



**Sex Discrimination:  
It's Now More than Gender**

Jeffrey M. Beemer  
Dickinson Wright PLLC  
424 Church Street, Suite 1401  
Nashville, TN 37219  
[jbeemer@dickinsonwright.com](mailto:jbeemer@dickinsonwright.com)  
(615) 620-1719  
October 26, 2016

---

---

---

---

---

---

---

---

#### TOPICS FOR DISCUSSION

- The state of the law on protections for LGBT employees under federal, state, and local anti-discrimination laws
- Recent litigation and enforcement activity
- Restroom access for transgender employees
- FMLA and ADA issues
- Best practices
- Your questions

---

---

---

---

---

---

---

---

[www.dickinson-wright.com](http://www.dickinson-wright.com) 

#### ISSUE

- Do federal, state, and local anti-discrimination laws apply to LGBT employees and applicants?

---

---

---

---

---

---

---

---

[www.dickinson-wright.com](http://www.dickinson-wright.com) 

### LGBT Discrimination

- Title VII of the Civil Rights Act prohibits employers from discriminating against applicants and employees "because of such individual's ... sex."
- Pregnancy Discrimination Act of 1978 amended Title VII such that discrimination on the basis of pregnancy, childbirth, or related medical conditions constitutes unlawful sex discrimination.
- Lesbian, Gay, Bisexual and Transgender are not specifically listed as protected classifications under Title VII.

www.dickinson-wright.com

DICKINSON WRIGHT

### LGBT Discrimination

- Congress has declined to add sexual orientation to the list of classifications protected from discrimination by Title VII eleven times since 1994. (Employment Non-Discrimination Act (ENDA))
- One sticking point has been ENDA's proposed blanket exception for religious-affiliated companies, educational institutions, and other organizations.

www.dickinson-wright.com

DICKINSON WRIGHT

### LGBT Discrimination

- 23 states and the District of Columbia prohibit private employers from discriminating against employees and applicants on the basis of sexual orientation.
- The majority of those states also prohibit discrimination on the basis of gender identity or expression.
- Tennessee (and 26 others states) do not have laws prohibiting private employers from discriminating on the basis of sexual orientation or gender identity or expression.

www.dickinson-wright.com

DICKINSON WRIGHT

### Transgender Discrimination

- Before 1989, several federal appellate courts held that discrimination against transgender workers did not fall within the protection of Title VII. E.g., Sommers v. Budget Mktg., Inc., 667 F.2d 748 (8<sup>th</sup> Cir. 1982).

www.dickinson-wright.com

DICKINSON WRIGHT

### Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)

- U.S. Supreme Court held that discrimination against an employee on the basis of sex stereotyping – i.e., a person's nonconformity to social or other expectations of that person's gender – constitutes impermissible sex discrimination in violation of Title VII.

www.dickinson-wright.com

DICKINSON WRIGHT

### Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)

- Accounting firm declined to promote a female accountant to partner because her demeanor did not match her employer's expectation of how a woman should look and act.
- One male partner described her as being "macho."
- The partner responsible for telling the employee the firm's decision not to promote her told her that to improve her chances for partnership, she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."

www.dickinson-wright.com

DICKINSON WRIGHT

**Price Waterhouse v. Hopkins,**  
**490 U.S. 228 (1989)**

- District Court held that employer had unlawfully discriminated against her on the basis of sex by consciously giving credence and effect to partners' comments about her that resulted from sex stereotyping.
- Supreme Court established that Title VII's reference to "sex" encompasses both the biological differences between men and women, and gender discrimination – i.e., discrimination based on a failure to conform to stereotypical gender norms.

www.dickinson-wright.com

DICKINSON WRIGHT

**Oncale v. Sundowner Offshore Services,**  
**523 U.S. 75 (1998)**

- U.S. Supreme Court held that same-sex harassment is sex discrimination under Title VII.
- Title VII prohibition of discrimination on the basis of sex must extend to sex-based discrimination "of any kind that meets the statutory requirements."

www.dickinson-wright.com

DICKINSON WRIGHT

**Smith v. City of Salem**  
**378 F.3d 566 (6<sup>th</sup> Cir. 2004)**

- U.S. Court of Appeals for the Sixth Circuit recognized sex stereotyping as impermissible discrimination in a case involving a transgender employee who had worked as a Lieutenant for City Fire Department for seven years without any negative incidents.
- An adverse action taken because of a transgender plaintiff's failure to conform to sex stereotypes concerning how a man or woman should look and behave constitutes unlawful sex discrimination.

