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## Sexual Orientation Discrimination as a Form of Sex-Plus Discrimination

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ABSTRACT

This Article examines whether sexual orientation discrimination claims are a form of sex-plus discrimination under Title VII of the Civil Rights Act of 1964. Title VII prohibits discrimination in employment on the basis of "sex." Until very recently, every United States Court of Appeals to have interpreted Title VII's prohibition of sex discrimination had determined that it does not encompass claims on the basis of sexual orientation. Times, and judicial interpretations, are changing. In April 2017, the United States Court of Appeals for the Seventh Circuit overturned decades of precedent by holding that sexual orientation discrimination claims are indeed encompassed within Title VII's prohibition of sex discrimination, a ruling adopted only months later by the Second Circuit Court of Appeals. Although there is little mention of sex-plus discrimination in these watershed cases, this Article shows how aspects of the sex-plus doctrine are interwoven throughout the majority and concurring opinions in those cases, and argues that sex-plus theory is a valid basis upon which to recognize sexual orientation discrimination claims under Title VII.

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## INTRODUCTION

Title VII of the Civil Rights Act of 1964 makes it unlawful for employers to discriminate against employees "because of . . . sex."[1] Until 2017, every United States Court of Appeals to have interpreted Title VII's prohibition of "sex" discrimination had determined that it does not encompass discrimination claims on the basis of sexual orientation.[2]

Times, and judicial interpretations, are changing. In April 2017, the United States Court of Appeals for the Seventh Circuit became the first federal appellate court to

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1. 42 U.S.C. § 2000e-2(a)(1) (making it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin").

2. *See, e.g.*, Evans v. Georgia Reg'l Hosp., 850 F.3d 1248, 1255 (11th Cir.), *cert. denied*, 138 S. Ct. 557 (2017) (affirming Eleventh Circuit binding precedent established in Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979), that "[d]ischarge for homosexuality is not prohibited by Title VII"); Kalich v. AT&T Mobility, LLC, 679 F.3d 464, 471 (6th Cir. 2012) (stating that "[u]nder Michigan law, as under Title VII, sexual orientation is not a protected classification"); Medina v. Income Support Div., 413 F.3d 1131, 1135 (10th Cir. 2005) (stating that "Title VII's protections . . . do not extend to harassment due to a person's sexuality"); Dawson v. Bumble & Bumble, 398 F.3d 211, 217 (2d Cir. 2005) (stating that "[t]he law is well-settled in this circuit and in all others to have reached the question that . . . Title VII does not prohibit harassment or discrimination because of sexual orientation"); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 261 (3d Cir. 2001) (recognizing that Title VII makes it unlawful "to discriminate against any individual . . . because of . . . sex," 42 U.S.C. § 2000e 2(a)(1), but "does not prohibit discrimination based on sexual orientation"); Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc., 224 F.3d 701, 704 (7th Cir. 2000) (declaring that "harassment based solely upon a person's sexual preference or orientation (and not on one's sex) is not an unlawful employment practice under Title VII"); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999) (stating that as a matter of "settled law," "Title VII does not proscribe harassment simply because of sexual orientation"); Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138, 143 (4th Cir. 1996) (recognizing that "Title VII does not afford a cause of action for discrimination based upon sexual orientation"); Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989) (stating that "Title VII does not prohibit discrimination against homosexuals"); Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979) (stating that "[d]ischarge for homosexuality is not prohibited by Title VII").

hold that disparate treatment sexual orientation discrimination claims are indeed encompassed within Title VII's prohibition of sex discrimination.[3] In February 2018, the United States Court of Appeals for the Second Circuit held the same.[4] And just a few weeks before that, the First Circuit Court of Appeals declared, in a sexual harassment case, that Title VII sexual orientation discrimination claims can be brought under a "sex-plus" theory as long as the plaintiff can prove that the discriminatory treatment she suffered was at least partly based upon her gender.[5]

Although the First Circuit's opinion recognizes that sex-plus doctrine may apply in the context of sexual orientation discrimination,[6] there is little mention of sex-plus discrimination in the watershed Seventh and Second Circuit opinions,[7] which involve claims of disparate treatment

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3. Hively v. Ivy Tech Cmty. Coll. of Indiana, 853 F.3d 339, 351-52 (7th Cir. 2017); *see also* Brian Soucek, Hively's *Self-Induced Blindness*, 127 YALE L.J. F. 115, 115–16 (2017) (noting that in *Hively*, the Seventh Circuit Court of Appeals became "the first federal court of appeals to declare that sexual orientation discrimination necessarily comprises sex discrimination under Title VII," and describing *Hively* as "the most important legal success for LGBT rights since the marriage rulings").

4. Zarda v. Altitude Express, Inc., 883 F.3d 100, 112 (2d Cir. 2018).

5. *See* Franchina v. City of Providence, 881 F.3d 32, 54 (1st Cir. 2018) ("[W]e do not believe [our prior precedent] forecloses a plaintiff in our Circuit from bringing sex-plus claims under Title VII where, in addition to the sex-based charge, the 'plus' factor is the plaintiff's status as a gay or lesbian individual. . . . [W]e see no reason why claims where the "plus-factor" is sexual orientation would not be viable if the gay or lesbian plaintiff asserting the claim also demonstrates that he or she was discriminated at least in part because of his or her gender.").

6. *See id*.

7. The only references to sex-plus discrimination in these opinions include a cursory dismissal of the doctrine by a dissenting opinion in the Second Circuit case. *See* Zarda v. Altitude Express, Inc., 883 F.3d 100, 151–52 (2d Cir. 2018) (Lynch, J., dissenting) (stating that "sex-plus" discrimination claims typically "single out for disfavored status traits that are, for example, common to women but rare in men"); *id*. at 152 n.20 (acknowledging that "discrimination against a subcategory of members of one sex is also prohibited by Title VII," and stating that "[a]n employer that hires gay men but refuses to hire lesbians, or vice versa, would thus be in violation of the statute").

(intentional) discrimination.[8] Nevertheless, this Article shows how aspects of the sex-plus doctrine are woven throughout the Seventh and Second Circuit opinions. From there, this Article argues that Title VII sexual orientation discrimination claims are in fact cognizable under the sex-plus doctrine, and contends that as other courts and litigants revisit whether Title VII applies to such claims, including the United States Supreme Court,[9] they should phrase the issue in sex-plus terms.[10] As a wise Notre Dame Law Professor, Professor G. Robert Blakey, once instructed me: if you can determine how a legal issue is phrased, you can almost assuredly win the debate.[11] That advice rings true when phrasing a Title VII sexual orientation discrimination claim as a sex-plus issue.

To briefly explain the argument, discrimination claims usually involve an employer treating an employee in a particular protected class differently than those outside the employee's protected class, such as where an employer promotes male but not equally-qualified female employees,[12] or where an employer imposes different workplace

8. By way of background, employees alleging discrimination usually assert one of four types of claims: (1) disparate treatment, *see, e.g.*, Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 985–86 (1988) (explaining that disparate treatment claims involve allegations of intentional discrimination); (2) disparate impact, *see, e.g.*, Griggs v. Duke Power, 401 U.S. 424, 430–31 (1971) (authorizing disparate impact claims under Title VII); (3) harassment, *see, e.g.*, Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986) (authorizing sexual harassment claims under Title VII); and (4) retaliation, *see, e.g.*, 42 U.S.C. § 2000e-3 (2012) (making it unlawful under Title VII "for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed" discriminatory actions prohibited by Title VII).

9. Altitude Express, Inc. v. Zarda, 139 S. Ct. 1599 (2019) (granting certiorari to review the Second Circuit's decision holding that sexual orientation discrimination is a form of gender discrimination under Title VII).

10. *Cf.* Soucek, *supra* note 3, at 115–16 (noting that the *Hively* ruling "will hopefully inspire other courts to embrace its result").

11. Information about Professor Blakey can be found at the following webpage: https://law.nd.edu/directory/g-blakey/.

12. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

requirements on employees of different races.[13] Sex-plus discrimination claims do not involve such categorically distinct treatment of an entire protected group.[14] Rather, in sex-plus discrimination scenarios, an employer exercises a more specific type of sex-based animus targeting only a certain segment of males or females on the basis of both the employee's sex and another "plus" factor, as when an employer treats women with children differently than men with children due to the employer's stereotypical belief that such women, but not such men, will be unproductive or unreliable employees.[15] At its core, then, sex-plus discrimination claims "are a flavor of gender discrimination claims" in which an employer discriminates against a particular segment of males or females on the basis of sex (e.g., female) plus another characteristic (e.g., child care responsibilities).[16] This is precisely the case for sexual orientation discrimination claims.

Take, for example, a sexual orientation discrimination claim brought by a lesbian employee alleging she was fired due to her employer's discriminatory animus against homosexuals. Here, the plaintiff's claim would not be one of

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13. *See, e.g.*, Vazquez v. Caesar's Palace Stream Resort, No. 3-CV-09-0625, 2013 WL 6244568 (M.D. Pa. Dec. 3, 2013) (plaintiff, an African-American employee, brought successful race discrimination claim where she was fired for wearing her hair in braids while a white employee was not).

14. *See Franchina*, 881 F.3d at 53 (declaring that "discrimination against one employee cannot be remedied solely by nondiscrimination against another employee in that same group").

15. *See* Phillips v. Martin Marietta Corp., 400 U.S. 542, 545 (1971) (Marshall, J., concurring); *see also* Smith v. AVSC Int'l, Inc., 148 F. Supp. 2d 302, 308 (S.D.N.Y. 2001) (stating that the "sex plus" theory "recognizes that it is impermissible to treat men with an additional characteristic more or less favorably than women with the same additional characteristic"); Chadwick v. WellPoint, Inc., 561 F.3d 38, 45 (1st Cir. 2009) (discussing sex-plus discrimination and concluding that, under Title VII, "an employer is not free to assume that a woman, because she is a woman, will necessarily be a poor worker because of family responsibilities").

16. *Franchina*, 881 F.3d at 52.

*pure* gender discrimination, as the plaintiff would not argue that her gender alone led to her termination.[17] Rather, the claim would be more specific, and would allege that the plaintiff's gender combined with her particular sexual preferences are what motivated the employer's adverse action.[18]

In the example of a lesbian employee who is treated differently than her work colleagues due to her sexual orientation, the "plus" characteristic that matters is the fact of being attracted to females, as opposed to males, as it is this particular "plus" factor that triggers the employer's discriminatory animus.[19] In this context, it would be easy for the plaintiff to prove that males who were likewise attracted to females were treated more favorably, such that simply changing the plaintiff's sex would eradicate the employer's animus.[20] In this sense, the plaintiff's sex is "a motivating factor" in the employer's decision, and Title VII requires no more proof than that.[21] Accordingly, discrimination on the

17. *See, e.g.,* Hively v. Ivy Tech Cmty. Coll. of Indiana, 853 F.3d 339, 358 (7th Cir. 2017) (Flaum, J., concurring) (explaining that Hively did not allege that the College refused to promote women more generally).

18. *See id*. ("There is no allegation . . . that the College refused to promote *women*; nor is there an allegation that it refused to promote *those who associate with women*. Rather, Ivy Tech's alleged animus was against Professor Hively [based on] *a combination of these two factors*." (emphasis added)).

19. *See id.* (articulating the plaintiff's argument as follows: "Professor Hively argues that [in refusing to promote her] the College relied on her sex, because, but for her sex, she would not have been denied a promotion (*i.e.*, she would not have been denied a promotion if she were a *man* who was sexually attracted to women) [emphasis in original].").

20. *Cf. Franchina*, 881 F.3d at 52–53 (1st Cir. 2018) (rejecting defendant's argument that a lesbian plaintiff alleging sexual harassment under a sex-plus theory must present evidence of a comparative class of gay males who were *not* discriminated against).

21. *See* 42 U.S.C. § 2000e–2(m) (2012) ("Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.").

basis of sex has necessarily occurred.[22] The fact that the plaintiff's sexual preference is also a motivating factor does not change the outcome; it simply makes the sex discrimination claim a sex-plus claim, given that it is the plaintiff's sex combined with her specific sexual preference that triggers the employer's discriminatory animus.[23] Accordingly, sex-plus discrimination is a strong foundation upon which to base claims of sexual orientation discrimination.

Part I of this Article summarizes the primary theories and rationales applied by courts when validating sex discrimination claims. Part II then examines the sex-plus discrimination doctrine in detail, and provides examples where the doctrine has been applied. Part III summarizes federal appellate court opinions, mostly from an earlier era of jurisprudence, refusing to extend Title VII's protections to sexual orientation discrimination claims. Part IV details the Second and Seventh Circuit cases extending Title VII to sexual orientation discrimination claims, and demonstrates how the key rationales set forth in these cases mirror sex-plus discrimination doctrine. Finally, Part V argues that sex-plus theory is a valid basis upon which to recognize Title VII claims of sexual orientation discrimination. Part VI concludes.

## I. SEX DISCRIMINATION THEORIES AND RATIONALES

Employment discrimination statutes prohibit employers from discriminating against employees or job applicants due to certain protected characteristics, such as a person's race

22. *See Hively*, 853 F.3d at 345 (majority opinion) ("Hively alleges that if she had been a man married to a woman . . . and everything else had stayed the same, Ivy Tech would not have refused to promote her and would not have fired her. . . . This describes paradigmatic sex discrimination. . . . Ivy Tech is disadvantaging her because she is a woman.").

23. *See* discussion *infra* Part V.

or sex.[24] Regardless of the protected characteristic at issue, victims of employment discrimination usually pursue one of four types of claims: disparate treatment,[25] disparate impact,[26] harassment,[27] or retaliation.[28] Although all four types of claims are generally available across the federal anti-discrimination statutes, plaintiffs alleging discrimination usually advance claims of disparate treatment, which require proof of intentional discrimination,

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24. *See, e.g.*, Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 623(a) (2012) (making it unlawful to discriminate against employees on the basis of age); 42 U.S.C. § 2000e-2(a)(1) (2012) (making it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin"); Americans With Disabilities Act of 1990 (ADA), 42 U.S.C. § 12112 (2012) (making it unlawful for an employer to discriminate on the basis of disability). Other significant federal statutes include the Genetic Information Nondiscrimination Act of 2008 ("GINA"), 42 U.S.C. § 2000ff-1(a) (2012) (prohibiting discrimination on the basis of genetic information); the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (stating that Title VII's prohibition against sex discrimination applies to discrimination on the basis of pregnancy); and the Rehabilitation Act of 1973 ("Rehabilitation Act"), Pub. L. No. 93-112, 87 Stat. 394 (codified as amended at 29 U.S.C. § 794 (2012)) (prohibiting discrimination against federal government employees based on disabilities).

25. *E.g.*, Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 985–86 (1988).

26. *E.g.*, Smith v. City of Jackson, 544 U.S. 228, 240 (2005) (authorizing disparate impact claims under the ADEA); *see also* Griggs v. Duke Power, 401 U.S. 424, 430–31 (1971) (authorizing disparate impact claims under Title VII).

27. *E.g.*, Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986) (authorizing sexual harassment claims under Title VII); Rickard v. Swedish Match N. Am., Inc., 773 F.3d 181, 184–85 (8th Cir. 2014) (discussing workplace harassment claims based on either sex or age).

