

The Gay Accent, Gender, and Title VII Employment Discrimination

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“His purse just fell out of his mouth.” – Gay Colloquialism

I. INTRODUCTION

While race, religion, ethnicity, and sex will always remain salient social issues in our nation, sexual orientation is currently at the forefront of our national debate and will likely not abate in the foreseeable future.¹ This necessarily implicates longstanding sex and gender debates.² Courts must adapt to new understandings of discrimination when ruling within the confines of Congress’s civil rights legislation. Federal courts, for example, struggle in differentiating sex, gender, and sexuality when adjudicating Title VII³ employment discrimination claims.⁴ Because Title VII

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1. For example, the *New York Times* reports that the issue of gay marriage “has been a flash-point in American politics for more than a decade, setting off waves of competing legislation, lawsuits and ballot initiatives to either legalize or ban the practice and causing rifts within religious groups.” *Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, N.Y. TIMES (Oct. 19, 2012), http://topics.nytimes.com/top/reference/timestopics/subjects/s/same_sex_marriage/index.html.

2. A prominent scholar in gender studies, R. W. Connell, describes the ubiquity and timelessness of gender debates:

Because gender is a way of structuring social practice in general, not a special type of practice, it is unavoidably involved with other social structure. It is now common to say that gender “intersects”—better, interacts—with race and class. We might add that it constantly interacts with nationality or position in the world order.

R. W. CONNELL, *MASCULINITIES* 75 (1995).

3. Civil Rights Act of 1964 tit. 7, 42 U.S.C. § 2000e-2(a); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 15 (1995) (noting that judges must write on a “blank slate” when adjudicating a sex discrimination case); Zachary A. Kramer, *Heterosexuality and Title VII*, 103 NW. U. L. REV. 205, 239 (2009) (explaining that most scholars and courts believe the sex amendment came at the last minute in an attempt to derail Title VII completely; therefore, its addition had no legislative history to explain the meaning of sex).

4. Michael S. Kimmel demonstrates the difficulty in delineating this boundary in the appropriate context of homophobia: “Homophobia is the fear that other men will unmask us, emasculate us,

does not protect employees from sexual orientation-based discrimination,⁵ plaintiffs who are or are perceived to be of a sexual minority have difficulty proving a valid sex-based discrimination claim in federal court.⁶ This difficulty arises because one cannot perceive sex, gender, and sexuality without muddling the stereotypes associated with each one.⁷ Social science can help separate gender and sex characteristics from sexual characteristics; these distinctions expose deeper social biases toward sex, gender, and sexuality.

This Comment examines one of these characteristics: the male voice.⁸ Discrimination based on the sound of one's voice tends to force men to conform their voices to male stereotypes, a process known as covering.⁹ For men, this means sounding like a masculine heterosexual

reveal us and the world that we do not measure up, that we are not real men." Michael S. Kimmel, *Masculinity as Homophobia*, in PRIVILEGE: A READER 51, 63 (Michael S. Kimmel & Abby L. Ferber eds., 2003).

5. See *infra* Part III.B. Many other federal and state laws do not protect sexual minorities in employment as well as housing and public accommodation, for example. See Jennifer Levi & Daniel Redman, *The Cross-Dressing Case for Bathroom Equality*, 34 SEATTLE U. L. REV. 133, 135 (2010).

6. In *McDonnell Douglas Corp. v. Green*, the Supreme Court created a burden shifting framework in which the plaintiff always carries the burden of persuasion in Title VII claims. 411 U.S. 792, 802 (1973). First, the plaintiff must prove his prima facie case by showing, in general, that he is a member of a protected class, and that some adverse employment action occurred against him by virtue of being a member of that class. *Id.* The employer must then produce evidence showing a legitimate reason for the adverse action. *Id.* If the employer meets this burden, then the plaintiff must show that the employer's stated reason is a pretext for illegitimate discrimination. *Id.* The differences between proving a retaliation, harassment, or disparate treatment/impact claim is irrelevant for the purposes of this Comment, but the *McDonnell* framework will change slightly depending on which type of claim the plaintiff brings.

7. For example, masculinity continues to be defined by its fear of femininity. This fear results in the following characteristics: emotional restriction, health care problems, obsession with achievement and success, restricted sexual and affectionate behavior, socialized control and power issues, and homophobia. James M. O'Neil et al., *Gender-Role Conflict Scale: College Men's Fear of Femininity*, in COLLEGE MEN AND MASCULINITIES: THEORY, RESEARCH, AND IMPLICATIONS FOR PRACTICE 32-34 (2010).

8. This Comment will only examine men's voices because there has been less linguistic research on lesbian phonetics. Further, because society generally views lesbianism differently from male homosexuality, a different sexuality and gender analysis of women's voices would be required. That is a subject matter for a different article.

9. See Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 878-923 (2002); see also Joan W. Howarth, *Recruiting Sexual Minorities and People with Disabilities to Be Dean*, 31 SEATTLE U. L. REV. 751, 752-53 (2008). Howarth states as follows:

Perhaps the most vexing questions that some people with hidden disabilities and some members of LGBT communities may face relate to visibility, passing, secrecy, privacy, and disclosure. Deliberate disclosure of personal information (otherwise known as "coming out") may be central for members of both groups. The irrelevance of being gay or being disabled is not securely established, so communication about these aspects of one's life may be challenging. Even in welcoming contexts, the LGBT or disabled applicant may face decisions about how to discuss that aspect of his or her identity, if at all.

man.¹⁰ These attempts at covering or negotiating one's identity can have deleterious effects on employee self-identity, work productivity, and ability to bring discrimination claims in the future.¹¹

We perceive identity by comparing behavior to stereotypes. Sociolinguist Kathryn Campbell-Kibler describes this interaction between identity and stereotype as "style."¹² In particular, "[L]inguistic cues are tied, not to sexual orientation, but to recognizable ways of being in the world—in other words, to styles. Sexual Orientation merely represents one piece of information that may (or may not) be implicated in a stylistic performance."¹³ Employers are no different from the rest of society.¹⁴ They not only respond to identity status, such as sex, but also to stereotypical conduct, such as sounding like a man should sound.

Federal courts have addressed alleged discrimination partly based on a male employee's gay or effeminate voice in six cases, with mixed results. This Comment argues that when male employees are discriminated against partly based on their voice being perceived as gay—what I term the gay accent¹⁵—this discrimination should be seen as sex discrim-

See Howarth, *supra*, at 752–53.

10. *See, e.g.*, Kimmel, *supra* note 4, at 57 (explaining gender from a power relations/hegemony approach, Kimmel asserts that "[w]ithin the dominant culture, the masculinity that defines white, middle class, early middle-aged, heterosexual men is the masculinity that sets the standard for other men, against which other men are measured and, more often than not, found wanting"); Ann C. McGinley, *Work, Caregiving, and Masculinities*, 34 SEATTLE U. L. REV. 703, 707 (2011). McGinley explains masculinities theory:

[It] recognizes that certain practices are normative. Masculinity prescriptions affect men and women of different races, ethnic backgrounds, classes, and sexual orientations in different ways. For many men, defining oneself as 'masculine' requires proof of two negatives: that one is not feminine or a girl, and that one is not gay.

