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Comment: Queer Womyn of Color and Employment Discrimination Law in Wisconsin - Does Wisconsin Law Do Enough to Lift Anxiety?

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QUEER WOMYN OF COLOR AND EMPLOYMENT DISCRIMINATION LAW IN WISCONSIN—DOES WISCONSIN LAW DO ENOUGH TO LIFT ANXIETY?

Amber Lara*

America’s current leadership appears to actively seek out ways to isolate and oppress those who do not identify as cis-gender white heterosexual males. The purpose of this comment is to help readers understand the issues queer womyn of color face interacting with society on a daily basis. This comment will outline the harmful expectations of assimilation and how failure to assimilate may make these womyn targets in their work environments. This comment will also compare the handling of employment discrimination under Title VII and Wisconsin law and determine whether Wisconsin law in practice actually affords queer womyn of color more protection than Title VII. The comment concludes suggesting two ways to improve Wisconsin law and hopefully afford queer womyn of color the same protections America’s current leadership actively bestows on its chosen group.

* J.D. Candidate 2018, Marquette University Law School. Thank Yous: To my parents, thank you for your unconditional love and support. To Professor Secunda, thank you for helping me realize my love and potential for the wonderful world of Labor and Employment. To Jordyn: there are not enough words to thank you for all of your sacrifice, patience, and support. I would like to dedicate this to all of my fellow queer womyn of color—You are not here to blend into the wall. This is for your courage to live authentically in a society destined to break you.

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I. INTRODUCTION

The focus of this comment is to highlight specific employment discrimination protections, or lack thereof, applicable to queer womyn of color. In order to accurately assess this, the comment will look at the protections provided under Title VII and the Wisconsin Fair Employment Act and address, despite Wisconsin’s broader protections, why queer womyn of color are ill-equipped to obtain protection under Wisconsin law.

The comment will begin by discussing the unique struggles queer womyn of color face on a daily basis and in particular, relate them to expected behavior in an employment environment. The comment will then introduce three different wholly fictional queer womyn of color and potential instances of employment discrimination. Next, the comment will divulge into a discussion of Title VII and the Wisconsin Fair Employment Act and then point out how these two laws are distinct. Finally, the comment will conclude discussing a couple of ways to try and improve the Wisconsin Fair Employment Act so that it might accomplish in practice what in theory it was set out to do, which is to discourage employment discrimination.

II. BACKGROUND

“The most disrespected woman in America is the black woman. The most un-protected person in America is the black woman. The most neglected person in America is the black woman.”


1. Throughout this comment I will use the spelling of “womyn” solely because of my own personal preference. The replacement of the “a” with a “y” stems from feminist ideology that by rejecting “woman” which refers to “of a man” and replacing it with the idea that a womyn is capable and deserving of having an independent identity and are not defined by relationships to men. WOMYN’S CENTRE, Why the Y?, https://womynscentre.wordpress.com/why-the-y/ [https://perma.cc/28VD-TRXT] (last visited Jan. 29, 2017). Although historically looking specifically at Michigan Womyn’s Festival that feminists who used the word “womyn” have been transphobic and intentionally expel trans people from womyn spaces citing wanted only “women-born women.” Anna Merlan, Trans-Excluding Michigan Womyn’s Music Festival to End this Year, Jezebel, (Apr. 22, 2015), http://jezebel.com/trans-excluding-michigan-womyns-music-festival-to-end-t-1699412910 [https://perma.cc/2HAU-VSMR]. I wish to separate myself from those ideas and state that I am firmly supportive and inclusive of all identities, including those who identify as trans.
Black Muslims and those interested in converting to the Nation of Islam, the theme of this message has retained its significance to this day. Author, bell hooks, an influential contributor to the empowerment of Black womyn, has stated, "[b]lack women ha[ve] been asked to fade into the background . . . ." Womyn of color, and in particular queer womyn of color, combat unique circumstances of oppression that do not necessarily translate to any other group of womyn. As womyn, it is likely that they receive less pay than their male counterparts with the presumption to perform on par if not better than, as well as the expectation by society to have children, and to act as the primary caregiver. As people of color, a complex, oppressive, and unacknowledged history of racism plagues them and often acts as a barrier to entry for progress.

This country has an arranged marriage with racism that elevates white wealthy men while constantly suppressing populations of color and the poor. The recent election and policy implementations of a man who has rallied overwhelming support from those who subscribe to the ideologies of white supremacy and favorable tax benefits for the top one percent are proof enough that this country has no interest in initiating a divorce.

