RESOLVED, That the American Bar Association supports an interpretation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), that its prohibition on sex discrimination in employment by covered employers includes discrimination on the bases of sexual orientation and gender identity; and

FURTHER RESOLVED, That the American Bar Association urges the Attorney General of the United States to withdraw the interpretation proposed by the U.S. Department of Justice in October 2017 that Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(a), does not protect transgender citizens against workplace discrimination.
The American Bar Association ("ABA") adopts this Resolution to support an interpretation of federal employment law prohibiting employment discrimination on the basis of sex to include discrimination on the basis of sexual orientation and gender identity. This report addresses the legal authority supporting this interpretation and the importance of interpreting "sex" discrimination broadly to include all aspects of such discrimination, including discrimination based on sexual orientation and gender identity.

The ABA has adopted several policies that are consistent with this Resolution and that strongly oppose all kinds of discrimination on the bases of sexual orientation and gender identity. The ABA first took such a position against such discrimination nearly 30 years ago when it urged federal, state, and local governments to enact laws prohibiting discrimination on the basis of sexual orientation in employment, housing, and public accommodation. See 1989M8. The ABA re-stated and expanded its opposition to such discrimination in 2006 when it urged federal, state, local, and territorial governments to enact laws prohibiting discrimination on the basis of actual or perceived gender identity or expression in employment, housing, and public accommodations. See 2006A122B. The ABA also urged the EEOC and Congress to provide resources sufficient to enable the EEOC to carry out its duties to investigate, conciliate, and where appropriate, take legal action to enforce laws prohibiting discrimination. See 98M116A.

These existing policies support an interpretation of Title VII in which its prohibition of sex discrimination includes sexual orientation and gender identity, because such an interpretation advances the purpose of existing policy against such discrimination. However, this resolution fully enables the ABA to file amicus curiae briefs in support of parties that take the position that Title VII's prohibition against sex discrimination includes a prohibition against discrimination on the bases of sexual orientation and gender identity.

Summary

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et. seq., prohibits discrimination in employment “because of [an] individual’s sex.” This provision is designed “to strike at the entire spectrum of disparate treatment of men and women in employment.”

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1 Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702, 708 n. 13 (1978) (quoting Sprogis v. United Air Lines Inc., 444 F.2d 1194, 1198 (7th Cir.1971)).
Gender Identity

Discrimination based on gender identity or transgender status is sex discrimination because it treats people differently from otherwise similarly situated people based on their transition from one gender to another, because it treats them differently based on sex stereotypes, and because it treats them differently based on gender identity and transgender status. The First, Sixth, Seventh, Ninth, and Eleventh Circuits have found transgender individuals to be protected by Title VII and other federal sex discrimination laws.²

Sexual Orientation

Sexual orientation discrimination is a form of sex discrimination because it treats otherwise similarly situated people differently because of their sex, because it treats them differently based on the sex of the individuals with whom they associate, and because such discrimination is rooted in gender stereotypes. The Seventh Circuit has recently held that Title VII covers discrimination based on sexual orientation.³ The Second Circuit has also recognized that discrimination based on gender stereotypes associated with sexual orientation is prohibited under Title VII.⁴

Since 2015, the Equal Employment Opportunity Commission (“EEOC”) has opined that “[s]exual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee’s sex.”⁵ Numerous federal district courts have agreed.⁶

² Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., No. 16-3522, 2017 WL 2331751, at *9 (7th Cir. May 30, 2017); Chavez v. Credit Nation Auto Sales, LLC, 641 F. App’x 883, 884 (11th Cir. 2016); Chavez v. Credit Nation Auto Sales, LLC, 641 F. App’x 883, 884 (11th Cir. 2016); Barnes v. City of Cincinnati, 401 F.3d 729, 737 (6th Cir. 2005); Smith v. City of Salem, Ohio, 378 F.3d 566, 575 (6th Cir. 2004); Schwenk v. Hartford, 204 F.3d 1187, 1201-02 (9th Cir. 2000); Rosa v. Park W. Bank & Trust Co., 214 F.3d 213, 215 (1st Cir. 2000).
³ Hively v. Ivy Tech Cmty. Coll. of Indiana, 853 F.3d 339, 351 (7th Cir. 2017) (“common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex”).
⁴ Christiansen v. Omnicom Grp., Inc., 852 F.3d 195 (2d Cir. 2017).
⁵ Baldwin v. Department of Transportation (Federal Aviation Administration), EEOC Appeal No. 0120133080 (July 15, 2015), 2015 WL 4397641, at 5, 10.
Department of Justice