McGinley, *supra*, at 707.

11. Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000).

12. Kathryn Campbell-Kibler, *Intersecting Variables and Perceived Sexual Orientation in Men*, 86 AM. SPEECH 1, 54 (2011).

13. *Id.*

14. M.V. Lee Badgett, Brad Sears, Holning Lau & Deborah Ho, *Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination 1998–2008*, 84 CHI.-KENT L. REV. 559 (2009). This article summarizes social science data published since the 1980s that document discrimination against lesbian, gay, bisexual, and transgender (LGBT) people in the workplace. Since the mid-1990s, fifteen studies found that 15% to 43% of LBG (not transgender) respondents experienced discrimination in the workplace. *Id.* at 559. "[Eight to 17%] were fired or denied employment, 10% to 28% were denied a promotion or given negative performance evaluations, 7% to 41% were verbally/physically abused or had their workplace vandalized, and 10% to 19% reported receiving unequal pay or benefits." *Id.* at 559–60.

15. In the context of employment discrimination, this Comment includes soft, effeminate, feminine, non-masculine, lispy, and high-pitched voices in the definition of gay accent. While these are not necessarily technical characteristics of gay phonetics, they are common stereotypes of the accent.

ination through a mixed-motive analysis.¹⁶ The gay accent is a gender construction; it is not tied to sexual orientation.¹⁷ Having a gay accent does not mean that a man is homosexual. To adhere to the purpose of Title VII, courts should consider the behavior of the allegedly gay employee, actions of the harasser, and modern understandings of bias when ruling whether a legitimate sex discrimination claim exists.¹⁸ Using this more holistic approach, courts should be wary to dismiss pleadings or enter summary judgment for employers; rather, courts should submit these ambiguous cases to a jury.

To reach this conclusion, Part II will first examine sociolinguistic studies defining the gay accent, society's perceptions of the gay accent, and then the accent's possible causes. Part III first discusses the boundary between sex and sexual orientation discrimination, and then outlines gay-accent jurisprudence. Part IV argues for a more holistic view of circumstances surrounding the harassment of gay male employees, thereby showing that Title VII protects those harassed on account of their gay accent. Part V concludes.

II. GAY PHONETICS

A. Evolution of Gay Linguistics

Sociolinguistic studies on gay speech have evolved from documenting word choice to a more phonetic approach by measuring acoustic differences between gay and straight speech.¹⁹ Within these newer studies, surveys tend to compare either gay men and straight men²⁰ or gay men and straight women.²¹ Typically, listeners rate and describe the voice they hear from individual words or a variety of passages.²² When one of two speakers is perceived as sounding more gay than the other, for ex-

16. See *infra* Part III.A.

17. See *infra* Part II.B.

18. This argument applies to disparate treatment, harassment, and retaliation claims, even though gay accent cases have all involved harassment and retaliation claims. This analysis, however, proposes to reach disparate *impact* claims in theory only, given the practical difficulty in finding, gathering, and measuring accent samples within a workplace or community.

19. See Don Kulick, *Gay and Lesbian Language*, 29 ANN. REV. ANTHROPOLOGY 243 (2000).

20. See Campbell-Kibler, *supra* note 12; Rudolf P. Gaudio, *Pitch Properties in the Speech of Gay and Straight Men*, 69 AM. SPEECH 1 (1994); Erez Levon, *Sexuality in Context: Variation and the Sociolinguistic Perception of Identity*, 36 LANGUAGE SOC'Y 533 (2007); Benjamin Munson, *The Acoustic Correlates of Perceived Masculinity, Perceived Femininity, and Perceived Sexual Orientation*, 50 LANGUAGE & SPEECH 1 (2007).

21. Ron Smyth & Henry Rogers, *Do Gay-Sounding Men Speak Like Women?*, 27 TORONTO WORKING PAPERS LINGUISTICS 129 (2008).

22. Campbell-Kibler, *supra* note 12; Gaudio, *supra* note 20; Munson, *supra* note 20.

ample, the study directors compare the differences between the two sets of voices in order to find which vocal markings are distinct.²³ Some linguists, however, isolate one acoustic marker, digitally manipulate it, and play the recordings to listeners to gauge their perceptions based on the change in one marker.²⁴ But a combination of markings is also likely to change perceptions and thus skew some studies' results.²⁵ As the relevant literature develops, sociolinguists are also taking into account that a gay man's speech, like any speech, depends on his audience, his subject matter, and his geographic influences.²⁶ Ultimately, social context and methodology can make it difficult to pinpoint gay-accent markings.

Despite problems with cementing definite linguistic markings in the gay accent, sociolinguistic research can provide some general conclusions. The acoustic markers typically analyzed in gay speech studies are: (1) consonants /s/,²⁷ /z/,²⁸ and /l/;²⁹ (2) formant vowels;³⁰ (3) pitch;³¹ (4) frequency;³² (5) /ing/;³³ (6) voice onset time;³⁴ and (7) the neutral *schwa*

23. See, e.g., Gaudio, *supra* note 20.

24. Levon, *supra* note 20.

25. Campbell-Kibler, *supra* note 12, at 54.

26. *Id.*

27. The /s/ is pronounced as in the word "silly." It is a fricative sound, in that there is friction without stopping air flow. SANDRA WILDE, WHAT'S A SCHWA SOUND ANYWAY? A HOLISTIC GUIDE TO PHONETICS, PHONICS, AND SPELLING 11–12 (1997).

28. The /z/ is pronounced as in the word "pizzazz." It too is a fricative. *Id.*

29. The /l/ is pronounced as in the word "lovely." It is a liquid sound, in that the airstream is interrupted but with no friction. *Id.* at 15. How the /l/ sound is produced with the tongue varies greatly from speaker to speaker. *Id.*

30. There are two general types of pitches produced by humans. PETER LADEFOGED, A COURSE IN PHONETICS 21–23 (5th ed. 2006). The first pitch created occurs from the vibration of the vocal chords when the sound is first uttered. *Id.* The second type consists of overtone pitches that are created by and vary dramatically based on the resonating cavities of the vocal tract. *Id.* While difficult to differentiate, vocal chord pitch can be heard in regular speaking while the vocal tract pitch can be heard by itself when whispering or creaking one's voice (because the vocal chords do not vibrate during whisper or creaking). *Id.* The vocal tract overtone pitches are further characterized by two overtone pitches, which are called formant vowels (only two overtones are widely seen to have a large impact on vowel formation, but depending on the vowel, there can be up to six overtones). *Id.* The first (F1) is a lower pitch, corresponds to tongue placement being close or far from the roof of your mouth, and can be heard in a creaky voice. *Id.* The second (F2) is higher, corresponds to tongue placement close or far from your teeth, and can be heard when whispering. *Id.* Formant vowel sounds, dependent on vocal tract shape and tongue placement, create the difference in vowel sounds and much of the distinctness that we hear in people's voices. *Id.*

31. When sociolinguistic researchers used the word *pitch* by itself, they referred to all pitch forms combined, as described in note 30 above. Pitch range, or intonation, refers to the near simultaneous use of lower and higher pitches in the same word or phrase. *Id.* at 23.

