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Federal Equal Protection

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CHAPTER 15

FEDERAL EQUAL PROTECTION

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I. INTRODUCTION

Because the equal protection[1] and due process[2] guarantees of the U.S. Constitution protect individuals against impermissible *governmental* action, they do not ordinarily provide protection against discriminatory treatment by *private* actors.[3] This means that, where applicable,[4] constitutional employment discrimination claims may be brought by federal, state, or local government employees. Such claims may be brought under Section 1 of the Civil Rights Act of 1871 as amended—commonly referred to as 42 U.S.C. §1983, or Section 1983. When considering such a claim, a court determines whether the governmental employer has deprived a plaintiff of a constitutional right, including guarantees of equal protection and due process.[5]

State and local government employees may bring sex or gender stereotyping claims under the Fourteenth Amendment's Equal Protection Clause,[6] whereas federal employees may bring them under the Fifth Amendment's Due Process Clause.[7] In contrast, individuals who face discrimination by a private employer must bring such claims under Title VII of the Civil Rights Act of 1964 (Title VII).[8] Subject to certain limitations, public employees may also pursue claims under Title VII.[9] Private and public employees who experience discrimination based on lesbian, gay, bisexual, or transgender (LGBT) status may pursue claims of sex discrimination, particularly where the discrimination is rooted in gender stereotypes.[10]

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[1]U.S. CONST. amend. XIV, §1, which reads in relevant part: "No State shall ... deny to any person within its jurisdiction the equal protection of the laws."

[2]U.S. CONST. amend. V, which reads in relevant part: "No person shall be ... deprived of life, liberty, or property, without due process of law...."

[3]*See, e.g.,* Virginia v. Rives, 100 U.S. 313, 318 (1879) ("[t]he provisions of the Fourteenth Amendment ... all have reference to State action exclusively").

[4]In some instances, government employees may not have recourse to constitutional claims. Notably, federal employees with discrimination claims that are substantively covered by Title VII of the Civil Rights Act of 1964 may only bring statutory claims and may not supplement with constitutional claims. See Section II. *infra.*

[5]42 U.S.C. §1983 (providing statutory liability for the deprivation of constitutional rights). For a detailed discussion of Section 1983 claims generally, see BARBARA T. LINDEMANN, PAUL GROSSMAN, & C. GEOFFREY WEIRICH, EMPLOYMENT DISCRIMINATION LAW ch. 36 (The Civil Rights Acts of 1866 and 1871), §III. (5th ed. 2012) [hereinafter EMPLOYMENT DISCRIMINATION LAW].

[6]*See* Brown v. Board of Educ., 347 U.S. 483 (1954) (holding that the Equal Protection Clause of the Fourteenth Amendment prohibits states from maintaining racially segregated public schools).

[7]Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (equal protection applies to the federal government through the Due Process Clause because "discrimination may be so unjustifiable as to be violative of due process").

[8]Pub. L. No. 88-352, Title VII (July 2, 1964) (codified as amended at 42 U.S.C. §2000e *et seq.*). See Chapter 14 (Title VII of the Civil Rights Act of 1964) for a discussion of Title VII.

[9]*See generally* EMPLOYMENT DISCRIMINATION LAW chs. 22 (Employers), §§I.B.3. and II.; 25 (Charging Parties and Plaintiffs), §II.C.–D.; and 32 (Federal Employee Litigation).

[10]See generally Chapter 14 (Title VII of the Civil Rights Act of 1964). The discussion in this chapter is limited to federal laws. Public and private employees may also have similar and/or additional claims under state fair employment practices laws. See Chapter 20 (Survey of State Laws Regarding Gender Identity and Sexual Orientation Discrimination in the Workplace).

II. DISTINGUISHING BETWEEN TITLE VII AND CONSTITUTIONAL CLAIMS

Although public employees are protected by the Equal Protection and Due Process Clauses in the U.S. Constitution, the vast majority of federal, sex-based employment discrimination claims by LGBT employees are brought as statutory challenges under Title VII.[11] State and local government employees have the option of bringing constitutional claims in tandem with discrimination claims under Title VII.[12] In contrast, the Supreme Court has held that federal employees with discrimination claims that are substantively covered by Title VII may only bring statutory claims and may not supplement with constitutional claims.[13] However, federal employees are not permanently barred from raising constitutional claims for employment discrimination. Where the substance of the discrimination

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[11] See Section I. *supra.*

[12] *See, e.g.,* Henley v. Brown, 686 F.3d 634, 642, 115 FEP 949 (8th Cir. 2012), *cert. denied,* 568 U.S. ___, 133 S. Ct. 868 (2013) (in holding that Title VII is not the sole remedy for a city employee who alleged that she was discriminated against on the basis of sex, including sexual harassment, the court concluded "that while Title VII provides the exclusive remedy for employment discrimination claims created by its own terms, its exclusivity ceases when the employer's conduct also amounts to a violation of a right secured by the Constitution" (citing the following circuit court decisions that are in agreement: Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 117–19, 93 FEP 1430 (2d Cir. 2004) (holding plaintiff stated a claim for sex discrimination based on gender stereotypes under the Equal Protection Clause and quoting *Price Waterhouse v. Hopkins,* 490 U.S. 228, 251, 49 FEP 954 (1989), for the proposition that " 'stereotyped remarks can certainly be evidence that gender played a part' in an adverse employment decision"); Booth v. Maryland, 327 F.3d 377, 382–83, 91 FEP 1227 (4th Cir. 2003) (reinstating plaintiff's religion-based §1983 claim for violation of the First and Fourteenth Amendments); Thigpen v. Bibb County, Ga., Sheriff's Dep't, 223 F.3d 1231, 1239 (11th Cir. 2000) (reinstating plaintiffs' raced-based §1983 equal protection claim and noting that "discrimination claims against municipal employers are often brought under both Title VII and the equal protection clause (via section 1983)"); Weberg v. Franks, 229 F.3d 514, 522, 84 FEP 291 (6th Cir. 2000) (reinstating plaintiffs' raced-based §1983 equal protection claim); Notari v. Denver Water Dep't, 971 F.2d 585, 587, 59 FEP 739 (10th Cir. 1992) (reinstating plaintiffs' sex-based §1983 equal protection and due process claims and related Title VII claim); Johnston v. Harris County Flood Control Dist., 869 F.2d 1565, 1575–76, 51 FEP 467 (5th Cir. 1989), *cert. denied,* 493 U.S. 1019 (1990) (affirming trial verdict for plaintiff on his retaliation-based Title VII and §1983 First Amendment claims); and Ratliff v. City of Milwaukee, 795 F.2d 612, 624, 41 FEP 296 (7th Cir. 1986) (recognizing that "[b]oth the Fourteenth Amendment and Title VII grant 'public sector employees independent rights to be free of [governmental] employment discrimination' " and affirming the posttrial dismissal of plaintiff's sex and race-based claims under Title VII and race-based equal protection claim))); *see also* Doe v. City of Belleville, 119 F.3d 563, 74 FEP 625 (7th Cir. 1997), *vacated and remanded for reconsideration in light of* Oncale v. Sundowner Offshore Servs., 523 U.S. 1001, 79 FEP 1696 (1998) (upholding as actionable plaintiff's sex discrimination claims based on gender stereotypes under Title VII and Fourteenth Amendment in a case involving plaintiff who was perceived to be a gay man); Smith v. City of Salem, 378 F.3d 566, 94 FEP 273 (6th Cir. 2004) (same, in a case involving transgender plaintiff); Barnes v. City of Cincinnati, 401 F.3d 729, 95 FEP 994 (6th Cir.), *cert. denied,* 546 U.S. 1003 (2005) (affirming verdict of jury that found sex discrimination against transgender plaintiff under both Title VII and Equal Protection Clause, although, because the Sixth Circuit affirmed the verdict under Title VII, the court did not address the defense's argument that the jury charge with respect to the equal protection claim was erroneous).