On October 4, 2017, the United States Department of Justice’s (“DOJ”) Office of the Attorney General Issued a Memorandum (“DOJ Memorandum”) to all United States Attorneys articulating the Department’s interpretation of Title VII of the Civil Rights Act of 1964. \(^7\) The Memorandum explained that the Department had concluded that “Although federal law, including Title VII provides various protections to transgender individuals, Title VII does not prohibit discrimination based upon gender identity per se. This is a conclusion of law, not policy.” \(^8\) This Memorandum contradicts and overrides a December 18, 2014 Memorandum from then-Attorney General Eric Holder determining that “the best reading of Title VII's prohibition of sex discrimination is that it encompasses discrimination based on gender identity, including transgender status.” \(^9\) The first district court opinion to address the issue since the Department issued its October 4 Memorandum denied summary judgment to the employer without mentioning the DOJ Memorandum. \(^10\)

Additionally, on July 26, 2017, the DOJ filed an *amicus curiae* brief in the Second Circuit arguing that Title VII does not protect employees from sexual orientation discrimination. \(^11\) The DOJ’s brief contradicted a brief filed in the same case by the EEOC, as the primary agency responsible for interpreting and enforcing Title VII, which argued that because such claims necessarily involve impermissible consideration of a plaintiff’s sex, gender-based associational discrimination, and sex stereotyping, discrimination claims based on sexual orientation “fall squarely within Title VII’s prohibition against discrimination on the basis of sex.” \(^12\)

*Evans v. Georgia Regional Hospital*

On September 7, 2017, petition for certiorari was filed by the plaintiff in *Evans v. Georgia Regional Hospital*. S. Ct. Docket No. 17-370. The question presented is “Whether the prohibition in Title VII ... against employment discrimination ‘because of...sex’ encompasses discrimination based on an individual’s sexual orientation.”

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\(^7\) https://www.documentcloud.org/documents/4067401-DOJ-memo.html#document/p1.

\(^8\) DOJ Memorandum at 1.


Statutory Background

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, provides, inter alia:

It shall be an unlawful employment practice for an employer
(1) to fail or refuse to hire or to discharge any individual, or otherwise to
discriminate against any individual with respect to his compensation, terms,
conditions, or privileges of employment, because of such individual’s … sex…; or
(2) to limit, segregate, or classify his employees or applicants for employment in
any way which would deprive or tend to deprive any individual of employment
opportunities or otherwise adversely affect his status as an employee, because of
such individual’s … sex….

The only definition provided regarding the meaning of “sex” in Title VII is as follows:

The terms “because of sex” or “on the basis of sex” include, but are not limited to,
because of or on the basis of pregnancy, childbirth, or related medical conditions;
and women affected by pregnancy, childbirth, or related medical conditions shall
be treated the same for all employment--related purposes, including receipt of
benefits under fringe benefit programs, as other persons not so affected but similar
in their ability or inability to work, and nothing in section 2000e-2(h) of this title
[section 703(h)] shall be interpreted to permit otherwise….

History

Early in the implementation of Title VII, a number of courts held that federal laws
prohibiting sex discrimination should be construed narrowly and therefore did not prohibit
discrimination based on sexual orientation or gender identity. This early approach focused
on the now discredited view that such laws prohibit only a very narrow spectrum of
discrimination based on a person’s biological sex – i.e., discrimination against women
because they are women, or against men because they are men. Most of these cases
predated a series of Supreme Court decisions which firmly established that Title VII was
intended not only to prohibit discrimination against women or men based on their
biological sex, but also “to strike at the entire spectrum of disparate treatment of men and
women resulting from sex stereotypes.”¹³

¹³ *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978) (citation and internal
quotation marks omitted).
The Supreme Court

The Supreme Court has not yet addressed whether Title VII prohibits sexual-orientation or gender identity discrimination. However, several Supreme Court cases shed light on how the Court is likely to examine the question of gender identity and sexual orientation discrimination under Title VII. In *City of Los Angeles Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978), the Court set forth a “simple test” for sex discrimination under Title VII: “treatment of a person in a manner which but for that person’s sex would be different.” A decade later the Court held that Title VII prohibits discrimination against workers for their failure to conform to sex-based stereotypes in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

In *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998), the Court recognized that same-sex sexual harassment can constitute discrimination because of sex and thus violate Title VII. The Court focused on differential treatment of similarly situated men and women, and away from the specific goals of Congress in passing Title VII. *Oncale* has been read to preclude courts from creating their own exceptions to Title VII coverage based on speculation about the primary intent of Congress in passing the legislation. The Court in *Oncale* observed that “[S]tatutory 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.” According to the Court, whatever evidentiary route a plaintiff chooses, so long as a plaintiff’s claim “meets the statutory requirements” – i.e., is “discrimination because of sex” – the claim is cognizable.

