EMPLOYMENT LAW — TITLE VII — THIRD CIRCUIT ISSUES SPLIT DECISION IN CASE INVOLVING GAY MAN'S HARASSMENT CLAIMS. — *Prowel v. Wise Business Forms, Inc.*, No. 07-3997, 2009 U.S. App. LEXIS 19350 (3d Cir. Aug. 28, 2009).

The provisions against employment discrimination contained within Title VII of the Civil Rights Act of 1964,[1] although broad themselves, are greatly limited in scope by the statute's application to only five protected classes.[2] Although there has been much litigation regarding the breadth of each individual class,[3] the proper treatment of claims alleging discrimination because of overlapping characteristics remains unclear. Recently, in *Prowel v. Wise Business Forms, Inc.*,[4] the Third Circuit held that it is a question of fact, to be decided by a jury, whether a male employee suffered harassment because of his sexual orientation or because of his effeminacy;[5] only the latter would constitute a form of impermissible gender stereotyping under Title VII. However, the court rejected the plaintiff's second claim — that he suffered discrimination as a result of religious harassment — because the alleged religious discrimination was based solely on his sexual orientation, an unprotected category under Title VII.[6] Together, the claims provided the circuit with an opportunity to demonstrate how an allegation of discrimination based on both impermissible and permissible motivating factors should be treated under the law. Rather than reach the same result for the two claims, however, the court split its decision, ostensibly basing the distinction on the strength of the nexus between the protected and unprotected statuses. The reasoning behind the holdings is incoherent, as it produced an inconsistent method of disposing of cases based on more than one characteristic. The court's obvious difficulty in dealing with identity-based claims created a dubious precedent for handling similar issues in the future.

Brian Prowel began working at Wise Business Forms in 1991.[7] Prowel alleged that during the course of his employment, until his

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[1] 42 U.S.C. §§ 2000e to 2000e-17 (2006).

[2] *Id.* § 2000e-2 (defining Title VII discrimination as being because of "race, color, religion, sex, [and] national origin").

[3] The expansion of the definition of discrimination "because of sex" is illustrative. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (plurality opinion) (holding that negative treatment of a female employee because she did not fit within gender norms amounted to discrimination because of sex); Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004) (applying gender nonconformity protection to men); Schroer v. Billington, 577 F. Supp. 2d 293 (D.D.C. 2008) (extending gender nonconformity protection to transgendered employees).

[4] No. 07-3997, 2009 U.S. App. LEXIS 19350 (3d Cir. Aug. 28, 2009).

[5] *Id.* at *15.

[6] *Id.* at *21.

[7] Prowel v. Wise Bus. Forms, Inc., No. 2:06-cv-259, 2007 WL 2702664, at *1 (W.D. Pa. Sept. 13, 2007).

termination in December 2004, he suffered numerous incidents of harassment at the hands of his coworkers.[8] A self-described "effeminate man,"[9] Prowel alleged that his coworkers mocked his mannerisms and appearance — for instance, by giving him derogatory nicknames, leaving a packet of lubricant and a tiara at his workspace, and vandalizing the bathroom with graffiti about AIDS and about Prowel's engaging in sexual acts with other men at the plant.[10] In addition, Prowel complained of harassment that was religious in tone, including "the Human Resources manager telling other employees that Prowel did not fit in with the good Christian values of the company" and coworkers' leaving prayer notes and religious materials at his work station that stated that Prowel would "burn in hell."[11] As a result of this harassment, as well as the management's inconsistent responses to it,[12] Prowel became increasingly dissatisfied with his work and began contemplating a lawsuit against the company, a consideration he discussed with other employees.[13] On December 13, 2004, Wise management informed Prowel that it was terminating his employment for lack of work.[14] After exhausting the Equal Employment Opportunity Commission's avenues for redress, Prowel sued Wise in the United States District Court for the Western District of Pennsylvania, requesting relief under Title VII and the Pennsylvania Human Relations Act.[15] He argued that he had been the subject of "harassment and wrongful termination because of sex and religion and concomitant retaliation."[16]

The district court granted summary judgment in favor of Wise.[17] First, the court considered *Price Waterhouse v. Hopkins*,[18] in which the Supreme Court held that employees who failed to conform to prevailing gender stereotypes could bring sex discrimination claims.[19] The court also acknowledged that the Third Circuit had previously stated, in dicta in *Bibby v. Philadelphia Coca Cola Bottling Co.*,[20] that a homosexual plaintiff might theoretically bring a valid Title VII claim for harassment that was motivated by his failure to "conform to the

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[8] *Id.*

[9] *Prowel*, 2009 U.S. App. LEXIS 19350, at *3.

