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Eliminating the Distinction Between Sex and Sexual Orientation Discrimination in Title VII's Antiretaliation Provisions

Benjamin Berkman†

INTRODUCTION

Title VII of the Civil Rights Act of 1964 prohibits discrimination against employees “because of . . . sex.”¹ Courts have interpreted the phrase “because . . . of sex” to include discrimination on the basis of nonconformity with one’s gender but at the same time have excluded discrimination on the basis of sexual orientation from Title VII protection.² The result has been a confused jurisprudence on the relationship of sexual orientation to Title VII.

Title VII provides both substantive and procedural protections to workers. To ensure that employees have broad leeway to pursue Title VII claims, Congress included provisions proscribing retaliatory action on the part of employers.³ But what of the employee who complains of discrimination not protected by Title VII’s substantive provisions, and subsequently faces retaliatory action? Specifically, what of the employee who faces retaliation after complaining of discrimination on the basis of sexual orientation? This Comment seeks to answer that question.

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³ 42 USC § 2000e-3(a); see also Burlington Northern & Santa Fe Railway Company v White, 548 US 53, 63 (2006).
This topic is ever timely. Amid a national conversation about the Employment Non-Discrimination Act, which would extend many of Title VII's substantive and procedural protections to employees who suffer discrimination on the basis of sexual orientation, a discussion of the extent of current protections is crucial. Lesbian, gay, bisexual, and transgender (LGBT) rights issues are increasingly at the forefront of our public discourse, and the role of sexuality in the workplace poses a difficult and important question.

Indeed, the intersection of employment law and LGBT rights has garnered significant media attention in recent months: For example, students at Eastside Catholic High School in Sammamish, Washington staged a sit-in protest after the school fired a teacher for marrying his same-sex partner. Holy Ghost Preparatory School in Bensalem, Pennsylvania, has garnered similar attention for firing a teacher who, along with his same-sex partner, filed for a marriage license in New Jersey. While there is widespread support for broad laws protecting LGBT employees from discrimination, most of the public appears to be uncertain or actively misinformed about the extent of current federal protections. Questions about the precise scope of legal rights afforded to LGBT individuals are central to our national political discussion.

A clear answer to this question will benefit employees and employers alike. Clarity will allow employees to make informed choices about what behavior they choose to complain about. Moreover, clarity will allow employers to craft employment

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policies that accurately reflect federal law. Finally, a clear rule will allow employers to be secure in their knowledge that a particular course of conduct will or will not lead to meritorious litigation against them. On both ends of the spectrum, a clear answer about the rights of LGBT employees facing retaliation lets the involved parties know, ex ante, the consequences of their actions.

This Comment maintains that, for the purposes of Title VII retaliation claims, courts ought to eliminate the distinction between complaints about sexual orientation discrimination and sex discrimination. This formulation is most consistent with the Supreme Court’s recent pronouncements about the meaning and purpose of Title VII’s antiretaliation provision. Moreover, this framework effectively accounts for the inherently blurred line between proscribed discrimination on the basis of “gender nonconformity” and permitted discrimination on the basis of sexual orientation.

In Part I, this Comment will first go over Title VII, explaining the scope of its substantive and procedural protections. Then, it will explore a circuit split between the Sixth and Seventh Circuits on the one hand, and the Ninth Circuit on the other, in determining whether Title VII’s retaliation provisions contemplate employees who complain about discrimination on the basis of sexual orientation. In Part II, this Comment will explain why courts ought to eliminate the distinction between sex and sexual orientation in this context, with a focus on recent Supreme Court precedent suggesting a broad construction of Title VII’s antiretaliation provisions.

I. TITLE VII, RETALIATION, AND SEXUAL ORIENTATION

President Kennedy proposed what eventually became the Civil Rights Act of 1964 as a response to rampant inequity and discrimination that pervaded, and continues to pervade, American society.9 Title VII of the Civil Rights Act was

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9 See John F. Kennedy, Report to the American People on Civil Rights, 11 June 1963 (John F. Kennedy Presidential Library and Museum), online at http://www.jfklibrary.org/Asset-Viewer/LH8F_0Mzv0e6RolyEm74Ng.aspx (visited Oct 18, 2014) (“One hundred years of delay have passed since President Lincoln freed the slaves, yet their heirs, their grandsons, are not fully free. They are not yet freed from the bonds of injustice. They are not yet freed from social and economic oppression. . . . Next week I shall ask the Congress of the United States to act, to make a commitment it has not fully made in this century to the proposition that race has no place in American life
specifically designed to combat inequalities in the workplace, where “[d]iscrimination against black employees was often accompanied by direct instances of racial animus.”

Indeed, “[t]he passage of Title VII reflected an ambitious attempt to transform society by eradicating discrimination based on protected characteristics and to promote facially neutral decision making and status-blind employment practices.”

A. Substantive Protections under Title VII

Title VII protects against discrimination on the basis of sex in the workplace. Nonetheless, legislative history is scant about the meaning of “sex” or why “sex” was included in the law to begin with. The “sex” language was added to the bill that became the Civil Rights Act via an amendment on the day before it passed the House of Representatives. Some accounts maintain that the authors of the amendment added the “sex” language in an attempt to kill the bill, believing that Congress would not vote to enact such broad protections for women. Nonetheless, both the amendment and the underlying bill quickly passed. The text of Title VII’s substantive provision reads:

It shall be an unlawful employment practice for an employer- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or

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11 Id.

12 Meritor Savings Bank, FSB v Vinson, 477 US 57, 63–64 (1986) ("The prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives. . . . [W]e are left with little legislative history to guide us in interpreting the Act’s prohibition against discrimination based on ‘sex.’").

13 See Diaz v Pan American World Airways, Inc, 442 F2d 385, 386 (5th Cir 1971).

14 See, for example, Barnes v Costle, 561 F2d 983, 987 (DC Cir 1977) ("It was offered as an addition to other proscriptions by opponents in a last-minute attempt to block the bill which became the Act.").

15 Id at 987.
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 race, color, religion, sex, or national origin.\textsuperscript{16}

This text outlines the precise substantive limits Title VII places on employer discrimination.

