

## Queering Sexual Harassment Law

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**ABSTRACT.** *Franchina v. City of Providence*, a recent First Circuit decision involving the sexual harassment of a lesbian firefighter, may be the first judicial opinion of the #MeToo movement. But the opinion also points beyond the #MeToo movement's dominant conception of sexual harassment. By foregrounding the experience of a lesbian firefighter harassed by her male subordinates, *Franchina* describes harassment that is sex based without always being sexualized, thereby supplementing the stories of unwelcome sexual advances and assaults that #MeToo has emphasized. *Franchina*'s brutal narrative demonstrates, as Vicki Schultz argued twenty years ago, that sexual harassment is motivated not by sexual desire so much as a desire to maintain gender roles. And by showing this, *Franchina* also illustrates why harassment based on sexual orientation—which similarly arises from and enforces gender stereotypes—constitutes sex discrimination prohibited by Title VII.

### INTRODUCTION

*Franchina v. City of Providence*<sup>1</sup> may well be the first judicial opinion of the #MeToo movement. Argued the week the Harvey Weinstein story broke,<sup>2</sup> *Franchina* is notable not just because it upheld a significant win for a lesbian plaintiff under federal employment discrimination law—law that until recently has been understood not to protect sexual orientation.<sup>3</sup> The *Franchina* opinion,

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1. 881 F.3d 32 (1st Cir. 2018).

2. *Franchina* was argued before the First Circuit on October 2, 2017; the Weinstein story broke three days later. See Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html> [<https://perma.cc/4YE5-LF27>].

3. See, e.g., *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1256–57 (11th Cir. 2017) (citing decisions from nine circuits that have held that Title VII does not cover sexual orientation discrimination). For decisions that have recently gone the other way, see *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th

written by Judge O. Rogeriee Thompson, the second woman and first African-American to sit on the First Circuit,<sup>4</sup> is most notable for something less expected: its fact section.

In unusual and unrelenting detail,<sup>5</sup> Judge Thompson does what so many other women have done in the burgeoning #MeToo era: she tells a story of harassment that is unflinching, devastating, and prolonged—much like the harassment itself.

The story that Judge Thompson tells—the story of Lieutenant Lori Franchina of the Providence Fire Department—includes sexual harassment of the kind the #MeToo movement has emphasized: crude come-ons and intentional invasions of privacy by male coworkers.<sup>6</sup> But while the sexual harassment Franchina faced was gendered through and through, it was not solely or even mostly “sexual” in the sense of sexual desire—a fact that Franchina’s sexual orientation makes somewhat easier to see. Franchina’s harassers gave little indication that they wanted to have sex with her; what they wanted was to drive her from the workplace. And they did so with astonishing efficiency, starting literally within moments of her arrival.

In so forcefully telling one woman’s story, the fact section of *Franchina* provides a #MeToo narrative that is not only exemplary but also instructive, especially in light of the sexualized stories that have dominated the media in recent months.<sup>7</sup> The #MeToo movement lies at the intersection of sexual harassment and sexual assault, sometimes reducing the former to the latter.<sup>8</sup> Franchina’s

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Cir. 2017) (en banc); and *Baldwin v. Foxx*, EEOC Decision No. 0120133080, 2015 WL 4397641 (July 15, 2015).

4. Judith Colenback Savage, *Hon. Ojetta Rogeriee Thompson: Judge, U.S. Court of Appeals for the First Circuit*, FED. BAR ASS’N 1 (2014), [http://www.fedbar.org/PDFs/Past-Judicial-Profiles/First-Circuit\\_1/Thompson-Hon-Ojetta-R.aspx](http://www.fedbar.org/PDFs/Past-Judicial-Profiles/First-Circuit_1/Thompson-Hon-Ojetta-R.aspx) [<https://perma.cc/NJ5F-T3CU>].
5. *Franchina*, 881 F.3d at 38-44.
6. See *infra* Part I.
7. See, e.g., Mahita Gajanan, ‘It’s Your Turn to Listen to Me.’ Read Aly Raisman’s Testimony at Larry Nassar’s Sentencing, TIME (Jan. 19, 2018, 4:52 PM EST), <http://time.com/5110455/aly-raisman-larry-nassar-testimony-trial> [<https://perma.cc/AN5M-HB7Z>]; Salma Hayek, *Harvey Weinstein Is My Monster Too*, N.Y. TIMES (Dec. 12, 2017), <https://www.nytimes.com/interactive/2017/12/13/opinion/contributors/salma-hayek-harvey-weinstein.html> [<https://perma.cc/D2AU-5RKS>]; Lupita Nyong’o, *Lupita Nyong’o: Speaking Out About Harvey Weinstein*, N.Y. TIMES (Oct. 19, 2017), <https://www.nytimes.com/2017/10/19/opinion/lupita-nyong'o-harvey-weinstein.html> [<https://perma.cc/KAZ4-C52V>]; Stephanie Zacharek et al., *The Silence Breakers*, TIME (Dec. 18, 2017), <http://time.com/time-person-of-the-year-2017-silence-breakers> [<https://perma.cc/8DYZ-6JX2>].
8. Cf. Abby Ohlheiser, *The Woman Behind ‘Me Too’ Knew the Power of the Phrase When She Created It—10 Years Ago*, WASH. POST (Oct. 19, 2017), <https://www.washingtonpost.com/news/the-intersect/wp/2017/10/19/the-woman-behind-me-too-knew-the-power-of-the-phrase-when>

story links harassment and assault in an importantly different way: it shows how harassment in the workplace can include assault but go beyond it; how those assaults can be sex-based even if not sexualized; and how assault and myriad other forms of sex-based harassment all serve to enforce traditional gender roles, stereotypes, and power dynamics—both in the workplace and beyond.

