SEX AND SEXUAL ORIENTATION: TITLE VII AFTER *MACY V. HOLDER*

CODY PERKINS*

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INTRODUCTION

Discrimination based on minority traits is not a new concept in our society. Whether based on skin color, religion, sexual orientation, gender, or any other characteristic, the biases that pervade our culture can have an incredible impact on individuals. When these biases affect the aspects of our lives that allow us to shelter ourselves, feed our families, and act as functioning members of society, they become an issue of national significance. In 1963, President Kennedy began to recognize the problems of prejudice in the field of employment, where some individuals were fired or simply not hired at all on the basis of some of these characteristics.[1]

* J.D. Candidate, 2014, American University Washington College of Law; B.A., 2010, Oberlin College. I would like to thank the entire *Administrative Law Review* staff for their efforts in preparing this Comment for publication and especially Brandon Marsh and Bryan Thurmond, my editors, for their incredible help, patience, and insight.

1. *See* Special Message to the Congress on Civil Rights and Job Opportunities, 248 PUB. PAPERS 483, 488–91 (June 19, 1963) (stating that African Americans were more than twice as likely to be unemployed as the general populace, and suggesting federal responses to correct the problem).

Accordingly, Congress passed Title VII of the Civil Rights Act of 1964 (Title VII), which prohibits discrimination in employment "because of . . . race, color, religion, sex, or national origin."[2] The policy rationale behind the Act was fairly simple: employers should focus only on characteristics relevant to employment when making employment decisions, and the enumerated traits listed in Title VII will almost never have any bearing on whether someone can perform a certain job.[3]

Particularly at issue after the passage of Title VII was its "because of sex" provision. Added on at the last minute and therefore with very little legislative history to shed light on Congress's intent, the meaning of "because of sex" became a matter of judicial interpretation.[4] Early on, the courts defined "sex" as merely biological sex, and interpreted the provision to only prohibit discrimination against biological men and women (mostly women) for being a man or being a woman.[5] As time went on and courts evolved, however, interpretations of Title VII's "because of sex" provision were expanded to include discrimination based on not just biological sex, but also sex stereotyping—discriminating against someone for violating gender norms.[6] In the landmark case of *Price Waterhouse v. Hopkins*,[7] the Supreme Court ruled definitively that discriminating against a woman, not for being a woman per se but for failing to act sufficiently feminine, was discriminating on the basis of sex under Title VII because it was "sex

2. 42 U.S.C. § 2000e-2 (2006).

3. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 239, 243 (1989) ("When an employer ignored the attributes enumerated in the statute, Congress hoped, it naturally would focus on the qualifications of the applicant or employee. The intent to drive employers to focus on qualifications rather than on race, religion, sex, or national origin is the theme of a good deal of the statute's legislative history."). *But see* 42 U.S.C. § 2000e-2(e) (stating that there are some instances where "religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise").

4. *See* Robert Stevens Miller, Jr., *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877, 880–84 (1967) (stating that the "because of sex" provision was added as a last-minute amendment by conservatives in an attempt to defeat the entire bill, and thus very little guidance was given to the Equal Employment Opportunity Commission (EEOC) as to the meaning of "sex").

5. *See* Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985) (finding that Title VII, under its plain meaning, only prohibited discrimination against women for being women and men for being men, and did not prohibit discrimination based on gender identity); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662–63 (9th Cir. 1977) (stating that "Congress has not shown any intent other than to restrict the term 'sex' to its traditional meaning" and, therefore, holding that the sole purpose of Title VII is to ensure the equal treatment of men and women).

6. *Hopkins*, 490 U.S. at 250 ("[A]n employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.").

7. 490 U.S. 228 (1989).

stereotyping."[8] In doing so, the Court stated that Title VII's prohibition on discrimination in employment "because of sex" reflected Congress's intent that employers not take gender into account at all in making employment decisions.[9]

Following *Hopkins*, other cases have clarified the meaning of "sex stereotyping," finding sex stereotyping impermissible in such disparate situations as a man harassed at work for "walking and carrying his serving tray 'like a woman,'"[10] a man harassed for taking his spouse's last name (a traditionally feminine practice),[11] a woman asked questions about her spouse and children in an interview when male applicants were not,[12] and a woman terminated because she became engaged to the son of a competitor and her employer believed women were more likely than men to engage in "pillow talk."[13] As recognized in these cases, under *Hopkins*, impermissible sex discrimination occurs whenever a person is treated differently in an employment context because they are not acting in accordance with stereotypes and gender norms about how people of their biological sex should act.

After *Hopkins*, many thought that gays, lesbians, and transgender people should have the right to bring cases under Title VII, arguing that discrimination against lesbian, gay, bisexual, and transgender (LGBT) people is based either on the stereotype that men should only be attracted to women and women should only be attracted to men, or that people born biologically male or female should identify as that biological gender and express themselves as such.[14] The courts originally dismissed these kinds of cases out of hand, finding that the discrimination was not because of sex but rather because of sexual orientation or gender identity.[15] Recently they have become more receptive to the idea, particularly in the case of

8. *Id.* at 250.

9. *Id.* at 239.

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

11. *See* Koren v. Ohio Bell Tel. Co., No. 1:11–CV–2674, 2012 WL 3484825, *4–5 (N.D. Ohio Aug. 14, 2012).

12. *See* Bruno v. City of Crown Point, 950 F.2d 355, 362 (7th Cir. 1991), *reh'g denied* (Jan. 31, 1992), *cert. denied*, 112 S. Ct. 2998 (1992).

13. *See* Vincenti v. Hilliard-Lyons, Inc., No. 91-5374, *1 (6th Cir. Dec. 5, 1991).

14. *See* Anthony E. Varona & Jeffrey M. Monks, *En/Gendering Equality: Seeking Relief Under Title VII Against Employment Discrimination Based on Sexual Orientation*, 7 WM. & MARY J. WOMEN & L. 67, 83–84, 89–90, 102–03 (2000).

