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Employment Discrimination: Have the Federal Courts Reached a Consensus on How to Interpret Title VII Claims Alleged by Plaintiffs Who Identify as Lesbian, Gay, Bisexual, or Transgender?

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EMPLOYMENT DISCRIMINATION: HAVE THE FEDERAL COURTS REACHED A CONSENSUS ON HOW TO INTERPRET TITLE VII CLAIMS ALLEGED BY PLAINTIFFS WHO IDENTIFY AS LESBIAN, GAY, BISEXUAL, OR TRANSGENDER?

By Nicholas Larkin

I. Introduction:

Discrimination, especially when it occurs in the workplace, is a controversial and complicated subject that society has struggled to overcome for many years.[1] When workplace discrimination is directed towards those who identify as Lesbian, Gay, Bisexual, or Transgender (LGBT), employment discrimination becomes even more complex.[2] Employment discrimination is complex because the federal statute that prohibits discrimination based on sex does not address workplace discrimination against those who identify as LGBT.[3] Many within the LGBT community have attempted, with varying levels of success, to use statutes and inventive legal theories to further their suits that allege workplace discrimination.[4] For instance, transgender plaintiffs typically argue, under Title VII of the Civil Rights Act of 1964 (Title VII), that employment discrimination occurred because of gender.[5] On the other hand, gay or lesbian plaintiffs typically argue under Title VII that employment discrimination occurred because of their sexual orientation or lack of gender conformity.[6] This paper will examine the federal statute most commonly used in LGBT employment-discrimination cases, Title VII, by analyzing and discussing federal case law to determine the current state of employment-discrimination claims made by LGBT individuals.

Determining the current state of the law as it pertains to employment discrimination against LGBT individuals requires several steps. Section II will discuss the history of Title VII and the steps Congress took to pass it. Section II will further elaborate on the amendments made

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[1] *See* Judy Bennett Garner & Sandy James, *Employment Discrimination Against LGBTQ Persons*, 14 GEO. J. GENDER & L. 363, 365-69 (2013).

[2] *See* Jennifer C. Pizer et al., *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 LOY. L.A. L. REV. 715, 728-31 (2012).

[3] *E.g.,* Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1221-22 (10th Cir. 2007); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 264-65 (3d Cir. 2001).

[4] *E.g.* Nichols v. Azteca Rest. Enter., Inc., 256 F.3d 864, 874-75 (9th Cir. 2001); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259-61 (1st Cir. 1999).

[5] *See generally* 42 U.S.C. §§2000e-2000e-17 (2009); *E.g.,* Barnes v. City of Cincinnati, 401 F.3d 729, 736-38 (6th Cir. 2005); Lopez v. River Oaks Imaging & Diagnostic Grp., Inc., 542 F. Supp. 2d 653, 657-59 (S.D. Tex. 2008); Garner & James, *supra* note 1, at 370-71.

[6] *E.g.,* Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285, 286-87 (3d Cir. 2009); Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212, 1217 (D. Or. 2002).

to Title VII that are pertinent to LGBT individuals and briefly discuss the Equal Employment Opportunity Commission (EEOC). Section III will briefly discuss how the disparate treatment and disparate impact theories affect court decisions and discuss cases heard by the Supreme Court, circuit courts, and district courts that deal with the issues LGBT individuals face in Title VII employment-discrimination claims. Section IV will conclude this article by discussing the current state of LGBT discrimination claims under Title VII.

II. A Short History of Title VII

A. The creation of Title VII

Title VII's creation was neither easy nor short; it passed only after a great deal of debate and opposition from many members of Congress.[7] The 1950s and 1960s saw the strengthening of the Civil Rights Movement and the public's growing desire for equality for all; these events placed a great deal of pressure on Congress to enact legislation that could help level the playing field for all residents of the United States.[8] Despite the enactment of several statutes in the 1950s and early 1960s that were designed to displace employment discrimination, they were largely unsuccessful.[9] However, in the early 1960s, several key Congressional members and the President of the United States began to apply even greater pressure on Congress to pass a more comprehensive civil rights statute.[10]

At the time of Title VII's passage, the political landscape was very complex.[11] Because of Title VII's complex political nature, Title VII's wording was constantly changing in order to garner enough support to pass through both houses of Congress; others proposed language changes in an effort to defeat the bill.[12] For instance, one Congressman made an attempt to block Title VII from being passed into law during its final considerations by adding the phrase "because of sex" to Title VII's language.[13] He was unsuccessful, however, for Title VII did pass in both houses of Congress with the added language.[14]

Throughout Title VII's existence, courts have opined that this one phrase, "because of sex," was meant only to provide protection for a person's gender, not for a person's sexual orientation.[15] Dissenters of this consistent judicial perspective argue, however, that the creation of Title VII was meant to protect all those within the United States from multiple forms of

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[7] *See* Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and its Interpretation*, 151 U. PA. L. REV1417, 1423-25 (2003).
[8] ALFRED W. BLUMROSEN, MODERN LAW: THE LAW TRANSMISSION SYSTEM AND EQUAL EMPLOYMENT OPPORTUNITY 41-42 (1993).
[9] *See id.* at 42-43.
[10] *See id.* at 43-45.
[11] *See id.* at 43-52.
[12] *See id.* at 45-52.
[13] *See id.* at 45.
[14] ALFRED W. BLUMROSEN, MODERN LAW: THE LAW TRANSMISSION SYSTEM AND EQUAL EMPLOYMENT OPPORTUNITY 45 (1993).
[15] Garner & James, *supra* note 1, at 369-70.

discrimination and to correct the many discrepancies faced by minority groups in daily life.[16] Under this latter view, Title VII's protections should extend to LGBT individuals.[17]

B. The Equal Employment Opportunity Commission

Congress originally only authorized the EEOC to investigate, accept claims, and create reports on Title VII discrimination.[18] But when Congress made additions to Title VII in 1972, the EEOC's authority was expanded to include having the ability to file suit on behalf of an employee who had been discriminated against by a non-government employer.[19] Congress felt, when passing the amendments to Title VII in 1972, that the EEOC did not have the adequate authority to effectively investigate allegations and enforce its findings.[20] Congress remedied these concerns, in part, by giving the EEOC the power to bring suit against private companies that were allegedly in violation of Title VII; Congress further expanded Title VII's scope by allowing discrimination cases originating from local and state governments to be considered under Title VII.[21]

The EEOC has provided guidance on what it considers to be sexual harassment and how an employee should be able to prove his or her employment-discrimination case under Title VII.[22] However, the EEOC's powers are limited in many respects because the EEOC's opinions and guidance regarding sex discrimination are only considered to be persuasive authority and are not binding upon any United States court.[23]

C. The Civil Rights Act of 1991 as a clarification and strengthening of Title VII

The enactment of the Civil Rights Act of 1991 stemmed from several factors that included the court system's interpretation of Title VII gender harassment.[24] Congress felt that the court system was not correctly interpreting Title VII because of court decisions such as *Price Waterhouse v. Hopkins*.[25] The Supreme Court's reasoning in *Price Waterhouse*, that an employer could avoid liability for sex discrimination if it could show that it would have made the

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[16] *See* Cody Perkins, *Sex and Sexual Orientation: Title VII After* Macy v. Holder, 65 ADMIN. L. REV. 427, 428-29 (2013).

[17] *See id.* at 428 (explaining that evolving interpretations of Title VII's "because of sex" provision were expanded to include discrimination based on sex stereotyping).

[18] Anne Noel Occhialino & Daniel Vail, *The 40th Anniversary of Title VII of the Civil Rights Act of 1964 Symposium: Why the EEOC (Still) Matters*, 22 HOFSTRA LAB. & EMP. L.J. 671, 672-73 (2005).

[19] *See* Occhialino & Vail, *supra* note 18, at 677.

[20] 20 *See id*.

[21] 42 U.S.C. §§2000e-2000e-17 (2009); *see* Occhialino & Vail, *supra* note 18, at 677-78 (noting that the amendments expanding Title VII's coverage hampered the EEOC's ability to manage its caseload).

[22] *See generally* Sexual Harassment, 29 C.F.R. §1604.11 (1999).

[23] Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 Fordham L. Rev. 1937, 1938-39 (2006).

[24] Civil Rights Act of 1991 Pub. L. No. 102-166, 105 Stat. 1071 (1991); *e.g.,* Price Waterhouse v. Hopkins, 490 U.S. 228, 239-41(1989).