Remarkably, Franchina’s story illustrates the argument that Vicki Schultz made in the *Yale Law Journal* twenty years ago, when she reconceptualized sexual harassment in this very way.<sup>9</sup> The #MeToo movement suggests that Schultz’s reconceptualization is and needs to be an ongoing project. *Franchina* can help with this. For some may find it easier to conceptualize sexual harassment as about something other than sexual desire when the victim isn’t a movie star fending off sexual advances from a producer, but a butch lesbian firefighter<sup>10</sup> suffering physical and verbal abuse from her subordinates. Sexual harassment is about maintaining traditional gender roles and privileges, as Franchina’s story makes all too alarmingly clear.<sup>11</sup> That is the first point of this Essay.

By clarifying sexual harassment’s connection to gender policing, Franchina’s story also helps us see, as courts have so far largely failed to do, that sexual *orientation* harassment serves the same end. That—the Essay’s second point—is why sexual orientation discrimination counts as the very discrimination “because of sex” that Congress outlawed when it passed Title VII in 1964.<sup>12</sup> Queering our view of sexual harassment law thus helps us better understand and prevent the workplace harassment of those who identify as queer.

In Part I, I retell Franchina’s story in order to show, in Part II, how it helps us once again reconceptualize our notion of sexual harassment, much along the lines Schultz has long argued. Hearing the story of a queer harassment victim teaches (or reminds) us that sexual harassment, in all its forms and no matter the sexuality of the victim, is ultimately about policing gender roles and hierarchies. As I argue in Part III, this is the—or at least a—reason why sexual orientation discrimination, another form of gender policing, is sex discrimination

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-she-created-it-10-years-ago [https://perma.cc/2QGJ-FFB4] (describing the roots of the phrase “Me Too” in Tarana Burke’s campaign against sexual violence).

9. See Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998).
10. For a description of the importance of appearances—and stereotypes about appearances—in cases brought by workers perceived as homosexual, see Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 AM. U. L. REV. 715 (2014).
11. The desire to maintain traditional gender privileges helps explain why the harassment of women by their subordinates—the kind Franchina experienced—is so common. One study has shown that female supervisors “report a rate of harassment 73 percent greater than that of nonsupervisors.” Heather McLaughlin et al., *Sexual Harassment, Workplace Authority, and the Paradox of Power*, 77 AM. SOC. REV. 625, 634 (2012).
12. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 253-66.

barred under the current text of Title VII. Federal antidiscrimination law cannot “strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes”<sup>13</sup> without guarding against the sex stereotypes that give rise to – and are reinforced by – sexual orientation discrimination, as Franchina’s story so vividly illustrates.

### I. FRANCHINA’S STORY

Franchina is a lesbian<sup>14</sup> all-American college softball player and coach<sup>15</sup> who became an emergency medical technician<sup>16</sup> and then went on to finish tenth out of her class of eighty in the Providence Firefighter Academy in 2002.<sup>17</sup>

In her early years at the Providence Fire Department, Franchina resisted being promoted too quickly for fear of provoking backlash.<sup>18</sup> But by September 2006 she had been named an Acting Rescue Lieutenant, the officer in charge of a vehicle akin to an ambulance.<sup>19</sup> Around that time, she had the misfortune to work the night shift with Andre Ferro, a firefighter whose prior harassment of women is the subject of another First Circuit opinion<sup>20</sup> – one from which the legal standards in *Franchina* are repeatedly drawn.<sup>21</sup>

In his first-ever conversation with Franchina – the two of them alone in the firehouse – Ferro asked if she was a lesbian, then told her: “I don’t normally like to work with women; but, you know, we like the same thing, so I think we’re going to get along.”<sup>22</sup> Out on their first call together, Franchina couldn’t hear the dispatcher over Ferro’s running commentary, which included questions about whether Franchina wanted children and an offer from Ferro to “help [her]

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13. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 551 (1989) (citing *City of L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

14. Transcript of Jury Trial – Volume I at 194, *Franchina v. City of Providence*, No. 12-517M (D.R.I. Nov. 7, 2016).

15. *Id.* at 192, 199.

16. *Id.* at 199.

17. *Id.* at 209.

18. *Id.* at 215-17.

19. Transcript of Jury Trial – Volume II at 5, *Franchina*, No. 12-517M.

20. *O’Rourke v. City of Providence*, 235 F.3d 713, 718 (1st Cir. 2001); see *Franchina v. City of Providence*, 881 F.3d 32, 38 n.4 (1st Cir. 2018).

21. See *Franchina*, 881 F.3d at 47, 54-55 (quoting and citing *O’Rourke* for its statements of First Circuit sexual harassment doctrine). Interestingly, *O’Rourke* in turn cites Schultz’s *Reconceptualizing Sexual Harassment*. *O’Rourke*, 235 F.3d at 730 n.5 (citing Schultz, *supra* note 9, at 1719-20).