15. *See, e.g.,* Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc., 224 F.3d 701, 703–07 (7th Cir. 2000); Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69 (8th Cir. 1989), *cert. denied*, 493 U.S. 1089 (1990); Sarff v. Cont'l Express, 894 F. Supp. 1076, 1084 (S.D. Tex. 1995).

transgender individuals.[16] The Equal Employment Opportunity Commission (EEOC), the federal agency tasked with enforcing Title VII, has made great strides as well, recognizing in recent nonbinding decisions[17] that discrimination based on sexual orientation falls under sex stereotyping and is therefore covered under Title VII.[18] Most recently, the EEOC issued a decision in *Macy v. Holder*[19] stating that transgender individuals can bring claims based on both a "sex stereotyping" theory and a new theory based on *Hopkins* that any employment action that takes gender into account at all is per se sex discrimination under Title VII.[20]

However, the EEOC has not issued any comparable guidance or binding adjudicatory decisions stating that claims of discrimination based on sexual orientation are cognizable under Title VII. This Comment argues that the EEOC should issue written guidance making it clear that Title VII's prohibition on discrimination in employment "because of sex" includes discrimination on the basis of sexual orientation, both under a "sex stereotyping" theory and a per se "taking gender into account" theory as presented in *Macy*. Part I provides an overview of Title VII, its history (including its treatment in *Hopkins*), and the courts' application of Title VII to sexual orientation. Part II provides an overview of the role and impact of the EEOC with regard to the federal agencies and the courts, and presents the EEOC's treatment of sexual orientation for Title VII purposes. Part III presents the decision in *Macy* and shows how and why its interpretation of "because of sex" is unique and different from previous interpretations of Title VII. Part IV shows how the *Macy* decision supports guidance by the EEOC that discrimination based on sexual orientation will always be both sex stereotyping and "per se because of sex" because it "takes gender into account." Part V shows that clear and official guidance is necessary to ensure that Title VII continues to be read and implemented in a manner consistent with *Macy*.

16. *See, e.g.*, Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011) (holding that discrimination against transgender people is inherently based on sex stereotyping and therefore protected under Title VII of the Civil Rights Act of 1964 (Title VII)).

17. *See infra* Part II (clarifying that not all appeals go up to the full Commission for a vote, and that those which are instead decided by attorneys in the Office of Federal Operations are not binding on anyone except the parties involved).

18. *See* Castello v. Donahoe, Appeal No. 0120111795, 2011 WL 6960810, at *3 (EEOC Dec. 20, 2011); Veretto v. Donahoe, Appeal No. 0120110873, 2011 WL 2663401, at *3 (EEOC July 1, 2011).

19. EEOC Appeal No. 0120120821, 2012 WL 1435995, at *1 (EEOC Apr. 20, 2012), http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt.

20. *Id.*

I. THE HISTORY OF TITLE VII

The idea that Title VII's "because of sex" provision could be interpreted to prohibit one man's harassment of another,[21] refusing promotion to a woman who acted aggressively,[22] denying a job to a person identifying as transgender,[23] or harassing someone for being gay[24] was almost certainly not in the minds of Congress when Title VII was first passed in 1964. To be sure, determining what *was* in the minds of Congress has been a difficult task from the start—the House debate on the addition of "sex" to Title VII encompasses no more than nine pages,[25] and the word "sex" was added to the statute only two days before its passage in the House.[26] Representative Howard Smith, a Virginia Democrat who had a history of railing *against* civil rights,[27] introduced the amendment to have "sex" included in the statute and is often credited with having introduced the provision in an attempt to derail the entire bill.[28]

Given this sparse and confusing background, the first courts to deal with the "because of sex" provision tended toward the conservative, often attempting to use the "plain language" of the statute and subsequent legislation to determine the scope and meaning of "sex."[29] What little legislative history there was clearly indicated that Congress considered the protection of women as the purpose of including the provision,[30] and thus,

21. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79–80 (1998).

22. Price Waterhouse v. Hopkins, 490 U.S. 228, 234–35 (1989).

23. *Macy*, 2012 WL 1435995 at *9.

24. *Castello*, 2011 WL 6960810, at *2–3.

25. *See* 110 CONG. REC. 2,577–84 (1964).

26. *See id.* at 2,804–05.

27. *See* Robert C. Bird, *More Than A Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137, 151–52 (1997) (relating that Representative Smith fought against the Civil Rights Bill, the Fair Employment Practices Commission, and other pieces of legislation offering protection to minorities prior to 1964).

28. *See, e.g.*, Deborah Epstein, *Can a "Dumb Ass Woman" Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech*, 84 GEO. L.J. 399, 409 n.62 (1996) (asserting that the amendment adding the "sex" provision to Title VII was proposed by anti-civil rights, conservative legislators in an attempt to defeat the bill entirely). *But see, e.g.*, Bird, *supra* note 27, at 157–58 (stating that, while Representative Smith was against the Civil Rights Act in general and his actions did indicate that he was not serious about his proposed amendment, he actually believed that, if the Act was to pass, that the "sex" provision should be included to protect white women competing against black women in employment).

29. *See, e.g.*, Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 (9th Cir. 1977) (using both the plain meaning of the statute and legislative activity subsequent to Title VII's passage to determine that Congress meant the word "sex" to be understood traditionally).

30. *See* 110 CONG. REC. 2577–84 (1964) (showing that every statement made on the House floor regarding the "sex" provision referenced its significance for women).

courts found no difficulty in construing the statute to protect biological women from discrimination in employment on the basis of being women.[31] More expansive interpretations were originally struck down, as courts strove to remain true to congressional intent.[32]

However, this strict, conservative reading of Title VII did not last long. Over time, courts interpreted the statute to protect many more people in many more and diverse situations. The protections of Title VII were applied to men as well as women,[33] and the Court found discrimination in such varied situations as a company's refusal to allow fertile women to perform certain jobs[34] and an employer's refusal to accept applications from women with preschool aged children while accepting applications from men with preschool aged children.[35] Courts determined that sexual harassment was always "because of sex,"[36] and plaintiffs began to bring more and more theories before the courts as to why their specific instances of being discriminated against were "because of sex" under Title VII.

Arguably one of the most important interpretations of "because of sex" came from the 1989 Supreme Court case *Price Waterhouse v. Hopkins*.[37] Hopkins was a senior manager in an accounting firm who had been denied

31. *See, e.g.*, Bowe v. Colgate–Palmolive Co., 416 F.2d 711, 718 (7th Cir. 1969) (holding that a seniority system allowing men to bid for all plant jobs but prohibiting women from bidding for jobs that require lifting over thirty-five pounds was impermissible employment discrimination on the basis of sex under Title VII because being a man was not a bona fide occupational qualification for lifting over thirty-five pounds).

32. *See, e.g.,* Gen. Electric Co. v. Gilbert, 429 U.S. 125, 128 (1976) (holding that an employer's disability benefits plan does not violate Title VII just because it fails to cover pregnancy-related disabilities).

33. *See* Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 685 (1983) (holding that a health benefits plan covering employees and their spouses that provided greater pregnancy-related coverage to female employees than to the spouses of male employees constituted discrimination against male employees on the basis of sex under Title VII); Diaz v. Pan Am. World Airways, 442 F.2d 385, 388 (5th Cir. 1971) (holding that refusal to hire men to be flight attendants was impermissible sex discrimination under Title VII).