Identifying as queer also subjects individuals to circumstances and situations that heterosexuals rarely, if ever, think twice about. For example, until recently with the Supreme Court issuance of Obergefell v. Hodges\textsuperscript{9} members of the LGBTQIA\textsuperscript{10} community were unable to have their marriages legally recognized throughout the country.\textsuperscript{11} Queer womyn of color must consider all and many more of these issues as a part of their daily lives. For these womyn there is not one aspect that weighs greater than another. Separating one of these from another is impossible because it would isolate a piece of them from their very being. The best way to emphasize this is with an example:

> [W]hen I was confronted with racism only my "Black self" was affected, that my "female self" and my "lesbian self" felt safe. As a person who is Black and female and lesbian all of the time and all at the same time, I cannot always compartmentalize and distinguish either the oppression or the injury. When asked to do so I am reminded of what Audre Lorde has written: "As a Black Lesbian feminist comfortable with the many different ingredients of an identity, and a woman committed to racial and sexual freedom from oppression, I find that I am constantly being encouraged to pluck out some aspect of myself and present this as the meaningful whole, eclipsing or denying the other part of self." Too many times, I’ve been confronted with racism at meetings of lesbians, and heterosexism at meeting of Blacks. I think that the concept that one person could face both racism and heterosexism simultaneously escaped these individuals. I was, however, profoundly aware of the intersection of the oppression.\textsuperscript{12}

\textsuperscript{10} This acronym refers to the queer community as a collective: Lesbian, Gay, Bi-Sexual, Transgender, Queer or Questioning, Intersex, and Asexual. LGBTQIA RESOURCE CENTER, LGBTQIA Resource Center Glossary, https://lgbtqia.ucdavis.edu/educated/glossary.html [https://perma.cc/2B3C-J8NY].
\textsuperscript{11} Obergefell, 135 S. Ct. at 2607-08.
\textsuperscript{12} Angela D. Gilmore, \textit{It Is Better to Speak}, 6 BERKELEY WOMEN’S L.J. 74, 76 (1990) (quoting \textsc{Audre Lorde, Sister Outsider: Essays and Speeches} 120 (Crossing Press, 1984)).
Before submerging into a discussion surrounding Title VII and the Wisconsin Fair Employment and Housing Act\textsuperscript{13} it is important to take a step back and understand exactly why fair employment laws are essential for queer womyn of color to help ensure equal opportunity. Because queer womyn of color never truly “fit” into one specific place, often times these womyn are forced to assimilate in one way or another to the dominant makeup of whatever group they find themselves in at the moment.\textsuperscript{14} As pointed out by bell hooks, “[n]o other group in America has so had their identity socialized out of existence as have black women. We are rarely recognized as a group separate and distinct from black men, or as a present part of the larger group ‘women’ in this culture.”\textsuperscript{15} Although hooks’ analysis is silent on the isolation of queer womyn of color a similar conclusion can be reached for this group. Breaking down each, equally important component of a queer womyn of color’s identity will help readers to visualize the full impact of isolation and then draw the conclusion of why assimilation occurs. Spaces for womyn tend to be dominated by white womyn, spaces for people of color, particularly Black people tend to be dominated by either men or those who identify as heterosexuals.\textsuperscript{16} “When black people are talked about the focus tends to be on black men; and when women are talked about the focus tends to be on white women.”\textsuperscript{17} In these spaces any sort of queer identity is not discussed or more generally ignored altogether.\textsuperscript{18} Alternatively, spaces for queer individuals tend to be dominated by white men.\textsuperscript{19} With no space strictly earmarked for queer womyn of color in any space or situation these womyn unfortunately stand out and may often feel “othered.”\textsuperscript{20} This may endanger these

\begin{thebibliography}{9}
\bibitem{14} KIMBERLY A. YURACKO, GENDER NONCONFORMITY AND THE LAW 152 (Yale U. Press, 2016).
\bibitem{15} HOOKS, supra note 4, at 7.
\bibitem{16} BUT SOME OF US ARE BRAVE: ALL THE WOMEN ARE WHITE, ALL THE BLACKS ARE MEN: BLACK WOMEN’S STUDIES xv-xvi (Gloria T. Hull et al. eds., 1982).
\bibitem{17} HOOKS, supra note 4, at 7.
\bibitem{20} MERRIAM-WEBSTER’S DICTIONARY, Is ‘Othering’ A Real Word,
womyn because it, in fact, might make these womyn more susceptible to discrimination in certain environments.

Queer womyn of color are generally outnumbered in every space they inhabit, particularly in the workplace. In order to establish and maintain any type of cohesiveness with coworkers, supervisors, and bosses there is often a sense that queer womyn of color have to assimilate to the dominant demographics of the workplace. Some readers may strongly disagree with these statements. Please take a step back and examine your own personal privilege and read on with an open mind. Barbara Flagg, a legal scholar, summarizes in one sentence why it is typical for anyone who is not white to assimilate in order to survive; “[r]acial identity is not a central life experience for most white people, because it does not have to be.” Flagg continues, “[o]ne consequence of two centuries of discrimination and disadvantage is that whites hold a disproportionate share of business ownership and decisionmaking power within corporate structures.” Flagg’s point is particularly important for queer womyn of color, whose physical differences are instantly apparent on account of their skin color and gender norms, which instantly causes these womyn to be a target.

Because these womyn are highly aware of their differences they feel pressure to diminish these differences and do their best to blend in with their co-workers.

