

Protection of LGBT Employees Under Title VII

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Labor and Employment Section Biennial Conference



**Federal Bar
Association**

Sexual Orientation Discrimination Under Title VII

- History of Sex Discrimination Under Title VII
- Case Analysis
 - EEOC
 - 11th Circuit
 - 7th Circuit
 - 1st Circuit
 - 2nd Circuit
 - 6th Circuit
 - 8th Circuit
 - 5th Circuit
 - Practical Considerations
- Other Statutes



- Civil Rights Act of 1964 (Title VII)– Background
 - 1954 – *Brown v. Board of Education*
 - 1955 – Montgomery bus boycott
 - 1958 – Bethel Baptist Church bombing, Birmingham, Alabama. Four girls killed
 - 1960 – Greensboro, NC sit-ins
 - 1961 – Freedom riders
 - June – October 1963 – Kennedy discusses bill with Congressional leaders
 - Aug. 1963 – MLK “I Have a Dream”
 - Nov. 1963 – Kennedy assassinated



- Title VII & Sexual Orientation – Background
 - Civil Rights Act of 1964
 - Passed Senate on June 19, 1964
 - Passed House July 2, 1964 signed by President Johnson that night
 - Longest debate in the history of U.S. Senate

- Title VII & Sexual Orientation – Background
 - 42 USC 2000(e)(2)
 - (a) Employer practices
 - It shall be an unlawful employment practice for an employer
 - (1) to fail or refuse 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, **because of such individual's** race, color, religion, **sex**, or national origin; or
 - (2) 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** race, color, religion, **sex**, or national origin.

- Title VII & Sexual Orientation – Background
 - Civil Rights Act of 1964
 - No legislative history explaining Congress’s intent in outlawing sex discrimination
 - One of first rulings stated it was unlawful under Title VII to have separate “help wanted” sections for men and women, despite protest from newspapers
 - First determination holds that a corporate policy requiring termination of female employees when they marry violates Title VII



Newspaper ad – 1921

HOUSEWORK, wanted, a woman for housework in the country. Italian, Spanish or French. Telephone 197-J-8, Newtown, Pa.

HOUSEWORK—Girl for general housework. Apply 1814 Greenwood Avenue.

HOUSEWORK — Middle-aged woman for housework; plain cooking. Possibly could use woman with small child. Three miles from city. Take Hopewell trolley get off at home of Robert Brophy, or 'phone 12-R12, Pennington.

HOUSEWORK — White girl for general housework at shore immediately. Apply this evening or Thursday. 11 Perdicas Place.

LADIES (young) for demonstrating and canvassing a necessity in life. \$1.50 a day. Address Albert A. Miller, 75 Ferrier Ave.

MAID, white, wanted for general housework; reference required. Phone 4942-W.



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1960s employment advertisement



AIRLINES NEED WOMEN!

TRAIN AT HOME!

- ✈ **HOSTESS**
- ✈ **RECEPTIONIST**
- ✈ **RESERVATIONIST**
- ✈ **TICKET AGENT**

Fascinating Airline Careers Open for Women! Romance! Adventure! Travel! Good Pay!

Women—train at home for a career in commercial aviation! Airlines need hostesses, receptionists, ticket agents, reservationists. Jobs are interesting, exciting and offer good pay, rapid advancement, secure future. Work near home, away from home,

in foreign lands. Airline jobs offer romance, adventure, travel. Complete home-study course prepares you. Training under supervision of experienced airline personnel. Free placement service anywhere in the United States.

Mail Coupon NOW for FREE Details!

This may be your chance for a lifetime career of romance, adventure and travel...PLUS good pay and security. Airlines are booming...and they need thousands of trained, qualified women for non-technical positions. Mail coupon at once!

CAREERS WITH AIRLINES
Dept. H-5 P.O. BOX 235,
MURRAY HILL STA., N. Y. 16, N. Y.

