The Development, Interpretation and Scope of the Word "Sex" Within Title VII: With Particular Reference to "Sexual Orientation."

I. INTRODUCTION

In 1964 Title VII was passed by Congress, which provided that it would be unlawful employment practice for employers to discriminate against an individual "because of such an individual's race, color, religion, sex or national origin."[1] This paper will take issue with the interpretation of the word "sex" within the meaning of the Title VII. The full scope interpretation of the word "sex" is of interest to potential litigants, lawyers, federal courts and legal scholars alike. The interest and controversy that has arisen around this word has heightened over the past two decades because the Supreme Court has yet to grant certiorari to a case which deals with this issue directly (whether sexual orientation is covered within the scope of the word "sex" under the jurisdiction of Title VII).

It is apparent that the "sex" means gender within the meaning of the Title VII. It has been referred to in numerous cases in this manner and there is no debate over this interpretation of the word throughout the jurisprudence of Title VII. However, the debate arises on the issue of sexual orientation. The ultimate question that has surfaced within this narrow section of Title VII is whether the word "sex" captures and or intends sexual orientation within its meaning.

There is little or no Congressional debates over this interpretation of Title VII. Therefore, before the arguments can be fully comprehended, it is essential to have a full foundational understanding of the stare decisis in this area of Title VII jurisprudence.

[1] 42 U.S.C.A. §2000e-2 (a)(1)

There has been a clash within the Circuits throughout the United States as to whether sexual orientation is included in the meaning of the word "sex." The Supreme Court and many of the Circuits have made numerous hints through other holdings and dicta that has left the contemporary litigant with contradicting and vague inferences as guidance; but as the stare decicis stands, there is no concrete precedent or legislation. Therefore this paper will talk about the stare decisis of major cases in this area of law from 1979 to the present day. This will lay a foundation for the discussion of the treatment of this issue within the Circuits within the last two years.

The hypocrisy of the current legal interpretation, on its face will be more than apparent after the discussion of the current precedent on this issue. It is important to note the inconsistencies of modern American jurisprudence to highlight the need for a legislative move to amend Title VII to fit within the social order that the 21st century American public demands.

The Supreme Court, however, has set some precedent that allows sexual minorities to seek protection under very particular circumstances (with reference to "sex" and sexual orientation under Title VII). Though at first glance this seems like a positive step in the right direction for the causes of sexual minorities, after some analysis it can be seen that these steps can be deemed in a very negative light. Philosophically, it can be seen that thee recent holdings have taken the cause of sexual minorities in a backward direction.

Vickie Schultz[2] is arguably the highest authority on this issue today. Her thoughts and academia are consistent with the need for change. Professor Schultz's philosophy

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along with the thoughts of Professor Robert DeKoven[3] resonate the interpretation of the word "sex" that call for legal change at the at every judicial and Congressional level. This change will be discussed at length because it will become apparent that the Circuits are not at fault for being in conflict. Facially the interpretation of the word "sex" is vague and consistent change can only be brought about by legislative amendment of Title VII.

II. DISCUSSION

The majority of Circuits throughout the United States have rejected the concept that sexual orientation is covered on its face within the meaning of Title VII. More recently, however, there has been a split amongst the Circuits, with a revolutionary school of thought that has offered *some* protection to the discrimination of sexual orientation under Title VII (led by the 9th Circuit). The 9th Circuit has even gone as far as suggesting that Title VII *should*[4] cover discrimination of sexual orientation on its face.

To understand the transformation of the thinking behind this relatively recent change, it is important to understand the development of jurisprudence within this area of law; especially the idiosyncratic shifts of the Supreme Court effectively "nudging" the very black and white reading of Title VII which the Circuits had followed previously, into a grayish middle ground. However, this middle ground is very much engulfed in the realms of ambiguity. This again brings us back to the theme of "the need for change".

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[4] The word "should" is used to suggest that this is clearly in the hands of the legislature. This will be discussed further in the paper.

a. Jurisprudence

It is important to follow the landmark cases dealt with by the Supreme Court and the Circuits chronologically. It is then possible to see how these courts dealt with "sex" discrimination and how they impacted the interpretation of the word "sex" within Title VII (with regards to its scope including "sexual orientation").