[13] Brown v. General Servs. Admin., 425 U.S. 820, 835, 12 FEP 1361 (1976) (holding that Title VII "provides the exclusive judicial remedy" for discrimination claims that are fully covered by Title VII).

claim is not covered by Title VII, courts have held that federal employees may bring constitutional claims.[14]

III. APPLICABILITY OF TITLE VII REASONING TO CONSTITUTIONAL CLAIMS

Because sex discrimination is prohibited under Title VII and the Constitution, federal courts have relied on reasoning in the former context when analyzing the latter, and vice versa.[15] This means that the watershed rationale of the Supreme Court's Title VII decision in *Price Waterhouse v. Hopkins*[16] applies to constitutional sex discrimination claims as well.

In *Price Waterhouse*, the Supreme Court ruled that Title VII's prohibition against discrimination because of sex includes discrimination based on gender stereotyping.[17] Importing *Price Waterhouse*'s Title VII holding to cases involving constitutional claims about sex discrimination, federal courts have ruled that the constitutional prohibition against discrimination based on sex also prohibits gender stereotyping.[18]

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[14]*See, e.g.,* Ethnic Employees of the Library of Congress v. Boorstin, 751 F.2d 1405, 1415, 36 FEP 1216 (D.C. Cir. 1985) ("Nothing in [the Title VII legislative] history even remotely suggests that Congress intended to prevent federal employees from suing their employers for constitutional violations against which Title VII provides no protection at all."); Gunning v. Runyon, 3 F. Supp. 2d 1423, 1431 (S.D. Fla. 1998) (permitting federal employee's First Amendment claim because it is not cognizable under Title VII).

[15]Smith v. City of Salem, 378 F.3d 566, 577, 94 FEP 273 (6th Cir. 2004) ("[t]he facts [plaintiff] has alleged to support his claims of gender discrimination pursuant to Title VII easily constitute a claim of sex discrimination grounded in the Equal Protection Clause of the Constitution"); Glover v. Williamsburg Local Sch. Dist. Bd. of Educ., 20 F. Supp. 2d 1160, 1170, 84 FEP 1445 (S.D. Ohio 1998) ("discrimination claims [under] the Equal Protection Clause[] can be analyzed under the Title VII framework"); Beall v. London City Sch. Dist. Bd. of Educ., 2006 WL 1582447, at *7, 98 FEP 1425 (S.D. Ohio 2006) (same); Dawkins v. Richmond County Schs., 2012 WL 1580455, at *4 (M.D.N.C. May 4, 2012) (same); Pratt v. Indian River Cent. Sch. Dist., 803 F. Supp. 2d 135, 152 n.10 (N.D.N.Y. 2011) ("Section 1983 sexual harassment claims that are based on a 'hostile environment' theory ... are governed by traditional Title VII 'hostile environment' jurisprudence." (internal quotation marks omitted)); *cf.* Nanda v. Board of Trustees of Univ. of Ill., 303 F.3d 817, 829–30, 89 FEP 1616 (7th Cir. 2002), *cert. denied*, 539 U.S. 902 (2003) ("the teaching of an unbroken phalanx of decisions by this and other courts" is that "the aim of Title VII, as well as the method for proving violations of Title VII, are the same as those of the Equal Protection Clause"), *with* Schroeder v. Hamilton Sch. Dist., 282 F.3d 946, 951, 88 FEP 500 (7th Cir.), *cert. denied*, 537 U.S. 974 (2002) (declining "to import Title VII employment discrimination standards into ... traditional equal protection analysis" when the standards differ from each other).

[16]490 U.S. 228, 49 FEP 954 (1989).

[17]490 U.S. at 250–52. *Price Waterhouse* is discussed extensively in Chapters 14 (Title VII of the Civil Rights Act of 1964) and 39 (Law and Culture in the Making of *Macy v. Holder*).

[18]*See, e.g.,* Glenn v. Brumby, 663 F.3d 1312, 1315–20, 113 FEP 1543 (11th Cir. 2011) (applying Title VII's gender stereotyping rationale to the Equal Protection Clause and ruling that discrimination against transgender individual because of gender nonconformity constitutes sex discrimination under U.S. Constitution); *Smith*, 378 F.3d at 577 (same, noting that " '[t]o prove a violation of the equal protection clause under §1983, [a plaintiff] must prove the same elements as are required to establish a disparate treatment claim under Title VII' ").

IV. CONSTITUTIONAL CLAIMS BY LGBT EMPLOYEES

Constitutional discrimination claims by LGBT employees often rely significantly on case law interpreting federal statutes that prohibit sex discrimination, including Title VII.[19] In *Price Waterhouse*, the Court clarified that gender stereotyping is an actionable form of sex discrimination.[20] Because gender stereotyping is often the root of discrimination faced by LGBT employees, the case lays a foundation for sex-based employment discrimination claims by these individuals. Since *Price Waterhouse*, several courts have held that discrimination against LGBT individuals is a form of sex discrimination pursuant to Title VII and the Equal Protection Clause. For lesbian, gay, and bisexual (LGB) litigants, the discrimination may be linked to comments or views about the person's gendered appearance or about stereotypes of sexuality linked to a person's sex (e.g., a man should only form physical and emotional attachments to a woman) and/or marriage (e.g., a woman should marry a man). For transgender employees, the discrimination may be linked to stereotypes about physical manifestations of gender identity (e.g., a person assigned the sex of male at birth should not have a body or appearance congruent with that of someone who is female) or stereotypes about the permanence of an individual's assigned sex (e.g., that persons should not change their sex from their assigned birth sex).

Apart from Title VII, a number of courts have held that discrimination based on sexual orientation deprives employees of equal protection of the laws, as will be discussed in the next section.

A. Constitutional Claims by LGB Employees

1. Sexual Orientation Discrimination Against LGB Employees

Although many courts have held that discrimination based on sexual orientation is not discrimination based on sex under Title VII because sexual

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[19]Title VII and many of the cases discussed in this chapter are discussed extensively in Chapter 14 (Title VII of the Civil Rights Act of 1964). Other federal sex discrimination statutes may also inform constitutional analysis. *See, e.g.*, Rosa v. Park West Bank & Trust Co., 214 F.3d 213, 215–16 (1st Cir. 2000) (holding that bank customer who was a biological male but dressed in female attire when he requested a loan application had successfully stated a claim for discrimination on the basis of sex and gender stereotyping in violation of the Equal Credit Opportunity Act, which specifically prohibits discrimination in a credit transaction on the basis of sex); Schwenk v. Hartford, 204 F.3d 1187, 1198–1202 (9th Cir. 2000) (holding that transsexual prisoner successfully stated a claim of discrimination based on sex under the Gender Motivated Violence Act against a prison guard who allegedly attempted to rape the prisoner because the guard's actions were motivated by the victim's gender and "animus based on the victim's gender"); Miles v. New York Univ., 979 F. Supp. 248, 249–50 (S.D.N.Y. 1997) (holding that professor's sexual conduct directed at transsexual student constituted discrimination on the basis of sex in violation of Title IX of the Education Amendments of 1972).