[10] *Prowel*, 2007 WL 2702664, at *1.

[11] *Id.*

[12] Management's responses included taking no action and repainting the graffitied bathroom. *Prowel*, 2009 U.S. App. LEXIS 19350, at *5–6.

[13] *Id.* at *7.

[14] *Id.* at *8.

[15] 43 PA. CONS. STAT. ANN. §§ 951–963 (West 2009).

[16] *Prowel*, 2009 U.S. App. LEXIS 19350, at *8.

[17] Prowel v. Wise Bus. Forms, Inc., No. 2:06-cv-259, 2007 WL 2702664, at *5, *8 (W.D. Pa. Sept. 13, 2007).

[18] 490 U.S. 228 (1989) (plurality opinion).

[19] *See id.* at 250.

[20] 260 F.3d 257 (3d Cir. 2001).

stereotypes of his . . . gender."[21] Nevertheless, the court found that Prowel had not presented sufficient evidence that the harassment he suffered was a result of his sex rather than his sexual orientation.[22] Seeing Prowel's suit as simply a "relabel[ing]" of a sexual orientation claim and noting Congress's refusal to include sexual orientation as a protected category in Title VII, the court declined to interpret the statute in such a way that would extend protection to sexual orientation, reasoning that to do so would contradict congressional intent.[23] Similarly, the court found Prowel's "effort to repackage his sexual orientation claim as one arising" out of religion to be transparent as well.[24] Noting that Wise had neither required Prowel to participate in religious activities nor failed to accommodate a religious request of his, the court found that Prowel's mere status as a gay man and his coworkers' religiously tinged reactions to it were not enough to qualify as discrimination based upon religion.[25] Accordingly, the district court granted summary judgment for Wise on both the sex and religious discrimination claims.

The Third Circuit vacated in part and affirmed in part.[26] Writing for a unanimous panel, Judge Hardiman,[27] first addressing Prowel's sex discrimination claim, disagreed with the parties' initial contention that *Bibby* dictated the outcome of the case.[28] The court rejected Wise's argument that Prowel's situation was identical to that of the plaintiff in *Bibby*, noting that a gender stereotyping claim like Prowel's had not been raised in that case.[29] Nor did the court accept Prowel's argument that *Bibby* required a reversal of summary judgment simply because the opinion noted that a plaintiff could, in theory, bring a gender stereotyping claim.[30] Instead, Judge Hardiman turned to the specific facts of Prowel's case in order to determine whether they could lead a reasonable jury to conclude that Prowel had suffered harassment and retaliation as a result of discrimination "because of sex."[31]

Judge Hardiman began his factual inquiry by noting the major difference between Prowel's situation and the one at issue in the original gender nonconformity case, *Price Waterhouse*: while the sexual

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[21] *Id.* at 262–63; *see also Prowel*, 2007 WL 2702664, at *3 ("[O]nce a plaintiff shows that harassment is motivated by sex, it is no defense that it may also have been motivated by anti-gay animus.").

[22] *Prowel*, 2007 WL 2702664, at *5.

[23] *Id.* at *4.

[24] *Id.* at *5.

[25] *Id.*

[26] *Prowel*, 2009 U.S. App. LEXIS 19350, at *23.

[27] Judges Fisher and Chagares joined the opinion.

[28] *Prowel*, 2009 U.S. App. LEXIS 19350, at *10–11.

[29] *Id.* at *12–13.

[30] *Id.* at *13.

