Dude Looks Like a Lady:* Protection Based on Gender Stereotyping Discrimination as Developed in *Nichols v. Azteca Restaurant Enterprises*

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I. Introduction

Once upon a time, in a great big office building, in a time not too far in the past, there worked three bears. Big Bear worked in the top floor of this office building for an extremely prestigious law firm. Every morning Big Bear would leave the house he shared with his same-sex partner, whom his colleagues had never met. He would work into the wee hours every day to meet his billable hour requirement, all the time hoping that he was behaving with sufficient masculinity and more than a little bit of homophobia so that his co-workers would never guess his sexual orientation.

On the tenth floor of this office building, Lady Bear managed a branch office of a major accounting firm.[1] With her strong, aggressive, and sometimes ruthless administrative style, she had expanded a tiny satellite office into an enormous growth success. However, Lady Bear had been informed by management that due to her lack of feminine deportment, she would never be transferred to the coveted position at corporate headquarters which, by her experience, she had expected to receive.

On the second floor, Little Bear worked as a server and host

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* Aerosmith, *Dude (Looks Like a Lady), on* PERMANENT VACATION (Geffen Records, Inc. 1987).

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1. *See generally* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (holding that an employer may not discriminate against a woman in the workplace for failing to comport with stereotyped expectations of femininity).

at the office building's bistro. Now, Little Bear could not quite be described as a "man's man." Little Bear loved the theatre, opera, and art. On any given Saturday, he could be found flipping past the myriad of college football games to watch competitive figure skating. In addition, Little Bear had the remnants of a childhood speech impediment and slightly "graceful" gestures. While Little Bear never disclosed his sexual orientation at work, his co-workers clearly asserted their opinions on the subject.

Although the three bears in our story seem like radically different personalities, they all have a significant commonality. None of them have always had federal protection for their inability to conform to their prescribed gender stereotypes, regardless of whether this nonconformity stems from sexual orientation, gender-prescribed behavior, or a combination of orientation and behavior.[2] While this "fairy" tale may seem rather silly and out of place in a legal journal article, it aptly illustrates the kind of bedtime story that would give nightmares to the modern gay man or lesbian—until the Ninth Circuit's July 2001 ruling in *Nichols v. Azteca Restaurant Enterprises*.[3]

The appellant in *Nichols*, Antonio Sanchez, was a former employee of Azteca Restaurant Enterprises.[4] Under Title VII of the Civil Rights Act of 1964 (Title VII),[5] Sanchez claimed that he was subjected to a hostile work environment because of frequent verbal abuse concerning his lack of masculinity.[6] On appeal, the Ninth Circuit held that Sanchez had suffered discrimination due to a hostile work environment and that abuse by male employees stemming from his mannerisms that comported with a female stereotype was "because of sex" with regard to Title VII.[7]

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2. *See infra* notes 23-119 and accompanying text.

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

4. *See id.* at 869 n.1, 870. The Ninth Circuit addressed the claims of Sanchez's co-plaintiffs in an unpublished memorandum disposition filed concurrently with this opinion. *See id.* at 869 n.1; Nichols v. Azteca Rest. Enters., No. 99-35579, 2001 WL 804002 (9th Cir. 2001).

5. 42 U.S.C. §§ 2000e to 2000e-15 (1994). Sanchez also brought this action under the Washington state law counterpart of Title VII, the Washington Law Against Discrimination (WLAD). *See Nichols*, 256 F.3d at 869. WLAD does not specifically protect on the basis of sexual orientation. WASH. REV. CODE § 49.60.010 (2001). Instead, it offers protection under language similar to that of Title VII. *See id.*

6. *See Nichols*, 256 F.3d at 869.

7. *Id.* This decision abrogated the Ninth Circuit's previous holding in *DeSantis v. Pacific Telephone & Telegraph Co.*, 608 F.2d 327, 329-30 (9th Cir. 1979), which stated that Title VII's sex discrimination prohibition only offered protection from discrimination based on "gender." *Nichols*, 256 F.3d at 875. See

In *Nichols*, the Ninth Circuit determined that the language of Title VII, which prohibits "discrimination . . . because of . . . sex,"[8] provides equal protection to men as well as women.[9] In so holding, the court applied the Supreme Court's previous decision in *Price Waterhouse v. Hopkins*,[10] stating that Title VII bars discrimination on the basis of sex stereotypes.[11] In addition, the Ninth Circuit referred to the Supreme Court's holding in *Oncale v. Sundowner Offshore Services, Inc.*[12] that same-sex discrimination by an individual, male or female, constitutes discrimination on the basis of sex.[13] The Ninth Circuit's analysis in *Nichols* led to a holding analogous to the Supreme Court's holding in *Price Waterhouse*:[14] Title VII bars discrimination against a man for his effeminacy, on the ground that discrimination "because of . . . sex" in Title VII includes discrimination because one does not fulfill stereotyped expectations of masculinity.[15] The holding in *Nichols* reflects society's growing recognition that gender roles cannot be separated into the traditional, monolithic male/female dichotomy, where males must manifest only masculine characteristics and females must manifest only feminine characteristics.[16] Such a dichotomy severely limits the purview and potency of Title VII protection.[17] Instead, the holding in *Nichols* allows for a wide array of variation

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infra notes 66-119 and accompanying text for a discussion of the definition of gender. In considering the holding in *Nichols*, one must bear in mind the distinction between *Nichols* and *Price Waterhouse*. *Price Waterhouse* barred discrimination because of sex, defining sex as gender stereotype and explaining that an employer cannot discriminate against an individual for not comporting with his or her particular gender stereotype. *See infra* notes 112-114 and accompanying text. *Nichols* further applies the gender stereotype rationale by protecting the individual who not only does not fulfill their own gender stereotype, as in *Price Waterhouse*, but fulfills the gender stereotype of the opposite sex, completely toppling the convention of the gender monolith. *See infra* notes 74, 148-151 and accompanying text.

8. 42 U.S.C. § 2000e-2(a)(1).

9. *See Nichols*, 256 F.3d at 874 (citing Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000)).

10. 490 U.S. 228 (1989).

11. *See Nichols*, 256 F.3d at 874 (citing *Price Waterhouse*, 490 U.S. at 228).

12. 523 U.S. 75 (1998).

13. *See Nichols*, 256 F.3d at 872.

14. *Price Waterhouse*, 490 U.S. at 258 (holding that Title VII bars discrimination against a woman for exhibiting masculine, instead of feminine, behavior in the workplace, on the grounds that "because of . . . sex" in Title VII includes discrimination because one does not fulfill stereotyped expectations of femininity).

15. *Nichols*, 256 F.3d at 875.

16. *See infra* notes 92-101, 154-162 and accompanying text.

17. *See infra* notes 192-205 and accompanying text.

between these traditional extremes, duly expanding Title VII protection and allowing individuals more freedom in their gender expression.

This Comment will detail the case law that led up to the Ninth Circuit's holding in *Nichols* and will explore the possible further interpretations of Title VII with regard to same-sex harassment claims in the hostile work environment setting. Part II will trace the development of the hostile work environment doctrine as it applies to same-sex sexual harassment, examining contrasting holdings that construe the term "sex" as referring to either the nature of an action or as gender identification.[18] Part III will briefly describe *Nichols* and examine the rationale behind the Ninth Circuit's holding.[19] Part IV will then analyze the basis for the court's rationale, note trends in case law, trace the development of these trends, relate this development to the court's holding, and posit where this development may lead.[20] Currently, it is questionable whether Title VII protects the Gay/Lesbian/Bisexual/Transgendered (GLBT) community from discrimination based on sexual orientation.[21] Part IV will illustrate how the Ninth Circuit's holding in *Nichols* has cleared a path for offering Title VII protection to members of the GLBT community by dictating the logical progression of defining "sex" to also include "sexual orientation."[22]

II. The Evolution of Title VII Jurisprudence

A. The Early Cases Interpreting Title VII: Life Before the Three Bears

Title VII of the Civil Rights Act of 1964 prohibits employment

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18. In the evolution of the jurisprudential definition of "sex," the courts began with a conception of sex as related to acts or behavior. *See infra* Part II.B.1. From this development, "sex" became conceptualized as gender, a term related more to biology and identity than to physical acts. *See infra* notes 68-114 and accompanying text. Rather than the previous emphasis on action, "sex" as gender emphasizes the person's status and individuality in place of more tangible acts. *See infra* notes 66-119 and accompanying text.

19. *See infra* notes 124-151 and accompanying text.

20. *See infra* notes 152-226 and accompanying text.

21. It should be noted that the legal analysis for transgendered individuals is often quite different from that for homosexual or bisexual individuals. While this Comment addresses homosexuality and bisexuality directly, the analysis can be logically extended to the transgendered community because it develops from gender identity and its relation to gender stereotypes.

22. *See infra* notes 152-226 and accompanying text.

discrimination and harassment on the basis of race, sex, religion, or national origin.[23] Since the inception of Title VII in 1964, all levels of the federal court system have spent considerable time and effort trying to ascertain the true meaning of the term "sex" as it applies to the statute.[24] Federal courts have defined "sex" in the context of the phrase "because of . . . sex," only to redefine, extend, and expand the definition of this term numerous times.[25]

Decided in 1971, *Sprogis v. United Air Lines, Inc.*[26] is one of the first cases in which the courts examined sexual harassment within the purview of Title VII.[27] The Seventh Circuit determined that Title VII was intended to remedy any disparate treatment, whether directed at men or women, that resulted from stereotypes of either sex.[28] With this holding, the court gave a fairly broad reach to the prohibitions contained in Title VII.[29] After *Sprogis*, courts could exercise greater discretion in application of Title VII to claims of sex discrimination.[30]

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23. Civil Rights Act, Title VII, 42 U.S.C. § 2000e (1994). Title VII states, in part, that "it shall be . . . unlawful . . . for an employer . . . to . . . discriminate against any individual . . . because of such individual's . . . sex." *Id.* at § 2000e-2(a)(1). Title VII does not refer specifically to sexual harassment, but instead to discrimination on the basis of sex. *Id.* The cause of action for sexual harassment has grown out of this prohibition of discrimination on the basis of sex. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 75 (1998). Title VII also prohibits retaliation against an employee who opposes illegal harassment or discrimination in the workplace. *See* 42 U.S.C. § 2000e-2; Nichols v. Azteca Rest. Enters., 256 F.3d 864, 869 (9th Cir. 2001).

24. *See infra* notes 25-119 and accompanying text.

