Civil Rights

Circumventing Congress: The Use of Sex-Stereotyping Theory to Expand Protected Classes Under Title VII

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Note from the Editor:

This article is about the EEOC's use of the Supreme Court's sex-stereotyping theory to attempt to extend Title VII to cover sexual orientation and gender identity. The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. Whenever we publish an article that advocates for a particular position, as here, we offer links to other perspectives on the issue, including ones opposed to the position taken in the article. We also invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

• Kevin McGowan and Chris Opfer, *EEOC Sexual Orientation Ruling Brings Strong Reactions*, BNA Daily Labor Report (July 20, 2015), *available at* http://www.bna.com/eeoc-sexual-orientation-n17179933661/.

• J. Randall Coffey, *Right Result, Wrong Path? The Meaning of "Sex" Under Title VII*, ABA Labor & Employment Law Conference (November 2015), *available at* http://www.americanbar.org/content/dam/aba/events/labor_law/2015/november/annual/papers/25.authcheckdam.pdf.

• Dana Beyer, Jillian T. Weiss, and Riki Wilchins, *New Title VII and EEOC Rulings Protect Transgender Employees*, Transgender Law Center (2014), *available at* http://transgenderlawcenter.org/wp-content/uploads/2014/01/TitleVII-Report-Final012414.pdf.

• *Sexual Orientation Discrimination*, Workplace Fairness, *available at* http://www.workplacefairness.org/sexual-orientation-discrimination.

• *EEOC Decides that Sexual Orientation Discrimination = Sex Discrimination*, Workplace Prof Blog (July 17, 2015), *available at* http://lawprofessors.typepad.com/laborprof_blog/2015/07/eeoc-decides-that-sexual-orientation-discrimination-sex-discrimination.html.

I. Introduction

Neither sexual orientation nor gender identity is a protected category under Title VII of the Civil Rights Act of 1964 ("Title VII"), which prohibits discrimination in employment "because of . . . race, color, religion, sex, or national origin."[1] The term "sex" was not defined in the statute,[2] and the legislative history includes few references that can be used to help determine the intended extent of this protected class. Hence, the question of whether discrimination on the basis of sex could be interpreted to encompass gender identity[3] and sexual orientation[4] has been left to the courts to decide.[5]

II. Early Views On The Meaning of Sex-Based Discrimination Under Title VII

In the early years following the adoption of Title VII, few would have argued that the protections provided on the basis of sex extended to protect individuals on the basis of sexual orientation or gender identity. The Equal Employment Opportunity Commission ("EEOC") is charged with enforcing Title VII,[6] but the original EEOC commissioners did not consider the prohibition on sex-based discrimination a broad concept.[7] In fact, one Executive Director of the EEOC even said that "no man should be required to have a male secretary."[8] Although it was generally accepted that this statutory language offered protection to women, who were a minority in the workforce at the time, it was not until 1983 that the United States Supreme Court held that Title VII made it illegal for employers to discriminate against individuals because they were male.[9] Until this decision in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, it was not firmly established law that Title VII offered males the same protection against sex-based discrimination that it did to females.[10] The law did not evolve quickly, and it also took until 1983 for a federal circuit court of appeals to recognize that claims of sexual harassment were viable under Title VII as constituting a form of sex-based discrimination.[11]

III. Courts Reject Early Attempts to Expand Title VII's Protection to Encompass Discrimination Based on Sexual Orientation and Gender Identity

The theory that Title VII's prohibition against sex-based discrimination extended to sexual orientation or gender identity proved more controversial than the theories that it offered the same protection to men that it did to women and that it protected against sexual harassment. Thus, it is not surprising that the plaintiffs who brought the initial claims to try to push the limits of sex discrimination beyond its traditional boundaries to include sexual orientation experienced little success. One of the earliest cases to consider whether Title VII prohibited private employers from discriminating on the basis of sexual orientation or gender identity was 1978's *Smith v. Liberty Mutual Insurance Co.*[12]

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The male plaintiff in *Smith* alleged that he was denied a position because the hiring manager deemed him too effeminate.[13] As part of his lawsuit, the plaintiff alleged that Title VII made it unlawful for employers to base such decisions on sexual preference.[14] The Fifth Circuit Court of Appeals rejected his argument based on the plain language of the statute. In the opinion, the court of appeals explained that the prohibition on sex-based discrimination could only support the conclusion that Congress intended to ensure equal job opportunities for men and women.[15] The court also went on to suggest that, if Congress did not amend the law to offer broader coverage, it would be inappropriate for courts to extend protection "to situations of questionable application."[16]

