

# ASSOCIATIONAL DISCRIMINATION THEORY & SEXUAL ORIENTATION-BASED EMPLOYMENT BIAS

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## INTRODUCTION

Because no federal statute expressly prohibits employment discrimination on the basis of sexual orientation, lesbian, gay, and bisexual (LGB) persons have long argued that anti-LGB bias should be actionable under Title VII as a form of sex discrimination.<sup>1</sup> This contention has

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1. See, e.g., *DeSantis v. Pac. Tel. & Tel. Co., Inc.*, 608 F.2d 327, 329 (9th Cir. 1979) (observing that in three cases consolidated for appeal, the plaintiffs collectively argued “that in prohibiting certain employment discrimination on the basis of ‘sex,’ Congress meant to include discrimination on the basis of sexual orientation”).

generally been met with skepticism by courts, with judges often relying on a narrow, biologically-based definition of “sex” and Congress’ repeated failure to pass LGB-inclusive nondiscrimination legislation as confirmation that Title VII does not afford a cause of action to LGB persons.<sup>2</sup> The U.S. Equal Employment Opportunity Commission (EEOC), moreover, historically has taken the position that sexual orientation discrimination does not constitute sex discrimination for the purposes of Title VII.<sup>3</sup> Yet, in a remarkable about-face, the EEOC recently reversed course and held that Title VII does in fact prohibit discrimination on the basis of an individual’s sexual orientation.

In *Baldwin v. Foxx*, the EEOC concluded that “sexual orientation is inherently a ‘sex-based consideration,’” such that “an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII.”<sup>4</sup> The EEOC identified three possible evidentiary routes by which LGB plaintiffs may prove that the relevant conduct constituted actionable sex discrimination: first, the discrimination involved treatment that would not have occurred but for the individual’s sex (the but-for route); second, the discrimination was premised on the fundamental sex stereotype that individuals should be physically and emotionally attracted only to persons of the opposite sex (the gender-stereotyping route); and third, the discrimination was based on the sex of the persons with whom the individual associates (the associational-discrimination route).<sup>5</sup> The EEOC has advanced the foregoing evidentiary routes in two lawsuits in which it is serving as the plaintiff<sup>6</sup> as well as in several additional cases where the EEOC has submitted friend-of-the-court briefs.<sup>7</sup>

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2. See Alex Reed, *Abandoning ENDA*, 51 HARV. J. ON LEGIS. 277, 290 (2014) (noting that “[c]ourts initially commandeered decisions holding that Title VII does not prohibit discrimination on the basis of ‘transsexualism’ to dismiss discrimination claims brought by lesbian, gay, and bisexual persons.”).

3. E.g., *Johnson v. Frank*, EEOC Decision No. 05910858, 1991 WL 1189760, at \*3 (EEOC Dec. 19, 1991).

4. EEOC Decision No. 0120133080, 2015 WL 4397641, at \*5 (EEOC July 15, 2015).

5. *Id.* at \*10.

6. See *EEOC v. Scott Med. Ctr.*, 2017 WL 5493975 (W.D. Pa. Nov. 16, 2017) (entering a Judgment Order for plaintiff); see also *EEOC v. Pallet Co.*, No. 1:16-cv-595-CCB (D. Md. June 28, 2016) (entering parties’ consent decree).

7. Brief of Amicus Curiae Equal Employment Opportunity Commission in Support of Plaintiff/Appellant and Reversal at 10-23, *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195 (2d Cir. 2017) (No. 16-748) [hereinafter *Christiansen Amicus Brief*]; Brief of the U.S. Equal Employment Opportunity Commission as Amicus Curiae in Support of Appellant and in Favor of Reversal at 11-24, *Evans v. Ga. Reg’l Hosp.*, 850 F.3d 1248 (11th Cir. 2017) (No. 15-15234) [hereinafter *Evans Amicus Brief*]; Brief of the United States Equal Employment Opportunity Commission as Amicus Curiae in Support of Hively’s Petition for Rehearing and Suggestion for Rehearing En Banc at 5-9, *Hively v. Ivy Tech Cmty. Coll.*, 2016 WL 6768628

This Article examines the associational-discrimination route as a means of securing employment protections for LGB persons and concludes that the approach should be abandoned in favor of the but-for and gender-stereotyping routes. Compared to these latter routes, the associational-discrimination route has three major flaws. First, although the circuit courts are uniform in holding that race-based associational discrimination is actionable under Title VII,<sup>8</sup> the notion of associational sex discrimination has been recognized by only one circuit, and that court's reasoning is highly suspect.<sup>9</sup> The Supreme Court, moreover, has never recognized the validity of associational discrimination theory in any context, race or otherwise.<sup>10</sup> Consequently, in asserting that sexual orientation discrimination is prohibited as a form of associational sex discrimination, plaintiffs are asking courts to untether the concept of associational discrimination from its racial moorings, expand the theory to include associational discrimination on the basis of sex, and then interpret associational sex discrimination as precluding discrimination on the basis of sexual orientation. For many courts, this argument will likely prove a bridge too far.

Second, plaintiffs seeking to contest sexual orientation discrimination as associational sex discrimination will likely have difficulty accessing the burden-shifting framework of *McDonnell Douglas Corp. v. Green*.<sup>11</sup> The experiences of the first Caucasian plaintiffs to assert claims of associational race discrimination are instructive. Courts once regarded Caucasian plaintiffs' allegations of associational race discrimination as disingenuous attempts to exploit the protected class status of their African-American associates.<sup>12</sup> These courts routinely chastised Caucasian plaintiffs for seeking to assert claims that were merely derivative of racial bias against African-Americans.<sup>13</sup> Although today it is generally understood that if a

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(7th Cir. 2016) (No. 15-1720) [hereinafter *Hively Amicus Brief*].

8. *Holcomb v. Iona Coll.*, 521 F.3d 130, 132 (2d Cir. 2008); *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.*, 173 F.3d 988, 994 (6th Cir. 1999); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 588-89 (5th Cir. 1998); *Drake v. Minn. Mining & Mfg. Co.*, 134 F.3d 878, 884 (7th Cir. 1998); *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986).

9. See *infra* pp. 33-41.

10. *Depaula v. Easter Seals El Mirador*, No. 14-CV-252, 2015 WL 12751708, at \*6 (D. N.M. Jan. 27, 2015).

11. 411 U.S. 792, 802 (1973).

12. See *Parr v. United Family Life Ins. Co.*, No. C-83-26-6, 1983 WL 1774, at \*2 (N.D. Ga. June 15, 1983) (stating that “[t]he court therefore finds that [the Caucasian] plaintiff is attempting to state a claim under Title VII based on the race of his [African-American] wife.”).

13. See *Ripp v. Dobbs Houses, Inc.*, 366 F. Supp. 205, 209-10 (N.D. Ala. 1973) (finding that “[w]hile the Court does not impugn the motives of the plaintiff, a holding which would permit a white plaintiff to attack practices which allegedly disadvantage blacks would open

Caucasian employee “is subjected to adverse action because an employer disapproves of interracial association, the [Caucasian] employee suffers discrimination because of the employee’s *own* race,”<sup>14</sup> courts adjudicating LGB plaintiffs’ claims of associational sex discrimination may default to the reasoning of these earlier cases and hold that LGB plaintiffs cannot satisfy the first element of *McDonnell Douglas Corp.* to the extent they are ostensibly seeking to invoke the protected class status of their same-sex associates.

Third, the associational-discrimination route stands to be under-inclusive. To date, most of the cases finding an actionable claim of associational discrimination have centered on relationships of a romantic or familial nature between an associator and a specific associatee.<sup>15</sup> Should this trend carry over into the sexual orientation context, persons discriminated against solely on the basis of their actual or perceived sexual orientation would lack any recourse under Title VII given that the discrimination they suffered was status-based rather than the result of their intimate association with an individual of a particular sex. This would have the practical effect of conferring privileged status on persons in sexual orientation-consistent relationships, notwithstanding the fact that an individual’s sexual orientation and the sex of the persons to whom they are attracted would seem to be inexorably intertwined. LGB persons, moreover, would be especially vulnerable given that many of them are not out at work and thus cannot acknowledge their involvement in a same-sex relationship to their colleagues, a prerequisite to invoking the protections of associational discrimination theory.<sup>16</sup>

Unlike associational discrimination, the but-for and gender-stereotyping routes are grounded in Supreme Court precedent and have their origins in the Court’s sex discrimination jurisprudence.<sup>17</sup> Because the inclusion of associational discrimination claims will only serve to undermine these other arguments’ strength while introducing unnecessary confusion into courts’ analyses, this article contends the EEOC and private litigants

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Title VII to dangerous abuse” given that a Caucasian plaintiff would have “no personal incentive to enforce the Act” but may instead have “an incentive to subvert [Title VII].”).

14. *Holcomb v. Iona Coll.*, 521 F.3d 130, 139 (2d Cir. 2008).

15. *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 513 (6th Cir. 2009).

16. HUMAN RIGHTS CAMPAIGN FOUNDATION, *The Cost of the Closet and the Rewards of Inclusion*, 9 (2014).

17. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989) (recognizing the gender-stereotyping theory of sex discrimination); *City of L.A., Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (finding sex discrimination where “the evidence shows ‘treatment of a person in a manner which but for that person’s sex would be different’” (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1205 (7th Cir. 1971) (Stevens, J., dissenting))).

should rely exclusively on the but-for and gender-stereotyping routes to prove that anti-LGB bias constitutes actionable sex discrimination. Part I considers the literature's treatment of associational sex discrimination generally and its implications for LGB persons specifically. Part II examines the EEOC's initial rejection and subsequent recognition of associational sex discrimination as a means of contesting sexual orientation bias in the workplace. Part III demonstrates that associational sex discrimination suffers from several major shortcomings, rendering it an imperfect vehicle for securing sexual orientation-based employment protections. Part IV contends that the associational-discrimination route should be abandoned in favor of the but-for and gender-stereotyping routes given that these latter methods are consistent with and reflective of established legal norms in the area of sex discrimination.

#### I. ASSOCIATIONAL SEX DISCRIMINATION IN THE ACADEMIC LITERATURE

The literature's treatment of associational sex discrimination as a means of redressing sexual orientation-based employment bias has been relatively limited, with authors often pausing just long enough to note the theoretical viability of such claims before returning to their primary theses.<sup>18</sup> The dearth of scholarly discourse in this area had the effect of relegating associational sex discrimination to an academic afterthought throughout much of the 1990s and early 2000s, notwithstanding the corresponding surge in LGB-oriented legal scholarship over that same timeframe.<sup>19</sup> Indeed, it was not until 2012 that a scholar by the name of Victoria Schwartz undertook a serious examination of associational discrimination theory's implications for LGB persons, and her seminal piece — *Title VII: A Shift from Sex to Relationships*<sup>20</sup> — remains one of only a handful of articles to be published

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18. E.g., Mark W. Honeycutt II & Van D. Turner, Jr., Comment, *Third-Party Associative Discrimination Under Title VII*, 68 TENN. L. REV. 913, 928 (2001) (discussing briefly the possibility of third-party associative discrimination claims based on same-sex partners before returning to the main discussion of race based discrimination). But see Matthew Clark, Comment, *Stating a Title VII Claim for Sexual Orientation Discrimination in the Workplace: The Legal Theories Available After Rene v. MGM Grand Hotel*, 51 UCLA L. REV. 313 (2003) (providing a comparatively more thorough exploration of associational discrimination theory's implications for sexual orientation-based employment bias).

19. See Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 351 (1995) ("These . . . writings have produced a virtual explosion of ideas in just a few years, creating a rich and expanding body of sexual orientation discourse and scholarship for the first time in the history of American legal academia.").

