



Office of Compliance

Office of the General Counsel

OOB BROWN BAG LUNCH SERIES SEXUAL ORIENTATION & GENDER IDENTITY JULY 19, 2017

I. Introduction

The Congressional Accountability Act of 1995 (“CAA”), 2 U.S.C. §§ 1301 *et seq.*, extends the protection of several anti-discrimination statutes to legislative branch employees, and also prohibits retaliation for protected activity. None of these statutes explicitly protects covered employees on the basis of sexual orientation or gender identity, but recently courts have been addressing the application of these laws to lesbian, gay, bisexual, and transgender (“LGBT”) workers with increasing frequency.

II. Supreme Court Guidance

Title VII of the Civil Rights Act of 1964 prohibits “discrimination based on... sex” in the employment context. 42 U.S.C. § 2000e-2(a). The Supreme Court has not yet directly addressed the issue of whether this provision prohibits discrimination on the basis of sexual orientation or gender identity. Because the Circuit Courts of Appeals are split regarding the application of Title VII to LGBT workers, it is expected that the Supreme Court will decide this question relatively soon. Meanwhile, several previous Supreme Court decisions are frequently cited by other federal courts faced with LGBT employment discrimination cases.

1) *Price Waterhouse* and “Sex Stereotyping”

- a) *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) – In a plurality opinion authored by Justice Brennan, the Supreme Court established that discrimination based on an employee’s failure to conform to gender stereotypes constitutes discrimination based on sex under Title VII. The female employee alleged that despite her excellent job performance, she was denied partnership because she was not considered to be feminine enough. In a concurring opinion, Justice O’Connor described the factual circumstances giving rise to the claims: “the District Court found that the partner responsible for informing Hopkins of the factors which caused her candidacy to be placed on hold, indicated that her ‘professional’ problems would be solved if she would ‘walk more femininely, talk more femininely, wear make-up, have her hair styled, and wear jewelry.’” As the Court of Appeals characterized it, Ann Hopkins proved that Price Waterhouse ‘permitt[ed] stereotypical attitudes towards women to play a significant, though unquantifiable, role in its decision not to invite her to become a partner.’” *Id.* at 272 (internal citations omitted). According to the plurality, “we are beyond the day when an

employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group,” and such “sex stereotyping” is prohibited by Title VII. *Id.* at 251.

- b) Significance of *Price Waterhouse* – Most of the *Price Waterhouse* opinion actually deals not with sex stereotyping, but with an analysis of the burden shifting framework and standards of proof regarding causation in discrimination cases. There is no mention at all of the employee’s sexual orientation or of the application of Title VII to LGBT individuals. Nonetheless, “sex stereotyping” or “gender stereotyping” has become a common legal theory that LGBT plaintiffs rely upon when making discrimination claims under Title VII. As discussed below, there is disagreement among the federal courts as to whether this theory justifies holding employers liable under Title VII for discrimination based on sexual orientation or gender identity. Specifically, the courts disagree as to whether sex stereotyping is a distinct concept from sexual orientation, or whether the characteristic of being attracted to members of the opposite sex is a stereotype in and of itself.
- c) *Lewis v. Heartland Inns of Am., LLC*, 591 F.3d 1033 (8th Cir. 2010) – Female hotel front desk worker alleged that her employer discriminated against her and ultimately fired her because she had a more “masculine” look, keeping her hair short and preferring to wear loose-fitting clothing that included men’s clothes. The plaintiff’s performance was praised by her supervisors and she had no history of discipline or customer complaints, but the Director of Operations repeatedly expressed concern about her appearance and stated, among other things, that the plaintiff lacked a “Midwestern girl look” and was not “pretty” enough for a front-desk position. Relying heavily on *Price Waterhouse*, the 8th Circuit reversed the district court’s grant of summary judgment, holding that the plaintiff had established a prima face case of sex discrimination based on sex stereotyping, and that genuine issues of fact existed about whether the employer’s proffered justification for the plaintiff’s termination was pretextual. The opinion makes no mention of the plaintiff’s sexual orientation or gender identity, basing its holding strictly on the plaintiff’s non-conformity to gender stereotypes regarding appearance.
- d) *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000) – An openly gay postal worker alleged that he was subjected to a severely hostile and abusive work environment by virtue of his sexual orientation. The court described the abuse as “morally reprehensible” but noted that its job was to interpret Title VII rather than to make a moral judgment, and held that “The law is well-settled in this circuit and in all others to have reached the question that Simonton has no cause of action under Title VII because Title VII does not prohibit harassment or discrimination because of sexual orientation.” The court rejected the plaintiff’s *Price Waterhouse* sex stereotyping argument, because it found “no basis in the record to surmise that Simonton behaved in a stereotypically feminine manner and that the harassment he endured was, in fact, based on his non-conformity with gender norms instead of his sexual orientation.” The court cautioned that a sex stereotyping theory “would not bootstrap protection for sexual orientation into Title VII because not all

homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine.”

- e) *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444 (5th Cir. 2013) – In an en banc decision, the court affirmed in part a jury verdict in favor of the plaintiff, a male construction worker who alleged a hostile work environment resulting from sexual harassment by his supervisor. The employee’s sexual orientation is never discussed, and in fact the alleged harasser – the male supervisor of the all-male construction crew– testified that he did not actually think the plaintiff was gay. However, the supervisor repeatedly used slang and derogatory terms for gay men to refer to the plaintiff, teased him for being too effeminate, and mocked him using lewd gestures including simulated anal sex. Drawing on *Price Waterhouse* and *Oncale* (see below), the court held that it was reasonable for a jury to conclude that these actions constituted a hostile work environment in violation of Title VII, based on the plaintiff’s failure to conform to the supervisor’s “manly-man stereotype.”

2) Other relevant Supreme Court cases

- a) *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) – Title VII prohibits “severe or pervasive” same-sex offensive sexual conduct, just as it prohibits opposite-sex offensive sexual conduct. A Title VII claim based on such actions is still valid even if the perpetrator and victim are of the same sex. Justice Scalia wrote on behalf of a unanimous Court: “As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But 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. Title VII prohibits ‘discriminat[ion]... because of... sex’ in the ‘terms’ or ‘conditions’ of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.”
- b) *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) – Although not an employment discrimination case, the *Obergefell* decision – in which the Supreme Court held that same-sex couples have the right to marry under the Due Process and Equal Protection Clauses of the United States Constitution – has implications both for the courts’ analysis of employment cases and for other statutes applied by the CAA, such as the Family and Medical Leave Act. Indeed, in the *Hively* decision (discussed in detail below), the court cited *Obergefell* as evidence that the Supreme Court is willing to find protections for gay, lesbian, and bisexual individuals in existing civil rights law.

III. Discrimination Against LGBT Workers

Until this year, no U.S. Court of Appeals had held that Title VII’s prohibition on sex discrimination included protection against discrimination based on sexual orientation. That changed when the Seventh Circuit issued an en banc decision in the case of *Hively v. Ivy Tech*

Community College of Indiana on April 4, 2017, holding that “sex” for Title VII purposes includes sexual orientation. This decision created a Circuit split that will likely send the issue to the Supreme Court in the near future.

1) **The *Hively* Case**

The decision in *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017), contains a majority opinion and two concurrences offering several different theories to justify the extension of Title VII to cover sexual orientation discrimination. Three judges dissented on textualist grounds, believing that it is up to Congress rather than the courts to expand Title VII’s protections.

