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The Quest for Equal Dignity: Federal Statutory Protection Against Sexual Orientation Discrimination

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NOTE

The Quest for Equal Dignity: Federal Statutory Protection Against Sexual Orientation Discrimination

Walsh v. Friendship Village of South County, 352 F. Supp. 3d 920 (E.D. Mo. 2019).

Alec D. Guy*

I. INTRODUCTION

Over one million Americans are married to someone of the same sex.¹ Although the United States Supreme Court guaranteed the fundamental right of marriage to same-sex couples in 2015,² these individuals can still be denied housing or fired from their dream job after getting legally married.³ For much of history, gay individuals have not been protected by the law, both statutorily and constitutionally. Private individuals are generally still free to discriminate against gay people today because federal statutes rarely prohibit discrimination based on sexual orientation. Consequently, many have argued that sexual orientation discrimination constitutes unlawful discrimination based on sex. Until

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1. Adam P. Romero, *Estimates of Marriages of Same-Sex Couples at the Two-Year Anniversary of Obergefell v. Hodges*, THE WILLIAMS INST. (June 2017), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Obergefell-2-Year-Marriages.pdf> [perma.cc/GW8R-6FLX].

2. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015).

3. See *Walsh v. Friendship Vill. of South Cty.*, 352 F. Supp. 3d 920, 925 (E.D. Mo. 2019), *appeal docketed*, No. 19-1395 (8th Cir. Feb. 27, 2019); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 108 (2d Cir. 2018) (en banc).

recently, these arguments were summarily dismissed, as nearly all federal circuit courts held sexual orientation is not a protected class.⁴ Some courts, however, have revisited precedent and held that discrimination based on sexual orientation constitutes unlawful sex discrimination.⁵

In *Walsh v. Friendship Village*, the plaintiffs, a same-sex couple, sued a senior living community under the Fair Housing Act (the “FHA”), alleging discrimination based on sex.⁶ The district court, bound by Eighth Circuit precedent, denied the claim.⁷ This Note, in addition to explaining the *Walsh* decision, discusses Title VII of the Civil Rights Act, the FHA, and federal case law that bears on whether sexual orientation discrimination is a subset of unlawful sex discrimination. This Note ultimately argues that sexual orientation discrimination constitutes unlawful sex discrimination based on Supreme Court precedent and a plain language analysis of Title VII and the FHA.

II. FACTS AND HOLDING

In 2009, Mary Walsh and Beverly Nance were legally married in Massachusetts after being in a committed relationship for nearly forty years.⁸ At the beginning of the present lawsuit, Walsh was seventy-two years old and Nance was sixty-eight years old.⁹ In 2016, with hopes of moving to senior housing, Walsh and Nance began researching Friendship Village, a senior living community that opened in 1978.¹⁰ Walsh and Nance visited the facility and spoke with residents as well as staff, including the Residence Director, Carmen Fronczack.¹¹ In July of 2016, Walsh and Nance paid a \$2000 deposit and signed up for a waiting list to live at Friendship Village.¹²

A few months later, Fronczack asked Walsh about her relationship with Nance, and Walsh explained that she and Nance were married.¹³ The next day,

4. *See, e.g.*, *Blum v. Golf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989); *Wrightson v. Pizza Hut of America, Inc.*, 99 F.3d 138 (4th Cir. 1996); *Fredette v. BVP Mgmt. Assocs.*, 112 F.3d 1503 (11th Cir. 1997); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005), *overruled by Zarda*, 883 F.3d at 100; *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 292 (3d Cir. 2009); *Kalich v. AT&T Mobility, LLC*, 679 F.3d 464, 470 (6th Cir. 2012); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 341 (7th Cir. 2017) (en banc).

5. *See Hively*, 853 F.3d at 341.

6. *Walsh*, 352 F. Supp. 3d at 924; *Zarda*, 883 F.3d at 108.

7. *Walsh*, 352 F. Supp. 3d at 926, 928.

8. *Id.* at 922.

9. *Id.* at 923.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

Fronczack informed Walsh that, due to Friendship Village's Cohabitation Policy (the "Policy"), Walsh and Nance could not share a single unit.¹⁴ Additionally, Walsh later received a letter that recited the Policy and reiterated this decision.¹⁵ The Policy stated that Friendship Village operates in accordance with biblical principles, as well as religious standards, and cohabitation is permitted only if the two individuals are spouses by marriage, parent and child, or siblings.¹⁶ The term marriage was defined as "the union of one man and one woman."¹⁷ The Policy had been applied for many years and continued to apply to new residents.¹⁸

In October 2016, Walsh and Nance filed a complaint alleging unlawful sex discrimination with the United States Department of Housing and Urban Development ("HUD").¹⁹ HUD referred the complaint to the Missouri Commission on Human Rights ("MCHR"), but, around a month later, MCHR voluntarily sent the complaint back to HUD.²⁰ HUD then investigated from December 2016 to June 2018.²¹

In July 2018, Walsh and Nance elected to pursue their claim in federal court.²² They first alleged sex discrimination under both the FHA and the Missouri Human Rights Act, but the latter claim was removed in an amended complaint.²³ Walsh and Nance advanced three arguments: (1) they were treated less favorably due to their sex; (2) they were treated less favorably due to their association with another person of a particular sex; and (3) they were treated less favorably because they did not conform to various, traditional sex stereotypes.²⁴ The alleged stereotypes included "that a married woman should be in a different-sex relationship; that a married woman's spouse should be a man; and that women should be attracted to and form relationships with men, not women."²⁵

Friendship Village filed a motion for judgment on the pleadings, contending that the complaint did not state a claim upon which relief could be

14. *Id.*

15. *Id.*

16. *Id.* ("It is the policy of Friendship Village Sunset Hills, consistent with its long-standing practice of operating its facilities in accordance with biblical principles and sincerely-held religious standards, that it will permit the cohabitation of residents within a single unit only if those residents, while residing in said unit, are related as spouses by marriage, as parent and child or as siblings.")

17. *Id.* ("The term 'marriage' as used in this policy means the union of one man and one woman, as marriage is understood in the Bible. . . .")

18. *Id.*

19. *Id.*

20. *Id.* at 923–24.

21. *Id.* at 924.

22. *Id.*

23. *Id.*

24. *Id.* at 925.

