AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY

Issue Brief August 2017

Sex Discrimination Law and LGBT Equality*

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Federal law offers a host of protections against discrimination on the basis of sex. Title VII of the Civil Rights Act of 1964 proscribes sex discrimination in employment. The Fair Housing Act prohibits sex discrimination in housing. Title IX prohibits sex discrimination in education by institutions that receive federal funds. And the Constitution proscribes sex discrimination unless the government has "an exceedingly persuasive justification."[1]

In implementing these laws, the courts have arrived at a number of common-sense principles (i.e., doctrines) for how they should be applied:

- It is sex discrimination for a decision-maker to take the sex or gender of the victim "into account" when taking an adverse action against them.[2]
- It is sex discrimination if, but for the sex of the victim, they would not have experienced discrimination.[3]

*For other ACS Issue Briefs that touch on related issues, see Katie Eyer, *Protecting Lesbian Gay Bisexual and Transgender (LGBT) Workers: Strategies for Bringing Employment Claims on Behalf of Members of the LGBT Community in the Absence of Clear Statutory Protections* (2006), https://www.acslaw.org/sites/default/files/Eyer_on_Protecting_LGBT_Workers--FINAL_0.pdf; Maxine Eichner, *The Employment Non-Discrimination Act: Requiring Fairness for All Employees Regardless of Sexual Orientation or Gender Identity* (2010), https://www.acslaw.org/files/ENDAbrief9-2-2010.pdf; Dr. Jillian T. Weiss, *The Transgender Tipping Point: An Overview for the Advocate* (2014), https://www.acslaw.org/sites/default/files/Weiss_-_The_Transgender_Tipping_Point.pdf. In addition, this author has a recent book chapter that describes narrower (non-per se) arguments that can be made for coverage of LGBT employment discrimination plaintiffs under federal and state anti-discrimination law. *See* Katie Eyer, *Lesbian, Gay, Bisexual and Transgender Employees*, *in* REPRESENTING LESBIAN, GAY, BISEXUAL AND TRANSGENDER CLIENTS (Kirby G. Upright & Tiffany L. Palmer eds., 3d ed. 2016) [hereinafter Eyer, *Lesbian, Gay, Bisexual and Transgender Employees*], https://ssrn.com/abstract=2674612.

[1] United States v. Virginia, 518 U.S. 515, 531 (1996). This list is not exhaustive. One could also add, for example, the Equal Credit Opportunity Act, The Affordable Care Act, and the Equal Pay Act. Many states and localities also have laws prohibiting sex discrimination. Note that while the remainder of this Issue Brief focuses on statutory analysis (instead of constitutional arguments), many of the same doctrinal arguments could be made vis-à-vis the application of the constitution's sex discrimination protections to anti-LGBT discrimination. If such discrimination were treated as sex discrimination under the constitution, intermediate scrutiny would apply (rather than the lowest level of review, rational basis review, which is currently what most courts apply to anti-LGBT discrimination).

[2] *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 239–40 (1989).

[3] *See, e.g.*, L.A. Dep't of Power & Water v. Manhart, 435 U.S. 702, 711 (1978).

- Sex discrimination includes gender discrimination, i.e., discrimination targeting an individual because they don't comport with the decision-maker's view of how persons of a particular sex should act, behave, or think.[4]

As set out below, the logic of these well-established doctrines (as well as others) compels the conclusion that sexual orientation and gender identity discrimination are, necessarily, also sex discrimination. Nevertheless, courts historically refused to extend sex discrimination protections to LGBT litigants, arguing that such protections cannot have been what Congress intended.[5]

Starting in the 2000s, and accelerating in the 2010s, this trend has reversed. Numerous courts and agencies now hold that gender identity discrimination is per se sex discrimination, and increasing numbers are reaching the same conclusion with regard to sexual orientation discrimination. As LGBT individuals have achieved greater social acceptance in our society, courts have been more willing—and able—to see that the faithful application of sex discrimination doctrine proscribes discrimination against them.[6]

This Issue Brief sets out the reasons why both sexual orientation and gender identity discrimination necessarily must be considered sex discrimination under well-established anti-discrimination doctrine. It also responds to the most common arguments raised against such a conclusion. Finally, the Issue Brief concludes by briefly discussing the reasons why, despite the move towards coverage of anti-LGBT discrimination under federal sex discrimination law, explicit formal statutory prohibitions on sexual orientation and gender identity discrimination remain important.

I. Sexual Orientation And Gender Identity Discrimination Are Also Sex Discrimination

As described below, faithful application of established anti-discrimination law doctrine leads inevitably to the conclusion that sexual orientation and gender identity discrimination are also sex discrimination. As the Seventh Circuit put it in the recent case of *Hively v. Ivy Tech Community College*, "it is actually impossible to discriminate on the basis of sexual orientation [or gender identity] without discriminating on the basis of sex."[7] Thus, all instances of sexual orientation and gender identity discrimination should also be considered "sex" discrimination under federal law.

[4] *See, e.g.*, *Price Waterhouse*, 490 U.S. at 250–51.
[5] *See, e.g.*, Ulane v. E. Airlines, 742 F.2d 1081, 1084–87 (7th Cir. 1984); DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 329–32 (9th Cir. 1979), *abrogated by* Nichols v. Azteca Rest. Enter., 256 F.3d 864 (9th Cir. 2001).
[6] *Cf.* Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015) ("The nature of injustice is that we may not always see it in our own times.").
[7] *See* Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 351 (7th Cir. 2017) (en banc) (addressing sexual orientation discrimination).