25. *See, e.g.*, Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971) (holding that "Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes"); L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 710-11 (1978) (holding that an employment practice cannot be predicated on mere "stereotyped" impressions about the characteristics of males or females); Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 685 (1983) (holding that men, as well as women, are protected from sex discrimination under Title VII); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64-65 (1986) (finding that hostile work environment sexual harassment is a form of sex discrimination actionable under Title VII); Price Waterhouse v. Hopkins, 490 U.S. 228, 244-45 (1989) (finding that an employer who has acted on the basis of sexual stereotypes has discriminated on the basis of gender); *Oncale*, 523 U.S. at 82 (stating that sex discrimination consisting of same-sex sexual harassment is actionable under Title VII).

26. 444 F.2d 1194 (7th Cir. 1971).

27. *See id.*

28. *See id.* at 1198.

29. *See id; supra* note 25 and accompanying text.

30. *See, e.g.*, Carroll v. Talman Fed. Sav. & Loan Ass'n of Chic., 604 F.2d 1028, 1032-33 (7th Cir. 1979) (holding that a written dress code that greatly differs for female employees, causing them greater personal expense than male employees,

In 1978, the Fifth Circuit held in *Smith v. Liberty Mutual Insurance Co.*[31] that Title VII does not prohibit discrimination based on sexual orientation.[32] The true issue in *Smith* was whether the employer refused to hire Smith because the employer believed Smith to be too "effeminate," not whether the plaintiff suffered discrimination because of his sexual orientation.[33] Perhaps a bit too eager to address the taboo subject of homosexuality, the Fifth Circuit made the *Smith* holding broader than was necessary.[34]

In its 1979 *DeSantis v. Pacific Telephone & Telegraph Co.*[35] decision, the Ninth Circuit followed the example of the Fifth Circuit, holding that Title VII does not prohibit discrimination based on sexual orientation.[36] The court further held that the term "sex" should not be judicially extended to include "sexual preference such as homosexuality."[37] Finally, the Ninth Circuit held that the term "sex" should be defined as "gender,"[38] a view that turns the substance of the definition away from acts committed by the harasser and points it toward characteristics of the harassed.[39] The *DeSantis* decision illustrates the complex process through which Title VII protection on the basis of sex has

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violates Title VII); Willingham v. Macon Tel. Pub. Co., 507 F.2d 1084, 1089 (5th Cir. 1975) (imposing an "equal protection gloss" when interpreting Title VII); Pettway v. Am. Cast Iron Pipe Co., 494 F.2d 211, 251-53 (5th Cir. 1974) (allowing for recovery of attorney's fees to the successful plaintiff suing under Title VII); Bartmess v. Drewrys U.S.A., Inc., 444 F.2d 1186, 1189 (7th Cir. 1971) (finding different compulsory retirement ages for male and female employees to be discriminatory under Title VII).

31. 569 F.2d 325 (5th Cir. 1978).

32. *See id.* at 326.

33. *Id.* at 327. The court did recognize that the effeminacy of the plaintiff was also an issue to be addressed. The court stated, "Here the claim is not that Smith was discriminated against because he was a male, but because as a male, he was thought to have those attributes more generally characteristic of females and epitomized in the descriptive 'effeminate.'" *Id.*

34. *See id.* at 326. In reaching its decision, the Fifth Circuit relied on the overly broad rationale of the lower court, stating, "In considering this claim, the District Court held that the Civil Rights Act does not forbid discrimination based on affectional or sexual preference." *Id.* The Fifth Circuit also cited the Equal Employment Opportunity Commission (EEOC) as an authority. *See id.* at 327 n.1 ("The EEOC itself has ruled that adverse action against homosexuals is not cognizable under Title VII.") (citing EEOC Dec. No. 76-75 (1976), Emp. Prac. Guide (CCH) ¶ 6495, at 4266; EEOC Dec. No. 76-67 (1975) (unpublished)).

35. 608 F.2d 327 (9th Cir. 1979).

36. *See id.* at 329-30.

37. *Id.* at 330.

38. *Id.* at 329-30.

39. *See infra* notes 68-119 and accompanying text.

evolved.

B. The Courts Struggle to Define "Sex"

Decisions such as *DeSantis* created confusion in the courts about the meaning of "sex" in Title VII. This confusion led to a string of inconsistent cases in which the courts vacillated between defining sex as either acts and behaviors,[40] or as gender.[41]

1. Somebody's Been Sleeping in My Bed! Sex Defined as Acts or Behavior

In its 1986 decision *Meritor Savings Bank v. Vinson*,[42] the Supreme Court very strongly implied that in the context of sex discrimination, the term "sex" refers to physical acts committed by the perpetrator of the discrimination,[43] specifically "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."[44] Here, the Court chose to focus on sexual conduct, avoiding consideration of the implications of defining "sex" as gender.[45] The Court also cited the Equal Employment Opportunity Commission (EEOC) Guidelines interpreting Title VII, which refer to "sexual misconduct" as constituting sexual harassment.[46] By focusing on conduct instead

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40. *See infra* Part II.B.1.

41. *See infra* notes 66-119 and accompanying text.

42. 477 U.S. 57 (1986).

43. *See id.* at 65. The Court noted that the EEOC Guidelines define sexual harassment by first describing "workplace *conduct* that may be actionable under Title VII." *Id.* (emphasis added). The *Vinson* Court also held that there are two types of sexual harassment prohibited by Title VII: "harassment that involves the conditioning of concrete employment benefits on sexual favors [quid pro quo harassment], and harassment that, while not affecting economic benefits, creates a hostile or offensive working environment." *Id.* at 62. The Court explained the EEOC's creation of hostile work environment claims: "the EEOC drew upon a substantial body of judicial decisions and EEOC precedent holding that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." *Id.* at 65.

44. *Id.* (citing 29 C.F.R. § 1604.11(a) (1985)).

45. See *infra* notes 68-119 and accompanying text for a discussion of the implications of defining sex as gender.

46. *See Vinson*, 477 U.S. at 65. The Court noted that the EEOC Guidelines prohibit both quid pro quo sexual harassment and hostile work environment sexual harassment. *See id.* Specifically, the Court explained its rationale as follows:

> Relevant to the charges at issue in this case, the Guidelines provide that such sexual misconduct constitutes prohibited "sexual harassment," whether or not it is directly linked to the grant or denial of an economic *quid pro quo*, where "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or

of adopting the Ninth Circuit's sex-as-gender definition as defined in *DeSantis*,[47] the court began a trend of examining discrimination from the viewpoint of the harasser.[48]

When the courts first began to recognize an action for same-sex sexual harassment, many courts required that the perpetrator be a homosexual or bisexual for an action to lie.[49] In its 1996 decision *Wrightson v. Pizza Hut of America, Inc.*,[50] the Fourth Circuit became one of the first jurisdictions to deem same-sex sexual harassment actionable under Title VII.[51] However, in the same sentence in which they found such harassment actionable, the *Wrightson* court qualified its holding by stating that the harassers must have a same-sex sexual orientation as well.[52] This

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creating an intimidating, hostile, or offensive working environment. *Id.* (citing 29 C.F.R. § 1604.11(a)(3) (1985)).

47. *See* DeSantis v. Pac. Telephone & Telegraph Co., 608 F.2d 327, 329-30 (9th Cir. 1979); *supra* notes 35-39 and accompanying text.

48. *See DeSantis*, 608 F.2d at 329-32. With the gender definition, greater emphasis would likely be put on the viewpoint of the person being harassed by examining the victim's comportment with the gender monolith, interpreted with respect to biological gender, gender identity, or gender stereotype. *See infra* notes 68-119 and accompanying text.

49. *See, e.g.*, McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1195 (4th Cir. 1996). Homosexual and bisexual individuals may collectively be referred to as "same-sex oriented." *See infra* notes 50-54 and accompanying text.

50. 99 F.3d 138 (4th Cir. 1996). In *Wrightson*, a male employee brought an action against his employer, alleging that his homosexual male supervisor and other homosexual male employees subjected him, as a heterosexual male, to hostile work environment sexual harassment in violation of Title VII. *See id.* at 139-41. Harassment consisted of pressure to engage in homosexual sex and frequent verbal descriptions of such acts. *See id.* In addition, the perpetrator touched Wrightson in sexually provocative ways while inviting Wrightson to engage in homosexual sex. *See id.*

51. *See id.* at 141. The court cited the relevant portion of Title VII, stating: "Title VII provides in relevant part that, '[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge . . . or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . .'" *Id.* at 141-42. The Fourth Circuit cited the gender-neutral designations of "employers" and "individual" employees as signifying that the employers and individual employees could be either male or female, thus proscribing discrimination regardless of "sex or gender." *Id.* at 142 (internal quotation marks omitted). The Fourth Circuit determined that "[t]hrough its proscription of 'employer' discrimination against 'individual' employees, the statute obviously places no gender limitation whatsoever on the perpetrator or the target of the harassment." *Id.*

52. *See id.* at 141. ("Today, we . . . hold that a claim under Title VII for same-sex 'hostile work environment' harassment may lie where the perpetrator of the sexual harassment is homosexual.") This holding strongly conflicts with the court's rationale for allowing an action for hostile work environment same-sex sexual harassment. The court first stated that "[a]n employee is harassed or otherwise

element was added to the traditional test used to prove a hostile work environment sexual harassment claim.[53] The Fourth Circuit acknowledged that while the general sentiment of the courts was against allowing claims for same-sex sexual harassment, they were compelled by the "plain language of Title VII" to recognize

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discriminated against 'because of' his or her sex if, 'but-for' the employee's sex, he or she would not have been the victim of the discrimination." *Id.* at 142. The court then explained:

> As a matter both of textual interpretation and simple logic, an employer of either sex can discriminate against his or her employees of the same sex because of their sex, just as he or she may discriminate against employees of the opposite sex because of their sex. That is, a male employer who discriminates only against his male employees and not against his female employees, and a female employer who discriminates against her female employees and not against her male employees, may be discriminating against his or her employees "because of" the employees' sex, no less so than may be the employer (male or female) who discriminates only against his or her employees of the opposite sex. In all four instances, it is possible that the employees would not have been victims of the employer's discrimination were it not for their sex. There is, in other words, simply no "logical connection" between Title VII's requirement that the discrimination be "because of" the employee's sex and a requirement that a harasser and victim be of different sexes.

Id. From the Fourth Circuit's analysis, the logical conclusion is that the employer's or the harasser's sexual orientation is equally as irrelevant as gender, due to the court's inability to provide a "logical connection."

