

## NICHOLS V. AZTECA RESTAURANT ENTERPRISES, INC. AND THE LEGACY OF PRICE WATERHOUSE V. HOPKINS: DOES TITLE VII PROHIBIT “EFFEMINACY” DISCRIMINATION?

Title VII of the Civil Rights Act of 1964 prohibits employers with fifteen or more employees from discriminating against an employee or applicant for employment “because of such individual’s race, color, religion, sex, or national origin.”<sup>1</sup> This Comment focuses on the federal courts’ continuing struggle to define discrimination “because of sex” for purposes of Title VII. Specifically, one of the more recent developments in Title VII jurisprudence has been the willingness of some federal courts to accept claims by male employees, alleging discrimination for failure to conform to male gender stereotypes (i.e., “effeminacy” discrimination).<sup>2</sup> This development is both a departure from earlier precedent<sup>3</sup> and an expansion of the “gender stereotype” theory of discrimination, which originated in a United States Supreme Court case involving a female employee who was discriminated against for being too “masculine.”<sup>4</sup> As recently as last year, however, legal

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1. 42 U.S.C. § 2000e-2(a) (2000). This subsection (often referred to as section 703(a)) provides:

It shall be an unlawful employment practice for an employer—

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

*Id.*

2. See, e.g., *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874-75 (9th Cir. 2001) (holding that male employee’s claim that he was sexually harassed because “he failed to conform to a male stereotype” was actionable under Title VII); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 262-63 (3d Cir. 2001), *cert. denied*, 534 U.S. 1155 (2002) (“[A] plaintiff may be able to prove that same-sex harassment was discrimination because of sex by presenting evidence that the harasser’s conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender.”); *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000) (holding that the plaintiff had not sufficiently pled a gender stereotype claim, but recognizing the Supreme Court’s implied endorsement of such claims and observing that “[t]his theory would not bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine.”); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999) (recognizing that “just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity”) (citation omitted).

3. See *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 332 (9th Cir. 1979) (holding that Title VII “does not protect against discrimination because of effeminacy”); *accord Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 327 (5th Cir. 1978).

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

scholars lamented the lack of protection for the male victim of gender stereotyping.<sup>5</sup>

Part I of this Comment discusses two important cases from the 1970s, *DeSantis v. Pacific Telephone & Telegraph Co.*<sup>6</sup> and *Smith v. Liberty Mutual Insurance Co.*,<sup>7</sup> which held that Title VII does not prohibit “effeminacy” discrimination.<sup>8</sup> Part II examines two subsequent United States Supreme Court cases, *Price Waterhouse v. Hopkins*<sup>9</sup> and *Oncale v. Sundowner Offshore Services, Inc.*,<sup>10</sup> and their impact on this area of the law. Part III explores the current status of “effeminacy” discrimination claims under Title VII, including the Ninth Circuit’s recent decision in *Nichols v. Azteca Restaurant Enterprises, Inc.*,<sup>11</sup> which held that a male employee’s “effeminacy” harassment claim was actionable under Title VII.

I. THE CIRCUIT COURTS’ EARLY REJECTION OF “EFFEMINACY”  
DISCRIMINATION CLAIMS: *SMITH V. LIBERTY MUTUAL INSURANCE CO.*  
AND *DESANTIS V. PACIFIC TELEPHONE AND TELEGRAPH CO.*

A. *The Crux of the Problem: What Exactly Is  
Discrimination “Because of Sex”?*

Title VII makes it an “unlawful employment practice” for an employer “to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex.”<sup>12</sup> However, as the United States Supreme Court explained in *Haris v. Forklift Systems, Inc.*:<sup>13</sup>

[T]his language “is not limited to ‘economic’ or ‘tangible’ discrimination. The phrase ‘terms, conditions, or privileges of employment’ evinces a congressional intent ‘to strike at the entire spectrum of disparate treatment of men and women’ in employment,” which includes requiring people to work in a discriminatorily hostile or abusive environment. When the workplace is permeated with “discriminatory intimidation, ridicule, and insult” that is “sufficiently severe or pervasive to alter the conditions of the victim’s employ-

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5. See, e.g., Stephen J. Nathans, *Twelve Years After Price Waterhouse and Still No Success for “Hopkins in Drag”: The Lack of Protection for the Male Victim of Gender Stereotyping Under Title VII*, 46 VILL. L. REV. 713, 713-14 (2001); see also Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 2-3 (1995) (perhaps the first article to examine the federal courts’ reluctance to extend the *Price Waterhouse* theory to “effeminate” males).

6. 608 F.2d 327 (9th Cir. 1979).

7. 569 F.2d 325 (5th Cir. 1978).

8. *DeSantis*, 608 F.2d at 332; *Smith*, 569 F.2d at 327.

9. 490 U.S. 228 (1989).

10. 523 U.S. 75 (1998).

11. 256 F.3d 864, 875 (9th Cir. 2001).

12. 42 U.S.C. § 2000e-2(a) (2000).

13. 510 U.S. 17 (1993).

ment and create an abusive working environment," Title VII is violated.<sup>14</sup>

Thus, Title VII prohibits both sex discrimination and sexual harassment.<sup>15</sup> To prevail on either type of claim, however, a plaintiff "must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted 'discrimina[tion] . . . because of . . . sex.'"<sup>16</sup> Although this has always been the Title VII plaintiff's ultimate task, the federal courts have often struggled in determining what constitutes discrimination "because of sex." For example, according to Professor Mary Anne C. Case:

The word "gender" has come to be used synonymously with the word "sex" in the law of discrimination. In women's studies and related disciplines, however, the two terms have long had distinct meanings, with gender being to sex what masculine and feminine are to male and female. Were that distinct meaning of gender to be recaptured in the law, great gains both in analytic clarity and in human liberty and equality might well result. For, as things now stand, the concept of gender has been imperfectly disaggregated in the law from sex on the one hand and sexual orientation on the other. Sex and orientation exert the following differential pull on gender in current life and law: When individuals diverge from the gender expectations for their sex—when a woman displays masculine characteristics or a man feminine ones—discrimination against her is now treated as sex discrimination while his behavior is generally viewed as a marker for homosexual orientation and may not receive protection from discrimination. This is most apparent from a comparison of *Price Waterhouse v. Hopkins* . . . with cases upholding an employer's right to fire or not to hire males specifically because they were deemed "effeminate."<sup>17</sup>

This judicial confusion can be attributed largely to the unique circumstances surrounding the enactment of Title VII. Specifically, "Title VII was originally intended to provide equal employment opportunities for racial and ethnic minorities"<sup>18</sup> and "[t]he prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives."<sup>19</sup> In fact, "Representative Howard W. Smith (D. Va.) was

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14. *Harris*, 510 U.S. at 21 (citations omitted).

15. *Id.*; *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64-67 (1986).

16. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) (alteration in original).

17. Case, *supra* note 5, at 2-3.

18. Nathans, *supra* note 5, at 716.

19. *Meritor Sav. Bank*, 477 U.S. at 63.

seeking to kill Title VII, and thought that including the ban on sex discrimination would encourage other representatives to oppose the legislation."<sup>20</sup>

"The principal argument in opposition to the amendment was that 'sex discrimination' was sufficiently different from other types of discrimination that it ought to receive separate legislative treatment."<sup>21</sup> However, "[t]his argument was defeated, the bill quickly passed as amended, and we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex.'"<sup>22</sup> Consequently, some courts view the circumstances surrounding the enactment of Title VII "as evincing Congress' intent that [Title VII's prohibition of] sex discrimination be construed liberally, [while] others would simply rely on Congress' general silence as support for a more narrow application of the sex amendment."<sup>23</sup>

### B. *Smith v. Liberty Mutual Insurance Co.*

In 1978, the Fifth Circuit, in *Smith v. Liberty Mutual Insurance Co.*,<sup>24</sup> specifically addressed whether Title VII prohibits "effeminacy" discrimination. *Smith* involved the Title VII claims of Bennie Smith, a black male who was denied employment by Liberty Mutual.<sup>25</sup> In 1969, Smith applied for employment with Liberty Mutual as a mailroom clerk.<sup>26</sup> After Liberty Mutual's personnel manager and mailroom supervisor interviewed Smith, the company refused to hire him.<sup>27</sup> Smith subsequently brought a Title VII action against Liberty Mutual, alleging race and sex discrimination.<sup>28</sup> At trial, Liberty Mutual admitted that it had rejected Smith's application because its mailroom supervisor "considered Smith effeminate."<sup>29</sup> Nevertheless, the district court granted summary judgment in favor of Liberty Mutual on Smith's sex discrimination claim.<sup>30</sup>

On appeal, the Fifth Circuit phrased Smith's argument for reversal as follows: "Smith argues that the law forbids an employer to reject a job applicant based on his or her affectional or sexual preference."<sup>31</sup> Although this characterization suggests that Smith was alleging sexual orientation discrimination, the court further explained, "[h]ere the claim is not that Smith was discriminated against because he was a male, but because as a male, he

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20. MARK A. ROTHSTEIN & LANCE LIEBMAN, *EMPLOYMENT LAW: CASES AND MATERIALS* 225 (4th ed. 1998).