As a textual matter, 42 USC § 2000e-2 affords no protection to individuals who claim that their employer has discriminated against them on the basis of sexual orientation.\textsuperscript{17} For example, in Simonton v Runyon,\textsuperscript{18} the Second Circuit considered an archetypal sexual orientation discrimination case: Simonton faced a barrage of comments, notes, and pictures aggressively targeting his homosexuality.\textsuperscript{19} This abuse caused Simonton to have a heart attack and he subsequently filed suit, alleging discrimination in violation of Title VII.\textsuperscript{20} The court rejected his claim, noting that “[t]he law is well-settled in this circuit and in all others to have reached the question that Simonton has no cause of action under Title VII because Title VII does not prohibit harassment or discrimination because of sexual orientation.”\textsuperscript{21} At the crux of the court’s ruling was the consistent congressional consideration and rejection of laws designed to expand substantive employment discrimination protections to cover sexual orientation; if such laws are consistently proposed, the court asserts, then existing law must not contemplate discrimination on the basis of sexual orientation.\textsuperscript{22}

\textsuperscript{16} 42 USC § 2000e-2.
\textsuperscript{18} 232 F3d 33 (2d Cir 2000).
\textsuperscript{19} Simonton, 232 F3d at 35.
\textsuperscript{20} Id at 34-35.
\textsuperscript{21} Id at 35.
\textsuperscript{22} Id (“Although congressional inaction subsequent to the enactment of a statute is not always a helpful guide, Congress’s refusal to expand the reach of Title VII is strong evidence of congressional intent in the face of consistent judicial decisions refusing to interpret ‘sex’ to include sexual orientation.”).
Nonetheless, the term “sex” in 42 USC § 2000e-2 has been construed to encompass individuals who face discrimination based on their non-gender conforming behavior.\(^{23}\) For example, in *Price Waterhouse v Hopkins*,\(^ {24}\) the Supreme Court ruled that Price Waterhouse violated Title VII when it denied a female employee a promotion because she was too aggressive, which the partners did not deem “feminine.”\(^ {25}\) The Court noted that under a construction of Title VII more forgiving of the employer, female employees would be in a “catch 22” of sorts: An employer may have a position that requires aggressiveness, but at the same time object to that trait in women.\(^ {26}\) This places women in the unenviable position of being “out of a job if they behave aggressively and out of a job if they do not.”\(^ {27}\) Title VII’s prohibition of discrimination based on gender nonconformity “lifts women out of this bind.”\(^ {28}\) Moreover, Title VII applies with the same force to a man facing discrimination for gender nonconformity that it does to a woman facing equivalent discrimination.\(^ {29}\)

There is an apparent paradox between the broad protection afforded to gender non-conforming individuals and the lack of protection afforded to those discriminated against on the basis of sexual orientation.\(^ {30}\) Discrimination on the basis of sexual

\(^{23}\) *Price Waterhouse*, 490 US at 251, quoting *Los Angeles Department of Water & Power v Manhart*, 435 US 702, 707 n 13 ("As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for [in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.").

\(^{24}\) 490 US 228 (1989).

\(^{25}\) *Price Waterhouse*, 490 US at 235 ("But it was the man who, as Judge Gesell found, bore responsibility for explaining to Hopkins the reasons for the Policy Board’s decision to place her candidacy on hold who delivered the coup de grace: in order to improve her chances for partnership, Thomas Beyer advised, Hopkins should ‘walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.’") (emphasis removed).

\(^{26}\) Id at 251.

\(^{27}\) Id.

\(^{28}\) Id.

\(^{29}\) *Oncale v Sundowner Offshore Services, Inc*, 523 US 75, 78 (1998), citing *Newport News Shipbuilding & Dry Dock Co v EEOC*, 462 US 669, 682 (1983) ("Title VII’s prohibition of discrimination 'because of... sex' protects men as well as women"). See also *Nichols v Azteca Restaurant Enterprises, Inc*, 256 F3d 864, 874 ("Sanchez contends that the holding in *Price Waterhouse* applies with equal force to a man who is discriminated against for acting too feminine. We agree.").

\(^{30}\) See *Birkholz v City of New York*, 2012 WL 580522, *8* (EDNY). See also
orientation is, after all, discrimination based upon an incongruity between the way in which men and women are traditionally expected to act and the way an individual actually acts. As one district court recently put it, “[a] homosexual male exhibiting an attraction toward other males in the workplace would not be behaving as a man would stereotypically be expected to behave.” Subsequently, the lack of protection afforded to those who suffer from workplace discrimination on the basis of sexual orientation is difficult to square with *Price Waterhouse’s* broad protections for victims of gender non-conformity discrimination.

In light of this difficulty, courts have had to walk a fine line to ensure that plaintiffs do not “bootstrap” discrimination on the basis of sexual orientation into the realm of Title VII protection using the gender nonconformity theory. Such “bootstrapping” may occur when plaintiffs assert legal theories that misrepresent the law in an attempt to garner broader substantive protections. On the other hand, the substantive differences between discrimination based on sexual orientation and discrimination based on gender nonconformity can occasionally be bridged by effective presentation. Despite these blurred lines, it remains settled law that Title VII affords no explicit protection to individuals discriminated against on the basis of sexual orientation.

B. Retaliation under Title VII

Title VII protects both those who have suffered from certain forms of discrimination, and those who face retaliatory action

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33 See, for example, *Dawson v Bumble & Bumble*, 398 F3d 211, 218 (2d Cir 2005) (citations and internal quotations omitted) (“When utilized by an avowedly homosexual plaintiff, however, gender stereotyping claims can easily present problems for an adjudicator. This is for the simple reason that [s]tereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality. Like other courts, we have therefore recognized that a gender stereotyping claim should not be used to bootstrap protection for sexual orientation into *Title VII*.”).


35 *Simonton*, 232 F3d at 35.
after complaining about such discrimination or participating in a Title VII investigation.\textsuperscript{36} As to the latter, the relevant portion of Title VII reads:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment. . . . Because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.\textsuperscript{37}

An employee need not actually be discriminated against to receive Title VII protection; mere opposition to illegal discrimination in the workplace, or participation in a Title VII investigation (the meaning of "investigation" is discussed below) confers some quantum of protection to an individual employee.\textsuperscript{38} That precise quantum of protection is, however, hotly debated.\textsuperscript{39}

Despite the lack of explicit substantive protection afforded to them, individuals facing discrimination on the basis of sexual orientation may choose to file complaints with human resources, in court or with the Equal Employment Opportunity Commission (EEOC).\textsuperscript{40} There are a number of explanations for this course of action: An employee may not understand the finer points of federal employment law, they may be confused about the distinction between "gender nonconformity" discrimination and "sexual orientation" discrimination, or they may believe their employer will take action irrespective of the content of the law. Because of the lack of substantive protections for victims of sexual orientation discrimination, any formal complaints filed presumably will fail.\textsuperscript{41} After lodging her complaint, an employee may face retaliation from her employer for her participation in

\textsuperscript{36} 42 USC § 2000e-3(a).
\textsuperscript{37} 42 USC § 2000e-3(a).
\textsuperscript{38} 42 USC § 2000e-3(a).
\textsuperscript{39} Compare Hammer v St Vincent Hospital and Health Care Center, Inc, 224 F3d 701, 707–08 (7th Cir 2000), with Birkholz, 2012 WL 580522 at *8.
\textsuperscript{40} See, for example, Gilbert v Country Music Association, Inc, 432 F Appx 516, 519–20 (6th Cir 2011).
\textsuperscript{41} See, for example, Simonton 232 F3d at 34–35.
the complaint or subsequent investigation.\textsuperscript{42} Such retaliation is unlawful under 42 USC § 2000e-3 if the employee “opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.”\textsuperscript{43}

