



Recognition of Sexual Orientation and Gender Identity Within Federal Sex Discrimination Law

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Supreme Court Precedent

There are two critical U.S. Supreme Court precedents that form the foundation for the increasing recognition by federal courts that laws barring discrimination based on sex necessarily encompass discrimination based on sexual orientation and gender identity.

- *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989): sex discrimination includes discrimination based on sex stereotyping, meaning whether a person is perceived to conform with expected gender stereotypes.

The prohibition against discrimination based on sex stereotypes support finding that discrimination based on both sexual orientation and gender identity are impermissible sex-based discrimination.

- *Oncale v. Sundowner Offshore Services, Inc.*, 118 S. Ct. 996 (1998): sexual harassment between members of the same sex is prohibited under Title VII of the Civil Rights Act. In the decision, Justice Antonin Scalia wrote that while Congress may not have written Title VII with the purpose of protecting same-sex sexual harassment, “statutory provisions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”

This holding supports finding that when laws are enacted against discrimination based on sex, they include sexual orientation and gender identity even if those forms of discrimination are not expressly enumerated in the statutes.

Gender Identity

Circuit Courts of Appeal:

Appellate courts in seven circuits have now issued decisions holding that federal nondiscrimination laws, including Title VII and Title IX, include gender identity within the scope of prohibited sex discrimination.

1st

Rosa v. Park W. Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000) (discrimination on the basis of gender identity is a legitimate claim for sex discrimination under the Equal Credit Opportunity Act)

3d

Doe v. Boyertown Area Sch. Dist., No. 17-3113, 2018 WL 3016864, at *14 (3d Cir. June 18, 2018) (“Title IX prohibits discrimination against transgender students in school facilities just as Title VII prohibited discrimination against Prowel in the workplace.”)

6th

E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018) (employer's decision to fire the transgender employee was based on gender stereotyping in violation of Title VII)

Myers v. Cuyahoga County, Ohio, No. 05-3370, 2006 WL 1479081 (6th Cir. 2006) (Title VII protects individuals from discrimination based on nonconformity with perceived sex or gender)

Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005) (discrimination due to nonconformity with sex stereotypes is discrimination because of sex)

Smith v. City of Salem, 378 F.3d 566, 575 (6th Cir. 2004) (plaintiff can prevail on a sex discrimination claim under Title VII if he or she “has suffered discrimination because of his or her gender non-conformity”)

7th

Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1049 (7th Cir. 2017) (“A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX.”), *cert. dismissed sub*

nom. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ. v. Whitaker ex rel. Whitaker, 138 S. Ct. 1260, 200 L. Ed. 2d 415 (2018)

8th

Tovar v. Essentia Health, 857 F.3d 771 (8th Cir. 2017) (permitting discrimination claims on the basis of transgender status are permitted under Section 1557 of the Affordable Care Act)

9th

Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000) (extending protections of the Gender Motivated Violence Act (GMVA) to transgender individuals and clarifying that the GVMA applies with equal force to both men and women)

11th

Evans v. Georgia Regional Hospital, 850 F.3d 1248, 1255 (11th Cir. 2017) (while sexual orientation discrimination is not actionable as sex discrimination under Title VII, discrimination based on gender nonconformity is covered under the sex provision of Title VII)

Chavez v. Credit Nation Auto Sales, LLC, 641 Fed. Appx. 883, 884 (11th Cir. 2016) ("[s]ex discrimination includes discrimination against a transgender person for gender nonconformity")

Glenn v. Brumby, 663 F.3d 1312, 1317 (11th Cir. 2011) ("discrimination against a transgender individual because of her gender-nonconformity is sex discrimination")

Of the three circuit court opinions declining to find that gender identity is encompassed within sex discrimination, two predate *Price Waterhouse* and *Oncale*.¹

District Courts:

There are at least forty federal district court decisions holding that gender identity discrimination falls within the ambit of federal sex discrimination laws, and only two holding to the contrary.²

¹ *Etsitty v. Utah Transit Authority*, 502 F.3d 1215, 1222 (10th Cir. 2007) (transgender individuals "may not claim protection under Title VII from discrimination based solely on their status as [transgender]"); *Sommers v. Budget Marketing Inc.*, 667 F. 2d 748 (8th Cir. 1982) (Title VII does not protect people from discrimination based on gender identity); *Willingham v. Macon Tel. Pub. Co.*, 507 F.2d 1084 (5th Cir. 1975) (sex discrimination could not be extended to new situations, this case regarding the employer's grooming standards, without a strong Congressional mandate).

