
A. Has LGBT Discrimination Ended in the Workplace?

1. A 2014 report by the Center for American Progress\(^1\) compiled the following data on LGBT employment discrimination:

   i. 11 to 28% of lesbian, gay, and bisexual, or LGB workers are denied or passed over for a promotion because of the sexual orientation.

   ii. 47% of transgender people reported being fired, not hired, or denied a promotion because of their gender identity.

      Of the 47% discriminated against, roughly 26% report being fired from a job they already had simply because of their gender identity.

   iii. Gay and bisexual men make 10 to 32 percent less than straight men working similar jobs.

   iv. 7 to 41% of LGB workers were verbally or physically harassed or had their workplace vandalized.

2. Only 18 states and the District of Columbia have laws explicitly protecting LGBT workers from being fired because of their sexual orientation or gender identity.\(^2\) Ohio, Kentucky, Michigan, and Tennessee offer no protections.

   i. Will employers provide more employment benefits to same sex couples after Obergefell? Many Fortune 500 corporations already do. Check out the Human Rights Campaign’s Corporate Equality Index,\(^3\) where 13 Ohio corporations, including law firms, earned a 100% rating. According to HRC’s 2015 Corporate Equality Index, 89% of the Fortune 500 companies have policies that prohibit discrimination


on the basis of sexual orientation and 66% prohibit discrimination based on gender identity compared to just 3 in 2000. That is up from 61% in 2002. Some employers have offered “domestic partner benefits” so same sex couples who could not marry in Ohio could share in their partner’s employment benefits. These may fade away after same sex couples are given time to marry. Although there is no federal law protecting employees from sexual orientation discrimination,

B. The Impact of Legalization of Same-Sex Marriage

i. On Friday, June 26, 2015, the United States Supreme Court issued a landmark decision in Obergefell v. Hodges, 135 S.Ct. 2584 (2015), striking down same-sex marriage bans across the country as unconstitutional under the due process and Equal Protection clauses of the Fourteenth Amendment.

ii. Equal Protection

a. Obergefell held that the right to marry is inherent to one’s personal liberty and that the Equal Protection Clause prohibits states from depriving same-sex couples of that right and liberty.

iii. Employee Benefits:

a. Employers must recognize the broader definition of marriage.

b. If Obergefell is applied retroactively, then same sex couples who have been together before Ohio ended common law marriage in 1991 may be married.

c. Employers that offer spousal health insurance benefits are bound by Obergefell and must provide benefits to legal spouses on an equal basis, regardless of sexual orientation.

d. Employers have a choice whether to continue to offer spousal benefits or domestic partner benefits to unmarried same-sex and opposite-sex couples.


iv. **Tax Implications**

a. After *United States v. Windsor*, 133 S. Ct. 1675 (2013), same-sex couples could file a federal joint tax return but not a state joint tax return if they lived in a state that did not allow same-sex marriages.

b. After *Obergefell*, same-Sex married couples will now be able to file joint state tax returns and have other financial options that are available to heterosexual couples.

   i. The state income tax treatment of employer-provided benefits could change for individuals with same-sex spouses.

C. **Title VII of the 1964 Civil Rights Act:**

   i. No federal law currently expressly prevents employers from discriminating against people on the basis of sexual orientation.

   ii. *Obergefell* is not an employment case and it does not serve to expand Title VII’s protected classes to now encompass sexual orientation. State law permitting same-sex couples to be married does not protect them from employer discrimination.

      a. However, given the equal protection and due process grounds relied upon in *Obergefell*, it seems possible that legal challenges could be pursued on these grounds to expand protection to LGBT public employees.

D. **Title VII:** Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e, *et seq.*: “It shall be an unlawful employment practice . . . to discriminate against any individual . . . because of sex.”

   i. Originally, title VII applied only to private employers, but the **Equal Employment Opportunity Act of 1972** (“EEOA”) extended Title VII’s provisions to public employers.\(^6\)

   ii. Title VII does not explicitly apply to discrimination on basis of sexual orientation or gender identity.

   iii. Since 1994, versions of Employment Non-Discrimination Act “ENDA” have been unsuccessfully introduced in each session of Congress, which would amend Title VII to add the term “sexual orientation.” But, attempts

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have been unsuccessful. Currently the pending legislation is called the Equality Act and will protect people from sexual orientation and gender identity discrimination at work, in housing, in access to public places and in education.

iv. Some courts have held that “because of sex” does not prohibit discrimination based on sexual orientation. *Dillion v. Frank*, 952 F.2d 403 (6th Cir.1992); *Ruth v. Children’s Medical Center*, 940 F.2d 662 (6th Cir. 1991); *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999).

