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Covering and Identity Performance in Employment Discrimination Law

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COVERING AND IDENTITY PERFORMANCE IN EMPLOYMENT DISCRIMINATION LAW

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ABSTRACT

At a time when the law is transforming gay rights, the LGBTQ community finds itself at the climax of its latest civil rights challenge: federal employment non-discrimination protections. This Note addresses the federal circuit split regarding whether Title VII's prohibition against sex discrimination includes a prohibition on the basis of sexual orientation. By integrating the Seventh Circuit's analysis in Hively v. Ivy Tech Community College *within the frameworks of intersectionality, identity performance, and queer theory, this Note evaluates how an evolving understanding of Title VII's protections affect members of the LGBTQ communities.*

INTRODUCTION

In March 2017, the Seventh Circuit Court of Appeals marked a turning point in *Hively v. Ivy Tech Community College*,[1] holding that discrimination based on sexual orientation was prohibited under Title VII of the Civil Rights Act of 1964.[2] In the same breath, the Eleventh Circuit found opposite in *Evans v. Georgia Regional Hospital*.[3] Since then, in *Zarda v. Altitude Express*,[4] the Second Circuit, sitting en banc, joined the Seventh Circuit—cementing a clear circuit split on the issue. Meanwhile, the Trump Administration and the U.S. Justice Department have walked back President Obama's executive support of employment discrimination protections.[5]

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1. Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 351–52 (7th Cir. 2017) (en banc) (finding that "a person who alleges that she experienced employment discrimination on basis of her sexual orientation has put forth a case of sex discrimination for Title VII purposes"). *See also* Sari M. Alamuddin, *Seventh Circuit Extends Title VII Protections to Sexual Orientation*, NAT'L L. REV. (Apr. 7, 2007), https://www.natlawreview.com/article/seventh-circuit-extends-title-vii-protections-to-sexual-orientation.

2. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2012).

3. *See* Evans v. Ga. Reg'l Hosp., 850 F.3d 1248 (11th Cir. 2017) (holding that discrimination based on sexual orientation was not actionable under Title VII).

4. Zarda v. Attitude Express, 883 F.3d 100 (2d Cir. 2018) (en banc).

5. *See, e.g.*, Fred Barbash, *Trump Administration, Intervening in Major LGBT Case, Says Job*

Thus, at this critical juncture, it is essential to evaluate how civil rights advocates should adapt to this evolving legal and political landscape; how employment discrimination law should address concerns about discrimination based on sexual orientation; and how best to do so while integrating an identity performance and intersectional framework. This note addresses these questions by evaluating them through the lens of identity performance theory, the "covering" legal scholarship,[6] and intersectionality theory in the workplace. This Note first discusses the implications of an evolving judicial and political landscape on employment protection efforts. The following section evaluates the renewed relevance of identity performance and intersectional theory as it relates to these efforts in the workplace. Finally, this Note argues that movement towards categorical employment protections for sexual orientation, although essential, ultimately displaces such discrimination elsewhere in more subtle, pervasive ways and fails to account for intersectional realities in the American workforce. Because of their intersectional identities, LGBTQ employees of color are in an especially vulnerable position under the current Title VII employment discrimination framework. Updating our understanding of identity performance in the workplace will require addressing these vulnerabilities in intersectional communities and adopting meaningful solutions under law.

I. CURRENT POLITICAL AND JUDICIAL LANDSCAPES

Understanding the political landscape is an essential prerequisite to effective advocacy for new civil rights legislation.[7] How the American

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Bias Law Does Not Cover Sexual Orientation, WASH. POST (July 27, 2017), http://www.washingtonpost.com/news/morning-mix/wp/2017/07/27/trump-administration-intervening-in-major-lgbt-case-says-job-bias-law-does-not-cover-sexual-orientation/?utm_term=.23654f66e095.

6. In renowned legal theorist Kenji Yoshino's touchstone book, *Covering*, Yoshino identified three ways any minority group can assimilate: conversion, passing, and covering. He explains:

> Conversion means the underlying identity is altered. Conversion occurs when a lesbian changes her orientation to become straight. Passing means the underlying identity is not altered, but hidden. Passing occurs when a lesbian presents herself to the world as straight. Covering means the underlying identity is neither altered nor hidden, but is downplayed. Covering occurs when a lesbian both is, and says she is, a lesbian, but otherwise makes it easy for others to disattend her orientation.

Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 772 (2002). For Yoshino's fully established theory of covering's role in employment discrimination, see KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS (2006).

7. William N. Eskridge, Jr., *A Jurisprudence of Coming Out: Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2426, 2443 (1997) (recognizing that the current political temperature around a civil rights issue shapes potential outcomes and strategies, including the discourse around "coming-out" and being out in the workplace, which are "explicitly political act[s]").

populace is discussing an issue can shape how the executive branch or the legislature chooses to support or contest a change in the law.[8] Likewise, in the judicial arena, often judges may more be inclined to "acquiesce [] in the political consensus."[9] There are three institutional players in the political landscape surrounding sexual orientation nondiscrimination protections: executive orders, national legislation, and agency guidelines and rulings. This Note will address significant developments in each of these arenas in turn.

A. Executive Orders

In 1998, President Bill Clinton passed the first executive order that included a prohibition on discrimination against federal employees because of their sexual orientation.[10] Executive Order 13,160 prohibits, *inter alia*, "discrimination on the basis of race, sex, color, national origin, disability, religion, age, sexual orientation, and status as a parent" in federal employment.[11] At the time, the Executive Order excluded members of the armed forces and military academies.[12] During his presidency, even "conservative, Republican President George W. Bush, Jr., continue[d] to enforce former President Bill Clinton's 1998 Executive Order."[13] President Obama further expanded those existing protections by adding gender identity as a protected characteristic; President Obama also extended federal employment protections based on sexual orientation or gender identity to employees working for federal government contractors.[14]

However, since President Donald Trump took office, his administration has reversed previous administrations' support for banning sexual orientation discrimination. In March 2017, President Trump rescinded former President Obama's executive order, revoking key provisions that "ban[ ] federal contractors from discriminating against employees on the basis of sexual orientation or identity."[15]

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8. *Id.* at 2426.
9. *Id.*
10. Exec. Order. No. 13,087, 63 Fed. Reg. 30,097 (May 28, 1998).
11. Exec. Order No. 13,160, 65 Fed. Reg. 39,775 (June 23, 2000).
12. MARIA L. ONTIVEROS ET AL., EMPLOYMENT DISCRIMINATION LAW CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE 528 (9th ed. 2016).
13. Toni Lester, *Queering the Office: Can Sexual Orientation Employment Discrimination Laws Transform Work Place Norms for LGBT Employees*, 73 UMKC L. REV. 643, 643 (2005).
14. *Id. See also* Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (2014).
15. Mary Emily O'Hara, *LGBT Advocates Say Trump's New Executive Order Makes Them Vulnerable to Discrimination,* NBC NEWS (Mar. 30, 2017, 8:45 A.M.), https://www.nbcnews.com/feature/nbc-out/lgbtq-advocates-say-trump-s-news-executive-order-makes-them-n740301.