28. *See, e.g.*, 42 U.S.C. § 2000e-3 (2012) (making it unlawful under Title VII "for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter"); 29 U.S.C. § 623(d) (2012) (making it unlawful under the ADEA "for an employer to discriminate against any of his employees or applicants for employment . . . because such individual . . . has opposed any practice made unlawful by [the ADEA], or because such individual . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter").

or claims of disparate impact, which do not.[29] This Article focuses primarily on disparate treatment claims.

The most comprehensive federal statute governing employment discrimination is Title VII of the Civil Rights Act of 1964, which makes it unlawful for employers to discriminate on the basis of "sex."[30] The most obvious instance of sex discrimination is when an employer favors men over women, or vice versa,[31] as when an employer chooses not to hire women or men for a particular job.[32] Title VII encompasses more than such obvious instances of sex discrimination, however, including for example, claims based on sexual harassment in the workplace.[33]

Although the following list is not intended to be exhaustive, there are at least four major rationales advanced by courts when recognizing more subtle forms of sex discrimination under Title VII. The most overarching rationale is equal employment opportunity, which "requires that persons of like qualifications be given employment opportunities irrespective of their sex," a rationale that has been invoked to strike down separate hiring policies for men and women that deny employment opportunities to one gender.[34] A second rationale is based on the relatively

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29. *Watson*, 487 U.S. at 986–87.

30. 42 U.S.C. § 2000e-2(a)(1) (2012).

31. Wittmer v. Phillips 66 Co., 915 F.3d 328, 334 (5th Cir. 2019).

32. Hively v. Ivy Tech Cmty. Coll. of Indiana, 853 F.3d 339, 345 (7th Cir. 2017).

33. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 73 (1986).

34. Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (declaring that Title VII "requires that persons of like qualifications be given employment opportunities irrespective of their sex," such that the statute does not permit "one hiring policy for women and another for men"); *see also* Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc., 499 U.S. 187, 199–200 (1991) (striking down employer's policy barring fertile women, but not fertile men, from jobs entailing high levels of lead exposure, and declaring that such an "explicit gender-based policy is sex discrimination under [Title VII]").

unequal burdens sometimes imposed upon the sexes. Under this rationale, unlawful sex discrimination occurs when an employer imposes *unreasonably* unequal burdens on males and females in similar positions, such as when an employer disciplines female, but not male, employees based on their weight.[35] A third theory is sex stereotyping. Under this framework, unlawful sex discrimination would occur when an employer takes action against an employee based on the employee's failure to conform to the employer's stereotyped characterization of the sexes, as where a female employee is denied a promotion because she does not meet the employer's expectation of how a female should behave in the workplace.[36] Somewhat differently, sex stereotyping might occur when an employer takes an adverse action against a male or female based on the employer's stereotypical assumption of how such a person would likely behave in the workplace; this particular type of sex stereotyping would occur, for example, if an employer refuses to hire women with children, but not men with children, on the belief that such women would inevitably be bad employees.[37] Yet another

35. *Compare* Frank v. United Airlines, Inc., 216 F.3d 845 (9th Cir. 2000) (striking down a weight policy under which women were forced to meet the requirements of a medium body frame standard while men were required to meet the more generous requirements of a large body frame standard because the policy did not impose equal burdens on the sexes, but instead categorically "applie[d] less favorably to one gender"), *with* Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1109–11 (9th Cir. 2006) (en banc) (rejecting Title VII claim of sex discrimination based on a policy under which female bartenders were required to wear makeup while male bartenders were prohibited from doing so, and finding that minor differences in appearance requirements do not impose unreasonably unequal burdens on either males or females).

36. Price Waterhouse v. Hopkins, 490 U.S. 228, 250–51 (1989) (adopting the sex stereotyping theory and stating that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group").

37. *See*, *e.g.*, Chadwick v. WellPoint, Inc., 561 F.3d 38, 45–48 (1st Cir. 2009); *see also* Zachary R. Herz, Price's *Progress: Sex Stereotyping and Its Potential for Antidiscrimination Law*, 124 YALE L.J. 396, 405 (2014) (describing the employer's application of such stereotypical assumptions in Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971)).

rationale underlying certain claims of sex discrimination, one that is the focus of this Article, is sex-plus discrimination.

## II. SEX-PLUS DISCRIMINATION

Under the sex-plus discrimination doctrine, a plaintiff, often female, may bring a Title VII claim for sex discrimination if she can show that her employer discriminated against her not because of her gender *per se*, but because of the combination of her gender plus some additional factor, such as having young children.[38] As courts have developed the doctrine, the additional "plus" factor in a sex-plus case must pertain either to an immutable characteristic or the exercise of a fundamental right.[39] This section examines these two types of sex-plus discrimination claims, and section V shows how each of these types of sex-plus claims are applicable in cases involving sexual orientation discrimination.

### A. *Sex-Plus Discrimination Claims Involving a Fundamental Right*

The United States Supreme Court first ratified the notion that Title VII could be violated by an employer's discriminatory treatment of a subclass of women in *Phillips v. Martin Marietta Corp*.[40] In *Phillips*, the Court declared that sex discrimination may occur through a policy of refusing to employ women, but not men, with pre-school aged

38. *See* Franchina v. City of Providence, 881 F.3d 32, 54 (1st Cir. 2018) (recognizing that in sex-plus claims, "the simple question posed . . . is whether the employer took an adverse employment action at least in part because of an employee's sex," and applying the sex-plus theory to plaintiffs who were allegedly discriminated against at least in part because of their gender where the "plus-factor" is sexual orientation).

39. Jefferies v. Harris Cty. Cmty. Action Ass'n, 615 F.2d 1025, 1033 (5th Cir. 1980); Arnett v. Aspin, 846 F. Supp. 1234, 1239 (E.D. Pa. 1994).

40. 400 U.S. 542 (1971).

children.[41] As the *Phillips* Court explained, Title VII "requires that persons of like qualifications be given employment opportunities irrespective of their sex," a principle violated by the employer's gender-based hiring policies.[42] Importantly, *Phillips* established that when an employer discriminates against a particular subgroup of women, such as women with children, the employer may not defend its actions with evidence that it does not discriminate against women on the whole.[43] The Court thus deemed it irrelevant that at least 75 percent of the persons hired for the position at issue in that case were women (albeit those without children), given that discrimination had occurred against a more specific subgroup of females—i.e., those with young children.[44]

In a more recent example where the "plus" factor in a sex-plus claim involved the exercise of a fundamental right, the Second Circuit Court of Appeals considered a discrimination claim brought by school psychologist, Elana Back, after she was denied tenure due to an alleged stereotypical view that young mothers could not balance both work and home obligations.[45] Treating the case as one of sex stereotyping against the particular segment of women with children, the court noted that, as in *Phillips*, "discrimination against one employee cannot be cured . . . solely by favorable . . . treatment of other employees of the

41. *Id.* at 544.

42. *Id.*

43. *See id.* at 543–44 (finding that a policy of refusing to hire women with pre-school age children discriminates on the basis of sex even though at least 75% of those hired for the position were women).

44. *See id.*

45. *See* Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 115 (2d Cir. 2004) (describing the alleged stereotyping behavior). Notably, Back brought her sex discrimination claim under the Equal Protection Clause, which the court found to encompass sex-plus claims. *Id.* at 118–19.

same . . . sex,"[46] as the question is whether Back herself was discriminated against under Title VII on the basis of her sex.[47] Accordingly, the court rejected the employer's argument that it was immune from Back's allegations of gender discrimination simply because 85% of the school's teachers were women, and 71% of these women had children.[48] Rather, "what matters is how Back was treated."[49] And on this point, the court found evidence that the decision makers who denied Back tenure had stereotyped her "as a woman and mother of young children, and thus treated her differently than they would have treated a man and father of young children."[50] Such evidence, according to the court, was enough for Back's discrimination claim to survive summary judgment.[51]

In another case involving a sex-plus discrimination claim with a "plus" characteristic involving a fundamental right, *McGrenaghan v. St. Denis School*, the United States District Court for the Eastern District of Pennsylvania ruled that a teacher could maintain a Title VII sex discrimination claim as a member of a subclass of women with disabled children.[52] There, the court found evidence of discriminatory animus against mothers with disabled children, including direct

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46. *Id*. at 121 (quoting Brown v. Henderson, 257 F.3d 246, 252 (2d Cir. 2001)).

47. *Id*. at 122. This point was later reiterated by the United States Supreme Court. *See* Connecticut v. Teal, 457 U.S. 440, 453–55 (1982) (stating that the purpose of Title VII "is the protection of the individual employee, rather than the protection of the minority group as a whole," and explaining that in enacting Title VII, "Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group").

48. *Back*, 365 F.3d at 122.

49. *Id*. at 122.

50. *Id*. at 130; *see also id*. at 124 (analyzing the evidence of discriminatory motives and comments of plaintiff's supervisors, Brennan and Wishnie).

51. *Id*. at 130. Notably, summary judgment was denied only against the actual decision makers in Back's case. *See id*.

52. 979 F. Supp. 323, 327 (E.D. Pa. 1997).

evidence of discriminatory animus by the school's principal.[53] The court thus rejected the defendant's argument that it could not be liable for sex discrimination given that the person ultimately hired for the position was also a woman, reasoning that the person hired was "not a member of the subclass of women with disabled children" to which plaintiff belonged.[54]

*Phillips*, *Back*, and *McGrenaghan* are examples of sex-plus discrimination claims brought by female employees treated differently for having children.[55] Courts have recognized similar subclasses of women based on their exercise of other fundamental rights.[56] Courts have found, for example, that an employer's unfavorable treatment of married women, as compared to married men, violates Title VII.[57]

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53. *Id*.

54. *Id*. Accordingly, the court denied summary judgment to the defendant on plaintiff's sex discrimination claim. *Id*.

55. *See also* Chadwick v. WellPoint, Inc., 561 F.3d 38, 48 (1st Cir. 2009) (denying summary judgment to defendant-employer on similar sex-plus discrimination claim); Philipsen v. Univ. of Michigan Bd. of Regents, No. 06-CV-11977-DT, 2007 WL 907822, at *6–9 (E.D. Mich. Mar. 22, 2007) (recognizing a similar claim, but granting summary judgment to the defendant on plaintiff's "sex plus" claim due to a lack of evidence that plaintiff was treated differently than males with young children).

56. *Jefferies*, 615 F.2d at 1033.

57. *See, e.g.*, Coleman v. B–G Maint. Mgmt. of Colorado, Inc., 108 F.3d 1199, 1202–05 (10th Cir. 1997) (in sex-plus marital status claim, ruling that a female plaintiff must show that her male co-workers with the same marital status were treated differently, and reversing jury verdict for plaintiff due to a lack of evidence on that point); Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971) (finding employer's no-marriage rule for stewardesses to violate Title VII); Gee-Thomas v. Cingular Wireless, 324 F. Supp. 2d 875, 884, 888 (M.D. Tenn. 2004) (recognizing a sex-plus claim on the basis of sex-plus marital and family status, but ultimately dismissing plaintiff's claim because she failed to raise a genuine issue of material fact for trial on the issue of pretext); Rauw v. Glickman, No. CV–99–1482–ST, 2001 WL 34039494, at *8 (D. Or. Aug. 6, 2001) (authorizing a sex-plus marital status claim under Title VII); Jurinko v. Wiegand Co., 331 F. Supp. 1184, 1187 (W.D. Pa. 1971) (refusal to hire married women violated Title VII).

In the sex-plus marital status cases, as in *Phillips*, *Back*, and *McGrenaghan*, courts have rejected employer arguments that no discrimination occurred "on the basis of sex" because the employer did not discriminate against women as a whole.[58] In one such case, the United States Court of Appeals for the Seventh Circuit noted that an employer's no-marriage rule, which it applied to female flight stewardesses but not their male counterparts, violated Title VII even though the rule did not apply to *all* female employees, "for so long as sex is a factor in the application of the rule, such application involves a discrimination based on sex."[59] Thus, the Seventh Circuit declared, Title VII's effect "is not to be diluted because discrimination adversely affects only a portion of the protected class."[60] As another court in a similar case declared, "[i]f [a] company discriminates against married women, but not against married men, the variable[s] become[] [men and] women, and the discrimination, based on solely sexual distinctions, invidious and unlawful."[61]

### B. *Sex-Plus Discrimination Claims Involving Immutable Characteristics*

As noted, the sex-plus theory applies when an employer discriminates against a particular subclass of males or females based on the exercise of a fundamental right, such as the right to marry or have children;[62] or an immutable characteristic, such as the plaintiff's race.[63]

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58. *Jurinko*, 331 F. Supp. at 1187 (rejecting the argument).

59. *Sprogis*, 444 F.2d at 1198 (adopting the reasoning of the EEOC, as expressed in 29 C.F.R. § 1604.3(a)).

60. *Id*.

61. *Jurinko*, 331 F. Supp. at 1187.

62. *See supra* Part II.A.

63. *See* Arnett v. Aspin, 846 F. Supp. 1234, 1239 (E.D. Pa. 1994); Nicole Buonocore Porter, *Sex Plus Age Discrimination: Protecting Older Women Workers*, 81 DENV. U. L. REV. 79, 87 (2003).

Immutable characteristics are simply those the employee cannot change.[64] In the past 50 years, courts have recognized various Title VII "plus claims" involving a combination of immutable characteristics. Exemplary claims include those based on sex-plus-race (e.g., alleging discrimination against black females[65] or against Asian females[66]), race-plus-religion (e.g., alleging discrimination against a white Jewish male[67]), and sex-plus-age (e.g., involving discrimination against older women[68]). This section summarizes a few leading cases.

In one case alleging discrimination on the basis of sex-plus-race, *Jefferies v. Harris County Community Action Association*, the United States Court of Appeals for the Fifth Circuit recognized a subclass of *black women* for purposes of Title VII discrimination analysis.[69] In that case, plaintiff Dafro Jefferies, a black female, alleged that her employer discriminated against her due to her race and sex.[70] The district court separated Jefferies' single sex-plus-race claim into distinct claims of race discrimination and sex

64. David Schraub, *Unsuspecting*, 96 B.U. L. REV. 361, 378 (2016) (citing Frontiero v. Richardson, 411 U.S. 677, 686 (1973)).

65. *See e.g.*, *Jefferies*, 615 F.2d at 1034 (recognizing a subclass of black women or a sex-plus-race claim).

66. *See e.g.*, Lam v. Univ. of Hawai'i, 40 F.3d 1551, 1561–62 (9th Cir. 1994) (recognizing a subclass of Asian women or a sex-plus-race claim).

67. *See, e.g.,* Feingold v. New York, 366 F.3d 138, 153 (2d Cir. 2004) (finding sufficient evidence "to support an inference that [Feingold] was terminated on the basis of his religion and/or race").

68. *See, e.g.,* Cartee v. Wilbur Smith Assocs., Inc., No. C/A3:08-4132-JFAPJG, 2010 WL 1052082, at *4 (D.S.C. Mar. 22, 2010).

69. 615 F.2d 1025 (5th Cir. 1980).