www.dickinson-wright.com

DICKINSON WRIGHT

**Macy v. Department of Justice,**  
 EEOC Appeal  
 No. 0120120821 (April 20, 2012)

- EEOC has appellate adjudicatory authority in federal sector cases.
- Complainant, a transgender woman, claimed she was not hired for a position with ATF on the basis of sex.
- EEOC held that discrimination against an individual based on transgender status, gender identity, or because an employee's transitioning between genders is discrimination based on sex and therefore prohibited under Title VII.

www.dickinson-wright.com

DICKINSON WRIGHT

**Lawsuits Filed by the EEOC**

- EEOC filed first two lawsuits on 9/25/14 against employers for sex discrimination against transgender employees.
  - EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., E.D. Mich. No. 2:14-cv-13710 (Defendant's Motion to Dismiss denied on April 23, 2015)
  - EEOC v. Lakeland Eye Clinic, P.A., M.D. Fla. No. 8:14-cv-2421 (settled in April 2015 for \$150,000)

www.dickinson-wright.com

DICKINSON WRIGHT

**Recent Lawsuits Filed by the EEOC**

- EEOC v. Deluxe Financial Services Corp., D. Minn. No. 0:15-cv-2646
- Consent decree approved January 20, 2016. Employer settled transgender call center worker's claim for \$115,000.

www.dickinson-wright.com

DICKINSON WRIGHT

### Are There Exceptions for Religious Organizations?

- Under Title VII, religious organizations are permitted to give employment preference to members of their own religion.
- The exception applies only to those institutions whose “purpose and character are primarily religious.”
- The exception does not allow religious organizations otherwise to discriminate in employment on the basis of race, color, national origin, sex, age, or disability.

www.dickinson-wright.com

DICKINSON WRIGHT

### Restroom Access

- Occupational Safety and Health Administration (OSHA) published a guide to restroom access for transgender workers in 2015.
- Under OSHA’s Sanitation standard, employers are required to provide their employees with prompt access to toilet facilities to protect them from the health effects when they are not available.
- Employers may not impose unreasonable restrictions on employee use of toilet facilities.

www.dickinson-wright.com

DICKINSON WRIGHT

### Restroom Access

OSHA’s Model Practices for Restroom Access:

- All employees should be permitted to use the facility that corresponds with their gender identities.
- Additional options:
  - Single occupancy gender-neutral facilities; and
  - Multi-occupant, gender-neutral restroom facilities with lockable single occupant stalls.

www.dickinson-wright.com

DICKINSON WRIGHT

## Restroom Access

OSHA's Model Practices for Restroom Access:

- Employers should not ask employees to provide any medical or legal documentation of their gender identity in order to have access to gender-appropriate facilities.
- Employers should not ask employees to use a segregated facility because of gender identity or transgender status.

www.dickinson-wright.com

DICKINSON WRIGHT

## Restroom Access

- EEOC issued a fact sheet with its position on restroom access in 2016.
- EEOC's position:
  - Denying an employee equal access to a common restroom corresponding to the employee's gender is sex discrimination.
  - An employer cannot condition this right on the employee undergoing or providing proof of surgery or any other medical procedure.
  - An employer cannot restrict a transgender employee's restroom access to a single-user restroom, unless the restroom is available to all employees who might choose to use it.

www.dickinson-wright.com

DICKINSON WRIGHT

## Sexual Orientation Discrimination

- Most federal appellate courts have held that Title VII does not support a claim for sexual orientation discrimination. See, e.g., Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 762 (6<sup>th</sup> Cir. 2006)
- Many courts have applied gender nonconformity case law to sexual orientation discrimination claims, which has produced a "confused hodge-podge of cases." Hively v. Ivy Tech Comm. College, 830 F.3d 698 (7<sup>th</sup> Cir. 2016)
- As a result, an employee can be protected from discrimination based on what he or she wears to work, but not whom he or she marries.

www.dickinson-wright.com

DICKINSON WRIGHT

## Sexual Orientation Discrimination

- On July 15, 2015, the EEOC determined that sexual orientation discrimination is, by its very nature, discrimination based on sex. Baldwin v. Dep't of Transportation, Appeal No. 0120133080 (federal sector decision).

www.dickinson-wright.com

DICKINSON WRIGHT

## Sexual Orientation Discrimination

EEOC'S rationale:

