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## Good for Thee, but Not for Me: How Bisexuals are Overlooked in Title VII Sexual Orientation Arguments

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# Good for Thee, but Not for Me: How Bisexuals are Overlooked in Title VII Sexual Orientation Arguments

Michael Conklin \*

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## I. INTRODUCTION

Legal scholars frequently refer to Title VII protections for LGBT individuals. However, their examples and legal theories invariably focus on protections for lesbian, gay, and transgender individuals to the exclusion of bisexual individuals.<sup>1</sup> The three Title VII cases heard by the Supreme Court on October 8, 2019, are illustrative of this point. Two involve the issue of discrimination against a gay employee (*Bostock v. Clayton County* and *Altitude Express v. Zarda*),<sup>2</sup> and the other involves discrimination against a transsexual employee (*R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*).<sup>3</sup> In the two hours of oral arguments for these three cases, the word “bisexual” was never mentioned. Even the acronym “LGBT”—in which the “B” stands for bisexuals—was never mentioned. The petitioner’s attorney in *Bostock* explicitly disagreed with interpreting Title VII to “encompass sexual orientation discrimination.”<sup>4</sup>

Despite claims that a Supreme Court decision in favor of *Bostock* would provide protections to employees discriminated against based on their sexual orientation, an evaluation of the arguments in *Bostock* casts serious doubt on how they would affect a future case involving a similarly

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<sup>1</sup> See, e.g., Ronald Turner, *Title VII and the Unenvisioned Case: Is Anti-LGBTQ Discrimination Unlawful Sex Discrimination?*, 95 IND. L.J. 227 (2020). “[T]he question posed in this Article [is]: Is anti-LGBTQ discrimination prohibited by Title VII’s discrimination ‘because of sex’ proscription?” *Id.* at 268. However, the only time Turner’s Article makes reference to bisexuality is in footnotes defining the acronym LGBT. *Id.* at 229 n.14, 254, n.202. In conducting research for this Article, this author did not see a single example in any law review article of how Title VII might affect a bisexual claimant.

<sup>2</sup> *Bostock v. Clayton Cty.*, No. 17-13801 (U.S. docketed June 1, 2018); *Altitude Express v. Zarda*, No. 15-3775 (U.S. docketed June 1, 2018). The two cases have been consolidated.

<sup>3</sup> *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Emp’t Opportunity Comm’n*, No. 16-2424 (U.S. docketed July 24, 2018).

<sup>4</sup> Oral Argument at 3:44, *Bostock*, No. 17-13801, <https://www.oyez.org/cases/2019/17-1618>. After explicitly disagreeing with interpreting Title VII to “encompass sexual orientation discrimination,” the petitioner’s attorney presented the following sex-based Title VII standard—which clearly applies to gays and lesbians but not necessarily to bisexuals:

Title VII was intended to make sure that men were not disadvantaged relative to women and women were not disadvantaged relative to men. And when you tell two employees who come in both of whom tell you they married their partner Bill last weekend, when you fire the male employee who married Bill and give the female employee who married Bill a couple of days off to celebrate the joyous event that’s discrimination because of sex.

*Id.* at 4:15.

situated bisexual plaintiff.<sup>5</sup> Part II of this Article looks at the relevant history of bisexuality, in particular their treatment in society and under the law when compared to heterosexuals and homosexuals. Part III provides an overview of the relevant Title VII history. The remainder of the Article evaluates the three arguments presented by petitioners in *Bostock* in favor of extending Title VII protections to gay and lesbian individuals, and assesses their likely effectiveness when applied to protecting bisexual individuals from employment discrimination. Part IV covers discrimination “because of . . . sex.”<sup>6</sup> Part V covers *Price Waterhouse* gender stereotyping,<sup>7</sup> and Part VI covers claims of associational discrimination.<sup>8</sup> It is the aim of this Article to present the arguments in a neutral manner, rather than engaging in advocacy for a personally desired outcome.

## II. RELEVANT BISEXUAL HISTORY

This section presents the historical context for treatment of bisexual individuals by—and compared to—heterosexuals and homosexuals, and how this results in bisexual erasure. This includes analysis of how bisexuals are treated by society in general and how they are treated under the law.

Despite being more than half of all LGBT individuals in the United States,<sup>9</sup> bisexual individuals have a long history of being ignored, even by fellow LGBT advocates.<sup>10</sup> The first national gay rights organization was founded in 1951.<sup>11</sup> The first national lesbian rights organization was founded in 1955.<sup>12</sup> It was not until 1983 that the first bisexual political organization was formed.<sup>13</sup> During the AIDS epidemic in the 1980s,

<sup>5</sup> While the term is somewhat amorphous, for the purposes of this Article, the term “bisexual” is defined as “of, relating to, or characterized by a tendency to be sexually attracted toward individuals of both sexes . . .” See *infra* note 104.

<sup>6</sup> Brief for Petitioner at 13, *Bostock v. Clayton County*, No. 17-13801 (2018).

<sup>7</sup> *Id.* at 17, 27.

<sup>8</sup> *Id.* at 19.

<sup>9</sup> GLAAD, REPORTING ON THE BISEXUAL COMMUNITY: A RESOURCE FOR JOURNALISTS AND MEDIA PROFESSIONALS 9 (2016), <https://www.glaad.org/sites/default/files/BiMediaResourceGuide.pdf>.

<sup>10</sup> *Id.* (“Despite making up a large portion of the LGBT community, the bisexual community and the issues bi people face are often under- and misreported.”)

<sup>11</sup> *The American Gay Rights Movement: A Timeline*, INFOPLEASE, <https://www.infoplease.com/history/pride-month/the-american-gay-rights-movement-a-timeline> (last updated Feb. 11, 2017).