70. *Id.* at 1028. In her complaint, Jefferies charged that HCCAA discriminated against her in promotion "because she is a woman, up in age and because she is Black." *Id.* at 1029. Jefferies' age-based discrimination claim, however, did not materialize as a live issue at trial, and was not before the court on appeal. *Id.* at 1030.

discrimination.[71] This, in turn, allowed the district court to reject Jefferies' race discrimination claim based on evidence that the promotion she sought was instead filled by a black male.[72] The district court then rejected Jefferies' sex discrimination claim due to evidence that 60–70 percent of the defendant's employees were female, who often held important positions within the organization.[73]

The Fifth Circuit Court of Appeals overturned the district court's decision for having improperly separated Jefferies' plus discrimination claim into distinct race and sex discrimination claims.[74] The court reasoned that discrimination against black females can exist even in the absence of discrimination against black men or white women.[75] Describing "black females as a distinct protected subgroup," the court concluded that "when a Title VII plaintiff alleges that an employer discriminates against black females, the fact that black males and white females are not subject to discrimination is irrelevant,"[76] particularly when invoked to *disprove* discrimination in the case at hand, as black men and white women must be treated as persons outside the subclass of black females.[77]

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71. *Id.* at 1032 (explaining that the district court did not analyze whether the plaintiff was discriminated against "based on a combination of race and sex," and instead "separately addressed Jefferies' claims of race discrimination and sex discrimination").

72. *See id.* at 1028, 1030 (rejecting Jefferies' claim of pure race discrimination in promotion, given that the person promoted to the position at issue was also black).

73. *Id.* at 1029–31.

74. *Id.* at 1032.

75. *Id.* at 1034.

76. *Id.*

77. *See id.* at 1032; *see also* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1243–44 (1991) ("[T]he experiences of women of color are frequently the product of intersecting patterns of racism and sexism, and . . . tend not to be represented within the discourses of either feminism or antiracism.").

Since *Jefferies*, numerous courts have ratified sex-plus claims by subclasses of employees in similar circumstances.[78] In one case, *Lam v. University of Hawai'i*, the United States Court of Appeals for the Ninth Circuit recognized a Title VII sex-plus-race discrimination claim brought by an Asian woman of Vietnamese descent.[79] In that case, Maivan Clech Lam filed a lawsuit claiming the University of Hawai'i's Law School discriminated against her on the basis of her race, sex, and national origin, when it twice rejected her application for a faculty position.[80] After losing at trial, Lam appealed.[81]

Examining the initial rejection of Lam's application, and focusing specifically on Lam's allegations of race and sex discrimination, the Ninth Circuit Court of Appeals declared that, "[o]n summary judgment, the existence of a discriminatory motive for the employment decision will

78. *See, e.g.*, Hicks v. Gates Rubber Co., 833 F.2d 1406, 1416–17 (10th Cir. 1987) (adopting the reasoning of *Jefferies* in recognizing a sex-plus-race hostile work environment claim); Robertson v. Wells Fargo Bank, N.A., No. 3:14-CV-01861 (VLB), 2017 WL 326317, at *8 (D. Conn. Jan. 23, 2017) (recognizing that "[a] plaintiff may bring a [discrimination] claim under a combination of two protected grounds of Title VII, such as race and gender"); Walton v. Vilsack, No. CIV.A. 09-7627, 2011 WL 3489967, at *10 (E.D. La. Aug. 10, 2011) (rejecting defendant's argument that a plaintiff cannot present evidence of discrimination against her as an African-American female); Johnson v. Dillard's Inc., No. 3:03–3445–MBS, 2007 WL 2792232, at *3–5 (D.S.C. Sept. 24, 2007) (in a lengthy discussion of the issue, recognizing a combination claim alleging race plus sex discrimination under Title VII); Nieto v. Kapoor, 182 F. Supp. 2d 1114, 1140 (D.N.M. 2000) (considering evidence of harassment based on both race and their sex); Chambers v. Omaha Girls Club, 629 F. Supp. 925, 944 (D. Neb. 1986), *aff'd sub nom.* Chambers v. Omaha Girls Club, Inc., 834 F.2d 697 (8th Cir. 1987) (treating plaintiff's race and gender discrimination claims as involving "the class of black women"); Graham v. Bendix Corp., 585 F. Supp. 1036, 1047 (N.D. Ind. 1984) ("Under Title VII, the plaintiff as a black woman is protected against discrimination on the double grounds of race and sex, and an employer who singles out black females for less favorable treatment does not defeat plaintiff's case by showing that white females or black males are not so unfavorably treated.").

79. 40 F.3d 1551, 1561 n.16, 1561–62 (9th Cir. 1994).

80. *Id.* at 1554, 1558.

81. *Id.* at 1558.

generally be the principal question."[82] And on that issue, Lam presented testimony that the Chair of the appointments committee, Professor A., had a biased attitude towards women and Asians.[83] According to the Ninth Circuit, this evidence was sufficient to preclude summary judgment for the defendants.[84]

As in *Jefferies*, the Ninth Circuit in *Lam* found it erroneous for the district court to have relied on the defendants' favorable treatment of two other candidates for the faculty position at issue: one an Asian man (tending to defeat a claim of pure race discrimination), and the other a white woman (tending to defeat a claim of pure sex discrimination).[85] According to the Ninth Circuit, the district court apparently viewed racism and sexism as "distinct elements amenable to almost mathematical treatment, so that evaluating discrimination against an Asian woman became a simple matter of performing two separate tasks: looking for racism 'alone' and looking for sexism 'alone,' with Asian men and white women as the corresponding model victims."[86] This slicing and dicing of Lam's plus-discrimination claim, according to the Ninth Circuit, failed to account for the fact that "Asian women are subject to a set of stereotypes and assumptions shared neither by Asian men nor by white women,"[87] such that Asian women may be targeted for discrimination "even in the absence of

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82. *Id*. at 1559.

83. *Id*. at 1560.

84. *Id*. In reaching this result, the court also noted that Lam had presented evidence that another professor who participated in the hiring process had stated that the new hire should be male. *Id*.

85. *Id*. at 1561.

86. *Id*.

87. *Id*. at 1562. Here, the court noted in a footnote that Asian women are subject to particular stereotypes such as geisha, dragon lady, concubine, and lotus blossom. *Id*. at 1562 n.21.

discrimination against [Asian] men or white women."[88] Accordingly, the court determined that "when a plaintiff is claiming race *and* sex bias, it is necessary to determine whether the employer discriminates on the basis of that *combination* of factors, not just whether it discriminates against people of the same race or of the same sex."[89]

### C. *Plus Factors Not Involving a Fundamental Right or Immutable Characteristic*

The sex-plus theory of discrimination is not without limitation.[90] For example, courts have rejected sex-plus discrimination claims in the context of gender differentiated appearance requirements, such as employer policies imposing different makeup or hair length requirements for men and women.[91] This is because, unlike valid sex-plus claims, the "plus" factors in these cases do not involve an immutable characteristic such as race or national origin, or a constitutionally protected fundamental right such as marriage or child rearing.[92]

In limiting sex-plus discrimination claims in this manner, courts have highlighted Title VII's objective of ensuring equal job opportunity for males and females based on their qualifications, rather than their sex.[93] The Fifth Circuit Court of Appeals, for example, has explained that "[e]qual employment *opportunity* may be secured only when employers are barred from discriminating against employees

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88. *Id.* at 1562 (quoting Jefferies v. Harris Cty. Cmty. Action Ass'n, 615 F.2d 1025, 1032 (5th Cir. 1980)).

89. *Id.* (citations omitted) (emphasis in original).

90. *See Jefferies*, 615 F.2d at 1033–34.

91. *See, e.g.,* Knott v. Missouri Pac. R. Co., 527 F.2d 1249, 1250–52 (8th Cir. 1975) (rejecting sex-plus discrimination under Title VII based on minor differences resulting from hair length limitations for male employees but not for female employees).

92. *Jefferies*, 615 F.2d at 1033.

93. Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1091 (5th Cir. 1975).

on the basis of immutable characteristics . . . [or] some fundamental right."[94] "But a hiring policy that distinguishes on some other ground, such as grooming codes or length of hair, is related more closely to the employer's choice of how to run his business than to equality of employment opportunity."[95]

In *Willingham v. Macon Telegraph Publishing Co.*, the Fifth Circuit Court of Appeals applied these principles to a male job applicant's sex-plus discrimination claim based on an employer's differing hair length requirements for men and women.[96] The court first found that because hair length can be easily changed, it is not an immutable characteristic.[97] Likewise, the court noted, hair length is unlike having pre-school age children, which is "an existing condition not subject to change."[98] Accordingly, the court declared, "[i]f [an] employee objects to [such a] grooming code he has the right to reject it by looking elsewhere for employment, or alternatively he may choose to subordinate his preference by accepting the code along with the job."[99]

Other courts agree with the Fifth Circuit's analysis. As the United States Court of Appeals for the D.C. Circuit has explained, different grooming and appearance standards for men and women, such as different hair length requirements, are merely "classifications by sex which do not limit employment opportunities by making distinctions based on immutable personal characteristics, which do not represent any attempt by the employer to prevent the employment of a particular sex, and which do not pose distinct employment

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94. *Id.* (emphasis in original).

95. *Id.*

96. *Id.* at 1086.

97. *Id.* at 1091 ("Hair length is not immutable and in the situation of employer vis à vis employee enjoys no constitutional protection.").

98. *Id.*

99. *Id.*

disadvantages for one sex."[100] Accordingly, the sex-plus discrimination doctrine may not be used to challenge such classifications.[101]

## III. COURTS REJECTING TITLE VII SEXUAL ORIENTATION DISCRIMINATION CLAIMS

Before 2017, essentially every federal appellate court had rejected the argument that Title VII permits claims of sexual orientation discrimination as a form of "sex" discrimination.[102] Nevertheless, nearly two dozen state legislatures have now included "sexual orientation" as a distinct protected characteristic under their own state anti-discrimination statutes, effectively making the employment rights of gays and lesbians dependent on the state in which the person lives and works.[103] Additionally, in 2015, the

100. Dodge v. Giant Food, Inc., 488 F.2d 1333, 1336–37 (D.C. Cir. 1973).

101. *Id.* at 1337.

102. *See supra* note 2.

103. *See*, *e.g.*, CAL. GOV'T CODE § 12940 (West 2019) (generally prohibiting employment discrimination on the basis of "race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status"); COLO. REV. STAT. § 24-34-402(1)(a) (2019) (making it generally unlawful for an employer to discriminate on the basis of "sexual orientation," among other things); CONN. GEN. STAT. § 46a-81c (2019) (generally prohibiting discrimination in employment "because of [an] individual's sexual orientation or civil union status"); DEL. CODE ANN. tit. 19, § 711(a)(1) (2019) (making it generally unlawful for an employer to discriminate against any individual "because of such individual's . . . sexual orientation, gender identity," or other protected characteristics); HAW. REV. STAT. § 378-2 (2019) (generally prohibiting employment discrimination on the basis of "race, sex including gender identity or expression, sexual orientation," and other protected characteristics); 775 ILL. COMP. STAT. 5/1-102(A) (2019) (stating a public policy of securing freedom from discrimination because of, among other things, "sexual orientation"); IOWA CODE § 216.6 (2019) (making it generally unlawful to discriminate against applicants for employment or employees because of, among other things, the individual's "sexual orientation" or "gender identity"); ME. STAT. tit. 5, § 4571 (2019) (recognizing as a civil right "[t]he opportunity for an individual to secure employment without discrimination because of . . . sexual orientation"); MD. CODE ANN., STATE GOV'T § 20-606(a)(1) (West 2019) (making it

Equal Employment Opportunity Commission (EEOC) determined that "allegations of discrimination on the basis of sexual orientation necessarily state a claim of discrimination on the basis of sex" under Title VII.[104] Applying a sex stereotyping analysis, the EEOC based its ruling in part on the notion that a person claiming sexual orientation discrimination often fails to live up to the employer's "fundamental sex stereotype, norm, or expectation that individuals should be attracted only to those of the opposite sex."[105]

Although not binding on courts, the EEOC's ruling prompted courts to re-examine whether Title VII permits claims of sexual orientation discrimination as an instance of sex discrimination.[106] In 2017, a three-judge panel of the

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generally unlawful for an employer to discriminate on the basis of, among other things, "sexual orientation" or "gender identity"); MASS. GEN. LAWS ch. 151B, § 4 (2019) (making it generally unlawful for an employer to discriminate against an individual "because of" the person's "sexual orientation" or "gender identity," among other protected characteristics); MINN. STAT. § 363A.08 (2019) (making it "an unfair employment practice for an employer" to discriminate against an individual because of her "sexual orientation," among other protected characteristics); NEV. REV. STAT. § 613.330 (2019) (making it unlawful "[t]o fail or refuse to hire or to discharge any person, or otherwise to discriminate against any person with respect to the person's compensation, terms, conditions or privileges of employment, because of his or her race, color, religion, sex, sexual orientation, gender identity or expression, age, disability or national origin"); *see also State Maps of Laws & Policies*, HUMAN RIGHTS CAMPAIGN, https://www.hrc.org/state-maps/employment (last updated June 7, 2019) (summarizing state laws prohibiting sexual orientation and gender identity discrimination, including those noted above along with laws from New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Utah, Vermont, Washington, and Wisconsin).

104. Baldwin v. Foxx, EEOC Appeal No. 0120133080, 2015 WL 4397641, at *10 (July 15, 2015).

105. *Id.* ("An employee could show that the sexual orientation discrimination he or she experienced was sex discrimination because it involved treatment that would not have occurred but for the individual's sex; because it was based on the sex of the person(s) the individual associates with; and/or because it was premised on the fundamental sex stereotype, norm, or expectation that individuals should be attracted only to those of the opposite sex.").

106. *See* Hively v. Ivy Tech Cmty. Coll. of Indiana, 853 F.3d 339, 344 (7th Cir.

United States Court of Appeals for the Eleventh Circuit revisited this issue in *Evans v. Georgia Regional Hospital*.[107] This decision is significant, in that it steadfastly rejects sexual orientation discrimination claims under Title VII, despite the EEOC's changed position on the issue.[108]

In *Evans*, plaintiff Jameka Evans sued her former employer, Georgia Regional Hospital, alleging that she was discriminated against on the basis of her sex for failing to carry herself in a "traditional woman[ly] manner," adding that although she did not openly broadcast her sexual orientation, it was "evident" that she identified with the male gender because of her "male uniform, low male haircut, shoes, etc."[109] Reading Evans's complaint as presenting separate claims for discrimination based on sexual orientation (for being a gay female) and gender non-conformity (for appearing male), a magistrate judge issued a report and recommendation ("R&R") recommending dismissal of all of Evans's claims with prejudice.[110] The magistrate judge reasoned that Title VII "was not intended to cover discrimination against homosexuals,"[111] and that Evans's gender non-conformity claim was "just another way

2017).

107. 850 F.3d 1248 (11th Cir.), *cert. denied*, 138 S. Ct. 557 (2017).

108. *See id.* at 1255–56; *see also* Bostock v. Clayton Cty. Bd. of Comm'rs, 894 F.3d 1335, 1335 (11th Cir. 2018) (refusing to grant a rehearing en banc on a similar Title VII issue); *cf.* Wittmer v. Phillips 66 Co., 915 F.3d 328, 333 (5th Cir. 2019) (declining to reach the issue of whether to overrule Blum v. Gulf Oil Corp., 597 F.2d 936 (5th Cir. 1979), which held that sexual orientation discrimination is not unlawful under Title VII, but noting that "*Blum* remains binding precedent in this circuit to this day").

109. *Evans*, 850 F.3d at 1250.