Race scholars ... have focused considerable attention in recent years on the racial implications of workplace “fit” requirements. They contend that while racial minorities are rarely excluded anymore from jobs because of their race per se, their inclusion in the work world often comes at a cost. The cost is assimilation to corporate culture.

https://www.merriam-webster.com/words-at-play/other-as-a-verb
[https://perma.cc/6WKP-TR42].
22. YURACKO, supra note 14, at 152.
24. Id. at 2036.
25. YURACKO, supra note 14, at 152.
demands that require workers to downplay their race and to act, even if not be, white.26

While during the course of employment this assimilation may help to propel careers, in the end, it is harmful to the individual because she does not feel comfortable enough to truly be herself in the presence of those with whom she spends forty plus hours per week. Because of this, queer womyn of color are faced with the expectation to assimilate based upon their race, sex, as well as their sexual orientation.27

In order to help the reader further visualize the circumstances facing these womyn, a few examples28 will be provided showing potential obstacles queer womyn of color could face in the course of their employment. In order for these examples to be as realistic as possible it is necessary to set a few parameters. All three womyn in each of the examples were raised in predominately black neighborhoods. Each attended predominately black colleges, are highly intelligent, live and work in Wisconsin, and are employed by a Wisconsin-based company where white heterosexuals are the dominate demographic. Throughout the remainder of the comment please keep these examples at the forefront, particularly when I discuss any sort of protections available under Federal or Wisconsin state law.

Nikki is the first example. Nikki is a “fish”29 feminine presenting womyn. Nikki is a television producer and has worked in this position for three years. Her new boss recently discovered that she identifies as queer and on a daily basis has found excuses to interact with her and has repeatedly made statements such as, “you don’t look gay.” He has also continuously attempted to set her up with men and encourages male co-workers to pursue romantic relationships with her.

26. YURACKO, supra note 14, at 152.
27. YURACKO, supra note 14, at 152.
28. By no means are these examples meant to be a perfect, accurate, or total representation of queer womyn of color within the LGBTQIA community.
29. “Fish” is terminology used by the transgender community to mean passable as noted by Janet Mock. JANET MOCK, REDEFINING REALNESS: MY PATH TO WOMANHOOD, IDENTITY, LOVE & SO MUCH MORE 115-16 (Atria Books, 2014). (“To be fish meant I could ‘pass’ as any other girl, specifically a cis woman, mirroring the concept of ‘realness ...’ Simply, ‘realness is the ability to be seen as heteronorritive, to assimilate, to not be read as other or deviate from the norm. ‘Realness’ means you are extraordinary in your embodiment of what society deems normative.”).
Riley is the second example. Riley is an androgynous presenting womyn. Riley is a highly successful code writer at a successful start-up that was recently bought out by a large tech company. Riley is the only person of color in her department and to her knowledge, the only queer identifying person. She does not often socialize with her co-workers during lunch hour or after work. She works well with others on projects but does not pursue personal relationships with anyone in the office. She does not share any interests or hobbies with her co-workers and chooses not to attend holiday parties and consistently declines co-workers’ dinner party invitations. One afternoon Riley is called into her supervisor’s office and told that she is fired. The supervisor states that Riley is not a “good fit” for the job, despite having stellar performance reviews and valuable contributions to the company’s software development.

Tasha is the third and final example. Tasha is a masculine presenting womyn, whose preferred pronouns are “she” “her” and “hers.” Tasha is a highly sought-after CPA. She recently landed a job with one of the top accounting firms in the country. Despite her excellent personality, job experience, and references the partners at the firm had some serious reservations about hiring Tasha. Tasha is often misgendered at work by her co-workers and clients. Upset with this, Tasha approaches her boss and asks that some sort of training surrounding her continued misgendering be addressed. Tasha’s boss simply tells her perhaps if she presented in a more feminine way this situation would not be happening. The next week Tasha is passed over for a promotion but was substantially more qualified than the individual who received the promotion. The individual who received the promotion is a white feminine presenting womyn.

Under Title VII, queer womyn of color are considered protected classes under sex and race. Under Wisconsin law, queer womyn of color are considered protected classes under sex, race, and sexual orientation. On the surface it would appear that Wisconsin provides adequate protection for queer womyn of color to live their lives openly and freely. However, it is necessary to dive deeper into Wisconsin’s law in order to determine whether in practice this law does enough to alleviate anxieties. Moving forward this comment will attempt to explain the differences between Title VII and Wisconsin law and which

course of action would actually be more favorable for the provided examples if they were to pursue actions of employment discrimination.