The Ninth Circuit Court of Appeals handed down a number of decisions in the late 1970s to confirm that Title VII did not prohibit discrimination on the basis of sexual orientation or gender identity. One such case was *Holloway v. Arthur Andersen & Co.*, in which the plaintiff argued that Title VII prohibited discrimination against transgender individuals.[17] The plaintiff in *Holloway* was originally hired at Arthur Anderson as a male, but later began receiving female hormone treatments in preparation for a sex reassignment surgery.[18] The plaintiff was eventually terminated, and brought a lawsuit alleging that the adverse employment decision was made because of her sex.[19] The Ninth Circuit rejected this claim outright, stating:

> Giving the statute its plain meaning, this court concludes that Congress had only the traditional notions of "sex" in mind. Later legislative activity makes this narrow definition even more evident. Several bills have been introduced to amend the Civil Rights Act to prohibit discrimination against "sexual preference." None have been enacted into law.
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> Congress has not shown any intent other than to restrict the term "sex" to its traditional meaning. Therefore, this court will not expand Title VII's application in the absence of Congressional mandate. The manifest purpose of Title VII's prohibition against sex discrimination in employment is to ensure that men and women are treated equally, absent a bona fide relationship between the qualifications for the job and the person's sex.[20]

This holding acknowledged that the Equality Act of 1974 was introduced in Congress; if it had been adopted, it would have made sexual orientation a protected category, but it was not adopted.[21] According to the Ninth Circuit, if Title VII already protected against discrimination on the basis of sexual orientation as claimed by the plaintiff, then it would not have been necessary for Congress to propose this new law.[22]

This trend in the Ninth Circuit continued with the decision in *DeSantis v. Pacific Telephone & Telegraph Co., Inc*.[23] In *DeSantis*, three separate plaintiffs alleged that they had each been discriminated against because they were gay, but the Ninth Circuit definitively held that the prohibition against discrimination on the basis of sex did not make it unlawful for an employer to take an adverse action against an employee because of his or her sexual preference.[24]

Other courts that were called upon to determine whether the prohibition against sex discrimination applied to sexual orientation and gender identity discrimination took a similar view.[25] Although some commentators may believe that the courts were hostile to such claims merely because of prejudice against lesbians, gays, and transsexuals, the opinions denying protection to these groups were consistent with the United States Supreme Court's narrow interpretation of what constituted discrimination on the basis of sex in its 1976 decision in *General Electric Co. v. Gilbert*.[26]

In *Gilbert*, the Supreme Court majority held that it was not unlawful for employers to discriminate on the basis of pregnancy because Title VII did not prohibit pregnancy discrimination. The Court rejected the notion that discrimination on the basis of pregnancy was the same as discrimination on the basis of sex, and it decided the case in favor of the employer.[27] The courts that rejected claims based on sexual orientation and gender identity essentially followed this reasoning by concluding that the prohibition of discrimination on the basis of sex should not be expansively read to extend Title VII's protection to sexual orientation and gender identity.

IV. The "Reinterpretation" Of Sex-Based Discrimination Under Title VII to Include Sex Stereotyping

The status quo largely remained unchanged until the U.S. Supreme Court's landmark decisionin 1989 in *Price Waterhouse v. Hopkins*.[28] The plaintiff, Hopkins, held a management level position with her accounting firm. After five years in this position, she was recommended for partner.[29] As part of the partnership review process, the firm solicited written comments from the partners.[30] The partners with whom Hopkins worked closely all recommended her for promotion, but others who knew her voted against her candidacy based on her personality traits, which they regarded as masculine in nature.[31] The evidence suggested that she was ultimately denied the promotion to partner because she did not behave like a "typical" female.[32] After being rejected, the firm had told her that she could improve her chances of becoming a partner if she were to "walk more femininely, talk more femininely, wear makeup, have her hair styled and wear jewelry."[33] The partners also suggested that she "take a course at charm school."[34]

One significant question presented in *Hopkins* was whether the basis of the firm's decision to deny her partnership qualified as discrimination on the basis of sex. The evidence presented confirms that Hopkins was not denied a promotion because she was a woman; instead, she was denied a promotion because she was "macho" and not feminine.[35] The Court, however, found that this "sex stereotyping" was discrimination "because of sex," stating:

> We are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.[36]

This opinion adopted a more expansive view of what could qualify as discrimination on the basis of sex, and it serves as a basis for some to argue that any adverse decision based on a

person's failure to conform to traditional gender norms is actionable under Title VII. Hence, it is also possible for one to argue that the Court's decision in *Hopkins* pushed the protections of Title VII beyond what the plain language of the statute provides.

