

# EEOC Takes the Lead in Challenging Sexual Orientation Discrimination

By Mary L. Lohrke and Jessica R. Fu

The Equal Employment Opportunity Commission (EEOC)<sup>1</sup> is taking the lead in challenging workplace sexual orientation<sup>2</sup> discrimination. In *EEOC v. Scott Medical Center*,<sup>3</sup> the EEOC filed suit under Title VII of the Civil Rights Act of 1964, as amended (Title VII), alleging that a gay male telemarketer was subjected to a sexually hostile work environment perpetuated by his manager. The EEOC's complaint alleges that the manager repeatedly referred to the employee using anti-gay epithets and made inappropriate comments about his sexuality and his sexual relationship with his partner. The complaint further alleges that the employee reported the conduct to the company's president, who refused to take action, forcing the employee to quit. The EEOC has taken the position that Title VII prohibits workplace discrimination on the basis of sexual orientation.<sup>4</sup>

The EEOC is also testing its interpretation in the high-profile case *Hively v. Ivy Tech Community College*, which is pending in the 7th Circuit.<sup>5</sup> The *Hively* case was originally filed in the Northern District of Indiana in August 2014.<sup>6</sup> Hively claimed she was denied promotions and full-time employment by Ivy Tech because of her sexual orientation. The lower court granted Ivy Tech's motion to dismiss on the ground that Title VII does not protect against sexual orientation discrimination.<sup>7</sup> A three-member panel of the 7th Circuit affirmed the district court's ruling on the same grounds.<sup>8</sup> Hively moved for rehearing *en banc*, and on Oct. 11, 2016, that motion was granted. The 7th Circuit vacated its own prior ruling and ordered a new hearing before all sitting 7th Circuit judges — a rare occurrence.<sup>9</sup> The EEOC filed a "friend of the

court" amicus brief supporting rehearing *en banc*<sup>10</sup> and addressed the full panel during oral argument on Nov. 30, 2016.

Sexual orientation is not explicitly listed in Title VII as a prohibited basis for employment actions. The statute only prohibits discrimination against employees "because of ... race, color, religion, sex, or national origin."<sup>11</sup> Further, there is very little legislative history regarding the meaning of "because of sex," as the original bill did not include a ban on sex discrimination and sex was added as a protected category to the bill just before it passed.<sup>12</sup> Over the years, "because of sex" has been expanded by the courts to include a number of previously unrecognized claims, but nearly every court that has addressed the issue, includ-

ing the 10th Circuit, has held that sexual orientation discrimination is *not* covered by Title VII.<sup>13</sup> However, the EEOC has recently taken the position that sexual orientation discrimination is, by its very nature, discrimination “because of sex” and, therefore, prohibited by Title VII. In July 2015, the EEOC issued a ruling that a federal sector employee claiming sexual orientation discrimination necessarily stated a claim of discrimination on the basis of sex under Title VII.<sup>14</sup> Following its decision, the EEOC updated its website to clarify its interpretive position that Title VII protects both sexual orientation and gender identity (or transgender) discrimination.<sup>15</sup> The EEOC is now testing its interpretation in federal courts by challenging sexual orientation discrimination in the private sector.

The EEOC makes several good arguments that sexual orientation discrimination is a cognizable claim under Title VII. First, the EEOC recognizes that sexual orientation discrimination was not considered by Congress when it passed Title VII, but cites United States Supreme Court precedent extending the scope of the law beyond its initial intent.<sup>16</sup> For example, in 1986 (24 years after Title VII was enacted), the Supreme Court, in *Meritor Savings Bank, FSB v. Vinson*,<sup>17</sup> recognized that the statute’s prohibition against discrimination “because of sex” encompasses hostile work environment sexual harassment. Twelve years later, the Supreme Court recognized a cause of action for same-sex harassment.<sup>18</sup>

In *Oncale v. Sundowner Offshore Services, Inc.*, a male oil-rig worker claimed that he was repeatedly subjected to sex-related, humiliating actions by his male co-workers, including sodomizing him with a bar of soap and threatening him with rape.<sup>19</sup> The Supreme Court in *Oncale* unanimously interpreted Title VII’s prohibition on sex discrimination to cover same-sex harassment even though the 1964 Congress probably never considered such conduct.<sup>20</sup> In so holding, the court stated that statutes “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.”<sup>21</sup> The EEOC argues that Title VII should be similarly expanded to recognize sexual orientation discrimination.