III. TITLE VII

Title VII of the Civil Rights Act of 1964 is a Federal law that prohibits employers from discriminating on the basis of an individual's race, color, religion, sex, or national origin. If an employee feels as though they have been discriminated against, the employee cannot just file a suit in court against the employer but instead must follow the complaint process established by the U.S. Equal Employment Opportunity Commission (EEOC). The EEOC is a Federal agency in charge of coordination and enforcement of all Federal Equal Employment Opportunity regulations, practices, and policies. As noted previously, all laws enforced by the EEOC must be filed with the agency before a private lawsuit may be filed in court. A charge must be filed within 180 days from the date of the alleged violation. This date is extended to 300 days if the charge is also covered by a state or local anti-discrimination law. Once a charge has been filed, the employer will then be notified that a charge has been filed against it. If, while in the course of investigation or at the end of its investigation, the EEOC decides to dismiss the charge,
it will issue a notice informing the employee. 39 This notification then gives the charging party 90 days to file a lawsuit on their own behalf. 40 This notification is referred to as a “right to sue letter.” 41

If the EEOC decides to proceed with the case, the agency will assume full responsibility in handling the case and meet with the employer to try and develop a remedy for the discrimination. 42 If the EEOC cannot develop a remedy, the agency at its own discretion may choose to bring a lawsuit in Federal court. 43 The remedies available under Title VII include back pay, hiring, promotion, reinstatement, front pay, reasonable accommodation, payment of attorney’s fees, expert witness fees, and court costs. 44 In cases of intentional discrimination, charging parties are entitled to compensatory and punitive damages, as well as the possibility of obtaining attorney’s fees and jury trials. 45

Having established the process of bringing a discrimination claim under federal law, now it is important to turn to a few crucial Federal cases that may be of concern to the examples of queer womyn of color provided earlier.

A. Sex

Price Waterhouse v. Hopkins 46 is the groundbreaking case establishing under Title VII that employers are not allowed to make employment decisions based on “sex stereotyping” which is

41. 29 C.F.R. § 1601.28 (2018).
43. 29 C.F.R. § 1601.27 (2018).
rooted in discriminating on the basis of sex. In Price, Hopkins was a senior manager who was up for partnership at Price Waterhouse. She was not selected for partnership, instead her selection was held over for reconsideration the following year. In Hopkins' partnership evaluation, virtually all of the partners cited negative feelings regarding Hopkins' personality as the main reason for not offering her a partner position. One partner described her as "macho." Several other partners criticized her use of profanity, and reasoned that they only objected, "because it's a lady using a foul language." Lastly, one partner suggested to Hopkins that she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." The Court concluded that Price Waterhouse had discriminated against her on the basis of "sex stereotyping" noting that an employer who acts on the basis of a belief that a womyn cannot be aggressive or that she must not be, has acted on the basis of gender. "Women were expected to be soft and tender, while men were expected to be assertive and competitive, even sharp-elbowed; because Hopkins was seen as behaving 'like a man,' she was judged more harshly."

Sex stereotypes place women into a 'double-bind' situation. If they are viewed 'as women' they are frequently denied access to high power positions because their presumed attributes cause them to appear incapable or their performance is ascribed to something other than competence . . . . If, however, they are perceived as engaging in 'masculine' behaviors deemed essential for the job, they are considered to be abrasive, or maladjusted.

47. Id. at 250-51.
48. Id. at 231.
49. Id.
50. Id. at 235.
51. Id. (internal citations omitted).
52. Id.
53. Id.
54. Id. at 250-51.
55. GILLIAN THOMAS, BECAUSE OF SEX: ONE LAW, TEN CASES, AND FIFTY YEARS THAT CHANGED AMERICAN WOMEN'S LIVES AT WORK 134 (St. Martin's Press, 2016).
56. Id. at 141.
Thinking specifically about how this particular case relates back to the provided examples this case might have a positive impact on a claim brought by either Nikki or Tasha. Nikki could present an argument based on the theory established by Price that her boss is projecting sex stereotypes on her by insinuating that because she is feminine presenting she should be attracted to and dating men. Tasha may want to use the reverse argument that simply because she is masculine presenting, because masculine attire is that which she feels the most comfortable in, does not mean that she wants or desire to be a man. Under the theory of Price, simply because she is a womyn this does not definitively dictate that she must dress in traditional feminine attire (dress, skirt, blouse, etc.). This argument may or may not be helpful for Riley because she may not adhere to traditional sex stereotypes. It may be harder to formulate an argument based around sex for her because she does not seem to place a great deal of emphasis on her sex.

B. Race

This section looks at race discrimination under Title VII, particularly critiquing the breadth of what qualifies as discrimination. Instead of focusing merely on the most obvious aspect of race discrimination (skin tone and complexion) this section pinpoints cultural aspects of racial identity and how courts have viewed these cultural aspects as a means of race discrimination. It is important to point out the shortcomings in courts’ acknowledgment of perceived racial discrimination because it will help lawmakers or attorneys develop comprehensive theories to fill the gaps and further extend protections. This section aims to do that by looking at two cases that pertain more to cultural impacts often associated with a particular race. The first case deals with an employee’s refusal to change her hairstyle.57 The second case deals with employees’ ability to wear their hair in certain styles and whether these hairstyles are protected under race discrimination.58

The court in Roger v. American Airlines, Inc. distinguishes different hairstyles as being either immutable or easily changed characteristics and such characteristics falls underneath the

protection of Title VII.59 In Roger, an employee sued American Airlines claiming that its policy prohibiting her from wearing her hair in corn rows qualified as race discrimination.60 The court concluded that American Airlines had not discriminated against her on the basis of race because wearing corn rows was a product of artifice.61 Her braided hair style was an "easily changed characteristic." 62 One point of interest in this opinion is the court also stated that if an employer had a policy that prohibited the afro/bush style it might violate Title VII because it would implicate the policies underlying the prohibition of discrimination on the basis of immutable characteristics.63