[31] *Id.*

orientation of the female plaintiff in that case was not at issue, Prowel was openly gay.[32] The court refused, however, to let this distinction determine the outcome of the case — to do so, it reasoned, would effectively allow sexual orientation to determine one's eligibility to bring a lawsuit for discrimination unrelated to that status.[33] Rather, the court concluded, Prowel's claim, taken as true, provided a sufficient basis to allow the jury to determine, as a question of fact, whether Prowel was harassed because of his sex or, instead, because of his sexual orientation.[34]

With respect to the second claim — religious discrimination — the court deemed the facts asserted in the complaint adequately decisive for summary judgment.[35] The court acknowledged that Title VII protects employees both from discrimination against their own religious beliefs as well as from forced religious conformity.[36] However, it did not agree that Prowel and Wise's single religious disagreement — the acceptability of homosexuality — and the treatment that ensued constituted harassment *because of* religion for the purposes of Title VII.[37] The court, echoing the position of the district judge, saw Prowel's religion claim as a sexual orientation claim in disguise and similarly deferred to Congress's apparent choice not to include the category as a protected status.[38] As a result, the court affirmed the district court's grant of summary judgment on the religion claim in favor of Wise.[39] To clarify the different results, the court explained that Prowel's "gender stereotyping claim [was] not limited to, or coextensive with," a sexual orientation claim, while his religious discrimination claim was "based entirely upon his status as a gay man."[40] As such, the religion claim, unlike Prowel's assertion of harassment based on gender nonconformity, did not deserve its day in court.

A logical tension persists beneath the court's proffered reasoning for a split holding between Prowel's two claims. Inherent in the issue presented was the question of how a court should treat a Title VII claim in which the discrimination was based on either or both of two class memberships, one protected and one unprotected. In response to

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[32] *Id.* at *14.

[33] *Id.* at *19 ("There is no basis in the statutory or case law to support the notion that an effeminate *heterosexual* man can bring a gender stereotyping claim while an effeminate *homosexual* man may not.").

[34] *Id.*

[35] *Id.* at *22–23.

[36] *Id.* at *20 (citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 20 (1993); Abramson v. William Paterson Coll. of N.J., 260 F.3d 265, 277 (3d Cir. 2001)).

[37] *Id.* at *21.

[38] *See id.*

[39] *Id.* at *23.

[40] *Id.* at *22.

the sex discrimination claim, the court implied that as long as the discrimination may have been based at least in part on a protected class status, the plaintiff has stated a claim upon which relief may be granted and may proceed past the summary judgment stage. However, the court's affirmance of the summary judgment ruling disposing of the religious nonconformity claim subverts this reasoning; the court decided that, as a matter of law, the religious harassment Prowel suffered was inextricable from his status as a gay man, and he therefore had no right to relief under the statute. But based on the facts presented, the same uncertainty about the motivating factor underlying the sexual harassment claim existed for the religious harassment claim, a fact that supports a unified holding for both claims. Instead, the court came to a tenuous conclusion that reflects wider uncertainty about the proper legal treatment of identity-based claims.

The issue presented by Prowel's suit against his employer, although split into two claims based on separate classes of Title VII, was a single legal question: how should a court treat a claim of discrimination when, based on the facts, the harassment was possibly motivated by multiple factors, some impermissible and some permissible? Title VII of the Civil Rights Act of 1964 protects employees from discrimination "because of [one's] race, color, religion, sex, or national origin."[41] In each of Prowel's claims, the harassment he suffered was a product of animosity toward either a protected status (sex or religion) or a class to which Congress has repeatedly denied protection (sexual orientation),[42] or both. The court had two coherent options in determining how to treat these claims. First, the court could have affirmed summary judgment on both by denying relief on these "mixed" claims, thereby giving more weight to Congress's apparent desire not to permit claims based on sexual orientation. Alternatively, the court could have reversed summary judgment for both and allowed the claims to proceed as long as the harassment was at least partially the result of membership in a protected class. The factfinder would then decide, at trial, the extent to which the protected class membership motivated the harassment. Instead of choosing either of these options, the court chose to issue divergent holdings, applying its reasoning to the two claims inconsistently.