34. *See* Int'l Union v. Johnson Controls, Inc., 499 U.S. 187, 197, 222 (1991) (holding that a company policy excluding fertile women from lead-exposed jobs was discrimination because of sex under Title VII).

35. *See* Phillips v. Martin Marietta Corp., 400 U.S. 542, 547 (1971) (Marshall, J., concurring) (per curiam) ("When performance characteristics of an individual are involved, even when parental roles are concerned, employment opportunity may be limited only by employment criteria that are neutral as to the sex of the applicant.").

36. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) (holding that sexual harassment, even that which does not lead to economic injury, is impermissible sex discrimination under Title VII when it creates a hostile work environment).

37. *See* 490 U.S. 228 (1989) (holding that gender role stereotypes also fall under Title VII protection).

partnership because she exhibited traits considered to be traditionally masculine, such as acting aggressively, refusing to wear makeup, and generally walking, talking, and dressing in an unfeminine manner.[38] The Court held that Hopkins had been discriminated against "because of sex" under Title VII because she had been denied partnership on the basis of "sex stereotyping."[39]

Under this reasoning, courts would no longer just look at whether discrimination was based on a person's gender, but would also look at whether discrimination was based on a person's transgression of "gender norms" or for acting in a manner traditionally associated with the opposite sex.[40] As the Court in *Hopkins* stated, discriminating against an employee for transgressing gender norms violated Title VII because, under Title VII, "an employer may not take gender into account."[41]

The fact that extensions of Title VII went far beyond Congress's originally anticipated protection of women was addressed explicitly in 1998, in *Oncale v. Sundowner Offshore Services, Inc.*[42] In *Oncale*, the Court extended Title VII's protections to prohibiting same-sex harassment between heterosexual males.[43] In doing so, the Court recognized that Congress had not passed Title VII to prohibit this kind of harassment but reconciled its decision by stating clearly that, while discrimination such as this,

> was assuredly not the principal evil Congress was concerned with when it enacted Title VII . . . statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.[44]

This statement made clear that the judiciary could apply Title VII to any employment discrimination that it deemed to be "because of sex," regardless of Congress's original intent.

The *Oncale* Court's decision to focus less on congressional intent in interpreting Title VII was not without foundation. After the statute's original passage in 1964, Congress's subsequent amendments to Title VII did little to lessen the confusion around the sex provision. The Equal Employment Opportunity Act of 1972 amended Title VII to add state and local governments, educational institutions, and the federal government to those entities subject to Title VII's admonitions but was conspicuously silent

38. *Id.* at 233, 235.
39. *Id.* at 257–58.
40. *Id.*
41. *Id.* at 244–45.
42. 523 U.S. 75 (1998).
43. *Id.* at 82.
44. *Id.* at 79.

as to the meaning of "because of sex," even though many cases had arisen around the country making it clear that courts were struggling to interpret the provision.[45] Although the EEOC had issued a new rule providing some guidelines as to how "because of sex" should be interpreted in 1972,[46] Congress remained silent until 1978, for the first time adding some clarification to "because of sex" by stating that the provision included discrimination on the basis of pregnancy via the Pregnancy Discrimination Act of 1978.[47] This was the only amendment to Title VII to address the meaning of "sex:" when Congress again amended Title VII in the Civil Rights Act of 1991, there was no mention of how courts should interpret "because of sex."[48]

Although this lack of meaningful guidance from Congress allowed courts to extend Title VII far beyond its original interpretation,[49] this trend did not reach discrimination involving sexual orientation or gender identity. In fact, plaintiffs identifying as LGBT attempting to bring cases not related to their sexual orientation or gender identity often had their cases dismissed where heterosexual plaintiffs would most likely have prevailed.[50] Those who brought claims alleging that discrimination based on sexual orientation or gender identity *was* "because of sex" fared much worse. In *DeSantis v.*

45. Pub. L. No. 92-261, § 701, 86 Stat. 103, 103 (codified as amended at 42 U.S.C. § 2000e (1972)). *Compare* Doe v. Osteopathic Hosp. of Wichita, Inc., 333 F. Supp. 1357, 1362 (D. Kan. 1971) (holding that a woman could not be fired because she was pregnant under Title VII), *with* Cheatwood v. S. Cent. Bell Tel. & Tel. Co., 303 F. Supp. 754, 759 (M.D. Ala. 1969) (stating that an employer could have a rule against pregnant women being hired for certain positions without violating Title VII).

46. *See* Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.2 (2012) (addressing confusion surrounding the meaning of "bona fide occupational qualification," sex-oriented state employment legislation, separate lines of progression and seniority systems for men and women, distinctions based on marital status, job advertisements, employment agencies, pre-employment inquiries as to sex, the Equal Pay Act, and "fringe benefits").

47. *See* Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e (2006)).

48. *See* Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 1981 (2006)).

49. *See, e.g.*, Nichols v. Azteca Rest. Enter., Inc., 256 F.3d 864, 870, 875 (9th Cir. 2001) (holding that harassment against a man for "walking and carrying his serving tray 'like a woman'" was impermissible sex stereotyping under Title VII).

50. *See, e.g.*, Spearman v. Ford Motor Co., 231 F.3d 1080, 1086–87 (7th Cir. 2000) (finding that coworkers calling the male plaintiff a "bitch" and drawing graffiti associating the plaintiff with a drag queen was not discrimination based on sex under *Hopkins* because this was not discrimination based on the sex stereotype that the plaintiff was too feminine, but rather discrimination based on sexual orientation, despite the fact that the plaintiff had not put his orientation at issue). *But see* Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1063 (9th Cir. 2002) (en banc) ("[S]exual orientation is irrelevant for purposes of Title VII. It neither provides *nor precludes* a cause of action for sexual harassment." (emphasis added)).

Pacific Telephone & Telegraph Co.,[51] the court rejected an argument that discrimination against a man for being attracted to other men was sex discrimination under Title VII.[52] Although the plaintiff argued that he would have been treated differently if he were a woman and therefore the discrimination was "because of sex," the court responded that this argument was merely an attempt to "bootstrap Title VII protection for homosexuals," and that discrimination on the basis of sexual orientation was not impermissible under Title VII because it affected biological males and females equally.[53] Even those who attempted to bring cases under a *Hopkins* sex stereotyping claim,[54] arguing that they were being discriminated against for violating the gender norm of being attracted to the opposite sex,[55] were turned away. In *Vickers v. Fairfield Medical Center*,[56] the court found that discrimination based on perceived homosexuality and therefore a failure to "conform to the traditionally masculine role" in sexual relationships was not impermissible sex discrimination under a *Hopkins* sex stereotyping theory because the harassment was not based on the plaintiff's gender nonconformity, but rather his perceived homosexuality.[57]

Recently, courts have become much more receptive to finding that discrimination against transgender people is impermissible sex stereotyping under Title VII.[58] In *Glenn v. Brumby*,[59] Glenn informed her employer that

51. 608 F.2d 327 (9th Cir. 1979) (partially abrogated by *Nichols*, although not referring to the court's treatment of sexual orientation).

