THE CHANGING LANDSCAPE OF LGBT EMPLOYMENT RIGHTS: A BATTLE OVER TITLE VII

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State Bar of Texas
THE LEGAL IMPACT OF MARRIAGE EQUALITY: NEW FRONTIERS, NEW ISSUES
December 7, 2016
Austin

CHAPTER 7

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ABSTRACT

Given recent developments in LGBT rights, courts are feeling pressured to reconsider whether Title VII includes protections against sexual orientation discrimination in the workplace. Understanding these developments and recent court opinions is important to guiding clients in such a rapidly evolving area of law.

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I. INTRODUCTION

In a post *Windsor* and *Obergefell* world, the rights of LGBT employees seem to have taken center stage. *See generally United States v. Windsor*, 133 S. Ct. 2675 (2013); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). Prior to these decisions, the LGBT rights movement was largely focused on fighting for marriage equality. Nevertheless, several attempts have been made at both state and federal levels to prohibit employment discrimination against the LGBT employees. Although there is significant movement in the courts, less than half of the states have some f against sexual orientation discrimination for employees. *See Hively v. Ivy Tech Cmty. Coll*., 830 F.3d 698, 714 (7th Cir. 2016)

Instead of requiring Congressional action, the problem might be solved by federal courts reconsidering the meaning of sex discrimination under Title VII of the Civil Rights Act of 1964 ("Title VII"). Adding even more fuel to the line of cases setting ablaze in federal court, the EEOC recently issued a federal-sector decision in which it held "sexual orientation is inherently a 'sex-based consideration,' and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII." Although *Windsor* and *Obergefell* did not directly deal with employment discrimination, the gravity of the decisions have been widely felt in courts across the country. *See id*. at 713–14. In fact, the Seventh Circuit has recently taken center stage in considering the rights of LGBT employees under Title VII.

Whether representing employees or employers, it is important that practitioners understand the rapidly changing landscape of LGBT employment rights. Not too long ago, most attorneys believed there to be little to no protection in the workplace for these employees. This was especially true given that Congress previously rejected attempts to extend Title VII's protections to cover sexual orientation discrimination. *See* Employment Non-Discrimination Act of 1994, H.R. 4626, 103rd Cong. (1994). However, cunning lawyers have been finding protections where none were believed to exist. This paper is intended to provide a brief history of relevant decisions before discussing how recent developments have caused the courts to reconsider the rights of LGBT employees under Title VII.

II. THE LANDSCAPE OF LGBT RIGHTS PRIOR TO THE SUPREME COURT'S DECISIONS IN *WINDSOR* AND *OBERGEFELL.*

Before the Supreme Court handed down its landmark decisions in *Windsor v. United States* and *Obergefell v. Hodges*, the entire country was a shifting landscape in regards to the rights afforded to the LGBT citizens. The most widely contested battlefront was marriage equality. The federal government's policy was then centered around the Defense of Marriage Act, which effectively allowed states to both withhold LGBT rights and to refuse to recognize other state's laws that granted marriage equality. Prior to *Windsor*, this inequality of treatment towards LGBT citizens was simply a way of life. However, the tides were clearly rising in favor of providing additional rights to LGBT people in our country. In fact, when the Supreme Court decided *Obergefell* in June 26, 2015, 37 states and the District of Columbia recognized same sex marriage. *See* Bill Chappell, *Supreme Court Declares Same-Sex Marriage Legal in All 50 States*, NPR, June 26, 2015, *http://www.npr.org/sections/the two-way/2015/06/26/417717613/supreme-court-rules-all-states-must-allow-same-sex-marriages*.

The *Windsor* and *Obergefell* decisions were clear victories for the LGBT community, but their legal and social consequences are still playing out in courts across the country. The Supreme Court's decision to strike down DOMA and its recognition of the constitutional right to marry a same-sex partner have had particularly strong effects in employment law. Employees across the country can now be legally married to another person of the same sex or gender, but as Vice President Joe Biden has previously pointed out, "LGBT people can get married in the morning and fired in the afternoon because of their sexual orientation or gender identity in 28 states," which leads to a confusing state of affairs. *See* Married in the Morning, Fired in the Afternoon: The State of LGBT Anti-Discrimination Laws in the U.S., *TOWLEROAD, Aug. 3, 2015,* http://www.towleroad.com/2015/08/married-in-the-morning-fired-in-the-afternoon-the-state-of-lgbt-anti-discrimination-laws-in-the-u-s.