[25] *Price Waterhouse*, 490 U.S. at 239-41; *see* Occhialino & Vail, *supra* note 18, at 686-87 ((describing three statutes, including the Civil Rights Act of 1991, that Congress enacted that impacted the EEOC's enforcement efforts).

same decision in any event, was rejected by the Civil Rights Act of 1991.[26] The Supreme Court's decisions during this time period, which included *Price Waterhouse v. Hopkins*, created a disparity for plaintiffs when they attempted to obtain a remedy in sexual harassment cases.[27] Because of the lack of a remedy for a plaintiff's damages in sexual harassment cases, the public put great pressure on Congress in 1991 to correct and amend the court system's interpretation of Title VII sexual harassment claims.[28] The public was further concerned as a result of Justice Thomas's confirmation hearing for the Supreme Court, where sexual harassment allegations were made against him.[29] As a result of the public's pressure to amend Title VII, Congress passed the Civil Rights Act of 1991.[30]

The Civil Rights Act of 1991, in addition to doing away with a mixed-motive defense, provided further protections against sexual harassment in the workplace by allowing punitive and compensatory damages to be awarded in certain circumstances.[31] The Civil Rights Act of 1991 was also meant to address the extension of gender protections in the workplace to assist in preventing discrimination.[32]

III. Case Law Examining Alleged Employment-Discrimination of LGBT Individuals Under Title VII

This section will briefly discuss the differences between disparate treatment and disparate impact theories of discrimination. This section will also present the federal court cases that have played a role in Title VII interpretation related to employment discrimination alleged by LGBT individuals in three subsections that examine relevant Supreme Court decisions, relevant appellate decisions, and relevant district court decisions.[33]

A. Disparate treatment and disparate impact

Disparate treatment and disparate impact are two theories courts use to reach a conclusion concerning alleged employment discrimination. As defined by the Supreme Court, disparate impact involves "practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities."[34] Disparate treatment, on the other hand, is defined by the Supreme Court as behavior that "occur[s] where an employer has 'treated [a] particular person less favorably than others because of' a particular trait."[35]

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[26] Civil Rights Act of 1991 Pub. L. No. 102-166, 105 Stat. 1071 (1991); *Price Waterhouse*, 490 U.S. at 240-41; BLUMROSEN, *supra* note 8, at 285.
[27] *Price Waterhouse*, 490 U.S. at 258; *Id.* at 259 (White, concurring); *see* BLUMROSEN, *supra* note 8, at 282-85.
[28] BLUMROSEN, *supra* note 8, at 284-85.
[29] *See id.* at 284.
[30] *See id.*
[31] Civil Rights Act of 1991, Pub. L.. 102-166, 105 Stat. 1071 (1991); BLUMROSEN, *supra* note 8, at 285.
[32] BLUMROSEN, *supra* note 8, at 285.
[33] *E.g.,* Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989); Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1068 (9th Cir. 2002).
[34] Ricci v. DeStefano, 557 U.S. 557, 577 (2009).
[35] *Id.* (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 985-86 (1988)).

LGBT individuals do not use the disparate-impact theory as often as they use disparate treatment in Title VII employment-discrimination claims.[36] Disparate treatment is used in LGBT workplace-discrimination cases because the treatment is generally far more explicit.[37] There are instances, however, where employers exhibit disparate impact-like behavior when making employment decisions associated with these individuals.[38] For instance, an employer concerned about potential litigation could, as noted in *Etsitty v. Utah Transit Authority*, inadvertently affect an LGBT individual by instituting a policy that unwittingly discriminates against an LGBT individual.[39] The court in *Etsitty* stated that "[i]t may be that use of the women's restroom is an inherent part of one's identity as a male-to-female transexual and that a prohibition on such use discriminates on the basis of one's status as a transsexual."[40]

B. The foundations of Title VII interpretation in the federal court system

The United States Supreme Court cases discussed in this section have played a pivotal role in interpreting Title VII suits that allege employment-discrimination against LGBT individuals.[41]

1. ***Griggs v. Duke Power Company***: The inception of the disparate-impact test.[42]

In the history of Title VII employment-discrimination interpretation, *Griggs* was the first Supreme Court decision that shaped how disparate impact could be used in workplace-discrimination claims under Title VII.[43] The case arose when Duke Power Company (Duke) created two aptitude tests and a transfer requirement, hoping to produce a way to determine which employees were best suited for promotion or transfer to another division within Duke.[44] On its face, the testing requirement was not discriminatory, nor was there any apparent intent to discriminate.[45] Before the passage of Title VII, Duke openly discriminated against its African American employees.[46] But in 1955, Duke did create a policy requiring a high school diploma for any transfer or appointment to all departments within Duke, excluding the labor department, which constituted all of Duke's African American employees.[47]

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[36] *See* Daniel M. Le Vay, *Sex Discrimination in Job Assignment or Transfer as Violation of Title VII of Civil Rights Act of 1964 (42 U.S.C.A. §§ 2000e et seq.)*, 123 A.L.R. FED. 1, 18 (1995).
[37] *See* Nichols v. Azteca Rest. Enter., Inc., 256 F.3d 864, 870 (9th Cir. 2001); Le Vay, *supra* note 36, at 18.
[38] *See* Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1218-20 (10th Cir. 2007); Le Vay, *supra* note 36, at 18.
[39] *See Etsitty*, 502 F.3d at 1219, 1224.
[40] *See id.* at 1224.
[41] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75 (1998); Harris v. Foklift Sys., Inc., 512 U.S. 17 (1994); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Griggs v. Duke Power Co., 401 U.S. 424 (1971).
[42] *Griggs*, 401 U.S. at 425-26.
[43] *Griggs,* 401 U.S. at 427-28 (discussing the enactment history of 42 U.S.C. §§2000e-2000e-17 (2009) and its relevance to an organization's testing and requirement standards).
[44] *See id.*
[45] *See id.* at 428.
[46] *See id.* at 426-27 (discussing the actions of companies before the enactment of 42 U.S.C. §§2000e-2000e-17 (2009)).
[47] *See id.* at 427.

When Title VII was passed and became effective, Duke required those who were employed in the labor department who desired a transfer or a promotion to another department to hold a high school diploma as well as take and obtain a satisfactory score on two tests.[48] Duke allegedly created the employment requirements to ensure that the performance of an employee in a new department at Duke would be satisfactory.[49]

The tests and education requirements proved to be discriminatory, however, towards Duke's African American employees.[50] The tests were discriminatory because African Americans had received an inferior education and as a result, they were not adequately prepared to take an aptitude test.[51] The test did not measure skills related to performance of the specific jobs.[52] Because of this policy's impact, the African American employees at Duke collectively filed suit against Duke, alleging that Duke's tests and requirements were discriminatory under Title VII.[53] The district court proclaimed that since Title VII was only meant to be prospective and not retrospective, and because Duke had not intentionally committed discrimination against its African American employees, Duke would prevail in the case.[54]

Griggs appealed the district court's decision, where the circuit court partially reversed the district court's decision, noting that discrimination on the part of an employer before the passing of Title VII could still be actionable if the discrimination was residual.[55] The circuit court, however, maintained that it must be shown that there was racial purpose or an intent that was evil in the creation of a set of requirements by an employer for Griggs's claims to be applicable under Title VII.[56] Because of the conflicting views held throughout the federal court system, the Supreme Court granted certiorari.[57]

The Supreme Court opined that the tests and requirements of an organization must be fair in how they are applied and how they are used in practice; that a test or requirement must be related to a job to be legitimate; that a business must show it had a legitimate business reason in using a test or requirement; and that the business reason had to be connected to the result of a test or requirement.[58] Because Duke failed to show how its promotion requirements were job related, the Court proclaimed Duke discriminated against African Americans.[59]

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[48] Griggs v. Duke Power Co., 401 U.S. 424, 427-428 (1971).(discussing the actions of certain organizations before the enactment of 42 U.S.C. §§2000e-2000e-17 (2009)).
[49] *See id.* at 431.
[50] *See id.* at 430.
[51] *See id.*
[52] *See id.* at 428.
[53] *See id.* at 425-26 (discussing Congress's inclusion of class action lawsuits under 42 U.S.C. §§2000e-2000e-17 (2009)).
[54] Griggs v. Duke Power Co., 401 U.S. 424, 428-29 (1971).
[55] *See id* at 429.
[56] *See id.* (discussing the circuit courts' interpretation of Congress's intent regarding 42 U.S.C. §§2000e-2000e-17 (2009)).
[57] *See id.*
[58] *See id.* at 431-34.
[59] See *id.* at 436.