Turning next to Equal Employment Opportunity Commission v. Catastrophe Management Solutions, which held that Title VII does not provide discrimination protection on the basis of locs. 64 This case provides a clearer picture into why courts do not recognize certain hairstyles as immutable characteristics despite hair playing a significant cultural role in the lives of people of color.65 When individuals think of race they often associate certain attributes or characteristics with that race, due to human nature as well as societal influence.66 As noted by the court in Catastrophe, "race . . . usu[ally] impl[ies] a physical type with certain underlying characteristics, as a particular color of skin or shape of skull . . . although sometimes, and most controversially, other presumed factors are chosen, such as place of origin . . . or common root language."67 While race today may be recognized as a social construct it seems that the courts are unwilling to view it in such an abstract way.68 Courts like to provide hard rules where it can and it seems that when it comes to discrimination on the basis of race, courts are
unwilling to establish obscurities. *Catastrophe* reinforces the reasoning of *Rogers* that discrimination on the basis of immutable characteristics is prohibited under Title VII, while mutable choices are not.\(^{69}\) Plainly put, this means that employers do not have to employ individuals who wear locs if the employer has a grooming policy that prohibits it and will not fall under scrutiny from the Federal government.\(^{70}\)

Think about the larger implications of these decisions revolving around cultural traits and practices. Does this mean that employers can fire employees of color who fail to assimilate to office culture with no possible backlash of racial discrimination? Will a court categorize lack of reliability as a characteristic that can be easily changed? Are facts relating to the employees’ upbringing and surrounding relevant to this analysis? One would hope courts would take an employee’s upbringing and surrounding into the analysis to perhaps attempt to understand why employees cannot relate to their co-workers on a personal level. One cannot always assume that the one outlier must adapt and change the predominate make-up of the office and instead place some responsibility on co-workers to reach out to better understand that individual and their cultural references.

Looking back to the provided examples of queer womyn of color it would appear that these cases would negatively impact any potential claims of discrimination on the basis of race that they might bring. Specifically looking at Riley these cases would appear to work against her if they were to bring a claim of wrongful discharge based on racial discrimination. Her employer may be able to refute her charge of racial discrimination by arguing that she had the opportunity to socialize and work with her co-workers but instead chose to isolate herself.

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69. *Id.* at 1032; *see also* Campbell v. Alabama Dep’t of Corr., 2013 WL 2248086 at 2 (N.D. Ala. May 20, 2013) (unpublished opinion) (“A dreadlock hairstyle, like hair length, is not an immutable characteristic.”); Pitts v. Wild Adventures, Inc., 2008 WL 1899306 at 5-6 (M.D. Ga. Apr. 25, 2008) (unpublished opinion) (holding that a grooming policy which prohibited dreadlocks and cornrows was outside the scope of federal employment discrimination statutes because it did not discriminate on the basis of immutable characteristics).

C. Sexual Orientation

Sexual orientation is not covered under Title VII but now it seems that some courts, particularly the Seventh Circuit, are beginning to question whether the framework should provide protection. This section will examine *Hively v. Ivy Tech Community College*, a recently decided by the Seventh Circuit that begins to question whether Title VII might provide protection for sexual orientation. In *Hively*, Hively was a part-time adjunct professor at Ivy Tech Community College who alleged she was refused a full-time position on the basis of her sexual orientation. The college’s only defense was that Title VII did not apply to claims of sexual orientation so Hively did not have a claim for which relief could be granted. The Seventh Circuit Court of Appeals agreed that Title VII does not provide protection nor remedies for sexual orientation discrimination. However, it appeared that the court simply upheld the trial court’s ruling because of *stare decisis*.

The court grappled with the EEOC’s decision in *Baldwin v. Foxx*, which concluded that sexual orientation is inherently a sex-based consideration and, therefore, an allegation of sex discrimination under Title VII. The court pointed out that discrimination against members of the LGBTQIA community comes about because their behaviors are viewed as failing to comply with traditional societal gender stereotypes about what

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72. *Hively v. Ivy Tech Cmty. Coll., S. Bend*, 830 F.3d 698, 702-03 (7th Cir. 2016), vacated on reh’g, 853 F.3d 339 (7th Cir. 2017).
73. *Hively*, 830 F.3d 698.
74. Id. at 702-03.
75. Id. at 699.
76. Id.
77. Id. at 700.
78. Id. at 701.
79. Id. at 702-03 (citing *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641, at *5-6, *10 (July 16, 2015)).
80. Id. (EEOC concluded that sexual orientation discrimination is sex discrimination because it entails treating an employee less favorably because of the employee’s sex, it is associational discrimination on the basis of sex, and is a form of discrimination based on gender stereotypes in which employees are harassed or punished for failing to live up to societal norms about appropriate masculine and feminine behaviors, mannerisms, and appearances).
men and women should do. The court also pointed out how some members of the LGBTQIA community may be able to proceed with claims grounded in sex stereotyping members who are more visibly and stereotypically gay, while members who exhibit behaviors and mannerisms that are more in line with the traditional view of how men and women should act would not be successful in bringing such a claim.