Although the courts are considering whether or not sexual orientation is a prohibited form of "sex" discrimination under Title VII, there are currently no federal laws that were specifically enacted to prohibit sexual orientation discrimination in the workplace. In fact, Congress, for various possible reasons, has failed to pass such legislation on several occasions. See Employment Non-Discrimination Act of 1994, H.R. 4636, 103rd Cong. (1994); Employment Non-Discrimination Act of 1994, S. 2238, 103rd Cong. (1994); Employment Non-Discrimination Act of 1995, H.R. 1863, 104th Cong. (1995); Employment Non-Discrimination Act of 1995, S. 932, 104th Cong. (1995); Employment Non-Discrimination Act of 1996, S. 2056, 104th Cong. (1995); Employment Non-Discrimination Act of 1997, H.R. 1858, 105th Cong. (1997); Employment Non-Discrimination Act of 1997, S. 869, 105th Cong. (1997); Employment Non-Discrimination Act of 1999, H.R. 2355, 106th Cong. (1999); Employment Non-Discrimination Act of 1999, S.

1276, 106th Cong. (1999); Employment Non-Discrimination Act of 2001, H.R. 2692, 107th Cong. (2001); Protecting Civil Rights for all Americans Act of 2001, S. 19, 107th Cong. (2001); Employment Non-Discrimination Act of 2002, S. 1284, 107th Cong. (2002); Equal Rights and Equal Dignity for Americans Act of 2003, S. 16, 108th Cong. (2003); Employment Non-Discrimination Act of 2003, H.R. 3285, 108th Cong. (2003); Employment Non-Discrimination Act of 2003, S. 1705, 108th Cong. (2003); Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong. (2007); Employment Non-Discrimination Act of 2007, H.R. 3685, 110th Cong. (2007); Employment Non-Discrimination Act of 2009, H.R. 3017, 111th Cong. (2009); Employment Non-Discrimination Act of 2009, H.R. 2981, 111th Cong. (2009); Employment Non-Discrimination Act of 2009, S. 1584, 111th Cong. (2009); Employment Non-Discrimination Act of 2011, H.R. 1397, 112th Cong. (2011); Employment Non-Discrimination Act of 2011, S. 811, 112th Cong. (2011); Employment Non-Discrimination Act of 2013, H.R. 1755, 113th Cong. (2013); Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013). Due to the absence of federal protections, states and localities have created an assortment of various standards.

Without state or federal protection, there is no specific prohibition against sexual orientation discrimination, and LGBT employees in Texas often fall victim to the at-will employment doctrine. Under the at-will doctrine, absent a statute or express agreement to the contrary, either party can modify or even terminate the employment relationship at any time for any reason, or no reason at all. The employment discrimination protections in Texas are found in the Texas Commission on Human Rights Act ("TCHRA"). The TCHRA is modeled after Title VII and prohibits employment discrimination on the basis of race, color, disability, religion, sex, and national origin. *Dillard Dep't Stores, Inc. v. Gonzales*, 72 S.W.3d 398, 406–07 (Tex. App.—El Paso 2002, no pet.). Unless additional action is taken, LGBT employees in Texas have very limited protections from being terminated as a result of their sexual orientation. Interestingly, many people, including members of the LGBT community, remain surprised to learn that a private employer is allowed to terminate an employee because of his or her sexual orientation.

A. The absence of a uniform state or federal standard has led to a variety of city protections for LGBT employees that are often overlooked.

In absence of a state law, numerous Texas cities have chosen to fill the legal void by adopting anti-discrimination ordinances to prohibit sexual orientation discrimination within their boundaries. However, employees bringing a claim under a city ordinance typically do not have the same control or options as they would by bringing a claim under a state or federal law. This is largely because the ordinances do not give the employee a private right of action to bring suit in state or federal court. Instead, the ordinances are often intended to act as a deterrent and provide employees and employers with a forum to resolve disputes. Currently, 12 Texas cities with populations of more than 100,000 have some level of protection—either from a city ordinance or otherwise—for its residents. These protections often include discrimination based on sexual orientation and gender identity. However, some of the cities have limited the protections to only protect city employees and contractors. The cities that have passed some form of protection include: Austin, Dallas, Fort Worth, Houston, San Antonio, Plano, Corpus Christi, Waco, Mesquite, El Paso, Brownsville, and Arlington. *See* Alexa Ura, Edgar Walters and Jolie McCullough, *Comparing Nondiscrimination Protections in Texas Cities, THE TEXAS TRIBUNE,* (June 9, 2016).

Austin was one of the first Texas cities to enact a city ordinance prohibiting all employers from discrimination against employees because of sexual orientation or gender identity. *See* Austin, Tex., City code § 5-3-4. The Code prohibits employers from discriminating and/or terminating an employee based on sexual orientation. *Id*. Importantly, the Austin code applies to city and private employers. In addition to Austin, Dallas and Fort Worth have both had long-standing ordinances to prevent employment discrimination based on sexual orientation, which cover both city and private employees. More recently, San Antonio and Plano have enacted protections against sexual orientation discrimination within their boundaries. However, Houston has repealed part of its previously enacted ordinance that protected all employees from discrimination based on sexual orientation and gender identity; however, the ordinance now only protects city employees.