In addition, the Fourth Circuit recognized that while the EEOC has a long history of interpreting Title VII, the EEOC interpretation is not binding upon the courts. *See id.* at 143. The court noted that:

> The EEOC Compliance Manual specifically states: "The victim does not have to be of the opposite sex from the harasser . . . [T]he crucial inquiry is whether the harasser treats a member or members of one sex differently from members of the other sex. The victim and the harasser may be of the same sex where, for instance, the sexual harassment is based on the victim's sex (not on the victim's sexual preference) and the harasser does not treat employees of the opposite sex the same way."

Id. (citing EEOC Compl. Man. (CCH) § 615.2(b)(3) (1987)).

The parenthetical phrase "not on the victim's sexual preference" may be interpreted as stating that the sexual orientation of the harasser is irrelevant. It could also be read as stating the converse: that Title VII does not provide a cause of action for discrimination based on the sexual orientation of the victim. While the Fourth Circuit did not specifically choose the latter interpretation, it also declined to specifically adopt the former. *See id.* at 143-44.

53. *See id.* at 142. The Fourth Circuit cited a previous articulation of the traditional test, stating:

> In order to prevail on a "hostile work environment" sexual harassment claim, an employee must prove: (1) that he was harassed "because of" his "sex"; (2) that the harassment was unwelcome; (3) that the harassment was sufficiently severe or pervasive to create an abusive working environment; and (4) that some basis exists for imputing liability to the employer.

Id. (citing *McWilliams*, 72 F.3d at 1195).

the cause of action.[54]

In its 1997 decision *Melnychenko v. 84 Lumber Co.*,[55] the Supreme Judicial Court of Massachusetts addressed a same-sex hostile work environment claim where the harasser was heterosexual.[56] The defendant argued that as a heterosexual man, he technically could not have sexually harassed an employee of the same sex.[57] The Massachusetts court held that this argument was incorrect, stating that "sexual harassment . . . is not limited . . . to same sex conduct only where the harasser is a homosexual."[58] The *Melnychenko* court cited numerous federal court decisions that conflicted with the defendant's theory.[59] These decisions led to the demise of the requirement that the perpetrator of same-sex sexual harassment in hostile work environment claims be homosexual or bisexual.

In 1998, the Supreme Court irrefutably answered the question of whether the perpetrator of same-sex sexual harassment has to be homosexual or bisexual for a claim to be actionable under Title VII. In *Oncale v. Sundowner Offshore Services, Inc.*[60] the Court held that same-sex sexual harassment is

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54. *Id.* at 144. The Fourth Circuit stated that "where Congress has unmistakably provided a cause of action, as it has through the plain language of Title VII, we are without authority in the guise of interpretation to deny that such exists, whatever the practical consequences." *Id.*

55. 676 N.E.2d 45 (Mass. 1997).

56. *See id.* at 46 n.4. While the harasser in this case was heterosexual, the harassment involved simulated homosexual sex acts. *See id.*

57. *See id.* at 47. While the action was brought under Massachusetts law, the defendant relied heavily on Title VII case law to support his argument. *See id.* In addition, the court considered Title VII case law in its opinion. *See id.*

58. *Id.* at 48.

59. *See id.* at 48 n.5 (citing Quick v. Donaldson Co., 90 F.3d 1372, 1378 (8th Cir. 1996) (holding that same-sex sexual harassment may be actionable under Title VII without regard to the sexual orientation of the harasser); Morgan v. Mass. Gen. Hosp., 901 F.2d 186, 192 (1st Cir. 1990) (assuming male employee had cause of action under Title VII for sexual harassment by heterosexual male coworker); Tanner v. Prima Donna Resorts, 919 F. Supp. 351, 354-55 (D. Nev. 1996) (holding that "same-sex sexual harassment claims are actionable under Title VII" as a matter of law, and furthermore that "the sexual preference of the harasser is irrelevant to a Title VII claim"); Nogueras v. Univ. of P.R., 890 F. Supp. 60, 63 (D.P.R. 1995) (holding that, where a female employee alleged she was harassed by female supervisor and co-worker, "same-sex harassment is an unlawful employment practice" under Title VII and the "*[d]efendant's* gender is irrelevant"); Polly v. Houston Lighting & Power Co., 825 F. Supp. 135, 137 (S.D. Tex. 1993) (reviewing decisions of other federal courts and "assuming, without deciding, that Title VII does apply to sexual harassment of a [presumably heterosexual] male by his male co-workers")).

60. 523 U.S. 75 (1998). In *Oncale*, a male employee brought a Title VII action

prohibited by Title VII[61] and that the statute does not require the perpetrator to be a homosexual or bisexual for an action to lie.[62] While the Court acknowledged that this was a departure from previous holdings of lower courts,[63] the Court justified this departure by relying on the pure text of the statute.[64] By not

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against his former employer, male supervisors, and male co-workers, alleging hostile work environment sexual harassment. *See id.* at 76. The plaintiff worked as a roustabout on an all-male oil platform in the Gulf of Mexico. *See id.* at 77. He was subjected to humiliating sex-related actions and verbal abuse on several occasions, including physical sexual assault and threats of rape. *See id.*

61. *See id.* at 79. Justice Scalia was emphatic in his statement of this holding: "If our precedents leave any doubt on the question, we hold today that nothing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex." *Id.*

62. *See id.*

63. *See id.* Justice Scalia first noted that many lower courts had held that for a same-sex sexual harassment action to lie, the harasser must be same-sex oriented. *See id.* ("Other decisions say that such claims are actionable only if the plaintiff can prove that the harasser is homosexual (and thus presumably motivated by sexual desire)."); *see, e.g.*, McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191 (4th Cir. 1996) (finding a cause of action could exist for same-sex sexual harassment only where the harasser is a homosexual); Wrightson v. Pizza Hut of Am., 99 F.3d 138 (4th Cir. 1996) (finding that a cause of action could exist for same-sex sexual harassment where the harasser is a homosexual).

Scalia then proceeded with the Court's rationale for overruling the decisions of the lower courts. After the initial statement that harassing conduct need not be motivated by sexual desire, Scalia stated that "[a] trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace." *Oncale*, 523 U.S. at 80. The Court tempered its ruling by determining that "[w]hatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted *'discriminat[ion]* . . . because of . . . sex.'" *Id.* at 81. It should be noted that Scalia refers to the "conduct at issue," relating this holding to the Court's notion in this decision that "sex" in the context of Title VII refers to acts or behavior. *Id.* This bright line is blurred slightly by the Court's statement that "[t]he real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." *Id.* at 81-82.

64. *See Oncale*, 523 U.S. at 79. As part of its textualist discussion, the Court stated:

> We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII. As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits 'discriminat[ion] . . . because of . . . sex' in the 'terms' or 'conditions' of

requiring the harasser to be homosexual or bisexual, the Court shifted its examination of harassment claims from the viewpoint of the harasser to the viewpoint of the victim.[65]

2. Sex Defined as Gender: The Story of Lady Bear and Her Friends

Throughout the history of Title VII litigation, courts have struggled to define "sex" within the context of the Act.[66] With its previous focus on conduct, the courts had been following a trend of examining discrimination from the viewpoint of the harasser.[67] When courts have chosen not to focus on conduct as the determinant in sexual harassment claims, they have treated the term "sex" as referring to gender, holding that Title VII addresses gender discrimination.[68] In *Schwenk v. Hartford*,[69] the Ninth Circuit noted the conflict between the differing approaches to the definition of "sex" as gender.[70]

After much deliberation, the courts have finally settled into the pattern of defining "sex" as gender.[71] The adoption of the

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> employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.

Id. at 79-80.

65. *See infra* notes 89-119 and accompanying text.

66. *See supra* Part II.A-II.B.1; *infra* notes 68-119 and accompanying text.

67. *See supra* Part II.A-II.B.1; *infra* notes 68-119 and accompanying text.

68. *See, e.g.*, Garcia v. Elf Atochem N. Am., 28 F.3d 446, 451-52 (5th Cir. 1994). The Fifth Circuit held that "[h]arassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones. Title VII addresses gender discrimination." *Id.* (citations omitted).

69. 204 F.3d 1187 (9th Cir. 2000).

70. *See id.* at 1201. The *Schwenk* court considered the terms "sex" and "gender" interchangeably, noting that some courts consider "sex" to mean "an individual's distinguishing biological or anatomical characteristics" and consider "gender" to mean "an individual's sexual identity" or refer to "socially-constructed characteristics." *Id.* (citing Dobre v. Amtrak, 850 F. Supp. 284, 286 (E.D. Pa. 1993); Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1084 (7th Cir. 1984)).

71. *See infra* notes 72-119 and accompanying text. The Court was also operating under this definition of "sex" when it allowed for the inclusion of men in the protections of Title VII. *See* Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 682-83 (1983). In this decision, the Court stated:

> Male as well as female employees are protected against discrimination. Thus, if a private employer were to provide complete health insurance coverage for the dependents of its female employees, and no coverage at all for the dependents of its male employees, it would violate Title VII. Such a practice would not pass the simple test of Title VII discrimination that we enunciated in *Los Angeles, Dept. of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978), for it would treat a male employee with dependents "in a

gender-based definition shifts the emphasis from the conduct of the harasser to the viewpoint of the person harassed by examining the victim's conformity to the traditional gender monolith, as interpreted with respect to biological gender, gender identity, or gender stereotype.[72] Therefore, in order to accurately consider the Ninth Circuit's reasoning in *Nichols*, one must examine what this holding means when gender is defined in terms of biology, identity, or stereotype, and how this analysis affects the reach of Title VII as defined in *Nichols*.

a. Sex Defined as Biological Gender

Beginning with the earliest opinions interpreting Title VII, courts have referred to biological gender—whether an individual is anatomically male or female—as the touchstone for interpreting the term "sex."[73] The biological gender approach originates in both the courts' and society's historical conception of gender as a dichotomy based on two opposing, internally monolithic categories.[74] The Supreme Court has used this approach in Title VII sex discrimination cases when it finds a general hostility to the presence of one sex in the workplace, a hostility that may be motivated by either hatred or desire.[75] Proof of hostility based on desire can be found relatively easily. One merely has to prove that, but for the gender of the victim, the victim would not be attractive to the harasser and would not be subject to unwelcome sexual advances of the harasser.[76] Hostility based on hatred, such

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manner which but for that person's sex would be different.

Id. (quoting *Manhart*, 435 U.S. at 711). Prior to *Oncale*, however, sex as gender had also been held to deny protection for same-sex sexual harassment claims in some jurisdictions. *See, e.g., Garcia*, 28 F.3d at 451-52 (stating that because Title VII specifically addresses gender discrimination, harassment by a male supervisor against a male subordinate does not state a claim upon which relief can be granted, even though the harassment has sexual overtones).

