
**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 07-3997

BRIAN D. PROWEL,

Appellant,

v.

WISE BUSINESS FORMS,

Appellee.

On Appeal from the United States District Court
for the Western District of Pennsylvania
No. 2:06-CV-259

**BRIEF *AMICI CURIAE* OF TWENTY-ONE ORGANIZATIONS
COMMITTED TO EQUALITY FOR WORKING WOMEN
IN SUPPORT OF APPELLANT**

Gillian Thomas
Senior Staff Attorney
LEGAL MOMENTUM
395 Hudson Street, 5th Floor
New York, NY 10014
(212) 413-7534

Counsel for Amici Curiae

Susan Frietsche
Senior Staff Attorney
Tatyana Margolin
Staff Attorney
WOMEN'S LAW PROJECT
425 Sixth Avenue, Suite 1860
Pittsburgh, PA 15219
(412) 227-0301

LIST OF THE *AMICI CURIAE*

Women's Law Project
Legal Momentum
American Medical Women's Association
California Women's Law Center
Center for Advancement of Public Policy
Chicago Women in the Trades
Clearinghouse on Women's Issues
Equal Rights Advocates
Gender Public Advocacy Coalition
Hard Hatted Women
International Association of Women in Fire and Emergency Services
National Association of Women Lawyers
National Council of Jewish Women
National Council of Jewish Women, Pennsylvania
National Organization for Women
Pennsylvania NOW, Inc.
National Women's Law Center
Northwest Women's Law Center
Southwest Women's Law Center
Wider Opportunities for Women
Women and Girls Foundation of Southwest Pennsylvania

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
STATEMENT OF INTEREST OF THE <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT.....	4
I. A CENTRAL PURPOSE OF TITLE VII IS TO ERADICATE THE ENTIRE SPECTRUM OF DISCRIMINATION “BECAUSE OF SEX”.....	4
II. THE CLEAR WEIGHT OF AUTHORITY IN THIS CIRCUIT AND IN OTHER CIRCUITS RECOGNIZES SEX DISCRIMINATION CLAIMS INVOLVING GENDER STEREOTYPING, REGARDLESS OF WHETHER THERE IS COINCIDENT EVIDENCE OF SEXUAL ORIENTATION DISCRIMINATION.....	8
III. IF AFFIRMED, THE REASONING OF THE DISTRICT COURT WILL PARTICULARLY HARM WOMEN IN NONTRADITIONAL EMPLOYMENT.....	22
CONCLUSION.....	31
APPENDIX: INDIVIDUAL STATEMENTS OF INTEREST OF THE <i>AMICI CURIAE</i>	32
CERTIFICATE OF COMPLIANCE WITH RULE 32A.....	38
CERTIFICATE OF BAR MEMBERSHIP.....	39
CERTIFICATION OF TEXT OF E-BRIEF.....	40
CERTIFICATION OF VIRUS CHECK.....	40
CERTIFICATE OF SERVICE.....	41

TABLE OF AUTHORITIES

Cases

<i>Andrews v. City of Philadelphia</i> , 895 F.2d 1469 (3d Cir. 1990)	28
<i>Badlam v. Reynolds Metals Co.</i> , 46 F. Supp. 2d 187 (N.D.N.Y. 1999)	28, 29
<i>Bianchi v. City of Phila.</i> , 183 F. Supp. 2d 726 (E.D. Pa. 2002)	9, 18, 19
<i>Bibby v. Coca-Cola Bottling Co.</i> , 260 F.3d 257 (3d Cir. 2001)	9
<i>Califano v. Goldfarb</i> , 430 U.S. 199 (1977)	4
<i>Centola v. Potter</i> , 183 F. Supp. 2d 403 (D. Mass. 2002).....	11, 12, 21
<i>City of Los Angeles Dep’t of Water & Power v. Manhart</i> , 435 U.S. 702 (1978).....	4, 7
<i>Danna v. New York Tel. Co.</i> , 752 F. Supp. 594 (S.D.N.Y. 1990)	28
<i>Dawson v. Bumble & Bumble</i> , 398 F.3d 211 (2d Cir. 2005)	18
<i>Doe by Doe v. City of Belleville</i> , 119 F.3d 563 (7th Cir. 1997), <i>vacated and remanded on other grounds</i> , 523 U.S. 1001 (1998)	14, 15, 21
<i>Fischer v. City of Portland</i> , No. CV 02-1728, 2004 U.S. Dist. LEXIS 20453 (D. Or. Sept. 27, 2004)	16
<i>Frontiero v. Richardson</i> , 411 U.S. 677 (1973)	4
<i>Hall v. Gus Constr. Co.</i> , 842 F.2d 1010 (8th Cir. 1988)	27
<i>Hansel v. Pub. Serv. Co.</i> , 778 F.Supp. 1126 (D.Colo. 1991)	27
<i>Harris v. Forklift Systems, Inc.</i> , 510 U.S. 17 (1993)	5
<i>Hellebusch v. City of Wentzville</i> , No. 4:95CV1533 JCH, 1996 U.S. Dist. LEXIS 20828 (E.D. Mo. Nov. 21, 1996)	28
<i>Heller v. Columbia Edgewater Country Club</i> , 195 F. Supp. 2d 1212 (D. Or. 2002)	16
<i>Hibbs v. Nevada Department of Human Resources</i> , 538 U.S. 721 (2003)	5
<i>Higgins v. New Balance Athletic Shoe, Inc.</i> , 194 F.3d 252 (1st Cir. 1999).....	10
<i>Huddleston v. Roger Dean Chevrolet, Inc.</i> , 845 F.2d 900 (11th Cir. 1988).....	26
<i>Int’l Union v. Johnson Controls</i> , 499 U.S. 187 (1991)	6
<i>Medina v. Income Support Div.</i> , 413 F.3d 1131 (10th Cir. 2005)	19
<i>Meritor Savings Bank FSB v. Vinson</i> , 477 U.S. 57 (1986).....	5
<i>Montgomery v. Indep. Sch. Dist.</i> , 109 F. Supp. 2d 1081 (D. Minn. 2000)	17
<i>Morris v. American Nat’l Can Corp.</i> , 730 F. Supp. 1489 (E.D. Mo. 1989).....	29
<i>Nichols v. Azteca Restaurant Enterprises, Inc.</i> , 256 F.3d 864 (9th Cir. 2001).....	15
<i>Oncale v. Sundowner Offshore Services, Inc.</i> , 523 U.S. 75 (1998)	5, 10
<i>Ostapowicz v. Johnson Bronze Co.</i> , 369 F. Supp. 522 (W.D. Pa. 1973), <i>aff’d in part and vacated in part on other grounds</i> , 541 F.2d 394 (3d Cir. 1976)	6
<i>Petrosino v. Bell Atlantic</i> , 385 F.3d 210 (2d Cir. 2004)	28
<i>Price Waterhouse v. Hopkins</i> , 490 U.S. 228 (1989).....	7
<i>Rhea v. Dollar Tree Stores, Inc.</i> , 395 F. Supp. 2d 696 (W.D. Tenn. 2005)	13
<i>Richardson v. City of Albuquerque</i> , 857 F.2d 727 (10th Cir. 1988).....	29
<i>Sanchez v. City of Miami Beach</i> , 720 F. Supp. 974 (S.D. Fla. 1989)	29
<i>Schmedding v. Tnemec Co.</i> , 187 F.3d 862, 865 (8th Cir. 1999).....	16, 17
<i>Simonton v. Runyon</i> , 232 F.3d 33 (2d Cir. 2000)	18, 19
<i>Smith v. City of Salem</i> , 378 F.3d 566 (6th Cir. 2004).....	12, 20, 21