20. Victoria Schwartz, *Title VII: A Shift from Sex to Relationships*, 35 HARV. J. L. & GENDER 209 (2012).

in this area to date.<sup>21</sup>

Professor Schwartz begins her article by suggesting that the text of Title VII is ambiguous insofar as associational discrimination is concerned.<sup>22</sup> In relevant part, Title VII provides “[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual’s race, color, religion, sex, or national origin.”<sup>23</sup> Schwartz contends that the foregoing passage is susceptible to two plausible interpretations.<sup>24</sup> Under the first reading, discrimination must be predicated on an individual’s race, color, religion, sex, or national origin independent of and without reference to the individual’s interpersonal relationships.<sup>25</sup> Under the second reading, discrimination may be based on an individual’s race, color, religion, sex, or national origin when considered in relation to and as informed by their interpersonal associations.<sup>26</sup> Schwartz, therefore, rejects the premise that associational discrimination theory is merely an ad hoc judicial construct and instead argues that a relationally-oriented reading of the passage is “entirely consistent with the text of Title VII.”<sup>27</sup>

After acknowledging that associational discrimination theory originated and developed within the specific context of race discrimination, Schwartz asserts there is nothing in Title VII’s text to suggest the theory should be limited to the category of race: “[T]he statutory language ‘because of such individual’s’ applies to each of the protected characteristics [set forth in Title VII, meaning] the relational discrimination interpretation of that phrase ought to apply equally to [the statute’s] other protected characteristics . . . .”<sup>28</sup> According to Schwartz, once courts recognize the applicability of associational discrimination theory to claims of sex discrimination, they necessarily must conclude that Title VII prohibits discrimination on the basis of sexual orientation: “[S]exual orientation is an inherently relational concept” in that a woman discriminated against for being gay:

“is discriminated against for her sex (female) in relation to her sexual relationships with others (female). Therefore, her claim for discrimination on the basis of her sexual orientation is necessarily a claim that she is being discriminated against on the basis of her

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21. E.g., Pierce G. Hand, IV, Note, *Affiliative Discrimination Theory: Title VII Litigation Within the Sixth Circuit*, 32 GA. ST. U. L. REV. 541 (2016) (contending the Sixth Circuit should recognize sexual orientation discrimination as associational sex discrimination).

22. Schwartz, *supra* note 20, at 216.

23. 42 U.S.C. § 2000e-2(a)(1) (2012).

24. Schwartz, *supra* note 20, at 216.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 221 (quoting 42 U.S.C. § 2000e-2(a) (2012)).

sex when viewed in relation to others.”<sup>29</sup>

The expansive view of associational discrimination endorsed by Professor Schwartz is further apparent from her contention that a person need not be in a sexual orientation-consistent relationship at the time of the alleged discrimination to state a cognizable claim of associational sex discrimination.<sup>30</sup> She contends that “[a]n employer who is motivated by animus based on an employee’s sexual orientation likely is so motivated regardless of the specific status of that employee’s relationships.”<sup>31</sup> According to Schwartz, it is the employee’s romantic association with persons of the same sex generally rather than his or her relationship with any individual specifically that is likely to engender animus on the part of the employer.<sup>32</sup> Schwartz, therefore, believes that associational sex discrimination stands to provide meaningful employment protections to all persons discriminated against on the basis of their sexual orientation, not just those fortunate enough to be in romantic relationships at the time of the discriminatory act.<sup>33</sup>

As discussed in Part III, however, Professor Schwartz ostensibly provides an unduly optimistic assessment of associational sex discrimination’s potential efficacy in redressing sexual orientation-based employment bias. First, courts will likely be hesitant to extend associational discrimination theory beyond its historic, race-based origins to include matters of sex, much less construe associational sex discrimination as precluding discrimination on the basis of sexual orientation. Second, courts adjudicating claims of associational sex discrimination will likely deny LGB persons access to the burden-shifting framework of *McDonnell Douglas*, meaning direct proof of discrimination will be necessary to state a cognizable Title VII claim. Third, courts will likely restrict associational sex discrimination claims to persons who were known by their coworkers to be in committed romantic relationships at the time of the alleged discrimination, leaving single and closeted LGB individuals without any recourse. Before examining the associational-discrimination route’s shortcomings in detail, however, it is important to understand the theory’s evolution within the EEOC.

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29. *Id.* at 248. Whereas Schwartz’s analysis focuses exclusively on sexual orientation discrimination directed against LGB persons, she makes a point to note that claims of associational sex discrimination stand to be available to persons of all sexual orientations, including heterosexuals. *Id.* at 250.

30. *Id.* at 249.

31. *Id.*

32. *Id.*

33. *Id.*

## II. THE EEOC AND ASSOCIATIONAL SEX DISCRIMINATION

For decades, neither the EEOC nor the courts had cause to consider the application of associational discrimination theory in the specific context of sex.<sup>34</sup> When the EEOC was finally confronted with the issue in *Cooke v. Nicholson*, the Commission's analysis was complicated by the fact the complainant/associator was a heterosexual man whereas the relevant associatee was a homosexual woman.<sup>35</sup> This initially led to the dismissal of the complainant's case on the grounds the harassment the complainant suffered was predicated on the associatee's sexual orientation rather than her sex.<sup>36</sup> On appeal, the complainant argued that he had been harassed because he was willing to work with the only female in what was otherwise an all-male environment such that the associatee's homosexuality was irrelevant for the purposes of his associational discrimination claim.<sup>37</sup> The Commission, nevertheless, affirmed the final order dismissing the complainant's case<sup>38</sup> and denied his subsequent request for reconsideration.<sup>39</sup>

Approximately one year later, the Commission sua sponte reconsidered *Cooke* and held that claims of associational sex discrimination are cognizable under Title VII.<sup>40</sup> The Commission began by observing that Title VII does not prohibit discrimination on the basis of an individual's sexual orientation and noted that at least some of the harassment the complainant endured appeared to be the result of his association with a gay co-worker.<sup>41</sup> As an example, the Commission cited complainant's receipt of a note implying that he was gay and complainant's belief the note stemmed from his cordial relationship with a homosexual colleague.<sup>42</sup> Conversely, the Commission recognized that some of the harassment directed against the complainant was the product of his association with a female co-worker, as reflected in the rumors that he and the associatee were having a sexual affair.<sup>43</sup> The case, therefore, posed two interrelated questions: whether a sex discrimination claim may be predicated on associational discrimination theory and, if so,

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34. Andrew W. Powell, *Is There a Future for Sex-Based Associational Discrimination Claims Under Title VII?*, LAB. LAW J. 9349634, 164, 166-68 (Fall 2015).

35. *Cooke v. Nicholson*, No. 05A60305, 2006 WL 842209, at \*2 (E.E.O.C. Mar. 23, 2006).

36. *Id.* at \*2-3.

37. *Id.* at \*3.

38. *Cooke v. Nicholson*, No. 01A51683, 2005 WL 1073710, at \*1 (E.E.O.C. Apr. 29, 2005).

39. *Cooke v. Nicholson*, No. 05A50929, 2005 WL 2428941, at \*2 (E.E.O.C. Sept. 22, 2005).

40. *Cooke*, 2006 WL 842209, at \*4.

41. *Id.*

42. *Id.*

43. *Id.*



whether such claims are rendered inactionable when accompanied by instances of sexual orientation discrimination. Answering yes and no, respectively, the Commission found that “if harassment was simultaneously directed against the complainant both because of his association with [the female associatee] because of her sexual orientation and gender, Title VII still protects the gender basis.”<sup>44</sup>

Notwithstanding the Commission’s decision in *Cooke*, courts have been hesitant to recognize claims of associational sex discrimination.<sup>45</sup> Some courts have intimated that while such claims may be cognizable in theory, they fail as a practical matter.<sup>46</sup> Other courts have cited a reluctance to confer employment protections on LGB persons as their reason for rejecting associational sex discrimination claims: “[T]he . . . novel theory that all associational sex discrimination is barred as the analogue of interracial relationship discrimination . . . proves too much and must be rejected” given that “[a]dopting such a theory would serve to protect sexual orientation in any context where sex discrimination is protected . . . .”<sup>47</sup> Significantly, in the decade following *Cooke* only one claim of associational sex discrimination was able to withstand a defendant’s summary judgment motion and only because the court implicitly assumed that both the male associator and the female associatee were heterosexual.<sup>48</sup> Thus, courts’ resistance to allowing claims of associational sex discrimination post-*Cooke* was attributable — at least in part — to continuing concerns that recognition of such claims would lead to protections for LGB persons.<sup>49</sup>

Ostensibly seeking to reinvigorate associational discrimination theory within the courts while at the same time endeavoring to eliminate workplace discrimination on the basis of sexual orientation, in 2015 the EEOC

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44. *Id.* (citing *Sexton v. Slater*, No. 05970111, 1999 WL 433295 (E.E.O.C. June 17, 1999)).

45. Powell, *supra* note 34, at 169.

46. See *Gallo v. W.B. Mason Co.*, No. 10-10618-RWZ, 2010 WL 4721064, at \*1 (D. Mass. Nov. 15, 2010) (“Assuming, arguendo, that Title VII prohibits gender-based associational discrimination, Gallo’s complaint falls [sic] to state such a claim.”); *Stezzi v. Aramark Sports, LLC*, No. 07-5121, 2009 WL 2356866, at \*5 (E.D. Penn. July 30, 2009) (“Here, there are . . . insufficient facts to persuade this Court to extend an associational discrimination claim to the gender context.”).

47. *Partners Healthcare Sys. v. Sullivan*, 497 F. Supp. 2d 29, 39 (D. Mass. 2007).

48. *Pratt v. Husted Chevrolet*, No. 05-4148, 2009 WL 805128 (E.D.N.Y. Mar. 27, 2009). See also *Schwartz, supra* note 20, at 254 (“[T]he district court accepted the relational discrimination argument in the [presumably] heterosexual sexual orientation context, and was able to avoid the bootstrapping arguments and legal stigma that would be triggered had the plaintiff been homosexual.”).

49. See, e.g., *Bibby v. Phila. Coca-Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001) (“It is clear . . . that Title VII does not prohibit discrimination based on sexual orientation.”). See also *Schwartz, supra* note 20, at 234-46 (discussing courts’ various rationales for concluding that sexual orientation discrimination is outside the purview of Title VII).

announced that sexual orientation discrimination is actionable under Title VII as a form of associational sex discrimination.<sup>50</sup> Specifically, in *Baldwin v. Foxx* the Commission held that:

Sexual orientation discrimination is . . . sex discrimination because it is associational discrimination on the basis of sex. That is, an employee alleging discrimination on the basis of sexual orientation is alleging that his or her employer took his or her sex into account by treating him or her differently for associating with a person of the same sex. For example, a gay man who alleges that his employer took an adverse employment action against him because he associated with or dated men states a claim of sex discrimination under Title VII; the fact that the employee is a man instead of a woman motivated the employer's discrimination against him. Similarly, a heterosexual man who alleges a gay supervisor denied him a promotion because he dates women instead of men states an actionable Title VII claim of discrimination because of his sex.<sup>51</sup>

The Commission indicated that the prohibition of sexual orientation discrimination was a logical extension of its earlier decisions finding that discrimination on the basis of an individual's interracial relationships constitutes actionable race discrimination, reasoning that "Title VII 'on its face treats each of the enumerated categories' — race, color, religion, sex, and national origin — 'exactly the same.'"<sup>52</sup> The Commission concluded by asserting that "sexual orientation is inherently a 'sex-based consideration,' and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII."<sup>53</sup>

Whereas *Baldwin* only applies to the federal workforce,<sup>54</sup> the Commission has endeavored to extend the decision's reach to the private sector by filing two lawsuits challenging sexual orientation discrimination as associational sex discrimination.<sup>55</sup> In *EEOC v. Scott Medical Center*, the Commission alleged that a male supervisor sexually harassed a gay subordinate because he "objected generally to males having romantic and sexual association with other males, and objected specifically to [the

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50. *Baldwin v. Foxx*, No. 0120133080, 2015 WL 4397641 (E.E.O.C. July 15, 2015).