72. *See infra* notes 73-119 and accompanying text.

73. *See supra* note 25 and accompanying text.

74. *See* Hilary S. Axam & Deborah Zalesne, *Simulated Sodomy and Other Forms of Heterosexual "HorsePlay": Same Sex Sexual Harassment, Workplace Gender Hierarchies, and the Myth of the Gender Monolith Before and After* Oncale, 11 YALE J.L. & FEMINISM 155, 210-11 (1999). These dichotomous categories, male and female, are said to be monolithic in that the characteristics of each sex are supposedly consistent throughout that sex and unique to that sex. *See id.*

75. *See id.* (citing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80-81 (1998)).

76. *See* Marianne C. DelPo, *The Thin Line Between Love and Hate: Same-Sex Hostile-Environment Sexual Harassment*, 40 SANTA CLARA L. REV. 1, 10 (1999).

as that present in *Oncale*,[77] is much more difficult to prove. Unfortunately, in a case of same-sex sexual harassment where the harasser is heterosexual, hostility based on hatred is the only method by which one can prove a Title VII claim if "sex" is defined as biological gender.[78] The absence of a convenient bright-line test, as established in Part II of this article, creates difficulty in interpretation of the harasser's motivation.[79] The best test as to motivation in such a case is a more general inquiry into whether the harasser would have harassed a victim of the opposite biological gender.[80] If not, then the presence of gender-related motivation has the same legitimacy and relevance as it would in a situation of opposite-sex sexual harassment.[81]

As early as 1979, the Ninth Circuit in *DeSantis* was among the first courts to hold that "sex" refers only to biological gender, not to conduct.[82] The Ninth Circuit cited its holding as comporting with "traditional notions of 'sex.'"[83] The court also stated that legislative history dictates that these notions could not be judicially extended to prohibit discrimination based on "sexual preference," emphasizing the court's staunch reliance on the biological definition of gender.[84] In addition, the Ninth Circuit noted that the purpose behind the legislation was to ensure equal treatment between men and women, again emphasizing the biological gender definition of "sex."[85]

While finding against the employee claiming discrimination, *DeSantis* was nonetheless a step forward because it defined "sex" as gender. Defining "sex" as gender is progressive because it puts the emphasis on the viewpoint of the victim. Unfortunately, it was

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77. *See supra* notes 60-64 and accompanying text.

78. *See supra* notes 60-64 and accompanying text.

79. *See supra* notes 60-64 and accompanying text.

80. *See* DelPo, *supra* note 76, at 24.

81. *See id.*

82. *See supra* notes 35-38 and accompanying text. In *DeSantis*, male and female homosexuals brought civil rights actions claiming that their employers or former employers made discriminatory employment decisions because of their homosexuality. *See* DeSantis v. Pac. Telephone & Telegraph Co., 608 F.2d 327, 328 (9th Cir. 1979). The court held that Title VII's prohibition of "sex" discrimination applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference such as homosexuality. *See id.* at 329-30.

83. *DeSantis*, 608 F.2d at 329.

84. *Id.* The court noted that while several bills had been introduced to amend the Civil Rights Act to prohibit discrimination on the basis of "sexual preference," none of the bills had been passed. *See id.*

85. *See id.*

years before this progressive definition of "sex" was adopted by other courts.

Years later, in 1996, the Fourth Circuit in *Wrightson* focused its analysis on the conduct aspect of "sex,"[86] while also incorporating aspects of the "biological gender" definition of "sex."[87] The Fourth Circuit's reliance on the biological gender of the parties in *Wrightson* demonstrates how, even when approaching "sex" through a conduct-based analysis, the courts considered the interplay of biological gender differences in deciding Title VII cases.[88]

b. Sex Defined as Gender Identity

The Ninth Circuit has also addressed "sex" as referring to both "biological differences between men and women–*and* gender."[89] In its 2000 decision *Schwenk*, the court addressed the issue of defining "sex" as the gender with which the plaintiff identifies, regardless of whether it comports with the plaintiff's biological gender.[90] The court examined the sex-gender definition as determined by several courts, concluding that the term "sex" in Title VII can be construed to include gender identity.[91]

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86. *See supra* notes 50-54 and accompanying text.

87. The Fourth Circuit was very conscious of clarifying that all gender-neutral terminology in Title VII referred to both males and females:

> Title VII broadly prohibits "employers" (whether male or female) from discriminating against "individual" employees (whether they be male or female) on the basis of the latter's "sex," or gender. Through its proscription of "employer" discrimination against "individual" employees, the statute obviously places no gender limitation whatsoever on the perpetrator or the target of the harassment.

Wrightson v. Pizza Hut of Am., 99 F.3d 138, 142 (4th Cir. 1996).

88. *See id.*

89. Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000) (explaining that past Title VII decisions lead to the conclusion that "sex" refers to both biological and gender identity).

90. *See id.* at 1201-02. Plaintiff was a pre-operative male-to-female transsexual prisoner who sued a state prison guard and prison officials alleging attempted rape by the prison guard. *See id.* at 1192. The court held that Title VII encompasses sex and gender and therefore non-conformance to the perception of one's gender as well. *See id.* at 1201-02.

91. *See id.* In its examination, the Ninth Circuit stated that "[i]n the context of Title VII, federal courts . . . initially adopted the approach that sex is distinct from gender, and, as a result, held that Title VII barred discrimination based on the former but not the latter." *Id.* (citing Holloway v. Arthur Andersen & Co., 566 F.2d 659, 661-63 (9th Cir. 1977)). *Schwenk* explained that *Holloway* "refus[ed] to extend protection of Title VII to transsexuals because discrimination against transsexuals is on basis of 'gender' rather than 'sex.'" *Id.* The court then compared its prior holding in *Holloway* to those of other jurisdictions. *See id.*

It is not unusual for a man to exhibit characteristics thought of as "feminine."[92] One can easily cite several motives for crossing gender boundaries in this manner.[93] One prominent motive is that there are aspects of the female gender monolith that a man may identify with more than those of his own biological sex.[94] These characteristics may vary in obviousness from graceful, exaggerated hand gestures to more subtle qualities, such as shyness or passivity.[95] In some cases, mere politeness has been considered crossing gender boundaries.[96] In cases such as this, harassers may even question the individual's sex, demonstrating their disdain for persons who have a gender identity that does not fully comport with the male gender monolith.[97] The converse is equally true for women, creating targets out of members of both genders who fail to conform to prescribed gender roles due to their more individualized gender identity.[98]

Sexual harassment based on gender identity is rooted in the paradigms of masculine sexual aggression and domination, and feminine passivity and submission, where the harasser feels the need to exercise his power over the victim in "sex-based terms."[99] This paradigm allows the harasser to subordinate his victim as a passive sexual object regardless of biological sex—the harasser relies on the victim's gender identity to perpetuate a workplace hierarchy favoring the harasser.[100] However, this must not be

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92. *See* Axam & Zalesne, *supra* note 74, at 236-39.

93. *See id.* at 236.

94. *See id.* at 238. The difference between gender identity and gender stereotype can be clarified by examining motive: gender identity originates within the individual whose behavior is being scrutinized. Gender stereotype originates in the external perception of the scrutinizing party. *See id.* at 236.

95. *See id.* at 237.

96. *See, e.g.*, One Eleven Wines & Liquors, Inc. v. Div. of Alcoholic Beverage Control, 235 A.2d 12, 15 (N.J. 1967).

97. *See, e.g.*, Nichols v. Azteca Rest. Enters., 256 F.3d 864, 869 (9th Cir. 2001).

98. *See* Axam & Zalesne, *supra* note 74, at 195.

99. *Id.* at 198.

100. *See id.* at 199. Axam and Zalesne continue this thought, stating that such hierarchies "equate masculinity with power and femininity with powerlessness and [therefore] consign less masculine individuals to positions of inferiority." *Id.* The authors also point out that:

> Regardless of whether these sexual humiliations and invasions are directed at women or at men whose projected gender identity is perceived as less masculine than the harasser's, these forms of sexual domination vividly evoke the harasser's uniquely male biological capacity to penetrate and dominate sexually. Thus, these forms of harassment become a powerful means by which dominant, masculine males communicate their superior position in terms of a gender-based hierarchy, perpetuate the

construed as a legitimate hierarchical workplace dynamic. Such a constant, focused barrage of verbal or physical abuse becomes a significant, defining aspect of the victim's work life, adversely affecting his or her ability to perform and contribute to productivity, hampering collegial relationships, and frequently causing him or her to leave that work situation.[101]

By adopting the gender identity definition, the Ninth Circuit strongly reinforces its shift from an emphasis on the viewpoint of the harasser to an emphasis on the viewpoint of the victim.[102] The Ninth Circuit concluded in *Schwenk* that "sex" cannot be defined by applying external gender stereotypes and declined to issue a narrow ruling that would refuse protection for those who do not meet their "socially-prescribed gender expectations."[103]

c. *Sex Defined as Externally Imposed Gender Stereotypes*

The most recent decisions in the area of same-sex sexual harassment have held that discrimination "because of . . . sex" prohibits harassment on the basis of non-conformity to externally-imposed gender stereotypes.[104] These gender stereotypes play a significant role in sexual discrimination encountered in the workplace.[105] They are used to degrade and demean members of the workforce who do not comport with societal gender expectations at large, despite the fact that non-fulfillment of a gender stereotype rarely has an impact on one's ability to perform

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masculinized image of power, and marginalize and subordinate women and men who occupy lower strata on the gender-driven hierarchy of power and privilege in the workplace.

Id.

101. *See id.* at 204.

102. *See supra* notes 89-91.

103. Schwenk v. Hartford, 204 F.3d 1187, 1201 n.12 (9th Cir. 2000). In making its decision, the Ninth Circuit reasoned that:

> What matters . . . is that in the mind of the perpetrator the discrimination is related to the sex of the victim: here, for example, the perpetrator's actions stem from the fact that he believed that the victim was a man who "failed to act like" one. Thus, under *Price Waterhouse*, "sex" under Title VII encompasses both sex—that is, the biological differences between men and women—*and* gender. Discrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII. . . . However, [Title VII and the Gender Motivated Violence Act] prohibit discrimination based on gender as well as sex. Indeed, for purposes of these two acts, the terms "sex" and "gender" have become interchangeable.

Id. at 1202.