<i>Theno v. Tonganoxie Unified Sch. Dist.</i> , 394 F. Supp. 2d 1299 (D. Kan. 2005).....	17
<i>United States v. Virginia</i> , 518 U.S. 515 (1996)	6
<i>Vickers v. Fairfield Medical Center</i> , 453 F.3d 757 (6th Cir. 2006)	12, 13, 18
<i>Waltman v. International Paper Co.</i> , 875 F.2d 468 (5th Cir. 1989).....	27, 28
<i>Weinberger v. Wiesenfeld</i> , 420 U.S. 636 (1975)	4
<i>Zorn v. Helene Curtis, Inc.</i> , 903 F. Supp. 1226 (N.D. Ill. 1995)	26

Other Authorities

Eugene Borgida, Ph.D., Corrie Hunt, and Anita Kim, <i>On the Use of Gender Stereotyping Research in Sex Discrimination Litigation</i> , 13 J. Law and Policy 613 (2005)	25, 26
Bureau of Labor Statistics, U.S. Dep’t of Labor, <i>Highlights of Women’s Earnings in 2003</i> (Sept. 2004).....	23
Mary Anne C. Case, <i>Disaggregating Gender from Sex and Sexual Orientation: The effeminate Man in the Law and Feminist Jurisprudence</i> , 105 Yale L.J. 1 (1995)	20
Catalyst, <i>2007 Catalyst Census of Women Corporate Officers and Top Earners of the Fortune 500</i> (2007)	24
<i>The Double-Bind Dilemma for Women in Leadership: Damned if You Do, Doomed if You Don’t</i> 3 (2007)	24, 26
Vicky Lowell and Cynthia Negrey, Institute for Women’s Policy Research, <i>Promoting Women’s Workforce Security: Findings from IWPR Research on Unemployment Insurance and Job Training</i> (2001)	23, 24
N.J. Stat. Ann. § 10:5-4 (2007)	21
Wendy Pollack, <i>Sexual Harassment: Women’s Experience vs. Legal Definitions</i> , 13 Harv. Women’s L.J. 35 (1990)	29
Laurie A. Rudman, <i>Self-Promotion as a Risk Factor for Women: The Costs and Benefits of Counterstereotypical Impression Management</i> , 74 J. of Personality and Soc. Psychol. 629 (1998)	25
Vicki Schultz, <i>Telling Stories About Women and Work: Judicial Interpretations in the Workplace in Title VII Cases Raising the Lack of Interest Argument</i> , 103 Harv. L. Rev. 1749 (1990).....	22, 27
Vicki Schultz, <i>Reconceptualizing Sexual Harassment</i> , 107 Yale L.J. 1683 (1998).....	6
<i>Sexual Harassment: Women’s Experience vs. Legal Definitions</i> , 13 Harv. Women’s L.J. 35 (1990).....	29
Daniel H. Weinberg, U.S. Dep’t of Commerce, Census 2000 Special Reports, <i>Evidence from Census 2000 About Earnings by Detailed Occupation for Men and Women</i> (May 2004)	23
Women’s Bureau, U.S. Dep’t of Labor, <i>20 Leading Occupations of Employed Women: 2006 Annual Averages</i> (2006).....	23
Women’s Bureau, U.S. Dep’t of Labor, <i>Quick Facts on Non-Traditional Occupations for Women</i> (2006).....	24
Women’s Bureau, U.S. Dep’t of Labor, <i>Women in the Labor Force in 2006</i> (2006)	23

STATEMENT OF INTEREST OF THE AMICI CURIAE

Amici curiae are twenty-one organizations committed to equality for women and to the eradication of sex discrimination in the workplace. *Amici* include women's professional and trade associations, legal and public policy advocates, and employment discrimination specialists. *Amici* have special expertise in the barriers to equality working women face, barriers that are particularly high for women breaking into traditionally male-dominated fields. Many of the *amici* have experience in assisting women employees harmed by sex discrimination that takes the form of gender stereotyping.

Amici submit this brief to assist the Court by summarizing the Supreme Court's Title VII gender stereotyping jurisprudence and by surveying decisions from other circuits in gender stereotyping cases where the record contains evidence of animus against the plaintiff's real or perceived sexual orientation. The brief explores the impact that the reasoning of the district court, if adopted by this Court, would have on women's struggle for equality in the workplace, particularly for women in nontraditional employment.

Individual statements of interest of the *amici curiae* are appended to this brief.

SUMMARY OF ARGUMENT

The decision of the district court ignores extensive Supreme Court precedent disapproving rigid gender-based stereotypes restricting men's and women's roles inside and outside the workplace. The decision misreads this Court's settled precedent and overlooks evolving law in this Circuit and nationwide clarifying that gender stereotyping claims are cognizable under Title VII even where the discrimination was partly motivated by animus against the victim's real or perceived sexual orientation. The clear weight of authority in this and other circuits supports a reading of Title VII that recognizes that, where a plaintiff has made out a case of gender stereotyping sex discrimination, additional evidence of anti-gay or anti-lesbian bias does not immunize the employer from liability. Rather, lesbian and gay litigants bringing gender stereotyping claims carry no greater evidentiary burden than heterosexual litigants; and the settled law governing "mixed motive" discrimination applies in cases where evidence of gender stereotyping sex discrimination is accompanied by evidence of anti-gay prejudice.

Women who break into well-paying, historically male-dominated nontraditional occupations, whether in the blue-collar trades or in the professions, commonly encounter the stereotype that they are deviating from assigned gender roles. Women experiencing sex discrimination involving

such gender stereotyping need legal remedies in order to survive and thrive at work. By narrowing the class of cases in which women may seek redress from gender stereotyping sexual harassment, the ruling below strikes at the heart of Title VII's prohibition of employment discrimination "because of sex."

For these reasons, as well as those set forth in the Brief for Appellant, the district court's ruling should be reversed.

ARGUMENT

I. A CENTRAL PURPOSE OF TITLE VII IS TO ERADICATE THE ENTIRE SPECTRUM OF DISCRIMINATION “BECAUSE OF SEX.”

Title VII’s “because of sex” provision strikes at the “entire spectrum of disparate treatment of men and women resulting from sex stereotypes.” *City of Los Angeles Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978) (internal citation omitted). Indeed, Supreme Court precedent long has held that sex stereotypes reinforce and perpetuate women’s inequality at work and at home. For instance, the Court on numerous occasions has addressed the most fundamental stereotype of all: that men are primary breadwinners and women work only within the home as caretakers. *See, e.g., Califano v. Goldfarb*, 430 U.S. 199, 216-17 (1977) (striking down as unconstitutional gender discrimination Social Security Act’s requirement that male spouses prove financial dependence to claim survivors’ benefits, while not imposing such requirement on female spouses); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 653 (1975) (holding that restricting Social Security survivors’ benefits to female spouses is unconstitutional gender discrimination); *Frontiero v. Richardson*, 411 U.S. 677, 690-91 (1973) (striking down federal statute awarding military benefits to male spouses

only upon showing financial independence, when no such requirement was placed on female spouses).

Nevertheless, stereotypes about men's and women's work-life roles endure and must be remedied, as confirmed by Chief Justice Rehnquist's majority opinion in *Hibbs v. Nevada Department of Human Resources*, 538 U.S. 721, 736 (2003), concerning the Family and Medical Leave Act ("FMLA"):

Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees.

