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# Employment Discrimination Claims Based on Sexual Orientation, Gender Identity, or HIV Status

Navigating the Evolving Legal Landscape and Minimizing Exposure to Claims

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# **BEFORE ENDA: SEXUAL ORIENTATION AND GENDER IDENTITY PROTECTIONS IN THE WORKPLACE UNDER FEDERAL LAW**

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## I. INTRODUCTION

Current federal law generally does not prohibit workplace discrimination based on sexual orientation. Until the recent ruling by the Equal Employment Opportunity Commission (EEOC), it was generally held that current federal law does not prohibit workplace discrimination based on gender identity.<sup>1</sup> For over a decade now, advocates of the gay, lesbian, bisexual and transgender (GLBT) community have sought to change this with proposed federal legislation—the Employment Non-Discrimination Act (ENDA)<sup>2</sup>—that would prohibit such discrimination nationwide. Upon President Obama’s election, ENDA was widely predicted to finally pass, but today its fate remains far from clear.

In light of current law and the uncertainty of ENDA’s passage in the near future, employees and employers need to know that a narrow range of employment discrimination claims involving GLBT individuals have the potential to succeed under federal law. This paper provides a timely overview of the viability of claims related to sexual orientation and gender identity under current federal statutory law before—or without—the passage of ENDA. As this paper demonstrates, some employee advocates have found successful paths to establish claims of sexual harassment or gender stereotyping despite the lack of explicit protection for GLBT individuals. However, such claims succeed only when they fit within a very narrow set of factual circumstances.

## II. EMPLOYMENT DISCRIMINATION BASED ON SEXUAL ORIENTATION

Neither sexual orientation nor gender identity is currently covered by federal anti-discrimination laws. Nonetheless, GLBT plaintiffs can succeed on claims related to sexual orientation or gender identity either by utilizing their state or local law, if applicable, or by shaping their claim to fit within the very particular requirements of cognizable same-sex sexual harassment or gender stereotyping claims under federal law.

### A. Title VII does not prohibit discrimination based on sexual orientation

Title VII of the Civil Rights Act of 1964 prohibits discrimination by covered employers on the basis of “race, color, religion, sex, or national origin.”<sup>3</sup> Title VII’s prohibition against discrimination based on “sex” does not include discrimination based on sexual orientation. *See, e.g., Medina v. Income Support Div.*;<sup>4</sup> *Bibby v. Phila. Coca Cola Bottling Co.*;<sup>5</sup> *Simonton v.*

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<sup>1</sup> *See infra* note 106 and accompanying text (discussing recent EEOC ruling establishing discrimination based on gender identity under Title VII).

<sup>2</sup> ENDA is described more fully in Section IV below.

<sup>3</sup> 42 U.S.C. § 2000e-2(a)(1).

<sup>4</sup> 413 F.3d 1131, 1135 (10th Cir. 2005) (“Title VII’s protections . . . do not extend to harassment due to a person’s sexuality.”).

(continued . . .)

*Runyon*;<sup>6</sup> *Spearman v. Ford Motor Co.*;<sup>7</sup> *Wrightson v. Pizza Hut of Am., Inc.*;<sup>8</sup> *U.S. Dep't of Housing & Urban Dev. v. Fed. Labor Relations Auth.*;<sup>9</sup> *Williamson v. A.G. Edwards & Sons, Inc.*;<sup>10</sup> *Smith v. Liberty Mut. Ins. Co.*<sup>11</sup>

For example, in *DeSantis v. Pacific Telephone & Telegraph Co.*, the Ninth Circuit found that Title VII “applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference such as homosexuality.”<sup>12</sup> The court also found that the employers had discriminated against all homosexuals, both male and female, and, therefore, there had been no gender discrimination under Title VII.<sup>13</sup>

The Equal Employment Opportunity Commission (EEOC) also has concluded that Title VII’s protections do not extend to discrimination based on sexual orientation. EEOC Dec. No. 76-75.<sup>14</sup> Although EEOC guidelines are not binding authority, the U.S. Supreme Court has

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( . . . continued)

<sup>5</sup> 260 F.3d 257, 261 (3d Cir. 2001) (“Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation.”).

<sup>6</sup> 232 F.3d 33, 36 (2d Cir. 2000) (“[Plaintiff] has alleged that he was discriminated against not because he was a man, but because of his sexual orientation. Such a claim remains non-cognizable under Title VII.”).

<sup>7</sup> 231 F.3d 1080, 1084 (7th Cir. 2000) (“Congress intended the term ‘sex’ to mean ‘biological male or biological female,’ and not one’s sexuality or sexual orientation.”).

<sup>8</sup> 99 F.3d 138 (4th Cir. 2000) (refusing to extend Title VII to encompass sexual orientation).

<sup>9</sup> 964 F.2d 1 (D.C. Cir. 1992) (acknowledging Title VII does not prohibit discrimination on basis of sexual orientation).

<sup>10</sup> 876 F.2d 69 (8th Cir. 1989) (termination based on homosexuality not actionable under Title VII), *cert. denied*, 493 U.S. 1089 (1990).

<sup>11</sup> 569 F.2d 325, 326-27 (5th Cir. 1978) (Title VII does not extend to rejection of job applicant on basis of presumed sexual orientation).

<sup>12</sup> *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 329-30 (9th Cir. 1979) (footnote omitted).

<sup>13</sup> *Id.* at 330-31.

<sup>14</sup> 19 Fair Empl. Prac. Cas. (BNA) 1823 (E.E.O.C. 1975).

shown a great deal of deference to them because the guidelines constitute “a body of experience and informed judgment to which courts . . . may properly resort for guidance.” *Meritor Sav. Bank, FSB v. Vinson*.<sup>15</sup>

**B. Many states, local governments and private employers do prohibit workplace discrimination based on sexual orientation**

Aside from federal law, many state and local laws prohibit employment discrimination based on sexual orientation. At least 181 cities and counties,<sup>16</sup> 21 states and the District of Columbia<sup>17</sup> prohibit sexual orientation discrimination by statute. Other laws contain language that has been held to prohibit sexual orientation discrimination by its express prohibition of discrimination on the basis of marital status, sex or gender. As noted in Section III below, 16 states and the District of Columbia also prohibit gender identity discrimination in the workplace.

In addition, many private employers have adopted policies prohibiting workplace sexual orientation discrimination. These protections have expanded rapidly in the past decade. In 2000, 51% of the Fortune 500 companies had such policies, and in 2008 that number had jumped to 85%, including 97% of the Fortune 100.<sup>18</sup>

Accordingly, employee advocates who are considering GLBT-related claims that may be subject to such state, local or company-provided protections should seriously consider whether to bring a federal claim of sexual harassment or gender stereotyping. As described below, there are only a handful of viable paths to a successful claim under Title VII, and the required evidentiary showing is often very difficult to achieve.

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<sup>15</sup> 477 U.S. 57, 65 (1986) (internal quotation marks and citations omitted).

<sup>16</sup> Samir Luther, Human Rights Campaign Foundation, *The State of the Workplace for Lesbian, Gay, Bisexual and Transgender Americans 2007-2008* at 4 (revised Feb. 20, 2009), available at [http://www.hrc.org/files/assets/resources/HRC\\_Foundation\\_State\\_of\\_the\\_Workplace\\_2007-2008.pdf](http://www.hrc.org/files/assets/resources/HRC_Foundation_State_of_the_Workplace_2007-2008.pdf).

<sup>17</sup> California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington and Wisconsin. Human Rights Campaign, *Statewide Employment Laws & Policies* (updated June 12, 2012), available at [http://www.hrc.org/files/assets/resources/Employment\\_Laws\\_and\\_Policies.pdf](http://www.hrc.org/files/assets/resources/Employment_Laws_and_Policies.pdf).

<sup>18</sup> Luther, *supra*, at 5-6.

### C. Same-sex sexual harassment claims are cognizable under Title VII

Until 1998, it was unclear whether and under what circumstances Title VII applied in cases of sexual harassment where the harasser and victim were of the same sex.<sup>19</sup> After years of divisiveness and bitterly split circuits, the U.S. Supreme Court finally decided in *Oncale v. Sundowner Offshore Services, Inc.*<sup>20</sup> that same-sex sexual harassment “because of sex” is actionable under Title VII.

In *Oncale*, the plaintiff, Joseph Oncale, worked as part of an eight-man crew on an offshore oil platform in the Gulf of Mexico. On several occasions, other crew members restrained the plaintiff, “subjected [him] to sex-related, humiliating actions” and threatened to rape him.<sup>21</sup> The plaintiff complained to supervisors, but no remedial actions were taken. He eventually resigned and soon after filed suit against Sundowner claiming quid pro quo and hostile environment sexual harassment under Title VII. The Eastern District of Louisiana held that Title VII did not encompass sexual harassment where the alleged harasser and the harassed employee were of the same sex,<sup>22</sup> and the Fifth Circuit affirmed.<sup>23</sup>

The U.S. Supreme Court reversed the Fifth Circuit on the narrow legal question of whether a same-sex sexual harassment claim could be cognizable under Title VII. It held: “If our precedents leave any doubt on the question, we hold today that nothing in Title VII necessarily bars a claim of discrimination ‘because of . . . sex’ merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex.”<sup>24</sup> The Court remanded the case back to the trial court for a determination of whether the alleged discrimination in that case was “because of sex.”