21. *Meritor Sav. Bank*, 477 U.S. at 63-64.

22. *Id.* at 64.

23. Nathans, *supra* note 5, at 717.

24. 569 F.2d 325 (5th Cir. 1978).

25. *Smith*, 569 F.2d at 326.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Smith*, 569 F.2d at 326.

31. *Id.*

was thought to have those attributes more generally characteristic of females and epitomized in the descriptive 'effeminate.'"<sup>32</sup>

Relying on *Willingham v. Macon Telegraph Publishing Co.*,<sup>33</sup> in which the court upheld an employer's grooming code that prohibited male employees, but not female employees, from wearing their hair longer than shoulder length,<sup>34</sup> the Fifth Circuit affirmed the district court's entry of summary judgment in favor of Liberty Mutual.<sup>35</sup> The court reasoned:

An examination of legislative history in *Willingham* led us to the concrete conclusion that Congress by its proscription of sex discrimination intended only to guarantee equal job opportunities for males and females. Thus, we held that the prohibition on sexual discrimination could not be "extend[ed] . . . to situations of questionable application without some stronger Congressional mandate."

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. . . We adhere to the conclusion of *Willingham* and hold that Title VII cannot be strained to reach the conduct complained of here.<sup>36</sup>

In other words, the Fifth Circuit viewed the lack of legislative history regarding the amendment of Title VII to prohibit discrimination because of sex as a justification for construing the provision narrowly.<sup>37</sup> Accordingly, the court held that "effeminacy" discrimination was not actionable under Title VII.<sup>38</sup>

### C. *DeSantis v. Pacific Telephone & Telegraph Co.*

Another important case from the 1970s, which examined the validity of "effeminacy" discrimination claims under Title VII, was *DeSantis v. Pacific Telephone & Telegraph Co.*<sup>39</sup> *DeSantis*, however, is perhaps better known for rejecting the notion that Title VII prohibits employment discrimination on the basis of sexual orientation or preference.<sup>40</sup> The case was actually a consolidated appeal from the dismissals of three separate Title VII actions involving both male and female homosexuals.<sup>41</sup> *Strailey v. Happy Times*

32. *Id.* at 327.

33. 507 F.2d 1084 (5th Cir. 1975).

34. *Willingham*, 507 F.2d at 1091-92.

35. *Smith*, 569 F.2d at 327.

36. *Id.* at 326-27 (alteration in original).

37. *Id.*

38. *Id.* at 327.

39. 608 F.2d 327 (9th Cir. 1979).

40. See *DeSantis*, 608 F.2d at 329-30 (holding that "Title VII's prohibition of 'sex' discrimination applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference such as homosexuality"); Nathans, *supra* note 5, at 725; MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 624 (5th ed. 2000) (reproducing *DeSantis* as the primary illustrative case for the topic: "Discrimination on the Basis of Sexual Preference").

41. *DeSantis*, 608 F.2d at 328.

*Nursery School, Inc.* was the original style of the most relevant of the three cases.<sup>42</sup>

The Happy Times Nursery School fired Strailey, a homosexual male, after two years of teaching service.<sup>43</sup> Strailey alleged that Happy Times terminated him "because he wore a small gold ear-loop to school prior to the commencement of the school year."<sup>44</sup> When Strailey filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC), the EEOC asserted that it lacked jurisdiction over claims of sexual orientation discrimination.<sup>45</sup> Strailey then filed a Title VII action in federal court seeking declaratory, injunctive, and monetary relief.<sup>46</sup> The district court, however, dismissed the complaint for failure to state a claim.<sup>47</sup>

On appeal, Strailey argued that "he was terminated by the Happy Times Nursery School because that school felt that it was inappropriate for a male teacher to wear an earring to school" and "that the school's reliance on a stereotype—that a male should have a virile rather than an effeminate appearance—violate[d] Title VII."<sup>48</sup> In affirming the district court's dismissal of Strailey's claim, the Ninth Circuit reasoned as follows:

In *Hollaway* this court noted that Congress intended Title VII's ban on sex discrimination in employment to prevent discrimination because of gender, not because of sexual orientation or preference. Recently the Fifth Circuit similarly read the legislative history of Title VII and concluded that Title VII thus does not protect against discrimination because of effeminacy. We agree and hold that discrimination because of effeminacy, like discrimination because of homosexuality or transsexualism, does not fall within the purview of Title VII.<sup>49</sup>

Thus, both of the federal courts of appeals that examined the issue during the 1970s concluded that "effeminacy" discrimination was not actionable under Title VII.<sup>50</sup>

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42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *DeSantis*, 608 F.2d at 328.

47. *Id.*

48. *Id.* at 331.

49. *Id.* at 331-32 (citations omitted).

50. *Id.* at 332; *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 326-27 (5th Cir. 1978).

II. *PRICE WATERHOUSE V. HOPKINS* AND *ONCALE V. SUNDOWNER OFFSHORE SERVICES, INC.*: THE SUPREME COURT RECOGNIZES "GENDER STEREOTYPE" AND "SAME-SEX" DISCRIMINATION AS ACTIONABLE UNDER TITLE VII

A. *Price Waterhouse v. Hopkins*: *The Supreme Court Recognizes "Gender Stereotype" Discrimination as Actionable Under Title VII*

In 1989, the United States Supreme Court decided the landmark case of *Price Waterhouse v. Hopkins*,<sup>51</sup> involving a Title VII sex discrimination claim against a prestigious national accounting firm. In 1982, Ann Hopkins, a senior manager in Price Waterhouse's Washington, D.C., office, was proposed for partnership in the firm.<sup>52</sup> At first, "[s]he was neither offered nor denied admission to the partnership; instead, her candidacy was held for reconsideration the following year."<sup>53</sup> However, when the partners in her office later refused to re-nominate her for partnership, Hopkins filed a Title VII sex discrimination action against Price Waterhouse.<sup>54</sup>

In 1982, only seven of Price Waterhouse's 662 partners were women, and of the eighty-eight candidates for partnership that year, Hopkins was the only woman.<sup>55</sup> Forty-seven of the eighty-eight candidates became partners, twenty-one were rejected, and Hopkins was among the twenty who were "held" for reconsideration the following year.<sup>56</sup> The Court described Price Waterhouse's partnership selection process as follows:

[A] senior manager becomes a candidate for partnership when the partners in her local office submit her name as a candidate. All of the other partners in the firm are then invited to submit written comments on each candidate—either on a "long" or a "short" form, depending on the partner's degree of exposure to the candidate. Not every partner in the firm submits comments on every candidate. After reviewing the comments and interviewing the partners who

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51. 490 U.S. 228 (1989). The Court's primary concern in *Price Waterhouse* was clarifying the various burdens of proof in mixed motive Title VII disparate treatment cases. *Price Waterhouse*, 490 U.S. at 232. However, as the First Circuit explained in *Higgins*:

The Civil Rights Act of 1991, Pub. [L. No. 102-166, 105 Stat. 1071 (1991), overruled that part of *Price Waterhouse* in which the Court held that an employer could avoid liability for intentional discrimination in "mixed motive" cases if it could demonstrate that the same action would have ensued in the absence of the discriminatory motive. The same legislation altered the remedial effects of parties meeting certain burdens, but not *Price Waterhouse's* burden-shifting structure itself. *Nevertheless*, *Price Waterhouse's* holding anent the role of stereotypes in Title VII remains viable.

194 F.3d at 259 n.3 (1st Cir. 1999) (citations omitted) (emphasis added).

52. *Price Waterhouse*, 490 U.S. at 231.

53. *Id.*

54. *Id.* at 231-32.

55. *Id.* at 233.