In interpreting Title VII, the Supreme Court has acknowledged that discrimination "because of sex" can play out in a variety of ways in the real world. From sustaining the hostile work environment theory, *see Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57 (1986), to confirming that harassment need not be "sexual" in order to be illegal, *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), to recognizing that harassment may occur between members of the same sex, *see Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), the Supreme Court has interpreted

flexibly Title VII's protection to reach these varied manifestations of sex discrimination in the workplace.

Moreover, stereotypes about women's abilities and preferences are impermissible grounds for employer decisions under Title VII. *See, e.g., Int'l Union v. Johnson Controls*, 499 U.S. 187, 198 (1991) (employer policy precluding women of childbearing age, but not men, from jobs involving lead exposure violates Title VII, notwithstanding arguably benign motives); *see also Ostapowicz v. Johnson Bronze Co.*, 369 F. Supp. 522, 537 (W.D. Pa. 1973), *aff'd in part and vacated in part on other grounds*, 541 F.2d 394 (3d Cir. 1976) ("To justify failure to advance women because they did not want to be advanced is a type of stereotyped characterization which will not stand."); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 Yale L.J. 1683, 1738 (1998) ("Title VII's traditional focus has been to prohibit employer policies and practices that treat workers differently based on gender-based expectations of who men and women are *supposed to be.*") (emphasis added). *See also United States v. Virginia*, 518 U.S. 515, 533 (1996) (for purposes of interpreting constitutionality of state's gender classification, state's justification "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females").

Of a piece with this body of law is *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), which identified the distinct harm inflicted by gender stereotypes at work. In holding that Title VII prohibits adverse treatment of female employees based in part on their failure to conform to a traditionally feminine model of how women should look and act, the Supreme Court struck down a core limitation for working women:

[W]e are beyond the day 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.”

Price Waterhouse, 490 U.S. at 251, quoting *Manhart*, 435 U.S. at 707 n.13.

Thus, the Court found it was discrimination “because of sex” to deny Ann Hopkins a promotion because she used profanity, purportedly needed “a course at charm school,” and did not “walk . . . femininely, talk . . . femininely, dress . . . femininely, wear make-up, have her hair styled, and wear jewelry” – in short, because she did not act as a woman “should.” *Id.* at 235.

This historical perspective confirms that gender stereotyping is a pernicious harm to women, and Title VII was meant to end it.

II. THE CLEAR WEIGHT OF AUTHORITY IN THIS CIRCUIT AND IN OTHER CIRCUITS RECOGNIZES SEX DISCRIMINATION CLAIMS INVOLVING GENDER STEREOTYPING, REGARDLESS OF WHETHER THERE IS COINCIDENT EVIDENCE OF SEXUAL ORIENTATION DISCRIMINATION.

The record in this case is replete with evidence that the harassment Mr. Prowel experienced at Wise Business Forms was based on his failure to conform to stereotypically masculine norms of appearance and behavior. *See, e.g.*, App. 63 (Def.’s Statement of Material Facts) (describing plaintiff-appellant’s high voice and stereotypically effeminate walk and mannerisms); App. 370-79 (Prowel Dep.) (same); App. 546 (Prowel Aff.) (describing co-workers’ mockery of his effeminate gestures); App. 64 (Def.’s Statement of Material Facts) (describing co-workers’ frequent use of derisive, feminine nicknames for Prowel such as “Rosebud” and “Princess”); App. 385, 435 (Prowel Dep.) (same); App. 545-46 (Prowel Aff.) (same); App. 65 (describing emblems of hyperbolic and degraded femininity—a feathered pink tiara and packet of personal lubricant—deposited at Prowel’s work station); App. 545 (Prowel Aff.) (same).

With minimal analysis, the district court disregarded this evidence of classic gender stereotyping, conflating it with evidence of anti-gay prejudice and misconstruing Mr. Prowel’s complaint as nothing but an artfully pled claim of sexual orientation discrimination. *See* App. 5-9 (district court

decision dated Sept. 13, 2007). This conclusion was plain error. As this Court ruled seven years ago, gender stereotyping can constitute sex discrimination even where evidence of sexual orientation discrimination is present as well: “Once it has been shown that the harassment was motivated by the victim’s sex, it is no defense that the harassment may have also been partially motivated by anti-gay or anti-lesbian animus.” *Bibby v. Coca-Cola Bottling Co.*, 260 F.3d 257, 265 (3d Cir. 2001). Simply stated, employers cannot immunize themselves against sex discrimination claims by hiding behind their anti-gay or anti-lesbian prejudice.

This conclusion is widely echoed in caselaw from other circuits that have examined the viability of Title VII claims brought under a gender stereotyping theory, where the record also contains evidence of animus against the victim’s real or perceived sexual orientation. In addition to this Court, *see Bibby*, 260 F.3d 257,¹ courts in the First, Sixth, Seventh, and Ninth Circuits have explicitly recognized that evidence of animus against a plaintiff’s sexual orientation does not preclude a gender stereotyping claim

¹ *See also Bianchi v. City of Phila.*, 183 F. Supp. 2d 726, 736 (E.D. Pa. 2002) (recognizing that harassment based on victim’s failure to conform to gender stereotypes can provide a cause of action under Title VII even where record contains evidence of sexual orientation discrimination, but granting summary judgment to defendant due to plaintiff’s failure to plead and offer sufficient proof of nonconformity to masculine role).

that is properly pled and supported by an appropriate evidentiary record.

The type of evidence that these courts have found sufficient to sustain a sex discrimination claim based on gender stereotyping is similar to the evidence Mr. Prowel has adduced²: the plaintiff displays gender-atypical mannerisms, appearance, gestures, or personality traits in the workplace; and is victimized or mocked for gender non-conformity, often in language or symbolic speech that is explicitly gender-linked.

In *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999), the Court of Appeals for the First Circuit recognized that sex discrimination claims involving gender stereotyping can be maintained by gay employees. The *Higgins* court affirmed a grant of summary judgment against the plaintiff, concluding that he had waived his sex discrimination claim by apparently failing to raise it at the district court level. *Id.* at 260. However, citing *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), the court took the opportunity to respond to a footnote in the district court opinion questioning whether a gender stereotyping theory could prevail in a same-sex sexual harassment case:

[J]ust as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped

² Indeed, as set forth in the Brief for Appellant, the evidence of gender stereotyping in some of these successful cases was considerably weaker than that in the instant case. *See* Br. for Appellant at 24.

expectations of femininity, *see Price Waterhouse*, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity.

Id. at 261 n.4 (internal citation omitted). A Massachusetts district court followed this clear instruction in *Centola v. Potter*, 183 F. Supp. 2d 403 (D. Mass. 2002), in which a gay postal worker brought a Title VII action claiming sex discrimination and sexual orientation discrimination. Mr. Centola’s co-workers continually mocked him for not being more “manly.” *See id.* at 407, 410 (harassment included placing photo of Richard Simmons in pink hot pants at Mr. Centola’s work station). Refusing to dismiss his sex discrimination claim, the court reasoned that Mr. Centola had alleged facts showing that his supervisors and co-workers discriminated against him because he did not fit into “their gender stereotypes of what a man should look like, or act like.” *Id.* at 409. The *Centola* court noted that it was not necessary for Mr. Centola to allege that the discrimination arose solely on the basis of sex, or that sexual orientation played no part in his mistreatment, as the Civil Rights Act of 1991 allows for recovery based upon proof of a “mixed motive”—a combination of unlawful and lawful motives. *Id.* Thus, if Mr. Centola could demonstrate that he was discriminated against “because of . . . sex” as a result of sex

stereotyping, the fact that he was also discriminated against on the basis of his sexual orientation would have no legal significance. *Id.* at 410.

