

Rewriting Title VII: *The EEOC's Push to Add LGBT Protections to Title VII of the Civil Rights Act of 1964*

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Rewriting Title VII



[O]urs is a government of laws and not of men. That means we are governed by the terms of our laws, not by the un-enacted will of our lawmakers. 'If Congress enacted into law something different from what it intended, then it should amend the statute to conform to its intent.' In the meantime, this Court 'has no roving license ... to disregard clear language simply on the view that ... Congress 'must have intended' something broader.

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Title VII; 42 U.S.C. sec. 2000e, *et seq.*

- No EXPLICIT prohibition against discrimination based on:
 - Sexual orientation;
 - Gender identity.
- No discussion of sexual orientation or gender identity when passed in 1964, or amended in 1991



Early Expansion of Title VII

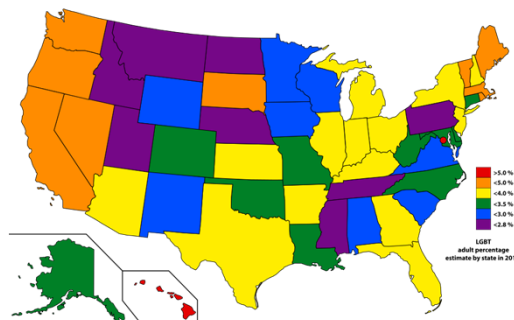
- *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)
 - “In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”

Early Expansion of Title VII, cont'd

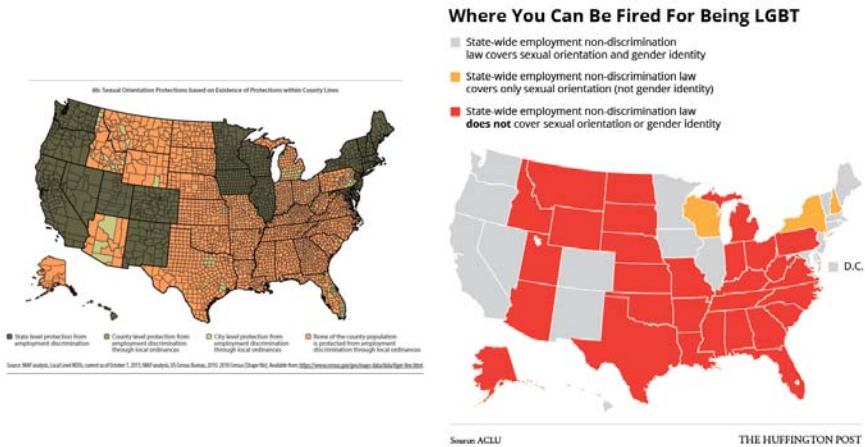
- *Oncale v. Sundowner Offshore Services, Inc.*, 118 S. Ct. 998 (1998)
 - “If our precedents leave any doubt on the question, we hold today that nothing in Title VII necessarily bars a claim of discrimination ‘because of ... sex’ merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex.”

Modern LGBT Demographics

- 3% of working adult population identifies as LGBT
 - High: 10%
Washington, D.C.
 - Low: 1.7%
North Dakota



LGBT Employment Protections



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Federal Legislative Efforts, Round 1

- Employment Non-Discrimination Act of 2013 (“ENDA”), Senate Bill 815
 - Extends Title VII protections to cover sexual orientation and gender identity
 - Sexual Orientation: homosexuality, heterosexuality, or bisexuality
 - Gender Identity: “the 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.”

Why is Congress letting
ENDA
grow cobwebs?
WWW.PFAW.ORG/ENDA



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Federal Legislative Efforts, Round 2

- The Equality Act of 2015, H.R. 3185
 - Includes all protections in ENDA
 - Expands DOJ authority
 - Extends to programs or activities receiving federal aid
 - Prohibits RFRA defense



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EEOC Response

“Addressing Emerging and Developing Issues. The EEOC will target emerging issues in equal employment law, including issues associated with significant events, demographic changes, developing theories, new legislation, judicial decisions and administrative interpretations.”



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EEOC Response, cont'd

“While Title VII of the Civil Rights Act of 1964 does not explicitly include sexual orientation or gender identity in its list of protected bases, the Commission, consistent with Supreme Court case law holding that employment actions motivated by gender stereotyping are unlawful sex discrimination and other court decisions, interprets the statute’s sex discrimination provision as prohibiting discrimination against employees on the basis of sexual orientation and gender identity. ... In so ruling, the Commission **has not recognized any new protected characteristics under Title VII.** Rather, it has applied existing Title VII precedents to sex discrimination claims raised by LGBT individuals.”



