DISCRIMINATION IN EMPLOYMENT ISSUES FOR LGBT INDIVIDUALS

Employment discrimination is a very real concern to persons in the LGBT community. Nearly 6.5 million employees in the United States identify as LGBT. Nationwide surveys reflect widespread discrimination against LGBT employees.

Congress has failed to pass legislation expressly protecting LGBT employees from discrimination, even though polls reflect that American people overwhelmingly support protecting gay and trans people from workplace discrimination. Only 20 states, the District of Columbia and Puerto Rico, have laws expressly prohibiting discrimination in employment because of sexual orientation and gender identity. Less than one-half of LGBT workers live in the 22 states that explicitly prohibit employment discrimination because of sexual orientation, and only about 40 percent live in states that expressly ban employment discrimination based on gender identity. There are many companies in the U.S. that embrace inclusion and are interested in attracting, retaining, and advancing LGBT employees, regardless of state and local law. The Human Rights Campaign reports that as of 2016, 92 percent of Fortune 500 companies have non-discrimination policies that include sexual orientation, and 82 percent have non-discrimination policies that include gender identity.

Although Title VII of the Civil Rights Act of 1964 ("Title VII") does not expressly ban employment discrimination against LGBT employees or applicants, recent federal court decisions have acknowledged Title VII’s protection of transgender individuals. This year, the Seventh Circuit Court of Appeals became the first federal appellate court to rule that Title VII prohibits discrimination based on sexual orientation. Another first this year was a ruling by a federal judge in the Eastern District of Pennsylvania that transgender individuals diagnosed with gender dysphoria may be covered under the Americans with Disabilities Act ("ADA"). These breakthroughs were a long time coming, and LGBT advocates are hopeful that other courts will adopt the reasoning of these decisions favorable to LGBT employees.

Title VII provides, in pertinent part, that "[i]t shall be an unlawful employment practice for an employer ... to discriminate continued on page 12
Greetings! Welcome to The Equalizer, the newsletter of the American Bar Association’s Commission on Sexual Orientation and Gender Identity (SOGI)!

We at SOGI cannot and will not sugar coat the last year. President Trump’s efforts to attack and erase the LGBTQ community during his first year in office have been harmful and far-ranging. I never like lists but it is important to see what harm has been done:

- January 20, 2017 – Minutes after Donald Trump was sworn into office, any mention of the LGBTQ community was erased from the White House, Department of State, and Department of Labor Websites.
- February 22, 2017 – With help of Attorney General Sessions, President Trump rescinded Title IX protections for transgender students in our nation’s schools.
- June 15, 2017 – The Department of Education rolls back the Office for Civil Rights’ expansive approach to investigating civil rights complaints that protect LGBTQ students, and other marginalized communities, from discrimination at school.
- July 26, 2017 – President Trump announces his proposed bans on transgender service members from serving in “any capacity” in the U.S. military, threatening to fire 15,000 currently serving troops over Twitter.
- July 26, 2017 – The Justice Department files a brief opposing workplace nondiscrimination protections for the LGBTQ community under Title VII of the Civil Rights Act of 1964 in the case Zarda v. Altitude Express.
- October 5, 2017 – In a Department of Justice memo, the Trump Administration reverses a policy that provided non-discrimination protections for transgender people in the workplace under Title VII of the Civil Rights Act of 1964.
- October 6, 2017 – The Department of Justice issues a sweeping “religious exemptions” guidance which invites taxpayer-funded federal agencies, government employees, and government contractors to legally discriminate against LGBTQ employees as long as they cite a religious belief as the reason for doing it.
- January 18, 2018 – The Department of Health and Human Services created a new department that shields healthcare workers who refuse to treat LGBTQ patients or those living with HIV by calming moral or religious objections.

The list goes on, but I think we all get the message. LGBTQ rights are under attack. We at the ABA have not and will not stand for this. Whether it be statements from the ABA President, filing Amicus briefs, or passing resolutions supporting LGBTQ rights the ABA has stood by the LGBTQ community. We at SOGI will continue to fight by continuing to provide educational programs, free resources, and policy changes.

In this newsletter, you will find articles that celebrate LGBT legal heroes, provide resources for transgender individuals, and bring to light some of the LGBT work being done on behalf of Native Americans.

We on the SOGI Commission continue to work hard on behalf of the LGBT community. If you are interested in being a part of this very exciting and essential work, please do not hesitate to contact me, or any member of the Commission, our liaisons, or our outstanding staff.