Ironically it was the 9th Circuit that first discussed the issue of sexual orientation in a landmark case in 1979 in DeSantis v. Pacific Bell[5]. The full circle of jurisprudence will be shown when the chronology finished with the 9th Circuit with considerably different results. In DeSantis, male and female homosexuals brought suit against their former employer due to discrimination because of *homosexuality*.

Though the appellants contended that their employer had discriminated against men that preferred men sexually, compared to men that preferred women, the court rejected the argument outright. The 9th Circuit waved off this argument contending that this was an attempt to "bootstrap"[6] for Title VII protection of homosexuals. The court read this, as legitimate conduct because the employer also treated women that sexually preferred women in the same manner. Thus, the Court stated that the intent of Title VII was to protect one sex against being discriminated against the other sex, and that did not include homosexuals (i.e. men's discrimination compared to other men that fall within another class)[7]. The Court saw this as merely as "decisional criteria for the sexes.[8]"

Credit, however, should be given to the 9th Circuit, because as far back as 1979, it pointed out that the full scope and interpretation of the word "sex" within Title VII

[5] DeSantis v. Pacific Bell, 608 F.2d 327 (9th Cir. 1979).
[6] Id. at 331.
[7] Id. at 331.
[8] Id. at 331.

should *not* be "judicially extended to include sexual preference such as homosexuality[9]." This showed great foresight because the 9th Circuit could see the development of this issue and effectively put the burden of interpretation of the statute on Congress.

The next major case that touched this issue outside of its dictum was in the Supreme Court seven years later. In Meritor Savings Bank v. Vinson,[10] a female bank employee brought suit against the bank and her supervisor under Title VII for harassment. In this case, there were two major holdings that essentially opened the door to a new outlook within the meaning of the word "sex" within Title VII.

The first holding of the court was that Title VII is violated when sexual harassment is present. This could mean sexual harassment, "while not affecting economic benefits creates a hostile or offensive working environment[11]." This is not a huge digression from the then existing stare decisis and it could be interpreted to mean that the Supreme Court is referring to the harassment of women by men or even vise versa.

However, Justice Rehnquist continued with this thinking. He explained that the bank does in fact have a defense in allowing Vinson's sexually provocative dress into evidence due to its relevance[12]. So by this sub-holding did Justice Rehnquist also infer that in a case where a gay man is being discriminated, could he say it was because he was wearing "gay" clothing that was provocative?

Surely this line of thinking was not asymmetrical but in fact symmetrical; allowing the potential plaintiff to use such evidence to prove that he or she was being

[9] Id. at 330.
[10] Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).
[11] Id. at 57.
[12] Id. at 69.

discriminated because of what the clothing that he or she wore; and thus because he or she was a man or woman. This could have been seen as opening the door for suits for discrimination of sexual orientation under Title VII. The counter argument here is that the Supreme Court was merely following the direction of legislation because in this case there was discrimination of a woman by men (as was the known intent of Congress). Thus the sexual orientation of the subject would be inconsequential with accord to this holding. But this was not explained in the opinion and this discussion was left to future courts. By leaving the meaning of its holding ambiguous, the Supreme Court at least left the door open for future plaintiffs to make the latter argument.

The next two cases are the unarguably the turning points in the over look of the interpretation of the word "sex" within Title VII jurisprudence. The turnaround came in 1989 in Price Waterhouse v. Hopkins[13]. The facts were simply that a female worker was refused partnership status when she felt that she had done enough to deserve such a position. She thus brought suit in federal court under Title VII for sex discrimination.

The first significance of this case comes from the majority opinion, which states in full that "gender must be irrelevant to employment decisions[14]." Though a clearly significant remark, very rarely has this sentence been used as a major argument in the cases in chief of plaintiffs. Surely if one is to take this argument one step further, they would contend that if a plaintiff proves that he is discriminated because he is homosexual (which on its face is still not protected by Title VII), he is being discriminated because he is a man who prefers to have sexual encounters with other men. Thus, if an employment decision is made against him, that decision is made because he is a *man*. Therefore, that

[13] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
[14] Id. at 240.

homosexual is being discriminated in exactly the form that the Supreme Court prohibited in this decision.