25. *Id.* at 924.

granted.²⁶ The United States District Court for the Eastern District of Missouri granted Friendship Village's motion.²⁷ The court held that the sex discrimination claim and gender stereotyping claims were truly based on sexual orientation, which is an unprotected class.²⁸ Further, the court denied the second claim, associational discrimination, because Walsh and Nance did not show such claims were actionable for statutorily unprotected classes.²⁹

III. LEGAL BACKGROUND

Under Title VII and the FHA, sexual orientation is not explicitly covered as a protected class. First, this Part details the history of federal antidiscrimination statutes, such as Title VII and the FHA. Next, this Part turns to federal case law, which continues to evolve. Early decisions dismissed the idea that unlawful sex discrimination encompasses discrimination based on sexual orientation with very little discussion. Intermediate decisions were more sympathetic but continued to deny protection. While some circuit courts continue to follow precedent, others have determined that discrimination based on sexual orientation is impermissible under federal statutes.

A. Federal Statutes

Over fifty years ago, the Civil Rights Act of 1964 (the "1964 Act") was signed by President Lyndon B. Johnson after five amendments and over 500 hours of debate in Congress.³⁰ The 1964 Act prohibits discrimination in many types of conduct, including public accommodations, governmental services, and education.³¹ Title VII of the 1964 Act, which applies to private employers, labor unions, and employment agencies, forbids employment discrimination based on race, sex, color, religion, and national origin.³² For example, Title VII provides that it is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."³³ Further, the 1964 Act created the Equal Employment Opportunity

26. *Id.*

27. *Id.* at 928.

28. *Id.* at 925–27.

29. *Id.* at 927.

30. 1964, EQUAL EMP. OPPORTUNITY COMM'N (last visited Oct. 2, 2019), <https://www.eeoc.gov/eeoc/history/35th/milestones/1964.html> [perma.cc/V4GC-S2GT].

31. *Id.*

32. *Id.*

33. 42 U.S.C. § 2000e-2(a)(1) (2018).

Commission (the “EEOC”) to assist in eliminating unlawful employment discrimination.³⁴

The Civil Rights Act of 1968 (the “1968 Act”), a supplement to the 1964 Act, was signed into law on April 11, 1968.³⁵ Title VIII of the 1968 Act, which addresses discrimination in housing, is known as the Fair Housing Act of 1968.³⁶ Within a year of the law’s enactment, HUD wrote a Title VIII Field Operations Handbook and created a formalized complaint process.³⁷ The FHA “protects people from discrimination when they are renting or buying a home, getting a mortgage, seeking housing assistance, or engaging in other housing-related activities.”³⁸ The FHA prohibits discrimination based on race, color, national origin, religion, sex, familial status, and disability.³⁹

Specifically, the FHA makes it illegal to “refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin” in most circumstances.⁴⁰ Additionally, the FHA prohibits the creation and publication of “any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.”⁴¹ Various other practices are forbidden by the FHA as well.⁴² Sexual orientation, however, is not explicitly protected by this statute.

While Title VII and the FHA are distinct, the laws are similar. Both statutes use identical language in forbidding discrimination “because of” an individual’s sex.⁴³ The statutes were passed within five years of each other, and the 1968 Act is intended to supplement the 1964 Act.⁴⁴ Finally, courts have determined decisions under Title VII can apply with equal force to the FHA.⁴⁵

34. *1964*, *supra* note 30.

35. *History of Fair Housing*, U.S. DEP’T OF HOUSING AND URBAN DEV. (last visited Oct. 2, 2019), https://www.hud.gov/program_offices/fair_housing_equal_opp/aboutftheo/history [perma.cc/LZG9-5Y8B].

36. *Id.*

37. *Id.*

38. *Housing Discrimination Under the Fair Housing Act*, U.S. DEP’T OF HOUSING AND URBAN DEV. (last visited Oct. 2, 2019), https://www.hud.gov/program_offices/fair_housing_equal_opp/fair_housing_act_overview [perma.cc/7KP9-EASE].

39. *Id.*

40. 42 U.S.C. § 3604(a) (2018).

41. § 3604(c).

42. *See* § 3604(b), (d).

43. § 3604(a); 42 U.S.C. § 2000e-2(a)(1) (2018).

44. *History of Fair Housing*, *supra* note 35; *1964*, *supra* note 30.

45. *Wetzel v. Glen St. Andrew Living Cmty., LLC*, 901 F.3d 856, 862 (7th Cir. 2018), *cert. dismissed* 139 S.Ct. 1249 (2019) (mem).

B. Early Decisions

Even though federal statutes often do not explicitly list sexual orientation as a protected class, individuals have argued discrimination based on sexual orientation is a form of sex discrimination, and, as such, is unlawful. Until recently, federal circuit courts have dismissed this argument and held that discrimination based on sexual orientation is not prohibited.

In *Williamson v. A.G. Edwards & Sons, Inc.*, the United States Court of Appeals for the Eighth Circuit opined on whether sexual orientation is protected by Title VII.⁴⁶ There, plaintiff Williamson contended his supervisor falsely accused him of interrupting workflow by discussing the details of his gay lifestyle and of harassing another employee.⁴⁷ Williamson argued he was discriminated against based on his race because white employees engaging in similar behavior were not punished.⁴⁸ The trial court granted summary judgment for A.G. Edwards & Sons and determined Williamson believed he was treated differently due to his sexual orientation, not his race.⁴⁹ The Eighth Circuit affirmed, summarily stating that “Title VII does not prohibit discrimination against homosexuals.”⁵⁰

Most other circuits have adopted a similar rule.⁵¹ Before revisiting this issue, the United States Court of Appeals for the Seventh Circuit determined that Title VII, in prohibiting discrimination based on sex, implied that “it is unlawful to discriminate against women because they are women and against men because they are men.”⁵² The court further stated that, based on the lack of legislative history regarding, and the circumstances surrounding, the sex amendment, Congress clearly “never considered nor intended that this [] legislation apply to anything other than the traditional concept of sex.”⁵³ The United States Court of Appeals for the Fifth Circuit held that “[d]ischarge for homosexuality is not prohibited by Title VII”⁵⁴ The United States Court of Appeals for the Ninth Circuit concluded “Title VII’s prohibition of ‘sex’ discrimination applies only to discrimination on the basis of gender and should

46. *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989).

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* (citing *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir.1979), *abrogated by Nichols v. Azteca Rest. Enters.*, 256 F.3d 864 (9th Cir. 2001)).

51. *See supra* note 4 (noting the approaches of other circuits).

52. *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984).

53. *Id.*

54. *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979).

not be judicially extended to include sexual preference such as homosexuality.”⁵⁵ While these decisions quickly dismissed the contention that sexual orientation is a protected characteristic, more recent decisions have been more sympathetic.

C. *Intermediate Decisions*

In intermediate rulings, courts continued to determine that discrimination based on sexual orientation was not unlawful, but the decisions were more supportive of plaintiffs and, in some cases, suggested alternative claims that might succeed.

