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Verdict

JULY 21, 2015

JOANNA L. GROSSMAN

Based on Sex: The EEOC Rules That Sexual Orientation Discrimination *Is* Sex Discrimination

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In a recent ruling, the EEOC concluded that alleged discrimination against a gay man—because he was gay—constitutes a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964, a federal law banning employment discrimination on the basis of certain protected characteristics. In so doing, the EEOC departed from several early court rulings on this issue, but built on a more recent trend and captured more contemporary thinking about the nature of sexual orientation discrimination.



The Complaint

The complainant, whose name is redacted from the decision, worked as an air traffic controller at the Miami International Airport. Air traffic controllers in the United States work for the Federal Aviation Administration (the “Agency”) and, while protected under Title VII, are also subject to special procedural rules reserved for federal employees.

In 2010, the complainant was given a temporary position as a Front Line Manager (FLM), a better position than the one he otherwise held. During the two-year temporary stint, a permanent FLM position opened up. The complainant did not apply, mistakenly believing that all temporary FLMs were considered automatically when permanent

positions became available. He was not selected to fill the permanent position.

Complainant alleged, through an intra-agency process, that he was passed over because he is gay. In formal terms, he alleged both sex and sexual orientation discrimination. The supervisor involved in the selection process, he alleges, had made negative comments about the complainant's sexual orientation. "We don't need to hear about that gay stuff," was the alleged comment when the complainant mentioned that he and his partner went to New Orleans during Mardi Gras. Other mentions of his partner met with the comment that he was "a distraction in the radar room."

In response to the internal complaint, the Agency did not address the merits. Instead, it ruled that the complainant had not reported the alleged discrimination within the very short 45-day window required for federal agency employees. The Agency also notified the complainant that although he could appeal the sex discrimination ruling to the EEOC, he could appeal the ruling on his sexual orientation complaint only through the intra-agency process. This distinction was based on the Agency's position that Title VII, which the EEOC is responsible for implementing, does not prohibit sexual orientation discrimination.

In the ruling, *Complainant v. Foxx*, the EEOC concluded that the agency was wrong on both counts. The complainant had reported the discrimination within the appropriate window of time, and sexual orientation discrimination does violate Title VII. This latter ruling is important, but requires some backstory to appreciate its significance.

Court Rulings on Sexual Orientation Discrimination Under Title VII

Title VII of the Civil Rights Act of 1964 is at the heart of federal anti-discrimination law. It prohibits employers with at least fifteen employees from discriminating on the basis of race, color, religion, sex, or national origin. Sexual orientation discrimination is not included in the list. Early on, several federal courts, both district and appellate, held that the statute's ban on sex discrimination did not encompass sexual orientation discrimination. Perhaps the most well known of these rulings is from the Ninth Circuit in *DeSantis v. Pacific Telephone & Telegraph* (1979). These rulings tended to focus on lack of congressional intent, with little by way of analysis about the nature of sex or sexual orientation discrimination (and the ways in which they might be cut from the same cloth).

Other federal anti-discrimination laws exist, but none of them covers sexual orientation discrimination either. The only direct prohibition on sexual-orientation discrimination comes from Executive Order 13087, issued in 1998 by President Bill Clinton, which bans such discrimination in the civilian federal workforce. This order was in response to a

long, if little known, history of the federal government's banning gays from federal civil service jobs. (See the unfortunate relics of that history [here](https://verdict.justia.com/2014/05/20/federal-judge-turns-back-hunt-gays-department-justice) (<https://verdict.justia.com/2014/05/20/federal-judge-turns-back-hunt-gays-department-justice>.) The executive order left in place the “Don’t Ask Don’t Tell” policy, which prohibited openly gay and lesbian individuals from serving in the military. (This policy was finally repealed as of September 2011.)

Despite those early rulings, many plaintiffs have prevailed in cases in which the essence of their complaint was sexual orientation discrimination or harassment. How?

Title VII prohibits employment actions taken “because of sex.” There have been two types of successful claims drawing on this language: discrimination based on sex stereotyping, and same-sex sexual harassment. These claims are made possible by two key Supreme Court cases.