The Supreme Court has divided this language into two distinct clauses: the “opposition” clause and the “participation” clause.\textsuperscript{44} The opposition clause protects an employee who speaks out against activity made unlawful by 42 USC § 2000e-2; it applies both where the employee has initiated the opposition, and where the employee speaks out against unlawful discrimination as a response to a question or an investigation.\textsuperscript{45} On the other hand, the participation clause is more formalistic.\textsuperscript{46} Though the language “participated in any manner” is broader than “oppose,” the participation clause exclusively refers to participation in any formally established Title VII investigation.\textsuperscript{47} In defining “investigation,” courts have preferred a narrow construction that excludes the employer’s internal investigations.\textsuperscript{48} As the Ninth Circuit explains, an employee is only protected via the participation clause where the “employee[] participat[es] in the machinery set up by Title VII to enforce its provisions.”\textsuperscript{49}

\textsuperscript{42} Id.
\textsuperscript{43} 42 USC § 2000e-3(a).
\textsuperscript{44} \textit{Crawford v Metropolitan Government of Nashville & Davidson County, Tennessee}, 555 US 271, 280 (2009).
\textsuperscript{45} Id.
\textsuperscript{46} See, for example, \textit{EEOC v Total System Services, Inc}, 221 F3d 1171, 1174 (11th Cir 2000).
\textsuperscript{47} Id (“This clause protects proceedings and activities which occur in conjunction with or after the filing of a formal charge with the EEOC; it does not include participating in an employer’s internal, in-house investigation, conducted apart from a formal charge with the EEOC.”).
\textsuperscript{48} See \textit{Townsend v Benjamin Enterprises, Inc}, 697 F3d 41, 49 (2d Cir 2012) (internal citation omitted) (“Every Court of Appeals to have considered this issue squarely has held that participation in an internal employer investigation not connected with a formal EEOC proceeding does not qualify as protected activity under the participation clause. . . . The Courts of Appeals for the Fifth and Sixth Circuits have also suggested that, for conduct to be protected by the participation clause, it must occur in connection with a formal EEOC proceeding.”).
\textsuperscript{49} \textit{Silker v KCA, Inc}, 586 F2d 138, 140 (9th Cir 1978).
Hence, despite the broader language of the participation clause, it is narrower in scope than the opposition clause. For example, an employee who only speaks to his boss about alleged discrimination would only receive protection under the opposition clause because he has not taken part in any formal Title VII investigation. On the contrary, an employee who files a formal complaint with the EEOC would receive the full protection of the participation clause because he is operating within the “machinery” of Title VII.

C. Differences Between Title VII’s Substantive and Retaliation Provisions

There are key differences between a retaliation claim brought pursuant to 42 USC § 2000e-3, and a substantive discrimination claim brought pursuant to 42 USC § 2000e-2. First, the standard of causation used in retaliation cases is “but-for” causation, while courts hearing traditional discrimination cases need only ask if the unlawful discrimination was a “motivating factor” in the adverse employment decision. Essentially, in retaliation cases, plaintiffs must demonstrate that their employer would not have taken adverse action against them if the employer were not unlawfully retaliating.

Second, the Supreme Court has identified a difference in purpose, and subsequently a difference in mechanics, between the two provisions. In Burlington Northern & Santa Fe Railway Company v White, the Court explained that “[t]he substantive provision seeks to prevent injury to individuals based on who they are, i.e., their status. The antiretaliation provision seeks to prevent harm to individuals based on what they do, i.e., their actions.”

Prior to Nassar, it was unclear whether retaliation claims required “but-for” causation. Congress enacted the Civil Rights Act of 1991, partially in response to the unclear causation framework the Court established in Price Waterhouse. While the statute makes it clear that the less demanding “motivating factor” analysis applies to traditional discrimination cases, the Nassar court held that it does not apply to retaliation cases.

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50 Id.
51 University of Texas Southwestern Medical Center v Nassar, 133 S Ct 2517, 2532 (2013) (“Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened causation test stated in § 2000e-2(m). This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.”). Prior to Nassar, it was unclear whether retaliation claims required “but-for” causation. Congress enacted the Civil Rights Act of 1991, partially in response to the unclear causation framework the Court established in Price Waterhouse. See 42 USC § 2000e-2(m). While the statute makes it clear that the less demanding “motivating factor” analysis applies to traditional discrimination cases, the Nassar court held that it does not apply to retaliation cases.
52 Nassar, 133 S Ct at 2532 (2013).
conduct.” In declaring the “primary purpose” of Title VII’s antiretaliation provisions to be “maintaining unfettered access to statutory remedial mechanisms,” the Court recognized that “conduct” may be entitled to broader protection than “status” under Title VII.

The Court made this pronouncement in the context of a limitation stipulating that an employer’s behavior must be “employment-related” to give rise to Title VII liability. 

_Burlington Northern_ concerned a female railroad worker whose responsibilities were made more difficult after she complained to her employer of sexual harassment. The Court sought to identify how severe an employer’s retaliatory action must be before the affected employee has a colorable Title VII claim. It ruled in favor of the employee, noting that retaliation claims do not require an alteration of the “terms or conditions” of employment (as meritorious claims under Title VII’s substantive provisions do); rather, a plaintiff need only demonstrate that the retaliatory action would have “dissuaded a reasonable worker from making or supporting a charge of discrimination.” Essentially, the Court explained that the antiretaliation provision’s aim to provide “unfettered access” to Title VII’s remedial mechanisms required broader constraints on employer behavior under Title VII’s antiretaliation provision than are provided for under its substantive provisions.

The Court remained silent as to whether the class of employees protected is broader in the retaliation provision than it is in the substantive provisions. Nonetheless, language from

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55 Id at 64–66 (“We do not accept petitioner’s and the Solicitor General’s view that it is ‘anomalous’ to read the statute to provide broader protection for victims of retaliation than for those whom Title VII primarily seeks to protect, namely, victims of race-based, ethnic-based, religion-based, or gender-based discrimination. Congress has provided similar kinds of protection from retaliation in comparable statutes without any judicial suggestion that those provisions are limited to the conduct prohibited by the primary substantive provisions.”).
57 Id at 57–59 (2006).
59 Id at 67–68.
60 Id at 66.
61 Id at 61–67.
Burlington Northern suggests a broad construction of all of Title VII’s antiretaliation elements:

Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses. Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances. Interpreting the antiretaliation provision to provide broad protection from retaliation helps ensure the cooperation upon which accomplishment of the Act’s primary objective depends.62

In so many words, the Burlington Northern Court feared a chilling effect if Title VII’s antiretaliation provisions were interpreted narrowly: individuals, fearing retaliation, would be more reticent to complain about discrimination or file charges.63 A broad construction, according the Court, mitigates that concern.64

Third, the Court has, in recent years, expanded the class of individuals who may bring retaliation claims under Title VII.65 In Thompson v North American Stainless, LP,66 the Supreme Court applied a “zone of interests” analysis to determine whether a particular plaintiff is entitled to file a retaliation claim under Title VII.67 The unanimous opinion noted, in discussing the word “aggrieved” in Title VII, that:

We have held that this language establishes a regime under which a plaintiff may not sue unless he “falls within the ‘zone of interests’ sought to be protected by the statutory provision whose violation forms the legal basis for his complaint.” We have described the “zone of interests” test as denying a right of review “if the plaintiff’s interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress

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62 Burlington Northern, 548 US at 67.
63 Id.
64 Id.
66 Id.
67 Id at 870.
intended to permit the suit.” We hold that the term “aggrieved” in Title VII incorporates this test, enabling suit by any plaintiff with an interest “arguably [sought] to be protected by the statutes.”