Griggs is an important decision for all plaintiffs because it provides a way for plaintiffs to show how they have been discriminated against in the workplace under a theory other than disparate treatment.[60] In *Griggs*, the Court created and used disparate impact for the first time by recognizing that Duke's standardized tests caused many African Americans to be excluded from certain jobs, despite being capable of performing the jobs, because of poor education.[61] Furthermore, *Griggs* helped to protect minority groups from discrimination in the workplace under Title VII by requiring an employer to provide a legitimate business reason for any requirements or tests used by the employer.[62]

2. *McDonnell Douglas Corporation v. Green*: Shifting burdens of proof.[63]

When considering Supreme Court cases that affect claims of Title VII employment discrimination, *McDonnell Douglas Corp.* has provided an important foundation for plaintiffs to prove an allegation of disparate-treatment workplace discrimination.[64] Green was laid off by McDonnell Douglas, and because of this layoff, Green began organizing and implementing demonstrations at the McDonnell Douglas plant.[65] When several new positions at McDonnell Douglas were created, Green applied for these positions, but McDonnell Douglas decided not to reemploy Green because of his involvement in the demonstrations.[66] Green brought suit against McDonnell Douglas citing, in part, racial discrimination on the part of McDonnell Douglas for refusing to rehire Green.[67] The district court ruled in favor of McDonnell Douglas by citing the EEOC's failure to find discrimination against Green as well as Green's participation in the demonstrations against McDonnell Douglas; Green appealed the district court's decision.[68] The circuit court, proclaiming that a claim did not require, as a prerequisite for jurisdiction, the EEOC's finding of cause, affirmed in part and reversed in part the district court's decision and remanded the case to the district court for further consideration of Green's discrimination claim.[69] Certiorari was granted by the Supreme Court.[70]

The majority created a test of shifting burdens to determine the reasons for the employer's actions.[71] First, a plaintiff must establish a prima facie case of discrimination by denoting:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer

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[60] *See id.* at 431.
[61] Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).
[62] *See id.* at 31.
[63] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).
[64] *Id. At 807*
[65] *See id.* at 794.
[66] *See id.*
[67] *See id*.
[68] *See id.*
[69] *See id.* at 797-98.
[70] *See McDonnel Douglas Corp.,* 411 U.S. at 798.
[71] *See id.* at 802.

> continued to seek applicants from persons of complainant's qualifications.[72]

Second, the employer must articulate a legitimate, nondiscriminatory business reason for its decision.[73] Third, the plaintiff must prove the employer's articulated reason is nothing more than a pretext for discrimination.[74] And fourth, the employer must show a legitimate reason that is untainted by discrimination for the denial of a person's employment.[75]

In coming to a determination, the majority opined that Green should have been afforded more time to rebut McDonnell Douglas's assertions, that Title VII did not tolerate race discrimination in any form, and that *McDonnell Douglas* was factually different from *Griggs* in that *Griggs* dealt with education and testing, while *McDonnell Douglas* dealt with the unlawful actions of Green.[76] The majority opined that McDonnell Douglas did not decide whether to hire Green based on his qualifications, but because of Green's actions prior to his attempt to be rehired.[77] *McDonnell Douglas* is important for plaintiffs and defendants because it created a shifting burden of proof requirement when plaintiffs are attempting to prove a case of disparate-treatment employment discrimination under Title VII.[78]

3. *Price Waterhouse v. Hopkins*: A failure to conform to gender stereotypes.[79]

Price Waterhouse assisted LGBT individuals by demonstrating that discrimination because of gender stereotypes is a triable issue under Title VII.[80] While working at Price Waterhouse, Hopkins attempted to gain full partnership, but was ultimately denied because she failed to conform to common female stereotypes and behaviors.[81] Hopkins did receive high praise from various partners within Price Waterhouse, but there were many within the firm who had concerns that Hopkins's behavior was too masculine and not feminine enough.[82]

In making its determination in favor of Hopkins, the majority proclaimed that an employer could not make an employment decision based solely on gender; that an employer could not make an employment decision of a mixed nature, in that an employer cannot make an employment decision based on reasons that would be considered of both a legitimate and illegitimate determination; that an employer could not take an adverse action against an employee or applicant based on gender without a valid business reason; and that an employee

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[72] *See id.*
[73] *See id.* at 802-03.
[74] *See id.* at 804.
[75] *See id.*
[76] *See id.* at 804-06; Griggs v. Duke Power Co., 401 U.S. 424, 435-36 (1971) (explaining that Title VII does not preclude the use of testing procedures, but it does forbid giving those procedures controlling force when they are not a reasonable measure of job performance).
[77] *See* McDonnell Douglas Corp., 411 U.S. at 806.
[78] *See id.* at 807 (stating that Green was allowed to bring forth his claim under 42 U.S.C. §§2000e-2000e-17 (2009)).
[79] *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
[80] *See id.* at 258 (stating that gender stereotypes made by an organization for the purpose of hiring or promoting a person is considered discrimination under 42 U.S.C. §§2000e-2000e-17 (2009)).
[81] *See id.* at 231-33.
[82] *See id.* at 234-35.

must show that an employer made a decision that affected the employee because of gender.[83] In essence, the majority opined that employment decisions based on gender without a valid business reason constitute discrimination due to Title VII's wording that, in part, states that discrimination cannot take place ". . . because of such individual's . . . sex."[84]

4. *Oncale v. Sundowner Offshore Services, Inc.*: Same-gender discrimination.[85]

The Supreme Court's determination in *Oncale* has proven to be an important decision for LGBT individuals who allege same-gender harassment in the workplace.[86] *Oncale* authorized plaintiffs to bring same-sex discrimination suits if they could show they were discriminated against by coworkers of the same gender because of a lack of gender conformity.[87] The ability to bring same-sex discrimination suits has helped to resolve employment-discrimination cases alleged by LGBT individuals.[88]

Oncale worked on an oil rig in the Gulf of Mexico and experienced adverse actions that were sexual in nature from three coworkers of the same gender.[89] Oncale reported the harassment to his supervisors, but nothing was done to rectify the situation.[90] Eventually, Oncale left his job on the oil rig, noting the high level of stress and constant harassment as his reasons for quitting.[91]

The Supreme Court determined, in part, that under Title VII, females and males are equally protected and that a party is protected from discrimination that originates from an employee of the same gender.[92] The majority reasoned there are times when a court must go beyond what Congress intended to do with a statute in order to apply the law fairly and equally to those parties who file a claim.[93]

Oncale's employer argued that by extending Title VII rights to cases such as *Oncale*, the Court would be creating a statute of general courtesy.[94] The majority opined, however, that such assertions were groundless because Title VII protections already encompassed sexual harassment towards those of the opposite gender.[95] The majority noted that the requirements of Title VII

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[83] *McDonnel Douglas Corp*., 411 U.S. 792, at 244-47, 250.
[84] *See id.* at 240 (quoting 42 U.S.C. §§2000e-2(a)(1), (2) (2009)).
[85] Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 75 (1998).
[86] *See id.* at 82.
[87] *See id.* at 80-81.
[88] *See* Garner & James, *supra* note 1, at 371-72.
[89] Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 77 (1998).
[90] *See id.*
[91] *See id.*
[92] *See id.* at 78 (noting that 42 U.S.C. §§2000e-2000e-17 (2009) covers both men and women in regards to disparate treatment in employment).
[93] *See id.* at 79-80.
[94] *See id.* at 80 (stating that a person must still prove all of the requirements set forth by 42 U.S.C. §§2000e-2000e-17 (2009) in order to show employment discrimination).
[95] Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 80 (1998) (stating that 42 U.S.C. §§2000e-2000e-17 (2009) provides protection for both men and women).

must be met and proven in order for a claim to move forward.[96] Furthermore, the Court maintained that Title VII does not protect an employee from teasing or horseplay from co-workers, but instead protects an employee from same-sex harassment that could adversely and pervasively alter the employee's conditions of employment.[97] In conclusion, the majority ruled that when considering claims of sexual harassment under Title VII, such claims should be distinguished correctly from behaviors between those of the same sex that are meant to be jokes or rowdiness by undertaking a measure of prudence while examining the context of a case as it is related to society.[98]

5. ***Meritor Savings Bank v. Vinson***: Sexual harassment from a supervisor.[99]

The Court's decision in *Meritor Savings Bank* has allowed LGBT individuals to bring a claim based on sex discrimination that creates a hostile workplace environment.[100] Mechelle Vinson worked for the Meritor Savings Bank (the Bank) and alleged that she had been sexually harassed by her supervisor, Taylor.[101] Vinson asserted that Taylor subjected her to various sexual acts that included inappropriate fondling, touching, and sexual favors so that, in Vinson's opinion, she could remain employed.[102] Vinson eventually decided to take an indefinite period of time off, but the Bank discharged Vinson two months after her leave began because of excessive use of sick leave.[103] Vinson filed suit against the Bank and Taylor, alleging that she had been sexually harassed by Taylor in violation of Title VII.[104]

The trial court found that Taylor's actions had not violated Title VII; Vinson appealed the decision to the court of appeals, where the trial court's findings were reversed.[105] The Bank then appealed the appellate court's decision to the Supreme Court.[106] The Court opined that Title VII was meant to prevent the disparate treatment of all women and men in the workplace.[107] The Court further noted that there were EEOC guidelines that defined sexual harassment under Title VII that were similar in nature to what Vinson had experienced.[108]

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[96] *See id.* at 80-82 (stating that the requirements of 42 U.S.C. §§2000e-2000e-17 (2009) must still be met to prove employment discrimination).