52. *Id.* at 334.

53. *Id.* at 331.

54. *See supra* notes 37–41 and accompanying text (explaining that, under the *Hopkins* sex stereotyping theory, discriminating against someone for failing to conform to certain norms associated with their gender, such as refusing to promote a woman who acts "too manly" in dress, appearance, or demeanor, is discrimination "because of sex" under Title VII).

55. *See infra* Part IV (discussing the "sex stereotyping" theory of discrimination).

56. 453 F.3d 757 (6th Cir. 2006).

57. *Id.* at 763; *see also* Dawson v. Bumble & Bumble, 398 F.3d 211 (2d Cir. 2005) (distinguishing between sex stereotypes and stereotypes based on sexual orientation to find no Title VII discrimination).

58. *See* Glenn v. Brumby, 663 F.3d 1312, 1320–21 (11th Cir. 2011) (finding that firing a transgender person in the process of transitioning from male to female on "the sheer fact of the transition" is inherently based on sex stereotyping and therefore protected under Title VII) (citing Lewis v. Smith, 731 F.2d 1535, 1537–38 (11th Cir. 1984)); Schwenk v. Hartford, 204 F.3d 1187, 1202–03 (9th Cir. 2000) (holding that a prison guard's sexual assault of a preoperative male-to-female transgender prisoner was "because of gender" under Title VII because the guard's actions were motivated by the fact that she failed to "conform to socially-constructed gender expectations"); Schroer v. Billington, 577 F. Supp. 2d 293, 305–06 (D.D.C. 2008) (holding that rescinding a job offer after learning that the applicant intended to transition from male to female was impermissible sex stereotyping under Title VII regardless of whether the rescinding of the offer was based on whether the employer "perceived Schroer to be an insufficiently masculine man, an insufficiently feminine woman,

she was preparing to transition from male to female and was immediately fired as a result. The court found that firing Glenn because of "the sheer fact of the transition"[60] was inherently sex stereotyping because discrimination against transgender people constitutes discrimination on the basis of gender nonconformity.[61] Although many believe that the kinds of arguments made in *Glenn* directly extend to sexual orientation, only a minority of courts have indicated that lesbian, gay, and bisexual (LGB) people may someday be able to succeed on a sex stereotyping theory,[62] and none have yet made that leap. No courts have accepted the argument that discrimination based on sexual orientation is per se "because of sex."

II. THE ROLE AND IMPACT OF THE EEOC

Although the courts have made few steps in extending Title VII to LGB people, the EEOC has made much greater strides. This is no surprise: in much of the history of Title VII's evolution, the first steps in adopting new interpretations have been taken by the EEOC in issuing guidelines and making adjudicatory decisions.[63] The scope of the EEOC's power to substantively interpret Title VII has been the subject of much dispute,[64] and many believe that the agency has no such statutory authority.[65] However,

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or an inherently gender-nonconforming transsexual").

59. 663 F.3d 1312 (11th Cir. 2011).

60. *Id.* at 1320–21.

61. *Id.* at 1320.

62. *See, e.g.*, Centola v. Potter, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) ("Conceivably, a plaintiff who is perceived by his harassers as stereotypically masculine in every way except for his actual or perceived sexual orientation could maintain a Title VII cause of action alleging sexual harassment because of his sex due to his failure to conform with sexual stereotypes about what 'real' men do or don't do.").

63. *See, e.g.*, Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986) (citing EEOC Guidelines defining sexual harassment and relying on them to support a finding that "hostile environment" sexual harassment is sex discrimination under Title VII).

64. *See* Rebecca Hanner White, *The EEOC, the Courts, and Employment Discrimination Policy: Recognizing the Agency's Leading Role in Statutory Interpretation*, 1995 UTAH L. REV. 51 (1995) (analyzing whether the EEOC has been delegated interpretation and rulemaking authority by Congress to interpret Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act).

65. *See, e.g.*, *Transcript of April 25, 2012 Meeting*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION (2012), http://www1.eeoc.gov//eeoc/meetings/4-25-12/transcript.cfm?renderforprint=1 (last visited May 14, 2013) ("We are an enforcement agency. We have the authority to issue, amend, or rescind federal procedural regulations. We have no authority to make substantive changes in the law by issuing guidance that goes beyond what is contained in the statutes as interpreted by the courts. Our job is to follow Congressional intent and court interpretations; not make new law.").

the agency has issued numerous "guidelines,"[66] which, though unofficial regulations and lacking the force of law granted by statutory mandate,[67] are still afforded some deference by courts.[68] Similarly, EEOC adjudicatory decisions are granted some judicial deference, and although they are not binding on anyone outside the federal sector, they are often treated as indications of what will constitute "good practice" in the future.[69] It is no wonder that the EEOC has had such influence on and foresight into how the courts will interpret Title VII—the Commission was established in 1964 by Title VII itself, and its sole duty is to enforce most federal laws regarding employment discrimination, including Title VII.[70] In addition to promulgating guidance as to how these laws should be interpreted, the Commission investigates complaints and conducts mediation between employers and employees in the private sector and can bring lawsuits in federal court against private employers accused of discrimination.[71] In the federal sector, the EEOC accepts appeals in individual cases and is charged with determining whether the agencies are interpreting and applying the law correctly.[72]

Not all appeals of federal sector employment discrimination, however, go before the full Commission and so not all decisions have the same

66. *See EEOC Regulations*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, http://www.eeoc.gov/laws/regulations/ (last visited May 14, 2013).

67. *See* 42 U.S.C. § 2000e-12(a) (2006) (expressly delegating to the EEOC only the power to issue procedural rules).

68. *See, e.g.*, Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 866 (1984) (holding that agency action must be given deference by the courts as long as Congress has not spoken directly on the issue and the agency's construction of the statute is reasonable); Griggs v. Duke Power Co., 401 U.S. 424, 433–34 (1971) ("The administrative interpretation of the Act by the [EEOC] is entitled to great deference [and since] the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress.") (citations omitted); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (holding that informal agency processes, while not deserving of *Chevron* deference, "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance").