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<sup>19</sup> The Fifth Circuit held that Title VII precluded a claim where the harasser and the victim were the same sex (*Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 451-52 (5th Cir. 1994)); the Fourth Circuit held that such a claim was cognizable but only if the harasser was homosexual (*McWilliams v. Fairfax Cnty. Bd. of Supervisors*, 72 F.3d 1191 (4th Cir. 1996); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138 (4th Cir. 1996)); and the Seventh Circuit permitted same-sex harassment claims as long as the harassment was sexual in nature (*Doe v. City of Belleville*, 119 F.3d 563, 576 (7th Cir. 1997)).

<sup>20</sup> 523 U.S. 75 (1998).

<sup>21</sup> *Id.* at 77.

<sup>22</sup> *See* Civ. A. No. 94-1483, 1995 WL 133349 (E.D. La. Mar. 24, 1995).

<sup>23</sup> *See* 83 F.3d 118 (5th Cir. 1996).

<sup>24</sup> 523 U.S. at 79 (ellipsis in original).

In *Oncale*, the Court described a handful of successful routes to a valid same-sex discrimination claim under Title VII. It stated, for example, that lower courts and juries generally had no trouble finding an inference of sex discrimination when the alleged conduct involved explicit or implicit proposals of sexual activity between a man and a woman because “it is reasonable to assume those proposals would not have been made to someone of the same sex.”<sup>25</sup> The Court also noted that a similar inference of sex discrimination could be drawn where the alleged harasser was homosexual and the alleged victim was of the same sex; for example, where a male employee claims that he was harassed by his gay male supervisor.

The *Oncale* decision also made clear, however, that sexual desire is not essential to find an inference of discrimination based on sex, including in same-sex harassment cases.<sup>26</sup> The Court reiterated that the critical inquiry in Title VII sex discrimination claims, including those involving same-sex sexual harassment, remains “whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”<sup>27</sup> The Court offered an example of such a situation not involving sexual desire: where a female victim is harassed in sex-specific and derogatory terms by another female in such a way as to make it clear that the harasser had a general hostility to the presence of women in the workplace. The Court also stated that a plaintiff could offer “direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.”<sup>28</sup>

Significantly, the Court in *Oncale* did not describe which evidentiary route could have been successful for *Oncale*, and none of the options it described appeared to apply, as there were no women in the workplace and there was no evidence that the alleged harassers were motivated by sexual desire or by a general hostility toward men in the workplace. *Oncale* settled with his employer upon remand.

**D. Valid claims for same-sex sexual harassment related to sexual orientation require a specific and narrow evidentiary showing that is rarely met**

Since *Oncale*, plaintiffs’ claims of same-sex sexual harassment have had mixed success. While several courts have recognized claims for same-sex sexual harassment under Title VII,

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<sup>25</sup> *Id.* at 80.

<sup>26</sup> *Id.* (“[H]arassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.”).

<sup>27</sup> *Id.* (internal quotation marks and citation omitted); *see also id.* (“A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace.”).

<sup>28</sup> *Id.* at 80-81.

see, e.g., *Dick v. Phone Directories Co.*;<sup>29</sup> *La Day v. Catalyst Tech., Inc.*;<sup>30</sup> *Schmedding v. Tnemec Co.*,<sup>31</sup> many courts have dismissed such claims based on a lack of sufficient evidence that the alleged harassment was based on sex, rather than on sexual orientation. These courts have invoked the Supreme Court's analysis in *Oncale* that same-sex sexual harassment can be inferred only where there is evidence of sexual desire, general hostility toward one sex, or noncompliance with gender stereotypes; plaintiffs have been required to provide evidence that fits squarely into one of those specific situations in order to have a viable claim. Despite recognition that there may be other ways to establish that discrimination was "because of sex," in practice, courts have rarely gone beyond the limited examples of *Oncale*. See, e.g., *McCown v. St. John's Health Sys., Inc.*;<sup>32</sup> *Bibby*;<sup>33</sup> *Lack v. Wal-Mart Stores, Inc.*<sup>34</sup>

For example, in *Bibby*, a gay male employee alleged hostile work environment sexual harassment based on the actions of a co-worker who assaulted him in a locker room, used a forklift to slam a load of pallets on the platform where he was standing, and yelled at the plaintiff that "everybody knows you're gay as a three dollar bill," "everybody knows you're a faggot" and "everybody knows you take it up the ass."<sup>35</sup> While acknowledging that same-sex sexual harassment claims are cognizable under Title VII, the Third Circuit nonetheless held that this plaintiff had not alleged a viable claim because the evidence indicated that he was harassed because of his sexual orientation and not because of sex.<sup>36</sup> The court acknowledged that there may be additional ways to prove that same-sex sexual harassment occurred because of sex, but it analyzed the evidence only in light of the illustrative examples from *Oncale* and upheld the dismissal of all claims.

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<sup>29</sup> 397 F.3d 1256, 1264-66 (10th Cir. 2005).

<sup>30</sup> 302 F.3d 474, 470-80 (5th Cir. 2002).

<sup>31</sup> 187 F.3d 862, 864 (8th Cir. 1999).

<sup>32</sup> 349 F.3d 540, 543 (8th Cir. 2003) (no evidence showing employer was homosexual or sexually attracted to plaintiff).

<sup>33</sup> 260 F.3d at 264 (no evidence that harassers were motivated by sexual desire or hostility toward men in workplace).

<sup>34</sup> 240 F.3d 255, 261 (4th Cir. 2001) (sex-specific conduct is not enough to establish claim for same-sex harassment if members of opposite sex are treated equally).

<sup>35</sup> 260 F.3d at 259-60 (internal quotation marks omitted).

<sup>36</sup> *Id.* at 264.

Despite this narrow approach in many cases, *Oncale* did open some doors to federal claims of workplace discrimination involving GLBT individuals. The Ninth Circuit’s en banc decision in *Rene v. MGM Grand Hotel, Inc.*<sup>37</sup> demonstrates the broadest interpretations of these theories to date. *Rene* involved an openly gay male worker who was subjected to workplace harassment amounting to sexual assault, as well as mockery by male co-workers and a male supervisor. The plaintiff alleged that the harassing treatment he received had been motivated by his sexual orientation; however, he also provided evidence that much of the harassment involved issues of gender stereotyping. The defendant argued that the claims were not cognizable under Title VII because they were based on the plaintiff’s sexual orientation.

Judge Fletcher, joined by four other judges, wrote the plurality opinion in favor of the plaintiff, holding that harassment “of a sexual nature” regardless of its motivation constitutes discrimination “because of sex” and is therefore actionable under Title VII.<sup>38</sup> Judge Fletcher held that “an employee’s sexual orientation is irrelevant for purposes of Title VII. It neither provides nor precludes a cause of action for sexual harassment. That the harasser is, or may be, motivated by hostility based on sexual orientation is similarly irrelevant, and neither provides nor precludes a cause of action [under Title VII].”<sup>39</sup> Under this analysis, sexual orientation harassment that relates to sex, including gender-related mockery or assault, contravenes Title VII.

Judge Pregerson, joined by two other judges, agreed that the treatment the plaintiff received was sex discrimination under Title VII, but disagreed with Judge Fletcher’s reasoning as to why and how. Judge Pregerson’s opinion argued that the plaintiff’s treatment amounted to gender stereotyping, and that, as such, he had stated a claim for Title VII discrimination under *Nichols v. Azteca Restaurant Enterprises, Inc.*<sup>40</sup> and *Price Waterhouse v. Hopkins*.<sup>41</sup> (Title VII sexual discrimination claims under gender stereotyping are discussed in the next section.)

The four-judge dissent, written by Judge Hug, argued that Title VII strictly requires that the harasser have a motivation based on gender as opposed to sexual orientation. The dissent did not disagree with the Pregerson concurrence’s statement of the law, but would nevertheless have rejected the claim on the grounds that the plaintiff had not raised gender stereotyping before the district court below.

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<sup>37</sup> 305 F.3d 1061 (9th Cir. 2002), *cert. denied*, 538 U.S. 922 (2003).

<sup>38</sup> *Id.* at 1068.

<sup>39</sup> *Id.* at 1063-64.

<sup>40</sup> 256 F.3d 864 (9th Cir. 2001).

<sup>41</sup> 490 U.S. 228 (1989) (harassment of woman deemed insufficiently “lady-like” by her office partners was actionable under Title VII).