The EEOC further argues that Congress’s failure to amend Title VII to include sexual orientation or to pass other legislation that would prohibit discrimination based on sexual orien-

tation or gender identity<sup>22</sup> says nothing about what the existing statute prohibits. Quoting the Supreme Court, the EEOC argues, “[S]ubsequent legislative history is a ‘hazardous basis for inferring the intent of an earlier’ Congress” and is “a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns ... a proposal that does not become law.”<sup>23</sup> Since the mid-1990s, proposed legislation would not simply have added sexual orientation discrimination to Title VII, but would have created stand-alone statutes with numerous other provisions, some of which were highly controversial.<sup>24</sup> The EEOC argues that Congress’s failure to pass any of those bills shows only that a majority of legislators could not agree on any single version of the provisions.

Next, the EEOC argues that discrimination on the basis of sexual orientation is a form of gender stereotyping, which has long been recognized by the Supreme Court and lower courts as a form of sex discrimination.<sup>25</sup> In *Price Waterhouse v. Hopkins*,<sup>26</sup> the plaintiff was denied partnership in an accounting firm because her employer perceived her as insufficiently feminine. One partner advised the plaintiff that she could improve her chances for partnership if she would “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”<sup>27</sup> The Supreme Court held that such comments indicated discrimination based on sex stereotypes, which is illegal discrimination “because of sex” under Title VII.<sup>28</sup>

Applying *Price Waterhouse*, the majority of courts that have considered the issue have recognized a Title VII cause of action for discrimination based on gender nonconformity or discrimination against transgender persons.<sup>29</sup> In *Etsitty v. Utah Transit Authority*,<sup>30</sup> the 10th Circuit held that Title VII protection extends to transsexuals if they are discriminated against because of gender nonconformity but determined that the plaintiff could not demonstrate that the stated reason for her termination was pretextual.<sup>31</sup> Relying on *Etsitty*, an Oklahoma federal district court in *United States of America and Dr. Rachel Tudor v. Southeastern Oklahoma State University*<sup>32</sup> recently refused to dismiss the plaintiff’s Title VII claim where she alleged harassment following her transition from male to female. The EEOC has taken a similar position. In *Macy v. Holder*,<sup>33</sup> a transgender woman applied for a job with the Bureau of Alcohol, Tobacco, Firearms and

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Explosives Agency (ATF). She was still known as a male at that time, having not yet made the transition to being female. The director of the ATF made the plaintiff an offer of employment contingent on a background check. The plaintiff then informed the ATF that she was in the process of transitioning from male to female. Five days later, the plaintiff received an email stating that, due to budget reductions, the position was no longer available. The EEOC held in *Macy* that “discrimination against a transgender individual because that person is transgender is, by definition, discrimination ‘based on ... sex,’ and such discrimination therefore violates Title VII.”<sup>34</sup>

The courts have not been as amenable to sexual orientation discrimination claims, distinguishing such claims from those based upon nonconformity with sexual stereotypes.<sup>35</sup> However, the EEOC argues that discrimination based on sexual orientation is necessarily based on sex stereotyping. That argument has some appeal where the line between discrimination based on gender stereotyping and discrimination based on sexual orientation is blurry and discrimination against gay people reflects, in large part, disapproval of their nonconformity with heterosexual attraction and gender-based expectations.

The EEOC also argues that discrimination on the basis of sexual orientation “necessarily entails treating an employee less favorably because of the employee’s sex.”<sup>36</sup> For example, if an employer would not have discriminated if the employee was a man dating a woman, instead of a woman dating a woman, then the employee was discriminated against because of her gender. Employers must treat men and women equally when they engage in the same activity, even when that activity is a romantic relationship with a person of the same gender. Of all the theories advanced by the EEOC, this

one has had the most success with the courts, not only in the context of Title VII claims but also claims of sex discrimination under Title IX, the Due Process Clause and the Equal Protection Clause.<sup>37</sup>

Finally, the EEOC argues that sexual orientation discrimination is “associational discrimination on the basis of sex.”<sup>38</sup> Title VII has long been interpreted to prohibit discrimination on the basis of association with a person in a protected class, *e.g.* because of the race of an employee’s friend or significant other.<sup>39</sup> The EEOC reasons that Title VII similarly prohibits employers from treating employees differently based on the fact that they are in a same-sex relationship.

While only the United States Supreme Court can give a conclusive interpretation that sexual orientation discrimination is protected under Title VII, the courts give great deference to the EEOC’s interpretation of the law.<sup>40</sup> The EEOC’s interpretation paves the way for federal courts and ultimately the Supreme Court to find that discrimination claims based on sexual orientation are cognizable under Title VII. This emerging area of the law should be monitored, as it has the potential to greatly expand employee protections in the workplace.<sup>41</sup> In the meantime, employers should be proactive to ensure that their managers and supervisors are trained to avoid discrimination on the basis of sexual orientation and to intervene when they see such harassment or discrimination, as they would when they see harassment or discrimination of any kind. If conduct potentially giving rise to sexual orientation discrimination is reported, employers should take the complaint seriously, investigate and take appropriate action.