- a) *Opinion by Judge Diane Wood* – Judge Wood begins by observing that “bizarre results ensure from the current [legal] regime...in which a person can be married on Saturday and then fired on Monday” for being gay, lesbian, or bisexual. Both comparative and associational theories are used to explain why the “based on... sex” language of Title VII should be interpreted as encompassing sexual orientation. The comparative analysis asks whether Hively would have been fired if her sex was male instead of female, with all other variables held constant. Hively alleges she was fired for being a lesbian, but in this hypothetical Hively would be a *man* married to a woman instead of a *woman* married to a woman. Hively would be unable to claim she was fired for being a lesbian if she were a man, and the comparative analysis thus shows her claim is intrinsically linked to her sex. To apply the associational analysis, Wood turns to the 1967 Supreme Court case *Loving v. Virginia*, which struck down miscegenation statutes that prohibited interracial marriage because the Court saw such statutes as denying rights solely on the basis of race. Discrimination towards an individual because of the race of their partner was held to still be racial discrimination. Analogizing *Loving*’s reasoning to sex, Wood writes that discrimination towards an employee because of the sex of their partner is discrimination that rests on “distinctions drawn according to sex.” Since this discrimination is ultimately still “based on... sex,” it is prohibited by Title VII.
- b) *Concurrence by Judge Richard Posner* – Judge Posner posits that “judicial interpretive updating” should be employed to reach the majority’s conclusion. This form of interpretation accounts for “present need and present understanding” and would permit the infusion of “fresh meaning” into the word “sex.” Posner emphasizes the change in attitude toward sex since Title VII’s enactment, noting that “sex” today means more than the genitalia you’re born with. While homosexuality was “almost invisible” in the 1960s, he observes, “today it is regarded by a large swathe of the American population as normal.” Posner acknowledges that embracing homosexuality within the meaning of “sex” for Title VII purposes requires “loose ‘interpretation,’” but indicates that the court is entitled to adopt such an interpretation “ ‘in light of what this country has become,’ ” quoting a Justice Holmes opinion interpreting the Second Amendment to confer gun rights on private citizens. Posner observes that there is a “compelling social interest in protecting homosexuals (male and female) from discrimination[.]” Posner points to constitutional texts whose meanings have been updated in this manner: the First

Amendment now embraces flag burning within the meaning of speech and the Fourth Amendment now requires the issuance of warrants before searching a person's home or arresting him there. Posner cautions against reliance on *Oncale*, writing that that decision calls for "originalism" interpretation of Title VII with its observation that "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." Similarly, the *Loving* case does not provide adequate support, he writes, because it was a constitutional case that had nothing to do with Title VII, which had only been recently enacted. Posner advises that the majority should not be reticent about its infusion of new meaning into Title VII sex discrimination, expressly rejecting the notion that Title VII always forbade sexual orientation discrimination but the framers and ratifiers were not smart enough to realize its scope. Posner would prefer to see the court "acknowledge openly that today we, who are judges rather than members of Congress, are imposing on a half-century-old statute a meaning of 'sex discrimination' that the Congress that enacted it would not have accepted."

- c) *Concurrence by Judge Joel Flaum* – Judge Flaum observes that discrimination on the basis of homosexuality is necessarily, in part, discrimination based on sex. One cannot consider a person's homosexuality without also accounting for their sex because homosexuality is defined by sexual attraction to individuals of the same sex. Based on this reasoning, homosexual plaintiffs will always have the enumerated trait of sex. At issue, then, is whether Title VII requires plaintiffs to show that they were discriminated against *solely* because of this enumerated trait. Flaum answers no, pointing to the "motivating factor" analysis applicable to Title VII sex discrimination claims. Under this analysis, employment practices motivated by sex are unlawful even if also motivated by other factors. Flaum draws on this logic to conclude that if discriminating against an employee because she is homosexual is equivalent to discriminating against her because she is a) a woman who is b) sexually attracted to women, then the discrimination was necessarily motivated, at least in part, by an enumerated trait: her sex. This is all that an employee must show to successfully allege a Title VII claim.
- d) *Dissent by Judge Diane Sykes* – In a lengthy dissent joined by Judges William Joseph Bauer and Michael Stephen Kanne, Judge Sykes employs a classic textualist method of statutory interpretation. She describes the court's role as "to give effect to the enacted text, interpreting the statutory language as a reasonable person would have understood it at the time of enactment. We are not authorized to infuse the text with a new or unconventional meaning or to update it to respond to changed social, economic, or political conditions." She rejects Judge Posner's "judicial interpretive updating" of the statute, as he calls it, and she disagrees strongly with what she views as the majority's attempt to "smuggle in the statutory amendment under cover of an aggressive reading of loosely related Supreme Court precedents." Instead, she writes that "sex" would not reasonably have been interpreted to include sexual orientation when the statute was enacted over 50 years ago, because at that time the "ordinary, contemporary, common meaning" of "because of sex" would not have included sexual orientation, and under the fundamental canons of statutory interpretation the scope of the statute cannot be

expanded to account for society's changing views. (Notably, Judge Sykes does *not* consider the legislators' intentions to be relevant; in this she agrees with the majority.) Even in today's ordinary usage, she writes, the plain meaning of "sex" is not interchangeable with "sexual orientation." She lists statutes that contain explicit prohibitions on discrimination based on "sexual orientation" listed separately from "sex," *id.* at 364, and goes on to methodically refute each of the other arguments made by the majority and concurring opinions, including those based on *Loving*, *Price Waterhouse*, *Oncale*, and sexual orientation cases in non-employment contexts such as *Romer v. Evans*, *Lawrence v. Texas*, *United States v. Windsor*, and *Obergefell v. Hodges*. Ultimately, she concludes that "If Kimberly Hively was denied a job because of her sexual orientation, she was treated unjustly. But Title VII does not provide a remedy for this kind of discrimination. The argument that it *should* must be addressed to Congress."

2) Other Title VII Sexual Orientation Cases

- a) *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999) – A gay male plaintiff alleged that he was fired based on his sexual orientation. According to the court, "The record makes manifest that the appellant toiled in a wretchedly hostile environment." However, the court held that claims of sexual orientation discrimination are not cognizable under Title VII: "We hold no brief for harassment because of sexual orientation; it is a noxious practice, deserving of censure and opprobrium. But we are called upon here to construe a statute as glossed by the Supreme Court, not to make a moral judgment—and we regard it as settled law that, as drafted and authoritatively construed, Title VII does not proscribe harassment simply because of sexual orientation." The plaintiff on appeal attempted to cast his sexual orientation discrimination claim under either a "sex-plus" theory (i.e., "that the employer discriminated against men—and only men—who possessed certain qualities," in this case sexual attraction to men) or a sex stereotyping theory based on his coworkers mocking him for having a high-pitched voice and some feminine mannerisms. However, because these issues were newly raised on appeal, the court could not consider them.
- b) *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248 (11th Cir. 2017) – The court drew a distinction between claims based on gender non-conformity (which are cognizable under Title VII) and claims based on sexual orientation (which are not). Citing its own precedents and decisions from other Circuit Courts of Appeal, and noting the absence of Supreme Court authority that is directly on point, the court held that it is bound to reject the sexual orientation discrimination claim, but allowed the *pro se* plaintiff leave to amend her complaint to more clearly state a claim for sex stereotyping. In a concurring opinion, Judge William Pryor framed the distinction as one between behavior (gender non-conformity) and status (sexual orientation), and opined that Congress would have to amend Title VII for it to cover an additional status. Judge Robin Rosenbaum dissented and disagreed with these distinctions: "Plain and simple, when a woman alleges, as Evans has, that she has been discriminated against because she is a lesbian, she necessarily alleges that she has been discriminated against because she failed to conform to the

employer's image of what women should be— specifically, that women should be sexually attracted to men only. And it is utter fiction to suggest that she was not discriminated against for failing to comport with her employer's stereotyped view of women. That is discrimination 'because of ... sex,' 42 U.S.C. § 2000e-2(a)(1), and it clearly violates Title VII under *Price Waterhouse*.” **STATUS:** On July 6, 2017 the 11th Circuit denied Evans's petition for rehearing en banc. According to media reports, Evans plans to petition for certiorari.