Grimm v. Gloucester Cty. Sch. Bd., --- F. Supp. 3d ---, No. 4:15cv54, 2018 WL 2328233, at *10 (E.D. Va. May 22, 2018) (“claims of discrimination on the basis of transgender status are per se actionable under a gender stereotyping theory under Title IX”)

Parker v. Strawser Constr., Inc., No. 2:17-CV-541, 2018 WL 1942374, at *7 (S.D. Ohio Apr. 25, 2018) (“discrimination against transgender persons necessarily implicates Title VII's proscriptions against sex stereotyping because an employer cannot discriminate on the basis of transgender status without imposing its stereotypical notions of how sexual organs and gender identity ought to align”)

Wittmer v. Phillips 66 Co., No. CV H-17-2188, 2018 WL 1626366, at *5 (S.D. Tex. Apr. 4, 2018) (plaintiff's “status as a transgender woman places her under the protections of Title VII”)

M.A.B. v. Bd. of Educ. of Talbot Cty., 286 F. Supp. 3d 704, 716 (D. Md. 2018) (claim of discrimination based on gender identity constitutes sex discrimination under Title IX)

F.V. v. Barron, 286 F. Supp. 3d 1131 (D. Ida. 2018) (applying heightened scrutiny under the Equal Protection Clause to discriminatory practice of denying transgender individuals' applications to change the sex listed on their birth certificates)

Karnoski v. Trump, No. C17-1297-MJP, 2018 WL 993973 (W.D. Wash. Feb. 21, 2018) (ban on transgender military service members is subject to heightened Equal Protection scrutiny)

A.H. by Handling v. Minersville Area Sch. Dist., 290 F. Supp. 3d 321 (M.D. Pa. 2017) (Title IX encompasses anti-transgender discrimination)

Stone v. Trump, 280 F. Supp. 3d 747 (D. Md. 2017) (discrimination against transgender people is gender-based discrimination under the Equal Protection Clause of the Constitution)

Doe 1 v. Trump, 275 F.Supp.3d 167 (D.D.C. 2017) (applying intermediate scrutiny to directive banning transgender military service members)

Brown v. Dep't of Health and Human Servs., No. 8:16CV569, 2017 WL 2414567, *6 (D. Neb. June 2, 2017) (transgender prisoners claim of discrimination actionable under the Equal Protection Clause)

² *Baker v. Aetna Life Insurance Co.*, 228 F. Supp. 3d 764, 768–69 (N.D. Tex. 2017) (an individual's transgender status is not a cause of action for a discrimination claim under section 1557 of the Affordable Care Act); *Eure v Sage Corp.*, 61 F. Supp. 3d 651, 661 (W.D. Tex. 2014) (declining to “extend the sex stereotyping theory to cover circumstances where the plaintiff is discriminated against because [of] the plaintiff's status as a transgender man or woman, without any additional evidence related to gender stereotype non-conformity”).

Tudor v. Se. Oklahoma State Univ., No. 15-324, 2017 WL 4849118 (W.D. Okla. Oct. 26, 2017) (denying a professor tenure and promotion due to being transgender constituted a Title VII violation)

Prescott v. Rady Children's Hospital-San Diego, 265 F. Supp. 3d 1090 (S.D. Cal. 2017) (discrimination against transgender patients violates section 1557 of the Affordable Care Act)

U.S. Equal Employment Opportunity Comm'n v. Rent-A-Ctr. E., Inc., 264 F. Supp. 3d 952, 956 (C.D. Ill. 2017) ("discrimination because a person is transgender is encompassed within the definition of sex discrimination [under Title VII] set forth in *Price Waterhouse*")