MARK JOHNSON ROBERTS
Chair, ABA Commission on Sexual Orientation and Gender Identity
Eduardo Juarez had just arrived in New York City from San Antonio, Texas to attend a conference on Transgender Advocacy in the context of Disability Rights Law when I had the opportunity to interview him for this spotlight. This detail alone is illustrative of precisely why Mr. Juarez is one of SOGI’s 2018 Stonewall Award recipients. It was immediately apparent to me that this is not just an award for what he has contributed up to now, it is an award for the ongoing activist and leader that Mr. Juarez is. He presently serves as the Supervisory Trial Attorney with the San Antonio Field Office of the EEOC.

JC: Tell us about your journey and how you got be where you are.

EJ: Recently I was at my 30 year Notre Dame alumni reunion, and attended an LGBT panel of alums from various generations, the 50’s, 60’s, 70’s, 80’s (when I went), up to the present. It was stark hearing how much things have improved for LGBT students. Suffice it to say, in the 80’s it was not good, in my opinion. I was still relatively closeted, even in law school. In terms of LGBT advocacy, it wasn’t until the 90’s when I was working at the Public Defender Service in Washington DC, likely due to the public interest nature of that work and having really good colleagues, that I felt comfortable coming out at work.

The first opportunity I had to work directly in the field of LGBT legal advocacy was in 2001 when I returned to San Antonio with the EEOC. There were some early cases, based on the Price Waterhouse case and the gender-stereotyping theory, that found some LGBT discrimination could be covered under Title VII. We had a charge at the EEOC in 2003 that didn’t turn into a lawsuit, but upon investigation we found cause for a transgender woman who had been fired for not meeting gender expectations. At about the same time we were investigating that charge, the 6th Circuit issued its opinion in Smith v. City of Salem. That was one of the first federal appellate opinions that held in favor of a transgender plaintiff under Title VII. It went to the very edge short of holding that transgender discrimination is per se prohibited by Title VII—which is the EEOC’s position as stated in the Macy decision in 2012. So, it was definitely at the EEOC where I began and continue doing LGBT legal advocacy.

JC: What are the most important LGBT legal issues yet to be resolved?

EJ: In the employment context, the Supreme Court will decide—hopefully soon—that the sex discrimination prohibited by Title VII necessarily includes discrimination based on sexual orientation and gender identity. Another important issue deals with the constitutionality of the trans exclusions in the Americans With Disabilities Act (ADA) and the ADA’s coverage of trans persons. We will be discussing this ADA issue here in New York at this intersectional meeting of legal and community advocates for both the trans community and the disability community, and in particular the Blatt v. Cabela case. The plaintiff in Blatt is transgender, and it’s an employment discrimination case under both Title VII and the ADA. The ADA has explicit exclusions associated with transgender people—it excludes “transsexualism,” “transvetism,” and “gender identity disorders not resulting from physical impairments.” There are at least three different ways that lawyers have argued the exclusions do not apply, and that the ADA should protect trans people with gender dysphoria. For example, the Court in Blatt decided that the trans exclusions in the ADA refer to only the condition of identifying with a different gender, and not to encompass the medical condition of gender dysphoria. The issue in general is the development of getting coverage for trans people under the ADA. The lawyers for Ms. Blatt also constitutionally challenged the trans exclusions because the legislative history shows that the intent was a bare desire to harm transgender people- two Senators in particular.
Phyllis Randolph Frye is the first openly transgender judge in the nation. There’s an award named after her at her alma mater, Texas A&M University; she’s a life member of the National Eagle Scout Association; and the New York Times has called her the grandmother of the transgender movement. This year, she and her wife will celebrate their 43rd wedding anniversary. But life wasn’t always so kind to this Houston lawyer. Frye started living as a woman 40 years ago, before the Internet, before Tootsie and Transparent, and well before Caitlyn Jenner. She endured unspeakable discrimination. She lost jobs. She faced arrest. Her neighbors slashed her tires and spray-painted slurs on her driveway. During law school, the organization of religious students she had joined even refused to pray with her. Through it all, Frye never gave up the fight—for acceptance, for opportunity, for political power and legal legitimacy.

Q. Your profile in the New York Times begins with a mention of Caitlyn Jenner. What do you think of her?
A. I am happy for her, of course, and I hope someday to get to meet her. She and I are within a year of each other in age: When she won the Olympic decathlon in 1976, that’s the year I went full-time as Phyllis.