In subsequent cases, courts grappling with a harasser's motivation have been reluctant to permit claims involving conduct of a sexual nature related to sexual orientation to the extent provided in Judge Fletcher's plurality opinion. *See, e.g., Vickers v. Fairfield Med. Ctr.*<sup>42</sup>

**E. Title VII claims of discrimination based on gender stereotyping related to sexual orientation can succeed**

The U.S. Supreme Court has made it clear that Title VII prohibits discrimination based on gender stereotyping. In *Price Waterhouse*, a case where sexual orientation was not expressly at issue, the Supreme Court upheld the sex discrimination claim of a woman who had been denied partnership in an accounting firm at least in part on the basis that she was "macho," "masculine," "overcompensated for being a woman" and needed "a course at charm school."<sup>43</sup> Moreover, a partner had advised the plaintiff that to improve her chances of joining the partnership, she should "walk more femininely, ... wear make-up, have her hair styled, and wear jewelry."<sup>44</sup> The Court held that Title VII prohibits employers from allowing gender to play a motivating part in an employment decision and found that "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."<sup>45</sup> The Court explicitly addressed the legal relevance of a sex stereotyping claim: "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."<sup>46</sup>

Building on *Oncale* and *Price Waterhouse*, the Ninth Circuit in *Nichols*<sup>47</sup> extended Title VII protections to a gay employee based on gender stereotyping. The plaintiff in *Nichols* sued his former employer for sexual harassment and retaliation after he was subjected on a daily basis to insults and name-calling, including being referred to by male co-workers and a supervisor (in Spanish and English) as "she," "her" and "faggot."<sup>48</sup> His co-workers also mocked the plaintiff

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<sup>42</sup> 453 F.3d 757 (6th Cir. 2006), *cert. denied*, 551 U.S. 1104 (2007).

<sup>43</sup> 490 U.S. at 235 (internal quotation marks omitted).

<sup>44</sup> *Id.* (internal quotation marks and citation omitted).

<sup>45</sup> *Id.* at 250.

<sup>46</sup> *Id.* at 251 (internal quotation marks and citations omitted).

<sup>47</sup> 256 F.3d at 864.

<sup>48</sup> *Id.* at 870.

for walking and carrying his serving tray “like a woman” and derided him for not having sexual intercourse with a female waitress who was his friend.<sup>49</sup>

The district court granted summary judgment to the employer, in part because it found that the alleged harassment was not “because of sex.”<sup>50</sup> The Ninth Circuit reversed, however, finding that the verbal abuse was closely linked to gender and therefore occurred because of sex.<sup>51</sup> The *Nichols* court expressly relied on *Price Waterhouse* in rejecting the employer’s argument that the harassment was not actionable because it was based on sexual orientation, reasoning as follows: “At its essence, the systematic abuse directed at [the plaintiff] reflected a belief that [he] did not act as a man should act.”<sup>52</sup> The court held that an employer violates Title VII when it discriminates against an employee because that employee did not conform to gender stereotypes.<sup>53</sup>

It has proven difficult for many gay and lesbian plaintiffs to establish a claim under Title VII for discrimination based on gender stereotyping because “[s]tereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality.”<sup>54</sup> Recognizing that a gender stereotyping claim should not be used to “bootstrap protection for sexual orientation into Title VII,” circuit courts have struggled to distinguish between discrimination based on sexual orientation and discrimination based on gender stereotyping. *Simonton*.<sup>55</sup> In determining whether discrimination is based on a plaintiff’s nonconforming gender behavior, these courts look to *Price Waterhouse*, where the Supreme Court focused principally on characteristics that were readily demonstrable in the workplace, such as a manner of walking and talking, work attire and hairstyle.<sup>56</sup> Thus, courts that have applied *Price Waterhouse* have reasoned that, for a gender stereotyping claim to succeed,

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<sup>49</sup> *Id.* at 870, 874.

<sup>50</sup> *Id.* at 871.

<sup>51</sup> *Id.* at 874-75.

<sup>52</sup> *Id.* at 874.

<sup>53</sup> *Id.* at 874-75 (recognizing male worker’s Title VII claim of harassment by male co-workers and male supervisor that stemmed from harassers’ perception that male worker did not behave according to stereotype of male behavior and finding such harassment amounted to discrimination “because of sex”).

<sup>54</sup> *Howell v. N. Cent. Coll.*, 320 F. Supp. 2d 717, 723 (N.D. Ill. 2004).

<sup>55</sup> 232 F.3d at 38.

<sup>56</sup> 490 U.S. at 235.

plaintiffs should be able to identify the observable nonconforming gender behavior upon which the discrimination could be based. See *Vickers*;<sup>57</sup> *Dawson v. Bumble & Bumble*;<sup>58</sup> *Hamm v. Weyauwega Milk Prods., Inc.*;<sup>59</sup> *Dawson v. Entek Int'l*.<sup>60</sup>

The facts necessary for a cognizable gender stereotyping claim were demonstrated recently in the Third Circuit. In *Prowel v. Wise Business Forms, Inc.*,<sup>61</sup> the plaintiff presented evidence of discrimination both because he was gay and because he failed to conform to gender stereotypes:

In stark contrast to the other men at Wise, Prowel testified that he had a high voice and did not curse; was very well-groomed; wore what others would consider dressy clothes; was neat; filed his nails instead of ripping them off with a utility knife; crossed his legs and had a tendency to shake his foot ‘the way a woman would sit’; walked and carried himself in an effeminate manner; drove a clean car; had a rainbow decal on the trunk of his car; talked about things like art, music, interior design, and decor; and pushed the buttons on the male encoder with ‘pizzazz.’<sup>[62]</sup>

Based on this evidence, the district court found that his claim was simply a repackaged sexual orientation discrimination claim (and therefore not viable under Title VII) and granted summary judgment to the employer. The Third Circuit reversed, however, holding that the plaintiff had put forth sufficient evidence of harassment based on gender stereotypes to withstand summary judgment. The court rejected the employer’s argument that because the plaintiff was

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<sup>57</sup> 453 F.3d at 763 (holding that comments that plaintiff was “gay” or “homosexual” were based on perceived sexual orientation rather than nonconforming gender behavior).

<sup>58</sup> 398 F.3d 211, 221 (2d Cir. 2005) (refusing to consider gender stereotyping claim when there was no substantial evidence that any adverse employment consequences resulted from plaintiff’s appearance).

<sup>59</sup> 332 F.3d 1058, 1065-66 (7th Cir. 2003) (finding that sexually explicit threats were based on plaintiff’s perceived sexual orientation because of his relationship with male co-worker, not way he dressed or behaved).

<sup>60</sup> 630 F.3d 928 (9th Cir. 2011) (affirming summary judgment for employer on hostile work environment claim because plaintiff, who allegedly was harassed for being gay but did not “exhibit effeminate traits,” presented no evidence that he failed to conform to gender stereotypes).

<sup>61</sup> 579 F.3d 285 (3d Cir. 2009).

<sup>62</sup> *Id.* at 287.

gay he was precluded from bringing a gender stereotype claim under Title VII: “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.”<sup>63</sup>

The Eighth Circuit also recently upheld a claim for gender stereotyping. In *Lewis v. Heartland Inns of America*,<sup>64</sup> the plaintiff was terminated for appearing “slightly more masculine” and having “an Ellen DeGeneres kind of look” instead of the preferred “Midwestern girl look.”<sup>65</sup> The plaintiff’s theory of her case was that Heartland had enforced a de facto requirement that a female employee had to conform to gender stereotypes in order to work the day shift at the hotel’s front desk.<sup>66</sup> The district court granted summary judgment in favor of Heartland on all claims, reasoning in part that the plaintiff was required to produce evidence that she was treated differently than similarly situated males.<sup>67</sup> Relying on *Price Waterhouse, Oncale* and other cases, the Eighth Circuit reversed and remanded, holding that the plaintiff had offered sufficient evidence from which a reasonable factfinder could find that she was discriminated against because of her sex.<sup>68</sup>

In other cases, courts have avoided the issue completely by dismissing gender stereotyping claims on discrete factual distinctions or procedural grounds. For example, in *Jespersen v. Harrah’s Operating Co.*, the Ninth Circuit dismissed a claim by a female bartender at Harrah’s Casino who was fired from her job for refusing to wear makeup in violation of her employer’s requirements.<sup>69</sup> In pursuit of a program aimed at enhancing its image throughout its casinos, Harrah’s had imposed gender-specific standards of appearance on employees.<sup>70</sup> The

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<sup>63</sup> *Id.* at 292. The court, however, dismissed Prowel’s claim of religious discrimination despite a strong evidentiary showing of religious-based bias, including co-workers leaving anonymous prayer notes on his work machine, leaving messages for him that he was “a sinner” for the way he lived his life and leaving a note that he would “burn in hell.” *Id.* at 288. The court rejected this religious discrimination claim as not “because of” religion but “because of” his sexual orientation and, therefore, his claim was not actionable. *Id.* at 293.

<sup>64</sup> 591 F.3d 1033 (8th Cir. 2010).

<sup>65</sup> *Id.* at 1036.

<sup>66</sup> *Id.* at 1037.

<sup>67</sup> *Id.* at 1040.

<sup>68</sup> *Id.* at 1042.

<sup>69</sup> 444 F.3d 1104, 1107-08 (9th Cir. 2006).