110. *See* Evans v. Georgia Reg'l Hosp., No. CV415-103, 2015 WL 5316694, at *2–3 (S.D. Ga. Sept. 10, 2015), *report and recommendation adopted*, No. CV415-103, 2015 WL 6555440 (S.D. Ga. Oct. 29, 2015), *aff'd in part, vacated in part, remanded*, 850 F.3d 1248 (11th Cir. 2017).

111. *Id.* at *2.

to claim discrimination based on sexual orientation."[112] The district court later adopted the R&R and dismissed the case with prejudice.[113]

On appeal to the Eleventh Circuit, Evans argued that the district court erred in dismissing both her gender non-conformity and sexual orientation discrimination claims.[114] Given the procedural posture of the case, the Eleventh Circuit began by noting that to survive a motion to dismiss, a complaint must simply contain enough factual matter that, accepted as true, "states a claim for relief that is plausible on its face."[115] The court then found that Evans's complaint failed to meet this standard as to both claims.[116]

Regarding her gender non-conformity claim, the court determined that a claim of sex discrimination based on gender non-conformity is indeed actionable,[117] and is not "just another way to claim discrimination based on sexual orientation," as the district court had determined.[118] Nevertheless, the court found that Evans's complaint failed to plead sufficient facts to create a plausible inference that she suffered discrimination on this basis.[119] Accordingly, the court remanded to permit Evans to amend that claim.[120]

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112. *Id.* at *3.

113. Evans v. Georgia Reg'l Hosp., No. CV415-103, 2015 WL 6555440, at *1 (S.D. Ga. Oct. 29, 2015), *aff'd in part, vacated in part, remanded*, 850 F.3d 1248 (11th Cir. 2017).

114. *Evans*, 850 F.3d at 1253.

115. *Id.*

116. *Id.* at 1253–58.

117. *Id.* at 1254 (stating that "[d]iscrimination based on failure to conform to a gender stereotype is sex-based discrimination").

118. *Id.* at 1254–55 (stating its holding on this issue as follows: "[w]e hold that the lower court erred because a gender non-conformity claim is not 'just another way to claim discrimination based on sexual orientation,' but instead, constitutes a separate, distinct avenue for relief under Title VII.").

119. *Id.* at 1254.

120. *Id.* at 1255.

More importantly, the court then affirmed the district court's dismissal of Evans's sexual orientation discrimination claim.[121] The *Evans* majority provided three primary reasons for this decision.[122] First, the court felt restrained by Eleventh Circuit precedent foreclosing such claims,[123] which in the Eleventh Circuit must be followed until overruled by the court en banc or by the Supreme Court.[124] Second, the *Evans* majority, as well as Judge William Pryor's concurring opinion, reasoned that at the time of its decision (prior to *Hively* and *Zarda*), essentially all other federal circuits had determined that sexual orientation discrimination is not actionable under Title VII.[125] As the *Evans* opinions pointed out, courts have generally rejected such claims under Title VII because "sexual orientation" is not itself a protected class under that statute.[126] And in Judge Pryor's view, Congress, rather than

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121. *Id.*

122. *Id.* at 1255–57.

123. *Id.* at 1255 (quoting Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979)) ("Discharge for homosexuality is not prohibited by Title VII.").

124. *Id.* (quoting Offshore of the Palm Beaches, Inc. v. Lynch, 741 F.3d 1251, 1256 (11th Cir. 2014)).

125. *See id.* at 1256–57 (citing cases); *id.* at 1261 (Pryor, J., concurring).

126. *See id.* at 1261 (Pryor, J., concurring); *id.* at 1272 (Rosenbaum, J., dissenting); *see also, e.g.*, Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 762 (6th Cir. 2006) (stating that "sexual orientation is not a prohibited basis for discriminatory acts under Title VII"); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 261 (3d Cir. 2001) (recognizing that Title VII makes it unlawful "to discriminate against any individual . . . because of . . . sex," 42 U.S.C. § 2000e 2(a)(1), but "does not prohibit discrimination based on sexual orientation"); Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000), *overruled by* Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018) ("The law is well-settled in this circuit and in all others to have reached the question that Simonton has no cause of action under Title VII because Title VII does not prohibit harassment or discrimination because of sexual orientation."); Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc., 224 F.3d 701, 707 (7th Cir. 2000), *overruled by* Hively v. Ivy Tech Cmty. Coll. of Indiana, 853 F.3d 339 (7th Cir. 2017) (stating that "[s]exual orientation is not a classification that is protected under Title VII; thus homosexuals are not members of a protected class under the law"); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999) ("[W]e are

courts, should decide whether Title VII applies to sexual orientation discrimination claims.[127] Finally, both the *Evans* majority and Judge Pryor's concurring opinion rejected Evans's argument that the Supreme Court's sex stereotyping precedent, *Price Waterhouse*, paves the way for sexual orientation discrimination claims under Title VII, reasoning that *Price Waterhouse* does not "squarely address whether sexual orientation discrimination is prohibited by Title VII."[128]

In *Price Waterhouse*, the Supreme Court ruled that Title VII's prohibition of "sex" discrimination encompasses employment decisions based on gender stereotypes.[129] In that case, the plaintiff, a female senior manager in an accounting firm, was denied partnership in the firm because she was considered "too macho"; further, she was told she could improve her chances of partnership if she were to "take a course at charm school," "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[130] The Supreme Court ruled that such comments could support a Title VII claim of sex discrimination, thereby establishing that Title VII precludes discrimination on the basis of sex stereotyping—here, due to the employer's belief that a female plaintiff like Hopkins failed to look and act like a woman *should* look and act.[131]

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called upon here 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."); Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138, 143 (4th Cir. 1996) (recognizing that "Title VII does not afford a cause of action for discrimination based upon sexual orientation").

127. *Evans*, 850 F.3d at 1261 (Pryor, J., concurring).

128. *See id.* at 1256 (majority opinion); *id.* at 1260 (Pryor, J., concurring).

129. Price Waterhouse v. Hopkins, 490 U.S. 228, 250–52 (1989).

130. *Id.* at 235.

131. *Id.* at 250 ("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"); *see also Evans*, 850 F.3d at 1262

Judge Pryor devoted much of his concurring opinion in *Evans* to refuting the argument that discrimination on the basis of sexual orientation *necessarily* involves the type of gender stereotyping condemned by the Supreme Court in *Price Waterhouse*.[132] Judge Pryor specifically addressed the argument asserted by the EEOC and the *Evans* dissent that "[a]ll homosexuals, by definition, fail to conform to traditional gender norms *in their sexual practices*."[133] This argument is flawed, the judge declared, because not all gay individuals behave the same or share the same interests.[134] Some gay individuals, for example, "may choose not to marry or date at all[,] or may choose a celibate lifestyle."[135] For this reason, although any particular gay employee may attempt to show "with enough factual evidence that she experienced sex discrimination because her behavior deviated from a gender stereotype held by an employer," the court's review of such a claim "would rest on behavior alone," rather than the employee's status as a gay individual.[136] According to Judge Pryor, a gender non-conformity claim is a "behavior-based inquiry" under which courts consider whether an employer "hold[s] males and females to different standards of

(Rosenbaum, J., dissenting) (stating that the accounting firm in *Price Waterhouse* denied Hopkins's partnership because "she had qualities that defied stereotypes of how women should look and act"); Herz, *supra* note 37, at 406–07 (describing *Price Waterhouse*).

132. *Evans*, 850 F.3d at 1258 (Pryor, J., concurring) (writing separately "to explain the error of the argument . . . that a person who experiences discrimination because of sexual orientation necessarily experiences discrimination for deviating from gender stereotypes").

133. *Id.* (quoting EEOC Amicus Brief, at 14); *see also id.* at 1261 (Rosenbaum, J., dissenting) ("Plain and simple, when a woman alleges, as Evans has, that she has been discriminated against because she is a lesbian, she necessarily alleges that she has been discriminated against because she failed to conform to the employer's image of what women should be—specifically, that women should be sexually attracted to men only.").

134. *See id.* at 1259 (Pryor, J., concurring).

135. *Id.*

136. *Id.*

behavior," whereas a sexual orientation discrimination involves a "status"-based inquiry.[137] As such, the claims are distinct, such that sexual orientation discrimination claims, on the whole, do not fall within the category of sex discrimination due to gender non-conformity.[138]

Despite the EEOC's ruling to the contrary, the Eleventh Circuit in *Evans* held firm to the notion that Title VII does not permit sexual orientation discrimination claims.[139] The court further clarified that a homosexual employee wishing to claim discrimination under Title VII must instead claim sex discrimination utilizing evidence of specific gender non-conforming behavior, as opposed to her sexual orientation *per se*.[140] If this interpretation of Title VII is correct, the gender stereotyping theory espoused by the Supreme Court in *Price Waterhouse* cannot justify the categorical inclusion of sexual orientation discrimination claims under Title VII.[141] Although this interpretation is debatable,[142] particularly in light of the Second and Seventh Circuit opinions summarized below, the Eleventh Circuit is not alone in this view.[143] As such, another rationale is needed to

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137. *Id.* at 1259–60.

138. *See id.* at 1260–61 ("We review claims of gender nonconformity the same way in all appeals regardless of a plaintiff's sexual orientation. Any correlation that might exist between a particular sexual orientation and deviation from a particular gender stereotype does not overcome this settled rule.").

139. *See supra* notes 104–05, 121-28, and accompanying text.

140. *See supra* notes 114–128 and accompanying text.

141. *See Evans*, 850 F.3d at 1258 (Pryor, J., concurring) (writing separately "to explain the error of the argument . . . that a person who experiences discrimination because of sexual orientation necessarily experiences discrimination for deviating from gender stereotypes").

142. *See, e.g.,* Herz, *supra* note 37, at 422–35 (arguing that *Price Waterhouse* allows courts to declare unlawful more subtle and individualized forms of sexual orientation discrimination).

143. *See* Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 763–65 (6th Cir. 2006) (articulating a similar argument that harassment based on perceived homosexuality is distinct from harassment based on actual and observed gender non-conformity).

connect sexual orientation discrimination to Title VII's existing prohibition of "sex" discrimination.[144] As the next section demonstrates, sex-plus theory provides the necessary connection.

## IV. COURTS AUTHORIZING TITLE VII SEXUAL ORIENTATION DISCRIMINATION CLAIMS

In April 2017, the United States Court of Appeals for the Seventh Circuit became the first federal appeals court to hold that Title VII permits claims of sexual orientation discrimination as a form of sex discrimination.[145] Less than one year later, the United States Court of Appeals for the Second Circuit held the same.[146] This section summarizes the major rationales offered by these two courts, and shows how those rationales can be recharacterized in sex-plus terms.

### A. *Seventh Circuit Court of Appeals*

The Seventh Circuit case extending Title VII to claims of sexual orientation discrimination, *Hively v. Ivy Tech Community College of Indiana*, involved allegations of sexual orientation discrimination by an openly lesbian plaintiff, Kimberly Hively.[147] Hively began teaching as a part-time, adjunct professor at Ivy Tech Community College in 2000.[148] Between 2009 and 2014, Hively applied for numerous full-time positions with Ivy Tech, which repeatedly rejected her

144. This is not to suggest that Judge Pryor will necessarily have the final say on the gender stereotyping theory as applied to claims of sexual orientation discrimination. Indeed, arguments for applying the gender stereotyping theory in this context are quite persuasive. *See, e.g.*, *Evans*, 850 F.3d at 1262–69 (Rosenbaum, J., dissenting).

145. Hively v. Ivy Tech Cmty. Coll. of Indiana, 853 F.3d 339, 341 (7th Cir. 2017).

146. Zarda v. Altitude Express, Inc., 883 F.3d 100, 112 (2d Cir. 2018).

147. *Hively*, 853 F.3d at 341.

148. *Id*.

applications.[149] After the college failed to renew her part-time contract in 2014, Hively filed an EEOC charge alleging that she was "being discriminated against based on [her] sexual orientation," in violation of Title VII.[150] Hively later sued Ivy Tech in federal district court, which dismissed her complaint on the basis that sexual orientation discrimination is not a protected class under Title VII.[151] This decision was affirmed by a panel of judges on appeal to the Seventh Circuit Court of Appeals,[152] after which the full court voted to rehear the case en banc.[153]

Writing for the en banc court, Chief Judge Diane Wood phrased the Title VII issue in the case as "whether actions taken on the basis of sexual orientation are a subset of actions taken on the basis of sex,"[154] one she described as "a pure question of statutory interpretation . . . well within the judiciary's competence."[155] Having established the court's authority to extend Title VII in this manner, the court then rejected Ivy Tech's argument that because Congress had not amended Title VII to include "sexual orientation" as a protected class under the statute, this particular claim remains unavailable under the statute.[156] According to the court, and contrary to the opinions of most courts on this issue,[157] no reliable inference could be drawn from Congress's

149. *Id.*

150. *Id.*

151. *Id.*

152. Hively v. Ivy Tech Cmty. Coll. of Indiana, 830 F.3d 698 (7th Cir. 2016), *rev'd on reh'g*, 853 F.3d 339 (7th Cir. 2017) (en banc).

153. *Hively*, 853 F.3d at 343.

154. *Id.*

155. *Id.*

156. *Id.* at 343–44.

157. *See supra* note 2; *see also Hively*, 853 F.3d at 353–54 (Posner, J., concurring) (rejecting the "diehard 'originalist'" approach "that what was believed [when Title VII was enacted] in 1964 defines the scope of the statute for as long as the statutory text remains unchanged, and therefore until changed by

failed attempts to amend Title VII in this manner.[158] The court noted, for example, that because the EEOC had recently ruled that Title VII's prohibition against sex discrimination indeed encompasses discrimination on the basis of sexual orientation, this "may have caused some in Congress to think that legislation is needed to carve sexual orientation *out* of the statute, not to put it *in*."[159] According to the court, this ruling, along with various decisions of the Supreme Court shedding new light on Title VII's existing prohibition of "sex discrimination" (including those deeming gender stereotyping a form of sex discrimination[160]), simply made it impossible to determine what inference to draw from congressional inaction on the subject.[161]

Rather than rely on Congress's failure to amend Title VII, the court chose instead to focus on "the [actual] provisions of the law that are on the books,"[162] in particular, the aspect of Title VII prohibiting discrimination on the basis of "sex," as that term has been interpreted by the United States Supreme Court.[163] Here, the court stated that when Congress enacted Title VII in 1964, it "may not have realized or understood the full scope of the words it chose."[164] This would not limit the court, however, given the notion that "statutory prohibitions often go beyond the principal evil"

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Congress's amending or replacing the statute").

158. *Hively*, 853 F.3d at 344 (majority opinion).

159. *Id.* at 344 (citing Baldwin v. Foxx, EEOC Appeal No. 0120133080, 2015 WL 4397641 (July 15, 2015)).

160. *Id.* at 342. Here, the court seemingly had in mind cases like *Price Waterhouse*, which held that the practice of gender stereotyping falls within Title VII's prohibition against sex discrimination. *See id.*

161. *Id.* at 344.

162. *Id.* at 345.

163. *See id.* at 347 (describing "the interpretative question raised by Hively's case" as follows: "is sexual-orientation discrimination a form of sex discrimination, given the way in which the Supreme Court has interpreted the word 'sex' in the statute?").