Q. Your third year, you did an internship at the Harris County DA’s office. How did that go?
A. I knew that no one was going to hire me after I graduated, so I needed to be able to feel comfortable in the courtroom, and that’s exactly what happened. But the DA was ultra-conservative, and since I was coming to work dressed as Phyllis, he would only allow me to use a one-stall bathroom on the second floor. Well, I worked on the 10th floor. So if I needed to use the bathroom, I had to go downstairs and through security. I only did that twice, and I finished the semester with a bladder infection.

Q. After your honorable discharge from the Army in 1972, you became a civil engineer. Did your advocacy inspire you to leave civil engineering and go to law school?
A. That was an accident! I became a lawyer because I was chased out of two careers. In the fall of ’76, I was trying to figure out what to do, and I thought, ‘I am going to use the GI Bill to go back to school.’ I decided to get an MBA because I thought I could meet other engineers who could help me get a job. That year, the University of Houston began a joint MBA-JD degree, and I thought: I can use the GI Bill for even longer. And when word gets out around the neighborhood that I’m a lawyer, maybe those mean people will finally leave us alone.

Q. Tell me about your role in shaping the movement.
A. I was the one who put it together from a national legal and political standpoint. I created the International Conference on Transgender Law and Employment Policy. We had our first convention in Houston in 1992. Only two other out-of-the-closet lawyers came in the beginning; but there were a lot of transgender activists, and we formulated policy, published our proceedings and started lobbying Congress. I traveled to transgender events across the country to do workshops on law and politics. I’d pay for it by selling bound copies of the proceedings from the previous year’s conference and by selling T-shirts that said “Transgender Menace” for $20. I also had ICTLEP coffee mugs. I sold those for $100.

Q. What’s amazing to me is that, while you were so active on a
national political front, you couldn't get a job as a lawyer in your own town.

A. Even the few gay and lesbian attorneys in town wouldn’t hire me. I spent many years selling Amway brand cleaning products to gay bars.

Q. How did you finally end up with a successful law practice?

A. I became a lawyer in May 1981. I was pretty well-known in the gay community at the time, and every once in a while people would need a lawyer. In 1986 a closeted, gay, active-duty military man who got a DWI while leaving a gay bar asked me if I could take it to court and keep it out of the newspaper. He said, 'Have you ever done this before?' Well, I hadn't, but I said 'Sure! I do it all the time!' I called one of my friends who had real experience and said, 'Will you come down to the courthouse? I'll pay you to sit in the hallway and tell me if the prosecutor is giving me a good deal or trying to screw with me.' It all worked out, so I took the money and bought my first ad in the statewide weekly gay bar guide, and that’s when I launched my law career.

Q. Despite so many challenges, you’ve always maintained an unwavering self-respect and sense of dignity. Where do you think that comes from?

A. I think it had a lot to do with being an Eagle Scout and being a real achiever in high school. I have always been proud of the fact that I went to college on an ROTC military scholarship as part of a congressional program for only 200 students in the country. That does something to you—it makes you feel like maybe you are something.

Q. Was there a specific moment when you realized the movement was off and running, that the momentum was self-sustaining?

A. Around the middle of the first decade of this century, a lot more people were coming out, and gay and lesbian national organizations began to include transgender. More and more people started doing more and more of the work and doing a fantastic job. That’s when I started slowing down. I didn’t have to be out there stirring it up all the time.

This article originally appeared in the May 2016 issue of the ABA Journal with this headline: “A ‘Menace’ Mellows: In this post-Caitlyn age, one of the country’s most strident transgender advocates happily softens her stance.”

BY JENNY B. DAVIS
writer for the ABA Journal.
Jennifer Levi, Transgender Legal Rights Pioneer

I recently had the opportunity to speak with Jennifer Levi, Transgender legal rights pioneer and congratulated her on receiving a Stonewall Award from the American Bar Association Commission on Sexual Orientation and Gender Identity. Levi, who identifies as transgender FTM, is the Director of GLAD’s Transgender Rights Project, a law professor at Western New England University and co-editor of “Transgender Family Law: A Guide to Effective Advocacy.” He is a graduate of Wellesley College and the University Of Chicago Law School.

Speaking of his award, Levi emphasized that it is a “particular honor to be recognized along with Judge Phyllis Randolph Frye,” as she was a major influence in both Levi’s professional and personal journey.