Under this framework, the Court permitted an individual to sue for retaliation when he was terminated after his fiancée filed a claim alleging that their common employer discriminated against her on the basis of sex. The Court’s analysis suggests that the purpose of Title VII is probative in determining whether an individual is within the “zone of interests” protected by the law. The Court’s ruling in Thompson necessarily means that some Title VII retaliation cases will be permitted to go forward, even when the employee claiming retaliation was not the initial victim of an employer’s unlawful discrimination.

D. Circuit Split

Circuits are split as to whether Title VII’s opposition clause prohibits employers from retaliating against employees who complain of discrimination on the basis of sexual orientation. The Sixth and Seventh Circuits maintain that an individual may not bring a retaliation claim when the discrimination complained of is solely based on sexual orientation. The Ninth Circuit permits such causes of action.

The Sixth Circuit announced its formulation in Gilbert v Country Music Association, Inc. Gilbert complained to his union that he had been threatened by another union member who “called him a ‘faggot’ and threatened to stab him.” The court determined that Gilbert complained only of sexual

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68 Id (internal citations omitted).
69 Thompson, 131 S Ct at 870.
70 Id (“Thompson was an employee of NAS, and the purpose of Title VII is to protect employees from their employers’ unlawful actions.”).
71 Id.
73 See Gilbert 432 Fed Appx at 519–20; see also Hamner, 224 F3d at 707–08.
74 Dawson v Emtek International, 630 F3d 928, 936–38 (9th Cir 2011).
75 432 F Appx 516 (6th Cir 2011).
76 Gilbert, 432 Fed Appx at 518.
orientation discrimination, which is unprotected by Title VII. Based on that finding, the court concluded that “[b]ecause the conduct Gilbert opposed was not an ‘unlawful employment practice,’ his retaliation claims must also fail.” This is the extent of the court’s reasoning; it held, with little analysis, that all retaliation claims brought under the opposition clause must be based on a practice proscribed by 42 USC § 2000e-2.

The Seventh Circuit came to the same conclusion. In *Hamner v St. Vincent Hospital & Health Care Center, Inc.*, the plaintiff was a hospital employee who complained of sexual harassment. The plaintiff, in direct examination, stated: “It was merely the fact that because I am gay, because that just is who I am, he was opposed to that and he absolutely could not handle that. And, so, it was constant harassment because of my sexual orientation.” From this, the court concluded that the plaintiff had suffered only discrimination on the basis of his sexual orientation and not discrimination on the basis of sex.

Nonetheless, the court discussed the possibility that an individual could bring a retaliation claim under Title VII without having suffered from unlawful discrimination pursuant to 42 USC § 2000e-2. The court applied a two-part test: First, it asked if the Title VII plaintiff had a subjective belief that she was complaining about an unlawful practice. Second, it asked if that belief was objectively reasonable. Though the court recognized that “an employee may engage in statutorily protected expression under section 2000e-3(a) even if the challenged practice does not actually violate Title VII,” it framed this as a matter of degree rather than a question of the form of substantive discrimination at issue. According to the court, a Title VII retaliation claim is sustainable if the alleged substantive discrimination is sex discrimination, even if the

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77 Id at 520.
78 Id.
79 Id at 519–21.
80 224 F3d 701 (7th Cir 2000).
81 *Hamner*, 224 F3d at 705.
82 Id.
83 Id at 706.
84 Id at 706–07.
85 *Hamner*, 224 F3d at 706–07.
86 Id.
87 Id.
severity of the employer’s discrimination would not give rise to liability under Title VII’s substantive provisions.88 The court will allow a plaintiff’s retaliation claim to go forward if the type of alleged discrimination is one explicitly contemplated by Title VII (even if the substantive claim would fail). But if the alleged substantive discrimination is of a type not contemplated by Title VII, the employee’s retaliation claim must fail.89 The Court determined that though the plaintiff believed he was complaining about proscribed sex discrimination, that belief could not have been objectively reasonable because Title VII affords no protection to those facing discrimination on the basis of sexual orientation.90

On the contrary, in Dawson v Entek International,91 the Ninth Circuit permitted a Title VII retaliation case to go forward, while at the same time concluding that the discrimination the plaintiff complained of was unprotected sexual orientation discrimination.92 The plaintiff was fired less than forty-eight hours after complaining to human resources about sexual orientation discrimination.93 The court, in permitting the plaintiff’s retaliation claim to go forward, posited that, “Dawson engaged in protected activity when he visited Morch in human resources to discuss his treatment and file a complaint. This was a complaint to human resources staff based directly on sexual orientation discrimination.”94 Much like the Sixth Circuit, the court came to its conclusion with little analysis.95 The court provides no reason why the plaintiff’s

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88 Id.  
89 Hamner, 224 F.3d at 706-07 (“[E]ven if the degree of discrimination does not reach a level where it affects the terms and conditions of employment, if the employee complains and the employer fires him because of the complaint, the retaliation claim could still be valid. But the complaint must involve discrimination that is prohibited by Title VII. The plaintiff must not only have a subjective (sincere, good faith) belief that he opposed an unlawful practice; his belief must also be objectively reasonable, which means that the complaint must involve discrimination that is prohibited by Title VII. Sexual orientation is not a classification that is protected under Title VII; thus homosexuals are not members of a protected class under the law.”).  
90 Id at 706-07.  
91 630 F.3d 928 (9th Cir 2011).  
92 Dawson, 630 F.3d at 936-38 (concluding that the plaintiff’s retaliation claim presented a genuine issue of material fact, while at the same time affirming the district court’s dismissal of the plaintiff’s sex discrimination claim under 42 USC § 2000e-2).  
93 Dawson, 630 F.3d at 936.  
94 Id (emphasis added).  
95 Id at 936-38.
complaint about sexual orientation discrimination constituted “protected activity.” It merely treated this proposition as a foregone conclusion. Nonetheless, despite a lack of substantial analysis, it is clear that the Ninth Circuit’s conclusion is at odds with the Sixth and Seventh Circuits' frameworks.96

E. A Broader Question?

In one sense, this issue is not specific to sexual orientation.97 One could fathom dozens of forms of discrimination employees may encounter that remain untouched by Title VII.98 Perhaps we need to ask a broader question: To what extent does 42 USC § 2000e-3(a) encompass complaints about forms of discrimination not contemplated by 42 USC § 2000e-2? The Sixth Circuit likely answers this by refusing to allow any retaliation claims to go forward in the absence of a colorable § 2000e-2 claim.99 The Seventh Circuit, on the other hand, does not wholesale reject all such claims.100 Rather, the Hamner court posited that a complaint about sex discrimination can still give rise to a retaliation claim even if the actions taken against the employee were not severe enough to create § 2000e-2 liability.101 The court framed the issue as one of severity rather than form.102