56. *Id.*

submitted them, the firm's Admissions Committee makes a recommendation to the Policy Board. This recommendation will be either that the firm accept the candidate for partnership, put her application on "hold," or deny her the promotion outright. The Policy Board then decides whether to submit the candidate's name to the entire partnership for a vote, to "hold" her candidacy, or to reject her. The recommendation of the Admissions Committee, and the decision of the Policy Board, are not controlled by fixed guidelines: a certain number of positive comments from partners will not guarantee a candidate's admission to the partnership, nor will a specific quantity of negative comments necessarily defeat her application. Price Waterhouse places no limit on the number of persons whom it will admit to the partnership in any given year.<sup>57</sup>

At the time of her candidacy, Hopkins had worked at Price Waterhouse for five years and had played an instrumental role in a successful effort to secure a twenty-five million dollar contract with the State Department.<sup>58</sup> The partners in her office described this multi-million dollar effort as "outstanding" and a "virtually . . . partner level" performance.<sup>59</sup> Additionally, the district court found that "[n]one of the other partnership candidates at Price Waterhouse that year had a comparable record in terms of successfully securing major contracts for the partnership."<sup>60</sup>

Partners and clients alike praised Hopkins' character and accomplishments, describing her as "an outstanding professional" who was "extremely competent [and] intelligent" as well as "strong and forthright, very productive, energetic and creative."<sup>61</sup> Such positive evaluations led the district court to further conclude that Hopkins "had no difficulty dealing with clients" and "was generally viewed as a highly competent project leader who worked long hours, pushed vigorously to meet deadlines and demanded much from the multidisciplinary staffs with which she worked."<sup>62</sup>

Why then did Price Waterhouse refuse to make Hopkins a partner? Although some partners criticized her "interpersonal skills," "[t]here were clear signs . . . that . . . the partners reacted negatively to Hopkins' personality because she was a woman."<sup>63</sup> For example, "[o]ne partner described her as 'macho,'" while "another suggested that she 'overcompensated for being a woman,'" and "a third advised her to take 'a course at charm school.'"<sup>64</sup> "Several partners criticized her use of profanity; in response, one partner

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57. Price Waterhouse, 490 U.S. at 232-33.

58. *Id.* at 233.

59. *Id.*

60. *Id.* at 234.

61. *Id.*

62. Price Waterhouse, 490 U.S. at 234.

63. *Id.* at 234-35.

64. *Id.* at 235.

suggested that those partners objected to her swearing only 'because it's a lady using foul language.'"<sup>65</sup> Most importantly:

[T]he man who . . . bore responsibility for explaining to Hopkins the reasons for the Policy Board's decision to place her candidacy on hold . . . delivered the coup de grace: in order to improve her chances for partnership, Thomas Beyer advised, Hopkins should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."<sup>66</sup>

Dr. Susan Fiske, a prominent social psychologist, testified at trial that "the partnership selection process at Price Waterhouse was likely influenced by sex stereotyping."<sup>67</sup> Fiske's testimony "focused not only on the overtly sex-based comments of partners but also on gender-neutral remarks, made by partners who knew Hopkins only slightly, that were intensely critical of her."<sup>68</sup> Further, "Hopkins' uniqueness (as the only woman in the pool of candidates) and the subjectivity of the evaluations made it likely that sharply critical remarks [even the gender-neutral ones] . . . were the product of sex stereotyping."<sup>69</sup>

Based on this evidence, the district court concluded that "Price Waterhouse had unlawfully discriminated against Hopkins on the basis of sex by consciously giving credence and effect to partners' comments that resulted from sex stereotyping."<sup>70</sup> The D.C. Circuit Court of Appeals subsequently affirmed the district court's finding of liability.<sup>71</sup>

Although it ultimately held that the lower courts erred in requiring the employer to establish the "same decision" defense by "clear and convincing evidence,"<sup>72</sup> the Supreme Court clearly endorsed a "gender stereotype" theory of discrimination for purposes of Title VII.<sup>73</sup> In a plurality opinion that was joined by Justices Marshall, Blackmun, and Stevens, Justice Brennan explained:

In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.

Although the parties do not overtly dispute this last proposition, the placement by Price Waterhouse of "sex stereotyping" in quota-

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65. *Id.*

66. *Id.*

67. *Price Waterhouse*, 490 U.S. at 235.

68. *Id.*

69. *Id.* at 236.

70. *Id.* at 237.

71. *Id.*

72. *Price Waterhouse*, 490 U.S. at 258.

73. *See id.* at 250 (plurality opinion); *id.* at 272 (O'Connor, J., concurring).

tion marks throughout its brief seems to us an insinuation either that such stereotyping was not present in this case or that it lacks legal relevance. We reject both possibilities. As to the existence of sex stereotyping in this case, we are not inclined to quarrel with the District Court's conclusion that a number of the partners' comments showed sex stereotyping at work. *As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "[i]n 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>74</sup>

In a concurring opinion, Justice O'Connor echoed the plurality's conclusions about the legal relevance of sex stereotypes:

Ann Hopkins proved that Price Waterhouse "permitt[ed] stereotypical attitudes towards women to play a significant, though unquantifiable, role in its decision not to invite her to become a partner."

At this point Ann Hopkins had taken her proof as far as it could go. She had proved discriminatory input into the decisional process, and had proved that participants in the process considered her failure to conform to the stereotypes credited by a number of the decisionmakers had been a substantial factor in the decision.<sup>75</sup>

Thus, in *Price Waterhouse*, a majority of the Justices of the United States Supreme Court agreed that discrimination against an employee for failure to conform to "gender stereotypes" violates Title VII's prohibition against discrimination "because of . . . sex."<sup>76</sup>

*B. Oncale v. Sundowner Offshore Services, Inc.:  
The Supreme Court Recognizes "Same-Sex" Sexual  
Harassment as Actionable under Title VII*

Although it has long been established that Title VII prohibits sexual harassment in the workplace,<sup>77</sup> the federal courts, until fairly recently, disagreed as to whether this protection extends to victims of "same-sex" harassment. In 1998, the Supreme Court resolved this issue in *Oncale v. Sun-*

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74. *Id.* at 250-51 (quoting *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)) (citations omitted) (emphasis added).

75. *Id.* at 272-73 (O'Connor, J., concurring) (citations omitted).

76. *Price Waterhouse*, 490 U.S. at 250-51 (plurality opinion); *id.* at 272-73 (O'Connor, J., concurring).

77. See discussion *supra* Part I.A.

*downer Offshore Services, Inc.*<sup>78</sup> The plaintiff, Joseph Oncale, had worked for the defendant, Sundowner Offshore Services, on an oil platform in the Gulf of Mexico.<sup>79</sup> Sundowner employed Oncale as a "roustabout" on an eight-man crew, which included defendants Lyons, Pippen, and Johnson—all of whom were men.<sup>80</sup> Both Lyons and Pippen possessed supervisory authority over Oncale.<sup>81</sup>

Oncale alleged that on several occasions during his employment with Sundowner, he "was forcibly subjected to sex-related, humiliating actions against him by Lyons, Pippen, and Johnson in the presence of the rest of the crew."<sup>82</sup> He also claimed that Pippen and Lyons physically assaulted him "in a sexual manner" and that "Lyons threatened him with rape."<sup>83</sup> Although Oncale complained to supervisory personnel, Sundowner took no action against his alleged harassers, and the company's Safety Compliance Clerk even confided in Oncale that "Lyons and Pippen 'picked [on] him all the time too,' and called him a name suggesting homosexuality."<sup>84</sup> When Oncale eventually quit his job, he requested "that his pink slip reflect that he 'voluntarily left due to sexual harassment and verbal abuse.'"<sup>85</sup> At his deposition, Oncale indicated that he left Sundowner because he feared that his co-workers would rape him.<sup>86</sup>

Oncale subsequently filed an action against Sundowner in the United States District Court for the Eastern District of Louisiana, alleging that Sundowner had discriminated against him "because of his sex" in violation of Title VII.<sup>87</sup> The district court relied on the Fifth Circuit's decision in *Garcia v. Elf Atochem North America*<sup>88</sup> and held that Oncale had no cause of action under Title VII for the alleged harassment perpetrated by his male co-workers.<sup>89</sup> On appeal, the Fifth Circuit found *Garcia* controlling and affirmed the district court's dismissal of Oncale's action.<sup>90</sup>

The Supreme Court reversed and remanded, unanimously holding that "sex discrimination consisting of same-sex sexual harassment is actionable under Title VII."<sup>91</sup> The Court reasoned as follows:

We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII. As some courts have observed,

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78. 523 U.S. 75 (1998).

