



Speaking With *One* Voice
Civil Rights Virtual Symposium

HONORING THE PAST, SHAPING THE FUTURE

MAY 17-18, 2017

**Recent Developments on
LGBTQ Issues for the Federal
Workforce and Workplace**

Your Speaker

- Chai Feldblum, Commissioner, U.S. Equal Employment Opportunity Commission



Purpose of the Session

- Update participants on recent case law and regulatory developments affecting LGBTQ applicants and employees in the federal workplace.
- Topics covered will include legal protections for employees and frequently asked questions for management and employees.



EEOC in the Federal Sector

- In complaints of discrimination, federal employees and applicants must start with the EEO system **inside their own agency**.
- Complainants and agencies can appeal findings to the EEOC. If the EEOC finds discrimination and orders relief, **an agency must comply with the EEOC's decision**.
- The EEOC's federal sector decisions **establish EEOC's view of the law** that also governs its **investigations of charges in the private sector**.



EEOC in the Private Sector

- Employees or applicants of a private employer with 15 or more employees, or of a state or local governmental employer **must file a charge with the EEOC** before going to court.
- The EEOC's job is **to investigate these charges and try to settle them** if the EEOC believes discrimination has occurred. The EEOC often helps people get relief from discrimination through these **informal settlements**.



Coverage for LGBT People

- Since 1964, the EEOC has led in interpreting the scope of **anti-discrimination under Title VII**, including sex discrimination, & courts have often followed the EEOC's lead.
- **For example:** EEOC was the first to conclude that discrimination against **married women** was sex discrimination, & that **sexual harassment** was sex discrimination
- Those rulings were subsequently adopted by the courts, with the courts often finding EEOC's legal analysis to be persuasive, particularly because the EEOC is **charged** with **enforcement of Title VII**.



Early LGBT Claims

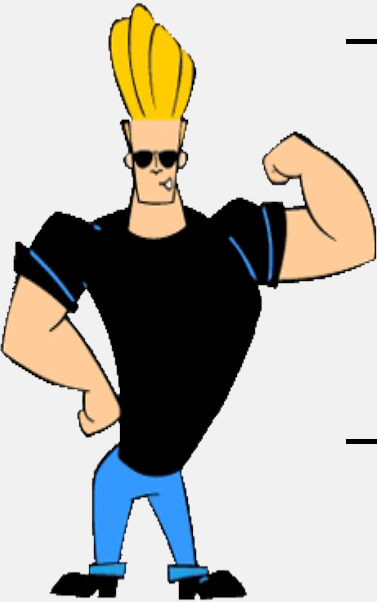
- **Title VII Passed**→ Transgender and gay individuals brought charges of sex discrimination to EEOC.
- **Common sense**→ Discrimination on the basis of **sexual orientation** or **gender identity** is a form of **sex discrimination**.
- **But**→ EEOC & the courts carved out an **LGBT exception to Title VII**, concluding that Title VII's sex discrimination protection prohibited **treating men and women differently, and nothing more**.



Gender Stereotyping

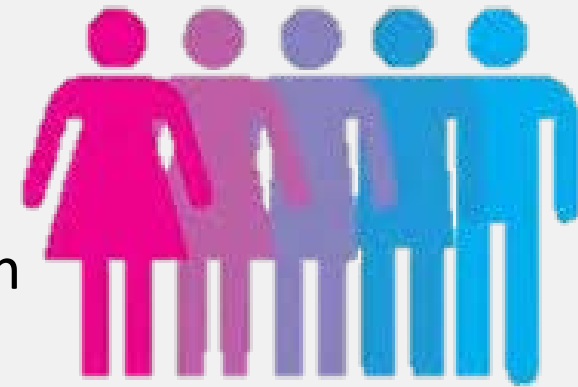
Price Waterhouse v. Hopkins

- In 1989, Supreme Court ruled that if discrimination occurred because a person did not meet a **gender stereotype** of how a **man or woman should act**, that was a form of **sex discrimination**.
- This meant that even if an employer did not treat all women differently from all men, an **individual** woman or man who was discriminated against because of a **gender stereotype** could claim sex discrimination.



Gender Identify Discrimination

- Gender stereotyping theory became an avenue of protection for some transgender people under Title VII.
- Transgender plaintiffs argued they had been discriminated against because they **violated a gender stereotype** by presenting as a gender **different** from the one assigned to that person at **birth**.
- By 2011, **four appellate courts** had ruled in favor of transgender plaintiffs based on gender stereotyping, and thus, transgender people were able to claim protection under sex discrimination laws in those cases.



Macy v. DOJ

- **April 2012**
- **Facts:** Applicant denied federal job after transition
- **Holding:** EEOC ruled that gender identity discrimination is **always** a form of sex discrimination. The EEOC explicitly **overturned** its previous decisions to the contrary.
- **Result in federal sector:** All agencies were informed to process gender identity complaints as sex discrimination complaints in the regular EEO process.
- **Result in private sector:** Charges of gender identity discrimination were investigated & settled by EEOC staff as sex discrimination charges.