32. Frequency measures the peaks in the waves of air pressure in a given period of time. *Id.* Pitch and frequency tend to correspond with each other in that a higher frequency (more waves per minute) tends to go hand in hand with a higher pitch. *Id.*

33. The /ing/ sound is made by voicing the gerund form of verbs, such as the word *making*. Campbell-Kibler, *supra* note 12, at 55.

sound.³⁵ Using these markings, researchers have asked listeners to rate voices, along a spectrum or by means of a binary choice, as masculine or feminine, gay or straight, and other social perceptions.

B. Perceptions and Realities of the Gay Accent

Gay-accent studies have attempted to corroborate or dispel common social stereotypes of the gay accent, namely the /s/ sound and pitch. Some linguists analyzed these sounds by recording listener perceptions on a masculine-feminine spectrum, a gay-straight spectrum, or both. Others empirically compared speech differences between gay and straight men.

First, Campbell-Kibler's study, representative of /s/ phonetic analysis,³⁶ found that /s/-fronting created a perception in speakers as being less masculine and more gay sounding.³⁷ It also found that /s/-fronting made the speaker sound less competent, but /s/-fronting and /s/-backing made the speaker sound less confident than a mid-/s/ sound.³⁸ The study's author notes, however, that perceptions of /s/-fronting may have been influenced by common social perceptions of the gay lisp.³⁹ Moreover, listeners are influenced by clusters of speech patterns, not simply by the use of /s/-fronting. Combining the phonetic variables of /s/-fronting, /s/-backing, and /ing/ showed that the more masculine one was perceived, the more competent he was also perceived.⁴⁰ Also, using that same phonetic combination, the less masculine a man was perceived, the more gay he was also perceived.⁴¹

34. Voice onset time is measured by aspiration: a period of voicelessness after the articulation of a consonant and before the articulation of the following vowel. For example, there is a longer aspiration, and thus longer voice onset time, in the word 'pie' than in 'buy' and in 'tie' than in 'die.' In 'pie' and 'tie' you can feel more air come out between the consonant and the following vowel sound. LADEFOGED, *supra* note 30, at 56, 146.

35. The *schwa* sound is a weak mid-central vowel sound occurring in unaccented syllables, such as the first syllable of *about* when said in a sentence or the third and fourth syllables in *esophagus*. No part of the mouth, lips, or tongue move to form the *schwa* sound. WILDE, *supra* note 27, at xv-xvi.

36. A consonant sound can be emphasized in words, such as when the /s/ sound in the word 'silly' is stressed in a particular manner. Campbell-Kibler, *supra* note 12, at 58. This is known as /s/ fronting. *Id.* Conversely, emphasizing the /s/ sound in 'apples' is known as /s/ backing. *Id.*

37. *Id.* Campbell-Kibler's study digitally manipulated four different male voices to vary /s/, /z/, and /ing/ markings, in which 285 online participants responded in the two phases of the study. *Id.* at 58-59.

38. *Id.* at 59.

39. *Id.* at 58.

40. *Id.* at 61.

41. *Id.*

Studies also debate about whether these perceptions correlate with actual sexuality. Gaudio's small, early study found that there was no pitch difference between what sounded masculine or feminine, and no pitch difference between gay and straight men.⁴² The study did find, however, that there was a strong correlation between sounding gay, sounding feminine, and actually being gay.⁴³ But many of these correlations are dependent on the type of passage being read: technical or dramatic.⁴⁴ In contrast, Smyth and Rogers's more comprehensive study found a

gaydar accuracy rate of only about 57% for a sample of 46 listeners, despite the fact that they exhibited a good deal of agreement about which voices sounded gay. According to our listeners' ratings, most straight men and many gay men sounded straight; some gay men sounded gay, to varying degrees, and some straight men also sounded gay. Some men had voices that were not clearly marked as either gay- or straight-sounding.⁴⁵

Second, rather than attempting to correlate perceived and real sexuality, other linguists have used an empirical method to find linguistic differences between gay and straight men. Rendall, Vasey, and McKenzie's study found that gay men had a higher F1 pitch in the vowel sound *beet* and a higher F2 pitch in the vowel sounds *butt* and *boat*.⁴⁶ Both pitches, however, were distinct in the *schwa* sound: F1 was lower, F2 was higher.⁴⁷ Yet the study noted that, because the gay men in its sample were shorter on average than the straight men, and because height affects the length of the vocal tract and thus pitch, differences in formant vowel pitches are likely not statistically significant.⁴⁸ But as Levon's study concluded, high variation in pitch range is more of an indicator of a gay accent than mere high or low pitch by itself.⁴⁹

42. Gaudio, *supra* note 20, at 50.

43. *Id.* at 48. Gaudio's sample group included only eight male speakers (four straight and four gay) and thirteen listeners. *Id.* at 43–44.

44. *Id.* at 54. The technical reading in this study was an accounting manual, and the dramatic passage was the script from a play. *Id.*

45. Smyth & Rogers, *supra* note 21, at 130. This study's sample consisted of forty-six listeners rating eight straight speakers and seventeen gay speakers. *Id.* at 133.

46. Drew Rendall, Paul L. Vasey & Jared McKenzie, *The Queen's English: An Alternative, Biosocial Hypothesis for the Distinctive Features of "Gay Speech,"* 37 ARCH. SEX. BEHAV. 188, 194–95 (2008). The authors studied thirty-four straight men and twenty-nine gay men. *Id.* at 191.

47. *Id.*

48. *Id.* at 197.

49. Levon, *supra* note 20, at 546. Levon's study used ten listeners and one digitally manipulated voice. *Id.* at 537.

These findings show that the gay accent is not easily distinguishable; there is no one gay accent. A voice may have all or one of the characteristics and be perceived as gay or straight, masculine or feminine. Even then, any conclusion must also take into account the differences in listener audio capabilities. Nevertheless, the studies do show a positive correlation between sounding gay and sounding feminine, and likely no correlation between sounding gay or feminine and actually being gay.