22. Transcript of Jury Trial – Volume II, *supra* note 19, at 10-11.

with that.”<sup>23</sup> Later that night—again, the very first night they met—Ferro rubbed his nipples and called Franchina his “lesbian lover” in front of other firefighters, patients, and their families at a hospital.<sup>24</sup> He ended the night by barging into Franchina’s officer’s quarters in his boxers; she was undressed. Purportedly there to apologize, Ferro instead sat in Franchina’s room with his feet on her desk, ignoring Franchina’s repeated orders to leave.<sup>25</sup>

Ferro was soon brought up on disciplinary charges—a welcome development were it not for the retaliation that followed. Within days, coworkers started referring to Franchina as “bitch,” “cunt,” and “Frangina”<sup>26</sup>—not just a play on her name and genitalia, but also apparently slang for a woman with untrimmed pubic hair.<sup>27</sup> (A female firefighter later said of her male colleagues: “They never used her real name.”<sup>28</sup>) Two different subordinates flicked the pin on Franchina’s collar that signified her rank and told her: “I’ll never take an order from you.”<sup>29</sup> Another subordinate yelled at Franchina in front of others, asking if she was trying to get Ferro fired.<sup>30</sup> He was the chef for their communal meals—meals that suddenly started making Franchina ill.<sup>31</sup> One night, Franchina switched her meal with someone else’s; that person soon went home sick.<sup>32</sup> During one entire shift, the message board hanging up at the firehouse was covered with insults directed at Franchina, from “You get what you get, bitch” to “Frangina leads Team Lesbo to victory.”<sup>33</sup>

The harassment and insubordination directed at Franchina was not confined to the fire station. Men under her command refused to lift stretchers;<sup>34</sup> abandoned the wheelchair of a patient with cerebral palsy, ignoring Franchina’s orders;<sup>35</sup> pushed her into a wall;<sup>36</sup> and, in the most horrific incident recounted at trial, purposely snapped off a pair of rubber gloves in Franchina’s direction,

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23. *Franchina*, 881 F.3d at 39.

24. *Id.*

25. Transcript of Jury Trial—Volume II, *supra* note 19, at 19-20.

26. *Id.* at 42, 109.

27. See *Frangina*, URB. DICTIONARY, <https://www.urbandictionary.com/define.php?term=Frangina> [<https://perma.cc/X6WN-DXBQ>].

28. Transcript of Jury Trial—Volume I, *supra* note 14, at 156.

29. Transcript of Jury Trial—Volume II, *supra* note 19, at 44, 78.

30. *Id.* at 28.

31. *Id.* at 38-40.

32. *Id.* at 41.

33. *Id.* at 50-51.

34. *Id.* at 34-36; *id.* at 43 (“That bitch can carry her own stretcher.”).

35. *Id.* at 70.

36. *Id.* at 73.

flinging blood and brain matter onto her face as she rode in the back of a rescue vehicle treating a man who had shot himself in the head.<sup>37</sup>

By the time Franchina retired on permanent disability in late 2013, she had been diagnosed with severe posttraumatic stress, received a restraining order against a fellow firefighter, and “submitted approximately forty different written statements complaining of harassment, discrimination, and retaliation to higher-ups in the Department.”<sup>38</sup>

Judge Thompson’s opinion recounts all this and more. And it notes other trial testimony claiming that women who work at the Providence Fire Department are treated better if they are dating a man in the Department.<sup>39</sup> The woman who testified to this added that complaints about harassment often led the Department to retaliate against the women making them.<sup>40</sup> She should know: the Department demoted her three weeks after her testimony.<sup>41</sup>

## II. SEXUAL HARASSMENT RECONCEPTUALIZED

Franchina’s story is not unique. Twenty years ago, in *Reconceptualizing Sexual Harassment*, Schultz told a depressingly similar story about female firefighters in New York City in the early 1980s.<sup>42</sup> But #MeToo is a movement built on repetition—the “too” is crucial, for only cumulatively do the stories show how common sex-based harassment continues to be. And even if much of Franchina’s story is disappointingly familiar, several of the specifics are worth underscoring for what they teach about the nature of sex-based harassment: the varied forms it takes, the sexualized forms most likely to provoke a response from employers, the aim of sexual harassers, and the centrality of stereotyped gender roles.

The first point to underscore is that Franchina, testifying at trial, never differentiated between the sexualized harassment she experienced and the nonsexualized but still very sexist ways that she was undermined, disparaged, and assaulted. Ferro’s offer to impregnate Franchina and his invasion of her room

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37. *Id.* at 117-23.

38. *Franchina v. City of Providence*, 881 F.3d 32, 43-44 (1st Cir. 2018).

39. *Id.* at 44.

40. *Id.*; see Transcript of Jury Trial—Volume I, *supra* note 14, at 150-51.

41. Katie Mulvaney, *A Second Woman Sues Providence Fire Department, Alleging Gender Discrimination*, PROVIDENCE J. (Aug. 25, 2016, 7:12 PM), <http://www.providencejournal.com/news/20160825/second-woman-sues-providence-fire-department-alleging-gender-discrimination> [https://perma.cc/KN9P-2VCT].

42. Schultz, *supra* note 9, at 1769-73 (describing *Berkman v. City of New York*, 580 F. Supp. 226 (E.D.N.Y. 1983), *aff’d*, 755 F.2d 913 (2d Cir. 1985)).

while she was changing both fit the traditional, sexualized notion of sexual harassment that #MeToo has foregrounded.<sup>43</sup> But this sexualized harassment quickly gave way to instances of nonsexual physical assault, job sabotage, and name-calling—taunting that itself blurred the line between sexualized and more general slurs.<sup>44</sup> Listening to Franchina’s story, Ferro’s sexualized crudeness almost seems minor compared to the tainted food, the flung brain matter, and the shouting match that led a court to impose a restraining order against one of Franchina’s colleagues.<sup>45</sup> Surely these incidents are what drove Franchina out of the Department.

But notice—my second point—that it was the former, sexualized comments, not the latter, more pervasive and threatening nonsexualized actions and slurs, that Franchina’s colleagues felt compelled to report. Even a female colleague refused to report the nonsexualized acts of insubordination against Franchina.<sup>46</sup> Meanwhile, supervisors heard almost immediately from men who had seen Ferro rub his nipples and call Franchina his lesbian lover. Members of the Department seem to have internalized the notion that nipple play and talk of lovers, or even just mention of sexual orientation, are verboten at work. They seemed far less concerned about insubordination, ostracism, or even nonsexual physical assault. Perhaps the latter was not part of their mandated sexual harassment training. It has certainly never been part of mine.