In a 1999 decision, the United States Court of Appeals for the First Circuit considered whether harassment based on sexual orientation was sufficient to sustain a hostile work environment claim.⁵⁶ The court ultimately determined that Title VII did not prohibit discrimination based on sexual orientation.⁵⁷ The First Circuit, however, condemned harassment based on sexual orientation, stating that “it is a noxious practice, deserving of censure and opprobrium.”⁵⁸ Yet, this was a matter of statutory construction, not moral judgment, so protection was not extended.⁵⁹ The United States Court of Appeals for the Second Circuit, when considering a Title VII claim alleging harassment based on sexual orientation, expressed a similar sentiment in 2000.⁶⁰ The court held that Title VII does not proscribe discrimination based on sexual orientation but noted that the alleged conduct was “morally reprehensible whenever and in whatever context it occurs, particularly in the modern workplace.”⁶¹

The United States Court of Appeals for the Third Circuit, in *Bibby v. Philadelphia Coca Cola Bottling Co.*, explained that Title VII does not prohibit discrimination based on sexual orientation.⁶² The court further mentioned that Congress has repeatedly rejected attempts to extend Title VII’s protection to sexual orientation.⁶³ Yet, the court noted that “[h]arassment on the basis of sexual orientation has no place in our society.”⁶⁴ Additionally, the Third Cir-

55. *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 329–30 (9th Cir. 1979), *abrogated by* *Nichols v. Azteca Rest. Enterprises, Inc.*, 256 F.3d 864 (9th Cir. 2001).

56. *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 256 (1st Cir. 1999).

57. *Id.* at 259.

58. *Id.*

59. *Id.*

60. *See Simonton v. Runyon*, 232 F.3d 33, 34 (2d Cir. 2000), *overruled by* *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 116 (2d Cir. 2018) (en banc).

61. *Id.* at 35.

62. *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001) (citing *Simonton*, 232 F.3d at 35).

63. *Id.*

64. *Id.* at 265 (citing *Simonton*, 232 F.3d at 35).

cuit suggested some alternative methods to prove that sexual orientation discrimination constitutes unlawful sex discrimination.⁶⁵ For example, an individual could show that “the harasser was motivated by sexual desire, the harasser was expressing a general hostility to the presence of one sex in the workplace, or the harasser was acting to punish the victim’s noncompliance with gender stereotypes.”⁶⁶ The court also expressed that there may be other ways to show discrimination based on sexual orientation occurred because of sex.⁶⁷ While these decisions still denied protection, they provided a basis for the continued evolution of the law.

D. Recent Decisions

In revisiting whether discrimination based on sexual orientation constitutes unlawful sex discrimination, some courts continue to follow precedent. Others, though, have found sexual orientation is protected, leading to a circuit split.

The United States Court of Appeals for the Eleventh Circuit addressed a Title VII claim based on sexual orientation discrimination in *Evans v. Georgia Regional Hospital*.⁶⁸ In that case, the plaintiff worked as a security officer at Georgia Regional Hospital.⁶⁹ As an employee of the hospital, Evans did not receive equal work or pay.⁷⁰ Further, Evans was “physically assaulted or battered,” harassed, and targeted for termination because she failed to “carry herself in a ‘traditional woman[ly] manner.’”⁷¹ Evans alleged that the discrimination occurred because of her sexual orientation, as well as her gender non-conformity, and that she was retaliated against when she filed a complaint with the human resources department.⁷² The trial court dismissed the case with prejudice.⁷³ The Eleventh Circuit determined Evans did not have a valid sexual orientation discrimination claim in light of the circuit’s prior precedent, which stated that “[d]ischarge for homosexuality is not prohibited by Title VII”⁷⁴

65. *Id.* at 264.

66. *Id.*

67. *Id.*

68. *Evans v. Georgia Reg’l Hosp.*, 850 F.3d 1248, 1254–55 (11th Cir. 2017), *cert. denied*, 138 S.Ct. 557 (2017). In *Bostock v. Clayton County Board of Commissioners*, a case currently on appeal to the Supreme Court, the Eleventh Circuit relied on *Evans* while affirming the trial court’s dismissal of a Title VII claim based on sexual orientation discrimination. 723 F. App’x 964, 965 (11th Cir. 2018), *cert. granted sub nom. Bostock v. Clayton Cty., Ga.*, 139 S. Ct. 1599 (2019).

69. *Evans*, 850 F.3d at 1251.

70. *Id.*

71. *Id.*

72. *Id.* at 1250.

73. *Id.* at 1253.

74. *Id.* at 1255 (quoting *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979)).

The court followed this decision, as precedent can only be overturned by a clear ruling of the United States Supreme Court or by the Eleventh Circuit sitting en banc.⁷⁵

In 2017, the Seventh Circuit revisited this issue in *Hively v. Ivy Tech Community College of Indiana*.⁷⁶ Hively was an openly lesbian adjunct professor teaching at Ivy Tech's South Bend Campus.⁷⁷ The school denied Hively's applications for a full-time position and did not renew her part-time contract.⁷⁸ Hively, alleging that she was discriminated against based on her sexual orientation, obtained a right-to-sue letter from the EEOC⁷⁹ and filed a claim in federal court.⁸⁰ Ivy Tech filed a motion to dismiss, arguing that sexual orientation was not a protected class.⁸¹ The trial court granted the motion, and Hively appealed.⁸²

Previous Seventh Circuit precedent held that "Congress had nothing more than the traditional notion of 'sex' in mind when it voted to outlaw sex discrimination."⁸³ The court mentioned that even though the Supreme Court has not directly addressed this issue, many recent opinions are relevant to the question at hand.⁸⁴ For example, the Supreme Court has held that gender stereotyping constitutes sex discrimination,⁸⁵ determined that harassment by a member of the same sex can be sex discrimination,⁸⁶ and recognized that same-sex marriage is constitutionally protected.⁸⁷ In *Hively*, the Seventh Circuit noted that deciding whether discrimination based on sexual orientation constitutes unlawful sex discrimination "is a pure question of statutory interpretation and thus well within the judiciary's competence."⁸⁸

75. *Id.* (quoting *Offshore of the Palm Beaches, Inc. v. Lynch*, 741 F.3d 1251, 1256 (11th Cir. 2014)).

76. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 343 (7th Cir. 2017) (en banc).

77. *Id.* at 341.

78. *Id.*

79. Before employees or job applicants can file a lawsuit alleging discrimination in violation of federal law, they must file a charge of discrimination with the EEOC and obtain a Notice of Right to Sue. *Filing a Lawsuit*, EQUAL EMP. OPPORTUNITY COMM. (last visited Oct. 2, 2019), <https://www.eeoc.gov/employees/lawsuit.cfm> [perma.cc/2LTP-XH23]. However, there are some exceptions to this general rule, such as age discrimination or equal pay lawsuits. *Id.*

80. *Hively*, 853 F.3d at 341.

