Changing Interpretations of LGBT Discrimination

Cultural Competence

Employment and Labor

changing interpretations of LGBT discrimination
By Gloria Myers and Jonathan W. Yarbrough

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CHEAT SHEET

- ***The old standard.*** The original intent of the law was meant to sanction cases where an employer unfairly privileged a man over a woman, and vice versa.
- ***An expanded definition.*** The notion of “sex stereotyping” came to recognize instances in which an employee was discriminated against for not conforming to conventional gender roles.
- ***Further changes.*** Pending judgments raise the possibility that “sex” in Title VII could come to refer to gay and lesbian employees as well.
- ***The bathroom debate.*** OSHA has instructed employers to permit transgender employees to use the bathroom of their choice, even if they haven’t begun a physical transition

Just two days before the vote on Title VII of the US Civil Rights Act of 1964, Howard Smith, a Democratic senator from Virginia, introduced an amendment to the then-proposed legislation to add “sex” as a protected class. There are still arguments to this day as to whether Senator Smith proposed his amendment as a joke. He voted against the Civil Rights Act, yet he supported women’s issues. Regardless of whether it was intended as a joke or not, sex discrimination became unlawful when Title VII passed. Although we will never solve the mystery of whether Smith’s amendment was a joke, one thing seems fairly certain. Sex, at least in the days of “Mad Men,” was intended to address just males and females — a strict biological interpretation. Fast forward some 50 years and the word sex has a whole different meaning under Title VII and affords protection to employees who were probably not considered when the law was under debate. Over the last 50 years, the word sex has been defined in strict biological terms, to sex stereotyping, and now to sexual orientation. It is doubtful that Judge Smith, as the senator was known, had any idea that sex discrimination would over time encompass discrimination against lesbian, gay, bisexual, and transgender (LGBT) employees.

Traditional views define early cases

In one early case, *DeSantis v. Pacific Telephone & Telegraph Co.*, gay and lesbian employees claimed that their employers had discriminated against them on the basis of sexual orientation (The case is actually a combination of three separate cases). In one of the cases, a gay employee claimed that he was fired because he wore a small gold earring prior to the start of the school year. The Ninth Circuit decided against the employees in each case, holding that sexual orientation or preference was not covered under Title VII because sex discrimination should be limited to traditional notions of sex, absent some Congressional mandate otherwise. The *DeSantis* case followed on the heels of an earlier Ninth Circuit decision with a similar holding regarding a transgender employee. In *Holloway v. Arthur Anderson and Company*, the plaintiff, a biological male when hired, revealed to his supervisor that he was transgender and was undergoing female hormone therapy, intending to transition to a female. In June 1974, during an annual review, a company official suggested that the plaintiff would “be happier” at a different workplace where her transsexual history would be unknown. In November 1974, the plaintiff requested that Arthur Anderson use his female name, and it was agreed upon. Shortly thereafter, she was terminated and filed suit alleging sex discrimination. The district court dismissed and the Ninth Circuit Court affirmed the dismissal of the suit, reasoning that the sex

discrimination prohibition in Title VII was “intended to place women on an equal footing with men,” and that Congress only had the traditional notions of “sex” in mind when enacting Title VII.

Since courts were not receptive to an argument that sexual orientation discrimination was included in the prohibition on sex discrimination, plaintiffs tried a different tack attempting to argue that the term sex should include gender identity. These attempts, largely brought by transsexual employees, failed as well because courts continued to hold that Title VII’s sex discrimination prohibition applied only to traditional notions of male and female. In one case, *Ulane v. Eastern Airlines, Inc.*, a male to female transsexual pilot prevailed at the lower court only to have her victory reversed. Ulane was employed as a pilot for Eastern Airlines. A combat pilot and decorated Vietnam veteran, Ulane was hired as a male pilot in 1968 and underwent reassignment surgery in 1980. Eastern Airlines was not even aware of the transition until Ulane returned to work. After prevailing at the District Court level with her argument that sexual identity is included within Title VII’s sex discrimination prohibition (and the District Court judge even amended his findings to conclude that Ulane was female and had been discriminated against on that basis as well), the Seventh Circuit reversed, stating that Ulane was not female but instead was transsexual — “a biological male who takes female hormones, cross-dresses, and has surgically altered parts of her body to make it appear to be female.” As such, she was not discriminated against as a female and Title VII was not expansive enough to include transsexuals.