Additionally, Corpus Christi, Waco, and Mesquite have each extended protection to LGBT city employees by amending the personnel policy on nondiscrimination. *See* Alexa Ura, Edgar Walters and Jolie McCullough, *Comparing Nondiscrimination Protections in Texas Cities, THE TEXAS TRIBUNE,* (June 9, 2016). Similarly, El Paso's city charter prohibits discrimination on the basis of sexual orientation or gender identity for all of its city employees, but these protections are not supported by city ordinance. More recently, Brownsville's city council passed a resolution protecting city employees against discrimination on the basis of sexual orientation and gender identity. *See id.* Conversely, the Arlington employee handbook prohibits city employees from discriminating against individuals on the basis of sexual orientation, but there is no direct reference to gender identity. *See id.* Interestingly, the Arlington rule applies to employees both on and off the job. *See id.* Thus, the absence of a uniform state standard has led to a preponderance of various city protections for LGBT employees.

III. THE SUPREME COURT GREATLY EXPANDED THE RIGHTS OF LGBT CITIZENS IN TWO LANDMARK DECISIONS, BOTH OF WHICH DIRECTLY AND INDIRECTLY IMPACTED THE RIGHTS OF LGBT EMPLOYEES ACROSS THE COUNTRY.

In two landmark decisions, the Supreme Court greatly expanded the rights of LGBT Americans by requiring the states to allow same-sex marriage. In *United States v. Windsor*, the Court held that the Defense of Marriage Act ("DOMA") was unconstitutional because it violated the equal protection guarantee of the Fifth Amendment. *Windsor*, 133 S. Ct. at 2675. Although *Windsor* did not directly deal with employment law, its holding had an almost immediate impact on LGBT employees. Specifically, qualified employees gained the right to take applicable medical leave to care for a same-sex spouse under the Family and Medical Leave Act ("FMLA"). In *Obergefell v. Hodges*, the Court took a much bigger step and held that the Fourteenth Amendment guaranteed same-sex couples the right to marry in every state. *Obergefell*, 135 S. Ct. at 2696. Although these two cases do not directly address anti-discrimination laws in employment, courts tasked with reconsidering the rights of LGBT employees are finding drawing support from *Windsor* and *Obergefell*. *See Hively* 830 F.3d at 710.

A. The Supreme Court struck down DOMA, requiring the federal government to recognize the existence of same-sex marriages in states where such marriages are legal under state law.

In 2009, Thea Spyer died and left her entire estate to her wife, Edith Windsor. *Windsor*, 133 S. Ct. at 2682–83. Ms. Windsor claimed the federal estate tax exemption, which is provided to a surviving spouse. *Id*. However, despite being married, Ms. Windsor was barred from receiving the tax exemption because DOMA amended the Dictionary Act and excluded same-sex relationships from the definition of "marriage" and "spouse." *Id*. In doing so, DOMA prevented the federal government from providing citizens in same-sex marriages federal rights afforded to citizens in opposite-sex marriages, regardless of whether or not the state recognized same-sex marriages. *Id*. After having to pay $363,053 in estate taxes as a result of DOMA, Ms. Windsor filed a suit against the United States seeking a refund. *Id*. Specifically, Ms. Windsor asserted that DOMA violated the Fifth Amendment guarantee of equal protection, as it applies to the Federal Government. *Id*.

The Supreme Court granted certiorari and accepted the matter for oral argument. In reaching a decision, the Court first determined that it had proper jurisdiction to consider the case. However, despite the Justice Department's refusal to defend the Act, the Court held that proper jurisdiction did exist to decide the case on its merits. *Id*. at 2684. Next, the Court turned its attention to the constitutionality of DOMA. The Court reasoned that the "Constitution's guarantee of equality "must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot" justify disparate treatment of that group. *Id*. at 2693 (quoting *Department of Agriculture v. Moreno*, 413 U.S. 528, 534–35 (1973). Ultimately, the Court held that DOMA violated the basic principles of due process and equal protection, as they apply to the Federal Government. *Id*. at 2695–96.

1. Although Windsor did not directly address federal employment laws, the fall of DOMA resulted in an immediate impact to the federal rights of LGBT employees across the country.