<sup>12</sup> *Id.*

<sup>13</sup> Miranda Rosenblum, *The U.S. Bisexual+ Movement: A #BiWeek History Lesson*, GLAAD (Sept. 22, 2017), <https://www.glaad.org/blog/us-bisexual-movement-biweek-history-lesson>.

bisexual men were portrayed as “the ultimate pariahs.”<sup>14</sup> Bisexual individuals are often mislabeled as either gay or lesbian, and their historical contributions to the LGBT movement are often overlooked.<sup>15</sup> Out of the \$487 million provided to LGBT programs and organizations from 1970 to 2010, only \$84,000 went to organizations that specifically serve the bisexual community.<sup>16</sup> Bisexual individuals are vastly underreported in media coverage. The ratio of references to “homosexuality” and “bisexuality” in major newspapers is greater than 20:1, despite bisexual individuals making up most of the LGBT community.<sup>17</sup>

Bisexual erasure is described as “the lack of acknowledgment and ignoring of the clear evidence that bisexuals exist.”<sup>18</sup> This, in turn, leads to bisexual invisibility. It is posited that bisexual erasure is the result of a shared interest from both heterosexuals and homosexuals to suppress bisexuality.<sup>19</sup> In the seminal work on the subject, three interests for bisexual erasure shared by heterosexuals and homosexuals are defined as “(1) an interest in the stability of sexual orientation categories; (2) an interest in the primacy of sex as a diacritical characteristic; and (3) an interest in the preservation of monogamy.”<sup>20</sup>

Bisexual erasure is likely an underlying cause for the poor health outcomes in the bisexual community.<sup>21</sup> This is because bisexuality is rarely discussed—and therefore rarely understood—by medical professionals and researchers.<sup>22</sup> As a result, the medical community lacks bi-inclusive resources on sexual health.<sup>23</sup> Experts conclude that biphobia is likely responsible for lower rates of preventative care in bisexual women.<sup>24</sup> This results in higher rates of breast cancer, heart disease, and

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Zachary Zane, *In the LGBT Community, Bisexual People Have More Health Risks. Here's What Could Help*, WASH. POST (Sept. 25, 2017), <https://www.washingtonpost.com/news/soloish/wp/2017/09/25/in-the-lgbt-community-bisexual-people-have-more-health-risks-heres-what-could-help/>.

<sup>17</sup> Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 368 (2000).

<sup>18</sup> *Bisexual Erasure*, GLAAD, <https://www.glaad.org/accordionview/bisexual-erasure> (last visited May 7, 2020).

<sup>19</sup> Yoshino, *supra* note 17, at 391–92.

<sup>20</sup> *Id.* at 399.

<sup>21</sup> *Health Disparities Among Bisexual People*, HUM. RTS. CAMPAIGN FOUND., <https://assets2.hrc.org/files/assets/resources/HRC-BiHealthBrief.pdf> (last visited May 6, 2020).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* (“Negative experiences in healthcare settings can lead bisexual people to delay health care visits, change healthcare providers, avoid disclosing their sexuality in

obesity.<sup>25</sup> Biphobia is also likely responsible for disproportionate HIV rates in bisexual men due to less testing.<sup>26</sup>

Despite relatively rapid advances in rights for gay and lesbian individuals, bisexual acceptance has not experienced the same growth.<sup>27</sup> Bisexual men and women experience poverty at higher rates than both their straight or gay counterparts.<sup>28</sup> They are also more likely to be unemployed or have more mental health issues.<sup>29</sup> Bisexual individuals are significantly less likely than gay and lesbian individuals to feel comfortable coming out as bisexual.<sup>30</sup> Some even choose to identify as gay or lesbian to avoid discrimination and to avoid unpleasant conversations regarding bisexual skepticism.<sup>31</sup> Bisexual individuals are more likely than gay and lesbian individuals to participate in self-harm, including suicide.<sup>32</sup>

Sometimes bisexual individuals have to deal with the unpleasant undertaking of being confronted by people who deny the very existence of their sexual orientation.<sup>33</sup> This challenge can even come from inside the LGBT community.<sup>34</sup> The belief that bisexuality does not exist as a

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subsequent interactions with providers and rely on internet sources rather than a doctor for health information.”).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> GLAAD, *supra* note 9, at 3 (“The past few years have seen a surge of acceptance for the LGBT community, but acceptance for bisexual people continues to lag behind.”).

<sup>28</sup> Shabab Ahmed Mirza, *Disaggregating the Data for Bisexual People*, CTR. FOR AM. PROGRESS (Sept. 24, 2018), <https://www.americanprogress.org/issues/lgbtq-rights/reports/2018/09/24/458472/disaggregating-data-bisexual-people/>.

<sup>29</sup> *Id.*

<sup>30</sup> Ann E. Tweedy & Karen Yescavage, *Employment Discrimination Against Bisexuals: An Empirical Study*, 21 WM. & MARY J. OF WOMEN & L. 699, 704 (2015) (“[B]isexuals were less than half as likely as gays and lesbians to have told most or all of the important people in their lives about their sexual orientations, and a 2013 survey of employees in Britain revealed that bisexuals are only roughly one third as likely as gays and lesbians to feel comfortable being out in the workplace. And, this reluctance to come out contributes to feelings of dissatisfaction at work.”).

<sup>31</sup> Benoit Denizet-Lewis, *The Scientific Quest to Prove Bisexuality Exists*, N.Y. TIMES MAGAZINE (Mar. 20, 2014), <https://www.nytimes.com/2014/03/23/magazine/the-scientific-quest-to-prove-bisexuality-exists.html> (giving the example of a bisexual man who chooses to identify as gay, who explains that “there are a host of emotional reasons why I choose to identify as gay. For one thing, it simplifies my life”).

<sup>32</sup> *Health Disparities Among Bisexual People*, *supra* note 21.

<sup>33</sup> Zachary Zane, *Bisexual People Have Long Felt Excluded at Pride Festivities. That’s Finally Changing*, WASH. POST (June 7, 2019), <https://www.washingtonpost.com/lifestyle/2019/06/07/bisexual-people-have-long-felt-excluded-pride-festivities-thats-finally-changing/> (providing the example of a bisexual man who attended a gay pride march and was harassed by gay men who asserted he would leave his girlfriend and come out as gay by the end of the day).