Levi identified as a lesbian in college, but had often been perceived as male since childhood—a perception that she was comfortable with, but knew others were not. Levi experienced an awakening after reading Leslie Feinberg’s Stone Butch Blues. In the 1990s he learned of the International Conference on Transgender Law and Employment Policy, which Judge Frye spearheaded. “I remember walking into a room and seeing about 100 transgender people...most were women but there were a handful of transgender men and I felt like I had come home,” Levi recalls.

The conference was perfect timing for Levi, who just got involved in transgender issues. He had started taking pro bono referrals from Lambda Legal and was seeing how few protections transgender individuals had. This motivated him to learn more.

In 1998, Levi became an attorney for GLAD. “Cases with transgender young people have been a central part of my work. I started working with a transgender student back in 2000, a time when there was very little visibility and understanding about transgender young people.” Levi was lead counsel in the case Doe v. Yunits where he represented a transgender student denied the right to attend school because of her clothing. This landmark ruling became an important precedent and is the first reported decision in a case brought by a transgender student. “The family of the client really stepped up to support her and I was inspired and hopeful to see the ability of families to go from not understanding to a place of advocacy.”

Levi has since served as counsel in many more cases establishing rights for transgender people, such as O’Donnabhain v. Commissioner of Internal Revenue, which established that gender transition medical costs qualifies as a medical deduction for federal income tax purposes and Adams v. Bureau of Prisons, which successfully challenged a federal prison policy that excluded medical care for transgender inmates who entered the system without a transition-related medical plan. And recently secured a preliminary injunction against President Trump’s ban of transgender people in the military.

Levi said it was a “wild ride but important to bring those cases when we did. We honored the contributions transgender people have made to society.”

Levi was fortunate to have supportive progressive parents—both of whom were involved in advocacy. Today, her support network has expanded to include his long-term term partner “who is a tremendous source of support for me. We have two teenagers who inspire me to do this work. And we have a dog who greets me with enthusiasm every night I get home from work.”

Ghenete Wright Muir
SOGI Commissioner
The Stonewall Award Reception at Midyear 2018

Reception was well attended. © Powell Photography, Inc.

President Bass speaking © Powell Photography, Inc.

Stonewall Award Recipients Hon Phyllis Frye, Jennifer Levi, and Eduardo Juarez with SOGI Chair Mark Johnson Roberts and ABA President Hilarie Bass © Powell Photography, Inc.

Shane Vannatta and Victor Marquez with former BOG Liaison Ruthe Catolico Ashley © Powell Photography, Inc.

Jack Rives speaking © Powell Photography, Inc.

Pres. Elect speaking at reception © Powell Photography, Inc.

President Bass and SOGI Chair Mark Johnson Roberts at podium © Powell Photography, Inc.
LGBT legal experts provided an overview and discussions on a variety of topics, including the advances and setbacks to LGBT laws and the effect that they have had on individuals and the country; transgender issues that include the military ban, public accommodations, and inmate rights. Other topics included the Department of Defense’s Religious Freedom memo and the Justice Department intervention in a private employment lawsuit, arguing that the ban on sex discrimination in the Civil Rights Act of 1964 does not protect workers on the basis of their sexual orientation.

The program was moderated by D’Arcy Kemnitz Esq, Executive Director of the National LGBT Bar Association. The panelists included Hon. Phyllis Randolph Frye, Assoc. Judge for the Municipal Courts in Houston; Shannon Price Minter Esq, Legal Director of the National Center of Lesbian Rights; and Jennifer Levi, Transgender Rights Project Director for GLAD.

A direct link to review and video highlights can be found by visiting the SOGI Commission website. https://ambar.org/sogi

Written at “At ABA Midyear Meeting in Vancouver, the SOGI Commission sponsored a live CLE program entitled, The Current State of LGBT Rights Under the Trump Administration.”

Skip Harsch
SOGI Director
Greetings! This section of the newsletter is new for SOGI, designed to broaden our discussion to include Native (American Indian, Alaska Native, and Native Hawaiian) individuals that identify as Two-Spirit as well as the broader Native LGBTQ2 community. Check out the following resources and news items to learn more about what’s happening in LGBTQ2 community across Native America.

