EMPLOYMENT DISCRIMINATION AGAINST LGBT PERSONS

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I. INTRODUCTION

"We are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."[1] While the federal government has enacted legislation prohibiting employment discrimination based on race, color, religion, sex, or national origin,[2]

1. Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989).
2. *See* Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2018).

courts and legislatures have been reluctant to extend these protections to sexual orientation and gender identity.[3]

It is important to note that sexual orientation and gender identity are distinct. Sexual orientation is "one's emotional or physical attraction to the same and/or opposite sex."[4] Gender identity is "one's inner sense of one's own gender, which may or may not match [one's] sex assigned at birth."[5] As such, discrimination claims based on sexual orientation and gender identity have received disparate recognition and treatment in state and federal law.[6]

This Article addresses the current state of legal protections for individuals facing employment discrimination due to their sexual orientation or transgender status. Part II provides an overview of current federal laws concerning sexual orientation discrimination. Part III examines specific types of employment discrimination faced by lesbian, gay, bisexual, and transgender (LGBT) persons based on their sexual orientation or transgender status and will evaluate successes in bringing such claims. Part IV provides a survey of contemporary employment benefits for LGBT persons and medical services for those seeking gender affirming treatments. Part V examines the position of the current administration, proposed changes to federal law, and the future of employment protections for LGBT persons.

II. ESTABLISHING EMPLOYMENT DISCRIMINATION TOWARD SEXUAL MINORITIES

Title VII of the Civil Rights Act of 1964 established that "it shall be unlawful employment practice for an employer 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 race, color, religion, sex, or national origin."[7] To assert a valid sex discrimination claim under Title VII, the plaintiff must establish a prima facie case showing that the defendant's action was intentionally discriminatory or had a discriminatory effect on the basis of gender.[8] Once established, the burden shifts to the employer to articulate a legitimate nondiscriminatory reason for its action.[9]

Part A of this section discusses the historical limitations and successes of applying Title VII rights against sex discrimination to LGBT discrimination cases. Part B explains the current jurisprudence of sex discrimination cases

3. *See Statewide Employment Laws & Policies: Employment*, HUMAN RIGHTS CAMPAIGN, https://www.hrc.org/state-maps/employment (last visited Jan. 20, 2020).

4. *Addressing Sexual Orientation and Gender Identity Discrimination in Federal Civilian Employment: A Guide to Employment Rights, Protections, and Responsibilities*, OFFICE OF PERSONNEL MGMT. (June 2015), http://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/addressing-sexual-orientation-and-gender-identity-discrimination-in-federal-civilian-employment.pdf.

5. *Id*.

6. *See* discussion *infra* Part II.A; discussion *infra* Part III.A

7. *See* 42 U.S.C. § 2000e-2(2)(1)(2018).

8. Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1108–09 (9th Cir. 2006).

9. *Id*. at 1109.

concerning lesbian, gay, or bisexual (LGB) plaintiffs. Part C lastly explores the current jurisprudence for transgender plaintiffs.

A. HISTORY OF LGBT EMPLOYMENT DISCRIMINATION UNDER FEDERAL LAW-TITLE VII

Traditionally, courts narrowly defined sex discrimination using disparate treatment "based on sex" as a standard,[10] because Congress had "only the traditional notions of 'sex' in mind" when it passed Title VII.[11] This narrow interpretation has precluded Title VII protection for sexual minorities, such as when the Seventh Circuit decided that the termination of a pilot who underwent gender confirmation surgery did not give rise to liability under Title VII:

> The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men . . .. [A] prohibition against discrimination based on an individual's sex is not synonymous with a prohibition based on an individual's sexual identity disorder or discontent with the sex into which they were born.[12]

Other courts followed the Seventh Circuit's definition and applied a narrow, traditional interpretation of "sex" when deciding whether Title VII prohibits discrimination on the basis of sexual orientation.[13]

Despite the apparent limitations of the reach of sex discrimination under Title VII, LGBT plaintiffs have succeeded by building upon the sex stereotyping theories of discrimination[14] articulated by the Supreme Court in *Price Waterhouse v. Hopkins*.[15] In *Price Waterhouse*, the Supreme Court significantly expanded the traditional definition of "sex" by incorporating discrimination based on noncompliance with gender stereotypes into Title VII's

10. *See, e.g.*, Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1088 (5th Cir. 1975). *But see* Schroer v. Billington, 577 F. Supp. 2d 293, 305–06 (D.D.C. 2008) (holding that when a job offer was made to an applicant, and the applicant's offer was rescinded when they notified the applicant's supervisor that they planned to transition from male to female, the applicant had been unlawfully discriminated against on the basis of sex, in the form of sex stereotyping, in violation of Title VII).

11. *See* Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662–633 (9th Cir. 1977). Congress's purpose in adding "sex" to Title VII , namely ensuring men and women be treated equally absent a bona fide occupational qualification, has been used by courts to justify a narrow interpretation of sex discrimination; *see also* Smith v. City of Salem, 378 F.3d 566, 573 (6th Cir. 2004). *But see* Oiler v. Winn-Dixie La., Inc., Civ. A-00-3114, 2002 WL 31098541, at *4 n.53 (E.D. La. Sept. 16, 2002).

12. Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984).

13. *See, e.g.*, Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1222 (10th Cir. 2007) (stating that "[i]n light of the traditional binary conception of sex" transgender persons "may not claim protection under Title VII from discrimination based solely on their status"); Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979) (holding that the firing of an employee due to his homosexuality is not covered by the protections of Title VII).

14. *See* discussion *infra* Part II.B.

15. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989); *Schroer*, 577 F. Supp. 2d at 300.

prohibition on sex discrimination.[16] The plaintiff, Ann Hopkins, was rejected for partnership at an accounting firm because her employer felt she was too masculine and needed to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[17] The Court determined that denying Hopkins partnership because she failed to comply with gender stereotypes was discrimination "because of sex."[18] The Court reasoned that, "in 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."[19]

LGBT plaintiffs have relied on *Price Waterhouse* to argue that discrimination on the basis of sexual orientation or gender identity is in fact discrimination on the basis of noncompliance with gender stereotypes and therefore within the protection of Title VII's prohibition on sex discrimination. Such arguments have been successful in several jurisdictions. For example, the Fifth Circuit in *Equal Employment Opportunity Commission v. Boh Bros. Construction Co.* held that a "plaintiff can satisfy Title VII's because-of-sex requirement with evidence of a plaintiff's perceived failure to conform to traditional gender stereotypes."[20] Likewise, the Ninth Circuit in *Nichols v. Azteca Restaurant Enterprises, Inc.* held that firing a gay man because he did not conform to gender norms was a violation of Title VII.[21] However, the Second Circuit in *Simonton v. Runyon*, as discussed in the next section, barred Title VII relief for LGB plaintiffs by explicitly stating, "Title VII does not prohibit harassment or discrimination because of sexual orientation."[22]

In lieu of risking it all in the current uncertain and contradictory federal court system, discriminated LGBT plaintiffs can seek redress by filing a complaint with the U.S. Equal Employment Opportunity Commission (EEOC).[23] After a preliminary investigation, the EEOC will notify the complainant of whether or not a likely violation has occurred.[24] If the EEOC believes a reasonable cause of action exists, it will invite the employer and employee to engage in conciliation to settle the case outside of court.[25] If the conciliation efforts ultimately fail, the EEOC can bring a lawsuit against the employer on behalf of the complainant.[26]

16. *See Price Waterhouse*, 490 U.S. at 251.
17. *Id.* at 235.
18. *Id.* at 277.
19. *Id.* at 251 (quoting L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).
20. Equal Employment Opportunity Commission v. Boh Bros. Construction Co. 731 F.3d 444, 454 (5th Cir. 2013).
21. Nicholas v. Azteca Restaurant Enterprises, Inc., 256 F.3d 864, 874–75 (9th Cir. 2001).
22. Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000).
23. *What You Should Know: The EEOC, Conciliation, and Litigation*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/newsroom/wysk/conciliation_litigation.cfm (last visited Jan. 20, 2020).
24. *Id.*
25. *Id.*
26. *Id.*

B. CURRENT TREATMENT OF TITLE VII CLAIMS BASED ON SEXUAL ORIENTATION DISCRIMINATION

LGB persons have approached Title VII claims on one of two theories: sex discrimination solely attributed to their perceived sexual orientation or, following the *Price Waterhouse* model, sex discrimination arising from their noncompliance with gender stereotypes. The first approach has generally not been successful, whereas showing discrimination for nonconformity with gender norms, as noted above, has garnered limited success.[27]

The Second Circuit rejected the second approach and refused to extend Title VII to discrimination based on sexual orientation alone.[28] In *Simonton v. Runyon*, relying on the failure of legislatures to expressly expand protection, the court found that the *Price Waterhouse* "theory would not bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically feminine and not all heterosexual men are stereotypically masculine."[29] This precedent has guided the Second Circuit in subsequent decisions.[30] Other circuits have similarly rejected claims that discrimination based on sexual orientation could be equated with discrimination "because of sex."[31]

However, Title VII sex discrimination claims under *Price Waterhouse* have been fairly successful for LGB plaintiffs when the alleged discrimination is based on the plaintiff's noncompliance with gender stereotypes, rather than strictly on his or her sexual orientation. *Rene v. MGM Grand Hotel, Inc.* is an illustrative case wherein the court ruled in favor of the plaintiff, holding that the sexual harassment was based on the plaintiff's un-masculine behaviors rather than his sexual orientation.[32] Coworkers tormented Rene, a gay male hotel employee, by grabbing and poking his genitals and referring to him as "muñeca" (doll) because

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27. *See, e.g.*, Terveer v. Billington, 34 F. Supp. 3d 100, 116 (D.D.C. 2014) (denying the defendant's motion to dismiss because the plaintiff sufficiently pleaded that he was the victim of sex stereotyping by alleging that the defendant denied promotions and created a hostile work environment because of the plaintiff's nonconformity with male sex stereotypes).