[20]*Price Waterhouse*, 490 U.S. at 250–52.

orientation is not a protected class expressly enumerated in Title VII,[21] "[t]he Equal Protection Clause of the Fourteenth Amendment is not so limited by express category. On the contrary, ... the Equal Protection Clause protects similarly situated individuals from invidious and irrational discrimination based on sexual orientation."[22] For example, in *Quinn v. Nassau County Police Department*,[23] the court sustained a jury verdict finding that a police officer was denied the equal protection of the laws where he was tormented over a nine-year period with pornographic cartoons—which depicted and labeled him a homosexual, a child molester, a sadomasochist, and a transvestite—"and photographs, anti-gay remarks, and barbaric 'pranks.' "[24] His supervisors did nothing to stop the harassment, which "transcended hostile, coarse and boorish behavior," and, in fact, some supervisors participated in the misconduct. One supervisor testified that the cartoons were not offensive.[25] In reaching its decision, the court "recognized that government action in

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[21] See Chapter 14 (Title VII of the Civil Rights Act of 1964), Section V., for a discussion of the cases.

[22] Quinn v. Nassau County Police Dep't, 53 F. Supp. 2d 347, 359, 80 FEP 286 (E.D.N.Y. 1999). *Accord* Emblen v. Port Authority of N.Y./N.J., 2002 WL 498634, at *7, 89 FEP 233 (S.D.N.Y. 2002) (following reasoning in *Quinn* in case involving claim of discrimination based on perceived homosexuality); Lovell v. Comsewogue Sch. Dist., 214 F. Supp. 2d 319, 323, 89 FEP 1189 (E.D.N.Y. 2002) (following reasoning in *Quinn* and *Emblen*); Nabozny v. Podlesny, 92 F.3d 446, 451, 454–55, 456 n.8, 457–58 (7th Cir. 1996) (gay student entitled to trial on his claims that he was denied the equal protection of laws based on his sexual orientation and sex where he alleged school administrators took minimal steps to protect him from rampant physical and verbal abuse because of his sexual orientation, mocked him, and told him "that 'boys will be boys' and ... if he was 'going to be so openly gay,' he should 'expect' such behavior from his fellow students;" among other things, the court observed that "[w]e find it impossible to believe that a female lodging a similar complaint would have received the same response"; "[w]e are unable to garner any important governmental objective that is furthered by the alleged gender discrimination in this case, and the defendants do not offer us one"; "[t]here can be little doubt that homosexuals are an identifiable minority subjected to discrimination in our society"; and "[w]e are unable to garner any rational basis for permitting one student to assault another based on the victim's sexual orientation, and the defendants do not offer us one" (footnote omitted)); Schroeder v. Hamilton School Dist., 282 F.3d 946, 951, 88 FEP 500 (7th Cir.), *cert. denied*, 537 U.S. 974 (2002) (affirming summary judgment in favor of defendants where plaintiff teacher failed to establish factual basis for his sexual orientation discrimination claim under the Fourteenth Amendment; distinguishing *Nabozny*); Miguel v. Guess, 112 Wash. App. 536, 554, 51 P.3d 89, 97, 89 FEP 990 (2002), *review denied*, 148 Wash. 2d 1019, 64 P.3d 650 (2003) (following reason in *Nabozny* and *Quinn* and "hold[ing] that a state actor violates a homosexual employee's right of equal protection when it treats that person differently than it treats heterosexual employees, based solely upon the employee's sexual orientation"); Dawkins v. Richmond County Schs., 2012 WL 1580455, *4–5 (M.D.N.C. May 4, 2012) (holding that plaintiff stated a viable claim for sexual orientation discrimination under the Equal Protection Clause, but not under Title VII); O.H. v. Oakland Unified Sch. Dist., 2000 WL 33376299, at *10 (N.D. Cal. Apr. 17, 2000) (noting that "[a] number of district courts and courts of appeals have also held that a plaintiff may recover under §1983 for discrimination based upon sexual orientation in violation of the Equal Protection Clause"); Pratt v. Indian River Cent. School Dist., 803 F. Supp. 2d 135, 152–53 (N.D.N.Y. 2011) (sexual harassment based on the sexual orientation of plaintiff student actionable under Equal Protection Clause; following *Quinn*).

[23] 53 F. Supp. 2d 347, 80 FEP 286 (E.D.N.Y. 1999).

[24] 53 F. Supp. 2d at 350–51.

[25] *Id.* at 350–52, 357.

[employment] cannot survive a rational basis review when it is motivated by irrational fear and prejudice towards homosexuals."[26] The court concluded that "conduct by police department officers, supervisors and policy makers contributing to, failing to address, and outright condoning harassment of homosexuals amounts to impermissible 'status-based [conduct and policy] divorced from any factual context from which we could discern a relationship to legitimate state interests.' "[27]

2. *Sexual Orientation Discrimination as a Form of Sex Discrimination Against LGB Employees*

The Constitution and Title VII prohibitions against sex discrimination provide relief for LGB claimants. As the federal district court explained in *Centola v. Potter*,[28] discrimination based on sexual orientation may in fact be "motivated by a desire to enforce heterosexuality defined gender norms."[29] For instance, a lesbian woman may be discriminated against because she fails to conform to the gender stereotype of forming a romantic relationship with a man. And, as the Supreme Court explained in *Price Waterhouse*,[30] discrimination based on gender norms constitutes unlawful sex discrimination. The *Centola* court explained that "[i]f an employer acts upon stereotypes about sexual roles [i.e., that a man should only have a romantic relationship with a woman] in making employment decisions, or allows the use of these stereotypes in the creation of a hostile or abusive work environment, then the employer opens itself up to liability under Title VII's prohibition of discrimination on the basis of sex."[31] Thus, animus against LGB employees may by itself constitute sex discrimination.

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[26] *Id.* at 357. *Accord* Glover v. Williamsburg Local Sch. Dist. Bd. of Educ., 20 F. Supp. 2d 1160, 1174–75, 84 FEP 1445 (S.D. Ohio 1998) (in ruling after a bench trial that a school board's "purported reason for ... nonrenewal of [plaintiff teacher's employment contract] was pretextual[] and ... [based on] his sexual orientation," the court observed "since governmental action 'must bear a rational relationship to a legitimate governmental purpose,' and the desire to effectuate one's animus against homosexuals can never be a legitimate governmental purpose, a state action based on that animus alone violates the Equal Protection Clause" (quoting Stemler v. City of Florence, 126 F.3d 856, 873–74 (6th Cir. 1997), *cert. denied*, 523 U.S. 1118 (1998) (quoting Romer v. Evans, 517 U.S. 620, 635, 70 FEP 1180 (1996))) (internal quotation marks omitted)); Beall v. London City Sch. Dist. Bd. of Educ., 2006 WL 1582447, at *6–11, 98 FEP 1425 (S.D. Ohio 2006) (denying summary judgment for defendants and following *Glover* in case involving teacher claiming she was not reappointed because of her sexual orientation).

[27] 53 F. Supp. 2d at 358 (quoting Romer v. Evans, 517 U.S. 620, 635, 70 FEP 1180 (1996)). *Accord* Lathrop v. City of St. Cloud, 2012 WL 185780, at *7, 114 FEP 509 (D. Minn. 2012) (holding that there are no "legitimate governmental concerns [that] would justify treating a homosexual police officer differently in terms of discipline than a heterosexual officer").

[28] 183 F. Supp. 2d 403, 87 FEP 1780 (D. Mass. 2002) (Title VII case).

[29] 183 F. Supp. 2d at 410–11 (denying employer's summary judgment because gay employee "carried his summary judgment burden of proving that his co-workers and supervisors discriminated against him because of his sex by using impermissible sexual stereotypes against him").

[30] Price Waterhouse v. Hopkins, 490 U.S. 228, 49 FEP 954 (1989).