The Lower Courts & Gender Identity

As mentioned above, the First, Sixth, Seventh, Ninth, and Eleventh Circuits have found transgender individuals to be protected by Title VII. Numerous district courts have also held that gender identity discrimination is prohibited by Title VII, either as *per se* sex discrimination because it is based on sex stereotypes, or because it is based on their

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14 *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (“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 match the stereotype associated with their group.”)

15 *Id.* at 79.

16 *Id.* at 80.

17 *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, No. 16-3522, 2017 WL 2331751, at *9 (7th Cir. May 30, 2017); *Chavez v. Credit Nation Auto Sales, LLC*, 641 F. App’x 883, 884 (11th Cir. 2016); *Chavez v. Credit Nation Auto Sales, LLC*, 641 F. App’x 883, 884 (11th Cir. 2016); *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 575 (6th Cir. 2004); *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215 (1st Cir. 2000).
gender transition. Numerous agency administrative decisions and regulations have also made clear that “sex” includes gender identity and transgender status.

**The Lower Courts & Sexual Orientation**

Courts and enforcement agencies have also been reconsidering the interpretation of Title VII in the context of sexual orientation discrimination. The EEOC identified three bases for its finding that “a complaint alleging that an agency took his or her sexual orientation into account in an employment action necessarily alleges that the agency took his or her sex into account.” The EEOC found that sexual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee’s sex, because it is associational discrimination on the basis of sex, and because it necessarily involves discrimination based on gender stereotypes.

While several circuit courts previously found sexual orientation not to be protected under Title VII, many of these cases were decided before the Supreme Court’s unanimous holding in *Oncale v. Sundowner Offshore Services, Inc.* that same-sex sexual harassment

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19 See, e.g., Lusardi v. Dep’t of the Army, 2015 WL 1607756, at *11 (E.E.O.C. Apr. 1, 2015); Macy v. Holder, 2012 WL 1435995, *10 (E.E.O.C. Apr. 20, 2012) (“Thus, we conclude that intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination ‘based on . . . sex,’ and such discrimination therefore violates Title VII.”); U.S. Department of Education - 34 C.F.R. § 270.7 (“Sex desegregation means the assignment of students to public schools … without regard to their sex (including transgender status; gender identity; sex stereotypes, such as treating a person differently because he or she does not conform to sex-role expectations because he or she is attracted to or is in a relationship with a person of the same sex; …)…”); U.S. Department of Health and Human Services - 45 C.F.R. § 92.4 (“On the basis of sex includes, but is not limited to, discrimination on the basis of . . . sex stereotyping, and gender identity.”).

20 Baldwin v. Department of Transportation (Federal Aviation Administration), EEOC Appeal No. 0120133080 (July 15, 2015), 2015 WL 4397641 at *5.

21 Id. at *5-14.
could constitute discrimination because of sex and therefore violate Title VII and that "statutory prohibitions often go beyond the principal evil [they were passed to combat] 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."\textsuperscript{22} Recent cases suggest an evolving understanding in keeping with \textit{Price Waterhouse}, \textit{Oncale} and the EEOC guidance in \textit{Baldwin}.

For example, the Second Circuit is currently reconsidering its precedents \textit{en banc} in \textit{Zarda v. Altitude Express} (2d Cir. No. 15-3775, oral argument Sept. 26, 2017) under the question of ““Does Title VII of the Civil Rights Act of 1964 prohibit discrimination on the basis of sexual orientation through its prohibition of discrimination ’because of . . . sex’?” And on April 4, 2017, the Seventh Circuit became the first federal appellate court to hold that Title VII proscribes sexual-orientation discrimination. \textit{Hively v. Ivy Tech Cmty. Coll. of Ind.}, 853 F.3d 339, 341 (7th Cir. 2017) (en banc). The court agreed with each of the coverage arguments in the EEOC’s \textit{Baldwin} decision. Several district courts have also found sexual orientation covered under Title VII.\textsuperscript{23}

The arguments of the EEOC in \textit{Baldwin} and the reasoning of the Seventh Circuit in \textit{Hively} are persuasive and represent "evolving standards of decency that mark[s] the progress of a maturing society," as Chief Justice Warren famously wrote in \textit{Trop v. Dulles}.