B. National Legislation

The next piece of the political landscape is national legislation. Currently there is no federal law that explicitly prohibits employment discrimination on the basis of sexual orientation.[16] The history of congressional attempts to pass such legislation has been rocky. The Equality Act, first introduced to the House of Representatives in 1974, sought to prohibit discrimination, *inter alia*, on the basis of sexual orientation in federally assisted programs, housing, and financing.[17] The original Act failed to ever reach a vote in the House of Representatives.[18]

Over thirty years later, in 2007, the House of Representatives passed a version of the Employment Non-Discrimination Act (ENDA), which would protect employees from discrimination on the basis of "actual or perceived sexual orientation," but not on the basis of gender identity.[19] The ENDA failed to reach a vote in the Senate.[20] Later, in 2009, the House of Representatives and the Senate both held hearings on a new version of the ENDA, which included protections for both sexual orientation and gender identity.[21] That version failed to make it out of either chamber's committee.[22]

Most recently, in March 2019, representatives in both the House and Senate reintroduced the Equality Act.[23] The current version of the Equality Act would amend Title VII to "ban discrimination against LGBTQ people in employment, housing, public accommodations, jury service, education, federal programs and credit."[24]

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16. ONTIVEROS ET AL., *supra* note 12, at 491. However, there are currently twenty-one states that prohibit discrimination based on sexual orientation and an additional twelve states that prohibit discrimination based on sexual orientation against public employees. Twenty states prohibit discrimination based on gender identity, with an additional five states that prohibit discrimination against public employees based on gender identity. Additionally, there are an increasing number of city and municipal ordinances providing such protections nationwide. *See State Map of Laws and Policies,* HUMAN RIGHTS CAMPAIGN, https://www.hrc.org/state-maps/employment (last visited Apr. 4, 2019). For a more thorough discussion, see generally Jerome Hunt, *A State-by-State Examination of Nondiscrimination Laws and Policies*, CTR. AM. PROGRESS ACTION FUND (2012), https://cdn.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/state_nondiscrimination.pdf.

17. H.R. 15692, 93rd Cong. (1974).

18. *Id.*

19. *See* H.R. 3685, 110th Cong. (2007).

20. ONTIVEROS ET AL., *supra* note 12, at 526.

21. *See* H.R. 3017, 111th Cong. (2009); S. 1584, 111th Cong. (2009).

22. ONTIVEROS ET AL., *supra* note 12, at 527.

23. H.R. 5, 116th Cong. (2019); S. 788, 116th Cong. (2019); *see also* Tim Fitzsimons, *Democrats Reintroduce Equality Act to Ban LGBTQ Discrimination*, NBC News (Mar. 13, 2019 3:48 PM), https://www.nbcnews.com/feature/nbc-out/democrats-reintroduce-equality-act-ban-lgbtq-discrimination-n982771.

24. *Id.*

C. Agency Authority

While national legislation defines the scope of federal law, administrative agencies and guidelines are critical enforcement mechanisms for those laws and policies. Agency guidelines are uniquely centered at the nexus of both the political and judicial landscapes. The U.S. Equal Employment Opportunity Commission ("EEOC"), tasked with enforcing federal employment protections, is a model example. For one, the EEOC, as an executive agency, is undeniably political. Granted, the EEOC has strived to be bipartisan; it currently seats both Democrat and Republican commissioners.[25] However, the EEOC appointment and confirmation processes, along with its employment guidelines and administrative decisions are political tools wielded by the executive.[26]

The Agency's rulings are judicial in nature. Like the patchwork of executive orders, the EEOC's understanding of sexual orientation under Title VII is also evolving. The EEOC's understanding is key because it is the executive agency tasked with enforcing Title VII.[27] Also, to file a claim for discrimination under Title VII, a plaintiff must first file a charge with the EEOC.[28] The federal judiciary also looks to the EEOC'S guidelines as an indicator of how the federal government may have intended Title VII to be interpreted.[29] However, the EEOC's rulings are not binding on federal courts—only federal employers.[30]

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25. The EEOC has five seats: currently one Republican, one Democrat, and three vacancies. *See The Commission and the General Counsel*, U.S. EQUAL OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/commission.cfm (last visited Apr. 4, 2019). Senator Mike Lee (R-Utah) blocked the renomination of Chai Feldblum in December 2018 because of her "radical views on marriage." Tim Fitzsimons, *GOP Senator Blocks Reappointment of EEOC's Only LGBTQ Commissioner*, NBC NEWS (Dec. 19, 2018), https://www.nbcnews.com/feature/nbc-out/gop-senator-holding-reappointment-eeoc-s-only-lgbtq-commissioner-n949611. President Trump nominated one Republican to fill one of those vacancies, but the nominee has since withdrawn. Erin Mulvaney, *Trump EEOC Nominee Daniel Gade Says He Withdrew Amid 'Political Mess'*, Nat'l L. J. (Dec. 20, 2018), https://www.law.com/nationallawjournal/2018/12/20/trump-eeoc-nominee-daniel-gade-says-he-withdrew-amid-political-mess/?slreturn=20190229152044.

26. *Id.*

27. Lester, *supra* note 13, at 653.

28. *See* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, FILING A CHARGE OF EMPLOYMENT DISCRIMINATION (2018), http://www.eeoc.gov/employees/charge.cfm.

29. ONTIVEROS ET AL., *supra* note 12, at 528–29.

30. *Id.*

Until 2015, the EEOC's rulings and guidelines were consistent with federal courts on this issue; sexual orientation was not included under Title VII's ban on sex discrimination.[31] In 2015, an EEOC ruling overturned the Agency's position in *Baldwin v. Foxx*, holding that Title VII's prohibition against discrimination on the basis of sex should be interpreted to include an understanding that discrimination on the basis of sexual orientation was barred as well.[32] Although the EEOC's decision in *Baldwin* is not binding on federal (or state) courts, its analysis is still critical to the development of the federal judiciary on this issue under Title VII.

In *Baldwin*, the plaintiff, David Baldwin worked as Supervisory Traffic Control Specialist at Miami International Airport.[33] When he was not promoted, Baldwin filed a charge with the EEOC, alleging he was denied because of his sexual orientation as a gay man.[34] Baldwin based his charge on the several negative comments he received about his orientation from his supervisor. On appeal the EEOC emphasized that Title VII's prohibition of sex discrimination "means that employers may not 'rel[y] upon sex-based considerations' or take gender into account when making employment decisions."[35] The EEOC held this protection "applies equally in claims brought by lesbian, gay, and bisexual individuals under Title VII."[36] The EEOC explained its rationale using the following example:

> Sexual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex. For example, assume that an employer suspends a lesbian employee for displaying a photo of her female spouse on her desk, but does not suspend a male employee for displaying a photo of his female spouse on his desk. The lesbian employee in that example can allege that her employer took an adverse action against her that the employer would not have taken had she been male.[37]

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31. *See, e.g.*, ONTIVEROS ET AL., *supra* note 12, at 496 (noting that EEOC's previous position been consistent with *DeSantis*—the precedential 1979 Ninth Circuit case rejecting discrimination on the basis of sexual orientation as "sex discrimination" under Title VII); *accord* DeSantis v. Pac. Tel. & Tel. Co., 607 F.3d 327 (9th Cir. 1979), *abrogated in part by* Nichols v. Azteca Rest. Enters, Inc., 256 F.3d 864, 874–75 (9th Cir. 2001).

32. Baldwin v. Foxx, EEOC Appeal No. 0120133080 (July 15, 2015).

33. *Id.*

34. *Id.*

35. *Id.* (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 239, 241-42 (1989)). The EEOC also clarified that as used in Title VII, "sex" "encompasses both sex—that is, the biological differences between men and women—and gender." *Id.* (quoting Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000)).