8 Things You Should Know About Two-Spirit People (Tony Enos)

Haven’t heard the term ‘Two-Spirit’? This short article discusses the origins of the term and the historical context that led to its creation. Some Native nations have a broader and more nuanced take on sexual orientation and gender identity. Like many identity labels, the term Two-Spirit is contested within Native communities. With 567 federally-recognized Native nations and hundreds of unrecognized tribes, it’s impossible for one term to work for everyone, but the term Two-Spirit has gained the most traction across Native communities; with each Native nation also maintaining its own terms for sexual orientation and gender identities that best fit its language and culture.

www.indiancountrymedianetwork.com/culture/social-issues/8-misconceptions-things-know-two-spirit-people/

Tribal Equity Toolkit 3.0: Tribal Resolutions and Codes to Support Two Spirit and LGBTQ Justice in Indian Country (Edited by Se-ah-dom Edmo and Aaron Ridings)

This toolkit provides sample legal language for adapting tribal resolutions and codes to recognize the rights of all tribal citizens. A third edition of the toolkit was published with the support of a growing coalition of national organizations convened by Western States Center, National LGBTQ Task Force, National Congress of American Indians, and the Center for American Progress.

www.thetaskforce.org/tribal-equity-toolkit-3-0/

BAAITS Two-Spirit Powwow in San Francisco

If you’re not in Vancouver for the ABA Mid-Year meeting, consider stopping by the annual Two-Spirit Powwow organized by the Bay Area American Indian Two-Spirits; an organization that exists to restore and recover the role of Two-Spirit people within the American Indian/First Nations community by creating a forum for the spiritual, cultural and artistic expression of Two-Spirit people. Be sure to download the BAAITS recommended “powwow etiquette” resource before attending your next powwow.

For information on future events, visit: www.baaits.org/baaitsevents.

KORI CORDERO
SOGI Commissioner
Document Correction Plays an Important Role in the Fight for Equality for Trans Community

The much publicized transition of celebrity Caitlyn Jenner increased the visibility of transgender people in our society. However, the reality is that transgender people are marginalized in our society and often in need of legal services to protect their rights in every facet of their lives. A Report of the National Transgender Survey concluded that it is “part of social and legal convention in the United States to discriminate against, ridicule, and abuse transgender and gender non-conforming people within foundational institutions such as the family, schools, the workplace and health care settings, every day.” Jamie M. Grant, et al., Injustice at Every Turn: A Report of the National Transgender Discrimination Survey 8 (National Center for Transgender Equality and National Gay and Lesbian Task Force 2011).

As part of its call to action to end discrimination and recognize the human rights of all people, The John Marshall Law School’s Pro Bono Clinic launched the Name and Gender Marker Change Project last year. Since then, we have assisted over 50 adults and minors in the process of correcting their identity documents in Illinois. Identity document correction for transgender people plays a crucial role in helping to end discrimination, harassment, and violence. Yet, the National Center for Transgender Equality (“NCTE”) estimates that only 1 out of 5 transgender people who have transitioned have updated all their documents to reflect their true gender identity.

There are many important reasons to correct identity documents. This became clear to me when a client told me that she simply avoided going anywhere or doing anything that required her to present identification because her state ID did not reflect how she presented. She was forced to opt out of many activities because of her non-matching documents, including doing anything that required an ID—like getting a job, enrolling in school, opening a bank account, getting a lease, buying a house, or going through airport security. The result of having non-matching documents, is that many transgender people are excluded from doing basic things that are necessary to function in society. This also puts the transgender population at much greater risk of poverty, unemployment, and homelessness than the general population. The NCTE estimates that one in five transgender people have experienced homelessness at some point.

Also, because transgender people are at much greater risk of harassment and violence, there are safety reasons for updating documents to reflect one’s true gender identity. After we assisted one woman with correcting her ID, she said she was excited to go to a bar with friends to celebrate. In the past, she suffered humiliation and harassment when she presented her ID that did not match how she presented. She was be publicly outed, forced to explain the mismatched documents, ridiculed, mocked and often denied access. Her experiences are not unusual. 40% surveyed in the Report of the National Transgender Discrimination Survey reported being harassed when they presented an ID that did not reflect their true gender identity. This social isolation puts transgender people at risk of mental health issues like depression. It is estimated that 41% of transgender people attempt suicide at some point in their lives. Presenting an ID that doesn’t match your gender identification or presentation also puts people at risk of violence. 3% of those surveyed reported being physically assaulted when presenting identification that did not match their gender identity.