Sex stereotyping

Just a few years after the *Ulane* decision, the US Supreme Court weighed in with a case that started the more expansive view of “sex” discrimination that we are seeing today with its decision in *Price Waterhouse v. Hopkins*. There, the Court held that “sex stereotyping” — where an employer makes an adverse employment decision based on stereotypical beliefs regarding males and females — is unlawful sex discrimination under Title VII. Couple this decision with the Supreme Court’s decision in *Oncale v. Sundowner Offshore Services*, Inc. that same sex harassment is actionable under Title VII and the landscape for employment law claims of discrimination and harassment brought by LGBT employees started to shift noticeably in their favor and away from traditional notions of sex discrimination.

For example, relying on *Price Waterhouse*, the Sixth Circuit held in two separate cases that sex stereotyping against transsexual employees violated Title VII. In the first case, *Smith v. City of Salem*, a transsexual firefighter was suspended for not being manly enough after having to undergo psychological evaluations for his non-conforming behavior. Similarly, in *Barnes v. Cincinnati*, a transsexual employee who lacked “command presence” among other faults had a jury verdict of over US$300,000 upheld by the Court after having been denied a promotion with the Cincinnati Police Department.

Big changes in recent years

The US Equal Employment Opportunity Commission (EEOC) has not sat on the sidelines as the law has started to change. Instead, the EEOC has been at the forefront, at least as of late. In April 2012, the EEOC ruled that a complaint of discrimination based on gender identity and/or transgender status is cognizable under Title VII of the Civil Rights Act of 1964. In *Macy v. Holder*, the complainant, Mia Macy, had completed a telephone interview for a job with the Bureau of Alcohol, Tobacco, Firearms and Explosives in December 2010, at which time she presented as a male. During or shortly after the telephone interview, she was told that she was being hired contingent on a background check. During the time that the background check was being conducted, Macy notified the agency that she was in

the process of transitioning from male to female. Five days later, the agency told Macy that the position was no longer available, and another person was hired for the position soon thereafter.

Macy filed a complaint with the EEOC in June 2011, checking the box “sex” as the basis of discrimination. In the actual charge form, Macy wrote that she was being discriminated against based on gender identity and “sex stereotyping.” When the EEOC District Office notified her that the EEOC was not going to investigate her claim under Title VII, Macy appealed to the full EEOC Commission, seeking to have her claim adjudicated under Title VII. The full EEOC Commission ruled that Macy’s claim of sex stereotyping and gender identity disorder discrimination was a form of sex discrimination within the meaning of Title VII. In doing so, the EEOC relied in part on the US Supreme Court’s decision in *Price Waterhouse v. Hopkins,* discussed above. The EEOC ruling stated:

“As used in Title VII, the term ‘sex’ encompasses both sex — that is the biological differences between men and women — and ‘gender.’ … As the Eleventh Circuit noted … Title VII barred ‘not just discrimination because of biological sex, but also gender stereotyping — failing to act and appear according to expectations defined by gender.’ As such, the terms ‘gender’ and ‘sex’ are often used interchangeably to describe the discrimination prohibited by Title VII. … That Title VII’s prohibition on sex discrimination proscribes gender discrimination — not just discrimination on the basis of biological sex — is important. If Title VII proscribed only discrimination on the basis of biological sex, the only gender-based disparate treatment would be when an employer prefers a man over a woman, or vice versa. But the statute’s protection sweeps far broader than that, in part because the term 'gender' encompasses not only a person’s biological sex but also the cultural and social aspects associated with masculinity and femininity.”