Smith v. Avanti, 249 F. Supp. 3d 1194 (D. Colo. 2017) (the Fair Housing Act's bar on sex discrimination prohibits discrimination against transgender individuals)

Evancho v. Pine-Richland Sch. Dist., 237 F. Supp. 3d 267, 297 (W.D. Pa. 2017) (granting injunctive relief to transgender students based on an Equal Protection claim and noting that "Title IX's prohibition of sex discrimination includes discrimination as to transgender individuals based on their transgender status and gender identity")

Mickens v. General Electric Co., No. 3:16CV-00603-JHM, 2016 WL 7015665 (W.D. Ky. Nov. 29, 2016) (discrimination based on gender identity is a valid sex discrimination claim under Title VII)

Students v. United States Dep't of Educ., No. 16-CV-4945, 2016 WL 6134121, at *1 (N.D. Ill. Oct. 18, 2016) (Title IX protections include gender identity)

Roberts v. Clark Cty. Sch. Dist., No. 2:15-cv-00388-JAD-PAL, 2016 WL 5843046 (D. Nev. Oct. 4, 2016) (plaintiff, a transgender school police officer, was subjected to sex discrimination in violation of Title VII when he was told by his employer that he could not use either the men's or women's bathroom at work), *reconsideration denied*, No. 2:15-cv-00388-JAD-PAL, 2016 WL 6986346 (D. Nev. Nov. 28, 2016)

Bd. of Educ. of Highland Local Sch. Dist. v. U.S. Dep't of Educ., 208 F. Supp. 3d 850 (S.D. Ohio 2016) (transgender student's claim of sex discrimination based on a school district policy not permitting her to use the girls' restroom was substantially likely to succeed under Title IX and did violate the Equal Protection Clause of the Constitution), *stay pending appeal denied sub nom. Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217 (6th Cir. 2016)

Carcaño v. McCrory, 203 F. Supp. 3d 615, 639, 640 (M.D.N.C. 2016) (claims of discrimination based on transgender status are actionable under Title IX and transgender individuals receive intermediate scrutiny on equal protection claims when discrimination is based on “biological sex”)

Cruz v. Zucker, 195 F. Supp. 3d 554 (S.D.N.Y. 2016) (discrimination on the basis of gender identity is sex discrimination under Section 1557 of the Affordable Care Act)

Doe v. Arizona, No. CV-15-02399-PHX-DGC, 2016 WL 1089743 (D. Ariz. Mar. 21, 2016) (discrimination against a transgender employee constitutes sex-based discrimination under Title VII)

Fabian v. Hospital of Central Connecticut, 172 F. Supp. 3d 509, 527 (D. Conn. 2016) (“On the basis of the plain language of the statute, and especially in light of the interpretation of that language evident in *Price Waterhouse’s* acknowledgement that gender-stereotyping discrimination is discrimination ‘because of sex,’ ... discrimination on the basis of transgender identity is cognizable under Title VII.”)

Adkins v. City of New York, 143 F. Supp. 3d 134 (S.D.N.Y. 2015) (transgender people are a quasi-suspect class and thus receive intermediate scrutiny in an equal protection analysis)

Dawson v. H&H Electric, No. 4:14CV00583 SWW, 2015 WL 5437101 (E.D. Ark. Sept. 15, 2015) (termination of employee based on transgender status and gender transition constitutes discrimination based on sex under Title VII)

United States v. Se. Oklahoma State Univ., No. CIV-15-324-C, 2015 WL 4606079, at *2 (W.D. Okla. July 10, 2015) (adverse employment action taken as a reaction to plaintiff’s transition from male to female was sufficiently pleaded as Title VII sex discrimination claim)

E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc., 100 F. Supp. 3d 594, 603 (E.D. Mich. 2015) (“having alleged that [the transgender plaintiff’s] failure to conform to sex stereotypes was the driving force behind the Funeral Home’s decision to fire [the plaintiff], the EEOC has sufficiently pleaded a sex-stereotyping gender-discrimination claim under Title VII”)