And yet—my third point—these acts are what undermined Franchina’s authority, set her apart from her workplace community, and destroyed her mental health. This is the argument that Schultz made twenty years ago: that sexual harassment is not limited to sexual come-ons and sexual assault. As Schultz writes in this Collection, harassment “takes a wide variety of nonsexual forms, including hostile behavior, physical assault, patronizing treatment, personal ridicule, social ostracism, exclusion or marginalization, denial of information, and work sabotage directed at people because of their sex or gender.”<sup>47</sup> Franchina experienced every one of these forms of harassment. And Schultz’s point, as true now as it was in 1998, is that they all happened for a reason: to “maintain work—

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43. See Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J.F. 22, 33-38 (2018); *supra* notes 22-25 and accompanying text.

44. The spectrum of insults stretched from “Team Lesbo” through “Frangina” to the more generic, though still gendered, “cunt” and “bitch.” See *supra* notes 26-28 and accompanying text.

45. *Franchina v. City of Providence*, 881 F.3d 32, 43 (1st Cir. 2018).; Transcript of Jury Trial—Volume II, *supra* note 19, at 39-41, 118-21, 135-36.

46. *Franchina*, 881 F.3d at 68 (describing how a female lieutenant responded to Franchina’s report of male insubordination by telling her “that this is not going to be dealt with, that you should really leave this one alone”).

47. Schultz, *supra* note 43, at 33-34.

particularly the more highly rewarded lines of work—as bastions of masculine competence and authority.”<sup>48</sup>

The men in Franchina’s story were unusually explicit about this motivation. Ferro, remember, began by telling Franchina that he didn’t “normally like to work with women.”<sup>49</sup> Franchina repeatedly overheard subordinates saying that they were “not taking orders from that cunt.”<sup>50</sup> One firefighter announced, as Franchina walked into the room, that “affirmative action’s killing this fucking job.”<sup>51</sup> By the end of Franchina’s time in the Department, “[g]uys would completely walk away from [her],” muttering that “[t]he bitch is in the house.”<sup>52</sup> The explicitness of the sexism makes laughable the City’s contention on appeal that Franchina “ha[d] not shown that any of the alleged harassment she experienced was based on her gender.”<sup>53</sup>

To be clear: the harassment Franchina endured was sexual harassment not, or not just, because some of it involved talk of sex, and not, or not just, because it involved “inherently ‘gender-specific’” words like “bitch” and “Frangina.”<sup>54</sup> What Franchina experienced counts as sexual harassment because her harassers did not want to work with, much less for, *someone of her sex*. Due to their harassment, they no longer do.

This point is easy to miss. Even the *Franchina* court’s statement of hostile-work-environment doctrine allows the sexual-desire approach to sneak back in. It confusingly requires plaintiffs to show both “unwelcome sexual harassment” and “that the harassment was based upon sex.”<sup>55</sup> What does the former add to the latter, if not the old “sexual desire paradigm” that Schultz has worked to move us beyond? Worse, the First Circuit claims to require “sexually objectionable conduct,”<sup>56</sup> phrasing that sounds more in desire or sexual assault than in “conduct that consigns people to gendered work roles.”<sup>57</sup>

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48. Schultz, *supra* note 9, at 1687.

49. Transcript of Jury Trial—Volume II, *supra* note 19, at 11.

50. *Id.* at 153.

51. *Id.* at 71-72.

52. *Id.* at 161.

53. Brief of Defendant/Appellant City of Providence at 21, *Franchina v. City of Providence*, 881 F.3d 32 (1st Cir. 2018) (No. 16-2401).

54. *Franchina*, 881 F.3d at 54.

55. *Id.* at 46 (quoting *Pérez-Cordero v. Wal-Mart P.R., Inc.*, 656 F.3d 19, 27 (1st Cir. 2011)).

56. *Id.*

57. Schultz, *supra* note 9, at 1689. Elsewhere, however, the First Circuit has made clear—in its earlier case involving Ferro, in fact!—that “sex-based harassment that is not overtly sexual is nonetheless actionable under Title VII.” *O’Rourke v. City of Providence*, 235 F.3d 713, 729 (1st Cir. 2001).



Ultimately, these statements of law did not pose a problem in *Franchina* precisely because Franchina experienced such a wide range of harassment. In the First Circuit’s words, “the jury heard evidence of repeated hostile, gender-based epithets, ill treatment of women as workers, sexual innuendoes, and preferential treatment for women who were more likely to sleep with the men of the Department.”<sup>58</sup> But even here, we need to be careful. Some might read the First Circuit to be saying that Franchina’s harassment was “sexual” because it included “gender-based epithets” and “sexual innuendoes.” I prefer a different reading of Franchina’s story—one that emphasizes how seamlessly the various forms of harassment—sexual and nonsexual—*all* comprised the “ill treatment of women as workers.”<sup>59</sup> The harassment was sexual insofar as it served sex-segregating, competence-undermining, gender-policing ends.

This reading is more obvious in Franchina’s case because of one final aspect of her story that needs underscoring: her sexual orientation. Franchina’s encounter with Ferro shows just how destabilizing her sexuality was to the expected gender roles in her workplace. On the one hand, Ferro’s claim that “we like the same thing, so I think we’re going to get along”<sup>60</sup> suggests a projection of the male gaze<sup>61</sup>—an expectation that Franchina too might see women primarily as sexual objects. (Women, remember, were treated better at the Department if they dated one of the men there.) Ferro, however, almost immediately went on to talk about impregnating Franchina. He refused to take her sexual unavailability as a given, and he assumed that motherhood must be her goal. Ferro seemed unable to fit a lesbian supervisor within the gender lines that he was so invested in policing.<sup>62</sup>

This blurring of gender roles complicates the typical story of sexual harassment, in which a heterosexual male makes sexual demands on a presumably heterosexual female subordinate. By foregrounding sexuality, Franchina’s story ends up highlighting the fact that sex-based harassment cannot be reduced to sexual desire.