A. Discrimination "Because of" Sex Has Occurred Where Sex or Gender is Taken "Into Account"

In the early years following the enactment of Title VII,[8] employers argued that the statute's proscriptions did not prohibit all employer consideration of or use of sex—that some forms of sex-based decision-making were not discriminatory.[9] This approach has, however, been rejected by the Supreme Court, which has repeatedly held that use of sex as a decision-making criterion violates Title VII.[10]

The Court perhaps articulated this principle most clearly in *Price Waterhouse v. Hopkins*, where it stated:

> Congress' intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute. In now-familiar language, the statute forbids an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment," or to "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of* such individual's . . . sex." 42 U.S.C. §§ 2000e-2(a)(1), (2) (emphasis added). We take these words to mean that gender must be irrelevant to employment decisions.[11]

It is easy to see how this proscription on the consideration of sex is violated in the context of discrimination based on sexual orientation and/or gender identity. Indeed, it is literally impossible to discriminate based on sexual orientation or gender identity without taking the sex of the victim "into account." (For example, you can't discriminate against a female employee for marrying a woman without taking the employee's sex into account. Similarly, you can't discriminate against a transgender employee for dressing in accordance with their gender identity, not their birth sex,

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[8] Many of the legal principles described herein were established in the context of Title VII, the federal law prohibiting employment discrimination on the basis of sex. Because the federal sex discrimination laws typically include very similar operative language ("because of . . . sex" or "on the basis of sex") the federal courts have held that legal principles deriving from one area of sex discrimination law can and should be "borrowed" in other sex discrimination contexts. *See, e.g.*, Summy-Long v. Pa. State Univ., 226 F. Supp. 3d 371, 411 (M.D. Pa. 2016) ("Title IX freely borrows the jurisprudence of Title VII.") (quoting Dawn L. v. Greater Johnstown Sch. Dist. 586 F. Supp. 2d 332, 381 (W.D. Pa. 2008)).

[9] *See* Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1333–58 (2012).

[10] *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 239–40 (1989); L.A. Dep't of Power & Water v. Manhart, 435 U.S. 702, 711 (1978); UAW v. Johnson Controls, 499 U.S. 187, 197–200 (1991). Under Title VII, there is a narrow defense available to employers who discriminate based on sex, where they can show that sex was a "bona fide occupational qualification" (BFOQ). *See* 42 U.S.C. § 2000e-2(e) (2012).

[11] *Price Waterhouse*, 490 U.S. at 239–40. Note that the application of the principles articulated in this passage of *Price Waterhouse* to statutes other than Title VII may be complicated by post-*Price Waterhouse* case law—holding, in the context of other anti-discrimination laws, that "because of" connotes but-for causation. *See, e.g.*, Gross v. FBL Fin. Servs., 557 U.S. 167 (2009). As set out below, sexual orientation and gender identity discrimination also count as discrimination even under the more rigorous "but-for" standard. And Title VII itself retains the lower causation standard articulated in *Price Waterhouse*. *See* 42 U.S.C. § 2000e-2(m) ("[A]n unlawful employment practice is established when the complaining party demonstrates that . . . sex . . . was a motivating factor for any employment practice.").

without taking the employee's sex—as well as their gender presentation—into account). Thus, any time sexual orientation or gender identity discrimination takes place, the defendant has acted "because of" sex, and is in violation of the statute.[12]

B. But-For Discrimination is Proscribed

Related to the proscription on taking sex or gender into account is the well-established principle that if a victim of discrimination would have been treated differently "but for" their protected class status, actionable discrimination has occurred. Thus, the Supreme Court held early on—and has consistently adhered to the principle—that employer actions that do not "pass the simple test of whether the evidence shows 'treatment of a person in a manner which, but for that person's sex, would be different' . . . constitute[] discrimination."[13]

There is no question that discrimination based on sexual orientation and gender identity is "but for" the sex (or the perceived sex) of the victim.[14] Thus, when an employer engages in sexual orientation discrimination—firing a man because he is together with, or sexually attracted to, other men—the employer would not, by definition, have treated a woman who engaged in identical conduct (dating or marrying men) or had identical desires (sexual attraction to men) the same way. Similarly, an employer who fires a transgender woman for wearing a dress to work has done so because of the employer's perception that the employee is a man who should not be wearing dresses.[15] But for the employee's perceived sex, the treatment of the employee would have been different.

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[12] *See, e.g.*, *Hively*, 853 F.3d at 346–47 (embracing this reasoning as to both sexual orientation and gender identity discrimination); Boutillier v. Hartford Pub. Sch., 221 F. Supp. 3d 255, 267–68 (D. Conn. 2016) (embracing this reasoning in the context of sexual orientation discrimination); Baldwin v. Foxx, No. 0120133080, 2015 WL 4397641, *4–5 (E.E.O.C. July 15, 2015) (same); Lusardi v. McHugh, No. 0120133395, 2015 WL 1607756, *7 (E.E.O.C. Apr. 1, 2015) (embracing this reasoning in the context of gender identity discrimination); Macy v. Holder, No. 0120120821, 2012 WL 1435995, *7 (E.E.O.C. Apr. 20, 2012) (same).

[13] *See Manhart*, 435 U.S. at 711; *see also Johnson Controls*, 499 U.S. at 200.

[14] *See, e.g.*, *Hively*, 853 F.3d at 345–47 (embracing this reasoning as to both sexual orientation and gender identity discrimination); Smith v. City of Salem, 378 F.3d 566, 574 (6th Cir. 2004) (embracing this reasoning in the gender identity context); Rosa v. Park W. Bank & Trust Co., 214 F.3d 213, 215–16 (1st Cir. 2000) (same); Videckis v. Pepperdine Univ., 150 F. Supp. 3d 1151, 1161 (C.D. Cal. 2015) (same); Hall v. BNSF Ry. Co., No. C13-2160 RSM, 2014 WL 4719007, at *3–5 (W.D. Wash. Sept. 22, 2014) (same); Schroer v. Billington, 577 F. Supp. 2d 293, 307–08 (D.D.C. 2008) (adopting a similar theory in the gender identity context); *Foxx*, 2015 WL 4397641, at *5 (embracing this reasoning in the sexual orientation context); *see also* Christiansen v. Omnicom Grp., 852 F.3d 195, 201–04 (2d Cir. 2017) (Katzmann, J., concurring) (embracing this reasoning in the sexual orientation context, but recognizing that the panel was bound by circuit precedent).

