



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Office of Commissioner Chai R. Feldblum

**Employment Protections for LGBT Persons under Federal Sex Discrimination Law
&
The Continuing Need for Explicit Laws Protecting LGBT People**

- Title VII of the Civil Rights Act of 1964 prohibits private employers from discriminating on the basis of sex. The Equal Employment Opportunity Commission (EEOC) interprets this law to provide protection for lesbian, gay, bisexual and transgender (LGBT) people.
- Any LGBT person who has experienced workplace discrimination on the basis of sexual orientation or gender identity may file a charge with any one of EEOC's 53 field offices claiming sex discrimination. A charge must be filed within 300 days (or sometimes 180 days) from the date of the discriminatory act. For information on how to file a charge, visit <http://www.eeoc.gov>.
- Starting January 2013 (when the EEOC began tracking such charges) and continuing through 2014, the EEOC has received and resolved hundreds of charges from individuals alleging employment discrimination on the basis of sexual orientation, gender identity or both. (See *The Practical Numbers* below.)
- Federal and state courts have not yet taken a uniform position regarding the scope of protection for LGBT people under existing sex discrimination law. Hence, this is an evolving and developing area of the law. (See *The Legal Details* below.)
- In June 2014, President Obama issued an Executive Order explicitly prohibiting discrimination on the basis of sexual orientation or gender identity by federal contractors.
- A strong federal law that provides explicit protection for those employed in the private sector, and state and local governments, as well as strong state and local laws providing similar clarity, continue to be necessary.
- Federal, state and local employment civil rights laws that **explicitly** protect LGBT people will raise **visibility** regarding such protection, will be a **deterrent** to discrimination, and will provide **certainty** that courts across the country will enforce the protections of these laws for LGBT people.

The Legal Details:

Gender Identity and Title VII: A Timeline of Some Key Decisions

- In 1974, the EEOC concluded that discrimination on the basis of gender identity was not sex discrimination under Title VII.ⁱ
- Most courts that initially considered the question of whether discrimination based on gender identity was a form of sex discrimination decided that it was not.ⁱⁱ
- In *Price Waterhouse v. Hopkins*, the Supreme Court ruled that individuals can establish violations of Title VII based on evidence that an employer discriminated against them for failure to conform to gender-stereotypes such as traditional notions of masculinity or femininity.ⁱⁱⁱ
- Post-*Price Waterhouse*, several federal circuit courts of appeal concluded that discrimination on the basis of gender identity is a form of impermissible gender stereotyping.^{iv}
- In *Macy v. Holder*, a decision issued in April 2012, the EEOC stated that discrimination on the basis of gender identity is impermissible sex discrimination, both because it is a form of impermissible gender stereotyping and because it impermissibly takes sex into account.^v
- In September 2014, the EEOC filed its first two lawsuits under Title VII on behalf of transgender employees claiming employment discrimination.^{vi}

EEOC field offices accept and investigate all charges of discrimination on the basis of gender identity as charges alleging discrimination on the basis of sex.

Sexual Orientation and Title VII: A Timeline of Some Key Decisions

- In 1976, the EEOC concluded that discrimination on the basis of sexual orientation was not impermissible sex discrimination under Title VII.^{vii}
- Most courts have held that discrimination on the basis of sexual orientation is not impermissible sex discrimination under Title VII.^{viii}
- In *Price Waterhouse v. Hopkins*, the Supreme Court ruled that individuals can establish violations of Title VII based on evidence that an employer discriminated against them for failure to conform to gender-stereotypes such as traditional notions of masculinity or femininity.^{ix} In *Oncale v. Sundowner Offshore Servs.*, the Supreme Court made it clear that Title VII's prohibition of discrimination "because of . . . sex" prohibits same-sex sexual harassment based on a plain reading of the statutory text.^x
- Post-*Price Waterhouse* and *Oncale*, courts have used the gender stereotyping theory to provide protection to some lesbian, gay, bisexual and heterosexual individuals under Title VII.^{xi} A district court has also found some protection based on evidence that a company treated a male

employee with a male spouse differently that it treated female employees with male spouses.^{xii} There remains a dispute about how (or whether) evidence of discrimination on the basis of sexual orientation can logically be separated from evidence of discrimination on the basis of gender stereotypes.^{xiii}

- In cases decided in 2011, 2013 and 2014, the EEOC ruled that federal employees discriminated against on the basis of sexual orientation could establish violations of Title VII based on the sex stereotyping theory that men and women should be sexually attracted to (and should marry) individuals of the opposite gender.^{xiv}

EEOC field offices accept all charges of discrimination on the basis of sexual orientation and investigate them to determine if they state a claim of sex discrimination.