Though it is extremely hard to prove the intent behind the most significant theory proposed for the first time, theoretically, this case set ground breaking precedent. The Supreme Court, in the midst of explaining its disparate impact theory explained, "an employer who acts on the basis of a belief that a women cannot be aggressive, or that she must not be, has acted on the basis of gender[15]." The implications of this theory are enormous. The Supreme Court did not say that sexual orientation is regarded as gender discrimination on its face (with regards to Title VII), but it did open the door to give the person that has been discriminated against due to their sexual preference a potential suit under Title VII.

In the example of a homosexual man, if he can show that he was discriminated because of his "fruity" clothing or his -flamboyant un-masculine behavior, he can sue under Title VII because he can claim that he was a victim under the meaning of Title VII because he did not fit the stereotype of a typical man. Really the employer had discriminated against the employee because he was homosexual, but the way to get around this is to use "stereotyping theory". Though this is good in theory, it is extremely hard to prove the intent of the employer.

The other significant Supreme Court case that had a major influence of sex discrimination under Title VII was Oncale v. Sundowner Offshore Services[16]. In this case, a male employee brought suit against a former employer (male supervisor) alleging sexual harassment. It is significant to note that at the Circuit level, the 5th Circuit

[15] Id. at 250.
[16] Oncale v. Sundowner Offshore Services, 523 U.S. 75 (1998).

affirmed the district court's granting of summary judgment for the defendant. Even at this late stage, the 5th Circuit was on its face rejecting any contemplation of accepting the protection of Title VII with regards to sexual orientation (or even same sex discrimination as the cause of action claimed in this case). The Supreme Court reversed this decision by a unique opinion written by Justice Scalia.

The majority in this case etched at the then existing law through three major inferences. First, Justice Scalia wrote that the word "sex" "evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment[17]." By inference surely this means all men and women are to be treated equally in all areas of employment. But if one is to take that to mean the equal treatment of heterosexual men and women, then that contradicts Justice Scalia's statement directly (because *only* heterosexual men and women are being treated equally, not *all* men and women). Alternatively this can be interpreted to mean that if the harasser is gay and the intent of the harassment is sexual, then there is protection under Title VII. However, that would mean that if the harassment was the opposite way around, there would not be any protection. One has to ask the question, how does this cover the "entire spectrum?" It only highlights the hypocrisy of the current interpretation of Title VII.

There is one clear holding of this case that can only be a good advancement for sexual minorities. The majority held that "nothing is Title VII necessarily bars a claim of discrimination because of sex merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex[18]." Once again, this left future courts unclear about the exact holding with regards to sexual

[17] Id. at 78.
[18] Id. at 79.

orientation in context of Title VII, but a small step towards the full protection was offered.

One of the most vague but encouraging parts of the dicta in Justice Scalia's opinion was the statement that "statutory provisions often go beyond the principal evil to cover reasonably comparable evils." Though dicta, this can only be taken to mean that Justice Scalia infers that sexual orientation should be protected by Title VII even as an inference of the intent of the statute. However, it can only be speculated that almost 20 years after DeSantis, the Supreme Court still has decided not take this issue head on, because like that 9th Circuit, it may believe that this is purely an issue for the legislature. However, one may look at the Supreme Court's refusal to tackle this issue on its face as irresponsible because society was ready for such a decision at this time in United States history.

After Oncale, we turn back to the 9th Circuit with two major holdings concerning sexual orientation. The first of these cases is Nichols v. Azteca Restaurant Enterprises, Inc[19]. Here the male employer sued former employer for sexual harassment and retaliation alleging male co-workers and supervisor harassed him because he did not meet their stereotypical views of masculinity. The significance of this case was that this was the first time the 9th Circuit had been confronted with the "stereotyping theory" offered by Price Waterhouse by his co-workers and supervisor. In this case, the appellant had been referred to by the "female gender[20]." The appellant here argued that he was discriminated against because he did not epitomize the average man but in no way, shape or form, did that effect the way he performed in the workplace. Thus, Sanchez (the

[19] Nichols v. Azteca Restaurant Enterprises Inc., 256 F.3d 864 (9th Cir. 2001).
[20] Id. at 872.

appellant) claimed that because he did not fit the role of the stereotypical man, he was discriminated and therefore looked for protection under Title VII.