CAREERS WITH AIRLINES Dept. H-5
P.O. BOX 235, MURRAY HILL STA., N. Y. 16, N. Y.

Rush me FREE and without obligation full information about careers for women in aviation.

Name _____ Age _____
(Please Print)

Address _____

City _____ State _____

No salesman will call — All information comes by mail!



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Title VII & Sexual Orientation – Background

- *Loving v. Virginia*, 388 U.S. 1 (1967)
 - *State laws barring different-race marriages unconstitutional*
 - *“Associational discrimination” is a cognizable form of discrimination*



Title VII & Sexual Orientation – Background

- *Phillips v. Martin Marietta Corporation*, 400 U.S. 542 (1971)
 - Policy refusing to employ women (but not men) with pre-school-age children violates Title VII
 - Discrimination based not strictly on gender, but because of *gender roles* and *sexuality* violates Title VII
 - Broader reading of “because of sex”



Title VII & Sexual Orientation – Background

- Equal Employment Opportunity Act of 1972
 - Extended Title VII to apply to federal, state, and local government employees
 - Expanded the EEOC's enforcement authority
 - Provides greater legislative history to shed light on Congress' intent
 - Came *after* *Martin Marietta*
 - NOW lobbyists argued that sex discrimination is just as serious as race discrimination



Title VII & Sexual Orientation – Background

- *Smith v. Liberty Mutual Insurance Co.* 569 F.2d 325 (5th Cir. 1978)
 - *OK to discriminate against man for being “effeminate.”*
 - *Title VII does not prohibit gender stereotype discrimination*



Title VII & Sexual Orientation – Background

- *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1978)
 - Appeal from bench trial where plaintiff alleged discrimination based on religion, race, sex and sexual orientation
 - Holding: “discharge for homosexuality is not prohibited by Title VII.”



Title VII & Sexual Orientation – Background

- *Price Waterhouse v. Hopkins*, 490 US 228 (1989)
 - Female plaintiff denied promotion, told to “act more feminine.”
 - Gender stereotyping (prescriptive stereotypes) prohibited by Title VII



Title VII & Sexual Orientation – Background

- *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998)
 - Same-sex sexual harassment prohibited, even though not the intent of Congress when Title VII was passed.



Title VII & Sexual Orientation – Background

But for decades, courts have held that sexual orientation discrimination is not prohibited under Title VII.



Title VII & Sexual Orientation – Background

- *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217-23 (2d Cir. 2005); *Kalich v. AT&T Mobility, LLC*, 679 F.3d 464, 471 (6th Cir. 2012); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 289 (3d Cir. 2009); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 704 (7th Cir. 2000); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) (per curiam); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979) (per curiam); see also *Johnson v. Frank*, EEOC Decision No. 05910858, 1991 EEOC LEXIS 2713, 1991 WL 1189760, at *3 (Dec. 19, 1991).



Title VII & Sexual Orientation – Background

- *United States v. Windsor*, 570 U.S. 744 (2013)
- *Obergefell v. Hodges*, 135 S.Ct. 2585 (2015)



Title VII & Sexual Orientation

- Courts wrestling with two concepts: gender stereotypes v. sexual orientation
- Impact on transgendered employees who identify as transgendered but do not exhibit gender non-conformity?



Title VII & Sexual Orientation – EEOC

□ *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641 (July 15, 2015)

- Sexual orientation discrimination is sex discrimination because:
 - Entails treatment of an employee less favorably because of the employee's sex
 - Association discrimination based on sex
 - Based on gender stereotypes



Title VII & Sexual Orientation – EEOC

□ *Baldwin*

- Facts alleged by Plaintiff:
 - Not hired for job because he was gay
 - Supervisor made comments to him when mentioning his partner “we don’t need to hear about that gay stuff.” And told that he was a distraction when mentioning his male partner



Title VII & Sexual Orientation – EEOC

□ *Baldwin*

- “When an employee raises a claim of sexual orientation discrimination as sex discrimination under Title VII,[t]he inquiry is the same as any other Title VII allegations of sex discrimination-whether the employer has relied on sex-based consideration’ or ‘take gender into account’ when taking the adverse action.”
- Under Title VII an employer may not rely on sex based considerations or take gender into account



Title VII & Sexual Orientation – 11th Cir.