The immediate impact of the decision in *Windsor* was widely felt in by LGBT employees in same-sex marriages across the country. One notable example of this impact relates to an employee's rights under the FMLA. Under the FMLA, a covered employer must provide up to twelve weeks of medical leave to an eligible employee to treat the serious medical condition of the employee, the employee's immediate family, and/or the employee's spouse. Prior to *Windsor*, an employee in a same-sex a marriage was prevented from taking leave under the FMLA to care for a same-sex spouse because DOMA modified the meaning of "spouse" to exclude same-sex relationships. *See* 29 C.F.R. § 825.102, .122(b) (2014). After the Court struck down DOMA, same-sex couples immediately earned FMLA rights in states where such marriages were legal. However, the conversation quickly shifted to those same-sex employees that were legally married in a state that recognized same-sex marriages, but who currently worked and/or resided in a state that did not recognize such marriages.

On February 25, 2015, the Department of Labor ("DOL") issued a Final Rule, which revised the regulatory definition of "spouse" under the FMLA to include same-sex marriages performed in states where such marriages were legal. *See* Family and Medical Leave Act, 80 Fed. Reg. 9989 (Feb. 25, 2015). Specifically, the DOL moved away from considering the "state of residence" to basing FMLA rights on the "state of celebration." *See id*. As a result of *Windsor* and with the clarification from the DOL, employers were often forced to determine whether or not an employee was legally married in a state, regardless of the state of residence, prior to providing employees with protected FMLA leave to care for a spouse. As one can imagine, this was problematic for employers.

After the DOL announced the Final Rule, four states (Texas, Arkansas, Louisiana, and Nebraska) filed suit against the United States and the Department of Labor on March 18, 2015, seeking declaratory and injunctive relief. *See Texas v. United States of America*, 95 F. Supp. 3d 965 (2015). After considering the argument, the district court granted the plaintiffs' request for injunctive relief and ordered the DOL to stay enforcement of the Final Rule. *See id*. at 982–83.

In doing so, the court believed that the plaintiffs had a substantial likelihood of prevailing on the claims that the DOL's Final Rule was invalid. *See id*. However, before this matter continued further into litigation, the Supreme Court rendered the issue moot in *Obergefell*.

B. The Court's decision in *Obergefell v. Hodges* gave same-sex couples the right to marry in every state and opened the door for an expansion of LGBT rights in other areas.

Two years after striking down DOMA, the Supreme Court reached a decision that was decades in the making and held that same-sex couples have the right to marry in every state in the union under the Fourteenth Amendment. *Obergefell*, 135 S. Ct. at 2696. In *Obergefell*, the petitioners originally filed suits in Federal District Courts asserting that their respective states violated the Fourteenth Amendment by denying same-sex marriages and/or failing to recognize those marriages lawfully performed in other states. *Id*. Although each District Court reached a holding in favor the petitioners, after consolidating the claims, the Sixth Circuit reversed the District Courts' decisions. *DeBoer v. Snyder*, 772 F.3d 388 (2014).

After considering the arguments in *Obergefell*, the Supreme Court ultimately agreed with the petitioners and held that the Fourteenth Amendment requires states to (1) issue marriage licenses to same-sex couples and (2) recognize same-sex marriages lawfully performed in other states. *Id.* at 2607–08. In reaching its decision, the Court noted, "The history of marriage is one of both continuity and change." *Id.* at 2588. The Court went on to state that the institution of marriage "has evolved over time." *Id.* at 2595. In addition to addressing the evolution of marriage, the Court pointed out that, until modern times, "Same-sex intimacy remained a crime in many states." *Id.* at 2596. Although this consideration was nothing more than dicta, the Court's seeming willingness to accept societies evolved acceptance of homosexuality has triggered similar conversations in lower courts tasked with considering other LGBT issues.

Although *Obergefell* was limited to the questions of same-sex marriage, the influence of the Court's decision has influenced lower courts across the country tasked with deciding the rights of LGBT employees. For example, United States District Judge Reed O'Connor dissolved the injunction and lifted the stay that previously prevented the DOL from modifying the FMLA to include spouses based on the state of celebration. As a direct result of *Obergefell*, the conversation of state of celebration versus state of residence became moot. As another example, lower courts are looking to *Obergefell* when considering whether or not the sex discrimination protections of Title VII also prohibit sexual orientation discrimination in the workplace. In fact, the Seventh Circuit recently cited *Obergefell* in deciding a Title VII dispute. *See Hively*, 830 F.3d at 717.

IV. THE IMPACTS OF *WINDSOR* AND *OBERGEFELL* ARE NOW RIPPLING THROUGH LOWER COURTS TASKED WITH DECIDING THE RIGHTS OF LGBT EMPLOYEES UNDER TITLE VII.

Although the rights of LGBT employees under Title VII are often lumped together, the claims that arise can generally be categorized into two broad theories. The more successful of the two theories is based on the argument that it violates Title VII to discriminate against an employee because he or she fails to confirm with traditional gender stereotypes. For reasons discussed herein, the gender stereotype protections seem to be more effective when raised by a transgender employee. However, partially due to recent decisions by the Supreme Court and the EEOC, some courts are reconsidering whether or not Title VII's protections against sex discrimination include discrimination based on sexual orientation.