Each state has its own rules regarding name and gender marker change as to state issued documents. NCTE has information on how to update name and gender marker on documents in your state at http://www.transequality.org/documents. The procedure for changing name and gender marker on federal documents like social security cards and passports is the same in all states.

In Illinois, a person over 18 can legally change their name in court if they have resided in Illinois for the past six months. If a person has been convicted of a felony, they must wait until ten years from the completion of their sentence. Illinois is among a minority of states that require a mandatory waiting period for convicted felons to change their names. A person is also ineligible if they are required to register as a sex offender or if they have been convicted of identity theft. For
Document Correction and the Transgender Community

minors, the court may enter a name change if it finds it is in the best interests of the minor.

In Illinois, changing the gender marker on state-issued documents, like a driver’s license and birth certificate, requires an individual to go through the agency issuing the documents. For a State ID or driver’s license, normally a letter is required from a medical or mental health professional, indicating that the individual has transitioned or is in the process of transitioning and a change in gender marker on the ID is necessary for their safety. Attorneys can assist clients by providing sample letters to give to their treaters or referring clients to treaters that are familiar with the requirements. Currently, Illinois requires a physician’s affidavit indicating that there has been some form of gender transition surgery in order to change a gender marker on a birth certificate. This creates confusion as to what type of surgery is required. Some states do not require surgery to change the marker on the birth certificate, as many transgender people can’t afford surgery, nor do they want or feel that they need surgery. The Illinois legislature recently passed HB1785 which would eliminate the surgery requirement. Advocates for transgender people are hopeful that the bill will become law, making birth certificate correction much less prohibitive.

We have a ways to go before ensuring equality for all trans people. Making the document correction process simpler and more available is a step in the right direction to helping transgender individuals live an authentic life, free from discrimination, harassment, and violence.

This article was originally printed in the Young Lawyers Division Publication, TYL, Documentation plays an important role in the Fight for Equality for Trans Community. Link to original article: https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/sexual-orientation-gender-identity/document-correction-and-the-fight-for-equality-in-the-transgender-community.html. TYL is available quarterly in print to members of the ABA Young Lawyers Division (YLD).

KELLY BURDEN LINDSTROM
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TRANSGENDER PERSONS AND THE LAW, 2ND EDITION
BY ALLY WINDSOR HOWELL, LL.M.

Transgender Persons and the Law, 2nd Edition further solidifies the ABA’s position as the forerunner and champion of combatting transgender discrimination and safeguarding the legal rights of all transgender individuals. This new edition is an excellent resource for lawyers as well as lay-activists engaged in transgender human and civil rights albeit in the courts or in legislative lobbying.

The following areas of the law are thoroughly explained in the book: What is transgendered? • Identification documents • Public facilities • Housing concerns • Military and veterans issues • Family law • School matters • Health care • Personal safety concerns • Keeping and securing employment • Criminal imprisonment disputes and more!

As a BONUS, the book includes a link to an online database that features a complete set of legal forms for all fifty states and the District of Columbia for name changes and for those jurisdictions that allow it, changes to birth certificates.
Discrimination in Employment Issues for LGBT Individuals

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against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s sex.” For the past 50-plus years, the Supreme Court has expanded the interpretation of “because of sex.” In Price Waterhouse v. Hopkins, the Court used the terms “sex” and “gender” interchangeably and noted that “Congress’ intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute.” The Court expressly found that “[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.” Nine years later, in Oncale v. Sundowner Offshore Servs., the Court ruled that same-sex harassment claims are covered by Title VII and noted that, while same sex harassment was “assuredly not” the primary concern of Congress when it enacted Title VII, “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”

In 2004, the Sixth Circuit Court of Appeals was the first federal court to expand the Price Waterhouse sex stereotyping theory to a transgender employee. Three years later, the U.S. Equal Employment Opportunity Commission (“EEOC”) issued an Informal Discussion Letter which included a comment that, “[h]istorically, courts and the EEOC have held that Title VII does not prohibit discrimination against an individual because of transgender status … [i]n the past few years, however, some courts have determined that discrimination against a transgender individual may constitute unlawful gender stereotyping in violation of Title VII’s prohibition against sex discrimination.”