The Sixth Circuit subsequently applied the sex-stereotyping theory from *Hopkins* to conclude that the transgender plaintiff in *Smith v. City of Salem* had asserted a valid Title VII claim against the fire department for which he worked.[37] The plaintiff's troubles at work began when he adopted "a more feminine appearance on a full time basis."[38] As a result of his appearance, his co-workers began making comments about his feminine attributes, which caused him to raise the issue with his supervisor.[39] Smith explained to his supervisor that he had a "gender identity disorder," and his supervisor communicated this information up the chain of command.[40] Soon thereafter, the city began looking to use his "gender identity disorder" as a basis for terminating Smith's employment, and he eventually filed a lawsuit.[41] The issue of whether Smith had stated a valid claim for relief based on Title VII was appealed to the Sixth Circuit, which held in favor of Smith. In the opinion, the court noted that *Hopkins* did not "provide any reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is transsexual."[42] In fact, the opinion noted:

> [D]iscrimination against a plaintiff who is a transsexual—and therefore fails to act and/or identify with his or her gender—is not different from the discrimination directed against Ann Hopkins in *Price Waterhouse* who, in sex-stereotypical terms, did not act like a woman.[43]

This reasoning has been applied in a number of other cases,[44] including *Barrett v. Pennsylvania Steel Co., Inc.*, where a male employee claimed that he was discharged for not conforming to the "stereotype" of being male because he did not curse or engage in crude banter like his male co-workers.[45]The district court concluded that these allegations were sufficient to state a valid claim for relief under Title VII.[46]

While the sex-stereotyping theory has been generally accepted, the courts have been less willing to accept the argument that Title VII protects against discrimination on the basis of sexual orientation under a sex-stereotyping theory. Although lesbian, gay, bisexual, and transsexual individuals can potentially state valid claims for relief by showing that adverse employment actions were based on their failure to conform to stereotypical gender norms, courts have not generally concluded that sexual orientation is a protected category.[47] In one such case that raised this issue, *Bibby v. Philadelphia Coca-Cola Bottling*, a gay male employee alleged that he was subjected to sex-based discrimination because employees had stated, "everyone knows you're a faggot," and antigay graffiti was allowed to remain in the restroom.[48] The court, however, found that the plaintiff had failed to plead a valid claim for relief because the harassment had been targeted at his sexual orientation rather than his sex.[49]

V. The EEOC Concludes That Discrimination on the Basis of Sexual Orientation Is Sex-Based Discrimination Under Title VII

On the other hand, the EEOC adopted a more aggressive interpretation of the statutory language. The EEOC in 2011's *Macy v. Department of Justice*[50] ruled that "discrimination against an individual because that person is transgender (also known as gender identity discrimination) is discrimination because of sex and therefore is covered under Title VII."[51] Subsequently, the EEOC adopted a Strategic Enforcement Plan for 2013-2016 in which it announced its intention to focus on extending Title VII's protections to "lesbian, gay, bisexual and transgender individuals."[52] As part of this agenda, the EEOC "made a landmark ruling in July 2015 in which it concluded that discrimination on the basis of sexual orientation is discrimination on the basis of sex under Title VII."[53]

In the *Foxx* case, which was an administrative action within the Federal Aviation Administration ("FAA"), the complainant alleged that he was denied a promotion on the basis of his sexual orientation.[54] The FAA did not decide the case on the merits, but rather dismissed the complaint on the ground that it had not been raised in a timely fashion."[55] The complainant appealed the dismissal to the EEOC who disagreed with the FAA, finding the complaint timely and remanded it to the agency.[56] After ruling on the timeliness issue, the EEOC addressed the merits of the claim and ruled, in a lengthy opinion, that discrimination on the basis of sexual orientation is sex-based discrimination which violates Title VII.[57]

The EEOC's opinion claims that it is not assuming the responsibility of the legislature by creating a new category of protection under Title VII.[58] To justify this reasoning, the EEOC relies on judicial decisions finding, *inter alia,* that Title VII's prohibition of discrimination on the basis of race applied to covered individuals who were disciplined because they were in an interracial relationship as well as the Supreme Court's decision in *Price Waterhouse*.[59] While the *Foxx* decision does not apply to private employers, it does confirm that the EEOC has adopted a more expansive view of the law which will directly impact private sector employers and may influence how courts interpret Title VII in the future. At least one federal court has denied a motion to dismiss a federal employee's Title VII sex discrimination claim based on a sex-stereotyping theory encompassing sexual orientation.[60]

The position adopted by the EEOC comes from an interpretation of the law that is not limited to the plain language of the statute, and it makes no attempt to argue that Congress intended for the prohibition of discrimination on the basis of sex to encompass sexual orientation. The impact on private sector employers became evident on March 1, 2016 when the EEOC filed its first lawsuits alleging sex discrimination based on sexual orientation.[61] Nonetheless, it concludes that it is not usurping legislative authority by adopting a more expansive interpretation than is arguably justified by either the statute or the legislative history, citing judicial decisions like *Price Waterhouse* as support for its position.

