



CLM 2016 Midwest Conference
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What Would You Do? A Discussion About Navigating LGBT Issues

I. What Is LGBT?

Definitions of LGBT-related groups.

LGBT stands for Lesbian Gay Bisexual Transgender. It is a term used to describe a variety of people. While most people are familiar with these terms at a high level, they may not know the legal significance of the terms or other relevant terminology. Knowing the proper terminology promotes understanding and facilitates communication. The American Psychological Association's website provides detailed definitions of these terms. For example, "sex" and "gender" are not the same thing. "Sex" is assigned at birth and boils down to biological aspects (i.e., chromosomes, hormones, anatomy). "Gender" is a social construction, meaning it may vary across cultures or over time. It is society's expectations of how each sex acts. "Gender Identity" refers to someone's innate sense of being male or female (or something else). It is not visible to others. "Gender expression" is how an individual presents themselves to others. "Transgender" is an umbrella term that refers to individuals whose gender identity is different from their biological sex. "Transsexual" generally refers to individuals who seek to change their biological sex through use of hormones and surgery. Transgender tends to be the preferred terms. "Sexual orientation" is a reference to who an individual is emotionally and sexually attracted to.

LGBT issues are relevant.

LGBT issues arise in a variety of contexts. In recent years, we have seen cases involving issues like marriage, insurance coverage, public accommodations, employment discrimination, workplace safety, schools, prisons, and workers' compensation.

II. LGBT in the Workplace

Title VII protects employees against sex discrimination in the workplace. Historically, courts refused to extend sex discrimination coverage to the LGBT community.

LGBT is not an expressly protected category under Title VII. However, there have been long standing efforts to bring LGBT discrimination under the sex discrimination provision of Title VII. Early court decisions rejected this argument. *Ulane v. Eastern Airlines*, 742 F.2d 1081 (7th Cir. 1984) is representative of this viewpoint. In *Ulane*, the court held that Title VII was not intended to extend to

“sexual identity.” The court concluded “sex” should be limited to the common and traditional interpretation. *See also Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977) (holding “Title VII does not embrace transsexual discrimination”); *Voyles v. Ralph K. Davies Med. Center*, 403 F.Supp. 456 (N. D. Cal. 1975) (stating “The legislative history of as well as the case law interpreting Title VII nowhere indicate that ‘sex’ discrimination was meant to embrace ‘transsexual’ discrimination...”).

The Supreme Court has rendered decisions that have opened the door for LGBT discrimination to fit under Title VII.

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the U.S. Supreme Court recognized a new theory of sex discrimination. *Price Waterhouse* involved a female who alleged her employer failed to promote her because she failed to conform to gender stereotypes. More specifically, she did not act as feminine enough. In *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), the Supreme Court recognized same-sex harassment is viable under Title VII. In other words, anyone can discriminate against anyone based on sex.

The sexual stereotyping theory has been applied to LGBT discrimination claims.

Price Waterhouse and *Oncale* opened the door for LGBT discrimination claims as sex discrimination claims. In *Smith v. Salem*, 378 F.3d 566 (6th Cir. 2004), the court extended the *Price Waterhouse* gender stereotyping theory to an LGBT discrimination claim. Since *Price Waterhouse* recognized it was sex discrimination for an employer to discriminate against a woman because she did not wear dresses or makeup, the court reasoned an employer who discriminates against men because they wear dresses or act femininely is similarly discriminating because of sex. Several courts have adopted this rationale. *See e.g. Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (holding “discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it’s described as being on the basis of sex or gender.”); *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.*, 542 F.Supp.2d 653, 659-661 (S.D. Tex. 2008) (stating “Title VII and *Price Waterhouse*...do not make any distinction between a transgendered litigant who fails to conform to traditional gender stereotypes and [a] ‘macho’ female...who is perceived by others to be in nonconformity with traditional gender stereotypes.”); *Chavez v. Credit Nation Auto Sales, LLC*, Case No. 14-14596, 2016 U.S. App. LEXIS 598 (11th Cir. Jan. 14, 2016) (holding “Sex discrimination includes discrimination against a transgender person for gender nonconformity.”)

However, there has been reluctance to shoe horn every LGBT claim into Title VII. In *Burrows v. College of Cent. Fla.*, 2014 U.S. Dist. LEXIS 174122 (M.D. Fla. 2012), the court rejected a plaintiff’s claim based on her allegation that her employer discriminated against her based on religious because she was gay. The court stated, “The sole religious belief to which Plaintiff alleges that she failed to conform related to her sexual orientation...courts in this circuit and across the country have consistently held that Title VII does not apply to discrimination claims based on sexual orientation.” In *Anderson v. Napolitano*, Case No. 09-60744, 2010 U.S. Dist. LEXIS 10422 (S.D. Fla. Feb. 8, 2010) the court recognized that gender stereotyping *may* apply to a gay plaintiff. The court cautioned, “[The plaintiff] seems to imply that all gay men fail to comply with male stereotypes simply because they are gay. However, that

would mean ‘that every case of sexual orientation discrimination [would] translate to a triable case of gender stereotyping discrimination, which would contradict Congress’s decision not to make sexual orientation discrimination cognizable under Title VII.’” *Id.* at *19.