81. *Id.*

82. *Id.*

83. *Id.* (quoting *Doe v. Belleville, Ill.*, 119 F.3d 563, 572 (7th Cir. 1997)), *cert. granted, judgment vacated*, 523 U.S. 1001 (1998).

84. *Id.* at 342.

85. *Id.* (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)).

86. *Id.* (citing *Onacle v. Sundowner Offshore Servs., Inc.*, 573 U.S. 75 (1998)).

87. *Id.* (citing *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015)).

88. *Id.* at 343.

The court explained that there are many approaches to statutory interpretation, such as focusing on the language of the statute, delving into legislative history, examining subsequent actions of the legislature, or some combination of these methods.⁸⁹ Of course, if the statute is clear, there is no need to examine legislative history or other sources, even if the language is not perfectly straightforward.⁹⁰ The court acknowledged that this method is more controversial when the language embodies unintended consequences.⁹¹ In these circumstances, some courts suggest turning to legislative history.⁹² The failure to include a protected class or amend a statute, however, could be the result of many factors.⁹³ Congress might be pleased with the statute or perhaps legislative gridlock is due to logrolling rather than the merits of the legislation.⁹⁴

The court used multiple methods to determine that discrimination based on sexual orientation is a subset of sex discrimination.⁹⁵ First, the court utilized the comparative method, which asks if the plaintiff would have been treated the same way had his or her sex been different.⁹⁶ The true question, the Seventh Circuit noted, is whether the plaintiff's protected characteristic played a role in the discrimination.⁹⁷ Consequently, other variables, such as the sex of the plaintiff's partner, should remain constant.⁹⁸ Using this analysis, the court determined that Hively was disadvantaged because she was a woman, as Ivy Tech did not have an anti-marriage policy that extended to heterosexual couples.⁹⁹ Further, Hively was treated differently because she did not conform to gender stereotypes, namely being heterosexual.¹⁰⁰ The court explained that a "policy that discriminates on the basis of sexual orientation does not affect every woman, or every man, but it is based on assumptions about the proper behavior for someone of a given sex."¹⁰¹ The court ultimately determined that the discrimination would not have occurred if Hively's sex was not considered.¹⁰²

Next, the court applied an association theory.¹⁰³ Courts have recognized that individuals who are treated differently based on the protected characteristic of a person with whom they associate are disadvantaged due to their own

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 343–44.

95. *Id.* at 345.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 345–46.

100. *Id.* at 346.

101. *Id.*

102. *Id.* at 346–47.

103. *Id.* at 347.

traits.¹⁰⁴ The Supreme Court first recognized this type of discrimination in *Loving v. Virginia*.¹⁰⁵ There, the Supreme Court “held that ‘restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.’”¹⁰⁶ Essentially, both parties to the interracial marriage were denied important rights solely because of their race.¹⁰⁷ Courts have applied this rationale to Title VII’s proscription on race discrimination.¹⁰⁸ The *Hively* court explained that the same analysis applies to discrimination based on sex, as the statute’s text draws no distinction between the protected categories listed.¹⁰⁹ The Seventh Circuit reserved additional complications, such as religious concerns, for future consideration.¹¹⁰

According to Judge Diane S. Sykes’s dissenting opinion, statutes should be interpreted by giving words their “ordinary, contemporary, common meaning.”¹¹¹ Consequently, the dissent argued, the statute should be interpreted considering the common meaning of sex in 1964. Judge Sykes argued that in 1964, sex meant biologically male or female.¹¹² Additionally, to a fluent speaker of English, sex does not encompass sexual orientation, and the terms are not used interchangeably.¹¹³ In support of this contention, Judge Sykes referenced various statutes that protect both sex and sexual orientation.¹¹⁴ Therefore, she concluded that sexual orientation should be considered a separate category of discrimination, not a subset of sex discrimination.¹¹⁵ The dissent further argued that the majority used the comparative test incorrectly because its analysis changed not only *Hively*’s sex but also *Hively*’s sexual orientation.¹¹⁶ Judge Sykes argued the proper test must be whether the employer treats gay men the same as lesbians.¹¹⁷

The dissent also determined that sex stereotyping is not implicated by sexual orientation discrimination, as heterosexuality is not a sex-specific stereotype.¹¹⁸ An employer does not insist that employees match a stereotype specific to their sex but instead that they match the conventional sexual orientation, regardless of whether they are male or female.¹¹⁹ The dissent then argued the

104. *Id.*

105. *Id.* (quoting *Loving v. Virginia*, 383 U.S. 1, 12 (1967)).

106. *Id.* (citing *Loving*, 383 U.S. at 12).

107. *Id.* at 347.

108. *Id.* at 347–48.

109. *Id.* at 349.

110. *Id.* at 352.

111. *Id.* at 362 (Sykes, J., dissenting) (quoting *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014)).

112. *Id.* (Sykes, J., dissenting).

113. *Id.* (Sykes, J., dissenting).

114. *Id.* at 363–64 (Sykes, J., dissenting).

115. *Id.* at 364–65 (Sykes, J., dissenting).

116. *Id.* at 366 (Sykes, J., dissenting).

117. *Id.* (Sykes, J., dissenting).

118. *Id.* at 370 (Sykes, J., dissenting).

119. *Id.* (Sykes, J., dissenting).

majority's reliance on *Loving* was misplaced.¹²⁰ Judge Sykes determined that *Loving* rested on the conclusion that miscegenation laws are inherently racist because those laws used racial classifications to promote white supremacy.¹²¹ However, Judge Sykes differentiated sexual orientation discrimination as not inherently sexist because it does not aim to promote the supremacy of one sex.¹²² The dissent believed that Congress, rather than the courts, should provide a remedy for discrimination based on sexual orientation.¹²³

The Second Circuit, in *Zarda v. Altitude Express, Inc.*, concluded that sexual orientation discrimination is, in part, motivated by sex.¹²⁴ As a result, discrimination based on sexual orientation is a subset of sex discrimination.¹²⁵ In *Zarda*, the plaintiff was a skydiving instructor.¹²⁶ Given the nature of the work, which often involved close physical proximity, instructors frequently joked with customers in an effort to make them feel more comfortable.¹²⁷ In June 2010, Zarda told a female client “he was gay ‘and ha[d] an ex-husband to prove it.’”¹²⁸ He said this was an attempt to preempt potential discomfort, but the client alleged Zarda inappropriately touched her and used his sexual orientation as an excuse.¹²⁹ The incident was reported to Zarda's boss, and he was quickly fired.¹³⁰ Zarda denied participating in any inappropriate behavior and insisted he was dismissed due to his sexual orientation.¹³¹

The trial court granted summary judgment for the defendant regarding Zarda's sex stereotyping claim, as the Second Circuit previously held gender stereotyping claims cannot be based on sexual orientation.¹³² Initially, a panel of Second Circuit judges declined Zarda's invitation to reconsider the court's prior rulings because precedent can only be changed by the court sitting en banc.¹³³ After the panel decision, the Second Circuit granted en banc review.¹³⁴

In *Zarda*, the Second Circuit addressed the contention that an employee can be fired for sexual orientation without reference to sex.¹³⁵ For example, an employer, when communicating the reason why a male employee was fired, would state “I fired him because he is gay” not “I fired him because he was a

120. *Id.* at 367 (Sykes, J., dissenting).