79. *Oncale*, 523 U.S. at 77.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Oncale*, 523 U.S. at 77.

85. *Id.*

86. *Id.*

87. *Id.*

88. 28 F.3d 446, 451-52 (5th Cir. 1994).

89. *Oncale*, 523 U.S. at 77.

90. *Id.*

91. *Id.* at 82.

male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits "discriminat[ion] . . . because of . . . sex" in the "terms" or "conditions" of employment. *Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.*<sup>92</sup>

The Court also discussed some of the methods by which a plaintiff can establish a claim for "same-sex" sexual harassment under Title VII.<sup>93</sup> As the Court explained:

Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex. The same chain of inference would be available to a plaintiff alleging same-sex harassment, if there were credible evidence that the harasser was homosexual.<sup>94</sup>

While suggesting that the presence of a homosexual harasser might make it easier for a court to infer discrimination "because of sex" in a "same-sex" case, the Court acknowledged that the "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex."<sup>95</sup> Therefore, "[a] trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace."<sup>96</sup> Additionally, "[a] same-sex harassment plaintiff may . . . offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace."<sup>97</sup>

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92. *Id.* at 79-80 (emphasis added).

93. *Id.* at 80-81. It should be noted, however, that Justice Scalia's discussion does not appear to have been intended as an exhaustive list of the evidentiary methods for establishing same-sex sexual harassment. The language that Justice Scalia uses—"for example" and "[w]hatever evidentiary route the plaintiff chooses to follow"—suggests that he was merely giving *some* examples of how a same-sex plaintiff might attempt to establish discrimination "because of sex" under Title VII. *See id.* at 81; Nathans, *supra* note 5, at 736.

94. *Oncale*, 523 U.S. at 80.

95. *Id.*

96. *Id.*

97. *Id.* at 80-81.

The Court, however, warned that "[w]hatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted 'discrimina[ti]on' . . . because of . . . sex.'"<sup>98</sup> The Court also emphasized that Title VII "forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment," and therefore, the challenged conduct must be "severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive."<sup>99</sup> According to the Court, these requirements ultimately prevent "Title VII from expanding into a general civility code."<sup>100</sup>

III. THE LEGACY OF *PRICE WATERHOUSE* AND *ONCALE*:  
*NICHOLS V. AZTECA RESTAURANT ENTERPRISES, INC.* AND THE  
 FEDERAL COURTS' RECENT ACCEPTANCE OF "EFFEMINACY"  
 DISCRIMINATION CLAIMS UNDER TITLE VII

*A. The Federal Courts' Initial Reluctance to Extend the Logic of Price  
 Waterhouse to Cases Involving "Effeminate" Men*

In 1995, six years after the Supreme Court decided *Price Waterhouse v. Hopkins*,<sup>101</sup> Professor Case observed the following:

As for the effeminate man in a workplace that encourages or tolerates feminine behavior in women, the logic of *Hopkins* dictates that he too should be protected: He is, in effect, *Hopkins* in drag. There is no basis in current Title VII doctrine for limiting to women the *Hopkins* holding that requiring conformity to the gendered behavior deemed appropriate for one's sex constitutes impermissible sex stereotyping.<sup>102</sup>

She further asserted:

Not only is it settled law that Title VII protects both men and women from discrimination on the basis of sex, the case of the effeminate man would be a peculiar one in which to argue for an exception from the equal protection of men, because the very characteristics for which he is being penalized are those associated with women, the subordinated group the statutory language was principally designed to protect. If women were protected for being mas-

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98. *Id.* at 81.

99. *Oncale*, 523 U.S. at 81 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)).

100. *Id.*

101. 490 U.S. 228 (1989).

102. Case, *supra* note 5, at 33.

culine but men could be penalized for being effeminate, this would . . . send a strong message of subordination to women, because it would mean that feminine qualities, which women are disproportionately likely to display, may legitimately be devalued although masculine qualities may not.<sup>103</sup>

Nevertheless, even after *Price Waterhouse*, the federal courts refused to recognize the Title VII claims of male employees who alleged that their employers discriminated against them for failing to conform to male gender stereotypes.<sup>104</sup> Like the courts that decided the “effeminacy” cases of the 1970s, these early post-*Price Waterhouse* courts often viewed a male’s “effeminate” behavior simply “as a marker for homosexual orientation.”<sup>105</sup> The logic behind such a view, however, is deeply flawed because “not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine.”<sup>106</sup> Thus, “[e]ven if legislative protection from discrimination on grounds of homosexuality could be achieved, this would not solve the problem of effeminate heterosexuals like Bennie Smith.”<sup>107</sup>

### B. Doe v. City of Belleville

The federal courts’ initial reluctance to protect male victims of “gender stereotype” discrimination began to subside with the Seventh Circuit’s decision in *Doe v. City of Belleville*.<sup>108</sup> *City of Belleville* involved two teenage brothers’ “same-sex” sexual harassment claims against their summer employer, the City of Belleville.<sup>109</sup>

In 1992, the City of Belleville hired J. and H. Doe—both sixteen years old—to cut weeds and grass at the city cemetery.<sup>110</sup> According to the court:

[B]oth young men were subjected to a relentless campaign of harassment by their male coworkers. For the ostensible purpose of differentiating between the brothers, the other men (all of whom were significantly older than the plaintiffs) nicknamed J., who apparently was overweight, the “fat boy” and dubbed H., who wore an earring, the “fag” or the “queer.” Day in and day out, both brothers were subjected to such ridicule, but it was H. who was the main target of the daily verbal abuse, most of which was served up by co-worker Jeff Dawe. Dawe, a former Marine of imposing stature, constantly

103. *Id.* at 47.

104. *Id.* at 2-3; *see, e.g.*, *Dillon v. Frank*, No. 90-2290, 1992 U.S. App. LEXIS 766, at \*27-28 (6th Cir. Jan. 15, 1992) (holding that the “sex stereotyping” language of *Price Waterhouse* was insufficient to sustain a male employee’s hostile work environment claim).

105. Case, *supra* note 5, at 2.

106. *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000).

107. Case, *supra* note 5, at 57.

108. 119 F.3d 563 (7th Cir. 1997), *vacated and remanded*, 523 U.S. 1001 (1998).

109. *Id.* at 566.

110. *Id.*

referred to H. as "queer" and "fag" and urged H. to "go back to San Francisco with the rest of the queers." Dawe also repeatedly inquired of H., "Are you a boy or a girl?" Dawe soon took to calling H. his "bitch" and said that he was going to take him "out to the woods" and "get [him] up the ass." Dawe regularly made these sorts of remarks in the presence of other co-workers, who joined in the harassment with derogatory remarks of their own. On one occasion, for example, Dave Harris encouraged Dawe to take H. out and "get a piece of that young ass." Like Dawe, Stan Goodwin, the plaintiffs' supervisor, referred to H. as a "queer" or "fag" because H. wore an earring. Once, in reference to Dawe's repeated announcement that he planned to take H. "out to the woods" for sexual purposes, Goodwin asked Dawe whether H. was "tight or loose," "would he scream or what?"<sup>111</sup>

The court further explained:

The verbal taunting of H. turned physical one day when Harris, noting that H. was in ill humor, told Dawe that his "bitch" appeared to be grumpy and urged Dawe to do something about it. Dawe, who had just returned from a lunch that included a few drinks at a local tavern, walked toward H. saying, "I'm going to finally find out if you are a girl or a guy." H. stepped backward in an attempt to avoid Dawe, but found himself trapped against a wall. Dawe proceeded to grab H. by the testicles and, having done so, announced to the assemblage of co-workers present, "Well, I guess he's a guy." In his deposition, H. testified that following this episode he came to believe that Dawe was actually willing and able to take him out to the woods and sexually assault him.<sup>112</sup>

Not surprisingly, following the "crotch-grabbing incident," the brothers decided to terminate their employment.<sup>113</sup> Before the Does left, however, their co-workers subjected them to more abuse, including a particularly nasty incident in which a co-worker threw a lit firecracker at H.<sup>114</sup>

The Does subsequently sued the City of Belleville, asserting Title VII claims for sexual harassment and constructive retaliatory discharge, as well as a Fourteenth Amendment equal protection claim.<sup>115</sup> The district court granted summary judgment in favor of the defendant on all claims, finding that the plaintiffs failed to present sufficient evidence that they were discriminated against "on the basis of their sex."<sup>116</sup> Although it affirmed the

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111. *Id.* at 566-67.