<sup>34</sup> *Id.*

legitimate sexual orientation is often rooted in the false notion that sexual orientation is binary—people are either homosexual or heterosexual.<sup>35</sup> Therefore, bisexual individuals are simply confused as to which of the two they are.<sup>36</sup> Consistent with this binary view of sexual orientation, bisexual men report harassment from gay men regarding how they should quit riding the fence and come out as fully gay.<sup>37</sup> It has been hypothesized that perhaps the reason bisexual individuals are viewed negatively by some gay and lesbian individuals is because they have the privilege of “passing” as straight.<sup>38</sup>

A majority of bisexual individuals report being the victim of employment discrimination.<sup>39</sup> The most common reason provided for why a bisexual employee did not file a complaint for the employment discrimination experienced was because they did not think they would get the assistance they needed.<sup>40</sup> Unfortunately, this hopeless mindset is supported by research. A 2015 study found that out of all the electronically available employment discrimination case law, bisexual plaintiffs have yet to win a single case on the merits.<sup>41</sup> Additionally, bisexual individuals are also disproportionately people of color.<sup>42</sup> This results in an increased vulnerability to further disparities related to racism and biphobia.<sup>43</sup>

Internet searches also demonstrate the different level of attention bisexual causes receive when compared to gay and lesbian causes. A Google search for “gay rights” returns more than nine times as many results as a search for “bisexual rights.”<sup>44</sup> The disparity is even more

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<sup>35</sup> GLAAD, *supra* note 9, at 4 (discussing a study about how bisexual people reported they “avoided coming out because they didn’t want to deal with misconceptions that bisexuals were indecisive or incapable of monogamy”).

<sup>36</sup> *Id.*

<sup>37</sup> Zane, *supra* note 33.

<sup>38</sup> *Id.* (quoting Ian Lawrence-Tourinho, director of the American Institute of Bisexuality, who said, “So there’s a bit of resentment toward bi people because they still have a foot—so to speak—in the straight world”).

<sup>39</sup> Tweedy & Yescavage, *supra* note 30, at 724.

<sup>40</sup> *Id.* at 735 (excluding the response of “other”).

<sup>41</sup> *Id.* at 717.

<sup>42</sup> *Health Disparities Among Bisexual People*, *supra* note 21. (“Moreover, (transgender people and people of color comprise large portions of the bisexual community – with more than 40 percent of LGBT people of color identifying as bisexual . . .”) (emphasis omitted)).

<sup>43</sup> *Id.*

<sup>44</sup> In Google searches performed on May 7, 2020, “Bisexual rights” returned approximately 93.5 million results, while “gay rights” returned approximately 812 million results. *Compare Bisexual Rights – Google Search*, GOOGLE, <https://www.google.com/search?q=bisexual+rights> (last visited May 14, 2020) [<https://perma.cc/X3US-H5G9>], with *Gay Rights – Google Search*, GOOGLE, <https://www.google.com/search?q=gay+rights> (last visited May 14, 2020) [<https://perma.cc/BZK7-L5N2>].

severe in the area of law. Similarly, a Westlaw search for “gay rights” returns more than eighty times as many cases as a search for “bisexual rights.”<sup>45</sup>

In addition to worse health outcomes, higher unemployment, less media coverage, and the burden of dealing with “double discrimination,”<sup>46</sup> including people who deny the very existence of bisexuality as a sexual orientation, bisexual individuals also face unequal treatment in the legal system. This often manifests in some form of not viewing bisexual individuals as legitimate members in the LGBT community. Relevant to the topic of Title VII protections, the Equal Employment Opportunity Commission’s (EEOC) memo on “Enforcement Protections for LGBT Workers” provides an example of this practice. The memo lists numerous cases as examples illustrating the protections for LGBT workers.<sup>47</sup> While these cases illustrate the protections for gay and transgender plaintiffs, none involve bisexual plaintiffs.<sup>48</sup> In another EEOC memo that lists eighteen cases of “Recent EEOC Litigation Regarding Title VII & LGBT-Related Discrimination,” lesbian, gay, and transgender plaintiffs are well represented; meanwhile, not a single case involving bisexual plaintiffs are provided.<sup>49</sup>

An analysis of cases involving LGBT plaintiffs demonstrates that even in the legal system, bisexual individuals face misconceptions as to their sexual orientation—and challenges as to whether there exists a bisexual orientation. LGBT case law also demonstrates bisexual erasure by sometimes explicitly excluding bisexuals from LGBT consideration. *Apilado v. North American Gay Amateur Athletic Alliance* (NAGAAA) is a prominent case involving bisexual plaintiffs.<sup>50</sup> It also illustrates the “double discrimination” experienced by bisexual individuals as it involves

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<sup>45</sup> Searches of all federal courts were performed on May 15, 2020; “bisexual rights” returned four cases while “gay rights” returned 329 cases. Westlaw search for “bisexual rights” (May 15, 2020) (on file with author); Westlaw search for “gay rights” (May 15, 2020) (on file with author).

<sup>46</sup> Double discrimination is when bisexuals are discriminated against by both heterosexuals and homosexuals. See Robyn Ochs, *Biphobia: It Goes More Than Two Ways*, <https://robynochs.com/biphobia-it-goes-more-than-two-ways/> (last visited May 7, 2020).

<sup>47</sup> *What You Should Know: The EEOC and the Enforcement Protections for LGBT Workers*, EQUAL EMP. OPPORTUNITY COMMISSION (May 4, 2015), <https://www.eeoc.gov/laws/guidance/what-you-should-know-eeoc-and-enforcement-protections-lgbt-workers>.

<sup>48</sup> *Id.*

<sup>49</sup> *Fact Sheet: Recent EEOC Litigation Regarding Title VII & LGBT-Related Discrimination*, EQUAL EMP. OPPORTUNITY COMMISSION (July 8, 2016), <https://www.eeoc.gov/fact-sheet-recent-eeoc-litigation-regarding-title-vii-lgbt-related-discrimination>.