121. *Id.* at 368 (Sykes, J., dissenting).

122. *Id.* (Sykes, J., dissenting).

123. *Id.* at 372 (Sykes, J., dissenting).

124. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 112 (2d Cir. 2018) (en banc).

125. *Id.*

126. *Id.* at 108.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 109.

132. *Id.*

133. *Id.* at 110.

134. *Id.*

135. *Id.* at 113.

man.”¹³⁶ However, the court noted that even if an employer does not reference sex, the employee is still a man that is attracted to men.¹³⁷ As such, “firing a man because he is attracted to men is a decision motivated, at least in part, by sex.”¹³⁸

The Second Circuit further addressed the argument that an individual in 1964, when Title VII was first passed, would never believe that discrimination based on sex also prohibited discrimination based on sexual orientation.¹³⁹ The court explained that, if this were true, the same could be said for other forms of discrimination prohibited by Title VII.¹⁴⁰ For example, sexual harassment and hostile work environment claims were not originally covered by Title VII.¹⁴¹ Congress simply could not include all types of discrimination against protected classes, so courts are responsible for “giv[ing] effect to the broad language that Congress used.”¹⁴² As the Supreme Court has said, statutory provisions often go beyond the primary evil to cover reasonably similar evils.¹⁴³ Finally, the Second Circuit explained that the text, rather than the main concerns of the legislature, is the lodestar of statutory interpretation.¹⁴⁴

The court found that the test for determining whether sex discrimination occurred reaffirms the result.¹⁴⁵ Courts determine whether a basis for discrimination is a function of sex by ascertaining whether the treatment would have been different but for the person’s sex.¹⁴⁶ In applying this test to sexual orientation, the court looked at the facts of *Hively*.¹⁴⁷ Under those circumstances, if Hively were a man attracted to women, she would not have been denied a promotion.¹⁴⁸ Therefore, Hively would not have been discriminated against but for her sex.¹⁴⁹ The Second Circuit then turned to the government’s contention that the true comparison should be between a gay man and a lesbian.¹⁵⁰ The court, however, rejected this argument and explained that for the comparative

136. *Id.*

137. *Id.*

138. *Id.* at 114.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 115 (citing *Pullman-Standard v. Swint*, 456 U.S. 273, 276 (1982)).

143. *Id.* (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 53 U.S. 75, 79–80 (1998)).

144. *Id.*

145. *Id.* at 116.

146. *Id.* (citing *L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978)).

147. *Id.* (citing *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 341 (7th Cir. 2017)).

148. *Id.*

149. *Id.*

150. *Id.*

test “the trait is the control, sex is the independent variable, and employee treatment is the dependent variable.”¹⁵¹

The court then provided an example of the application of this test.¹⁵² In *City of Los Angeles, Department of Water and Power v. Manhart*,¹⁵³ the Supreme Court analyzed whether the Department of Water and Power’s practice of requiring female employees to make larger pension contributions was discriminatory.¹⁵⁴ In doing so, the Supreme Court looked at “whether the evidence shows ‘treatment of a person in a manner which but for that person’s sex would be different.’”¹⁵⁵ The Second Circuit noted that life expectancy is a sex-dependent trait because when an individual’s sex is changed that person’s life expectancy also changes.¹⁵⁶ As a result, the Supreme Court determined that the pension system was merely a proxy for sex discrimination.¹⁵⁷ The *Zarda* court, conducting a similar analysis, explained that “a woman who is subject to an adverse employment action because she is attracted to women would have been treated differently if she had been a man who was attracted to women.”¹⁵⁸ As such, discrimination based on sexual orientation is a function of sex and a subset of sex discrimination.¹⁵⁹

Next, the Second Circuit performed a gender stereotyping analysis.¹⁶⁰ The Supreme Court has determined that employment decisions cannot be based on typical impressions about males and females.¹⁶¹ For example, “adverse employment actions taken based on the belief that a female [employee] should walk, talk, and dress femininely constitute[s] impermissible sex discrimination.”¹⁶² To determine if something is a gender stereotype, the court looked to whether an individual would have been treated differently had he or she been a member of a different sex.¹⁶³ The court concluded that “when . . . ‘an employer . . . acts on the basis of a belief that [men] cannot be [attracted to men], or that [they] must not be,’ but takes no such action against women who are attracted to men, the employer ‘has acted on the basis of gender.’”¹⁶⁴

151. *Id.* at 116–17.

152. *Id.* at 117.

153. *L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702 (1978).

154. *Id.* at 704–05.

155. *Id.* at 711 (internal citations omitted).

156. *Zarda*, 883 F.3d at 117.

157. *Manhart*, 435 U.S. at 711.

158. *Zarda*, 883 F.3d at 119.

159. *Id.*

160. *Id.*

161. *Manhart*, 435 U.S. at 707.

162. *Zarda*, 883 F.3d at 119 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–52 (1989)).

163. *Id.* at 120 (citing *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 120 n.10 (2d Cir. 2004)).

164. *Id.* at 120–21 (en banc) (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989)) (alterations in the original).

In support of this notion, the Second Circuit noted that courts have previously attempted to draw lines between gender stereotypes that create valid claims of sex discrimination and those that constitute discrimination based on sexual orientation.¹⁶⁵ The court determined that a line need not be drawn because sexual orientation discrimination is rooted in gender stereotypes.¹⁶⁶ In response, the government argued that even if sexual orientation discrimination is based on gender stereotypes, it is not unlawful because men and women are treated the same.¹⁶⁷ The court rejected this argument, stating that “an employer who discriminates against employees based on assumptions about the gender to which the employees can or should be attracted has engaged in sex-discrimination irrespective of whether the employer uses a double-edged sword that cuts both men and women.”¹⁶⁸ Consistent with *Hively*, the Second Circuit determined associational discrimination reinforces that sexual orientation discrimination is a subset of sex discrimination.¹⁶⁹ Yet, the majority did not express an opinion on whether an exception might be appropriate for “discriminatory conduct rooted in religious beliefs.”¹⁷⁰