[31] *Centola*, 183 F. Supp. 2d at 409.

As explained in Chapter 14 (Title VII of the Civil Rights Act of 1964), Section VI., in addition to the gender-stereotyping theory for proving sex discrimination, a few tribunals have applied a similar theory of association discrimination. That theory has been used previously to find discrimination against employees based on their associations with persons of a different color, national origin, race, or religion, and has now been applied to claims by employees who have been discriminated against based on their same-sex relationships. In association cases, the discrimination arises because of the discriminator's distaste for the combination of the protected statuses of two associated people. That distaste is often premised on stereotypes. For example, in the case of race, if an employer does not approve of biracial marriages and takes adverse actions based on those marriages, then the married employees have been discriminated against because of their race. Had the employees' race been the same as their spouses' race, they presumably would not have suffered the adverse actions. Similarly, in the case of employees who are married or are otherwise in a relationship with persons of the same sex, application of the association theory of sex discrimination would mean those employees presumably would not have been subjected to adverse actions had they been the opposite sex.

As Chapter 14 (Title VII of the Civil Rights Act of 1964), Section VI., explains, the few cases to address this issue are divided, although the U.S. Equal Employment Opportunity Commission (EEOC)—the federal administrative agency responsible for enforcing employment antidiscrimination laws—appears to support application of the association theory to all classes protected by Title VII. Although few federal courts have yet to expressly address sex-based association claims, and some cases have rejected sex discrimination claims brought by LGBT litigants,[32] recent analysis from the EEOC and some courts suggests viability for future claims. For instance, in *Castello v. Donahoe*,[33] the EEOC concluded that a lesbian employee had "alleged a plausible sex stereotyping case which would entitle her to relief under Title VII if she were to prevail."[34] The Commission found that the employee had successfully argued that her manager "was motivated [to discriminate against her] by the sexual stereotype that having relationships with men is an essential part of being a woman."[35] Similarly, in *Veretto v. Donahoe*,[36] the EEOC held that a gay claimant could proceed with his sex discrimination claim against his employer. The employee alleged that he was subjected to a hostile work environment because his harasser learned he was marrying a man; and his harasser "was motivated by the sexual

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[32]For a detailed discussion of the cases, see Chapter 14 (Title VII of the Civil Rights Act of 1964), Section V.

[33]2011 WL 6960810 (EEOC Dec. 20, 2011).

[34]*Id.* at *2.

[35]*Id.* at *3.

[36]2011 WL 2663401 (EEOC July 1, 2011).

stereotype that marrying a woman is an essential part of being a man, and became enraged when Complainant did not adhere to this stereotype."[37]

In November 2013, in *In re Fonberg*,[38] the Judicial Council of the Ninth Circuit held that U.S. Office of Personnel Management (OPM) wrongly barred a federal employee from enrolling her same-sex domestic partner in a federal group health insurance plan. At the time, only different-sex married spouses could be enrolled. The plaintiff and her partner were in a registered domestic partnership under Oregon law. In Oregon, such partnerships are the equivalent of different-sex marriages. The court held that "[t]he distinction drawn by OPM *based on the sex of the participants in the union* amounts to discrimination on the basis of sex ... and ... constitutes a deprivation of due process and equal protection" under the U.S. Constitution.[39] In December 2013, in *Kitchen v. Herbert*,[40] the U.S. District Court for the District of Utah held that Utah's "Amendment 3," which prohibits permitting or recognizing same-sex marriages in Utah, violated the due process and equal protection guarantees of the Fourteenth Amendment to the U.S. Constitution. The court observed:

> [Utah] argues that Amendment 3 does not discriminate on the basis of sex because its prohibition against same-sex marriage applies equally to both men and women. The Supreme Court rejected an analogous argument in *Loving v. Virginia*, 388 U.S. 1, 8–9 (1967). In *Loving*, Virginia argued that its anti-miscegenation laws did not discriminate based on race because the prohibition against mixed-race marriage applied equally to both white and black citizens. *Id.* at 7–8. The Court found that "the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race." *Id.* at 9. Applying the same logic, the court finds that the fact of equal application to both men and women does not immunize Utah's Amendment 3 from the heightened burden of justification that the Fourteenth Amendment requires of state laws drawn according to sex.[41]

In January 2014, the U.S. Supreme Court stayed the *Kitchen* decision pending disposition of an appeal in the Tenth Circuit.

Centola, *Castello*, *Veretto*, and similar cases are discussed more thoroughly in Chapter 14 (Title VII of the Civil Rights Act of 1964), in connection with Title VII claims.[42]

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[37] *Id.* at *3.

[38] 736 F.3d 901 (9th Cir. 2013).

[39] *Id.* at 903 (emphasis added). *Accord In re* Balas, 449 B.R. 567, 577–78 (Bankr. C.D. Cal. 2011) (in holding that §3 of the federal Defense of Marriage Act (DOMA) violated a same-sex married couple's right to equal protection because it denied them the right to file a joint bankruptcy petition that a different-sex married couple would have been permitted to file, the court observed that "DOMA is gender-biased because it is explicitly designed to deprive the Debtors of the benefits of other important federal law solely on the basis that these debtors are two people married to each other who happen to be men.").

[40] 961 F. Supp. 2d 1181 (D. Utah 2013), *stay granted*, 571 U.S. ___, 134 S. Ct. 893 (2014).

[41] 961 F. Supp. 2d at 1206.

[42] See in particular Chapter 14 (Title VII of the Civil Rights Act of 1964), Section V.B.2.a.

3. *Sex Discrimination Claims by LGB Employees Based on Gender Stereotyping and Sexual Harassment*

Regardless of whether or how future courts interpret claims of sex discrimination brought by LGB litigants, many courts have recognized actionable sex discrimination claims based on the *Price Waterhouse* gender-stereotyping theory, including in cases involving same-sex harassment.[43] Although the vast majority of the same-sex sexual harassment cases involve statutory discrimination claims, federal courts often import reasoning from Title VII cases to constitutional cases that raise similar claims.[44]

In *Doe v. City of Belleville*,[45] the Seventh Circuit held that numerous comments concerning a plaintiff's perceived homosexuality or gender nonconformity constituted actionable evidence of gender stereotyping. The plaintiff was referred to as a "bitch" (or as a particular coworker's "bitch"), a "fag," and a "queer";[46] was asked by coworkers whether he was "a boy or a girl";[47]; and was "singled out for harassment because, in wearing an earring, he departed from what his co-workers deemed within the realm of appropriate masculine appearance."[48] The Seventh Circuit ruled that the plaintiff had an actionable claim of sex discrimination against his male coworkers under Title VII and the Fourteenth Amendment, concluding that "one need only consider for a moment whether [the plaintiff's] gender would have been questioned for wearing an earring ... if he were a woman rather than a man. It seems an obvious inference to us that it would not."[49] The court had earlier remarked that "[i]n view of the overt references to [the plaintiff's] gender and the repeated allusions to sexual assault, it would appear unnecessary to require any further proof that ... gender had something to do with this harassment; the acts speak for themselves in that regard."[50] In rejecting the employer's defense that the harassment was based on sexual orientation and not sex, the court observed that "considerable overlap [exists] in the origins of sex discrimination and homophobia" and that "a homophobic epithet like

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[43] *See, e.g.*, Bibby v. Philadelphia Coca-Cola Bottling Co., 260 F.3d 257, 263, 86 FEP 553 (3d Cir. 2001), *cert. denied*, 534 U.S. 1155 (2002) (explaining that "[t]he gender stereotypes method for proving same-sex sexual harassment is based on *Price Waterhouse v. Hopkins*"). For an in-depth discussion of the gender-stereotyping theory, same-sex sexual harassment claims, and additional case law under Title VII, see Chapter 14 (Title VII of the Civil Rights Act of 1964), Section V.