[15] In some circuits, this analysis would be more complicated in contexts where a dress code was applicable, by virtue of the fact that some circuits have created a judicial carve-out from the ordinary rule that but-for discrimination is proscribed in order to permit for sex-differentiated dress codes. *See, e.g.*, Jespersen v. Harrah's Operating Co., 444 F.3d 1104 (9th Cir. 2006) (en banc). Note that the Supreme Court has never endorsed a "dress code" exception to the rule that but-for discrimination is prohibited sex discrimination. Indeed, *Price Waterhouse*—which makes clear that employers cannot informally require employees to dress in ways that comport with social expectations about gender-specific attire—strongly suggests a contrary rule. *Price Waterhouse*, 490 U.S. at 250–53.

C. Gender Stereotyping is Prohibited

The Supreme Court has also made clear that gender stereotyping—requiring women or men to comply with the stereotypes associated with their sex—is discrimination "because of . . . sex."[16] As the Court put it in *Price Waterhouse*, "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.'"[17] Thus, in *Price Waterhouse*, the Court found that a woman partnership candidate was subjected to discrimination "because of sex" where she was denied partnership because she did not sufficiently meet partners' expectations of what a woman should be (feminine in dress, appearance, and demeanor).[18]

Again, prohibitions on gender stereotyping are necessarily violated when an institution or employer subjects an individual to sexual orientation or gender identity discrimination. This is perhaps most obvious in the gender identity context, where courts have observed that, "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. . . . There is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms."[19]

So, too, in the sexual orientation context, discrimination based on sexual orientation necessarily rests on an employee's failure to conform to a core gender stereotype: that men should only have sexual attractions to women, and that women should only have sexual attractions to men. As the District of Massachusetts put it in an early case, "In fact, stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women. . . . The harasser may discriminate against an openly gay co-worker, or a co-worker that he perceives to be gay, whether effeminate or not, because he thinks, . . . 'real' men should date women, and not other men."[20]

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[16] *Price Waterhouse*, 490 U.S. at 250–51. As the Seventh Circuit recognized in its recent en banc decision in *Hively v. Ivy Tech*, this conclusion follows logically from Title VII's proscription on but-for discrimination. In every context in which a victim is subjected to discrimination for failure to conform to the gender stereotypes associated with their actual or perceived sex, that discrimination would not have occurred "but for" their sex. *Hively*, 853 F.3d at 346–47.

[17] *Price Waterhouse*, 490 U.S. at 251.

[18] *Id.* at 250–51.

[19] Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011) (citation omitted). For other cases embracing similar reasoning, *see, e.g.*, Whitaker v. Kenosha Unified Sch. Dist., 858 F.3d 1034, 1047-51 (7th Cir. 2017); Dodds v. U.S. Dep't of Educ., 845 F.3d 217, 221 (6th Cir. 2016); Barnes v. City of Cincinnati, 401 F.3d 729, 737–38 (6th Cir. 2005); *Smith*, 378 F.3d at 571–75; Schwenk v. Hartford, 204 F.3d 1187, 1201–03 (9th Cir. 2000); *Rosa*, 214 F.3d at 216; Fabian v. Hosp. of Cent. Conn., 172 F. Supp. 3d 509, 521–27 (D. Conn. 2016); Mickens v. General Elec. Co., No. 3:16CV-00603-JHM, 2016 WL 7015665, at *3 (W.D. Ky. Nov. 28, 2016); Roberts v. Clark Cty. Sch. Dist., 215 F. Supp. 3d 1001, 1011–15 (D. Nev. 2016); Finkle v. Howard Cty., 12 F. Supp. 3d 780, 787–89 (D. Md. 2014), *dismissed on other grounds* 640 Fed. Appx. 245 (4th Cir. 2016); *Schroer*, 577 F. Supp. 2d at 303–06; Lopez v. River Oaks Imaging & Diagnostic Grp., 542 F. Supp. 2d 653, 658–61 (S.D. Tex. 2008); Mitchell v. Axcan Scandipharm, No. Civ.A. 05-243, 2006 WL 456173, at *2 (W.D. Pa. Feb. 17, 2006); Tronetti v. TLC HealthNet Lakeshore Hosp., No. 03-CV-0375E(SC), 2003 WL 22757935, at *4 (W.D.N.Y. Sept. 26, 2003); Macy v. Holder, No. 0120120821, 2012 WL 1435995, *5–9 (E.E.O.C. Apr. 20, 2012).

[20] Centola v. Potter, 183 F. Supp. 2d 403, 410 (D. Mass. 2002). For other cases embracing similar reasoning, see *Hively*, 853 F.3d at 346–47; Boutillier v. Hartford Pub. Sch., 221 F. Supp. 3d 255, 269 (D. Conn. 2016); Winstead v. Lafayette Cty. Bd. of Cty. Comm'rs, 197 F. Supp. 3d 1334, 1344–47 (N.D. Fla. 2016); EEOC v. Scott Med. Health Ctr., 217 F.

D. Other Doctrines

There are a number of other well-established anti-discrimination doctrines that also lead to the conclusion that sexual orientation and/or gender identity discrimination are sex discrimination.

For example, case law in the circuit courts has long recognized that "associational discrimination"—discrimination because of one's association with someone of a particular protected class membership—is discrimination "because of . . ." the plaintiff's protected class status. The majority of these cases have arisen in the context of interracial relationships, where the courts have recognized that "[w]here a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of his race."[21] As the court in *Hively v. Ivy Tech Community College* recently recognized, this same logic applies in the context of sexual orientation discrimination, where the plaintiff, of necessity, has been discriminated against "because of [her] sex" where she is subjected to discrimination because of same-sex romantic associations (had she been a man, a relationship with or attraction to a woman would not have led to discrimination).[22]

In addition, as a number of courts have recognized, it is unquestionable that Title VII's prohibition on discrimination "because of . . . religion" (and related prohibitions under other civil rights laws) would be violated were an individual subjected to discrimination because of a religious conversion.[23] Thus, a former Christian who is targeted for discrimination because he has converted to Judaism has been subjected to actionable discrimination "because of . . . religion"—regardless of whether non-convert Jews or Christians are subjected to discrimination. So, too, transgender plaintiffs—who are targeted because they have changed their sex or gender presentation—are unquestionably subjected to discrimination "because of . . . sex."