28. *See* Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000).

29. *Id.* at 38.

30. *See, e.g.*, Swift v. Countrywide Home Loans, Inc., 770 F. Supp. 2d 483, 488 (2d Cir. 2011); Dawson v. Bumble & Bumble, 398 F.3d 211, 217-18 (2d Cir. 2005).

31. *See* Muhammad v. Caterpillar, Inc., 767 F.3d 694, 697 (7th Cir. 2014) (affirming the district court's holding that "Title VII prohibition on discrimination based on sex extended only to discrimination based on a person's gender, and not that aimed at a person's sexual orientation"); Gilbert v. Country Music Ass'n, 432 F. App'x 516, 519 (6th Cir. 2011) (holding that under Title VII, "sexual orientation is not a prohibited basis for discriminatory acts"); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 261 (3d Cir. 2001) (dismissing plaintiff's claim because employee only claimed discrimination because of sexual orientation); Fredette v. BVP Mgmt. Assocs., 112 F.3d 1503, 1510 (11th Cir. 1997) ("We do not hold that discrimination because of sexual orientation is actionable."); Hopkins v. Bait. Gas & Elec. Co., 77 F.3d 745, 751–52 (4th Cir. 1996) ("Title VII does not prohibit conduct based on the employee's sexual orientation, whether homosexual, bisexual, or heterosexual."); Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979) (per curiam) ("Discharge for homosexuality is not prohibited by Title VII.").

32. Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1069 (9th Cir. 2002).

he "did not conform to their gender-based stereotypes."[33] The Ninth Circuit held that Rene's allegations established a claim for sex discrimination under Title VII because the offensive physical conduct was sufficiently severe and pervasive.[34] The court emphasized that this conduct was actionable among coworkers of the same sex, without regard to Rene's sexual orientation, "so long as the environment itself [was] hostile to the [employee] because of sex."[35] The *Rene* court found that the physical sexual conduct was enough to state a sex discrimination claim, and that the motive for the discrimination (such as sexual orientation) was of no legal consequence.[36] The courts reached similar results in *Centola v. Potter* and *Heller v. Columbia Edgewater Country Club*.[37]

In *Centola*, the federal district court in Massachusetts went further by recognizing a direct link between harassment against LGB persons and nonconformity with gender stereotypes.[38] Plaintiff Stephen Centola's coworkers at the United States Postal Service verbally abused him and placed homophobic signs and cartoons in his work area.[39] Centola reported these incidents to management and received "further harassment and retaliation" before finally being terminated.[40] Noting that claims based solely on sexual orientation are not protected under Title VII, the court found that a plaintiff's sexual orientation still might be relevant to a finding of discrimination.[41] The court stated in dicta that:

> Sexual orientation harassment is often, if not always, motivated by a desire to enforce heterosexually-defined gender norms. In fact, stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women . . .. Conceivably, a plaintiff who is perceived by his harassers as stereotypically masculine in every way except for his actual or perceived sexual orientation could maintain a Title VII cause of action alleging sexual harassment because of his sex due to his failure to conform with sexual stereotypes about what 'real' men do or don't do.[42]

In *Heller v. Columbia Edgewater Country Club*, the federal district court in Oregon also recognized the link between sexual orientation discrimination and nonconformity with gender stereotypes. Heller, a lesbian, brought suit after being

33. *Id.* at 1065, 1069.
34. *Id.* at 1065.
35. *Id.* at 1066.
36. *Id.*
37. *See* Centola v. Potter, 183 F. Supp. 2d 403, 410 (D. Mass. 2002); *see also* Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212, 1222-23 (D. Or. 2002).
38. *See Centola*, 183 F. Supp. 2d at 410.
39. *Id.* at 407 (noting that coworkers referred to Centola as a "sword swallower" and asked if he "had AIDS yet" and "taped pictures of Richard Simmons 'in pink hot pants' to Centola's [work space].").
40. *Id.*
41. *Id.*
42. *Id.*

terminated for disputing disciplinary actions that were allegedly motivated by her supervisor's animus toward gays and lesbians.[43] Drawing upon the Court's reasoning in *Price Waterhouse*, the *Heller* court found the discrimination to be based on sex because Heller would not have been fired "if [she] were a man dating a woman, instead of a woman dating a woman."[44] These three cases—*Rene, Centola*, and *Heller*—illustrate the possibility of extending Title VII protection to lesbian, gay, and bisexual plaintiffs who are harassed for failing to comply with the "ultimate gender stereotype" of heterosexuality.[45]

The prohibition on discrimination because of gender stereotypes is not guaranteed to provide the relief sought by plaintiffs. In some circuits, employers are permitted to enforce policies related to gender conformity if they are equally burdensome on both genders.[46] In *Jespersen v. Harrah's Operating Co*., the Ninth Circuit upheld the termination of a female bartender after she refused to follow a company policy requiring women to wear foundation or powder, blush, lipstick, and mascara.[47] In that court's judgment, the "Personal Best" policy did not violate Title VII because it imposed equally burdensome gender-differentiated standards on men and women.[48] More recently in *Ramirez v. County of Marin*, the court found "there was no evidence that anyone acted with discriminatory intent with respect to the dress code that required men but not women to wear collared shirts."[49] These Ninth Circuit rulings suggest that, at least in some jurisdictions, employers can make policies requiring employees to adhere to gender stereotypes. Consequently, this may hamper LGB plaintiffs' cases pursuing relief under the *Price Waterhouse* theory if the alleged discriminatory act equally burdened both men and women.[50]

Although there has been movement among some courts towards the recognition of sexual orientation as discrimination under Title VII claims, LGB plaintiffs still face reluctance in the recognition of claims based solely on sexual orientation discrimination.[51] Thus, while sexual orientation may be considered a factor in

43. *See Heller*, 195 F. Supp. 2d at 1215.

44. *Id*. at 1223.

45. Zachary A. Kramer, *The Ultimate Gender Stereotype: Equalizing Gender-Conforming and Gender Nonconforming Homosexuals Under Title VII*, 2004 U. ILL. L. REV. 465, 490 (2004).

46. *See, e.g*., Jespersen v. Harrah's Operating Co., 392 F.3d 1076, 1081 (9th Cir. 2004) (holding that "employers are permitted to apply different appearance standards to each sex so long as those standards are equal").

47. *Id*. at 1083.

48. *Id*.

49. Ramirez v. Cty. of Marin, 578 F.App'x 673, 676 (9th Cir. 2014).

50. *See* Angela Clements, *Sexual Orientation, Gender Nonconformity, and Trait-Based Discrimination: Cautionary Tales From Title VII & An Argument for Inclusion*, 24 BERKELEY J. GENDER L. & JUST. 166, 184 (2009).

51. The First, Second, Fourth, Seventh, Eighth, Tenth, and Eleventh Circuits have not recognized sexual orientation discrimination claims under Title VIL. *See* Kiley v. Am. Soc'y for Prevention of Cruelty to Animals, 296 F. App'x 107, 109 (2d. Cir. 2008); Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1222 (10th Cir. 2007); Silva v. Sifflard, No. 99-1499, 2000 WL 525573, at *1 (1st Cir. Apr. 24, 2000) (per curiam); Spearman v. Ford Motor Co., 231 F.3d 1080, 1084 (7th Cir. 2000); Fredette v. BVP Mgmt.

some courts, no federal cause of action yet exists for employment discrimination based solely on sexual orientation.[52] Following the plurality decision in *Rene*,[53] one author writes that gay plaintiffs are left "contemplating Title VII claims in a position analogous to that of poker players at the MGM Grand Casino–a plaintiff may believe he has the makings of a good hand . . . but everything turns on the last card dealt. If it does not include gender-specific verbal harassment or sexualized touching, the plaintiff loses."[54]

There has been some recognition of Title VII claims based on sexual orientation discrimination in the federal administrative sector. On July 15, 2015, the EEOC issued a ruling that recognized employment discrimination claims based on sexual orientation, holding that this kind of discrimination violated Title VII.[55] The complainant was denied a permanent managerial position at his Air Traffic Control Tower and brought a complaint before the Commission claiming the denial of his promotion was based on his sexual orientation.[56] The Commission held that "sexual orientation is inseparable from and inescapably linked to sex, and, therefore, that allegations of sexual orientation discrimination involve sex-based considerations."[57] Thus, this ruling recognizes sexual orientation discrimination as straightforward sex discrimination in suits brought against employers by employees.[58] Several other EEOC rulings have since affirmed this decision.[59] Some federal courts have cited the 2015 EEOC ruling, but concluded that the EEOC's interpretation of Title VII to include discrimination based on sexual

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Assocs., 112 F.3d 1503, 1510 (11th Cir. 1997); Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138, 143 (4th Cir. 1996); Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989). The Sixth Circuit has stated that "sexual orientation is not a prohibited basis for discriminatory acts under Title VII . . . [but] individuals who are perceived as or who identify as homosexuals are not barred from bringing a claim for sex discrimination under Title VIL". Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 762 (6th Cir. 2006) (quoting Smith v. City of Salem, 378 F.3d 566, 574-75 (6th Cir. 2004)). While not recognizing a claim for sexual orientation discrimination, the Ninth Circuit does recognize the possibility of same-sex sexual harassment. *See* Nichols v. Azteca Rest. Enter., Inc., 256 F.3d 864, 875 (9th Cir. 2001). No Appellate Court cases have been on point in the D.C. Circuit; however, district court cases from the D.C. Circuit have not recognized a claim of sexual orientation discrimination under Title VIL *See* Schroer v. Billington, 424 F. Supp. 2d 203, 208 (D.D.C. 2006).

52. *See Jespersen*, 392 F.3d 1076.