[44] See Sections I. and II. *supra*.

[45] 119 F.3d 563, 74 FEP 625 (7th Cir. 1997), *vacated and remanded for reconsideration in light of* Oncale v. Sundowner Offshore Servs., 523 U.S. 1001, 79 FEP 1696 (1998). *City of Belleville* is discussed extensively in Chapter 14 (Title VII of the Civil Rights Act of 1964), Section V.C.1.c.

[46] *City of Belleville*, 119 F.3d at 567, 577.

[47] *Id.* at 566–68.

[48] *Id.* at 596–97.

[49] *Id.* at 581–82.

[50] 119 F.3d 563, 577, 74 FEP 625 (7th Cir. 1997), *vacated and remanded for reconsideration in light of Oncale*, 523 U.S. 1001, 79 FEP 1696 (1998).

'fag,' for example, may be as much of a disparagement of a man's perceived effeminate qualities as it is of his perceived sexual orientation."[51]

The Seventh Circuit's judgment in *City of Belleville* was vacated and remanded by the Supreme Court "for further consideration in light of *Oncale v. Sundowner Offshore Services*,"[52] in which the Supreme Court ruled that same-sex sexual harassment is actionable under Title VII. The case settled before the Seventh Circuit was able to consider it again. However, the Court's holding in *Oncale* likely did not call into question the Seventh Circuit's holding that gender stereotyping constitutes sex discrimination.[53] As evidenced by district courts that have continued to adhere to the Seventh Circuit's holding, the *Price Waterhouse* gender stereotyping theory of sex discrimination remains an actionable claim.[54]

Similar to the Seventh Circuit's holding in *City of Belleville*, the Ninth Circuit, in *Nichols v. Azteca Restaurant Enterprises*,[55] held that verbal abuse of a male employee by his male coworkers constituted actionable sex discrimination under Title VII. Coworkers referred to the male plaintiff using female pronouns, commented that he carried his tray "like a woman," criticized him for not having sexual intercourse with a female friend of his, and called him a "faggot" and "female whore."[56] The court reasoned that these comments were based on the perception that the plaintiff is effeminate and failed to conform to traditional male norms. "At its essence," the court stated, "the systematic abuse directed at [the plaintiff] reflected a belief that [he] did not act as a man should act."[57] Thus, the court concluded that "this

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[51] 119 F.3d at 593 n.27.

[52] City of Belleville v. Doe, 523 U.S. 1001, 79 FEP 1696 (1998) (citing Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 76 FEP 221 (1998)).

[53] Bibby v. Philadelphia Coca-Cola Bottling Co., 260 F.3d 257, 263 n.5, 86 FEP 553 (3d Cir. 2001), *cert. denied*, 534 U.S. 1155 (2002).

[54] *See id.*, citing three district court decisions from within the Seventh Circuit. As explained in Chapter 14 (Title VII of the Civil Rights Act of 1964), Sections V.C.1.b. and V.C.6., other circuit courts have held, subsequent to *Oncale*, that same-sex harassment claims may be based on the gender-stereotyping theory.

[55] 256 F.3d 864, 86 FEP 336 (9th Cir. 2001).

[56] 256 F.3d at 870, 874 (internal quotation marks omitted).

[57] *Id.* at 874. *See also Bibby*, 260 F.3d at 262–63 (holding that "a plaintiff may be able to prove that same-sex harassment was discrimination because of sex by presenting evidence that the harassment was motivated by a belief that the victim did not conform to the stereotypes of his or her gender," but finding that plaintiff was not discriminated against because he was a man); Simonton v. Runyon, 232 F.3d 33, 37–38 (2d Cir. 2000) (noting that "[o]ther courts have suggested that gender discrimination—discrimination based on failure to conform to gender norms—might be cognizable under Title VII," but not reaching the merits of this theory of sex discrimination because plaintiff failed to plead sufficient facts); Schwenk v. Hartford, 204, F.3d 1187, 1202 (9th Cir. 2000) (explaining that pursuant to the Supreme Court's holding in *Price Waterhouse*, "[d]iscrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII"); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261, n.4, 81 FEP 161, 9 AD 1555 (1st Cir. 1999) (explaining that based, on *Price Waterhouse*, "just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, ... a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity," but holding, among other things, that former employee waived this argument by

verbal abuse was closely linked to gender"[58] and constituted unlawful gender stereotyping. Federal courts around the country have similarly concluded that read together *Price Waterhouse* and *Oncale* indicate that same-sex sexual harassment may be proven "by showing that the harassment was motivated by the plaintiff's failure to conform to gender stereotypes."[59]

B. Constitutional Claims by Transgender Employees

Before *Price Waterhouse,* most federal courts held that transgender employees did not have a viable sex discrimination claim under Title VII, reasoning that Title VII's reference to "sex" referred to the biological differences between men and women rather than failure to conform to gender stereotypes.[60] These courts concluded that Title VII did not protect transgender plaintiffs, because the plaintiffs were discriminated against because of their gender nonconformity or because of antitransgender animus, and not because they were biologically male or female.[61] For instance, in *Ulane v. Eastern Airlines,*[62] the Seventh Circuit held that the plaintiff did not have a valid Title VII sex discrimination claim because she was discriminated against "not because she is a female, but because [she] is a transsexual."[63]

However, after *Price Waterhouse*, federal courts widely rejected the rationale of these earlier cases. Recent cases have nearly uniformly held that the reasoning of *Price Waterhouse* permits transgender plaintiffs to assert a sex discrimination claim based on their nonconformity with gender stereotypes.[64] As the Eleventh Circuit observed in 2011 in *Glenn v. Brumby,*[65] "since the decision in *Price Waterhouse*, federal courts have recognized with near-total uniformity that 'the approach in [cases such as] *Ulane* ...

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failing to raise it below); Centola v. Potter, 183 F. Supp. 2d 403, 411 (D. Mass. 2002) (denying employer's summary judgment because gay employee "carried his summary judgment burden of proving that his co-workers and supervisors discriminated against him because of his sex by using impermissible sexual stereotypes against him").

[58]*Nichols*, 256 F.3d at 874.

[59]Klen v. Colorado State Bd. of Agric., 2007 WL 2022061, *16 (D. Colo. July 9, 2007) (in applying the *Price Waterhouse* gender stereotyping theory to same-sex sexual harassment claims under Title VII and the Equal Protection Clause, the court granted summary judgment for the employer due to plaintiff's failure to produce sufficient evidence of discrimination). For additional cases, see Chapter 14 (Title VII of the Civil Rights Act of 1964), Sections V.C.1.b. and V.C.6.

[60]For a detailed discussion of the cases, see Chapter 14 (Title VII of the Civil Rights Act of 1964), Section B.1. In addition, EEOC Commissioner Feldblum traces the history of Title VII jurisprudence relating to transgender individuals in her essay in Chapter 39 (Law and Culture in the Making of *Macy v. Holder*).

[61]*Id.*

[62]742 F.2d 1081, 35 FEP 1348 (7th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985).

[63]742 F.2d at 1087. The *Ulane* decision is discussed further in Chapter 14 (Title VII of the Civil Rights Act of 1964), Sections IV.B.1.e.

[64]For a detailed discussion of the cases, see Chapter 14 (Title VII of the Civil Rights Act of 1964), Sections IV.B.3., IV.C., and IV.D., and Chapter 39 (Law and Culture in the Making of *Macy v. Holder*). See also Chapter 16 (The Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973), Section III.E.2., for a discussion of the court decisions holding that "sex" encompasses more than anatomic sex.