A. There continues to be both acceptance and confusion amongst lower courts as to the application of gender stereotype claims brought under Title VII.

In *Price Waterhouse v. Hopkins*, the Supreme Court held that sex discrimination protections under Title VII prevented an employer from discriminating against an employee because he or she does not conform to traditional gender stereotypes. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775 (1989). In *Price Waterhouse*, Ms. Hopkins was denied the opportunity to make partner. As part of her review, the partners tasked with conducting her review informed Ms. Hopkins that she would have a better chance of making partner if she would, "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* at 235. One partner advised Ms. Hopkins to take "a course at charm school," and another even object to her use of swearing only "because it's a lady using foul language." *Id.* In reaching the holding that discrimination based on an employee's failure to conform to gender stereotypes is a form of sex discrimination under Title VII, the Court stated,

> As for the legal relevance of sex stereotyping, 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 "'[i]n 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.'"

Id. at 251 (quoting *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707, n. 13 (1978), quoting *Sprogis v. United Air Lines, Inc*., 444 F.2d 1194, 1198 (CA7 1971)).

Despite the Supreme Court's holding in *Price Waterhouse v. Hopkins*, many lowers courts have found it difficult, if not impossible, to draw a line between discrimination based on gender stereotypes and discrimination based on the sexual orientation. Recently, the Fourth Circuit stated, "for the last quarter century since *Price Waterhouse*, courts have been haphazardly, and with limited success, trying to figure out how to draw the line between gender norm discrimination . . . and sexual orientation discrimination." *Hivley*, at 14 (citing *Prowel v. Wise Bus. Forms, Inc*., 579 F.3d 285, 291 (3d Cir. 2009) ("the line between sexual orientation discrimination and discrimination 'because of sex' can be difficult to draw."); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217 (2d Cir. 2005) ("it is often difficult to discern when [the plaintiff] is alleging that the various adverse employment actions allegedly visited upon her by [her employer] were motivated by animus toward her gender, her appearance, her sexual orientation, or some combination of these" because "the borders [between these classes] are so imprecise."); *Centola v. Potter*, 183 F. Supp. 2d 403, 408 (D. Mass. 2002) ("the line between discrimination because of sexual orientation and discrimination because of sex is hardly clear."); *Hamm*, 332 F.3d at 1065 n.5 ("We recognize that distinguishing between failure to adhere to sex stereotypes (a sexual stereotyping claim permissible under Title VII) and discrimination based on sexual orientation (a claim not covered by Title VII) may be difficult. This is especially true in cases in which a perception of homosexuality itself may result from an impression of nonconformance with sexual stereotypes."); *Id.* at 1067 (Posner, J., concurring) ("Hostility to effeminate men and to homosexual men, or to masculine women and to lesbians, will often be indistinguishable as a practical matter.")).

However, the line between discrimination based on gender stereotypes and sexual orientation seems much easier for courts to identify when employees who identify as transgender assert the claim. In considering a claim based on the Equal Protection Clause in *Glenn v. Brumby*, the Eleventh Circuit noted that an employer would violate Title VII's prohibition against sex discrimination by terminating an employee for transitioning from male to female. *Glenn v. Brumby*, 663 F.3d 1312, 1321 (11th Cir. 2011); *See also Lewis v. Smith*, 731 F.2d 1535, 1537–38 (11th Cir. 1984).

The court reasoned, "A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. '[T]he very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior.'" *Glenn*, at 1316 (quoting Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 Cal. L. Rev. 561, 563 (2007)). The Eleventh Circuit cited several other courts in support of the conclusion that discrimination against employees based on gender-nonconformity is, in fact, sex discrimination. *Id*. at 1317 (citing *Schwenk v. Hartford*, 204 F.3d 1187, 1198–1203 (9th Cir. 2000) (stating plaintiff asserted actionable claim for sex discrimination under Gender Motivated Violence Act because perpetrator's actions stemmed from the belief the victim was a failed to act as a stereotypical male); (*Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) (clarifying that a firefighter could not be suspended based on his failure to conform to gender stereotypes). *See Barnes v. Cincinnati*, 401 F.3d 729 (6th Cir. 2005) (holding that a claim for failing to conform to sex stereotypes brought by an employee who a "was a male-to-female transsexual" was cognizable claim of sex discrimination under Title VII.) *As a practice note, the terminology used by the courts when referring to transgender plaintiffs may sometimes be inaccurate and/or outdated.*