In *Macy v. Holder*, the EEOC held that transgender discrimination is sex discrimination. The EEOC has continued to take this position. It filed three lawsuits in 2014 and 2015 alleging transgender discrimination is sex discrimination under Title VII. The EEOC claims transgender discrimination is covered in and of itself, and that it is covered via the *Price Waterhouse* theory.

There has been a trend to extend anti-discrimination laws to LGBT employees.

In June 2015, OSHA published best practices for bathroom access. OSHA takes the position that bathroom access for transgender individuals falls within the regulations related to providing sanitary bathrooms. The guidance states employers should allow employees to use the bathroom that correlates with their gender identity.

Twenty states prohibit gender identity discrimination. Twenty-three states prohibit sexual orientation discrimination. Executive Order 11246 prohibits federal contractors from discriminating against their employees on the basis of sexual orientation or gender identity. There are also numerous municipalities that have implemented similar statutes.

III. LGBT Protections and Religious Organizations

Religious organizations are exempt from Title VII in some cases. State laws generally provide similar exemptions.

Most state statutes provide an exemption for religious organizations from transgender/sexual orientation discrimination provisions. Title VII also has a religious organization exemption. For example, in *Little v. Wuerl*, 929 F.2d 944 (1991), the Third Circuit Court of Appeals upheld a Catholic school’s discharge of a teacher for remarrying without having a prior marriage annulled. The court held the Catholic school was not required to employ a teacher who did not conform to Catholic mores. *See also Henry v. Red Hill Evangelical Lutheran Church of Tustin*, 201 Cal. App. 4th 1041 (2011) (recognizing under Title VII’s religious exemption, the decision to employ individuals of a certain religion has been interpreted to include the decision to terminate an employee “whose conduct or religious beliefs are inconsistent with those of its employer.”). This does not give employers the leeway to harass employees. *See Logan v. Salvation Army*, 10 Misc. 3d 756 (NY 2005).

Employers may be faced with religious accommodation requests by employees based on LGBT issues.

In *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012), a graduate student in the final stages of a counseling-degree program asked her faculty supervisor to reassign a gay client to a different student. The graduate student’s request was based on her religious objection to the client’s sexual orientation. The school dismissed her and the student challenged the decision as violating her free speech and free exercise rights. The 6th Circuit allowed the student to pursue her claims. The court noted there was no written policy that prevented the student from requesting reassignment and there was evidence that the

applicable code of ethics permitted values-based reassignment. However, an employer is not required to accommodate an employee's religious belief if doing so would result in discrimination against his co-workers or deprive them of contractual or other statutory rights. See *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004).

In *Schwartzberg v. Mellon Bank, N.A.*, 2008 U.S. Dist. LEXIS 1180 (W.D. Penn. Jan. 8, 2008), an employee claimed his employer failed to accommodate his religious object to homosexuality by encouraging employees to support and condone homosexual activity (i.e., by encouraging employees to attend and support a lunch and learn meeting hosted by the employer LGBT group). The court rejected the employee's claim, because there was no conflict between the employee's religious belief and the employer's employment requirements. The lunch and learn was voluntary. In *Buonanno v. AT&T Broadband, LLC*, 313 F.Supp.2d 1069 (D. Colo. 2004), an employee refused to sign an anti-discrimination pledge that required him to "value" the beliefs of his coworkers due to his religious beliefs. The employer fired him. The employee claimed he could have been accommodated by modifying the language. The employee was awarded damages at a jury trial.

IV. How should my organization prepare to handle LGBT issues?

Employers are being confronted with challenging LGBT issues in increasing numbers and frequency. Organizations must be prepared to handle these issues not only in order to accommodate the LGBT employee but also to teach managers and employees how provide a harassment free workplace. Today's workforce is diverse and competitive and therefore recruiting and selection practices must welcome diversity and not discriminate against any protected class. Further, organizations must educate all employees about all types of diversity and create a culture that accepts differences. Lastly, all policies and procedures should reflect the culture of acceptance of a diverse workforce.

V. Risk Management for LGBT Issues

Understanding Employment Practices Liability Insurance.