Lastly, the court even comments on the paradox of *Obergefell v. Hodges* in that the members of the LGBTQIA community may be able to freely marry but may still be fired for exercising their right to do so. Despite this, the court ruled in favor of Ivy Tech, because the court was bound by precedent and in order to overrule precedent it requires a compelling reason. It is troubling that despite the court laying out numerous arguments, and opinions of the EEOC and scholars that these are not enough to overturn precedent and must in fact come from either the Supreme Court or changes in the legislation.

There however seems to be a chance for hope as this opinion was vacated on October 11, 2016 and a petition for rehearing *en banc* was granted.

Following a rehearing *en banc*, the Seventh Circuit issued *Hively v. Ivy Tech Community College of Indiana*, holding that an individual who alleges that she experienced employment discrimination on the basis of her sexual orientation has put forth a case of sex discrimination for Title VII purposes overruling Seventh Circuit precedent. In coming to this conclusion the court noted that it was well within its power to determine what it means to discriminate on the basis of sex, because it was a question of statutory interpretation. Upon this ruling, the case was remanded to the district court and Hively was allowed to pursue her discrimination claim.

The Second Circuit appears to be grappling with similar reasoning given the issuance of two opinions: *Zarda v. Altitude*

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81. Id. at 705.
82. Id. at 709.
83. Id. at 714.
84. Id. at 718.
85. Id.
86. See *Hively v. Ivy Tech Cmty. Coll.*, S. Bend, 2016 WL 6768628 (7th Cir. 2016).
88. Id. at 341, 351-52.
89. Id. at 343.
90. Id. at 341.
Express\textsuperscript{91} and Christiansen v. Omnicom Group, Inc.\textsuperscript{92} with the former being granted a rehearing en banc to determine whether Title VII encompasses sexual orientation.\textsuperscript{93} Given the current administration’s views regarding the protection of LGBTQIA rights\textsuperscript{94} this is a hot button topic. While it is encouraging that two circuits have started to consider whether Title VII encompasses sexual orientation,\textsuperscript{95} the fight for equal protection is far from over for the LGBTQIA community.

\textit{Hively} may provide support for a claim, such as one in the provided examples, charging discrimination on the basis of sexual orientation. As pointed out by \textit{Hively}, Tasha may be able to pursue a claim of both sex discrimination and sexual orientation discrimination. Under the sex discrimination claim, Tasha may want to pursue a theory of gender non-conformity and argue that because she does not adhere to the traditional norms of womynhood she is subject to sex stereotyping. Under the sexual orientation claim, Tasha would simply need to provide sufficient facts (as articulated in \textit{Hively}) that she was discriminated against, because of her attraction to the same sex. It is important to note that in pursuing these two theories it may create some confusion for the court, because Tasha’s sexual stereotyping theory is heavily tied into her sexual orientation and she falls within the stereotypical imagery of what a lesbian “looks” like.

IV. WISCONSIN LAW

Concluding with the Title VII discussion, it is now necessary to turn to applicable Wisconsin law to determine if Wisconsin’s employment discrimination law would afford the provided examples broader protection in practice.

Under the Wisconsin Fair Employment Act (WFEA), race,

\begin{itemize}
\item \textsuperscript{91} Zarda v. Altitude Express, 855 F.3d 76, 82 (2d Cir. 2017) vacated in part on \textit{reh’g}, 883 F.3d 100 (2d Cir. 2018) (holding that the court could not overturn circuit precedent holding that Title VII’s prohibition on sex discrimination did not encompass discrimination based on sexual orientation).
\item \textsuperscript{92} Christiansen v. Omnicom Grp., Inc., 852 F.3d 195, 199-200 (2d Cir. 2017) (finding that an openly gay male pleaded a claim of gender stereotyping that was sufficient to survive motion to dismiss).
\item \textsuperscript{93} Zarda v. Altitude Express, 883 F.3d 100 (2d Cir. 2018)
\item \textsuperscript{95} Hively v. Ivy Tech Cmty. Coll. S. Bend, 853 F.3d 339, 341 (7th Cir. 2017); see also Christiansen v. Omnicom Grp., Inc., 852 F.3d 195 (2d Cir. 2017).
\end{itemize}
sex, and sexual orientation are all considered protected classes.96 The Department Workforce Development (DWD) state agency oversees the enforcement of WFEA.97 The Equal Rights Division (ERD), which is a sub-branch of the DWD, specifically is charged with investigating claims of employment discrimination.98