69. EEOC's Federal Training & Outreach Division, *What Does the* Macy *Decision Mean for Title VII?*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION (June 15, 2012), http://www.eeoc.gov/federal/training/brown_bag_macy.cfm (stating that agencies should begin to treat the *Macy* decision as prohibiting discrimination on the basis of sexual orientation under Title VII as well).

70. *See* 42 U.S.C. § 2000e-4 (2006). *But see Workplace Laws Not Enforced by the EEOC*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, http://www.eeoc.gov/laws/other.cfm (last visited Jan. 24, 2013) (providing a list of federal employment laws not enforced by the EEOC).

71. *See About the EEOC: Overview*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, http://www.eeoc.gov/eeoc/ (last visited May 14, 2013).

72. *Id.*

precedential and binding effect on the agencies.[73] The Commission is a bipartisan body made up of five members and a General Counsel, which are appointed by the President, all subject to confirmation by the Senate.[74] Given the limited number of commissioners and the thousands of claims that are submitted per year, the Commission delegates much of its adjudicatory power to the Office of Federal Operations, where writing attorneys issue most of the opinions that come out of the EEOC.[75] These opinions, while binding on the parties involved, do not have the precedential weight of actual Commission decisions and agencies are not required to adopt their interpretations of federal law.[76] As a result, the only truly binding authority on the federal agencies issuing from the EEOC comes from the thirty to fifty cases that actually make their way up to the full Commission for a vote every year.[77]

Given this system, the EEOC's treatment of sexual orientation is somewhat convoluted. There is binding precedent from the Commission that "Title VII's prohibition of discrimination based on sex does not include sexual preference or sexual orientation."[78] However, two decisions have recently been issued through the Office of Federal Operations indicating that discrimination based on sexual orientation *is* discrimination based on sex for Title VII purposes under a *Hopkins* sex stereotyping theory.[79] In *Veretto v. Donahoe*, the Office of Federal Operations found that discrimination against a man for marrying another man was a valid sex stereotyping claim, because it was discrimination based on the stereotype that "marrying a woman is an essential part of being a man," as well as

73. *See* EEOC's Federal Training & Outreach Division, *supra* note 69 (stating that only thirty to fifty cases actually go before the full Commission per year, and only these cases have precedential effect on future federal sector cases).

74. *See The Commission*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, http://www.eeoc.gov/eeoc/commission.cfm (last visited May 14, 2013).

75. *See* EEOC Federal Training & Outreach Division, *supra* note 69.

76. *Id.*

77. *Id.*

78. Johnson v. Frank, Appeal No. 01911827, 1991 WL 1189760, at *3 (EEOC Dec. 19, 1991); *see also* Morrison v. Dalton, Appeal No. 01930778, 1994 WL 746296, at *1 (EEOC June 16, 1994) (holding that harassment in the form of one coworker informing other coworkers that complainant was gay and had been observed kissing another man was not based on his sex, but rather his sexual orientation, and was therefore not impermissible discrimination "due to sex" under Title VII); *see also* Yost v. Runyon, Appeal Nos. 01965505 & 01965383, 1997 WL 655997, at *2 (EEOC Oct. 2, 1997) (holding that discrimination based on sexual orientation was not prohibited by Title VII).

79. *See* Castello v. Donahoe, Appeal No. 0120111795, 2011 WL 6960810, at *2–3 (EEOC Dec. 20, 2011); Veretto v. Donahoe, Appeal No. 0120110873, 2011 WL 2663401, at *3 (EEOC July 1, 2011).

stereotypes about gender roles in marriage.[80] Similarly, in *Castello v. Donahoe*, the Office of Federal Operations found that discrimination against a woman for being attracted to other women was a valid sex stereotyping claim under Title VII, because it was discrimination based on the stereotype that women should only be attracted to and have relationships with men.[81]

These decisions, while not binding on federal agencies, indicate that the EEOC intends to allow claims based on sexual orientation under a sex stereotyping theory under Title VII.[82] This inference is supported by recent informal statements by the elements within the EEOC indicating that agencies should begin to treat discrimination based on sexual orientation as cognizable under Title VII.[83] However, there is still no official guidance or binding precedent from the EEOC to clarify this point.

III. THE DECISION: *MACY V. HOLDER*

While there may be no binding precedent from the EEOC stating that sexual orientation is covered under Title VII, there *is* binding precedent regarding transgender people. In *Macy v. Holder*, Ms. Macy—a police detective from Phoenix who was still presenting as a man at the time—had applied for and been given assurances that she would be hired for a position with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF).[84] After going through a significant number of steps in the hiring process and being told repeatedly that she would be hired, Ms. Macy disclosed to ATF that she was in the process of transitioning from male to female and days later was informed that the position she had applied for was no longer available due to budget constraints.[85] Upon further investigation, Ms. Macy learned that the position had in fact been offered to someone else and filed a formal Equal Employment Opportunity complaint with ATF, alleging discrimination in hiring based on sex.[86] When the agency failed to

80. *Veretto*, 2011 WL 2663401, at *3.

81. *Castello*, 2011 WL 6960810, at *2–3.

82. *See* EEOC's Federal Training & Outreach Division, *supra* note 69 (stating that *Castello* and *Veretto*, while not binding, reflect the EEOC's intention to find that discrimination on the basis of sexual orientation is impermissible discrimination "based on sex" under Title VII).

83. *See id.* (showing EEOC Commissioner Chai Feldblum advising an agency EEO employee that, although there is no binding precedent on the subject, she expects to see cases applying *Macy* to sexual orientation in the future, and so it would be smart for agencies to treat discrimination based on sexual orientation as "because of sex" under Title VII).

84. EEOC Appeal No. 0120120821, 2012 WL 1435995, at *1 (EEOC Apr. 20, 2012).

85. *Id.*

86. *Id.* at *2.

identify her claim as sex discrimination, instead creating a separate claim of "discrimination based on gender identity," Ms. Macy appealed her case to the EEOC.[87]

In a reversal of its previous position,[88] the full Commission held that "discrimination based on gender identity, change of sex, and/or transgender status" is discrimination "because of sex" under Title VII.[89] In making this determination, the EEOC utilized two important theories: a traditional "sex stereotyping" theory[90] and a new "per se because of sex" theory, both based on the Supreme Court's decision in *Hopkins.*

Under the "sex stereotyping" theory, the Commission stated that, as in *Hopkins*, "gender discrimination occurs any time an employer treats an employee differently for failing to conform to any gender-based expectations or norms."[91] Following this theory, the Commission recognized that discrimination against someone for being transgender is always based on a person transgressing the gender-based expectation and norm that people born biologically male should identify as men and people born biologically female should identify as women. As a result, the Commission stated that discrimination against transgender people is always "because of sex" under Title VII.[92] In coming to this conclusion, the Commission cited *Brumby* and other cases finding sex stereotyping in discrimination against transgender people,[93] and reiterated *Hopkins*'s admonition that discriminating against someone for failing to act sufficiently masculine (for men) or feminine (for women) is discrimination on the basis of sex under Title VII.[94] This argument was a direct extension of the sex stereotyping theory as it had been used in the past.[95]