- *Evans v. Ga Reg'l Hosp*, 850 F.3d 1248 (11th Cir. 2017)
 - March 10, 2017
 - Security officer filed pro se claim of discrimination based on sexual orientation.
 - Sexual orientation is NOT protected under Title VII.
 - BUT: Gender non-conformity is protected.
 - Supreme Court denied cert in December 2017.



Title VII & Sexual Orientation – 11th Cir.

□ *Bostock v. Clayton Cty. Bd. of Comm'rs*, 723 F. App'x. 964 (11th Cir.), *en banc denied*, 894 F.3d 1335 (11th Cir.), *petition for cert. filed*, (U.S. May 25, 2018) (No. 17-1618)

- Majority of circuit court voted against hearing case *en banc* to decide whether Title VII protects gay and lesbian individuals from discrimination because their sexual preferences do not conform to their employers' views of whom individuals of their respective genders should love



Title VII & Sexual Orientation – 11th Cir.

□ *Bostock*

- Dissent- Noting 8 million Americans identified as lesbian, gay or bisexual and of those who so identify, roughly 25% report experiencing workplace discrimination because their sexual preferences do not match their employers' expectations. "That's a whole lot of people potentially affected by this issue."
- Instead cling to 39 year old precedent (*Blum*)
- **Petition for Cert. under consideration**



Title VII & Sexual Orientation – 7th Cir.

- *Hively v. Ivy Tech. Commty. College of Ind.*, 853 F.3d 339 (7th Cir. 2017)(en banc)
 - Lesbian woman was denied multiple promotions at a community college.
 - She filed a charge with the EEOC and was fired.
 - Argued sexual orientation discrimination is a form of sex discrimination



Title VII & Sexual Orientation – 7th Cir.

- *Hively v. Ivy Tech. Commty. College of Ind.*, 853 F.3d 339 (7th Cir. 2017)(en banc)
 - Lower court dismissed complaint, COA reversed lower court.
 - Holding: sexual orientation is protected as both (1) gender-non-conformity, and (2) associational discrimination.



Title VII & Sexual Orientation – 7th Cir.

- *Hively v. Ivy Tech. Commty. College of Ind.*, 853 F.3d 339 (7th Cir. 2017)(en banc)
 - Gender non-conformity:
 - Relied on *Price Waterhouse*.
 - Also relied on *Oncale v. Sundowner Offshore Services*.
 - “Must ask if “Hively is a man, but everything else stays the same, in particular, the sex or gender of the partner, would she have been treated differently.” If so, it’s unlawful under Title VII.
 - “This is paradigmatic sex discrimination.”
 - The distinctions between “gender-non-conforming” and “sexual orientation” doesn’t exist.



Title VII & Sexual Orientation – 7th Cir.

▫ *Hively v. Ivy Tech. Commty. College of Ind.*, 853 F.3d 339 (7th Cir. 2017)(en banc)

- Associational discrimination theory:
 - Relied on *Loving v. Virginia*
- Posner concurrence: job of judiciary to “evolve” interpretations of statutes



Title VII & Sexual Orientation – 7th Cir.

▫ *Hively v. Ivy Tech. Commty. College of Ind.*, 853 F.3d 339 (7th Cir. 2017)(en banc)

- Dissent

- Congress knows difference between “sex” and “sexual orientation”
 - VAWA, Fed. Hate Crimes Act
- Price Waterhouse was only plurality
- Congress undoubtedly did not intend to cover sexual orientation



Title VII & Sexual Orientation

- Theories:

1. Gender Stereotyping (*Price Waterhouse*)
2. Associational Discrimination (*Loving*)



Title VII & Sexual Orientation – 1st Cir.