Although the EEOC relied in part on *Price Waterhouse* and other similar cases, the EEOC went beyond the Supreme Court’s interpretation of gender stereotyping, ruling that whether the alleged discrimination is motivated by “hostility, a desire to protect people of a certain gender, by assumptions that disadvantage men, by gender stereotypes, or by a desire to accommodate other people’s prejudices and discomfort,” all such behavior is evidence of sex discrimination under Title VII. As a result, the EEOC determined that a transgender person who has experienced discrimination based on his or her gender identity could establish a *prima facie* case of sex discrimination in a number of ways, all of which are part of the broad definition of sex discrimination under Title VII.

The EEOC went on to say that Macy might be able to establish that she did not get the job because the agency believed that biological men should present and dress as men or because the agency was willing to hire her when it thought she was a man but refused her employment once it found out she was a woman. In essence, Macy had to present some evidence that the agency impermissibly used gender in making its employment decision.

Gender identity and Title VII

Historically the EEOC deemed claims of discrimination based on gender identity or transgender status to be not permissible under Title VII; and the decision in the Macy case overturned those prior decisions. In effect, this created a whole new class of people protected under Title VII and a set of new obligations on employers with respect to transgender employees (although courts are not bound by EEOC decision). The Macy decision was in line with the EEOC’s December 2012 Strategic Enforcement Plan which included coverage of LGBT employees under Title VII’s sex discrimination prohibition as one of the Agency’s enforcement priorities. In 2014, EEOC received 918 sexual orientation charges and 202 gender identity charges. In 2013, EEOC received 834 sexual orientation and 199 gender identity charges. More information on the EEOC’s processing of LGBT complaints

can be found here: www.eeoc.gov/federal/directives/lgbt_complaint_processing.cfm.

Although decision of the EEOC are not binding on federal courts, the EEOC interpretation that Title VII protects transgender employees appears to have been adopted by at least one Federal Court of Appeal. In November 2013, the Third Circuit Court of Appeals considered a discrimination suit by a transgender employee alleging that the company she worked for had fired her for discriminatory reasons. In *Janis Stacy v. LSI Corp*. the plaintiff was employed as an engineer who had transitioned from a male to a female in mid-2005. In early 2008, the employee was terminated in a reduction in force, and filed a discrimination lawsuit under Title VII.

While the trial court granted summary judgment in favor of the company because the company had presented a non-discriminatory reason for the layoff or the termination and the plaintiff had not proved that the reason was pretextual, the case is important because the trial court agreed that the plaintiff had established a prima facie case of discrimination based on gender identity disorder and transgender status. In essence, the trial court and the Court of Appeals in Philadelphia recognized the right of a person to file a discrimination suit under Title VII based on transgender status. They simply ruled in this case that the employee had not proved her case of discrimination.

EEOC has also filed at least three lawsuits on behalf of transgender employees. In each of the cases, an employee presented as a male when hired then were terminated or otherwise harassed when they disclosed that they would be going through with gender reassignment and began dressing as females. Lakeland Eye Clinic paid US$150,000 to settle its lawsuit with the EEOC while the other two are still in litigation. EEOC took an additional step forward in defining the term “sex” in Title VII to include a sexual orientation when it ruled three to two that an unnamed complainant who worked as an air traffic controller for the FAA had been a victim of sex discrimination even though his complaint alleged that he was not selected for a permanent position because he is gay. According to the EEOC’s decision, the gay employee's supervisor had made negative comments about his sexual orientation and had said he would be a distraction in the radar room. The EEOC concluded that Title VII’s sex discrimination prohibition was violated because his sex had been taken in to consideration when the FAA considered his sexual orientation when declining to hire him for a permanent position. The employee has since filed suit in federal court. This case will be closely watched because it, similar to the *Obergfell v. Hodges* case, the Baldwin case has the potential to impact many employers.