VI. Conclusion

The Equality Act of 1974 was the first legislation introduced in Congress that would have made sexual orientation a protected category under Title VII.[62] Another push was made to expand the protections provided by federal law with the Employment Non-Discrimination Act, which was introduced in 1994.[63] To date, all such legislative attempts to expand the

protections provided by Title VII have failed. Nonetheless, the courts have expanded Title VII's protections by approving the sex-stereotyping theory of liability, and the EEOC has determined that it is possible for the scope of protection provided by Congress to grow beyond the limits established by the plain statutory language and the intentions indicated by legislative activities. "Discrimination on the basis of sex" does not have the same meaning today that it did when it was adopted by Congress in 1964, or when it was later amended by the PDA in 1978.[64] It seems very likely that this evolution will continue even without legislative action, particularly given national political polarization and rapidly changing societal norms. It is clear that courts (to varying degrees) and the EEOC have rejected the notion expressed in *Smith v. Liberty Mutual Ins. Co.* that congressional action would be necessary to justify interpreting "because of sex" to include gender, gender identity, and sexual orientation.[65]

Endnotes

1 42 U.S.C. §§ 2000e et seq.

2 Section 701(k) of Title VII was later adopted as part of the Pregnancy Discrimination Act ("PDA") of 1978 in response to the United States Supreme Court's decision in *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976). The PDA offered the first statutory definition of the term "sex" as it is used in Title VII, but this definition only clarifies that the language "because of sex" includes "because of or on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k).

3 "Gender identity refers to 'one's sense of oneself as male, female, or transgender' (APA, 2006). When one's gender identity and biological sex are not congruent, the individual may identify as transsexual or as another transgender category (cf. Gainor, 2000)." American Pyschological Association, *The Guidelines for Psychological Practice with Lesbian, Gay, and Bisexual Clients*, 67 American Psychologist 1, at 10 (Jan. 2012), *available at* http://www.apa.org/pubs/journals/features/amp-a0024659.pdf.

4 "Sexual orientation refers to the sex of those to whom one is sexually and romantically attracted. Categories of sexual orientation typically have included attraction to members of one's own sex (gay men or lesbians), attraction to members of the other sex (heterosexuals), and attraction to members of both sexes (bisexuals)." *Id.*

5 *See generally* Major Velma Cheri Gay, *50 Years Later... Still Interpreting the Meaning of "Because of Sex" Within Title VII and Whether It Prohibits Sexual Orientation Discrimination*, 73 A.F. L. Rev. 61 (2015).

6 42 U.S.C. §§ 2000e–2000e-4 (2000).

7 Cynthia Harrison, On Account of Sex: The Politics of Women's Issues, 1945-1968 187 (1988).

8 *Id.*

9 *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 684 (1983).

10 *Id.*

11 *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1983).

12 *Smith v. Liberty Mutual Insurance Co.*, 569 F.2d. 325 (5th Cir. 1978).

13 *Id.* at 326.

14 *Id.*

15 *Id.* at 327.

16 *Id.*

17 *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662-663 (9th Cir. 1977).

18 *Id.* at 661.

19 *Id.*

20 *Id.* at 662.

21 Equality Act of 1974, H.R. 14752, 93rd Congress (1974).

22 *Holloway*, 566 F.2d at 662-63.

23 *DeSantis v. Pacific Tel. & Telegraph Co., Inc.*, 608 F.2d 327 (9th Cir. 2001).

24 *Id.* at 328-30.

25 *See, e.g.*, *Williamson v. A.G. Edwards*, 876 F.2d 69 (8th Cir. 1989) (holding that sexual orientation discrimination was not a valid basis for relief under Title VII); *Hopkins v. Balt. Gas & Elec. Co.*, 871 F. Supp. 822, 832 n.17 (D. Md. 1994) (explaining that courts have consistently rejected the notion that Title VII prohibits discrimination on the basis of sexual orientation or sexual preference).