C. Possible Causes of the Gay Accent

Two studies discuss the possible causes of the gay accent. Without delving into a deep Freudian analysis, explanations fall into the physiological, the social, or a combination of the two. Linguists rely on the understanding that vowel and frequency markings are based on physical differences found in vocal tracts.⁵⁰ In contrast, consonants are sociologically dictated, as they are made in the mouth.⁵¹ By showing that gay male, gay-sounding male, straight male, and straight female phonetics largely coincided or diverged with consonant sounds, Smyth and Rogers found that there is no physiological difference between gay and straight male vocal tracts and no physiological similarity with gay male and straight female vocal tracts.⁵² Yet, preadolescent boys and girls have the same shaped vocal tracts, and boys have lower frequencies.⁵³ As an explanation of this contradiction, the study concludes that preadolescent children may learn to speak from adult male and female models, just as any child learns how to speak from her community, and that biological traits can be unconsciously manipulated.⁵⁴

Rendall, Vasey, and McKenzie agreed that a combination of social and physical variables create a gay accent.⁵⁵ Because their study found only minor variations in certain vowel formants, it hypothesized that differences in hormone processes between gay and straight adolescents caused further physiological, neurological, and psychobehavioral changes later in life.⁵⁶ These psychobehavioral traits affect physical and social assertiveness.⁵⁷ The slight differences in vowel formants are affected either by lip protrusion and retraction during speech or, relatedly, by facial

50. Smyth & Rogers, *supra* note 21, at 139.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 140.

55. See Rendall, Vasey & McKenzie, *supra* note 46, at 199.

56. *Id.*

57. *Id.*

expressions.⁵⁸ The study explained this concept of unconscious social assertiveness:

Facial expressions with greater lip protrusion are associated cross-culturally, and across species, with more threatening, assertive or aggressive demeanors, and lower frequency voices are associated with greater social assertiveness and potency through their broader association with larger bodied individuals, such as with men versus women, or with adults versus children. In contrast, facial expressions with greater lip retraction are associated cross-culturally, and across species, with less threatening or less assertive demeanors, and higher frequency voices are associated with reduced social assertiveness and potency through their broader association with smaller bodied individuals, such as with women versus men; and with children versus adults.⁵⁹

The study then hypothesized that gay men speak with greater lip retraction than straight men.⁶⁰ It notes, however, that this explanation is quite speculative.⁶¹ Ultimately, gay speech is affected by complex social and physical variables: attempted imitation of straight women at adolescence, attempted imitation of other gay men later in life, and hormonal differences that accompany different sexualities.⁶²

The few studies hypothesizing the cause of the gay accent, like those studies trying to define it, present as many questions as answers. It may be that children are forced into certain vocal characteristics as they develop, but are still left with subconscious vocal choices, such as consonant markings. Gay and straight males are imitating, acquiring, individualizing, and discarding the same vocal markings, and they are forced into others based on minute physical differences in the vocal organs. While the causes of the gay accent can be contingent on sexual orientation as much as on gender consciousness, perceptions related to the gay accent determine the ultimate reason behind this discrimination: gender stereotypes. The gay accent and gender are inseparable.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 199–200.

III. GAY-ACCENT JURISPRUDENCE

A. Gender Discrimination and Mixed Motives

On its face, Title VII does not protect employees who are subject to gender discrimination.⁶³ But in the 1989 case *Price Waterhouse v. Hopkins*, the Supreme Court ruled that gender discrimination equated to sex-based discrimination, a protected category under Title VII.⁶⁴ The female plaintiff was denied a promotion to become partner in her accounting firm, despite her seemingly strong work performance.⁶⁵ In determining whether candidates, like Hopkins, should receive partnership, the current partners would submit comments about whether they thought the candidate should be promoted.⁶⁶ But before she submitted her application for partnership, Hopkins received evaluations critiquing her aggressive and abrasive interaction with colleagues.⁶⁷ While it was these interpersonal skills that caused the firm to reject her partnership application, some partners' comments also indicated that they did not like her interpersonal skills because of her sex.⁶⁸ They described her as seeming macho, needing to enroll in charm school, and using profanity too often.⁶⁹ Finally, one comment suggested that Hopkins should walk, talk, and dress more femininely, put on make-up, wear jewelry, and style her hair to improve her chances at receiving partnership.⁷⁰ Dispelling the employer's argument that gender stereotyping was not a cognizable claim under Title VII, the Court pragmatically reasoned that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."⁷¹

The Court found it unclear, however, whether Hopkins's firm would have still denied her partnership even if it had not exercised gender stereotyping in its decisionmaking process.⁷² The Court ruled that this "mixed-motive" situation required the employer to prove, by a preponderance of the evidence, that it would have made the same employment decision despite the partial discriminatory reasons.⁷³ The 1991

63. Civil Rights Act of 1964 tit. 7, 42 U.S.C. § 2000(e)-2(a).

64. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

65. *Id.* at 233-34.

66. *Id.* at 233.

67. *Id.* at 234-35.

68. *Id.*

69. *Id.* at 235.

70. *Id.*

71. *Id.* at 251.

72. *Id.* at 252-53.

73. *Id.* at 253.

amendments to Title VII, however, in response to the Court's ruling in *Hopkins*, partially altered the mixed-motive analysis.⁷⁴ Now, a plaintiff need only show that the employer's decision was based on a combination of legitimate and illegitimate motives in order to receive relief, however limited; whether or not the employer would have made the same decision absent discrimination is no longer relevant.⁷⁵

This mixed-motive liability is relevant in instances of gay-accent discrimination. In cases involving gay-accent discrimination, it is difficult to decipher if the employer acted based on an employee's gender-based traits—an illegitimate reason—or sexuality-based traits—a legitimate reason—or both.

B. The Vickers "Readily Demonstrable" Test

Despite the availability of a mixed-motive analysis, courts are mindful not to bootstrap sexual-orientation-discrimination claims onto sex discrimination claims. Most prominently, the Sixth Circuit in *Vickers v. Fairfield Medical Center* defined the line between sex and sexual orientation discrimination.⁷⁶ In *Vickers*, the plaintiff, a private police officer at a medical center, befriended a gay male doctor at the center and helped him investigate a claim of sexual misconduct that the doctor asserted had occurred against him.⁷⁷ Once Vickers's coworkers found out about his friendship with the doctor, they began making derogatory remarks against Vickers, claiming he was gay, and questioning his masculinity.⁷⁸ His coworkers also groped him, took and shared photos taken while handcuffing and simulating sex with him, and shoved a stuffed animal in his crotch after the coworkers simulated sex with it.⁷⁹ After reporting the incidents to human resources and being denied any practical remedy to the harassment, Vickers was warned by human resources that a personnel action would be taken against him if he filed a lawsuit against the medi-

74. Civil Rights Act of 1991, § 107, Pub.L. 102-166, 105 Stat. 1071 (1991) (codified at 42 U.S.C. § 1981).

75. *Id.* Section 706(g)(2)(B) of Title VII states that no court shall order damages of back pay, reinstatement, or admission to employment for mixed-motive plaintiffs, but declaratory and injunctive relief, attorney's fees, and costs may be granted.