<sup>50</sup> *Apilado v. N. Am. Gay Amateur Athletic All.*, 792 F. Supp. 2d 1151 (W.D. Wash. 2011).



discrimination by gay individuals against bisexual individuals. The case involved a gay softball league that interrogated bisexual players with intrusive questions about their sexual orientation.<sup>51</sup> Because of this questioning, the team with the bisexual players were forced to forfeit and stripped of their second-place finish in the world series.<sup>52</sup> This is despite the explicit statement that the league was to promote the participation of bisexuals.<sup>53</sup> The court ruled in favor of NAGAAA—on First Amendment freedom of association grounds—while avoiding the issue of how the NAGAAA essentially refused to recognize the existence of bisexual individuals by enforcing rules that labeled individuals as either heterosexual or homosexual.<sup>54</sup>

Some cases have also exhibited gay and lesbian individuals presenting their legal arguments in a way that delegitimizes bisexuality. In *United States v. Windsor*,<sup>55</sup> the plaintiff's attorney made the strategic decision to use the terms "gay marriage," "straight marriage," "marriages of gay couples," and "marriages of straight people."<sup>56</sup> This was reportedly based on the determination that those terms are more associated with being comfortable among gay and lesbian couples.<sup>57</sup> However, when compared to the more accurate terms of "same-sex marriage" and "different-sex marriage,"<sup>58</sup> the terminology used by the plaintiff's attorney in *Windsor*. The plaintiff's attorney is exposed for suggesting that there are only the binary groups of homosexual or heterosexual—thus ignoring the bisexual orientation.<sup>59</sup> Furthermore, the plaintiff's attorney in *Windsor* felt it necessary to point out that, despite Ms. Windsor being formerly married to a man, she is a lesbian.<sup>60</sup> The problem with such a statement is the implication that if Ms. Windsor were bisexual, her right to same-sex marriage would somehow be limited or weakened.<sup>61</sup> This strategy is likely

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<sup>51</sup> *Id.* at 1159.

<sup>52</sup> Tweedy & Yescavage, *supra* note 30, at 711–12.

<sup>53</sup> *Apilado*, 792 F. Supp. 2d at 1159.

<sup>54</sup> Tweedy & Yescavage, *supra* note 30, at 711–13.

<sup>55</sup> 570 U.S. 744 (2013).

<sup>56</sup> Tweedy & Yescavage, *supra* note 30, at 714.

<sup>57</sup> *Id.*

<sup>58</sup> The terms "same-sex marriage" and "different-sex marriage" are more accurate than the terms "gay marriage" and "straight marriage" because, technically, the issue in cases such as *Windsor* the issue is whether two people of the same sex can get married, not whether a person who is of the gay or lesbian sexual orientation can get married.

<sup>59</sup> Tweedy & Yescavage, *supra* note 30, at 714.

<sup>60</sup> *Id.* at 714–15. A similar occurrence happened in the California Proposition 8 case where the plaintiff's attorney felt it necessary to point out that the plaintiff, Sandy Stier, was in fact a lesbian and not bisexual despite formerly being married to a man she claimed to love. *Id.* at 715.

<sup>61</sup> *Id.* at 715. This is not to say that the attorney representing Ms. Windsor is in any way bi-phobic herself. Given the bi-phobic climate—even among many who support to be

in part due to the fear that bisexuality challenges the immutability characteristic of homosexuality, which is integral to pro-same-sex marriage arguments.<sup>62</sup>

In 2016 Judge Posner criticized a judge for demonstrating a lack of knowledge regarding the definition of bisexuality. “Apparently the immigration judge does not know the meaning of bisexual,”<sup>63</sup> Judge Posner stated. Nevertheless, the very next year, Judge Posner defined bisexuality as someone who has “both homosexual and heterosexual orientations.”<sup>64</sup> This definition is not only incorrect but harmful to the bisexual cause as it reinforces the harmful belief that there are only two sexual orientations and that those who identify as bisexual are simply confused as to which one of these binary options they fit into.

*Romer v. Evans*<sup>65</sup> serves as an excellent illustration as to how the law often overlooks those who identify as bisexual. The case involved a Colorado constitutional amendment that barred certain protections for “homosexual, lesbian, or bisexual orientation, conduct, practices or relationships.”<sup>66</sup> However, in the majority decision, Justice Kennedy insisted on referring to the named class in the Colorado constitutional amendment as “homosexual persons or gays and lesbians.”<sup>67</sup>

There is also evidence to suggest that bisexual individuals are discriminated against in the immigration and asylum context. In a 2016 case, the Seventh Circuit was highly skeptical of a bisexual asylum seeker’s claim that he was the victim of violent discrimination, despite evidence supporting his claim.<sup>68</sup> The immigration judge also appeared to be skeptical of even the existence of bisexuality.<sup>69</sup>

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LGBT supporters—this was likely a wise strategic decision for representing Ms. Windsor’s interests. But the need for such a strategy does point to how bisexuals are ignored in sexual orientation legal analysis.

<sup>62</sup> *Id.* at 716.

<sup>63</sup> *Fuller v. Lynch*, 833 F.3d 866, 879 (7th Cir. 2016).

<sup>64</sup> *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 355 (7th Cir. 2017), (Posner, J., concurring).

<sup>65</sup> 517 U.S. 620 (1996).

<sup>66</sup> *Id.* at 620.

<sup>67</sup> *Id.* at 624 (“It prohibits all legislative, executive or judicial action at any level of state or local government designed to protect the named class, a class we shall refer to as homosexual persons or gays and lesbians.”).

<sup>68</sup> *Fuller*, 833 F.3d at 872 (Posner, J., dissenting).

<sup>69</sup> The immigration judge seemed to be confused by how the asylum seeker produced evidence of his former boyfriends while also being formerly married to a woman. *Id.* at 873–74.