Only twenty-two years before this case, the 9th Circuit had thrown out the case of DeSantis stating that Title VII offers no protection to people being discriminated due to their sexual orientation. On its face, this was (and still is) the case. Though sexual orientation was not the ultimate issue in Nichols, the implications are of paramount importance with regards to sexual orientation. A plaintiff can seek protection under Title VII because they are homosexual or lesbian. However, that plaintiff could seek protection if they are able to prove that they are being discriminated against because they are a homosexual or a lesbian and by being so, do not fit into the stereotypical category of a man or woman. Therefore, the law has not technically changed since 1979, but alternative strategies are available that were not available at that time. The implications of this will be discussed further later in the discussion.

The lack of direct protection under Title VII for sexual orientation was evident in Rene v. MGM Grand Hotel, Inc[21]. A homosexual male former employee sued former employer alleging sexual harassment by male supervisors and co-workers in violation of Title VII. But the appellant here went one step further to allege that the harassment was motivated by hostility based on his sexual orientation. Though the appellant prevailed on the sexual harassment section of his claim[22], the court rejected his claim on the basis of sexual orientation on its face. The 9th Circuit stated very clearly "if sexual orientation is

[21] Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061 (9th Cir. 2002).
[22] Rene, a gay man was touched by his co-workers and supervisor on his crotch, his anus and felt up like a woman. The 9th Circuit had no hesitation to offer him protection under Title VII by stating, "physical sexual assault has routinely been prohibited as sexual harassment under Title VII." Id. at 1065.

irrelevant for a female victim, we see no reason why it is not irrelevant for a male victim[23]."

The 9th Circuit interpreted the law as lesbians would not be deemed to be protected due to their sexual orientation and thus nor should homosexual men. Through a brief journey of the jurisprudence of Title VII with regards to the interpretation of the word "sex" it would appear that the law has gone a full circle. The law began as a very black and white reading of Title VII and during a brief period, the Supreme Court seemed to open the door to a broadened interpretation of the statute. Though there is clearly a round about way of seeking protection, via the route of stereotype theory, no court to date has given protection to sexual minorities under Title VII for a direct claim. So the question that forbears itself is where does the law stand today? Also, it should be asked whether the introduction of the stereotype theory by the Supreme Court actually helped the cause of sexual minorities to receive protection by Title VII. Though the answer would seem straight forward and for the positive, philosophically the antithesis of that theory could be true.

b. Philosophy and Implications of Modern Jurisprudence

It would be easy to perceive the introduction of the "stereotyping theory" by the Price Waterhouse court, as a step forward for sexual minorities. As mentioned above, this can be regarded in the exact opposite manner. Before explaining negative aspects of this move, it is important to comprehend the positive implications.

The positive implications of Price Waterhouse are that sexual minorities do have *some* recourse under Title VII if tactically the claim of their action can fit into the

[23] Id. at 1066.

stereotype theory analysis. By this, it is meant that the plaintiff has to prove that they do not fit into a stereotypical category as recognized by the employer, *and* their discrimination was because of this miss-fitting with regards to sex. If the sexual minority wants this to specifically to apply to their sexual orientation, it is possible, though it is an extremely hard burden of proof. First, the plaintiff has to prove that their *sexual orientation* was something that did not fit into the employer's preexisting stereotype and second, their employment actions (that discriminated against the plaintiff) were as a result of the plaintiff's miss-fitting (within that category of people that had a sexual preference not being within the stereotype of the employer).

On a practical level, this is a negative implication for sexual minorities. If a sexual minority acted as a plaintiff and wanted to use stereotyping theory as a direct protection clause of Title VII for his or her *sexual orientation*, he or she would have to overcome two burdens of proof. The first burden is to show that their *sexual orientation* does not fit into the employer's preexisting stereotype of what they perceive as a man or woman. The second burden is that the plaintiff has to prove that the actions of the employer were due to their miss-fitting. But most causes of action will fail at the first hurdle. What if a homosexual man was very butch and actually a stereotypical man? When the employer finds out about the truth of that plaintiff's sexual orientation and then discriminates against him because of his sexual tendencies, the potential plaintiff would *not* have any recourse under this theory.