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58. *Franchina*, 881 F.3d at 55.

59. *Id.*

60. Transcript of Jury Trial—Volume II, *supra* note 19, at 11.

61. Cf. JOHN BERGER, *WAYS OF SEEING* 47 (1972) (“[M]en act and women appear. Men look at women . . . This determines not only most relations between men and women but also the relation of women to themselves. The surveyor of woman in herself is male: the surveyed female.”); Laura Mulvey, *Visual Pleasure and Narrative Cinema*, 16 *SCREEN* 6, 11 (1975).

62. Cf. Schultz, *supra* note 9, at 1775 (“[I]n [some] men’s eyes, it is important to affirm that any woman who would be found in a ‘man’s job’ is neither as competent as a man, nor even a ‘real’ woman. Indeed, nontraditionally employed women are often branded as lesbians, without regard to the accuracy of the label.”).

### III. QUEERING TITLE VII

As I showed in Part II, Franchina’s sexual orientation makes it easier to understand the nature of sexual harassment faced by workers of all sexualities. And understanding sexual harassment as gender policing in turn helps us see why existing federal sexual harassment law protects against acts that target gay, lesbian, and bisexual employees<sup>63</sup> – in other words, why Title VII prohibits discrimination based on sexual orientation. For sexual orientation discrimination *also* serves as a way in which gendered stereotypes are enforced in the workplace.

“Sexual harassment” is a subset of the acts prohibited under Title VII of the 1964 Civil Rights Act, which makes it unlawful to “discriminate against any individual with respect to his . . . conditions . . . of employment[] because of such individual’s . . . sex.”<sup>64</sup> Importantly, sexual harassment is something the 1964 Congress probably did not realize it was prohibiting;<sup>65</sup> only in 1980 did the EEOC promulgate guidelines interpreting the statute to cover sexual harassment.<sup>66</sup> Recently, more and more courts have reconsidered whether the sex

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63. Many of the arguments in this Part apply equally to discrimination against transgender employees. But in order to avoid conflating sexual orientation and gender identity, I largely set that issue aside in this Essay. In doing so, I in no way mean to deny that important recent transgender rights cases, such as *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), provide precedential support for analogous claims about Title VII’s prohibition of sexual orientation discrimination.

64. 42 U.S.C. § 2000e-2(a)(1) (2012).

65. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 79–80 (1998) (“[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”); see also *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 146 (2d Cir. 2018) (en banc) (Lynch, J., dissenting) (“Perhaps it did not occur to some of those male members of Congress that sexual harassment of women in the workplace was a form of employment discrimination . . .”); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 351–52 (7th Cir. 2017) (en banc) (“[T]he Congress that enacted the Civil Rights Act in 1964 . . . may not have realized or understood the full scope of the words it chose . . . . The Supreme Court has held that the prohibition against sex discrimination reaches sexual harassment in the workplace, . . . including same-sex workplace harassment . . . . It is quite possible that these interpretations may . . . have surprised some who served in the 88th Congress.” (citations omitted)); William N. Eskridge Jr., *Title VII’s Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 *YALE L.J.* 322, 382 (2017) (describing the EEOC’s expansion of sexual harassment protections under Title VII as “a classic example of successful administrative policy entrepreneurship”); Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 *DENV. U. L. REV.* 995, 1009 (2015) (“Who would have imagined [in 1964] the law addressing . . . sexual harassment . . . ?”).

66. See Eskridge, *supra* note 65, at 381 & n.218.

prong of Title VII might also cover discrimination because of sexual orientation,<sup>67</sup> though Congress in 1964 surely was not thinking of that either.<sup>68</sup>

The *Franchina* court did not have to answer this question – although it did note that “the tide may be turning when it comes to Title VII’s protections”<sup>69</sup> – because Franchina’s sexual orientation claim had been dismissed below and she did not appeal the issue.

The district court’s dismissal was based on binding First Circuit precedent from 1999.<sup>70</sup> But the district court made clear – and the First Circuit later affirmed – that a plaintiff like Franchina can still claim “that she was discriminated against due to her ‘sex *plus* another characteristic’ – in this case her sexual orientation.”<sup>71</sup>

Within the First Circuit, this “sex-plus” doctrine stems from a case involving discrimination against women with small children.<sup>72</sup> The idea is that employers need not discriminate against all women to run afoul of Title VII; employers are also prohibited from mistreating a particular subclass of men or women: women with small children,<sup>73</sup> say, or lesbians.

What, then, is the difference between saying that Title VII prohibits discrimination based on sexual orientation – which the First Circuit, recall, still denies – and saying that Title VII prohibits discrimination against women who are lesbian – the claim that Franchina won and the First Circuit upheld?

The answer might hinge on the modes of proof. Whereas a sexual orientation discrimination claimant could point directly to evidence of antigay animus, a sex-plus plaintiff would need to take a different approach. She might show, for example, that, unlike lesbian women, a comparator class of gay men at her workplace was not harassed. In *Franchina*, the City of Providence argued that this was

67. See cases cited *supra* note 3; see also *R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d at 600 (finding analogous protections for a transgender employee under Title VII).