The Court of Appeals for the Sixth Circuit also has approved the gender stereotyping theory where evidence of sexual orientation discrimination is present in the record as well. In *Vickers v. Fairfield Medical Center*, 453 F.3d 757 (6th Cir. 2006), the court recognized this theory but rejected its application to the plaintiff because he did not plead that the gender non-conformity essential to his claim was observable by his co-workers in the workplace:

[W]e do not suggest that Vickers' claim fails merely because he has been classified by his co-workers and supervisor, rightly or wrongly, as a homosexual. Rather, his claim fails because Vickers has failed to allege that he did not conform to traditional gender stereotypes in any observable way at work. Thus, he does not allege a claim of sex stereotyping.

Id. at 764; *cf. Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004)

(approving gender stereotyping sex discrimination theory in transgender context). The *Vickers* court expressly distinguished cases with facts similar to Mr. Prowel's that are based on discrimination or harassment targeting an employee's gender-atypical mannerisms or appearance and noted that such claims are actionable:

By contrast, the gender non-conforming behavior which Vickers claims supports his theory of sex stereotyping is not behavior observed at work or affecting his job performance. Vickers has made no argument that his appearance or mannerisms on the job were perceived as gender non-conforming in some way and provided the basis for the harassment he experienced. Rather, the harassment of which Vickers complains is more properly viewed as harassment based on Vickers' perceived homosexuality, rather than based on gender non-conformity.

See Vickers, 453 F.3d at 763.

This theory of sex stereotyping had been successfully applied in prior gender stereotyping decisions of the district courts in the Sixth Circuit. For example, in *Rhea v. Dollar Tree Stores, Inc.*, 395 F. Supp. 2d 696 (W.D. Tenn. 2005), plaintiffs, two male Dollar Tree employees, survived a motion for summary judgment after the court determined that they were discriminated against because they did not conform to male gender stereotypes. *Id.* at 705. The court considered evidence of the manager's derogatory remarks about the plaintiffs' non-gender conforming appearance and behavior, his comments that Mr. Rhea looked more like a man after he cut his shoulder-length hair, his description of the plaintiffs as "half and half. They're actually guys, but..." and his statement that one of the plaintiffs "was afraid of breaking a nail when lifting boxes." *Id.* at 700. This evidence, containing both gender stereotypes and derisive references to the plaintiffs' sexual orientation, sustained a Title VII sex discrimination claim.

Likewise, in *Doe by Doe v. City of Belleville*, 119 F.3d 563 (7th Cir. 1997), *vacated and remanded on other grounds*, 523 U.S. 1001 (1998), two sixteen-year-old brothers brought claims for sex discrimination and retaliation following a relentless campaign of harassment at their landscaping job. One of the brothers, H. Doe, wore an earring, and his abusers repeatedly called him a “fag” and a “queer,” asked if he was a boy or a girl, called him “bitch,” and threatened to take him “out to the woods” to sexually assault him. *See id.* at 567. Recognizing the gender-based nature of the harassment, the court noted that “[o]n any given work day, H. was faced with the prospect of having his gender questioned (‘Are you a boy or a girl?’).” *Id.* at 568.

The *Belleville* court held that, despite the plethora of insults based on the abusers’ perception of H. Doe’s sexual orientation, it was reasonable to infer that he was harassed because of his gender: “If [sex-based harassment] cannot be inferred from the sexual character of the harassment itself, it can be inferred from the harassers’ evident belief that in wearing an earring, H. Doe did not conform to male standards.” *Id.* at 575. The court concluded that “H. Doe apparently was singled out for this abuse because the way in which he projected the sexual aspect of his personality (and by that we mean his

gender) did not conform to his co-workers' view of appropriate masculine behavior." *Id.* at 580.

In a case involving the same type of gender stereotyping evidence that Mr. Prowel adduced, the Court of Appeals for the Ninth Circuit upheld a sex discrimination claim in *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864 (9th Cir. 2001). The *Nichols* record contained evidence that the defendant restaurant's employees abused the male plaintiff for behaving like a woman, attacked him for walking and carrying his tray like a woman, and baited him for not having sexual intercourse with a waitress with whom he was friendly. *See id.* at 874. In short, the plaintiff's male co-workers and supervisor "repeatedly reminded [him] that he did not conform to their gender-based stereotypes, referring to him as 'she' and 'her.' And, the most vulgar name-calling directed at [the plaintiff] was cast in female terms." *Id.* This evidentiary record, indistinguishable from the proof in the present case, was sufficient to sustain a sex discrimination claim under Title VII.³

Lower courts in the Ninth Circuit have followed *Nichols* in sustaining gender stereotyping claims where evidence of gender non-conformity is

³ *See also Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1063 (9th Cir. 2002) (*en banc*) (reversing summary judgment for defendant and recognizing vitality of gender stereotyping sex discrimination theory). The *en banc* court affirmed that "sexual orientation is irrelevant for purposes of Title VII. It neither provides nor precludes a cause of action for sexual harassment." *Id.*

mixed with evidence of anti-gay or anti-lesbian animus. In *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212 (D. Or. 2002), Ms. Heller's claim survived a motion for summary judgment after the court found that her gender-atypical behavior did not conform to her employer's expectations of how women should act and, in fact, led to her discharge. The court determined that "a jury could find that [her employer] Cagle repeatedly harassed (and ultimately discharged) Heller because Heller did not conform to Cagle's stereotype of how a woman ought to behave." *Id.* at 1224. Similarly, in the unreported case of *Fischer v. City of Portland*, No. CV 02-1728, 2004 U.S. Dist. LEXIS 20453 (D. Or. Sept. 27, 2004), the district court refused to grant the employer's motion for summary judgment in a hostile environment sex discrimination case in light of evidence of gender-stereotyping, including co-workers' taunts that the plaintiff had a male haircut, wore a shirt that "looks like something her father would wear," and wore men's shoes. *Id.* at *8.

The Court of Appeals for the Eighth Circuit also has suggested that evidence of sexual orientation discrimination will not doom a properly supported claim for gender discrimination. In *Schmedding v. Tnemec Co.*, 187 F.3d 862, 865 (8th Cir. 1999), the court of appeals reversed the district court's dismissal of a Title VII sexual harassment action initially framed as

discrimination based on “perceived sexual orientation.” While not styled as a gender stereotyping case, on appeal Mr. Schmedding contended that his claim arose from his co-workers’ campaign to “debase his masculinity.” *See id.* at 865. The appeals court concluded that the record contained enough evidence of gender-based animus to preclude summary judgment, despite the evidence of intolerance against gay employees. *Id.* at 864; *cf.*

Montgomery v. Indep. Sch. Dist., 109 F. Supp. 2d 1081, 1092-93 (D. Minn. 2000) (sustaining plaintiff’s Title IX gender stereotyping sex discrimination claim where record also contained evidence of sexual orientation discrimination); *Theno v. Tonganoxie Unified Sch. Dist.*, 394 F. Supp. 2d 1299, 1307 (D. Kan. 2005) (sustaining Title IX gender stereotyping sexual harassment claim where record also included evidence of sexual orientation discrimination).