[97] *See id.* at 81-82 (noting that it must be shown how a coworker's behavior met the requirements of 42 U.S.C. §§2000e-2000e-17 (2009)).

[98] *See id.* at 82 (noting that common sense and all of the facts of the case must be examined in conjunction with 42 U.S.C. §§2000e-2000e-17 (2009) to determine if employment discrimination has occurred).

[99] Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 57 (1986).

[100] *See id.* at 73.

[101] *See id.* at 60.

[102] *See id.*

[103] *See id.*

[104] *See id.* at 60 (alleging that the actions of the plaintiff's supervisor were illegal under 42 U.S.C. §§2000e-2000e-17 (2009).

[105] Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 62 (1986).

[106] *See id.* at 63.

[107] *See id.* at 65. (Holding that 42 U.S.C. §§2000e-2000e-17 (2009) was meant to protect women and men in the workplace from discrimination, not just prevent the discrimination of one group or another).

[108] *See id.*

Because the EEOC guidelines were created with case law in mind and were consistently used by courts in Title VII hostile employment cases, the Court maintained the guidance was valid.[109] The Court further concluded that Vinson showed how the harassment in her work environment had been sufficiently pervasive and severe to cause a working environment that was abusive, thus causing the alteration of her employment conditions.[110] In order for conduct to be unwelcome, the Court noted, a person must indicate through action or word that said conduct was unwelcome.[111] Therefore, the Court held that Vinson did have an actionable claim under Title VII for sex discrimination that caused a hostile work environment.[112]

6. *Harris v. Forklift System, Inc.*: An abusive work environment because of gender.[113]

Teresa Harris worked for Forklift Systems, Inc. (Forklift) as a manager and was consistently harassed by the president of Forklift, Charles Hardy, because of her gender.[114] Harris alleged that Hardy's harassment included sexually demeaning comments based on her gender.[115] Harris quit her job at Forklift because of Hardy's harassment and proceeded to file suit under Title VII for abusive work environment based on gender.[116] The trial court did not find in favor of Harris, reasoning that Hardy's behavior did not affect Harris's psychological well-being in a serious manner.[117] Harris appealed the trial court's decision, but the appellate court upheld the lower court's decision.[118] The Supreme Court granted certiorari.[119]

The Court opined that Title VII encompasses all disparate treatment of women and men in the workplace and that Title VII is violated when an employee's actions in the workplace are pervasive or severe enough to affect another employee's work environment.[120] The Court further noted that Title VII does not require the psychological well-being of a person to be affected seriously by the harassment or require a person to succumb to a nervous breakdown.[121] The hostile work environment test, the Court maintained, was not a precise test, but was instead meant to examine cases on an individual level to determine if Title VII had been violated.[122] Because the lower courts failed to properly consider the appropriate hostile work environment test in Harris's case, the Court reversed the appellate court's decision.[123]

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[109] *See id.* at 65-66.
[110] *See id.* at 67.
[111] Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 68 (1986).
[112] *See id.* at 73.
[113] Harris v. Foklift Sys., Inc., 512 U.S. 17, 17 (1994).
[114] *See id.* at 19.
[115] *See id.*
[116] *See id.* at 19-20. (alleging that 42 U.S.C. §§2000e-2000e-17 (2009) protects employees from a supervisor's sexual harassment).
[117] *See id.* at 20.
[118] *See id.*
[119] Harris v. Foklift Sys., Inc., 512 U.S. 17, 20 (1994).
[120] *See id.* at 21 (discussing 42 U.S.C. §2000e-2(a)(1) (2009)).
[121] *See id.* at 22 (discussing 42 U.S.C. §§2000e-2000e-17 (2009) generally).
[122] *See id.* at 23 (discussing 42 U.S.C. §§2000e-2000e-17 (2009) generally).
[123] *See id.*

7. *Burlington Industries, Inc. v. Ellerth*: Quitting because of sexual harassment.[124]

Kimberly Ellerth worked for Burlington Industries (Burlington) as a salesperson where she experienced verbal and physical sexual harassment from a supervisor.[125] Ellerth never informed her superiors about the sexual harassment, and she eventually decided to leave Burlington's employment because of the continuing harassment.[126] Ellerth then filed suit alleging, among several charges, that one of Burlington's supervisors had committed sexual harassment and had thus created a hostile work environment in violation of Title VII.[127] The trial court, finding that there was no triable issue and that Ellerth had failed to report the supervisor's behavior, granted summary judgment in favor of Burlington.[128] Ellerth appealed the trial court's decision, and the court of appeals reversed, citing vicarious liability on the part of Burlington as the essence of the suit brought forth by Ellerth.[129] Burlington appealed the decision to the Supreme Court.[130]

The Court maintained that in order for vicarious liability to apply to an employer in a Title VII hostile-work-environment case, a supervisor must have control over an employee that is immediate.[131] The Court proclaimed that if there are no tangible employment actions taken against an employee by an employer, the employer could use an affirmative defense consisting of two elements to show by a preponderance of the evidence that vicarious liability did not apply to the employer.[132] The two elements of this defense, the Court asserted, required:

> (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.[133]

The Court noted, however, that when there is an employment action that tangibly results in a discharge, when there is a reassignment that is not desirable by an employee, or when there is a discharge of the employee, an affirmative defense could not be used by the employer.[134] The Court determined that Burlington was liable for the supervisor's alleged actions based on the theory of vicarious liability because the supervisor's alleged actions led to Ellerth's decision to leave Burlington's employment.[135] *Burlington Industries* is an important vicarious liability case because the Court specified what is required for vicarious liability to apply in an employment

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[124] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 742 (1998).
[125] *See id.* at 747.
[126] *See id.* at 748.
[127] *See id.* at 748-49 (discussing 42 U.S.C. §§2000e-2000e-17 (2009)).
[128] *See id.* at 749.
[129] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 749 (1998).
[130] *See id.*
[131] *See id.* at 764-65.
[132] *See id.* at 765.
[133] *See id.*
[134] *See id.*
[135] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 766 (1998).

context.[136] In essence, the Court created a new employment discrimination test based on vicarious liability that would allow plaintiffs to show how they had been discriminated against in the workplace.[137]

8. *Faragher v. City of Boca Raton*: Sexual harassment at the city pool.[138]

Faragher v. City of Boca Raton is a companion case to *Burlington Industries, Inc. v. Ellerth* because both cases deal with vicarious liability and because the Supreme Court considered and rendered an opinion on both cases at the same time.[139] *Faragher*, like *Burlington Industries, Inc.*, is an important vicarious liability case that has helped plaintiffs to apply vicarious liability to an employer, or its agents, that has allegedly committed workplace discrimination.[140] Beth Faragher worked for the city of Boca Raton as a lifeguard.[141] While working for Boca Raton, Faragher alleged that two of her supervisors verbally harassed her and other female lifeguards in a sexual manner, thus adversely affecting the privileges, terms, and conditions of Faragher's employment.[142]

Faragher quit her job at Boca Raton because of her supervisors' behavior; she filed suit against Boca Raton and her supervisors alleging sexual harassment and hostile work environment under Title VII.[143] The trial court ruled in Faragher's favor, noting that the supervisors' behavior did alter Faragher's employment in its conditions and therefore constituted an abusive working environment.[144] Boca Raton appealed the trial court's ruling, and the circuit reversed.[145] The Supreme Court then granted certiorari.[146]

The Court maintained that in order for vicarious liability to apply to an employer in a Title VII hostile work environment suit, a supervisor must have immediate control over an employee.[147] The Court proclaimed that if an employer took no tangible employment actions against an employee, the employer could use an affirmative defense consisting of two elements to show by a preponderance of the evidence that vicarious liability did not apply to the employer.[148] The two elements of this defense, the Court announced, require:

> (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any

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[136] *See id.* at 765.
[137] *See id.* at 766.
[138] Faragher v. City of Boca Raton, 524 U.S. 775, 775 (1998).
[139] *See id.* at 793; *Burlington Indus., Inc.*, 524 U.S. at 766-67.
[140] *Faragher*, 524 U.S. at 809-10; *Burlington Indus., Inc.*, 524 U.S. at 764-66.
[141] *Faragher*, 524 U.S. at 780-81.
[142] *See id.*
[143] *See id.* (discussing 42 U.S.C. §§2000e-2000e-17 (2009) generally).
[144] *See id.* at 783.
[145] Faragher v. City of Boca Raton, 524 U.S. 775, 783-784 (1998).
[146] *See id.* at 786.
[147] *See id.* at 807-08 (discussing 42 U.S.C. §§2000e-2000e-17 (2009) generally).
[148] *See id.*

> preventive or corrective opportunities provided by the employer or to avoid harm otherwise.[149]