The EEOC issued a landmark ruling in 2012 in Mia Macy v. Eric Holder, Attorney General, Department of Justice (Bureau of Alcohol, Tobacco, Firearms and Explosives) (“Macy”). Macy was “one of thousands of decisions issued by the [EEOC] regarding the rights of federal employees in 2012.” For the first time, the EEOC held that claims of transgender discrimination are cognizable under Title VII. The EEOC determined that when an employer discriminates against an employee because the person is transgender, the employer has engaged in disparate treatment “related to the sex of the victim.” And, this is true whether or not “an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like the person identifying as a transgender person. In each of these circumstances, the employer is making a gender-based evaluation and violating the Supreme Court’s admonition that ‘an employer may not take gender into account in making an employment decision.’”

Price Waterhouse, 490 U.S. at 244.

The EEOC’s 2013-2016 Strategic Enforcement Plan (“SEP”) was approved by the Commission on December 17, 2012, and included among its priorities the following emerging or developing issues: “coverage of lesbian, gay, bisexual and transgender individuals under Title VII’s sex discrimination provisions, as they may apply.” In 2014, for the first time in its history, the EEOC filed lawsuits challenging discrimination against transgender employees as violating Title VII. Equal Employment Opportunity Commission v. R.G. & G.R Harris Funeral Homes, Inc. is currently pending before the Sixth Circuit. The EEOC is appealing the trial court’s decision that the defendant is entitled to an exemption under the Religious Freedom Restoration Act (“RFRA”) “from Title VII and the body of sex-stereotyping case law that has developed under it, under the facts and circumstances of this unique case.” A consent judgment was entered in the second case, U.S. Equal Employment Opportunity Commission v. Lakeland Eye Clinic, about six months after it was filed.

The EEOC and private plaintiffs in transgender discrimination lawsuits are working toward pushing past the sex stereotyping theory to achieve judicial decisions that transgender discrimination is sex discrimination. One recent decision of note is Fabian v. Hospital of Central Connecticut, where the court, in denying the employer’s motion for summary judgment, held that “[e]mployment discrimination on the basis of transgender identity is employment discrimination ‘because of sex’ and constitutes a violation of Title VII of the Civil Rights Act.”

In July 2015, in ruling on a federal sector matter, the EEOC determined for the first time that “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.” Subsequently, on
March 1, 2016, the EEOC filed its first lawsuits challenging sexual orientation discrimination as sex discrimination under Title VII. U.S. Equal Employment Opportunity Commission v. Pallet Companies, involved a lesbian woman who was harassed and then terminated in retaliation for objecting to the harassment. A consent decree was entered on June 28, 2016. The other case, U.S. Equal Employment Opportunity Commission v. Scott Medical Health Center, involves a gay man who was harassed at work and who claims that he was constructively discharged. Trial in this matter is scheduled for December 11, 2017.

As noted by the Seventh Circuit in Hively v. Ivy Tech Community College of Indiana, “[f]or many years, the courts of appeals of this country understood [Title VII’s] prohibition against sex discrimination to exclude discrimination on the basis of a person’s sexual orientation. The Supreme Court, however, has never spoken to that question.” In Hively, the Seventh Circuit ruled that sexual orientation discrimination is sex discrimination under Title VII. Ivy Tech did not appeal. Two other circuit courts have recently ruled that sexual orientation discrimination claims are not covered by Title VII. The Second Circuit has recently voted in favor of rehearing the appeal in Zarda v. Altitude Express. The Eleventh Circuit has recently denied en banc review in Evans v. Georgia Reg’l Hosp., and it is expected that the employee’s attorneys at Lambda Legal will appeal to the Supreme Court.

To briefly address discrimination in employment benefits, Section 1557 of the Affordable Care Act (“ACA”) prohibits healthcare providers and health insurance issuers from discriminating on the basis of sexual orientation and gender identity, among other protections. The U.S. Department of Health and Human Services is currently enjoined from enforcing Section 1557’s regulations prohibiting discrimination on the basis of gender identity. Regardless of what happens to the ACA, the EEOC has taken the position that employers who fail to provide healthcare coverage for their transgender employees engage in sex discrimination in violation of Title VII. In the agency’s amicus brief filed in Josef Robinson v. Dignity Health d/b/a/ Chandler Reg’l Medical Center, the EEOC noted that Title VII makes it unlawful for an employer to “discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s ... sex.” 42 U.S.C. § 2000e-2(a)(1). ‘Health insurance and other fringe benefits are ‘compensation, terms, conditions, or privileges of employment.’ Newport News Shipbldg. & Drydock v. EEOC, 462 U.S. 669, 682.”