112. *Id.* at 567.

113. *City of Belleville*, 119 F.3d at 567.

114. *Id.*

115. *Id.*

116. *Id.* at 567-68.

summary judgment on the retaliation claims, the Seventh Circuit held that the district court erred in granting summary judgment on the Does' Title VII sexual harassment and Fourteenth Amendment equal protection claims.<sup>117</sup> The court reasoned as follows:

On any given work day, H. was faced with the prospect of having his gender questioned ("Are you a boy or a girl?"), having a co-worker, Jeff Dawe, repeat his threat to assault H. sexually ("I'm going to take you out in the woods and give it to you up your ass"), often with the encouragement of others (who urged Dawe to "get a piece of that young ass" and asked if H. was "tight or loose" and "would he scream or what?"), and, ultimately, having his testicles grabbed in a proclaimed effort to determine once and for all whether he was male or female ("Well, I guess he's a guy."). If H. were a woman, no court would have any difficulty construing such abusive conduct as sexual harassment. And if the harassment were triggered by that woman's decision to wear overalls and a flannel shirt to work, for example—something her harassers might perceive to be masculine just as they apparently perceived H.'s decision to wear an earring to be feminine—the court would have all the confirmation that it needed that the harassment indeed amounted to discrimination on the basis of sex. The fact that H. is male changes the analysis not at all . . . . We believe, then, that there is more than enough evidence that would permit the factfinder to conclude that his workplace was made hostile because of his sex.<sup>118</sup>

In reversing summary judgment, the Seventh Circuit stated, "We view with considerable skepticism . . . the notion that same-sex harassment that is overtly sexual and sex-based is only sex discrimination when the plaintiff can produce proof that the harasser chose him specifically because he is male."<sup>119</sup> The court, however, added:

Assuming *arguendo* that proof other than the explicit sexual character of the harassment is indeed necessary to establish that same-sex harassment qualifies as sex discrimination, the fact that H. Doe apparently was singled out for this abuse because the way in which he projected the sexual aspect of his personality (and by that we mean his gender) did not conform to his coworkers' view of appropriate masculine behavior supplies that proof here. The Supreme Court's decision in *Price Waterhouse v. Hopkins* makes clear that Title VII does not permit an employee to be treated adversely because *his or*

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117. *Id.* at 568-69.

118. *City of Belleville*, 119 F.3d at 568-69.

119. *Id.* at 580.

her appearance or conduct does not conform to stereotypical gender roles.<sup>120</sup>

Thus, the Seventh Circuit not only recognized that the *Price Waterhouse* "gender stereotype" theory of discrimination protects "effeminate" men, the court relied on the theory as an alternative ground for reversing the district court's entry of summary judgment.<sup>121</sup> The court analogized the Does' case to *Price Waterhouse* as follows:

Just as the accounting firm's reliance upon gender stereotypes informed the Court's decision in *Price Waterhouse* that Ann Hopkins had presented sufficient proof that she was denied a partnership because of her sex and not some other factor, evidence that the same stereotypes animated H. Doe's co-workers suggests that the harassment they perpetrated on him was "because of" his sex. A woman who is harassed in the workplace with the degree of severity or pervasiveness that our cases require because her personality, her figure, her clothing, her hairstyle, or her decision not to wear jewelry or cosmetics is perceived as unacceptably "masculine" is harassed "because of" her sex even if the harassment itself is not explicitly sexual. *In the same way, a man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers' idea of how men are to appear and behave, is harassed "because of" his sex.* Read favorably to the plaintiffs, the testimony here suggests that H. Doe was harassed (in an explicitly sexual fashion, we reiterate) in whole or in part because he wore an earring, a fact that evidently suggested to his co-workers that he was a "girl" or, in their more vulgar view, a "bitch." . . . Just as in *Price Waterhouse*, then, gender stereotyping establishes the link to the plaintiff's sex that Title VII requires . . . . One need only consider for a moment whether H.'s gender would have been questioned for wearing an earring if he were a woman rather than a man. It seems an obvious inference to us that it would not.<sup>122</sup>

The Supreme Court, however, disagreed with the Seventh Circuit's suggestion that "workplace harassment that is sexual in content is always actionable, regardless of the harasser's sex, sexual orientation, or motivations."<sup>123</sup> Accordingly, the Court vacated the Seventh Circuit's judgment and remanded the case "for further consideration in light of *Oncale v. Sun-*

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120. *Id.* (citation omitted) (second emphasis added).

121. *Id.*

122. *Id.* at 581-82 (citations omitted) (first emphasis added).

123. *Oncale*, 523 U.S. at 79-80.

downer *Offshore Services, Inc.*”<sup>124</sup> Therefore, it is not exactly clear whether the Seventh Circuit’s extension of the *Price Waterhouse* theory to male victims of “gender stereotype” discrimination remains good law. At least some courts, however, have concluded that the “gender stereotypes” holding from *City of Belleville* is still valid.<sup>125</sup>

Subsequently, in *Spearman v. Ford Motor Co.*,<sup>126</sup> the Seventh Circuit acknowledged that “sex stereotyping may constitute evidence of sex discrimination,” but cautioned that “[r]emarks at work that are based on sex-stereotypes do not inevitably prove that gender played a part in a particular employment decision.”<sup>127</sup> Rather, “[t]he plaintiff must show that the employer actually relied on [the plaintiff’s] gender in making its decision.”<sup>128</sup> Relying on *Price Waterhouse* and *Oncale*, the court explained that, in evaluating a male plaintiff’s hostile work environment claim under Title VII, it had to “consider any sexually explicit language or stereotypical statements within the context of all of the evidence of harassment in the case, and then determine whether the evidence as a whole create[d] a reasonable inference that the plaintiff was discriminated against because of his sex.”<sup>129</sup> The court ultimately concluded that “the record clearly demonstrate[d] that [the plaintiff’s] problems resulted from his altercations with co-workers over work issues, and because of his apparent homosexuality,” and, therefore, he was not harassed “because of his sex” as required for liability under Title VII.<sup>130</sup> Accordingly, the Seventh Circuit affirmed summary judgment in favor of the defendant.<sup>131</sup>

124. *City of Belleville v. Doe*, 523 U.S. 1001 (1998).

125. See, e.g., *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 263 n.5 (3d Cir. 2001), cert. denied, 534 U.S. 1155 (2002). In *Bibby*, the Third Circuit opined:

It would seem . . . that the gender stereotypes holding of *City of Belleville* was not disturbed. In deciding the case, the Seventh Circuit relied on alternative holdings. The first was that where the harassment was sexual in nature, it was not necessary for the plaintiff to prove that it was motivated by the victim’s gender. The second was that if proof of sex discrimination was necessary, the evidence that the victim’s harassers sought to punish him for failing to live up to expected gender stereotypes would be sufficient to prove such discrimination. The first holding was clearly wrong in light of *Oncale*’s requirement that all sexual harassment plaintiffs must prove that the harassment was discrimination because of sex. There is nothing in *Oncale*, however, that would call into question the second holding . . . [T]he gender stereotypes argument is squarely based on *Price Waterhouse v. Hopkins*. Absent an explicit statement from the Supreme Court that it is turning its back on *Price Waterhouse*, there is no reason to believe that the remand in *City of Belleville* was intended to call its gender stereotypes holding into question. *City of Belleville* settled before there was a decision on remand, so it is not possible to know if the Seventh Circuit would have continued to apply the gender stereotypes holding. District courts in that Circuit, however, have continued to treat that holding as binding on them.

260 F.3d at 263 n.5 (citations omitted).

126. 231 F.3d 1080 (7th Cir. 2000).

127. *Spearman*, 231 F.3d at 1085 (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989)).

128. *Id.* (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989)).