51. *Id.* at \*6.

52. *Id.* at \*6-7 (quoting *Price Waterhouse*, 490 U.S. at 243 n.9).

53. *Id.* at \*5.

54. Ryan H. Nelson, *Sexual Orientation Discrimination Under Title VII After Baldwin v. Foxx*, 72 WASH. & LEE L. REV. ONLINE 255, 256 (2015).

55. Press Release, U.S. Equal Emp't Opportunity Comm'n, EEOC Files First Suits Challenging Sexual Orientation Discrimination as Sex Discrimination (Mar. 1, 2016), available at <https://www.eeoc.gov/eeoc/newsroom/release/3-1-16.cfm> [<https://perma.cc/V9G5-8P7F>].

subordinate's] close, loving relationship with his male partner."<sup>56</sup> Similarly, in *EEOC v. Pallet Companies*, the Commission alleged that a male supervisor sexually harassed a lesbian subordinate because he "objected generally to females having romantic and sexual association with other females, and objected specifically to [the subordinate's] close, loving association with her female partner."<sup>57</sup> Although *Pallet Companies* ultimately settled,<sup>58</sup> *Scott Medical Center* resulted in a \$55,500 judgment for the plaintiff, but only after the defendant accepted a default judgment on the question of liability.<sup>59</sup>

As amicus curiae, moreover, the EEOC has advocated the associational-discrimination route in three circuits<sup>60</sup> wherein sexual orientation discrimination has previously been deemed permissible under Title VII.<sup>61</sup> In its briefs, the Commission argues that the relevant circuit precedent is outdated and unworkable.<sup>62</sup> The Commission also contends that "[t]he behavior of an employer that discriminates against a gay employee because it disapproves of same-sex dating is not materially different from the behavior of an employer that discriminates against an employee because it disapproves of interracial dating," given that "[i]n both cases, the employer bases its actions on the protected characteristic of its employee, viewed in relation to the individuals with whom that employee associates."<sup>63</sup> To date, however, only one of the three aforementioned circuits has embraced associational discrimination theory as a means by which LGB persons may contest sexual orientation-based employment discrimination,<sup>64</sup> and that

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56. Complaint at 4-5, No. 2:16-cv-225-CB (W.D. Pa. Mar. 1, 2016).

57. Complaint at 5, No. 1:16-cv-595-CCB (D. Md. Mar. 1, 2016).

58. *EEOC v. Pallet Cos.*, No. 1:16-cv-595-CCB (D. Md. June 28, 2016) (order entering parties' consent decree).

59. *EEOC v. Scott Med. Ctr.*, No. 2:16-cv-225-CB (W.D. Pa. Nov. 16, 2017). Separately, the associational-discrimination route has been endorsed by one U.S. circuit court. *Hively*, 853 F.3d at 347-49.

60. *Hively* Amicus Brief, *supra* note 7, at 6-7; Christiansen Amicus Brief, *supra* note 7, at 18-20; Evans Amicus Brief, *supra* note 7, at 19-22.

61. See *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 704 (7th Cir. 2000) ("[H]arassment based solely upon a person's sexual preference or orientation (and not on one's sex) is not an unlawful employment practice under Title VII."); *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000) ("Title VII does not prohibit harassment or discrimination because of sexual orientation."); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979) ("Discharge for homosexuality is not prohibited by Title VII or Section 1981."). Note that decisions issued by the Fifth Circuit prior to September 30, 1981 constitute binding precedent within the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

62. *Hively* Amicus Brief, *supra* note 7, at 4; Christiansen Amicus Brief, *supra* note 7, at 10.

63. Christiansen Amicus Brief, *supra* note 7, at 20.

64. *Hively*, 853 F.3d at 347-49. Three-judge panels of the Second and Eleventh Circuits

court's reasoning is predicated on a false equivalence as discussed in greater detail in Part III.

### III. ASSOCIATIONAL SEX DISCRIMINATION: AN IMPERFECT MEANS OF REDRESSING SEXUAL ORIENTATION-BASED EMPLOYMENT BIAS

Compared to the but-for and gender-stereotyping routes, the associational-discrimination route stands to be over complex and under inclusive as a means of redressing sexual orientation-based employment bias. First, courts will likely be hesitant to expand associational discrimination theory beyond its historic, race-based origins to combat instances of sexual orientation discrimination. Second, plaintiffs seeking to contest sexual orientation discrimination as a form of associational sex discrimination will likely have difficulty accessing the burden-shifting framework of *McDonnell Douglas*. Third, courts willing to entertain claims of associational sex discrimination will likely limit such claims' scope to persons who were in committed romantic relationships at the time of the alleged discrimination. The EEOC and LGB plaintiffs should, therefore, abandon the associational-discrimination route as a means of contesting sexual orientation-based employment bias given that the inclusion of associational discrimination claims will only serve to detract from the but-for and gender-stereotyping routes' strengths while at the same time affording courts hostile to LGB equality an opportunity to curtail the associational-discrimination route's efficacy via narrow, fact-restrictive rulings.<sup>65</sup>

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rejected LGB plaintiffs' claims of associational sex discrimination after concluding that such claims were barred by circuit precedent. *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 199 (2d Cir. 2017), *reh'g denied*, No. 16-748 (2d Cir. June 28, 2017); *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1257 (11th Cir. 2017), *reh'g denied*, No. 15-15234-BB (11th Cir. July 6, 2017), *petition for cert. filed*, 2017 WL 4022788 (U.S. Sept. 7, 2017) (No. 17-370).

65. The "strategic" manner in which courts have sought to limit LGB persons' otherwise actionable claims of sex discrimination is well-documented. *See, e.g.*, Valdes, *supra* note 19, at 24 ("[C]ourts can and do (re)characterize sex and gender discrimination as sexual orientation discrimination virtually at will. This practice employs sexual orientation to create a loophole for sex and gender biases . . ."). *See also* Alex Reed, *Same-Sex Harassment After Boh Brothers*, 2016 UTAH L. REV. 441, 456-57 (2016) (observing that courts adjudicating same-sex harassment claims have endeavored to limit the gender-stereotyping theory to the facts of *Price Waterhouse v. Hopkins*); Alex Reed, *A Pro-Trans Argument for a Transexclusive Employment Non-Discrimination Act*, 50 AM. BUS. L.J. 835, 852-53 (2013) (acknowledging that although the gender-stereotyping theory "would seem to afford the transgender community a ready means of securing employment protections under Title VII," courts historically have sought to limit the theory to the facts of *Price Waterhouse*).

### A. *Expanding Coverage Beyond Race*

Whereas the circuits are uniform in holding that race-based associational discrimination is actionable under Title VII,<sup>66</sup> the concept of associational sex discrimination has been embraced by only one circuit,<sup>67</sup> and that court's reasoning is highly suspect.<sup>68</sup> The Supreme Court, moreover, has never explicitly recognized the validity of associational discrimination theory in any Title VII context, race or otherwise.<sup>69</sup> Consequently, in asserting that sexual orientation discrimination is prohibited as a form of associational sex discrimination, plaintiffs are asking courts to untether associational discrimination theory from its racial moorings, expand the theory to include discrimination on the basis of sex, and then interpret associational sex discrimination as precluding discrimination on the basis of sexual orientation. For many courts, this argument will likely prove a bridge too far.<sup>70</sup>

The Ninth Circuit Court of Appeals' decision in *DeSantis v. Pacific Telephone & Telegraph Co.* is instructive.<sup>71</sup> Appellants in that case were a group of LGB persons alleging they had been subjected to associational sex discrimination in violation of Title VII.<sup>72</sup> As paraphrased by the court, “[a]ppellants argue that the EEOC has held that discrimination against an employee because of the race of the employee’s friends may constitute discrimination based on race in violation of Title VII” and “contend that

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66. See *supra* note 8.

67. *Hively*, 853 F.3d at 349. The chief judge of the Second Circuit Court of Appeals has endorsed the associational-discrimination route in a concurrence, however. *Christiansen*, 852 F.3d at 204 (Katzmann, C.J., concurring). Separately, the associational-discrimination route has been endorsed by two district courts. *E.g.*, *Boutillier v. Hartford Pub. Sch.*, 221 F. Supp. 3d 255, 268 (D. Conn. 2016); *Isaacs v. Felder Servs., LLC*, 143 F. Supp. 3d 1190, 1193-94 (M.D. Ala. 2015).

68. See *infra* pp. 33-41.

69. See William N. Eskridge, Jr., *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 *YALE L.J.* 322, 356 (2017) (observing the Supreme Court did “not explicitly rely on the associational discrimination argument” in a 1983 case involving sex discrimination but noting that “lower court decisions since 1975 have all but uniformly interpreted Title VII to regulate discrimination because of the race or ethnicity of one’s intimate associates”).

70. See *Partners Healthcare Sys.*, 497 F. Supp. 2d at 39 (“[T]he . . . novel theory that all associational sex discrimination is barred as the analogue of interracial relationship discrimination . . . proves too much and must be rejected” given that “[a]dopting such a theory would serve to protect sexual orientation in any context where sex discrimination is protected, including under Title VII and Amendment XIV analysis.”). See also Luke A. Boso, *Acting Gay, Acting Straight: Sexual Orientation Stereotyping*, 83 *TENN. L. REV.* 575, 600-01 (2016) (“What seems to trouble courts . . . is the number of links in the causal chain necessary to arrive at the conclusion that sexual orientation discrimination is sex discrimination.”).

71. 608 F.2d 327 (9th Cir. 1979).

72. *Id.* at 331.

analogously discrimination because of the sex of the employees' sexual partner should constitute discrimination based on sex."<sup>73</sup> Although the Ninth Circuit was prepared to "assum[e] that it would violate Title VII for an employer to discriminate against employees because of the gender of their friends," the court declined to construe associational sex discrimination as encompassing appellants' claims of sexual orientation discrimination.<sup>74</sup>

Commentators have criticized *DeSantis* as deliberately distorting the appellants' claims in order to conclude that Title VII does not protect LGB persons. Matthew Clark, for example, contends that "[b]y mischaracterizing the associati[onal] discrimination theory as an inquiry into the sex of an employee's 'friends,' the Ninth Circuit . . . missed the point."<sup>75</sup> He explains that to prevail on an associational discrimination claim, plaintiffs "generally must show a very substantial relationship with the other person that is greater than friendship."<sup>76</sup> Separately, Victoria Schwartz notes that "while the court's language is reminiscent of [associational] discrimination arguments, its analysis shows that it misses the essence of those arguments."<sup>77</sup> Schwartz explains that "it is not the sex of the third party that is the focus of the analysis, but rather the sex of the employee viewed vis-à-vis the third party" such that "[t]he Ninth Circuit never considers, much less rejects, this properly understood [associational] discrimination argument."<sup>78</sup>

Whereas these scholars' criticisms are justified from a purely academic standpoint, their contentions are irrelevant for the purposes of this Article. *DeSantis* may be read as standing for one of two distinct propositions: associational sex discrimination — by definition — does not encompass discrimination on the basis of an individual's same-sex romantic relationships; or courts are so averse to providing redress for sexual orientation-based employment discrimination that they are prepared to mischaracterize LGB plaintiffs' otherwise actionable claims of associational sex discrimination. Under either interpretation, *DeSantis* highlights the risks of advancing associational discrimination theory as a means of contesting anti-LGB employment bias.

The associational-discrimination route's flaws are evident not only in the cases rejecting the route, but also in the cases embracing it. To date, the only court to permit an explicit claim of associational sex discrimination is the Seventh Circuit Court of Appeals, and the opacity of the court's analysis

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73. *Id.*

74. *Id.*

75. Clark, *supra* note 18, at 333-34.

76. *Id.* at 334.