<sup>70</sup> *Id.*

standard at issue required women to wear makeup at all times, while men were prohibited from wearing cosmetics.<sup>71</sup> While upholding its earlier gender-stereotype decisions in *Nichols* and *Rene*, the *Jespersen* court distinguished this case as one of employer appearance standards and not sexual harassment.<sup>72</sup> Because the Ninth Circuit has applied *Price Waterhouse* to sexual harassment and not to appearance and grooming cases, it declined to do so here.<sup>73</sup>

Despite this general reluctance to recognize gender stereotyping claims by gay or lesbian plaintiffs, the circuit courts have consistently acknowledged that such claims could be viable under different facts or circumstances. See *Dawson*;<sup>74</sup> *Hamm*;<sup>75</sup> *Bibby*;<sup>76</sup> *Higgins v. New Balance Athletic Shoe, Inc.*<sup>77</sup> Interestingly, Sixth Circuit Judge Lawson commented in his dissent in *Vickers* that in gender stereotyping cases where factual distinctions are complicated, the circuit courts' tendency to grant summary judgment draws a "line [that] should not occur at the pleading stage of the lawsuit."<sup>78</sup>

### III. EMPLOYMENT DISCRIMINATION BASED ON GENDER IDENTITY

Openly transgender individuals have become part of the American workplace. See Kristine W. Holt, Comment, *Reevaluating Holloway: Title VII, Equal Protection, and the Evolution of a Transgender Jurisprudence*.<sup>79</sup> Some estimates place the number of transgender Americans at nearly a quarter million. Indeed, "[t]ransgendered people are now represented in virtually every profession—musicians, entertainers, writers, engineers, teachers, doctors, and lawyers—and are 'coming out' as such to their employers and coworkers in ever-increasing

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 1109.

<sup>73</sup> *Id.* at 1112-13.

<sup>74</sup> 398 F.3d at 218-21 (lesbian employee was fired because of her poor performance on job).

<sup>75</sup> 332 F.3d at 1065 (sexual comments made due to work-related conflicts are not sexual harassment).

<sup>76</sup> 260 F.3d at 264 (gay male plaintiff had no Title VII gender stereotyping claim because he failed to plead that theory in his original complaint).

<sup>77</sup> 194 F.3d 252, 258-59 (1st Cir. 1999) (refusing to consider gender stereotyping claim because it was not argued in district court).

<sup>78</sup> 453 F.3d at 767 (Lawson, J., dissenting).

<sup>79</sup> 70 Temple L. Rev. 283 (1997).

numbers.”<sup>80</sup> This is evident in both the public and private sectors. Sixteen states and over 100 cities and counties prohibit gender identity discrimination by statute.<sup>81</sup> According to a 2008 study by the Human Rights Campaign, 176 of the Fortune 500 businesses have gender identity protections at this time, including 61 of the Fortune 100.<sup>82</sup>

### A. Gender identity defined

Gender identity, also referred to as transsexuality or gender dysphoria in medical communities, is distinct from homosexuality (attraction to members of one’s own biological sex) and transvestitism or cross-dressing (dressing in clothes usually worn by those of the opposite biological sex).<sup>83</sup> Although definitions vary, an article from the Human Rights Campaign defines gender identity as “a person’s innate, deeply felt psychological identification as male or female, which may or may not correspond to the person’s body or designated sex at birth (meaning what sex was originally listed on a person’s birth certificate).”<sup>84</sup>

Transgender individuals identify emotionally and psychologically with the opposite biological sex and usually live in the gender role opposite the one they were biologically born into or assigned. Transgender individuals do not always use surgery or medication to alter their bodies, but many do seek surgical alteration of their anatomy to conform to their desired biological sex.<sup>85</sup> Before undergoing gender reassignment surgery, transgender individuals are required to undergo a period of counseling and cross-gendered living—a period that, by necessity, includes employment.<sup>86</sup>

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<sup>80</sup> *Id.* at 285.

<sup>81</sup> Sixteen states (and the District of Columbia) have laws prohibiting gender identity discrimination in public and private employment: California, Colorado, Connecticut, Hawaii, Illinois, Iowa, Maine, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont and Washington. Human Rights Campaign, *Statewide Employment Laws & Policies*, available at [http://www.hrc.org/files/assets/resources/Employment\\_Laws\\_and\\_Policies.pdf](http://www.hrc.org/files/assets/resources/Employment_Laws_and_Policies.pdf).

<sup>82</sup> *Id.* at 5-6.

<sup>83</sup> *See id.* at 283 n.3 (citing Gender Vocabulary fact sheet distributed by Action AIDS, 1216 Arch Street, Philadelphia, PA 19107).

<sup>84</sup> Human Rights Campaign, *Sexual Orientation and Gender Identity: Terminology and Definitions*, <http://www.hrc.org/resources/entry/sexual-orientation-and-gender-identity-terminology-and-definitions> (last visited July 17, 2012).

<sup>85</sup> *Id.*

<sup>86</sup> *See* Eric Matusewitch, *Transsexual Rights in the Workplace*, 12 No. 5 *Andrews Empl. Litig. Rep.* 3 (1998).

(continued . . .)

## **B. Title VII does not prohibit discrimination based on gender identity**

Federal courts have generally held that transgender individuals are not afforded protection under Title VII when the discrimination is based on transsexuality itself. *See, e.g., Ulane v. E. Airlines, Inc.*;<sup>87</sup> *Sommers v. Budget Mktg., Inc.*;<sup>88</sup> *Holloway v. Arthur Andersen & Co.*;<sup>89</sup> *Maffei v. Kolaeton Indus., Inc.*<sup>90</sup>

Generally, the physical state of the transgender individual at the time of the alleged discrimination has little influence on a court's decision to deny Title VII discrimination claims. Courts have refused to allow Title VII actions when the transgender individual has yet to undergo gender reassignment surgery, *see Sommers*;<sup>91</sup> *Holloway*,<sup>92</sup> and after the transgender individual has undergone such surgery, *see Ulane*.<sup>93</sup>

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(. . . continued)

<sup>87</sup> 742 F.2d 1081, 1085 (7th Cir. 1984) (“[A] prohibition against discrimination based on an individual’s sex is not synonymous with a prohibition against discrimination based on an individual’s sexual identity disorder or discontent with the sex into which they were born.”), *cert. denied*, 471 U.S. 1017 (1985).

<sup>88</sup> 667 F.2d 748, 750 (8th Cir. 1982) (“Because Congress has not shown an intention to protect transsexuals, we hold that discrimination based on one’s transsexualism does not fall within the protective purview of the Act.”).

<sup>89</sup> 566 F.2d 659, 663 (9th Cir. 1977) (“Congress has not shown any intent other than to restrict the term ‘sex’ to its traditional meaning.”).

<sup>90</sup> 626 N.Y.S.2d 391, 394 (Sup. Ct. 1995) (“The federal courts that have considered the issue at hand have unanimously held that the Title VII prohibitions do not apply to transsexuals.”).

<sup>91</sup> 667 F.2d at 749 (no actionable Title VII claim existed when transgender individual was fired after discovery that she was male who represented herself as female but had not yet undergone sex change surgery).

<sup>92</sup> 566 F.2d at 661 (Title VII inapplicable when transgender individual was fired in midst of hormonal and other treatment in preparation for sex change surgery).

<sup>93</sup> 742 F.2d at 1083 (refusing to extend Title VII protections to transgender individual who was fired after undergoing sex change surgery).

**C. Courts generally have held that Title VII claims of discrimination based on gender stereotyping related to gender identity can succeed**

Recently, the rationales in gender identity decisions have been shaped by application of the Supreme Court’s broad interpretations of Title VII and gender stereotyping in *Price Waterhouse*. For example, in *Smith v. City of Salem, Ohio*,<sup>94</sup> the Sixth Circuit recognized the Title VII claim of a transgender firefighter who alleged that he was fired because of his feminine mannerisms. Relying on the reasoning in *Price Waterhouse*, the court held that an employer violates Title VII when it discriminates against an employee because that employee does not conform to gender stereotypes, regardless of the employee’s status as a transgender individual.<sup>95</sup> Similarly, in *Etsitty v. Utah Transit Authority*, the Tenth Circuit assumed without deciding that Title VII protected transgender individuals who are discriminated against because they do not conform to gender stereotypes.<sup>96</sup>

In *Schroer v. Billington*, the plaintiff, who applied and interviewed while presenting as a man, was given an offer of employment as a terrorism research analyst with the Library of Congress.<sup>97</sup> After the plaintiff informed the organization that she was in the process of transitioning from male to female and would be working as a woman, the Library rescinded the plaintiff’s employment offer. The district court upheld Schroer’s Title VII sexual stereotype claim under *Price Waterhouse*, but also concluded that she was entitled to judgment based on the language of the statute itself, finding that “the Library’s refusal to hire Schroer after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was literally discrimination ‘because of . . . sex.’”<sup>98</sup>

Similarly, the Eleventh Circuit recently held that firing a transgender or transsexual employee because of gender nonconformity violated the Equal Protection Clause’s prohibition of sex-based discrimination.<sup>99</sup> In *Glenn*, the plaintiff was hired by the Georgia General Assembly’s Office of Legal Counsel (OLC) as an editor. Soon after, the plaintiff notified her direct

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<sup>94</sup> 378 F.3d 566 (6th Cir. 2004).

<sup>95</sup> *Id.* at 574; *see also Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005) (recognizing claim for sex discrimination under Title VII when transgender police officer alleged denial of promotion to sergeant because of nonconformance to male stereotype).

<sup>96</sup> 502 F.3d 1215, 1221-24 (10th Cir. 2007) (denying Title VII claim because defendant had a legitimate, nondiscriminatory reason for its employment decision and the plaintiff proffered no evidence that such reason was pretextual).

<sup>97</sup> 577 F. Supp. 2d 293 (D.D.C. 2008).