1. The EEOC is the primary agency charged by Congress with enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* Through its administrative enforcement process, the EEOC receives, investigates and resolves charges of employment discrimination filed against private sector employers, employment agencies, labor unions and state and local governments. 42 U.S.C. §2000e-5(b). Where the charges are not resolved through conciliation or other informal methods, the EEOC may pursue litigation. 42 U.S.C. §2000e-5(f) (1). The EEOC also leads and coordinates equal employment opportunity efforts across the federal government and conducts administrative hearings and issues appellate decisions on complaints of discrimination filed by federal employees. *See Federal Agencies: Federal Sector*, EEOC, [www.eeoc.gov/federal/index.cfm](http://www.eeoc.gov/federal/index.cfm). EEOC decisions are binding on federal employers. 29 C.F.R. §1614.502.

2. According to the American Psychological Association, sexual orientation refers to the sex of those to whom one is sexually and romantically attracted and traditionally includes heterosexuality, bisexuality and homosexuality. *See “The Guidelines for Psychological Practice with Lesbian, Gay, and Bisexual Clients,”* adopted by the APA Council of Representatives, Feb. 18-20, 2011, [www.apa.org/pi/lgbt/resources/guidelines.aspx](http://www.apa.org/pi/lgbt/resources/guidelines.aspx).

3. *EEOC v. Scott Medical Center*, Case No. 2:16-cv-00225-CB, is filed in the Western District of Pennsylvania. The defendants in the *Scott*

case filed a motion to dismiss, arguing that Title VII does not protect against discrimination based on sexual orientation. The district court denied the motion to dismiss, holding that Title VII's "because of sex" provision prohibits discrimination on the basis of sexual orientation.

4. The EEOC filed a second sexual orientation lawsuit in *EEOC v. Pallet Companies*, Case No. 1:16-cv-00595-CCB, which was filed in the District of Maryland, Baltimore Division. However, that case was settled by Consent Decree entered on June 28, 2016.

5. *Hively v. Ivy Tech Cmty College*, Case No. 15-1720 (7th Cir.).

6. *Hively v. Ivy Tech Cmty College*, Case No. 14-cv-01791-RL-CAN.

7. *Id.* at Dkt. #14.

8. *Hively v. Ivy Tech Cmty College*, 830 F.3d 698, 2016 WL 4039703 (7th Cir. 2016).

9. *Hively*, Case No. 15-1720, Dkt. #60.

10. Brief for the EEOC as Amicus Curiae filed Aug. 29, 2016, *Hively*, Case No. 15-1720, Dkt. #52. The EEOC has also filed amicus briefs in two cases pending before the three-judge panel in the 2nd Circuit and the Eleventh Circuit. See Brief for the EEOC as Amicus Curiae filed June 28, 2016, *Christiansen v. Omnicom Group, Inc.*, [www.eeoc.gov/eooc/litigation/briefs/christiansen](http://www.eeoc.gov/eooc/litigation/briefs/christiansen), and Brief for the EEOC as Amicus Curiae filed Jan. 11, 2016, *Evans v. Georgia Regional Hospital*, [www.eeoc.gov/eooc/litigation/briefs/evans4](http://www.eeoc.gov/eooc/litigation/briefs/evans4).

11. 42 U.S.C. §2000e-2(a)(1). Similarly, the Oklahoma Anti-Discrimination Act prohibits discrimination "because of race, color, religion, sex, national origin, age, genetic information or disability." 25 O.S. §§1301, *et seq.*

12. Robert Stevens Miller Jr., "Sex Discrimination and Title VII of the Civil Rights Act of 1964," 51 *Minn. L. Rev.* 877, 880 (1967). Apparently, "sex" was added at the last minute as a strategy to prevent passage of the bill. See *id.*, n. 15, at 883. Of course, this strategy failed.

13. See e.g. *Medina v. Income Support Div.*, N.M., 413 F.3d 1131, 1135 (10th Cir. 2005) ("Title VII's protections ... do not extend to harassment due to a person's sexuality."); *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000) ("The law is well-settled in this circuit and in all others to have reached the question that ... Title VII does not prohibit harassment or discrimination because of sexual orientation."); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996) ("Title VII does not afford a cause of action for discrimination based upon sexual orientation."); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) ("Title VII does not prohibit discrimination against homosexuals."); *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 329-330 (9th Cir. 1979) ("[W]e conclude that Title VII's prohibition of 'sex' discrimination applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference such as homosexuality.") (citing cases).