76. 453 F.3d 757 (6th Cir. 2006). The *Vickers* court cited several opinions, including *Hopkins*, that supposedly conformed to the readily demonstrable test including *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005), and *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004). The *Vickers* rule has been followed by several district courts and at least one recent Sixth Circuit case. See, e.g., *Gilbert v. Country Music Ass'n, Inc.*, 432 F. App'x 516, 519 (6th Cir. 2011).

77. *Vickers*, 453 F.3d at 759.

78. *Id.*

79. *Id.* at 759–60.

cal center.⁸⁰ Vickers then resigned.⁸¹ The court held that this harassment was purely based on Vickers's perceived sexual orientation.⁸² The court reasoned that,

[u]ltimately, recognition of Vickers' claim would have the effect of *de facto* amending Title VII to encompass sexual orientation as a prohibited basis for discrimination. In all likelihood, any discrimination based on sexual orientation would be actionable under a sex stereotyping theory if this claim is allowed to stand, as all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices.⁸³

According to the court, the test for determining gender discrimination is whether gender nonconforming traits were "readily demonstrable" through appearance or behavior, as implied by the court in *Hopkins*.⁸⁴ Vickers did not allege that he acted or behaved effeminately, causing the court to affirm dismissal of his claim.⁸⁵

This boundary focuses on the victim's behavior and actions. As will be discussed in Part IV, this incomplete approach leads to denial of valid sex-based discrimination claims of homosexual employees and does not conform to the goals of Title VII.

C. *Gay-Accent Cases*

Federal courts have been inconsistent over whether to find a legitimate claim for Title VII violations when presented with factual scenarios that include gay accents. Although the jurisprudence is not extensive, the courts that considered such an issue have typically discounted the gendered nature of gay-accent discrimination, even when considering a mixed-motive employment decision.

Three approaches are analyzed below. In the first approach, the two courts that discussed the gay accent in dicta reasoned that discrimination based on the feminine sound of a man's voice should be actionable as gender-based discrimination. In the second set of cases, three courts found only sexual orientation discrimination in cases involving a gay accent. Last, the one court that found sex-based discrimination did so through a mixed-motive analysis.

80. *Id.* at 760.

81. *Id.*

82. *Id.*

83. *Id.* at 764.

84. *Id.* at 763.

85. *Id.* at 764.

1. Cases in Which Courts Hypothesized About the Gay Accent in Dicta

In the first set of cases, two courts stated in dicta that discrimination based on a man's soft or effeminate voice would create an actionable claim under Title VII as sex-based discrimination if supported by sufficient facts.⁸⁶ First, in *Doe by Doe v. City of Belleville*, the Seventh Circuit stated,

[A] man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers' idea of how men are to appear and behave, is harassed 'because of' his sex.⁸⁷

Second, the court in *E.E.O.C. v. Family Dollar Stores, Inc.* implied that comments based on a feminine voice would create a cognizable claim for sex discrimination.⁸⁸ In that case, however, the plaintiff's coworker "never told him that he was not sufficiently manly, had female mannerisms, acted like a woman, or had a feminine voice," which caused the court to find that the coworker did not discriminate based on sex.⁸⁹ This Comment agrees that harassment based on a feminine voice creates a cognizable sex discrimination claim. But both of these courts focused only on the actions of the alleged victim or the actions of the alleged harasser. Just like the *Vickers* rule, these approaches are erroneously narrow, as will be discussed in Part IV.

2. Cases in Which Courts Found Only Sexual Orientation Discrimination

In the second set of gay-accent cases, three courts have held that the discrimination against an employee because of his effeminate voice was wholly based on perceived sexual orientation and thus not actionable under Title VII.

In *Anderson v. Napolitano*,⁹⁰ the plaintiff, who was an air marshal named Anderson, claimed that his supervisor, Bauer, shunned and isolated him at work after learning of Anderson's homosexual orientation.⁹¹ Bauer publicly called him a "fag" and told others not to associate with

86. *Doe by Doe v. City of Belleville*, 119 F.3d 563 (7th Cir. 1997), *vacated on other grounds and remanded by* 523 U.S. 1001 (1998); *E.E.O.C. v. Family Dollar Stores, Inc.*, No. 1:06-CV-2569-TWT, 2008 WL 4098723 (N.D. Ga. Aug. 28, 2008).

87. *City of Belleville*, 119 F.3d at 581.

88. *Family Dollar Stores*, 2008 WL 4098723, at *3.

89. *Id.*

90. *Anderson v. Napolitano*, No. 09-60744-CIV, 2010 WL 431898, at *1 (S.D. Fla. Feb. 8, 2010).

91. *Id.*

him.⁹² One colleague then told Anderson that he “had been informed via upper management that he was not to socialize with Anderson if he ‘knew what was good for him and his career,’ and the reason given was Anderson’s sexuality.”⁹³ In one instance of harassment, after denouncing Anderson for bringing attention to subordinates’ complaints of racial discrimination, Bauer told Anderson that he was too gay and too flamboyant.⁹⁴ In another incident, Anderson heard two colleagues lisping and saying in a “stereotypically flamboyant voice, ‘Oh my God, we’ve got to clean up in here now,’” as they entered the room where Anderson was working.⁹⁵ They immediately stopped talking when they saw Anderson.⁹⁶

After filing a complaint for sexuality discrimination with the Equal Employment Opportunity Commission (EEOC) in 2006, and receiving a demotion at work in 2008, Anderson filed another complaint with the EEOC later that year for retaliation based on the original filing.⁹⁷ Because sexual orientation discrimination is not a cognizable claim under Title VII, the EEOC dismissed the claim.⁹⁸

In May 2009, Anderson filed a complaint in the Southern District of Florida, claiming Title VII sex discrimination and retaliation.⁹⁹ A few months earlier he had retired on medical disability, receiving disability payments at a lower rate due to his demotion.¹⁰⁰ In 2010, the court entered summary judgment for Anderson’s employer, holding that Anderson’s claim of sex discrimination was based on his sexual orientation and thus not protected under Title VII.¹⁰¹ Despite considering a mixed motive for the discrimination, the court held that Anderson’s allegations of harassment and discrimination were based solely on sexual orientation.¹⁰² Specifically, it found that the lisping colleagues were making fun of gay stereotypes, not female stereotypes, because lisping is not associated with women.¹⁰³

In the next case, *Dandan v. Radisson Hotel Lisle*, the plaintiff Dandan sued Radisson Hotels for sex discrimination and retaliation in

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at *2.

96. *Id.*

97. *Id.* at *2–3.

98. *Id.* at *3.

99. *Id.*

100. *Id.*

101. *Id.* at *7.

102. *Id.* at *5.