However, the Commission did not confine its decision to this sex stereotyping theory. In addition to that argument, the Commission introduced a new theory in Title VII jurisprudence: that transgender

87. *Id.*

88. *See* Kowalczyk v. Brown, Appeal No. 01942053, 1996 WL 124832, at *1 n.1 (EEOC Dec. 27, 1994) (holding that withdrawing an offer of employment on the basis of "transsexualism" is not discrimination "because of sex" for Title VII purposes); Campbell v. Espy, Appeal No. 01931703, 1994 WL 652840, at *3 (EEOC July 21, 1994); Casoni v. U.S. Postal Serv., Appeal No. 01840104, 1984 WL 485399, at *3 (EEOC Sept. 28, 1984).

89. *Macy*, 2012 WL 1435995 at *1.

90. *See supra* notes 39–41 and accompanying text (outlining the *Hopkins* sex stereotyping theory).

91. *Macy*, 2012 WL 1435995 at *6.

92. *Id.*

93. *See supra* note 58.

94. *Macy*, 2012 WL 1435995, at *7–9.

95. *See supra* notes 39–41 and accompanying text (outlining the *Hopkins* sex stereotyping theory).

individuals could bring a cognizable claim under Title VII on the basis of transgender status alone, *without* arguing sex stereotyping.[96] The Commission relied on a new per se theory of sex discrimination that any employment decision that *takes sex into account* is per se sex discrimination under Title VII.[97] In adopting this interpretation, the Commission cited *Hopkins*'s language that "an employer may not take gender into account in making an employment decision"[98] and that employers could not allow "sex-linked evaluations to play a part in the decisionmaking process."[99] In short, the Commission determined that any employment decision that takes gender into account in any way is impermissible discrimination under Title VII on the basis of sex.[100] As the Commission stated,

> [An] employer has engaged in disparate treatment 'related to the sex of the victim' . . . regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, *or because the employer simply does not like that the person is identifying as a transgender person*.[101]

As a result of *Macy*, not only was previous Title VII "sex stereotyping" jurisprudence extended to transgender individuals, but a new "per se because of sex" theory was introduced. Under this new theory, the Commission followed *Hopkins*'s lead by focusing less on whether an employment decision treated men and women differently and more on Congress's intent that certain characteristics should never be taken into account at all in employment decisions, and that employers should instead be focusing on the job-related merits of each applicant.[102] This theory made it clear that any discrimination based on the fact that a person is transgender is "per se because of sex" for Title VII purposes.

IV. HOW THE *MACY* RATIONALE DIRECTLY EXTENDS TO THE COVERAGE OF SEXUAL ORIENTATION UNDER TITLE VII

The sex stereotyping and "per se because of sex" theories on which the

96. *Macy*, 2012 WL 1435995, at *10.

97. *Id.* at *9.

98. *Id.* at *7 (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 244 (1989)).

99. *Id.* at *6 (citing 490 U.S. at 255) (internal alterations omitted).

100. *See id.* at *8; EEOC's Federal Training & Outreach Division, *supra* note 69 (explaining the *Macy* decision to agency employees and stating that "if gender's on the brain, if gender is clearly being taken into account, that's a violation of Title VII").

101. *Macy*, 2012 WL 1435995, at *7 (emphasis added) (citing Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000)).

102. *See Hopkins*, 490 U.S. at 228, 239, 243.

Commission based its decision in *Macy* can be applied directly to LGB people, and therefore the EEOC should issue official guidance to the agencies that discrimination based on sexual orientation is impermissible sex discrimination under Title VII. Under a sex stereotyping theory, discrimination on the basis of sexual orientation is always going to be the result of the LGB person violating the gender norm of being attracted to the opposite sex. It is incontrovertible that, in our society, there is a distinct gender norm that men should be attracted to only women, and women should be attracted to only men. When an employer discriminates on the basis of sexual orientation, they are acting because the person in question is violating the gender norm that he or she should be attracted to the opposite sex.[103] Just as the impermissible discrimination in *Hopkins* was directed at the plaintiff for being a woman who transgressed gender norms by acting masculinely,[104] a gay woman who is discriminated against for being a woman who acts masculinely by having the traditionally male trait of being attracted to women is being discriminated against on the basis of a sex stereotype. As a result, discrimination on the basis of sexual orientation should always be impermissible under a Title VII sex stereotyping theory.

Just as in *Macy*, however, sex stereotyping is not the only theory by which discrimination on the basis of sexual orientation is impermissible under Title VII. Under *Macy*'s "per se because of sex theory," discrimination on the basis of sexual orientation will also always be "because of sex." This is not because LGB people inherently present themselves more masculinely (for women) or femininely (for men) than heterosexual people,[105] although that is certainly a stereotype on its own.[106] The reason that those who

103. *See* Varona & Monks, *supra* note 14, at 84 ("[G]ay people, simply by identifying themselves as gay, are violating the ultimate gender stereotype—heterosexual attraction. Since there is a 'presumption and prescription that erotic interests are exclusively directed to the opposite sex,' those who are attracted to members of the same sex contradict traditional notions about appropriate behavior for men and women.") (citing Sylvia Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 196 (1988)).

104. 490 U.S. 228 (1989).

105. *See* EEOC's Federal Training & Outreach Division, *supra* note 69 (quoting Dan Vail, Acting Assistant General Counsel in the Office of General Counsel for the EEOC) ("Stereotyping is not just about how you look or how you present yourself or your mannerisms . . . discrimination on the basis of sexual orientation inherently, inevitably is grounded in the notion that the person you're harassing or discriminating against because they're gay or lesbian or bisexual, that that victim, that person, doesn't adhere to the norm that you want them to adhere to, which is if you're born a man, then you should be attracted only to women.").

106. *See* John Stossel & Gena Binkley, *Gay Stereotypes: Are They True?*, ABC NEWS (Sept. 15, 2006), http:///www.abcnews.go.com/2020/story?id=2449185&page=1#UXL887WG1I4 (addressing and dispelling the stereotype that gay men are super stylish, obsessed with fashion, and tend to prefer more feminine professions, while lesbians like

discriminate on the basis of sexual orientation will always have "gender on the brain" is because one's sexual orientation is always about the gender of the person one is attracted to. People identifying as LGB are attracted to people of the same sex: women are attracted to women and men are attracted to men (at least some of the time, in the case of bisexuals).[107] Consider the following example:

> Situation A: Pat (male) is attracted to Beth (female). Employer is okay with this, and allows Pat to remain employed.
>
> Situation B: Pat (female) is attracted to Beth (female). Employer is not okay with this, and fires Pat.