68. See *Zarda*, 883 F.3d at 140-42 (Lynch, J., dissenting) (“Discrimination against gay women and men . . . was not on the table for public debate [in 1964]. In those dark, pre-Stonewall days, same-sex sexual relations were criminalized in nearly all states.”).

69. *Franchina v. City of Providence*, 881 F.3d 32, 54 n.19 (1st Cir. 2018).

70. *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999); see also *Franchina*, 881 F.3d at 54 (describing *Higgins* as “a nearly twenty-year-old case in which we concluded that Title VII does not proscribe harassment based solely on one’s sexual orientation”).

71. Text Order, *Franchina v. City of Providence*, No. 1:12-cv-00517-JJM-LDA (D.R.I. Feb. 22, 2016) (emphasis added); see also *Franchina*, 881 F.3d at 54 (“[W]e do not believe that *Higgins* forecloses a plaintiff in our Circuit from bringing sex-plus claims under Title VII where, in addition to the sex-based charge, the ‘plus’ factor is the plaintiff’s status as a gay or lesbian individual.”).

72. See *Chadwick v. WellPoint, Inc.*, 561 F.3d 38, 43 (1st Cir. 2009); *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107 (2d Cir. 2004).

73. See *Chadwick*, 561 F.3d at 46; *Back*, 365 F.3d at 121-22.

the only way Franchina could succeed: in the First Circuit's words, "the City tells us she is required to have presented evidence at trial of a comparative class of gay male firefighters who were *not* discriminated against."<sup>74</sup> The court rejected this argument, refusing to let defendants avoid liability by failing to hire a comparator class such as gay men or fathers, for example, and thereby freeing the employers to discriminate against lesbian women and mothers.<sup>75</sup>

A second possibility would be to show gender stereotyping affecting the subclass. In *Chadwick*, the First Circuit's earlier sex-plus case, the mother proved sex discrimination not by comparing her treatment to that of fathers but by showing that her employer subscribed to what the Supreme Court has referred to as the "pervasive sex-role stereotype that caring for family members is women's work"<sup>76</sup>: the company denied her a promotion because they thought she had "too much on her plate" with three small children at home.<sup>77</sup>

*Franchina* doesn't exactly follow this analysis. Without mentioning stereotypes at all, the court finds sex discrimination based on the array of sexualized and sexist epithets, insults, and actions canvassed above, along with the fact that "women who were more likely to sleep with the men of the Department" were given preferential treatment.<sup>78</sup> The latter comes across as the only reason for bringing a sex-plus claim in the first place: Franchina presumably thought she had to get around the fact that some women were not treated as badly as she was.

In reality, though, the differential treatment of women based on their sexual availability is telling evidence of the stereotyping that *all* women—and surely men, too—faced within the Providence Fire Department. To understand this is, importantly, to understand what sexual orientation discrimination has to do with gender stereotyping.

Men in the Department clearly subscribed to the idea that a woman's place was, if not in the home, at least not in a fire department, and certainly not in a position of authority there. They said such things outright. But stereotypes like these are just strands in a web of intersecting gendered expectations that women and men are expected to follow as a matter of course.<sup>79</sup> Gender policing patrols

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74. *Franchina*, 881 F.3d at 52.

75. See *id.* at 52-53. The court also noted that Title VII does not require but-for causation, which is what the comparator approach shows; sex need only be a "motivating factor" in an employee's treatment. *Id.* at 53 (quoting 42 U.S.C. § 2000e-2(m) (2012)).

76. See *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 731 (2003).

77. *Chadwick*, 561 F.3d at 42.

78. *Franchina*, 881 F.3d at 55.

79. Ann C. McGinley describes how the gender policing that occurs at work mirrors and continues the stereotype enforcement that begins in school. See Ann C. McGinley, *The Masculinity Motivation*, 71 STAN. L. REV. ONLINE 99, 104-06 (2018).

the boundaries of not just what jobs men and women are “allowed” to do,<sup>80</sup> but also what interests they are permitted to pursue and discuss,<sup>81</sup> what colors and styles of clothing they can wear,<sup>82</sup> how closely they should attend to their appearance or cleanliness,<sup>83</sup> and how active, aggressive, assertive, emotional, supportive, or passive they are expected or allowed to be.<sup>84</sup> As the treatment of women dating men in the Providence Fire Department suggests, gender stereotyping extends also to women’s and men’s respective sexual roles, expected availability, and presumed assertiveness. Workers are rewarded or harassed depending on whether they play their gender roles correctly.

Gender policing shapes the lives and constrains the opportunities of people of all sexual orientations. But those who are lesbian, gay, or bisexual are particularly threatening to—and thus threatened by—gender stereotypes. We have to be careful here. It is sometimes thought—most troublingly, by federal judges<sup>85</sup>—that the prescriptive stereotype affecting gay men and lesbian women is just to “be straight.” Phrased like that, the stereotype sounds like “a belief about what *all* people ought to be or do—to . . . have sexual attraction to or relations with only members of the opposite sex,” as Judge Lynch wrote in dissent to the Second Circuit’s en banc decision in *Zarda v. Altitude Express*.<sup>86</sup> At this level of generality, the same stereotype applies to both sexes—and thus doesn’t count as sex discrimination. As Judge Sykes wrote in her dissent in *Hively v. Ivy Tech Community College*, the Seventh Circuit’s parallel en banc decision on the issue, “heterosexuality is not a *female* stereotype; it is not a *male* stereotype; it is not a *sex-specific* stereotype at all.”<sup>87</sup>

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80. See Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1835-37 (1990).

81. See, e.g., *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 291-92 (3d Cir. 2009).

82. I own a pair of lilac corduroys, and although I teach at the most diverse law school in the country, see Kevin R. Johnson, *How and Why We Built a Majority-Minority Faculty*, CHRON. HIGHER EDUC. (July 24, 2016), <https://www.chronicle.com/article/HowWhy-We-Built-a/237213> [<https://perma.cc/VZ7H-V62Q>], I have never worn those pants to work without garnering commentary.