The DWD has the authority to hold hearings, subpoena witnesses, and take testimony.99 Once a complaint has been filed with the DWD the complaint is then passed off to the ERD, which then opens up an investigation.100 A complaint must be filed within three hundred days of the alleged discrimination in order to receive an investigation.101 If the ERD investigator finds probable cause while conducting the investigation, the investigator may initiate a reconciliation meeting with the employer.102 If the ERD investigator is unable to eliminate the discrimination, the department will issue and serve a notice of a hearing upon the employer accused of discrimination.103 This notice specifies the time and place of the hearing, in addition to notifying the “accused” of the need to provide an answer to the complaint at the hearing.104

This hearing is then transferred to the Division of Hearing and Appeals (DHA) which falls within the Department of Administration (DOA).105 This division is staffed with administrative law judges who hear the case and make a determination, which either affirms, reverses, modifies, or sets aside the preliminary determination of the ERD investigator.106 Remedies available under the act are lost wages, interest on lost

101. Id.
103. Id.
104. Id.
wages, attorney fees and costs, or a job.\textsuperscript{107} The DWD then serves the decision of the administrative law judge to the parties in the case.\textsuperscript{108} If either party is unsatisfied with the determination of the administrative law judge, the decision could be appealed to the Labor and Industry Review Commission (LIRC).\textsuperscript{109} The decisions of the commission are subject to judicial review under Wisconsin Chapter 227.\textsuperscript{110} If a party seeks review of a LIRC decision in state court, the state court conducts a review that is limited to the administrative review.\textsuperscript{111} This simply means that the state court will simply review the ruling of the administration and the facts stated in the record and determine whether the decision of the administration was within its range of discretion delegated to the agency.\textsuperscript{112} These decisions are final and preempted, meaning that these decisions cannot be overruled by bringing a separate Title VII claim.\textsuperscript{113} The WFEA does not allow for individuals who prevail on an administrative claim to bring a private suit for compensatory and punitive damages.\textsuperscript{114} This action was previously allowed under an amendment to the act but was repealed in 2012.\textsuperscript{115} So unless the cause of action happened within this limited window, employees who endured discrimination are unable to pursue a separate lawsuit for compensatory and punitive damages.\textsuperscript{116} The WFEA does not provide a remedy for emotional distress resulting from discriminatory firing.\textsuperscript{117} Having laid out the complaint process, it is now important to determine whether the purpose of the WFEA is being implemented in practice.

The purposes of the WFEA are to make the individual victims of discrimination “whole” and discourage discriminatory
practices in the employment area. In Anderson v. Labor & Industry Review Commission, the court specifically recognized that an individual who has been the victim of discriminatory treatment and who prevails in an action brought pursuant to the Fair Employment Act should be “made whole.” The court previously held “that although the Fair Employment Act does not expressly provide for prejudgment interest on back pay awards, prejudgment interest must be included in such awards because its inclusion is necessary to carry out the purposes of the Act, e.g., to make the prevailing complainant ‘whole.’”

However within the same opinion the court notes that the plaintiff’s right to damages was limited to the right to seek recovery for lost wages, rather than for emotional harm, harm to reputation, or attorney’s fees. The court stated “[t]he statutes expressly refer to harm from loss of wages; they do not refer to emotional or reputation harm or attorney’s fees.” These two ideas do not really seem logical because if the purpose of the Act is to make the victim “whole” and to discourage discriminatory practices then why is there some restraint on what ultimately enables an individual to be made “whole” or to discourage discriminatory practices? It almost appears that by placing some types of restraints on the remedies available that either the state is not thoroughly concerned with discriminatory practices or does not believe that individuals could be so negatively impacted that remedies such as punitive damages would be necessary.

It is important to note that in 2009, WFEA did in fact contain a provision, which allowed for anyone discriminated against to bring an action in circuit court and recover compensatory and punitive damages caused by the violation, plus reasonable costs and attorney fees incurred in the action. However, this section was repealed in 2012. It seems as if for a short period the legislature realized the disservice the act was doing and attempted to correct it but was overruled. It is also
important to note that the Equal Rights Division is the exclusive forum under which you can bring WFEA claims. The WFEA does not create a private right of action. This is somewhat connected to point one in that this right to a private cause of action was taken away with the repeal of Wisconsin Statute section 111.397.

To date, no Wisconsin state court has issued an opinion on appeal from an administrative law judge’s ruling (whether published or unpublished) finding a claim of discrimination on the basis of sexual orientation. Although WFEA in theory does provide sufficient protection for queer womyn of color in practice the entire process seems calculated and skewed towards those in positions of power. Those who are bringing claims of discrimination may not fully understand how the process works and this greatly disadvantages them. Many of these complaints do not state enough facts in their complaint so it could initially be dismissed or even if they do plead enough facts and proceed to the investigation stage and then can have their case heard before an administrative judge, it is unclear if these employees understand that this is a bench trial. The complainant must present enough evidence (including witnesses and documentation) of the alleged discrimination. Even if all of this is done, the judge may still rule against them and even the lack of authority pertaining to sexual orientation appealing the decision does nothing to soothe the waters.

At this point it would definitely appear that the system is against them because even if the complainant appeals this decision of the judge to the commission; the scope of review in state court is so limited. Administrative law judges are given such broad discretion that in order to overrule their decisions it would have to be a clear abuse of discretion, which is rare. Taking all this knowledge in, it seems clear Title VII is the preferred choice for pursuing employment discrimination claims.