v. “Because of sex” refers only to membership in a class delineated by gender and not sexual affiliation.

vi. In *Baldwin v. Foxx* the EEOC ruled in July 2015 that Title VII’s protection from sex discrimination protected an employee from sexual orientation discrimination. The EEOC reasoned that if a man marries a man and is fired for marrying a man, he is being discriminated against based on sex because if the man had married a woman he would not have been fired. While the employee’s claims were against his employer, the federal government, plaintiff’s employment lawyers will try to use *Baldwin v. Foxx* to extend Title VII protections to private employees discriminated against on the basis of his or her sexual orientation.

a. EEOC’s views on the scope of Title VII are considered persuasive, but not binding authority on the courts.

E. **Ohio Revised Code Section 4112.02**

i. “It shall be an unlawful discrimination practice for any employer, because of race, color, **SEX**...to discharge without just cause, to refuse to hire or otherwise to discriminate against that person with respect to hire, terms, conditions, or privileges of employment or any matter directly or indirectly related to employment.”

ii. Courts have held that Section 4112 of the Ohio Revised Code **does not** apply to sexual orientation. *Burns v. Ohio State Univ. Coll. of Veterinary Med.*, 2014-Ohio-1190, ¶ 13 appeal not allowed sub nom. *Burns v. Ohio State Univ. Coll. of Veterinary Med.*, 139 Ohio St. 3d 1473 (App. 10th Dist 2014).

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F. Equal Protection: All Public Employees Must be Treated Equally.

i. The Fourteenth Amendment to the United States Constitution provides that no “State [shall] deprive any person within its jurisdiction the equal protection of the laws.”

ii. The U.S. Supreme Court, the Sixth Circuit, and this District Court have held that it is a violation of the Equal Protection Clause to discriminate on the basis of sexual orientation. Romer v. Evans, 517 U.S. 620, 116 S.Ct. 1620 (May 20, 1996); Stemler v. City of Florence, 126 F.3d 856 (6th Cir. 1997); Glover v. Williamsburg Local School Bd., 20 F. Supp. 2d 1160 (S.D. Ohio 1998); Equality Foundation v. City of Cincinnati, 860 F.Supp. 417 (S.D. Ohio 1994).

iii. In Romer, the Court identified whether the classification drawn by the Colorado Amendment served a legitimate governmental purpose, as illegitimate purposes are never constitutional. The Court reinforced the principle that the rational relationship test is sufficient to expose and strike down laws that draw a classification whose true purpose is simply to discriminate.

iv. Using extraordinarily strong language in a six member majority, the Romer Court held that the Colorado law was a “literal” violation of the Equal Protection Clause as no legitimate purpose is served by a law which defines persons by a single trait and then denies them the right to seek protection “across the board.” Id. at 1626, 1628. The Colorado law was held to reflect animus toward gay people. The Court held that hostility or animus is not a legitimate governmental purpose. Id. A “bare desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” Id. at 1628.

v. Justice O’Connor’s concurrence in Lawrence v. Texas, 529 U.S. 558 (2003), elaborated on Romer stating that Texas’ sodomy law brands all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else.

vi. The Sixth Circuit has held that in sexual orientation equal protection challenges, justifications grounded in prejudice cannot be upheld under rational basis review. “[S]ince governmental action ‘must bear a rational relationship to a legitimate governmental purpose,’ and the desire to effectuate one’s animus against homosexuals can never be a legitimate governmental purpose, a state action based on that animus alone violates the Equal Protection Clause.” Stemler, at 856.

G. Governments May Protect Their Employees from LGBT Discrimination

i. City of Cincinnati Municipal Code Chapter 914

a. All employers who employ 10 or more persons within the City of Cincinnati are prohibited from discriminating on the basis of sexual orientation or transgendered status.
b. It is unlawful for any employer to discriminate by refusing to hire any person or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions or privileges of employment, or any matter directly or indirectly related to employment.
   - If an employer discriminates, it is subject to a maximum $1,000 fine.

ii. Ohio Executive Order 2011-05K

a. In January 2011 Governor Kasich declared it the policy of the State of Ohio that no person employed by an agency, board or commission may discriminate on the basis of sexual orientation in hiring, layoff, termination, transfer, promotion, demotion, or rate of compensation.

   b. Governor Strickland’s executive Order included a prohibition from discriminating on the basis of gender identity. Executive Order 2007-10S

iii. Hamilton County Ohio

a. The County protects its employees from unfair treatment based on sexual orientation and gender identity. The County has a “zero tolerance” for violations of employee rights, harassment, or discrimination.
iv. President Obama’s Executive Order 13672-2014

a. President Obama signed the Order in 2014 and the regulation took effect on April 8, 2015.8

b. The order prohibits federal contractors and subcontractors from discriminating on the basis of sexual orientation and gender identity.

c. Secretary of Labor was directed to prepare regulations implementing the new protections.

