



# COMPLIANCE @ WORK

July 2016

## LGBT Discrimination in the Workplace



June 26, 2016 marked the one-year anniversary of the Supreme Court's decision in *Obergefell v. Hodges*, which guaranteed same-sex couples the right to marry throughout the United States.<sup>1</sup> While this landmark decision requires employers to recognize all lawful marriages entered into by lesbian, gay, bisexual, and transgender (LGBT) employees, much uncertainty remains with regard to other workplace rights of LGBT employees in the legislative branch and beyond. Indeed, according to the Human Rights Campaign, 47 percent of LGBT individuals have reported experiencing discrimination in the workplace; yet, only 18 states have passed laws which specifically prevent employment discrimination on the basis of sexual orientation and gender identity.<sup>2</sup>

The Supreme Court has not ruled on whether Title VII protects employees from discrimination based on their sexual orientation or gender identity.

### Title VII in the Federal Courts and Sex Stereotyping

#### Title VII of the Civil Rights Act of 1964

Title VII prohibits workplace discrimination based on “race, color, religion, sex, or national origin.” The [Congressional Accountability Act \(CAA\) of 1995](#) extends it and twelve other federal employment laws to legislative branch employees.

Title VII is a federal statute that prohibits workplace discrimination based on “race, color, religion, sex, or national origin.” It is one of the thirteen employment laws that the Congressional Accountability Act (CAA) of 1995 extends to legislative branch employees. The meaning of the term “discrimination based on sex” in Title VII has been widely argued by lawmakers and courts and is the crux of the debate on whether LGBT employees are covered by Title VII. While not explicitly included in its list of protected bases, several federal courts have interpreted Title VII’s sex discrimination provision as prohibiting discrimination against employees on the basis of sexual orientation and gender identity. Moreover, courts around the country have held that employment actions motivated by gender stereotyping amount to unlawful sex discrimination.

In 1989, in *Price Waterhouse v. Hopkins*, the Supreme Court ruled that Title VII’s protection based on “sex” also protects individuals from discrimination for failure to conform to sex stereotypes.<sup>3</sup> Sex stereotyping

occurs when an individual is discriminated against based on that person’s non-conformance with a gender stereotype. In *Price Waterhouse*, a woman prevailed on a sex discrimination claim by alleging that she was denied a promotion because she needed to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”<sup>4</sup>

<sup>1</sup>*Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

<sup>2</sup>Brandon Lorenz, *New HRC Poll Shows Overwhelming Support for Federal LGBT Non-Discrimination Bill* (2015), <http://www.hrc.org/blog/new-hrc-poll-shows-overwhelming-support-for-federal-lgbt-non-discrimination>.

<sup>3</sup>*Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989).

<sup>4</sup>*Id.* at 235.

Sex stereotyping applies equally to both men and women. So if an employer thinks men should dress “manly,” speak with a low voice, or behave in a certain “stereotypically male” way and refuses to hire or promote a male employee because he does not behave that way, that has been determined to be prohibited discrimination under Title VII.

Transgender individuals can more easily claim discrimination based on sex stereotyping than lesbian, gay, and bisexual (LGB) workers, because their very identity is contrary to their biological sex. For example, in *Smith v. City of Salem, Ohio*, a federal court of appeals found that a firefighter was discriminated against on the basis of her sex, when she was fired while transitioning from male to female.<sup>5</sup> In other words, the employer fired her because she was not conforming to her employer’s idea of what someone who was born male should look and act like.

The EEOC has recently ruled that discrimination based on sexual orientation or gender identity is prohibited by Title VII. These rulings are only persuasive authority for federal courts and the OOC.

In the executive branch and private sectors, the Equal Employment Opportunity Commission (EEOC) investigates and processes Title VII administrative claims of employment discrimination. The EEOC interprets and enforces Title VII’s prohibition of sex discrimination as forbidding any employment discrimination based on gender identity<sup>6</sup> or sexual orientation.<sup>7</sup> While not binding on the legislative branch, the EEOC rulings do provide guidance for review under the CAA. Through investigation, conciliation, and litigation of charges by individuals against private sector employers, as well as hearings and

appeals for federal sector workers in the executive branch, the EEOC has taken the position that existing sex discrimination provisions in Title VII protect LGBT applicants and employees against sex discrimination. Whether courts will find the EEOC’s position on sex discrimination claims for LGBT employees to be persuasive remains to be seen.

## Bringing LGBT Discrimination Claims in the Legislative Branch

The Office of Compliance (OOC), located in the Library of Congress Adams Building, has an administrative dispute resolution (ADR) program that provides a confidential avenue for legislative branch employees to discuss their employment issues and, if need be, file a formal request for counseling within 180 days of an alleged violation.

Legislative branch employees who feel their rights have been violated based on their sexual orientation or gender identity may make a claim under the CAA by initiating the ADR process, which includes mandatory counseling and mediation. If the claim is not resolved at this early stage, the employee may elect to take the claim to a hearing officer appointed by the OOC or to a federal district court. The hearing officers and the OOC Board of Directors (serving as the appellate body) are guided by judicial decisions under Title VII.



<sup>5</sup>*Smith v. City of Salem, Ohio*, 378 F.3d 566, 571 (6th Cir. 2004).

<sup>6</sup>*Macy v. Holder*, No. 0120120821, 2012 WL 1435995, at \*4 (E.E.O.C. April 20, 2012).

<sup>7</sup>*Baldwin v. Foxx*, No. 0120133080, 2015 WL 4397641, at \*4 (E.E.O.C. July 15, 2015).

For more information on the Office of Compliance or the Congressional Accountability Act please call us at (202) 724-9250 or visit [www.compliance.gov](http://www.compliance.gov).

All inquiries to the Office of Compliance are strictly confidential.