164. *Id.* at 345.

that prompted a statute's enactment "to cover reasonably comparable evils."[165] The court noted that Title VII, in particular "has been understood to cover far more than the simple decision of an employer not to hire a woman for Job A, or a man for Job B."[166] The Supreme Court has held, for example, that Title VII's prohibition of sex discrimination reaches sexual harassment in the workplace,[167] including same-sex workplace harassment,[168] even though such claims were not recognized for many years after Title VII was enacted.[169] Along these lines, Title VII has been held to reach discrimination based on "actuarial assumptions about a person's longevity,"[170] as well as discrimination based on gender non-conforming behavior.[171] As the court declared, "[i]t is quite possible that these interpretations may . . . have surprised" the legislatures who enacted Title VII; "[n]evertheless, experience with the law has led the Supreme Court to recognize that each of these examples is a covered form of sex discrimination."[172]

Having determined that courts may legitimately extend Title VII to forms of sex discrimination not envisioned when the statute was enacted (a point disputed by the *Hively*

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165. *Id.* at 344–45 (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79–80 (1998)).

166. *Id.* at 345.

167. *Id.* (citing Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986)).

168. *Id.* (citing *Oncale*, 523 U.S. 75).

169. As the *Hively* court noted, the Supreme Court first held that Title VII's prohibition against sex discrimination extends to sexual harassment in the workplace in *Meritor Savings Bank, FSB*. *Hively*, 853 F.3d at 345. This was over twenty years after Title VII was enacted. *See also* Zarda v. Altitude Express, Inc., 883 F.3d 100, 114 (2d Cir. 2018) (discussing that it was "not necessarily obvious" to courts, in the years following Title VII's enactment, that its prohibition of "sex" discrimination would apply to sexual harassment claims).

170. *Hively*, 853 F.3d at 345 (citing City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978)).

171. *Id.* (citing Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)).

172. *Id.*

dissent[173]), the court then provided three primary bases for extending Title VII's prohibition of sex discrimination to sexual orientation discrimination claims: the first based on the comparative method of analyzing employment discrimination claims, the second employing the associational theory of employment discrimination, and the third based on cases more generally protecting the right to associate intimately with persons of the same sex.[174] As explained below, aspects of sex-plus discrimination can be seen throughout the first two rationales outlined above.

Beginning with the "tried-and-true comparative method" of analysis, the court declared that "[i]t is critical, in applying the comparative method, to be sure that only the variable of the plaintiff's sex is allowed change."[175] Applying what is in effect sex-plus analysis, the court then explained that the issue "is not whether a lesbian is being treated better or worse than gay men, bisexuals, or transsexuals, because such a comparison shifts too many pieces at once"; rather, "the counterfactual we must use is a situation in which Hively is a man, but everything else stays the same: in particular, the sex or gender of the partner."[176]

Rephrased in sex-plus terms, in delineating the proper comparator for Hively's sexual orientation discrimination

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173. *Id.* at 360 (Sykes, J., dissenting) ("When a statute supplies the rule of decision, our role is to give effect to the enacted text, interpreting the statutory language *as a reasonable person would have understood it at the time of enactment*. We are not authorized to infuse the text with a new or unconventional meaning or to update it to respond to changed social, economic, or political conditions.") (emphasis added).

174. *See id.* at 345–52 (majority opinion).

175. *Id.* at 345.

176. *Id.*; *see also id.* at 347 ("The dissent criticizes us for not trying to *rule out* sexual-orientation discrimination by controlling for it in our comparator example. . . . [But] [i]t makes no sense to control for or rule out discrimination on the basis of sexual orientation if the question before us is *whether* that type of discrimination is nothing more or less than a form of sex discrimination.") (emphasis in original).

claim, the court essentially identified the key variables as the plaintiff's and comparator's gender (female and male, respectively), along with a "plus" factor of *attraction to a female*, as opposed to *attraction to members of the same sex*.[177] By holding constant "the sex or gender of the partner" (female), as opposed to the homosexuality or bisexuality of the plaintiff, a ruling for Hively becomes almost inevitable.[178] Indeed, immediately following this statement, the court declared:

> Hively alleges that if she had been a man married to a woman (or living with a woman, or dating a woman) and everything else had stayed the same, Ivy Tech would not have refused to promote her and would not have fired her. [Assuming these allegations are true], [t]his describes paradigmatic sex discrimination.[179]

When viewed through a sex-plus lens, the particular "plus" factor identified as relevant is critical. Indeed, under the alternative formulation endorsed by the dissent, which in sex-plus terms contemplates a "plus" factor of *attraction to members of the same sex*,[180] a plaintiff like Hively might find it more difficult to prove sex discrimination under the comparative method, given that an employer who allegedly discriminates against *female* homosexuals is likely to treat *male* homosexuals no differently.[181] As the *Hively* dissent

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177. *See id.* at 345.

178. *Id.*

179. *Id.*; *see also* Zarda v. Altitude Express, Inc., 883 F.3d 100, 119 (2d Cir. 2018) (describing the issue similarly, and concluding, "In the context of sexual orientation, a woman who is subject to an adverse employment action because she is attracted to women would have been treated differently if she had been a man who was attracted to women. We can therefore conclude that sexual orientation is a function of sex and, by extension, sexual orientation discrimination is a subset of sex discrimination.").

180. *See Hively*, 853 F.3d at 365 (Sykes, J., dissenting).

181. *See id.* at 353 (Posner, J., concurring) (stating that when Title VII was enacted in 1964, the statute's prohibition of "sex" discrimination would have only applied in the event a lesbian employee were fired but a homosexual man was not, "for in that event the only difference between the two would be the gender of the one [who was] fired").

explained:

> [T]he proper comparison is to ask how Ivy Tech treated qualified gay men. If an employer is willing to hire gay men but not lesbians, then the comparative method has exposed an actual case of sex discrimination. If, on the other hand, an employer . . . rejects all homosexual applicants, then no inference of sex discrimination is possible. . . .[182]

Considered in light of sex-plus theory, the dissent's articulation of the discrimination issue differs in respect to the "plus" factor identified as relevant. In effect, the "plus" factor identified by the majority is *attraction to females,* whereas the "plus" factor identified by the dissent is *attraction to members of the same sex*. This change in focus, although subtle, allowed the dissent to reach the opposite conclusion in regards to whether sexual orientation discrimination constitutes sex discrimination.[183] Nevertheless, it is the wrong approach, particularly at the motion-to-dismiss stage presented in *Hively*, given that Hively herself did *not* allege that her employer discriminated against women with same-sex attraction but not men with same-sex attraction.[184] As explained more fully in the next section, the majority's approach is also more consistent with sex-plus discrimination precedents because it more clearly exposes an employer's animus against plaintiffs like Hively and reveals discrimination against a particular subgroup of female employees, precisely what the sex-plus doctrine is designed to do.[185]

Returning to the majority's analysis of Hively's sexual

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

183. *Id.*

184. *Zarda*, 883 F.3d at 117 (explaining the flaw in this argument).

185. *See* Back v. Hastings On Hudson Union Free Sch. Dist., 365 F.3d 107, 118 (2d Cir. 2004) (noting that "[t]he term 'sex plus' . . . is simply a heuristic . . . developed in the context of Title VII to affirm that plaintiffs can [claim sex discrimination] even when not all members of a disfavored class are discriminated against").

orientation discrimination claim, the court next analogized Hively's claim to those based on gender non-conformity or gender stereotypes.[186] Again, the court's analysis here reflects sex-plus discrimination theory. The court noted, for example, that in 1971 the Supreme Court ruled in *Phillips v. Martin Marietta Corp.* that "Title VII does not permit an employer to refuse to hire women with pre-school-age children, but not men."[187] Likewise, the court noted its own ruling in *Sprogis v. United Air Lines, Inc.*, striking down a rule requiring only female employees to be unmarried.[188]

As explained above, *Phillips* and *Sprogis* are each classic examples of sex-plus discrimination, as those cases involve an employer discriminating against a subset of females on the basis of sex (gender) plus another characteristic connected to a fundamental right (having young children, or being married).[189] This point was not lost on the *Hively* court, as immediately after citing *Sprogis* the court declared:

> In both [*Phillips* and *Sprogis*], the employer's rule did not affect every woman in the workforce. Just so here: a policy that discriminates on the basis of sexual orientation does not affect every woman, or every man, but it is based on assumptions about the proper behavior for someone of a given sex. . . . Any . . . job decision based on the fact that the complainant—woman or man—dresses differently, speaks differently, or dates or marries a same-sex partner, is a reaction purely and simply based on sex. That means that it falls within Title VII's prohibition against sex discrimination . . . .[190]

Next, the court turned to the associational theory of discrimination, which through a series of judicial rulings recognizes that "a person who is discriminated against

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186. *Hively*, 853 F.3d at 346.

187. *Id.* (citing Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971)).

188. *Id.* (citing Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971)).

189. *See supra* Part II.A.

190. *Hively*, 853 F.3d at 346–47.

because of the protected characteristic of one with whom she associates is actually being disadvantaged because of her own traits."[191] Applying this theory, the court explained that there is no meaningful difference between discrimination based upon interracial association, which courts routinely reject as a form of race discrimination, and claims alleging discrimination on the basis of the sex with whom a person associates, which should also be unlawful.[192]

Here again, the court's analysis reflects sex-plus theory. For example, examining cases finding Title VII violated by discriminatory treatment based on an employee's association with a person of another race, the court explained that "[c]hanging the race of one partner made a difference in determining the legality of the [employer's] conduct" in those cases, such that those cases "rested on 'distinctions drawn according to race.'"[193] The same scenario is present here, the court explained, because "[i]f we were to change the sex of one partner in a lesbian relationship, the outcome would be different."[194] As the EEOC has so eloquently explained, sexual orientation discrimination is "sex" discrimination because "an employee alleging discrimination on the basis of sexual orientation is alleging that his or her employer took his or her sex into account by treating him or her differently for *associating* with a person of the same sex."[195] Thus, the EEOC noted, "a gay man who alleges that his employer took an adverse employment action against him because he associated with or dated men states a claim of sex discrimination under Title VII; the fact that the employee is a man instead of a woman motivated the employer's

191. *See id.* at 347–48 (summarizing cases applying the associational theory).

192. *See id.* at 348.

193. *Id.*

194. *Id.* at 349.

195. Baldwin v. Foxx, EEOC Appeal No. 0120133080, 2015 WL 4397641, at *6 (July 15, 2015) (emphasis in original).

discrimination against him."[196]

In sex-plus terms, the associational theory of discrimination, as applied in the sexual orientation discrimination context, simply recognizes that it is the plaintiff's sex (e.g., female) combined with the sex of her partner (e.g., female) that drives the employer's discriminatory action. In the *Hively* court's words, such discriminatory animus disappears "[i]f we were to change the sex of one partner" in such a relationship, such as by considering how an employer treats a male comparator with a female partner.[197] This is precisely the type of scenario sex-plus theory is designed to cover (where the plus factor consists of having a female partner).[198]

In the final section of its opinion, the *Hively* court reviewed a line of Supreme Court decisions protecting the right to associate intimately with people of the same sex.[199] Although many of these decisions extend beyond the employment context, they are important, according to the court, given its task of "consider[ing] what the correct rule of law is *now* in light of the Supreme Court's authoritative interpretations, not what someone thought it meant one, ten, or twenty years ago."[200]

Here, the court referenced two employment discrimination cases, *Price Waterhouse* (holding that gender stereotyping falls within Title VII's prohibition of sex discrimination) and *Oncale* (holding male-on-male sexual harassment actionable).[201] The court also cited numerous cases beyond the employment context, including *Romer v.*

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196. *Id*.

197. *Hively*, 853 F.3d at 349.

198. *See infra* notes 228–30 and accompanying text.

199. *See Hively*, 853 F.3d at 349–50.

200. *Id.* at 350 (emphasis added).

201. *Id.* at 342, 349 (citing Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998)).

*Evans*, in which the Supreme Court found the federal Equal Protection Clause violated by the Colorado Constitution's provision forbidding any state governmental organ from taking action designed to protect "homosexual, lesbian, or bisexual" persons;[202] *Lawrence v. Texas*, in which the Court struck down a Texas statute criminalizing homosexual intimacy between consenting adults as a violation of the liberty provision of the Due Process Clause;[203] *United States v. Windsor*, which found due process and equal protection violations in the Defense of Marriage Act's exclusion of a same-sex partner from the definition of "spouse" in other federal statutes;[204] and *Obergefell v. Hodges*, which struck down restrictions on the right of same-sex couples to marry under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[205] After summarizing these cases, the court concluded that "the time has come" to recognize sexual orientation discrimination as a form of sex discrimination under Title VII.[206] Accordingly, the court ended its opinion similar to how it began by again emphasizing the judiciary's role in expanding Title VII's protections to appropriately modernize the statute,[207] a task that sex-plus discrimination theory is well-equipped to perform.

In the second of four opinions in the case, Judge Richard Posner wrote a concurrence agreeing with the majority while suggesting "an alternative approach that may be more

202. *Id.* at 349 (citing Romer v. Evans, 517 U.S. 620, 624 (1996)).

203. *Id.* (citing Lawrence v. Texas, 539 U.S. 558 (2003)).

204. *Id.* (citing United States v. Windsor, 570 U.S. 744, 769 (2013)).

205. *Id.* at 349–50 (citing Obergefell v. Hodges, 135 S. Ct. 2584 (2015)).

206. *Id.* at 350–51.

207. *See id*; *see also id.* at 343 (stating that the issue of statutory interpretation before the court is "well within the judiciary's competence"); *id.* at 345 (summarizing the lesson of *Oncale* as follows: "the fact that the enacting Congress may not have anticipated a particular application of the law cannot stand in the way of the provisions of the law that are on the books").

straightforward."[208] Similar to the majority, Judge Posner first articulated the method of statutory interpretation he found "most clearly applicable in the present case."[209] This particular method goes beyond the original meaning of a statute, he explained, and involves "giving a fresh meaning to a [statutory or constitutional] statement . . . that infuses the statement with vitality and significance today," thereby "making old law satisfy modern needs and understandings."[210] Judge Posner noted that Title VII in particular is now more than 50 years old, and "invites an interpretation that will update it to the present, a present that differs markedly from the era in which the Act was enacted."[211]

In an important passage for sex-plus theory, Judge Posner then noted that when Title VII was enacted in 1964, the statute's prohibition of "sex" discrimination would have only applied in the event a lesbian employee were fired but a homosexual man was not, "for in that event the only difference between the two would be the gender of the one [who was] fired."[212] He also noted that Title VII does not explicitly outlaw sexual orientation discrimination, adding further that Title VII's framers likely did not have homosexuality in mind at the time the statute was enacted,[213] such that "an explanation is needed for how 53 years later the meaning of the statute has changed and the word 'sex' now connotes both gender *and* sexual orientation."[214]

Judge Posner provided that "explanation" by again

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208. *Id.* at 352 (Posner, J., concurring).

209. *Id.*

210. *Id.*

211. *Id.* at 353.