The great bathroom debate

One common question when dealing with transgender employees is the choice of restroom. EEOC recently addressed this issue in *Lusardi v. McHugh*. Lusardi, a male to female transgender government employee, was told to use a unisex bathroom since she was making her coworkers uncomfortable by using the women’s restroom. According to the EEOC, it was illegal sex discrimination. While a court may ultimately differ with this interpretation, employers should be forewarned that the EEOC will make reasonable cause findings in similar situations. Notably, a federal court in Georgia, when faced with the restroom issue, held that a male to female transgender automobile mechanic had no right to use the “clean” restroom reserved for customers and instead had to use the unisex restroom used by mechanics — the same as all of the other mechanics — since it was reasonable that the employer did not want dirt and grease in the customer bathroom. On June 1, 2015, OSHA issued guidance, instructing private employers to allow transgender employees to access the bathroom of their choice — even if they have only changed their name and not their gender.

A question of religion?

Sex discrimination is not the only avenue under Title VII for an LGBT employee to pursue claims against an employer. In *Terveer v. Billington*, a gay employee at the Library of Congress survived a motion to dismiss on his religious discrimination claim. He also sued under Title VII for sex stereotyping. According to the plaintiff, his supervisor had made comments to him about getting him closer to God and had held a one-hour meeting with him to talk about the sins of homosexuality. Terveer claimed that the proselytizing took place both before and after his supervisor learned of his sexual orientation and that when he failed to adapt to his supervisor's religious viewpoints his annual review suffered as did his work assignments and that he was eventually constructively discharged. It should be noted that *Terveer* is in contrast to the Third Circuit which had earlier held in *Prowel v. Wise Business Forms* that religious statements made toward a gay employee was actually harassment based on sexual orientation and not therefore actionable under Title VII's prohibition on religious discrimination.

US President Obama, using his power to issue and amend Executive Orders, amended Executive Order 11246, the 1965 Executive Order which largely mirrored Title VII's protected classes and which applies to federal contractors and subcontractors to include "sexual orientation" and "gender identity." President Obama also revised Executive Order 11478, which applies to the federal government, in the same manner. Since 2014, it has been illegal for those federal contractors and subcontractors subject to Executive Order 11246 to discriminate against LGBT employees. Notably, and not without controversy, is the fact that there is no exception to religious organizations. The amended Executive Order was not that controversial as a whole since most of the largest federal contractors already prohibited discrimination on the basis of sexual orientation and a majority of the largest federal contractors also already prohibited discrimination on the basis of gender identity. OFCCP released its rule implementing the revised Executive Order taking effect on April 8, 2015.

What should employers do as the law evolves?

As noted above, the word sex has not changed since 1964 but the interpretations of sex, for Title VII purposes, has changed dramatically. Therefore, the prudent employer should ensure that sexual orientation and gender identity are added as protected classes to their Equal Opportunity and harassment policies and that managers and employees are trained on such just like with any other type of harassment training. At least at the EEOC level, gone are the days when the employer could argue that sexual orientation and gender identity are not protected classes so they do not have to be included in employer policies. Try explaining that to the EEOC and to the growing number of courts that think otherwise.

However, simply adding a few words to policies and some training is not enough. Prudent employers should try to create a welcoming and inclusive workplace. For example, employers should take a close look at their dress and grooming standards if they have such to try to ensure that there are no legal issues. If the policy requires employees to dress consistent with their biological sex, as opposed to the employee's gender identity, the policy may well run afoul of Title VII. Also, employers should be on the lookout for issues related to customer preferences and discomfort with LGBT so as to avoid a harassment or discrimination claim brought by an employee for actions taken by a customer or client toward the employee. Some larger companies, like AT&T and Microsoft, have created LGBT resource groups. These groups provide input as to policies and practices at employers in an attempt to ensure that the workplace is friendly to LGBT employees as well as advocate for LGBT concerns in the workplace. There is even a strong business case for such groups as they may well help identify

business opportunities for the employer.