## III. RELEVANT TITLE VII HISTORY

In 1964, Congress passed Title VII of the Civil Rights Act.<sup>70</sup> Originally, the language of Title VII only included protections for discrimination on the basis of race, color, religion, and national origin.<sup>71</sup> The addition of “sex” was later included on the final day of debate in the House in an effort to make the bill “so controversial that eventually it would be voted down . . .”<sup>72</sup> President Lyndon B. Johnson—whose administration had opposed the addition of “sex” to the legislation—signed the bill into law after the longest continuous filibuster in Senate history.<sup>73</sup> The text of Title VII does not explicitly make reference to sexual orientation or gender identity.<sup>74</sup> It is unlikely that, in 1964, the legislature that passed Title VII intended for it to be applied to LGBT individuals—especially considering that even the act of extending protections from gender discrimination was so controversial.<sup>75</sup> While LGBT individuals continue to face unjust treatment in the twenty-first century, at the time the bill was passed, gay and lesbian individuals were considered “presumptive felons” and “literally, considered psychopaths, criminals, and enemies of the people.”<sup>76</sup>

The history of Title VII adjudications is one of ever-increasing liberality. The causation requirement has been relaxed and lessened.<sup>77</sup> The Act has been extended to include prohibitions on workplace sexual harassment<sup>78</sup> and then to workplace racial and national origin

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<sup>70</sup> 42 U.S.C. §§ 2000e to 2000e-17.

<sup>71</sup> Turner, *supra* note 1, at 230.

<sup>72</sup> Charles Whalen & Barbara Whalen, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* 116 (1985).

<sup>73</sup> Turner, *supra* note 1, at 235.

<sup>74</sup> *What You Should Know*, *supra* note 47 (“Title VII of the Civil Rights Act of 1964 does not explicitly include sexual orientation or gender identity in its list of protected bases . . .”).

<sup>75</sup> See Whalen & Whalen, *supra* note 72.

<sup>76</sup> William N. Eskridge, Jr., *Title VII’s Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 *YALE L.J.* 322, 336, 333 (2017).

<sup>77</sup> Turner, *supra* note 1, at 236. (“Beginning in 1991, Title VII plaintiffs alleging status-based (race, color, religion, sex, or national origin) discrimination can satisfy a relaxed and lessened causation standard by ‘show[ing] that the motive to discriminate was one of the employer’s motives, even if the employer also had other, lawful motives which were causative in the employer’s decision.’”) (quoting *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 343 (2013)).

<sup>78</sup> Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 *YALE L. & POL’Y REV.* 333, 346 (1990) (“In all likelihood, the members of Congress would have been quite surprised to learn that they had contemplated including sexual harassment within the confines of sex discrimination—especially since the term ‘sexual harassment’ did not come into currency until the late 1970s.”).

harassment.<sup>79</sup> The Act did not apply to associational race discrimination claims until the 1980s<sup>80</sup> and not in associational gender discrimination claims until even more recently.<sup>81</sup> The Act originally did not apply to educational institutions or state and local governments.<sup>82</sup> The Act currently includes protections against pregnancy discrimination as a form of sex discrimination, but it was not originally interpreted to do so.<sup>83</sup> In *Price Waterhouse v. Hopkins*, the Supreme Court extended Title VII “because of . . . sex” protections to victims of gender stereotyping.<sup>84</sup> In 1998 the Supreme Court held that Title VII sex-based discrimination protections extend to same-sex harassment.<sup>85</sup> The EEOC has long held that Title VII did not provide protections against sexual orientation discrimination<sup>86</sup> but currently maintains that it does.<sup>87</sup> In 2015 the EEOC released a memorandum stating that they “interpret[] and enforce[] Title VII’s prohibition of sex discrimination as forbidding any employment discrimination based on gender identity or sexual orientation.”<sup>88</sup>

In 2015, the Supreme Court in the landmark case of *Obergefell v. Hodges* upheld the constitutional right to same sex marriage.<sup>89</sup> This led to

<sup>79</sup> Turner, *supra* note 1, at 239.

<sup>80</sup> Andrew W. Powell, *Is There a Future for Sex-Based Associational Discrimination Claims Under Title VII?*, 66 LAB. L.J. 164, 165–66 (2015).

<sup>81</sup> *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 125 (2d Cir. 2018) (“We now hold that the prohibition on associational discrimination applies with equal force to all the classes protected by Title VII, including sex.”).

<sup>82</sup> Carol Nackenoff, *The Supreme Court Hears Arguments on the Meaning of “Sex Discrimination,”* GENDER POL’Y REP. (Oct. 8, 2019), <https://genderpolicyreport.umn.edu/meaning-of-sex-discrimination/>.

<sup>83</sup> *Id.*

<sup>84</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989).

<sup>85</sup> *Oncale v. Sundower Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998).

<sup>86</sup> Katherine Carter, *Questioning the Definition of “Sex” in Title VII: Bostock v. Clayton County, GA*, 15 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 59, 72 (2020).

<sup>87</sup> *Sex-Based Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/laws/types/sex.cfm> (last visited Mar. 15, 2020) (“Discrimination against an individual because of . . . sexual orientation is discrimination because of sex in violation of Title VII.”). Although, note that Attorney General Jeff Sessions responded to this by claiming that “the EEOC is not speaking for the United States and its position about the scope of Title VII is entitled to no deference beyond its power to persuade.” Nackenoff, *supra* note 82.

<sup>88</sup> *What You Should Know*, *supra* note 47. However, relevant to the theme of this Article, the explanations provided by the EEOC as to how “sexual orientation” is protected under Title VII seem to focus on lesbian, gay, and transgender individuals while omitting protections for bisexual individuals. In the section “Examples of LGBT-Related Sex Discrimination Claims,” multiple examples are provided for transgender discrimination. Also, “Denying an employee a promotion because he is gay or straight” is also provided. *Id.* But no explicit example of how Title VII protections apply to bisexual individuals is provided. *See id.*

<sup>89</sup> *Obergefell v. Hodges*, 576 U.S. 644 (2015).

the Seventh Circuit pointing out in a Title VII discrimination case involving a lesbian woman that “[*Obergefell*] creates a paradoxical legal landscape in which a person can be married on Saturday and then fired on Monday for just that act.”<sup>90</sup>

There is a current circuit split among federal appeals courts on this issue.<sup>91</sup> Twenty-one states and the District of Columbia expressly prohibit sexual orientation discrimination.<sup>92</sup> This is a hotly contested issue because many states still have no legislation against sexual orientation employment discrimination.<sup>93</sup> In these states, Title VII is the only available safeguard against sexual orientation discrimination.<sup>94</sup>