Gay and lesbian employees have had lesser success when asserting gender stereotype protections under Title VII. In such cases, the courts must often attempt to decide the true nature of the discrimination. For example, in *Prowel*, a plaintiff who described himself as an effeminate gay male, argued that his employer violated Title VII for discriminating against him for failing to conform to gender stereotypes. *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 287 (3d Cir. 2009). The court noted the plaintiff had stereotypical characteristics, which could be considered by a jury to conclude that he was harassed because he did not conform his employer's expectations of a stereotypical male. *Id.* at 291–92. However, other courts have denied such claims as an attempt to bootstrap claims for sexual orientation. *See Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000). In *Vickers v. Fairfield Medical Center*, the Sixth Circuit upheld the dismissal of a gender stereotype claim brought under Title VII by a plaintiff who was perceived to be gay. *See Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757 (6th Cir. 2006). In reaching its decision in *Vickers*, the court reasoned that such a claim "would have the effect of de facto amending Title VII to encompass sexual orientation as a prohibited basis for discrimination." *Id.* at 764. The court went on to state, "In all likelihood, any discrimination based on sexual orientation would be actionable under a sex stereotyping theory if this claim is allowed to stand, as all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices. *Id.*

B. In light of the Supreme Court's decisions in *Windsor* and *Obergefell* and the EEOC's decision in *Baldwin*, courts across the country are reconsidering whether or not discrimination based on sexual orientation is a protected form of sex discrimination under Title VII.

Within a month of the Supreme Court releasing its decision in *Obergefell*, the EEOC issued an administrative decision in *Baldwin v. Foxx* holding sexual orientation discrimination to be actionable as a claim for sex discrimination under Title VII. *See Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 EEOPUB LEXIS 1905, 2015 WL 4397641 (July 16, 2015). Although the EEOC does not adjudicate cases against private employers, the EEOC is the agency charged with enforcing Title VII's protections against employment discrimination. In reaching its decision, the EEOC considered numerous developments in federal case law regarding sex discrimination claims under title VII. *Id.* at 5 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239, 241–42 (1989) (prohibiting employers from relying upon sex considerations or gender stereotypes to make employment decisions); *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004) ("The Supreme Court made clear that in the context of Title VII, discrimination because of 'sex' includes gender discrimination); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000). Although *Baldwin* does not expressly mention *Windsor* or *Obergefell*, the decision cites to the success of another same-sex marriage case in stating that a "number of federal courts" have considered the gender stereotypes places upon gay, lesbian, and bisexual citizens. *See id*. at 9–10 (citing *Latta v. Otter*, 771 F.3d 456, 474 (9th Cir. 2014), petition for cert. filed, (U.S. Dec. 31, 2014) (No. 14-765) (holding state laws prohibiting same-sex marriage violated the Equal Protection Clause of the Fourteenth Amendment while also stating "the constitutional restraints the Supreme Court has long imposed on sex-role stereotyping . . . may provide another potentially persuasive answer."); *Id.* at 495 (Berzon, J., concurring) ("[I]t bears noting that the social exclusion and state discrimination against lesbian, gay, bisexual, and transgender people reflects, in large part, disapproval of their nonconformity with gender-based expectations.").

In *Baldwin*, the EEOC provided three reasons Title VII includes protections against discrimination based on sexual orientation. First, the EEOC reasoned that sexual orientation discrimination violates Title VII because it includes treating employees more or less favorably based on the employee's sex. *Baldwin*, EEOC Apeal No. 0120133080, 2015 WL 4397641, at 7. "For example, assume that an employer suspends a lesbian employee for displaying a photo of her female spouse on her desk, but does not suspend a male employee for displaying a photo of his female spouse on his desk. The employee in this example can allege that her employer took an adverse action against her that the employer would not have taken had she been male." *Id*. Such an employment decision would be based on sex, which violates Title VII.

Second, the EEOC stated that sexual orientation discrimination also violates Title VII because it is associational discrimination based on sex. "That is, an employee alleging discrimination on the basis of sexual orientation is alleging that his or her employer took his or her sex into consideration by treating him or her differently for *associating* with a person of the same sex." *Id*. Under this theory, sexual orientation discrimination entails an employer's bias towards the sex of an employee who associated with an individual of the same sex. The EEOC cites numerous cases when drawing a parallel between the similarities of the current sex discrimination claim and Title VII's established prohibition against discrimination based on an employee's association with a person of a different race. *Id*. at 8 (citing *Floyd v. Amite County School Dist*., 581 F.3d 244, 249 (5th Cir. 2009) ("This court has recognized that . . . Title VII prohibit[s] discrimination against an employee on the basis of a personal relationship between the employee and a person of a different race."); *Holcomb v. Iona Coll*., 521 F.3d 130, 138 (2d Cir. 2008) ("We . . . hold that an employer may violate Title VII if it takes action against an employee because of the employee's association with a person of another race."); *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick & GMC Trucks, Inc.*, 173 F.3d 988, 994 (6th Cir.1999) ("A white employee who is discharged because his child is biracial is discriminated against on the basis of his race . . . ."); *Hancock v. Dep't of Transp*., EEOC Appeal No. 01922416, 1992 WL 1371812 (EEOC Dec. 2, 1991), *req. for recon. den.*, EEOC Request No. 05930356, 1993 WL 1510013 (EEOC Sept. 30, 1993) ("[A]n individual may be entitled to protection by virtue of association with a member of a protected class . . . ."); *Robertson v. U.S. Postal Serv.*, EEOC Appeal No. 0120113558, 2013 WL 3865026 (EEOC Jul. 18, 2013), n.1 (associational discrimination may be established where evidence permits the inference that an agency's act or omission would not have occurred if the complainant and associate were of the same race).