II. Counter-Arguments

What are the counter-arguments that exist against this straightforward reasoning? As set forth below, there are two common arguments on which defendants and courts have relied. First, it is argued that Congress did not intend the inclusion of sexual orientation and gender identity as protected classes, and thus discrimination on those bases cannot be actionable. Second, it is argued that it can't be sex discrimination to discriminate based on sexual orientation or gender identity because under such a regime, both men and women may be treated equally badly. As set out below, both of these arguments are inconsistent with existing Supreme Court authority.

Supp. 3d 834, 840–42 (W.D. Pa. 2016); Videckis v. Pepperdine Univ., 150 F. Supp. 3d 1151, 1159–61 (C.D. Cal. 2015); Isaacs v. Felder Servs., 143 F. Supp. 3d 1190, 1194 (M.D. Ala. 2015); Terveer v. Billington, 34 F. Supp. 3d 100, 116 (D.D.C. 2014); Koren v. Ohio Bell Tel. Co., 894 F. Supp. 2d 1032, 1037–38 (N.D. Ohio 2012); Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002); *see also Christiansen*, 852 F.3d at 205–06 (Katzmann, J., concurring) (embracing this reasoning in the sexual orientation context, but recognizing that the panel was bound by circuit precedent).

[21] Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 892 (11th Cir. 1986); *see also, e.g.*, Holcomb v. Iona Coll., 521 F.3d 130, 132–39 (2d Cir. 2008).

[22] *Hively*, 853 F.3d at 347–49; *see also Boutillier*, 221 F. Supp. 3d at 268; *Isaacs*, 143 F. Supp. 3d at 1193–94.

[23] *See, e.g.*, *Schroer*, 577 F. Supp. 2d at 306; *Fabian*, 172 F. Supp. 3d at 527; *Macy*, 2012 WL 1435995 at *11.

A. Congress Didn't Intend It

By far the most common argument against reading the sex discrimination laws to proscribe sexual orientation and gender identity discrimination—both historically and today—is that Congress did not intend it. There are two variants of this argument. First, advocates and some courts have argued that the enacting Congress (in 1964, when Title VII was enacted, or at whatever date the applicable law was enacted) surely did not intend to prohibit sexual orientation or gender identity discrimination.[24] Second, advocates and some courts have contended that the actions of post-enactment Congresses (in introducing, and not passing legislation that would directly proscribe "sexual orientation" and "gender identity" discrimination) make clear that sexual orientation and gender identity discrimination cannot already be prohibited as sex discrimination.[25] As set out below, both of these arguments are inconsistent with modern Supreme Court statutory interpretation precedents. It is also worth noting that they have nothing to do with the internal logic of the well-established doctrines discussed above. Rather, they are arguments for carving LGBT people out of otherwise applicable protections under sex discrimination law, based on contrary congressional intent.

1. Congress Didn't Intend It . . . *(in 1964, in 1968, in 1972… Whenever the Relevant Sex Discrimination Law Was Passed)*

The first variant of the congressional intent argument relies on a common-sense intuition: that surely the enacting Congress (in 1964 when Title VII was enacted, or in the shortly following time frames for enactment of the other sex discrimination laws), did not intend to prohibit sexual orientation and gender identity discrimination. This intuition—that Congress in 1964 would not have chosen to prohibit sexual orientation or gender identity discrimination—may well be correct. But under existing Supreme Court precedent, this type of reasoning is not a basis for refusing to apply an otherwise applicable law. Thus, for example, in the context of responding to an identical argument against allowing a cause of action for same-sex sexual harassment, Justice Scalia stated for the Court that:

> We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII. As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the *provisions of our laws rather than the principal concerns of our legislators by which we are governed*. Title VII prohibits "discriminat[ion] . . . because of . . . sex" in the "terms" or "conditions" of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.[26]

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[24] *See, e.g.*, Ulane v. E. Airlines, 742 F.2d 1081, 1085–87 (7th Cir. 1984).
[25] *Id.*
[26] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79–80 (1998) (emphasis added); *see also* Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 212 (1998) ("[Even] assuming [the ADA's statement of findings and purpose] . . . proves, as

Precisely this same reasoning applies in the context of application of the sex discrimination laws to sexual orientation and gender identity discrimination. The language that Congress enacted—prohibiting discrimination "because of sex"—literally proscribes sexual orientation and gender identity discrimination (which, as set forth above, are always "because of" sex). As in *Oncale v. Sundowner Offshore Services*, *Pennsylvania Department of Corrections v. Yeskey*, and other cases, the fact that Congress did not anticipate—and might even have opposed—a particular application of broad statutory language is not a basis for refusing to apply the statute as written.[27]

2. Subsequent Congresses Introduced, but Did Not Pass, Legislation Explicitly Proscribing Sexual Orientation and Gender Identity Discrimination

A second variant on the congressional intent argument notes that subsequent Congresses have introduced (but not enacted) legislation that would prohibit "sexual orientation" and "gender identity" discrimination explicitly.[28] Thus, some courts and advocates have reasoned that sexual orientation and gender identity discrimination cannot already be proscribed under existing law.

Again, this argument runs afoul of existing Supreme Court statutory interpretation precedents. While the Court has not been entirely consistent, it has most often rejected the notion that Congress's failure to enact subsequent legislation is relevant to the interpretation of a previously enacted statute. As the Court put it in *Central Bank of Denver v. First Interstate Bank of Denver*, in deciding whether § 10(b) of the Securities Exchange Act provided a cause of action to private parties for "aiding and abetting" liability:

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petitioners contend, that Congress did not 'envisio[n] that the ADA would be applied to state prisoners,' in the context of an unambiguous statutory text that is irrelevant. As we have said before, the fact that a statute can be 'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'") (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985)).