53. Rene v. MGM Grand Hotel, Inc., 243 F.3d 1206 (9th Cir. 2001).

54. *Ninth Circuit Extends Title VII Protection to Employee Alleging Discrimination Based on Sexual Orientation: Rene v. MGM Grand Hotel, Inc*., 116 HARV. L. REV. 1889, 1895-96 (2003).

55. Complainant v. Foxx, No. 0120133080, 2015 WL 4397641, at *5 (E.E.O.C. July 15, 2015) (concluding "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").

56. *Id*.

57. *Id*.

58. *See id*.

59. *See* Vince D. v. Shulkin, No. 0320170017, 2017 WL 1089131, at *1 (E.E.O.C. Mar. 2, 2017); Jules H. v. Colvin, No. 0120130874, 2017 WL 1035161, at *2 (E.E.O.C. Feb. 28, 2017); Everett C. v. McDonald, No. 0120142107, 2017 WL 491372, at *2 (E.E.O.C. Jan. 26, 2017); Joelle L. v. Brennan, No. 0120150121, 2016 WL 6662803, at *5 (E.E.O.C. Oct. 28, 2016); Larita G. v. Brennan, No. 012014215, 2015 WL 9997300, at *5 (E.E.O.C. Nov. 18, 2015).

orientation is only persuasive, not controlling.[60] While the EEOC's ruling is not binding, it does assist courts in their interpretation of sexual discrimination under Title VII, especially with regard to protections for transgender employees.[61] The Department of Justice, however, has taken a different stance than the EEOC arguing that sexual orientation discrimination is not explicitly protected by Title VII.[62] And unfortunately for LGB plaintiffs, the EEOC relinquishes suits to the Solicitor General once the Supreme Court grants certiorari.[63]

To settle the debate, the Supreme Court granted certiorari for two employment discrimination cases against gay employees. In *Zarda v. Altitude Express*, the plaintiff alleged that his employer fired him because of his sexual orientation and gender nonconforming behavior after discussing his sexuality with a client.[64] The Second Circuit, diverging from its previous rulings, reasoned that sexual orientation discrimination is a subset of sex discrimination prohibited by Title VII because "sexual orientation is *defined* by one's sex in relation to the sex of those to whom one is attracted, making it impossible for an employer to discriminate on the basis of sexual orientation without taking sex into account."[65] The Eleventh Circuit, on the other hand, continued in *Bostock v. Clayton Cty. Bd. of Comm'rs* its long-standing precedent that firing an employee for their sexuality is not prohibited by Title VII.[66] The Supreme Court heard oral arguments for the two cases on October 8, 2019.[67] A decision is expected by the end of June 2020.[68]

C. CURRENT TREATMENT OF TITLE VII CLAIMS BASED ON GENDER IDENTITY DISCRIMINATION

Although transgender plaintiffs have historically faced the same problems as gay, lesbian, and bisexual plaintiffs in having their claims recognized under Title VII sex discrimination, some recent transgender plaintiffs have been more

60. *See* Christiansen v. Omnicom Grp., Inc., 167 F. Supp. 3d 598, 621-22 (S.D.N.Y. 2016); Videckis v. Pepperdine Univ., 150 F. Supp. 3d 1151, 1161-62 (C.D. Cal. 2015); Isaacs v. Felder Servs., 143 F. Supp. 3d 1190, 1193-94 (M.D. Ala. 2015); Dew v. Edmunds, No. 1:15-CV-00149-CWD, 2015 WL 5886184, at *9 (D. Idaho Oct. 8, 2015).

61. *See* Robyn B. Gigi, et al., *It's Not Just A Job – LGBT Workplace Issues*, 282 N.J.L. 76, 78 (2013).

62. *See* Mark Wilson, *DOJ Says Title VII Doesn't Protect Gender Identity, EEOC Says Supreme Court Should Settle the Issue*, HR POL'Y ASS'N, (Nov. 2, 2018) http://www.hrpolicy.org/news/story/doj-says-title-vii-doesn%E2%80%99t-protect-gender-identity-eeoc-says-supreme-court-should-settle-the-issue-16144.

63. *See* Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CAL. L. REV. 255, 278-79 (1994).

64. *See* Zarda v. Altitude Express, Inc., 883 F.3d 100, 108–09 (2d Cir. 2017).

65. *Id.* at 131.

66. *See* Bostock v. Clayton Cty. Bd. of Comm'rs, 723 F. App'x 964, 964–65 (11th Cir. 2018).

67. *See* Adam Liptak, *Can Someone Be Fired for Being Gay? The Supreme Court Will Decide*, N.Y. TIMES (Sep. 23, 2019), https://www.nytimes.com/2019/09/23/us/politics/supreme-court-fired-gay.html?action=click.

68. *See* Tucker Higgins, *LGBT Workers Head to Supreme Court for Blockbuster Discrimination Cases: 'I'll Be That Person to Stand Up'*, CNBC (Oct. 7, 2019), https://www.cnbc.com/2019/10/07/supreme-court-lgbt-worker-rights-kavanaugh.html.

successful.[69] Transgender plaintiffs have secured Title VII protection against discrimination in part because courts have accepted *Price Waterhouse* arguments that the discrimination plaintiffs suffered was a result of sex stereotyping, or failure to conform to socially defined gender norms.[70] The Sixth Circuit held that "[s]ex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as 'transsexual,' is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity."[71] Other federal jurisdictions have followed suit.[72]

However, when employer discrimination is not based strictly on gender non-conformity, transgender plaintiffs have experienced limited success. In *Etsitty Utah Transit Authority*, the Tenth Circuit upheld the termination of a transgender bus driver.[73] The court found that the plaintiff was fired for a legitimate non-discriminatory reason, namely, concern regarding liability for employing a person with male genitalia who used female public restrooms along the bus route.[74] The court also found that transgender persons as a class are not protected under Title VII;[75] however, it stressed that transgender individuals could still be successful when bringing a gender-stereotyping claim under *Price Waterhouse*.[76] Similarly, in *Dobre v. National Railroad Passenger Corporation (AMTRAK)*, the court did not find a violation of Title VII against a transgender female employee because the employee conformed to female gender stereotypes and therefore did not have a solid claim under *Price Waterhouse*.[77]

Courts are also expanding the definition of "sex" within the sex-stereotyping framework, improving the likelihood of success for transgender plaintiffs

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69. *See* Drew Culler, *The Price of Price Waterhouse: How Title VII Reduces the Lives of LGBT Americans to Sex and Gender Stereotypes*, 25 AM. U. J. GENDER SOC. POL'Y & L. 509, 521–23 (2017) ("For courts that do recognize transgender individuals under Title VII, however, the proof required is much easier for transgender plaintiffs than LGB plaintiffs simply because transgender discrimination is directly linked to sex stereotyping and gender discrimination.").

70. *See id.*; *See also* Smith v. City of Salem, 378 F.3d 566, 575 (6th Cir. 2004).

71. Barnes v. City of Cincinnati, 401 F.3d 729, 737 (6th Cir. 2005) (quoting Smith, 378 F.3d at 575).

72. *See e.g.*, Finkle v. Howard Cty., 12 F. Supp. 3d 780, 788 (D. Md. 2014) ("Plaintiff's claim that she was discriminated against 'because of her obvious transgendered status' is a cognizable claim of sex discrimination under Title VII. To hold otherwise would be 'to deny transsexual employees the legal protection other employees enjoy merely by labeling them as transsexuals.'") (quoting Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1229 (10th Cir. 2007)); Mitchell v. Axcan Scandipharm, Inc., No. 05-243, 2006 WL 456173, at *2–4 (W.D. Pa. Feb. 17, 2006); Lopez v. River Oaks Imaging & Diagnostic Grp., Inc., 542 F.Supp.2d 653, 660 (S.D. Tex. 2008); Rosa v. Park West Bank & Trust Co., 214 F.3d 213, 214 (1st Cir. 2000) (reinstating a discrimination claim on behalf of a "biological male" plaintiff who "alleged that the Bank refused him with a loan application because he did not come dressed in masculine attire"); Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000); Glenn v. Brumby, 663 F.3d 1312, 1317 (11th Cir. 2011).

73. *See* Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1226–27 (10th Cir. 2007).

74. *See id.* at 1224–25.

75. *See id.*

76. *See id.*

77. *See* Dobre v. Nat'l R.R. Passenger Corp., 850 F. Supp. 284, 287 (E.D. Pa. 1993).

bringing Title VII claims. The Sixth Circuit in *Smith v. City of Salem* broke from the traditional definition and found that a gender non-conforming transgender person had a valid sexual harassment claim under Title VII.[78] The court emphasized that the *Price Waterhouse* definition of sex as "sex stereotype" went beyond biological sex.[79]

The *Smith* approach has been followed in other courts as well. In *Schroer v. Billington*, the U.S. District Court for the District of Columbia ruled in favor of a transgender plaintiff who sued for discrimination under Title VII.[80] The court held that the findings of *Ulane, Holloway*, and *Etsitty* are "no longer a tenable approach to statutory construction."[81] In those cases, the courts reasoned that "discrimination based on changing one's sex" did not constitute sex discrimination because it was not within the original legislative spirit or intent of Title VII.[82] The *Schroer* court was not persuaded by the original intent argument and observed that since *Ulane* and *Holloway*, the Supreme Court has applied Title VII in ways not originally contemplated by Congress.[83] Consequently, it held that the "[l]ibrary's refusal to hire Schroer after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was literally discrimination 'because of . . . sex.'"[84]

In 2012, the EEOC issued a decision in *Macy v. Holder*, clarifying that claims of discrimination based on "gender identity, change of sex, and/or transgender status" are cognizable under Title VII.[85] In making its determination, the EEOC explained that the statute's protections reached beyond that of just biological sex "in part because the term 'gender' encompasses not only a person's biological sex but also the cultural and social aspects associated with masculinity and femininity."[86] The EEOC further clarified that discrimination by an employer against a person because of their transgender status constitutes disparate treatment based on that person's sex, regardless of the precise nature of the discrimination. In contrast with the sex stereotyping approach, the EEOC interprets Title VII to cover discrimination because of an individual's non-stereotypical gender expression,

78. *Compare* Smith v. City of Salem, 378 F.3d 566, 575 (6th Cir. 2004) (applying Title VII where plaintiff was able to prove case of sex stereotyping based on *Price Waterhouse* due to nonconforming behavior and appearance), *with* King v. Super Serv., Inc., 68 F. App'x 659, 664 (6th Cir. 2003) (ruling that harassment was based on sexual orientation, not on sex, and therefore not covered under Title VII, because "the animosity directed towards the plaintiff because of his apparent sexual orientation is . . . different from behavior and appearance").