- c) *Zarda v. Altitude Express*, 855 F.3d 76 (2d Cir. 2017) – A gay skydiving instructor alleged that he had been fired because of his sexual orientation and because of sex stereotyping. The district court found that Zarda failed to prove the requisite proximity between his termination and his failure to conform to gender stereotypes, and the Second Circuit affirmed. Notably, the district court did not consider the fact that Zarda dated other men as part of his gender non-conformity claim, but focused instead on allegations that the employer criticized Zarda for behaviors such as wearing pink or polishing his toenails. As to the other basis for Zarda's claim – that he was fired because he was gay – the court held that Second Circuit precedent foreclosed a Title VII claim based on sexual orientation and that a three-judge panel could not overturn that precedent. **STATUS:** **This case will be reheard en banc on September 26, 2017.**
- d) *Christiansen v. Omnicrom Grp., Inc.*, 852 F.3d 195 (2d Cir. 2017) – An openly gay male employee alleged harassment on the basis of his failure to conform to gender stereotypes. The district court dismissed the complaint, holding that the alleged facts indicated discrimination based on the plaintiff's status as a gay man rather than his failure to conform to male stereotypes. The Court of Appeals reversed that part of the decision, holding that the complaint alleged sufficient facts to support a gender non-conformity claim, and remanded. In a per curiam opinion the court acknowledged that it is often difficult to draw a line between sexual orientation discrimination claims and sex stereotyping claims. Pointing out that “the sexual orientation of the plaintiff in *Price Waterhouse* was of no consequence,” the court went on to explain that although sexual orientation discrimination claims cannot be bootstrapped onto gender stereotyping claims, “gay, lesbian, and bisexual individuals do not have *less* protection under *Price Waterhouse* against traditional gender stereotype discrimination than do heterosexual individuals.” Rather, the court's precedents “merely hold that being gay, lesbian, or bisexual, standing alone, does not constitute nonconformity with a gender stereotype that can give rise to a cognizable gender stereotyping claim.” In a concurring opinion that has been cited favorably by other courts, Chief Judge Robert A. Katzmann addressed three alternative arguments raised by the plaintiff and *amici* for why “sexual orientation is, almost by definition, discrimination ‘because of ... sex’” – specifically, that sexual orientation discrimination qualifies as sex discrimination, associational sex discrimination, and gender stereotyping, all of which are prohibited – and found all three arguments “persuasive.” Judge Katzmann analyzed the three arguments in detail to express his view “that when the appropriate occasion presents itself, it would make sense for the Court to revisit the central legal issue” of whether Title VII's prohibition on sex

discrimination encompasses discrimination based on sexual orientation. **STATUS:** On June 28, 2017 the 2nd Circuit denied a petition for rehearing en banc (which is not surprising, because a few weeks earlier the court had already agreed to rehear the *Zarda* case en banc).

- e) *Terveer v. Billington*, 34 F. Supp. 3d 100 (D.D.C. 2014) (Judge Colleen Kollar-Kotelly) – Plaintiff, a gay man, successfully stated a claim for sex discrimination under Title VII based on sex stereotyping, where he was allegedly denied promotions and subjected to a hostile work environment by his conservative Catholic supervisor, who regularly expressed disapproval of plaintiff’s homosexuality.
- f) *EEOC v. Scott Med. Health Ctr., P.C.*, 217 F. Supp. 3d 834 (W.D. Pa. 2016) – The EEOC alleged that a gay male employee had been discriminated against because of his sexual orientation, and made arguments similar to those of the plaintiff in the *Christiansen* case described above: (1) the employee was targeted because he was male, because if he had been female he would not have been discriminated against for having intimate relationships with men; (2) the employee was harassed because of his intimate association with someone of the same sex, which necessarily took the employee’s sex into account; and (3) the employee was harassed because he did not conform to the harasser’s concepts of what a man should be or do. The court viewed these three arguments as “the same argument articulated in three different ways, with the singular question being whether, but for [the employee’s] sex, would he have been subjected to this discrimination or harassment. The answer, based on these allegations, is no.” The court held that “Title VII’s ‘because of sex’ provision prohibits discrimination on the basis of sexual orientation. Accordingly, the EEOC’s Complaint stating that [the employee] was discriminated against for being gay properly states a claim for relief. The Court sees no meaningful difference between sexual orientation discrimination and discrimination ‘because of sex.’” Applying a *Price Waterhouse* analysis, the court wrote that “There is no more obvious form of sex stereotyping than making a determination that a person should conform to heterosexuality.” “Indeed, the Court finds discrimination on the basis of sexual orientation is, at its very core, sex stereotyping plain and simple; there is no line separating the two... It is, in the view of the undersigned, a distinction without a difference. Forcing an employee to fit into a gendered expectation – whether that expectation involves physical traits, clothing, mannerisms or sexual attraction – constitutes sex stereotyping and, under *Price Waterhouse*, violates Title VII.”
- g) *Philpott v. New York*, No. 16 Civ. 6778 (AKH), 2017 WL 1750398 (S.D.N.Y. May 3, 2017) – The plaintiff alleged that he was harassed and discriminated against because of his sexual orientation. The district court judge held that such a claim is cognizable under Title VII, despite the fact that the Second Circuit had held otherwise in both *Zarda* and *Christiansen*. The court adopted the reasoning of the concurring opinion in *Christiansen* and the Seventh Circuit’s en banc decision in *Hively*, explaining that “because plaintiff has stated a claim for sexual orientation discrimination, ‘common sense’ dictates that he has also stated a claim for gender stereotyping discrimination, which is cognizable under Title VII. The fact that plaintiff has framed his complaint in terms of sexual orientation

discrimination and not gender stereotyping discrimination is immaterial. I decline to embrace an ‘illogical’ and artificial distinction between gender stereotyping discrimination and sexual orientation discrimination, and in so doing, I join several other courts throughout the country.”