The EEOC also reasoned that sexual orientation discrimination violates Title VII because, at its core, "it necessarily involves discrimination based on gender stereotypes." *Id*. at 9. As such, the decision notes that sexual orientation discrimination is "often, if not always, motivated by a desire to enforce heterosexually defined gender norms." *Id*. at 11 (quoting *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002)). The concept of gender norms is what drives discrimination based on sexual orientation. As such, sexual orientation discrimination is a prohibited form of sex discrimination under Title VII.

1. In addition to its decision in *Baldwin*, the EEOC has taken other steps to increase the rights of LGBT employees as part of the agency's Strategic Enforcement Plan.

The Equal Employment Opportunity Commission periodically publishes a set of objectives known as its Strategic Enforcement Plan (SEP). The SEP serves as the EEOC's core mission, and the EEOC adopted its current SEP in December 2012. This recent SEP includes "coverage of lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions, as they may apply" as one of the EEOC's top enforcement priorities. In furtherance of its SEP, the EEOC has recently begun to take significant steps to pursue this agenda.

In 2015, the EEOC reversed its long-time position that a homosexual man could not charge a federal agency employer with sex discrimination in violation of Title VII of the Civil Rights Act of 1964. *Baldwin v. Foxx*, Apeal No. 0120133080, 2015 WL 4397641 (EEOC 2015). In addition to sexual orientation discrimination protections, the EEOC is also prioritizing the fight against discrimination based on gender identity. In fact, the Agency has recently filed numerous lawsuits to that are still pending. *See EEOC v. Bojangles Restaurants, Inc.*, (E.D. N.C., Civ. No. 5:16-cv-00654-BO, filed July 6, 2016); *EEOC v. Scott Medical Health Center, P.C.*, (W.D. Pa., Civ. No. 2:16-cv-00225-CB, filed March 1, 2016); *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); *Broussard v. First Tower Loan LLC*, (E.D. La., Civ. No. 2:15-cv-01161-CJB-SS) (court granted EEOC's Motion to intervene on September 17, 2015). These cases have various degrees of allegations, but all involve claims of discrimination based on the charging parties' gender identity. The outcomes of these cases will continue to shed significant light protections LGBT employees have under Title VII.

In addition to the cases that are pending, three similar EEOC claims have been settled. *EEOC v. Pallet Companies d/b/a IFCO Sys. North Am., Inc.*, (D. Md., Civ. No. 1:16-cv-00595-CCB, filed Mar. 1, 2016, settled June 28, 2016) (resulting in a $202,200 settlement for a lesbian employee asserting claims of harassment on the basis of sexual orientation and nonconformity with traditional gender stereotypes); *EEOC v. Deluxe Financial Services Corp.*, (D. Minn., Civ. No. 0:15-cv-02646-ADM-SER, filed June 4, 2015, settled January 20, 2016) (a $115,000 settlement for a transgender employee that was refused access to the women's restroom in violation of Title VII); *EEOC v. Lakeland Eye Clinic, P.A.*, (M.D. Fla., Civ. No. 8:14-cv-2421-T35 AEP, filed Sept. 25, 2014, settled April 9, 2015) ($115,000 settlement for a transgender employee that was discriminated against because she failed to meet the employer's gender-based expectations, preferences, or stereotypes in violation of Title VII). Each of these cases resulted in six-figure settlements, as well as additional employee training to explain that discrimination based on sex-stereotypes, gender-identity, sexual orientation, and transgender status are all violations of Title VII. These cases are among the first of their kind to reach resolution with the aid of the EEOC.

2. Although the EEOC's interpretation of Title VII is not binding on Federal Courts, the decision in *Baldwin* and recent EEOC actions were thoroughly examined by the Seventh Circuit when reconsidering whether discrimination based on sexual orientation is a protected form of sex discrimination under Title VII.