Johnston v. University of Pittsburgh of Com. System of Higher Educ., 97 F. Supp. 3d 657 (W.D. Pa. 2015) (stating that a transgender individual may prevail on a sex discrimination claim under Title VII due to noncompliance with sex stereotypes)

Norsworthy v. Beard, 87 F. Supp. 3d 1104 (N.D. Ca. 2015) (applying heightened Equal Protection scrutiny to policy of denying necessary medical treatment for transgender prisoner as a form of sex-based discrimination)

Rumble v. Fairview Health Servs., No. 14–cv–2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015) (discrimination against hospital patient based on his transgender status constitutes sex discrimination under Section 1557 of the Affordable Care Act)

Lewis v. High Point Regional Health Systems, 79 F. Supp. 3d 588 (E.D.N.C. 2015) (allegations of gender discrimination based on transgender status are sufficient to state a Title VII claim against an employer)

Finkle v. Howard County, Md., 12 F. Supp. 3d 780 (D. Md. 2014) (discrimination based on gender identity is a cognizable claim of sex discrimination under Title VII)

Parris v. Keyston Foods, LLC, 959 F. Supp. 2d 1291, 1303 (N.D. Ala. 2014) (noting that Title VII covers claims of discrimination against transgender individuals for failing to conform to “conventional gender roles and stereotypes”)

Radtke v. Miscellaneous Drivers & Helpers Union Local #638 Health, Welfare, Eye, & Dental Fund, 867 F. Supp. 2d 1023, 1032 (D. Minn. 2012) (“sex” is not “narrowly defined as an immutable biological determination at birth”)

Schroer v. Billington, 577 F. Supp. 2d 293 (D.D.C. 2008) (the revocation of a job offer to a transgender candidate constituted discrimination because of sex in violation of Title VII)

Lopez v. River Oaks Imaging & Diagnostic Group, Inc., 542 F. Supp. 2d 653 (S.D. Tex. Apr. 3, 2008) (transgender individual's claim of gender discrimination on the basis on gender non-conformance is actionable under Title VII)

Creed v. Family Express Corp., No. 3:06-CV-465RM, 2007 WL 2265630, at *3 (N.D. Ind. Aug. 3, 2007) (allowing a Title VII claim of discrimination based on sex stereotyping to move forward, while noting that *Price Waterhouse* does not “provide a cause of action based solely on a plaintiff’s transgender status”)

Mitchell v. Axcan Scandipharm, Inc., No. 05-243, 2006 WL 456173 (W.D. Pa. Feb. 17, 2006) (termination of employee based on transgender status constituted gender discrimination based on sex stereotypes under Title VII)

Tronetti v. TLC HealthNet Lakeshore Hosp., No. 03-CV-0375E, 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003) (transgender people are “protected under Title VII to the extent that they are discriminated against on the basis of sex”)

Ianetta v. Putnam Invs., Inc., 142 F. Supp. 2d 131 (D. Mass. 2001) (discrimination on the basis of gender identity is a legitimate Title VII claim under sex discrimination)

Miles v. New York Univ., 979 F. Supp. 248, 249–50 (S.D.N.Y. 1997) (Title IX covers sexual harassment of transgender individuals)

Sexual Orientation

Circuit Courts of Appeal:

Appellate courts in two circuits³ have issued decisions holding that federal nondiscrimination laws, including Title VII and Title IX, include sexual orientation within the scope of prohibited sex discrimination, and three additional circuits have case law that supports such a finding.

1st

Franchina v. City of Providence, 881 F.3d 32, 55 (1st Cir. 2018) (determining that the trial court was not required to instruct jury in Title VII gender-based hostile work environment case that plaintiff could not recover if she was harassed solely because of her sexual orientation where the court instructed jury that plaintiff could show that harassment was gender-based “by proving that she was harassed because she is part of a subclass of women, in this case lesbians, if she also proves that this harassment was at least in part because of her sex or gender”)

2d

Zarda v. Altitude Express, Inc., 883 F.3d 100, 112 (2d Cir. 2018) (concluding that “sexual orientation discrimination is motivated, at least in part, by sex and is thus a subset of sex discrimination” for purposes of Title VII), *cert. granted* on June 1, 2018 (No. 17-1623)

Christiansen v. Omnicom Grp., Inc., 852 F.3d 195, 201 (2d Cir. 2017) (gay plaintiff’s gender stereotyping allegations are cognizable under *Price Waterhouse* and circuit precedents)

³ *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 112 (2d Cir. 2018); *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 351 (7th Cir. 2017).