- Sexual orientation discrimination is sex discrimination because it entails treating an employee less favorably because of the employee's sex.
- It is associational discrimination on the basis of sex - i.e., discrimination against employees based on whom they date or marry.
- It is unlawful gender stereotyping.

www.dickinson-wright.com

DICKINSON WRIGHT

## Recent Lawsuits Filed By EEOC

- On March 1, 2016, the EEOC filed its first two discrimination lawsuits based on sexual orientation discrimination.
  - EEOC v. Scott Medical Health Center, W.D. Pa. No. 2:16-cv-225-CB
  - EEOC v. Pallet Cos. d/b/a IFCO Sys. North Am., Inc., D.Md. No. 1:16-cv-595-RDB (settled in June 2016 for \$7,200 in back pay, \$175,000 in compensatory damages to the employee, and a \$20,000 donation to the Human Rights Campaign Workplace Equality Program).

www.dickinson-wright.com

DICKINSON WRIGHT



## EEOC's Position on Unlawful Sex Discrimination

- Examples of LGBT-related claims that the EEOC views as unlawful sex discrimination:
  - Failing to hire an applicant because she is transgender.
  - Firing an employee because he is planning or has made a gender transition.
  - Harassing an employee by intentionally and persistently failing to use the name and gender pronoun that correspond to the gender identity with which the employee identifies and which the employee has communicated to management and employees
  - Harassing an employee because of his or her sexual orientation, for example, by derogatory terms, sexually oriented comments, or disparaging remarks for associating with a person of the same or opposite sex.

www.dickinson-wright.com

DICKINSON WRIGHT

## Executive Order 13672

- Executive Order (EO) 11246, which prohibits federal contractors from discriminating against individuals on the basis of race, color, religion, sex, or national origin, was amended on July 21, 2014 by EO 13672 to include sexual orientation and gender identity as protected classes.
- On April 8, 2015, the Office of Federal Contract Compliance Programs (OFCCP) issued a final rule implementing EO 13672 prohibiting discrimination based on sexual orientation and gender identity in federal government and federal contractor employment.
- OFCCP's enforcement position is similar to EEOC's.

www.dickinson-wright.com

DICKINSON WRIGHT

## But see *Hiveley v. Ivy Tech Community College*, 830 F. 3d 698 (7<sup>th</sup> Cir. July 28, 2016)

- First federal appellate court to address the question of whether Title VII covers sexual orientation discrimination since EEOC's 2015 decision in Baldwin.
- Court upheld District Court's dismissal of lawsuit because Title VII does not offer protection from or remedies for sexual orientation discrimination.
- Court recognized deference to EEOC's position, produced lengthy opinion summarizing muddled area of the law.

www.dickinson-wright.com

DICKINSON WRIGHT

## Sexual Orientation Discrimination

- Two cases on this issue are pending in the U.S. Court of Appeals for the Second and Eleventh Circuits.
- If either or both courts reach a different conclusion that the Seventh Circuit, it is very possible that SCOTUS will hear an appeal and decide the issue.

www.dickinson-wright.com

DICKINSON WRIGHT

## FMLA Issues

- DOL issued a final rule in February 2015 revising the regulatory definition of spouse under the FMLA. Eligible employees in legal same-sex marriages may take FMLA leave to care for their spouse or family member.
- Whether an employee may take FMLA leave for gender reassignment surgery.
  - Issue has not yet been litigated.
  - Answer may depend on whether the surgery is medically necessary or merely cosmetic.

www.dickinson-wright.com

DICKINSON WRIGHT

## ADA Issues

- Whether gender dysphoria is a covered disability under the ADA.
- The statute specifically excludes gender identity disorders not resulting from a physical impairment.
- EEOC has not taken a position on the issue.
- The issue is currently being litigated in federal court in Pennsylvania. Doe v. Romberger, E.D.Pa. No. 2:16-cv-2337.

www.dickinson-wright.com

DICKINSON WRIGHT

## Best Practices

- Include sexual orientation and gender identity in your company's EEO and anti-discrimination and anti-harassment policies, which are mandatory for certain federal contractors and subcontractors.
- Have a gender transition in the workplace policy closely connected to your EEO or anti-discrimination policy.
- Have an employee resource group on LGBT issues.
- Have an HR staff member who is knowledgeable about LGBT issues.
- Educate management and employees on LGBT issues.
- Avoid gender stereotypes in your dress code policy.




---

---

---

---

---

---

---

---



---

---

---

---

---

---

---

---