Other courts have taken different approaches. As evidenced by the Dawson decision, the Ninth Circuit permits such cases to go forward in some instances.103 They operate under a formulation similar to, but less demanding than, the Seventh Circuit’s framework.104 While the Ninth Circuit similarly requires an employee to have an objectively reasonable belief that their employer engaged in unlawful conduct, the line of reasonableness is not drawn at the outer limits of Title VII’s

96 Compare Dawson, 630 F3d at 936–38, with Hamner 224 F3d at 705–07 (7th Cir 2000), and Gilbert, 432 Fed Appx at 519–20.
97 See, for example, Moyo v Gomez, 32 F3d 1382, 1385–86 (9th Cir 1994).
98 Id.
100 Hamner, 224 F3d at 706–07.
101 Id.
102 Id.
103 Dawson, 630 F3d at 936–38.
104 Id.
substantive provisions. The Second Circuit similarly eschews the Seventh Circuit’s focus on severity as opposed to form: “the plaintiff need not establish that the conduct she opposed was actually a violation of Title VII, but only that she possessed a ‘good faith, reasonable belief that the underlying employment practice was unlawful’ under that statute.” The court further stated that “[t]he reasonableness of the plaintiff’s belief is to be assessed in light of the totality of the circumstances.”

Indeed, at least one district court in the Second Circuit has come to the opposite conclusion of the Seventh Circuit in Hamner. In Birkholz v City of New York, the plaintiff asserted that he faced gender nonconformity discrimination “motivated by the stereotype ‘that a homosexual is more likely to be a pedophile [sic].’” The Eastern District of New York rejected the idea that this constituted discrimination based on gender nonconformity but nonetheless allowed the plaintiff’s retaliation claim to go forward. The court determined that not permitting the retaliation claim to go forward would undermine one of the fundamental purposes of Title VII’s retaliation provisions:

The court notes that a necessary consequence of encouraging “unfettered access” to Title VII’s remedial mechanisms is that not all complaints or charges of discrimination will be legally sustainable. However, the court also believes that the reality that some complaints are not legally sustainable does not license employers to retaliate in ways that would undermine the goal of unfettered access. . . . The ostensible difference between gender stereotyping and sexual-orientation-based

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105 See Moyo, 32 F3d at 1385–86 (“[E]ven if the inmates in this case did not qualify as ‘employees’ under Title VII, Moyo would be able to state a retaliation claim if he could show that his belief that an unlawful employment practice occurred (i.e., that the inmates were employees protected by Title VII) was otherwise ‘reasonable.’ The reasonableness of Moyo’s belief that an unlawful employment practice occurred must be assessed according to an objective standard—one that makes due allowance, moreover, for the limited knowledge possessed by most Title VII plaintiffs about the factual and legal bases of their claims. We note again that a reasonable mistake may be one of fact or law.”).


107 Id (emphasis added).


110 Id at *8.
discrimination is that the former is motivated by the employer's animus towards the employee's outward behavior, the latter by the employee's sexual preference. Courts have candidly recognized the analytical difficulties this creates, as "stereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality.... If opposition to sexual-orientation-based discrimination was not protected activity, employees subjected to gender stereotyping would have to base their decision to oppose or not oppose unlawful conduct on a brittle legal distinction, a situation that might produce a chilling effect on gender stereotyping claims.111

In coming to this conclusion, the district court relied on the Supreme Court's Burlington Northern formulation, calling for a broad interpretation of the antiretaliation provision to comport with Congress' purpose in enacting it.112

II. ELIMINATING THE DISTINCTION BETWEEN SEX AND ORIENTATION IN TITLE VII'S ANTIRETALIATION PROVISIONS

There appears to be a dearth of academic discussion on this issue, as the circuit split is relatively new. While one article has considered the extent to which Title VII's retaliation provisions protect those who complain of sexual orientation discrimination, it does so only briefly, as part of a broader paper on retaliation.113 Moreover, this article predates Burlington Northern, a case that fundamentally alters the lens through which courts must view retaliation claims. ThisComment posits that the best rule is one that eliminates the distinction between discrimination on the basis of sex and discrimination on the basis of sexual orientation for purposes of evaluating the "reasonableness" of a plaintiff's subjective belief that his

111 Id.

112 Id. See also Burlington Northern 548 US at 63 ("The antiretaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees. The substantive provision seeks to prevent injury to individuals based on who they are, i.e., their status. The antiretaliation provision seeks to prevent harm to individuals based on what they do, i.e., their conduct.").

employer has engaged in unlawful discrimination pursuant to Title VII.

A. Consistency with Burlington Northern

First, only a per se elimination of the distinction between sex and sexual orientation is consistent with the Burlington Northern Court’s declaration of Title VII’s purpose. If indeed “effective enforcement could... [o]nly be expected if employees felt free to approach officials with their grievances,” then an acceptable rule cannot hinge on a distinction as blurred as the one between discrimination on the basis of sex and discrimination on the basis of sexual orientation. Even making the deliberately incorrect assumption that all employees have a strong understanding of finer points of employment law, a rule that fails to protect those claiming discrimination on the basis of sexual orientation would create a chilling effect on complaints about discrimination made unlawful by Title VII’s substantive provisions. Employees who understand the distinction made by the law may choose to not file charges or complain to superiors for fear of lawful retaliation, should it turn out that their claim was based on sexual orientation as opposed to gender nonconformity.

It is no secret that even employees who suffer from discrimination value their employment. The possibility that an individual may lose her job because her complaint fit into one rather than the other of two overwhelmingly similar categories undoubtedly serves as an effective deterrent to making such complaints. This is precisely the danger that the Burlington Northern Court sought to avoid. Indeed, this argument is not about extending substantive protections to individuals who suffer from discrimination on the basis of sexual orientation. It is about ensuring that those who arguably have cognizable claims under Title VII’s substantive provisions will pursue those claims. Only a rule that eliminates the distinction between sex/gender nonconformity discrimination and sexual orientation discrimination in evaluating retaliation claims comports with what the Burlington Northern court describes as 42 USC

114 Burlington Northern, 548 US at 67.
115 See Birkholz, 2012 WL 580522, *8 (referring to a “chilling effect”).
§ 2000e-3(a)’s primary purpose: “Maintaining unfettered access to statutory remedial mechanisms.”

Critics may assert that this argument misapplies Burlington Northern. They may argue that because Burlington Northern only considered the more formalistic question of whether an employer’s conduct must be “employment-related” to give rise to Title VII retaliation liability, courts ought not extend its findings to the more substantive question of which employees are covered. This argument ignores the language of Burlington Northern. The Court consistently describes the purposes of Title VII’s retaliation provisions broadly; it does not limit its discussion to the question of relation to employment. For example, the Court wrote: “Interpreting the antiretaliation provision to provide broad protection from retaliation helps ensure the cooperation upon which accomplishment of the Act’s primary objective depends,” and “[t]he antiretaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee’s efforts to secure or advance enforcement of the Act’s basic guarantees.” The Court does not couch its language. It refers broadly to the purpose of the antiretaliation provision in its entirety. It makes no disclaimer about the application of such purposes to other elements of a retaliation claim. Hence, any criticisms based on factual differences between the instant question and Burlington Northern are unfounded.