[27] A slightly different variant of this argument—characterized by some advocates as "statutory originalism"—has emerged recently in the LGBT cases, and is equally unmeritorious. First, the central defining concept of "statutory originalism"—that courts should look to the "original public meaning" of laws—is a theory developed by academics, which has barely made inroads into constitutional law jurisprudence, and has not done so at all in the statutory context. *Cf. Hively*, 853 F.3d at 360 (Sykes, J. dissenting) (one of the only references to this term in the statutory context anywhere in the federal case law, made only in dissent). More importantly, even if one applies the closest analog to so-called "statutory originalism" in the Court's actual statutory interpretation jurisprudence—looking to dictionary definitions contemporary to the enacting Congress (a practice sometimes, albeit irregularly, followed by the Court)—it does not do anything to defeat the reasoning that sexual orientation and gender identity are per se sex discrimination. Even if one defines sex in its narrowest way—as the state of being a man or a woman—discrimination based on sexual orientation and gender identity is still literally discrimination "because of . . . sex," as delineated above. Moreover, it is not clear that historic dictionaries defined sex exclusively in this way, as opposed to as including those characteristics which define one as male or female, including gender characteristics. *See, e.g.*, *Fabian*, 172 F. Supp. 3d at 526.

[28] In 1974, Representatives Bella Abzug (D-NY) and Ed Koch (D-NY) introduced the Equality Act of 1974, which would have explicitly prohibited sexual orientation discrimination in employment, housing and public accommodations. Jerome Hunt, *A History of the Employment Non-Discrimination Act*, CTR. FOR AM. PROGRESS (July 19, 2011) https://www.americanprogress.org/issues/lgbt/news/2011/07/19/10006/a-history-of-the-employment-non-discrimination-act/. Since that time, there have been numerous bills introduced in Congress which would provide explicit protections for the LGBT community. The most recent version of the legislation, also called the Equality Act, would amend the Civil Rights Act of 1964 to explicitly ban sexual orientation and gender identity discrimination, while also legislatively recognizing that sexual orientation and gender identity discrimination are sex discrimination. *See* Equality Act, H.R. 2282, 115th Cong. (2017).

> Central Bank, for its part, points out that [after the enactment of Securities Exchange Act § 10(b)], bills were introduced that would have amended the securities laws to make it "unlawful . . . to aid, abet, counsel, command, induce, or procure the violation of any provision" of the 1934 Act. . . . These bills prompted "industry fears that private litigants, not only the SEC, may find in this section a vehicle by which to sue aiders and abettors," and the bills were not passed. . . . According to Central Bank, these proposals reveal that those Congresses interpreted § 10(b) not to cover aiding and abetting. We have stated, however, that failed legislative proposals are "a particularly dangerous ground on which to rest an interpretation of a prior statute." . . . "Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change."[29]

This principle applies equally in the context of proposals which have not been passed in the LGBT context. Indeed, several of the congressional sponsors of one such measure recently submitted an amicus brief in an LGBT sex discrimination case to affirm that, in their view, sex discrimination law already proscribes "sexual orientation" and "gender identity" discrimination.[30] As those legislators explained, they nevertheless felt it important to sponsor the recent Equality Act (which would provide explicit protections for sexual orientation and gender identity as their own categories) in order to codify existing holdings (that anti-LGBT discrimination is sex discrimination), to "avoid further confusion" and to "put the public on clear notice that LGBT status is an explicitly protected characteristic under federal law."[31]

B. We Know it Can't Be Sex Discrimination Because Men and Women Are Treated Equally Badly

Congressional intent arguments have been by far the most common argument (historically and today) against applying sex discrimination laws to anti-LGBT discrimination. However, as those congressional intent arguments have increasingly been challenged, advocates and judges have begun to also address the doctrinal arguments (discussed above) on their own terms. The principal response that advocates and judges have offered is to contend that despite the straightforward analyses laid out above—showing that disparate treatment based on sex necessarily occurs in any sexual orientation or gender identity case—sex discrimination can't have occurred, since men and women would be treated equally badly by the defendant (i.e., a gay man would be treated just as badly as a lesbian woman).[32] Thus, this argument purports to identify the fatal flaw in sex discrimination arguments for LGBT equality: they are *really* about sexual orientation, or *really* about gender identity, not about sex per se.

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[29] Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 186–87 (1994); *see also* United States v. Craft, 535 U.S. 274, 287 (2002); Star Athletica, L.L.C. v. Varsity Brands, Inc., 137 S. Ct. 1002, 1015 (2017).

[30] Brief Amici Curiae of Five Members of Congress in Support of Plaintiff-Appellant's Petition for Panel Rehearing or Rehearing En Banc, Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339 (7th Cir. 2017) (No. 15-1720), 2016 WL 4662263.

[31] *Id.* at *9.

[32] *See, e.g.*, *Hively*, 853 F.3d at 365 (Sykes, J., dissenting).

This logic quickly runs out if one considers how this argument—that but-for discrimination is OK if *both* groups are subjected to the same adverse treatment—would translate to other areas of anti-discrimination law. As such consideration demonstrates, the "equal application" theory is not (and should not be) a defense to but-for consideration of race, sex, and other protected categories. For example:

- Bob is an African American man who works for a nursing home. He is told not to work with a white client who does not want to have an African American attendant. The employer says they simply have a policy of "respecting the preferences" of their clients. This is race discrimination, even if the employer would have also told a white worker not to work with an African American client who expressed race-based preferences.[33]
- Jane is denied employment in a male prison. The employer suggests that they simply want to have same-sex prison guards employed at all prisons. This is sex discrimination even if a man would have been denied employment in a female prison.[34]
- Joanne is a salesperson. She is an aggressive and successful salesperson, whose appearance is not stereotypically feminine. She is not promoted, and is told that if she wishes to be promoted, she needs to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." This is sex discrimination, even though the employer might have also declined to promote an "insufficiently" masculine man.[35]
- James, a white man, marries Karen, an African American woman. James's employer fires him, telling him he thinks that people should "stick with their own kind." This is race discrimination, even if James's employer would have also fired an African American man who married a white woman.[36]

