CIVIL RIGHTS ACT TURNS 50

Sexual Orientation and Gender Identity

BY JEFF BRODIN

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Does Title VII prohibit discrimination based on sexual orientation and gender identity?

The EEOC and some federal courts say "yes."

The Civil Rights Act of 1964, also known as Title VII, was signed into law by President Lyndon Johnson 50 years ago. During that time, the Act has been amended to provide for compensatory and punitive damages in the case of intentional violations.[1] Disability has been added as a protected class,[2] and pay-discrimination claims have been strengthened.[3]

Employment Non-Discrimination Act Gains Traction

Since 1974, Congress has considered amendments to Title VII to prohibit discrimination based on sexual orientation.[4] Those proposed amendments evolved into the Employment Non-Discrimination Act (ENDA), which provides protections based on sexual orientation and gender identity. ENDA has been introduced in nearly every Congress since 1994, and it has passed in the U.S. Senate by a vote of 64–32 in the current session.[5] The bill is now mired in the partisan politics of the U.S. House. While there appear to be enough votes to pass ENDA in the House, Speaker Boehner has stated in a press conference that he believes the legislation is unnecessary, and he has no intention of bringing it up for a vote.[6]

In addition to Republican opposition in Congress, many LGBT advocacy groups oppose ENDA because of its religious exemption. This provision exempts the employment decisions of religious organizations from the prohibition against discrimination based on sexual orientation and gender identity.[7] Title VII has never before included a religious exemption from the law's prohibitions against discrimination.

EEOC Offers View of Title VII

While ENDA appears to be stalled in Congress, the federal agency charged with the enforcement of Title VII, the Equal Employment Opportunity Commission (EEOC), has declared its position that Title VII in its current form already prohibits employment discrimination based on sexual orientation and gender identity. The EEOC bases this determination on a 25-year-old U.S. Supreme Court case, *Price Waterhouse v. Hopkins*.[8] The EEOC Strategic Enforcement Plan for 2013-2016 lists "coverage of lesbian, gay, bisexual, and transgender individuals under Title VII" as one of its top six national enforcement priorities, and the EEOC has conducted nationwide training of its investigators on how to investigate claims of discrimination based on sexual orientation and gender identity. On September 25, 2014, the EEOC filed the first two lawsuits in the agency's history alleging sex discrimination against transgender individuals under Title VII.[9] EEOC Commissioner Chai Feldblum recently reported that from January 1 through June 30, 2014, the EEOC had received 459 sexual-orientation charges and 81 gender-identity charges.

Biological Sex, Gender in Employment Decisions

In cases brought by LGBT plaintiffs in the 1970s, courts rejected coverage of sexual orientation and gender identity under Title VII on the grounds that sex meant only "traditional notions of sex," which did not, in the view of the courts, include either discrimination on the basis of sexual orientation or "discrimination because of effeminacy." Courts frequently found that Title VII only made it unlawful "to discriminate against woman because they are women and against men because they are men."[10] Nothing more.

In the *Price Waterhouse* case, the Supreme Court rejected this narrow view of Title VII. In the case, Ann Hopkins sued Price Waterhouse for discrimination based on sex, in violation of Title VII. Hopkins was a senior manager who was up for partner in the accounting firm. She was denied partnership on the basis that she was considered to be too "macho." The firm advised her that she could improve her chances for partnership if she were "to take a course at charm school," "walk more femininely, talk more femininely, wear make-up, have her hair styled and wear jewelry."[11]

The Supreme Court ruled that it did not "require expertise in psychology to know that, if an employee's flawed 'interpersonal skills' can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism."[12] The Court continued:

> 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."[13]

The Court stated, "In passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees."[14] "Congress' intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute,"[15] and these words "mean that gender must be irrelevant to employment decisions."[16] As to whether gender had been taken into account as part of the company's motive for denying Hopkins the partnership: "In the specific context of sex stereotyping, 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."[17]

In her concurrence, Justice O'Connor wrote there "is no doubt that Congress considered reliance on gender or race in making employment decisions an evil in

itself. As Senator Clark put it, '[t]he bill simply eliminates consideration of color [or other forbidden criteria] from the decision to hire or promote.'"[18]

The *Price Waterhouse* decision held that the term "sex" in Title VII encompasses both biological sex and gender. Gender includes the socially constructed roles, behaviors and attributes that society considers appropriate for men and women. Whenever gender plays a role in an employer's decision to take an adverse employment action—for example, when an employer believes an applicant or employee has violated appropriate gender roles—the employer has violated Title VII's prohibition against discrimination on the basis of sex.