36. *Id.*

37. *Id.*

Reception of *Baldwin*'s significance has been mixed. On the one hand, "[c]ourts might defer to the Agency's interpretation."[38] On the other hand, "[a]s an EEOC ruling, "*Baldwin* . . . is not controlling on the federal courts."[39] In fact, in its most recent opportunity, the Supreme Court declined to give the EEOC deference.[40] For those reasons, some legal theorists argue that *Baldwin* is not "a watershed moment for advocates of LGBTQ workplace equality."[41] In fact, *Baldwin* may prove to be an anomalous decision if other federal courts do not follow in a similar fashion as the EEOC.

D. Federal Judiciary

Whether Title VII's protections against sex discrimination in the workplace include sexual orientation discrimination has been the cause of decades of debate among legal theorists.[42] Yet, it wasn't until quite recently in the past two years that the federal judiciary began to take such a question seriously under Title VII.[43]

In March 2017, the Seventh Circuit Court of Appeals broke from federal precedent in *Hively v. Ivy Tech Community College.* In *Hively*, the Seventh Circuit, sitting en banc, held that Title VII protects employees from discrimination on the basis of his or her sexual orientation.[44] Within a month of the Seventh Circuit's decision en banc, the Eleventh Circuit

38. ONTIVEROS ET AL., *supra* note 12, at 501; *see also* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

39. ONTIVEROS ET AL., *supra* note 12, at 501.

40. *See* Young v. United Parcel Serv., Inc., 135 S. Ct. 1338 (2015) (declining deference to the Agency's guidelines concerning the Pregnancy Discrimination Act due to "timing, consistency, and thoroughness of consideration); *see also* ONTIVEROS ET AL., *supra* note 12, at 501.

41. Ryan H. Nelson, *Sexual Orientation Discrimination Under Title VII After* Baldwin v. Foxx, 72 WASH. & LEE L. REV. ONLINE 255, 277 (2015).

42. *See, e.g.*, Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 197–258 (1994); Shawn Clancy, *The Queer Truth: The Need to Update Title VII to Include Sexual Orientation*, 37 J. LEGIS. 119 (2011).

43. *See, e.g.*, Muhammad v. Caterpillar Inc., 767 F.3d 694 (7th. Cir. 2014), *as amended on denial of reh'g*, (Oct. 16, 2014) (denying petitioner's hostile work environment based on sexual orientation claim, but amending its decision to delete language that sexual orientation discrimination was non-cognizable under Title VII); Boutillier v. Hartford Pub. Schs., 221 F. Supp.3d 255 (D. Conn. 2016) (denying employer's motion for summary judgment and reasoning that "straightforward statutory interpretation and logic dictate that sexual orientation cannot be extricated from sex; the two are necessarily intertwined in a manner that, when viewed under the Title VII paradigm set forth by the Supreme Court, place sexual orientation discrimination within the penumbra of sex discrimination."); *Examples of Court Decisions Supporting Coverage of LGBT-Related Discrimination Under Title VII*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/newsroom/wysk/lgbt_examples_decisions.cfm (last visited Apr. 4, 2019) (collecting cases).

44. Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 339–41 (7th Cir. 2017) (en banc). Notably, it is unclear how the Seventh Circuit's decision affects those who do not identify along a gender binary.

ruled opposite the Seventh Circuit on the same question.[45] Since, then, in *Zarda v. Altitude Express*,[46] the Second Circuit joined the Seventh Circuit, cementing a circuit split and almost ensuring future resolution by the Supreme Court next term.

The Seventh Circuit's decision in *Hively* relied on three strings of analysis. First, the court echoed back to the "comparative method."[47] This is the same method the EEOC relied on in the pivotal *Baldwin.*[48] In the Seventh Circuit, Chief Judge Wood, writing for the majority reasoned:

> Hively alleges that if she had been a man married to a woman (or living with a woman, or dating a woman) and everything else had stayed the same, Ivy Tech would not have refused to promote her and would not have fired her . . . . This describes paradigmatic sex discrimination.[49]

The dissent in *Hively* argued that the correct application of the comparative method in this context would be comparing the "treatment of men who are attracted to members of the male sex with the treatment of women who are attracted to members of the female sex, and ask whether an employer treats the men differently from the women."[50] The majority rejected the dissent's comparison for similar reasons that it rejected an analogous comparison in *Loving v. Virginia*[51]:

> In the context of interracial relationships, we could just as easily hold constant a variable such as 'sexual or romantic attraction to persons of a different race' and ask whether an employer treated persons of different races who shared that propensity the same. That is precisely the rule that *Loving* rejected, and so too must we, in the context of sexual associations.[52]

Quite simply, the Court reasoned that Hively was discriminated against based on her sex because it would be impossible to disentangle her sex from her sexual orientation. Thus, any employment discrimination based on her sexual orientation, *necessarily* entailed sex discrimination.

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45. *See* Evans v. Ga. Reg'l Hosp., 850 F.3d 1248 (11th Cir. 2017).

46. Zarda v. Attitude Express, 883 F.3d 100 (2d Cir. 2018) (en banc).

47. *Hively*, 853 F.3d at 342, 345.

48. As to whether the majority was persuaded by the EEOC's Guideline and decision in *Baldwin v. Foxx*, the court remarked: "[o]ur point here is not that we have a duty to defer to the EEOC's position. We assume for present purposes that no such duty exists." *Hively*, 853 F.3d at 344.

49. *Id.* at 345.

50. *Id.* at 349.

51. Loving v. Virginia, 388 U.S. 1, 6–11 (1967) (holding that miscegenation statues restricting the right to marry because of racial classifications violated the Equal Protection Clause).

52. *Hively*, 853 F.3d at 349.

The Court also relied on a second line of reasoning: the gender stereotyping analysis from the landmark Title VII sex discrimination case, *Price Waterhouse v. Hopkins*.[53] As the Supreme Court held in *Price Waterhouse,* "the practice of gender stereotyping falls within Title VII's prohibition against sex discrimination."[54] In order to fully understand the impact of the *Hively* ruling and the sex-stereotyping analysis on future identity performance cases, it is important to first unpack the implications of *Price Waterhouse*.

The plaintiff in *Price Waterhouse*, Ann Hopkins, was a senior manager denied partnership at her accounting firm, Price Waterhouse.[55] Hopkins filed a claim under Title VII, claiming her employer had discriminated against her on the basis of sex.[56] The employer feedback during the partnership consideration process included criticisms that Hopkins, a woman, was too "macho," used too much "profanity," and was too "aggressive."[57] Partners also commented that Hopkins should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[58] Ultimately, Hopkins was denied partnership despite a stellar employment record.[59] The Court held that Hopkins' employer impermissibly relied on sex stereotyping at work.[60] In doing so, the Court reasoned:

> 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. [61]

In *Hively*, the majority looked to this language in *Price Waterhouse* as indicative of a broad interpretation of sex stereotyping under Title VII.[62]

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53. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (holding that employer discriminated against petitioner on the basis of her sex by relying on sex stereotypes).
54. *Hively*, 853 F.3d at 342.
55. *Price Waterhouse*, 490 U.S. at 231–32.
56. *Id.* at 231–32.
57. *Id.* at 235.
58. *Id.*
59. *Id.* at 233–34.
60. *Id.* at 251.
61. *Id.* (emphasis added) (citations and quotation marks omitted).
62. Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 343 (7th Cir. 2017) (en banc).