All of the above fact patterns—based on real cases—involve circumstances where, but for the employee's race or sex, they would have been treated differently. In many of them, defendants argued that they were not engaging in discrimination, because they would apply the same adverse criteria to those of the opposite sex or race. Both the lower courts and the Supreme Court itself have long rejected these arguments.[37]

But, one might argue, the LGBT sex discrimination cases are different, because the employer's or institution's *motives* there are not to discriminate on the basis of sex, but rather to discriminate on the basis of sexual orientation or gender identity. This argument, too, has been rejected by the Supreme Court. As the Court has made clear across a series of cases, where sex is a "but-for" cause of the

[33] For a factually analogous case, see *Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908 (7th Cir. 2010).
[34] For a factually analogous case, see *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (concluding that Alabama regulation in this case "explicitly discriminates against women on the basis of their sex"—but finding it justified based on Title VII's narrow "bona fide occupational qualification"/BFOQ defense).
[35] For a factually analogous case, see *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).
[36] For a factually analogous case, see *Holcomb v. Iona Coll.*, 521 F.3d 130 (2d Cir. 2008).
[37] Indeed, the Supreme Court rejected this argument as early as its seminal decision in *Loving v. Virginia*, 388 U.S. 1, 7–11 (1967) (rejecting the state's "equal application" argument in support of its anti-miscegenation law, which alleged that since both blacks and white were equally proscribed from interracially marrying, there was no race discrimination).

discrimination, it does not matter that the employer's or institution's motives may have been benign—or even that they are capable of articulation in entirely non-sex based terms.[38] Rather, an employer or institution in such circumstances has engaged in sex discrimination, and must defend their actions, if at all, under some affirmative defense (such as Title VII's "bona fide occupational qualification"/BFOQ defense).[39]

III. Why Clear, Explicit Protections Are Important[40]

As set out above, faithful application of existing sex discrimination law should lead to the conclusion that sexual orientation and gender identity discrimination are already prohibited under federal law. The arguments against applying sex discrimination law to sexual orientation and gender identity discrimination are unpersuasive and contradict long-standing principles of anti-discrimination law and statutory interpretation. Nevertheless, advocates have continued to push for explicit protections for the LGBT community, such as the Equality Act, which would amend the Civil Rights Act of 1964 to include sexual orientation and gender identity.[41] As set out below, such political efforts remain important for a number of reasons.

A. The Law Remains Unsettled

Although the underlying legal principles that lead to the conclusion that sexual orientation and gender identity discrimination are sex discrimination have long existed, it is only in the last fifteen years that courts and agencies have begun to apply those doctrines to find LGBT individuals to be categorically protected.[42] Prior to that time, courts most often rejected per se sex discrimination arguments by LGBT plaintiffs, summarily concluding that to do so would run afoul of the presumed contrary congressional intent.

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[38] *See, e.g.*, UAW v. Johnson Controls, 499 U.S. 187, 197–200 (1991) (noting that the employer's motive in adopting a fetal protection policy—to protect unborn offspring—did not mean that "but-for" discrimination was not sex discrimination); L.A. Dep't of Power & Water v. Manhart, 435 U.S. 702, 711–13 (1978) (where employer alleged that its intent simply was to adjust pension contributions to match actuarial longevity, and data supported this argument, nevertheless finding sex discrimination where "the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'"); *cf.* Phillips v. Martin Marietta Corp., 400 U.S. 542, 543–44 (1971) (per curiam) (employer who clearly did not discriminate against women as a group, since they hired large majorities of women into the disputed position, still had engaged in sex discrimination where mothers, but not fathers, of pre-school aged children were barred from employment).

[39] *See* sources cited *supra* note 38.

[40] In keeping with the focus of this Issue Brief on statutory arguments, this section focuses its arguments only on why clear, explicit statutory protections against anti-LGBT discrimination are important. Again, however, similar arguments could be made about the value of having discrimination against the LGBT community be declared "suspect" or "quasi-suspect" under the Constitution (even if sex discrimination arguments are also viable).

[41] *See* Equality Act, H.R. 2282, 115th Cong. (2017).

[42] In the context of interpreting the federal statutes, this trend towards considering anti-LGBT discrimination to be categorically sex discrimination began sooner for transgender plaintiffs than for gay and lesbian plaintiffs. The earliest cases adopting a per se (or close to per se) argument for finding anti-transgender discrimination to be sex discrimination were decided in the early 2000s, whereas such arguments did not begin to gain significant traction in the sexual orientation context until the last 5 years.

Some of these cases did address the type of arguments set out above, and were simply wrongly decided under neutral principles of anti-discrimination and statutory interpretation law.[43] In other cases litigants did not even raise the arguments delineated above, relying instead on narrower theories, like behavior-based gender stereotyping. [44] Nevertheless, these older cases—and their holding that sexual orientation (and, much more rarely in recent years, gender identity) are not categorically sex discrimination—remain binding circuit precedent in many circuits.[45] There are also circuits that currently lack any binding precedent at all on the applicability of sex discrimination law to LGBT plaintiffs, especially in the area of transgender rights.[46]

This patchwork of precedents means that LGBT plaintiffs face an uncertain legal landscape when they bring sex discrimination claims. Even judges who are persuaded by such plaintiffs' legal arguments may be bound by pre-existing circuit precedent, unless the circuit decides to go en banc (an extremely rare occurrence in most circuits). As a result, many LGBT sex discrimination claims—especially in the sexual orientation context—still fail today, as courts apply older precedents that had carved out exclusions for sexual orientation (and to a lesser extent gender identity) discrimination.[47] Moreover, this legal uncertainty surrounding coverage no doubt has other important consequences, making it much less likely that employers, schools and landlords will simply refrain from engaging in sexual orientation and gender identity discrimination, and making it more difficult for LGBT plaintiffs to find private attorneys willing to represent them.