Employers today are subject to Federal, State and local laws regarding employment practices. Employment Practices Liability Insurance coverage provides coverage for employers against claims and/or lawsuits for Employment Practices Acts. Companies can use EPLI Insurance to cover expenses involved in defending claims and for indemnification if the case is settled or a verdict is obtained against the employer.

EPLI insures against claims for wrongful dismissal or termination of employment, breach of a written or oral Employment Contract, Employment related misrepresentation, violations of employment related discrimination laws (including harassment), employment related defamation related (including libel and slander), sexual or work place harassment of any kind, employment related retaliation, violation of any federal, state or local civil rights laws, and violation of the Family Medical Act or other leave laws. In addition some policies provide coverage for claims based on protected categories (sexual orientation) that are not covered under federal discrimination statutes but may be covered by state or local law. (Stephanie D. Gironda, Esq, Wilentz, Goldman & Spitzwer, P.A.)

The definition of “claim” under an EPLI policy typically includes LGBT claims.

Philadelphia Insurance Company’s EPLI Form includes wording—a claim means:

1. A written demand for monetary or non-monetary relief;
2. A judicial or civil proceeding commenced by the service of a complaint or similar pleading;
3. A Criminal proceeding commenced by a return of an indictment;
4. A formal administrative or Regulatory proceeding commenced by the filing of a notice of charges, formal investigation order or similar document, including, but not limited to, proceedings before the Equal Opportunity Commission or any similar governmental agency;

Forms with other Insurance Carriers include discrimination based on sexual preference.

According to information provided by the U.S. Equal Employment Opportunity Commission, the EEOC interprets and enforces Title VII’s prohibition of sex Discrimination as forbidding any employment discrimination based on gender identity or sexual orientation. The Commission has taken the position that existing sex discrimination provisions in Title VII protect lesbian, gay, bisexual and transgender (LGBT) applicants and employees against employment bias.

While Title VII of the Civil Rights Act of 1964 does not include sexual orientation or gender identity on its face, the EEOC has taken the position that both classifications fall within the purview of Title VII pursuant to the gender stereotyping theory set forth in *Price Waterhouse*.

EEOC’s 2015 Charge Data indicates an increase of approximately 28% over the total LGBT charges filed in FY 2014. While many federal, state and local employment discrimination laws do not extend to sexual orientation or gender identity, the trend toward providing more protections against LGBT discrimination will likely continue. Employers should consider the scope of coverage for discrimination claims when procuring EPLI Insurance Coverage.

Travelers Insurance Company defines a claimant as:

1. A past, present or future employee of or applicant for employment with the insured organization.
2. A governmental entity or agency, including the Equal Employment Opportunity Commission or similar federal, state or local agency, when acting on behalf of or for the benefit of a past, present or future employee or applicant for employment with the insured organization; or
3. Any Independent contractor.

Specialized endorsements for religious organizations are available.

An article from World Magazine posted online on July 17, 2015 provides information from a bulletin by Southern Mutual Church Insurance Company. The article indicates the Company has received numerous calls and emails regarding the Supreme Court’s decision in *Obergefell v. Hodges* prohibiting states from banning or refusing to recognize same-sex marriage. The bulletin provides:

The main concern is whether or not liability coverage applies in the event a church gets sued for declining to perform a same-sex marriage...The general liability form does not provide any coverage for this type of situation since there is no bodily injury, property damage, personal or advertising injury...If a church is concerned about the possibility of a suit, the Company does offer Miscellaneous Legal Defense coverage. This is not Liability coverage, but rather expense reimbursement for Defense Cost.

This article indicates the coverage is unique and was designed at the request of churches insured by Southern Mutual. The Company provides coverage for more than 8,400 churches, synagogues and mosques, primarily in southern states.

Third-party claims may also be covered under EPLI policies.

The purpose of third-party insurance coverage in EPLI policies is to protect an organization and its employees from accusations of wrongful acts committed against customers, clients, vendors, and suppliers. Wrongful acts committed by third parties against an insured's employees are covered by some EPLI policies.

Philadelphia Insurance Company EPLI coverage provides:

Solely with respect to any claim brought by or on behalf of any Third Party, Employment Practices Act means any actual or alleged wrongful failure to employ, discrimination, sexual harassment or violation of such Third Party's civil Rights in relation to such wrongful failure to employ, discrimination or sexual harassment, whether direct, indirect, or unintentional, committed by an Individual Insured in his/her capacity as an Individual Insured or by the Private company.

Travelers Insurance Company's EPLI policy states:

Third Party Wrongful Act means, with respect to any natural person other than a claimant, any actual or alleged:
Violation of any federal, State or Local Law or Statute or any common Law prohibiting any kind of Discrimination; or
Unwelcome sexual advances, request for sexual favors or any other conduct of a sexual nature which violates the Civil Rights of any such person.

