual orientation).

162. 147 CONG. REC. 8466, 8480 (2001).

163. *Id.*

164. Webb v. Puget Sound Broad. Co., 1998 WL 898788, at *6 (Wash. Ct. App. 1998).

165. *Rene II*, 305 F.3d at 1075 (Hug, J., dissenting).

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