Later, the Supreme Court also directly extended its rationale in *Price Waterhouse* to a same-sex context in *Oncale v. Sundowner Offshore Services, Inc.*[63] Before *Oncale*, same-sex sexual harassment was not actionable under Title VII.[64] There are three judicial approaches that the courts applied to handle same-sex sexual harassment. The first is that same-sex sexual harassment is not actionable because Congress did not intend to prohibit same-sex harassment when passing the Civil Rights Act of 1964.[65] To the extent that sex discrimination was a concern of the drafters at all,[66] same-sex discrimination was not an evil the drafters were concerned with addressing.[67] The second judicial approach to same-sex sexual harassment is that the plaintiff's claim could only be actionable if the plaintiff could show the harasser was gay. If the plaintiff could prove the harasser was gay, then the plaintiff could presumably establish the defendant harassed the plaintiff based on sexual desire. Absent such evidence, plaintiff's claim was only discrimination based on sexual orientation and therefore not actionable under Title VII.[68] The third judicial approach to same-sex sexual harassment claims is that any harassment that is sexual in nature is always actionable under Title VII, regardless of the harasser's sexual orientation or motivations.[69] These approaches—each adopted by some courts across the country—are inherently incompatible. Thus, in resolving this question, the Court faced a critical turning point.

The Court's decision in *Oncale* was essential to abolishing the first judicial approach to same-sex sexual harassment. In *Oncale*, the plaintiff

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63. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998).

64. ONTIVEROS ET AL., *supra* note 12 at 501.

65. *Id.*

66. When the House of Representatives was debating Title VII, conservatives added the category of "sex" as an attempted "poison pill" to defeat the amendment—not as a genuine attempt to address sex discrimination. Francis J. Mootz III, *Judging Well*, 11 WASH. U. JURIS. REV. 28, n.96 (2019). The Supreme Court has recognized this historical pretext to Title VII:

> The prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives. 110 Cong. Rec. 2577–84 (1964). 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. *See id*. at 2577 (statement of Rep. Celler quoting letter from United States Department of Labor); *id.* at 2584 (statement of Rep. Green). This argument was defeated, the bill quickly passes as amended, and we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on "sex."

Id. (quoting Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 63–64 (1986)).

67. *Id.*

68. Bizarrely, if the harasser was bisexual, then some courts held plaintiff's claim was not actionable because the defendant was thereby an "equal opportunity harasser" and their behavior was outside the scope of discrimination based on sex. *Id.*

69. *Id.*

was sexually harassed and physically threatened by his other male coworkers and supervisors on the all-male oil rig in which he worked.[70] Ultimately, the plaintiff quit his job because of the sexual harassment and brought a claim against his employer under Title VII.[71] The Court reasoned that the critical issue underpinning the case was whether members of one sex were exposed to disadvantaged terms or conditions of employment to which members of the other sex were not exposed.[72] The Court also recognized that while same-sex sexual harassment was surely not the principal evil Congress intended to address by enacting Title VII of the Civil Rights Act of 1964, statutes often go beyond the principal evil of their enactment, evolving to cover other comparable evils as well.[73] This further clarified the Court's precedent established in *Price Waterhouse.*

However, while the Court's decision in *Oncale* resolved the question of whether a same-sex sexual harassment claim is actionable under Title VII, the precise evidentiary path a plaintiff must pursue to bring a successful claim remains unclear today.[74] In that regard, the courts have not unanimously nor consistently adopted a single judicial approach.[75] Scholars have identified three possible evidentiary routes to prove same-sex sexual harassment: (1) prove the harasser is gay; (2) prove that the female employee or supervisor who harassed the female victim did so in a way that indicates the harasser is generally hostile to women in the workplace; or (3) offer comparative evidence of how the harasser treats both sexes in a mixed-sex workplace environment.[76]

These evidentiary routes are problematic for several reasons. For one, the judicial uncertainty is emblematic of inconsistencies with how the federal judiciary treats same-sex related discrimination claims—not only regarding same-sex sexual harassment, but also with sexual orientation claims under Title VII. Additionally, the different evidentiary routes raise a steep hill for any potential plaintiff to climb to successfully bring a same-sex sexual harassment claim. For instance, in *Oncale*, while the Court reversed the summary judgment against plaintiff, the Court did not directly find for plaintiff either. On remand, the plaintiff's only viable

70. *Oncale*, 523 U.S. at 77.
71. *Id.*
72. *Id.* at 80–82.
73. *Id.* at 79–80.
74. ONTIVEROS ET AL., *supra* note 12 at 501.
75. *Id.* The first approach is no longer viable, post-*Oncale*, which held that same-sex harassment is actionable as sex discrimination under Title VII. *See Oncale*, 523 U.S. at 75. The second approach remains partly viable depending on the circuit. The third approach is the rationale the Seventh Circuit adopted in *Hively*. *See* Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 345 (7th Cir. 2017) (en banc).
76. ONTIVEROS ET AL., *supra* note 12 at 505.

evidentiary route of those identified above would be to prove that his harasser was gay. In an all-male workplace environment, the other two evidentiary routes would not be available. This raises a critical issue with the scope of the Court's analysis. It is one thing to say that a claim is theoretically actionable; it is another thing entirely to make that claim realistically possible to pursue. This is a critical lesson to remember as the Court prepares to determine whether sexual orientation is directly actionable under Title VII.

With this in mind, the Court's rationale in *Price Waterhouse* and *Oncale* laid the foundation for the *Hively* majority: sexual harassment based on gender stereotyping includes whether "the sex of the harasser is (or is not) the same as the sex of the victim."[77] Accordingly, the *Hively* majority held that "Hively represents the ultimate case of failure to conform to the female stereotype (at least as understood in a place such as modern America, which views heterosexuality as the norm and other forms of sexuality as exceptional): she is not heterosexual."[78]

Finally, the third line of reasoning the majority relied on in *Hively*, was the Supreme Court's long line of cases based on "associational theory."[79] Beginning with *Loving*[80] and *Obergefell*,[81] the court drew an analogy to the Supreme Court's well-settled law that discrimination based on whom a person associates with is a form of prohibited discrimination against the person "because of his or her [own traits.]"[82] The court also noted that while *Loving* was a racial discrimination case, "the text of the statute draws no distinction, for this purpose, among the different varieties of discrimination it addresses," and is therefore applicable outside a racial context.[83] Likewise, although *Obergefell* was a case about the right to marry, not Title VII, the majority reasoned that "[t]oday's decision must be understood against the backdrop of the Supreme Court's decisions, not only in the field of employment discrimination, but also in the area of broader discrimination on the basis of sexual orientation."[84]

77. *Hively*, 853 F.3d at 342 (citing *Oncale*, 523 U.S. at 75).
78. *Id.* at 346.
79. *Id.* at 342.
80. Loving v. Virginia, 388 U.S. 1 (1967)
81. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).
82. *Hively*, 853 F.3d at 347-50.
83. *Id.* at 349.
84. *Id.*

Thus, in *Hively*, the majority reasoned that associational theory likewise prohibits discrimination against individuals for his or her intimate associations based on his or her sexual orientation.[85] Ultimately, the majority relied on all three lines of reasoning: the comparative method, sex stereotyping, and the associational theory. Each of these the theories impact identity performance claims and intersectional theory in distinct ways.