Notably, courts that have rejected claims like Mr. Prowel’s post-*Price Waterhouse* and *Oncale* invariably have done so not because they have concluded that Title VII imposes a *per se* bar on gender stereotyping claims by homosexual plaintiffs, or on claims involving mixed motives of sex discrimination and sexual orientation discrimination, but because the plaintiff either failed to plead or preserve a sex discrimination claim or failed to present any evidence of gender stereotyping in the workplace. For

example, in *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), the Court of Appeals for the Second Circuit upheld the dismissal of the plaintiff's complaint, which alleged only sexual orientation discrimination. While finding the plaintiff's gender stereotyping theory "more substantial" than his other claims, the court refused to reach its merits because it was improperly pled, and because the record was devoid of evidence of gender stereotyping:

We do not have sufficient allegations before us to decide Simonton's claims based on stereotyping because we have no basis in the record to surmise that Simonton behaved in a stereotypically feminine manner and that the harassment he endured was, in fact, based on his non-conformity with gender norms instead of his sexual orientation.

Id. at 38. Importantly, the court explicitly left the door open for a properly pled and supported stereotyping claim. *Id.*; see also *Bianchi*, 183 F. Supp. 2d at 735. Likewise, in *Vickers*, the Court of Appeals for the Sixth Circuit refused to sustain plaintiff's gender stereotyping sex discrimination claim because of a lack of proof that his gender non-conformity was visibly displayed to his co-workers. See *Vickers*, 453 F.3d 757; see also *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005) (dismissing claims in absence of evidence that harassment or discrimination was due to plaintiff's gender non-conforming appearance or behavior in her admittedly unconventional workplace where few gender norms prevailed).

Even in rejecting unsuccessful gender stereotyping sex discrimination claims, several courts have taken care to point out that the claim might have been sustained had it been properly pled and supported with sufficient evidence. *See, e.g., Bianchi*, 183 F. Supp. 2d at 735; *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005) (noting that gender stereotyping theory offers alternative to the three evidentiary methods listed in *Oncale* for a plaintiff to establish that same-sex harassment constitutes discrimination because of sex).

Thus, contrary to the district court's implication that decisional law from other circuits would preclude a sex discrimination claim involving gender stereotyping where the evidence also reveals animosity toward the plaintiff's sexual orientation, *see* App. at 7 n.2, the majority view is quite the opposite.

The analytical error into which the district court fell in this case was in disregarding ample evidence of gender stereotyping by labeling it as non-actionable sexual orientation discrimination.⁴ The Sixth Circuit detected

⁴ In this respect, the district court worked its own gender stereotyping. It presumed that male effeminacy signals homosexuality. This presumption ignored the reality that “not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine.” *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000). Indeed, our modern understanding of gender – as opposed to sex (in terms of anatomy) or sexual orientation (in terms of the object of one's romantic desire) – leaves room

this error in a Title VII case involving a gender-atypical transsexual plaintiff, noting that the same analytical misstep can arise in cases involving homosexual plaintiffs:

Discrimination against the transsexual is then found not to be discrimination “because of . . . sex,” but rather, discrimination against the plaintiff’s unprotected status or mode of self-identification. In other words, these courts superimpose classifications such as “transsexual” on a plaintiff, and then legitimize discrimination based on the plaintiff’s gender non-conformity by formalizing the non-conformity into an ostensibly unprotected classification.

Smith v. City of Salem, 378 F.3d 566, 574 (6th Cir. 2004). The court concluded that “[s]uch analyses cannot be reconciled with *Price Waterhouse*, which does not make Title VII protection against sex stereotyping conditional or provide any reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the

for limitless variety in dress, hairstyle, speaking voice, and mannerisms that defies a binary approach to sex and sexuality – i.e., male versus female, gay versus straight. “We have to come to realize that the categories of sex, gender, and orientation do not always come together in neat packages. Not only are they not as binary as we might once have thought, they can in fact be disaggregated.” 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, 14, 15-16 (1995). Harassers punish all variety of gender non-conforming behaviors. But under the district court’s analysis, harassment defining these behaviors as either “masculine” or “feminine” is permissible as long as the target is homosexual.

person is a transsexual.” *See id.* at 574-75. This conclusion applies with equal force when the plaintiff is a lesbian or a gay man.

By strenuously trying to avoid “bootstrapping” sexual orientation claims into Title VII, the district court essentially carved out an exception from this Court’s mixed-motive jurisprudence for cases involving both gender stereotyping sex discrimination and sexual orientation discrimination. Yet, it is precisely this class of cases where the evidence of motive may be mixed: “It is not at all uncommon for sexual harassment and other manifestations of sex discrimination to be accompanied by homophobic epithets.”

Belleville, 119 F.3d at 593; *see also Centola*, 183 F. Supp. 2d at 409-10 (noting that sex discrimination and hatred of lesbian or gay people can co-exist in same workplace and in same evidentiary record).

Dismissing sex discrimination claims under Title VII that have “too much” evidence of sexual orientation discrimination is particularly problematic for plaintiffs in those jurisdictions in which employment discrimination on the basis of sexual orientation is illegal under state law.⁵ These plaintiffs would face an untenable choice: they would have to produce plentiful factual proof of sexual orientation

⁵ *See, e.g.*, N.J. Stat. Ann. § 10:5-4 (2007) (prohibiting employment discrimination on the basis of “affectional or sexual orientation”).

discrimination to support their pendent state claim, but by doing so, they would risk the dismissal of their action if their Title VII sex discrimination claim is consequently characterized as a sexual orientation claim in disguise.

III. IF AFFIRMED, THE REASONING OF THE DISTRICT COURT WILL PARTICULARLY HARM WOMEN IN NONTRADITIONAL EMPLOYMENT.

As outlined in Part I, *supra*, stereotypes of men’s and women’s preferences, needs, and abilities have historically segregated “men’s work” from “women’s work.”⁶ Despite the gains in the forty years since Title VII’s enactment, sex segregation of the workplace remains a primary cause of women’s second-class economic status. Consequently, enabling women to integrate high-paying, traditionally male-dominated fields, whether blue collar or professional, is essential to bridging the gender wage gap. And because women face intense hostility for stepping outside their historically assigned gender roles, the continuing vitality of the sex stereotype discrimination model is central to their equality.

⁶ As one commentator has explained, “With the world neatly compartmentalized into gendered people and jobs, sex segregation becomes easy to explain. Women bring to the workplace their preexisting preferences for traditionally female work, and employers merely honor those preferences.” Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 Harv. L. Rev. 1749, 1805 (1990).

Although they comprise approximately half the workforce, women lag far behind men in virtually every measure of workplace success. Women still earn, on average, between 70 and 80 cents on every dollar earned by men, and that wage gap persists at every level of the educational and earnings spectrum. *See, e.g.*, Bureau of Labor Statistics, U.S. Dep't of Labor, *Highlights of Women's Earnings in 2003*, at 29 tbl. 12, 31 tbl. 14 (Sept. 2004); Daniel H. Weinberg, U.S. Dep't of Commerce, Census 2000 Special Reports, *Evidence from Census 2000 About Earnings by Detailed Occupation for Men and Women* 7 (May 2004). Women also remain concentrated in a small universe of fields. Sixty-four percent of women work in sales, office, and service jobs. Women's Bureau, U.S. Dep't of Labor, *Women in the Labor Force in 2006* (2006). In 2006, the top five occupations held by women were secretary (96.9% women), registered nurse (91.3%), cashier (74.8%), elementary and middle school teacher (82.2%), and retail salesperson (51.4%). Women's Bureau, U.S. Dep't of Labor, *20 Leading Occupations of Employed Women: 2006 Annual Averages* (2006). These jobs pay an average of \$600 per week, substantially less than fields dominated by men. *Id.* Indeed, fields like the construction trades pay up to 20-30% more an hour than traditionally female jobs. Vicky Lowell and Cynthia Negrey, Institute for Women's Policy Research, *Promoting*

Women's Workforce Security: Findings from IWPR Research on Unemployment Insurance and Job Training 12 (2001) (internal citation omitted). Additionally, these jobs typically come with benefits not available in female-dominated jobs, such as pension plans and health care coverage. *Id.* at 13.