83. See, e.g., *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 450 (5th Cir. 2013) (en banc).

84. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 234-35 (1989).

85. See, e.g., *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 158 (2d Cir. 2018) (en banc) (Lynch, J., dissenting); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 370 (7th Cir. 2017) (en banc) (Sykes, J., dissenting).

86. 883 F.3d at 158 (Lynch, J., dissenting).

87. 853 F.3d at 370 (Sykes, J., dissenting); see also *Zarda*, 883 F.3d at 158 (Lynch, J., dissenting) (“[D]isapproval [of homosexuals] does not stem from a desire to discriminate against either sex, nor does it result from any sex-specific stereotype . . .”).

Both dissents are wrong. To see this, compare *Zarda*'s facts to *Franchina*'s. In *Zarda*, a gay male skydiving instructor “sometimes told female clients about his sexual orientation to assuage any concern they might have about being strapped to a man for a tandem skydive.”<sup>88</sup> *Zarda* outed himself to counteract the gender stereotype that men will or should sexually pursue women – to “see what they can get away with” – any chance they can get. To be strapped to a man is thus to invite sexual assault – unless the man is gay.

The gender roles expected of women, and flouted by lesbian women like *Franchina*, are far different. Were *Franchina* a skydiver, she would never need to out herself to clients because clients wouldn't worry that a female instructor would try to take sexual advantage of them.<sup>89</sup> Women are not expected to be sexual aggressors; they are encouraged instead to invite *men*'s sexual attention, especially through their appearance. That is what *Franchina*, as a lesbian woman in a position of authority over men, failed to do.

In *Hively*, a case brought by a lesbian professor who faced discrimination at work, Judge Rovner described this point especially well:

Lesbian women and gay men upend our gender paradigms by their very status—causing us to question . . . antiquated and anachronistic ideas about what roles men and women should play in their relationships. Who is dominant and who is submissive? Who is charged with earning a living and who makes a home? Who is a father and who a mother? In this way the roots of sexual orientation discrimination and gender discrimination wrap around each other inextricably.<sup>90</sup>

The point to note is that gay men and lesbian women respectively flout *different* gender stereotypes. Women with authority and those good at sports—

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88. 883 F.3d at 108. *Zarda* demonstrates the way that sexualized notions of sexual harassment might end up overregulating even harmless talk about sex in the workplace. This is the dynamic Schultz criticized fifteen years ago in Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2064 (2003). Schultz presciently argued that racial and sexual minorities are the ones most likely to be sanctioned under such overbroad sexual harassment policies. *Id.* at 2158-63 (discussing how “gays may be accused of sexual harassment for merely revealing their sexual identity”).

89. This is not to suggest that lesbian and gender nonconforming women are not seen as troublemakers in other ways, however. A recent study found that lesbian students received school discipline at a rate thirteen percentage points higher than straight female students. Joel Mittleman, *Sexual Orientation and School Discipline: New Evidence from a Population-Based Sample*, 47 EDUC. RESEARCHER 181, 187 (2018) (arguing that, “for sexual minority girls, more masculine, ‘unladylike’ gender expression may be interpreted by adults as threatening in a way that requires more formal control”).

90. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 830 F.3d 698, 706 (7th Cir. 2016), *rev'd en banc*, 853 F.3d 339 (7th Cir. 2017).

Franchina, remember, was both—are routinely branded as lesbian. Would anyone think that a man must surely be gay because of his athletic prowess? By contrast, would anyone “accuse” a woman of homosexuality because she cares too much about her appearance? (It is surely no coincidence that the Department’s nickname for Franchina portrayed her pubic hair as insufficiently groomed;<sup>91</sup> for men, by contrast, “manscaping” is often seen as gay.<sup>92</sup>)

From different directions, then, nonheterosexual women and men challenge the gender roles that continue to limit the opportunities available to women and men, both in the workplace and beyond. Scholars have been arguing this for decades.<sup>93</sup> Even Judge Lynch, dissenting in *Zarda*, acknowledges that homophobia may be related to “beliefs about the proper roles of men and women in family life that underlie at least some employment discrimination against women.”<sup>94</sup> But he claims that Title VII is concerned with overt acts, not with “eliminating the ‘deep roots’ of biased attitudes” or misogynistic ideas “about how families are best structured.”<sup>95</sup> Here, Judge Lynch confuses Title VII’s adverse action and “because of sex” requirements. No one can doubt that adverse actions were taken against Franchina. The only question is whether she was harassed for one of the reasons Congress was concerned about in 1964. Insofar as Franchina was mistreated because she subverted expected gender roles at work, the answer is yes.<sup>96</sup>

Back, then, to the question with which this Part began: is there any difference between a sexual orientation discrimination claim and a sex-plus claim by a lesbian woman based on gender stereotyping? I tend to think not. I have yet to see a case of sexual orientation discrimination that does not involve gender policing—an attempt to keep men and women in their separate lanes, hewing to their traditional roles. From my vantage point, sexual orientation discrimination is

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91. See *supra* note 27 and accompanying text.

92. See Tracy Moore, *Here’s What Men Are Doing with Their Pubes These Days*, MEL (Aug. 21, 2017), <https://melmagazine.com/heres-what-men-are-doing-with-their-pubes-these-days-2907a42eb1d8> [<https://perma.cc/DBB9-SPE6>] (“Let’s start with the stereotypes: Waxing and grooming your pubes is mostly a gay thing; straight men are about as aware of their pubes needing a tune-up as they are of their feelings.”); Ben Schott, *Manscaping*, N.Y. TIMES: SCHOTT’S VOCAB (Mar. 30, 2009, 6:00 PM), <https://schott.blogs.nytimes.com/2009/03/30/manscaping> [<https://perma.cc/NP5E-6MJT>].