<sup>98</sup> *Id.* at 308 (ellipsis in original).

<sup>99</sup> *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011).

supervisor that she was initiating a gender transition and would be coming to work as a woman. The OLC subsequently fired her, claiming that her gender transition was inappropriate, disruptive and immoral.<sup>100</sup> In holding that transsexuality was a protected class under the Equal Protection Clause, the court substantially relied on *Price Waterhouse* and its progeny. The court also concluded that the transgender plaintiff would have been protected under Title VII's prohibition of gender stereotyping. In its discussion of the Title VII analysis, the court stated that "the very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior."<sup>101</sup> The court noted that discrimination against transgender or transsexual individuals is inherently similar to discrimination based on gender stereotypes.<sup>102</sup>

Federal district courts are increasingly recognizing Title VII claims brought by transsexual plaintiffs under a gender stereotyping theory. *See, e.g., Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*;<sup>103</sup> *Mitchell v. Axcán Scandipharm, Inc.*;<sup>104</sup> *Michaels v. Akal Sec., Inc.*<sup>105</sup> As these decisions are appealed, more circuit courts will have the opportunity to address the issue of sex discrimination against transgender employees.

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<sup>100</sup> *Id.* at 1313-14.

<sup>101</sup> *Id.* at 1316 (citing Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 Cal. L. Rev. 561, 563 (2007)).

<sup>102</sup> *Id.*; *see infra* note 105 and accompanying text (drawing on the *Glenn* court's discussion of gender stereotypes as an inherent part of discrimination against transgendered individuals to conclude that Title VII prohibits discrimination based on transsexuality itself).

<sup>103</sup> 542 F. Supp. 2d 653, 667 (S.D. Tex. 2008) (permitting Title VII claim to proceed to trial to determine whether employer relied on "impermissible sex stereotyping" in rescinding job offer to transgender applicant).

<sup>104</sup> No. Civ. A. 05-243, 2006 WL 456173 (W.D. Pa. Feb. 17, 2006) (permitting Title VII sex discrimination claim by male-to-female transgender individual to proceed under *Price Waterhouse*).

<sup>105</sup> No. 09-cv-01300-ZLW-CBS, 2010 U.S. Dist. LEXIS 62954 (D. Colo. June 24, 2010) (denying motion to dismiss claim by male-to-female transgender individual claiming gender stereotyping).

**D. Recent developments: EEOC holds that Title VII prohibits discrimination based on gender identity**

In a landmark decision, the EEOC unanimously held in *Macy v. Holder* that gender identity discrimination is sex discrimination under Title VII.<sup>106</sup> Under *Macy*, transgender and transsexual individuals are not limited to a showing of discrimination through gender stereotyping. The EEOC held that discrimination based on gender identity alone is actionable under Title VII.<sup>107</sup>

In *Macy*, a former police detective applied for a position at the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF).<sup>108</sup> During the application process, the complainant informed the background check company that she had changed her name and gender, and asked that the ATF be informed of her decision. Not long afterward, the ATF notified her that the position was no longer available due to budget restrictions. However, the complainant learned later that the position actually had been offered to another candidate after the disclosure of her gender change.

The EEOC held that “intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination ‘based on ... sex.’”<sup>109</sup> From *Price Waterhouse* to *Glenn*, the EEOC’s decision relied on a catalog of supporting Title VII cases. Most notably, the EEOC applied reasoning from *Schroer* analogizing a discriminatory action based on gender identity to discrimination based on an individual’s change of religion. The EEOC reasoned that discrimination “because of religion” included discrimination toward “converts” from one religion to another.<sup>110</sup> Under an analogous theory, the EEOC explained that a complainant would be covered under Title VII for discrimination based on *change* of gender identity without the need for proof of gender stereotyping. However, the EEOC explained that the central question remained “whether the employer actually relied on the employee’s gender in making its decision.”<sup>111</sup> Consequently, under *Macy*, an employer violates Title VII by discriminating based on (a) nonstereotypical gender expressions, (b) change or transition from

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<sup>106</sup> No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012).

<sup>107</sup> *Id.* at \*14

<sup>108</sup> *Id.* at \*1-3.

<sup>109</sup> *Id.* at \*11.

<sup>110</sup> *Id.* (quoting *Schroer*, 577 F. Supp. 2d at 306 (“No court would take serious the notion that ‘converts’ are not covered by [Title VII’s prohibition of religious discrimination].”)).

<sup>111</sup> *Id.* at \*10 (internal quotation marks and brackets omitted) (quoting *Price Waterhouse*, 490 U.S. at 251).

one gender to another, or (c) plain dislike of transgender persons. According to the EEOC, all three are clear examples of discrimination “based on ... sex” under Title VII.<sup>112</sup>

While not binding on courts, the EEOC’s position is persuasive authority to which the Supreme Court has expressed a great deal of deference.<sup>113</sup> It is possible, if not likely, that district and circuit courts will rely on *Macy*’s analysis of gender identity discrimination in future Title VII cases.

Under *Macy*, most transgender employees may remedy discrimination based on gender identity by filing a complaint at any of the EEOC’s 53 field offices. Alternatively, a transgender federal employee may file a complaint with the equal employment opportunity counselor within the federal agency. Lastly, a transgender employee working for an employer controlled by the Office of Federal Contract Compliance Programs (OFCCP) may file a complaint with OFCCP and EEOC.<sup>114</sup>

#### **IV. PROPOSED EMPLOYMENT NON-DISCRIMINATION ACT (ENDA)**

ENDA, H.R. 1397, was introduced in the U.S. House of Representatives on April 4, 2011 by Barney Frank of Massachusetts, along with 165 co-sponsors. The bill was subsequently referred to the Committees on Education and the Workforce, House Administration, Oversight and Government Reform, and the Judiciary. Jeff Merkley of Oregon, along with 42 co-sponsors, introduced a companion ENDA bill, S. 811, in the U.S. Senate on April 14, 2011. The bill was subsequently referred to the Committee on Health, Education, Labor, and Pensions.

If enacted, the current version of ENDA, which closely tracks Title VII, would prohibit employment discrimination on the basis of sexual orientation and gender identity nationwide. Under ENDA, an employer that employs 15 or more employees may not “fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment of the individual, because of such individual’s actual or perceived sexual orientation or gender identity,” including such actions taken “against an individual based on the actual or perceived sexual orientation or gender identity of a person with whom the individual associates or has associated.”<sup>115</sup>

Thus, even if an employee is not gay, lesbian, bisexual or transgender, if his or her employer makes an adverse employment decision based on erroneous perceptions about the

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<sup>112</sup> *Id.* at \*7.

<sup>113</sup> *Meritor Sav. Bank, FSB*, 477 U.S. at 65.

<sup>114</sup> Equal Employment Opportunity Commission, Coordination of Functions; Memorandum of Understanding, 76 Fed. Reg. 71,029 (Nov. 16, 2011).

<sup>115</sup> H.R. 1397, 112th Cong. § 4(a)(1), (e) (2011).

employee's sexual orientation or gender identity, the employer would be in violation of ENDA. Additionally, ENDA would protect employees from adverse employment decisions based on their association with a child, parent or friend who is of, or is perceived as having, a particular sexual orientation or gender identity. There are several major exceptions in the current version of ENDA. The proposed legislation exempts religious organizations (including educational institutions substantially controlled or supported by religious organizations), the Armed Forces and small businesses.<sup>116</sup> It does not apply to domestic partnership benefits<sup>117</sup> and prohibits quotas or preferential treatment based on sexual orientation.<sup>118</sup> The legislation also specifically excludes disparate impact claims and bars the EEOC from requiring the collection of statistical information on sexual orientation or gender identity.<sup>119</sup> The EEOC and the Department of Justice would enforce the law, and the relief available would be the same as under Title VII.<sup>120</sup>

As proposed, ENDA would define "sexual orientation" as meaning "homosexuality, heterosexuality, or bisexuality,"<sup>121</sup> and "gender identity" as "gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth."<sup>122</sup> Thus, if enacted, ENDA will prohibit discrimination based on actual or perceived heterosexuality. ENDA also will prohibit employment discrimination against transgender individuals to the same extent it will prohibit discrimination based on sexual orientation.

## V. CONCLUSION

The inconsistent results in federal case law and the narrow protections afforded currently under Title VII establish the need for ENDA if there is to be any meaningful federal prohibition of workplace discrimination and harassment based on sexual orientation and gender identity. Nonetheless, existing federal law does, in limited circumstances, provide some potential remedies to employees who suffer gender stereotyping or sexual harassment related to their sexual orientation or gender identity. Additionally, while federal law offers only limited assistance, the EEOC's *Macy* decision provides alternative recourse for many victims of gender identity discrimination and will likely influence federal courts in future Title VII cases.

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<sup>116</sup> *Id.* §§ 6, 7.

<sup>117</sup> *Id.* § 8(b).

<sup>118</sup> *Id.* § 4(f).

<sup>119</sup> *Id.* § 9.

<sup>120</sup> *Id.* § 10.

<sup>121</sup> *Id.* § 3(a)(9).

<sup>122</sup> *Id.* § 3(a)(6).