103. *Id.* at *6.

the Northern District of Illinois.¹⁰⁴ In 1995, Radisson employed him as an assistant bartender, working alongside his colleague Zoellner.¹⁰⁵ Beginning in early 1996, Zoellner repeatedly called him “fagboy,” “fruitcake,” and “Tinkerbell.”¹⁰⁶ Several months later, Zoellner became Dandan’s supervisor:

This is when Zoellner’s insults intensified in their cruelty. Dandan testified that Zoellner’s insults progressed from name-calling to very graphic insults, such as: “didn’t your boyfriend do you last night?”; “shove [a vacuum cleaner hose] up your a”; “take [a tube lubricator] home, you’ll have fun with it”; “do you want to eat this [pointing to his crotch]? Eat this, Eddie”; “I hate you because you are a faggot.” Zoellner also criticized Dandan’s speech patterns and kinesics for being feminine. Dandan alleges that Zoellner’s insults occurred nearly every day.¹⁰⁷

Zoellner transferred shifts and stopped his harassment after being disciplined by his supervisors.¹⁰⁸ Once Zoellner transferred, however, the kitchen staff started harassing Dandan in the same vein as Zoellner.¹⁰⁹ Dandan complained to his supervisor again and most of the insults stopped.¹¹⁰ But in late 1997, the restaurant’s manager suspended Dandan for two weeks for chewing gum, which normally would have only warranted a three- to five-day suspension.¹¹¹

The court granted summary judgment for the employer, holding that while same-sex harassment is actionable under Title VII, Dandan did not assert facts that this harassment occurred because he was male, but rather asserted facts that harassment occurred because he was perceived as gay.¹¹²

Third, in *Hamm v. Weyauwega Milk Products Inc.*, the plaintiff Hamm filed suit under Title VII for harassment and retaliation against his employer, a dairy producer.¹¹³ Eventually, Hamm’s work performance decreased and coworkers began harassing him, allegedly commenting on his high-pitched voice and calling him “faggot,” “bisexual,”

104. *Dandan v. Radisson Hotel Lisle*, No. 97 C 8342, 2000 WL 336528, at *1 (N.D. Ill. Mar. 28, 2000).

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at *2.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at *4.

113. *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1059 (7th Cir. 2003).

“girl scout,” and “kid.”¹¹⁴ However, one coworker claimed that he only commented on the high-pitched voice Hamm used while yelling.¹¹⁵ Hamm’s supervisors disciplined him for horseplay and poor work performance, requesting that he act as a team player.¹¹⁶ After this discipline, Hamm began filing complaints with the Wisconsin Equal Rights Division and Weyauwega management.¹¹⁷ The harassment continued during these filings, which included a coworker threatening Hamm with a pipe and another spraying him with water from a hose.¹¹⁸ Then in mid-1999, Weyauwega terminated Hamm and offered him a severance package.¹¹⁹

In contrast to the court in *Dandan*, the court in *Hamm* characterized the coworker comments as work-related disputes that occurred because of Hamm’s poor work performance.¹²⁰ The court also discounted many of the comments because the dairy plant was pervasive with horseplay and pranks: “Of course we do not mean to suggest that the presence of horseplay in a workplace precludes a claim of sexual harassment, but we do recognize that, in some cases, sexually explicit remarks among male coworkers may be ‘simply expressions of animosity or juvenile provocation.’”¹²¹ Additionally, the court ruled that Hamm’s supervisor calling him a “girl scout” was not sex discrimination because the supervisor referred to all employees, who were mostly male, as “girl scouts.”¹²² The court determined that Hamm was harassed because of his poor work performance and perceived sexual orientation, affirming summary judgment for the employer.¹²³

The courts in *Anderson*, *Dandan*, and *Hamm* incorrectly applied or even failed to consider a mixed-motive analysis. Most harassing comments were directed at the plaintiffs’ perceived sexual orientation, but not all. Some comments were directed at the sound of the plaintiffs’ voices or were directed at their masculinity in general, and for that reason, the courts should have submitted the case to the fact finder to determine if at least one motive was based on gender.

114. *Id.* at 1059–61, 1068 n.4.

115. *Id.* at 1068 n.4.

116. *Id.* at 1060.

117. *Id.* at 1060–61.

118. *Id.* at 1061.

119. *Id.*

120. *Id.* at 1063.

121. *Id.* at 1064–65.

122. *Id.* at 1064.

123. *Id.*

3. A Case in Which the Court Used Mixed-Motive Analysis

Recently, the Third Circuit in *Prowel v. Wise Business Forms* applied a mixed-motive analysis in a Title VII gay-accent case and denied the employer's motion for summary judgment.¹²⁴ In this case, the plaintiff, Prowel, began working for Wise Business Forms, Inc., a producer and distributor of business forms, in 1991.¹²⁵ On summary judgment, the court took Prowel's self-description as true:

In stark contrast to the other men at Wise, Prowel testified that he had a high voice and did not curse; was very well-groomed; wore what others would consider dressy clothes; was neat; filed his nails instead of ripping them off with a utility knife; crossed his legs and had a tendency to shake his foot "the way a woman would sit"; walked and carried himself in an effeminate manner; drove a clean car; had a rainbow decal on the trunk of his car; talked about things like art, music, interior design, and decor; and pushed the buttons on the male encoder with "pizzazz."¹²⁶

The court also took Prowel's account of the harassment as true.¹²⁷ He stated that coworkers called him "princess," "rosebud," and "fag" and made fun of his manner of walking, the way he crossed his legs, and what he wore.¹²⁸ Gay personal ads from the newspaper¹²⁹ appeared on his desk and workstation as well as prayer notes and messages stating that he was a sinner and would burn in hell.¹³⁰ A pink feather tiara was left at his workstation with a bottle of personal lubricant.¹³¹ He also overheard coworkers state that they hated Prowel and that they should "shoot all the fags," and one supervisor stated that he disapproved of Prowel's lifestyle.¹³² Finally, messages stating that Prowel had AIDS and was having sex with male coworkers were written on the bathroom walls.¹³³ In late 2004, Prowel was fired for lack of available work.¹³⁴ He then filed suit alleging sex and religious discrimination and retaliation under Title VII.¹³⁵

124. *Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285 (3d Cir. 2009).

125. *Id.* at 286.

126. *Id.* at 287.

127. *Id.* at 291.

128. *Id.* at 287.

129. *Id.*

130. *Id.* at 288.

131. *Id.* at 287.

132. *Id.*

133. *Id.* at 287–88.

134. *Id.* at 288.