212. *Id.*

213. *Id.*

214. *Id.* (emphasis in original).

reiterating his expansive view of the judiciary's role in interpreting statutes and constitutional provisions.[215] He wrote, for example, that "statutory and constitutional provisions frequently are interpreted on the basis of present need and understanding rather than original meaning," and cited numerous case examples adopting that approach.[216] This assertion then led Judge Posner to perhaps the most controversial statement across the range of *Hively* opinions, in which he stated that, rather than merely *interpreting* Title VII in light of changing times, the *Hively* court is instead "rewriting" the statute to give it "a new, a broader meaning,"[217] one which the Congress that enacted Title VII "would not have accepted."[218]

From there, Judge Posner then turned to the task of defending his interpretation of the word "sex" as encompassing both *gender* and *sexual orientation*.[219] The rationale offered by Judge Posner to justify this "admittedly loose" interpretation of sex discrimination[220] largely rests on sex-plus theory. In one passage, for example, Judge Posner explained that because sexual orientation is innate, rather than chosen, discrimination on the basis of sexual orientation should be unlawful.[221] He wrote:

> The position of a woman discriminated against on account of being a lesbian is thus analogous to a woman's being discriminated against on account of being a woman. That woman didn't choose to be a woman; the lesbian didn't choose to be a lesbian. I don't see

215. *Id.* at 353–54.

216. *Id.*

217. *Id.* at 354; *see also id.* at 357 ("I . . . acknowledge openly that today we, who are judges rather than members of Congress, are imposing on a half-century-old statute a meaning of 'sex discrimination' that the Congress that enacted it would not have accepted. This is something courts do fairly frequently . . . .").

218. *Id.* at 357.

219. *See id.* at 354–56.

220. *Id.* at 355.

221. *Id.* at 354–55.

> why firing a lesbian because she is in the subset of women who are lesbian should be thought any less a form of sex discrimination than firing a woman because she's a woman.[222]

Recall that the sex-plus doctrine prohibits discrimination against a subset of male or female employees based on either the exercise of a fundamental right or an immutable characteristic, one the employee cannot change.[223] Although Judge Posner's analysis, quoted above, does not explicitly reference sex-plus discrimination doctrine, his reasoning echoes the theory. Judge Posner states, for example, that "the lesbian didn't choose to be a lesbian,"[224] indicating that, in his view, sexual preferences are immutable.[225] He also "do[es]n't see why firing a lesbian because she is in the subset of women who are lesbian should be thought any less a form of sex discrimination than firing a woman because she's a woman."[226] Neither does sex-plus theory, given that the subset of women comprised of lesbians would involve "plus" factors of immutable characteristics or fundamental rights, a point developed more fully in the section to follow.[227]

In another striking passage reminiscent of sex-plus theory, Judge Posner ratified the majority's statement that "Ivy Tech is disadvantaging [Hively] *because she is a woman*," not a man, who prefers female partners.[228] He then wrote: "That's a different type of sex discrimination from the

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222. *Id.*

223. *See supra* Part II.

224. *Hively*, 853 F.3d at 355.

225. *See id.* at 354 (citing Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014)) (explaining that the Seventh Circuit, in 2014, examined whether homosexual orientation is innate or chosen, and determined that "the scientific literature strongly supports the proposition that it is biological and innate, not a choice like deciding how to dress").

226. *Id.* at 355.

227. *See infra* notes 286, 290 and accompanying text.

228. *Hively*, 853 F.3d at 356 (emphasis in original).

classic cases of old in which women were erroneously (sometimes maliciously) deemed unqualified for certain jobs" simply because they were women.[229]

Judge Posner is correct. In sex-plus terms, the "different type of sex discrimination" to which he refers is, in fact, discrimination on the basis of sex plus a certain sexual preference, i.e., for female partners. As Judge Posner notes, this is indeed different from classic cases of pure gender discrimination, but it is gender discrimination nonetheless.[230]

*Hively*'s closest analog to sex-plus theory is contained in the third opinion in the case, a concurring opinion written by Judge Joel Flaum and joined by Judge Kenneth Ripple.[231] Similar to the previous two opinions, Judge Flaum described the issue as whether "discrimination based on Professor Hively's 'sexual orientation' constitute[s] discrimination based on her 'sex'" under Title VII.[232] Judge Flaum concluded that it does.[233]

To establish the necessary connection to Hively's gender,[234] Judge Flaum reiterated Hively's argument that Ivy Tech "relied on her sex, because, but for her sex, she would not have been denied a promotion (*i.e.*, she would not

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229. *Id.*

230. *See* Back v. Hastings On Hudson Union Free Sch. Dist., 365 F.3d 107, 118 (2d Cir. 2004) (noting that "[t]he term 'sex plus' . . . is simply a heuristic . . . developed in the context of Title VII to affirm that plaintiffs can [claim sex discrimination] even when not all members of a disfavored class are discriminated against").

231. *Hively*, 853 F.3d at 357–59 (Flaum, J., concurring).

232. *Id.* at 357 ("I find the issue before us is simply whether discriminating against an employee for being homosexual violates Title VII's prohibition against discriminating against that employee because of their sex").

233. *Id.*

234. *See id.* at 358 (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989), for the proposition that an employee alleging sex discrimination "must show that the employer actually relied on her gender in making its decision.").

have been denied a promotion if she were a *man* who was sexually attracted to women)."[235] From there, the judge declared, "[t]here is no allegation [in Hively's case] that the College refused to promote women; nor is there an allegation that it refused to promote those who associate with women."[236] Rather, the judge declared, "Ivy Tech's alleged animus was against Professor Hively's sexual orientation—a combination of these two factors."[237]

Having stated Hively's argument in this manner—one that is nothing more than a claim of sex-plus discrimination based on the combination of both Hively's gender and her association with women—Judge Flaum declared that "discrimination against an employee on the basis of their homosexuality is necessarily, in part, discrimination based on their sex."[238] As Judge Flaum explained, homosexuality is marked by attraction to individuals of the "same sex."[239] Accordingly, "[o]ne cannot consider a person's homosexuality without also accounting for their sex: doing so would render 'same' [sex] meaningless."[240] As such, the judge explained, "discriminating against that employee because they are homosexual constitutes discriminating against an employee because of (A) the employee's sex, *and* (B) their sexual attraction to individuals of the *same sex*. And 'sex,' under Title VII, is an enumerated trait."[241] Finally, the judge noted, Title VII requires a plaintiff like Hively to prove only that her sex was "a motivating factor for any employment practice, even though other factors also motivated the

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.* (emphasis in original).

practice."[242] Accordingly, unlawful "sex" discrimination occurs when an employer discriminates against an employee because they are homosexual.[243]

Judge Flaum's analysis most closely resembles sex-plus discrimination theory, in that it explicitly recognizes that Hively's claim is based upon "a combination" of both her gender and her attraction to women, which together produced the "alleged animus" for which she complained.[244] Although Judge Flaum did not mention the sex-plus theory in his analysis, the sex-plus doctrine is implicit within it.[245] As such, the sex-plus theory appears to be a viable argument for litigants to present in cases similar to Hively's.

### B. *Second Circuit Court of Appeals*

In *Zarda v. Altitude Express, Inc.*,[246] the United States Court of Appeals for the Second Circuit joined the Seventh Circuit in extending Title VII's prohibition of "sex" discrimination to claims of sexual orientation discrimination.[247] Although the *Zarda* court's analysis is less obviously related to sex-plus theory, the opinion is undoubtedly significant, and employs a strikingly similar structure to the majority opinion in *Hively*.

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242. *Id.* (quoting 42 U.S.C. § 2000e–2(m)).

243. *See id.* at 359 ("[I]f discriminating against an employee because she is homosexual is equivalent to discriminating against her because she is (A) a woman who is (B) sexually attracted to women, then it is motivated, in part, by an enumerated trait: the employee's sex. That is all an employee must show to successfully allege a Title VII claim.").

244. *See id.* at 358.

245. *See, e.g.*, *id.* at 359 ("Ivy Tech allegedly refused to promote Professor Hively because she was homosexual—or (A) a woman who is (B) sexually attracted to women. Thus, the College allegedly discriminated against Professor Hively, at least in part, because of her sex. . . . Title VII, as its text provides, does not allow this.").

246. 883 F.3d 100 (2d Cir. 2018).

247. *Id.* at 107–08.

Similar to the *Hively* majority, the en banc court in *Zarda* began its analysis of Zarda's sexual orientation discrimination claim by emphasizing its task of simply interpreting Title VII's existing prohibition of "sex" discrimination, as that text has been interpreted by the Supreme Court.[248] Also similar to *Hively*, the *Zarda* court declared that Title VII's prohibition of "sex" discrimination should be interpreted broadly,[249] consistent with the Supreme Court's view that Title VII covers not just "the principal evil" that led to Title VII's enactment, but also "reasonably comparable evils" that meet the statutory requirements.[250] Finally, the court stated that "the critical inquiry" in a Title VII sex discrimination claim is to determine whether the plaintiff's sex was "a motivating factor" in the employer's decision.[251] As such, the court described the issue as "whether an employee's sex is necessarily a motivating factor in discrimination based on sexual orientation," so as to make sexual orientation discrimination claims a subset of sex discrimination claims.[252] And on that issue, the court agreed with *Hively* that "sexual orientation discrimination is motivated, at least

248. *Id.* at 111–12 ("In deciding whether Title VII prohibits sexual orientation discrimination, we are guided, as always, by the text and, in particular, by the phrase 'because of . . . sex.' However, in interpreting this language, we do not write on a blank slate. Instead, we must construe the text in light of the entirety of the statute as well as relevant precedent."); *cf. Hively*, 853 F.3d at 347 (describing "the interpretative question raised by Hively's case" as follows: "is sexual-orientation discrimination a form of sex discrimination, given the way in which the Supreme Court has interpreted the word 'sex' in the statute?").

249. *Zarda*, 883 F.3d at 111.

250. *Id.* at 112 (citing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998)); *cf. Hively*, 853 F.3d at 344–45.

251. *Zarda*, 883 F.3d at 112 (citing 42 U.S.C. § 2000e–2(m)); *cf. Hively*, 853 F.3d at 358 (Flaum, J., concurring) (also highlighting the "motivating factor" standard in 42 U.S.C. § 2000e–2(m)).

252. *Zarda*, 883 F.3d at 112; *cf. Hively*, 853 F.3d at 343 (describing the issue in that case as "whether actions taken on the basis of sexual orientation are a subset of actions taken on the basis of sex").

in part, by sex and is thus a subset of sex discrimination."[253]

Similar to *Hively*, and borrowing as well from the EEOC's reasoning in *Baldwin*, the *Zarda* court then provided three primary reasons for extending Title VII's prohibition of "sex" discrimination to claims of sexual orientation discrimination: the first based on the plain text of Title VII, including the comparative method of analyzing employment discrimination claims; the second based on gender stereotyping precedents; and the third employing the associational theory of discrimination.[254]

From the perspective of sex-plus discrimination analysis, the *Zarda* court's first articulated rationale is most significant. The court began this particular analysis by declaring that "sex is necessarily a factor in sexual orientation."[255] "Sexual orientation," the court explained, refers to "a person's predisposition or inclination toward sexual activity or behavior with other males or females," and is commonly characterized as heterosexuality, homosexuality, or bisexuality.[256] Homosexuality, for example, is "characterized by sexual desire for a person of the same sex."[257] Accordingly, to identify a person's sexual orientation, one must know both "the sex of the person and that of the people to whom he or she is attracted."[258] For this reason, the court explained, "sexual orientation is a function of sex," and is in fact "doubly delineated by sex because it is a function of both a person's sex and the sex of those to whom

253. *Zarda*, 883 F.3d at 112; *cf. Hively*, 853 F.3d at 345 (describing Hively's claim as "paradigmatic sex discrimination").

254. *Zarda*, 883 F.3d at 112–13; *cf.* Baldwin v. Foxx, EEOC Appeal No. 0120133080, 2015 WL 4397641, at *5–8 (July 15, 2015) (presenting similar rationales).

255. *Zarda*, 883 F.3d at 112.

256. *Id.* at 113 (quoting *Sexual Orientation*, BLACK'S LAW DICTIONARY (10th ed. 2014)).

257. *Id.* (quoting *Homosexual*, BLACK'S LAW DICTIONARY (10th ed. 2014)).

258. *Id.*

he or she is attracted."[259] Finally, the court declared, "because sexual orientation is a function of sex and sex is a protected characteristic under Title VII, it follows that sexual orientation is also protected."[260]

Although the hints of sex-plus discrimination are more subtle than in *Hively*, the sex-plus doctrine is nevertheless reflected in the *Zarda* court's analysis above. As the court explained, a person's "sexual orientation" is "doubly delineated by sex because it is a function of both a person's sex and the sex of those to whom he or she is attracted."[261] Accordingly, discriminating against a gay male because of his sexual orientation is equivalent to discriminating against him because of (A) his own sex, male; and (B) his attraction to males.[262] From a male plaintiff's perspective, this combination of factors describes an instance of sex-plus discrimination involving a plus factor—attraction to males—consisting of an immutable characteristic. And as the *Hively* court declared, if one "were to change the sex of one partner in a [homosexual] relationship"—here, by considering a female comparator who is likewise attracted to males—the result would be different.[263] Or, as the EEOC artfully explained: if an employer suspends a lesbian employee for displaying a photo of her female spouse on her desk, but does not suspend a male employee for displaying a photo of his female spouse on his desk, that action necessarily entails treating the female employee less favorably because of her sex, because "but for" that characteristic, her suspension would not have occurred.[264] Although in this passage the

259. *Id.*

260. *Id.*

261. *Id.*

262. *See id.* (quoting *Hively*, 853 F.3d at 358 (Flaum, J., concurring)).

263. *Hively*, 853 F.3d at 349.

264. Baldwin v. Foxx, EEOC Appeal No. 0120133080, 2015 WL 4397641, at *5 (July 15, 2015) (citing Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 711 (1978)).

EEOC purports to describe an instance of pure sex discrimination, the plus factor at issue—having a female spouse—is central to the analysis. Moreover, the claim here would not be that the employer is discriminating against females as a whole, but rather only against the particular subset of females with female partners. Sex-plus theory is tailor-made for those circumstances.

## V. HOW SEX-PLUS THEORY AUTHORIZES TITLE VII SEXUAL ORIENTATION DISCRIMINATION CLAIMS

By this point, it should be obvious that sexual orientation discrimination is a form of sex-plus discrimination, such that no amendment to Title VII is needed for courts to apply the statute in that manner. A comparison to *Phillips v. Martin Marietta Corp.*[265] further reveals how sex-plus theory exposes sexual orientation discrimination claims as a subset of sex discrimination claims.

In *Phillips*, the Court found an employer liable for sex discrimination due to its policy of refusing to hire women, but not men, with pre-school aged children.[266] As the *Phillips* Court succinctly declared, Title VII "requires that persons of like qualifications be given employment opportunities irrespective of their sex," a principle violated by the employer's gender-based hiring policies.[267]

In *Phillips*, the plaintiff belonged to a subgroup of women consisting of women with pre-school aged children; the comparator group, treated more favorably by the employer, consisted of men with pre-school aged children.[268] In that context, a female applicant's sex and the "plus" factor of having young children combined to produce the employer's specific discriminatory animus, leading to gender-based

265. 400 U.S. 542 (1971).

266. *Id.* at 544.

267. *Id.*

268. *Id.*

differences in hiring. Accordingly, if one were to change either of those variables—by considering either a *male* applicant with young children or a female applicant *without young children*—the employer's specific discriminatory animus would disappear.