79. *Smith*, 378 F.3d at 573.

80. Schroer v. Billington, 577 F. Supp. 2d 293, 308 (D.D.C. 2008).

81. *Id*. at 307.

82. *Id*.

83. *Id*.; *see* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) (recognizing that Title VII proscribes male-on-male sexual harassment).

84. *Schroer*, 577 F. Supp. 2d at 308. *But see* Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ., 97 F. Supp. 3d 657, 680 (W.D. Pa. 2015) (holding that "a plaintiff must show that his harasser was acting to punish his noncompliance with gender stereotypes").

85. Macy v. Holder, No. 0120120821, 2012 WL 1435995, at *1 (E.E.O.C. Apr. 20, 2012).

86. *Id*. at *6.

because of the employer's discomfort with the individual's transition from one gender to another, or because the employer does not like that the individual identifies as a transgender person.[87] This ruling is not binding beyond the federal sector.[88]

In making its determination, the EEOC cited the Eleventh Circuit decision in *Glenn v. Brumby*,[89] wherein the court suggested that consideration of gender stereotypes is an inherent part of discrimination against transgender people.[90] In *Glenn*, the Eleventh Circuit held that the termination of a transgender employee at the Georgia General Assembly Office of Legislative Counsel violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, because the termination was on the basis of sex discrimination.[91] The court explained that a person is "defined as transgender precisely because of the perception that [the individual's] behavior transgresses gender stereotypes,"[92] and "the very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior."[93] Although the court was addressing an Equal Protection claim, it recognized that a finding that Glenn's employer had acted on the basis of Glenn's gender nonconformity would be sufficient to find a violation under Title VII.[94]

Since the *Macy* and *Smith* decisions, the federal government has reversed many positions relevant to success of Title VII claims for transgender plaintiffs. For example, in *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*, the Obama administration EEOC sued Harris Funeral Homes for discrimination on the basis of transgender status and refusal to conform to sex-based stereotypes.[95] But the Trump administration sided with Harris Funeral Homes.[96] The Sixth Circuit held that discrimination on the basis of transgender status is necessarily discrimination on the basis of sex.[97] The Supreme Court granted certiorari on "[w]hether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*."[98] The federal respondent argued in its brief that transgender status is not protected under Title VII and that discrimination against transgender individuals does not constitute sex stereotyping, clearly

87. *Id.* at *7.

88. Cody Perkins, *Sex and Sexual Orientation: Title VII After* Macy v. Holder, 65 ADMIN. L. REV. 427, 437–38, 441 (2013) (citing *Macy*, 2012 WL 1435995, at *7–9) (discussing the impact of the *Macy* ruling on employment discrimination claims brought by transgender people).

89. Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011).

90. *Macy*, 2012 WL 1435995, at *8–9 (citing *Glenn*, 663 F.3d at 1316–17).

91. *Glenn*, 663 F.3d at 1321.

92. *Id.* at 1316.

93. *Id.* (quoting Ilona M. Turner, *Sex Stereotyping* Per Se*: Transgender Employees and Title VII*, 95 CAL. L.REV. 561, 563 (2007)).

94. *Id.* at 1321.

95. EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 201 F. Supp. 3d 837, 842 (E.D. Mich. 2016).

96. Brief for the Respondent, at 8, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, No. 18-107 (Aug. 16, 2019).

97. EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 571 (6th Cir. 2018).

98. R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, 139 S.Ct. 1599, 1599 (2019).

advocating against its holding in *Macy*.[99] The respondent cited to a Department of Justice memorandum that adopted the position that transgender individuals are not protected under Title VII on the basis of their transgender status.[100] The United States Solicitor General argued for reversal before the Supreme Court on October 8, 2019.

In summary, transgender plaintiffs have had more success using the sex-stereotyping framework articulated in *Price Waterhouse* than asserting sexual orientation or transgender status discrimination claims under Title VII. The favorable rulings in *Smith* and *Schroer*, and further interpretations by the *Macy* and *Glenn* analyses, demonstrate how the *Price Waterhouse* framework can evolve to include sex discrimination based on gender identity and transgender status. These court rulings also provide insight on how other courts may interpret such claims in the future.[101] Although, EEOC decisions like *Macy* may indicate best practices for employers in the future, their current impact is limited.[102] The decision in *Harris Funeral Homes* will invariably shift the future interpretation of Title VII and protections available to LGBTQ plaintiffs.

D. FEDERAL EMPLOYEES UNDER TITLE VII

Federal employees have the same protections as private employees under Title VII, but the recognized rights for federal employees can vary depending on the type of employment and executive orders in force. The major distinction in protections for LGBTQ employees is between civilian personnel and members of the Armed Forces. Civil applicants and employees may bring sex discrimination claims under Title VII. Enlisted and commissioned employees in the Armed Forces are protected by internal Department of Defense policies prohibiting discrimination on the basis of sex and gender identity, but transgender individuals still face discrimination as a result of executive policies.

1. Civilian Personnel

For civilian federal employees, Title VII provides the main cause of action against workplace sex discrimination.[103] To bring a claim under § 2000e-16 of Title VII, an individual must be an applicant for federal employment, a current

99. Brief for the Respondent passim, R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission, No. 18-107 (Aug. 16, 2019).

100. *Id*. at 8; Memorandum from Attorney Gen. Jeff Sessions to U.S. Attorneys and Department Heads (Oct. 1, 2017), https://www.justice.gov/ag/page/file/1006981/download.

101. Perkins, *supra* note 88, at 437 (citing *What Does the* Macy *Decision Mean for Title VII*, U.S. EEOC (June 15, 2012), http://www.eeoc.gov/federal/training/brown_bag_macy.cfin) (discussing how EEOC adjudicatory decisions have no binding authority outside the federal sector).

102. *See id*. (discussing the implications of an adjudicatory ruling by the EEOC).

103. Helton v. Lipani, No. 13-693-JJB-RLB, 2014 WL 2876442, at *2 (M.D. La. Jun. 24, 2014) (quoting Brown v. Gen. Servs. Admin., 425 U.S. 820, 829 (1976)) ("Title VII provides 'the exclusive, preemptive, administrative and judicial scheme for the redress of federal employment discrimination.'").

federal employee, or a former federal employee.[104] Federal employees may pursue administrative remedies or file civil suits.[105]

In federal employment civil suits, courts are engaged in the same debate over the meaning of "sex discrimination" as discussed *supra* in Sections II. B and C. For example, in *Hart v. Lew*,[106] Hart was terminated by the Internal Revenue Service (IRS) but had intended to continue employment during and after gender confirmation surgery.[107] Hart filed an employment discrimination suit claiming "that she was subjected to different treatment on the basis of her gender, because [she] failed to conform to Management's expectations of gender norms, and that IRS Management routinely impeded [her] gender transition, by failing to accommodate her needs."[108] The court affirmed that Title VII provides a remedy for "individuals who were discriminated against on the basis of ... 'sex.'"[109] Consequently, the court held that Hart's allegations of discrimination "based on her sex, because she is a transsexual, and because she failed to conform to gender norms ... [was] within Title VII's aegis."[110] This result is consistent with the D.C. Circuit's approach endorsed in *Schroer v. Billington*,[111] but will be similarly subject to the pending Supreme Court holding in *Harris Funeral Homes*.

Additionally, federal employees and contractors have historically had discrimination protections beyond those of Title VII through executive order. In 1969, President Nixon issued an Order for Equal Employment Opportunity in the Federal Government.[112] President Obama issued two executive orders on July 31, 2014, which extended sexual orientation and gender identity protections to federal employees and contractors.[113] President Trump revoked the protections for federal contractors on March 27, 2017.[114]

2. Armed Forces Exception

Title VII protects civilian employees and applicants for civilian employment in the Department of Defense (DOD).[115] But courts have denied Title VII

104. 42 U.S.C. § 2000e-16 (2018).
105. *Id*.
106. Hart v. Lew, 973 F. Supp. 2d 561 (D. Md. 2013).
107. *Id*. at 570.
108. *Id*. at 578–79.
109. *Id*. at 579.
110. *Id*.
111. Schroer v. Billington, 577 F. Supp. 2d 293, 305–06 (D.D.C. 2008) (observing that for purposes of Title VII liability, it does not matter if an offer of employment is withdrawn because the employee is perceived to be "an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual. . . . [The plaintiff] is entitled to judgment based on the language of the statute itself.").
112. Exec. Order No. 11478, 34 Fed. Reg. 12985 (Aug. 8, 1969).
113. Exec. Order No. 13672, 79 Fed. Reg. 72985 (Dec. 9, 2014); Exec. Order No. 13673, 81 Fed. Reg. 58653 (Aug. 25, 2016).
114. Exec. Order No. 13782, 82 Fed. Reg. 15607 (Mar. 30, 2017).
115. *See* 10 U.S.C. § 101(a) (2018); Civil Rights Act of 1964 § 717(a), *codified as amended at* 42 U.S.C. § 2000e-16(a) (2018).