- *Higgins v. New Balance Athletic Shoe*, 194 F.3d 252 (1st Cir. 1999)
 - Sexual orientation not covered under Title VII
 - 20 year old decision



Title VII & Sexual Orientation – 1st. Cir.

- *Franchina v. City of Providence*, 881 F.3d 32 (1st Cir. 2018)
 - Sexual orientation discrimination (hostile work environment) under Title VII
 - “sex plus” theory
 - Firefighter, female, lesbian
 - Extremely egregious conduct toward Plaintiff



Title VII & Sexual Orientation – 1st. Cir.

- *Franchina v. City of Providence*, 881 F.3d 32 (1st Cir. 2018)
 - Sex-plus – additional method for a sexual orientation claim under Title VII
 - Relies upon *Chadwick v. Wellpoint*
 - Evidence of opposite sex sub class is not needed (ex. Gay males treated differently)
 - Distinguishes *Higgins*



Title VII & Sexual Orientation

▫ Theories:

1. Gender Stereotyping (*Hively* via *Price Waterhouse*)
2. Associational Discrimination (*Hively* via *Loving*)
3. Sex-Plus (*Franchina* via *Chadwick*)



Title VII & Sexual Orientation – 2d Cir.

- *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018)(en banc)
 - Alleged gender stereo-typing under Title VII and sexual orientation discrimination under state law
 - Gay skydiving instructor, admitted he was gay and was terminated
 - Lower court granted SJ on Title VII claim; Jury found in favor of Defendant on state claims at trial



Title VII & Sexual Orientation – 2d Cir.

- *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018)(en banc)
 - Sexual orientation discrimination IS prohibited under Title VII.
 - Three ways to get there:
 - Sexual orientation as a subset of sex discrimination
 - Gender non-conformity/stereotyping
 - Associational discrimination – “associating with a man” parallels race discrimination which was recognized in *Holcomb v. Iona College*, a white man was fired for his relationship to a black woman.
 - **Petition for Cert. under consideration**



Title VII & Sexual Orientation – 6th Cir.

- *EEOC v. R.G. & G.R. Harris Funeral Homes*, 884 F.3d 560 (6th Cir. 2018)
 - Plaintiff Aimee Stephens (FKA Anthony Stevens) was transgendered funeral director
 - Five year employee, announced that she would begin the process for a gender reassignment surgery
 - Began dressing according to the female dress code, and was promptly fired
 - The owner stated people couldn't deal with seeing "him" like this
 - The owner identified as being "religious" and stated he had a calling from God to help people grieve when losing a loved one.



Title VII & Sexual Orientation – 6th Cir.

- *EEOC v. R.G. & G.R. Harris Funeral Homes*, 884 F.3d 560 (6th Cir. 2018)
 - Holding:
 - Affirmative SJ granted to EEOC
 - Sex-stereotyping is unlawful (*Price Waterhouse*)
 - This has been case law in 6th Circuit since 2004 – *Smith v. City of Salem*, 6th Cir. 2004
 - and discriminating against transgendered persons is sex discrimination
 - Ministerial protections didn't apply because the funeral home did not meet the requirements of having “religious characteristics”
 - And Stephens was not a “ministerial employee”
 - **Petition for Cert. under consideration**



Title VII & Sexual Orientation – 8th Cir.

- *Williamson v. AG Edwards & Sons*, 876 F.2d 69 (8th Cir. 1989), *cert. denied*, 493 U.S. 1089 (1990)
 - Sexual orientation not covered under Title VII.



Title VII & Sexual Orientation – 8th Cir.