This is also the case with sexual orientation discrimination. Take, for example, a lesbian plaintiff who experiences a hostile work environment and is eventually fired due to her employer's anti-gay bias. Under a sex-plus analysis, the plaintiff's relevant subgroup of women would be those attracted to other women; the comparator group, treated more favorably by the employer, would consist of men who share the same plus factor, attraction to women. Finally, just as in *Phillips*, the lesbian plaintiff's sex (female) would combine with the plus factor (attraction to women) to generate the employer's specific discriminatory animus. If one were to change either of those two variables—by considering either a *male* employee attracted to females or a female employee *attracted to males*—the employer's discriminatory animus disappears. Thus, just as in *Phillips*, the plaintiff's sex is necessarily a motivating factor in the employer's decision, which is all that Title VII requires.[269]

In the example of a sex-plus discrimination claim brought by a lesbian plaintiff, the plus characteristic that matters is the fact of being attracted to females, as it is this particular plus factor that triggers the employer's discriminatory animus. This, in turn, makes the relevant comparator subgroup men who are likewise attracted to females. From there, it would ordinarily be easy for a lesbian plaintiff possessing evidence of sexual orientation discrimination to prove a difference in treatment between females who are attracted to females, as compared to males

269. *See* 42 U.S.C. § 2000e-2(m) (2012); *see also* Franchina v. City of Providence, 881 F.3d 32, 53 (noting that Title VII's text "bars discrimination when sex is 'a motivating factor,' not 'the motivating factor'").

attracted to females, thereby establishing an instance of sex-plus discrimination.[270] As such, the only question remaining is whether the relevant plus factor, sexual attraction, involves an immutable characteristic or a fundamental right, either of which sex-plus theory typically requires.[271]

### A. *Intimate Association as a Fundamental Right*

There is no doubt that a person's intimate association with another implicates fundamental rights. This much the Supreme Court made clear in *Obergefell v. Hodges*,[272] as well as the cases leading up to it.

In *Obergefell*, the Court considered whether the Fourteenth Amendment was violated by state statutes that either denied same-sex couples the right to marry or denied recognition to lawful same-sex marriages performed in another state.[273] The Court analyzed these issues primarily under the Fourteenth Amendment's Due Process Clause, which declares that "no State shall 'deprive any person of life, liberty, or property, without due process of law.'"[274] The "fundamental rights" protected by this Clause, the Court noted, include "interests of the person so fundamental that the State must accord them its respect,"[275] and consist of

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270. *See Phillips*, 400 U.S. at 544 (finding that a policy of refusing to hire women with pre-school age children discriminates on the basis of sex where there was no similar policy for men with such children).

271. *See* Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1091 (5th Cir. 1975); *cf.* Valdes v. Lumbermen's Mut. Cas. Co., (The Kemper Grp.), 507 F. Supp. 10, 12 (S.D. Fla. 1980) (recognizing that "[i]f one's sexual preference is such a 'fundamental right' or 'immutable' characteristic, it would seem that an employer may not discriminate between male and female homosexuals," but determining that the Fifth Circuit Court of Appeals had seemingly "adopted a different approach" in a case concluding that discrimination against "effeminate" males does not constitute sex discrimination).

272. 135 S. Ct. 2584 (2015).

273. *Id.* at 2593.

274. *Id.* at 2597 (quoting U.S. CONST. amend. XIV).

275. *Id.* at 2598.

"certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."[276] Marriage, the Court declared, is among those liberties, such that "the right to marry is fundamental under the Due Process Clause."[277] Examining whether the right to marry encompasses same-sex marriage, the Court then noted that although its previous cases "presumed a relationship involving opposite-sex partners," the rationales underlying those cases apply with equal force to same-sex couples, which "compels the conclusion that same-sex couples may exercise the right to marry."[278] Accordingly, the Court held that same-sex couples may not be deprived of the fundamental right to marry.[279]

Although *Obergefell* contains a lengthy discussion of the fundamental nature of *marriage*,[280] prior to *Obergefell* the Court had been moving towards recognizing *intimate association* as a fundamental right, both for opposite-sex and same-sex couples.[281] In 1996, for example, the Court in *Romer v. Evans* invalidated an amendment to Colorado's Constitution that sought to foreclose any branch or political subdivision of the State from protecting persons against discrimination based on sexual orientation.[282] Then, in 2003,

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276. *Id.* at 2597.

277. *Id.* at 2598 ("Over time and in other contexts, the Court has reiterated that the right to marry is fundamental under the Due Process Clause."); *see also* Loving v. Virginia, 388 U.S. 1, 12 (1967) (describing the right to marry as a "fundamental freedom" and stating that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men").

278. *Obergefell*, 135 S. Ct. at 2598–99 ("[T]he reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.").

279. *Id.* at 2604–05 ("The Court now holds that same-sex couples may exercise the fundamental right to marry.").

280. *See id.* at 2598–2602.

281. *See id.* at 2596–2600 (summarizing these and other cases).

282. 517 U.S. 620, 624 (1996); *see also* Gregory M. Herek et al., *Demographic, Psychological, and Social Characteristics of Self–Identified Lesbian, Gay, and*

the Court in *Lawrence v. Texas* invalidated laws that made same-sex intimacy a criminal act.[283] The *Obergefell* Court later described *Lawrence* as holding that "same-sex couples have the same right as opposite-sex couples to enjoy *intimate association*,"[284] providing support for the notion that intimate association with a person of the same sex, even in the absence of marriage, can be linked to a fundamental right.[285] Once this is established, a plus factor involving an employee's intimate association with a person of the same sex would trigger the sex-plus doctrine.[286]

### B. *Sexual Attraction as Immutable*

Even assuming there is no fundamental right to intimately associate with a person of the same sex, a plaintiff-employee's sexual attraction to a person of the same sex could, at least for many plaintiffs, be considered immutable.

In *Baskin v. Bogan*, the Seventh Circuit Court of Appeals discussed at length whether homosexual orientation is innate or chosen, and found that the scientific literature

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*Bisexual Adults in a U.S. Probability Sample*, 7 SEXUALITY RES. & SOC. POL'Y 176, 177 (2010) (stating that "sexual orientation is a multifaceted construct that encompasses sexual attraction, sexual behavior, personal identity, romantic relationships, and community membership.").

283. 539 U.S. 558, 575 (2003).

284. *Obergefell*, 135 S. Ct. at 2600 (emphasis added); *see also id*. at 2604 (stating that "[a]lthough *Lawrence* elaborated its holding under the Due Process Clause, it acknowledged, and sought to remedy, the continuing inequality that resulted from laws making intimacy in the lives of gays and lesbians a crime").

285. *See id.* at 2600 ("[W]hile *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty."); *id.* at 2602 (describing "the approach this Court has used in discussing *other fundamental rights, including marriage and intimacy*" (emphasis added)).

286. *See* Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1091 (5th Cir. 1975) ("[A]n employer cannot have one hiring policy for men and another for women *if* the distinction is based on some fundamental right.").

strongly supports the proposition that it is biological and innate, rather than a choice.[287] As Judge Posner later explained in *Hively*, this finding is important because it makes "[t]he position of a woman discriminated against on account of being a lesbian . . . analogous to a woman's being discriminated against on account of being a woman."[288] As Judge Posner declared, just like a woman does not choose to be a woman, "the lesbian didn't choose to be a lesbian."[289] Accordingly, "firing a lesbian because she is in the subset of women who are lesbian [is no] less a form of sex discrimination than firing a woman because she's a woman."[290]

As the Seventh Circuit has recognized, scientific literature supports the proposition that homosexual orientation is biological and innate, making it an immutable characteristic similar to one's race or national origin.[291] Such evidence could help build the case for treating sexual orientation discrimination as a form of unlawful sex-plus discrimination.

In a study examining this issue, researchers Gregory M. Herek, Aaron T. Norton, Thomas J. Allen, and Charles L. Sims, examined data from a U.S. national probability sample consisting of 662 self-identified lesbian, gay, and bisexual

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287. 766 F.3d 648, 657 (7th Cir. 2014) (finding "little doubt that sexual orientation . . . is an immutable (and probably an innate, in the sense of in-born) characteristic rather than a choice."); *see also Obergefell*, 135 S. Ct. at 2596 (citing Brief for American Psychological Association et al. as Amici Curiae 7–17) ("Only in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable.").

288. Hively v. Ivy Tech Cmty. Coll. of Indiana, 853 F.3d 339, 354–55 (7th Cir. 2017) (Posner, J., concurring).

289. *Id.* at 355.

290. *Id.*

291. *See Baskin*, 766 F.3d at 657; *see also Hively*, 853 F.3d at 363 (Sykes, J., dissenting) (stating that "sex" and "sexual orientation" are "different immutable characteristic[s]").

adults,[292] and determined that the vast majority of respondents reported experiencing little or no choice about their sexual orientation.[293] In their study, perceived choice about one's sexual orientation was assessed with the question, "How much choice do you feel you had about being [L[esbian]/G[ay]/B[isexual]/Q[ueer]/H[omosexual]]?"[294] The response options were "no choice at all," "a small amount of choice," "a fair amount of choice," and "a great deal of choice."[295] With 95% confidence intervals,[296] the authors reported that 60.6% of respondents reported having "no choice at all," 14.2% reported having "a small amount of choice," and 25.2% reported having either "a fair amount" or "great deal of" choice in their specific sexual orientation.[297] According to the authors, "[o]verall, respondents reported that they did not experience their sexual orientation as a choice," but "[t]his pattern varied somewhat . . . according to gender and sexual orientation."[298] For example, nearly nine out of ten gay men (88%), and roughly two thirds of lesbians (68%) reported having no choice at all about their sexual orientation.[299] In addition, "[c]ombining respondents who said they'd had a small amount of choice with those reporting no choice, 95% of gay men and 84% of lesbians could be characterized as perceiving that they had little or no choice

292. Herek et al., *supra* note 282, at 176, 178; *see also id.* at 179–80 (describing the sample).

293. *Id.* at 176.

294. *Id.* at 180. As the authors note, respondents were asked to indicate their preferred term for characterizing their own sexual orientation (e.g., "Gay," "Lesbian," "Bisexual," "Queer," "Homosexual"). This label was subsequently inserted into questions that referred to the respondent's sexual orientation or identity. This individualized item wording is indicated throughout their article as [L/G/B/Q/H]. *Id.*

295. *Id.*

296. *Id.* at 181.

297. *Id.* at 186 (reporting results at Table 3).

298. *Id.* at 188.

299. *Id.*

about their sexual orientation."[300] Reaching a similar conclusion, the American Psychological Association has said that "most people experience little or no sense of choice about their sexual orientation."[301] Thus, although there will always be those who believe homosexuality represents a willful choice,[302] those with that orientation often do not perceive it that way.[303]

Beyond the argument that Congress, rather than courts, should decide whether sexual orientation discrimination should be outlawed under Title VII as a matter of public policy,[304] perhaps the biggest objection to the sex-plus argument outlined in this Article is that it considers the wrong plus factor, thereby failing to demonstrate discrimination on the basis of sex. As the competing *Hively* opinions demonstrate (albeit without actually examining the issue from a sex-plus perspective), there are essentially two ways to state the relevant plus factor in a case involving alleged sexual orientation discrimination.

The first, plaintiff-friendly view, is to state the relevant plus characteristic as *attraction to members of the plaintiff's same sex*. In the hypothetical scenario of a lesbian plaintiff, the plus factor would thus become attraction to females. From there, sex discrimination can be revealed by holding constant that particular plus factor (i.e., attraction to females) and examining whether there is evidence of differential treatment between the plaintiff and males who

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300. *Id*.

301. *Answers to Your Questions: For a Better Understanding of Sexual Orientation & Homosexuality*, AM. PSYCHOLOGICAL ASS'N, https://www.apa.org/topics/lgbt/orientation (last visited July 13, 2019) (under the heading "What causes a person to have a particular sexual orientation?").

302. *See generally* DIDI HERMAN, THE ANTIGAY AGENDA: ORTHODOX VISION AND THE CHRISTIAN RIGHT (1997).

303. *See* Herek et al., *supra* note 282, at 195.

304. *See supra* notes 126–27 and accompanying text.

are likewise attracted to females.[305]

The alternative, employer-friendly view, is to state the relevant plus characteristic as *a particular sexual orientation*, here, homosexuality.[306] In this respect, a lesbian plaintiff like Hively might find it more difficult to prove the requisite sex discrimination under Title VII, given that an employer who allegedly discriminates against *female* homosexuals would likely treat the relevant *male* comparator sharing that particular plus factor, male homosexuals, no differently.[307]

For a sex-plus discrimination claim brought by a lesbian employee, however, the truly relevant comparator group of the opposite gender is *not* gay males, as the *Hively* dissent posits.[308] Rather, it is males sharing the identical plus factor that in fact triggers the employer's animus against the particular subset of women who are gay: attraction to females.[309] The Seventh Circuit addressed this very issue in *Hively*, and rejected the dissent's comparator of homosexual males through an analogy to *Loving*, in which the Supreme Court deemed unconstitutional certain state statutes preventing marriages between persons on the basis of racial

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305. *See* Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339, 358 (Flaum, J., concurring) (articulating the plaintiff's argument as follows: "Professor Hively argues that [in refusing to promote her] the College relied on her sex, because, but for her sex, she would not have been denied a promotion (*i.e.*, she would not have been denied a promotion if she were a *man* who was sexually attracted to women).") (emphasis in original).

306. *Id.* at 345 (majority opinion).

307. *See id.* at 353 (Posner, J., concurring) (stating that when Title VII was enacted in 1964, the statute's prohibition of "sex" discrimination would have only applied in the event a lesbian employee were fired but a homosexual man was not, "for in that event the only difference between the two would be the gender of the one [who was] fired.").

308. *See id.* at 366 (Sykes, J., dissenting).

309. *See* Franchina v. City of Providence, 881 F.3d 32, 52–53 (1st Cir. 2018) (rejecting defendant's argument that a lesbian plaintiff alleging sexual harassment under a sex-plus theory must present evidence of a comparative class of *gay males* who were *not* discriminated against).

classifications.[310] The *Hively* court explained:

> The dissent would instead have us compare the treatment of men who are attracted to members of the male sex with the treatment of women who are attracted to members of the female sex, and ask whether an employer treats the men differently from the women. . . . *Loving* shows why this fails. In the context of interracial relationships, we could just as easily hold constant a variable such as "sexual or romantic attraction to persons of a different race" and ask whether an employer treated persons of different races who shared that propensity the same. That is precisely the rule that *Loving* rejected, and so too must we, in the context of sexual associations. . . . No matter which [Title VII] category is involved, the essence of the claim is that the *plaintiff* would not be suffering the adverse action had his or her sex [or] race . . . been different.[311]

Because the Supreme Court in *Loving* effectively rejected the defendant's proposed comparator of a person of a different race than the plaintiff who associates with someone of a different race than the comparator, which is analogous to that advocated by the *Hively* dissent (i.e., an opposite-sex comparator who is attracted to members of the comparator's same sex), courts examining sexual orientation discrimination claims under a sex-plus theory should likewise reject the type of comparator advocated by the *Hively* dissent.[312]

Aside from the analogy to *Loving* outlined above, even if a court were to isolate an employer's treatment of both female and male homosexuals, this would not rule out the possibility of discriminatory intent against a plaintiff like Hively.[313] After all, the comparative method is just one

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310. Loving v. Virginia, 388 U.S. 1, 2 (1967).