# Sexual Orientation, Gender Identity, And Diversity In The Workplace

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## Iván Espinoza-Madrugal

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**LGBT equality in the workplace is not optional — the law demands it.**

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**IN 1974**, Mechelle Vinson, an African-American woman, accepted a bank teller position. During her four years working at the bank, Ms. Vinson was subjected to constant sexual harassment and physical assault by Sidney Taylor, a vice president at the bank. She had sex with Mr. Taylor in response to “repeated demands upon her for sexual favors,” and Mr. Taylor touched her sexually at work, exposed himself to her, followed her into the bathroom alone, and raped her on several occasions. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 60 (1986). She never reported him for fear of losing her job. The Supreme Court held that Mr. Taylor’s sexual advances towards Ms. Vinson created a “hostile environment,” in violation of a federal anti-discrimination law commonly known as Title VII.

Ms. Vinson’s experience as a woman and as an African-American placed her in a unique position with respect to her relationship with her manager and the sexual harassment she experienced. The lack of job opportunities she likely encountered as an African-American woman in 1974 may have contributed to her hesitation to report Mr.

Taylor and, ultimately, to remain in her job. This vulnerability undoubtedly left her more at risk of sexual harassment in the workplace.

Ms. Vinson's experience as both a woman and as an African-American offers a window into the way that some people experience workplace harassment and discrimination. Indeed, women, racial minorities and those who identify or are perceived as lesbian, gay, bisexual or transgender ("LGBT") may not experience discrimination solely on the basis of one element or dimension of their identity. Although the U.S. Supreme Court did not pay particular attention to Ms. Vinson's experience as an African-American woman in 1986, courts across the country are increasingly recognizing and addressing how an individual with multiple identities can experience discrimination in the workplace. It is essential that employers and employment lawyers understand the growing and important role of intersectional analysis in discrimination cases. This article explains how courts are increasingly moving towards protecting LGBT employees, and how people who identify across intersecting lines of race, sex, gender identity and sexual orientation are particularly vulnerable to discrimination. At the end of this article, the content of the discussion is incorporated into ten practical suggestions to help promote diversity and inclusion in the workplace.

### **AN OVERVIEW OF FEDERAL WORKPLACE PROTECTIONS**

• Work is an essential part of almost every person's life. Work plays an important and defining role; it can carry both professional and personal significance and meaning. Luckily, for many people, work is an accepting and reaffirming place — a community away from home. But for others, the workplace is an unwelcoming and hostile place. Many people experience a toxic work environment: bullying, teasing, harassment, and discrimination are not uncommon. These experiences not only negatively affect employee morale and performance, but also create a harmful envi-

ronment that can weaken productivity and even expose employers to liability.

Under federal law, employees are protected from discrimination on the basis of their race, sex, religion, and national origin. *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq. In relevant part, federal employment discrimination law mandates that personnel actions cannot be based on sex. Title VII prohibits an employer from failing or refusing "to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment" or "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's ... sex." *Id.* at §§2000e-2(a)(1), (2). This is a broad and powerful measure designed to combat discrimination and promote equality in the workplace. Federal law aims to create equal opportunity for employment and advancement, regardless of an employee's sex, and courts have recognized that sex discrimination protections are available to all workers independent of sexual orientation and gender identity. Employers and employment lawyers should realize that LGBT employees are covered by Title VII's prohibition against discrimination on the basis of sex. To understand how courts are interpreting Title VII to cover some LGBT employees, it is important to know the evolution of Title VII jurisprudence.

In *Price Waterhouse v. Hopkins*, a landmark sex discrimination case, the U.S. Supreme Court found that an employer can violate Title VII by relying on sex stereotyping to assess an employee. 490 U.S. 228 (1989). Ann Hopkins, a white female senior manager, brought suit against Price Waterhouse when the company failed to consider her candidacy for partnership. Price Waterhouse partners felt that Ms. Hopkins was insufficiently "feminine" because her behavior and appearance clashed with

the partners' view of how a woman should look and act. The partners at Price Waterhouse commented that Ms. Hopkins was "macho," "overcompensated for being a woman," and should take "a course at charm school." *Id.* at 235. Ms. Hopkins was told that, in order to make partner, she had to comport with traditional notions of femininity — she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* In Ms. Hopkins' case, the Supreme Court held that discrimination based on stereotypes about sex and gender conformity falls squarely within the scope of sex discrimination. Indeed, Title VII is not limited to discrimination on the basis of the sex a person is assigned or presumed to be at birth — typically, male or female — it also encompasses the "entire spectrum of disparate treatment" on the basis of sex, including discrimination based on gender stereotypes and characteristics. *Id.* at 251. The Court found that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group." *Id.* This was — and remains today — a powerful assertion that discrimination on the basis of sex also encompasses discrimination on the basis of gender stereotypes or gender non-conformity.

The Court's decision in *Price Waterhouse* informs our contemporary understanding of the challenges that women, racial minorities, and LGBT individuals routinely face in the workplace. Notably, LGBT and gender non-conforming people may face problems in the workplace because some employers may fire, refuse to hire or promote, or take other adverse actions against employees who fail to conform to stereotypical notions and expectations of gender identity, gender expression, and sexual orientation. There are many ways that an LGBT individual may fail to meet an employer's stereotypical expectations: an employer could deem an individual's characteristics, conduct, mannerisms, dress or lifestyle to violate out-dated notions of "masculinity" and

"femininity." Indeed, traditional notions of sex and gender are quickly changing in mainstream society. *See, e.g.,* Jennifer Conlin, *The Freedom to Choose Your Pronoun*, New York Times (Sept. 30, 2011), available at <http://www.nytimes.com/2011/10/02/fashion/choosing-a-pronoun-he-she-or-other-after-curfew.html> (noting the "growing number of high school and college students who are questioning the gender roles society assigns individuals simply because they have been born male or female"). Employers can minimize liability and maximize corporate competitiveness by staying attuned to both social and legal trends.

**TITLE VII AND LGBT EMPLOYEES** • Although Title VII does not expressly enumerate sexual orientation, gender identity or gender expression as protected characteristics, courts across the country are increasingly finding that LGBT and gender non-conforming employees are entitled to protection under Title VII. To be clear, these legal advances have not always been won by self-identified LGBT plaintiffs. For example, in *Oncale v. Sundowner Offshore Services*, a man working on an oil platform in the Gulf of Mexico was forcibly subjected to humiliating sex-related acts, physically assaulted in a sexual manner, and threatened with rape by other men in his work team. 523 U.S. 75, 77 (1998). In *Oncale*, the Supreme Court did not discuss the sexual orientation of any of the men, and the holding covers all employees regardless of sexual orientation or gender identity/expression: an employee may bring a Title VII claim where sexual harassment was perpetrated by a person of the same sex.

Although the Court recognized that "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII," it concluded that there was simply "no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII." *Id.* at 79. This outcome makes

clear that “statutory 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.” *Id.* Thus, Title VII does not only encompass what Congress intended in 1964; the law also covers any discrimination “because of ... sex.” *Id.* at 80 (ellipsis in original); *see also Schroer v. Billington*, 577 F. Supp. 2d 293, 307 (D.D.C. 2008) (noting that “Supreme Court decisions ... have applied Title VII in ways Congress could not have contemplated”). Following *Oncale* and *Price Waterhouse*, courts have found that employees who are sexually harassed by persons of their same sex, or discriminated against because they do not conform to stereotypical notions of gender, have legal protection and recourse under Title VII.

Harassment and discrimination against LGBT and gender non-conforming people can take many forms. For example, Antonio Sanchez brought a lawsuit against his employer, Azteca Restaurant in Washington State, because he was constantly called obscene and derogatory names, including “faggot” and “female fucking whore,” while serving as a waiter at the restaurant. *Nichols v. Azteca Rest. Enter., Inc.*, 256 F.3d 864, 870 (9th Cir. 2001). Mr. Sanchez’s co-workers and his supervisor consistently referred to him with female pronouns, taunted him for behaving “like a woman,” and ridiculed him for “walking and carrying his serving tray ‘like a woman.’” *Id.* The court found that, just as it was illegal for Price Waterhouse to discriminate against Ms. Hopkins for exhibiting stereotypical “masculine” qualities, Azteca Restaurant could not discriminate against Mr. Sanchez for expressing stereotypical “feminine” qualities. *Id.* at 874. Mr. Sanchez’s successful claim is important for all employees — LGBT and straight alike — whose conduct or presentation is somehow perceived as departing from traditional or stereotypical gender roles and expectations.

Notably, courts have also applied the sex discrimination framework in cases involving openly

gay employees. In *Prowel v. Wise Business Forms, Inc.*, a gay man, Brian Prowel, sued his employer for sex discrimination. 579 F.3d 285 (3d Cir. 2009). Mr. Prowel identified as an “effeminate” gay man, and his “mannerisms caused him not to ‘fit in’ with the other men” at work: Mr. Prowel “had a high voice and did not curse; was very well-groomed; wore what others would consider dressy clothes; was neat; filed his nails instead of ripping them off with a utility knife; crossed his legs and had a tendency to shake his foot ‘the way a woman would sit’; walked and carried himself in an effeminate manner; drove a clean car; had a rainbow decal on the trunk of his car; talked about things like art, music, interior design, and decor; and pushed the buttons on [his work machine] with ‘pizzazz.’” *Id.* at 287. Mr. Prowel’s co-workers subjected him to verbal and written attacks, called him “princess,” “rosebud,” and “fag,” and wrote messages “on the wall of the men’s bathroom, claiming Prowel had AIDS and engaged in sexual relations with male co-workers.” *Id.* at 287-288. His co-workers left “a pink, light-up feather tiara with a package of lubricant jelly” on his work machine, and he also “found anonymous prayer notes on his work machine on a daily basis” saying he “will burn in hell.” *Id.* Mr. Prowel overheard a co-worker say: “[t]hey should shoot all the fags.” *Id.* at 287.