[65]663 F.3d 1312, 113 FEP 1543 (11th Cir. 2011).

has been eviscerated' by *Price Waterhouse's* holding that 'Title VII's reference to "sex" encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms.' "[66]

One case in the Tenth Circuit stands in contrast to the wave of courts identified by the Eleventh Circuit. In 2007, in *Etsitty v. Utah Transit Authority*,[67] the Tenth Circuit rejected a transsexual woman's sex discrimination claim, holding that, pursuant to Title VII and the Fourteenth Amendment's Equal Protection Clause, discrimination based on the plaintiff's status as a transsexual was not cognizable because it was not discrimination based on "sex."[68] Furthermore, the court refused to find a Title VII violation under the plaintiff's *Price Waterhouse* theory of discrimination because it held that the employer had a legitimate, nondiscriminatory reason for firing the plaintiff.[69] Therefore, even accepting arguendo that the plaintiff, as a biological male, was "discriminated against for failing to conform to social stereotypes about how a man should act and appear,"[70] the Tenth Circuit explained that the employer was not liable under Title VII because it proffered a legitimate reason for her termination.[71]

Aside from the Tenth Circuit's holding in *Etsitty*, subsequent to *Price Waterhouse* a vast majority of courts have held that transgender plaintiffs may assert sex discrimination claims based on their nonconformity with gender stereotypes. Most of these cases involve statutory sex discrimination claims, as opposed to constitutional sex discrimination claims.[72]

However, in 2004, in *Smith v. City of Salem*,[73] the Sixth Circuit applied *Price Waterhouse's* gender stereotyping rationale to a constitutional sex discrimination claim by a transsexual employee. The Sixth Circuit held that a transsexual firefighter could not be suspended because of the fact that he "[failed] to conform to sex stereotypes by expressing less masculine, and more feminine mannerisms and appearance"[74] because this constituted unlawful discrimination based on sex, in violation of both the Equal Protection Clause and Title VII.[75] The following year, the Sixth Circuit reiterated its holding in *Smith*. In *Barnes v. City of Cincinnati*,[76] the court held that at trial

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[66]663 F.3d at 1318 n.5 (quoting Smith v. City of Salem, 378 F.3d 566, 573, 94 FEP 273 (6th Cir. 2004)). The *Glenn* decision is discussed further in Chapter 14 (Title VII of the Civil Rights Act of 1964), Section IV.D.1.

[67]502 F.3d 1215, 101 FEP 1357 (10th Cir. 2007).

[68]502 F.3d at 1221–22.

[69]*Id.* at 1223–25.

[70]*Id.* at 1223.

[71]*Id.* at 1225. The *Etsitty* decision is discussed further in Chapter 14 (Title VII of the Civil Rights Act of 1964), Sections IV.B.3.d. and IV.E.

[72]For a detailed discussion of the cases, see Chapter 14 (Title VII of the Civil Rights Act of 1964), Sections IV.B.3., IV.C., and IV.D., and Chapter 39 (Law and Culture in the Making of *Macy v. Holder*).

[73]378 F.3d 566, 94 FEP 273 (6th Cir. 2004).

[74]378 F.3d at 572.

[75]*Id.* at 578.

[76]401 F.3d 729, 95 FEP 994 (6th Cir.), *cert. denied*, 546 U.S. 1003 (2005). The *Smith* decision is discussed further in Chapter 14 (Title VII of the Civil Rights Act of 1964), Section IV.B.3.d.

the transsexual plaintiff had successfully proved a claim of sex discrimination based on the plaintiff's failure to conform to sex stereotypes.[77] Accordingly, the court upheld the jury verdict in favor of the plaintiff.[78]

The Eleventh Circuit soon followed suit. In 2011, in *Glenn v. Brumby*,[79] the court applied *Price Waterhouse*'s gender stereotyping rationale to a constitutional sex discrimination claim by a transgender employee. The plaintiff, Vandiver Elizabeth Glenn,[80] was fired from her job as an editor in the Georgia General Assembly's Office of Legislative Counsel when she began transitioning from male to female. Glenn alleged that Sewell Brumby, her former supervisor, "discriminat[ed] against her because of her sex, including her female gender identity and her failure to conform to the sex stereotypes associated with the sex [Brumby] perceived her to be."[81] Holding that "discriminating against someone on the basis of his or her gender nonconformity constitutes sex-based discrimination under the Equal Protection Clause,"[82] the Eleventh Circuit found that Brumby failed to advance a "sufficiently important governmental purpose" by firing Glenn.[83] Significantly, the Court explained that "[a] person is defined as transgender *precisely because* of the perception that his or her behavior transgresses gender stereotypes."[84] The Court concluded, "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender."[85]

The EEOC has also held that discrimination on the basis of an employee's transgender status, regardless of how it is manifested, is sex discrimination. In 2012, in *Macy v. Holder*,[86] the EEOC held that "discrimination based on gender identity, change of sex, and/or transgender status" violates Title VII.[87] Therefore, "a transgender person who has experienced discrimination based on his or her gender identity may establish a prima facie [statutory] case of sex discrimination through any number of different formulations."[88] The plaintiff in *Macy* had variously framed her claim as one based on sex,

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[77]401 F.3d at 735–38.

[78]The jury returned a verdict for the plaintiff on both her equal protection and Title VII claims. Because the Sixth Circuit upheld the Title VII verdict, it had no need to address the defendant's appeal with respect to the equal protection verdict. *Id.* at 741. The *Barnes* decision is discussed further in Chapter 14 (Title VII of the Civil Rights Act of 1964), Section IV.B.3.d.

[79]663 F.3d 1312, 113 FEP 1543 (11th Cir. 2011). The *Glenn* decision is discussed further in Chapter 14 (Title VII of the Civil Rights Act of 1964), Section IV.D.1.

[80]See Chapter 6 (*Glenn v. Brumby*: Forty Years After *Grossman*) for an essay by Ms. Glenn about her termination, litigation, and ultimate reinstatement.

[81]*Glenn*, 663 F.3d at 1314 (internal quotation marks omitted).

[82]*Id.* at 1316.

[83]*Id.* at 1321 (internal quotation marks omitted).

[84]663 F.3d 1312, 1316, 113 FEP 1543 (11th Cir. 2011) (emphasis added).

[85]663 F.3d at 1317.

[86]2012 WL 1435995 (EEOC Apr. 20, 2012). The *Macy* decision is discussed further in Chapter 14 (Title VII of the Civil Rights Act of 1964), Section IV.D.2., and in EEOC Commissioner Feldblum's essay in Chapter 39 (Law and Culture in the Making of *Macy v. Holder*).

[87]2012 WL 1435995, at *1.

[88]*Id.* at *10.

sex stereotyping, gender identity, change of sex, and her transgender status.[89] As the EEOC explained, "[t]hese different formulations are not, however, different claims of discrimination.... Rather, they are simply different ways of describing sex discrimination."[90]

The fact that an employer's animus was rooted in employees' "change of sex" as distinct from their transgender identity or their gendered appearance does not obviate protections under sex discrimination laws. For example, in *Schroer v. Billington*,[91] the district court for the District of Columbia reasoned that just as "[d]iscrimination 'because of religion' easily encompasses discrimination because of a *change* in religion," so, too, does discrimination because of sex encompass discrimination because of a *change* in sex.[92] In *Macy*, the EEOC cited *Schroer* and similarly noted that just as discrimination based on a transition in religion violates Title VII, discrimination based on a transition in gender also violates the statute.[93] Therefore, although an employer may claim that it discriminated against a transgender employee not because of his or her sex or gender but because of his or her sex or gender *transition*, tribunals have rejected this rationale and held that the discrimination remains unlawful under Title VII.

