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# Sexual Orientation and Gender Identity: Protected Categories Under Title VII?

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## **Sexual Orientation and Gender Identity: Protected Categories under Title VII?**

### **Lowell Ritter**

Plaintiffs and their attorneys have an increasingly viable argument that Title VII's definition of "sex" includes sexual orientation and gender identity, expanding employers' potential liability. This is based in part on the Equal Employment Opportunity Commission's (EEOC) firm position that both sexual orientation and gender identity are protected under the statute.

Indeed, the EEOC has identified "coverage of lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions" as one of the foremost national enforcement priorities in their Strategic Enforcement Plan, which spans through 2016. Even the most well-intentioned employers are vulnerable to claims by an aggrieved employee or applicant as well as the possibility of costly, public litigation.

### **Background**

Title VII of the Civil Rights Act of 1964 prohibits discrimination "with respect to [an individual's] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 USC §2000e-2(a)(1). Whether Title VII protects discrimination based on sexual orientation or gender identity has not been definitively answered and any finality will likely only come once a legislative solution has been reached by Congress and/or the Supreme Court interprets the statute's term.

### **Gender Identity**

Even though courts and the EEOC initially concluded in the 1970s and 80s that gender identity was not protected under Title VII, that is no longer true.

Employers can be liable for discrimination based on sex stereotyping, such as concluding that a female employee does not conform to the employer's version of being "lady-like enough." *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). In 2012, the EEOC definitively concluded that gender identity discrimination comes within Title VII's definition of "sex" and is, therefore, prohibited by the statute. *Macy v. Holder*, EEOC Appeal No. 0120120821 (4/20/12).

Relying in part on *Price Waterhouse*, the agency reasoned that "sex" in Title VII includes both biological sex and gender (including "the cultural and social aspects associated with masculinity and femininity") and that Title VII prohibits gender stereotyping. Importantly, the EEOC concluded that gender stereotyping is just *one* way in which a plaintiff can prove a prima facie case of sex discrimination with the primary question always being "whether the employer actually relied on the employee's gender in making its decision," whatever form that may take.

Subsequently, the EEOC filed its first two lawsuits, *EEOC v. Lakeland Eye Clinic, P.A.*, M.D. Fla., No. 8:14-02421, complaint filed 9/25/14 and *EEOC v. R.G. & G.R. Harris Funeral Homes Inc.*, E.D. Mich., No. 2:14-13710 complaint filed 9/25/14, alleging sex discrimination based on the firing of a transgender employee.

The *Lakeland Eye Clinic* case settled; Lakeland paid \$150,000 to the former employee in addition to providing a letter of reference, instituting an anti-discrimination policy and implementing anti-discrimination training. The *R.G. & G.R. Harris Funeral Homes, Inc.* case survived a motion to dismiss in Michigan federal court and recently entered mediation.

Following these two lawsuits, the EEOC has been steadily pursuing enforcement of transgender bias claims. In September 2015, the EEOC intervened to join a plaintiff suing First Tower Loan, LLC, alleging his termination for being transgender constituted sex discrimination. *Broussard v. First Tower Loan, LLC*, E.D. La. No. 2:15-01161, complaint filed 4/13/15.

Even more recently, Deluxe Financial in Minnesota paid \$115,000 in January 2016 to settle claims that the plaintiff was not allowed to use the women's restroom in addition to other offensive comments and harassment. The company agreed to issue an apology and provide a future reference. The settlement also included a three-year consent decree that requires their health plan not exclude necessary medical care based on transgender status, a revised EEO policy, annual training, and annual reports to the EEOC.

Notwithstanding the regulatory climate, some courts have been unwilling to expand Title VII's definition, concluding that "discrimination against a transsexual based on the person's status as a transsexual is not discrimination because of sex under Title VII." *Etsitty v. Utah Transit Authority*, 502 F.3d 1215 (10th Cir. 2007).

But courts are split. The Eleventh Circuit recently held that "[s]ex discrimination includes discrimination against a transgender person for gender nonconformity," allowing the plaintiff to proceed to trial. *Chavez v. Credit Nation Auto Sales, LLC*, 641 Fed.App'x. 883 (11th Cir. 2016).

Courts are moving in the direction of recognizing gender identity discrimination as a form of sex discrimination. Even outside of court, employers are facing costly settlements in addition to required adoption of new policies and training.

### **Sexual Orientation**

Like gender identity, the EEOC did not always support the proposition that Title VII's definition of "sex" includes sexual orientation. The EEOC's groundbreaking decision on this issue involved a former air traffic controller who alleged he was not selected for a promotion because of his sexual orientation. *David Baldwin v. Dep't of Transportation*, EEOC Appeal No. 0120133080 (July 15, 2015). The EEOC, analogizing the protections for federal employees to those in the private sector, concluded that "[s]exual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex."

The EEOC also recognized coverage based on "associational discrimination" and "discrimination based on gender stereotypes." For example, an employer basing an adverse employment action on the idea that "'real' men should date women and not other men" would be unlawful stereotyping in the EEOC's eyes. Mr. Baldwin filed suit in federal district court in Florida once the EEOC issued their decision. *Baldwin v. Secretary, United States Department of Transportation*, S.D. Fla., 1:15-23825, complaint filed 10/13/15.

Many courts do not accept the EEOC's position. For example, the Seventh Circuit recently ruled in *Hively v. Ivy Tech Community College*, No. 15-1720, 2016 WL 4039703, (7th Cir. 2016) that Title VII's definition of "sex" does not include sexual orientation. The Court wrote that they were bound by Seventh Circuit Precedent while recognizing the "...paradoxical legal landscape in which a person can be married on Saturday and then fired on Monday for just that act." This is the first Court of Appeals to rule on the issue since the EEOC took their strong position in *Baldwin*. No Court of Appeals has ruled that Title VII covers sexual orientation discrimination.

The Fifth and Sixth Circuits have ruled only that LGBT workers who do not conform to gender stereotypes (e.g., not being “manly enough”) have a Title VII claim. Several district courts have seemed to accept the EEOC’s position, at least in dicta, including district courts in Massachusetts, Connecticut, Ohio, Oregon, and California.

### **Legislative Responses**

20 states and Washington, D.C. protect against both sexual orientation and gender identity discrimination. For example, in California, the text of the statute reads:

It is an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

(a) For an employer, because of the ... genetic information, marital status, sex, gender, gender identity, gender expression, ... [or] sexual orientation of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment. Cal. Gov. Code §12940.

While California’s statute is broad, other states are less comprehensive or non-existent. This creates a patchwork of laws across the United States without protection on the federal level. Because courts seem reluctant to recognize protection under Title VII, a national response may come only through Congress.

Proposed federal law includes the Employment Non-Discrimination Act which would prohibit discrimination based on sexual orientation and gender identity, but it has failed to pass Congress year after year. The Equality Act (S. 1858, H.R. 3185), introduced on July 23, 2015, would amend the Civil Rights Act of 1964, among other laws, to explicitly include sexual orientation and gender identity as protected classes.

It is clear the Title VII legal landscape is changing and presenting a challenge to courts and legislators alike, with any type of finality only to come from Congress or the Supreme Court.