In Situation A, where Pat is heterosexual, there is no discrimination; in Situation B, where Pat is homosexual, there is. The difference between the two situations will always be not just Pat's sexual orientation but also Pat's gender. Pat's attraction to women is only okay with the employer if Pat is a man. Because Pat's gender matters to the employer and is taken into account, discrimination against Pat for her sexual orientation will always be based on the fact that Pat is a woman attracted to women and not a man attracted to women. Although most situations of discrimination are likely to be more nuanced than in this example, as long as the employer is discriminating on the basis of sexual orientation they will necessarily be treating a woman who is attracted to women differently than a man who is attracted to women, and vice versa. This means that employers who discriminate on the basis of sexual orientation always act differently on the basis of the employee's gender and have "gender on the brain," and thus the discrimination is "per se because of sex" under the *Macy* reasoning.

Although the above hypothetical clearly demonstrates that the *Macy* sex stereotyping and "per se because of sex" theories directly apply to LGB people when discrimination is based on sexual orientation,[108] courts and agencies have failed to acknowledge these kinds of arguments in the past.[109] In the next section, this Comment outlines how courts have justified this failure and why it is thus crucial that the EEOC issue clear guidance that discrimination based on sexual orientation always provides a basis for a cognizable claim under Title VII.

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sports and the military).

107. *See* MERRIAM–WEBSTER'S COLLEGIATE DICTIONARY 126 (11th ed. 2007) (defining "bisexual" as "of, relating to, or characterized by a tendency to direct sexual desire toward both sexes"); *Id.* at 596 (defining "homosexual" as "of, relating to, or characterized by a tendency to direct sexual desire toward another of the same sex").

108. *But see infra* Part V.

109. *See infra* Part V.

V. WHY THE EEOC MUST ISSUE GUIDANCE

Given the previous discussion, one might wonder why anything further is required from the EEOC beyond the *Macy* decision. After all, if discrimination against gay and lesbian people is so clearly sex stereotyping and so clearly does take gender into account,[110] why is that reasoning not enough? Because the EEOC has both acknowledged the sex stereotyping argument in nonbinding decisions[111] and suggested that agencies start to treat claims of discrimination based on sexual orientation as "because of sex,"[112] it might seem that the public should be content to wait until a claim based on sexual orientation eventually reaches the full Commission. The Commission could then apply *Macy* using the aforementioned reasoning, thereby effecting a binding decision on the agencies.

There are two reasons why prompt guidance[113] is necessary to ensure that LGB people are protected from discrimination under Title VII. First, precedent shows that the *Macy* decision could be interpreted in a manner that does not include discrimination based on sexual orientation as "because of sex." Second, the practice and makeup of the EEOC could allow a new Administration and new Commission members to apply those alternate interpretations sooner rather than later.

As to the first issue, much of the confusion in Title VII jurisprudence has centered on how exactly to characterize certain kinds of discrimination, because characterization has a lot to do with whether the discrimination is covered under Title VII. With sexual orientation, one could characterize the situation as shown in Part IV,[114] where men are discriminated against for transgressing the gender norm that they should be attracted to women, and vice versa.[115] This characterization, if employed, makes it obvious that the discrimination is based on sex stereotyping and takes gender into

110. *See supra* Part IV.

111. *See* Castello v. U.S. Postal Serv., EEOC Appeal No. 0120111795 2 (Dec. 12, 2011), *available at* http://www.eeoc.gov/decisions/0520110649.txt; Veretto v. U.S. Postal Serv., EEOC Appeal No. 0120110873, 2011 WL 2663401, at *3 (2011) (finding that discrimination on the basis of sexual orientation can be considered impermissible sex stereotyping under Title VII).

112. *See* EEOC's Federal Training & Outreach Division, *supra* note 69 (advising an agency employee that, although there is no binding precedent on the subject, the Commission expects to see cases applying *Macy* to sexual orientation in the future and suggesting that agencies address sexual orientation discrimination under Title VII based on *Castello* and *Veretto*).

113. *See supra* notes 65–68 and accompanying text (showing that the EEOC does not have the power to promulgate substantive regulations and, thus, can only substantively interpret Title VII through guidelines).

114. *See supra* Part IV.

115. *Id.*

account. However, one could also characterize the situation as men and women being discriminated against equally for being attracted to the same sex.[116] In this characterization of the issue, one could argue—and many courts have—that the discrimination is not based on sex, since men and women are being treated equally in that context.[117]

One could also argue—and again, courts have—that the discrimination is not taking gender into account because the characteristic being acted upon negatively is not the fact that a person is a man who is attracted to other men, but rather the fact that a person is attracted to someone of the same sex, regardless of whether that person is a man or a woman.[118] These possible characterizations, though inconsistent with *Hopkins*,[119] make it much less clear that *Macy* will automatically extend to protecting LGB people, and given the history of courts and other adjudicators refusing to extend reasoning based on one set of facts to its logical conclusion on a different set of facts,[120] clear guidance from the EEOC is necessary to ensure that LGB people truly will be covered under Title VII's "because of sex" provision.

One might respond that while these kinds of restrictive characterizations *could* be used, the EEOC has made it very clear that it does not intend to use these kinds of characterizations in its treatment of LGB people.[121] In fact, at least one Commissioner has gone so far as to informally instruct agencies to start treating LGB people as covered under Title VII.[122] Since these actions indicate that the Commission is likely to issue a binding decision in some future case stating explicitly that, under the *Macy* reasoning, LGB people are covered by Title VII's "because of sex" provision, it might seem unnecessary to issue guidance beforehand on the issue. However, the Commission is made up of five members appointed by

116. *See, e.g.*, DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 331 (9th Cir. 1979).

117. *Id.*

118. *See* Dillon v. Frank, 58 FAIR. EMPL. PRAC. CAS. (BNA) 144 (6th Cir. Jan. 15, 1992) (holding that an employer does not violate Title VII in discriminating on the basis of sexual orientation as long as gay men are treated the same way as lesbian women).

119. *See* Varona & Monks, *supra* note 14, at 114 (noting that the Supreme Court did not require Hopkins to demonstrate that a man who failed to conform to gender norms would have been granted partnership while a woman did not).