These problems may be especially acute in the areas where plaintiffs have traditionally struggled the most to persuade courts of their sex discrimination claims—straightforward sexual orientation discrimination (not tied to non-gender stereotypical appearance or demeanor), and access to sex-segregated facilities for transgender plaintiffs. In these contexts, courts have traditionally been most reluctant to afford sex discrimination coverage, and have only recently begun to come out the other

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[43] For example, both *Ulane* and *DeSantis* were cases in which the plaintiff had raised some arguments for why anti-LGBT discrimination should be considered per se sex discrimination, albeit not all of those arguments delineated above in Part I. *See* Ulane v. E. Airlines, 742 F.2d 1081, 1083–87 (7th Cir. 1984); DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 329–32 (9th Cir. 1979). Moreover, both *Ulane* and *DeSantis* have been at least partially abrogated by later circuit precedents. *See, e.g.*, Whitaker v. Kenosha Unified Sch. Dist., 858 F.3d 1034, 1047-50 (7th Cir. 2017); Schwenk v. Hartford, 204 F.3d 1187, 1201–03 (9th Cir. 2000).

[44] For example, in the Third Circuit, the arguments set out in *supra* Part I, were raised in neither of the major precedential cases which established the legal framework applicable to claims by gay and lesbian employees. *See* Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257 (3d Cir. 2001); Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285 (3d Cir. 2009).

[45] *See, e.g.*, Christiansen v. Omnicom Grp., 852 F.3d 195, 201–06 (2d Cir. 2017) (Katzmann, J., concurring) (endorsing a variety of arguments for why sexual orientation discrimination is sex discrimination, but noting that there was circuit precedent holding to the contrary); Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1255–56 (11th Cir. 2017) (holding against lesbian plaintiff without considering her arguments, because the circuit was bound by circuit precedent). Following the decision in *Christiansen*, the Second Circuit elected to go en banc on the issue of whether sexual orientation discrimination is per se sex discrimination. *See* Order, Zarda v. Altitude Express, No. 15-3775, https://www.employmentmattersblog.com/wp-content/uploads/sites/5/2017/06/Order.pdf. Those en banc proceedings remain pending as of this writing.

[46] It appears, for example, that the D.C. Circuit has no binding precedent at the circuit level on this issue.

[47] On the issue of sexual orientation cases still failing under Title VII, see generally Katie Eyer, Brown *Not* Loving: Obergefell *and the Unfinished Business of Formal Equality*, 125 YALE L.J. F. 1, 8 n. 31 (2015). For a recent example in the gender identity context, see, for example, Johnston v. Univ. of Pittsburgh, 97 F. Supp. 3d 657 (W.D. Pa. 2015).

way.[48] Thus, there are significant reasons to believe that—absent the intervention of Congress or the Supreme Court—it may be years before there is nationwide consistency in finding anti-LGBT discrimination to be covered by the federal sex discrimination laws.[49]

B. Deterrence and Moral Messaging Are Important

Even were the Supreme Court to take up the issue of sex discrimination coverage for LGBT employees, students and others today, there would remain important reasons to amend existing law to include specific coverage for sexual orientation and gender identity discrimination. Including LGBT people in anti-discrimination law protections via sex discrimination law is legally correct and straightforward under existing anti-discrimination law. But it seems unlikely to have the deterrence and moral impact that amending the anti-discrimination laws to explicitly include sexual orientation and gender identity would have.

1. Deterrence

One of the most important functions of anti-discrimination law is to deter discrimination. If the deterrence mission of anti-discrimination law is effective, the community knows that discrimination is legally prohibited, and thus they do not engage in it. The gay employee is not fired when they put the photograph on their desk of their same-sex spouse. The transgender student is allowed to use a restroom consistent with her gender identity and gender presentation. Deterrence is important because the vast majority of those subjected to discrimination will not pursue claims (because of resource constraints, a desire to move on, lack of knowledge that the real reason was discrimination, etc.). Thus, anti-discrimination law's impact is severely constrained if it relies on case-by-case legal enforcement (as opposed to a fortiori deterrence) to effectuate change.[50] Deterrence is also important because what most people want is not a lawsuit—but to never experience discrimination to begin with.

There are significant reasons to believe that legislation like the Equality Act—explicitly prohibiting sexual orientation and gender identity discrimination—would fulfill the deterrence function of anti-discrimination law much better than simply interpreting sex discrimination law to provide such coverage. That is certainly true under the current regime, in which there is a patchwork of case law and agency determinations finding anti-LGBT discrimination to be covered. But even were the Supreme Court to impose consistency nationwide, holding that anti-LGBT discrimination is sex discrimination, it seems unlikely that this would have a comparable deterrent effect as explicit protections for the LGBT community.

There are a number of reasons for this. Deterrence can only operate where a person knows that their conduct is unlawful. A law explicitly prohibiting sexual orientation and gender identity

[48] *See, e.g.*, Eyer, *supra* note 47, at 8 n. 31 (straightforward sexual orientation); Weiss, *supra* note *, at 7 (restroom access).
[49] In theory, another path to nationwide consistency would be for the courts to afford administrative deference to the decisions of federal agencies such as the EEOC which hold that sexual orientation and gender identity discrimination are per se sex discrimination. But while such deference arguments are plausible, *see, e.g.*, Eyer, *Lesbian, Gay, Bisexual and Transgender Employees*, *supra* note *, at n. 13, the courts have thus far shown relatively little interest in this argument.
[50] This is, of course, most true for constituencies that lack access to political or legal channels of authority, such as students, prisoners, and the poor.

discrimination would ensure this knowledge better than a legal decision interpreting sex discrimination law. Most would-be discriminators are not lawyers, but rather are line level supervisors, landlords, and teachers. Sometimes, as in the case of harassment, they are even co-workers or students. It seems straightforward that an explicit law prohibiting sexual orientation and gender identity discrimination would do a better job of informing all of these multiple constituencies that sexual orientation and gender identity discrimination are unlawful than a legal decision based on a theory that even judges are today debating. No matter how legally straightforward the sex discrimination analysis may be, it will never be as straightforward as simply saying that sexual orientation and gender identity discrimination are prohibited.