129. *Id.*

130. *Id.*

131. *Id.* at 1087; see also *Hamm v. Weyauomega Milk Prods., Inc.*, 199 F. Supp. 2d 878, 888-97 (E.D. Wis. 2002) (recognizing that “a plaintiff can prove same-sex sexual harassment by establishing that the harassment was based upon perceived non-conformance with gender-based stereotypes,” but granting summary judgment in favor of the defendant employer, because the male plaintiff failed to present

## C. Higgins v. New Balance Athletic Shoe, Inc.

In *Higgins v. New Balance Athletic Shoe, Inc.*,<sup>132</sup> Robert Higgins sued New Balance, his former employer, alleging, *inter alia*, hostile work environment sexual harassment in violation of Title VII.<sup>133</sup> The district court granted summary judgment in favor of New Balance, finding that Higgins "had shown only harassment because of his sexual orientation, not harassment because of his sex."<sup>134</sup>

On appeal, Higgins asserted a *Price Waterhouse* "gender stereotype" discrimination theory, pointing to evidence that his co-workers had mocked his "effeminate" characteristics by using high-pitched voices and making stereotypically feminine gestures.<sup>135</sup> The First Circuit, however, affirmed the summary judgment for the defendant, because Higgins had only presented this evidence to the district court to establish discrimination on the basis of his sexual orientation and had failed to assert the "gender stereotype" theory at the trial court level.<sup>136</sup> Nevertheless, in an important footnote, the court announced its view that the *Price Waterhouse* "gender stereotype" theory extends to "effeminate" men:

[I]n a footnoted rumination the district court questioned whether plaintiffs in same-sex sexual harassment cases might properly argue that they were harassed because they did not conform to gender-based stereotypes. We think it prudent to note that the precise question that the district court posed is no longer open: *Oncale* confirms that the standards of liability under Title VII, as they have been refined and explicated over time, apply to same-sex plaintiffs just as they do to opposite-sex plaintiffs. *In other words, just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity.*<sup>137</sup>

Thus, in *Higgins*, the First Circuit explicitly recognized that a male employee could assert a Title VII claim based on "effeminacy" discrimination,

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sufficient evidence that he was harassed "because of his sex" in violation of Title VII). *But see* Jones v. Pac. Rail Servs., No. 00 C 5776, 2001 U.S. Dist. LEXIS 1549, at \*3-7 (N.D. Ill. Feb. 12, 2001) (holding that a male plaintiff stated a claim for sexual harassment under Title VII, where he alleged that the defendant employer failed to take corrective action in response to his complaints of harassment by a male co-worker, because the plaintiff failed to conform to male gender stereotypes).

132. 194 F.3d 252 (1st Cir. 1999).

133. *Higgins*, 194 F.3d at 256.

134. *Id.* at 258.

135. *Id.* at 259.

136. *Id.* at 261.

137. *Id.* at 261 n.4 (citations omitted) (emphasis added).

thereby departing from the earlier holdings of the *Smith* and *DeSantis* cases.<sup>138</sup>

#### D. *Simonton v. Runyon*

In August 2000, the Second Circuit decided *Simonton v. Runyon*,<sup>139</sup> a case with facts very similar to those involved in *Higgins*. The plaintiff, Dwayne Simonton, sued the Postmaster General and the United States Postal Service, alleging that the harassment he suffered in the workplace, because of his sexual orientation, violated Title VII.<sup>140</sup> This harassment included numerous sexually explicit verbal assaults, the posting of notes on a bathroom wall with Simonton's name and the names of celebrities who had died of AIDS, and the placing of pornographic pictures on Simonton's work area.<sup>141</sup> The district court, however, dismissed the complaint for failure to state a claim, reasoning that Title VII does not prohibit sexual orientation discrimination.<sup>142</sup>

On appeal, the Second Circuit affirmed the dismissal, explaining that "[t]he law is well-settled in this circuit and in all others to have reached the question that Simonton has no cause of action under Title VII because Title VII does not prohibit harassment or discrimination because of sexual orientation."<sup>143</sup> Like the plaintiff in *Higgins*, Simonton asserted a *Price Waterhouse* theory for the first time on appeal.<sup>144</sup> Although it refused to address the merits of Simonton's *Price Waterhouse* argument, the court implied that it would be open to such an argument in the future.<sup>145</sup> Specifically, the court acknowledged the following about the potential application of the *Price Waterhouse* "gender stereotype" theory to cases involving "effeminate" men:

The Court in *Price Waterhouse* implied that a suit alleging harassment or disparate treatment based upon nonconformity with sexual stereotypes is cognizable under Title VII as discrimination because of sex. This theory would not bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically

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138. *Higgins*, 194 F.3d at 261 n.4. See also *Centola v. Potter*, 183 F. Supp. 2d 403, 411 (D. Mass. 2002) (denying summary judgment regarding a male plaintiff's Title VII sexual harassment claim, because the plaintiff "carried his summary judgment burden of proving that his co-workers and supervisors discriminated against him because of his sex by using impermissible sexual stereotypes against him").

139. 232 F.3d 33 (2d Cir. 2000).

140. *Id.* at 34.

141. *Id.* at 35.

142. *Id.* at 34.

143. *Id.* at 35.

144. *Simonton*, 232 F.3d at 37.

145. *Id.* ("We find this argument more substantial than Simonton's previous two arguments, but not sufficiently pled in this case.").

masculine. But, under this theory, relief would be available for discrimination based upon sexual stereotypes.<sup>146</sup>

*E. Nichols v. Azteca Restaurant Enterprises, Inc.: The Ninth Circuit Recognizes Price Waterhouse's Abrogation of DeSantis*

Although cases like *City of Belleville*, *Spearman*, *Higgins*, and *Simonton* signaled a new willingness of some federal courts to apply the *Price Waterhouse* "gender stereotype" theory evenhandedly, the Ninth Circuit's July 2001 decision in *Nichols v. Azteca Restaurant Enterprises, Inc.*<sup>147</sup> has been, by far, the most significant development in this area of the law. *Nichols* is significant because it removed one of the two major precedential barriers to the extension of the "gender stereotype" theory to cases involving "effeminate" men (*DeSantis*) and made the continued validity of the other (*Smith v. Liberty Mutual Insurance Co.*) even more uncertain.

From October 1991 to July 1995, Antonio Sanchez worked as a host, and later as a food server, at two of Azteca's restaurants.<sup>148</sup> According to the court:

Throughout his tenure at Azteca, Sanchez was subjected to a relentless campaign of insults, name-calling, and vulgarities . . . . Male co-workers mocked Sanchez for walking and carrying his serving tray "like a woman," and taunted him in Spanish and English as, among other things, a "faggot" and a "fucking female whore." The remarks were not stray or isolated. Rather, the abuse occurred at least once a week and often several times a day.<sup>149</sup>

Following his termination, Sanchez filed an action against Azteca in federal court, alleging hostile work environment sexual harassment and retaliation in violation of Title VII and its Washington counterpart, the Washington Law Against Discrimination (WLAD).<sup>150</sup> Relying on *Price Waterhouse*, "Sanchez claimed that he was verbally harassed by some male co-workers and a supervisor because he was effeminate and did not meet their views of a male stereotype."<sup>151</sup> After a bench trial, the district court entered a judgment for the defendant on all claims.<sup>152</sup>

On appeal, the Ninth Circuit reversed the district court's judgment regarding Sanchez's hostile work environment sexual harassment claim and

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146. *Id.* at 38.

147. 256 F.3d 864 (9th Cir. 2001).

148. *Nichols*, 256 F.3d at 870.

149. *Id.*

150. *Id.* at 869.

151. *Id.*

152. *Id.*

remanded the case for further proceedings.<sup>153</sup> The court agreed wholeheartedly with Sanchez's argument that "the holding in *Price Waterhouse* applies with equal force to a man who is discriminated against for acting too feminine."<sup>154</sup> The court reasoned:

At its essence, the systematic abuse directed at Sanchez reflected a belief that Sanchez did not act as a man should act. Sanchez was attacked for walking and carrying his tray "like a woman"—i.e., for having feminine mannerisms. Sanchez was derided for not having sexual intercourse with a waitress who was his friend. Sanchez's male co-workers and one of his supervisors repeatedly reminded Sanchez that he did not conform to their gender-based stereotypes, referring to him as "she" and "her." And, the most vulgar name-calling directed at Sanchez was cast in female terms. We conclude that this verbal abuse was closely linked to gender.<sup>155</sup>

Regarding its earlier decision in *DeSantis v. Pacific Telephone & Telegraph Co.*,<sup>156</sup> the court explained:

*Price Waterhouse* sets a rule that bars discrimination on the basis of sex stereotypes. That rule squarely applies . . . here. The only potential difficulty arises out of a now faint shadow cast by our decision in *DeSantis v. Pacific Telephone & Telegraph Co., Inc.* *DeSantis* holds that discrimination based on a stereotype that a man "should have a virile rather than an effeminate appearance" does not fall within Title VII's purview. This holding, however, predates and conflicts with the Supreme Court's decision in *Price Waterhouse*. And, in this direct conflict, *DeSantis* must lose. *To the extent it conflicts with Price Waterhouse, as we hold it does, DeSantis is no longer good law.* Under *Price Waterhouse*, Sanchez must prevail.<sup>157</sup>

Thus, in *Nichols*, the Ninth Circuit not only held that a male employee's claim of harassment for failing to conform to male gender stereotypes (i.e., for being too "effeminate") was actionable under Title VII, but also recognized that *Price Waterhouse* abrogated its earlier *DeSantis* decision.<sup>158</sup> This

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153. *Nichols*, 256 F.3d at 869.