7th

Hively v. Ivy Tech Cmty. Coll. of Indiana, 853 F.3d 339, 351 (7th Cir. 2017) (“it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex”)

9th

Latta v. Otter, 771 F.3d 456 (9th Cir. 2014) (Idaho and Nevada’s marriage laws were held unconstitutional on Equal Protection grounds for failing to recognize same-sex marriages reasoning that “[l]aws that treat people differently based on sexual orientation are unconstitutional unless a ‘legitimate purpose ... overcomes’ the injury inflicted by the law on lesbians and gays and their families”)

Nichols v Aztecha Rest. Enters. Inc., 256 F. 3d 864, 874 (9th Cir. 2001) (Title VII violation where harassment was “based upon the perception that [the male plaintiff] is effeminate”)

11th

Fredette v. BVP Mgmt. Assocs., 112 F.3d 1503, 1505, 1510 (11th Cir. 1997) (“Since sexual harassment is a form of sex discrimination, the crucial inquiry is whether the harasser treats a member or members of one sex differently from members of the other sex. ... We conclude that the plain language of Title VII provides protection against the conduct at issue here where a homosexual male superior has solicited sexual favors from a male subordinate and conditioned work benefits or detriment on receiving such favors.”).

Of the circuit court opinions declining to find that sexual orientation is encompassed within sex discrimination,⁴ four predate *Price Waterhouse* and *Oncale*. Four of the opinions finding

⁴ *Bostock v. Clayton Cty. Bd. of Commissioners*, 723 Fed. Appx. 964, 965 (11th Cir. 2018), *petition for cert. docketed*, No. 17-1618 (U.S. June 1, 2018) (*Price Waterhouse* and *Oncale* do not “support a cause of action for sexual orientation discrimination under Title VII”); *Evans v. Georgia Regional Hospital*, 850 F.3d 1248, 1255 (11th Cir. 2017) (while sexual orientation discrimination is not actionable as sex discrimination under Title VII, discrimination based on gender nonconformity is covered under the sex provision of Title VII); *Hinton v. Virginia Union University*, 185 F. Supp. 3d 807 (4th Cir. 2016) (Title VII does not protect discrimination based on sexual orientation and cannot be supplanted by EEOC decision saying that it does); *Kalich v. AT&T Mobility, LLC*, 679 F.3d 464, 471 (6th Cir. 2012) (declaring that under “Michigan law, as under Title VII, sexual orientation is not a protected classification. Thus, harassment or discrimination based upon a person’s sexual orientation cannot form the basis of a cognizable claim.”); *Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285 (3d Cir. 2009) (sexual orientation is not protected under Title VII); *Vickers v. Fairfield Medical Center*, 453 F.3d 757 (6th Cir. 2006) (Title VII does not prohibit discrimination based on sexual orientation); *Medina v. Income Support Division*, 413 F.3d 1131 (10th Cir. 2005) (an alleged hostile work environment based on employee’s sexual orientation did not involve actionable sex discrimination under Title VII); *Kay v. Independence Blue Cross*, No. 03-2628, 2005 WL

that sexual orientation discrimination is actionable have come within the last two years, indicating that the jurisprudence is shifting demonstrably toward this interpretation.