104. *See infra* notes 111-119 and accompanying text.

105. *See supra* notes 99-101 and accompanying text.

in the workplace.[106] Ironically, the harassment that springs from gender stereotypes can significantly interfere with the victim's career progress.[107]

When defining "sex" as gender stereotypes, it is important to note how a man may process his perceptions in relation to his position within the workplace hierarchy. As one author opines, "[s]eeing a feminine man evokes a tremendous amount of anxiety in many men; it triggers an awareness of their own feminine qualities, such as passivity or sensitivity, which they see as being a sign of weakness."[108] As a result, the male harasser re-evaluates his position within the hierarchy with a newfound awareness of his feminine traits, which in his mind lower his hierarchical worth.[109] He may then determine to distract from his newly-perceived personal weaknesses by drawing attention to these exaggerated traits in his co-worker, thereby demonstrating how the co-worker does not fulfill the gender stereotype.[110]

In 1978, the Supreme Court first recognized the proposition that discrimination based on gender stereotypes is prohibited, stating that, "employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females."[111] In 1989, the Court expanded this statement in *Price Waterhouse v. Hopkins*,[112] stating that employers who act on the

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106. *See* DelPo, *supra* note 76, at 23.

107. *See id.*

108. Amelia A. Craig, *Musing About Discrimination Based on Sex and Sexual Orientation as "Gender Role" Discrimination*, 5 S. CAL. REV. L. & WOMEN'S STUD. 105, 106 (1995).

109. *See id.* at 105-06.

110. The consequences of this same-sex gender stereotype dynamic can be aptly demonstrated within the opposite-sex paradigm. As Axam and Zalesne explain:

> One recurring pattern in both opposite-sex and same-sex harassment cases is the derision of stereotypically feminine traits and the marginalization of individuals who possess such traits. This form of harassment invokes gender stereotypes that view stereotypically masculine traits as hallmarks of a competent, successful worker and depict stereotypically feminine traits as more appropriate to other, traditionally female roles centered around domesticity, sexuality, and reproduction.

Axam & Zalesne, *supra* note 74, at 192-93. Women, not fearing their own femininity, are not prone to anxiety over any perceived weakness in the workplace hierarchy that could be stimulated by seeing a feminine man. *See* Craig, *supra* note 108, at 106.

111. L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 (1978).

112. 490 U.S. 228 (1989). In *Price Waterhouse*, Hopkins, a female employee, brought a Title VII action against her employer, an accounting firm, after the firm refused to make her a partner. *See id.* at 228. Criticisms of her business abilities were based on her lack of femininity and general aggressive demeanor deemed not befitting a female partner. *See id.* at 234-35. Evaluators suggested Hopkins wear

basis of sex stereotypes are acting on the basis of gender.[113] Following *Price Waterhouse*, any employment action made on the basis of gender is proscribed by Title VII.[114]

In 2001, the Third Circuit followed Supreme Court precedent from *Price Waterhouse*, stating in *Bibby v. Philadelphia Coca Cola Bottling Co.*[115] that a cause of action under Title VII exists for same-sex sexual harassment when the harassment is directed at the victim's non-conformity to gender stereotypes.[116] The Third Circuit named such harassment as one of three ways in which a plaintiff may allege same-sex sexual harassment.[117] The court then continued to state that other ways to allege same-sex sexual harassment, such as harassment based on sexual orientation, may

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makeup and jewelry, style her hair in a more feminine manner, and take a course at "charm school" to improve her chances at making partner the next time she was evaluated. *Id.* at 235. In contrast, her actual work product for Price Waterhouse was deemed impressive. *See id.* at 234.

113. *See id.* at 250. Specifically, the Court stated that "[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." *Id.*

114. The Court made this determination after a strict textualist reading of Title VII. *See id.* at 239. It stated:

> In passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees. . . . Congress' intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute. . . . In now-familiar language, the statute forbids an employer to "fail or refuse to hire or to discharge an individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment," or to "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex". . . . We take these words to mean that gender must be irrelevant to employment decisions.

Id. at 239-40 (citing 42 U.S.C. § 2000e-2(a)(1) to (2) (1978)).

115. 260 F.3d 257 (3d Cir. 2001). In *Bibby*, a male homosexual employee brought an action against his employer, "alleging hostile work environment sexual harassment under Title VII." *Id.* at 257. Having taken time off from his job at Philadelphia Coca-Cola for medical reasons, Bibby returned to endure physical and verbal threats and abuse from a co-worker, aimed at his sexual orientation. *See id.* at 259. Bathroom graffiti of the same nature appeared throughout the factory. *See id.* at 260. Bibby also returned to increased job-related harassment and criticism by supervisors, which he alleged to be unwarranted. *See id.*

116. *See id.* at 263.

117. *See id.* at 264. The court held discrimination may be because of sex if: (1) the harasser is "motivated by sexual desire;" (2) the harasser is expressing "general hostility to the presence of one sex in the workplace;" or (3) the harasser is acting "to punish the victim's noncompliance with gender stereotypes." *Id.* (citing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80-81 (1998).

be determined in the future.[118] However, the court declined to make such a jurisprudential leap, as the matter was not properly before it.[119]

In considering the decisions discussed thus far, it is apparent that the courts have slowly moved towards expanding Title VII protections "because of sex."[120] Some courts have explicitly expressed their distaste for any discrimination based on sexual orientation.[121] Other courts have intimated that they would consider extending Title VII protections to sexual orientation, given the proper circumstances.[122] However, the courts will not make this extension until the definition of "sex" as gender stereotype is broadened. "Sex" as gender stereotype must include individuals who not only fail to comport with the monolithic conception of their biological gender, but also individuals who comport with the monolithic conception of the opposite gender. *Nichols* has accomplished the necessary broadening.[123]

III. *Nichols v. Azteca Restaurant Enterprises*: Little Bear Enters the Picture

Nichols v. Azteca Restaurant Enterprises represents a considerable leap forward in the jurisprudence underlying same-sex sexual harassment. From its inception in 1964, until the Supreme Court's landmark decision in *Price Waterhouse*, this sex-as-gender-stereotypes doctrine has developed with great caution and trepidation, lest too many protections be imputed to Title VII and its potency be diluted.[124] Both *Price Waterhouse* and *Oncale* have accelerated this development with the sweeping breadth of their holdings, a breadth that has yet to be limited. *Price Waterhouse* held that if an employer acts out of a belief that a woman cannot be aggressive because that behavior takes her out of the confines of femininity, that employer has discriminated on

118. *See id.*

119. *See id.*

120. *See supra* notes 23-119 and accompanying text.

121. *See infra* notes 209-215 and accompanying text.

122. *See supra* notes 117-119 and accompanying text; *see also infra* notes 206-208 and accompanying text (noting why courts might be willing to extend Title VII protections to sexual orientation).

123. *See* Nichols v. Azteca Rest. Enters., 256 F.3d 864, 875 (9th Cir. 2001).

124. *See supra* notes 23-119 and accompanying text.

the basis of gender.[125] *Oncale* held that a cause of action under Title VII is not barred merely because the harasser and the victim are of the same sex.[126] Taking its cue from these decisions, the Ninth Circuit has used these two decisions as the firm foundation to make another leap in the analysis of same-sex sexual harassment claims.

Nichols was brought on appeal from the United States District Court for the Western District of Washington, where the court had entered judgment for the employer following a bench trial.[127] In reversing this decision in favor of Sanchez, the Ninth Circuit examined the facts of his claim. During his four-year career as a restaurant host and a food server with Azteca Restaurant Enterprises, Sanchez endured a continuous and unrelenting course of verbal abuse aimed at his effeminate bearing, ranging from insults and name-calling to extreme vulgarities.[128] Both his co-workers and a supervisor "repeatedly referred to [him] in Spanish and English as 'she' and 'her,'" in addition to calling him a "faggot" and a "fucking female whore."[129] Additionally, Sanchez was chided for having feminine mannerisms, exemplified by an incident when he was berated for "carrying his [serving] tray 'like a woman.'"[130] Furthermore, he was harassed for not having sexual intercourse with a female friend who was also a server at the restaurant.[131] The Ninth Circuit determined that these abuses occurred from once a week to several times a day.[132]

After stating that sexual harassment that creates a hostile work environment constitutes sex discrimination under Title VII, the Ninth Circuit applied the test for hostile work environment sexual harassment, as set forth in *Faragher v. City of Boca Raton*.[133] Proceeding under this analysis, the court examined

125. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989).

126. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998).

127. *See Nichols*, 256 F.3d at 864.

128. *See id.* at 870.

129. *Id.*

130. *Id.* at 874.

131. *See id.*

132. *See id.* at 870.

133. 524 U.S. 775, 787 (1998). Prior to *Faragher*, the Ninth Circuit examined hostile work environment complaints by considering: (1) whether the victim was subjected to harassing verbal or physical conduct; (2) whether the conduct was unwelcome; and (3) whether the conduct altered the conditions of the victim's employment and created an abusive working environment. *Nichols*, 256 F.3d at 872 n.4 (citing Ellison v. Brady, 924 F.2d 872, 875-76 (9th Cir. 1997)).

whether the workplace was "both objectively and subjectively offensive."[134] Drawing on the Supreme Court's ruling in *Oncale*, the Ninth Circuit stated that Sanchez would also have to prove that the harassment was "because of sex."[135]

In considering whether the environment was objectively hostile, the court examined the frequency and severity of the conduct, whether the conduct was physically threatening, whether the conduct was humiliating, and whether the conduct interfered with Sanchez's work performance.[136] Having reviewed the testimony of the parties, the Ninth Circuit held, contrary to the district court, that the verbal abuse suffered by Sanchez undeniably created an objectively hostile work environment.[137]

The Ninth Circuit also disagreed with the district court with respect to the "subjectively hostile" prong of the *Faragher* test.[138] Although Sanchez may not have exhausted all of the proper remedial channels directly provided by Azteca, the Ninth Circuit emphasized that he did complain about the sexual harassment to supervisors on several occasions.[139] The district court found that the environment was not subjectively hostile because not all of Sanchez's interactions with his harassers were hostile.[140] The Ninth Circuit scrutinized the district court's flawed reasoning and determined that, although not all the interactions had been hostile, this did not mean that none of them were.[141]

Finally, the *Nichols* court addressed whether the harassment occurred because of Sanchez's sex. Jurisprudentially, this portion of the opinion continues where the Supreme Court concluded in *Price Waterhouse*. Sanchez asserted that he was verbally abused because of his perceived effeminacy, an effeminacy which caused him to fail to conform to his harassers' heterosexist male

134. *Nichols*, 256 F.3d at 871-72 (quoting *Faragher*, 524 U.S. at 787). The court stated that the *Faragher* "objectively and subjectively offensive" test required both that a reasonable person would find the workplace hostile or abusive and that the victim in fact perceived the workplace as such. *Id.*

135. *Id.* at 872 (citing *Oncale*, 523 U.S. at 79).