In this case, the court recognized that the record was “replete with evidence of harassment motivated by Prowel’s sexual orientation,” but ultimately found that “Prowel was harassed because he did not conform to [his employer’s] vision of how a man should look, speak and act — rather than harassment based solely on his sexual orientation.” *Id.* at 292. The court noted that there was “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.” *Id.* (emphasis in original). Indeed, “once a plaintiff shows that harassment is motivated by sex, it is no defense that it may also have been mo-

tivated by anti-gay animus.” *Id.* at 289. Thus, an employee’s sexual orientation does not vitiate the sex discrimination claim, and “has no legal significance under Title VII.” *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002).

Essentially, the rule is: “If an employer acts upon stereotypes about sexual roles in making employment decisions, or allows the use of these stereotypes in the creation of a hostile or abusive work environment, then the employer opens itself up to liability under Title VII’s prohibition of discrimination: on the basis of sex.” *Id.* at 409.

Several federal courts have applied this legal framework to claims brought by transgender employees — people whose gender identity, or inner sense of being male or female, differs from their assigned or presumed sex at birth. *See, e.g., Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000) (finding that Title VII, under *Price Waterhouse*, bars “not just discrimination based on the fact that Hopkins was a woman, but also discrimination based on the fact that she failed ‘to act like a woman’ — that is, to conform to socially-constructed gender expectations”) (citing *Price Waterhouse*, 490 U.S. at 240); *see also Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000) (holding that, if plaintiff did not receive a loan application because the bank treated “a woman who dresses like a man differently than a man who dresses like a woman,” then this conduct is prohibited under Title VII because “stereotyped remarks [including statements about dressing more ‘femininely’] can certainly be *evidence* that gender played a part”) (quoting *Price Waterhouse*, 490 U.S. at 251) (brackets and emphasis in original). Courts have found that Title VII protects transgender employees when they are discriminated against at work on the basis of their gender identity.

For example, in *Schroer v. Billington*, a transgender woman named Diane Schroer applied for a position as a terrorism research analyst with the Congressional Research Service, a division of the Library of Congress. 577 F. Supp. 2d 293, 295-296

(D.D.C. 2008). At the time she applied, Ms. Schroer, who identifies as female, was planning to transition. Once she accepted the position, Ms. Schroer informed her supervisor that she would begin her gender transition. The next day, Ms. Schroer’s supervisor rescinded the job offer.

After hearing the evidence presented at trial, the court held that Ms. Schroer “was discriminated against because of sex in violation of Title VII .... whether viewed as sex stereotyping or as discrimination literally ‘because of ... sex.’” *Schroer*, 577 F. Supp. 2d at 300 (second ellipsis in original). The court explained that, after *Price Waterhouse*, “punishing employees for failure to conform to sex stereotypes is actionable sex discrimination under Title VII.” *Id.* at 303. Ultimately, it did not matter “whether the Library withdrew its offer of employment because it perceived Schroer to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual.” *Id.* at 305. The court also found that “the Library’s refusal to hire Schroer after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was *literally* discrimination ‘because of ... sex.’” *Id.* at 308 (emphasis and ellipsis in original).

Ms. Schroer’s case illustrates that transgender employees may be protected under Title VII when they experience the kind of discrimination that Ms. Hopkins and Mr. Sanchez experienced — simply put, discrimination based on gender stereotypes and sex. Other cases have made clear that “[t]here is nothing in existing case law setting a point at which a man becomes *too* effeminate, or a woman becomes *too* masculine, to warrant protection under *Title VII* and *Price Waterhouse*.” *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.*, 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008) (emphasis in original).

More recently, on April 20, 2012, the U.S. Equal Employment Opportunity Commission (“EEOC”), a federal agency that is responsible for interpreting and enforcing federal employment discrimination

laws, including Title VII, found that a “complaint of discrimination based on gender identity, change of sex, and/or transgender status is cognizable” under Title VII’s sex discrimination prohibition. *Macy v. Holder*, 2012 WL 1435995 (EEOC Apr. 20, 2012). The facts in this EEOC case closely resemble those at issue in *Schroer*: Mia Macy, a transgender woman who is a trained and certified ballistics investigator, was denied employment in a crime laboratory after disclosing that she was “in the process of transitioning from male to female.” *Id.* at 1. Ms. Macy filed an equal employment opportunity complaint alleging employment discrimination in violation of Title VII on the basis of sex, gender identity, and sex stereotyping. Following “a steady stream of district court decisions,” *id.* at 9, the EEOC ruled in Ms. Macy’s favor making clear that Title VII covers gender identity discrimination claims: “If Title VII proscribed only discrimination on the basis of biological sex, the only prohibited gender-based disparate treatment would be when an employer prefers a man over a woman, or vice versa. But the statute’s protections sweep 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.” *Id.* at 6. Clearly, as the EEOC recognized, sex and gender are complex.

Notably, the EEOC did not pay particular attention to Ms. Macy’s identity documents, medical treatments or anatomy — this is an implicit recognition that there is no set formula for gender transition. There is medical consensus that hormone therapy and sex reassignment surgery are medically necessary for many transgender people. Gender Identity Disorder (“GID”) is a medical diagnosis that describes the extreme distress some people experience when their bodies do not match their gender identity. *See* Am. Psychiatric Ass’n, *Diagnostic & Statistical Manual of Mental Disorders* (4th ed. 2000). The treatment for GID involves some combination of hormone therapy, sex reassign-

ment surgery, and/or real life experience (living for a period of time in accordance with your gender identity). Each patient must be evaluated on a case-by-case basis, with expert medical judgment required for both reaching a diagnosis and determining a course of treatment. *See* World Prof’l Ass’n for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* (7th version 2012), available at [http://www.wpath.org/documents/Standards%20of%20Care\\_FullBook\\_1g-1.pdf](http://www.wpath.org/documents/Standards%20of%20Care_FullBook_1g-1.pdf). This information is important for employers because transgender people are becoming increasingly visible. *See* Alissa Quart, *When Girls Will be Boys*, *New York Times* (Mar. 16, 2008), available at <http://www.nytimes.com/2008/03/16/magazine/16students-t.html?pagewanted=all> (noting that “[t]he number of young people who openly identify as transgendered has grown”).

Additionally, transgender employees are being protected outside of the Title VII context. In an important case involving a transgender employee, *Glenn v. Brumby*, the court held that “discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it’s described as being on the basis of sex or gender.” 663 F.3d 1312, 1317 (11th Cir. 2011). In this case, Vandiver Elizabeth Glenn, an editor in the Georgia General Assembly’s Office of Legislative Counsel, claimed that she was terminated, in violation of her Constitutional rights under the Fourteenth Amendment’s Equal Protection Clause, “because of sex discrimination.” *Id.* at 1313-14. Ms. Glenn did not sue under Title VII; she raised these claims in a Constitutional action. The court ruled strongly in Ms. Glenn’s favor: “An individual cannot be punished because of his or her perceived gender-nonconformity. Because these protections are afforded to everyone, they cannot be denied to a transgender individual . . . discrimination on this basis is a form of sex-based discrimination that is subject to heightened scrutiny under the Equal Pro-

tection Clause.” *Id.* at 1319. Ms. Glenn’s case shows that transgender employees may be protected not only under Title VII, but also under a Constitutional framework.

*Schroer, Glenn, and Macy* are expected to result in greater protection for transgender and gender non-conforming employees. In response, employers should:

- Consider adopting a non-discrimination policy that explicitly bars treating transgender people differently from other workers;
- Ensure that employees have access to restrooms in accordance with their gender identity, and add a gender-neutral restroom option;
- Use a health insurance company that provides coverage for transition-related healthcare, and make sure to opt-in for the coverage; and
- Foster a trans-inclusive workplace culture by providing mandatory training on transgender issues.

*See, e.g.,* Lambda Legal, *Transgender Rights Toolkit: A Legal Guide for Trans People and their Advocates, Workplace Rights & Wrongs* (Feb. 1, 2011), available at <http://www.lambdalegal.org/publications/trans-toolkit> (outlining “best practices” for transgender inclusion in the workplace).

**EMPLOYEES WHO IDENTIFY ACROSS INTERSECTING LINES OF RACE, SEX, GENDER IDENTITY, SEXUAL ORIENTATION AND/OR OTHER IDENTITY CHARACTERISTICS** • Another common misconception held by employers is that employees can be easily categorized along one axis of identity usually related to race, sex, gender identity, or sexual orientation. This is an oversimplification of identity. In an increasingly diverse workplace, individuals may identify along multiple axes and identity characteristics. A Latina woman, for example, may identify along complex and intersecting lines of sex, race,

national origin, and/or sexual orientation. Thus, employers should resist the urge to compartmentalize discrimination, and should not assume that people can only experience discrimination along one axis of identity.