77. Schwartz, *supra* note 20, at 252.

78. *Id.*

suggests the theory is ill-suited for application in areas other than race.<sup>79</sup> In finding that the lesbian plaintiff stated a viable claim of discrimination on the basis of her intimate association with a person of the same sex, the Seventh Circuit acknowledged that it had never before been confronted with a claim of associational discrimination in any context, race or otherwise.<sup>80</sup> The majority in *Hively*, nevertheless, proceeded to embrace a sweeping view of associational discrimination whereby plaintiffs may state cognizable Title VII claims on the basis of their relationships with persons belonging to any of the statute's explicitly enumerated categories.<sup>81</sup>

The majority predicated the associational discrimination portion of its ruling on the Supreme Court's 1967 decision in *Loving v. Virginia*, wherein state miscegenation laws prohibiting interracial marriages were struck down as violations of equal protection.<sup>82</sup> The majority in *Hively* observed that:

These [miscegenation] laws were long defended and understood as non-discriminatory because the legal obstacle affected both partners. The Court in *Loving* recognized that equal application of a law that prohibited conduct only between members of different races did not save it. Changing the race of one partner made a difference in determining the legality of the conduct, and so the law rested on "distinctions drawn according to race," which were unjustifiable and racially discriminatory. So too, here. If we were to change the sex of one partner in a lesbian relationship, the outcome would be different. This reveals that the discrimination rests on distinctions drawn according to sex.<sup>83</sup>

Significantly, the majority did not address the fact that whereas *Loving* entailed a constitutional challenge to racial discrimination in the context of marriage, *Hively* concerned a statutory claim of sex discrimination in the area of private employment. The Seventh Circuit instead declared that the "line of cases [addressing associational discrimination] began with *Loving*" and then proceeded to summarize several Title VII decisions applying associational discrimination theory to instances of race discrimination.<sup>84</sup> Throughout its opinion, the majority assiduously avoided any discussion of how a theory originating under the Equal Protection Clause in the specific context of race was applicable to a claim of sex discrimination arising under

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79. *Hively*, 853 F.3d at 339.

80. *Id.* at 348. *See also id.* at 359 (Flaum, J., concurring) ("Although this Circuit has not yet addressed whether claims based on a theory of associational discrimination are cognizable under Title VII, I agree with the majority that . . . [t]his type of discrimination is prohibited by Title VII.")

81. *Id.* at 349.

82. 388 U.S. 1, 12 (1967).

83. *Hively*, at 348-49 (quoting *Loving*, 388 U.S. at 11).

84. *Id.* at 347-48.

Title VII.<sup>85</sup> This is likely because the court's holding cannot be justified from a constitutional standpoint given the differential treatment afforded race and gender by the Supreme Court's equal protection jurisprudence.<sup>86</sup> Rather, the court engaged in analytic sleight of hand by focusing instead on the coequal status of race and sex for the purposes of Title VII: "The fact that *Loving* [and certain associational discrimination cases implicating Title VII] . . . deal[t] with racial associations, as opposed to those based on color, national origin, religion, or sex, is of no moment" because Title VII's text "draws no distinction . . . among the different varieties of discrimination it addresses."<sup>87</sup>

The flaws in the majority's rationale were laid bare in the dissenting opinion authored by Judge Sykes. Regarding the issue of associational sex discrimination, Judge Sykes refuted a central tenet of the majority's argument by rendering *Loving* inapposite:

*Loving* rests on the inescapable truth that miscegenation laws are inherently racist. They are premised on invidious ideas about white superiority and use racial classifications toward the end of racial purity and white supremacy. Sexual-orientation discrimination, on the other hand, is not inherently *sexist*. No one argues that sexual-orientation discrimination aims to promote or perpetuate the supremacy of one sex. In short, *Loving* neither compels nor supports the majority's decision to upend the long-settled understanding that sex discrimination and sexual-orientation discrimination are distinct.

For the same reason, the majority's reliance on [precedent from other circuits recognizing the viability of associational

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85. See *id.* at 348-49 (discussing the rationale underlying the Supreme Court's opinion in *Loving* and declaring, "[s]o too, here"). The Supreme Court has indicated that its decisions construing the Equal Protection Clause "are a useful starting point in interpreting" Title VII. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 133 (1976), *superseded by statute on other grounds*, Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076. See also *Gutzwiller v. Fenik*, 860 F.2d 1317, 1325 (6th Cir. 1988) (holding that "the showing a plaintiff must make to recover on a disparate treatment claim under Title VII mirrors that which must be made to recover on an equal protection claim under section 1983."). Consequently, the Supreme Court's differential treatment of race and gender in the equal protection context suggests that courts adjudicating Title VII claims should be hesitant to extend associational discrimination theory beyond its historic, race-based origins to encompass matters of sex discrimination. See Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 171 (2016) (acknowledging that under the Supreme Court's equal protection jurisprudence "race is subject to the most rigorous constitutional protection" as reflected by the fact racial classifications are accorded strict scrutiny whereas "[s]ex is less suspect" such that classifications based on gender receive intermediate scrutiny).

86. See *supra* note 85.

87. *Hively*, 853 F.3d at 349 (citing *Price Waterhouse*, 490 U.S. at 243).



discrimination claims in the context of race], which translated *Loving* to the Title VII context, is entirely inapt. An employer who refuses to hire or fires an employee based on his interracial marriage is obviously drawing invidious racial classifications akin to those inherent in Virginia's miscegenation laws. *Loving's* equal-protection holding extends to Title VII racial-discrimination claims because those claims share the same contextual foundation. They arise in a nation whose original sin is slavery, where some states sought to perpetuate white supremacy as recently as half a century ago, and where the vestiges of this iniquitous history persist in our workplaces and in other institutions of our society. The Equal Protection Clause and Title VII's prohibition of racial discrimination in the workplace *both* operate to curtail the evil of racism inherent in anti-miscegenation. That explains why *Loving* applies to Title VII racial-discrimination claims but is not a warrant for reading sexual-orientation discrimination into the statute.<sup>88</sup>

Judge Sykes' dissent, thus, exposes the major flaw in the majority's reasoning and highlights the difficulties LGB persons are likely to encounter in contesting sexual orientation discrimination as a form of associational sex discrimination.<sup>89</sup> Whereas LGB plaintiffs may be tempted to draw parallels between discrimination on the basis of race and sex in the hope of gaining access to associational discrimination theory, the fact that race and sex discrimination are readily distinguishable,<sup>90</sup> particularly in the constitutional context,<sup>91</sup> suggests that LGB plaintiffs should be wary of advancing such arguments as they would only serve to undermine the litigants' credibility

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88. *Id.* at 368-69. *See also* Brief for the United States as Amicus Curiae at 22, *Zarda v. Altitude Express, Inc.*, No. 15-3775 (2d Cir. 2017) (arguing that "an employer who discriminates against an employee in a same-sex relationship is not engaged in sex-based treatment of women as inferior to similarly situated men (or vice versa), but rather is engaged in sex-neutral treatment of homosexual men and women alike"); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 201 (1994) (explaining that "the gravamen of *Loving's* objection to the miscegenation prohibition was that it was 'designed to maintain White Supremacy.'") (quoting *Loving*, 388 U.S. at 11).

89. *See* Schwartz, *supra* note 20, at 258 (finding that "*Loving* is not directly relevant to the argument" that sexual orientation discrimination should be actionable as a form of associational sex discrimination given that "*Loving* involved a constitutional argument, and sex and race are not treated identically in the constitutional context").

90. *See* Brief for the United States as Amicus Curiae, *supra* note 88, at 21 (positing that the "analogy to racial discrimination is fundamentally inapposite").

91. *See* Leonore F. Carpenter, *The Next Phase: Positioning the Post-Obergefell LGBT Rights Movement to Bridge the Gap Between Formal and Lived Equality*, 13 STAN. J. CIV. RTS. & CIV. LIBERTIES 255, 265 (2017) (explaining that unlike classifications on the basis of race and sex, the Supreme Court has never explicitly held that classifications on the basis of sexual orientation warrant heightened scrutiny); *supra* note 85.

and detract from more persuasive arguments as to why sexual orientation discrimination is actionable under Title VII.<sup>92</sup>

B. *Demonstrating Membership in a Protected Class*

Additionally, if history is any guide, plaintiffs seeking to contest sexual orientation discrimination as a form of associational sex discrimination will have difficulty accessing the burden-shifting framework of *McDonnell Douglas Corp. v. Green*.<sup>93</sup> *McDonnell Douglas* allows plaintiffs to establish a prima facie case of discrimination by proving “(1) membership in a protected class; (2) qualification for the position; (3) an adverse employment action; and (4) circumstances giving rise to an inference of discrimination on the basis of membership in the protected class.”<sup>94</sup> Once a plaintiff has established a prima facie case, the burden shifts to the employer to “produc[e] evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason.”<sup>95</sup> If the employer satisfies this requirement, the burden then shifts back to the plaintiff to prove

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92. To date, the District of Colorado is the only federal district court to explicitly apply associational discrimination theory in a setting other than race and did so in the context of discrimination on the basis of national origin rather than sex. *Reiter v. Ctr. Consol. Sch. Dist.*, 618 F. Supp. 1458 (D. Colo. 1985). The court begins by noting, “the EEOC has found that reasonable cause existed to believe that an employer violated Title VII by discharging an employee because of his or her association with people of a different race” and references two Commission decisions standing for that proposition. *Id.* at 1460 (citing EEOC Decision No. 71-1902, 3 Fair Empl. Prac. Cas. (BNA) 1244 (1971) and EEOC Decision No. 71-909, 3 Fair Empl. Prac. Cas. (BNA) 269 (1970)). Without citing any additional authority or providing any further explanation, however, the court then characterizes these decisions as “indicat[ing] that the EEOC interprets Title VII as prohibiting discriminatory employment practices based on an individual’s association with people of a particular race or national origin.” *Id.* Thus, in failing to elucidate how the Commission’s rulings in the area of associational race discrimination support its conclusion that claims of national origin-based associational discrimination are actionable under Title VII, the court declined to try to situate associational discrimination theory within the broader framework of Title VII.

93. 411 U.S. 792 (1973).

94. *Ricci v. DeStefano*, 530 F.3d 88, 110 (2d Cir. 2008). *See also McDonnell Douglas*, 411 U.S. at 802 (articulating the Supreme Court framework requiring that a plaintiff show:

“(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications”).

*But see* Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 202 (2009) (recognizing that “the original *McDonnell Douglas* formulation was so fact-specific that it has applied to almost no actual cases”).

95. *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 142 (2000) (quoting *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981)).

that the employer's proffered reasons are pretextual.<sup>96</sup> As noted by Victoria Schwartz, "[g]iven this framework, the first prong of the plaintiff's prima facie case — the ability to establish membership in a protected class — holds the key to the entire burden-shifting kingdom,"<sup>97</sup> and it is here that plaintiffs contesting sexual orientation discrimination as associational sex discrimination are likely to have their claims derailed in a manner analogous to the first plaintiffs alleging associational discrimination in the context of race.

Courts confronted with allegations of associational race discrimination once routinely dismissed such claims on the grounds that the Caucasian plaintiffs were unable to satisfy the first prong of *McDonnell Douglas*, i.e., membership in a protected class.<sup>98</sup> These courts regarded Caucasian plaintiffs' allegations of associational race discrimination as attempts to establish a prima facie case, not based on the plaintiffs' own protected class status, but instead based on the protected class status of their African-American associates.<sup>99</sup> This understanding is revealed in various statements to the effect that "[p]laintiff does not contend that he has been discriminated against because of 'his' race" but instead "contends that he has been discriminated against because of the race of his wife,"<sup>100</sup> and "plaintiff's complaint does not allege that he was denied employment because of his race" but "because he is married to a black female."<sup>101</sup> Although today it is generally understood that "an employer may violate Title VII if it takes action against an employee because of the employee's association with a person of another race,"<sup>102</sup> courts adjudicating LGB plaintiffs' claims of associational sex discrimination may default to the reasoning of these earlier cases and hold that LGB plaintiffs cannot satisfy the first prong of *McDonnell Douglas*.