\textbf{Conclusion}

In order for Title VII of the Civil Rights Act of 1964 “to strike at the entire spectrum of disparate treatment of men and women” in employment, its provisions must be interpreted to take into full account that sexual orientation and gender identity are inseparable from and inescapably linked to sex.\textsuperscript{24} In keeping with existing ABA policy and Goals III and IV of the ABA’s Mission, the ABA supports an interpretation of Title VII of the Civil Rights Act of 1964 that prohibits sex discrimination in employment by covered employers on the bases of gender identity and sexual orientation and urges the Attorney General to withdraw DOJ guidance inconsistent with that interpretation.

\textsuperscript{22} 523 U.S. 75, 78-80 (1998).
\textsuperscript{24} \textit{Los Angeles Dept. of Water & Power v. Manhart}, 435 U.S. 702, 708 n. 13 (1978) (quoting \textit{Sprogis v. United Air Lines Inc.}, 444 F.2d 1194, 1198 (7th Cir.1971)).
Respectfully submitted,

Robert Weiner
Chair, Section of Civil Rights and Social Justice
February 2018
GENERAL INFORMATION FORM

Submitting Entities: ABA Section of Civil Rights and Social Justice

Submitted By: Robert N. Weiner, Chair, Section of Civil Rights and Social Justice

1. **Summary of Resolution**

   This Resolution would establish policy in support of an interpretation of Title VII of the Civil Rights Act of 1964 that prohibits discrimination in employment on the bases of (1) sexual orientation and (2) gender identity.

2. **Approval by Submitting Entity**

   The Section of Civil Rights and Social Justice approved this policy resolution on Friday, October 20, 2017 during its Fall Council Meeting.

3. **Has This or a Similar Recommendation Been Submitted to the House or Board Previously?**

   No.

4. **What Existing Association Policies are Relevant to This Resolution and How Would They be Affected by its Adoption?**

   This resolution is consistent with prior policy supporting laws that prohibit discrimination in employment on the basis of sexual orientation and gender identity in 06A122B, 89M8, and 98M116A.

5. **If this is a late report, what urgency exists which requires action at this meeting of the House?**

   N/A

6. **Status of Legislation**

   N/A
7. Plans for Implementation of the Policy if Adopted by the House of Delegates

The policy will provide authority for the preparation and filing of an ABA *amicus curiae* brief in the U.S. Supreme Court or other appropriate judicial forum in any case presenting the issues that are addressed in the policy.

8. Cost to the Association (both direct and indirect costs).

Adoption of this Resolution would result only in minor indirect costs associated with staff time devoted to the policy subject matter as part of the staff members’ overall substantive responsibilities.

9. Disclosure of Interest

There are no known conflicts of interest to this recommendation.

10. Referrals

By copy of this form, this Resolution will be referred to the following entities:

Government and Public Sector Lawyers Division
Law Practice Division
Judicial Division
Law Student Division
Senior Lawyers Division
Young Lawyers Division
Section of Business Law
Section of Dispute Resolution
Section of International Law
Section of Labor and Employment Law
Section of Litigation
Section of State and Local Government Law
Section of Tort Trial and Insurance Practice
Commission on Sexual Orientation and Gender Identity
11. **Contact Persons (prior to meeting)**

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12. **Contact Persons (who will present the report to the House)**

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EXECUTIVE SUMMARY

1. Summary of the Resolution

The Resolution will establish policy that sex discrimination in employment prohibited by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et. seq., includes discrimination on the bases of (1) sexual orientation and (2) gender identity.

2. Summary of the Issue that the Resolution Addresses

The Resolution addresses a split of interpretations on the application of Title VII’s prohibition of sex discrimination to claims of discrimination by (1) lesbian, gay, and bisexual individuals challenging discrimination on the basis of their sexual orientation and (2) transgender individuals challenging discrimination on the basis of their gender identity.

3. Please Explain How the Proposed Policy Position Will Address the Issue

The Resolution clarifies and emphasizes the ABA’s position on employment discrimination on the bases of sexual orientation and/or gender identity and more fully enables the ABA Governmental Affairs Office, the ABA President, and the Standing Committee on Amicus Curiae Briefs to act.

4. Summary of Minority Views

No opposing views have been expressed by other ABA entities or organizations as of the preparation of this summary. The Section will work with other ABA entities, as necessary, on wording and scope of this Resolution.