- h) Several other federal district judges have held that claims for sexual orientation discrimination under Title VII are valid, either as sex discrimination in and of itself or based on the idea that attraction to the same sex constitutes gender nonconformity and is thus a prohibited basis for discrimination under a *Price Waterhouse* sex stereotyping theory. *See, e.g., Boutillier v. Hartford Pub. Schs.*, 221 F. Supp. 3d 255 (D. Conn. 2016) (citing *Price Waterhouse* and also analogizing to *Loving*); *Winstead v. Lafayette Cty. Bd. of Cty. Comm’rs*, 197 F. Supp. 3d 1334 (N.D. Fla. 2016) (rejecting the argument that sexual orientation discrimination is sex discrimination, but allowing a Title VII claim to proceed on a gender stereotyping theory); *Isaacs v. Felder Servs., LLC*, 143 F. Supp. 3d 1190 (M.D. Ala. 2015) (holding that sexual orientation discrimination claims are cognizable under Title VII based on both theories, but granting summary judgment for employer because plaintiff failed to produce evidence that his termination was based on his sexual orientation). Note: these cases were decided prior to *Zarda* in the 2nd Circuit and *Evans* in the 11th Circuit, which would have been binding authority and might have affected the outcomes in the lower courts.

3) Gender Identity Under Title VII

- a) *Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir. 2004) – Plaintiff, a biologically male firefighter who began expressing as female, successfully stated a claim for discrimination under Title VII by alleging that the employer’s actions were motivated by the plaintiff’s gender nonconformity. The court explained that in *Price Waterhouse*, “By holding that Title VII protected a woman who failed to conform to social expectations concerning how a woman should look and behave, the Supreme Court established that Title VII’s reference to ‘sex’ encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms.”
- b) *Hunter v. United Parcel Serv., Inc.*, 697 F.3d 697 (8th Cir. 2012) – The court rejected plaintiff’s claim for failure to hire based on his status as a transgender male because there was insufficient evidence that the employer was aware of plaintiff’s protected status. The court also found that the employer offered legitimate, non-pretextual reasons for not hiring the plaintiff.
- c) *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984) – A pilot alleged that she had been fired after her sex reassignment surgery, solely on the basis that she was transsexual. Applying maxims of statutory interpretation and citing the dearth of legislative history regarding Title VII’s sex discrimination prohibition,¹ the court

¹ “When Congress enacted the Civil Rights Act of 1964 it was primarily concerned with race discrimination. ‘Sex as a basis of discrimination was added as a floor amendment one day before the House approved Title VII, without prior hearing or debate.’ *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir.1977) (citations omitted);

explained: “In our view, to include transsexuals within the reach of Title VII far exceeds mere statutory interpretation. Congress had a narrow view of sex in mind when it passed the Civil Rights Act, and it has rejected subsequent attempts to broaden the scope of its original interpretation. For us to now hold that Title VII protects transsexuals would take us out of the realm of interpreting and reviewing and into the realm of legislating. The court therefore held that, “While we do not condone discrimination in any form, we are constrained to hold that Title VII does not protect transsexuals[.]”

- d) *Shroer v. Billington*, 424 F. Supp. 2d 203 (D.D.C. 2006) – The plaintiff, a transgender female, claimed that her job offer from the Congressional Research Service was revoked after she revealed her transition plans to the hiring official. Judge James Robertson (now retired) noted that “Some district courts have relied upon *Ulane* and its progeny to reject discrimination claims of transsexuals as if *Price Waterhouse* were irrelevant. However, a larger number of district and appellate courts have treated discrimination against transsexuals as sex discrimination based on gender non-conforming behavior.” Judge Robertson took a different view, stating that although a transgender plaintiff may be able to state a *Price Waterhouse*-type sex stereotyping claim, “such a claim must actually arise from the employee’s appearance or conduct and the employer’s stereotypical perceptions.” Perhaps ironically, he found that in this case the plaintiff could not avail herself of a sex stereotyping claim because her job offer was revoked after she shared that she was planning to *conform* to a female gender stereotype by presenting as female and dressing in a feminine manner. On the other hand, Judge Robertson allowed the plaintiff to pursue a more traditional Title VII claim based on sex discrimination, referencing the theory from the lower court in *Ulane* that “discrimination against transsexuals *because they are transsexuals* is ‘literally’ discrimination ‘because of... sex.’” (See *Ulane v. Eastern Airlines, Inc.*, 581 F. Supp. 821, 825 (N.D. Ill. 1983), *rev’d*, 742 F.2d 1081 (7th Cir. 1984)). Judge Robertson further explained: “That approach strikes me as a straightforward way to deal with the factual complexities that underlie human sexual identity. These complexities stem from real variations in how the different components of biological sexuality – chromosomal, gonadal, hormonal, and neurological – interact with each other, and in turn, with social, psychological, and legal conceptions of gender.”
- e) *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007) – Despite holding that “transsexuals are not a protected class under Title VII,” the court allowed for the possibility that the *Price Waterhouse* sex stereotyping theory could apply to transgender individuals, “assum[ing], without deciding, that such a claim is available.” However, the court affirmed summary judgment in favor of the employer on the basis that it had offered a legitimate, non-pretextual justification for terminating the employee.
- f) *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) – Although the employee brought claims under the Equal Protection Clause rather than Title VII, the court relied on *Price*

Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1167 (1971). This sex amendment was the gambit of a congressman seeking to scuttle adoption of the Civil Rights Act. The ploy failed and sex discrimination was abruptly added to the statute’s prohibition against race discrimination. See *Bradford v. Peoples Natural Gas Co.*, 60 F.R.D. 432, 434–35 & n. 1 (W.D.Pa.1973).” *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984).

Waterhouse and other Title VII cases, explaining that “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.” The court cited numerous gender stereotyping cases, noting that “All persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype. ... An individual cannot be punished because of his or her perceived gender-nonconformity. Because these protections are afforded to everyone, they cannot be denied to a transgender individual. The nature of the discrimination is the same; it may differ in degree but not in kind, and discrimination on this basis is a form of sex-based discrimination[.]”

4) Equal Protection

- a) *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) – The 11th Circuit held that discriminating against a person on the basis of his or her gender nonconformity constitutes sex-based discrimination under the Equal Protection Clause, and that heightened scrutiny review applies to cases involving discrimination against transgender government employees. Discussing the concept of sex stereotyping, the court wrote, “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.” The court applied the sex stereotyping concept – established with respect to Title VII in the Supreme Court’s *Price Waterhouse* decision – to the Equal Protection Clause, citing several more recent Supreme Court cases that “reiterate that the Equal Protection Clause does not tolerate gender stereotypes.” In this particular case, a transgender employee of the Georgia General Assembly’s Office of Legislative Counsel was fired when the head of her office found out that she was transitioning from male to female, because he believed it was “inappropriate” and found it “unsettling” and “unnatural.” Applying heightened scrutiny, the court held that the government failed to show that it had a “sufficiently important governmental interest” for this discriminatory conduct. The court noted that hypothesized or post-hoc rationalizations cannot be used to meet the government’s burden, and that the defendant in this case only offered one after-the-fact justification – a speculative concern that other women might object to the plaintiff’s use of the women’s bathroom – which failed to satisfy the heightened scrutiny test.
- b) *Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir. 2004) – In addition to holding that Title VII prohibits discrimination against transsexual employees because it is a form of sex stereotyping, the court also held that the plaintiff had successfully stated a claim under 42 U.S.C. § 1983. “Individuals have a right, protected by the Equal Protection clause of the Fourteenth Amendment, to be free from discrimination on the basis of sex in public employment.” In this case, the court held that the same facts alleged to support the plaintiff’s Title VII gender discrimination claim “easily constitute a claim of sex

discrimination grounded in the Equal Protection Clause of the Constitution, pursuant to § 1983.”