154. *Id.* at 874.

155. *Id.*

156. 608 F.2d 327 (9th Cir. 1979).

157. *Nichols*, 256 F.3d at 874-75 (citations omitted) (emphasis added). The court, however, also indicated that its decision would not affect an employer's right to enact "reasonable regulations that require male and female employees to conform to different dress and grooming standards." *Id.* at 875 n.7.

158. *Id.* at 874-75.

was the precise conclusion that Professor Case suggested six years earlier.<sup>159</sup>

*F. Bibby v. Philadelphia Coca Cola Bottling Co.*

In August 2001, the Third Circuit decided *Bibby v. Philadelphia Coca Cola Bottling Co.*,<sup>160</sup> in which it, too, recognized that Title VII protects male victims of "gender stereotype" discrimination.<sup>161</sup> *Bibby* involved yet another appeal from a summary judgment for the defendant in a Title VII "same-sex" sexual harassment case.<sup>162</sup> John Bibby, a homosexual male, worked for the Philadelphia Coca-Cola Bottling Company.<sup>163</sup> In 1993, he began experiencing some medical problems, which included weight loss, respiratory problems, and vomiting blood.<sup>164</sup> One day in August 1993, Bibby's supervisor found him with his eyes closed, while his machine was malfunctioning and destroying some of his employer's product.<sup>165</sup> Bibby, who was experiencing stomach and chest pains, asked for permission to go to the hospital; instead, his supervisor informed him that he was terminated (although he was actually suspended with intent to terminate).<sup>166</sup> Subsequently, Bibby was hospitalized for several weeks and treated for depression and anxiety.<sup>167</sup> After he was later terminated, Bibby filed a grievance with his union and was reinstated following arbitration.<sup>168</sup>

Upon returning to work in December 1993, a co-worker assaulted Bibby in a locker room.<sup>169</sup> The co-worker told Bibby "to get out of the locker room, shook his fist in Bibby's face, grabbed Bibby by the shirt collar, and threw him up against the lockers."<sup>170</sup> Then, in January 1995, the same co-worker assaulted Bibby again.<sup>171</sup> The court described the second incident as follows:

Bibby was at the top of a set of steps working at a machine that puts cases of soda on wooden or plastic pallets. Berthcsi was driving a forklift loaded with pallets, and he "slammed" the load of pallets under the stairs, blocking Bibby's exit from the platform on which he was standing. Bibby paged a supervisor, and Berthcsi was ordered to remove the pallets. He refused. Berthcsi and Bibby then exchanged some angry words, and Berthcsi repeatedly yelled at

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159. Case, *supra* note 5, 45-61.

160. 260 F.3d 257 (3d Cir. 2001), *cert. denied*, 122 S. Ct. 1126 (2002).

161. *Bibby*, 260 F.3d at 262-64.

162. *Id.* at 259.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Bibby*, 260 F.3d at 259.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Bibby*, 260 F.3d at 259.

Bibby that “everybody knows you’re gay as a three dollar bill,” “everybody knows you’re a faggot,” and “everybody knows you take it up the ass.” Later that day, Berthcsi called Bibby a “sissy.” Bibby filed a complaint with the union and with the employer, and Berthcsi was suspended pending an investigation. Bibby refused the union’s request that he withdraw the complaint, and Berthcsi’s employment was terminated. The union filed a grievance on behalf of Berthcsi, and he was reinstated subject to the employer’s condition that he undergo anger management training.<sup>172</sup>

Bibby also alleged that his “supervisors . . . harassed him by yelling at him, ignoring his reports of problems with machinery, and arbitrarily enforcing rules against him in situations where infractions by other employees would be ignored,” but he did not “assert that there was any sexual component to any of this alleged harassment.”<sup>173</sup> He further claimed that “graffiti of a sexual nature, some bearing his name, was written in the bathrooms and allowed to remain on the walls for much longer than some other graffiti.”<sup>174</sup> Based on these facts, the district court granted summary judgment in favor of the defendant on the Title VII sexual harassment claim, finding that Bibby “was harassed because of his sexual orientation and not because of his sex.”<sup>175</sup>

On appeal, the Third Circuit considered whether Bibby had presented sufficient evidence that his harassment was “because of sex” to survive summary judgment on his Title VII claim.<sup>176</sup> In doing so, the court discussed several ways in which a plaintiff might establish a “same-sex” sexual harassment claim under Title VII:

[T]here are at least three ways by which a plaintiff alleging same-sex sexual harassment might demonstrate that the harassment amounted to discrimination because of sex—the harasser was motivated by sexual desire, the harasser was expressing a general hostility to the presence of one sex in the workplace, *or the harasser was acting to punish the victim’s noncompliance with gender stereotypes.*<sup>177</sup>

The court, however, concluded:

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172. *Id.* at 259-60.

173. *Id.* at 260.

174. *Id.*

175. *Id.*

176. *Bibby*, 260 F.3d at 262-65.

177. *Id.* at 264 (emphasis added); *see also* EEOC v. Harbert-Yeargin, Inc., 266 F.3d 498, 522 n.6 (6th Cir. 2001) (citing *Bibby* with approval, including the court’s assertion that a plaintiff can meet the “because of sex” requirement of Title VII by showing that “the harasser was acting to punish the victim’s noncompliance with gender stereotypes”).

[I]t is clear that "[w]hatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted 'discrimin[ation] . . . because of . . . sex.'" Bibby simply failed in this respect; indeed, he did not even argue that he was being harassed because he was a man and offered nothing that would support such a conclusion . . . . *Moreover, he did not claim that he was harassed because he failed to comply with societal stereotypes of how men ought to appear or behave or that as a man he was treated differently than female co-workers.* His claim was, pure and simple, that he was discriminated against because of his sexual orientation. No reasonable finder of fact could reach the conclusion that he was discriminated against because he was a man.<sup>178</sup>

Thus, the Third Circuit also recognizes the *Price Waterhouse* "gender stereotype" theory as a way in which a male plaintiff can establish a "same-sex" sexual harassment claim under Title VII.<sup>179</sup> Unfortunately for Bibby, he failed to take advantage of a great opportunity; rather than claiming harassment for failure to conform to male gender stereotypes (which would have been actionable under Title VII), Bibby alleged that his supervisors and co-workers harassed him for being a homosexual (which is not actionable under Title VII).<sup>180</sup> Accordingly, the Third Circuit affirmed the district court's entry of summary judgment in favor of the defendant.<sup>181</sup>

Bibby's failure and Sanchez's success (in the *Nichols* case) provide a valuable lesson for attorneys who represent homosexual males who claim to be victims of sex discrimination: Keep your client's sexual orientation out of his Title VII claim! If you hope to prevail, you must focus all of your energy on showing that the employer discriminated against your client for failing to conform to some male gender stereotype (i.e., he was too "effeminate"), thereby satisfying Title VII's "because of sex" requirement. "Once such a showing has been made, the sexual orientation of the plaintiff is irrelevant."<sup>182</sup> In other words:

[O]nce it has been shown that the harassment was motivated by the victim's sex, it is no defense that the harassment may have also been partially motivated by anti-gay or anti-lesbian animus. For example, had the plaintiff in *Price Waterhouse* been a lesbian, that

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178. *Bibby*, 260 F.3d at 264 (citation omitted) (emphasis added); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998).

179. *Bibby*, 260 F.3d at 263-64.

180. *Id.* at 264.

181. *Id.* at 265; see also *Bianchi v. Philadelphia*, 183 F. Supp. 2d 726, 734-38 (E.D. Pa. 2002) (recognizing the *Price Waterhouse* "gender stereotype" theory as a valid method of proving discrimination "because of sex" for purposes of Title VII, but granting summary judgment in favor of the defendant employer, because the plaintiff failed to present sufficient evidence that "he deviated from an ideal of manliness").