14. See *Baldwin v. Dep't of Transp.*, EEOC Appeal No. 0120133080 (July 15, 2015), [www.eeoc.gov/decisions/0120133080.pdf](http://www.eeoc.gov/decisions/0120133080.pdf). Additionally, the EEOC, in conjunction with the Office of Personnel Management, the Office of Special Counsel and the Merit Systems Protection Board, has issued guidance addressing sexual orientation and gender identity discrimination in the federal sector. See *Addressing Sexual Orientation and Gender Identity Discrimination in Federal Civilian Employment, A Guide to Employment Rights, Protections, and Responsibilities*, [www.opm.gov/LGBTGuide](http://www.opm.gov/LGBTGuide). Further, the Obama administration issued Executive Order 13672, prohibiting federal contractors from discriminating on the basis of sexual orientation and gender identity. 79 Fed. Reg. 42971, [www.gpo.gov/fdsys/pkg/FR-2014-07-23/pdf/2014-17522.pdf](http://www.gpo.gov/fdsys/pkg/FR-2014-07-23/pdf/2014-17522.pdf).

15. See *What You Should Know About EEOC and the Enforcement Protections for LGBT Workers*, EEOC, [www.eeoc.gov/eooc/newsroom/wysk/enforcement\\_protections\\_lgbt\\_workers.cfm](http://www.eeoc.gov/eooc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm).

16. EEOC *Hively* Brief, *supra*, n. 10, at p.9.

17. 477 U.S. 57, 66, 106 S.Ct. 2399, 2405 (1986).

18. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79-80, 118 S.Ct. 998, 1002 (1998).

19. *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118, 118-119 (5th Cir. 1996).

20. *Oncale*, 523 U.S. at 79, 118 S.Ct. 1002.

21. *Id.*

22. Jody Feder and Cynthia Brougher, *Sexual Orientation and Gender Identity Discrimination in Employment: A Legal Analysis of the Employment Non-Discrimination Act (ENDA)*, Cong'l Res. Serv., July 15, 2013, [www.fas.org/sgp/crs/misc/R40934.pdf](http://www.fas.org/sgp/crs/misc/R40934.pdf).

23. EEOC *Hively* Brief, *supra*, n. 10, at ps. 9-10 (citing *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650, 110 S.Ct. 2668, 2678 (1990)).

24. See Kate B. Rhodes, *Defending ENDA: The Ramifications of Omitting the BFOQ Defense in the Employment Non-discrimination Act*, 19 *Law & Sexuality J.* \*8-11 (2010) (describing ENDA congressional history).

25. EEOC *Hively* Brief, *supra*, n. 10, at p.7.

26. 490 U.S. 228, 109 S.Ct. 1775 (1989).

27. *Id.* at 235, 109 S.Ct. at 1782.

28. See *id.*

29. See, e.g. *Smith v. City of Salem, Ohio*, 378 F.3d 566, 572, 575 (6th Cir. 2004) ("Sex stereotyping based upon a person's gender non-conforming behavior is impermissible discrimination ..."); *Kastl v. Maricopa Co. Cmty. Coll. Dist.*, 325 F. App'x. 492, 493 (9th Cir. 2009) ("it is unlawful to discriminate against a transgender (or any other) person because he or she does not behave in accordance with an employer's expectations for men or women"); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (holding that defendant discriminated against the plaintiff based on sex by terminating her because she was transitioning from male to female); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005) (holding that employee who alleged he was demoted because he was a male-to-female transsexual stated a claim under Title VII); *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 262-64 (3rd Cir. 2001) ("[A] plaintiff may be able to prove that same-sex harassment was discrimination because of sex by presenting evidence that the harasser's conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender."); see also *Rosa v. Parks W. Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (analogizing to Title VII to hold that plaintiff stated a claim of sex discrimination under the Equal Credit Opportunity Act by alleging he was denied a loan application because he dressed in female attire); *Schwenck v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000) (relying on Title VII case law to conclude that violence against a transsexual was violence because of gender under the Gender Motivated Violence Act); but see *Schroer v. Billington*, 424 F. Supp. 2d 203 (D.D.C. 2006) (dismissing case because employee did not allege that she was fired for not being typically masculine or typically feminine as required for sex-stereotyping claim, but noting that it was time to "revisit" the theory that discrimination because someone is a transsexual is "literally" discrimination "because of ... sex").

