

Texas City Attorneys Association  
Fall Conference  
Sept. 24, 2015

**Domestic Partner Benefits, Sexual Orientation and Gender Identity Discrimination, and  
Navigating the *Obergefell v. Hodges* Ruling**

By Sheila Gladstone and Elizabeth Pierson Hernandez

In the marriage context, courts have moved at a rapid clip to provide protections to same-sex couples, most recently with *Obergefell*. Prior to that, the *Windsor* decision and resulting executive actions provided certainty that same-sex spouses are entitled to the same retirement and family and medical leave benefits as heterosexual spouses, although in states like Texas, where state law prohibited governmental entities from recognizing same sex marriage for purposes of benefits, the issues surrounding insurance, FMLA coverage and other employment benefits were still in limbo. In *Obergefell*, the U.S. Supreme Court settled that remaining question by holding such state bans unconstitutional. However, the opinion's truncated equal protection analysis leaves numerous other open questions surrounding the scope of the decision, especially with regard to whether sexual orientation status is now a protected class in other contexts besides marriage, and, if so, to what level of scrutiny the purported governmental interest should be held.

In an employment context, courts have inched more slowly toward protection against sexual-orientation discrimination, using Title VII and gender stereotyping analysis as their primary vehicle. The EEOC has moved faster and farther toward full protection against discrimination for gay, lesbian, bisexual, and transgender employees, even those whose behavior at work does not implicate the stereotyping analysis. The Agency's decisions in response to federal employee complaints have the force of law for federal employees subject to the EEOC appeal process. For non-federal employees, including city employees and those in the private sector, the EEOC decisions remain important as an indicator of how the agency is handling charges of all sexual-orientation discrimination claims.

***Obergefell v. Hodges***

The United States Supreme Court, in its June 26, 2015 *Obergefell v. Hodges* decision, held that states are required to allow same-sex couples to marry, and are required to recognize same-sex marriages performed in other jurisdictions. In the majority opinion, Justice Kennedy stated that same-sex couples seeking the right to marry "ask for equal dignity in the eyes of the law. The Constitution grants them that right." However, the opinion was silent on the level of scrutiny attached to sexual orientation claims, and provided little or no equal-protection analysis. In his dissent, Justice Roberts urges those who agree with the decision to celebrate it, adding: "But do not celebrate the Constitution. It had nothing to do with it."

## Sexual Orientation Discrimination

### **From the EEOC**

The EEOC stated explicitly in a federal employee complaint case this year that it is a violation of Title VII of the Civil Rights Act of 1964 to discriminate against a person because of his or her sexual orientation. In *Baldwin v. Dep't of Transportation*, (EEOC App. 7/15/2015), the EEOC acknowledged that the language of Title VII does not explicitly state that sexual orientation is included in the definition of "sex discrimination." However, it held that "'Sexual orientation' as a concept cannot be defined or understood without reference to sex." The complainant, a temporary air traffic control specialist with the Federal Aviation Administration, was passed over for a permanent position. His supervisor, who was involved in the decision, had made repeated comments regarding his sexual orientation. When the complainant mentioned that he and his partner had attended Mardi Gras in New Orleans, the supervisor said, "We don't need to hear about that gay stuff." On a number of occasions, the supervisor said he was "a distraction in the radar room" when his participation in conversations included mention of his male partner. The EEOC was not concerned, as the courts have been, about whether the employee acted in an effeminate manner at work. The stereotyping occurred based only on expectations about who the employee should find attractive. See also, *Veretto v. U.S. Postal Service* (EEOC App. 7/1/11) (valid claim of coworker harassment for marrying a man); *Castello v. U.S. Postal Service* (EEOC Req. 12/20/11) and *Complainant v. Dep't of Energy* (EEOC App. 8/13/13) (hostile environment sexual harassment for derogatory comments about same-sex relationships because motivated by attitudes about stereotypical gender roles in relationships).