Supreme Court on Same-Sex Harassment

Nearly 10 years after the *Price Waterhouse* decision, in *Oncale v. Sundowner Offshore Services, Inc.*,[19] the Supreme Court was faced with the question of whether Title VII's prohibition against sex discrimination and harassment included illegal conduct against someone of the same sex. Joseph Oncale worked on an offshore oil rig, where he was physically assaulted and threatened with rape by male co-workers, and his supervisors did nothing. In a unanimous decision, the Court held that workplace harassment can violate the sex-discrimination prohibition even when harasser and harassed are of the same sex. The Court stated, "Nothing in the language of Title VII necessarily bars a claim of discrimination 'because of … sex' merely because the plaintiff and the defendant … are of the same sex."[20]

Writing for the unanimous Court, Justice Scalia explained: While "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII," 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."[21]

Title VII and Gender Stereotyping

After *Price Waterhouse*, courts slowly began recognizing Title VII protection in cases of gender stereotyping. In *Doe v. City of Belleville*,[22] the Seventh Circuit ruled:

> *Price Waterhouse* makes clear that Title VII does not permit an employee to be treated adversely because his or her appearance or conduct does not conform to stereotypical gender roles … A man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he … does not meet his coworkers' idea of how men are to appear and behave, is harassed "because of" his sex.[23]

In the case of *Nichols v. Azteca Rest. Enters., Inc.*, the Ninth Circuit weighed in, holding "*Price Waterhouse* sets a rule that bars discrimination on the basis of sex stereotype … To the extent [Ninth Circuit precedent] conflicts with *Price Waterhouse* … [it] is no longer good law."[24]

Since the gender stereotyping reasoning was established by the U.S. Supreme Court in *Price Waterhouse*, other courts have used that reasoning to protect LGBT and heterosexual individuals who did not conform to gender stereotypes with regard to dress, appearance or behavior.[25] For example:

> *Price Waterhouse* … does not … provide any reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is a transsexual … [D]iscrimination against a plaintiff who is a transsexual —and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against [the plaintiff] in *Price Waterhouse* who, in sex-stereotypical terms, did not act like a woman.[26]
>
> A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes … Accordingly, 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."[27]

Protections Evolve

The EEOC unanimously ruled that claims of discrimination based on transgender status or gender identity are cognizable under Title VII in *Macy v. Department of Justice*.[28] In *Macy*, similar to federal and state courts, the EEOC concluded that the gender stereotyping theory of *Price Waterhouse* protects transgender individuals who have been discriminated against on the basis of their transgender status. The EEOC made it clear that no additional proof of gender stereotyping is needed other than proof that discrimination occurred *because of* the person's transgender status or intent to transition. The EEOC cites with approval the Eleventh Circuit's *Glenn v. Brumby* decision. "A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes."[29]

In *Macy*, the EEOC returned to the principle upon which *Price Waterhouse*'s gender stereotyping analysis had been based—that Title VII prohibits employers from taking gender into account in making employment decisions. The Supreme Court explained in *Price Waterhouse* that statements expressing gender stereotypes are *evidence* that gender has been taken into account in violation of Title VII. Thus, it is possible for a transgender person to make out a claim based on simple, direct evidence that an employer has inappropriately taken gender into account in an employment decision.

EEOC Includes Sexual Orientation in Title VII Protections

There are federal Circuit and District Court cases using the gender stereotyping analysis of *Price Waterhouse* to protect against sex stereotyping based on gender identity and behaviors perceived as gay or lesbian, and the EEOC has made its position clear that sexual orientation is included in the protections against discrimination afforded under Title VII. Yet courts have generally held back on finding that sexual orientation discrimination itself is covered by Title VII. The Ninth Circuit signaled that it was no longer holding back in protecting against sexual orientation in January 2014 in *SmithKline Beecham Corp. v. Abbott Laboratories*.[30]

In *SmithKline*, the Ninth Circuit held that lawyers cannot exclude potential jurors solely on the basis of sexual orientation. "Strikes based upon sexual orientation continue this deplorable tradition of treating gays and lesbians as undeserving of participation in our nation's most cherished rites and rituals."[31] The court went on to overrule prior cases applying a rational basis standard, holding that a "heightened scrutiny" standard was to be applied to all government actions that discriminate on the basis of sexual orientation.[32]