Indeed, courts have already demonstrated a willingness to dismiss otherwise viable claims of associational sex discrimination brought by

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96. *Ricci*, 530 F.3d at 110.

97. Schwartz, *supra* note 20, at 215.

98. See, e.g., *Adams v. Governor's Comm. on Postsecondary Educ.*, No. C80-624A, 1981 WL 27101, at \*3 (N.D. Ga. Sept. 3, 1981) (stating that "[p]laintiff does not contend that he has been discriminated against because of 'his' race" as a Caucasian person, rather "[h]e contends that he has been discriminated against because of the race of his [African-American] wife").

99. Alex B. Long, *The Troublemaker's Friend: Retaliation Against Third Parties and the Right of Association in the Workplace*, 59 FLA. L. REV. 931, 948 (2007); Noah D. Zatz, *Beyond the Zero-Sum Game: Toward Title VII Protection for Intergroup Solidarity*, 77 IND. L. J. 63, 100 (2002).

100. *Adams*, 1981 WL 27101, at \*3.

101. *Parr v. United Family Life Ins. Co.*, No. C-83-26-6, 1983 WL 1774, at \*1 (N.D. Ga. June 15, 1983).

102. *Holcomb v. Iona Coll.*, 521 F.3d 130, 138 (2d Cir. 2008).

heterosexual men on the grounds that they failed to establish membership in a protected class. In *Stezzi v. Aramark Sports, LLC*, the court characterized the plaintiff's claim of associational sex discrimination as follows: "Because [p]laintiff, a white male, is not a member of a protected class, he attempts to establish a prima facie case of discrimination through his association with Ms. Risica," a female co-worker with whom the plaintiff had become romantically involved.<sup>103</sup> Specifically, the plaintiff alleged that he had been harassed by a male supervisor because he was dating a woman to whom the supervisor was sexually attracted.<sup>104</sup> The court ultimately found that "[t]he facts relied upon by [p]laintiff have nothing to do with his gender, but rather, revolve around his relationship with Risica, and, in turn, her relationship with [the supervisor]."<sup>105</sup> Consequently, the court granted summary judgment for the defendant on the grounds the plaintiff had failed to prove that he was harassed because of "his own gender" and therefore could not satisfy the first prong of *McDonnell Douglas*.<sup>106</sup>

The fact that heterosexual plaintiffs have struggled to state viable associational discrimination claims on the basis of sex does not bode well for LGB individuals seeking to contest sexual orientation bias as a form of associational sex discrimination. Historically, when confronted with LGB persons' otherwise actionable claims of sex discrimination, courts have seized on the plaintiffs' same-sex attraction as proof that, in reality, plaintiffs were attempting to bootstrap sexual orientation protection into Title VII.<sup>107</sup> This trend is likely to continue in the context of LGB persons' claims of associational sex discrimination. Indeed, whereas in *Stezzi* the court made no mention of the parties' respective sexual orientations but instead simply assumed that all of the parties were heterosexual,<sup>108</sup> a court adjudicating a claim of associational sex discrimination brought by an openly LGB person would likely be "hyperaware" of the plaintiff's sexual orientation.<sup>109</sup> Presumably, this would lead the court to abstain from the sort of detailed — albeit questionable — analysis set forth in *Stezzi* in favor of summarily rejecting the plaintiff's claim as an attempt to amend Title VII by judicial fiat.<sup>110</sup>

If such a claim were to receive a court's reasoned consideration, moreover, the result would likely be the same as in *Stezzi* or any of the early

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103. No. 07-5121, 2009 WL 2356866, at \*4 (E.D. Pa. July 30, 2009).

104. *Id.*

105. *Id.* at \*5.

106. *Id.*

107. Alex Reed, *Redressing LGBT Employment Discrimination via Executive Order*, 29 NOTRE DAME J.L. ETHICS & PUB. POL'Y 133, 155 (2015).

108. *Stezzi*, 2009 WL 2356866, at \*4-5.

109. Schwartz, *supra* note 20, at 211.

110. *Id.* at 211, 255.

associational race discrimination cases. If, for example, a man was to bring a Title VII claim against his employer alleging that he had been fired for marrying another man, a court might well reject his claim on the grounds he “does not contend that he has been discriminated against because of ‘his’ [sex]” but instead “contends that he has been discriminated against because of the [sex] of his [spouse].”<sup>111</sup> Even if the plaintiff took pains to characterize his claim as alleging discrimination on the basis of his own sex, male, when viewed in relation to the sex of his male spouse, a court might nonetheless seize on his spouse’s alleged gender nonconforming appearance or behavior to hold that “[t]he facts relied upon by [p]laintiff have nothing to do with his gender, but rather, revolve around his relationship with [his same-sex spouse], and, in turn,”<sup>112</sup> his same-sex spouse’s alleged failure to comport with male gender norms.<sup>113</sup>

Additionally, LGB plaintiffs’ ability to establish a prima facie case may depend on the sex of the associator and associatee. In the preceding hypothetical wherein the plaintiff and spouse are both men, a court might begin its analysis by noting that “[b]ecause Plaintiff, a . . . male, is not a member of a protected class, he attempts to establish a prima facie case of discrimination through his association with [his spouse].”<sup>114</sup> The court presumably would then observe that in this case, however, the relevant associatee is also male such that the plaintiff cannot rely on his spouse’s sex to establish membership in a protected class. A court adjudicating a case of this sort would likely stress that whereas prior associational discrimination claims have been characterized by an associator of a different race or sex than the relevant associatee, here the plaintiff and spouse are both men.<sup>115</sup> Although this distinction would apply with equal force if the associator and associatee were both female, a court may be more inclined to permit a claim of associational sex discrimination by a lesbian given that she would likely

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111. *Adams*, 1981 WL 27101, at \*3.

112. *Stezzi*, 2009 WL 2356866, at \*5.

113. This scenario presumably would not constitute associational sex discrimination given that the plaintiff’s sex is not being considered in relation to the sex of his spouse, but rather the spouse’s sex is being considered independent of and without reference to the plaintiff’s own sex.

114. *Stezzi*, 2009 WL 2356866, at \*4.

115. See Brief Amicus Curiae of Conservative Legal Defense and Education Fund, Public Advocate of the United States, and United States Justice Foundation in Support of Appellees and Affirmance at 11, *Zarda v. Altitude Express, Inc.*, No. 15-3775 (2d Cir. July 26, 2017)

(“In the race case, the associational theory applies only to an employee who is associated with a person of another or different race, whereas in the sex case, the associational theory is applied only when the person is in a relationship with a person of the same sex . . . Thus, the two cases are not analogous.”).

See also Clark, *supra* note 18, at 329-31 (observing that employment discrimination on the basis of interracial or opposite-sex relationships is actionable under Title VII).

be deemed a member of a protected class both in her own right and in relation to her female spouse. While the logic underlying the foregoing analysis is admittedly tortured, history suggests that such holdings are not only possible but indeed probable based on courts' initial reluctance to allow claims of associational race discrimination by Caucasians and more recent hesitance to permit claims of associational sex discrimination by heterosexuals.<sup>116</sup>

LGB plaintiffs, therefore, should be wary of contesting sexual orientation discrimination as a form of associational sex discrimination for two reasons. First, courts adjudicating LGB plaintiffs' claims of associational sex discrimination may invoke the reasoning of the early associational race discrimination cases to deny LGB plaintiffs access to the burden-shifting framework of *McDonnell Douglas*. Second, even if courts are otherwise receptive to sex-based associational discrimination claims, LGB plaintiffs' ability to establish a prima facie case may hinge on the sex of the relevant associator and associatee.

### C. *Proving a Sufficiently Substantial Relationship*

Contesting sexual orientation bias as a form of associational sex discrimination is also problematic from the standpoint that it promises to be under-inclusive. To date, most of the cases finding an actionable claim of associational discrimination have centered on relationships of a romantic or familial nature between an associator and a specific associatee.<sup>117</sup> Should this trend carry over into the sexual orientation context, persons discriminated against solely on the basis of their sexual orientation — whether heterosexual, homosexual, or bisexual — would be left without any recourse under Title VII given that the discrimination they suffered was ostensibly status-based rather than the result of their intimate association with an individual of a particular sex.<sup>118</sup> This would have the practical effect

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116. See generally Jessica A. Clarke, *Protected Class Gatekeeping*, 92 N.Y.U. L. REV. 101, 107 (2017) (“Protected class reasoning must be overcome for the view that anti-LGBT discrimination is sex discrimination to gain wide acceptance.”).

117. *Barrett*, 556 F.3d at 513. See also Naomi Schoenbaum, *Towards a Law of Coworkers*, 68 ALA. L. REV. 605, 646 (2017) (“[F]ew jurisdictions will recognize the claim where the association is a strong coworker relationship rather than a family relationship.”).

118. See *Evans*, 850 F.3d at 1258-60 (Pryor, J., concurring) (rejecting plaintiff's contention that “a person who experiences discrimination because of sexual orientation necessarily experiences discrimination for deviating from gender stereotypes” after concluding that “a claim of gender nonconformity is a behavior-based claim, not a status-based claim”). But see Schwartz, *supra* note 20, at 249 (arguing that “[a]n employer who is motivated by animus based on an employee's sexual orientation likely is so motivated regardless of the specific status of that employee's relationships” such that the employee should be permitted to state a viable claim of associational sex discrimination on the basis of her LGB status alone).

of conferring privileged status on persons known by their coworkers to be in sexual orientation-consistent relationships at the time of the alleged discrimination.

LGB persons stand to be particularly vulnerable to this “singles loophole” given that many of them are not out at work and those who are out in the workplace are statistically less likely to be married than their heterosexual counterparts. Studies indicate that fifty-three percent of LGB persons actively conceal the fact that they are homosexual or bisexual from their work colleagues.<sup>119</sup> This includes disavowing romantic interest in persons of the same sex generally as well as hiding the fact that they are currently dating persons of the same sex or are in a committed relationship with a person of the same sex specifically.<sup>120</sup> Despite their best efforts, however, these persons may still be suspected of being homosexual or bisexual and find themselves subjected to discrimination on that basis.<sup>121</sup> Associational discrimination theory would not provide these individuals with a viable cause of action because the discrimination they suffered would have been based on their perceived sexual orientation rather than any actual same-sex relationships. Given that avoiding sexual orientation-based discrimination is one of the most common reasons for remaining closeted in the workplace,<sup>122</sup> yet acknowledging one’s same-sex relationships to one’s coworkers is a necessary prerequisite to stating a cognizable claim of associational sex discrimination, associational discrimination theory threatens to leave more than half of the LGB community in an intractable catch-22.

Simply coming out would not guarantee LGB persons employment protections, however, as even individuals who are honest about their sexual orientation and known by their coworkers to be in a committed same-sex relationship may struggle to state a viable associational discrimination claim unless they have solemnized their relationship via a legal marriage. Although two circuits have held that the degree of association between an associator and associatee is irrelevant,<sup>123</sup> the cases in which other circuits

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119. HUMAN RIGHTS CAMPAIGN FOUND., *supra* note 16, at 9.

120. Jeffrey S. Byrne, *Affirmative Action for Lesbians and Gay Men: A Proposal for True Equality of Opportunity and Workforce Diversity*, 11 YALE L. & POL’Y REV. 47, 60 n.51 (1993).

121. See, e.g., *Evans*, 850 F.3d at 1251 (observing that although plaintiff “did not broadcast her sexuality” in the workplace, her coworkers suspected she was a lesbian based on her failure to conform to female stereotypes and harassed her on that basis).

122. Brad Sears & Christy Mallory, *Documented Evidence of Employment Discrimination & Its Effects on LGBT People*, WILLIAMS INST., 13 (July 2011), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-2011.pdf> [<https://perma.cc/4YDD-U2CP>].