In order to evaluate how the *Hively* lines of reasoning impact identity performance and intersectional theory, it is first noteworthy to understand why the dissent in *Hively*—along with the majority of federal circuit courts—remain squarely opposite the Seventh Circuit. The dissent reasoned that the "question before the [court] was one of statutory interpretation."[86] Therefore, the court should not, in good conscience, "smuggle in" "aggressive" textual interpretations that would be "[un]faithful" to Title VII's text.[87] In this spirit of strict statutory construction, the dissent relied on "the traditional first principle of statutory interpretation": "interpreting the statutory language as a reasonable person would have understood it at the time of enactment."[88] To do otherwise—as the dissent alleges the majority does—would be to "assume the power to alter the original public meaning of a statute." A power left to the legislature—not the judiciary.[89] While the dissent acknowledged a "robust debate . . . in our culture, media, and politics" about sexual orientation discrimination and gay rights, the dissent declined to incorporate any culture change into its analysis.[90] Rather, the "sole inquiry" for the dissent was whether dominant interpretation—that Title VII does not prohibit sexual orientation discrimination—was "*wrong as an original matter*."[91] On that question, the dissent concluded the answer "begin[s]" and "largely ends" with the statutory text.[92] Therefore, the dissent would have held that textually, the word "sex" means "biologically *male* or *female*; it does not also refer to sexual orientation."[93]

The Eleventh Circuit decision in *Evans v. Georgia Regional Hospital*[94] provides a recent illustration of the *Hively* dissent's arguments as applied

85. *Id.*
86. *Hively*, 853 F.3d at 360 (Sykes, J., dissenting).
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.* at 361.
91. *Id.*
92. *Id.* at 362.
93. Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 362 (7th Cir. 2017) (Sykes, J., dissenting).
94. Evans v. Ga. Reg'l Hosp., 850 F.3d 1248 (11th Cir. 2017).

to sexual orientation and gender non-conformity discrimination Title VII claims. Jameka Evans alleged her employer discriminated against her because of her sexual orientation and gender non-conformity.[95] Evans, a security officer at a hospital, alleged she was denied equal pay, harassed, and physically assaulted because she did not "carry herself in a traditional woman[ly] manner . . . (male uniform, low male haircut, shoes, etc.)."[96] The Eleventh Circuit denied the petitioner's claim alleging employment discrimination based on her sexual orientation; found "[its] binding precedent forecloses" such an action; and held that while a gender-nonconformity claim is actionable, the petitioner had failed to adequately plead such a claim.[97]

Compared to the majority in *Hively*, the majority in *Evans* held that the Supreme Court's precedents in *Price Waterhouse* and *Oncale* did not establish the basis for a sex-discrimination claim based on sexual orientation under Title VII.[98] The court acknowledged that discrimination based on failure to conform to a gender stereotype is sex-based discrimination.[99] However, the court declined to extend that rationale to a sexual orientation context. While the Eleventh Circuit recognized that discrimination claims based on gender non-conformity and same-sex discrimination are actionable under Title VII, it did not find the analysis of either *Price Waterhouse* or *Oncale* sufficiently "on point."[100] The court also relied heavily on previous holdings in other circuits reaching the same conclusion.[101] Ultimately, the Eleventh Circuit reasoned that until the Supreme Court "squarely addresses" sexual orientation discrimination under Title VII, the Eleventh Circuit is bound by its precedent.[102]

In its next term, the Supreme Court will consider whether to resolve the circuit split and take up the challenge to Title VII. [103] In "an unusual

95. *Id.* at 1250.

96. *Id.* at 1251 (citation and quotation marks omitted). The Court also notes that "although [Evans] is a gay woman, she did not broadcast her sexuality." *Id.* This is a distinguishing fact for the Eleventh Circuit because it reasons that Evans' discrimination was a response to gender stereotyping, not her sexual orientation. *Id.*

97. *Id.* at 1255 (citing Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979)) (reasoning the court was bound to follow circuit precedent "unless and until it is overruled by this court en banc or by the Supreme Court") (citation omitted).

98. *Id.* at 1256.

99. Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1254 (11th Cir. 2017) (citing Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)).

100. *Id.* at 1256.

101. *Id.* at 1257 (collecting cases from nine of the other federal circuit courts of appeal, dating back from 1989 to 2005).

102. *Id.*

103. Jon Steingart, *LGBT Workers' Federal Civil Rights Back on Supreme Court Radar*, BLOOMBERG LAW (NOV. 8, 2018), https://news.bloomberglaw.com/daily-labor-report/lgbt-workers-federal-civil-rights-back-on-supreme-court-radar.

twist," the Trump Administration has poised itself on "opposite sides from the [EEOC]"—going so far as to write amicus briefs contrary to the EEOC's position in *Baldwin v. Foxx*, which interpreted sexual orientation as within Title VII's protections.[104] Thus, in light of this inverted legal and political landscape, legal theorists should revisit the fundamentals of identity performance theory and intersectional theory in employment discrimination law jurisprudence. By viewing the reasoning in *Hively* through these lenses, we can better determine to what extent an incorporation of sexual orientation into Title VII will align with these theoretical objectives and in what ways the law must adapt.

I. INTERSECTIONALITY, IDENTITY PERFORMANCE AND COVERING THEORY

A. Intersectionality Theory

Kimberlé Williams Crenshaw, a leading intersectionality scholar, explains intersectionality scholarship as a critique of the "tendencies to see race and gender as exclusive or separable categories" that in reality intersect to form "multidimensional" identities.[105] Intersectionality theory has also been applied to queer theory,[106] but remains of particular relevance to the intersection of race, sex, class, and sexuality.

Intersectionality scholarship shapes the employment discrimination discussion in several ways. For one, it has shifted the discussion from "monolithic groups" to interactions between patriarchy, racial oppression, and homophobia.[107] In addition, intersectional critiques have highlighted that such discussions tend to revolve around individuals of relative privilege.[108] Critiques have also emphasized the importance of evaluating

104. Ariane de Vogue, *LGBT Employment Cases on Road to Supreme Court*, CNN NEWS (Sept. 6, 2017 6:24 AM), https://www.cnn.com/2017/09/26/politics/lgbt-employment-case-index.html.

105. KIMBERLÉ WILLIAMS CRENSHAW, BEYOND RACISM AND MISOGYNY: BLACK FEMINISM AND 2 LIVE CREW, IN WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH AND THE FIRST AMENDMENT 111, 114 (Mari J. Matsuda et al. eds., 1993); *see also* Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183, 1189 (1991); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 615 (1990); Darren Leonard Hutchinson, *Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 284, 301–03 (2001) [hereinafter Hutchinson, *Identity Crisis*].

106. *See, e.g.*, Hutchinson, *Identity Crisis*, *supra* note 104; Robert S. Chang & Jerome McCristal Culp, Jr., *After Intersectionality*, 71 UMKC L. REV. 485 (2002).