#### IV. DISCRIMINATION “BECAUSE OF . . . SEX”<sup>95</sup>

One of the three main arguments presented in favor of including gay and lesbian individuals in Title VII employment discrimination protection claims is that the discrimination is ultimately because of sex.<sup>96</sup> For purposes of potential application to bisexual individuals, it is important to distinguish the method by which this theory would protect gay and lesbian individuals from discrimination. It does not add sexual orientation to the statute’s enumerated protected classes of race, color, religion, sex, and national origin. As the Seventh Circuit pointed out, “[o]bviously that lies beyond our power.”<sup>97</sup> Rather, the courts that have interpreted Title VII’s “because of . . . sex” provision to protect gay and lesbian claimants from employment discrimination have done so by viewing their mistreatment as a form of sex discrimination. This is consistent with the EEOC’s position that, in federal employment, their decisions regarding extending Title VII protections to LGBT individuals does not involve “recogniz[ing] any new protected characteristics under Title VII. Rather [the EEOC] has

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<sup>90</sup> *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 342 (7th Cir. 2017) (quoting *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 714 (7th Cir. 2016)).

<sup>91</sup> The Eleventh Circuit held in *Bostock* that sexual-orientation discrimination does not constitute sex discrimination. Both the Seventh Circuit and Second Circuit held that it does in *Hively* and *Zarda*, respectively.

<sup>92</sup> Carter, *supra* note 86, at 59.

<sup>93</sup> Susan Miller, ‘Shocking’ Numbers: Half of LGBTQ Adults Live in States Where No Laws Ban Job Discrimination, USA TODAY (Oct. 8, 2019), <https://www.usatoday.com/story/news/nation/2019/10/08/lgbt-employment-discrimination-half-of-states-offer-no-protections/3837244002/>.

<sup>94</sup> *Id.*

<sup>95</sup> 42 U.S.C. § 2000e-2(a)(1).

<sup>96</sup> Garrett Epps, *Why ‘Because of Sex’ Should Protect Gay People*, ATLANTIC (Sept. 26, 2019), <https://www.theatlantic.com/ideas/archive/2019/09/title-vii-should-protect-gay-people/598825/>.

<sup>97</sup> *Hively v. Ivy Tech. Cmty. Coll.*, 853 F.3d 339, 343 (7th Cir. 2017).

applied existing Title VII precedents to sex discrimination claims raised by LGBT individuals.”<sup>98</sup>

This distinction may not be highly relevant to gay and lesbian individuals who have been discriminated against, since the end result is the same—the presence or absence of a legal recourse. However, for bisexual individuals this distinction could ultimately result in no protection at all. Adding “sexual orientation” to the enumerated list of protected classifications would clearly provide protections for bisexual individuals. But it is not clear that the reliance on a theory of discrimination “because of . . . sex” will result in the same protections.

The standard argument for protecting gay and lesbian individuals from discrimination under Title VII involves considering the employer’s likely response to the same actions if performed by an employee of the opposite sex. As the petitioner’s attorney in *Bostock* summarized in her first sentence at oral argument, “[w]hen an employer fires a male employee for dating men but does not fire a female employee who dates men, he violates Title VII.”<sup>99</sup> For example, if *Bostock*—a gay man who was fired for being sexually attracted to men—would have been female and sexually attracted to men, there would have been no firing. Therefore, *Bostock*’s firing was literally “because of . . . sex.”

However, the gender discrimination that is so obvious in *Bostock* is less clear when applied to a similarly situated bisexual individual. This is because considering the gender of a bisexual employee would not necessarily lead to different behavior on the part of the employer. Consider the previous rationale for why firing a gay male employee is sex discrimination. It was because a female employee who engaged in the exact same behavior would not be fired. But an employer could likely maintain that if the gender of a male bisexual employee who was fired were switched to female, this would equally lead to a firing. In this way, even if the Supreme Court holds that *Bostock* was a victim of gender discrimination and therefore protected under Title VII, courts could nevertheless maintain that bisexual employment discrimination is not protected under Title VII.

Note that this hypothetical employer who presents the defense that he equally discriminates against male and female bisexual employees is distinct from the argument provided by the employer in *Zarda*: that an employer who fires gay men and lesbian women alike cannot be said to be discriminating on the basis of sex because “[n]either sex is favored over

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<sup>98</sup> *What You Should Know*, *supra* note 47.

<sup>99</sup> Oral Argument, *supra* note 4, at 0:15.

the other.”<sup>100</sup> This latter line of reasoning is easily refuted because the sexual partners of a gay man and a lesbian woman are different. Namely, the former are male and the latter are female. Thus, this argument provided by the employer in *Zarda* would not negate the claim that he is engaging in gender discrimination. This employer is simply providing an additional example of how he would also unlawfully discriminate against a lesbian woman.<sup>101</sup> However, with the bisexual male employee, the sexual partners would be indistinguishable—by gender—with those of a bisexual female employee.

A similar argument from the petitioners in *Bostock* involves the act of defining “homosexual.” The petitioner’s brief in *Bostock* argues that one cannot define “homosexual” without first taking into account an individual’s sex.<sup>102</sup> Webster’s dictionary defines “homosexual” as “of, relating to, or characterized by a tendency to direct sexual desire toward another of the same sex.”<sup>103</sup> Therefore, in order to categorize someone as homosexual, one must first take into consideration his or her sex. However, “bisexual” is defined as “of, relating to, or characterized by a tendency to be sexually attracted toward individuals of both sexes . . . .”<sup>104</sup> While this definition of “bisexual” does refer to sex, it is not in the same context as the definition of “homosexual.” Namely, one is not required to know the sex of the individual to accurately identify him or her as bisexual. It is enough to know that the individual is sexually attracted to males and females. Conversely, if one only knows that someone is attracted to males, one must ascertain that person’s sex before being able to identify the individual as homosexual.

## V. GENDER STEREOTYPING DISCRIMINATION

The second theory offered to extend Title VII protections to gay and lesbian individuals from employment discrimination is that the practice ultimately functions as a form of gender stereotyping discrimination. In the 1982 case *Price Waterhouse v. Hopkins*, the Supreme Court held that

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<sup>100</sup> Brief for Petitioners Altitude Express, Inc., and Ray Maynard at 9, *Altitude Express, Inc. v. Zarda*, No. 17-623 (U.S. Aug. 16, 2019).