123. *Barrett*, 556 F.3d at 513; *Drake*, 134 F.3d at 884.

have found an actionable claim of associational discrimination have centered on relatively substantial relationships such as marriage.<sup>124</sup> Should courts adjudicating claims of associational sex discrimination import this substantiality requirement into their analyses, a valid same-sex marriage may be necessary to state a cognizable claim.<sup>125</sup> Such a requirement would place a disproportionate burden on LGB persons given that same-sex marriage rates are significantly lower than opposite-sex marriage rates. Indeed, whereas approximately fifty percent of adult heterosexuals are married,<sup>126</sup> the marriage rate for LGB adults is under ten percent.<sup>127</sup> Thus, LGB persons are five times less likely than heterosexuals to be married, making it difficult for LGB plaintiffs to prove that their relationships are of a sufficiently substantial nature to sustain a claim of associational sex discrimination.

LGB plaintiffs, therefore, should be hesitant to contest sexual orientation discrimination as a form of associational sex discrimination for three reasons. First, closeted LGB persons would be left without recourse since any discrimination they might suffer on the basis of their perceived sexual orientation would be status-based rather than the result of their intimate association with an individual of a particular sex.<sup>128</sup> Second, even

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124. See *Barrett*, 556 F.3d at 513 (“[I]n many of the cases that have found actionable associational discrimination, the relationship at issue has been one that extended outside the place of employment, such as a familial or romantic relationship.”). See also Clark, *supra* note 18, at 334 (“[T]o state a claim of associative discrimination, a plaintiff generally must show a very substantial relationship with the other person that is greater than friendship.”).

125. See *Zielonka v. Temple Univ.*, No. Civ. A. 99-5693, 2001 WL 1231746, at \*6 (E.D. Pa. Oct. 12, 2001) (observing that “[t]he cases in which courts have recognized a cause of action under Title VII [for associational discrimination] have typically involved more substantial relationships” such as marriage). Significantly, whereas the panel decision in *Hively v. Ivy Tech Community College* noted that “[a] number of courts have found that Title VII protects those who have been discriminated against based on interracial friendships and other associations” as support for its contention that “[t]he relationship in play need not be a marriage to be protected,” comparable language is missing from the en banc decision. Compare 853 F.3d 339, 347-49 (7th Cir. 2017) (en banc), with 830 F.3d 698, 716 (7th Cir. 2016).

126. *Marriage*, PEW RESEARCH CTR., <http://www.pewresearch.org/data-trend/society-and-demographics/marriage/> [<https://perma.cc/Z766-VHSX>] (last visited Aug. 2, 2017).

127. See Jeffrey M. Jones, *Same-Sex Marriages Up One Year After Supreme Court Verdict*, GALLUP (June 22, 2016), <http://www.gallup.com/poll/193055/same-sex-marriages-one-year-supreme-court-verdict.aspx> [<https://perma.cc/8G3C-7U3Q>] (observing that the percentage of LGBT adults in same-sex marriages increased from 7.9% in the first half of 2015 to 9.6% in the second half of 2015 but then essentially remained unchanged at 9.5% as of June 2016, “suggest[ing] there was a burst of same-sex marriages in the first few months after the Supreme Court ruling [legalizing same-sex marriage] but little additional increase since then”).

128. See Brief of the Defendant-Appellee Ivy Tech Cmty. Coll. of Ind. at 19, *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698 (7th Cir. 2016) (No. 15-1720) (“Factually, there is nothing in the District Court record suggesting that [plaintiff] associated with anyone — regardless of race, gender, sexual orientation, or otherwise. Thus, there is no basis for any sort of



if they are out to their coworkers, single LGB persons would be unable to attain relief given that they were not in a same-sex relationship at the time of the alleged discrimination. Third, LGB persons known by their coworkers to be in committed same-sex relationships may be unable to state a viable claim of associational sex discrimination unless they have solemnized their relationship via a legal marriage.<sup>129</sup>

The existence of two other compelling, comparatively straightforward arguments as to why discrimination on the basis of sexual orientation constitutes actionable sex discrimination only serves to underscore the severity of the associational-discrimination route's flaws. Unlike associational discrimination theory, moreover, these alternative arguments stand to protect all LGB persons, not just those fortunate enough to be in committed same-sex relationships at the time of the alleged discrimination.<sup>130</sup> Because the inclusion of associational discrimination theory threatens to undermine these other arguments' strength and introduce unnecessary confusion into courts' analyses, the EEOC and LGB plaintiffs should rely exclusively on the but-for and gender-stereotyping routes as discussed in greater detail in Part IV.

#### IV. THE BUT-FOR AND GENDER-STEREOTYPING ROUTES AS PREFERRED MEANS OF SECURING LGB EMPLOYMENT PROTECTIONS

The associational-discrimination route is not the only means of contesting sexual orientation discrimination under Title VII. Rather, it is but one of three routes by which persons discriminated against on the basis of sexual orientation may establish a cognizable claim of sex discrimination. The remaining routes rely on established Supreme Court precedent to show that sexual orientation discrimination is a form of sex discrimination in that "it necessarily entails treating an employee less favorably because of the employee's sex"<sup>131</sup> in contravention of *Los Angeles Department of Water & Power v. Manhart*,<sup>132</sup> and "it necessarily involves discrimination based on

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associational claim here.").

129. See *supra* pp. 22-23 and notes 124-25.

130. See En Banc Brief of Christian Legal Soc'y & Nat'l Ass'n of Evangelicals as Amici Curiae in Support of Defendants-Appellees and Affirmance at 12, *Zarda v. Altitude Express, Inc.*, 855 F.3d 76 (2d Cir. 2017) (No. 15-3775) ("It would be a large stretch . . . to a new rule barring discrimination based on merely hypothetical relationships, and it would be highly undesirable to create a situation under which a court would have to enquire whether the plaintiff actually was in — and the defendant actually knew about — a relationship with an individual of the same sex.").

131. *Baldwin*, 2015 WL 4397641, at \*5.

132. 435 U.S. 702, 711 (1978) ("Such a practice does not pass the simple test of whether

gender stereotypes”<sup>133</sup> in violation of *Price Waterhouse v. Hopkins*.<sup>134</sup> Because the inclusion of associational discrimination claims stands to undermine the legitimacy of these latter routes — while at the same time affording courts hostile to LGB equality an opportunity to recognize claims of associational sex discrimination only to then construe such claims narrowly in a manner precluding relief<sup>135</sup> — the EEOC and private litigants should abandon the associational-discrimination route as a means of contesting anti-LGB employment bias.

A. *The But-For Route*<sup>136</sup>

The simplest, most direct means of demonstrating that sexual orientation discrimination constitutes actionable sex discrimination is via the Supreme Court’s ruling in *Manhart*.<sup>137</sup> There, the Court articulated a “simple test” for evaluating claims of sex discrimination: “[W]hether the evidence shows ‘treatment of a person in a manner which *but for* that person’s sex would be different.’”<sup>138</sup> Over the past forty years, the Court has invoked the but-for route to find actionable sex discrimination in a variety of contexts, including circumstances where employers require female employees to make

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the evidence shows ‘treatment of a person in a manner which but for that person’s sex would be different.’”) (quoting *Sprogis*, 444 F.2d at 1205 (Stevens, J., dissenting)).

133. *Baldwin*, 2015 WL 4397641, at \*7.

134. 490 U.S. at 251 (“[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group . . .”).

135. *See supra* note 65.

136. To be clear, “but-for causation is not the test” in archetypal Title VII cases where “[i]t suffices instead to show that the motive to discriminate was one of the employer’s motives, even if the employer also had other, lawful motives that were causative in the employer’s decision.” *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 343 (2013). The author’s decision to refer to this method as the “but-for route” should not be interpreted as advocating for the imposition of a more demanding causation standard for sexual orientation-based discrimination claims, but rather reflects a desire to utilize terminology consistent with the standard as articulated by the EEOC. *See Baldwin*, 2015 WL 4397641, at \*10 (“An employee could show that the sexual orientation discrimination he or she experienced was sex discrimination because it involved treatment that would not have occurred but for the individual’s sex.”). *See also* Brief of Lambda Legal Def. & Educ. Fund, Inc. as Amicus Curiae in Support of Plaintiffs-Appellants and Reversal at 5 n.4, *Zarda v. Altitude Express, Inc.*, 855 F.3d 76 (2d Cir. 2017) (No. 15-3775) (“While a plaintiff satisfying *Manhart*’s ‘but-for’ test necessarily satisfies Title VII’s causation requirement, Title VII plaintiffs may also prevail based on ‘the less stringent “motivating-factor” test.’”) (quoting *Zarda v. Altitude Express*, 855 F.3d 76, 82 (2d Cir. 2017)).

137. 435 U.S. 702 (1978).

138. *Id.* at 711 (emphasis added) (quoting *Sprogis*, 444 F.2d at 1205 (Stevens, J., dissenting)).

larger pension contributions than their male peers,<sup>139</sup> provide married male employees with health insurance coverage for dependents that is less inclusive than the dependency coverage furnished to married female employees,<sup>140</sup> and implement fetal protection policies barring women of childbearing age from certain jobs.<sup>141</sup> Thus, whereas the associational discrimination theory has never been recognized by the Supreme Court in any context, race or otherwise, the but-for route has its origins in the Court's sex discrimination jurisprudence and has been reaffirmed by the Court on numerous occasions.

The appeal of the but-for route as a means of contesting sexual orientation discrimination is evidenced by the fact that, unlike associational discrimination theory, it had already been embraced by several courts prior to receiving the EEOC's endorsement in *Baldwin*.<sup>142</sup> The first and most significant of these decisions was issued by the U.S. District Court for the District of Oregon in 2002.<sup>143</sup> There, the employer moved for summary judgment on the grounds the discrimination was predicated on the plaintiff's sexual orientation rather than her sex, as reflected by her supervisor's repeated use of the terms "fag" and "homo" when referring to the plaintiff.<sup>144</sup> Whereas most courts of this era would have seized on the sexual orientation-related aspects of the case to conclude that the lesbian plaintiff was attempting to bootstrap sexual orientation protection into Title VII,<sup>145</sup> neither the plaintiff's acknowledged homosexuality nor the defendant's use of anti-gay slurs prevented the court from considering whether the plaintiff had adduced sufficient evidence to support a claim of sex discrimination.<sup>146</sup> In

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139. *Id.*

140. *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 683-84 (1983).

141. *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 200 (1991).

142. *See Hall v. BNSF Ry. Co.*, No. C13-2160, 2014 WL 4719007, at \*3 (W.D. Wash. Sept. 22, 2014) ("Plaintiff alleges disparate treatment based on his sex, not his sexual orientation, specifically that he (as a male who married a male) was treated differently in comparison to his female coworkers who also married males."); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1223 (D. Or. 2002) ("A jury could find that [the supervisor] would not have acted as she (allegedly) did if Plaintiff were a man dating a woman, instead of a woman dating a woman. If that is so, then Plaintiff was discriminated against because of her gender."). *See also Foray v. Bell Atl.*, 56 F. Supp. 2d 327, 329-30 (S.D.N.Y. 1999) (observing that the gay "[p]laintiff's chief argument, that 'but for' his sex, he would not have been discriminated against, is supported by legal theorists and [related state case law]," but dismissing plaintiff's Title VII claim because he was unable to show that he had been "treated differently from 'similarly situated' persons of the opposite sex").

143. *Heller*, 195 F. Supp. 2d at 1215-16.

144. *Id.* at 1216-18, 1222.

145. *See Zachary A. Kramer, Heterosexuality & Title VII*, 103 *Nw. U. L. REV.* 205, 207 n.17 (2009) (collecting cases).