- ❑ *Horton v. Midwest Geriatric Mgmt. L.L.C.*, No. 4:17CV2324 JCH, 2017 WL 6536576 (E.D. Mo. Dec. 21, 2017), *appeal filed*, No. 18-1104 (8th Cir. Jan. 12, 2018)
 - Argued several theories of sex discrimination based solely on sexual orientation
 - Sex discrimination (*Hively*)
 - Associational discrimination (*Loving*)
 - Sex stereotypes (*Price Waterhouse*)
 - Motion to dismiss granted
 - **Appealed to 8th Circuit – Currently briefing**



Title VII & Sexual Orientation – 8th Cir.



Horton

- Rejected first argument because Title VII does not prohibit discrimination against homosexuals
- Associational discrimination is based on *Loving* decided twenty years before *Williamson* and does not overrule it
- Stereotyping often are really just claims for discrimination based on sexual orientation (fine line between discrimination based on notions of femininity and masculinity and that based on sexual orientation)



Title VII & Sexual Orientation – 5th Cir.

❑ *Wittmer v. Phillips 66 Company*, ____ F.3d ____ (5th Cir. 2019); 2019 WL 458405; 2019 U.S. App. LEXIS 3731

❑ Overturns district court decision

❑ Sexual orientation is *not* covered under Title VII, citing to *Blum*

❑ Regardless, Plaintiff did not meet elements of claim and case was dismissed on summary judgment



Alternative Avenues for Employment Discrimination Claims by LGBT Employees

- State law
- Americans with Disabilities Act



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State and Local Law Protections

- Title VII is not the sole source of employee protections against employment discrimination
 - In many states, and even some counties/cities, state and local laws provide parallel protections
 - Many of these state and local laws explicitly bar discrimination based on sexual orientation and gender identity



State Law Protections Nationwide

- **Public Employers Only:**
 - Alaska (orientation only), Arizona (orientation only), Indiana, Kentucky, Michigan, Missouri (orientation only), Montana (orientation only), Ohio, Pennsylvania, Virginia
- **All Employers:**
 - California, Colorado, Connecticut, Delaware, District of Columbia, Guam, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Puerto Rico, Rhode Island, Utah, Vermont, Washington, Wisconsin



Americans with Disabilities Act

- 42 U.S.C. § 12211(b)(1) – “the term ‘disability’ shall not include . . . transvestism, transsexualism, . . . , [and] gender identity disorders not resulting from physical impairments”
- *Johnson v. Fresh Mark, Inc.*, 98 Fed. Appx. 461 (6th Cir. 2004) – no obligation to accommodate transgender employee by allowing use of desired bathroom facility
 - Traditional view



ADA Paradigm Shift

- *Blatt v. Cabela's Retail, Inc.*, 2017 WL 2178123 (E.D. Pa. 2017)
 - Adopted a narrow reading of the ADA's carve out for transgender-related conditions
 - Found carve-out inapplicable because Plaintiff's gender dysphoria was accompanied by clinically disabling stress
 - ADA carve-out only applies to "non-disabling" conditions based on gender identity



ADA Paradigm Shift

- *Parker v. Strawser Construction, Inc.*, 307 F.Supp.3d 744 (S.D. Ohio 2018)
 - Rejected *Bhatt*'s “non-disabling” distinction – non-disabling conditions are not disabilities in the first instance
 - Rejected that claims of differences in brain structure/physiology are a “physical impairment” to render ADA carve-out inapplicable
- *Doe v. Mass. Dept. of Correction*, 208 WL 2994403 (D. Mass. 2018)
 - Agrees with *Bhatt*
 - ADA carve-out for “gender identity disorders” does not apply to “gender dysphoria”



Practical Considerations – a View from the Bench

- Jury instructions
- Voir dire
- Trial strategies that work



- Title VII & Sexual Orientation

Practical considerations



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Practical considerations

1. Don't discriminate.



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Practical considerations

1. Don't discriminate.
2. Plaintiffs: plead all theories.



- Title VII & Sexual Orientation

Practical considerations

1. Don't discriminate.
2. Plaintiffs: plead all theories.
3. Defendants: understand all dissenting arguments and argue them all.



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Questions?

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