Additionally, critics may note that nothing in the text of Title VII suggests that the types of discrimination contemplated by Title VII’s antiretaliation provisions are broader than those explicitly covered by its substantive provisions. In this view, the Hamner court is correct in declaring that though a retaliation claim can succeed where a substantive claim is unsustainable, a retaliation claim must fail where the substantive claim is of a type not contemplated by the statute. The language of Burlington Northern does not bear this interpretation. The Court explicitly rejected the view that it is “anomalous to read the statute to provide broader protection for victims of

117 Id at 55.
118 Burlington Northern, 548 US at 61–62.
119 Id at 67 (emphasis added).
120 Id at 63 (emphasis added).
121 Hamner, 224 F3d at 706–07.
retaliation than for those whom Title VII primarily seeks to protect, namely, victims of race-based, ethnic-based, religion-based, or gender-based discrimination.”\textsuperscript{122} The Court’s explication that the protections of antiretaliation provisions extend beyond “victims of race-based, ethnic-based, religion-based, or gender-based discrimination” is compelling evidence that colorable retaliation claims need not be of a type explicitly mentioned in Title VII’s substantive provisions.

At the very least, \textit{Burlington Northern} provides no reason why we ought to manufacture a distinction between substantive claims that fail because the employer did not act with the requisite severity, and substantive claims that fail because they are of a type not contemplated by the statute. The Court, in declaring that the antiretaliation and substantive provisions of Title VII are not coterminous, noted that the difference in scope is a consequence of the provisions’ different purposes.\textsuperscript{123} Hence, the central question in analyzing the scope of the antiretaliation provision must be whether the particular expansion beyond the substantive provisions would serve the aim of the antiretaliation provisions: maintaining unfettered access. Consequently, it does not matter whether a substantive claim would fail because the employer did not act harshly enough, or because the employer engaged in a type of discrimination that is still permissible under the statute. If legitimate claims may be chilled if a retaliation suit is not permitted, then courts must allow retaliation claims to go forward. Under the language of \textit{Burlington Northern}, the reason for the chilling appears to be immaterial. The \textit{Hamner} court was wrong to assign legal significance to the distinction between severity and type.\textsuperscript{124}

B. A Slippery Slope?

Critics may assert that this is a slippery slope: If we extend the scope of Title VII’s antiretaliation provisions beyond that of its substantive provisions, then literally any complaint could be “protected activity.” But I do not advocate a full-scale departure from the Seventh Circuit’s two-prong test: A plaintiff must have a subjective belief that the activity she complains of is

\textsuperscript{122} \textit{Burlington Northern}, 548 US at 66–67.

\textsuperscript{123} Id.

\textsuperscript{124} \textit{Hamner}, 224 F3d at 706–07.
prohibited by Title VII’s substantive provisions, and that belief
must be objectively reasonable. This Comment merely
advocates an expansion of the reasonableness analysis beyond
the confines of Title VII’s substantive provisions in the context
of complaints about discrimination on the basis of sexual
orientation. Consider the following scenario: An employee
claims that his boss is harassing him because he watches
“Two and Half Men” every week. The employee is subsequently
fired, and he files a Title VII suit claiming his boss retaliated
against him for complaining about discrimination on the basis of
sex. The employee’s belief that the harassment he incurred was
sex discrimination is frivolous; it is objectively unreasonable.
However, when it turns out that what an employee thought was
sex discrimination was actually sexual orientation
discrimination, that mistake is a reasonable one. Indeed, “a
reasonable mistake may be one of fact or law.”
This particular mistake of law is always a reasonable one, because of the “brittle
legal distinction” between discrimination on the basis of sex and
discrimination on the basis of sexual orientation.

Hence, reasonableness analysis checks back against any slippery slope
argument.

Additionally, the law provides two additional checks against
frivolous retaliation claims. First, a court must make a factual
finding that the employee has a subjective, good faith belief that
they were complaining about discrimination on the basis of
sex. This is a question independent of subsequent
“reasonableness” analysis. Where a claim very clearly has little
to do with sex (like the “Two and Half Men” example above), it
is likely the employee did not actually have a good faith belief
that he was complaining about sex discrimination. The court can
dismiss the case before getting to the “reasonableness” prong.
Second, Thompson’s “zone of interests” analysis prevents absurd
claims from going forward. If indeed “the plaintiff’s interests are
so marginally related to or inconsistent with the purposes
implicit in the statute that it cannot reasonably be assumed that
Congress intended to permit the suit,” then retaliation claims

125 Id at 705–07.
126 Moyo v Gomez, 32 F3d 1382, 1385–86 (9th Cir 1994).
128 Hamner, 224 F3d at 706–07.
that obviously have nothing to do with sex cannot succeed. On the contrary, because of the “brittle legal distinction” between sexual orientation discrimination and gender nonconformity discrimination, it cannot be said that retaliation claims based on sexual orientation discrimination is “marginally related to or inconsistent with the purposes implicit in the statute.”

C. A Brittle Distinction

This compels the question: Is the distinction between sex discrimination and sexual orientation discrimination really so brittle? One could argue that sexual orientation discrimination concerns status, whereas gender nonconformity discrimination concerns conduct. Additionally, critics may assert that sexual orientation discrimination concerns behavior outside the workplace, whereas gender nonconformity discrimination concerns the way an individual comports themselves within the workplace.

These arguments are unavailing. First, broad social science evidence indicates that “sex” and “sexual orientation” are heavily intersectional. One’s sexual orientation is a factor of one’s sex; indeed, “sexual orientation is measured chiefly by the relationship the sex of the object(s) of one’s sexual desire bears to one’s own sex, i.e., whether the object(s) of one’s desire are of the same or of a different sex than oneself.” Sexual orientation is absolutely dependent on sex; to divorce the two makes little sense.

Nowhere is this interrelationship more apparent than the law. Courts have had enormous difficulty distinguishing claims of sexual orientation discrimination from claims of gender nonconformity discrimination. “When individuals diverge from the gender expectations for their sex—when a woman displays masculine characteristics or a man feminine ones—discrimination against her is now treated as sex discrimination

129 Thompson, 131 S Ct at 870.
130 Id at 870.
131 See, for example, Julie Konik and Lilia M. Cortina, Policing Gender at Work: Intersections of Harassment Based on Sex and Sexuality, 21 Soc Just Rsrch 313, 331 (2008) (“[G]ender harassment and heterosexist harassment are linked at a fundamental level, both serving to punish deviation from traditional patriarchal gender norms.”).
while his behavior is generally viewed as a marker for homosexual orientation and may not receive protection from discrimination. Essentially, courts in parallel cases concerning female masculinity and male effeminacy have come to differing conclusions because of the inherent difficulty in separating claims based on gender nonconformity discrimination from claims based on sexual orientation discrimination.