107. Hutchinson, *Identity Crisis, supra* note 104, at 308.

108. *See* CRENSHAW, *supra* note 105, at 151. This can include a focus in the literature on the most privileged members within protected groups (e.g. the impact of sexism on white cisgender women; racism on black men; heterosexism on wealthy, cisgender, white men, etc., often excluding

all different systems of oppression and their interplay in order to design solutions to any single system of oppression.[109]

Within a queer theory context, it is important to evaluate the intersection between heterosexism, racism, and sexism in the workplace. A corollary theory, "multidimensionality" posits that these different forms of identity and oppression "are inextricably and forever intertwined."[110] Multidimensionality also recognizes the inherent complexities of not only individual identities, but also systems of oppression and social power.[111]

Multidimensionality is especially relevant to intersection Title VII disparate treatment claims. Under the current framework, federal courts tend to evaluate a plaintiff's employment discrimination claim by isolating the employer's motivation behind the alleged adverse employment action.[112] Under Title VII, the employer's motivation cannot be "because of such individual's race, color, religion, sex, or national origin."[113] However, multidimensional and intersectional scholarship understands discrimination as when multiple identities and stereotypes "converge" into a specific discriminatory act.[114] This requires a "holistic examination" of the causes and effects of those prejudices—not a single characteristic or motivation.[115]

B. Identity Performance Under Title VII

An individual's identity performance is the collection of one's intersectional identities, including race, sex, gender identity, ethnicity, and sexual orientation. Identity performance is also the many ways that in our everyday interactions our bodies, mannerisms, clothing, movement, and speech convey information about ourselves to others.[116] Identity performance is both introspective and a matter of public perception; it is a

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discussion of less privileged members of those groups, namely women of color, transgender people, and people of lower socioeconomic status).

109. Hutchinson, *Identity Crisis*, *supra* note 104, at 308; *see also* Francisco Valdes, *Sex and Race in Queer Legal Culture: Ruminations on Identities and Inter-Connectivities*, 5 S. CAL. REV. L. & WOMEN'S STUD. 25 (1995).

110. Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 621–22, 641 (1997) (arguing that any discussion of gay politics should also discuss racial, class, and gender privilege).

111. *Id. See also* Elvia R. Arriola, *Gendered Inequality: Lesbians, Gays, and Feminist Legal Theory*, 9 BERKLEY WOMEN'S L. J. 103 (1994); Peter Kwan, *Complicity and Complexity: Cosynthesis and Praxis*, 49 DEPAUL L. REV. 673 (2000).

112. Hutchinson*, Identity Crisis*, *supra* note 104, at 301–03.

113. Civil Rights Act of 1964, § 703(a) (codified at 42 U.S.C. 2000e-2(a)(1) (2012)).

114. Arriola, *supra* note 111, at 139–41.

115. *Id.*

116. *See generally* FRED DAVIS, FASHION, CULTURE AND IDENTITY (1992).

combination of how one seeks to convey their identity and self to the outside world and how others perceive those cues.[117] Thus, one's identity performance is rarely static—but rather an evolving and responsive dynamic. By learning to interpret other people's responses to one's identity performance, an individual can better adapt their performance in accordance with what he or she intended. This is known as impression management.[118]

Identity performance can play a critical role in the employment arena. It can shape both an employee and employer's schema[119] in the workplace.[120] These schemas "enable" employees and employers to "know (or believe [they] know) a great deal about [a] person . . . in a shorthand fashion."[121] This shapes how coworkers, supervisors, and employers perceive, treat, and value an employee.[122]

In the context of Title VII, often an employee's identity performance cannot be captured under a single category of prohibited discrimination.[123] This is because "most courts effectively require that distinct minority subclasses frame employment discrimination claims as a member of one protected class or another, but not as a member of two or more protected groups."[124] Thus, the current Title VII employment discrimination framework does not account for plaintiffs' intersectionality or more complex identity performances.[125] Consequently, "individuals who are members of multiple protected classes often lack a complete remedy in the employment discrimination context."[126]

This poses distinct problems for members of the LGBTQ community. As discussed above, no federal statute currently expressly prohibits discrimination based on either sexual orientation or gender identity. Some scholars have coined employer discrimination based on sexual

117. ERVING GOFFMAN, BEHAVIOR IN PUBLIC PLACES (1963).

118. *Id.*

119. Schemas are "a set of beliefs about people, events or situations that we use as guides in our interaction with these things." Todd Brower, *Social Cognition 'At Work:' Schema Theory and Lesbian and Gay Identity Under Title VII* 2 (2008).

120. *Id.*

121. *Id.* at 2.

122. *Id.*

123. Alexander M. Nourafshan, *The New Employment Discrimination: Intra-LGBT Intersectional Invisibility and the Marginalization of Minority Subclasses in Antidiscrimination Law*, 24 DUKE J. GENDER L. & POL'Y 107, 108–11 (2017); *see also* Hutchinson, *Identity Crisis*, *supra* note 104, at 301–03 ("[C]ourts have failed to recognize that the cumulative effect of multiple forms of discrimination may create a unique type of victimization that differs in kind from the sum of individual acts of discrimination.").

124. Nourafshan, *supra* note 123 at 108.

125. *Id.*

126. *Id.*

discrimination, rather than on a protected characteristic under Title VII (e.g. race, sex, national origin) as the "Sexual Orientation Loophole" of Title VII.[127] In the context of combined race and sexuality discrimination claims, (e.g., LGBTQ people of color), this can be especially problematic: "the unprotected status of sexual orientation in civil rights jurisprudence, along with judicial essentialism, actually provides an incentive for defendants to concede homophobic intent as a way of masking and obscuring racism."[128] In these cases,[129] courts have used evidence of sexual orientation discrimination to negate the possibility of racial discrimination, ignoring the reality that plaintiffs with intersectional claims face "unique discrimination as gays and lesbians of color."[130]

Therefore, "intersectional LGBT plaintiffs can actually lose the ability to bring a successful claim based on other protected characteristics."[131] This hole in employment discrimination coverage is increasingly problematic for potential plaintiffs because intersectional claims of employment discrimination are on the rise.[132]

There are three reasons why the federal judiciary has failed to embrace intersectional discrimination claims. The first reason is directly related to Title VII's textual language.[133] Title VII relies on the "disjunctive 'or' in describing discrete minorities that are protected under the statute."[134] Specifically, the pertinent provision of Title VII's text protects against discrimination "based on race, color, religion, sex, *or* national origin."[135] This has resulted in courts interpreting the text of the statute to mean, e.g., a plaintiff cannot be discriminated against based on their race *or* their sex (i.e. including his or her sexual orientation). However, this interpretation does not expressly prohibit discrimination based on a combination of factors, (e.g. race *and* sex).[136]

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127. Hutchinson, *Identity Crisis*, *supra* note 104, at 302–03; *see also* Zachary A. Kramer, *Heterosexuality and Title VII*, 103 NW. L. REV. 205, 242–43 (2009) ("[E]mployers are already using this defense—indeed, with great success.")

128. Hutchinson, *Identity Crisis*, *supra* note 104, at 306.

129. *See, e.g.*, Peterson v. Bodlovich, 215 F.3d 1330 (Table) (7th Cir. 2000) (holding that prison officials did not racially discriminate against black gay male prison inmate, despite evidence of racist and homophobic treatment); *see also* Hutchinson, *Identity Crisis*, *supra* note 104, at 303–06 (analyzing *Peterson* and collecting cases).

130. Hutchinson, *Identity Crisis*, *supra* note 104, at 303.

131. *Id.*; *see also* Rachel Kahn Best et al., *Multiple Disadvantages: An Empirical Test of Intersectionality in EEO Litigation*, 45 LAW & SOC'Y REV. 991, 1008 (2011) ("Intersectional claims have increased dramatically over time.").