While *Hively* and *Zarda* analyzed Title VII, the Seventh Circuit extended *Hively*'s rationale to the FHA in *Wetzel v. Glen St. Andrew Living Community*.¹⁷¹ In that case, Wetzel moved to St. Andrew, a living community for older adults.¹⁷² Wetzel spoke to the staff, as well as other residents, about her sexual orientation, but she was met with animosity, including verbal and physical abuse, from other residents.¹⁷³ The various incidents were reported, but St. Andrew did nothing to help Wetzel.¹⁷⁴ In fact, St. Andrew responded by retaliating against Wetzel.¹⁷⁵ For example, St. Andrew substantially barred Wetzel from the lobby, halted her cleaning services, and moved her to a less optimal dining area.¹⁷⁶ Eventually, Wetzel sued under the FHA, alleging that St. Andrew did not provide a non-discriminatory living environment and that she was retaliated against for complaining about the harassment.¹⁷⁷ In deciding whether

165. *Id.* at 124 (citing *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 830 F.3d 698, 705–09 (7th Cir. 2017)), *vacated by* 853 F.3d 339 (7th Cir. 2017) (en banc).

166. *Id.* at 122.

167. *Id.* at 123.

168. *Id.*

169. *Id.* at 124.

170. *Id.* at 122, n.22.

171. *Wetzel v. Glen St. Andrew Living Cmty., LLC*, 901 F.3d 856, 862 (7th Cir. 2018), *cert. dismissed* 139 S. Ct. 1249 (2019) (mem).

172. *Id.* at 859.

173. *Id.* at 860.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 861.

sexual orientation discrimination constituted discrimination based on sex, the Seventh Circuit stated that *Hively* applied with equal force under the FHA.¹⁷⁸

Despite these recent decisions the Eastern District of Missouri, in *Walsh*, was bound by Eighth Circuit precedent, which has not been revisited and clearly states that sexual orientation is not a protected characteristic.¹⁷⁹

IV. INSTANT DECISION

In *Walsh*, the United States District Court for the Eastern District of Missouri granted Friendship Village's motion for judgment on the pleadings because sexual orientation is not a protected class under Eighth Circuit precedent.¹⁸⁰ The court first explained that the FHA covers multiple classes but does not explicitly protect sexual orientation.¹⁸¹ The court then addressed the claim that Walsh and Nance were treated less favorably because of their sex.¹⁸² The Eastern District noted Walsh and Nance did not adduce any evidence showing that men in a same-sex relationship would have been admitted to Friendship Village.¹⁸³ As a result, the court determined the claims were truly based on sexual orientation, not just sex,¹⁸⁴ and the Eighth Circuit has "held that 'Title VII does not prohibit discrimination against homosexuals.'"¹⁸⁵ Additionally, the court referenced other decisions that have determined sexual orientation is not protected by the FHA.¹⁸⁶ The Eastern District, however, acknowledged that other courts have recently held that discrimination based on sexual orientation is in fact a form of sex discrimination.¹⁸⁷ Yet, because the court was bound by Eighth Circuit precedent, the claim was denied.¹⁸⁸

Next, the court considered the claim that Walsh and Nance were treated less favorably due to their association with a person of a particular sex.¹⁸⁹ Walsh and Nance specifically argued that if one of them were a man, they

178. *Id.* at 862.

179. *Walsh v. Friendship Vill. of S. Cty.*, 352 F. Supp. 3d 920, 926 (E.D. Mo. 2019), *appeal docketed*, No. 19-1395 (8th Cir. Feb. 27, 2019) (citing *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989)).

180. *Id.* at 925–27.

181. *Id.* at 925.

182. *Id.*

183. *Id.*

184. *Id.* at 925–26.

185. *Id.* at 926 (quoting *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989)).

186. *Id.* (citing *Fair Housing Ctr. of Washtenaw Cty., Inc. v. Town and Country Apartments*, No. 07–10262, 2009 WL 497402, at *7 n.1 (E.D. Mich. Feb. 27, 2009)).

187. *Id.* (citing *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 113 (2d Cir. 2018) (en banc)).

188. *Id.*

189. *Id.*

would not have been denied housing.¹⁹⁰ Thus, but for their sex, Friendship Village's decision would have been different.¹⁹¹ The court agreed that associational discrimination claims are sometimes valid but denied Walsh and Nance's assertion because they did not show that these claims are actionable when the class at issue is not statutorily protected.¹⁹²

Finally, the court turned to the sex stereotyping claim.¹⁹³ Courts have allowed gender stereotyping claims under Title VII when such stereotyping impacts employment decisions.¹⁹⁴ Yet, these claims are rejected when they are used as a proxy for sexual orientation discrimination claims.¹⁹⁵ Courts usually try "to distinguish between discrimination based on stereotypical notions of femininity and masculinity and that based on sexual orientation, determining the former is actionable under Title VII while the latter is not."¹⁹⁶ Here, the court determined that this claim need not be addressed because the stereotyping was based only on sexual orientation – an unprotected class – and thus, the claim could not stand.¹⁹⁷

For the above reasons, the Eastern District granted Friendship Village's motion for judgment on the pleadings and dismissed Walsh and Nance's amended complaint.¹⁹⁸ In February 2019, Walsh and Nance filed an appeal to the Eighth Circuit.¹⁹⁹

V. COMMENT

While early decisions determined sexual orientation is not a protected class under federal statutes, courts are now reaching different results. Two federal circuits have changed their position, and other circuits continue to face this issue. This Part will examine the close relationship between discrimination based on sex and discrimination based on sexual orientation by looking to Supreme Court precedent, as well as the plain language of Title VII and the FHA. Ultimately, this Part argues that discrimination based on sexual orientation is a subset of sex discrimination.

190. *Id.*

191. *Id.* at 926–27.

192. *Id.* at 927.

193. *Id.*

194. *Id.* (quoting *Hunter v. United Parcel Serv., Inc.*, 697 F.3d 697, 702 (8th Cir. 2012)).

195. *Id.* (citing *Pambianchi v. Ark. Tech Univ.*, No. 4:13-CV-00046-KGB, 2014 WL 11498236, at *5 (E.D. Ark. Mar. 14, 2014)).

196. *Id.* (quoting *Pambianchi*, 2014 WL 11498236, at *5).

197. *Id.* at 927–28.

198. *Id.* at 928.

199. *Id.* The appeal will be held in abeyance until the Supreme Court issues a decision in *Zarda and Bostock v. Clayton County, Georgia*.