V. LEVEL OF SCRUTINY APPLIED TO CONSTITUTIONAL CLAIMS BY LGBT EMPLOYEES

Although courts disagree on the appropriate level of scrutiny for an equal protection discrimination claim based on a government employee's sexual orientation, courts agree that governmental discrimination based on sex, including gender stereotyping, is subject to "intermediate scrutiny" under the Fourteenth Amendment's Equal Protection Clause (for state or local employees)[94] or the Fifth Amendment's Due Process Clause (for federal employees).[95]

The standard for intermediate scrutiny for constitutional sex discrimination claims was first outlined by the Supreme Court in *Craig v. Boren*.[96]

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[89]*Id.* at *2–4.

[90]*Id.* at *10.

[91]577 F. Supp. 2d 293, 104 FEP 628 (D.D.C. 2008). The *Schroer* litigation is discussed further in Chapter 14 (Title VII of the Civil Rights Act of 1964), Section IV.C., and Chapter 22 (Transgender Discrimination Claims: A Plaintiff Perspective on Proofs and Trial Strategies).

[92]577 F. Supp. 2d at 306.

[93]Macy v. Holder, 2012 WL 1435995, at *11 (EEOC Apr. 20, 2012).

[94]*See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976) (invalidating a state statute that classified men and women differently while explaining that gender-based classifications "must serve important governmental objectives and must be substantially related to the achievement of those objectives"); United States v. Virginia, 518 U.S. 515, 531–56 (1996) (applying intermediate scrutiny and holding that the Commonwealth of Virginia violated equal protection by failing to show an "exceedingly persuasive justification" for excluding women from the citizen-soldier program offered at the Virginia Military Institute (VMI)).

[95]Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (holding that the guarantee of equal protection applies to the federal government through the Fifth Amendment's Due Process Clause).

[96]429 U.S. 190 (1976).

If the government treats men and women differently, then it has the burden of justifying this discriminatory treatment by demonstrating that its justification is "exceedingly persuasive" and showing that its action "at least ... serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives."[97] As the Supreme Court emphasized in *United States v. Virginia*[98]—commonly referred to as the *VMI* case, because the Virginia Military Institute (VMI) was a party to the case—the government's justification under intermediate scrutiny "must be genuine, not hypothesized or invented *post hoc* in response to litigation."[99] In *VMI*, the Commonwealth of Virginia argued that it maintained an all-male military academy to further "diversity" of educational opportunities.[100] The Supreme Court recognized that this justification was insincere and rejected it, explaining that diversity of educational options is not achieved by providing a "unique educational benefit *only* to males."[101]

Similarly, in *Glenn v. Brumby*,[102] the Eleventh Circuit rejected the defendant's insincere proffered justification for terminating the transgender plaintiff's employment. The employer voiced a purported concern that "other women might object to [the plaintiff's] restroom use."[103] Affirming the lower court, the Eleventh Circuit held that this speculative concern did not reflect the actual justification for the plaintiff's termination and thus did not withstand intermediate scrutiny because it was not a "sufficiently important government purpose" to fire her.[104]

Moreover, the government's rationale for its discriminatory classification or action may not rely on gender stereotypes.[105] In *VMI,* the Supreme Court explicitly stated that the government "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females" to justify the classification or discrimination based on sex.[106] "Ever since the Supreme Court began to apply heightened scrutiny to sex-based classifications, its consistent purpose has been to eliminate discrimination

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[97] *VMI*, 518 U.S. at 524, 533 (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (internal quotation marks omitted)).

[98] 518 U.S. 515 (1996).

[99] *VMI*, 518 U.S. 515, 533 (1996).

[100] *Id.* at 539–40.

[101] *Id.* at 540 (emphasis added; internal quotation marks omitted).

[102] 663 F.3d 1312, 113 FEP 1543 (11th Cir. 2011).

[103] 663 F.3d at 1321.

[104] *Id.*

[105] *See, e.g.*, *VMI*, 518 U.S. 515, 533 (1996) (explaining that the state "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females"); *id.* at 565 (Rehnquist, J., concurring) (noting that "the State should avoid assuming demand [or interest in attending the military institute] based on stereotypes"); Craig v. Boren, 429 U.S. 190, 199 (1976) (reasoning that "the weak congruence between gender and the characteristic or trait that gender purported to represent" necessitated applying heightened scrutiny); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725–26 (1982) (explaining that "the purpose" of heightened scrutiny is to ensure that sex-based classifications rest upon "reasoned analysis rather than ... traditional, often inaccurate, assumptions about the proper roles of men and women").

[106] *VMI*, 518 U.S. at 533.

on the basis of gender stereotypes."[107] Citing *VMI,* the *Glenn* court held that the employer's discriminatory treatment of a transgender plaintiff violated the Equal Protection Clause because the employer discriminated against the plaintiff on the basis of gender nonconformity or gender stereotyping.[108] The court reasoned that the employer's gender stereotyping did not constitute an "exceedingly persuasive justification" for the discriminatory conduct.[109] Therefore, if an LGBT employee brings a viable sex discrimination claim based on gender stereotyping, then a court is likely to evaluate that claim with intermediate scrutiny.

Although federal courts concur that discrimination on the basis of sex is subject to intermediate scrutiny, case law pertaining to the level of scrutiny appropriate for equal protection claims of discrimination on the basis of sexual orientation remains unsettled. In *Romer v. Evans,*[110] the Supreme Court struck down a state constitutional amendment that discriminated against gay and lesbians. The Court invalidated the state amendment on equal protection grounds because it lacked a "rational relationship to legitimate state interests."[111] Invoking the importance of "careful consideration" to determine the constitutionality of the state amendment,[112] the Court used what scholars have now recognized as "rational basis with bite."[113]

However, the *Romer* Court did not formally state whether sexual orientation discrimination is always subject to rational basis review or "rational basis with bite."[114] Nonetheless, following *Romer,* several courts have applied rational basis review—the least demanding level of scrutiny—to equal protection claims of sexual orientation discrimination.[115] In contrast, other

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[107]Glenn v. Brumby, 663 F.3d 1312, 1319, 113 FEP 1543 (11th Cir. 2011).

[108]*See* 663 F.3d at 1319–21 ("Brumby testified at his deposition that he fired Glenn because he considered it 'inappropriate' for her to appear at work dressed as a woman and that he found it 'unsettling' and 'unnatural' that Glenn would appear wearing women's clothing" and because Brumby was disconcerted by " 'a man dressed as a woman and made up as a woman[.' He admitted] that his decision to fire Glenn was based on 'the sheer fact of the transition.' Brumby's testimony provides ample direct evidence to support the district court's conclusion that Brumby acted on the basis of Glenn's gender non-conformity.").

[109]*Id.* at 1321.

[110]517 U.S. 620, 70 FEP 1180 (1996).

[111]517 U.S. at 632 (holding that "Amendment 2 fails, indeed defies, even [rational basis review]").

[112]*Id.* at 633 (" '[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision' ").

[113]*See* Kenji Yoshino, *The New Equal Protection,* 124 HARV. L. REV. 747, 761–62 (2011), *available at* www.harvardlawreview.org/media/pdf/vol124_yoshino.pdf; *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 673 (3d ed. 2006).

[114]*See Romer,* 517 U.S. at 631–35.