135. *Id.*

While the court for the Western District of Pennsylvania entered summary judgment for his employer because it found that the discrimination was based on Prowel's perceived sexual orientation, the Third Circuit reversed.¹³⁶ Noting that the line between sex and sexual orientation can be difficult to draw and taking into consideration the *Vickers* rule, the *Prowel* court reasoned that its task was to determine if a reasonable fact finder could find only sex or sexual orientation discrimination or *both*.¹³⁷ The court found an issue of material fact over the nature of the harassment, holding that the case should be submitted to the fact finder.¹³⁸ The court stated its rule:

There is no basis in the statutory or case law to support the notion that an effeminate *heterosexual* man can bring a gender stereotyping claim while an effeminate *homosexual* man may not. As long as the employee—regardless of his or her sexual orientation—marshals sufficient evidence such that a reasonable jury could conclude that harassment or discrimination occurred 'because of sex,' the case is not appropriate for summary judgment.¹³⁹

The rule in *Prowel* recognizes the inherent ambiguity when sexual orientation discrimination is at issue, implying that courts should tread carefully when faced with a summary judgment motion from the employer. Given that only 15% of employment discrimination cases between 1999 to 2007 ended in a win for the employee—many losing upon complaint dismissal or summary judgment—the Third Circuit's recognition that alleged sexual orientation discrimination often presents issues of material fact is especially important in order to create parity with other kinds of cases that average a 51% plaintiff win rate.¹⁴⁰

136. *Id.* at 291. In reversing, the Third Circuit stated that the district court incorrectly applied *Hopkins* because, while *Hopkins* provides a legal framework to resolve gender discrimination cases, the analysis is more complicated here because the plaintiff in *Hopkins* was not perceived as homosexual. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 292. Before the decision in *Prowel*, the Ninth Circuit in *Rene v. MGM Grand Hotel, Inc.* articulated a similar need to clearly separate sex-based from sexuality-based conduct in same-sex sexual harassment cases. See 305 F.3d 1061, 1067 (9th Cir. 2002).

140. ADR News, *Employment Discrimination Plaintiffs Do Poorly in Federal Court, Study Says*, DISP. RESOL. J., Nov. 2008–Jan. 2009, at 9 (citing Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 1 (2009)). The authors also note that the win rate for plaintiffs on appeal in employment discrimination cases is under 9%, which is significantly less than the 41% reversal rate for other appellants during the period studied. *Id.* This disparity, however, can be partly explained by the fact that many employment disputes are resolved through alternative dispute resolution, rather than litigation. *Id.*

IV. BOOTSTRAPPING SEXUAL ORIENTATION DISCRIMINATION

Mindful of erroneously equating sexual orientation discrimination as sex discrimination, this Part argues that inclusion of the gay accent still conforms to Congress's goals of excluding sexual orientation from Title VII. First, this Part shows that the *Vickers* "readily demonstrable" test fails to conform to the purposes of Title VII. Second, it argues that the *Prowel* rule's holistic analytical approach does conform. Finally, this Part shows how the gay accent falls within the *Prowel* rule and why inclusion of gay-accent discrimination does not bootstrap sexual orientation onto Title VII.¹⁴¹

A. *The Inadequacy of the Vickers Readily Demonstrable Test*

The *Vickers* readily demonstrable test, focusing only on the outward behavior of the victim, fails to conform to Title VII's goals and fails to take into account a mixed motive for the harassment. A more comprehensive approach to understanding motives for discrimination and bias is necessary.

First, Title VII aims to "deter unlawful harassment and intentional discrimination in the workplace."¹⁴² Deterring discrimination necessarily requires probing the mental state of the discriminator. Because people rarely state or are able to consciously understand the deeper reasons behind their own biases,¹⁴³ the *Vickers* court relied on the actions of *Vickers* to determine the mental state of his harassers. While outward behavior is relevant, the Supreme Court in *Hopkins*, contrary to the *Vickers* court's interpretation, looked to other evidentiary sources, including har-

141. Some scholars have argued for a complete bootstrapping. See, e.g., Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities, and Employment Discrimination*, 43 U. MICH. J.L. REFORM 713 (2010) (arguing that sexual orientation should be actionable as sex discrimination based on masculinities theory, in that harassment or employment actions based on sexual orientation are in fact based on gender perceptions where white males enforce a masculinities structure in the workplace).

142. Civil Rights Act of 1991, Pub. L. 102-166, § 2(1), 105 Stat. 1071 (1991).

143. Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1283, 1341 (2012). Eyer explains that various psychological studies indicate that the plaintiff success rate of 4% in discrimination cases is so low because of a deeper unconscious American belief in meritocracy, as opposed to acceptance of discrimination as a reason for one's actions. This conclusion leads the author to argue that employment remedies based on nondiscrimination laws, such as firing for "just cause" provisions or violating the Family and Medical Leave Act, are the only way to avoid the problems of discrimination psychology. See also Eden B. King et. al., *Discrimination in the 21st Century: Are Science and the Law Aligned?*, 17 PSYCHOL. PUB. POL'Y & L. 54, 58 (2011) (arguing that modern scientific understandings of how people discriminate, seen through microaggressive actions, are not accounted for under Title VII jurisprudence).

asser conduct and more modern understandings of discrimination.¹⁴⁴ Still, it may be that the court in *Vickers*, as well as in *Anderson, Dandan*, and *Hamm*, would have reached the same holding even without using the readily demonstrable test. But this erroneous test still endures.

Second, while the *Vickers* court was quick to point out that the Court in *Hopkins* required outward manifestation of gender non-conformity, it was also quick to discount the mixed-motive ruling in *Hopkins*, failing to make any mention of it at all. *Vickers*'s coworkers harassed him because they perceived he was gay *and* because they deemed him less masculine. Because possible mixed motives behind *Vickers*'s harassment existed and ambiguity in cases involving possible sexual orientation discrimination are common, courts should be wary to dismiss claims before a trier of fact has had the opportunity to weigh the evidence.

B. The Prowel Rule Conforms to the Purpose of Title VII

The Third Circuit in *Prowel* wisely understood the difficulties in deciphering the motives behind discrimination. The court relied on the plaintiff's own testimony regarding his high-pitched voice and effeminate behavior in conjunction with coworker comments.¹⁴⁵ Even though *Prowel* never pleaded that his colleagues and supervisors made comments directly teasing him for his voice or for the way he sat or pushed buttons, the court recognized that discrimination is not only evident through statements made by harassers.¹⁴⁶ The court took a more holistic look at harasser comments and plaintiff behavior.

It also took into account modern sex- and gender-based biases. The court considered the double standard that homosexual employees face when attempting to push forward with a sex-based discrimination claim.¹⁴⁷ By making clear that a double standard exists for gay employee-plaintiffs, the *Prowel* court indicated its understanding of how people

144. The court in *Hopkins* looked to harasser comments, victim behavior, and personal experience working in the legal profession in determining that society has progressed to the point where courts should consider gender discrimination as sex discrimination. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

145. *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 291–92 (3d Cir. 2009).