- **How they get there:** The EEOC relies on the sexual stereotyping analysis in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239, 241-42 (1989) (senior manager at brokerage firm was passed over for partner after she was informed that she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."); and its own opinion, *Macy v. Dep't of Justice*, described in detail below.
- **What this means to cities:** The EEOC decision applies directly only to federal employees, but is an indicator that the EEOC sees merit to charges of sexual orientation discrimination under Title VII, even if the statute does not explicitly list it as a protected class.
- **Also from the EEOC:** The agency has listed sexual orientation discrimination as a priority in its 2013-2016 Enforcement Plan.

### **From the Courts**

The U.S. Supreme Court has not held that sexual orientation discrimination is prohibited under Title VII, the Equal Protection clause of the Constitution, or any other law. However, some federal courts have held in favor of individuals who claim discrimination based on sexual orientation, using either gender-stereotyping or sexually hostile work environment analysis.

- **How they get there:** Courts that find discrimination based on sexual orientation have used, among others, *Price Waterhouse*; and *Prowel v. Wise Business Forms*, 579 F.3d 285 (3d Cir. 2009) (issue of material fact existed as to whether alleged harassment suffered by a male employee who identified himself as an "effeminate male" was because he failed to comply with traditional male stereotypes.).

- **What this means to cities:** A plaintiff can bring a successful claim against a city based on sexual-orientation discrimination if he or she proves the discrimination was based on non-conformance to traditional stereotypes.

#### **From Congress and the Texas Legislature**

- Sexual orientation is not a statutorily protected class for employment purposes in Texas.
- Sexual orientation is not a statutorily protected class for employment purposes under federal law (except as the EEOC and some courts interpret the “based on sex” provision of Title VII).
- Members of Congress have filed the Employment Non-Discrimination Act (ENDA) repeatedly in the last 20 years, but it has not passed.

### **Transgender Identity Discrimination**

#### **From the EEOC**

As with sexual orientation discrimination, the EEOC has taken the position that discrimination because of a person’s transgender status violates Title VII. *Macy v. Dep’t of Justice*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (EEOC) (April 20, 2012). In *Macy*, Mia Macy had been a male police detective and ballistics investigator with the Phoenix office of the Bureau of Alcohol, Tobacco, Firearms and Explosives Agency (part of the Department of Justice). She decided to seek work in San Francisco and, while still presenting as a man, was offered and accepted a job in the San Francisco ATFE Field Office laboratory. In multiple conversations with the hiring office between approximately December 2010 and March 2011, the San Francisco office represented that she would be hired, provided she passed the pending background check. At the end of March, the employee told the contractor for which she would be working that she would begin presenting as a woman, and within 10 days, the agency stated it was eliminating the position due to federal budget reductions. The agency later told a federal EEOC counselor it hired someone else because that person was further along in the background check process. Macy filed a charge against the Department of Justice based on sex, gender identity (transgender woman), and on the basis of sex stereotyping. The agency argued that Title VII was not available to transgender individuals. The EEOC held that discrimination based on transgender or transsexual status is sex stereotyping and is therefore discrimination “based on sex” in violation of Title VII.

In the three years since *Macy*, the EEOC has ruled consistently in favor of transgender nondiscrimination rights in federal agencies. Of interest is *Complainant v. USPS* (EEOC App. 5/21/13), where a supervisor refused to refer to a transgender employee as “she” or by her new female first name; the EEOC held this refusal to be intentional sex-based disparate treatment and harassment. More recently, in *Lusardi v. Dep’t of the Army*, (EEOC App. 4/1/15) the EEOC found that restricting a transgender female from using a common female restroom facility constituted disparate treatment based on sex, and that coworker discomfort, confusion or anxiety did not justify the denial of access. Allowing the option of a single-room bathroom was not sufficient.

In a case with implications beyond employment law, the EEOC found that an agency’s refusal to change the employee’s name in its official records to reflect a change in gender identity gave rise

to a gender discrimination claim under Title VII. *Complainant v. Dep't of Veterans Affairs*, EEOC App. 4/16/14).

- **How the agency gets there:** Heavy reliance on *Price Waterhouse*. The *Macy* decision held “Since *Price Waterhouse*, courts have widely recognized the availability of the sex stereotyping theory as a valid method of establishing discrimination ‘on the basis of sex’ in many scenarios involving individuals who act or appear in gender-nonconforming ways.”
- **What this means to cities:** The decision only directly affects federal employees, but is an indicator that the EEOC is sympathetic to transgender claims from any sector.