Professor Robert DeKoven, in a personal interview, pointed out the mere fact that most homosexual men do not fit into the preconceived image of "fairies." Most

homosexual men wear "ordinary"[24] male clothing, work in "normal" jobs and do not partake in flamboyant effeminate gestures. Professor DeKoven went to explain that most homosexual actually typify the butch "Broke Back Cowboy[25]" persona. This would preclude these men from seeking protection from Title VII.

Also on a practical level, it should not be forgotten that Title VII is intended as a pro-plaintiff statute. Both disparate treatment and disparate impact theories of Title VII have burden shifts that are plaintiff friendly (making it is easier for the plaintiff to sue because intent is hard to prove). The hurdles mentioned above make it close to impossible for a plaintiff to bring a suit under stereotype theory citing that it was their sexual orientation that was the motive behind the discrimination. This begins the more philosophical discussion of the implications of the aforementioned theory.

As explained, it is very difficult for the average plaintiff to use their sexual orientation as the predominant issue in their case chief in a Title VII action. So what can the plaintiff do to remedy this situation in order to receive some protection under Title VII? The answer is simply to reduce him or herself to what a court would deem as a gay man or a lesbian woman. This shows the shortcomings of the current Supreme Court as well as the legislation that they work within.

A plaintiff would have to use other factors that would be perceived not to fit within a stereotype of an employer. An example of this would be a man wearing overly colorful shirts, using effeminate gestures or language expected from a "queen." Alternatively a lesbian would have to the same thing; acting like a man, being butch or what is perceived as a "bull-dyke." So, what if the plaintiffs are not naturally like this

[24] *Ordinary* in the sense that the men behave in what is seen as *normal* by the average prudent person (to be masculine behavior).
[25] The in vogue terminology for masculine homosexual men.

and they are being discriminated? Essentially under the holding of Price Waterhouse, they would have to give a *performance* in order to have a chance of having *any* recourse. The butch homosexual man would have to wear "fruity" clothing, use "fairly" like gestures and homosexual colloquialisms and the woman would have to wear leathers, reduce her femininity, and partake in vulgarities associated with the male species.

One may argue that this is one recourse, which is better than none. But the counter argument would be, *at what cost*? The plaintiff may have to live a lie to have the possibility of *some* recourse. They would have to be someone that they are not, to ironically fit into a category that would allow them to be abused and discriminated against even further. These plaintiffs would have to give performances, which under the strictest terms can be deemed nothing short of perjury for the purposes of proving their potential cases. These implications bring about a very different implication of the Price Waterhouse introduction of stereotyping theory. This is no more prevalent and more apparent than in the 6th Circuit where trans-gendered employees are given more protection than gays and lesbians. As soon as a trans-gendered employee encounters any adversity because of their sexual orientation, they have recourse due to their natural being (the fact that they are dressed as the opposite sex, which unarguably puts them in the *abnormal* category) in contract to an average gay man who may not have such camp attributes[26].

A theory that should have helped sexual minorities in their quest for equality under the protection of Title VII actually took them arguably further back than the 1979 holding of DeSantis. The Supreme Court is essentially asking the potential plaintiff to

[26] Arthur S. Leonard, *Twenty First Annual Carl Warns Labour & Employment Institute: Sexual Minority Rights in the Workplace,* 43 Brandeis L.J. 145, at 157.

lower their dignity and *hide* their true selves in order to seek justice. There are so many aspects of this that are inherently unjust, especially in the 21st century. Professor Schultz of Yale Law School has exactly the same conclusion but for the exact opposite reason. She believes that, Price Waterhouse "instructs, imposing pressure to conform to preconceived notions of appropriate manhood or womanhood at work…[27]" I believe that both theories are correct.

Professor Schultz believes that the employee would have to conform to the preconceived ideologies of masculinity and femininity, whereas my thought is that the holding of Price Waterhouse is to force the potential plaintiff to act abnormally effeminate or butch to have any chance of protection under Title VII. Surely this invites gay men and lesbian women to *act* as stereotypical gays and lesbians so that they have some recourse in the future, should they need future protection.