Third-party coverage may not always be automatic in EPLI policies. Some companies require their policies be enhanced by a Third Party Endorsement requiring specific underwriting and an additional premium for the coverage. Depending on the exposure, coverage offered may be limited, such as covering accusations of discrimination but not harassment claims.

EPLI Policy Structure

Discrimination defined.

Insurance Service Office Form (EP 00 01 11 19) defines "Discrimination" to mean "violation of a person's civil rights with respects to such person...sexual orientation or preference."

ISO's EPL Form EP 00 02 11 09 defines "Discrimination" as a "violation of a person's civil rights with respect to such person's race, color, national origin, religion, gender, marital status, age, sexual orientation or preference, physical or mental condition or any other protected class or characteristic established by any federal, state or local statutes, rules or regulations."

The Travelers EPLI Policy Form defines "Discrimination" as "any actual or alleged: Violation of any employment Discrimination Law or Disparate treatment of, or the failure or refusal to hire an outside

claimant because he or she is or claims to be a member of a class which is or alleged to be legally protected.”

Occurrence vs Claims Made Form.

Insurance coverage for liability exposures are provided by one of two basic types of policies: occurrence or claims made.

The Standard Insurance Service Office Form is an occurrence form. It covers damages that you become legally obligated to pay because of bodily injury or property damage. This form also provides coverage for personal injury. This policy provides coverage for bodily injury or property damage claims which occur during the policy period regardless of when reported.

A claims made policy protects an insured against claims or incidents that occur and are reported while the policy is in force. It is important to note that defense costs count towards the total liability limit on an EPLI insurance policy. EPLI policies are written on a claims made form. Coverage may be provided for acts occurring prior to the current policy period with a policy extension called “prior acts coverage”. This coverage is usually only provided when a claims-made policy has been in force immediately prior to the current policy. The policy period is defined by a “Retro Date.”

Policy Limitations and Exclusions

Claims normally excluded under EPLI policies are those made under the National Labor Relations Act (NLRA), the Workers Adjustment and Retraining Notification Act (WARN), the Employee Retirement Income Security Act (ERISA), the Fair Labor Standards Act, issues related to the continuation of benefits under the Consolidated Omnibus Budget Reconciliation Act (COBRA) and Occupation Safety and Health Administration (OSHA) claims.

VI. Other legal challenges related to LGBT issues

Businesses are generally required to provide services to members of the LGBT community under state public accommodation statutes.

Many states prohibit sexual orientation, gender identity, and/or marital status discrimination with regard to public accommodations. In *Koebke v. Bernardo Heights Country Club*, 36 Cal. 4th 824 (Cal. 2005), the California Supreme Court extended the State’s marital status discrimination statute to same sex couples. In *Elaine Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013) a wedding photographer refused to provide services for a same sex wedding. In *Mullins v. Masterpiece Cakeshop, Inc.*, 2015 Colo. App. 115, a bakery to refuse to provide serve to same sex couples. In both cases, the business owner objected for religious reasons. The business owners claimed First Amendment and Free Exercise Clause violations. Neither succeeded.

The Supreme Court’s recognition of same-sex marriage has not resolved all issues.

Some states, like Nebraska, have statutes that state if a mother was married at the time of conception or birth, the name of the “husband” will be entered on the birth certificate as the father of the child. Neb. Rev. Stat. § 71-640.01. Courts have generally required plaintiffs to address these issues separately. See e.g. *Wolf v. Walker*, 2015 U.S. Dist. LEXIS 150683 (D. Wisc. July 7, 2015); *Waters v. Ricketts*, 2016 U.S. Dist. LEXIS 13515 (D. Neb. Feb. 4, 2016).

Constitutional issues regarding LGBT individuals arise in other contexts, like prisons, and may have far-reaching implications.

The Eighth Amendment prohibits cruel and unusual punishment, including the unnecessary infliction of pain on a prison, either intentionally or because of deliberate indifference of the responsible prison official. Inmates have argued the hormone injections or gender reassignment surgery is medically necessary to treat Gender Identity Disorder. See e.g. *Naturalite v. Forner*, 2013 U.S. Dist. LEXIS 5725 (E.D. Mich, Jan. 15, 2013); *Kosilek v. Maloney*, 221 F.Supp.2d 156 (D. Mass. 2002); *Gammett v. Idaho State Bd. of Corrections*, U.S. Dist. LEXIS 55564 (D. Idaho July 27, 2007); *Norsworthy v. Beard*, 87 F.Supp.3d 1164 (N.D. Cal. 2015) (ordering prison to provide access to “adequate medical care, including sex reassignment surgery.”).