protection to service members and applicants for service because Congress did not explicitly include members of the armed forces when drafting Title VII.[116] Until its repeal on September 20, 2011, the United States' policy for the armed forces known as Don't Ask Don't Tell (DADT)[117] provided a further exception to federal employment discrimination rules. The DADT statute required discharge from the armed forces if an active service member engaged in or solicited participation in homosexual practices, announced homosexual status, or attempted to marry a same-sex partner.[118] In general, courts recognized a compelling government interest in maintaining "high morale, good order and discipline, and unit cohesion,"[119] and therefore declined to find that DADT facially violated substantive due process.[120] Since the repeal of DADT, LGB armed service members can serve openly and honestly and are protected through the DOD Management and Military Equal Opportunity (MEO) Program.[121] This program uses the existing chain of command to identify and resolve unlawful discriminatory practices and provides mechanisms to file complaints and monitor compliance.[122]

Transgender individuals still face many challenges in the armed forces and under current policy are presumptively disqualified from enlisting.[123] During the Obama administration, Secretary of Defense Ash Carter repealed this longstanding ban on June 30, 2016.[124] But on August 25, 2017, the White House issued a Presidential Memorandum directing the Secretary of Defense and the Secretary of Homeland Security "to return to the longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016 until such time as a sufficient basis exists upon which to conclude that terminating that policy and practice would not have . . . negative effects."[125] The Supreme Court declined to grant a preliminary injunction,[126] and the policy went into effect on

116. *See* Johnson v. Alexander, 572 F.2d 1219, 1224 (8th Cir. 1978) (holding that "if Congress had intended for the statute to apply to the uniformed personnel of the various armed services it would have said so in unmistakable terms").

117. 10 U.S.C § 654 (repealed 2010).

118. *Id*.

119. *Id*.

120. *See, e.g*., Cook v. Gates, 528 F.3d 42, 56 (1st Cir. 2008).

121. *See* U.S. Dep't of Def., Dir. No. 1350.2, "Department of Defense Military Equal Opportunity (MEO) Program" (Jun. 8, 2015), https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/135002p.pdf.

122. *Id*.

123. Department of Defense, *5 Things to Know About DOD's New Policy on Military Service by Transgender Persons and Persons with Gender Dysphoria* (Mar. 13, 2019), https://www.defense.gov/explore/story/Article/1783822/5-things-to-know-about-dods-new-policy-on-military-service-by-transgender-perso/ (see chart).

124. Terri Moon Cronk, *Transgender Service Members Can Now Serve Openly, Carter Announces*, DOD NEWS (June 30, 2016), https://www.defense.gov/News/Article/Article/822235/transgender-service-members-can-now-serve-openly-carter-announces.

125. *Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security*, WHITE HOUSE (Aug. 25, 2017), https://www.whitehouse.gov/presidential-actions/presidential-memorandum-secretary-defense-secretary-homeland-security/.

126. Trump v. Karnoski, 139 S.Ct. 950, 950 (2019).

April 12, 2019.[127] Under this policy, transgender service members are not automatically discharged. Service members who joined before 2018 may continue serving in their "preferred gender."[128] Beyond that carry-over exception, all service members are required to adhere to the physical and appearance standards "associated with their biological sex."[129] Transgender individuals who have transitioned or begun transitioning are barred from enlisting, as are individuals with a history of gender dysphoria.[130]

III. EMPLOYMENT DISCRIMINATION IN HIRING AND TERMINATION

As discussed in Part II, LGBT plaintiffs have had some success with claims of sex discrimination under Title VII, but usually under the guise of discrimination because of sex stereotyping. However, courts have dealt with this issue differently depending on the context of employment, the type of employment, and the specific sexual character of the plaintiffs.

Some LGBT individuals instead rely on state and local anti-discrimination laws for protection against employment discrimination. The levels of protection, however, depend largely on whether the employer is a public or private entity, with public and quasi-public employees often receiving the greatest protection under state and federal equal protection principles. Courts sometimes split on cases in which employers offer up Equal Protection and First Amendment defenses to justify discrimination on the basis of sexual orientation or gender identity.

Another important factor is the type of employment action an LGBT employee is challenging as discriminatory. State and local laws that prohibit discrimination on the basis of sexual orientation and gender identity generally protect against certain adverse employment decisions such as terminating, failure to hire, and others. Claims about discrimination in different employment actions often require different burdens of proof and standards courts must apply when evaluating the claims, making it easier or more difficult for certain plaintiffs to prevail in certain actions. For a number of reasons, there are generally even fewer protections against discrimination based on gender identity than on sexual orientation.

A. STATE AND LOCAL STATUTES ON DISCRIMINATION

There is notable protection against employment discrimination at the state and local levels for LGBT individuals. Thirty-four states, two territories, and the District of Columbia prohibit employment discrimination based on sexual

127. Office of the Deputy Secretary of Defense, Directive-Ype Memorandum (DTM)-19-004, *Military Service by Transgender Persons and Perons with Gender Dysphoria* (Mar. 12, 2019).

128. DEP'T OF DEF., 5 THINGS TO KNOW ABOUT DOD'S NEW POLICY ON MILITARY SERVICE BY TRANSGENDER PERSONS AND PERSONS WITH GENDER DYSPHORIA (March 13, 2019), https://www.defense.gov/explore/story/Article/1783822/5-things-to-know-about-dods-new-policy-on-military-service-by-transgender-perso/.

129. *Id.*

130. *Id.*

orientation,[131] although the degree of protection depends on whether the employment is private, public, or quasi-public.[132] Currently, twenty-one states, two territories, and the District of Columbia prohibit discrimination based on sexual orientation and gender identity for both public and private employment,[133] while one state (Wisconsin) restricts this level of protection to just sexual orientation.[134] Twelve states limit their LGBT employment discrimination protection to public employment; eight of these states provide protection for both sexual orientation and gender identity, whereas the remaining four provide protection for only

131. The thirty-four states that provide at least some form of protection for sexual orientation are: Alaska, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Utah, Vermont, Virginia, Washington, and Wisconsin. The District of Columbia, Guam, and Puerto Rico also prohibit discrimination on the basis of sexual orientation. The respective provisions in alphabetical order are: Alaska Admin. Order No. 195 (Mar. 5, 2002), https://gov.alaska.gov/admin-orders/administrative-order-no-195/ ; Ariz. Exec. Order No. 2003-22 (Sept. 12, 2003), http://apps.azsos.gov/public_services/register/2003/37/governor.pdf; CAL. GOV'T CODE §12940 (West, Westlaw through Ch. 870 of 2019 Reg. Sess.); COLO. REV. STAT. ANN. §24-34-402(1)(a) (West, Westlaw through 2019 Reg. Sess); CONN. GEN. STAT. ANN. §§ 46a-60(b) (West, Westlaw through 2019 Jan. Reg. Sess. & July Spec. Sess.); DEL. CODE ANN. tit. 19 § 711 (West, Westlaw through ch. 219 of the 150th Gen. Ass.); D.C. Code Ann.§ 2-1402.11 (West, Westlaw through Dec. 24, 2019); 22 G.C.A. § 5201 (Guam); HAW. REV. STAT. ANN. § 378-2(a) (West, Westlaw through 2019 Reg. Sess.); ILL. COMP. STAT. ANN. 775 § 10/1 (West, Westlaw through P.A. 101-622); IND. OFFICE OF THE GOVERNOR, GOVERNOR'S POLICY STATEMENT (Apr. 26, 2005), http://www.in.gov/spd/files/gov_policy.pdf; IOWA CODE ANN. § 216.6 (West, Westlaw through 2019 Reg. Sess.); Kan. Exec. Order No. 07-24 (Aug. 21, 2007), http://kslib.info/DocumentCenterNiew/547; Ky. Exec. Order No. 2008-473 (June 2, 2008), https://personnel.ky.gov/Documents/EqualOpportunityEO2008473.pdf; ME. REV. STAT. tit. 5, § 4552 (West, Westlaw through 2019 First Reg. Sess.); MD. CODE ANN., STATE GOV'T § 20-602 (West, Westlaw through 2019 Reg. Sess.); MASS. GEN. LAWS ANN. ch. 151B § 4 (West, Westlaw through ch. 134 of the 2019 1st Ann. Sess.); Mich. Exec. Order No. 2007-24 (Nov. 21, 2007), http://www.michigan.gov/formergovernors/0,4584,7-212-57648_36898-180697-,00.html; MINN. STAT. ANN. § 363A.08 (West, Westlaw through Jan. 1, 2020); Mo. Exec. Order No. 10-24 (July 9, 2010), https://www.sos.mo.gov/library/reference/orders/2010/eo10_024; Mont. Exec. Order No. 04-2016 (Jan. 19, 2016), https://governor.mt.gov/Portals/16/docs/2016EOs/EO-04-2016%20Anti-Discrimination%20in%20workplace.pdf?ver=2016-01-19-161003-600; NEV. REV. STAT. ANN. § 613.330 (West, Westlaw through 80th Reg. Sess. 2019); N.H. REV. STAT. ANN.§ 354-A:7 (West, Westlaw through ch. 346 of 2019 Reg. Sess.); N.J. STAT. ANN. §§ 10:5-4 (West, Westlaw through L.2019); N.M. STAT. ANN. § 28-1-7 (West, Westlaw through 1st Reg. Sess. of the 54th Legis. 2019); N.Y. EXEC. APP. § 466.13(c) (West, Westlaw through June 30, 2019); N.C. Exec. Order 24 (Oct. 18, 2017), https://governor.nc.gov/news/governor-cooper-signs-non-discrimination-executive-order-nc; Ohio Exec. Order No. 2019-05D (Jan. 14, 2019), https://governor.ohio.gov/wps/portal/gov/governor/media/executive-orders/2019-05d; OR. REV. STAT. ANN. § 659A.030 (West, Westlaw through 2018 Spec. Sess.); Pa. Exec. Order No. 2003-10 (July 28, 2003), https://www.oa.pa.gov/Policies/eo/Documents/2003_10.pdf; 29 L.P.R.A. § 146 (Puerto Rico); 28 R.I. GEN. LAWS ANN. §28-5-7 (West, Westlaw through ch. 310 of 2019 Reg. Sess.); UTAH CODE ANN. § 34A-5-106 (West, Westlaw through 2019 1st Spec. Sess.); VT. STAT. ANN. tit. 21, § 495 (West, Westlaw through 2019-2020 Vt. Gen. Assemb.); Va. Exec. Order 1 (Jan. 13, 2018), https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/eo-1-equal-opportunity.pdf; WASH. REV. CODE ANN. § 49.60.180 (West, Westlaw through ch. 1 of 2020 Reg. Sess.); WIS. STAT. ANN. §§ 111.31 (West, Westlaw through 2019 Act 21).