182. *Bibby*, 260 F.3d at 265.

fact would have provided the employer with no excuse for its decision to discriminate against her because she failed to conform to traditional feminine stereotypes.<sup>183</sup>

*G. The Current Status of Smith v. Liberty Mutual Insurance Co.*

Having discussed the cases that have recognized that the *Price Waterhouse* “gender stereotype” theory also applies to “effeminate” men, it is only fair to mention that the Fifth Circuit has not yet recognized the abrogation of *Smith v. Liberty Mutual Insurance Co.*<sup>184</sup> This means that, for the moment at least, *Smith*’s prohibition of “effeminacy” discrimination claims under Title VII is alive and well in the Fifth and Eleventh Circuits.<sup>185</sup>

However, based on *Price Waterhouse*, *Oncale*, and the subsequent cases extending the “gender stereotype” theory of discrimination to “effeminate” men, the holding of *Smith* rests on shaky analytical ground. In fact, long before the Ninth Circuit decided *Nichols Professor Case* viewed *Price Waterhouse* as implicitly overruling *Smith* and *DeSantis*.<sup>186</sup> According to *Case*, *Smith* falls “squarely within the rule applied in *Hopkins*—to refuse to hire someone simply for displaying ‘characteristics inappropriate to his sex’ is indisputably to engage in impermissible sex stereotyping.”<sup>187</sup> Despite this fact, “both the district and appeals courts ruled against *Smith*, each holding that, in their reading of the statute, it is permissible to discriminate both on grounds of nonconformity to gender roles and on the basis of sexual orientation.”<sup>188</sup>

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183. *Id.*

184. 569 F.2d 325, 327 (5th Cir. 1978); *see, e.g.*, *Mims v. Carrier Corp.*, 88 F. Supp. 2d 706, 713-14 (E.D. Tex. 2000) (citing *Smith* in holding that a male employee’s alleged harassment was not based upon his sex).

185. Although there are currently no Eleventh Circuit cases on point, *Smith* was decided before Congress split the old Fifth Circuit into the current Fifth and Eleventh Circuits. *Smith* itself was a Georgia case and the case is binding precedent for the Eleventh Circuit, as well. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (adopting “the decisions of the United States Court of Appeals for the Fifth Circuit, as that court existed on September 30, 1981, handed down by that court prior to close of business on that date,” as binding precedent for the Eleventh Circuit).

186. *Case*, *supra* note 5, at 49-50 (“Two cases most squarely raise the issue of discrimination on the basis of effeminacy; both are circuit court cases from the mid-1970s and therefore are arguably no longer good law in light of *Hopkins*. It would certainly be my considered judgment that *Hopkins* should in effect be seen as overruling them.”).

187. *Id.* at 51.

188. *Id.* at 51-52.

Although the Fifth Circuit's conclusion that Title VII does not prohibit discrimination on the basis of sexual orientation remains valid,<sup>189</sup> the emerging consensus among the federal courts is that discrimination against "effeminate" men—on the basis of their "effeminacy" and not their sexual orientation—cannot be tolerated in light of the Supreme Court's holding in *Price Waterhouse*.<sup>190</sup> Only time will tell, however, whether the Fifth Circuit will eventually follow the Ninth Circuit's lead and acknowledge that *Price Waterhouse* effectively overruled *Smith*, or whether the Supreme Court will have to resolve this issue itself. Regardless of the ultimate outcome, for the reasons articulated by Professor Case and by the courts in *City of Belleville*, *Higgins*, *Simonton*, *Nichols*, and *Bibby*, the better view seems to be that *Price Waterhouse* implicitly overruled *Smith*, *DeSantis*, and any other cases that held that employers may discriminate on the basis of "effeminacy."<sup>191</sup>

### CONCLUSION

For a long time, the federal courts simply refused to acknowledge the cognizability of Title VII claims by male employees alleging that their employers discriminated against them for being too "effeminate." In the mid-1970s, the two federal courts that addressed this issue unequivocally held that Title VII did not prohibit "effeminacy" discrimination.<sup>192</sup> Thus, employers were free to discriminate against male employees or applicants who failed to conform to traditional views of how a man should dress, speak, or act.

In 1989, the United States Supreme Court, in a case involving a female who was perceived as being too "masculine," announced:

[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 "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to

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189. See, e.g., *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 265 (3d Cir. 2001), *cert. denied*, 534 U.S. 1155 (2002) ("Harassment on the basis of sexual orientation has no place in our society. Congress has not yet seen fit, however, to provide protection against such harassment.") (citations omitted); *Rene v. MGM Grand Hotel, Inc.*, 243 F.3d 1206, 1209 (9th Cir. 2001) ("While societal attitudes towards homosexuality have undergone some changes since *DeSantis* was decided, Title VII has not been amended to prohibit discrimination based on sexual orientation."); *Simonton v. Runyon*, 232 F.3d 33, 36 (2d Cir. 2000) ("Simonton has alleged that he was discriminated against not because he was a man, but because of his sexual orientation. Such a claim remains non-cognizable under Title VII."); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999) ("[W]e regard it as settled law that, as drafted and authoritatively construed, Title VII does not proscribe harassment simply because of sexual orientation.").

190. See discussion, *supra* Part III (B)-(F).

191. See discussion, *supra* Part III (B)-(F).

192. *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 332 (9th Cir. 1979); *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 327 (5th Cir. 1978).

strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."<sup>193</sup>

Then, in 1998, the Supreme Court unanimously held that "same-sex" sexual harassment was actionable under Title VII.<sup>194</sup> This second development was almost as significant as the first because, in most "effeminacy" discrimination cases, a male supervisor or co-worker is the alleged harasser.

Despite these seemingly clear announcements by the Supreme Court, the lower courts remained reluctant to apply the *Price Waterhouse* "gender stereotype" theory even-handedly, leading some legal scholars, as recently as last year, to conclude that there was no protection for "Hopkins in drag"—the male victim of "gender stereotype" discrimination.<sup>195</sup> In denying "gender stereotype" discrimination claims by male employees, these courts often "conflate[d] discrimination on the basis of effeminacy with sexual orientation discrimination . . ."<sup>196</sup>

Recently, however, the initial judicial reluctance has waned, as the First, Second, Third, Seventh, and Ninth Circuits have all recognized that a male employee could satisfy Title VII's "because of sex" requirement by showing that his employer discriminated against him for failing to conform to male gender stereotypes.<sup>197</sup> Most significantly, the Ninth Circuit, in *Nichols v. Azteca Restaurant Enterprises, Inc.*,<sup>198</sup> acknowledging that *Price Waterhouse* abrogated its earlier *DeSantis* decision, held that a male employee had established a Title VII "same-sex" sexual harassment claim by showing that his co-workers harassed him for being "effeminate."

In cases like *City of Belleville*, *Higgins*, *Simonton*, *Nichols*, and *Bibby*, the courts have correctly realized that "effeminacy" and homosexuality do not go hand-in-hand. Thus, extending the *Price Waterhouse* "gender stereotype" theory to prohibit "effeminacy" discrimination "would not bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine."<sup>199</sup>

These cases also provide a valuable lesson for attorneys who represent male homosexual victims of discrimination—do not make your client's sexual orientation an issue in his Title VII case! Rather, focus your attention on showing that the employer discriminated against your client for failing to conform to male gender stereotypes (i.e., for being too "effeminate").<sup>200</sup>

193. *Price Waterhouse v. Hopkins*, 490 U.S. 251 (1989) (quoting *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

194. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998).

195. See Case, *supra* note 5, at 2-3, 33, 57-61; Nathans, *supra* note 5, at 713.

196. Case, *supra* note 5, at 57.

197. See discussion, *supra* Part III.

198. 256 F.3d 864, 874-75 (9th Cir. 2001).

199. *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000).

200. See Nathans, *supra* note 5, at 736-39 (recognizing that plaintiffs who make their homosexuality an issue have achieved very little success under Title VII, while "[m]ale employees who have premised their Title VII gender stereotyping claims on their sex, as opposed to their sexual orientation" have been

Although the current judicial consensus is (and will probably remain) that Title VII does not prohibit sexual orientation discrimination, a skillful attorney might nevertheless obtain relief for his homosexual male client by establishing that an employer discriminated against the client for failing to conform to stereotypical views about how a man should dress, speak, or act. This recent development in Title VII jurisprudence "becomes increasingly important to male homosexuals as hopes for an amendment to Title VII adding sexual orientation as a protected class grow bleak."<sup>201</sup>

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more successful).

201. *Id.* at 714.