[115]*See, e.g.,* Pederson v. Office of Personnel Mgmt., 881 F. Supp. 2d 294, 333, 115 FEP 1228 (D. Conn. 2012), *cert. denied,* 570 U.S. ___ (2013) ("Having considered all four factors, this Court finds that homosexuals display all the traditional indicia of suspectness and therefore statutory classifications based on sexual orientation are entitled to a heightened form of judicial scrutiny. However, the Court need not apply a form of heightened scrutiny in the instant case to conclude that [Section 3 of] DOMA violates the promise of the equal protection as it is clear that DOMA fails to pass constitutional muster under even the most deferential level of judicial scrutiny." (footnote omitted)); *In re* Balas, 449 B.R. 567, 574, 579 (Bankr. C.D. Cal. 2011) (in holding that a same-sex married couple may file a joint bankruptcy petition, the court

courts have applied a higher level of scrutiny to assess equal protection sexual orientation discrimination claims.[116]

In 2013, in *United States v. Windsor*,[117] the Supreme Court applied what appeared to be "rational basis with bite" when assessing the constitutionality of Section 3 of the federal Defense of Marriage Act (DOMA).[118] Section 3 prevented the U.S. government from treating same-sex married couples equally to opposite-sex married couples because it mandated that only marriages between a man and a woman would be recognized by the federal government.[119] The Court struck down Section 3, explaining that "[i]n determining whether a law is motivated by an improper animus or purpose, '[d]iscriminations of an unusual character especially require

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held Section 3 of DOMA does not survive either rational or heightened scrutiny); Golinski v. U.S. Office of Personnel Mgmt., 824 F. Supp. 2d 968, 995–96, 1002, 114 FEP 819 (N.D. Cal. 2012), *cert denied*, 570 U.S. ___, 133 S. Ct. 2887 (2013), *appeal dismissed*, 724 F.3d 1048 (9th Cir. 2013) (Section 3 of DOMA does not survive either rational or heightened scrutiny); Dragovich v. United States Dep't of Treasury, 872 F. Supp. 2d 944, 954, 964, 115 FEP 466 (N.D. Cal. 2012) (invalidating Section 3 of DOMA under rational basis review); Obergefell v. Wymyslo, 962 F. Supp. 2d 968, 986–93 (S.D. Ohio 2013) (Ohio's prohibition on recognizing same-sex marriages lawfully performed in other jurisdictions does not survive either rational or heightened scrutiny); Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1210–15 (D. Utah 2013), *stay granted*, 571 U.S. ___, 134 S. Ct. 893 (2014) (in holding that Utah's prohibitions against permitting and recognizing same-sex marriages violated the due process and equal protection guarantees of the Fourteenth Amendment, the court applied rational basis review); Equality Found. of Greater Cincinnati v. City of Cincinnati, 128 F.3d 289, 75 FEP 115 (6th Cir. 1997), *reh'g en banc denied*, 75 FEP 1763 (1998), *cert. denied*, 525 U.S. 943 (1998) (applying rational basis and upholding city charter amendment that removed homosexuals from class of people protected by local nondiscrimination ordinances; although in the minority, six judges voted to rehear the case en banc, arguing the panel decision was contrary to the holding in *Romer*). In January 2014, the U.S. Supreme Court stayed the *Kitchen* decision pending disposition of an appeal in the Tenth Circuit.

[116]*See, e.g.*, Windsor v. United States, 699 F.3d 169, 181 (2d Cir. 2012), *aff'd*, 570 U.S. ___, 133 S. Ct. 2675, 118 FEP 1417 (2013) ("[W]e conclude that review of Section 3 of DOMA requires heightened scrutiny"); Massachusetts v. Dep't of Health and Human Servs., 682 F.3d 1, 10, 16 (1st Cir. 2012), *cert. denied*, 570 U.S. ___, 133 S. Ct. 2884, 2887 (2013) (in holding that §3 of DOMA is unconstitutional, the court explained that "Supreme Court equal protection decisions have both intensified scrutiny of purported justifications where minorities are subject to discrepant treatment and have limited the permissible justifications.... [The] Supreme Court decisions in the last fifty years call for closer scrutiny of government action touching upon minority group interests and of federal action in areas of traditional state concern."); *Pederson*, 881 F. Supp. 2d at 333 (in holding that DOMA is unconstitutional, the court found "that homosexuals display all the traditional indicia of suspectness and therefore statutory classifications based on sexual orientation are entitled to a heightened form of judicial scrutiny"); *Golinski*, 824 F. Supp. 2d at 995–96, 1002 (Section 3 of DOMA does not survive either rational or heightened scrutiny); *In re Balas*, 449 B.R. at 574, 579 (same); *Obergefell*, 962 F. Supp. 2d at 986–93 (Ohio's prohibition on recognizing same-sex marriages lawfully performed in other jurisdictions does not survive either rational or heightened scrutiny); *see also* Griego v. Oliver, 316 P.3d 865, 880–84 (N.M. Sup. Ct. 2013) (in striking down New Mexico's ban on same-sex marriage as violative of New Mexico's constitution, the court applied intermediate scrutiny, citing in support, among other cases, the Second Circuit's decision in United States v. *Windsor*, 699 F.3d 169 (2d Cir. 2012)).

[117]570 U.S. ___, 133 S. Ct. 2675, 118 FEP 1417 (2013).

[118]Pub. L. No. 104-199, §3 (Sept. 21, 1996) (codified at 1 U.S.C. §7).

[119]1 U.S.C. §7 ("the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife").

careful consideration.' "[120] The Court did not fully discuss the level of scrutiny it applied to determine the unconstitutionality of the statutory provision. However, by citing *Romer*'s "careful consideration" language, the Court invoked a form of "rational basis with a bite." Therefore, although it remains uncertain, it seems that the appropriate level of scrutiny for evaluating an equal protection claim based on sexual orientation discrimination is at least "rational basis with bite."[121] However, most successful equal protection employment discrimination claims by LGBT employees are permutations of gender stereotyping sex discrimination claims that are undoubtedly subject to intermediate scrutiny.

The *Windsor* case is discussed further in Chapters 16 (The Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973) and 37 (Employee Benefit Issues). In Chapter 16, *Windsor* is considered in connection with the argument that the exclusion of gender identity disorders (including transsexualism) and transvestism from the Americans with Disabilities Act and the Rehabilitation Act violates equal protection, either under the heightened scrutiny that courts apply to gender and sexual minorities or under the lower, rational basis review that courts apply to classifications based on disabilities. In Chapter 37 (Employee Benefit Issues), *Windsor* is referenced in connection with the discussion of the pernicious effect that DOMA had on employee benefits.

In any event, even if it is assumed arguendo that claims based on gender identity or sexual orientation are not subject to heightened scrutiny, the cases discussed in Section IV.A.1. *supra* demonstrate that courts have regularly upheld employees' discrimination claims premised on the Fourteenth Amendment's Equal Protection Clause under the rational basis standard.

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[120] *Windsor*, 570 U.S. at ___, 133 S. Ct. at 2693, 118 FEP at 1425 (quoting Romer v. Evans, 517 U.S. 620, 633, 70 FEP 1180 (1996) (internal quotation marks omitted)). The Court also observed that "[t]he Constitution's guarantee of equality 'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that group." *Id.* (quoting United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534–35 (1973)).

[121] *See* SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 479–84 (9th Cir. 2014) (in holding that it violates equal protection standards to excuse prospective jurors from a jury based on their sexual orientation, the Ninth Circuit held that the Supreme Court in *Windsor* applied heightened, not rational basis, scrutiny). For a discussion for pre-*Windsor* cases, see EMPLOYMENT DISCRIMINATION LAW ch. 11 (Sexual Orientation and Gender Identity), §III.B.