Yet in the well-paying blue-collar trades and at high levels of the white-collar professions, women's numbers are dwarfed by men's. For instance, women comprise just 3.7% of construction laborers, 2.2% of structural iron and steel workers, and 1.9% of electricians. U.S. Dep't of Labor, Women's Bureau, *Quick Facts on Non-Traditional Occupations for Women* (2006). In the professions, women comprise just 15% of the corporate officer ranks. Catalyst, *2007 Catalyst Census of Women Corporate Officers and Top Earners of the Fortune 500* (2007). Moreover, just 2% of CEOs are women. *The Double-Bind Dilemma for Women in Leadership: Damned if You Do, Doomed if You Don't* 3 (2007).⁷

Therefore, women's economic security depends upon their ability to find employment outside traditionally feminine fields. Not surprisingly,

⁷ These low numbers qualify these positions as "nontraditional" jobs for women. The U.S. Department of Labor characterizes as a "nontraditional" job any one in which women comprise 25% or fewer of the total number of workers. U.S. Dep't of Labor, Women's Bureau, *Quick Facts on Non-Traditional Occupations for Women* (2006).

though, women who seek work that seems inconsistent with those stereotypes encounter a complex stew of curiosity, confusion, and hostility.

An extensive body of social science research confirms the negative reactions women seeking traditionally masculine work may expect due to colleagues' stereotypes.⁸ Women seeking leadership roles in professional fields in particular must grapple with a classic "Catch-22":

Historically, women have been perceived as less competent and competitive than are men. Therefore, when women compete against men (e.g., for employment), it may be incumbent on them to manage an atypical impression or risk losing to rivals who will be deemed better qualified. . . . Unfortunately, women who behave confidently and assertively are not as well received as men who engage in the same behaviors.

Laurie A. Rudman, *Self-Promotion as a Risk Factor for Women: The Costs and Benefits of Counterstereotypical Impression Management*, 74 *J. of Personality and Soc. Psychol.* 629, 629 (1998). Even after a woman manages to obtain a leadership position, her success in that role is further compromised by a new kind of double-bind:

When women act in gender-consistent ways – that is, in a

⁸ “Once an individual is categorized as belonging to a gender, the stereotypes of that gender may quickly come to the perceiver’s mind, a process known as stereotype activation. Once stereotypes are activated, they are then available for the perceiver to apply in her thinking about and evaluation of the target person.” Eugene Borgida, Ph.D., Corrie Hunt, and Anita Kim, *On the Use of Gender Stereotyping Research in Sex Discrimination Litigation*, 13 *J. Law and Policy* 613, 617 (2005).

cooperative, relationship-focused manner – they are perceived as “too soft” a leader. They are perceived to “fit in” as women, but not as leaders. When women act in gender inconsistent ways – that is, when they act authoritatively, show ambition, and focus on the task – they are viewed as “too tough.” In this case, they are often accused of “acting like a man” and of being overly aggressive. They might be acting leader-like, but not “lady-like.” Based on these extreme perceptions, women face trade-offs that men in the same situation do not experience.

Catalyst, *supra*, at 13. *See also* Borgida, *et al.*, *supra* note 8, at 617-18;

Moreover, research confirms that the double-bind persists even when seeking leadership roles in stereotypically female jobs. *Id.* at 623.

The negative perceptions stemming from gender role dissonance are reflected in job benefits such as work assignments, *see, e.g., Zorn v. Helene Curtis, Inc.*, 903 F. Supp. 1226 (N.D. Ill. 1995) (management level woman asked to perform stereotypically female tasks such as cleaning up after meetings and cleaning supply closets was harassed because of sex), or are played out as harassment. *See, e.g., Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900, 902 (11th Cir. 1988) (only woman sales representative at car dealership told by co-workers, “[w]e’re going to take your pants off and put a skirt on you,” and “we’re going to take your clothes off and see if you are real”). Women seeking entry into the male-dominated trades such as construction face barriers distinct from those faced by professional women. The blue-collar work environment is typified by intense – even violent –

harassment. This harassment is a potent weapon wielded by male co-workers to express their distaste for a woman's invasion of their hyper-masculine domain. As one commentator has explained:

By driving women out of nontraditional jobs, harassment reinforces the idea that women are inferior workers who cannot meet the demands of a "man's job." More subtly, for women who stay in nontraditional jobs, harassment exaggerates gender differences to remind them that they are women who are "out of place" in a man's workworld. By labeling the women as "freaks" or "deviants," and simultaneously pressuring them to conform to the dominant culture, men mediate the contradiction posed by the presence of women doing "masculine" work.

Schultz, *supra* note 6, at 1837.⁹

These tactics are vividly illustrated by the Title VII litigation brought

⁹ A full discussion of the kinds of harassment in nontraditional jobs is beyond the scope of this brief. That conduct includes sabotage of tools, failure to train or assist with dangerous tasks, explicit sexual talk and behavior, demands for sexual favors, pornography, and even physical assault. *See, e.g., Waltman v. International Paper Co.*, 875 F.2d 468, 471 (5th Cir. 1989) (over three years of employment, female mill worker received more than thirty pornographic notes on her locker); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1012 (8th Cir. 1988) (male co-workers urinated in plaintiff's water bottle and gas tank of her truck, asked plaintiff if she "wanted to fuck," cornered plaintiff and other women and touched them sexually); *Hansel v. Pub. Serv. Co.*, 778 F. Supp. 1126, 1128, 1129 (D. Colo. 1991) (co-workers of female power plant worker filled her work gloves with bathroom cleaner, lime powder, and sunflower seeds; hit her "over the head with a crescent wrench with such force that her helmet was dented"; and showed her a noose and suggested she kill herself). Although such conduct could be interpreted as communicating the belief that women's "proper" role is as a sex object for men – a form of stereotyping in and of itself – for purposes of this brief, we examine the ways in which male co-workers explicitly label women in nontraditional fields as "deviant" or otherwise gender non-conforming.

by tradeswomen. *See, e.g., Petrosino v. Bell Atlantic*, 385 F.3d 210, 215 (2d Cir. 2004) (supervisor of female technician “dismiss[ed] her job concerns as attributable to her menstrual cycle,” while a manager “told her as an individual that she was ‘too thin-skinned’ to belong in her work assignment” and stated that “women as a group were too ‘simple,’ ‘too sensitive,’ and ‘too damn thin-skinned’ to work at the garage”); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1475 (3d Cir. 1990) (when female police officer requested a transfer to another work location, supervisor told her, “You women don’t know what you want. Why don’t you stay in one place like a man?”); *Waltman v. International Paper Co.*, 875 F.2d 468, 471 (5th Cir. 1989) (male co-worker of female factory worker threatened to “cut off [her] breast and shove it down [her] throat”); *Badlam v. Reynolds Metals Co.*, 46 F. Supp. 2d 187, 195-96 (N.D.N.Y. 1999) (female plant worker “advis[ed] . . . to stay home and get pregnant and barefoot like most woman [sic] do, instead of coming into the workplace”); *Hellebusch v. City of Wentzville*, No. 4:95CV1533 JCH, 1996 U.S. Dist. LEXIS 20828, at *5 (E.D. Mo. Nov. 21, 1996) (holding that female employee in police department who was told that she should be “at home baking cookies and taking care of her children” was harassed because of sex); *Danna v. New York Tel. Co.*, 752 F. Supp. 594 (S.D.N.Y. 1990) (female repair technician

advised to be more “feminine and cutesy”); *Sanchez v. City of Miami Beach*, 720 F. Supp. 974 (S.D. Fla. 1989) (female police officer bodybuilder harassed for failing to conform to gender-based stereotypes of expected female appearance).

