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Distinction Without a Difference: Federal Court Says Sexual Orientation Discrimination Is Sex Discrimination

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The relationship between sex discrimination and sexual orientation discrimination has always been somewhat of a contested issue. Courts have routinely declared that they bear no relationship to one another, while advocates have long argued that they are one and the same. This matters because Title VII and other antidiscrimination laws with similar scope expressly protect against sex discrimination, but not against sexual orientation discrimination.

In a recent, groundbreaking ruling, ***Videckis v. Pepperdine University*** **(https://docs.justia.com/cases/federal/district-courts/california/cacdce/2:2015cv00298/608485/41)** , a federal district court has denounced the line between these two types of discrimination as "illusory and artificial," leading it to rule that a claim of sexual orientation discrimination and harassment is cognizable under Title IX (as it would be under Title VII).

Basketball Players Versus Pepperdine University

This case was brought by Haley Videckis and Layana White, both former members of Pepperdine's women's basketball team who transferred there from Arizona State University. Same weather, perhaps, but a more hostile climate.

According to the facts alleged in the complaint (which the court had to accept as true when ruling on Pepperdine's motion to dismiss for failure to state a claim), the two women almost immediately faced hostility because of the perception by those involved in Pepperdine athletics that they were lesbians. They were peppered (no pun intended) with questions by the athletic academic coordinator about whether they traveled together (and if so, whether they pushed their beds together) and whether they went on dates.

When Videckis and White they complained to the women's basketball coach, he promised to monitor the players' meetings with the coordinator to make sure she stuck to academic lines of questioning. But he never followed through. To the contrary, at a team leadership meeting, the coach spoke about "lesbianism" and his concerns that it was a problem for women's basketball in general and for his team. Lesbianism, he told the players, is why teams lose.

The plaintiffs allege similar types of hostility from the athletic director and others involved with the basketball program. White had been promised that Pepperdine would file an appeal with the NCAA to allow her to play in her first year as a transfer student, but the paperwork was never filed (though it was for a male basketball player). An athletic trainer, meanwhile, questioned Videckis about dating women and then falsely accused Videckis of violating training room rules. The athletic coordinator accused them of cheating, but no evidence was found to substantiate the claim. The coach told other players not to live with the plaintiffs because they were bad influences. When Plaintiff White informed her coach she had raised her GPA to 3.0, the level at which the number of mandatory study halls went down, he raised the minimum on the spot to 3.2.

The hostility the plaintiffs allege directly interfered with their ability to participate in the basketball program. Coaches and trainers demanded unusual medical documentation from them and then, even when the documentation was provided, did not allow them to

play. Their complaints fell, at best, on deaf ears, and, at worst, on ears inclined to retaliate.

Let's assume, as the court was required to do, that everything the plaintiffs described actually happened. Did Pepperdine violate Title IX?

Title IX Versus Title VII

Plaintiffs brought suit under Title IX of the Education Amendments of 1972, a general ban on sex discrimination by educational institutions that receive federal funding. Although Title IX is perhaps best known for its impact on college and high school athletics (discussed, in part, **here (https://verdict.justia.com/2012/06/26/the-big-4-0)**), the statute speaks to all forms of sex discrimination, including disparate treatment and sexual harassment.

The Supreme Court first applied Title IX to sexual harassment in schools in the case of ***Franklin v. Gwinnett County Public Schools*** **(http://supreme.justia.com/cases/federal/us/503/60/case.html)** (1991). In that case, a tenth-grade girl complained that her teacher, who was also a coach, had subjected her to a barrage of sexual harassment, including sexually-oriented conversations; on three occasions, he insisted that other teachers release her from class so that he could take her to a private office and force her to have sex with him. The legal issue was whether the school district could be forced to pay money damages for its failure to maintain a non-discriminatory environment, and the Court's answer was yes. In *Franklin*, the Court defined hostile environment harassment very similarly to the way it had defined it in ***Meritor Savings Bank v. Vinson*** **(https://supreme.justia.com/cases/federal/us/477/57/case.html)** , the 1986 case in which the Court first held that sexual harassment was a form of intentional sex discrimination (and therefore actionable) under Title VII.

Although the Supreme Court would later decide that Title IX and Title VII should be interpreted differently with respect to institutional and employer liability for harassment (see ***Gebser v. Lago Vista Independent School District*** **(http://supreme.justia.com/cases/federal/us/524/274/)** (1998) and ***Davis v. Monroe County Board of Education*** **(http://supreme.justia.com/cases/federal/us/526/629/)** (1999)), courts have continued to define actionable harassment in similar ways under the two statutes.

The question in the case against Pepperdine is whether discrimination on the basis of sexual orientation is actionable under Title IX. As discussed below, this is a question that has been extensively litigated under Title VII, less so under Title IX. But, as explained

above, the Title VII precedents are relevant.

Sexual Orientation Discrimination Versus Sex Discrimination

Title VII is at the heart of federal anti-discrimination law. It prohibits employers with at least fifteen employees from discriminating on the basis of race, color, religion, sex, or national origin. Notice what is not on this list: sexual orientation. But early on, lawsuits were brought alleging sexual orientation discrimination. In one well-known case, *DeSantis v. Pacific Telephone & Telegraph* (1979), the Ninth Circuit Court of Appeals held that Title VII's ban on sex discrimination did not encompass sexual orientation discrimination. Similar rulings followed, from trial and appellate courts in different jurisdictions.

These rulings have some overlapping qualities. They tend to focus on the lack of congressional intent—few people, if any, were talking about the harms of sexual orientation. Or the mere fact that "sexual orientation" is not literally on the list of protected characteristic. And one of the oft-cited concerns is "bootstrapping"—the sin of trying to attach an uncovered claim to a covered one. But these rulings offer little by way of analysis about the nature of sex or sexual orientation discrimination (and the ways in which they might be cut from the same cloth).