The Practical Details:

- Calendar Year 2013: EEOC offices received 834 charges raising allegations on the basis of Sex-Sexual Orientation (coded as “GO”) and 199 charges alleging the basis of Sex-Gender Identity/Transgender (coded as “GT”). Of this number, 33 charges were filed with the concurrent basis of GO and GT and are included in the GO and GT totals.
- Calendar Year 2014: As of 6/30/2014, EEOC offices received 459 charges raising allegations on the basis of Sex-Sexual Orientation (“GO”) and 81 charges alleging the basis of Sex-Gender Identity/Transgender (“GT”). Of this number, 9 charges were filed with the concurrent basis of GO and GT and are included in the GO and GT totals.
- The EEOC also tracks the number of charges *resolved* in a given year. In Calendar Year 2013, EEOC staff recorded 417 resolutions of LGBT (GO/GT) charges. Of these 417, 36 were recorded as resolved at the optional mediation stage of our process and 329 were recorded as resolved in the enforcement stage. The 329 charges recorded as resolved in enforcement included 12 settlements, 15 withdrawals of charges with benefits to the charging party, 9 charges where cause was found and conciliation entered into (6 were successful, 3 were unsuccessful), and 283 charges where we either found no cause or closed the charge with a right to sue letter at the request of the charging party.
- In Calendar Year 2014 (as of 9/18/14), EEOC staff recorded an additional 614 LGBT (GO/GT) claim resolutions. Of these 614, 44 were recorded as resolved in the optional mediation stage of our process and 515 were recorded as resolved in the enforcement stage. The 515 charges recorded as resolved in enforcement include 24 settlements, 18 withdrawals of charges with benefits to the charging party, 11 charges where cause was found and conciliation entered into (3 successful and 8 unsuccessful), and 462 charges where we either found no cause or closed the charge with a right to sue letter at the request of the charging party.

ⁱ EEOC Decisions (CCH) ¶6499 (Sept. 24, 1974).

ⁱⁱ *See, e.g. Ulane v. Eastern Airlines*, 742 F.2d. 1031 (7th Cir. 1984).

ⁱⁱⁱ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

^{iv} See *Schwenk v. Hartford*, 204 F. 3d 1187 (9th Cir. 2000); *Smith v. City of Salem, Ohio*, 378 F. 3d 566 (6th Cir. 2004); *Glenn v. Brumby*, 663 F. 3d 1312 (11th Cir. 2011).

^v *Macy v. Holder*, EEOC DOC 0120120821, 2012 WL 1435995 (E.E.O.C.) (April 20, 2012).

^{vi} *EEOC v. Lakeland Eye Clinic, P.A.* (M.D. Fla. Civ. No. 8:14-cv-2421-T35 AEP filed Sept. 25, 2014); *EEOC v. R.G. & G.R. Harris Funeral Homes Inc.* (E.D. Mich. Civ. No. 2:14-cv-13710-SFC-DRG filed Sept. 25, 2014).

^{vii} EEOC Decision (CCH) ¶6495 (March 2, 1976).

^{viii} For a sample, see *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979), *overruled on other grounds*, *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 875 (9th Cir. 2001); *Hamner v. St. Vincent Hosp. & Health Ctr., Inc.*, 224 F.3d 701 (7th Cir. 2000); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757 (6th Cir. 2006).

^{ix} *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

^x *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79–80 (1998) (“[M]ale-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.”)

^{xi} See e.g., *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285 (3rd Cir. 2009); *EEOC v. Boh Brothers*, 731 F.3d 444 (5th Cir. 2013) (en banc); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212 (D. Or. 2002); *Terveer v. Billington*, 2014 WL 1280301 (D.D.C. March 31, 2014).

^{xii} *Hall v. BNSF Railway Company*, 2014 WL 4719007 (W.D. Wash., 2014).

^{xiii} See e.g., *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000); *Ayala-Sepulveda v. Municipality of San German*, 661 F. Supp. 2d 130 (D.P.R. 2009).

^{xiv} See *Veretto v. United States Postal Service*, EEOC DOC 0120110873, 2011 WL 2663401 (E.E.O.C.) (July 1, 2011) (sex discrimination claim based on allegation that supervisor harassed a male employee because supervisor was motivated by sexual stereotype that men should only marry women may proceed under Title VII); *Castello v. United States Postal Service*, EEOC DOC 0520110649, 2011 6960810 (E.E.O.C.) (December 20, 2011) (sex discrimination claim alleging that supervisor harassed a female employee because supervisor was motivated by sexual stereotype that having relationships with men is an essential part of being a woman may proceed under Title VII); *Baker v. Social Security Administration*, EEOC DOC 0120110008, 2013 WL 1182258 (E.E.O.C.) (January 11, 2013) (accepting claim of sex discrimination under Title VII based on allegations that male employee was mocked as effeminate and told that his flamboyant mannerisms were unsuited to his workplace and finding that the allegations, if true, were sufficient to overcome agency’s motion for summary judgment); *Culp v. Dep’t of Homeland Security*, EEOC DOC 0720130012, 2013 WL 2146756 (E.E.O.C.) (May 7, 2013) (accepting claim of sex discrimination under Title VII based on allegation that female employee was discriminated against when counseled numerous times that taking lunch breaks with a lesbian colleague created an improper perception but finding that allegations, even if true, were not sufficient to overcome agency motion for summary judgment); *Brooker v. United States Postal Serv.*, EEOC DOC 0520110680 (E.E.O.C.), 2013 WL 4041270 (May 20, 2013) (reversing finding that claim of sex discrimination under Title VII based on allegations that male employee was harassed for being gay was an isolated incident and deciding that claim was based on ongoing allegations of harassment for being gay); *Complainant v. Dep’t of Homeland Sec.*, EEOC DOC 0120110576 (E.E.O.C.), 2014 WL 4407457 (August 20, 2014)(reaffirming prior findings that federal employees discriminated against on the basis of sexual orientation can establish violations of Title VII based on the sex stereotyping theory).