26 429 U.S. 125, 129 (1976). The Supreme Court's holding in *Gilbert* was overruled by Congress two years later with the enactment of the PDA. *See supra* note 3. *Cf.* Diana Kasdan, *Reclaiming Title VII and the PDA: Prohibiting Workplace Discrimination Against Breastfeeding Women*, 76 N.Y.U. L. Rev. 306 (April 2001).

27 *Id.* at 135.

28 490 U.S. 228 (1989).

29 *See* Cynthia Estlund, *The Story of Price Waterhouse v. Hopkins*, Employment Discrimination Stories 68 (Joel Wm. Friedman ed., Foundation Press 2006).

30 *Hopkins*, 490 U.S. at 232.

31 *Id.* at. 234-35.

32 *Id.* at 235.

33 *Id.*

34 *Id.*

35 *Id. See also supra* note 29.

36 *Hopkins*, 490 U.S. at 251.

37 378 F.3d 566 (6th Cir. 2004). *See* James O'Keefe, *Pyrrhic Victory: Smith v. City of Salem and the Title VII Rights of Transsexuals*, 56 DePaul L. Rev. 1101, 1101-02 (2007).

38 *Smith*, 378 F.3d at 570.

39 *Id.* at 568.

40 *Id.*

41 *Id.*

42 *Id.*

43 *Id.* at 575.

44 *See, e.g.*, *Finkle v. Howard Cnty., Md.*, 122 Fair Empl. Prac. Cas. (BNA) 861, 2014 WL 1396386 (D. Md. Apr. 10, 2014)(denying defendant's motion for summary judgment finding that transgender plaintiff asserted a viable claim

of sex discrimination because under *Hopkins*, transsexual individuals who do not conform to sex based stereotypes, fall within the protection provided by Title VII).

45 2014 WL 3572888 (E.D. Pa. 2014).

46 *Id.*

47 *See, e.g.*, Burrows v. Coll. of Cent. Fla., 2015 U.S. Dist. LEXIS 90576, at 26-28 (M.D. Fla. July 13, 2015) (rejecting the argument that sex-stereotyping prohibited as sex-based discrimination under Title VII encompasses sexual orientation discrimination).

48 85 F. Supp. 2d 509 (E.D. Pa. 2000), *aff'd*, 260 F.3d 257 (3d Cir. 2001).

49 *Id.*

50 EEOC Appeal No. 0120120821 (April 20, 2012) *available at* http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt.

51 *Facts about Discrimination in Federal Government Employment Based on Marital Status, Political Affiliation, Status as a Parent, Sexual Orientation, and Gender Identity*, EEOC *available at* http://www.eeoc.gov/federal/otherprotections.cfm.

52 *Strategic Enforcement Plan*, EEOC (December 17, 2012), *available at* http://www.eeoc.gov/eeoc/plan/sep.cfm.

53 *Complainant v. Anthony Foxx*, Secretary, Dept. of Transportation (Federal Aviation Administration), Agency, EEOC DOC 0120133080, *available at* http://www.eeoc.gov/decisions/0120133080.pdf.

54 *Id.* at 2.

55 *Id.*

56 *Id*, at 4-5.

57 *Id.* at. 6.

58 *Id.* at. 13-14

59 *Id.* at 14

60 *Terveer v. Billington,* 34 F. Supp. 3d 100, 1155-16 (D.D.C. 2014).

61 Equality Act of 1974, H.R. 14752.

62 *See* EEOC v. Scott Medical Health Center, P.C., Case No. 2:16-cv-00225 (W.D. Pa. March 1, 2016) and EEOC v. Pallet Companies d/b/a IFCO Systems, NA, Inc., Case No. 1:16-cv-00595 (D. Md. March 1, 2016). *See also* EEOC Press Release (March 1, 2016) http://www.eeoc.gov/eeoc/newsroom/release/3-1-16.cfm.

63 Employment Non-Discrimination Act of 1994, H.R. 4636, 103rd Congress (1994).

64 *Lewis v. High Point Regional Health System*, 79 F. Supp. 3d 588 (E.D.N.C. 2015) is a case in which the plaintiff asserted a failure to hire claim. At the time, the plaintiff was receiving hormone therapy to prepare for sex reassignment surgery. The employer filed a motion to dismiss, which was denied by the court because it concluded that Title VII prohibits discrimination on the basis of transgender status.

65 *See Smith*, 569 F.2d. at 327. The EEOC has filed an amicus brief in *Burrows v. The College of Central Florida*, No. 15-14554 (11th Cir.) urging the Eleventh Circuit to find, among other things, that sexual orientation is protected under Title VII's prohibition of sex-based discrimination.