2. Moral Messaging

The deterrence rationale dovetails into a second reason why amending anti-discrimination law to include explicit bans on sexual orientation and gender identity discrimination law is important: moral messaging. The modification of anti-discrimination law to include a new protected class is an important occurrence. Unlike judicial decisions interpreting the anti-discrimination laws, which are issued frequently, adding new protected categories to the federal anti-discrimination laws (whether by amendment or via new legislation) is very rare. When such categories are added, it signals a national moral consensus that such discrimination runs counter to our national ethos regarding the types of distinctions that are appropriate to draw.

A law amending federal law to include explicit protections against sexual orientation and gender identity discrimination would include this type of moral messaging. It would signal that we, as a national community, view anti-LGBT discrimination as generally inappropriate—sufficiently inappropriate to be labeled unlawful. Because civil rights legislation is so difficult to pass, the passage of such legislation could rightly be taken to mean that large majorities of the national community share a commitment to LGBT equality.[51] In contrast, a sex discrimination decision—even by the Supreme Court—would not send such a clear message about how the moral salience of anti-LGBT discrimination is viewed by our national community.

There are reasons to believe that such moral messaging is independently important to the effectiveness of anti-discrimination law. There have long been debates about whether anti-discrimination law has the capacity to change morality, and surely there are limits to its ability to do so.[52] But for those in the middle—who are not committed to an anti-LGBT perspective—it seems likely that the moral message of anti-discrimination law matters. And to the extent that anti-

[51] Polling in fact bears out that this is already true—that large majorities of Americans believe that federal anti-discrimination legislation should exist prohibiting sexual orientation and gender identity discrimination. *See, e.g.*, *Growing U.S. Majority Agrees: Transgender Americans Deserve Equal Treatment on the Job and in Public Accommodations: 2 in 3 Americans Today Favor Federal Nondiscrimination Protections for LGBT People*, THE HARRIS POLL (Oct. 11, 2016) http://www.theharrispoll.com/business/2016-Out--Equal-Workplace-Survey.html.

[52] There have long been debates on the ability of the law to influence public morality. For two recent perspectives, see, for example, Kenworthey Bilz & Janice Nadler, *Law, Moral Attitudes, and Behavioral Change*, *in* THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW (Eyal Zamir & Doron Teichman, eds. 2014); Linda C. McClain, *The Civil Rights Act of 1964 and "Legislating Morality": On Conscience, Prejudice, and Whether "Stateways" Can Change "Folkways,"* 95 BOSTON U. L. REV. 891 (2015).

discrimination law does have the capacity to persuade, in addition to simply proscribing, its impact will no doubt be greater.

IV. Conclusion

As courts and agencies around the country have increasingly recognized, "it is . . . impossible to discriminate on the basis of sexual orientation [or gender identity] without discriminating on the basis of sex."[53] In every instance of sexual orientation or gender identity discrimination the plaintiff has experienced an adverse action that—but for his or her sex—would have been different. This is classic sex discrimination, and under well-established anti-discrimination law should be proscribed.

Courts have traditionally resisted this conclusion by pointing to the presumed intent of Congress not to provide protections for sexual orientation or gender identity discrimination. But there are often many specific applications of a statute that an enacting Congress might not have anticipated or approved of, and the Supreme Court's doctrine has made clear that that is not a reason for carving out an exception to the law. Moreover, the Court has repeatedly stated that the conduct of later Congresses (like in introducing, but not enacting, the Equality Act) is to be given little weight in interpreting a statute.

Courts and agencies are increasingly adopting this straightforward reasoning. What seemed an absurd result to judges 30 years ago—that LGBT individuals might have protections under federal anti-discrimination law—no longer seems so. And led by anti-discrimination law's dictates, as opposed to judicial assumptions about what the law "must" mean, there can be little doubt that anti-LGBT discrimination is indeed sex discrimination. [54]

Nevertheless, clear explicit prohibitions on sexual orientation and gender identity discrimination remain important. Large majorities of Americans believe that discriminatory actions—like firing a worker because they are gay or transgender—are wrong. We should have federal laws that reflect these national commitments—and that provide the most clear, unambiguous guidance possible to our employers, schools, landlords and businesses regarding their obligations under anti-discrimination law.

About the Author

Katie Eyer is an Associate Professor at Rutgers Law School, where she teaches constitutional law, civil procedure, and courses related to anti-discrimination law. Her award-winning research draws on archival and other historical materials to illuminate contemporary debates in anti-discrimination law and theory. Prior to coming to Rutgers, Professor Eyer was a Research Scholar and Lecturer at the University of Pennsylvania, where she conducted research in conjunction with the Alice Paul Center

[53] Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 351 (7th Cir. 2017) (en banc) (addressing sexual orientation discrimination).

[54] *Cf.* Phillips v. Martin Marietta Corp., 411 F.2d 1, 4 (5th Cir. 1969), *vacated*, 400 U.S. 542 (1971) (finding that a rule against hiring women with pre-school aged children was not sex discrimination within the meaning of Title VII, since, "The common experience of Congressmen is surely not so far removed from that of mankind in general as to warrant our attributing to them such an irrational purpose [as to prohibit an employer from refusing to hire mothers of young children] in the formulation of this statute.").

for Research on Women, Gender and Sexuality and taught Disability Law. Professor Eyer also litigated civil rights cases prior to entering academia full time, and secured a number of precedents in the Third Circuit expanding the legal rights of LGBT and disabled employees. From 2005-2007, she was a Skadden Fellow at Equality Advocates Pennsylvania, where she launched their employment rights project, providing direct legal services and engaging in impact litigation on behalf of LGBT employees. Professor Eyer clerked for the Hon. Guido Calabresi in 2004-2005, and was a plaintiff-side anti-discrimination litigator with the private firm of Salmanson Goldshaw, PC from 2007-2012. She graduated from Yale Law School in 2004.

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