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[41] 42 U.S.C. § 2000e-2(a)(1) (2006).

[42] Congress has repeatedly refused to pass the Employment Non-Discrimination Act (ENDA), which would add "sexual orientation" to the list of classes protected by Title VII. Examples of failed versions of ENDA are S. 2056, 104th Cong. (1996); H.R. 1863, 104th Cong. (1995); and H.R. 4636, 103d Cong. (1994). For information on the ENDA bill recently before Congress, including a criticism of its effectiveness, see generally Jennifer S. Hendricks, *Instead of ENDA, A Course Correction for Title VII*, 103 NW. U. L. REV. COLLOQUY 209 (2008), http://www.law.northwestern.edu/lawreview/colloquy/2008/43/LRColl2008n43Hendricks.pdf.

On the one hand, the court allowed the sex discrimination claim to proceed despite the fact that the harassment may have also been motivated by Prowel's sexual orientation. The opinion openly addressed the possibility of dual motives for the harassment.[43] However, the Third Circuit disagreed with the lower court's conclusion that this fact required an automatic ruling in the employer's favor.[44] Rather, the opinion persuasively argued that Title VII jurisprudence does not support disparate treatment of claims depending on the sexual orientation of the plaintiff, as long as a factfinder could conclude that the harassment in question occurred "because of" a protected characteristic.[45] Indeed, the statute itself explicitly supports allowing a claim that alleges harassment if it is at least in part premised on a protected status.[46]

On the other hand, the court used the possibility of multiple motivations to justify affirming the lower court's rejection of Prowel's religious discrimination claim. Declining to apply the same logic that it used for the sex discrimination issue, the court reasoned that because Prowel's sexual orientation played a key part in the harassment he suffered, it was irrelevant that the harassment may have also been motivated by religion, a protected class.[47] The court decided as a matter of law that since the discrimination was certainly motivated by Prowel's sexual orientation, a class Congress chose not to protect under Title VII, Prowel had not stated an actionable claim, even if the claim was also premised on the sort of religious discrimination against which Congress *had* wished to protect.[48]

The court did not offer a satisfactory explanation for its disparate treatment of the two claims. The court maintained that it *was* using a single rationale to draw a solid, cognizable line between Prowel's two claims,[49] but the basis of the court's distinction — that the alleged religious harassment could not exist apart from his sexual orientation, while the alleged gender discrimination could — misconstrued the

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[43] *See Prowel*, 2009 U.S. App. LEXIS 19350, at *18 ("[I]t is possible that the harassment Prowel alleges was because of his sexual orientation, not his effeminacy. Nevertheless, this does not vitiate the possibility that Prowel was also harassed for his failure to conform to gender stereotypes.").

[44] *Id.*

[45] *Id.* at *19.

[46] *See* 42 U.S.C. § 2000e-2(m) (2006) ("[A]n unlawful employment practice is established when the complaining party demonstrates that . . . sex . . . was a motivating factor for any employment practice, even though other factors also motivated the practice.").

[47] *Prowel*, 2009 U.S. App. LEXIS 19350, at *21 ("Prowel's identification of this single 'religious' belief [that homosexuality is 'contrary to being a good Christian'] leads ineluctably to the conclusion that he was harassed not 'because of religion,' but because of his sexual orientation.").

[48] *See id.* at *22.

[49] *Id.* ("In sum, the same principle that requires Prowel's gender stereotyping claim to be submitted to the jury requires that his religious harassment claim fail at this stage.").

facts asserted by Prowel in his complaint. Prowel pleaded sufficient facts that, if true, depicted instances of harassment that had a sound basis in religion rather than in pure anti-gay bias. He alleged that religious materials were left around his workspace and that he was exposed to verbal harassment about religious issues and Christian values.[50] These facts suggest that Prowel's coworkers might have been targeting religious nonconformity generally, rather than homosexuality exclusively. Thus, the same doubt that compelled the court to allow the gender nonconformity claim to go to trial also existed for the religious nonconformity claim. A factfinder should have been given the opportunity to resolve the uncertainty regarding whether Prowel's colleagues harassed him because of his religious nonconformity in the abstract or because his religious nonconformity was the result of his sexual orientation.