5) EEOC Cases

Although EEOC decisions and positions are not binding on the OOC, they are sometimes referenced as informative or persuasive by the OOC, its Hearing Officers, and its Board.

- a) *Macy v. Holder*, EEOC Decision No. 0120120821, 2012 WL 1435995 (Apr. 20, 2012) – Complainant, a transgender woman, applied for a position with the Bureau of Alcohol, Tobacco and Firearms. She was still presenting as male when she interviewed, but she later informed the background check investigator that she was in the process of transitioning. She was not selected for the position and filed a complaint alleging that her non-selection was based on sex, gender identity, and sex stereotyping. The DOJ’s EEO office accepted and processed the sex discrimination part of the complaint through EEO procedures, but informed complainant that gender identity discrimination claim was not cognizable under Title VII and would therefore be processed solely under DOJ administrative complaint procedures. On appeal, the EEOC ruled that both the sex discrimination claim and the gender identity, change of sex and/or transgender status discrimination claim were cognizable under Title VII’s sex discrimination prohibition, and all of the claims could therefore be processed under Part 1614 of the EEOCs federal sector EEO complaints process. The EEOC explained its reasoning: “That Title VII’s prohibition on sex discrimination proscribes gender discrimination, and not just discrimination on the basis of biological sex, is important. If Title VII proscribed only discrimination on the basis of biological sex, the only prohibited gender-based disparate treatment would be when an employer prefers a man over a woman, or vice versa. But the statute’s protections sweep far broader than that, in part because the term ‘gender’ encompasses not only a person’s biological sex but also the cultural and social aspects associated with masculinity and femininity.”
- b) *Lusardi v. McHugh*, EEOC Decision No. 0120133395, 2015 WL 1607756 (Apr. 1, 2015) – Complainant, a transgender woman, proved that she was subjected to disparate treatment based on sex when she was denied access to the common female restroom facilities, and that she suffered an actionable hostile work environment based on sex both because she was prevented from using the women’s restroom and because her team leader was allowed to intentionally and repeatedly refer to her by male names and pronouns well after he knew that her gender identity was female.
- c) *Baldwin v. Foxx*, EEOC Decision No. 0120133080, 2015 WL 4397641 (July 15, 2015) – The EEOC remanded a sexual orientation discrimination claim that the agency’s EEO office refused to process. Complainant, a gay air traffic controller who was serving as a temporary supervisor, alleged that the FAA discriminated against him on the basis of sex when it refused to permanently promote him. His supervisor, who was involved in the selection process, had made several negative comments about Complainant’s sexual orientation (e.g. “We don’t need to hear about that gay stuff”) and on a number of occasions stated that Complainant was “a distraction in the radar room” when his

participation in conversations included mention of his male partner. The EEOC found that the agency improperly refused to process Complainant's sexual orientation discrimination claim under Title VII: "When an employee raises a claim of sexual orientation discrimination as sex discrimination under Title VII, the question is not whether sexual orientation is explicitly listed in Title VII as a prohibited basis for employment actions. It is not. Rather, the question for purposes of Title VII coverage of a sexual orientation claim is the same as any other Title VII case involving allegations of sex discrimination – whether the agency has 'relied on sex-based considerations' or 'taken gender into account' when taking the challenged employment action." EEOC explained that sexual orientation discrimination is sex discrimination because (1) it entails treating an employee less favorably because of the employee's sex; (2) it is associational discrimination on the basis of sex; and (3) it involves discrimination based on gender stereotypes.

- d) *Jameson v. Donahoe*, EEOC Decision No. 0120130992, 2013 WL 2368729 (May 21, 2013) – The EEOC reversed and remanded the Postal Service's dismissal of a transgender employee's sex harassment claims, which alleged that misuse of the employee's name and gender pronoun was part of an overall hostile work environment. The EEOC's decision explained that "supervisors and coworkers should use the name and pronoun of the gender that the employee identifies with in employee records and in communications with and about the employee. Intentional misuse of the employee's new name and pronoun may cause harm to the employee, and may constitute sex based discrimination and/or harassment."

6) Agency Guidance

- a) EEOC guidance – The Equal Employment Opportunity Commission (EEOC) provides extensive guidance regarding that agency's interpretation and application of Title VII's prohibition of sex discrimination as forbidding any employment discrimination based on gender identity or sexual orientation. See *What You Should Know About EEOC and the Enforcement Protections for LGBT Workers* and hyperlinked materials at https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm
- b) OPM regulations – In July 2014, the Office of Personnel Management (OPM) updated its nondiscrimination regulations, including provisions relating to sexual orientation and gender identity discrimination. See 79 Fed. Reg. 43919 (July 29, 2014). The applicable regulation now reads, in relevant part: "An employment practice must not discriminate on the basis of ... sex (including pregnancy and gender identity), ... sexual orientation, ... or any other non-merit-based factor, or retaliation for exercising rights with respect to the categories enumerated above, where retaliation rights are available." 5 C.F.R. § 300.103(c).
- c) Joint federal agency guidance – OPM, in cooperation with the EEOC, the Office of Special Counsel (OSC), and the Merit Systems Protection Board (MSPB), has published a guide entitled "Addressing Sexual Orientation and Gender Identity Discrimination in Federal Civilian Employment: A Guide to Employment Rights, Protections, and

Responsibilities.” This document is available at <https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/addressing-sexual-orientation-and-gender-identity-discrimination-in-federal-civilian-employment.pdf>

IV. Restroom Access for Transgender Workers

An important issue facing transgender individuals in the workplace is restroom access – specifically, whether employers allow transgender employees to use the restroom corresponding to their gender identity, or whether these workers are required to use the restroom corresponding to the gender they were assigned at birth or gender-neutral facilities. In addition to Title VII cases addressing this issue, we also include a discussion of some recent high-profile cases arising in the educational context under Title IX, because the challenges faced by transgender students and transgender employees are similar, and the courts often employ a similar analysis under Title IX and Title VII.

1) Employment cases

- a) *Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001 (D. Nev. 2016) – Transgender school police officer in the process of transitioning from female to male alleged that the school’s refusal to let him use the men’s restroom violated Title VII. The court granted summary judgment in favor of the employee on this claim, on the basis of sex stereotyping.
- b) *Mickens v. Gen. Elec. Co.*, No. 3:16CV-00603-JHM, 2016 WL 7015665 (W.D. Ky. Nov. 29, 2016) – Following a gender stereotyping theory, the court held that a transgender male’s Title VII discrimination complaint survived dismissal where he alleged harassment based on, *inter alia*, his employer’s refusal to allow him to use the men’s room near his work station and its discipline of him for returning late from using a bathroom farther away.
- c) *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007) – The employer did not allow the plaintiff, a transgender female bus driver who still had male genitalia, to use public women’s restrooms while on duty. The court affirmed summary judgment in favor of the employer, holding that “However far *Price Waterhouse* reaches, this court cannot conclude it requires employers to allow biological males to use women’s restrooms. Use of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes.” The court found that the Transit Authority’s concern over potential liability and public complaints for allowing a biologically male driver to use public women’s restrooms was a legitimate, non-pretextual reason for the employee’s termination.
- d) *Kastl v. Maricopa Cty. Cmty. Coll. Dist.*, 325 F. App’x 492 (9th Cir. 2009) – Transgender female who was banned from using the women’s restroom established a prima facie case of discrimination under Title VII based on gender stereotyping, but failed to rebut the employer’s evidence that it took the action for safety reasons. Summary judgment was therefore granted in favor of the employer.