136. *See id.* (citing Harris v. Forklift Sys., 510 U.S. 17, 23 (1993)).

137. *See id.* at 873.

138. *See id.*

139. *See id.* at 873. Azteca company policy requires that any incidents be reported either to the Azteca EEO Officer at the corporate office or to the Area Manager responsible for the restaurant where the incident occurred. *See id.* at 870.

140. *See id.* at 873.

141. *See id.*

stereotype.[142] Sanchez further asserted that under this theory, his harassment occurred because of sex and was therefore actionable under Title VII.[143] Sanchez relied on the *Price Waterhouse* decision, contending that it applies equally to a man who does not fulfill societal stereotypes because he acts in a manner that is too "feminine."[144] The Ninth Circuit cited dicta from *Higgins v. New Balance Athletic Shoe, Inc.*[145] that commented on the applicability of *Price Waterhouse* to a case of same-sex harassment of a man for failing to "meet stereotyped expectations of masculinity."[146] Applying this dicta, the court held that same-sex sexual harassment based on failure to fulfill the male stereotype constitutes discrimination based on sex.[147] Therefore, any harassment of this nature is prohibited by Title VII because it is discrimination based on sex.

In *Nichols*, the Ninth Circuit combined and developed the holdings of *Price Waterhouse* and *Oncale*, holding that Title VII allows a hostile work environment action when the victim is subjected to verbal abuse for not fulfilling monolithic gender stereotypes, regardless of his true sexual orientation and regardless of whether the harassers are of the same or opposite sex.[148] *Nichols* also furthers *Price Waterhouse*'s proposition that an employer cannot discriminate against an individual for failing to comport with his or her gender stereotype.[149] *Nichols* extends this by barring discrimination against an individual whose behavior comports with the gender stereotype of the opposite sex, whereas *Price Waterhouse* solely barred discrimination against an individual whose behavior does not comport with the gender

142. *See id.* at 874.

143. *See id.*

144. *See id.* (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989)). The Ninth Circuit quoted from Justice Brennan's plurality opinion in *Price Waterhouse* for the proposition that "[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." *Id.* (quoting *Price Waterhouse*, 490 U.S. at 250).

145. 194 F.3d 252 (1st Cir. 1999).

146. *Nichols*, 256 F.3d at 874 ("[J]ust as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity." (quoting *Higgins*, 194 F.3d at 261 n.4)).

147. *See id.*

148. *See id.* at 874-75.

149. *See Price Waterhouse*, 490 U.S. at 250.

stereotype of his or her own sex.[150] The *Nichols* decision takes the viewpoint that gender definition originates with the individual instead of with society, allowing the individual greater freedom to behave as he or she feels is in his or her true nature.[151] *Nichols* thus frees the individual from society's gender monolithic confines by offering Title VII protection from hostile work environments that can result from the exercise of this freedom.

IV. When Dude Can Look Like a Lady Under Title VII

The legal community has followed the course of *Nichols v. Azteca Restaurant Enterprises* with intense scrutiny, while the GLBT community has watched the development of *Nichols* with hopes that the case will yield Title VII protection based on sexual orientation.[152] Conservative jurists have declared the decision inconsequential, adding nothing to extant case law that had not been previously addressed in *Price Waterhouse* or *Oncale*. To the chagrin of both of these divergent factions, the actual significance of the *Nichols* holding lies somewhere between these extremes. To understand the advance in Title VII jurisprudence yielded by *Nichols*, one must first understand the meaning this holding attributes to the definition of "sex," as well as how that meaning is applied in *Nichols*. In addition, one must understand how that meaning comports with the different views of the basis of sexual orientation that are held by society at large and by the courts.

A. Nichols Analyzed Through "Sex" Defined as Gender

To determine if the gender monolithic doctrine of "sex" as biological gender is applicable to *Nichols*, one must focus on proving that the hostility towards Sanchez was based on hatred.[153] The court's opinion does not state that Sanchez's harassers were same-sex oriented or that any of the harassment had a basis in desire.[154] Indeed, the comments quoted in the record imply

150. *See Nichols*, 256 F.3d at 874.

151. *See id.* at 875.

152. *See, e.g.*, Alan J. Jacobs, *Ninth Circuit Rules Same-Sex Harassment Based on Nonconformity Violates Title VII*, LESBIAN/GAY L. NOTES, Sept. 2001, at 159; *Federal Court Rules Against Sex Stereotyping of Male Employees*, GENDERPAC NATIONAL NEWS, Aug. 27, 2001, *at* http://www.gpac.org/archive/news/index.html (last visited Apr. 25, 2002).

153. *See supra* notes 75-81 and accompanying text.

154. *See Nichols*, 256 F.3d at 870-75.

nothing but hatred and derision for Sanchez.[155] Proceeding under the biological gender analysis, one must ask whether the harassers would object to the presence of a male server who exhibited all of the typical male personality characteristics as determined by the male gender monolith. The record does not imply that the harassers had any such objections.[156] Next, one must consider whether Sanchez exhibited all of the typical male personality characteristics as determined by the male gender monolith. The record implies that he did not.[157] In fact, the record indicates that it was the disparity between Sanchez's mannerisms and those of the male gender monolith that was the impetus for the harassment.[158] Without evidence that the harassers were discriminating against Sanchez because he was representative of a biological gender toward which they felt animosity, a court analyzing *Nichols* under the biological gender approach probably would not find sex discrimination.

As demonstrated in the discussion of *Oncale*,[159] analysis of a same-sex sexual harassment claim under the biological gender definition limits this cause of action to situations where the harasser treats men and women differently based on this dichotomous grouping. This definition necessarily limits application of Title VII sex discrimination protection to individuals who do not identify with socially accepted perceptions of the gender dichotomy, or to individuals who do not fulfill the stereotype of acceptable behavior of either male or female.

As illustrated in the discussion of *Schwenk*,[160] "sex" has also been defined by the Ninth Circuit as the individual's gender identity: how the victim of harassment describes his or her self-conception of gender and how he or she relates to persons of differing and like genders.[161] The importance of the gender-identification definition of "sex" becomes apparent when one considers how the specific gender-defined aspects of one's personality can be used to distinguish that individual from other members of his or her biological sex. When merely considering biological gender, the courts neglect an array of factors that help to

155. *See id.* at 870, 874.
156. *See id.* at 870-75.
157. *See id.*
158. *See id.* at 870, 874.
159. *See supra* notes 60-64 and accompanying text.
160. *See supra* notes 89-103 and accompanying text.
161. *See supra* notes 89-103 and accompanying text.

define the individual and place him or her in the proper societal context to adequately and accurately consider a Title VII hostile work environment claim.[162]

By performing a cursory examination of the facts of *Nichols*, one can readily apply the gender identity definition of "sex" to the text of Title VII and arrive at the same result as the Ninth Circuit. Sanchez was chastised for his feminine mannerisms in both his walk and how he carried his tray.[163] In addition, he was constantly referred to with feminine pronouns.[164] The facts of *Nichols* do not state that Sanchez was a more masculine individual than claimed by his harassers. It was, however, implied that Sanchez's harassers used these insults and invectives to subjugate him, elevating themselves in the workplace hierarchy while debasing Sanchez for not identifying with a strict definition of the masculine gender monolith.[165] As analyzed under the gender identity definition of "sex," the Ninth Circuit would have extended Title VII protection to Sanchez.

As evidenced by the Supreme Court's holding in *Price Waterhouse*, the latest trend in Title VII jurisprudence is to analyze sexual discrimination claims under a gender stereotype definition of "sex."[166] Simply explained, if the harasser creates a hostile work environment by insinuating through verbal or physical abuse that the victim does not fulfill the harasser's conception of a representative member of the victim's gender, then the harasser has discriminated against the victim "because of . . . sex."[167] The gender stereotype in question is that held by the harasser, which is typically determined by the ubiquitous and omnipresent gender monolith.[168] The key distinction between gender stereotype and gender identity is whether it is the harasser or the victim who is defining the victim's characteristics and

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162. Quoting two prominent jurists, one author has stated that "[t]he term 'gender' is 'borrowed from grammar to designate the sexes viewed as social rather than biological classes' and 'has acquired the new and useful connotation of cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes.'" Ronald Turner, *Same-Sex Sexual Harassment: A Call for Conduct-Based and Gender-Based Applications of Title VII*, 5 VA. J. SOC. POL'Y & L. 151, 168-69 (1997) (quoting, respectively, RICHARD A. POSNER, SEX AND REASON 24 (1992) and J.E.B. v. Alabama, 511 U.S. 127, 157 n.1 (1994) (Scalia, J., dissenting)).

163. *See Nichols*, 256 F.3d at 874.

164. *See id.* at 870.

165. *See id.* at 872-73.

166. *See supra* notes 112-114 and accompanying text.

167. *See supra* notes 112-114 and accompanying text.

168. *See* Axam & Zalesne, *supra* note 74, at 209.

applying them to the gender monolith.[169] In choosing to analyze Title VII under a gender stereotype definition of "sex," the Ninth Circuit shifted its focus back toward the perceptions of the harassers and how the harassers imposed their external gender expectations on Sanchez, by forcing him to submit to further abuse when he failed to meet these gender expectations.