H. Private Employees Are Protected By Federal Law If They Are Sexually Harassed By a Same Sex Harasser.


Supreme Court overruled Fifth Circuit opinion that held that, as a matter of law, Title VII categorically barred any claim for same-sex sexual harassment.

Just as there can be no presumption that a person of one race would not discriminate against another person of the same race, there can be no absolute presumption that a person of one gender would not discriminate against another person of the same gender.

It is not the sex of the harasser or the victim that is important, but, rather, whether the victim can “prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted ‘discriminat[ion] . . . because of . . . sex.’”

ii. But how do you prove same-sex sexual harassment?

a. One scenario is there is evidence the harasser sexually desired the victim.

b. Another is there is no evidence of sexual attraction, but there is evidence the harasser displays hostility to the presence of a particular sex in the workplace.

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Another is where the plaintiff offers direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed sex workplace.

I. Title VII Offers Protection From Sex Stereotyping For Transgender Persons But Not GLB Employees.

i. In order to prove a sex discrimination claim a plaintiff must prove that (1) he is a member of a protected class; (2) he applied and was qualified for a promotion; (3) he was considered for and denied the promotion; and (4) other employees of similar qualifications who were not members of the protected class received promotions. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

ii. A protected class does not included transgendered people. However, a protected class includes men and women. Men and women are protected from sex-stereotyping. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). Therefore, discrimination that is based on sex-stereotyping or gender non-conformity is protected, regardless whether the person also happens to be transgendered. *Smith v. City of Salem, Ohio*, 378 F.3d 566, 575 (6th Cir. 2004) (good discussion of all case law); *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2004).

a. In *Smith*, 7 year firefighter Jimmie Lee Smith was diagnosed with Gender Identity Disorder. He then started the process of becoming more feminine in his appearance. After being harassed by co-workers for not being masculine enough, he told his supervisor he had GID and would eventual completely transform from a man to a woman. Thereafter the City began a “witch hunt” and tried to get Smith to resign by forcing him to undergo three psychological tests. Smith filed a Title VII suit for sex discrimination – which was dismissed. On appeal, the Sixth Circuit held that Smith stated a Title VII claim for sex stereotyping under *Price Waterhouse*. The case later settled.

b. In *Barnes*, police sergeant Philip Barnes was demoted. Barnes was the only sergeant in the history of Cincinnati Police to fail sergeant probation. Barnes argued he was demoted because he failed to conform to how a man should look and behave (arched eye brows, French manicure, and facial makeup). Barnes was even warned by a fellow sergeant he was going to fail probation because he was not

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9 Gender Identity Disorder, also called Gender Dysphoria, is a formal diagnosis in the DSM IV to describe persons who experience significant gender dysphoria (discontent with their biological sex and/or the gender they were assigned at birth).
masculine enough. By the time the case was tried in 2004 Philip had changed his name to Philecia and appeared at trial as a woman. The jury found she was discriminated against in violation of Title VII and awarded her $320,511 in back pay, front pay and compensatory damages. The court awarded $527,888 in attorney fees, plus $25,837 in expenses. The verdict was upheld on appeal.

iii. **Macy v. Holder** the Equal Employment Opportunity Commission (“EEOC”) in 2012 provided protections for transgender employees under Title VII’s prohibition of discrimination because of sex. The EEOC took 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 takes an action that simply reflects animus against transgender individuals or a desire to exclude them from the workplace, rather than a concern, specifically, about gender non-conformity. While the decision applied to the appeal of a federal employee, it could have broader application if Courts follow its logic.

iv. However, sex stereotyping cannot be stretched to protect gay men. In **Vickers v. Fairfield Medical Center**, 453 F.3d 757, 763 (6th Cir. 2006) the court denied a Title VII claim by a security officer who was harassed at work for being perceived as gay. The Court would not extend sex-stereotyping to protect male employees whose supposed sexual practices were objectionable because he was perceived to behave more like a woman. The Court limited sex stereotyping to gender non-conforming behavior observed at work. In **Price Waterhouse** her manner of walking and talking at work, as well as her work attire and her hairstyle were the basis of the sex stereotyping claim.

a. **Gilbert v. Country Music Association, Inc.**, 2011 WL 3288655. Union worker filed suit against union and others for refusing to give him work after he complained that another union member called him a faggot and threatened to stab him. The Sixth Circuit found no federal or state law protected him but his breach of duty claim against the union could proceed.