- e) *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) – In an Equal Protection case, under heightened scrutiny review, the court held that the employer’s purported justification for firing the transgender female plaintiff – a concern that other women might object to the employee’s use of the women’s restroom – was entirely speculative and therefore did not demonstrate a sufficiently important governmental purpose for the employee’s termination.

2) Recent Title IX cases

- a) *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017) – Transgender boy challenged the school district’s ban on him using the boys’ restroom. The district court granted a preliminary injunction and issued an order granting the student access to the boys’ restroom. The Seventh Circuit affirmed, holding that the student showed a likelihood of success on the merits under both Title IX (under a sex stereotyping theory like that applied in Title VII cases) and the Equal Protection Clause (under heightened scrutiny review). The court found that the harm to the student was well documented, whereas any harm to the school district was speculative.
- b) *Dodds v. U.S. Dep’t of Educ.*, 845 F.3d 217 (6th Cir. 2016) – The district court issued a preliminary injunction ordering the school district to allow a transgender girl to use the girls’ restroom, and the Sixth Circuit Court of Appeals denied the school district’s motion to stay the injunction. The court held that the school district failed to show a likelihood of success on appeal, because sex stereotyping based on gender non-conformity is impermissible discrimination. The court also held that the school district’s allegations of harm did not rise to the level of “irreparable harm” that would be required to stay the injunction, whereas irreparable harm would result to the student, whom the court described as “a vulnerable eleven year old with special needs” for whom exclusion from the bathroom of her identified gender “already had substantial and immediate adverse effects on [her] daily life and well-being[.]” Finally, the court noted that “public interest weights strongly against a stay of the injunction. The district court issued the injunction to protect [the student’s] constitutional and civil rights, a purpose that is always in the public interest.”
- c) *G.G. v. Gloucester Cty. Sch. Bd.*, 853 F.3d 729 (4th Cir. 2017) – The school board refused to allow a transgender boy to use the boys’ restroom at school, and the boy sought a preliminary injunction. The district court initially denied the injunction, but the appellate court reversed, according deference to a January 7, 2015 opinion letter issued by the Department of Education’s Office for Civil Rights, which interpreted the relevant regulations as requiring schools to allow students to use the restroom that corresponds to their gender identity. However, on February 22, 2017, the Department of Education and Department of Justice issued a “Dear Colleague Letter” rescinding the previous administration’s guidance, upon which the Fourth Circuit’s decision had been based. Based on that change, the Supreme Court vacated the Circuit Court’s decision and remanded the case, and the Circuit Court ultimately vacated the preliminary injunction, such that the student was once again forbidden from using the boys’ restroom. The

Supreme Court had agreed to hear the case, but in light of the new administration's policy change, the Justices removed the case from the Court's calendar despite both parties' desire to move forward.

- d) *Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657 (W.D. Pa. 2015) – Transgender male college student was expelled for continuing to use the men's restrooms after having been repeatedly disciplined for doing so. The student alleged that the school violated the Equal Protection Clause and Title IX. The court dismissed the complaint, holding that the plaintiff failed to state a claim under either theory. The court applied a rational basis review to the Equal Protection claim because neither the Supreme Court nor the 3rd Circuit had recognized transgender individuals as a suspect class, but held that even under a heightened scrutiny review the school's justification for its rule – the need to ensure the privacy of its students to disrobe and shower outside of the presence of members of the opposite sex – was substantially related to a sufficiently important government interest. The court further found significance in the distinction between “birth sex” and “gender” in this case because there was no evidence that the plaintiff had yet undergone sex reassignment surgery or updated the required documentation. The Title IX claim was similarly rejected based on a distinction between “sex” and “gender,” the former of which can form the basis for illegal discrimination but the latter of which – according to this court – cannot. Finally, the court held that the *Price Waterhouse* sex stereotyping theory did not apply to the facts of this case. In dicta, the court did note that “society's views of gender, gender identity, sex, and sexual orientation have significantly evolved in recent years. Likewise, the Court is mindful that the legal landscape is transforming as it relates to gender identify, sexual orientation, and similar issues, especially in the context of providing expanded legal rights. Within the context of these expanding rights and protections arises the profound question of self-identify, as exemplified by this case. But, while this case arises out of a climate of changing legal and social perceptions related to sex and gender, the question presented is relatively narrow and the applicable legal principles are well-settled.”

3) Agency guidance

- a) OSHA guidance – The Occupational Safety and Health Administration (OSHA) has issued a “Guide to Restroom Access for Transgender Workers,” available at <https://www.osha.gov/Publications/OSHA3795.pdf>. Under the OSHA sanitation standard, employers must provide toilet facilities to their employees, with certain specifications depending on the number of employees at a work site. 29 C.F.R. § 1910.141(c). Although there is no standard addressing the use of toilet facilities by transgender workers specifically, OSHA's guidance document sets forth “best practices,” governed by the “core principle” that “All employees, including transgender employees, should have access to restrooms that correspond to their gender identity.” The guidance explains why restricting the use of bathrooms corresponding to a person's gender identity

may lead to physical injury or illness. Links to model policies and other resources are provided in the document.

- b) EEOC guidance – The Equal Employment Opportunity Commission (EEOC) has resources on its web site regarding Bathroom/Facility Access and Transgender Employees, available at <https://www.eeoc.gov/eeoc/publications/fs-bathroom-access-transgender.cfm>.
- c) OPM guidance – the Office of Personnel Management (OPM) provides guidance on a variety of issues facing transgender workers and their employers, including restroom access. This guidance is available at <https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance/>.

V. Other Issues

In addition to the types of discrimination arguably covered by Title VII and the Equal Protection Clause, LGBT employees may face particular issues implicating other statutes applied to the Legislative Branch by the CAA, including the Family and Medical Leave Act (FMLA), the Americans with Disabilities act (ADA), and the Federal Service Labor-Management Relations Statute (FSLMRS). Moreover, in a fascinating example of competing interests under the same statute, some employers whose policies protect LGBT workers from discrimination have faced lawsuits from other employees arguing that those policies constitute *religious* discrimination under Title VII. At least one court has also recognized a Religious Freedom Restoration Act (RFRA) defense to discrimination against LGBT employees.

1) Family and Medical Leave Act

- a) Current Regulations – The current FMLA substantive regulations issued by the OOC Board of Directors date back to 1996, and in section 825.113 “spouse” is defined as “a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized.”
- b) Pending OOC Regulations – On June 22, 2016, the OOC Board issued a Notice of Adoption of Regulations and Transmittal for Congressional Approval, which appeared in the Congressional Record at 162 Cong. Rec. H4128 and 162 Cong. Rec. S4475. Following the definition of “spouse” adopted by the Department of Labor in February 2015, the pending regulations define “spouse” as “a husband or wife. For purposes of this definition, husband or wife refers to the other person with whom an individual entered into marriage as defined or recognized under state law for purposes of marriage in the State in which the marriage was entered into or, in the case of a marriage entered into outside of any State, if the marriage is valid in the place where entered into and could have been entered into in at least one State. This definition includes an individual in a same-sex or common law marriage that either: (1) Was entered into in a State that recognizes such marriages; or (2) If entered into outside of any State, is valid in the place where entered into and could have been entered into in at least one State.”