A. Supreme Court Precedent

The inclusion of sexual orientation discrimination as a subset of sex discrimination is reasonable when considered in light of Supreme Court precedent. Treating individuals differently based on traits not explicitly protected in statutes can constitute unlawful discrimination if those traits are a proxy for, or a function of, a protected characteristic. For example, the Supreme Court has determined that treating individuals differently based on life expectancy constitutes unlawful sex discrimination.²⁰⁰ In *Manhart*, the defendant required females to make larger pension contributions than men because, on average, women live longer.²⁰¹ Life expectancy is a sex-dependent trait, so altering an individual's sex would change life expectancy, and consequently, the application of the pension policy.²⁰² Because life expectancy is a function of sex, the pension policy treated employees differently due to their sex, which is prohibited by the statute.

In terms of sexual orientation, changing an individual's sex leads to different treatment. The Second Circuit has explained that a "but for" test is used to determine whether a given trait serves as a proxy for, or a function of, sex.²⁰³ In *Hively*, the plaintiff was a lesbian, but had she been a male, she would have been heterosexual.²⁰⁴ If this were the case, Hively would not have been denied her promotion.²⁰⁵ Just as changing an individual's sex necessarily alters an individual's life expectancy, changing an individual's sex necessarily alters that person's sexual orientation. In other words, sexual orientation is, in part, dependent on an individual's sex. Thus, when individuals are treated differently based on their sexual orientation, they are treated differently, in part, because of sex.

Gender stereotyping jurisprudence further supports the notion that sex discrimination encompasses sexual orientation discrimination. Individuals cannot be treated adversely based on a failure to comply with generalizations about their gender.²⁰⁶ Gay individuals "represent[] the ultimate . . . failure to conform to [gender] stereotype[s] (at least as understood in a place such as modern America, which views heterosexuality as the norm and other forms of sexuality as exceptional): [they are] not heterosexual."²⁰⁷ Some argue that heterosexuality is not a sex-specific stereotype but rather an insistence that individuals match the typical sexual orientation irrespective of sex.²⁰⁸ Yet, this

200. *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978).

201. *Id.* at 704–05.

202. *Id.* at 711.

203. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 116 (2d Cir. 2018) (en banc).

204. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 341 (7th Cir. 2017).

205. *Id.* at 345.

206. *Zarda*, 883 F.3d at 120.

207. *Hively*, 853 F.3d at 346.

208. *Id.* at 370 (Sykes, J. dissenting).

view is too wide. Sex-specific stereotypes emerge when a preference for heterosexuality is applied on an individual level. For example, asking a male to conform to the usual sexual orientation requires that man to marry a woman. The reverse would be true for a woman that is asked to conform to the standard sexual orientation. So, at a general level, requiring heterosexuality does not create stereotypes specific to males or females, but, on the individual level, people are treated adversely due to their failure to conform with a quintessential gender stereotype – that males should be attracted to females and vice versa. Finally, some maintain that this form of sex stereotyping is not prohibited because men and women are treated the same.²⁰⁹ Yet, two wrongs do not make a right, and impermissible discrimination has occurred even if “a double-edged sword” was used to cut both men and women.²¹⁰

Associational discrimination provides another basis for determining that sexual orientation is protected under the “because of” sex language. This type of discrimination was first recognized in the context of miscegenation statutes.²¹¹ In *Loving v. Virginia*, the Supreme Court determined that a Virginia law criminalizing interracial marriages was impermissibly based on race and therefore violated the Equal Protection Clause.²¹² While *Loving* was decided on constitutional grounds, courts have held that constitutional determinations can provide guidance in the statutory context.²¹³ In fact, circuit courts have extended this rationale to statutes and determined that if an action is taken against a person due to their association with another race, then that person has been discriminated against based on his or her own race.²¹⁴ Associational discrimination has a similar application to sexual orientation. A person’s sexual orientation depends not only on the sex of the individual but also on the sex of one’s partner. Consequently, discrimination based on sexual orientation is, in part, based on an individual’s association with a member of the same sex, and adverse treatment due to this association constitutes discrimination based on that individual’s own sex. Some argue the rationale of cases addressing race discrimination should not be extended to this context because of differences in these types of discrimination.²¹⁵ However, the text of both Title VII and the

209. *Zarda*, 883 F.3d at 123.

210. *Id.*

211. *See Loving v. Virginia*, 388 U.S. 1, 2, 12 (1967).

212. *Id.* at 12.

213. *See Ricci v. DeStefano*, 557 U.S. 557, 582 (2009).

214. *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986) (“Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of *his* race.”) (emphasis added); *Holcomb v. Iona Coll.*, 521 F.3d 130, 139 (2nd Cir. 2008) (“[W]here an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee’s *own* race.”) (emphasis added); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 348 (7th Cir. 2017) (adopting the analysis used in *Holcomb*).

215. *Hively*, 853 F.3d at 368 (Sykes, J., dissenting).

FHA do not draw a distinction between discrimination based on race and discrimination based on sex.²¹⁶

B. Statutory Interpretation

The plain language of the statute further reinforces that discrimination based on sexual orientation is, in part, a function of an individual's sex. Title VII and the FHA prohibit discrimination "because of" sex.²¹⁷ Sexual orientation meets this test because discrimination based on someone's sexual orientation is partially predicated on an individual's sex. Black's Law Dictionary defines sexual orientation as "[a] person's predisposition or inclination toward sexual activity or behavior with other males or females" and is commonly categorized as 'heterosexuality, homosexuality, or bisexuality.'²¹⁸ Additionally, Merriam Webster defines gay as "of, relating to, or characterized by a tendency to direct sexual desire toward another of the same sex."²¹⁹ Consequently, sexual orientation is predicated on both the sex of the individual and the sex of those to whom he or she is attracted. As the majority in *Zarda* explained, one cannot fully define sexual orientation without identifying an individual's sex, and, as such, sex plays a role in sexual orientation discrimination.²²⁰

Some argue that, to the average person, sex is distinct from sexual orientation.²²¹ While this is true to an extent, sex still plays a role in the average person's perception of sexual orientation. Individuals invariably consider the sex of a person, as well as the sex of that person's partner, when determining a person's sexual orientation. Even though these two traits are distinct, there is an overlap because determining whether one is gay must be based, in part, on that person's sex. The connection can be shown by the applying the "but for" test utilized in *Zarda*.²²² For example, if a woman is in a romantic relationship with another woman, she is a lesbian, while a man in a relationship with a woman is heterosexual.²²³ In short, sex and sexual orientation are connected because changing one's sex also alters that person's sexual orientation.²²⁴

Even though the plain language of both Title VII and the FHA fairly encompass sexual orientation discrimination, legislative intent poses an issue. Of course, inquiry into legislative intent is unnecessary when a statute is plain on

216. 42 U.S.C. § 3604(a) (2018); 42 U.S.C. § 2000e-2(a)(1) (2018).

217. § 3604(a); § 2000e-2(a)(1).

218. *Sexual Orientation*, BLACK'S LAW DICTIONARY (11th ed. 2019).