First, the Supreme Court ruled in *Price Waterhouse v. Hopkins* (<https://supreme.justia.com/cases/federal/us/490/228/>) (1989), that reliance on sex-role stereotyping can be an actionable form of employment discrimination. In that case, the Court held that a woman was a victim of sex discrimination when her employer denied her partnership in an accounting firm at least in part because she was insufficiently “feminine” in the way she dressed and conducted herself. That decision took on a life of its own—fueling, among other things, claims by effeminate gay men and masculine lesbians that the discrimination they experienced was sex, rather than sexual orientation, discrimination.

Second, in *Oncale v. Sundowner Services* (<https://supreme.justia.com/cases/federal/us/523/75/>) (1998), the Court considered a claim of same-sex harassment. The federal appellate court had ruled that such a claim could never be cognizable under Title VII, regardless of the circumstances, because it could not satisfy the “because of sex” requirement in the statute. But the Supreme Court reversed, holding that the requirement might be met in one of three ways: (i) with evidence of the perpetrator’s homosexuality; (ii) with evidence that the perpetrator in fact targeted only members of one sex; or (iii) with evidence that the harassment took the form of gender-role policing—à la *Price Waterhouse*—to punish an employee for failing to live up to traditional gender norms. *Oncale* has both reinforced the use of *Price Waterhouse* in sexual orientation claims and fueled separate claims for harassment rooted in homosexual desire or gender-targeted bullying.

Price Waterhouse and *Oncale* gave teeth to some sexual orientation discrimination claims, but with some illogical consequences. For example, gays and lesbians who conform to gender-role stereotypes are less protected from discrimination than those

who transgress them. And those who transgress expectations are sometimes unprotected because courts fear “bootstrapping”—using a cognizable cause of action to remedy a permissible type of discrimination. Moreover, courts have refused to consider the possibility that the very nature of sexual orientation discrimination is animus against people who defy sex-role expectations by being attracted to someone of the same sex.

Legislative Efforts to Amend Title VII

Given those early court rulings, there has been a longstanding effort to amend Title VII to provide express protection against sexual orientation discrimination. Congresswoman Bella Abzug introduced the first bill in 1974, which broadly protected gays and lesbians against discrimination in employment, housing, and public accommodations. Throughout the 1970s and 1980s, similar bills were introduced, but none became law. Over time, as is often the case with civil rights legislation, the proposed bills have become narrower and narrower.

The modern versions of Abzug’s first bill go by the name the Employment Non-Discrimination Act (ENDA). The first version of ENDA was introduced in the Senate by the late Senator Ted Kennedy; hearings were held, but the bill did not make it through the Senate. In 2007, a version of ENDA was passed in the House, but the Senate never voted, and then-President George W. Bush issued an anticipatory veto notice saying, in essence, “don’t bother.”

A 2013 version of ENDA, which would have also prohibited employers from discriminating on the basis of gender identity, was passed by a vote of 64 to 32 in the Senate, but died after that. Nothing of significance has happened since.

Under the narrower approach, transgender discrimination is actionable only if the employer acted on sex stereotypes to punish gender non-conformity. But the EEOC takes the position that any sort of transgender discrimination is sex discrimination because it inherently involves taking gender—and therefore sex—into account. This is true even if the employer’s action simply reflects animus against transgender individuals or a desire to exclude them from the workplace. As I will argue in this column, the EEOC has the better of the argument. Its ruling takes an honest, straightforward look at the nature of transgender discrimination and the natural scope of Title VII’s broad prohibition of sex discrimination in employment.

The EEOC Ruling in *Complainant v. Foxx*

On this background, the EEOC issued [this recent decision](https://s3.amazonaws.com/s3.documentcloud.org/documents/2167512/complainantvfo) (<https://s3.amazonaws.com/s3.documentcloud.org/documents/2167512/complainantvfo>)

, in which it squarely concluded that sexual orientation discrimination violates Title VII as written, without the amendment embodied in ENDA.