If an employer has a transgender employee who is undergoing a transition, consider developing a plan with that employee and Human Resources as to how to handle the transition — everything from communicating with coworkers regarding the transition, to employee privacy, to the need for leave. Of course, keep in mind that the transgender employee may not want to reveal his or her status to coworkers so privacy is paramount. Employers should also review their employee benefits to ensure that the benefits provide coverage to LGBT employees.

Further Reading

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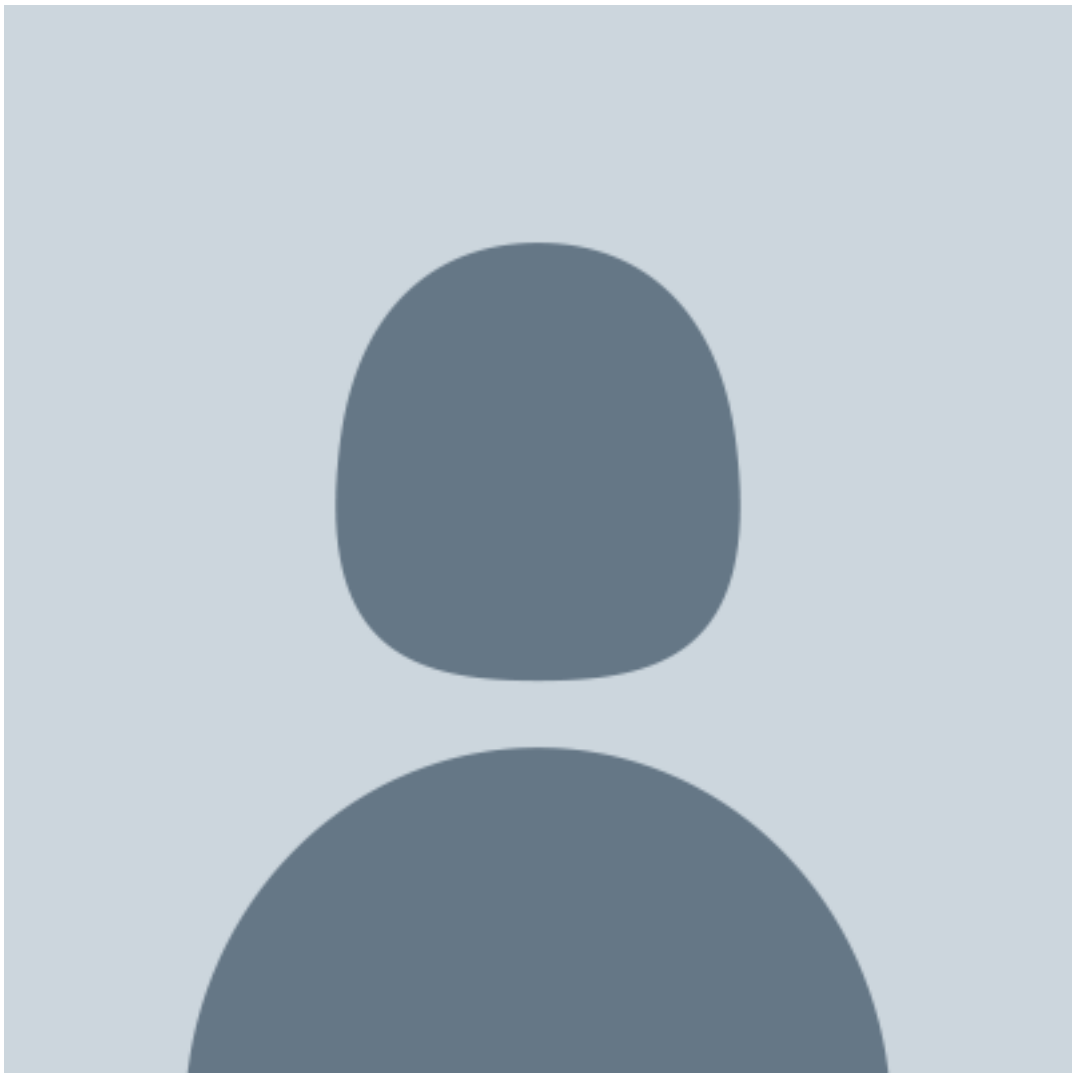