146. *Heller*, 195 F. Supp. 2d at 1222-23.

denying the defendant's summary judgment motion, the court held that "[a] jury could find that [the supervisor] would not have acted as she (allegedly) did if [p]laintiff were a man dating a woman, instead of a woman dating a woman," in which case the plaintiff "was discriminated against because of her gender."<sup>147</sup> Having received the backing of the U.S. District Court for the District of Oregon, the but-for route was subsequently adopted by the District of Washington in 2014<sup>148</sup> and the EEOC in 2015.<sup>149</sup>

The but-for route's popularity has only grown following the EEOC's ruling in *Baldwin*.<sup>150</sup> Significantly, several courts embracing the route post-*Baldwin* have done so in a footnote or string citation rather than in the main body of the opinion.<sup>151</sup> These courts seem to regard the route's applicability as a foregone conclusion not warranting detailed analysis. Similarly, some courts have adopted the but-for route without citing to any legal authority for support, apparently perceiving the route as following naturally from the statutory text.<sup>152</sup> Thus, the somewhat perfunctory manner in which courts have gone about recognizing the but-for route within the past few years suggests the route is increasingly viewed as an obvious, non-controversial means by which LGB persons may contest instances of sexual orientation discrimination.

Of the cases to embrace the but-for route within the last few years, none is more significant than the Seventh Circuit Court of Appeals' decision in *Hively*.<sup>153</sup> There, the Seventh Circuit adopted the but-for route in three succinct sentences:

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147. *Id.* at 1223.

148. *Hall*, 2014 WL 4719007, at \*3.

149. *Baldwin*, 2015 WL 4397641, at \*5.

150. *See Isaacs*, 143 F. Supp. 3d at 1193 ("This court agrees . . . with the view of the [EEOC] that claims of sexual orientation-based discrimination are cognizable under Title VII."). *See also Christiansen*, 852 F.3d at 203-04 (Katzmann, C.J., dissenting) ("[I]f gay, lesbian, or bisexual plaintiffs can show that 'but for' their sex they would not have been discriminated against for being attracted to men (or being attracted to women), they have made out a cognizable sex discrimination claim.") (citation omitted); *Evans*, 850 F.3d at 1271 n.16 (Rosenbaum, J., dissenting) ("When an employer discriminates against a woman because she is sexually attracted to women but does not discriminate against a man because he is sexually attracted to women, the employer treats women and men differently 'because of . . . sex.'"); *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1161 (C.D. Cal. 2015) (demonstrating a Title IX case which relies on Title VII law to hold that "Plaintiffs have stated a straightforward claim of sex discrimination under Title IX" because "[i]f Plaintiffs had been males dating females, instead of females dating females, they would not have been subjected to the alleged different treatment").

151. *Isaacs*, 143 F. Supp. 3d at 1194; *Evans*, 850 F.3d at 1271 n.16 (Rosenbaum, J., dissenting).

152. *See, e.g., Evans*, 850 F.3d at 1265 n.9 (Rosenbaum, J., dissenting) (failing to cite legal authority for the but-for route).

153. 853 F.3d at 339.

Hively alleges that if she had been a man married to a woman (or living with a woman, or dating a woman) and everything else had stayed the same, Ivy Tech would not have refused to promote her and would not have fired her . . . This describes paradigmatic sex discrimination . . . Ivy Tech is disadvantaging her *because she is a woman*.<sup>154</sup>

Compared to the rationale accompanying the court's endorsement of the associational-discrimination route,<sup>155</sup> the analysis accompanying its adoption of the but-for route is both concise and coherent. Consequently, *Hively* is significant to the extent it highlights both the associational-discrimination route's weaknesses as well as the but-for route's strengths.

Given the but-for route's appeal both before and after *Baldwin*, as most recently exemplified by *Hively*, courts will likely be more receptive to the but-for route as a means by which LGB persons may contest sexual orientation-based employment bias than to the associational-discrimination route. Unlike associational discrimination theory, application of the but-for route to instances of sexual orientation discrimination does not require the doctrine's expansion beyond its historic origins. Nor is the but-for route encumbered by precedent potentially restricting the doctrine's scope to persons in committed romantic relationships or by otherwise limiting persons' ability to access the burden-shifting framework of *McDonnell Douglas*. Rather, the but-for route requires only a literal application of the "simple test" announced in *Manhart*: "[W]hether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'"<sup>156</sup>

### B. *The Gender-Stereotyping Route*

Whereas the but-for route arguably represents the simplest and most direct means of contesting sexual orientation discrimination under Title VII, the gender-stereotyping route is the method most likely to be embraced by

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154. *Id.* at 345.

155. *See supra* pp. 14-16.

156. 435 U.S. at 711 (quoting *Sprogis*, 444 F.2d at 1205 (Stevens, J., dissenting)). *See also Baldwin*, 2015 WL 4397641, at \*5

("[A]ssume that an employer suspends a lesbian employee for displaying a photo of her female spouse on her desk, but does not suspend a male employee for displaying a photo of his female spouse on his desk. The lesbian employee in that example can allege that her employer took an adverse action against her that the employer would not have taken had she been male.");

Koppelman, *supra* note 88, at 208 ("If a business fires Ricky . . . because of his sexual activities with Fred, while these actions would not be taken against Lucy if she did exactly the same things with Fred, then Ricky is being discriminated against because of his sex.").

courts.<sup>157</sup> The gender-stereotyping theory of sex discrimination has its origins in *Price Waterhouse*, wherein the Supreme Court famously declared:

[W]e 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.”<sup>158</sup>

Because employers discriminating against LGB persons on the belief that men should be attracted exclusively to women and women should be attracted exclusively to men are, at bottom, insisting that LGB persons match the stereotype associated with their sex, *Price Waterhouse* dictates that sexual orientation discrimination is sex discrimination for the purposes of Title VII.<sup>159</sup> Although LGB persons advancing this argument historically have enjoyed limited success,<sup>160</sup> courts are increasingly inclined to construe the gender-stereotyping theory as prohibiting discrimination against sexual minorities.<sup>161</sup>

The appeal of the gender-stereotyping route as a means of contesting sexual orientation discrimination is evidenced by the fact that — unlike associational discrimination theory — it had already been embraced by several courts prior to receiving the EEOC’s endorsement in *Baldwin v. Foxx*.<sup>162</sup> The most noteworthy of these pre-*Baldwin* decisions was issued by

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157. Unlike the associational-discrimination and but-for routes, the gender-stereotyping route has not been explicitly rejected by any court following the EEOC’s decision in *Baldwin*. See *Smith v. City of Pleasant Grove*, No. 2:16-cv-00373-JEO, 2016 WL 5868510, at \*6 n.4 (N.D. Ala. Oct. 7, 2016) (rejecting the associational-discrimination route); *Winstead v. Lafayette Cty. Bd. of Cty. Comm’rs*, 197 F. Supp. 3d 1334, 1344 (N.D. Fla. 2016) (rejecting the but-for route).

158. 490 U.S. at 251 (quoting *Manhart*, 435 U.S. at 707 n.13).

159. See Zachary A. Kramer, *The Ultimate Gender Stereotype: Equalizing Gender-Conforming and Gender Non-Conforming Homosexuals Under Title VII*, 2004 U. ILL. L. REV. 465, 479 (2004) (“No longer constrained to only sex-based claims, Hopkins enabled plaintiffs to raise gender-based claims [under Title VII] that focus instead on an employer’s stereotypical conceptions of the sexes.”).

160. Reed, *supra* note 2, at 291-94.

161. See Reed, *supra* note 65, at 853-55 (observing courts are increasingly likely to regard discrimination against transgender persons as actionable sex discrimination).

162. See *Terveer v. Billington*, 34 F. Supp. 3d 100, 116 (D.D.C. 2014) (denying defendant’s motion to dismiss on the grounds the plaintiff, a gay man, stated a cognizable claim of sex discrimination by alleging that his “sexual orientation is not consistent with the Defendant’s perception of acceptable gender roles”); *Boutillier v. Hartford Pub. Sch.*, No. 3:13CV1303, 2014 WL 4794527, at \*2 (D. Conn. Sept. 25, 2014) (holding that a lesbian plaintiff “has set forth a plausible claim she was discriminated against based on her non-conforming gender behavior” to the extent she “stated that the discriminatory conduct commenced after certain individuals became aware of her sexual orientation and that she was

the U.S. District Court for the District of Columbia in 2014.<sup>163</sup> There, the employer moved to dismiss a gay man's gender-stereotyping claim on the grounds the plaintiff failed to allege that his "supervisor's [discriminatory] conduct was motivated by judgments about plaintiff's behavior, demeanor or appearance" and because there were "no facts to support an allegation that the employer was motivated by his views about [p]laintiff's conformity (or lack thereof) with sex stereotypes."<sup>164</sup> In denying the motion, the court held that the plaintiff met his pleading burden by alleging that he was "a homosexual male whose sexual orientation is not consistent with the [d]efendant's perception of acceptable gender roles" such that his "status as a homosexual male did not conform to the [d]efendant's gender stereotypes associated with men."<sup>165</sup> This marked the first time that an LGB person's gender-stereotyping claim was able to withstand a motion to dismiss where the plaintiff's allegations focused exclusively on his status as a homosexual rather than his observable behavior or appearance in the workplace.<sup>166</sup>

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subjected to sexual stereotyping during her employment on the basis of her sexual orientation"); *Heller*, 195 F. Supp. 2d at 1224 ("[A] jury could find that [the supervisor] repeatedly harassed (and ultimately discharged) Heller because Heller did not conform to [the supervisor's] stereotype of how a woman ought to behave. Heller is attracted to and dates other women, whereas [the supervisor] believes that a woman should be attracted to and date only men.").

163. *Terveer*, 34 F. Supp. 3d at 116.

164. *Id.* at 115-16.

165. *Id.* at 116.

166. Kerry Eleveld, *Title VII Awakening*, *ADVOCATE* (July 15, 2014), <http://www.advocate.com/print-issue/current-issue/2014/07/15/title-vii-awakening> [<https://perma.cc/6CFE-CKSS>].

Several circuit courts and numerous district courts have held that the gender-stereotyping theory affords protection to LGB persons who are discriminated against on the basis of their gender nonconforming appearance or behavior as observed in the workplace. See *Christiansen*, 852 F.3d at 201 (finding that plaintiff, an openly gay man, stated a cognizable claim of sex discrimination by alleging that he was perceived as "effeminate and submissive" by his coworkers and harassed on that basis); *Evans*, 850 F.3d at 1254-55 (granting a lesbian plaintiff leave to amend her complaint so that she may "provide enough factual matter to plausibly suggest that her decision to present herself in a masculine manner led to the alleged adverse employment actions"); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 291 (3d Cir. 2009) (reversing summary judgment for defendant on the grounds plaintiff, an openly gay man, presented sufficient evidence of gender stereotyping-based harassment to the extent plaintiff "acknowledged that he has a high voice and walks in an effeminate manner" and "discussed things like art, music, interior design, and décor" with his coworkers).

These courts often note that LGB persons' failure to conform to gender stereotypes vis-à-vis their romantic partners cannot give rise to a cognizable Title VII claim. See, e.g., *Christiansen*, 852 F.3d at 201 ("[B]eing gay, lesbian, or bisexual, standing alone, does not constitute nonconformity with a gender stereotype that can give rise to a cognizable gender stereotyping claim."). See also *Thompson v. CHI Health Good Samaritan Hosp.*, No. 8:16CV160, 2016 WL 5394691, at \*2 (D. Neb. Sept. 27, 2016) ("While a significant amount of case law following *Price [Waterhouse v. Hopkins]* included the discrimination of gay or

Application of the gender-stereotyping route has increased dramatically following the EEOC's ruling in *Baldwin v. Foxx*.<sup>167</sup> Several courts adopting the route post-*Baldwin* have sought to expand upon the EEOC's contention that sexual orientation discrimination necessarily entails discrimination on the basis of gender stereotypes. Specifically, these courts have shown that attempts to draw distinctions between an LGB individual's gender-nonconforming status and gender-nonconforming behavior are unworkable from a practical, textual, and doctrinal standpoint such that discrimination predicated on a person's LGB status is — by itself — sufficient to sustain a

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lesbian plaintiffs, these types of claims are only successful if the plaintiffs can carve out discrimination based upon sexual stereotypes from discrimination based upon their sexual orientation.”).