Though Title VII is not a constitutional protection, it is inconsistent with Supreme Court constitutional decisions on the issue of sexual orientation. In Lawrence v. Texas[28], the Supreme Court held that federal employees would have potential due process and equal protection claims against any civilian federal agency that embraced the explicit discrimination on the basis of sexual orientation[29]. This is obviously a federal protection given to non-private workers. But it is still in conflict with federal workers that would want to have protection for the discrimination of their sexual orientation within the meaning of Title VII. Would that not make the statute unconstitutional with regards to non-private workers? If so, then surely the next step would be to extend it to all private

[27] Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 Yale L.J. 1683, at 1777.
[28] Lawrence v. Texas, 539 U.S. 558
[29] Arthur S. Leonard, *Twenty First Annual Carl Warns Labour & Employment Institute: Sexual Minority Rights in the Workplace,* 43 Brandeis L.J. 145, at 146.

and non-private enterprises to show consistency within the precedent set by the Supreme Court.

It seems most peculiar that the Supreme Court readily accepts the concept if sexual harassment within the meaning of the word "sex" under Title VII and yet no court accepts sexual orientation. The Supreme Court has also explicitly held that the plaintiff and the defendant can be of the same sex[30]. If then a man is getting sexually harassed as was the case of Rene[31] above, and he was getting harassed because he was gay, then surely there is an argument that the sexual harassment and sexual orientation discrimination can be unanimous and go hand in hand. Thus, they should be offered the same protection under the same umbrella. Yet all Circuits are yet to accept this argument. The opposition is led by one Richard Posner of the 7th Circuit who sees this as "bootstrapping" sexual orientation under the umbrella of Title VII[32].

As Vicki Schultz points out[33], it is an *absolute* prerequisite for a sexual harassment suit under Title VII to be "because of sex." What does this mean? Essentially this means that there have to be actual "sexual advances[34]" as a required prerequisite to a sexual harassment suit under Title VII. Any other kind of harassment will not satisfy for a claim under Title VII. Therefore, non-sexual harassment suits will not qualify. So in a case such as Turley v. Union Carbide Corp.[35], the plaintiff, a woman, complained that her supervisor harassed her and treated her differently from the other male employees. The court, however, refused to accept that Turley had a claim because there was no proof of

[30] See footnote 18.
[31] Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061 (9th Cir. 2002).
[32] Doe v. City of Belleville III., 119 F.3d 563 (7th Cir. 1997).
[33] Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 Yale L.J. 1683, at 1716.
[34] Walker v. Sullair, 736 F. Supp. 94 (W.DN.C. 1990).
[35] Turley v. Union Carbide Corp., 554 F. Supp. 659 (D.R.I. 1982).

sexual "fondling" or "sexual advances[36]." Professor Schultz points out that, if the woman was in fact a man, she would have not have been harassed; thus she was harassed because she *was a woman* and in turn it was because of her "sex."

Taking this argument, one can argue that if a gay man was harassed, but not sexually, but for being gay, he would have a case under the theory of Professor Schultz. Though he is not being sexually fondled, he is being harassed because is a *man* that sexually prefers men (where a woman would not be harassed because she is supposed to like men sexually). Therefore, that gay man is being harassed because of his sex. Surely, this leads to the only conclusion that reasonably can be drawn; that sexual orientation firmly falls under the scope of "sex" within Title VII. Therefore, as often as courts have rejected this argument on its face, it could hardly have been like a search for a needle in a haystack to come to the same conclusion as Professor Schultz.

In one of the most recent 9th Circuit decisions, the court openly insinuated that protection should be offered to sexual minorities under Title VII. In Peterson v. Hewlett-Packard Co.[37], the court stated that the eradication of homophobic discrimination is "consistent with the goals and objectives of our civil right statutes generally[38]." Though Justice Reinhardt openly sees the flaw in the current Title VII interpretation, in this case he had to play with the statute of Title VII to find a remedy for the plaintiff. Peterson won his case because of his religious beliefs and thus the harassment was actionable under religious harassment. It just happens that Peterson was lucky in his case, but Justice Reinhardt points out that his sexual harassment case (due to his sexual orientation) was not actionable due to the current stare decisis standing in his way.

[36] Id. at 662.
[37] Peterson v. Hewlett-Packard Co., 358 F.3d 599, (2004).
[38] Id. at 607-608.