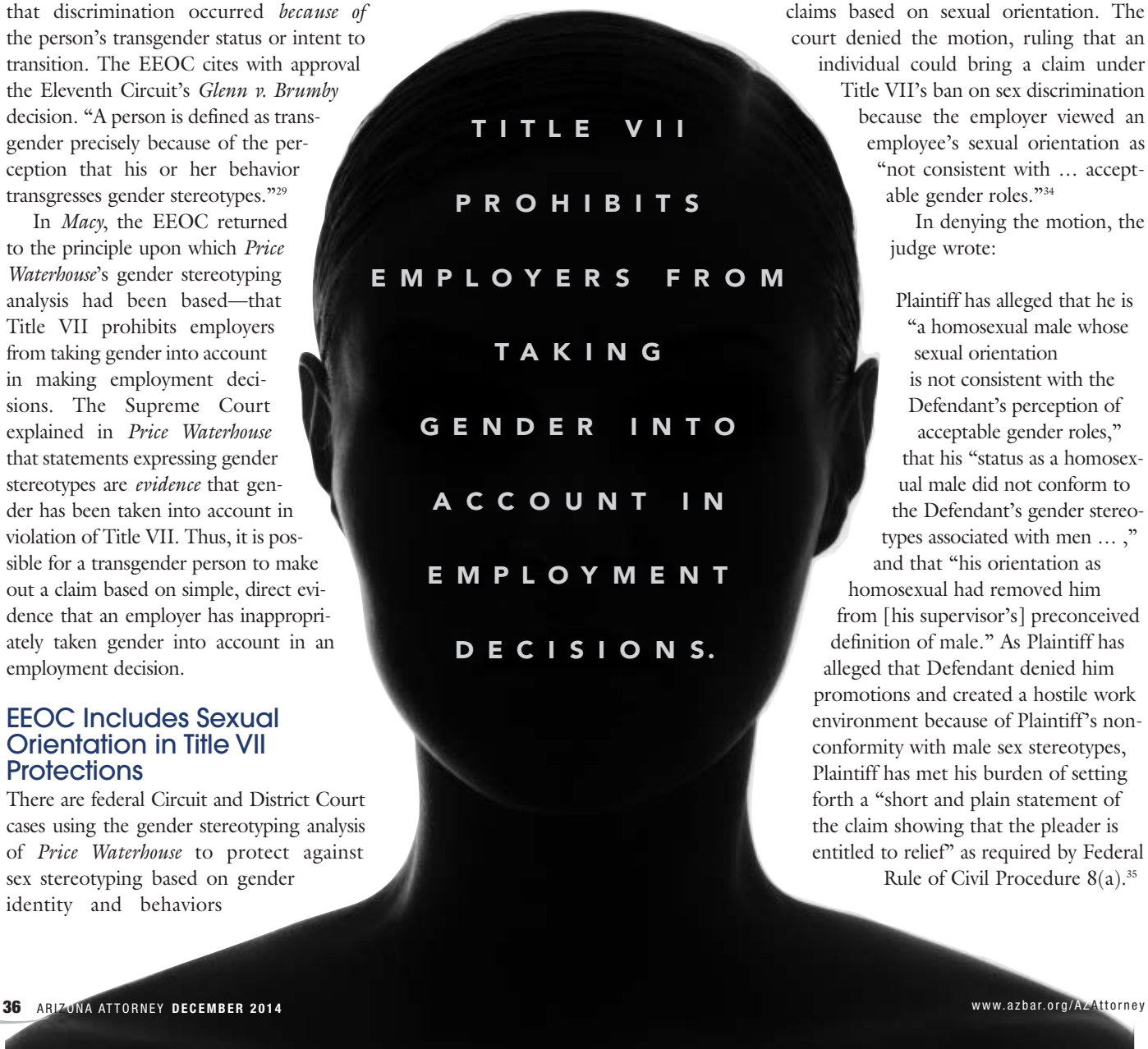
SmithKline was followed by a U.S. District Court for the District of Columbia case decided on March 31, 2014, in which the court ruled that plaintiff Peter TerVeer's case against the Library of Congress could proceed under Title VII's ban on sex discrimination based on his claim that he was discriminated against after his boss learned that he was gay.[33]

Court: Title VII Includes Sexual Orientation

The Library of Congress had moved to dismiss TerVeer's claims on the basis that Title VII did not provide for discrimination claims based on sexual orientation. The court denied the motion, ruling that an individual could bring a claim under Title VII's ban on sex discrimination because the employer viewed an employee's sexual orientation as "not consistent with … acceptable gender roles."[34]

In denying the motion, the judge wrote:

> Plaintiff has alleged that he is "a homosexual male whose sexual orientation is not consistent with the Defendant's perception of acceptable gender roles," that his "status as a homosexual male did not conform to the Defendant's gender stereotypes associated with men … ," and that "his orientation as homosexual had removed him from [his supervisor's] preconceived definition of male." As Plaintiff has alleged that Defendant denied him promotions and created a hostile work environment because of Plaintiff's nonconformity with male sex stereotypes, Plaintiff has met his burden of setting forth a "short and plain statement of the claim showing that the pleader is entitled to relief" as required by Federal Rule of Civil Procedure 8(a).[35]



Employer Policies and Training

So where does this leave employers? Employers should expect to see courts apply the EEOC's *Macy* decision and the rationale used by the court in *TerVeer* in different factual contexts, such as harassment, disparate treatment cases, dress codes, health care and benefits, restroom access and segregated job duties.

All employers should review their equal-employment-opportunity statement and other policies prohibiting discrimination and harassment to ensure those policies include protections based on sexual orientation and gender identity. In addition, all employee and supervisor training should address prohibitions against discrimination and harassment based on sexual orientation and gender identity, with case scenarios specific to those protections. If an employer finds that an employee has discriminated against or harassed another employee based on his or her actual or perceived sexual orientation or gender identity, the employer must take appropriate corrective actions.

• Handle gender transitions individually

Employers also should be prepared for gender transitions in the workplace. Transitions should be handled on a case-by-case basis considering the preferences of the transgender employee where possible and, at a minimum, should include discussions with the employee regarding transition issues such as dress code and restroom use, informing coworkers and informing customers. Employers should approach each case in a way that ensures the transgender employee is treated with dignity and respect.

• Evolution of anti-discrimination law requires attention

Attorneys who represent employees must ensure they are current on these legal developments if they provide counsel to clients who may have claims of discrimination in employment based on sexual orientation or gender identity. The case law will continue to evolve, which will likely have a profound impact on the protections of the 50-year-old Civil Rights Act of 1964 against discrimination on the basis of sexual orientation and gender identity.

endnotes

1. Civil Rights Act of 1991 (Pub. L. 102-166).
2. Americans With Disabilities Act of 1990, section 501 of the Rehabilitations Act of 1973 and the ADA Amendments Act of 2008.
3. Lily Ledbetter Fair Pay Act of 2009.
4. Civil Rights Amendments of 1975, H.R. 166, 94th Cong. (1975).
5. S. 815 (113th Congress).
6. Several cities in Arizona, including Phoenix, Tempe and Tucson, have ordinances prohibiting discrimination in employment and public accommodation, but the remedies are limited.
7. *Id.*
8. 490 U.S. 228 (1989).
9. *EEOC v. Lakeland Eye Clinic* and *EEOC v. R.G. & R.G. Harris Funeral Homes, Inc.*
10. *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984).
11. 490 U.S. 228 at 235.
12. *Id.* at 256.
13. *Id.* at 251.
14. *Id.* at 239.
15. *Id.*
16. *Id.* at 240.
17. *Id.* at 250.
18. *Id.* at 264.
19. 523 U.S. 75 (1998).
20. *Id.* at 78.
21. *Id.* at 80.
22. 119 F. 3d 563 (7th Cir. 1997).
23. *Id.* at 580.
24. *Nichols v. Azteca Restaurant Enters., Inc.*, 256 F. 3d 864, 874-875 (9th Cir. 2001).
25. **Sexual Orientation Cases:** *Lewis v. Heartland Inns of Am*, 591 F.3d 1033 (8th Cir. 2010), *Prowel v. Wise Business Forms*, 579 F.3d 285 (3rd Cir. 2009), *Medina v. Income Support Div.*, 413 F.3d 1131 (10th Cir. 2005), and *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000). **Transgender Cases:** *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004), *Schroer v. Billington*, 577 F. Supp. 2d 293 (D. D.C. 2008).
26. *Smith v. City of Salem*, 378 F.3d at 574-575.
27. *Glenn v. Brumby*, 663 F.3d 1312, 1316-17 (11th Cir. 2011) (relying on *Price Waterhouse* to find violation of Equal Protection).
28. *Macy v. Department of Justice*, EEOC DOC 0120120821 (April 2012), 2012 WL 1435995, p. 5 (EEOC).
29. *Id.*, citing *Glenn v.* Brumby, 663 F.3d at 1316-17.
30. 740 F.3d 471 (9th Cir. 2014).
31. *Id.* at 485.
32. *Id.*, at 484.
33. *TerVeer v. Billington*, CA No. 12-1290 (CKK) Dist. Court, Dist. Of Columbia (March 31, 2014).
34. *Id.*
35. *Id.*