District Courts:

Federal district court opinions addressing whether sexual orientation discrimination is encompassed with sex discrimination laws are split, with nineteen in favor⁵ and eleven ruling

1678816 (3d Cir. 2005) (harassment based on sexual orientation is not actionable under Title VII); *King v. Super Service, Inc.*, No. 01-6143, 2003 WL 21500008 (6th Cir. 2003) (sexual orientation is not protected under Title VII); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1063 (9th Cir. 2002) ("sexual orientation is irrelevant for purposes of Title VII"); *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001) ("Title VII does not prohibit discrimination based on sexual orientation"); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999) (Title VII does not protect against discrimination based upon sexual orientation); *Wrightson v. Pizza Hut of America, Inc.*, 99 F.3d 138, 143 (4th Cir. 1996) (acknowledging that "Title VII does not afford a cause of action for discrimination based upon sexual orientation"); *Williamson v. A.G. Edwards and Sons, Inc.*, 876 F.2d 69 (8th Cir. 1989) (Title VII does not protect against discrimination based upon sexual orientation); *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979) (Title VII does not prohibit discrimination based on sexual orientation); *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325 (5th Cir. 1978) (employer did not violate Title VII in refusing to hire Plaintiff because he was "effeminate").

⁵ *Philpott v. New York*, 252 F. Supp. 3d 313 (S.D.N.Y. 2017) (sexual orientation discrimination is cognizable under Title VII); *Spellman v. Ohio Dept. of Transp.*, 244 F. Supp. 3d 686 (S.D. Ohio 2017) (sexual orientation discrimination claim actionable under Title VII sex discrimination provision); *Boutillier v. Hartford Public Schools*, 221 F. Supp. 3d 255 (D. Conn. 2016) (Title VII protects individuals who are discriminated against on the basis of sexual orientation); *U.S. Equal Employment Opportunity Comm'n v. Scott Med. Health Ctr., P.C.*, No. 16-225, 2016 WL 6569233 (W.D. Pa. Nov. 4, 2016) (discrimination based on sexual orientation is a subset of sex stereotyping and is actionable under Title VII); *Winstead v. Lafayette County Board of County Commissioners*, 197 F. Supp. 3d 1334, 1346–47 (N.D. Fl. 2016) ("to treat someone differently based on her attraction to women is necessarily to treat that person differently because of her failure to conform to gender or sex stereotypes, which is, in turn, necessarily discrimination on the basis of sex"); *Waters v. Ricketts*, 159 F. Supp. 3d 992, 1001 (D. Neb. 2016) (Nebraska law prohibiting state from recognizing same-sex marriages was unconstitutional under the Equal Protection Clause); *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015) (sexual orientation discrimination is covered as sex or gender discrimination under Title IX in part because "the line between discrimination based on gender stereotyping and discrimination based on sexual orientation is blurry, at best"); *Isaacs v. Felder Services, LLC*, 143 F. Supp. 3d 1190, 1193 (M.D. Ala. 2015) ("claims of sexual orientation-based discrimination are cognizable under Title VII"); *Burrows v. Coll. of Cent. Fla.*, No. 5:14-CV-197-OC-30PRL, 2015 WL 4250427, at *9 (M.D. Fla. July 13, 2015) (claim for gender stereotyping discrimination "is merely a repackaged claim for discrimination based on sexual orientation, which is not cognizable under Title VII or the [Florida Civil Rights Act]"); *Deneffe v. Skywest, Inc.*, No. 14-CV-00348-MEH, 2015 WL 2265373, at *6 (D. Colo. May 11, 2015) (evidence of discrimination based on sexual orientation is prohibited under Title VII because it was based on plaintiff's "failure to conform to male stereotypes"); *Rosenbrahn v. Dugaard*, 61 F. Supp. 3d 845 (D.S.D. 2014) (six same-sex couples' Equal Protection claim was actionable on alleged deprivation of the fundamental right to marry); *Lawson v. Kelly*, 58 F. Supp. 3d 923, 934 (W.D. Mo. 2014) (Missouri law prohibiting the state from recognizing same-sex marriages is unconstitutional under the Equal Protection Clause as a classification based on gender); *Hall v. BNSF Ry Co.*, No. C13-2160 RSM, 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014) (making no comment on validity of Title VII sexual orientation claim under theory of sex discrimination but finding that plaintiff has satisfied initial burden of stating claim that is plausible on its face); *Terveer v. Billington*, 34 F. Supp. 3d 100 (D.D.C. 2014) (discrimination on the basis of sexual orientation is actionable under Title VII); *Koren v. Ohio Bell Tel. Co.*, 894 F. Supp. 2d 1032 (N.D. Ohio 2012) (discriminating against a man because he is in a same-sex marriage is discrimination because of sex under Title VII); *Schroeder ex rel. Schroeder v. Maumee Bd. Of Educ.*,

the other way.⁶ Given the recent shift toward such a recognition at the appellate level, we expect a similar shift in district court opinions to follow.