“Lesbian-baiting” also is typical of the harassment experienced by women in male-dominated jobs. *See, e.g., Richardson v. City of Albuquerque*, 857 F.2d 727, 729 (10th Cir. 1988) (co-workers of female police cadet “accused her of having sexual problems with her husband and having a sexual preference for other women”); *Badlam*, 46 F. Supp. 2d at 195 (male co-workers “constantly” referred to woman plant worker as “dyke,” and wrote on mirror in the workplace, “What is Edna, a dyke, half man, half woman, prostitute”); *Morris v. American Nat’l Can Corp.*, 730 F. Supp. 1489, 1491, 1500 (E.D. Mo. 1989) (machinist received a “large replica of an erect penis . . . , along with a note saying: ‘Hey Jake – Heard ya got one in your pants the same size. I never knew, think we could get together – Your Lesbian Friend’”); *see also* Wendy Pollack, *Sexual Harassment: Women’s Experience vs. Legal Definitions*, 13 Harv. Women’s L.J. 35, 78 n.178 (1990) (“[T]hey are repeatedly asked out since ‘you just need a real man,’ or quizzed about their boyfriends.”).

In sum, women in nontraditional jobs inspire exceptionally intense

hostility when they attempt to enter a “man’s world.” These reactions often reflect a perception that any woman wanting or seeking such jobs is less than a “real” woman, and may include homophobic epithets. If the reasoning of the district court in this case is upheld, however, employers who seek to lock women out of these well-paying fields could evade Title VII liability through the simple expedient of lacing their gender discrimination with enough anti-lesbian slurs. This perverse result, counter to the central purpose of Title VII’s prohibition against discrimination “because of sex” and in clear contradiction to this Court’s settled precedent, must be rejected.

CONCLUSION

For these reasons, as well as those set forth in the Brief for Appellant, the judgment of the district court should be reversed.

February 14, 2008

Respectfully submitted,

/s/Susan Frietsche

Susan Frietsche
Tatyana Margolin
WOMEN'S LAW PROJECT
425 Sixth Avenue, Suite 1860
Pittsburgh, PA 15219
(412) 227-0301

Gillian Thomas
Senior Staff Attorney
LEGAL MOMENTUM
395 Hudson Street, 5th Floor
New York, NY 10014
(212) 413-7534

Counsel for *Amici Curiae*

APPENDIX
INDIVIDUAL STATEMENTS OF INTEREST
OF AMICI CURIAE

WOMEN’S LAW PROJECT

The Women’s Law Project (WLP) is a non-profit, feminist legal advocacy organization with offices in Philadelphia and Pittsburgh. Founded in 1974, WLP works to abolish discrimination and injustice and to advance the legal and economic status of women and their families through litigation, public education, and individual counseling. During the past nineteen years of its existence, WLP’s activities have included extensive work in the area of sex discrimination in employment.

LEGAL MOMENTUM

Legal Momentum advances the rights of women and girls by using the power of the law and creating innovative public policy. Legal Momentum works to promote recruitment and retention of women in “nontraditional” jobs, such as construction and firefighting, by advocating in the courts and with federal, state, and local policymakers, as well as with unions and private business. Legal Momentum has litigated cases to secure full enforcement of laws prohibiting sex discrimination, including *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and has participated as *amicus curiae* on leading cases in this area, including *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), and *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). Legal Momentum is deeply concerned with assuring women the most expansive protection from employment discrimination based on gender stereotypes. Women in historically male-dominated jobs are especially vulnerable to such discrimination, due to the stereotype that women cannot, and should not, perform such work.

AMERICAN MEDICAL WOMEN’S ASSOCIATION

The American Medical Women’s Association (AMWA) is an organization of women physicians, medical students and other persons dedicated to serving as the unique voice for women’s health and the advancement of women in medicine. The AMA functions at the local, national, and international levels to advance women in medicine and improve women’s health. The organization was founded by Dr. Bertha VanHoosen in 1915 in Chicago, at a time when women physicians were an under-represented

minority. As women in medicine increase in numbers, new problems and issues arise that were not anticipated. AMWA has been addressing these issues for 93 years.

CALIFORNIA WOMEN’S LAW CENTER

Since its founding in 1989, the California Women’s Law Center (CWLC) has served as a unique advocate in California, working in collaboration with others to protect, secure and advance the comprehensive civil rights of women and girls. CWLC prides itself on forging novel approaches to the problems that confront women and girls, proposing unique strategies to implement those approaches, and recasting issues in new terms. CWLC programs are designed to empower individuals to use the law that governs their rights and to address the legal issues that perpetuate the growing poverty among women and children.

CENTER FOR ADVANCEMENT OF PUBLIC POLICY

The Center for Advancement of Public Policy (CAPP) promotes women’s equity in the workplace, in political participation, in family relationships, and throughout society, by formulating policy options that are responsive to the economic and social realities faced by contemporary women. Founded in 1991, it serves as an independent and nonpartisan resource to members of Congress, the press, advocacy organizations, community leaders, employee groups, corporate managers, and consumers. The Center has been working with the National Council of Women’s Organizations to combat discrimination of all kinds in the workplace.

CHICAGO WOMEN IN THE TRADES

Chicago Women in the Trades (CWIT) was founded by tradeswomen in 1981 to improve women’s access to and retention in skilled construction careers. More than 25 years later, women still comprise just 3% of construction workers in Cook County, due in large part to gender stereotyping. Those women brave enough to step outside accepted gender roles and join the ranks of the construction workforce will almost certainly encounter some form of discrimination or sexual harassment at some point in their careers. Inappropriate sexual conduct is an expression of hostility toward women in this male-dominated industry, and anti-lesbian slurs are a common means of making women feel unwelcome and isolated. CWIT urges the court to preserve the rights of women in non-traditional occupations to pursue legal remedies for discrimination based on gender stereotyping.

CLEARINGHOUSE ON WOMEN'S ISSUES

The Clearinghouse on Women's Issues (CWI) is a member of the National Council of Women's Organizations. It is concerned with the elimination of gender bias and discrimination in all areas of society, the protection of human and civil rights, and equality in the workplace. CWI presents expert speakers on current topics which impact the lives of women, particularly public policies that affect women economically, educationally, medically and legally.

EQUAL RIGHTS ADVOCATES

Equal Rights Advocates (ERA) has led the legal fight for women's equality for more than 30 years. Since 1974, ERA's mission has been to protect and secure equal rights and economic opportunities for women and girls through litigation and advocacy. It works to eradicate illegal discriminatory practices that deny women advancement opportunities, equal compensation, and access to certain occupations, and demands that employers provide women with a work environment that is free of sexual harassment and in compliance with health and safety laws. ERA also enforces family and medical leave and pregnancy protection laws, and is active in the effort to establish paid family and medical leave.

GENDER PUBLIC ADVOCACY COALITION

The Gender Public Advocacy Coalition (GenderPAC) works to create classrooms and communities that are safe for everyone to learn, grow, and succeed, whether or not they meet expectations for masculinity and femininity. As a human rights organization, GenderPAC also promotes an understanding of the connection between discrimination based on gender stereotypes and sex, sexual orientation, age, race, and class.