Therefore, without openly saying so, the 9th Circuit is admitting the flaw in the current law and having to manipulate the law in anyway that it can, to bring justice to the worthy plaintiff in such situations to illustrate the shortcomings of Title VII legislation.

Though this is one step short of what is required, there is very little that can effectively be done by the circuit courts to change the situation. This leads us to the question of *what is the logical (next) step for the progression of minority rights under Title VII?*

III. CONCLUSION

Since the holding of DeSantis in 1979, it has taken the 9th Circuit over 25 years to see the shortcomings of Title VII. The tragic part of this delay lies in the fact that now that the Court has seen the flaw in the law; it can do very little about it. The court is drawn into having to play with Title VII to come to most just decisions that it can within its powers. Unfortunately, not every plaintiff is as lucky as Peterson above. So where does this leave the law, and where should it go?

Though it is easy to criticize the different circuits around the United Stated for their inaction, and continual rejection of the arguments advocating the protection of sexual minorities under Title VII (due to their sexual orientation), it is arguable that they are merely doing their job (and that they are acting within their given powers). The United States Supreme Court is yet to take a case that tackles this issue head on. That leaves great ambiguity within the circuits and the obvious conflict of decisions that ensues.

There can be three things that can possibly change the inaction within the legal fraternity to change the current status quo. The first, and probably most demanding manner that change can be brought about is by a circuit holding on its own accord that Title VII, on its face, does protect sexual minorities with regards to their sexual orientation (because it is engulfed by the word "sex" within the statute of Title VII). This would create direct conflict within the Circuits, as no Circuit has yet strayed from the current stare decisis. This would hopefully motivate the Supreme Court to take action in order to reach equilibrium and justice within its Circuits (not that there is any guarantee that they would hold that sexual orientation does fall within the word "sex" within Title VII). This is unlikely for the simple reason that the Circuits are not willing to go against precedent just because they are sympathetic to the cause of the plaintiff. It goes against the system of justice and history that the United States courts work within.

This leaves the opportunity for the Supreme Court to take the initiative and take a case on its own accord as a matter of public policy. Social acceptabilities have dramatically changed since the 1960s when Title VII was introduced. In 2006, the public are much more accepting of sexual minorities. Serious public debates have taken place in Congress on such issues as gay and lesbian marriages. Should the boundaries not be different today, such debates would not even be taking place. Therefore, the signs are clear that change is needed, as the vogue of the times has changed. Homosexuals are part and parcel of everyday life in 2006. The responsibility has to fall onto lawmakers and the interpreters of law to translate the law that represents the acceptabilities of the contemporary public. This either means that the Supreme Court is completely out of touch with popular culture or they take their responsibilities for granted.

There would be a counter argument, however, that if homosexuality was such an intricate and accepted part of popular culture, then why the influx of the need for the protection of discrimination against sexual minorities? The answer to this would be that racism is prohibited by every state in this country and by Title VII. Racism was prevalent and acceptable in the 1960s (and arguably legal). But today every court in this country protects ethnic minorities against racism because it is wrong, immoral and against public policy. But that does not mean that racism no longer exists. The protection of ethnicities is in fact a major part of Title VII because Congress understand that just because something is widely accepted to be the truth, does not mean the entire populace follows suit.

However, the primary responsibility for change falls upon the shoulders of Congress. They are the primary lawmakers in the United States and all courts including the Supreme Court take the lead of Congress. The Supreme Court has the job of interpretation but it is not primarily their job or the job of any court to create new law (though it is the job of the Supreme Court to take affirmative action if they encounter manifest injustice, which the current situation arguably qualifies under). This job falls directly into the lap of Congress. I would have the exact same criticism for Congress as I do for the Supreme Court but to a much higher degree because they are the primary lawmakers. The easiest and clearest way that change can be brought about is by Congressional amendments to Title VII stating clearly its intention that sexual orientation would be considered within the scope of the word "sex" within Title VII.

As the law stands, it seems the interpretation of the statute has done a full circle with a new cycle beginning (with the rejuvenation of the 9th Circuit, led admirably by

Justice Reinhardt). It is important for the Supreme Court to use this shift in judicial thinking to make amendments and "nudge" Congress into making the necessary amendments that are required.