296 F. Supp. 2d 869 (N.D. Ohio 2003) (sexual orientation discrimination is actionable under Title IX as motivated by the plaintiff's sex); *Centola v. Potter*, 183 F. Supp. 2d 403 (D. Mass. 2002) (sexual orientation harassment is often directly related to sex stereotypes); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212 (D. Or. 2002) (the belief that a man or woman should only be attracted to or date a person of the opposite sex constitutes a gender stereotype, actionable under Title VII); *Ray v. Antioch Unified School Dist.*, 107 F. Supp. 2d 1165, 1169 (N.D. Cal. 2000) ("Because the Supreme Court has found same sex harassment actionable under Title VII, and Title VII is an appropriate guide in construing Title IX claims, the Court finds that same sex harassment is a form of harassment actionable under Title IX.").

⁶ *Horton v. Midwest Geriatric Management*, No. 4:17CV2324 JCH, 2017 WL 6536576 (E.D. Mo. Dec. 21, 2017) (dismissing Title VII claims for sexual orientation discrimination), *pending appeal at the Eighth Circuit*; *Moore v. Lift for Life Academy, Inc.*, 489 S.W.3d 843, 847 n.1 (E.D. Mo. 2016) (stating that "sexual orientation is not a protected category under the Missouri Human Rights Act"); *Arnold v. Heartland Dental, LLC*, 101 F. Supp. 3d 1220, 1225–26 (M.D. Fl. 2015) ("Title VII, and accordingly the FCRA, was not intended to cover discrimination against homosexuals"; however, discrimination based on gender non-conformity is actionable under Title VII as sex discrimination); *Candina v. University of Miami*, 185 F. Supp. 3d 1343, 1350 (S.D. Fl. 2015) ("neither Title VII nor the FCRA prohibit discrimination based on sexual orientation alone"); *Lewis v. High Point Regional Health System*, 79 F. Supp. 3d 588, 589 (E.D.N.C. 2015) (stating that the Fourth Circuit has not recognized "Title VII as protecting individuals because of their sexual orientation"); *Pambianchi v. Arkansas Tech University*, 95 F. Supp. 3d 1101 (E.D. Ark. 2015) (Title VII does not protect against discrimination based upon sexual orientation); *Robertson v. Siouxland Cmty. Health Ctr.*, 938 F. Supp. 2d 831 (N.D. Iowa 2013) (stating that Title VII does not protect against discrimination based upon sexual orientation); *Henderson v. Labor Finders of Va., Inc.*, No. 3:12cv600, 2013 WL 1352158 (E.D. Va. Apr. 2, 2013) (noting that Title VII does not prohibit sexual orientation discrimination, but permitting a claim by a heterosexual plaintiff who was subject to gendered slurs and those associated with sexual orientation intended to denote accusations of effeminacy); *Ayala-Sepulveda v. Municipality of San German*, 661 F. Supp. 2d 130 (D.P.R. 2009) (Title VII does not protect against discrimination based upon sexual orientation); *Fitzpatrick v. Winn-Dixie Montgomery, Inc.*, 153 F. Supp. 2d 1303, 1306 (M.D. Ala. 2001) ("[s]exual orientation is not a protected class under Title VII" and "harassing someone because of that person's sexual orientation is not harassment because of gender"); *Mims v. Carrier Corp.*, 88 F. Supp. 2d 706 (E.D. Tex. 2000) (verbal harassment based on perceived sexual orientation is not sexual harassment because sex discrimination under Title VII does not include discrimination based on sexual orientation).