93. For a list of twenty-two scholars and four courts that have developed this argument from 1980 to the present, see Brian Soucek, *Hively’s Self-Induced Blindness*, 127 YALE L.J.F. 115, 121 n.36 (2017).

94. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 160 (2d Cir. 2018) (en banc) (Lynch, J., dissenting).

95. *Id.* at 161.

96. See Soucek, *supra* note 93, at 124–25.

always triggered by and meant to enforce gender-specific stereotypes. Sexual orientation discrimination thus *categorically* comprises discrimination because of sex, prohibited by Title VII.

This, however, is one place where Schultz and I might temporarily part ways. In *Reconceptualizing Sexual Harassment*, Schultz imagined stereotypes about gay men – “as carriers of AIDS, for example” – that “would not necessarily be based on gender”<sup>97</sup> and thus could not be used to support a Title VII claim. Insofar as such stereotypes are fueled by a gendered disgust that links disease, bodily fluids, and receptive anal sex,<sup>98</sup> I would press a sex discrimination claim even here. But the crucial point of Schultz’s hypothetical is that not everyone thinks sexual orientation discrimination always counts as sex stereotyping under Title VII.<sup>99</sup> And while I disagree, I acknowledge that this is perhaps why the sex stereotyping argument – to me, the most compelling of those on offer<sup>100</sup> – has yet to lead the appellate opinions and briefs that read Title VII to prohibit discrimination based on sexual orientation.<sup>101</sup>

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97. Schultz, *supra* note 9, at 1787 n.533.

98. See Brian Soucek, *The Case of the Religious Gay Blood Donor*, 60 WM. & MARY L. REV. (forthcoming 2019) (manuscript at 39) (on file with author).

99. Compare *Zarda*, 883 F.3d at 119 (“[S]exual orientation discrimination is *almost invariably* rooted in stereotypes about men and women.” (emphasis added)), with *id.* at 122 (“We now conclude that sexual orientation discrimination is rooted in gender stereotypes and is thus a subset of sex discrimination.”). These statements, however, only attracted six out of thirteen votes on the en banc panel in *Zarda*.

100. See Brief for Anti-Discrimination Scholars as Amici Curiae Supporting Petitioner at 6-7, *Evans v. Ga. Reg’l Hosp.*, 850 F.3d 1248 (11th Cir. 2017) (No. 17-370); see also *Zarda*, 883 F.3d at 156 (Lynch, J., dissenting) (“Perhaps the most appealing of the majority’s approaches is its effort to treat sexual orientation discrimination as an instance of sexual stereotyping.”). For a description of the other arguments for why sexual orientation discrimination is prohibited by Title VII – including gender-blind comparator arguments and associational arguments – see Soucek, *supra* note 93, at 117-21.

101. See, e.g., *Zarda*, 883 F.3d 100 (garnering eight out of thirteen votes for a gender-blind argument, which says that *Zarda* would not face discrimination were he a woman attracted to men, and eight votes for an associational argument, which says that discriminating against employees because of the sex of those with whom they associate counts as sex discrimination); Petition for Writ of Certiorari, *Evans*, 850 F.3d 1248 (No. 17-370) (leading with the argument that a lesbian employee would not have faced sexual orientation discrimination but for her sex).



#### IV. CONCLUSION

What do any of us really know about the plaintiffs in other circuits' recent sexual orientation discrimination cases: Jameka Evans,<sup>102</sup> Kimberly Hively,<sup>103</sup> or Donald Zarda?<sup>104</sup> Scant on facts and faint in their outrage, the opinions in those cases could start by saying merely “a Gay Man or a Lesbian Woman faced discrimination at work” and nothing would be substantively different. Not so with Lori Franchina. Readers of *Franchina v. City of Providence* may not know Franchina as a fully fleshed-out person, but we know well what she suffered at work. We know what drove her to file those forty complaints of harassment.<sup>105</sup> We know, too, how the people of Providence were endangered by male firefighters who would rather let residents die than allow their lesbian supervisor to succeed.<sup>106</sup> We know to be outraged that the City of Providence appealed this case rather than apologizing to the woman who went from the top of her firefighters' class to permanent disability.

We know all of this because Judge Thompson told us Franchina's story—as the City of Providence so pointedly refused to do.<sup>107</sup> Like others in the #MeToo movement, Franchina stood up, and through Judge Thompson's opinion, her appalling story of harassment was told.

The mistreatment Franchina experienced often targeted her sexual orientation. But it arose because of her gender—because she was a woman in (what men wanted to be) a man's world. And while her harassment occasionally took sexualized forms, it was not about desire; it was about power and exclusion. Sexual harassment is sexist harassment. Sexual orientation harassment is sexist harassment. Both are sexist because they aim to police sharply defined gender roles, traits, and opportunities. *Franchina v. City of Providence* tells a story of how this happens—a story that deserves to be counted as part of the #MeToo movement, and one that helps clarify what that movement might seek to change.

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102. *Evans*, 850 F.3d 1248.

103. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017) (en banc).

104. *Zarda*, 883 F.3d 100.

105. See *Franchina v. City of Providence*, 881 F.3d 32, 44 (1st Cir. 2018).

106. See *id.* at 41-42.

107. *Id.* at 38 (“Though the City attempts to trivialize the abuse inflicted upon Franchina while working for the Department by giving it short shrift in its brief, we decline to be as pithy in reciting Franchina's plight . . .”).

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