311. *Hively*, 853 F.3d at 349 (majority opinion); *see also Loving*, 388 U.S. at 7–8 (describing the State of Virginia's argument in that case, which the Supreme Court rejected).

312. *Hively,* 853 F.3d at 349.

313. Of course, there may be times where an employer harbors discriminatory animus against female homosexuals *but not* male homosexuals. Where such animus results in adverse employment actions against lesbians but not gay males, gender discrimination has necessarily occurred. *Hively*, 853 F.3d at 366

method of proving discrimination.[314] Primarily used as an evidentiary test,[315] the comparative method is particularly helpful when a plaintiff attempts to prove discrimination through circumstantial evidence of discriminatory intent.[316] Where direct evidence of discriminatory intent exists, however, the comparative method is unnecessary.[317] For this reason, courts upholding sex-plus discrimination claims have often relied on other forms of evidence, beyond comparators, to reveal the employer's unique discriminatory animus.

In *Lam*,[318] for example, the Ninth Circuit Court of Appeals relied on evidence that members of the appointments committee in Lam's case were particularly biased against women and Asians.[319] According to the Ninth Circuit, this evidence was sufficient to preclude summary judgment for the defendants on Lam's sex-plus-race discrimination claim.[320] Likewise, in a sex-plus

(Sykes, J., dissenting) ("If an employer is willing to hire gay men but not lesbians, then the comparative method has exposed an actual case of sex discrimination.").

314. *See id.* at 365–66 (Sykes, J., dissenting) (explaining how the comparative method is often used as a method of proving that an employer acted with a discriminatory motive in a given case).

315. *See id.*

316. *See* Bagwe v. Sedgwick Claims Mgmt. Servs., Inc., 811 F.3d 866, 879 (7th Cir. 2016) (characterizing comparative evidence as circumstantial evidence of discriminatory intent).

317. *See id.*; *see also* Desert Palace, Inc. v. Costa, 539 U.S. 90, 99 (2003) (recognizing that a Title VII plaintiff may prove his case using either direct or circumstantial evidence); Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 204 (2009) (discussing the use of comparator evidence in discrimination cases and stating that "the lower courts have pretty clearly rejected comparator proof as necessary."); *see also, e.g.*, Mora v. Jackson Mem'l Found., Inc., 597 F.3d 1201, 1204 (11th Cir. 2010) (finding alleged statement that plaintiff was "too old" to be direct evidence of age discrimination); Van Voorhis v. Hillsborough Cty. Bd. of Cty. Comm'rs, 512 F.3d 1296, 1300 (11th Cir. 2008) (classifying an employer's statement of not wanting to hire "any old pilots" as direct evidence).

318. Lam v. Univ. of Hawai'i, 40 F.3d 1551 (9th Cir. 1994).

319. *Id.* at 1560.

320. *Id.*

discrimination claim involving a fundamental right, the court in *McGrenaghan* ruled that a teacher could maintain a Title VII sex discrimination claim as a member of a subclass of women with disabled children based on evidence of discriminatory animus specific to such women, including direct evidence of discriminatory animus by the school's principal.[321] And most importantly, given such evidence, the *McGrenaghan* court did not consider whether the employer harbored a similar animus against fathers with disabled children.[322]

As *Lam* and *McGrenaghan* show, although comparator evidence across genders could certainly help prove discrimination based on sex where such evidence is necessary to expose the employer's discriminatory animus, what matters most is whether a plaintiff like Hively can prove her employer acted on the basis of a discriminatory animus directed against her, in particular, because of her sex in combination with an immutable characteristic or fundamental right.[323] The concurring judges in *Hively* recognized this when they wrote: "The foregoing analysis should obtain even if an employer allegedly discriminates against all homosexual employees. In that case, the employer's discrimination across sexes does not demonstrate that sex is irrelevant, but rather that each individual has a plausible sex-based discrimination claim."[324] The majority in *Zarda* made the same point when it noted that the employer

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321. McGrenaghan v. St. Denis Sch., 979 F. Supp. 323, 327 (E.D. Pa. 1997).

322. *See id.* at 326–27 (denying summary judgment to the defendant-employer without considering such comparative evidence).

323. *See Lam*, 40 F.3d at 1559 (noting that "the existence of a discriminatory motive for the employment decision will generally be the principal question" in an employment discrimination case).

324. Hively v. Ivy Tech Cmty. Coll. of Indiana, 853 F.3d 339, 359 n.2 (7th Cir. 2017) (Flaum, J., concurring) ("When confronting claims that are inherently based in part on sex, such as discrimination against homosexuals, each employee's claim satisfies Title VII on its face, no matter the sex of any other employee who experienced discrimination.").

in *Price Waterhouse* could not have defended itself against Hopkins's gender non-conformity claim by arguing that it fired a gender-non-conforming man as well as a gender-non-conforming woman.[325] "To the contrary," the court noted, "this claim would merely be an admission that the employer has doubly violated Title VII by using gender stereotypes to discriminate against both men and women."[326] The same result should apply when an employer discriminates against all employees, male and female, based on stereotypes about the gender to which the employees should be attracted, as this is nothing more than "a double-edged sword that cuts both men and women" the same.[327] For these reasons and others, numerous scholars agree that the comparative method of proving employment discrimination has its flaws.[328]

In sum, where a female plaintiff alleges sex discrimination on the basis of sexual orientation, the relevant subclass of women consists of women who are sexually attracted to other women. Under precedents like *Lam*, *McGrenaghan*, *Hively*, and *Zarda*, if a plaintiff presents evidence of discriminatory animus against her particular subset of women, that is all the plaintiff must show. This point was made explicit in a 2018 First Circuit

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325. Zarda v. Altitude Express, Inc., 883 F.3d 100, 123 (2d Cir. 2018).

326. *Id*.

327. *Id*.

328. *See, e.g.*, Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 731 (2011) (arguing that "the most traditional and widely used heuristic—comparators, who are similar to the complainant in all respects but for the protected characteristic—is barely functional in today's economy and is largely unresponsive to updated understandings of discrimination"); *id.* at 733 (noting that under the comparative method, "however abusively an employer treats its employees, the bad acts do not present a discrimination problem so long as they are committed in an evenhanded fashion."); *id*. at 751 (noting that "[a]s a practical matter, comparators are hard to find even in workplaces with a diverse group of employees," and that "conceptually, the existence of a comparator is simply not relevant, under some discrimination theories, to the question whether discrimination has occurred").

Court of Appeals decision, *Franchina v. City of Providence*,[329] applying the sex-plus doctrine to a Title VII claim (albeit one involving allegations of a sexually hostile work environment based in part on evidence of pure gender discrimination).[330]

In *Franchina*, a former female firefighter of the Providence, Rhode Island, fire department, Lori Franchina, sued the city, its fire department, and union asserting a Title VII claim for hostile work environment based on her gender, as well as a retaliation claim for having reported the harassment to her superiors.[331] After trial, a jury ruled in Franchina's favor on each of her claims, and awarded her front pay and emotional damages.[332]

In its attempt to overturn the jury's verdict on the sexual harassment charge,[333] the City argued on appeal that Franchina failed to present sufficient evidence under a sex-plus theory of discrimination as required by the First Circuit's Title VII jurisprudence.[334] Specifically, the City argued that for a plaintiff like Franchina to be successful under a sex-plus theory, the plaintiff must "identify a corresponding sub-class of the opposite gender and show that the corresponding class was not subject to similar harassment or discrimination."[335] Thus, the City argued that Franchina "is required to have presented evidence at trial of a comparative class of gay male firefighters who were not discriminated against" because, in the City's view, without

329. *See* Franchina v. City of Providence, 881 F.3d 32, 45–46 (1st Cir. 2018) (summarizing Franchina's claims).

330. *See* Brief of Plaintiff-Appellee Lori Franchina at 26, Franchina v. City of Providence, 881 F.3d 32 (No. 16-2401).

331. *Franchina*, 881 F.3d at 37, 45–46.

332. *Id.* at 37–38.

333. *See id.* at 46 ("On appeal, the City shines its spotlight solely on the hostile work environment cause of action.").

334. *Id.* at 51.

335. *Id.* at 52.

such evidence, "it would not be possible to prove that any sort of differential treatment a plaintiff experiences is necessarily predicated on his or her gender."[336]

The First Circuit Court of Appeals rejected the City's argument for numerous reasons.[337] First, the court declared that the City's argument, if accepted, "would permit employers to discriminate free from Title VII recourse so long as they do not employ any subclass member of the opposite gender."[338] This result, according to the court, cannot be correct, as it would "be inapposite to Title VII's mandate against sex-based discrimination."[339] In a related point, the court declared that "discrimination against one employee cannot be remedied solely by nondiscrimination against another employee in that same group."[340] For this reason, the court noted, "discrimination [that] adversely affects only a portion of the protected class" remains unlawful.[341] "Similarly," the court declared, "the effect of Title VII is not to be diluted because discrimination adversely affects a plaintiff who is unlucky enough to lack a comparator in his

336. *Id.*

337. *See id.* at 52 (stating that the City's argument "has some rather obvious flaws"). *But see* Coleman v. B-G Maint. Mgmt. of Colorado, Inc., 108 F.3d 1199, 1202–04 (10th Cir. 1997) (ruling in a sex-plus-marital status claim that a female plaintiff must show that her male co-workers with the same marital status were treated differently, and reversing jury verdict for plaintiff due to a lack of evidence on that point).

338. *Franchina*, 881 F.3d at 52.

339. *Id.* at 53.

340. *Id.* (quoting Chadwick v. WellPoint, Inc., 561 F.3d 38, 42 n.4 (1st Cir. 2009)); *see also* Connecticut v. Teal, 457 U.S. 440, 453–55 (stating that the purpose of Title VII "is the protection of the individual employee, rather than the protection of the minority group as a whole," and explaining that in enacting Title VII, "Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group").

341. *Franchina*, 881 F.3d at 53 (quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971)).

or her workplace."[342]

Finally, the court declared that the City's proposed comparator requirement "conflicts also with Title VII's text and jurisprudence."[343] The court explained:

> Requiring a plaintiff to point to a comparator of the opposite gender implies the inquiry is that of "but-for" causation. That is to say, the City's approach requires Franchina to make a showing that, all else being equal (the "plus" factors being the same), the discrimination would not have occurred but for her gender. Title VII requires no such proof. The text bars discrimination when sex is "a motivating factor," not "the motivating factor."[344]

Regarding this latter point, the court concluded by noting that the label, sex-plus, "does not mean that more than simple sex discrimination must be alleged."[345] Rather, the court observed, "the sex-plus label is no more than a heuristic . . . to affirm that plaintiffs can, under certain circumstances, survive summary judgment [and obtain a favorable verdict at trial] even when not all members of a disfavored class are discriminated against."[346]

As *Franchina* observed, the sex-plus theory of discrimination is merely a tool for unveiling discrimination against a particular subset of male or female employees where an employer treats only that particular subset in a sexually discriminatory manner.[347] Moreover, it is well established that an employer in a sex-plus case cannot justify its discriminatory actions towards a particular subgroup of

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342. *Id*.

343. *Id*.

344. *Id*. (citing 42 U.S.C. § 2000e-2(m)).

345. *Id.* (quoting *Chadwick*, 561 F.3d at 43).

346. *Id.* (quoting *Chadwick*, 561 F.3d at 43).

347. *See also* Myers v. Goodwill Indus. of Akron, Inc., 701 N.E.2d 738, 743 (Ohio Ct. App. 1997) (stating that "[t]he point behind the establishment of the sex-plus discrimination theory is to allow Title VII plaintiffs to survive summary judgment when the defendant employer does not discriminate against *all* members of the sex" (emphasis in original)).

women by pointing to its favorable treatment of other women not in that subgroup.[348] By the same token, an employer defending a sexual orientation discrimination claim cannot justify its discriminatory treatment of lesbians with evidence of how it treats heterosexual women.[349] In fact, the opposite is true, as a female plaintiff alleging sexual orientation discrimination can sometimes benefit by evidence that her employer treats heterosexual females more favorably. Such evidence, for example, might help a plaintiff like Hively expose her employer's specific animus against *homosexual* females, rather than females on the whole, based on gender stereotypes.[350] For this reason, courts analyzing sex-plus claims have found, for example, that a plaintiff's age-plus-gender claim alleging discrimination against *older women* can be proven with evidence of differential treatment between the plaintiff and younger women.[351] After all, where an employer treats both older women and younger women with the same discriminatory intent, the plaintiff's claim would be better cast as a pure sex discrimination claim.

In the final analysis, sex discrimination claims require proof that "the employer actually relied on [a plaintiff's] gender in making its decision."[352] What matters most, then, is not whether the plaintiff can generate evidence pertaining either to an opposite gender comparator or to other women

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348. *See* Phillips v. Martin Marietta Corp., 400 U.S. 542, 543–44 (1971) (finding that a policy of refusing to hire women with pre-school age children discriminates on the basis of sex even though "75–80% of those hired for the position" at issue were women).

349. *See id.*

350. *See* Brief of Plaintiff-Appellee Lori Franchina at 30, Franchina v. City of Providence, 881 F.3d 32 (No. 16-2401).

351. *See, e.g.*, Smith v. Bd. of Cty. Comm'rs of Johnson Cty., Kansas, 96 F. Supp. 2d 1177, 1187–88 (D. Kan. 2000) (stating that because "[p]laintiff's age-plus-gender claim is based on defendants' alleged discrimination against . . . older women . . . plaintiff must show differential treatment between herself and younger women" to prevail).

352. Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989).

outside the plaintiff's subclass, but rather whether the plaintiff can show that her gender was "a motivating factor" in the employer's adverse decision, which is all Title VII requires.[353] For sexual orientation discrimination claims, sex-plus theory provides the basis for such a claim.[354]

## CONCLUSION

Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of sex, and well-established sex-plus precedents make clear that such discrimination can occur even when not all male or female employees in a defendant's workforce experience the same discriminatory treatment. Although the First, Second, and Seventh Circuits have taken the initiative in expanding Title VII's protections to claims of sexual orientation discrimination, the majority of federal appellate courts still cling to the idea that sexual orientation discrimination is not unlawful. As this Article has shown, sex-plus theory destroys that notion, and can serve a critical role in bringing uniformity to the nation's laws on this issue.

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353. *See Franchina*, 881 F.3d at 53.

354. *See, e.g.,* Zarda v. Altitude Express, Inc., 883 F.3d 100, 112–13 (2d Cir. 2018) (explaining why, in the Second Circuit's view, "sexual orientation is a function of sex"); Hively v. Ivy Tech Cmty. Coll. of Indiana, 853 F.3d 339, 346–47 (7th Cir. 2017) (explaining that "a policy that discriminates on the basis of sexual orientation . . . is based on assumptions about the proper behavior for someone of a given sex," and that "[a]ny . . . job decision based on the fact that the complainant—woman or man—dresses differently, speaks differently, or dates or marries a same-sex partner, is a reaction purely and simply based on sex," such that "it falls within Title VII's prohibition against sex discrimination"); Baldwin v. Foxx, EEOC Appeal No. 0120133080, 2015 WL 4397641, at *6 (July 15, 2015) (explaining that sexual orientation discrimination is "sex" discrimination because "an employee alleging discrimination on the basis of sexual orientation is alleging that his or her employer took his or her sex into account by treating him or her differently for associating with a person of the same sex").