132. *See State Maps of Laws & Policies*, HUM. RTS. CAMPAIGN (last updated Jun. 7, 2019), https://www.hrc.org/state-maps/employment.

133. *Id.*

134. *Id.*; WIS. STAT. ANN. § lll.321. (West, Westlaw through 2019 Act 21).

sexual orientation.[135] Additionally, several states have in place an executive order, administrative order, or personnel regulation prohibiting discrimination against public employees based on sexual orientation and gender identity.[136]

Many local governments also provide protections against employment discrimination on the basis of gender identity. As of January 28, 2017, at least 225 cities and counties have enacted ordinances that prohibit public and private employers from discriminating on the basis of gender identity.[137]

For transgender individuals, some states prohibit discrimination on the basis that gender dysphoria is a disability, either by statute or through judicial interpretation of statutes.[138] In 1992, the Washington Court of Appeals in *Doe v. Boeing* found that the plaintiff's gender dysphoria[139] constituted a disability for the purposes of the Washington Law Against Discrimination, which defines a disability as "any sensory, mental, or physical disability."[140] Nonetheless, the Washington Supreme Court reversed.[141] Although the court found the plaintiff's gender dysphoria to constitute an abnormal condition, it held that her employer did not discriminate against her by failing to accommodate its dress code.[142]

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135. *See Maps of State Laws & Policies, supra* note 132. Indiana, Kentucky, Michigan, Montana, Ohio, Pennsylvania, and Virginia provide protection for sexual orientation and gender identity. *Id.* The states that only provide protection for sexual orientation are Alaska, Arizona, Missouri, and North Carolina, and Ohio. *Id.*

136. For examples, see Alaska Admin. Order No. 195 (Mar. 5, 2002), https://gov.alaska.gov/admin-orders/administrative-order-no-195/; Ariz. Exec. Order No. 2003-22 (Sept. 12, 2003), http://apps.azsos.gov/public_services/register/2003/37/governor.pdf; Ind. Off. of the Governor, Governor's Policy Statement (Apr. 26, 2005); Kan. Exec. Order No. 07-24 (Aug. 21, 2007), http://kslib.info/DocumentCenterNiew/547; KY. Exec. Order No. 2008-473 (June 2, 2008), https://personnel.ky.gov/Documents/EqualOpportunityEO2008473.pdf; Bill H.3810 187th (Mass. 2011), https://malegislature.gov/Bills/187/House/H3810; Mich. Exec. Order No. 2007-24 (Nov. 21, 2007), https://www.michigan.gov/formergovernors/0,4584,7-212-96477_57648_36898-180697–,00.html; Pa. Exec. Order No. 2003-10 (July 28, 2003), http://www.oa.pa.gov/Policies/eo/Documents/2003_10.pdf.

137. *Cities and Counties with Non-Discrimination Ordinances that Include Gender Identity*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/cities-and-counties-with-non-discrimination-ordinances-that-include-gender (last visited Jan. 19, 2020).

138. *See e.g.*, 2 CCR § 11065(d)(2)(C) (statute was amended in 2000 to remove exclusion of gender dysphoria); CONN. GEN. STAT. § 46a-51(20) (judicial interpretation protects gender dysphoria); FLA. STAT. ANN. § 760.10; MASS. ANN. LAWS ch. 151B, § 1 (same); N.J. Stat § 10:5-5(q); N.Y. COMP. CODES R. § Regs. Tit 9, §§ 466.13(b)(3)–466.13(d) (specifically excluded by statute). *See also* Tanya A. DeVos, *Sexuality and Transgender Issues in Employment Law*, 10 GEO. J. GENDER & L. 599, 619 (2009).

139. *See* AM. PSYCHIATRIC ASS'N, WHAT IS GENDER DYSPHORIA? (Feb. 2016), *available at* https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria. Gender dysphoria is a general term used in the Diagnostic and Statistical Manual of Mental Disorders (DSM-5) for persons who have confusion or discomfort about their birth gender. *Id.* Milder forms of gender dysphoria cause incomplete or occasional feelings of being the opposite sex, while more intense forms may lead a person to seek gender reversal. *Id.*

140. Doe v. Boeing Co., 823 P.2d 1159, 1162 (Wash. Ct. App. 1992), *rev'd*, 846 P.2d 531 (Wash. 1993) (interpreting WASH. REV. CODE § 49.60.180(2)).

141. *Doe*, 846 P.2d at 539.

142. *Id.* at 538.

The year before *Doe*, the Florida Commission on Human Rights, in an eight-to-one decision, found the discharge of a transgender corrections officer to be discrimination based on a disability.[143] More recently, in *Enriquez v. West Jersey Health Systems*, a New Jersey court held that gender dysphoria constituted a disability that entitled the plaintiff to legal protections against discrimination.[144] The court in *Enriquez* also recognized that sex discrimination laws protect against gender identity discrimination.[145] Nonetheless, many states still do not allow claims under disability statutes, usually pointing to the fact that being transgender does not affect the ability to work.[146]

Despite the growing recognition of gender identity discrimination claims, the protections offered are still extremely limited. In Minnesota, for example, the court held that the state statute explicitly providing protection for gender identity and expression does not require employers to change restroom policies to accommodate transgender employees before or during the transition process.[147] Thus, even where states provide some form of protection for gender identity and expression, this protection is limited in some crucial respects.

B. DISPARATE LEVELS OF PROTECTION BASED ON EMPLOYMENT SECTOR

The level of sovereign immunity protection against discrimination suits varies depending on whether the employer is a public, quasi-public, or private entity.[148] Because the applicability of anti-discrimination statutes depends on the employer's status, some courts look at the functions of the employer's business to determine whether it is public or private. For example, in *Gay Law Students Ass' n v. Pacific Telephone & Telegraph Co*., the California Supreme Court determined that the highly regulated nature of the employer's business made it "more akin to a governmental entity than to a purely private employer."[149] The court reasoned

143. Smith v. City of Jacksonville Corr. Inst., No. 88-5451, 1991 WL 833882, at *1 (Fla. Div. Admin. Hrgs. 1991).

144. Enriquez v. W. Jersey Health Sys., 777 A.2d 365, 376 (N.J. 2001). The Massachusetts Supreme Judicial Court has similarly held that a transgender employee who refused to dress like a man was discriminated against because of sex stereotyping and on the basis of a disability. *See* Lie v. Sky Publ'g Corp., 15 Mass. L. Rptr. 412, 2002 WL 31492397, at *7 (Mass. Super. 2002) ("[T]ranssexuals have a classically stigmatizing condition that sometimes elicits reactions based solely on prejudices, stereotypes, or unfounded fear. Thus, the plaintiff has established a prima facie case of discrimination on the basis of handicap.").

145. *Enriquez*, 777 A.2d at 373.

146. *See* Sommers v. Iowa Civil Rights Comm'n, 337 N.W.2d 470, 477 (Iowa 1983) (finding that transgender status does not prohibit a person from performing major life activity, and therefore transgender individuals are not disabled).

147. Goins v. West Group, 635 N.W.2d 717, 723 (Minn. 2001) (finding that employer was not obligated to allow employee to use the female restroom until after sexual reassignment surgery). However, the plaintiff in this case did not argue that hormone therapy had altered her sex. Therefore, this holding addresses what an employer's obligations are before sexual reassignment occurs but does not address how much medical treatment is necessary to trigger such a change.

148. *See, e.g*., *Municipal Liability and Qualified Immunity Explored in Discrimination Case*, 26 No. 6 MCQUILLIN MUN. LAW REP. 4 (2008).

149. Gay Law Students Ass'n v. Pac. Tel. & Tel. Co., 595 P.2d 592, 599 (Cal. 1979).

that because the "breadth and depth of governmental regulation of a public utility's business practices inextricably ties the state to a public utility's conduct, both in the public's perception and in the utility's day-to-day activities," the entity must conduct its affairs more like a governmental entity than like a private corporation.[150] While the court relied on the state constitution's equal protection clause to rule against the employer,[151] California later amended its discrimination statute to incorporate this holding, protecting both public and private employees through legislation.[152]

Additionally, in a 2003 sovereign immunity case, a Washington court allowed a patient at a municipal public health authority to sue their doctor under an argument based on *Gay Law Students Association*.[153] The court held that a public health authority established by a municipality for the purpose of providing healthcare for the general welfare was a quasi-municipal corporation that qualified as a local government entity for purposes of a statute waiving sovereign immunity.[154] This holding suggests that protection of sexual orientation statutes could be extended to employers that can be categorized as "quasi-public" corporations or state protected monopolies, although this application has yet to be seen. Thus, the equal protection doctrine and state statutes that explicitly protect against sexual orientation discrimination may be a source of relief for LGBT plaintiffs, at least with respect to employees of the government or industries subject to the same regulations as government employees.

Conversely, certain state employers advocate for heightened levels of deference when faced with sexual orientation discrimination suits. For instance, school districts have argued that homosexuality presents a "moral issue," and that they therefore have a right and an obligation to look out for the "best interests" of their students.[155] However, many courts have struck down school policies for being too vague when they include general provisions to terminate and refuse to hire or promote on moral deficiency grounds.[156] The most common rationale for these

150. *Id*.