Nevertheless, the fact that these courts have demonstrated a willingness to entertain sex discrimination claims brought by LGB persons suggests that they and other courts may be inclined to adopt the EEOC's more expansive view that “[s]exual orientation discrimination . . . necessarily involves discrimination based on gender stereotypes.” *Baldwin v. Foxx*, No. 0120133080, 2015 WL 4397641, at \*7 (E.E.O.C. July 15, 2015). Indeed, the Second Circuit Court of Appeals has agreed to rehear a case en banc to determine whether discrimination on the basis of sexual orientation is actionable under Title VII as a form of sex discrimination. *Zarda v. Altitude Express, Inc.*, No. 15-3775 (2d Cir. May 25, 2017).

167. See *Winstead v. Lafayette Cty. Bd. of Comm'rs*, 197 F. Supp. 3d 1334, 1346 (N.D. Fla. 2016) (“This view — that discrimination on the basis of sexual orientation is necessarily discrimination based on gender or sex stereotypes, and is therefore sex discrimination — is persuasive to this Court, as it has been to numerous other courts and the EEOC.”); *Scott Med. Health Ctr.*, 217 F. Supp. 3d at 842 (“[D]iscrimination on the basis of sexual orientation is a subset of sexual stereotyping and thus covered by Title VII's prohibitions on discrimination ‘because of sex.’”); *Isaacs v. Felder Servs., LLC*, 143 F. Supp. 3d 1190, 1194 (M.D. Ala. 2015)

(“To the extent that sexual orientation discrimination occurs not because of the targeted individual's romantic or sexual attraction to or involvement with people of the same sex, but rather based on her or his perceived deviations from ‘heterosexually defined gender norms,’ this, too, is sex discrimination, of the gender-stereotyping variety.” (quoting *Baldwin*, 2015 WL 4397641, at \*7-8)).

See also *Christiansen*, 852 F.3d at 206 (Katzmann, C.J., dissenting)

(“Thus, in my view, if gay, lesbian, or bisexual plaintiffs can show that they were discriminated against for failing to comply with some gender stereotype, including the stereotype that men should be exclusively attracted to women and women should be exclusively attracted to men, they have made out a cognizable sex discrimination claim.”);

*Evans*, 850 F.3d at 1261 (Rosenbaum, J., dissenting)

(“Plain and simple, when a woman alleges, as [plaintiff] has, that she has been discriminated against because she is a lesbian, she necessarily alleges that she has been discriminated against because she failed to conform to the employer's image of what women should be — specifically, that women should be sexually attracted to men only.”);

*Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1160 (C.D. Cal. 2015) (“[D]iscrimination based on gender stereotyping encompasses sexual orientation discrimination.”).



gender stereotyping claim.<sup>168</sup> Similarly, the emerging consensus that discrimination against transgender persons is, by definition, discrimination on the basis of gender stereotypes has been shown to apply with equal force in the sexual orientation context such that anti-LGB bias, like anti-trans bias, is invariably predicated on gender stereotypes.<sup>169</sup>

Of the cases recognizing the gender-stereotyping route within the last few years, the Seventh Circuit Court of Appeals' decision in *Hively v. Ivy Tech Community College* once again proves the most significant.<sup>170</sup> There, the majority relied exclusively on Title VII precedent to justify its adoption of the gender-stereotyping route:

Viewed through the lens of the gender non-conformity line of cases, *Hively* represents the ultimate case of failure to conform to the female stereotype (at least as understood in a place such as modern America, which views heterosexuality as the norm and other forms of sexuality as exceptional): she is not heterosexual. Our panel described the line between a gender nonconformity claim and one based on sexual orientation as gossamer-thin; we conclude that it does not exist at all. *Hively*'s claim is no different from the claims brought by women who were rejected for jobs in traditionally male workplaces, such as fire departments, construction, and policing. The employers in those cases were policing the boundaries of what jobs or behaviors they found acceptable for a woman (or in some cases, for a man).

This was the critical point that the Supreme Court was making in [*Price Waterhouse v. Hopkins* . . .]. And even before *Hopkins*, courts had found sex discrimination in situations where women were resisting stereotypical roles. As far back as 1971, the Supreme Court held that Title VII does not permit an employer to refuse to hire women with pre-school-age children, but not men. Around the same time, [the Seventh Circuit] held that Title VII "strikes at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes" and struck down a rule requiring only the female employees to be unmarried. In both those instances, the employer's rule did not affect every woman in the workforce. Just so here: a policy that discriminates on the basis of sexual orientation does not affect every woman, or every man, but it is based on assumptions about the proper behavior for someone of a given sex. The discriminatory behavior does not

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168. *E.g.*, *Winstead*, 197 F. Supp. 3d at 1345-46. *See also Evans*, 850 F.3d at 1267-68 (Rosenbaum, J., dissenting).

169. *Id.* at 1265-69; *Winstead*, 197 F. Supp. 3d at 1345-46.

170. 853 F.3d 339 (7th Cir. 2017) (en banc).

exist without taking the victim's biological sex (either as observed at birth or as modified, in the case of transsexuals) into account. Any discomfort, disapproval, or job decision based on the fact that the complainant — woman or man — dresses differently, speaks differently, or dates or marries a same-sex partner, is a reaction purely and simply based on sex. That means that it falls within Title VII's prohibition against sex discrimination, if it affects employment in one of the specified ways.<sup>171</sup>

Compared to the Seventh Circuit's rationale for endorsing the associational-discrimination route,<sup>172</sup> the analysis accompanying the court's adoption of the gender-stereotyping route is both logical and coherent. Thus, *Hively* is significant to the extent it highlights both the gender-stereotyping route's strengths and the associational-discrimination route's weaknesses.

In light of the gender-stereotyping route's popularity both before and after *Baldwin* — as most recently illustrated by *Hively* — courts will likely be more receptive to the gender-stereotyping route as a means by which LGB persons may contest sexual orientation-based employment discrimination than they would the associational-discrimination route. Compared to associational discrimination theory, application of the gender-stereotyping route to instances of sexual orientation discrimination does not require the doctrine's expansion beyond its historic origins. Nor is the gender-stereotyping route burdened by precedent potentially restricting the doctrine's scope to persons in committed romantic relationships or otherwise limiting persons' ability to access the burden-shifting framework of *McDonnell Douglas*. Rather, the route merely requires recognition of the fact that LGB persons contravene the "ultimate gender stereotype,"<sup>173</sup> i.e., opposite-sex attraction.

#### CONCLUSION

On September 26, 2017, the Second Circuit Court of Appeals convened a rare en banc sitting to hear argument on the following question: "Does Title VII of the Civil Rights Act of 1964 prohibit discrimination on the basis of sexual orientation through its prohibition of discrimination 'because of . . . sex'?"<sup>174</sup> Whereas to date the appellant/employee has relied on the associational-discrimination route to prove that the anti-LGB bias he

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171. *Id.* at 346-47 (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)).

172. *See supra* pp. 33-41.

173. Kramer, *supra* note 159, at 490.

174. *Zarda v. Altitude Express, Inc.*, No. 15-3775 (2d Cir. May 25, 2017) (granting en banc review).

endured constitutes actionable sex discrimination,<sup>175</sup> this article contends that he should abandon the associational-discrimination route in favor of proceeding under the but-for and gender-stereotyping routes.

The associational-discrimination route's flaws are apparent from a review of the appellant's own legal briefs. Specifically, the appellant acknowledges that the Second Circuit first recognized claims of associational race discrimination in the 2008 case of *Holcomb v. Iona College* and then declares, "*Holcomb* is this Court's *Baldwin* [*v. Foxx*], dressed in the language of race. Extend *Holcomb* to same-sex partners and [circuit precedent holding that sexual orientation discrimination is not actionable under Title VII] is dead."<sup>176</sup> Consequently, the appellant is asking the court to untether associational discrimination theory from its racial moorings, expand the theory to include associational discrimination on the basis of sex, and then interpret associational sex discrimination as precluding discrimination on the basis of sexual orientation. For a circuit that only recently embraced associational discrimination theory in the specific context of race, this argument will likely prove a bridge too far.

Second, the appellant contends that the trial court erred in its application of *McDonnell Douglas*. According to the appellant, whether a prima facie case of discrimination has been established — so as to then shift the burden to the employer to come forward with a legitimate, non-discriminatory reason for the contested action — is a question of law for the trial judge such that it was error for the court to have entrusted that responsibility to the jury.<sup>177</sup> Had the jury not been involved in this determination, however, the trial judge may still have defaulted to the reasoning of the early associational race discrimination cases and held that the appellant was unable to satisfy the first element of *McDonnell Douglas*, i.e., membership in a protected class. Specifically, the trial judge may have concluded that, as a man, the appellant cannot establish membership in a protected class either in his own right or derivatively via the protected class status of his romantic associates.

Third, the appellant asserts that he was terminated after acknowledging his homosexuality to his coworkers — a necessary prerequisite to invoking the associational-discrimination route, and yet because he was not at that time married to a person of the same sex, the Second Circuit may well conclude that he cannot state a viable claim of associational sex discrimination. Although other circuits have held that the degree of

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175. Appellant's Brief at 33-35, 38, 48, *Zarda v. Altitude Express, Inc.*, 855 F.3d 76 (2d Cir. 2017) (No. 15-3775); Appellant's Reply Brief at 3, 13-14, *Zarda v. Altitude Express, Inc.*, 855 F.3d 76 (2d Cir. 2017) (No. 15-3775).

176. Appellant's Brief, *supra* note 175, at 48.

177. *Id.* at 43.

association between an associator and associatee is irrelevant,<sup>178</sup> the Second Circuit's decision in *Holcomb* centered on the most substantial of all relationships: marriage.<sup>179</sup> Thus, the fact that the appellant and his same-sex partner separated before he began working for the appellee<sup>180</sup> may lead the Second Circuit to find that, as a single person, he is unable to state a cognizable claim of associational sex discrimination.

Unlike associational discrimination theory, the but-for and gender-stereotyping routes are grounded in Supreme Court precedent and have their origins in the Court's sex discrimination jurisprudence. Because the inclusion of associational discrimination claims will only serve to undermine these other arguments' strength while at the same time affording courts hostile to LGB equality an opportunity to curtail the associational-discrimination route's efficacy via narrow, fact-restricted rulings, the appellant in *Zarda v. Altitude Express* — together with the EEOC<sup>181</sup> — should rely exclusively on the but-for and gender-stereotyping routes to show that the anti-LGB bias he suffered constitutes actionable sex discrimination under Title VII.

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178. See *Barrett*, 556 F.3d at 513; *Drake*, 134 F.3d at 884.

179. *Holcomb v. Iona Coll.*, 521 F.3d 130, 139.

180. Joint Appendix – Volume I at 141, *Zarda v. Altitude Express, Inc.*, 855 F.3d 76 (2d Cir. 2017) (No. 15-3775); Joint Appendix – Volume II at 570, *Zarda v. Altitude Express, Inc.*, 855 F.3d 76 (2d Cir. 2017) (No. 15-3775).

181. The Second Circuit Court of Appeals invited the EEOC “to brief and argue this case as amicus curiae.” *Zarda v. Altitude Express, Inc.*, No. 15-3775 (2d Cir. May 31, 2017). In its brief, the EEOC continues to advance the associational-discrimination route as a means of demonstrating that sexual orientation-based employment discrimination constitutes actionable sex discrimination under Title VII. En Banc Brief of Amicus Curiae Equal Employment Opportunity Commission in Support of Plaintiffs/Appellants and in Favor of Reversal at 10-13, *Zarda v. Altitude Express, Inc.*, No. 15-3775 (2d Cir. June 23, 2017).