HARD HATTED WOMEN

The mission of Hard Hatted Women is to empower women to achieve economic independence by creating workplace diversity in trade and technical careers. It encourages and prepares women for nontraditional employment through outreach, education, training, support, and job placement assistance; advocates for and implements systems which promote equity in recruitment, training and hiring; works to eliminate harassment and discrimination against workers on the basis of gender, race, sexual orientation or age; creates equitable work environments for women and minorities through education, training and resources; and advocates for

systemic change on issues which impact the region's economy on workforce development issues and economic access on local, state, and regional levels.

INTERNATIONAL ASSOCIATION OF WOMEN IN FIRE AND EMERGENCY SERVICES

The International Association of Women in Fire and Emergency Services (iAWFES) promotes and facilitates the participation of women in the fire service by providing education, a support network and mentoring. iAWFES is dedicated to improving the fire service through the involvement and success of women. It advocates for constructive changes within the fire service by establishing coalitions with other fire service groups, provides a voice for women on national policy-making bodies, and provides assistance for individual women in dealing with institutional barriers.

NATIONAL ASSOCIATION OF WOMEN LAWYERS

The National Association of Women Lawyers (NAWL), a one-hundred-year-old bar association headquartered in Chicago, was the first and is the oldest national women's bar association in the United States. NAWL's members include individuals and professional associations. NAWL works to support and advance the interests of women in and under the law and works towards the social, political, and professional empowerment of women. NAWL members work to end discrimination and violence against women and to prevent the erosion of hard-fought gains.

NATIONAL COUNCIL OF JEWISH WOMEN and NATIONAL COUNCIL OF JEWISH WOMEN, PENNSYLVANIA

The National Council of Jewish Women (NCJW) is a volunteer organization, inspired by Jewish values, that works through a program of research, education, advocacy and community service to improve the quality of life for women, children and families and strives to ensure individual rights and freedoms for all. Founded in 1893, NCJW has 100,000 members in over 500 communities around the country. NCJW believes that individual liberties and rights guaranteed by the Constitution are keystones of a free and pluralistic society and must be protected.

NATIONAL ORGANIZATION FOR WOMEN

National Organization for Women (NOW) is the largest, most comprehensive feminist advocacy group in the United States. It has over 500,000 members, both women and men, in more than 450 chapters in all 50 states and the District of Columbia. Its purpose is to take action to bring

women into full participation in society — sharing equal rights, responsibilities and opportunities with men, while living free from discrimination.

PENNSYLVANIA NOW, INC.

Pennsylvania NOW, Inc., was founded in 1971 as a state chapter of the National Organization for Women. It is a grassroots, non-profit, volunteer organization with over 13,000 contributing members and about 20 chapters statewide. NOW members are women and men, young and old, of all colors, classes, and backgrounds, working together to bring about equal rights for all women.

NATIONAL WOMEN’S LAW CENTER

National Women’s Law Center (NWLC) is a non-profit legal advocacy organization dedicated to the advancement and protection of women’s rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity in the workplace through full enforcement of Title VII of the Civil Rights Act of 1964, as amended, and other civil rights statutes, and through the implementation of effective remedies for long-standing discrimination against women and minorities.

NORTHWEST WOMEN’S LAW CENTER

The Northwest Women’s Law Center (NWWLC) is a regional non-profit public interest organization that works to advance the legal rights of all women through litigation, legislation, education and the provision of legal information and referral services. Since its founding in 1978, NWWLC has been dedicated to protecting and ensuring women’s legal rights, including the right to equality in the workplace. Throughout its history, NWWLC has been involved in both litigation and legislation aimed at ending all forms of discrimination against women. Toward that end, NWWLC has participated as counsel and as *amicus curiae* in cases throughout the Northwest and the country.

SOUTHWEST WOMEN’S LAW CENTER

The Southwest Women’s Law Center is a nonprofit women’s legal advocacy organization based in Albuquerque, New Mexico. Its mission is to create the opportunity for women to realize their full economic and personal potential by eliminating gender discrimination, helping to lift women and their families out of poverty, and ensuring that women have control over

their reproductive lives. The Southwest Women’s Law Center is committed to eliminating gender discrimination in all of its forms. Traditional gender stereotypes regarding the “proper” role for men and women lead too often to a form of bigotry that labels “homosexual” anyone who does not fit that traditional mode. Such stereotypes and attitudes have been used to discriminate against women, regardless of their sexual orientation.

WIDER OPPORTUNITIES FOR WOMEN

Wider Opportunities for Women (WOW) is a non-profit organization that was founded in 1964 to help advance economic opportunities for women and girls. Since then, WOW has evolved into an organization that both helps individual women and girls locally and that works on a state level with partners in 35 states as well as on a national level. WOW has played a leadership role in promoting the concept of non-traditional occupations for women and was instrumental in informing the passage of key federal programs and funding to support collaborations to implement these new federal policies in the education and workforce system.

WOMEN AND GIRLS FOUNDATION OF SOUTHWEST PENNSYLVANIA

The Women and Girls Foundation of Southwest Pennsylvania (WGF) is an independent community-based foundation serving eleven counties in southwest Pennsylvania. Its mission is to achieve equity for women and girls in the region. Through a combination of public advocacy, coalition building and grantmaking, WGF seeds, supports, and strengthens women’s and girls’ efforts to achieve social and economic justice in southwest Pennsylvania. It gives priority to the following outcomes: social and systemic change; economic justice; and girls’ futures. It aims to achieve equal political representation, economic and civic participation and leadership development in all arenas.

CERTIFICATION OF COMPLIANCE WITH RULE 32A

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,714 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman font size 14.

/s/Susan Frietsche
WOMEN'S LAW PROJECT
425 Sixth Avenue, Suite 1860
Pittsburgh, PA 15219
(412) 227-0301

CERTIFICATION OF BAR MEMBERSHIP

I certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

/s/Susan Frietsche
WOMEN'S LAW PROJECT
425 Sixth Avenue, Suite 1860
Pittsburgh, PA 15219
(412) 227-0301

CERTIFICATION OF TEXT OF E-BRIEF

I certify that the text of the E-Brief and the text of the hard copies of the Brief *Amici Curiae* of Twenty-One Organizations Committed to Equality for Working Women are identical.

/s/Susan Frietsche
WOMEN'S LAW PROJECT
425 Sixth Avenue, Suite 1860
Pittsburgh, PA 15219
(412) 227-0301

CERTIFICATION OF VIRUS CHECK

I certify that a virus check was performed on the PDF file of the Brief *Amici Curiae* using Symantec Anti-Virus software.

/s/Susan Frietsche
WOMEN'S LAW PROJECT
425 Sixth Avenue, Suite 1860
Pittsburgh, PA 15219
(412) 227-0301

CERTIFICATE OF SERVICE

I certify that on this 14th day of February 2008, I caused two true and correct copies of the foregoing Brief *Amici Curiae* to be served by first-class mail, postage prepaid, on counsel for the parties as follows:

Katie R. Eyre, Esq.
Michael J. Salmanson, Esq.
Salmanson Goldshaw, PC
Two Penn Center, Suite 1230
1500 J.F.K. Blvd.
Philadelphia, PA 19102

Counsel for Appellant

Kurt A. Miller, Esq.
Thorp Reed & Armstrong, LLP
One Oxford Centre
301 Grant Street, 14th Floor
Pittsburgh, PA 15219-1425

Counsel for Appellee

/s/Susan Frietsche
Counsel for Amici Curiae