Perhaps courts have had such difficulty because the “markers” of gender nonconformity are the same characteristics that co-workers and supervisors use to make assumptions about an employee's sexual orientation. For example, in Dandan v Radisson Hotel Lisle, the plaintiff, who had not revealed his sexual orientation to his co-workers, filed suit after a supervisor criticized his “speech patterns and kinesics for being feminine ... nearly every day.” Nonetheless, because the court determined that “the derogatory and bigoted comments inflicted upon Dandan were due to his co-workers’ perception of his sexual orientation,” the court rejected his substantive Title VII claim. Though the plaintiff was criticized for being an effeminate male—criticism that placed the plaintiff’s claim at the heart of Price Waterhouse’s gender nonconformity theory—the court determined that he suffered only from sexual orientation discrimination.

Dandan demonstrates that the precise facts used to establish a gender nonconformity claim—here, statements directly implicating the plaintiff’s effeminacy—can also be the markers that shape co-workers’ perceptions of an employee’s

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133 Id.
134 Id at 2 ("This is most apparent from a comparison of Price Waterhouse v. Hopkins, in which the Supreme Court held it to constitute impermissible sex stereotyping to advise a female candidate for an accounting partnership that she should ‘walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, ... wear jewelry,’ and go to ‘charm school,’ with cases upholding an employer’s right to fire or not to hire males specifically because they were deemed ‘effeminate.’"). Compare Price Waterhouse, 490 US at 251, with Dandan v Radisson Hotel Lisle, No 97 C 8342, 2000 WL 336528, at *1-4 (ND Ill Mar 28, 2000) (dismissing a plaintiff’s Title VII sex discrimination claim where a supervisor criticized plaintiff’s “speech patterns and kinesics for being feminine” because the comments were “due to his co-workers' perception of his sexual orientation”).
137 Id.
138 Id.
sexuality. This has two implications. First, that the use of explicit language implicating an employee’s gender nonconformity can in one instance be deemed sex discrimination\(^{139}\) and in another be deemed sexual orientation discrimination\(^{140}\) demonstrates the inherent difficulties courts—institutional actors experienced in difficult questions of law—have in making this distinction. Employees, then, stand little chance of being able to predict, ex ante, whether their complaint concerns protected sex discrimination, or unprotected sexual orientation discrimination. Second, if courts assign legal significance to co-workers’ perceptions, as the Dandan court did, then this difficulty is compounded—the status of the claim would depend on the co-workers’ state of mind, an unascertainable fact. In a world where employees are unprotected from retaliation after complaining about sexual orientation discrimination, this forces employees to make a choice: complain, and risk lawful retaliation should the offending supervisor have the requisite perception of the employee’s sexuality, or say nothing and take no such risk. Burlington Northern’s demand for “unfettered access” does not abide such a choice.\(^{141}\)

Second, arguments that the distinction between sex discrimination and sexual orientation discrimination is clear are divorced from the reality of current public perception. One recent poll found that 69% of people believe that it is currently illegal under federal law for an employer to discriminate on the basis of sexual orientation.\(^{142}\) In the same poll, only 13 percent believed that federal law permits such discrimination.\(^{143}\) While this data is undeniably imperfect, it reflects widespread misunderstanding of Title VII. To say that the line between proscribed sex discrimination and permitted sexual orientation discrimination is clear is to declare the vast majority of the populace unreasonable.

Third, the minute distinctions between sex and sexual orientation discrimination are overshadowed by their broad similarities. Price Waterhouse and its progeny proscribe

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\(^{139}\) Price Waterhouse, 490 US at 251.


\(^{141}\) Burlington Northern, 548 US at 64.

\(^{142}\) Jagel, Poll Results: Gay Rights (cited in note 8).

\(^{143}\) Id.
discrimination on the basis of gender nonconformity. Attraction to the same sex is one potential mode of gender nonconformity, albeit one that lower courts have gerrymandered out of Price Waterhouse’s general rule. Nonetheless, the mere existence of the “gender nonconformity” rule renders reasonable the belief that Title VII’s substantive provisions proscribe sexual orientation discrimination, as such discrimination fits within a broader category of proscribed conduct.

As a response to this, critics may maintain that we have moved past the day when our expectation of an individual’s sexual orientation is tied to their gender. In this view, we no longer make the default assumption that an individual is attracted to males simply because she is female; notions of gender identity and sexual orientation have been “disaggregated.” From this proposition follows the conclusion that there is no interaction between sexual orientation discrimination and Price Waterhouse, because sexual orientation discrimination is decidedly not a form of gender nonconformity discrimination.

These arguments ought not have legal significance for two reasons. First, expectations of heterosexuality remain the norm. Society tends to maintain the default belief that a male is attracted to females and vice versa. That default belief is

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144 Price Waterhouse, 490 US at 251.
145 See Case, 105 Yale L J at 15–16 (cited in note 132) (footnote omitted) (“We have come to realize that the categories of sex, gender, and orientation do not always come together in neat packages. Not only are they not as binary as we might once have thought, they can in fact be disaggregated. Indeed, the disaggregation of sex and orientation is conceptually well-nigh complete. It should by now come as no surprise to anyone in this culture, whatever his or her normative view of homosexuality, that being male does not necessarily fix one’s sexual orientation toward females; there are unquestionably males who lust after other males, and we no longer tend to think of them as a ‘third sex’ or an ‘intermediate sex’ because of this tendency.”).
146 Price Waterhouse, 490 US at 251.
147 See Karin A. Martin, Normalizing Heterosexuality: Mothers’ Assumptions, Talk, and Strategies with Young Children, 74 Am Soc Rev 191 (2009) (“Heteronormativity (Jackson 2006; Kitzinger 2005), of course, encompasses the many mundane, everyday ways in which heterosexuality is privileged over homosexuality, taken for granted, and seen as natural, ordinary, persistent, and without need of explanation. Jackson (2006) argues that heteronormativity ‘governs’ both gender and sexuality and operates through multiple dimensions of social life (e.g., structure, meaning, everyday practice, and individual subjectivity). Heteronormativity is also normative in a moral sense, defining what is within the bounds of normal.”).
solely a product of the subject’s sex, and it is a presumption that requires the affirmative gathering of information to be overcome. While we no longer hold hard and fast beliefs that all males are attracted to females, individuals still hold heavy presumptions of heteronormativity. The disaggregation of sex and sexuality is not complete.