- c) *Duane v. IXL Learning, Inc.*, No. C 17-00078 WHA, 2017 WL 2021358 (N.D. Cal. May 12, 2017) – A transgender male alleged that his employer violated the FMLA by terminating him because he took FMLA leave in connection with a phalloplasty. The court found that because the company allegedly fired the plaintiff only 8 days after his return from leave, he had stated a plausible claim for FMLA interference. The parties did not dispute that the plaintiff’s leave was covered under the FMLA.

2) Americans with Disabilities Act

- a) Statutory exclusions – “For purposes of the definition of ‘disability’ in section 12102(2) of this title, homosexuality and bisexuality are not impairments and as such are not disabilities under this chapter.” 42 U.S.C. § 12211(a). “Under this chapter, the term ‘disability’ shall not include... transvestism, transsexualism... gender identity disorders not resulting from physical impairments, or other sexual behavior disorders[.]” 42 U.S.C. § 12211(b)(1).
- b) *Blatt v. Cabela’s Retail, Inc.*, No. 5:14-cv-04822, 2017 WL 2178123 (E.D. Pa. May 18, 2017) – The ADA excludes from its definition of disability “transvestism, transsexualism... [and] gender identity disorders not resulting from physical impairments.” The plaintiff in *Blatt* claimed that this exclusion of “gender identity disorders” violates the Equal Protection Clause of the Constitution. Following the doctrine of constitutional-avoidance, the district court judge narrowly interpreted the ADA statute to avoid addressing this constitutional question. The court held that gender dysphoria is a distinct condition from gender identity disorder, and therefore *not* excluded from the ADA’s definition of disability. The court understood “gender identity disorder” to refer only to “the condition of identifying with a different gender,” whereas gender dysphoria “is characterized by clinically significant stress and other impairments that may be disabling.” The court observed that this holding is consistent with the ADA’s stated purpose of providing a “comprehensive” mandate for the elimination of discrimination against individuals with disabilities.
- c) *Johnson v. Fresh Mark, Inc.*, 337 F. Supp. 2d 996 (N.D. Ohio 2003), *aff’d*, 98 F. App’x 461 (6th Cir. 2004) – This case represents the traditional interpretation of the ADA prior to *Blatt*. Plaintiff, a transgender woman, sued her former employer under the ADA for not providing “alternative restroom facilities” as a reasonable accommodation for her gender identity disorder. She claimed her gender identity disorder resulted from a physical impairment, and thus her condition was not statutorily excluded from coverage. The court dismissed this claim by explaining that “the plain language of the statute indicates that transsexualism is excluded from the definition of disability no matter how it is characterized, whether as a physical impairment, a mental disorder, or some combination thereof.” Judge Economus goes on to say that even if “transsexualism was not explicitly excluded,” the plaintiff’s case would fail because she did not specify how major life activities were affected by her condition, a prerequisite for ADA coverage.

3) Unfair Labor Practices

- a) 5 U.S.C. § 7114(a)(1) imposes on labor organizations a duty of fair representation, requiring them to “represent[] the interests of all employees in the unit it represents without discrimination...” In addition, 5 U.S.C. § 7116(b)(4) makes it an unfair labor practice for a labor organization “to discriminate against an employee with regard to the terms or conditions of membership in the labor organization on the basis of ... sex...”
- b) *Fowlkes v. Ironworkers Local 40*, 790 F.3d 378 (2d Cir. 2015) – Plaintiff, a transgender male, alleged that the union refused to refer him for work through its hiring hall because of his transgender status and out of retaliation. The court held that the plaintiff stated a claim under the National Labor Relations Act, allowing for the possibility that discrimination based on gender identity may constitute a breach of the duty of fair representation.
- c) *Gilbert v. Country Music Ass’n, Inc.*, 432 F. App’x 516 (6th Cir. 2011) – An openly gay union member successfully stated a claim for breach of the duty of fair representation where he alleged that the Local abused its power by blacklisting him from future job opportunities despite his qualifications and experience and by undermining his efforts to obtain other work. “The duty of fair representation requires a union to ‘serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.’” (*See Vaca v. Sipes*, 386 U.S. 171 (1967)). Addressing the plaintiff’s allegations that the Local blacklisted him and undermined his work opportunities, the court held that, “If true, this conduct falls ‘so far outside a wide range of reasonableness that it is wholly irrational,’ and constitutes ‘arbitrary’ conduct in violation of the union’s duty of fair representation.”

4) Religious Discrimination/Religious Freedom Restoration Act

- a) *Terveer v. Billington*, 34 F. Supp. 3d 100 (D.D.C. 2014) (Judge Colleen Kollar-Kotelly) – The plaintiff, a gay man, alleged that his conservative Catholic supervisor regularly lectured the plaintiff about his homosexuality and about the plaintiff’s different religious views generally. In addition to allowing the plaintiff’s Title VII sex discrimination claim to proceed, the court held that the plaintiff also successfully stated a Title VII claim for religious discrimination, because he “alleged sufficient facts to establish a claim of religious discrimination for failure to follow his employer’s religious beliefs.”
- b) *Cruzan v. Special Sch. Dist. No. 1*, 294 F.3d 981 (8th Cir. 2002) – Female teacher complained to school authorities about a transgender female coworker using the women’s restroom, but the school continued to allow the transgender employee to use the restroom corresponding to her gender identity. The teacher filed claims alleging religious discrimination and a hostile work environment. The court rejected the plaintiff’s religious discrimination claim, holding that she had failed to disclose to the employer that her complaint was based on her religious views, and that even if she had, the employer allowing a transgender coworker to use the women’s room did not constitute an adverse employment action against the plaintiff. The court also rejected the plaintiff’s hostile work environment claim, holding that a reasonable person would not have found the

work environment hostile or abusive, especially because other restrooms were available for plaintiff's use and because the plaintiff did not allege any inappropriate conduct other than the transgender coworker's mere presence in the restroom.