146. *Id.*

147. Some scholars have already touched upon the issue of double standards. See, e.g., Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 18, 33, 47 (1995) (arguing that courts treat effeminate men differently from masculine women); Kramer, *supra* note 3, at 229–33 (arguing that there is a double standard against gays in same-sex sexual harassment cases because courts have failed to see the heterosexual orientation factor in heterosexual harassment cases).

discriminate in the modern workplace. But beyond the personal experiences of judges, this analysis may require the aid of social science. Indeed, courts have already proposed using modern biological and social scientific advances to inform future rulings in Title VII sex discrimination cases.¹⁴⁸

Separating homosexual behavior as one separates heterosexual behavior in a sex discrimination analysis, coupled with application of a more holistic approach that considers harasser behavior, victim behavior, and modern understandings of bias, can still conform to Title VII's purpose of deterring sex discrimination. At the least, a homosexual employee presents enough ambiguity in his sex-based-discrimination claim to warrant review beyond summary judgment to the same extent that a heterosexual employee does.

C. *The Gay Accent Falls Within the Prowel Rule*

Because the gay accent and perceived effeminacy are so intertwined, the gay accent should fall within *Prowel's* rule. First, sociolinguistic findings update our understanding of discrimination. The gay accent is associated with effeminacy and is likely not correlated with a speaker's actual sexuality. Second, factual scenarios can contain references to the gay accent and also include evidence of victim behavior and harasser response. A speaker's accented speech is readily demonstrable, and a listener likely perceives the gay accent as feminine and the speaker as gay, possibly commenting one way or another. Even if the harasser only describes the accent as "gay" and never describes it as feminine or not masculine, at the least, sociolinguistic findings create enough ambiguity to warrant review beyond summary judgment.

Unlike the court in *Prowel*, the courts in *Anderson*, *Dandan*, and *Hamm* relied more on the harassers' express words than on the gender stereotypes perceived by the harassers, especially regarding the sound of the victims' voices.¹⁴⁹ In contrast, the courts in *City of Belleville*, *Family Dollar Stores*, and *Prowel*¹⁵⁰ better understood the relationship between gender and sexual orientation. They correctly associated sounding gay with sounding feminine. This association does not necessarily mean that

148. See, e.g., *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007) ("Scientific research may someday cause a shift in the plain meaning of the term 'sex' so that it extends beyond the two starkly defined categories of male and female."); *Schroer v. Billington*, 424 F. Supp. 2d 203, 213 (D.D.C. 2006) ("A factual record is required, one that reflects the scientific basis of sexual identity in general, and gender dysphoria in particular.").

149. See *supra* Part III.C.2.

150. See *supra* Part III.C.1, C.3.

a feminine male voice sounds like a woman, just that it does not adhere to masculine stereotypes. For example, the court in *Anderson* erred in reasoning that harassment by imitating a lisp is not gender discrimination because women do not stereotypically have a lisp.¹⁵¹ The comparison to women is misguided. It is the comparison to male, not female, voice stereotypes that informs listeners' perceptions of what is masculine and what is feminine.

*D. The Gay Accent and the Prowel Rule Do Not Bootstrap
Sexual Orientation*

Still, the argument that gay-accent discrimination is sex discrimination asks courts to equate a listener's perception of sounding gay with sounding effeminate. Arguably, this jump in logic from sexuality to sex could be made for any gay male behavior, and thus bootstrap sexual orientation discrimination onto Title VII.¹⁵² The science of sociolinguistics, however, validates this jump. If an employer can show that a male employee was discriminated against solely because he was thought to have sex with other men, and no possible feminine traits of the employee were a part of that discrimination, then the discrimination should be considered sexual orientation discrimination. If a reasonable person could believe that other, illegitimate discriminatory motives are present, then summary judgment is improper.

Of course, creating a claim that pleads facts supporting sex discrimination is essential to surviving summary judgment. Emphasizing the importance of framing pleadings, Olivia Szwalbneest argued that a cohesive narrative can turn a sexual orientation claim into a gender claim.¹⁵³ While precise facts are necessary to demonstrate gender discrimination, including the gay accent as a form of gender discrimination does not deceptively dress up an actual sexual orientation claim as gender bias. Pleadings should represent a meritorious claim, and sociolinguist findings create merit in gay-accent cases.

151. See *supra* text accompanying notes 90–103.

152. Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1217 (2004) (arguing that original ideas of discrimination were a historical product and courts must now take into account assimilationist patterns of discrimination within race, ethnicity, and sex; thus, sexual orientation should receive complete coverage under the sex discrimination category because sex, gender, and sexuality are always intertwined).

153. Olivia Szwalbneest, *Discriminating Because of "Pizzazz": Why Discrimination Based on Sexual Orientation Evidences Sexual Discrimination Under the Sex-Stereotyping Doctrine of Title VII*, 20 TEX. J. WOMEN & L. 75 (2010).

V. CONCLUSION

When federal courts are confronted with employment discrimination claims involving harassment, retaliation, or disparate treatment based on the gay or effeminate sound of a male employee's voice, courts should consider the likely ambiguity in this type of discrimination and preclude summary judgment for either party. Beyond phonetics research, more inquiries will be necessary to determine the gendered or nongendered nature of other stereotypically gay traits. In this light, the gay accent can be seen as a case study in pursuit of further research for similar civil rights purposes.

This argument relies on a more modern and holistic understanding of sex and gender discrimination while still adhering to Title VII's purpose of deterring discrimination based on sex. This broader analysis may push many courts further than they have previously gone in protecting alleged victims of sex discrimination. Yet, enough courts have shown a willingness to take into account more modern theories of sex, gender, and sexuality to deepen the analysis of a gay male employee's sex discrimination claim, and preclude summary judgment for the employer.¹⁵⁴ Moreover, courts should submit ambiguous cases to a jury because community members, rather than judicial application of outdated social notions, can better determine the current cultural lines between gender, sex, and sexuality.

While legislation may be the best tool to extend legal equality to all sexual orientations, the judiciary also has a role in creating a more just society.¹⁵⁵ The American legal system has consistently allowed for flexibility in interpreting the law as our social, scientific, and moral understandings progress.¹⁵⁶ Correcting existing boundaries between sex, gender, and sexuality should be no different.

154. See, e.g., *Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285 (3d Cir. 2009); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1067 (9th Cir. 2002); *Nichols v. Azteca Rest. Enterprises, Inc.*, 256 F.3d 864, 874 (9th Cir. 2001); see also Scott A. Moss, *Reluctant Judicial Factfinding: When Minimalism and Judicial Modesty Go Too Far*, 32 SEATTLE U. L. REV. 549, 565 (2009) (explaining that the Supreme Court consistently overturns lower federal court rulings using an overly restrictive application of Title VII).

155. See Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 156 (2011) ("[T]he Ninth Circuit held that gays and lesbians failed to demonstrate that they were politically powerless because 'legislatures have addressed and continue to address the discrimination suffered by homosexuals on account of their sexual orientation through the passage of anti-discrimination legislation. Thus, homosexuals are not without political power; they have the ability to attract the attention of lawmakers as evidenced by such legislation.'").

156. A famous example is the Supreme Court's reversal on the separate but equal doctrine. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954), *supplemented*, 349 U.S. 294 (1955).