130. Id.
First, under Title VII courts are entitled to award punitive damages.\textsuperscript{131} Second, the process under Title VII seems to be a lot clearer and fairer to employees when looking at how decisions are decided and the reviewability of decisions.\textsuperscript{132}

V. SOLUTION

The major differences between the WFEA and Title VII seem to be the way in which complaints are handled and alternative courses of action available to charging parties. The WFEA is governed by administrative law and empowers administrative law judges with extraordinary amounts of discretion in hearing claims and fashioning remedies.\textsuperscript{133} On the other hand, Title VII is overseen by a Federal agency so there is more accountability and uniformity.\textsuperscript{134} Under Title VII, charging parties may also still be afforded a private right of action after bringing the claim through the EEOC whereas with the WFEA once the charging party brings a claim through the ERD and the claim proceeds onto an administrative law judge they no longer have an independent means of receiving justice.\textsuperscript{135}

While conceptually, the WFEA may be better for queer womyn of color than Title VII, in theory it does not appear to be effective in practice. The effectiveness of the Act seems to be lost in the execution. In order to return to the fundamental purpose of the act, which \textit{should} be to discourage and perhaps altogether eliminate discriminatory firing and acts, incorporating a couple of components that are used in California’s Fair Employment and Housing Act\textsuperscript{136} could provide vast improvement in helping


\textsuperscript{136} CA DEPT. OF FAIR EMP. AND HOUS., Employees and Job Applicants are Protected from Bias, https://www.dfeh.ca.gov/employment/ [https://perma.cc/27AG-K34V] (last accessed Mar. 31, 2018).
provide security for groups at risk for discrimination.

A. California’s Fair Employment and Housing Act

In California, any employment discrimination claim is handed over to the Department of Fair Employment and Housing (DREH). Under California’s Fair Employment and Housing Act if an investigator finds a probable violation of the law, the case then moves into DFEH’s Legal Division, at which time the parties are required by law to go to mediation or alternative dispute resolution, which is provided free of charge. If the parties are unable to come to a settlement during mediation, the director of DFEH may then bring a civil action in the name of the department. Unlike WFEA, California’s act specifically spells out the remedies available under the law. These remedies include recovery of out-of-pocket losses, an injunction prohibiting the unlawful practice, access to a job opportunity, policy changes, training, reasonable accommodations, damages for emotional distress, and civil penalties or punitive damages.

Using California’s Act as a starting point, implementing some of the components of California’s Act that make it more straightforward could help Wisconsin in two specific areas. First, implementing some type of mediation and education for charging parties would be beneficial to help individuals understand the state’s process in pursuing discrimination.

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139. Id.
143. The exact language of Cal. Gov’t Code § 12926(a) (2017) is as follows: “Affirmative relief or ‘prospective relief’ includes the authority to order reinstatement of an employee, awards of back pay, reimbursement of out-of-pocket expenses, hiring, transfers, reassignments, grants of tenure, promotions, cease and desist orders, posting of notices, training of personnel, testing, expunging of records, reporting of records, and any other similar relief that is intended to correct unlawful practices under this part.”
claims. This could also help communicate to parties a desire for this process to be cooperative. This could encourage complete honesty between parties and facilitate favorable outcomes for both sides. Efforts such as these could signal that the ultimate goal of the process is to correct the perceived wrong and make a concrete effort to eliminate the action. Giving parties the opportunity to settle the dispute privately rather than dragging on a court case would promote time efficiency but also promote a genuine desire to resolve the issue and provide transparency and education for both parties. Second, it would be extremely helpful if WFEA explicitly stated the remedies available under the act. Before initiating an action under Wisconsin law this would help charging parties understand what remedies are available to them.

VI. CONCLUSION

Formulating a discrimination claim for queer womyn of color has no one distinct formula and there is no guaranteed outcome for one situation. While the root of discrimination may be tied to a person’s sexual orientation, the law is formulated in such a way that it allows employers to hide behind other aspects of a person’s identity and protect them against unlawful discrimination. An employer may be discriminating against that person because of their sexual orientation but could make an argument that because that person is a womyn and a person of color and point to some facts that would suggest that the employer has not acted in any discriminatory manner.

A queer womyn of color cannot separate any aspect of her identity because each piece is equally important, and rightfully so, to her. This same viewpoint should be taken when dealing with claims of discrimination under either state or federal law. As discussed, Wisconsin law appears to accept this premise and promises to deter discrimination for all aspects of a queer womyn of color's identity while Title VII still has a hurdle to overcome. Even with Wisconsin acknowledging all aspects of queer womyn of color, the process of bringing a claim under state law is daunting and the prospect of proving discrimination seem slim and might actually discourage these womyn from bringing their claims. If Wisconsin were to offer education as to how claims are processed and incorporate a mediation component these efforts may be enough not only to help employees prove claims of discrimination but also help employers pinpoint problem areas and correct them before conflict arises.