30. 502 F.3d 1215 (10th Cir. 2007).

31. See *id.* at 1224.

32. 2015 WL 4606079 (W.D. Okla. July 10, 2015).

33. *Macy v. Holder*, EEOC Appeal No. 0120120821 (April 20, 2012), [www.washingtonblade.com/content/files/2012/04/90910497-EEOC-Ruling.pdf](http://www.washingtonblade.com/content/files/2012/04/90910497-EEOC-Ruling.pdf).

34. In addition, the Department of Justice recently filed suit against the State of North Carolina, alleging that House Bill 2, which requires transgender persons to use the bathroom that conforms with the gender on their birth certificate, constitutes a "pattern or practice of employment discrimination on the basis of sex in violation of Title VII ... discrimination on the basis of sex in an education program receiving federal funds in violation of Title IX ... and discrimination on the basis of sex and gender identity in programs receiving federal funds in violation of the Violence Against Women Reauthorization Act of 2013." *U.S. v. North Carolina*, Case No. 1:16-cv-00425 filed May 9, 2016, in the Middle District of North Carolina, [www.justice.gov/opa/file/849991/download](http://www.justice.gov/opa/file/849991/download). On May 13, 2016, the Department of Justice issued guidance to all schools receiving federal funds regarding their obligations to transgender students under Title IX. See *Dear Colleague Letter on Transgender Students*, DOJ, [www.justice.gov/opa/file/850986/download](http://www.justice.gov/opa/file/850986/download).

35. See e.g. *Dawson v. Bumble & Bumble*, 389 F.3d 211, 219 (2nd Cir. 2005) ("Like other courts, we have therefore recognized that a gender stereotyping claim should not be used to bootstrap protection for sexual orientation into Title VII.") (internal quotation marks omitted); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 763 (6th Cir. 2006) (dismissing sex-stereotyping claim where plaintiff alleged he was harassed because his perceived sexual practices did not conform to traditionally masculine roles but he "failed to allege that he did not conform to traditional gender stereotypes in any observable way at work"; the court noted that recognition of plaintiff's claim "would have the effect of *de facto* amending Title VII to encompass sexual orientation as a prohibited basis for discrimination"); but see *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212 (D. Ore. 2002) (refusing to dismiss claim where jury could find that employee was harassed and ultimately discharged because she did not conform to the stereotype that women should be attracted to and date only men).

36. EEOC *Hively* Brief, *supra*, n. 10, at p. 5.

37. See e.g. *Hall v. BNSF Ry. Co.*, 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014) (refusing to dismiss sex discrimination claim where employee argued that he was denied the spousal health benefit for his male spouse while female employees received the benefit); *Heller*, 195 F. Supp. 2d at 1223 (D. Or. 2002) ("One way (but certainly not the only means) of [proving conduct is discriminatory] is to inquire whether the harasser would have acted the same if the gender of the victim had been different. A jury could find that [the plaintiff's manager] would not have acted as she (allegedly) did if plaintiff were a man dating a woman, instead of a woman dating a woman.") (internal citations omitted); see also *Videckis v. Pepperdine Univ.*, 100 F. Supp. 3d 927, 937 (C.D. Cal. 2015) ("[D]iscrimination based on a same-sex relationship could fall under the umbrella of sexual discrimination even if such discrimination were not based explicitly on gender stereotypes. For

example, a policy that female basketball players could only be in relationships with males inherently would seem to discriminate on the basis of gender.”); *Lawson v. Kelly*, 58 F. Supp. 3d 923 (W.D. Mo. 2014) (holding that ban on same-sex marriage created gender classification that violated equal protection and due process).

38. EEOC *Hively* Brief, *supra* n. 10, at p. 6.

39. See e.g. *Holcomb v. Iona College*, 521 F.3d 130, 139 (2nd Cir. 2008) (recognizing associational race claim of plaintiff in interracial marriage); *Drake v. Minnesota Min. & Mfg. Co.*, 134 F.3d 878 (7th Cir. 1998) (holding that a white employee may sue under Title VII for discrimination against him resulting from his friendship with black co-workers).

40. See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 279, 96 S. Ct. 2574, 2578 (1976).

41. It is uncertain what a Trump administration will mean for this developing area of the law. The Trump administration will have the opportunity to appoint new commissioners and general counsel for the EEOC and to fill more than 100 federal judgeships that are currently vacant, including at least one on the Supreme Court. The new president can also rescind any executive orders that may have extended protections based on sexual orientation. All of this, along with the appointment of the current attorney general nominee, Jeff Sessions, who has a well-documented history of opposing protections for sexual orientation, may affect this area of law moving forward.

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