Providing transgender employees the rights and protections afforded under the ADA is important, even though the disability label is currently controversial for some. There are a number of reasons why transgender individuals need or could benefit from accommodations during transitioning. The Family and Medical Leave Act allows for some leave taking but only covers employers of 50 or more employees. The ADA only requires 15 employees and there is no requirement that the employee be with a company a full year before being covered. The ADA requires employers to provide reasonable accommodations to a broad range of covered employees. Reasonable accommodations that would be beneficial to many transgender employees include the ability to work from home a few days each month in preparation for electrolysis and laser removal of facial hair, which requires at least a couple days of beard growth before treatment. ADA coverage should permit time off or working remotely so that transgender women do not have to appear at work with noticeable beards. Additionally, transgender employees should be afforded reasonable amounts of time off as ADA accommodations to attend counseling, endocrinologist appointments, and after surgery recovery, if that is in their plan.

The Equality Act was reintroduced in both the U.S. House of Representatives (H.R. 2282) and the Senate (S. 1006) on May 2, 2017. The Act would, among other things, amend Title VII to expressly prohibit discrimination because of sexual orientation and gender identity. Although there have been important victories in the fight for equal employment opportunity for LGBT individuals, there is much more work to be done to ensure that all gay, lesbian, bisexual, transgender, and genderqueer people are legally protected from employment discrimination.

This article was originally printed in the Young Lawyers Division Publication, TYL. Link to original article: https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/sexual-orientation-gender-identity/discrimination-in-employment-issues-for-lgbt-individuals.html. TYL is available quarterly in print to members of the ABA Young Lawyers Division (YLD).

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wanting to exclude transgender people because they are “immoral.” I’m here to get educated and learn from the lawyers who actually litigated and worked on this case.

JC: There’s New York, then California, how about Texas?

EJ: Based on some polling done by Equality Texas, and my own experiences, I believe there is a disconnect in Texas between politicians and citizens or the people. These polls have shown that a majority of Texans, especially among the African-American and Latino communities, support LGBT civil rights. Locally, however, we have a lot to be proud of. In 2012 San Antonio passed a Non-Discrimination Ordinance (“NDO”), which is trans-inclusive. San Antonio is an important city nationally. For one, it’s a majority minority city, 63% Latino city. I participated in an organization called CAUSA (Communities Allied for a United San Antonio) and it was a coalition of organizations that pushed to get the NDO passed in San Antonio. I worked alongside different LGBT and civil rights stakeholders like MALDEF, religious organizations, the NAACP and the City Attorneys to get the NDO drafted and passed. We can be very proud of that as a municipal victory.

JC: You are both Latino AND LGBT, your success speaks to a lot of people.

EJ: Being a gay Latino is who I am and this intersectionality provides a lot of opportunities to collaborate and form coalitions. As President of the National LGBT Bar and a member of the Hispanic National Bar Association LGBT Division, I was better able to facilitate collaboration between these two associations including organizing educational events together. Recognizing and seizing on the opportunities that our intersections provide is very important because there needs to be a coalition in order to get things accomplished. The LGBT community alone is a numerical minority, and our straight allies are a very important part of our coalition to accomplish advancements. There are commonalities and interests, particularly regarding civil rights, shared between ethnic and racial minorities and the LGBT community. When we are able to collaborate, we accomplish many more things.

JC: What has been your proudest accomplishment thus far?

EJ: Although I take pride in my
legal work, it has been more my community activism work, in particular with the NDO in San Antonio, that I am proudest. I used my legal knowledge to be more of an community educator. For example, I educated our own LGBT community about things like religious exemptions, and what the language of the NDO meant. And, the community educated me about practicality and common sense. In the final result, it was a fantastic experience to be part of that community movement. Regarding my professional work, it's always a thrill to win trials, but many of the significant accomplishments are the ones nobody ever hears about. The myriad of cases and charges that get settled before a lawsuit is filed, educating willing employers on LGBT issues, all of these show significant social progress.

JC: Any advice to empower those with difficult experiences?

EJ: The impact of marginalization and discrimination is serious. One thing I came to personally realize is that oftentimes the limits I put on myself were greater than the actual limits society placed on me. I had to break through any internal fears or negative ideas that I couldn’t do something, for example, by taking on leadership roles. My advice, especially to our youth, is to take one step at a time and don’t listen to any kind of internal voices that are expressing any kind of doubt or fear. The only thing we have to fear is fear itself.

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