132. Nourafshan, *supra* note 123, at 99.

133. *Id.* at 117.

134. *Id.*

135. 42 U.S.C. § 200e-2(a)(1) (2012).

136. *See* Hutchinson, *supra* note 104 and accompanying text.

Inherently, this seems counterintuitive to the rationale underpinning anti-discrimination laws. If Title VII seeks to prevent and remedy discrimination based on a protected characteristic, why would it not likewise seek to prevent discrimination based on multiple protected characteristics? The answer is rooted in the second reason behind the failure of mainstream intersectional claims: the federal judiciary's reliance on the single-motive framework.[137] The entire foundation for a Title VII disparate treatment claim was based in the single-motive or "McDonnell Douglas framework"—the cornerstone of Title VII disparate treatment discrimination lawsuits.[138]

Established in *McDonnell Douglas v. Green*, the Court outlined the framework for bringing and defending a disparate treatment claim under Title VII.[139] First, a plaintiff must establish a prima-facie case: (1) the plaintiff was a member of a protected class; (2) the plaintiff was qualified for the position or performing at the employer's expectations; (3) the plaintiff was not hired or the plaintiff suffered an adverse employment action by the defendant; and (4) the position remained open or a "similarly situated" employee did not receive comparable adverse employment action.[140] At the second stage of the *McDonnell Douglas* framework, the defendant has a rebuttal burden to show a "legitimate, non-discriminatory reason" for the employment action.[141] Finally, at the third stage, the plaintiff has the final burden to establish that any reason the defendant offered was actually a pretext for discrimination.[142]

This framework is known as the single-motive framework because in order to prevail, the plaintiff must meet the final burden of persuasion that their protected characteristic was the single cause for the discrimination—not the reason(s) offered by the defendant.[143] A false reliance on the single-motive framework discourages a plaintiff from brining an intersectional claim by its very nature because often there is no "single-motive" for the adverse employment action, but rather a motive driven by multiple biases against the plaintiff's intersectional identities.[144]

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137. Nourafshan, *supra* note 123, at 117.
138. ONTIVEROS ET AL., *supra* note 12.
139. McDonnell Douglas, Corp. v. Green, 411 U.S. 792 (1973).
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*; *see also* Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII* 98 GEO. L. J. 1121 (2010).
144. Nourafshan, *supra* note 123, at 117.

The federal courts' reliance on the single-motive framework poses problems for intersectional plaintiffs who bring disparate impact claims as well:

> In establishing a prima facie case of disparate impact, a plaintiff first must identify a specific employment practice to be challenged, and then, *through relevant statistical analysis*, must prove that the challenged practice has an adverse impact on a protected group. In making these comparisons, a plaintiff must demonstrate disparate impact with respect to the pool of qualified persons in the relevant labor market for the given position. [145]

This is problematic for intersectional plaintiffs because it would be very difficult—if not impossible—to establish a statistical comparison to a "similarly situated plaintiff" who did not face discrimination in his or her workplace.[146]

As the American population becomes increasingly racially and ethnically diverse, more openly LGBTQ, and more fluid in its understanding of gender identity and expression, it will become increasingly difficult for plaintiffs to reduce their discrimination claims to one element of their identity.[147] This is especially true when we consider how discrimination manifests in a workplace. The reality is workplace discrimination does not operate upon discrete elements of a person's identity; rather, it is more often a person's reaction to an individual's whole identity performance.

C. Covering Theory and Employment Discrimination

Covering is the "act of downplaying a disfavored identity—even when this identity is known or apparent to others—in order to present oneself more palatably as part of the so-called American mainstream."[148] Covering is the consequence of implicit expectations and self-censorship of identity performance in the workplace. Fifteen years after Kenji Yoshino's milestone analysis of covering in the workplace, covering remains a

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145. *Id.*

146. Nourafshan offers an illustrative example of this dynamic in a race-sex claim context:

> [I]f a black woman is alleging race-sex intersectional discrimination, an employer might use statistics that show that he has eight black employees, and ten female employees. These statistics fail to reveal that seven of the black employees are men and nine of the female employees are white. There is only one black woman, and her claim can therefore be undermined. Use of statistics is thus problematic in this context.

Id. at 119.

147. *Id.*

148. Yoshino, *Covering*, *supra* note 6, at 769.

routine dynamic in American workplaces for employees who are members of certain racial, ethnic, sex, gender, and sexual orientation groups. Therefore, it is critical to understand the theoretical underpinnings of covering in the workplace and identify how the expectation to cover can have a coercive pressure on employees—even as employers move away from expectations of conversion and passing. The tendency—or worse, implicit expectation—for an employee to cover can still create coercive pressure dynamics in a workplace.

Yoshino outlines "four axes of behavior" individuals cover along: "appearance, affiliation, activism, and association."[149] "Appearance" entails the clothing, grooming, and mannerisms one chooses to present or unconsciously conveys to the their environment.[150] Yoshino also explains that individuals can "cover" their appearance through the many ways they pay extra attention to how specifically they are communicating their identities to their peers.[151] That also includes the nuances of gestures and information about one's personal life as well."[152] "Affiliation" is a concept that encompasses the different ways in which a person voluntarily chooses to associate within a particular cultural context or group. "Activism" is the willingness of someone to take the initiative and incorporate social causes or issues related to one's membership in a group. Finally, "association" is the direct confrontation of one's identity with its associated traits or behaviors. Yoshino explains these four axes within an LGBTQ context:[153]

> (1) [A]ppearance, including gender performance or being a so-called straight-acting gay;[154] (2) affiliation, avoiding gay social settings like Fire Island in New York, and gay culture more generally;[155] (3) activism, eschewing the stereotype of the 'gay activist';[156] and (4) association, including avoiding public displays of affection.[157]

Yoshino cautions there are a few important considerations when evaluating these four axes of covering. First, these covering behaviors are not limited to the workplace; nor are they necessarily a dynamic in every workplace.[158] Second, "we should not assume that everybody who engages

149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.* at 813.
153. Russell K. Robinson, *Uncovering Covering*, 101 NW. L. REV. 1809, 1811 (2007).
154. *See* YOSHINO, COVERING, *supra* note 6, at 79–82.
155. *Id.* at 82–85.
156. *Id.* at 87–88.
157. *Id.* at 89–91.
158. Robinson, *supra* note 153, at 1811.

in acts of assimilation is covering."[159] What one considers to be an authentic self-expression or presentation of identity can only be truly understood by the individual. Thus, while someone may perceive that a person appears to be covering, it is actually the person's self-understanding that controls whether they indeed are doing so.[160] Finally, Yoshino emphasizes that everyone covers—no matter their race, gender, sex, etc. or how integrated they are into the mainstream.[161] This principle recognizes that "every person covers in some way to be seen as 'normal,' and "place[s] more emphasis on a new understanding of civil rights that would allow all individuals to put forth their authentic selves."[162]

Understanding covering within the employment context is easier after considering other examples of covering in a variety of contexts. For example, some of Yoshino's most illustrative examples include:

> Margaret Thatcher, who took voice lessons to lower the pitch of her voice, and Rosie O'Donnell, who, even after she came out of the closet, did not make public appearances with her female partner. Several actors cover their racial or religious identities in order to secure mainstream acceptance: Martin Sheen was born Ramón Estévez; Kirk Douglas's given name is Issur Danielovitch Demsky.[163]

The critical point here is that these people were denying their identities. Margaret Thatcher is a woman. Rosie O'Donnell is openly gay. Martin Sheen and Kirk Douglas have distinct ethnic backgrounds. However, these examples do illustrate the deliberate efforts each person took to "mute or deflect stigmatized identities."