Despite those early rulings, many plaintiffs have prevailed in cases in which the essence of their complaint was sexual orientation discrimination or harassment. These cases focus on Title VII's requirement that discrimination be "because of sex." Two types of successful claims draw on this language, those based on sex stereotyping and same-sex sexual harassment.

Success has been fueled by two Supreme Court decisions. First, in ***Price Waterhouse v. Hopkins*** **(https://supreme.justia.com/cases/federal/us/490/228/)** (1989), the Court held that reliance on sex-role stereotyping can be an actionable form of employment discrimination. Thus, a woman who was denied partnership in an accounting firm at least in part because she was perceived as not feminine enough, had suffered actionable discrimination. That decision gave legs to claims by effeminate gay men and masculine lesbians, who could also claim they had been subjected to gender policing—discriminated against for failing to live up to the expectations for their gender.

Then, in ***Oncale v. Sundowner Services*** **(https://supreme.justia.com/cases/federal/us/523/75/)** (1998), the Court considered a claim of same-sex harassment. The federal appellate court had ruled that such a claim could never be cognizable under Title VII, regardless of the circumstances, because it could not satisfy the "because of sex" requirement in the statute. But the Supreme Court

reversed, holding that the requirement might be met in one of three ways: (i) with evidence of the perpetrator's homosexuality; (ii) with evidence that the perpetrator in fact targeted only members of one sex; or (iii) with evidence that the harassment took the form of gender-role policing—à la *Price Waterhouse*—to punish an employee for failing to live up to traditional gender norms. *Oncale* has both reinforced the use of *Price Waterhouse* in sexual orientation claims and fueled separate claims for harassment rooted in homosexual desire or gender-targeted bullying. The Ninth Circuit, for example, in ***Nichols v. Azteca Restaurant Enterprises*** **(http://law.justia.com/cases/federal/appellate-courts/F3/256/864/526495/)** (2001), held that a male restaurant employee who was discriminated against for carrying his tray "like a woman" and refusing to have sex with a female waitress had stated an actionable claim of sex discrimination.

Together, these precedents have allowed plaintiffs in some sexual orientation discrimination claims to succeed (such as *Nichols*), but sometimes with ironic consequences. For example, gays and lesbians who conform to gender-role stereotypes are less protected from discrimination than those who violate them, but those who violate those norms are more likely to be blocked by the "bootstrapping" objection. And transgender plaintiffs have been more successful than gay or lesbian plaintiffs because the "gender policing" point is more obvious.

Even when courts allow these claims to proceed, they engage very little with the important question of what sexual orientation discrimination is: animus against people who defy sex-role expectations by being attracted to someone of the same sex.

This question of how and whether to draw the line between sexual orientation discrimination and sex discrimination has remained important, as Congress has repeatedly failed to pass the Employment Non-Discrimination Act, a bill that would expressly add "sexual orientation" (and, in some versions, "gender identity") to the list of characteristics against which employers may not discriminate.

Back to *Videckis v. Pepperdine University*

The district court in *Videckis* denounced the stark line that courts have tried to draw between sex discrimination and sexual orientation discrimination. That distinction, the court wrote, is "illusory and artificial." Sexual orientation discrimination, the court continued, "is not a category distinct from sex or gender discrimination. . . . Claims of sexual orientation discrimination are gender stereotype claims."

In reaching this conclusion, the court noted the difficulty prior courts have had in explaining the difference between the two types of claims—or in defending an insistence

that they are indeed separate. Courts used words and phrases like "imprecise," "blurry," "difficult to draw," and "hardly clear" to describe the line separating the two claims. This court decided that the reason the line is so hard to draw is because it "does not exist, save as a lingering and faulty judicial construct."

Moreover, this court explained, the current case law misunderstands the nature of a discrimination claim. For example, an effeminate male plaintiff should not be protected because of the way he acts or looks. What makes discrimination illegal is the biased mind and actions of the employer, regardless of the sexual orientation of the victim. Thus, the Ninth Circuit (in which this district court sits), in ***Rene v. MGM Grand Hotel (http://law.justia.com/cases/federal/appellate-courts/F3/305/1061/593045/)*** (2002), held that an employee's sexual orientation is irrelevant for Title VII purposes. "It neither provides nor precludes a cause of action for sexual harassment." That means an employee should not have to prove he is gay in order to prevail, but neither should such evidence prevent him from obtaining redress for discrimination. If he was treated differently because he was a man—perhaps because he was a man attracted to other men, or a man with an effeminate style—then he was the victim of discrimination.

Videckis is the first case in which a federal court has held that sexual orientation is sex discrimination, regardless of the role of stereotyping or the gender-role transgression of the plaintiff. Earlier this year, the EEOC reached the same conclusion, in *Complainant v. Foxx*. There, the agency held squarely, as did the court in *Videckis*, that all sexual orientation discrimination is actionable sex discrimination. (Three years earlier, the EEOC had held that transgender discrimination is sex discrimination, a conclusion also reached by a small number of federal courts.)

Conclusion

As a result of this ruling (subject to appeal), Videckis and White will have the opportunity to prove that they were the victims of discrimination. If what they allege is true, Pepperdine's hostility to the women's sexual orientation seems pretty unmistakable. And the tangible actions allegedly taken against them because of their failure to conform to standards for (heterosexual) women may well support a retaliation claim as well.

This opinion will stand as an attempt to stem a tide of confusing and often poorly reasoned rulings. It represents a more sensible application of the Supreme Court's principles set forth in *Price Waterhouse* and *Oncale*. "We are beyond the day," the Court wrote in *Price Waterhouse*, "when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex

stereotypes.'" Let thy will be done.

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