The Court, however, noted that when there is an employment action that tangibly results in a discharge, when there is a reassignment that is not desirable by an employee, or when there is a discharge of the employee, the affirmative defense could not be used by the employer.[150] The Court reversed the appellate court's decision because Faragher's supervisors had complete authority to oversee and direct Faragher; the Court also noted that Faragher was not aware of Boca Raton's anti-harassment policies and could not reasonably report the supervisors' behavior, thus subjecting Boca Raton to liability under Title VII.[151] The Court further maintained that the actions of Faragher's supervisors rose to the necessary level of an actionable case, in that the supervisors actions were sufficiently adverse to create a hostile work environment claim under Title VII, thus subjecting Boca Raton to vicarious liability.[152]

C. Appellate court cases associated with LGBT employment-discrimination claims under Title VII

This subsection will introduce the case facts of a select number of federal circuit-court-employment-discrimination cases brought by LGBT individuals.[153]

1. ***Barnes v. City of Cincinnati***: A case of command presence.[154]

In this Sixth Circuit case, the court made a determination that showed how a person could prove an allegation of employment discrimination based on gender under Title VII.[155] Barnes, who was making the transition from male to female, worked for the Cincinnati Police Department (CPD) when she successfully passed CPD's sergeant examination; she was subsequently promoted to the rank of sergeant on a probationary basis.[156] During Barnes's probation, she was systematically discriminated against when CPD treated and evaluated her differently than other probationary sergeants because Barnes's behavior did not fall within typical male stereotypes.[157] When Barnes's probationary period was complete, CPD failed Barnes, citing a lack of command presence.[158]

Barnes brought suit against the city of Cincinnati alleging that CPD had committed sexual discrimination under Title VII based on her lack of gender conformity.[159] At the

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[149] *See id.* at 807.
[150] *See id.* at 807-08.
[151] Faragher v. City of Boca Raton, 524 U.S. 775, 808-810 (1998).
[152] *See id.* at 808.
[153] *E.g.,* Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005); Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061 (9th Cir. 2002); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257 (3d Cir. 2001).
[154] *See Barnes*, 401 F.3d at 729.
[155] *Id See id.* at 738-39 (discussing 42 U.S.C. §§2000e-2000e-17 (2009) generally).
[156] *See id.* at 733.
[157] *See id.* at 733-35.
[158] *See id.* at 735.
[159] Barnes v. City of Cincinnati, 401 F.3d 729, 733 (6th Cir. 2005)

conclusion of trial, the jury decided in favor of Barnes.[160] The city of Cincinnati then appealed the jury's decision to the Sixth Circuit Court of Appeals.[161] By using the test created in *McDonnell Douglas*, the majority proclaimed that Barnes had shown how she had been discriminated against by CPD when it refused to allow Barnes's promotion to remain in effect.[162]

After considering all of the facts and case law, which included *Smith v. City of Salem* (discussed below), the majority declared that Barnes was a member of a protected class; that Barnes did not have to present an exact match between her treatment and the treatment of her coworkers; that Barnes had adequately proven her claims for discrimination under Title VII; and that Barnes had properly presented and argued her discrimination claim.[163] For the above-stated reasons, the majority affirmed the jury's findings.[164] *Barnes* is an excellent example of how an LGBT individual can make a successful claim under Title VII while showing how to properly present and argue a case of Title VII employment discrimination.[165]

2. *Smith v. City of Salem*: Trying to put out a fire.[166]

There are times when transgender individuals receive the brunt of employment discrimination, especially when transitioning from male to female or female to male. Discrimination against these parties can be acute because it can be hard for them to fit into a typical gender profile. Smith worked for the Salem, Ohio Fire Department as a firefighter.[167] Several of Smith's coworkers started to notice a change in Smith when she began transitioning from male to female.[168] In an attempt to prevent any problems from occurring, Smith went to a supervisor to explain the situation.[169] However, Smith's supervisor decided to inform the Fire Department's chief, who then collaborated with several other city officials in an attempt to force Smith to quit because of Smith's gender non-conformity.[170] Despite these attempts, Smith did not quit, nor was she fired.[171]

In making a determination of Smith's discrimination claim, the majority opined that Smith had shown that her actions were protected under Title VII; that the Salem Fire Department was aware of Smith's protected behavior; that the Fire Department acted adversely towards Smith despite its awareness of her protected behavior; and that Smith had been able to show an affiliation between her protected actions and the Fire Department's detrimental actions.[172] The

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[160] *See id.* at 735.
[161] *See id.*
[162] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); *Barnes*, 401 F.3d at 736-37.
[163] *Barnes*, 401 F.3d at 737-38 (discussing 42 U.S.C. §§2000e-2000e-17 (2009) generally); Smith v. City of Salem, 378 F.3d 566, 575 (6th Cir. 2004) (declaring that sex discrimination "based on a person's gender non-conforming behavior is impermissible discrimination").
[164] *See Barnes*, 401 F.3d at 747.
[165] *See id.* at 739.
[166] *See Smith*, 378 F.3d at 566.
[167] *See id.* at 568.
[168] *See id.*
[169] *See id.*
[170] *See id.* at 568-69.
[171] Smith v. City of Salem, 378 F.3d 566, 569 (6th Cir. 2004).
[172] *See id.* at 570-72 (discussing 42 U.S.C. §2000e-2(a) (2009)).

majority also found that the Salem Fire Department's actions were due to Smith's failure to fit into a typical gender stereotype.[173] Furthermore, the majority found that because of Smith's work suspension, the Salem Fire Department's actions did establish a negative effect on the conditions and terms of Smith's employment.[174]

3. ***Etsitty v. Utah Transit Authority***: Barred from using certain restrooms.[175]

Discrimination against LGBT individuals in the workplace can be commonplace, but sometimes, transgender individuals who are making the transition from male to female or female to male face stronger discrimination because of a lack of gender conformity. Etsitty began working as a bus driver at the Utah Transit Authority (UTA).[176] Because Etsitty was in the process of transitioning from male to female, she was using female restrooms while on her bus route.[177] Out of concern that Etsitty's restroom usage could create litigation because she was still biologically male, UTA decided to release Etsitty from its employment, despite Etsitty's unblemished employment record.[178]

The majority opined, through the use of precedent that included *McDonnell Douglas*, that Etsitty had failed to properly prove her case of employment discrimination under Title VII.[179] By using the *McDonnell Douglas* test, the majority maintained that UTA had a legitimate business reason for releasing Etsitty from its employment, in that UTA was concerned about possible litigation over Etsitty's use of female restrooms during work hours when she was still technically a male.[180] The majority further found that Etsitty had failed to rebut UTA's genuine business reason for releasing Etsitty.[181] Etsitty's failure to rebut UTA's assertions helps to show that a claim of this nature must be carefully crafted so that any assertion of a legitimate, nondiscriminatory reason for an adverse employment action made by an employer can be properly rebutted while showing that discrimination under Title VII did occur against an LGBT individual.[182]

4. ***Nichols v. Azteca Restaurant Enterprises, Inc.***: A burger, with a side of discrimination.[183]

At times, discrimination in the workplace can be pervasive, especially when a person fails to conform to certain stereotypes associated with his or her gender. This was especially true for Sanchez, who worked as a waiter at an Azteca restaurant, where many of his mannerisms did

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[173] *See id.* at 572.
[174] *See id.* at 576.
[175] Etsitty v. Utah Transit Auth., 502 F.3d 1215 (10th Cir. 2007).
[176] *See id.* at 1219.
[177] *See id.*
[178] *See id.* at 1219-20.
[179] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 792 (1973); *Etsitty*, 502 F.3d at 1224 (discussing 42 U.S.C. §§2000e-2000e-17 (2009) generally).
[180] *McDonnell Douglas Corp.*, 411 U.S. at 802; *Etsitty*, 502 F.3d at 1224-25.
[181] *Etsitty*, 502 F.3d at 1224-27.
[182] *See id.* at 1227-28 (discussing 42 U.S.C. §§2000e-2000e-17 (2009) generally).
[183] Nichols v. Azteca Rest. Enter., Inc., 256 F.3d 864, 864 (9th Cir. 2001).

not fit within the male norm.[184] While working at Azteca, Sanchez was persistently harassed by coworkers and a supervisor because of his mannerisms.[185] Sanchez told his coworkers to stop, considered such behavior to be unwelcome, and reported the harassment to his supervisors.[186] But little was done about Sanchez's situation, and he was eventually fired from Azteca for leaving work in the middle of his shift after a volatile argument with an assistant manager.[187]