How Yoshino recommends that the legal community adapt to the problem of covering is particularly salient given the current momentum surrounding Title VII. Yoshino advocates for a civil rights model based not on legislative intent behind Title VII, strict statutory construction, or analogies to sex stereotyping, the comparative method, or the associational theory—although Yoshino's argument is closest to the final line of reasoning. Yoshini roots his model in a fundamental concept of universal liberty. This is a deliberate step away from the type of equality-based liberty that the Supreme Court has evoked throughout its string of LGBT

159. *Id.*
160. *Id.*
161. YOSHINO, COVERING, *supra* note 6.
162. Rebecca K. Lee, *Assimilation at the Cost of Authenticity Kenji Yoshino's Covering: The Hidden Assault on Our Civil Rights*, 15 ASIAN AM. POL'Y REV. 59, 60–61 (2006).
163. *Id.*

rights cases including *Romer v. Evans*,[164] *Lawrence v. Texas*,[165] *United States v. Windsor*,[166] and *Obergefell*.[167]

Yoshino advocates separately for individual liberty. By evoking a central thesis of individual liberty, Yoshino hopes to invite more people to the table for the civil rights model. Because everyone covers, not simply minorities, an individual liberty model is adaptable and relevant to all. This is a strong divergence from the more traditional queer and identity performance theory that emphasizes the importance of protecting historically disenfranchised groups and promoting equal opportunity to combat systemic inequities. By advocating for a more individualistic, and less class-centric model, Yoshino's theory refocuses the discussion around the numerous individual identities that shape how all Americans live their lives; identities that are not historically recognized as barriers to employment or the workplace.

However, given Yoshino's argument that everyone covers, that leads to the natural conclusion that everyone also covers in different ways across different axes with respect to an individual's identities. The striking increase in intersectional employment discrimination Title VII claims substantiates this reality. Yet, this also becomes particularly problematic given the current reality that plaintiffs remain unable to allege supplementary theories of discrimination under Title VII. Rather, plaintiffs remain forced to raise one—and only one—particular member class in which to root their claim. Therefore, while identity performance theory and non-discrimination laws have made great advances in the past fifteen years, there remains a critical disconnect between Yoshino's individual liberty theory and the reality of plaintiffs' Title VII prospects.

CONCLUSION

Queer legal theory and employment discrimination jurisprudence are at a critical crossroads. While federal legislation to expand employment protections for the LGBTQ community has stalled,[168] and the Trump Administration threatens to rollback existing protections,[169] there is increasing focus on how the Supreme Court will resolve the federal circuit

164. Romer v. Evans, 517 U.S. 620 (1996).
165. Lawrence v. Texas, 539 U.S. 558 (2003).
166. United States v. Windsor, 570 U.S. 744 (2013).
167. Obergefell v. Hodges, 135 S.Ct. 2584 (2015).
168. *See supra* notes 16–22 and accompanying text.
169. *See* Michael D. Shear and Charlie Savage, *In One Day, Trump Administration Lands 3 Punches Against Gay Rights*, N.Y. TIMES, (July 7, 2017), https://www.nytimes.com/2017/07/27/us/politics/white-house-lgbt-rights-military-civil-rights-act.html.

split. Thus, at this crossroads, it is essential to evaluate the existing employment discrimination framework and determine how the federal judiciary and legal community should best adapt to evolutions in our understandings of sex-stereotyping and gender under Title VII and in the American workplace.

To do so, this Note reviewed the status of employment protections at each national level: executive orders, national legislation, agency guidelines, and the federal judiciary. At the federal judicial level, the circuit split between the Seventh Circuit in *Hively* and the Second Circuit in *Zarda*, versus all of the other circuits, presents a unique opportunity to evaluate the underlying arguments. The *Hively* majority outlines how the Supreme Court's precedents in *Price Waterhouse* and *Oncale* provide the rationale to include sexual orientation discrimination under Title VII. Additionally, the Supreme Court's line of cases from *Loving* to *Obergefell* provide a separate basis to include sexual orientation under Title VII based on the associational theory. Therefore, the Seventh Circuit's majority opinion delivers the Supreme Court a clear blueprint for how to determine that discrimination on the basis of sexual orientation is on the basis of sex, and therefore prohibited under Title VII's employment protections.

However, no matter how the Supreme Court resolves the Title VII question, it is essential to critically evaluate the surrounding scholarship on the issue as well. Applying intersectionality theory to LGBTQ employment discrimination claims highlights the importance of recognizing that plaintiffs' claims are not simply an isolated question of their sexuality in the workplace; rather, their claims require a holistic examination of how each part of plaintiffs' identities—including their race, sex, gender identity, and class—converge to shape their identity performance and treatment in the workplace.

By revisiting Yoshino's *Covering* scholarship, we can better understand how these intersectional identities manifest in the workplace and create implicit discrimination in various ways. Appreciating the importance of identity performance will also be critical to empower plaintiffs to bring successful discrimination claims in the future. It will be a pivotal milestone to achieve federal employment discrimination protections for sexual orientation and gender identity. Yet it will be a hollow victory if those claims become actionable—but not winnable. As we have seen with same-sex sexual harassment claims post-*Oncale*, there must be clear and accessible evidentiary routes for plaintiffs to successfully plead claims.

Fully addressing inequities in LGBTQ employment discrimination law will also require addressing two of the institutional problems surrounding this discussion: the reliance on the single-motive framework the statutory

language of employment discrimination laws. Courts need to shift away from their dependency on the single-motive framework to the more modern and inclusive "mixed-motive framework" established in *Price Waterhouse.*[170] This will enable a plaintiff to plead more holistic theories in his or her Title VII claim and will better reflect the employer's discriminatory response to his or her full intersectional identities—not simply a monolithic piece of his or her identities.

Realistically, meaningful progress will begin before a lawsuit ever reaches a courtroom. Employers should also develop clear and expansive discrimination policies that work to effectively prevent and manage discrimination claims internally and foster more inclusive and tolerant workplace environments for all employees. Ideally, legislatures at the national, state, and municipal levels should also amend the statutory language of these laws to explicitly include sexual orientation and gender identity as protected characteristics.[171] Doing so would help alleviate the statutory interpretation dilemmas courts continue to face today.[172] Clear articulation of employment protections in the statutory codes will facilitate consistent application of employment protections by federal judges across the country. Ultimately, a holistic response to these problems will require the efforts of the courts, legislatures, agencies, and employers nationwide.

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170. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (establishing the availability of the mixed-motive framework for Title VII disparate treatment claims). Under the mixed-motive framework, a plaintiff does not need to prove that this or her protected characteristic was the *only* motivating factor, but simple *a* motivating factor in the employer's decision. Thus, under a mixed-motive framework, a Latina lesbian plaintiff raising a sexuality-race claim would not need to prove that solely her race, sex, or sexuality was the basis of discrimination, but that together her identities unlawfully motivated the employment action.

171. *See supra* notes 142–43.

172. *Id.*