The Seventh Circuit recently issued a thorough discussion regarding the meaning of sex discrimination under Title VII and whether or not it includes discrimination based on sexual orientation. *See Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 703 (7th Cir. 2016). In *Hively*, the plaintiff was a part-time adjunct professor asserting that she was denied full-time employment and promotions because of her sexual orientation. *Id.* at 699. The college presented the defense that Title VII does not apply to claims of sexual orientation discrimination. *Id.* Although the Seventh Circuit held Title VII not to include protections based on sexual orientation, the decision was seemingly reached with great reluctance. *See generally Hively*, 830 F.3d 698.

In a lengthy discussion—which was delayed on at least one occasion—the Seventh Circuit noted its consideration of prior precedent, congressional intent, legislative history, EEOC Guidance, and the recent expansion of LGBT rights in *Windsor* and *Obergefell*. In *Hively*, the Court noted that it is "presumptively bound by [its] own precedent in *Hammer*, *Spearman*, *Muhammad*, *Hamm*, *Schroeder*, and *Ulane*," all of which support the holding that "Title VII does not redress sexual orientation discrimination." *Id.* at 701. The Court continues by asserting, "Our holding and those of other courts reflect the fact that despite multiple efforts, Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation." *Id.* (supporting the argument that Congress very narrowly defined "sex" when passing Title VII of the Civil Rights Act).

However, instead of ending the decision there, the Seventh Circuit continued by declaring, "we would be remiss not to consider the EEOC's recent decision" in *Baldwin*. *Id*. at 702. The Court identified several reasons why *Baldwin* is significant and should carry weight amongst the courts. *See id*. at 702–04. *Baldwin* marked the first time the EEOC concluded that sexual orientation discrimination is a form of protected sex discrimination under Title VII. *Id.* at 703. Additionally, the EEOC criticized the Seventh Circuit and other courts that "'simply cite[d] earlier and dated decisions without any additional analysis' even in light of the relevant intervening Supreme Court law." *Id*. (quoting *Baldwin*, 2015 WL 4397641, at *8 n.11).

Acting in apparent compliance with the EEOC's suggestion to consider intervening case law, the Seventh Circuit began a rather lengthy discussion regarding the evolution of LGBT rights. *Id.* at 704. In fact, although the Court noted that *Obergefell* did not address issues regarding employment discrimination under Title VII, the decision calls attention to several statements made by Chief Justice Roberts in oral arguments. *Id.* at 713–14. Specifically, the Court noted his line of questioning "wondering whether 'if Sue loves Joe and Tom loves Joe, Sue can marry him and Tom can't. And the difference is based upon their different sex. Why isn't that a straightforward question of sexual discrimination?" *Id.* (quoting transcript of oral argument at 62:1-4 *Obergefell*, 135 S. Ct. at 2584). In reaching its decision in *Hively*, the Seventh Circuit noted a clear concern that the current cases "create a paradoxical legal landscape in which a person can be married on Saturday and then fired on Monday for just that act. For although federal law now guarantees anyone the right to marry another person of the same gender, Title VII, to the extent it does not reach sexual orientation discrimination, also allows employers to fire that employee for doing so." *Id.* at 714.

The Seventh Circuit's lengthy discussion of the shifting legal landscape signaled a notable struggle to uphold precedent. In fact, the court noted that under prior precedent, "our understanding of Title VII leaves us with a somewhat odd body of case law that protects a lesbian who faces discrimination because she fails to meet some superficial gender norm . . . , but not a lesbian who meets cosmetic gender norms, but violates the most essential of gender stereotypes by marrying another woman." *Id*. at 715. Ultimately, the Justices on the panel were unwilling to break from prior precedent and expand Title VII protections, despite acknowledging, "Perhaps the writing is on the wall." The court concluded the opinion by stating, "But writing on the wall is not enough. Until the writing comes in the form of a Supreme Court opinion or new legislation, we must adhere to the writing of our prior precedent." *Id.* at 42.

On October 11, 2016, the Seventh Circuit granted *en banc* review in *Hively*. Although a date for oral argument has not been scheduled, it seems that the Circuit may be ready to reconsider prior precedent. The battlefront for LGBT rights has not been concluded; instead, it has merely shifted from marriage to the workplace. The Seventh Circuit currently stands at the precipice of change. The court's decision to review its decision in *Hively* is as important as it is interesting. The original opinion reads as a plea for direction from the Supreme Court to reinterpret Title VII, and an *en banc* review can easily be interpreted as the Seventh Circuit's final effort to encourage the Supreme Court to take action. As such, a reversal in *Hively* could very likely prompt the Supreme Court to weigh in on Title VII's coverage of sexual orientation discrimination, but only time will tell.