After examining all of the evidence presented by Sanchez and the record of the trial court, the majority proclaimed that the behavior of Sanchez's coworkers did constitute sexual harassment as defined by Title VII.[188] The majority noted that the behavior of Sanchez's coworkers was not welcome; that Sanchez had told his coworkers to desist from the offensive behavior; that Sanchez had reported the offensive behavior to his supervisors; that seen through the eyes of a reasonable person, the behavior committed by Sanchez's coworkers could be seen as sexual harassment under Title VII; that Sanchez's claims under Title VII were viable because of the decision made in *Price Waterhouse*, in that Sanchez's behavior did not fall under typical male stereotypes; and that Sanchez had provided sufficient evidence to support his claim under Title VII.[189] Thus, the majority proclaimed that Sanchez had a claim under Title VII for sexual harassment.[190]

5. *Prowel v. Wise Business Forms, Inc.*: Walking in the wrong way.[191]

Gender stereotyping can be quite pervasive in the workplace, especially when one considers the strength of gender roles within the United States. Prowel worked for Wise Business Forms (Wise) on the production line.[192] Because Prowel lacked gender conformity in the way that he acted and carried himself, several coworkers heckled and launched slurs at him and left sexually abusive material at Prowel's workspace.[193] Prowel met with Wise management in an attempt to solve the situation, but nothing was done about the harassment he experienced; citing a lack of available work at Wise, Prowel's supervisors eventually fired him.[194] Prowel brought suit against Wise, alleging sexual harassment under Title VII.[195] Wise filed a motion for summary judgement after the completion of discovery, and the court granted Wise's motion.[196] Prowel then appealed the court's decision.[197]

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[184] *See id.* at 870.
[185] *See id.*
[186] *See id.* at 870-71.
[187] *See id.* at 871.
[188] *See id.* at 871-73 (discussing 42 U.S.C. §2000e-2(a)(1) (2009)).
[189] Price Waterhouse v. Hopkins, 490 U.S. 228, 257-58 (1989); *Nichols*, 256 F.3d at 873-75 (discussing 42 U.S.C. §2000e-2(a)(1) (2009)).
[190] *Nichols*, 256 F.3d at 877-78 (discussing 42 U.S.C. §2000e-2(a)(1) (2009)).
[191] Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285 (3d Cir. 2009).
[192] *See id.* at 286.
[193] *See id.* at 287.
[194] *See id.* at 287-88.
[195] *See id.* at 288.
[196] *See id.* at 288-89.
[197] Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285, 289 (3d Cir. 2009).

When considering Prowel's case, the majority maintained that Prowel had submitted enough evidence to support his claim of sexual harassment under Title VII.[198] However, because of the ambiguity of whether Prowel was discriminated against because of his sexual orientation or because he failed to conform to gender stereotypes, the case had to be considered by a jury.[199] Therefore, the majority remanded Prowel's case to the district court for further consideration.[200]

6. *Rene v. MGM Grand Hotel, Inc.*: The butler did it.[201]

In a workplace predominantly comprised of males, discrimination due to a lack of gender conformity can be very acute. This fact was especially true for Rene, who worked as a butler at MGM Grand Hotel (MGM) with other male butlers.[202] While employed at MGM, Rene was subjected to pervasive as well as continuous verbal and physical abuse that included touching in an extreme manner.[203] Rene provided evidence that showed how the majority of his coworkers, including a supervisor, took part in the harassment, primarily because Rene was homosexual.[204]

In making a decision in favor of Rene, the majority disregarded sexual orientation in light of the pervasiveness of the harassment, noting that in cases involving women in similar situations, sexual orientation was irrelevant.[205] Furthermore, by relying in part on *Oncale*, the majority opined that the behavior of Rene's coworkers was based on Rene's lack of gender conformity; that Rene's coworkers' behavior was both sexual and discriminatory in nature; and that the behavior of Rene's coworkers fell under the types of behavior that are prohibited under Title VII.[206]

7. *Dawson v. Entek International*: Harassment based on sexual orientation.[207]

Without properly pleading and arguing a Title VII discrimination case, an LGBT plaintiff has little hope of being successful in an attempt to sue an employer for harassment involving gender; *Dawson* is an example of such a situation.[208] Dawson began working at Entek International (Entek) on a production line where several coworkers were already aware that Dawson was homosexual.[209] Over a one-month period, Dawson experienced sexual harassment that included derogatory statements from his coworkers because of his sexual orientation, thus causing him a high level of stress.[210] Because of this stress, Dawson decided to take one day

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[198] *See id.* at 291 (discussing 42 U.S.C. §§2000e-2000e-17 (2009) generally).
[199] *See id.* at 292 (discussing 42 U.S.C. §§2000e-2000e-17 (2009) generally).
[200] *See id.* at 293.
[201] Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1061 (9th Cir. 2002).
[202] *See id.* at 1064.
[203] *See id.*
[204] *See id.*
[205] *See id.* at 1068.
[206] Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 81 (1998); *Rene*, 305 F.3d at 1066-68 (discussing 42 U.S.C. §§2000e-2000e-17 (2009) generally).
[207] Dawson v. Entek Int'l, 630 F.3d 928, 928 (9th Cir. 2011).
[208] *See id.* at 938 (discussing 42 U.S.C. §§2000e-2000e-17 (2009) generally).
[209] *See id.* at 932.
[210] *See id.* at 932-33.

off.[211] When Dawson returned to work the next day, he informed the human resources department at Entek about the sexual harassment he was experiencing.[212] Entek fired Dawson from his position two days after he called in sick because of his failure to follow Entek's company policy that required an employee to inform a supervisor at least one hour before a scheduled shift was to begin that the employee would be unable to work the shift.[213]

The majority maintained Dawson had failed to prove or properly argue his claim for hostile work environment due to sex.[214] Dawson failed in this regard because he did not provide any persuasive evidence that he was being harassed due to a lack of gender conformity in the workplace.[215] Furthermore, Dawson failed to meet the requirements set down by *McDonnell Douglas*.[216] Thus, Dawson did not have a claim under Title VII for same-gender harassment.[217] *Dawson* helps to show how an LGBT individual must properly argue and present evidence by showing that an adverse action has taken place against him because of a failure to conform to gender stereotypes.[218]

8. ***Bibby v. Philadelphia Coca Cola Bottling Company***: Sexual harassment based on identity.[219]

In a sexual-harassment case, an LGBT individual must meet certain criteria to show that sexual discrimination occurred in the workplace.[220] The criteria that must be met include showing how sexual harassment could adversely and pervasively alter a person's conditions of employment.[221] *Bibby* is a case where the plaintiff failed to take these criteria into consideration.[222] While working for a Coca-Cola bottling plant in Philadelphia, Bibby was the target of harassment based in part on his sexual orientation.[223] He alleged, in part, that his coworkers and supervisor regularly harassed him sexually.[224] He filed a complaint with the Philadelphia Human Rights Commission and later requested the right to sue his employer and coworkers.[225] Bibby's request was granted, and he filed suit in the Eastern District of Pennsylvania.[226] After discovery had been conducted, Bibby's employer filed a motion for

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[211] *See id.* at 933.
[212] *See id.* at 933-34.
[213] Dawson v. Entek Int'l, 630 F.3d 928, 933-934 (9th Cir. 2011).
[214] *See id.* at 938 (discussing 42 U.S.C. §§2000e-2000e-17 (2009) generally).
[215] *See id.* (discussing 42 U.S.C. §§2000e-2000e-17 (2009) generally).
[216] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801-04 (1973); *Dawson*, 630 F.3d at 938 (discussing 42 U.S.C. §§2000e-2000e-17 (2009) generally).
[217] *Dawson*, 630 F.3d at 938 (discussing 42 U.S.C. §§2000e-2000e-17 (2009) generally).
[218] *See id.* at 942.
[219] Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 257 (3d Cir. 2001).
[220] *See id.* at 264-65.
[221] Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 78-82 (1998).
[222] *Bibby*, 260 F.3d at 264-65.
[223] *See id.* at 259.
[224] *See id.* at 259-61.
[225] *See id.* at 260.
[226] *See id.*

summary judgment, and the district court granted it.[227] Bibby then filed an appeal with the Third Circuit of the Court of Appeals.[228]

Because the harassment was in large part due to Bibby's sexual orientation, he was unable to show that the origin of the harassment was due to his gender.[229] The majority proclaimed that Bibby failed to prove he was discriminated against under Title VII; the evidence showed, the majority maintained, the harassment was due to his sexual orientation, not because of his lack of gender conformity.[230] Furthermore, the majority noted that once a party proves that he or she has been discriminated against because of a lack of gender conformity, the person's sexual orientation is of no consequence.[231] Bibby's situation was very similar to the facts in *Dawson*, in that Dawson and Bibby were both harassed because of their sexual orientation and were both unable to show they were harassed because of gender.[232]

9. *Higgins v. New Balance Athletic Shoe, Inc.*: Harassment based on sexual identity.[233]