### From the Courts

The courts have not yet gone as far as the EEOC. On Nov. 19, 2014, a federal district court in San Antonio granted summary judgment for the employer and held that a transgender employee failed to establish discrimination in violation of Title VII. *Eure v. The Sage Corp.*, 61 F.Supp.3d 651 (W.D. Texas Nov. 19, 2014). The employee was born as a female but presented as a male, and when he began working as a truck driving instructor, his male trainer subjected him to pervasive sarcasm and innuendos. When a national manager came to conduct specialized training at the San Antonio location, the manager saw the employee and made comments that included: “What is that and who hired that?” and “Please don’t tell me that is a Sage instructor.” The national manager told a San Antonio manager: “We will deal with you seriously for hiring that.”

- **Holding:** Employee failed to establish discrimination was based on failure to act like a woman. The court stopped short of making new law protecting the status of being a transgender employee under Title VII, preferring to leave that to higher courts.
- **Status of case:** On appeal in 5<sup>th</sup> Circuit.
- **What it means for cities:** An employee who sues for discrimination based on transgender status does not have a federal court decision stating transgender status, by itself, is protected under Title VII. Nevertheless, this is a flimsy barrier to protection because courts have already said gender stereotyping is prohibited under Title VII and *Price Waterhouse*. Bottom line: it is better not to discriminate or harass based on transgender or transsexual status.
- **Other case of interest:** *Jamal v. Saks and Co.*, Case No. 4:14-cv-02782 (S. Dist. Tex., 2014). Plaintiff, a transgender woman who worked at the high-end department store, alleged she had been discriminated against, harassed, and subject to a hostile work environment because of her status as a transgender woman. She alleged that Saks forced her to use the male bathroom, that she was repeatedly referred to by the wrong gender, and that a manager suggested that she make her appearance more masculine and “separate her home life from her work life.” Saks first filed a motion to dismiss as a matter of law, arguing that transgender status is not a protected class. In an unusual move, Saks later withdrew its Motion after angry customers and activist groups accused the retailer of fighting to discriminate against transgender individuals. Instead, Saks stated it wished instead to defend the case on its merits, arguing that discrimination did not occur. The case, however, recently settled.

## Same-Sex Couple Benefits

Most impediments to same-sex couples receiving workplace benefits began to fall after the U.S. Supreme Court decided *United States v. Windsor* in June 2013. A lesbian couple in New York had been married under New York law, but when one died, the other was not considered by the IRS to be a “spouse” for purposes of inheritance tax, and was taxed \$363,000 in estate taxes. The Court held unconstitutional the portion of the Defense of Marriage Act that excluded a same-sex partner from the definition of “spouse” for all federal benefit and tax purposes. Soon after *Windsor*:

- Internal Revenue Service announced a person legally married anywhere would be a “spouse” for tax purposes;
- Department of Labor changed rules to include same-sex partners legally married to the employee in any jurisdiction in definition of “spouse” for Family and Medical Leave Act purposes (this was delayed in its application to Texas public employers, but is reinstated in light of the *Obergefell* decision);
- The DOL announced that same-sex couples legally married in any jurisdiction would be spouses for ERISA benefits purposes; and
- The Secretary of Labor directed agency leaders to implement *Windsor* in a way that “provides maximum protection for workers and their families.”

## Open Questions

- What level of scrutiny is applied to equal protection claims based on sexual orientation? Transgender status?
- What, if any, religious accommodations must governmental entities make to clerks who do not wish to issue marriage licenses to same-sex couples?
- What is the status of gay divorce in Texas? What about recognition of common law marriages where couples held themselves out to be married prior to the decision? How about the spousal presumption in paternity cases?
- Are public entities required to provide transgender employees single-sex bathrooms, or allow them to use the restroom of the gender for which they are presenting even if it makes others uncomfortable? Are they even allowed to require single-sex bathrooms as an alternative, or is that segregation? What about locker rooms?
- What about for citizens visiting the public buildings?
- Must police departments and jails account for gender identity preferences in booking, facility choices, and living arrangements?