120. *See* Spearman v. Ford Motor Co., 231 F.3d 1080, 1085 (7th Cir. 2000) (finding that *Hopkins* did not cover one man calling the male plaintiff a "bitch" or graffiti associating the plaintiff with a drag queen, because this was not discrimination based on the sex stereotype that the plaintiff was too feminine, but rather discrimination based on sexual orientation).

121. *See* EEOC's Federal Training & Outreach Division, *supra* note 69 (showing that EEOC Commissioner Feldblum expects the *Macy* decision to be extended to prohibiting discrimination based on sexual orientation under Title VII in the future).

122. *Id.*

the President, and each has a five-year term.[123] A new Administration could appoint new commissioners with very different political allegiances, and although the Commission is bipartisan by statutory mandate,[124] members of both political parties have exhibited reticence about supporting gay rights in the past.[125] As the full Commission only votes on a limited number of cases per year,[126] and the EEOC often takes an incredibly long time to process appeals,[127] the Commission could be very different in makeup and agenda by the time it comes to issuing a binding decision. Given the existence of federal precedent refusing to extend Title VII to discrimination based on sexual orientation,[128] it would not be inconceivable for the Commission to adopt those courts' characterizations and refuse to extend *Macy* to sexual orientation. Although EEOC Commissioner Chai Feldblum and other elements within the agency have been vocal about their intent to extend *Macy*,[129] very little deference need be paid to these vocalizations.[130]

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123. *See* 42 U.S.C. § 2000e-4(a) (2006) (noting the composition and term of the Commission).

124. *Id.* (requiring that, of the five members of the Commission, no more than three be affiliated with the same political party).

125. *See, e.g.*, Alexander Bolton, *Vulnerable Democratic Senators Balk at Obama's Gay Marriage Endorsement*, HILL, May 12, 2012, http://thehill.com/homenews/senate/227007-vulnerable-democratic-senators-balk-at-obamas-endorsement-of-gay-marriage (stating that some Democrats are not prepared to support gay marriage); Michael Guest, *The Republican Party's Anti-Gay Bias*, WASH. POST, May 4, 2012, http://www.washingtonpost.com/opinions/richard-grenell-and-the-republican-partys-anti-gay-bias/2012/05/04/gIQApxgL2T_story.html (condemning the "Republican Party's obsession with demonizing gay and lesbian citizens").

126. *See* EEOC's Federal Training & Outreach Division, *supra* note 69 (showing Commissioner Feldblum stating that the full Commission votes on and makes precedential only between thirty and fifty cases a year).

127. *See* Stephen Losey, *EEOC Taking Longer to Complete Appeals, Hearings, Investigations*, FEDERAL TIMES, Aug. 20, 2012, http://www.federaltimes.com/article/20120820/AGENCY02/308200002/EEOC-taking-longer-complete-appeals-hearings-investigations (stating that appeals often take more than a year to resolve, with the average processing time for a hearing measuring 345 days in 2011).

128. *See, e.g.*, Vickers v. Fairfield Med. Ctr., 435 F.3d 757, 764–65 (6th Cir. 2006) (holding that discrimination on the basis of sexual orientation cannot be found to be because of sex under a sex stereotyping theory); Dawson v. Bumble & Bumble, 398 F.3d 211, 217–18 (2d Cir. 2005) (distinguishing between sex stereotypes and stereotypes based on sexual orientation to find no Title VII discrimination); DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 331 (9th Cir. 1979) (holding that discrimination against a man for being attracted to another man is not impermissible under Title VII because it treats men and women equally).

129. *See* EEOC's Federal Training & Outreach Division, *supra* note 69 (showing Commissioner Feldblum stating that she expects the *Macy* decision to be extended to prohibiting discrimination based on sexual orientation under Title VII in the future).

130. *See* Elise Foley, *Deportation Guidelines to Officially Define Same-Sex Couples as Families*,

Because all these different characterizations are theoretically possible and have been used in courts across the country, clear guidance is needed from the EEOC. This guidance will help ensure that the interpretation of *Hopkins* used in *Macy*—showing that discrimination against transgender people is both "sex stereotyping" and "per se because of sex"—will be extended to sexual orientation, because discrimination against LGB people will always be the result of sex stereotyping and always takes gender into account.

CONCLUSION

Prohibitions on discrimination in employment are not merely a matter of legal fairness. For those who cannot find a job for reasons wholly unrelated to their qualifications (such as sexual orientation), unemployment can mean hunger, homelessness, bankruptcy, and much more.[131] When studies show that between fifteen and forty-three percent of LGB people have experienced some form of discrimination at work,[132] the importance of institutionalized protection from the EEOC and from the courts becomes all the more apparent.

Without further action from the judiciary or Congress,[133] guidance from the EEOC is obviously just the first step in a long road toward true equality in employment. However, this step is a crucial starting point, as EEOC decisions and guidance are often persuasive in court decisions[134] and are afforded some deference.[135] With such high stakes and with countless

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HUFFINGTON POST, Sept. 28, 2012, http://www.huffingtonpost.com/2012/09/28/deportation-same-sex-couples_n_1923094.html (emphasizing the difference between an oral promise from an agency and real guidance, and outlining the significance of putting these promises into writing for field officers).

131. *See* THE UNITED STATES CONFERENCE OF MAYORS, HUNGER AND HOMELESSNESS SURVEY: A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA'S CITIES, 1–2 (2012) (finding that unemployment is the number one cause of hunger and the number two cause of homelessness in the United States).

132. *See* Crosby Burns & Jeff Krehely, *Gay and Transgender People Face High Rates of Workplace Discrimination and Harassment*, CTR. FOR AM. PROGRESS (June 2, 2011), http://www.americanprogress.org/issues/lgbt/news/2011/06/02/9872/gay-and-transgender-people-face-high-rates-of-workplace-discrimination-and-harassment/.

133. *See* Chris Geidner, *Workplace Protections for LGBT Workers Remain Stalled*, BUZZFEED.COM (Dec. 18, 2012, 4:18 PM), http://www.buzzfeed.com/chrisgeidner/workplace-protections-for-lgbt-workers-remain-stal (stating that the Employment Non-Discrimination Act has not passed in the sixteen years since it was first introduced, despite being put up for a vote numerous times in Congress, and showing that legislators do not expect the Act to pass the House of Representatives in the 113th Congress).

134. *See supra* Part II.

135. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (holding that informal agency processes, while not deserving of *Chevron* deference, "do constitute a body of

individuals living under the daily threat of being fired, refused employment, or harassed at work because of their sexual orientation, the EEOC must commit to taking this step and issuing guidance to ensure Title VII protections for LGB Americans.

experience and informed judgment to which courts and litigants may properly resort for guidance").