b. **Gilbert** leaves an opening. If plaintiff had made a more detailed explanation of sex stereotyping in his complaint to satisfy **Ashcroft v Iqbal**, 566 U.S. 662, 129 S.Ct. 1937 (2009), the Plaintiff may have stated a claim to survive the motion to dismiss.

c. **Taylor v. H.B. Fuller Co.**, 2008 WL 4647690 (Barrett J.), the court found Title VII and Price Waterhouse did not protect the plaintiff from being harassed at work because his co-workers thought he

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was gay. He did not offer any evidence that the “deplorable and unacceptable” actions of his co-workers, including hostile repeated sexual touchings and sexual remarks were not “because of sex” because there was no evidence how the harassers treated women in the workplace.

d. Herbert v. Milford Towing, S.D. Ohio, 1:00-cv-855 (Hogan M.J.), male on male sex harassment alleged men touching plaintiff was because of sex because men did not touch female employees.

v. See other district court cases: Fischer v. City of Portland, 2004 WL 2203276 (D. Or. 2004) (city must protect lesbian who dresses like a man from harassment); Schroer v. Billington, 577 F. Supp.2d 292 (D.D.C. 2008) (Library of Congress cannot discriminate against transgendered employee); Glenn v. Brumby, 2009 U.S. Dist. LEXIS 54768 (N.D. Ga. 2009) (legislative aide in transition to being a woman was protected from being fired); Kastl v. Maricopa County Community College District, 2004 WL 2008954 (June 3, 2004), (forcing employee transitioning from male to female to prove she did not have a penis before she could use the women’s bathroom stated a claim).

J. Other Transgender Workplace Issues (Transitions, Bathrooms, Dressing Areas)

i. Name change. A transgendered person in Ohio can have her name changed but cannot have the gender on her driver’s license changed. Employers must accept the name change. For example, the City of Cincinnati accepted Philip Barnes as Philecia Barnes and required her to follow female dress and grooming codes and female arrest procedures (female officers pat down female suspects).

ii. Locker rooms/shower. If fellow employees do not want the transgendered person, either before her gender transformation or during it, to use their locker room or shower, employers must decide without legal guidance. There is no law addressing this. Negotiation is the best practice (designate times for transgendered employee, designate private area, create a unisex locker room).

iii. Bathrooms. If fellow employees do not want the transgendered person, either before her gender transformation or during it, to use their bathroom, the employer must still offer the transgendered employee a bathroom. There is no law to force employers to honor the new gender for bathroom assignment. The best practice is have the transgendered person use the bathroom that is identified with her gender identity and tell employees who do not want to share with her to use an alternate bathroom.

i. In February 24, 2015, a 14-year-old transgender student brought suit against the school district for banning him from the boy’s restroom. He alleged that the defendants denied him equal treatment and benefits and subjected him to harassment based on sex in violation of Title IX.

ii. The Department of Justice affirmed its position by filing a brief in federal court stating that transgender students may use the restroom reflecting their gender identity.

iii. **Title IX of the Education Amendments of 1972**

   a. Title IX bans sex-based discrimination in public education facilities.

   b. The language of Title IX does not prohibit discrimination and harassment on the basis of sexual orientation.

b. *Gavin Grimm* (Virginia)

i. In the fall of 2014, the Gloucester County School Board held a meeting over a proposal aimed at solely Grimm. He was called a freak and compared to a dog. Some speakers debated his anatomy as a transgender boy. Then, the Board passed a policy prohibiting transgender students from using restrooms that do not correspond to their biological genders.

ii. In late June, with the help of ACLU, *Gavin Grimm* brought suit in federal court arguing that he has a constitutional right to use the boy’s restroom under Title IX that bans sex-based discrimination in schools that accept federal money.

iii. In June 30, 2015, the U.S. Department of Justice entered a statement of interest arguing that the County Board’s policy violated Grimm’s rights and that the federal officials are seeking to ensure that all students have the opportunity to learn in an environment free of sex discrimination.\(^{11}\)

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iv. In September 2015, the U.S. District Judge denied the preliminary injunction so Gavin is not allowed to sue the boy’s restrooms. He denied the Title IX claim, too. The case remains pending.

K. Wrongful Discharge and Public Policy

a. Southern District of Ohio held that a claim of sexual orientation discrimination may be brought under Ohio’s public policy exception based on Columbus City Code Section 2331.03.

b. The Court found that an employee could maintain an action in Ohio for wrongful discharge in violation of public policy based on the City of Columbus’ prohibition of discrimination on the basis of sexual orientation.