<sup>101</sup> Much like it is no defense for an employer to point out that his discrimination against a white employee married to a black person is not racial discrimination because the employer would also discriminate against a black employee married to a white person. This employer has ironically stated his intention to engage in more racial discrimination in an attempt to argue his original racial discrimination was something other than racial discrimination.

<sup>102</sup> Brief for Petitioner, *supra* note 6, at 13–14.

<sup>103</sup> *Id.* at 13.

<sup>104</sup> *Bisexual*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/bisexual> (last visited Mar. 6, 2020).

gender stereotyping violated Title VII protections.<sup>105</sup> The case involved a female employee who was denied a promotion because she was, among other things, too “macho.”<sup>106</sup> Using language highly relevant to gay plaintiffs such as *Bostock*, the Court in *Price Waterhouse* explained the requirement of the causal relationship between the employer’s gender stereotyping and the employee’s harm:

In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were . . . one of those reasons would be that the applicant or employee was a woman. In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.<sup>107</sup>

Later in the opinion, the Court more succinctly summed up the issue as, “in sex-based terms would [the employer] have criticized her as sharply (or criticized her at all) if she had been a man.”<sup>108</sup> It is easy to see how this *Price Waterhouse* standard could lead to the conclusion that discrimination against a gay male employee is a form of gender stereotyping—the stereotype that males should be in romantic relationships with females—and therefore violate Title VII’s protection against gender discrimination. However, it is harder to see how this standard would lead to Title VII protections against a similarly situated bisexual employee. An employer who fired a male, bisexual employee solely because he was bisexual could potentially pass the *Price Waterhouse* standard. As such, the employer’s actions would not necessarily involve the practice of gender stereotyping.<sup>109</sup>

A claim of gender stereotyping by a bisexual plaintiff is further complicated when one considers the subjective practice of considering behavior to be stereotypically “gay” or “bisexual.” In *Prowel v. Wise Business Forms, Inc.*, the court recognized that Prowel, a gay man, was harmed because he demonstrated numerous gay stereotypes.<sup>110</sup> These included speaking with a high voice, walking femininely, sitting “the way a woman would sit,” wearing “dressy clothes,” and pressing buttons on a

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<sup>105</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989).

<sup>106</sup> *Id.* at 235 (plurality opinion).

<sup>107</sup> *Id.* at 250.

<sup>108</sup> *Id.* at 258.

<sup>109</sup> An employer who attempts to defend himself by saying that he would discriminate against male and female bisexuals equally is separate and distinct from the employer in *Zarda* who attempts to use the defense that he would discriminate against gay and lesbian employees equally. See Brief for Petitioners, *supra* note 100; see also *supra* note 101, and accompanying text.

<sup>110</sup> 579 F.3d 285, 287 (3rd Cir. 2009).



piece of machinery “with pizzazz.”<sup>111</sup> The plaintiff received protection because the court was able to ascertain that these behaviors are generally identified as stereotypically “gay.”<sup>112</sup> However, stereotypical bisexual behavior is less universally agreed upon—and therefore bisexual individuals would be less likely to receive protections from courts under this theory.

This is not to say a Supreme Court holding that gay and lesbian employees receive Title VII protections on a theory of gender stereotype discrimination would be detrimental to bisexual advocates. Such a Supreme Court holding would just not necessarily apply to a similarly situated bisexual employee. It would still be a significant step toward bisexual individuals receiving Title VII protections. In the event of such a Supreme Court ruling, advocates could attempt to analogize the gender stereotypes involved in bisexual discrimination to those involved in gay and lesbian discrimination. As the district court pointed out in *Zarda*—a case involving a gay male employee—“[t]he gender stereotype at work here is that ‘real’ men should date women, and not other men.”<sup>113</sup> While bisexual men do not violate this gender stereotype to the extent that a gay man does—bisexual men do conform to the first part of dating women—they do violate the second part of the stereotype by dating men. Therefore, a future case involving a male bisexual plaintiff could attempt to isolate the issue to his intimate relationship with men. After all, the male partners are likely the sole reason for the discrimination since without them the male employee would be left with only female partners. In this way, a Supreme Court precedent applying Title VII protections to gay and lesbian individuals on a gender stereotyping theory would not necessarily be interpreted to apply protections to bisexual individuals, but it would provide beneficial case law that currently does not exist.

## VI. ASSOCIATIONAL DISCRIMINATION

The third and final theory offered to extend Title VII employment protections to gay and lesbian individuals is that of associational discrimination. Associational discrimination occurs when someone is discriminated against due to his association or relationship to a third person who the employer disapproves of.<sup>114</sup> The text of Title VII “contains

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<sup>111</sup> *Id.*

<sup>112</sup> The issue of how gay and lesbian individuals who demonstrate stereotypical behavior are more likely to be protected under Title VII and the harm that comes from perpetuating stereotypes are beyond the scope of this paper.

<sup>113</sup> *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 121 (2d Cir. 2018).

<sup>114</sup> Powell, *supra* note 80, at 165.

no express prohibition against associational discrimination . . . .”<sup>115</sup> However, associational discrimination claims began to be read into Title VII by the courts in the 1980s.<sup>116</sup> Initially these claims were mostly limited to associations based on race,<sup>117</sup> but in the 2018 case of *Zarda*, the district court held that protection from associational discrimination applies to all the enumerated classes in Title VII.<sup>118</sup>

In associational discrimination cases, the employee (associator) is not viewed as being harmed because of the employer’s animosity toward his own characteristics.<sup>119</sup> Rather, it is the characteristics of the third party he is associating with that the employer has animosity toward, and therefore results in harm to the employee.<sup>120</sup> This standard likely results in a bisexual individual having a more difficult time than a gay or lesbian person in prevailing on a Title VII associational discrimination claim. To illustrate, imagine the following two discriminatory actions involving a gay employee and a bisexual employee:

(1) The employer fires George, a gay employee, solely because George is gay.

(2) The employer fires Brett, a bisexual employee, solely because Brett is bisexual.