In determining whether the harassment is based on "sex" as defined by gender stereotype, it does not matter if the harasser and the victim are of the same biological gender.[170] If the victim faces ridicule because of his or her inability to fulfill a stereotype, then it is the victim's gender, not that of the harasser, that is the reason for the harassment, making the harassment truly "because of . . . sex."[171] In such a case, the sexual nature of the claim will hinge on the sexual nature of the harassment, which is not to be confused with the sexual orientation of the victim.[172] When considering "sex" as defined by gender stereotype, the focus of the court will be on how the abuse of the harasser relates to the victim's inability to conform to gender stereotypes as dictated by the traditional gender monoliths.[173]

In applying the gender stereotype definition of "sex" to the facts of *Nichols*, the Ninth Circuit determined that Sanchez did indeed suffer discrimination "because of . . . sex" and was therefore entitled to the protections available under Title VII.[174] Sanchez's harassers were very clear about their feelings that he did not fulfill their stereotype for a male server at the restaurant.[175] The harassers would refer to Sanchez as "her" or "she" several times a day.[176] Frequently they would carry this gender-bending abuse farther, as when they referred to him as a "fucking female whore."[177] Sanchez additionally did not fulfill their masculine stereotype when he declined to have sex with a female platonic friend and co-worker.[178] While observing his feminine mannerisms in the work environment, the harassers may have

169. *See supra* note 94.
170. *See* DelPo, *supra* note 76, at 24.
171. *See id.* at 23.
172. *See id.*
173. *See id.*
174. *See supra* notes 124-147 and accompanying text.
175. *See Nichols*, 256 F.3d at 870.
176. *See id.*
177. *Id.*
178. *See id.* at 874.

seen similarities between their victim and themselves and wished to mask those similarities by subjecting him to "a relentless campaign of insults, name-calling, and vulgarities,"[179] thereby assuring their elevated status in the workplace hierarchy.[180]

In *Nichols*, the Ninth Circuit clearly established that the gender stereotype definition of "sex" is the appropriate definition for the purpose of applying Title VII protections.[181] The court applied all of the traditional rules, tests, and holdings, ultimately finding that there is no doubt that an effeminate man can claim Title VII protections from harassers of the same sex who are subjecting him to a hostile work environment because of his effeminacy.[182] The court never addressed the sexual orientation of the victim, most likely because the victim never alleged sexual orientation discrimination.[183] However, because of the content of some of the harassers' epithets, the Ninth Circuit could have broadened its holding to include sexual orientation in the definition of gender stereotype.[184] Instead, the Ninth Circuit in *Nichols* merely pointed us in that direction, preserving a more sweeping declaration for a future case.

B. *The Breadth of Title VII Protection Offered to the GLBT Community Through* Nichols v. Azteca Restaurant Enterprises: *What Happens to Big Bear?*

If the nation's courts adopt the Ninth Circuit's holding in *Nichols* as prevailing law in all jurisdictions, it does not necessarily follow that courts would have to extend Title VII protection to explicitly cover all instances of sexual orientation discrimination in the workplace. Upon consideration of several hypothetical situations, it is evident that for Title VII to apply, there must be some clear correlation between the victim's sexual orientation and his or her conduct or behavior that does not comport with the gender stereotype.

At one extreme of the correlative spectrum is the situation in which the employee's sexual orientation has no connection to any employment action taken. Here, a homosexual employee is not

179. *Id.* at 870.

180. *See supra* notes 108-110 and accompanying text.

181. *See Nichols*, 256 F.3d at 873-75.

182. *See id.*

183. *See id.*

184. *See id.* at 870. The harassers in *Nichols* also called Sanchez a "faggot" on several occasions. *Id.*

entitled to Title VII protection if he or she is terminated because of poor job performance, which is an evaluative factor unrelated to his or her sexual orientation. In this situation, there is no nexus between the negative employment action and the employee's sexual orientation as it relates to "sex" defined as gender stereotype. At the other extreme of the correlative spectrum between conduct and behavior, a homosexual employee is protected by Title VII if he or she is verbally or physically abused in a manner directly relating to his or her inability to comport with gender stereotypes.[185] This nexus between abuse and gender-stereotype conformity has been judicially established in both *Nichols* and *Price Waterhouse*.[186]

Between these two extremes lies a more nebulous area that merits further exploration and conjecture. How far into the differences inherent in same-sex sexual orientation does the protection offered by the gender stereotype definition of "sex" reach? *Nichols* established that the effeminate male employee will be protected from abuse aimed at his behavior to the extent that this behavior is contrary to his gender stereotype.[187] It is therefore logical that Title VII protection will be equally available to the homosexual employee who suffers adverse employment treatment, being told that he cannot do his job as effectively as a heterosexual employee because his effeminacy renders him weak and lower in the workplace hierarchy. There is an obvious nexus in this case between the gender stereotype that stems from the homosexual employee's sexual orientation and the resulting adverse employment action suffered.

In contrast, under present Title VII jurisprudence, the Act's protections do not extend to the homosexual job applicant who is turned away, being told that the employer does not hire homosexuals simply because he or she does not like homosexuals. While this may be an admittedly unjust and dissatisfactory result, there can be no nexus between a gender stereotype and behavior when there is no behavior to which one can apply the stereotype. In addition, the employer could also turn away a homosexual applicant by saying that other employees or business associates

185. This extreme refers to the scenario of the effeminate man or the masculine woman.

186. *See Nichols*, 256 F.3d at 874-75; Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989); *see also supra* notes 112-114 and 124-151 and accompanying text (detailing the implications of *Nichols* and discussing *Price Waterhouse*).

187. *See Nichols*, 256 F.3d at 874-75.

would be uncomfortable working with "immoral sodomites." Again, while the result is upsetting, the discrimination is not related to gender stereotypical behavior attributed to the homosexual applicant and thus is not prohibited by Title VII. The employer remains free to make judgments on the morality of the applicant, so long as those judgments are not linked to a specific behavior. In such a situation, the homosexual job applicant may have an available remedy through state law, depending upon his or her state of residence.[188]

To compare, consider the scenario in which the employer refuses to hire the homosexual applicant because the employer believes that all homosexuals are promiscuous, whereas all heterosexual applicants are virtuous, and the employer wants a clean, moral workplace where the employees are not always thinking about, discussing, and seeking sexual activities. In such a situation, the employer has imputed a behavioral stereotype on the homosexual employee. It is arguable that the employer has not held the homosexual employee to a gender stereotype inapposite to his behavior—instead, the homosexual's behavior is simply assumed, causing his application to be immediately and summarily discarded.

However, the reality of this situation is quite different. The employer is operating under the gender stereotype that all male employees are virtuous and morally suitable for employment, and that their virtue and morality are connected to their comportment with behavior dictated by the male gender monolith. The employer is also assuming that the homosexual applicant is promiscuous, basing this assumption on the applicant's inability to fulfill the monolithic gender stereotype due to his sexual orientation: because the homosexual is attracted to people of the same sex, he or she does not fulfill the monolithic stereotype of opposite-sex sexual attraction. Furthermore, the employer is assuming that the homosexual applicant's failure to fulfill the gender stereotype with regard to sexual orientation will cause him to fail to fulfill the gender stereotype of a man as virtuous and moral. It is this last assumption of the employer that provides the homosexual with the necessary nexus between behavior and

188. *See, e.g.*, Minnesota Human Rights Act, MINN. STAT. §§ 363.01-.03 (2001). The Minnesota Human Rights Act prohibits discrimination on the basis of sexual orientation in the areas of employment, housing, public accommodation, public services, education, or credit. *See id.*

gender stereotype to receive Title VII protection.[189] The employer in this scenario has constructed a gender stereotype that he or she refuses to allow the applicant to fulfill, thus discriminating against the homosexual "because of . . . sex."[190]

By examining these hypothetical situations, one can further understand the meaning of the Ninth Circuit's holding in *Nichols*. *Nichols* has created greater protections for individuals not falling within the traditional gender stereotypes prescribed by society. However, these protections are not limitless. It is therefore important that we examine the boundaries of this new guard against discrimination.

C. *And This One's Just Right . . . The Effects of Changing Attitudes Towards Same-Sex Sexual Orientations*

It is evident from their recent conflicting holdings that some circuits are still battling the quandary of how to reconcile the progressive developments of a more accepting society with present-but-wavering conservative jurisprudential homophobia.[191] Some of the more enlightened circuits, such as the Ninth Circuit,[192] have refrained from taking the final step toward inclusion of same-sex oriented individuals in Title VII protections because they have not yet been forced to address this issue in light of the Supreme Court's holdings in *Price Waterhouse*[193] and *Oncale*.[194] Prior to these groundbreaking decisions, other circuits with less progressive reputations had quickly determined that sexual orientation is not within the purview of Title VII protection.[195]

Upon consideration of these holdings, some authors have

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189. *See supra* Part II.B.2.c.

190. *Price Waterhouse*, 490 U.S. at 239-40 (citing 42 U.S.C. § 2000e-2(a)(1) to (2) (1964)).

191. *See supra* notes 40-103 and accompanying text.

192. *See supra* notes 35-38 and accompanying text. It should be noted that the Ninth Circuit referenced its opinion as to the possibility of allowing for such protections under Title VII in its decision in *DeSantis*. *See also infra* notes 209-210 and accompanying text (noting that the *DeSantis* court specifically addressed this possibility in dicta).

193. *See supra* notes 112-114 and accompanying text.

194. *See supra* notes 60-64 and accompanying text.

195. *See, e.g.*, Smith v. Liberty Mutual Insurance Co., 569 F.2d 325, 327 (5th Cir. 1978). In *Smith*, the Fifth Circuit stated that Title VII does not prohibit discrimination based on sexual orientation. *See id.* In this 1978 case, the true issue was discrimination based on the potential employee's effeminacy, not his sexual orientation. *See id.* The issue of effeminacy has not been revisited by the Fifth Circuit in the twenty-four years that have passed since *Smith*.

posited that a cause of action under Title VII for sexual discrimination based on sexual orientation is inevitable.[196] As the workforce dynamic continues to change, the courts will continue to perceive these changes—some circuits more aptly than others.[197] When presented with the appropriate facts, the courts will eventually extend Title VII's protection against discrimination "because of sex" to sexual harassment on the basis of sexual orientation.[198]

Some courts will continue to struggle with their jurisprudential homophobia while trying to conform to societal growth and development. Even if these less than open-minded courts resist growing with society at large, they will have to eventually allow Title VII protection against sexual orientation discrimination in order to continue to give effective protection from gender-based discrimination.[199] The tendency of these conservative courts has been to see sexual orientation discrimination as "inextricably wedded to homosexuality."[200] This causes courts to protect the harassers in these instances because of the courts' value judgment that homosexuality is "devoid of social benefit."[201] However, because of the close nexus between sexual orientation and gender, courts that prohibit sexual orientation discrimination will also often be protecting individuals from gender discrimination.[202] If a court conflates effeminate characteristics in a man or masculine characteristics in a woman with homosexuality, thus deeming that person unprotected under Title VII, then the court is essentially allowing gender discrimination, clearly prohibited under Title VII, in order to make its point that sexual orientation is not protected. In this manner, the court would be burdening gender protection to support its homophobia.[203] As society continues to change, evolve, and progress, gender and sexual orientation become more intertwined.