Eunice Hollins, an African-American woman, experienced discrimination based on multiple axes of identity firsthand when she was threatened with termination, all because of her hair. Ms. Hollins worked as a machine operator in Willoughby Hills, Ohio, and was told that she must “seek advance approval for her hairstyles” before she wore them to work. *Hollins v. Atlantic Co., Inc.*, 188 F.3d 652, 656 (6th Cir. 1999). She first encountered this problem when she wore her hair to work in a “finger waves” hairstyle. *Id.* at 655. Ms. Hollins’ supervisor informed her that her hair was “too different” and “eye catching,” and therefore violated the company’s grooming and personal appearance policies, which required women to have a “neat and well groomed hair style.” *Id.* Ms. Hollins was told to “present to her supervisor pictures of any styles she might wish to try,” and repeatedly cautioned to “present pictures for pre-approval.” *Id.* at 656. Ms. Hollins was reprimanded when she wore her hair in a ponytail, which many white female employees wore to work. *Id.* According to her supervisor, a ponytail was “too drastic” for her hair. *Id.* She was also told that her failure to follow the grooming policy could result in termination and affect future wage increases. Ultimately, Ms. Hollins was threatened with termination, and her job performance ratings dropped. *Id.*

In this case, the court found that Ms. Hollins had successfully raised an inference of unlawful discrimination because several “white women on Hollins’s shift, working under the same supervisors, came to work repeatedly wearing the same hairstyle as that for which [supervisors] reprimanded Hollins.” *Id.* at 660. The white women who wore their hair in the exact same style as Ms. Hollins “were never reprimanded, never required to present pic-

tures of proposed hairstyles, or otherwise required to provide notice or request approval in advance for a hairstyle change.” *Id.*

Ms. Hollins encountered discrimination because she was an African-American woman whose hairstyles were deemed “too different” and “too drastic” by her employer — even when her hairstyle was indistinguishable from that of her white female co-workers. *Id.* at 655-656. Ms. Hollins’ discrimination cannot be considered along a single dimension or axis of identity. Her sex and race cannot be separated; rather, race and sex are inextricably intertwined in her discrimination. Her race and sex — coupled together — worked in tandem to trigger a unique form of discrimination. Finding that the employer “singled her out for different treatment,” the court implicitly recognized that Ms. Hollins was treated differently on the basis of both her race and sex. *Id.* at 661. Since Ms. Hollins was “singled out” as an African-American woman, the court implicitly incorporated an intersectional approach and analysis to Title VII to find that Ms. Hollins’ experience was shaped by both her race and sex.

When an employee alleges both sex and race discrimination, it is not appropriate to separate the two bases for discrimination. “Rather than aiding the decisional process, the attempt to bisect a person’s identity at the intersection of race and gender often distorts or ignores the particular nature of their experiences.” *Lam v. Univ. of Hawaii*, 40 F.3d 1551, 1562 (9th Cir. 1994). Sex and race cannot be viewed as separate and distinct elements: “when a plaintiff is claiming race *and* sex bias, it is necessary to determine whether the employer discriminates on the basis of that *combination* of factors, not just whether it discriminates against people of the same race or of the same sex.” *Id.* (emphasis in original). Thus, “when a Title VII plaintiff alleges that an employer discriminates against black females, the fact that black males and white females are not subject to discrimination is irrelevant and must not form any part of the basis for a finding that the employer

did not discriminate against the black female plaintiff.” *Jefferies v. Harris County Cmty. Action Comm’n*, 615 F.2d 1025, 1034 (5th Cir. 1980). Courts have found that “an employer should not escape from liability for discrimination against black females by a showing that it does not discriminate against blacks and that it does not discriminate against females.” *Id.* at 1032.

To better understand how discrimination is experienced by those who identify across intersecting lines of race, sex, gender identity, or sexual orientation, employers and employment lawyers should consider incorporating an intersectional analysis in employment discrimination cases. This may help explain or determine how a multiplicity of identities could contribute to workplace problems or dynamics. This practical approach is supported by Title VII cases that involve people who identify along multiple axes or characteristics.

### **PROMOTING DIVERSITY AND INCLUSION IN THE WORKPLACE** •

As the workplace becomes more diverse, it is essential that employers and employment lawyers understand the contours of Title VII to better address the complex issues that may arise when dealing with LGBT and gender non-conforming employees, and those who identify across intersecting lines of race, sex, gender identity, and/or sexual orientation. Here are 10 practical suggestions that summarize the content of this article to help promote diversity and inclusion in the workplace:

- Do not assume that discrimination can only exist along a single-axis of identity. Keep in mind that race and sex — coupled together — can work in tandem to trigger a complex and unique form of discrimination. *See, e.g., Hollins v. Atlantic Co.*, *supra*; *Lam v. Univ. of Hawaii*, *supra*; *Jefferies v. Harris County Cmty. Action Comm’n*, *supra*;

- Do not act based on stereotypes or assumptions. Notions of “masculinity” and “femininity” are ever-evolving, and sex and gender can be fluid. *See Price Waterhouse v. Hopkins*, supra; *see also* Jennifer Conlin, *The Freedom to Choose Your Pronoun*, New York Times (Sept. 30, 2011), supra;
- Employees — regardless of their sexual orientation or gender identity/expression — may bring employment discrimination claims based on sex and gender stereotypes. *See Oncale v. Sundowner Offshore Servs.*, supra; *see also Nichols v. Azteca Rest. Enter., Inc.*, supra. To be clear, LGBT employees may be able to bring employment discrimination claims even though sexual orientation and gender identity are not specifically enumerated in Title VII. *See Prowel v. Wise Bus. Forms, Inc.*, supra;
- Transgender and gender non-conforming employees are protected under Title VII. *See Macy v. Holder*, supra. Employers should consider adopting an LGBT nondiscrimination policy that explicitly bars treating transgender people differently from other workers; ensure that employees have access to restrooms in accordance with their gender identity, and add a gender neutral restroom option; use a health insurance company (such as Aetna, Cigna or Blue Cross/Blue Shield) that provides coverage for transition-related healthcare, and make sure to opt-in for the coverage; and foster a trans-inclusive workplace culture by providing mandatory training on transgender issues;
- State or local laws may recognize additional protected classes and provide broader employment discrimination protection than Title VII. In fact, some state and local laws expressly prohibit discrimination on the basis of sexual orientation and/or gender identity/expression. *See* Nat’l Gay & Lesbian Task Force, *State Nondiscrimination Laws in the U.S.*, available at [http://www.thetaskforce.org/downloads/reports/issue\\_maps/non\\_discrimination\\_1\\_12\\_color.pdf](http://www.thetaskforce.org/downloads/reports/issue_maps/non_discrimination_1_12_color.pdf); *see also* Nat’l Gay & Lesbian Task Force, *Jurisdictions with Explicitly Transgender-Inclusive Non-discrimination Laws*, available at [http://www.thetaskforce.org/downloads/reports/fact\\_sheets/all\\_jurisdictions\\_w\\_pop\\_8\\_08.pdf](http://www.thetaskforce.org/downloads/reports/fact_sheets/all_jurisdictions_w_pop_8_08.pdf). Additionally, federal and state laws protect people living with HIV/AIDS, a disability under the law. *See Bragdon v. Abbott*, 524 U.S. 624 (1998). Employers should, therefore, be prepared to make accommodations for people living with HIV/AIDS;
- Adopt an equal employment opportunity policy that includes sexual orientation and gender identity/expression;
- Stay tuned to developments in the movement for LGBT equality. Federal recognition of LGBT equality is evolving, and the law is changing quickly. On February 23, 2011, U.S. Attorney General Eric Holder announced that the so-called Defense of Marriage Act (“DOMA”) is unconstitutional. *See* U.S. Department of Justice, *Statement of the Attorney General on Litigation Involving the Defense of Marriage Act* (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-222.html>. The constitutionality of DOMA is also the subject of significant ongoing litigation. Most recently, on February 22, 2012, a federal court found that DOMA was unconstitutional as applied to a woman who was barred from adding her wife to her federal employer’s health insurance plan solely because their same-sex marriage was not recognized under federal law. *Golinski v. Office*

*of Pers. Mgmt.*, 824 F. Supp. 2d 968 (N.D. Cal 2012);

- Implement diversity competency and cultural sensitivity trainings that are LGBT inclusive. Employees should undergo training that clearly explains the company's non-discrimination policy. Performance and accountability measures should include diversity metrics that are LGBT inclusive. To help improve employee morale and productivity, provide resources and support for employee affinity groups;
- Promote employee recruitment efforts that have a demonstrated outreach to and inclusion of minorities, including LGBT and gender non-conforming people;

- Express public engagement and community involvement by marketing and advertising to diverse communities, including LGBT clients and consumers. Provide philanthropic support for organizations that support low-income, minority and LGBT communities.

**CONCLUSION** • Recent legal developments demonstrate that Title VII can encompass discrimination based on sex stereotypes, gender identity, gender expression, and transgender identity. As the law evolves, intersectional considerations can be expected to play a greater role in Title VII claims. Employers can minimize liability and maximize corporate competitiveness by staying attuned to social and legal trends, particularly, the movement for LGBT equality.

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