Second, even if the disaggregation is complete, Price Waterhouse contemplates adverse employment actions taken as a response to traditional notions of gender conformity as well as modern notions of gender conformity. In creating the gender nonconformity framework, the Court noted that “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.” Indeed, the Price Waterhouse court makes consistent reference to “sex stereotyping” as impermissible under Title VII. Any reading of this “stereotype” language that excludes traditional expectations about men and women would create absurd results. For example, society’s expectation that women remain submissive to men has obviously waned over time. It would be an exceedingly narrow reading of Price Waterhouse, and one that is assuredly inconsonant with Price Waterhouse’s broad rule against employer stereotyping. To say that an employer who fires a female worker for refusing to be submissive to a male co-worker is not committing gender nonconformity discrimination. This construction deprives Price Waterhouse of all meaning. That some societal expectations have shifted does not narrow the protection Title VII affords against gender nonconformity discrimination. Hence, the distinction between sexual orientation discrimination and gender nonconformity discrimination is indeed a brittle one.

heterosexual hegemony (e.g., Thompson 1992), heteropatriarchy (Ramazanoglu 1994), heteronormativity (Kitzinger et al. 1992), technologies of heterosexuality (Gavey 1993), and the heterosexual imaginary (Ingraham 1994). In various ways and to various degrees, these terms capture the taken-for-granted and simultaneously compulsory character of institutionalized heterosexuality. All are attempts to highlight an aspect of sexuality that is rarely stated (i.e., that heterosexuality is the default option) and to underscore its cultural dominance.

149 Price Waterhouse, 490 US at 251.
150 Id at 250–52.
151 Id.
152 Id at 251.
Finally, critics may concede that the distinction is brittle, but nonetheless point out that there are individual cases where it is clear that discrimination is based exclusively on sexual orientation and not on gender nonconformity. From this may follow the criticism that the proposed per se rule is inappropriate because, in these exceptionally clear cases, the employee’s belief that the discrimination at issue is gender nonconformity discrimination is unreasonable by definition.

This argument ought not prevail for two reasons. First, because homosexuality could be viewed as a violation of our traditional societal expectations for a man’s or woman’s behavior independent of any other markers of gender nonconformity, there is no exceptionally clear case. Second, even if some cases are clearer than others, only a per se rule maintains “unfettered access” to Title VII’s remedial mechanisms. If a gay employee has any lingering doubt that he may face retaliation should he complain, he will be appreciably less likely to do so. Only a per se rule completely eliminates that lingering doubt and minimizes the very real risk that legitimate sex discrimination claims will be chilled. If “unfettered access” is truly to mean unfettered access, then courts may have to abide cases where they believe it exceptionally clear that a complaint was based exclusively on sexual orientation discrimination.

D. ENDA and Existing Law

Finally, critics may assert that the existence of ENDA necessarily means that Title VII’s antiretaliation provisions do not contemplate sexual orientation discrimination. An example of this kind of argument is found in the Second Circuit’s decision in Kiley v American Society for Prevention of Cruelty to Animals. In Kiley, the court considered whether Title VII’s substantive provisions protected employees from sexual

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153 See, for example, Hamner, 224 F3d at 705 (quoting portions of the plaintiff’s testimony that make it obvious the discrimination at issue was exclusively based on his sexual orientation).


155 Burlington Northern, 548 US at 66.

156 See Crawford, 555 US at 279 (citing “fear of retaliation” as the predominant reason employees do not file discrimination complaints).

orientation discrimination. In rejecting this notion, the court noted “based on numerous bills attempting to extend Title VII protection to sexual orientation ... Congress did not intend to include sexual orientation in Title VII’s current form.”

Opponents may argue that the same logic applies to Title VII’s antiretaliation provisions; because ENDA includes antiretaliation provisions similar to those contained in Title VII, it can be assumed that Congress did not intend to protect individuals who complain of sexual orientation discrimination when it passed Title VII.

This argument is also unavailing. While it is “well-settled” law that Title VII’s substantive provisions do not contemplate sexual orientation discrimination, the law is anything but well-settled on the nature of Title VII’s antiretaliation provisions. It is entirely possible that the antiretaliation provisions of ENDA are merely intended to clarify a current ambiguity in the law, rather than make a statement that current law does not protect those who complain of sexual orientation discrimination. More likely, however, the Congresses that have considered ENDA wanted to ensure broad substantive protections for those suffering from sexual orientation discrimination; it is unlikely that shortcomings of Title VII’s antiretaliation provisions are motivating ENDA’s passage. On the other hand, it is clear that Title VII’s substantive shortcomings are motivating ENDA’s consideration. This distinguishes Title VII’s antiretaliation provisions from the substantive provisions discussed in Kiley. While the Senate has likely acted to correct what it views as a deficit in Title VII’s substantive provisions, it has not done so with respect to Title VII’s antiretaliation provisions. Hence, the consideration of ENDA does not provide evidence that Congress did not intend
Title VII's antiretaliation provisions to cover those complaining of sexual orientation discrimination.

Moreover, courts have not uniformly refused to interpret existing law in a way that expands substantive rights even as Congress considers legislative mechanisms that would achieve the same end. For example, the Supreme Court made a number of rulings expanding substantive protections against sex and gender discrimination under the Equal Protection Clause of the Fourteenth Amendment amid state and Congressional consideration of the Equal Rights Amendment. The Court conferred heightened scrutiny to sex-based distinctions despite the existence of a pending Constitutional amendment that would have explicitly done so. In fact, in *Frontiero v Richardson*, the plurality noted that Congress's decision to pass the Equal Rights Amendment was a powerful indicator "that classifications based upon sex are inherently invidious" and entitled to heightened protection under existing Fourteenth Amendment jurisprudence. Hence, the Senate's decision to pass ENDA may actually be evidence that Title VII confers greater protection upon those suffering from discrimination on the basis of sexual orientation.

III. CONCLUSION

Few political issues are as salient and relevant in contemporary America as LGBT rights, and workplace rights are at the heart of our national conversation. While Title VII

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62 See, for example, *Craig v Boren*, 429 US 190 (1976) (striking down an Oklahoma statute creating separate alcohol purchasing rules for men and women); *Reed v Reed*, 404 US 71 (1971) (striking down an Idaho law giving automatic preference to males in determining who administers an estate); *Frontiero v Richardson*, 411 US 677 (1973) (striking down a federal practice that denied benefits conferred upon wives of male service members to husbands of female service members).

63 See *Craig*, 429 US at 197; *Frontiero*, 411 US at 687–88 (1973) (footnotes omitted) (“And s 1 of the Equal Rights Amendment, passed by Congress on March 22, 1972, and submitted to the legislatures of the States for ratification, declares that ‘equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.’ Thus, Congress itself has concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the question presently under consideration... With these considerations in mind, we can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny.”).


65 Id at 687–88.
does not provide substantive protection for those facing discrimination on the basis of sexual orientation in the workplace, a recent circuit split has created an unclear jurisprudence with regard to protection for employees who complain about such discrimination. Recent Supreme Court precedent suggests a broad construction of Title VII’s antiretaliation provisions is necessary to secure the goal of “unfettered access” to Title VII’s remedial mechanisms. As applied to those who complain of sexual orientation discrimination and face retaliation, this precedent requires an elimination of the distinction between “sex” and “sexual orientation.” Hence, those who face retaliation after making such complaints ought to receive the full protection of Title VII’s antiretaliation provisions.