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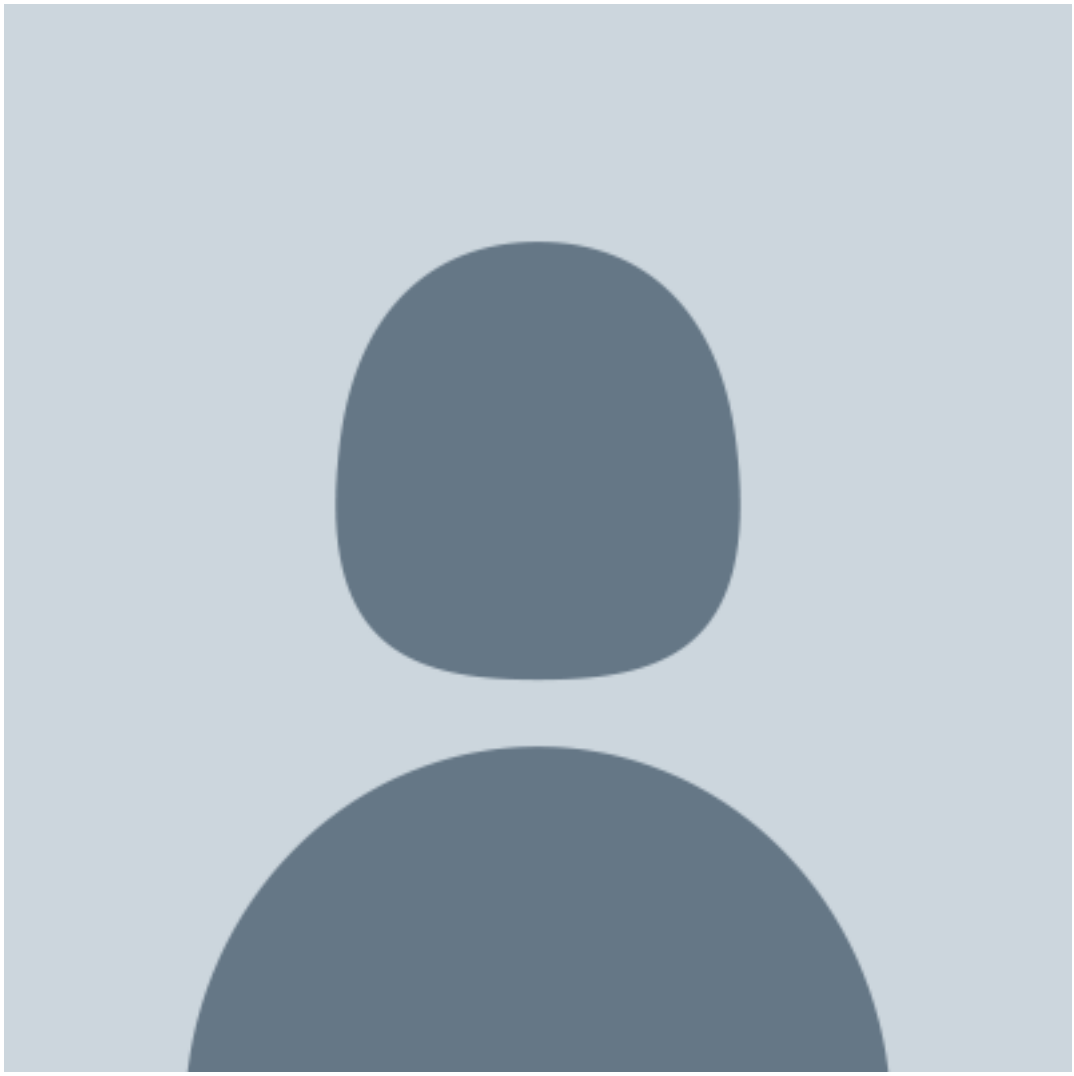

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