151. *Id*. ("[A]rbitrary exclusion of qualified individuals from employment opportunities by a state-protected public utility does, indeed, violate the state constitutional rights of the victims of such discrimination.").

152. The holdings of *Gay Law Students Ass'n* and *Soroka v. Dayton Hudson Corp*., 1 Cal. Rptr. 2d 77, 89 (Cal. Ct. App. 1991) effectively amended California employment statutes to prohibit discrimination on the basis of sexual orientation. The holdings were later codified in CAL. GOV'T CODE § 12920 (West, Westlaw through ch. 651 of the 2019 Reg. Sess.). For a discussion of the legislative history, *see* Murray v. Oceanside Unified Sch. Dist., 95 Cal. Rptr. 2d 28, 36 (Cal. Ct. App. 2000).

153. *See* Woods v. Bailet, 67 P.3d 511, 515 (Wash. Ct. App. 2003).

154. *Id*. (holding that plaintiff's allegation that doctors performed surgery on her without informed consent required her to file a claim with the corporation's governing body prior to filing suit, in accordance with the sovereign immunity statute).

155. *See, e.g*., Gish v. Bd. of Educ., 366 A.2d 1337, 1342 (N.J. Super. Ct. App. Div. 1976) ("[T]he school authorities have the right and duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted." (quoting Adler v. Bd. of Educ., 342 U.S. 485, 493 (1952))).

156. *See, e.g*., Burton v. Cascade Sch. Dist. Union High Sch. No. 5, 353 F. Supp. 254, 255 (D. Or. 1973) (interpreting Oregon law to hold that "immorality" is unconstitutionally vague as grounds for

rulings is that a citation to a general requirement of morality, without specific reference to an articulated standard, exposes the moral judgment to the vagaries of a particular school board's notion of morality.[157] In *Weaver v. Nebo School District*, the court held that a school principal's decision not to assign a teacher as a volleyball coach because of a negative reaction in the community to her sexual orientation violated the Equal Protection Clause of the Fourteenth Amendment.[158] The court noted that the equal protection guarantee, if it is to mean anything, stands for the proposition that the "private antipathy of some members of a community cannot validate state discrimination."[159]

C. BRINGING CLAIMS OF HIRING AND TERMINATION DISCRIMINATION

Generally, LGBT persons have only been protected from discrimination under statutes that expressly prohibit discrimination on the basis of gender identity or sexual orientation.[160] These laws usually protect certain classes of employees from adverse employment decisions,[161] including termination, failure to hire or promote, providing lower salaries or benefits, and offering inferior work terms.[162]

To prevail on a discrimination claim, plaintiffs must prove that a discriminatory reason more likely than not motivated the employer's adverse action.[163] They may do so by offering direct proof of discriminatory intent, or they may offer indirect proof under the *McDonnell Douglas* method.[164] Under the *McDonnell Douglas* method, an employee has the initial burden of making a

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dismissal; regulation must define immorality and cannot depend on the idiosyncrasies of the individual school board members, or of the community as a whole).

157. *Id.*

158. *See* Weaver v. Nebo Sch. Dist., 29 F. Supp. 2d 1279, 1289 (D. Utah 1998).

159. *Id.* (citing City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448 (1985)).

160. *See, e.g.*, Flynn v. Hillard, 707 N.E.2d 716, 720 (Ill. App. Ct. 1999) (stating that the claim should have been brought under the city statute that prohibited sexual orientation discrimination instead of state anti-discrimination statute, which did not expressly protect against sexual orientation discrimination); Barbour v. Dep't of Soc. Servs., 497 N.W.2d 216, 217-18 (Mich. Ct. App. 1993) (demonstrating that no claim is available where protections of civil rights statute were aimed at gender discrimination, not sexual orientation discrimination); Nacinovich v. Tullet & Tokyo Forex, Inc., 685 N.Y.S.2d 17 (N.Y. App. Div. 1999) (noting that civil rights statute did not prohibit sexual orientation discrimination, but claim could survive under New York City Human Rights Law, codified at N.Y. ADMIN. CODE § 8-107). *But see* Hubert v. Williams, 184 Cal. Rptr. 161, 162-63 (Cal. App. Dep't Super. Ct. 1982) (providing that LGBT persons are protected under state civil rights act, although not explicitly stated, where statute had been interpreted to prohibit all forms of arbitrary discrimination by business establishments).

161. *See, e.g., Gay Law Students Ass'n.*, 595 P.2d at 599 (holding that, even though the state statute did not protect against sexual orientation discrimination, arbitrary employment decisions against a class of persons by a public utility company violated state due process rights under the state constitution). Protection for sexual orientation has since been codified in California under CAL. GOV. CODE ANN. § 12920 (West, Westlaw through 2019 Reg. Sess).

162. *See, e.g.*, CONN. GEN. STAT. ANN. § 46a-60 (West, Westlaw through 2019 Jan. Reg. Sess. & July Spec. Sess.).

163. *See, e.g.*, Reynaga v. Roseburg Forest Prods., 847 F.3d 678, 690 (9th Cir. 2017).

164. 3 Labor and Employment Law § 54.01 (2019); *see also* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

prima facie showing of discrimination. Then, the burden shifts to the employer "to articulate some legitimate, nondiscriminatory reason for the employee's rejection."[165] Finally, the burden shifts back to the plaintiff to show that the reason given by the employer was not legitimate, but was "pretext" for discrimination.[166]

1. Failure to Hire

The burden-shifting framework for a claim of discriminatory failure to hire creates a relatively high standard for potential plaintiffs.[167] To establish a *prima facie* case of discrimination under the *McDonnell Douglas* method, a plaintiff must show that the individual was (l) a member of a protected class; (2) qualified for the position sought; (3) subjected to adverse employment action; and (4) replaced by someone else with similar qualifications or the position remained open.[168] If the plaintiff succeeds, a presumption of discrimination arises.[169] The employer then has the burden of stating a "legitimate, nondiscriminatory reason" for not hiring the plaintiff.[170] If successful, the plaintiff must present evidence demonstrating that the reason articulated by the employer was a pretext for unlawful discrimination.[171] The plaintiff must then do more than refute or question the employer's nondiscriminatory reason for the action.[172]

2. Wrongful Termination

In contrast, wrongful termination claims may be easier to establish than those of discriminatory failure to hire. The burden of proof in wrongful termination cases is less forgiving to the employer—the employee need only show an increased likelihood of termination based on the employee's sexual orientation or

165. *McDonnell Douglas*, 411 U.S. at 802.

166. *Id.*

167. *See, e.g.*, Robin Cheryl Miller, Annotation, *Validity, Construction, and Application of State Enactment, Order, or Regulation Expressly Prohibiting Sexual Orientation Discrimination*, 82 A.L.R. 5th 1, § 7 (2000) (discussing cases where plaintiff job applicants failed to establish prima facie cases of employment discrimination due to lack of sufficient evidence); Sondheimer v. Georgetown Univ., No. Civ. A.87-1052-LFO, 1987 WL 14618, at *3 (D.D.C. Oct. 20, 1987) (applicant unable to establish a prima facie case of employment discrimination). *But see* R.I. GEN. LAWS ANN. § 28-5-7.3 (establishing that discrimination only has to be one motivating factor in termination to constitute an unlawful employment practice) (West, Westlaw through Ch. 310 of the 2019 Reg. Sess.).

168. This test is widely accepted among circuits. *See, e.g.*, Prescott v. Higgins, 538 F.3d 32, 40 (1st Cir. 2008) (citation omitted); *see also* Zarda v. Altitude Express, Inc., 883 F.3d 100, 110 (2d. Cir. 2018), *cert. granted sub nom.* Altitude Express, Inc. v. Zarda, 139 S. Ct. 1599 (2019).

169. Cook v. PC Connection, Inc., No. 08-cv-496-SM, 2010 WL 148369, at *4 (D.N.H. Jan. 13, 2010).

170. *Id.* (quoting Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 54 (1st Cir. 2000)).

171. *Id.* (citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510–11 (1993)).

172. *Id.*

gender identity.[173] Additionally, employees have more tools available to prove wrongful termination. For example, plaintiffs may utilize circumstantial evidence to claim constructive termination based on a hostile work environment.[174]

Many states apply an objective standard when determining constructive termination.[175] Specifically, an employee must prove by preponderance of the evidence "that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign."[176]

In *Kovatch v. California Casualty Management Co.*, evidence of decreased job responsibilities, ostracization, and threatened termination constituted a showing of constructive termination.[177] The employee was tormented about his sexual orientation at work to the point that he required psychiatric counseling.[178] After exhausting his disability leave, which he had taken under his psychiatrist's advisement, Kovatch refused to return to work or take an alternate position that he found less desirable.[179] In overturning a summary judgment ruling against the employee, the court held that the evidence created triable issues of fact as to whether Kovatch had been constructively terminated as a result of harassment, and whether he had been discriminated against on the basis of his sexual orientation through his employer's failure to provide an adequate remedy for the harassment.[180]

Circumstantial evidence is an accepted and often necessary method for demonstrating the requisite causal link between an employee's sexual orientation and subsequent termination.[181] In turn, courts do not always require direct evidence to show that disclosure of sexuality caused termination.[182] In many cases, the

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173. *See, e.g.*, Leibert v. Transworld Sys., Inc., 39 Cal. Rptr. 2d 65, 70 (Cal. Ct. App. 1995) (holding that employee's subjection to a heightened degree of job performance scrutiny and threats of firing were sufficient to constitute discrimination).

174. *See* Kovatch v. Cal. Casualty Mgmt. Co., 77 Cal. Rptr. 2d 217, 225–26 (Cal. Ct. App. 1998).