The court's comparison of its reasoning with a decision in the Northern District of California further underscores the inconsistency of its holding. In *Erdmann v. Tranquility Inc.*,[51] the court denied the defendants' summary judgment motion in a case in which a gay employee claimed religious harassment because his boss insisted he become heterosexual.[52] The *Prowel* court contrasted that situation with Prowel's alleged facts, insisting that the plaintiff in *Erdmann* "did not claim Title VII religious harassment based exclusively upon his homosexual status,"[53] a conclusion the court found supported by the fact that "the employer insisted that [the plaintiff] convert to [a different] faith and lead the company's daily prayer service."[54] But the harassment alleged by the plaintiff in *Erdmann* was just as firmly based in sexual orientation as that aimed at Prowel. The statements by the offending employer in *Erdmann* pinpoint the beginning of the harassing conduct as "after [a supervisor] found out [that the plaintiff was] homosexual."[55] In fact, by allowing Erdmann's religion claim to proceed despite the harassment's basis in the plaintiff's sexual orientation, the court utilized the same understanding of Title VII protection that the *Prowel* court espoused with respect to the gender nonconformity claim: discrimination at least partially motivated by a protected status requires remedy. The *Prowel* court, then, erred in its reliance on the decision in *Erdmann* to explain away the logical dissonance in its split holding.

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[50] *Id.* at *6–7.
[51] 155 F. Supp. 2d 1152 (N.D. Cal. 2001).
[52] *See id.* at 1156, 1167.
[53] *Prowel*, 2009 U.S. App. LEXIS 19350, at *22.
[54] *Id.*
[55] *Erdmann*, 155 F. Supp. 2d at 1156.

Thus, while the court asserted — when discussing Prowel's gender claim — that it would follow statutory language by allowing any claim of discrimination that occurs "because of" a protected characteristic, its dismissal of Prowel's religious nonconformity claim suggests that it still may not allow claims in which a person cannot provide specific evidence of discrimination occurring for reasons entirely distinct from an unprotected status. The court's seemingly contradictory holdings illustrate the general problems that attend judicial efforts to parse identity when attempting to determine whether particular harassment claims fall under the Title VII umbrella.[56] But while the Third Circuit's difficulties may not be unique, the holding's implications are still problematic. Although *Prowel* does support an emerging, more inclusive view of discrimination "because of sex,"[57] the confusion inherent in its decision will likely impede further movement toward a more coherent understanding of the protections Congress intended in enacting Title VII.

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[56] For example, there has been a long-running dispute within the courts over the proper treatment of individuals claiming multiple protected characteristics. Since the late 1970s, the judiciary has given varying degrees of legal protection to those who claim that their employers discriminate against only those who possess two Title VII characteristics and not against those who possess only one of the two. *See* Bradley Allan Areheart, *Intersectionality and Identity: Revisiting a Wrinkle in Title VII*, 17 GEO. MASON U. CIV. RTS. L.J. 199, 218–20 (2006). *Compare* Jefferies v. Harris County Cmty. Action Ass'n, 615 F.2d 1025, 1032 (5th Cir. 1980) (allowing evaluation of race and sex together to state a Title VII claim), *with* DeGraffenreid v. Gen. Motors Assembly Div., St. Louis, 413 F. Supp. 142 (E.D. Mo. 1976) (partially granting summary judgment against black women who could not prove discrimination against white women). For a more in-depth background on intersectional theory and the legal treatment of identity in Title VII claims, see generally Areheart, *supra*.

[57] Other circuits have also allowed gender nonconformity claims similar to Prowel's to survive summary judgment. *See, e.g.*, Doe v. City of Belleville, 119 F.3d 563, 580–83 (7th Cir. 1997) (holding that evidence that a man was harassed and threatened because of his effeminate appearance, including his wearing an earring, was sufficient to support a finding that he had suffered as a result of discrimination "because of sex").