Lusardi v. Dept. of the Army

- **April 2015**
- **Facts:** Transgender female employee denied right to use female restroom at work
- **Holding:** EEOC ruled that a transgender employee has the right to use the restroom and locker room consistent with his or her gender identity, regardless of what surgery the person may or may not have had.
- EEOC also ruled the agency was liable for harassment for not stopping the consistent and inappropriate use of Lusardi's wrong name & pronoun & denying her access to the appropriate restroom.



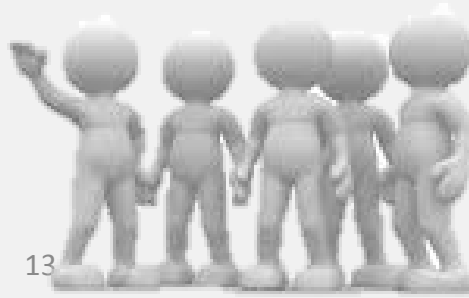
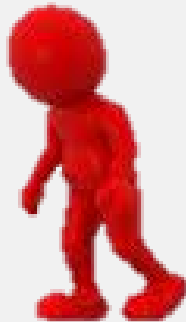
Sexual Orientation Claims in the Courts

- Some LGB plaintiffs used the gender stereotype language in *Price Waterhouse* to argue for protection under Title VII.
- Courts responded by trying to draw a line between claims of gender stereotyping and claims of sexual orientation discrimination.
- Plaintiffs would win if they showed they were discriminated against because they dressed or acted in ways that were not stereotypically feminine or masculine.
- Plaintiffs would lose if they were fired because of their sexual orientation.



Sexual Orientation Claims at the EEOC

- Starting in 2011, the EEOC concluded that discrimination on the basis of sexual orientation could be a form of sex discrimination if such discrimination was based on the **gender stereotype that people should be attracted to persons of the opposite sex.**
- ***Baldwin v. DOT***: In July 2015, EEOC ruled that sexual orientation discrimination is **always** a form of sex discrimination. The EEOC explicitly **overturned** its previous decisions to the contrary.



Three Theories in Baldwin

- Action based on sex of the **employee**
- Action based on sex of the person the employee **associates** with
- Action based on the **gender stereotype** that men and women should be sexually attracted to members of the opposite sex



Numbers of LGBT Charges

**5,088 charges
received**

**3,985 charges
resolved**

**1,103 charges
pending**

- In the past four fiscal years, EEOC has received **5,088 charges** in the private sector alleging discrimination on the basis of sexual orientation and/or gender identity from all over the U.S.
- EEOC has resolved **3,985** of these charges, leaving a pending inventory of **1,103** LGBT charges.



Practical Relief

Relief for **563 LGBT
Individuals**

\$10,800,000 in
Monetary Relief

- Over the past 4 fiscal years, the EEOC has helped **563 LGBT people** get relief through its **administrative processes without having to go to court.**
- The EEOC collected approximately **\$10.8 million in monetary relief** & got hundreds of employers to **change their policies**



EEOC in the Courts – Litigation

6

- EEOC has filed 6 suits alleging transgender discrimination.
- 3 suits have settled and 3 are still in litigation

4

- The EEOC has filed **4 suits** alleging sexual orientation discrimination.
- All four are still in litigation.



Private Parties in the Courts

- EEOC filed **amicus briefs** in cases brought by private parties claiming that sexual orientation is sex discrimination: before the the **7th Circuit (*Hively*)**, **2nd Circuit (*Christiansen*)**, and **the 11th Circuit (*Evans*)**.
- **Panel decisions** from all 3 courts of appeals **upheld prior precedent** finding that sexual orientation discrimination is ***not*** a form of sex discrimination.
- In each case, the private party asked **the appellate court in full (en banc) to overturn its precedent**.



En Banc Results and Efforts

- In *Hively*, the **7th Circuit en banc** ruled that sexual orientation discrimination is sex discrimination. ***First appellate court to reach this result.***
- In *Christiansen*, **two judges on the panel** issued an opinion saying the 2nd Circuit *en banc* should reverse its precedent.
- In *Evans*, **one judge** dissented saying the 11th Circuit *en banc* should reverse its precedent.

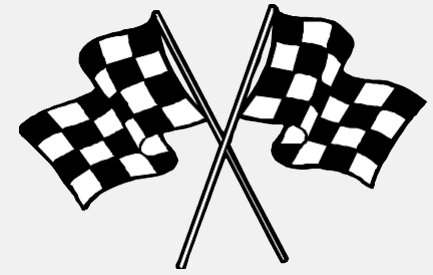


The Future of LGBT Employment Protections

- District courts and appellate courts will continue to consider cases on the scope of protections for LGBT persons under Title VII.
- The EEOC's interpretations of Title VII will continue to govern federal agencies and complaints of gender identity or sexual orientation discrimination will continue to be addressed in the ordinary EEO process as complaints of sex discrimination.



It's a Race



- Cases arguing that discrimination based on gender identity or sexual orientation are cases of sex discrimination will ultimately reach the **Supreme Court**. If the Court agrees with the EEOC's position, that will decide the issue.
- **Congress** might pass the **Equality Act** and provide civil right protections to LGBT persons through a new law.
- It's a **race** between the Supreme Court & Congress.



It's a New Day

And the new days will
keep coming.



Questions