George could make an associational discrimination case that he was fired because of the employer’s animosity toward the gender of his sexual partners. Namely, if George’s sexual partners were female, he would not have been fired. It was only because they were male that George was fired.

However, a similar associational discrimination claim by Brett would not be so clear. Note that in George’s example the employer’s animosity toward the third party is not considered to be based on the third party’s sexual orientation. Rather, it is considered to be based on the third party’s gender. However, in Brett’s case the employer could claim that it was not the gender of any individual third party that was the cause of the firing. Rather, it was the act of Brett engaging in sexual relationships with *both* males and females. In other words, if the Supreme Court extends Title VII protections to gay and lesbian individuals based on a theory of gender-

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<sup>115</sup> Thomas Johnson and Betina Miranda, *The Company You Keep: Associational Discrimination*, LAW 360 (Oct. 22, 2018), <https://www.law360.com/articles/73829/the-company-you-keep-associational-discrimination>.

<sup>116</sup> Powell, *supra* note 80, at 165–66.

<sup>117</sup> This most frequently manifests in an employee being harmed due to the race of his or her spouse, children, or close friends. *Holcomb v. Iona Coll.*, 521 F.3d 130, 139 (2d Cir. 2008).

<sup>118</sup> *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 125 (2d Cir. 2018) (“We now hold that the prohibition on associational discrimination applies with equal force to all the classes protected by Title VII, including sex.”).

<sup>119</sup> Powell, *supra* note 80, at 165.

<sup>120</sup> *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 512 (6th Cir. 2009).

based associational discrimination, the same logic would not necessarily protect bisexual individuals. Brett's employer could claim that he has no issue with a male employee having intimate relationships with *either* males or females. The bisexual practice of having intimate relationships with *both* males and females that is the issue—and thus Brett was discriminated against based on his sexual orientation and not based on the gender of his romantic partners. The third party in an associational discrimination cause of action must be a part of a specifically enumerated “protected class,” such as race or sex.<sup>121</sup> Sexual orientation is not one of the enumerated protected classes.

In such a case, Brett's best associational discrimination argument would likely involve parsing out his sexual partners and focusing solely on the males. In this way he could claim that his employer is showing animosity toward these male partners on the basis of their gender. After all, if those men were women—and therefore all of Brett's sexual partners were women—the employer would not have fired Brett. But this produces a more convoluted associational discrimination argument than the one available to George. Based on current jurisprudence, George's more straightforward argument already stretches Title VII protections further than the Supreme Court has allowed. While Brett's argument is not a giant leap from George's, it is far from the language of Title VII, which does not even explicitly allow associational discrimination claims on any grounds.<sup>122</sup>

The issue for Brett could become even more difficult to prevail on if he were bisexual but—during the time of his employment—only engaged in intimate relationships with females, or did not engage in any intimate relationships at all. If Brett was fired for being bisexual, it is even more clear that it was only because of his bisexuality and not because of any characteristic of his partner(s). In this scenario, there is a complete lack of any association whereby an associative discrimination claim could be rooted.

The good news for bisexual rights advocates is that there is a clear trend in district courts extending the scope of associational discrimination claims. Originally this cause of action was not available in any cases.<sup>123</sup> Then, it only applied in race-based cases.<sup>124</sup> In 2007 the idea of gender-based associational discrimination was “a novel theory.”<sup>125</sup> In 2009 it

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<sup>121</sup> Powell, *supra* note 80, at 165.

<sup>122</sup> See Johnson & Miranda, *supra* note 115.

<sup>123</sup> Powell, *supra* note 80, at 165–66.

<sup>124</sup> Zarda v. Altitude Express, Inc., 883 F.3d 100, 125 (2d Cir. 2018).

<sup>125</sup> Partners Healthcare Sys. v. Sullivan, 497 F. Supp. 2d 29, 39 (D. Mass. 2007).

“[lacked] precedential support.”<sup>126</sup> In 2010 it was “an unsettled legal question,”<sup>127</sup> and in 2018 the Second Circuit held that it “applied with equal force to all the classes protected by Title VII.”<sup>128</sup>

## VII. CONCLUSION

Many legal scholars view the LGBTQ+ community as a conglomerate where a Supreme Court victory providing employment protections from discrimination for some would necessarily provide protections for all. As demonstrated in this Article, that is not necessarily accurate. The three arguments for extending Title VII gender protections to gay and lesbian individuals do not perfectly translate to protections for bisexual individuals. Compared to a case involving discrimination against a gay or lesbian employee, it is a more tenuous connection to show that discrimination against a bisexual employee was “because of . . . sex.” Likewise, it would be more difficult for a bisexual employee to show that he was discriminated against based on gender stereotyping than a gay or lesbian employee. Finally, the nature of associational discrimination claims results in that theory more easily applying to a gay or lesbian employee than a bisexual employee.

A Supreme Court win for the petitioners in *Bostock* would still be good for bisexual advocates. But it is far from clear that it would automatically provide the same protections for bisexual individuals as it would for gay and lesbian individuals. The petitioner’s attorney in *Bostock* even explicitly stated that Title VII should not “encompass sexual orientation discrimination”<sup>129</sup> and instead provided a gender-based rationale that does not necessarily apply to bisexual individuals.<sup>130</sup> How the Court crafts its opinion in *Bostock* could provide clues as to how bisexual advocates should move forward to secure the protections enjoyed by gay and lesbian individuals. No matter what the outcome in *Bostock* and future LGBT cases, it is important not to engage in the practice of bisexual erasure analyzed in this Article by neglecting to consider how legal outcomes will affect the bisexual community specifically.

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<sup>126</sup> *Stezzi v. Aramark Sports, LLC*, No. 07-5121, 2009 U.S. Dist. LEXIS 66565, at \*9 (E.D. Pa. July 30, 2009).

<sup>127</sup> *Gallo v. W.B. Mason Co.*, No. 10-10618, 2010 U.S. Dist. LEXIS 125193, at \*2 (D. Mass. Nov. 15, 2010).

<sup>128</sup> *Zarda*, 883 F.3d at 125.

<sup>129</sup> Oral Argument, *supra* note 4, at 3:44.

<sup>130</sup> *See id.* and accompanying text.