219. *Gay*, MERRIAM-WEBSTER (last visited Oct. 4, 2019), <https://www.merriam-webster.com/dictionary/gay> [perma.cc/YVL7-S9V4].

220. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 113 (2d Cir. 2018) (en banc).

221. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 362 (7th Cir. 2017) (Sykes, J., dissenting).

222. *Zarda*, 883 F.3d at 116.

223. *Id.*

224. *Id.*

its face.²²⁵ Further, “the text is the lodestar of statutory interpretation.”²²⁶ Courts defer to the text of statutes, rather than legislative intent, for various reasons. First, courts are tasked with giving effect to the broad language of a statute.²²⁷ The Supreme Court has explained that statutes “often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”²²⁸ Second, legislative intent can be unreliable.²²⁹ Records might be poorly kept, and there are often multiple explanations for why a law did not pass. For example, unpopular amendments might be attached to a bill or lobbying might influence the legislative process. Additionally, members of Congress might not propose laws in the first instance because they believe other issues are more pressing. The complications worsen when one attempts to understand why Congress has neglected to amend existing law.²³⁰ Perhaps Congress is content with the law as written, pleased with how courts have interpreted the statute, or gridlock prevents further legislation, regardless of the merits of the proposed change.²³¹

The above concerns regarding legislative history, however, do not apply with similar force in this context. Congressional intent can be safely intuited based on the circumstances that existed when these laws were passed. In 1964, “homosexuality” was a crime, and gay people were believed to suffer from mental illness.²³² In fact, the American Psychiatric Association and the American Psychological Association classified “homosexuality” as a mental disorder until 1973 and 1975, respectively.²³³ Based on these facts, sexual orientation discrimination does not appear to be a “reasonably comparable evil.”²³⁴ Congress surely was not concerned with discrimination based on sexual orientation when Title VII and the FHA were passed, given the prevailing attitude towards gay individuals at that time. Thus, even if plain language favors including sexual orientation as a protected characteristic, this interpretation is controversial. As the Seventh Circuit explained in *Hively*, the results of statutory interpretation are harder to accept when the language leads to unintended consequences,²³⁵ such as extending protection beyond legislative intent.

225. *Hively*, 853 F.3d at 343.

226. *Zarda*, 883 F.3d at 115 (citing *Onacle v. Sundowner Offshore Servs., Inc.*, 573 U.S. 75, 79–80 (1998)).

227. *Id.*

228. *Onacle*, 573 U.S. at 79–80.

229. *Hively*, 853 F.3d at 343.

230. *Id.*

231. *Id.* at 343–44.

232. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 140 (2d Cir. 2018) (en banc) (Lynch, J., dissenting).

233. *Id.* (Lynch, J., dissenting).

234. *Id.* at 142 (Lynch, J., dissenting).

235. *Hively*, 853 F.3d at 343.

A further concern is that an interpretation expanding the scope of discrimination because of sex threatens the balance of power in the government. The court is directly contravening legislative intent, at least from the time of the law's enactment. Congress, as a representative of the public, is tasked with creating law, and the judiciary serves to interpret the law. Here, courts are overriding Congress and creating new law. Thus, some argue that decisions involving the expansion of legislation should be left to our legislators.²³⁶

Yet, there is importance in law being workable. Over time, society progresses and public opinion changes. As a result, giving new meaning to statutes can be justified. As Judge Posner explained in his *Hively* concurrence:

This is something courts do fairly frequently to avoid statutory obsolescence and concomitantly to avoid placing the entire burden of updating old statutes on the legislative branch. We should not leave the impression that we are merely the obedient servants of the 88th Congress (1963–1965), carrying out their wishes. We are not. We are taking advantage of what the last half century has taught.²³⁷

While this view is often endorsed in constitutional jurisprudence,²³⁸ courts have used statutory interpretation to give legislation a new meaning, one that comports with modern public opinion.²³⁹ For example, the Sherman Antitrust Act was passed in 1890, but courts interpret that law in light of modern economics.²⁴⁰ Judicial interpretation has been used to update the Sherman Act, and this practice ensures that “old law satisf[ies] modern needs and understandings.”²⁴¹ Title VII and the FHA were passed in 1964 and 1968, respectively.²⁴² Much has changed in the fifty years since then – the fundamental right of marriage has been constitutionally guaranteed to same-sex couples,²⁴³ and a majority of Americans now support same-sex marriage.²⁴⁴ Courts should “tak[e] advantage of what the last half century has taught,” rather than applying the congressional intent of 1964 and 1968, which is now antiquated and disconnected from modern sentiments.

236. *See id.* at 372 (Sykes, J., dissenting).

237. *See id.* at 357 (Posner, J., concurring).

238. *Id.* at 353–54.

239. *Id.* at 352.

240. *Id.*

241. *Id.*

242. 1964, *supra* note 30 (discussing the history of the 1964 Act, which includes Title VII); *History of Fair Housing*, *supra* note 35 (discussing the history of the FHA).

243. *Obergefell v. Hodges*, 135 S.Ct. 2584, 2607–08 (2015).

244. *Changing Attitudes on Gay Marriage: Public Opinion on Same-Sex Marriage*, PEW RES. CTR. (May 14, 2019), <https://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/> [perma.cc/XRU3-9KHC] (finding that, based on a 2019 survey, 61% of Americans support same-sex marriage while 31% are opposed).

The notion that discrimination based on sexual orientation is a type of unlawful sex discrimination is supported by Supreme Court precedent, as well as the plain language of Title VII and the FHA. Although, as courts continue to alter their interpretation of federal statutes, additional issues will arise. For example, the plaintiffs in *Walsh* were denied housing based on a policy informed by religious beliefs.²⁴⁵ In both *Hively* and *Zarda*, however, the courts did not address how religious motivations might impact this new interpretation.²⁴⁶ As individuals continue to allege discrimination based on sexual orientation, courts will be forced to resolve these complex issues.

VI. CONCLUSION

Both Supreme Court precedent and the plain language of federal antidiscrimination statutes indicate that discrimination based on sexual orientation is a subset of unlawful sex discrimination. Yet, there are viable arguments on both sides, and the federal circuits remain split on this issue. As courts continue to alter their interpretation of federal statutes, additional complications will likely appear. Despite these potential issues, gay people deserve to be treated with “equal dignity in the eyes of the law,”²⁴⁷ and federal statutes, as well as the judiciary, should reinforce that notion.

245. *Walsh v. Friendship Vill. of South Cty.*, 352 F. Supp. 3d 920, 923 (E.D. Mo. 2019), *docketed*, No. 19-1395 (8th Cir. Feb. 27, 2019).

246. *Hively*, 853 F.3d at 352; *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 122 n.22 (2d Cir. 2018) (en banc).

247. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