When bringing a claim of sexual harassment under Title VII, an LGBT individual must be sure to distinguish discrimination based on sexual orientation and discrimination based on gender. At New Balance Athletic Shoes, Inc. (New Balance), Higgins worked in the production facility and had few problems with the administration.[234] However, a number of employees and supervisors sexually harassed Higgins based solely on his homosexuality.[235] The sexual harassment Higgins experienced included derogatory and vulgar remarks.[236] Due to several altercations with fellow employees, management at New Balance decided to fire Higgins, citing his lack of communication skills.[237]

Higgins lost, the majority asserted, because he failed to properly demonstrate, with a preponderance of evidence, his case under Title VII.[238] When appealing the decision, Higgins brought forth two new theories based on Title VII's requirement that harassment occur "because of . . . sex" and the Supreme Court's decision in *Price Waterhouse*.[239] However, the majority maintained that Higgins had failed to properly present these theories when his case was tried at the district court, thereby negating Higgins's new theories.[240] The majority further proclaimed that Higgins failed to provide sufficient evidence to prove his case of sexual harassment as

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[227] Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 257 (3d Cir. 2001).
[228] *See id.*
[229] *See id.* at 264.
[230] *See id.* at 264-65.
[231] *See id.*
[232] *See id.* at 264-65; Dawson v. Entek Int'l, 630 F.3d 928, 942 (9th Cir. 2011).
[233] Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 252-53 (1st Cir. 1999).
[234] *See id.* at 257.
[235] *See id.*
[236] *See id.*
[237] *See id.*
[238] *Id.* at 258-59 (discussing 42 U.S.C. §§2000e-2000e-17 (2009) generally).
[239] Price Waterhouse v. Hopkins, 490 U.S. 228, 250-52 (1989); *Higgins*, 194 F.3d at 258-59 (discussing 42 U.S. §20002-2(a)(1) (2009)).
[240] *Higgins*, 194 F.3d at 259-60.

denoted by *Oncale*, which requires a plaintiff to show that behavior is based on sex and is not merely offensive to the plaintiff.[241]

10. ***Pedreira v. Kentucky Baptist Homes for Children, Inc.***: Not allowing LGBT individuals to work at an establishment.[242]

When dealing with employment discrimination against LGBT individuals, employers with a certain set of religious beliefs sometimes object to employing them. Vance, a lesbian, was a potential employee of Kentucky Baptist Homes for Children (KBHC) who joined a discrimination suit under Title VII alleging that KBHC's practice of not hiring or employing LGBT individuals was illegal.[243] Vance contended she was fully qualified for a job at KBHC caring for children, but because of KBHC's policy that prohibited the employment of LGBT individuals, Vance was unable to work at KBHC.[244]

Because KBHC's policy excluded LGBT individuals from its employment, Vance contended she had been discriminated against under Title VII.[245] The majority opined that because Vance did not properly argue her case under Title VII, have standing under Title VII to allege that she was discriminated against because of her sex, or apply for the job in question, Vance's claims under Title VII were moot.[246]

D. The district court cases that are associated with LGBT employment discrimination under Title VII

In this subsection, a presentation of a select number of district court cases that dealt with employment discrimination against LGBT individuals under Title VII shall be introduced.[247]

1. ***Centola v. Potter***: Delivering discrimination.[248]

When an LGBT individual files an employment-discrimination claim under Title VII, he or she must be sure to bring forth sufficient evidence to properly assert a claim of sex discrimination. A plaintiff cannot simply make an allegation without any supporting evidence, but instead must provide a preponderance of proof to show that the plaintiff has been discriminated against due to gender or because of a failure to conform to gender stereotypes.[249]

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[241] Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 78-82 (1998); *Higgins*, 194 F.3d at 258-59.
[242] Pedreira v. Ky. Baptist Homes for Children, Inc., 579 F.3d 722 (6th Cir. 2009).
[243] *See id.* at 724-28.
[244] *See id.* at 727.
[245] *See id.* (discussing 42 U.S.C. §§2000e-2000e-17 (2009) generally).
[246] *See id.* (discussing 42 U.S.C. §§2000e-2000e-17 (2009) generally).
[247] Lopez v. River Oaks Imaging & Diagnostic Grp., Inc., 542 F. Supp. 2d 653, 653 (S.D. Tex. 2008); Schroer v. Billington, 577 F. Supp. 2d 293, 293 (D.D.C. 2008); Centola v. Potter, 183 F. Supp. 2d 403, 403 (D. Ma. 2002); Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212, 1212 (D. Or. 2002); Erdmann v. Tranquility, Inc., 155 F. Supp. 2d 1152, 1152 (N.D. Ca. 2001).
[248] *See Centola*, 183 F. Supp. 2d at 403.
[249] *See id.* at 406; *e.g.,* Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 78-82 (1998).

Centola worked at the United States Post Office as a mail carrier for a number of years.[250] While Centola was gay, he never revealed his homosexual status to his coworkers, but Centola's coworkers still harassed him in a verbal nature and left sexually explicit items at his workstation.[251] Centola's coworkers treated him differently when compared to other coworkers; when Centola asked his coworkers to stop the harassment, they ignored his requests.[252] Centola also informed his supervisors of the situation, but Centola's supervisors did nothing to correct the situation.[253] Centola filed suit against the United States Postal Service alleging, among several charges, that he had been sexually harassed and discharged from his job because he did not conform to the gender stereotypes held by his co-workers and because of his sex.[254] The United States Postal Service contested Centola's claims and filed a motion for summary judgment.[255]

After examining the evidence, Judge Gertner proclaimed Centola had a case for sexual harassment under Title VII because he had provided evidence that could provide an inference that he had been harassed based on gender and sex stereotyping, thereby negating a motion for summary judgement.[256] Judge Gertner further opined that because Centola's co-workers and supervisors were unaware of his sexual orientation, the United States Postal Service's assertion that Centola's discrimination was based on his sexual orientation was groundless.[257]

2. ***Heller v. Columbia Edgewater Country Club***: Cooking discrimination.[258]

Commonly held ideals and misconceptions that are maintained by some about other groups can be, at times, hard to overcome. Heller, a lesbian, worked for Columbia Edgewater (Columbia) as a cook.[259] While working at Columbia, Heller, as well as several other openly gay coworkers and friends of Heller, were systematically harassed by her supervisor, Cagle, for failing to conform to typical gender stereotypes.[260] Cagle's alleged sexual harassment included derogatory comments, slurs, and questions concerning Heller's gender non-conformity and sexuality with other parties.[261] Cagle treated Heller, Heller's friends, and the other openly gay employees differently when compared to the other employees at Columbia by making statements about their gender non-conformity and sexual orientations, thus adversely affecting Heller's work environment.[262]

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[250] *See Centola*, 183 F. Supp. 2d at 406-07.
[251] *See id.* at 407.
[252] *See id.*
[253] Centola v. Potter, 183 F. Supp. 2d 403, 407 (D. Ma. 2002).
[254] *See id.* at 406.
[255] *See id.* at 407-08.
[256] *See id.* at 409-10 (discussing 42 U.S.C. §2000e-2(a)(1) (2009)).
[257] *See id.* at 410 (discussing 42 U.S.C. §2000e-2(a)(1) (2009)).
[258] Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212, 1212 (D. Or. 2002).
[259] *See id.* at 1216-17.
[260] *See id.* at 1217-18.
[261] *See id.* at 1216-18.
[262] *See id.* at 1217-19.

Cagle further subjected Heller, Heller's friends, and the other openly gay employees to more and harder work, and she was overly critical of Heller's shift when the shift was doing work that was comparable to the other shifts.[263] Heller was also written up several times by Cagle for actions that were typically overlooked when committed by heterosexual employees.[264] Eventually, Heller was fired by Cagle, who claimed that Heller failed to improve her performance after receiving the write-ups.[265] After Heller's termination, she filed suit against Columbia alleging that she was discriminated against because of sex as defined by Title VII.[266]

After considering all of the evidence, Judge Jelderks denied Columbia's motion for summary judgement and proclaimed that Heller did have sufficient evidence to move forward in her Title VII harassment claims.[267] Furthermore, Judge Jelderks maintained that Heller had provided sufficient evidence to show that she could have been harassed and discharged for lack of conforming to gender stereotypes, thus further negating Columbia's assertions.[268]

Judge Jelderks maintained that as long as a supervisor's conduct is pervasive enough to cause harassment, the exact number of times the behavior occurred is irrelevant.[269] Judge Jelderks stressed that even though Cagle had not been physically threatening, this fact did not relieve Cagle or Columbia of liability under Title VII.[270] Judge Jelderks also noted that Heller had asked Cagle to desist from the harassment, but the behavior continued.[271] Furthermore, Judge Jelderks maintained that the testimony provided at court suggested animus emanating from Cagle towards Heller and her friends.[272]

3. ***Lopez v. River Oaks Imaging & Diagnostic Group, Inc.***: Discrimination based on an alleged lie.[273]