- c) *Matthews v. Wal-Mart Stores, Inc.*, 417 F. App'x 552 (7th Cir. 2011) – Wal-Mart fired an employee after she screamed at a gay coworker that homosexuals are sinners who are going to hell, which the company found to be a violation of its zero-tolerance Discrimination and Harassment Prevention Policy. The employee brought a religious discrimination claim, alleging that Wal-Mart fired her because of her religious beliefs about homosexuality, but the court disagreed, explaining that “if Matthews is arguing that Wal-Mart must permit her to admonish gays at work to accommodate her religion, the claim fails. ... Wal-Mart fired her because she violated company policy when she harassed a coworker, not because of her beliefs, and employers need not relieve workers from complying with neutral workplace rules as a religious accommodation if it would create an undue hardship. In this case, such an accommodation could place Wal-Mart on the ‘razor’s edge’ of liability by exposing it to claims of permitting workplace harassment.”
- d) *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004) – As part of a diversity campaign, the company displayed posters featuring company employees captioned with their race, age, or sexual orientation. In response to the posters that read “gay,” an employee posted Biblical verses in his cubicle that address homosexuality as a sin, in a typeface large enough for coworkers, customers, and others to see. His supervisor removed the scriptures, based on a determination that they were offensive to certain employees and that posting the verses violated the company's anti-harassment policy. The employee acknowledged that the passages were “intended to be hurtful” and that he hoped his gay and lesbian coworkers would read the passages, repent, and be saved. He requested that the company accommodate his religious beliefs either by allowing him to keep the scriptures posted in his cubicle or by removing the “gay” diversity posters (in which case he would take down the scriptures). The company refused both requests, but the employee put the scriptures back up and was eventually terminated for insubordination, and subsequently brought a claim for religious discrimination under Title VII. The Ninth Circuit affirmed summary judgment in favor of the company. It held that the employee's disparate treatment claim failed because “it is evident that he was discharged, not because of his religious beliefs, but because he violated the company's harassment policy by attempting to generate a hostile and intolerant work environment and because he was insubordinate in that he repeatedly disregarded the company's instructions to remove the demeaning and degrading postings from his cubicle.” The employee's claim for failure to accommodate his religious belief also failed, because “it is readily apparent that the only accommodations that Peterson was willing to accept would have imposed undue hardship upon Hewlett-Packard.” The company satisfied its duty to negotiate possible accommodations by holding at least four meetings with the plaintiff, during which “they explained the reasons for the company's diversity campaign, allowed Peterson to explain fully his reasons for his postings, and

attempted to determine whether it would be possible to resolve the conflict in a manner that would respect the dignity of Peterson's fellow employees. Peterson, however, repeatedly made it clear that only two options for accommodation would be acceptable to him," both of which the court found would impose undue hardship on the company: "Peterson's first proposed accommodation would have compelled Hewlett-Packard to permit an employee to post messages intended to demean and harass his co-workers. His second proposed accommodation would have forced the company to exclude sexual orientation from its workplace diversity program. Either choice would have created undue hardship for Hewlett-Packard because it would have inhibited its efforts to attract and retain a qualified, diverse workforce, which the company reasonably views as vital to its commercial success; thus, neither provides a reasonable accommodation."

- e) *Buonanno v. AT&T Broadband, LLC*, 313 F. Supp. 2d 1069 (D. Colo. 2004) – The company's diversity policy charged employees "with the responsibility to fully recognize, respect, and value the differences among all of us." The court found that "Buonanno was fully prepared to comply with the principles underlying the Diversity Philosophy; he recognized that individuals have differing beliefs and behaviors and he would not discriminate against or harass any person based on that person's differing beliefs or behaviors. However, he could not comply with the challenged language insofar as it apparently required him to 'value' the particular belief or behavior that was repudiated by Scripture." Accordingly, the plaintiff refused to sign the "Certificate of Understanding" that would acknowledge his agreement to "abide by" the language in the diversity policy, and this refusal to sign led to his termination. After a bench trial, the court rejected Buonanno's direct discrimination claim, holding that the company did not fire him for his religious beliefs but rather for his refusal to sign its diversity policy. However, the court ruled in Buonanno's favor on his failure-to-accommodate claim, holding that the company failed to carry its burden to "either show that it offered a reasonable accommodation, or to show that it was unable reasonably to accommodate Buonanno's religious needs without undue hardship on the conduct of its business." The court held if the company had done a better job discussing Buonanno's concerns with him, it would have realized that his only objection was to the vague and ambiguous language in the policy that seemed to require him to "value" homosexuality, and that "Buonanno's promise to recognize that there were differences between what he believed and did and what his co-workers believed and did and to treat everyone with respect regardless of their beliefs and behavior would have been sufficient to accomplish the goals of the challenged language."
- f) *Sommers v. EEOC*, No. 6:13-00257, 2014 WL 1268582 (D.S.C. Mar. 26, 2014) – An EEOC investigator filed a religious discrimination claim against the EEOC after it refused his request to be excused from working on sexual orientation discrimination cases. The employee argued that he was being required to enforce the EEOC's policy that Title VII prohibits discrimination on the basis of sexual orientation, which he felt conflicted with his sincerely held religious beliefs and Biblical teachings about homosexuality, and would therefore violate his conscience. The court held that the

employee had failed to show that he suffered an adverse employment action, and noted that “Plaintiff does little to dispute this finding in his objections or in his reply memorandum other than arguing that refusal to make a reasonable accommodation, in and of itself, violates Title VII” – an argument which the court found “unavailing.” The magistrate judge, whose recommendations the court adopted, found that “An adverse employment action must amount to more than an insignificant alteration of job responsibilities” and that “Plaintiff has not alleged any change to the terms, conditions, or benefits of his employment. Plaintiff does not allege that his day-to-day job duties will change in any way, instead he alleges that he may now be asked to investigate cases based on sexual orientation discrimination, a class alleged to have recently been added to the list of protected classes by the EEOC.” (It is worth noting that at the time he filed his lawsuit the plaintiff had not yet been assigned to investigate any such cases, and although he subsequently was given such an assignment, the court held that it “cannot conclude that Plaintiff’s new accommodation request casts any doubt on the well-reasoned findings of the Magistrate Judge. To the contrary, Plaintiff’s new accommodation request of March 10, 2014—without any accompanying response from the EEOC as to whether the request was granted or denied—only highlights the importance of the administrative exhaustion process.”) Finally, the court noted that “it is well settled that federal employees are subject to Title VII and that other statutory remedies for discrimination in employment are preempted by Title VII” and thus rejected the plaintiff’s claims that were brought under other theories.

- g) *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d 837 (E.D. Mich. 2016) – A funeral home admitted to firing a transgender employee for violating its sex-specific dress code, claiming an exemption from Title VII under the RFRA, and the court ruled in favor of the employer. The employee, then known as Anthony Stephens, had informed his employer that he intended to change his name and begin presenting as a woman – including by wearing skirt suits to work – as part of a male-to-female transition. Stephens was terminated shortly thereafter. The court held that the EEOC had stated a valid claim based on a sex stereotyping theory. However, the funeral home owner argued that the dress code was based on his Christian faith, that his business openly featured religious messaging and iconography, and that he “would feel significant pressure to sell the business and give up [his] life’s calling of ministering to grieving people as a funeral home director and owner” if he were forced to allow an employee to dress inconsistently with his or her biological sex. The court found that the employer’s belief was a sincerely-held religious belief, and that the application of “the body of sex-stereotyping case law... would impose a substantial burden on its ability to conduct business.” Under the RFRA, once the employer established a substantial burden, it was entitled to an exemption from compliance with Title VII unless the EEOC could meet a “demanding two-part burden”: first, that forcing the employer to allow Stephens to wear a skirt suit was in furtherance of a compelling governmental interest; and second, that allowing Stephens to wear a skirt suit would be “the least restrictive means of furthering that compelling governmental interest.” The court assumed without deciding that the EEOC

had met the first part of the test – i.e., that eliminating workplace discrimination is a compelling governmental interest – but went on to hold that the EEOC failed to show that there was no less restrictive means of furthering that interest than allowing Stephens to wear a skirt suit. Therefore, the funeral home qualified for an exemption under the RFRA and was granted summary judgment. The court noted repeatedly that its holding is limited to “the facts and circumstances of this unique case.” **STATUS**: The decision is currently on appeal to the Sixth Circuit.