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196. *See, e.g.*, Beauford Demond Pines, *Civil Rights: Interpretation of Title VII's Prohibition Against Sexual Discrimination: Recognition of Same-Sex Sexual Harassment in a Hostile Work Environment*, 26 S.U. L. REV. 115, 137 (1998) (noting that "[t]he recognition of sexual orientation harassment is inevitable").

197. *See id.*

198. *See id.*

199. *See* Robert Brookins, *A Rose by Any Other Name . . . The Gender Basis of Same-Sex Sexual Harassment*, 46 DRAKE L. REV. 441, 520 (1998).

200. *Id.*

201. *Id.*

202. *See id.*

203. *See id.*

In order to continue to prohibit gender discrimination under Title VII, courts will inevitably have to prohibit sexual orientation discrimination.[204] Extending protection against sexual orientation discrimination is necessary to avoid dilution of the protection already afforded gender under Title VII. If the courts neglect their duty to continue prohibiting gender discrimination under Title VII by allowing this dilution, Title VII and its panoply of protections will devolve into a limited form of relief, inconsistently applied, until it eventually becomes completely impotent.[205]

While the courts have typically refrained from addressing the possibility of offering Title VII protection based on sexual orientation, they have been known to broach this "Subject That Dare Not Speak Its Name" in dicta. In *Bibby*, the Third Circuit stated that "[h]arassment on the basis of sexual orientation has no place in our society."[206] More importantly, the Third Circuit stated that while the *Oncale* Court listed three specific instances in which an action for same-sex sexual harassment may arise under Title VII, these three instances are not an exclusive list of circumstances under which such a cause of action may arise.[207] The Third Circuit further stated that other protections may be available under the "because of sex" prong of Title VII.[208] One does not have to stretch the meaning of the court's statements too far to surmise that the Third Circuit would be amenable to extending Title VII protections on the basis of sexual orientation.

In a fascinating historical twist, the Ninth Circuit voiced its disapproval of sexual orientation discrimination in its 1979 *DeSantis* decision, which Azteca presumably referenced in its defense in *Nichols*.[209] The *DeSantis* court stated that:

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204. *See* Brookins, *supra* note 199, at 520.

205. In deconstructing the gender monolith, one must note that because of the endlessly varying combinations of masculine and feminine characteristics, this new extension of "sex" as gender stereotype can be applied to a variety of extremely different employment situations. The scope of these situations ranges from the effeminate waiter in *Nichols* to an employee much like Big Bear from the introductory hypothetical—a homosexual who does not violate the traditional gender monolith, with the notable exception of having a same-sex sexual partner, itself a gender stereotype. See *supra* notes 187-190 and accompanying text for further discussion and application to different employment situations.

206. Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 265 (3d Cir. 2001); *see also supra* notes 115-119 and accompanying text (noting that dicta in *Bibby* demonstrates the Third Circuit's willingness to take a progressive stance on same-sex sexual harassment).

207. *See Bibby*, 260 F.3d at 264.

208. *See id.*

209. *See* DeSantis v. Pac. Telephone & Telegraph Co., 608 F.2d 327, 331 (9th Cir.

> While we do not express approval of an employment policy that differentiates according to sexual preference, we note that whether dealing with men or women the employer is using the same criterion: it will not hire or promote a person who prefers sexual partners of the same sex. Thus this policy does not involve different decisional criteria for the sexes.[210]

Thus in 1979, the Ninth Circuit made it very clear that it did not approve of discrimination based on sexual orientation, even though it ultimately decided that Title VII did not prohibit it. In 2001, the *Nichols* court stated that "*DeSantis* is no longer good law."[211] In so doing, the *Nichols* court adopted as law the dicta portion of the *DeSantis* decision that had earlier disapproved of sexual orientation discrimination.

In *Higgins v. New Balance Athletic Shoe, Inc.*,[212] the First Circuit added its dicta-voice to the chorus, stating that harassment because of sexual orientation is a "noxious practice, deserving of censure and opprobrium."[213] The First Circuit refrained from extending Title VII protection to the plaintiff, noting that the issue was not properly before the reviewing court, because the plaintiff failed to raise the issue on motion for summary judgment.[214] The court stated that although it condemns discrimination on the basis of sexual orientation, it is bound by the decisions of the Supreme Court and does not have the authority to rule as it might choose.[215] Although the First Circuit recognizes that it alone cannot extend Title VII protections to sexual orientation, its dicta in *Higgins* support such an extension if made by the proper authority.[216]

Even Justice Scalia may have implicitly allowed room for an interpretation of Title VII that would prohibit discrimination based on sexual orientation.[217] In the pertinent portion of the *Oncale* opinion, Justice Scalia stated:

> We see no justification in the statutory language or our

1979); *see also* Nichols v. Azteca Rest. Enters., 256 F.3d 864, 875 (9th Cir. 2001) (overruling the *DeSantis* holding that "discriminating based on a stereotype that a man 'should have a virile rather than an effeminate appearance' does not fall within Title VII's purview"(quoting *DeSantis*, 608 F.2d at 331-32)).

210. *Desantis*, 608 F.2d at 331.

211. *Nichols*, 256 F.3d at 875.

212. 194 F.3d 252, 259 (1st Cir. 1999).

213. *Id.*

214. *See id.* at 259-60.

215. *See id.* at 259.

216. *See id.*

217. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79-80 (1998).

> precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII. As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. *But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.* Title VII prohibits "discriminat[ion] . . . because of . . . sex" in the "terms" or "conditions" of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.[218]

One can construe from this dicta that while Congress may not have been concerned with sexual orientation discrimination, this form of discrimination could also be considered a "reasonably comparable evil"[219] to be remedied by Title VII. If it is deemed to meet statutory requirements, Justice Scalia's dicta may also encompass sexual harassment based on sexual orientation. In the *Oncale* decision, Justice Scalia has laid the textualist groundwork that will eventually facilitate the extension of Title VII protections based on sexual orientation. Scalia has stated that although sexual orientation may not have been considered in the drafting of Title VII, the "provisions of our laws"[220] found in the text of the statute may cover sexual orientation discrimination as one of the "reasonably comparable evils" that occur "because . . . of sex . . . in the 'terms' or 'conditions' of employment."[221] In dicta, Scalia is allowing for protection against any sexual harassment meeting the statutory requirements of Title VII.[222] The plain meaning of this language "dictates" that if the Supreme Court addresses the issue of sexual harassment based on sexual orientation, the Court will be compelled to extend properly Title VII protections.

By addressing the possibility of extension of Title VII protections based on sexual orientation, the *Bibby* court gave a clear roadmap as to where its future analysis may lead, verbalizing in dicta a viewpoint for future citation when the issue of sexual orientation protection properly arises before the Third Circuit.[223] While the *Higgins* court did not demonstrate the same

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218. *Id.* at 79-80 (emphasis added).
219. *Id.* at 79.
220. *Id.* at 80.
221. *Id.*
222. *See id.* at 80.
223. *See supra* notes 115-119 and accompanying text.

strategic forethought as the Third Circuit in *Bibby*, it did state its disapproval of harassment based on sexual orientation.[224] This leads the observer to believe that, given the opportunity, the First Circuit would also extend Title VII protection based on sexual orientation. In addition to appellate support for extending Title VII protection to sexual orientation, Justice Scalia did not preclude this possibility in his opinion in *Oncale*.[225] Future court holdings are often predicted by tracking consistent trends in dicta.[226] If these statements are accurate indicators, it seems apparent that "because of . . . sex" will eventually be held to include sexual orientation, offering much-needed employment protection for members of the GLBT community.

Conclusion: And Some of Them Lived Happily Ever After

Operating under the court's definition of "sex" as gender stereotype, sexual orientation discrimination is a form of discrimination "because of . . . sex."[227] A gender stereotype is founded on traditional gender monoliths, which determine that men must be attracted to women and women must be attracted to men.[228] There is no room in this traditional stereotype for same-sex sexual orientation.

Sex discrimination, with regard to gender stereotypes, functions on the principle that traditional gender roles must be enforced, to the exclusion of individuals who do not fulfill the stereotype.[229] In *Nichols*, the Ninth Circuit took its direction from the Supreme Court's holdings in *Price Waterhouse* and *Oncale*, prohibiting this exclusionary sex stereotyping by offering Title VII protection to those who fall outside of the gender monoliths.[230] Same-sex sexual orientation also falls outside of the monolith-dictated gender stereotypes and should receive the same course of

224. *See supra* notes 213-215 and accompanying text.

225. *See supra* notes 217-222 and accompanying text.

226. *See, e.g.*, Chowdhury, M.D. v. Reading Hosp. & Med. Ctr., 677 F.2d 317, 324 (3rd Cir. 1982) (Aldisert, J., dissenting) (stating that dicta serves as a tool for predicting what the court might do when an issue is properly presented); *see also* Conesco Indus., Ltd. v. Conforti & Eisele, Inc., 627 F.2d 312, 319 (D.C. Cir. 1980) (Wilkey, J., dissenting) (noting that great weight is to be accorded dictum from a high level court which is thoroughly reasoned and explicitly and conclusively expressed).

227. 42 U.S.C. § 2000e-2(a)(1) (1994).

228. *See* Axam & Zalesne, *supra* note 74, at 236.

229. *See supra* notes 73-184 and accompanying text.

230. *See* Nichols v. Azteca Rest. Enters., 256 F.3d 864, 874-75 (9th Cir. 2001).

Title VII protection as offered Sanchez for his failure to fulfill the stereotype. Through its decision in *Nichols*, the Ninth Circuit opened a door that will lead to such a holding in the future, creating the same Title VII protections for the GLBT community.

Returning to the office tower where Big Bear, Lady Bear, and Little Bear work, we now know that both Lady Bear and Little Bear will receive protection under Title VII for the workplace harassment they have endured. Like the plaintiff in *Price Waterhouse*, Lady Bear will have a remedy available through Title VII for her nonconformity to her gender stereotype. Little Bear could be afforded Title VII protection from a hostile workplace in the same manner as the plaintiff in *Nichols*, receiving protection from harassment due to his effeminate characteristics. Because Big Bear does not outwardly defy his gender stereotype with effeminate mannerisms, Big Bear might be the only one of this trio who remains without definite Title VII protection. If Big Bear were fired because his employer claimed he could not perform his job adequately due to his same-sex sexual orientation, he probably would have a cause of action under Title VII after *Nichols*. But if Big Bear were fired simply because his employer did not approve of homosexuality, he would not be protected under Title VII. If the courts were to include sexual orientation as a characteristic included in the male and female gender stereotypes, then Big Bear would be protected against sexual orientation discrimination under Title VII—and so would the entire GLBT community.