Some people automatically assume, without basis, that LGBT individuals lack morals and are prone to lie. Lopez, a transgender person who lived her life completely as a female but was not yet a full female, applied for a job at River Oaks as a scheduler.[274] Lopez filled out all of the necessary paperwork for the job at River Oaks with her female name and male name.[275] The interview and background check were successful, and Lopez was offered the position.[276] But upper management at River Oaks soon discovered Lopez's transgender status.[277] Citing

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[263] *See id.* at 1218.
[264] Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212, 1219 (D. Or. 2002).
[265] *See id.* at 1220.
[266] *See id.* (discussing 42 U.S.C. §§2000e-2000e-17 (2009) generally).
[267] *See id.* at 1224-25 (discussing 42 U.S.C. §§2000e-2000e-17 (2009) generally).
[268] *See id.* at 1224.
[269] Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212, 1225 (D. Or. 2002).
[270] *See id.* at 1225-26.
[271] *See id.* at 1226.
[272] *See id.* at 1228.
[273] Lopez v. River Oaks Imaging & Diagnostic Grp., Inc., 542 F. Supp. 2d 653, 653 (S.D. Tex. 2008).
[274] *See id.* at 655-56.
[275] *See id.* at 656.
[276] *See id.*
[277] *See id.*

Lopez's supposed deception about her gender on her application and background check, River Oaks revoked the job offer and Lopez filed suit.[278]

In concluding that Lopez did have a triable case of sex discrimination under Title VII, Judge Atlas stressed several facts presented to the court during a hearing pertaining to a motion for summary judgement that River Oaks filed.[279] First, Judge Atlas maintained that Lopez had provided enough evidence for the claims made under Title VII to move forward.[280] Second, despite River Oaks's assertions to the contrary, Judge Atlas maintained that Lopez had provided both her male and female name on all of the relevant paperwork necessary to work at River Oaks, and that none of the parties associated with hiring Lopez were confused by the two names that were provided by Lopez.[281] And third, Judge Atlas proclaimed that Lopez's status as a transgender person did not bar a claim under Title VII, that River Oaks's perception of Lopez did play a role in River Oaks's decision not to hire Lopez, and because River Oaks viewed Lopez and other transgender individuals as not falling under typical gender profiles, the suit would move forward.[282]

4. ***Schroer v. Billington***: Making assumptions in the library.[283]

When examining a person's history, one has a tendency to automatically make assumptions about the person based solely on the person's past. Schroer, a transgender individual who had just begun to put herself out as female, applied for a job at the Library of Congress (the Library).[284] Schroer was highly qualified for the job, having an extensive military history and a top secret clearance.[285] Before learning of Schroer's status as a transgender individual, the Library offered the job to Schroer.[286] However, upon learning that Schroer was a transgender individual, the Library secretly planned to revoke Schroer's job offer based solely on Schroer's status as a transgender individual and offer the job to another applicant.[287]

Representatives of the Library created several reasons why Schroer could not be hired by the Library.[288] The Library's alleged concerns were that Schroer would no longer have the necessary security clearance to work at the Library; that Schroer would lose her contacts and credibility to testify at Congress after making her transition from male to female; that Schroer's transition would distract her co-workers; and that because Schroer lied to the Library about her transition from male to female, Schroer was not trustworthy.[289] When Schroer learned why she

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[278] *See id.*
[279] Lopez v. River Oaks Imaging & Diagnostic Grp., Inc., 542 F. Supp. 2d 653, 657 (S.D. Tex. 2008) (discussing 42 U.S.C. §§2000e-2000e-17 (2009) generally).
[280] *id.* at 660-61 (discussing 42 U.S.C. §§2000e-2000e-17 (2009) generally).
[281] *See id.* at 665.
[282] *See id.* at 666-68.
[283] Schroer v. Billington, 577 F. Supp. 2d 293, 293 (D.D.C. 2008).
[284] *See id.* at 295.
[285] *See id.*
[286] *Id.* at 296.
[287] *See id.* at 296-97.
[288] *See id.* at 300-02.
[289] Schroer v. Billington, 577 F. Supp. 2d 293, 300-02 (D.D.C. 2008).

did not get the job at the Library, she filed suit against the Library alleging that the Library had committed sex discrimination under Title VII.[290]

In order to reach a determination on a motion for summary judgement filed by the Library, Judge Robertson examined arguments from both the Library and Schroer.[291] After examining these arguments and the evidence produced by both parties that included depositions, testimony, and internal correspondence within the Library, Judge Robertson proclaimed that Schroer did have a claim for gender discrimination as defined by Title VII.[292] To come to this conclusion, Judge Robertson noted that the reasons provided by the Library that included concerns over Schroer's security clearance and Schroer losing vital contacts related to the job at the Library were pretextual, in that the Library had failed to properly determine if Schroer's contacts and top secret clearance would be affected in an adverse way by her transgender status.[293]

Judge Robertson further stressed that the actions of Preece, the employee at the Library responsible for deciding if Schroer would be hired, was biased against Schroer and that Preece was only attempting to make an excuse not to hire Schroer because she did not fit into typical gender stereotypes.[294] Judge Robertson declared that Schroer did have a triable case for gender discrimination under Title VII and denied the Library's motion to dismiss Schroer's claims because Schroer provided sufficient evidence and properly argued her case while also showing that the Library's reasons for not hiring her were merely a pretext.[295]

IV. Final Thoughts

Employment discrimination against LGBT individuals is still a controversial issue within the United States, but the federal court system has taken important steps in preventing further discrimination.[296] The Supreme Court has created a number of important tests and decisions, including a test of shifting burdens and how same-gender harassment is not permitted under Title VII, which have assisted in preventing workplace discrimination under Title VII.[297] Additionally, the Supreme Court created a test that allowed LGBT individuals to assert employment discrimination based on vicarious liability that would apply to an employer when a supervisor has direct control over an employee that is immediate.[298]

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[290] *See id.* at 295 (discussing 42 U.S.C. §§2000e-2000e-17 (2009) generally).
[291] *See id.* at 300.
[292] *See id.* at 308 (discussing 42 U.S.C. §§2000e-2000e-17 (2009) generally).
[293] *See id.* at 300-02.
[294] Schroer v. Billington, 577 F. Supp. 2d 293, 305 (D.D.C. 2008).
[295] *See id.* at 308 (discussing 42 U.S.C. §§2000e-2000e-17 (2009) generally).
[296] *See* Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 81-82 (1998); Price Waterhouse v. Hopkins, 490 U.S. 228, 257-58 (1989); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 806-07 (1973); Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971); Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1069 (9th Cir. 2002).
[297] *See McDonnell Douglas Corp.*, 411 U.S. at 802; *Oncale*, 523 U.S. at 78-82; *Griggs*, 401 U.S. at 431; *Price Waterhouse*, 490 U.S. at 241-42.
[298] Faragher v. City of Boca Raton, 524 U.S. 775, 807-08 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764-65 (1998).

Furthermore, when there is an employment action that tangibly results in a discharge, when there is a reassignment that is not desirable by an employee, or when there is a discharge of the employee, an employer cannot use an affirmative defense in a vicarious liability employment discrimination case.[299] But the court system has not yet come to a consensus in how to deal with employment discrimination allegations brought by LGBT individuals, particularly when the discrimination is associated with sexual orientation.[300]

In order to be successful, an LGBT individual must assert that employment discrimination was because of gender or sex, a failure to conform to gender stereotypes, or because of sexual harassment.[301] Typically, courts will not recognize an allegation of employment discrimination based on sexual orientation unless the discrimination can be shown to be similar to heterosexual employment discrimination.[302] The claims that seem to have the most success involve discrimination against LGBT individuals who fail to conform to gender stereotypes.[303]

But success could prove to be elusive, for Title VII claims brought forth by LGBT individuals are still very difficult to prove.[304] As Judge Gertner noted in *Centola*, if a person is stereotyped and the behavior results in discrimination because of his or her gender, then sexual orientation is irrelevant under Title VII and the employer has allowed itself to become liable under Title VII.[305] Until such time as the court system comes to a consensus in how to decide employment-discrimination claims brought by LGBT individuals under Title VII, an easier remedy for LGBT individuals will be difficult to find.

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[299] *Faragher*, 524 U.S. at 807-08; *Burlington Indus., Inc.*, 524 U.S. at 765.
[300] *See* Pizer, Sears, Mallory, & Hunter, *supra* note 2, at 752-54.
[301] *See* Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 264-65 (3d Cir. 2001); Nichols v. Azteca Rest. Enter., Inc., 256 F.3d 864, 874-75, 877-78 (9th Cir. 2001).
[302] *See* Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1064 (9th Cir. 2002).
[303] *See* Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002); *Rene*, 305 F.3d at 1064-65.
[304] *See Bibby*, 260 F.3d at 264-65.
[305] Centola v. Potter, 183 F. Supp. 2d 403, 409-10 (D. Ma. 2002).