In 2012, the EEOC reached a similar conclusion about transgender discrimination. As discussed in more detail [here \(https://verdict.justia.com/2012/05/01/the-eeoc-rules-that-transgender-discrimination-is-sex-discrimination\)](https://verdict.justia.com/2012/05/01/the-eeoc-rules-that-transgender-discrimination-is-sex-discrimination), the EEOC concluded in *Macy v. Holder* (<http://www.washingtonblade.com/content/files/2012/04/90910497-EEOC-Ruling.pdf>) that discriminating against a person who has transitioned from one sex to the other or who assumes an appearance contrary to birth sex is a form of sex discrimination. Prior to that ruling, transgender individuals had met with success in court using the *Oncale* and *Price-Waterhouse* theories discussed above. In fact, those precedents are an even better fit for transgender discrimination claims since the very essence of being transgender is expressing gender in a manner that is inconsistent with our expectations given a person's gender assigned at birth.

What is the basis for the EEOC's new ruling that sexual orientation discrimination is also a form of sex discrimination?

The ruling starts with the basic observation that Title VII prohibits employers from taking sex into account when making employment decisions and then states immediately that this “applies equally in claims brought by lesbian, gay, and bisexual individuals under Title VII.” The connection between these two observations is the claim that when an employer acts on the basis of sexual orientation, it has taken sex (gender) into account.

The EEOC's ruling depends on its view that “[d]iscrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms.” There is no way to understand this type of discrimination, the ruling reasons, without reference to a person's sex. Sexual orientation is, by definition, being attracted to a person of the same sex.

The ruling describes the link between sexual orientation and sex in a variety of different ways. First, “[s]exual orientation is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex.” A female employee who is disciplined for displaying a photo of a female spouse, in the example used in the ruling, is being treated differently than would be a male employee displaying a photo of a female spouse. That sort of “but-for” sex discrimination is clearly covered by standard sex discrimination doctrine, as well as by the Court's explanation in *Oncale* of how to prove that same-sex harassment is “because of sex.”

Second, “[s]exual orientation discrimination is also sex discrimination because it is

associational discrimination on the basis of sex.” As the ruling explains, courts have had no trouble conceiving of discrimination on the basis of interracial marriage or friendship as race discrimination—an employer takes the employee’s race into account when it displays animus against the employee’s relationship with someone of a different race. Thus, the EEOC ruling explains, one’s association with an intimate partner of the same sex should be understood as sex discrimination.

Third, “[s]exual orientation discrimination also is sex discrimination because it necessarily involves discrimination based on gender stereotypes.” In the EEOC’s view, it is the ultimate gender stereotype to assume that a man must only be attracted to women and vice versa. Heterosexuality is itself a gender norm, enforcement of which in the employment context is prohibited by *Price Waterhouse*. The idea that “real” men are not attracted to other men is at the heart of sexual orientation discrimination. Is that any different from *Price Waterhouse*’s view that real women must assume a feminine persona?

The EEOC ruling acknowledges the court rulings to the contrary, but criticizes them for failing to really grapple with the nature of sexual orientation discrimination and for being too focused on Congress’s intent in 1964. But surely Congress did not contemplate same-sex harassment either, and, under the Court’s ruling in *Oncale*, that is clearly actionable because it is based on an employee’s sex. This, the ruling concludes, is no different. Recognizing sexual orientation discrimination as actionable does not require recognition of a completely new category of discrimination—just a more nuanced understanding of how a person’s sex is taken into account when it happens.

Moreover, the EEOC criticized the oft-repeated observation that Title VII must not extend to sexual orientation discrimination because members of Congress have been trying to amend it through ENDA and its predecessors. But neither the efforts to amend—nor their failure—is relevant. ENDA proponents are responding to court rulings about the meaning of Title VII, rather than offering their own interpretation of the statute. And, as the Supreme Court has recognized, “[c]ongressional inaction lacks persuasive significance because severally equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.” (*Foxx*, citing *Pension Benefit Guaranty Corp. v. LTV Corp.* (1990).)

Conclusion

This EEOC ruling goes, in its words, “where the principles of Title VII have directed.” Will courts follow suit?



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