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Expanding the Law Through the Courts

- *EEOC v. R.G. & G.R. Harris Funeral Homes Inc.* (E.D. Mich. Civ. No. 2:14-cv-13710-SFC-DRG, filed Sept. 25, 2014)
- *EEOC v. Boh Bros. Constr. Co. LLC* (5th Cir. 11-30770)
- *EEOC v. Pallet Companies d/b/a IFCO Systems NA, Inc.* (“IFCO”) (D. Md. 1:16-CV-00595-RDB)
- *EEOC v. Scott Medical Health Center, P.C.* (W.D. Pa. 2:16-CV-00225-CB)



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Potty Wars: More than an Election Issue

- DOJ/EEOC Position:
 - Title VII protects against discrimination based on gender identity. North Carolina law forces individuals to use restrooms incongruent with their gender identity.
- NC Position:
 - Title VII prohibits discrimination based on sex (i.e., gender). Gender is male or female only. Title VII requires employers to treat all genders equally. Restroom law treats all genders equally—all men are treated the same, all women are treated the same. DOJ/EEOC position is antithetical to what Title VII protects—it mandates employers preferentially discriminate against transgender employees solely on the basis of gender.



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Potty Wars, cont'd

Macy v. Holder, EEOC Appeal
No. 0120120821, 2012 WL 1435995,
*10 (Apr. 20, 2012):

Title VII violated “regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion...” Intentional discrimination against a transgender individual because that person is transgender “**is, by definition, discrimination ‘based on . . . sex,’ and such discrimination therefore violates Title VII.**” *Id.* at 11. After *Macy*, the Obama administration’s official position is that anti-transgender discrimination is **per se** sex discrimination.



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Potty Wars, cont'd

Ettsity v. Utah Transit Auth., 502 F.3d 1215 (10th Cir. 2007): Employer did not violate Title VII by prohibiting transitioning (male to female) bus driver from using the public restrooms of her gender identity along the public bus route.



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Conclusion/Best Practices

- The battle is just beginning.
 - Title VII was never intended to be a “general civility code for the American workplace” *Oncale*, 118 S. Ct. at 1002.
 - Every federal agency responsible for enforcing federal employment laws has taken the official position that the plain language of the statute and the intent of Congress does not matter: Title VII can and will be used to transform the American workplace to conform with the administration’s unwritten general civility code. EEOC/DOJ (federal employment), OFCCP (government contractors), OSC (civilian employees in the military) have all adopted this position and are aggressively enforcing it.

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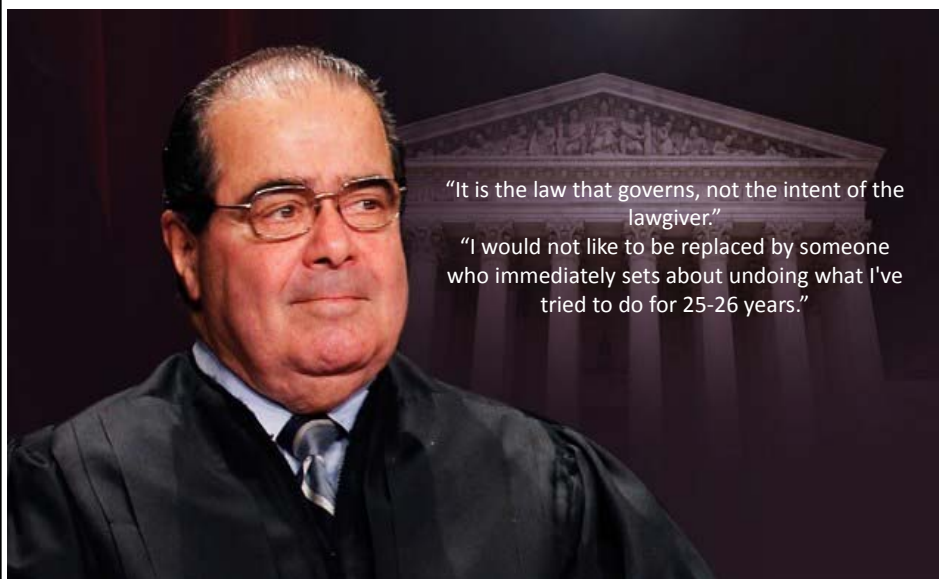
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Conclusion/Best Practices, cont'd

- Risk Management Strategies
 1. Review, adopt and implement EEO policies to address discrimination on the basis of gender identity and sexual orientation
 2. Provide training
 3. Government contractors: Update policies, EEO clauses, AAPs, contract provisions, job solicitations, workplace notices, etc.
 4. Restrooms/Locker Rooms:
 - a. Safest: Allow use based on gender identity
 - b. Limited Risk: Take an ADA approach
 5. Closely monitor future developments



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