175. *See, e.g.*, Baker v. Tremco Inc., 890 N.E.2d 73, 80 (Ind. Ct. App. 2008); Kosa v. Dallas Lite & Barricade, Inc., 228 S.W.3d 428 (Tex. Ct. App. 2007); Darrow v. Dillingham & Murphy, LLP, 902 A.2d 135, 138 (D.C. 2006); Turner v. Anheuser-Busch, Inc., 876 P.2d 1022, 1027 (Cal. 1994), *overruled on other grounds by* Romano v. Rockwell Int'l, Inc., 926 P.2d 1114 (Cal. 1996).

176. *Turner*, 876 P.2d at 1029.

177. *Kovatch*, 77 Cal. Rptr. 2d at 226.

178. *Id.*

179. *Id.* at 222.

180. *Id.* at 228–29.

181. *See, e.g.*, Hollander v. Am. Cyananiid Co., 895 F.2d 80, 85 (2d Cir. 1990) (finding that because employers rarely leave a trail of concrete evidence, circumstantial evidence is an appropriate way to build a case against an employer charged with discrimination); Sussman v. N.Y.C. Health & Hosps. Corp., No. 94 CIV. 8461 (DBS), 1997 WL 334964, at *15 (S.D.N.Y. June 16, 1997) (finding circumstantial evidence that employer's hostility towards employee increased after disclosure of employee's sexual orientation was sufficient to survive employer's motion for summary judgment).

182. *See, e.g.*, Goins v. West Group, 635 N.W.2d 717, 724 (Minn. 2001) ("Disparate treatment claims based on circumstantial evidence are governed by the burden-shifting framework established under the *McDonnell Douglas* scheme. This scheme allocates the burden of producing evidence

admissibility of circumstantial evidence will mean the difference between summary judgment for or against the plaintiff.[183]

3. Intentional Infliction of Emotional Distress

In addition to an employment discrimination claim, an employee can bring an intentional infliction of emotional distress claim if an employer purposely causes severe emotional distress through extreme and outrageous conduct. Many courts recognize intentional infliction of emotional distress as a cause of action separate from a discrimination claim.[184] In order to establish such a claim, a plaintiff must include the traditional elements of this tort in his or her prima facie case.[185] However, in the absence of a bright-line standard for what level of harassment an employer must intentionally or negligently inflict on an employee, it is extremely difficult for LGBT plaintiffs to survive a summary judgment motion.[186] Courts have generally been unwilling to find a defendant liable for intentional or negligent infliction of emotional distress when the only conduct complained of is harassment due to the employee's actual or presumed sexual orientation.[187] For

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between the parties and establishes the order of presentation of proof. A plaintiff must first establish a prima facie case of discriminatory motive. If the plaintiff makes this showing, the burden of production then shifts to the employer to articulate a legitimate nondiscriminatory reason for its adverse employment action. If the employer articulates such a reason, the plaintiff must then put forward sufficient evidence to demonstrate that the employer's proffered explanation was a pretext for discrimination. The burden of persuasion, however, remains with the plaintiff at all stages.").

183. *See Hollander*, 895 F.2d at 84; Husman v. Toyota Motor Credit Corp., 220 Cal. Rptr. 3d 42, 61–62 (Cal. App. 2d Dist. 2017), *rev. den'd* (Sept. 27, 2017).

184. *See, e.g.*, Kofoid v. Woodard Hotels, 716 P.2d 771, 775 (Or. Ct. App. 1986) (holding that lower court erred in finding that a statutory violation preempted the independent claim of intentional infliction of emotional distress); Holien v. Sears, Roebuck & Co., 677 P.2d 704, 705 (Or. Ct. App. 1984) (establishing intentional infliction of emotional distress as a separate claim in the jury verdicts). *But see* Steven Aptheker, *Rethinking Tort Claims In Employment Discrimination Cases*, 248 N.Y.L.J. 55 (2012) (observing that tacking IIED onto employment discrimination claims in New York is routinely dismissed).

185. *See* Ellison v. Stant, 136 P.3d 1242, 1249 n.5 (Utah Ct. App. 2006) (stating that the traditional elements to establish intentional infliction of emotional distress are: (1) the defendant intentionally engaged in some conduct toward the plaintiff considered outrageous and intolerable in that it offends generally accepted standards of decency and morality; (2) the defendant engaged in such conduct either with the purpose of inflicting emotional distress or where a reasonable person would have known that such would result; and (3) the defendant's conduct directly resulted in severe emotional distress).

186. *See* Forgione v. Skybox Lounge, LLC, No. NNHCV146050777S, 2015 WL 7941111, at *7 (Conn. Super. Ct. Nov. 10, 2015) (granting partial summary judgment for employer because his statements and conduct while terminating employee were not extreme or outrageous enough to support intentional infliction of emotional distress); Riscili v. Gibson Guitar Corp., No. 06 CIV 7596 RJH, 2007 WL 2005555, at *5 (S.D.N.Y. July 10, 2007) (granting partial summary judgment for employer because the conduct alleged did not meet the strict standard for intentional infliction of emotional distress); Rubalcaba v. Albertson's LLC, B278626, 2019 WL 1417158, at *22 (Cal. App. 2d Dist. Mar. 29, 2019) (reversing a jury finding of intentional infliction of emotional distress).

187. *See generally* CAMILLE L. HERBERT, EMPLOYEE PRIVACY LAW §§ 9:3–9:4 (West 2017). Many cases illustrate the types of conduct that are insufficient to rise to the level of outrageousness needed to recover under the tort. *See, e.g.*, Dawson v. Entek Intern, 630 F.3d 928, 941 (9th Cir. 2011) (finding that an employer's indifference to derogatory comments made by its employees about the plaintiff was not sufficiently outrageous to give rise to such a claim); De La Campa v. Grifols Am., Inc., 819 So. 2d 940,

example, the District Court for the Southern District of New York in *Moye v. Gary* rejected the plaintiff's claim that her employer had engaged in intentional infliction of emotional distress when a supervisor called her a "fag" and suggested that she was a lesbian.[188] The court held that the comments were not sufficiently outrageous to state a claim and implied that further "outrageous" actions beyond name-calling were necessary to constitute intentional infliction of emotional distress.[189] Comparably, the District of Connecticut expressly stated:

> The standard of outrageousness for cases of intentional infliction of emotional distress is high: Liability . . . has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, Outrageous![190]

Until courts adopt a more workable standard for such harassment, the intentional infliction of emotional distress claim is an ineffective alternative to the explicit right to relief under a state antidiscrimination statute.

4. Wrongful Termination in Violation of Public Policy

Employees may also find relief under the theory that adverse action violates established public policy.[191] Because a significant number of states do not protect against discrimination on the basis of sexual orientation, a claim necessitating a clear enunciation of a public policy is thus contingent on the level of protection

943–44 (Fla. Dist. Ct. App. 2002) (finding that employer's expression of displeasure about employee's sexual orientation and statement that he would be terminated, while offensive, were not outrageous enough to support a claim of intentional infliction of emotion distress). *See also* Spencer v. Town of Bedford, No.6:18-CV-31, 2018 WL 5983572, at *1 (W.D. Va. Nov. 2, 2018) (openly gay police officer did not plead enough facts to survive motion to dismiss for IIED but survived other claims for retaliation).

188. Moye v. Gary, 595 F. Supp. 738, 739 (S.D.N.Y. 1984).

189. *Id*. at 740.

190. Byra-Grzegorczyk v. Bristol-Myers Squibb Co., 572 F. Supp. 2d 233, 256 (D. Conn. 2008) (quoting Morrissey v. Yale Univ., 844 A.2d 853, 854 (Conn. 2004)) (quotation marks omitted).

191. *See* Pierce v. Ortho Pharm. Corp., 417 A.2d 505, 512 (N.J. 1980) (including legislation, administrative rules, regulations or decisions, judicial decisions, and in certain instances, professional codes of ethics as possible sources of public policy). *See also* Paul H. Tobias, *State-By-State Compendium of Leading and Representative Decisions Concerning the Public Policy Tort Doctrine*, l Lit. Wrong. Discharge Claims app. 5A (Dec. 2017) (noting that forty-five states and the District of Columbia recognize the public policy exception to at-will employment: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming).

afforded to LGBT employees by the state.[192] The court in *Hicks v. Arthur* applied Pennsylvania state law to determine that at-will employment can be terminated with or without cause, except when the termination is in violation of a "significant, clearly mandated public policy."[193] The court also held that a statutory remedy does not need to be available if the public policy is clear,[194] but if alternative causes of action exist in clearly articulated laws by the legislature, the wrongful termination claim cannot be maintained.[195] Therefore, this form of relief becomes unavailable as more states enact LGBT discrimination statutes.

In *Hicks*, protection from discrimination on the basis of sexual orientation was deemed not to be a "clearly mandated public policy" that would create such an avenue for relief.[196] However, in *Kovatch*, the court found a clear public policy given that "California law explicitly prohibits discrimination in any aspect of employment based on actual or perceived sexual orientation limited state and federal protections.[197]

IV. EMPLOYMENT BENEFITS FOR LGBT PERSONS

As discussed in Sections I and II, LGBT individuals may face significant discrimination in the workplace and may have difficulty challenging adverse employment action. An important and connected issue facing LGBT persons in the workplace is access to healthcare and paid sick and family leave – each of which also raise some important issues of equality. This section will discuss access to employer-provided spousal benefits for same-sex couples, insurer's limits on access to gender confirmation surgery, and the problem of paid leave.

Many LGBT individuals gained access to employer-based benefits previously only available to opposite-sex spouses after the Supreme Court's decision in *Obergefell v. Hodges*, which extended marriage rights to same-sex couples. Post-*Obergefell* employers who refuse to provide access to the same benefits risk discrimination lawsuits. In this way, LGBT individuals have made significant gains. Apart from gaining access to spousal benefits however, transgender individuals seeking gender confirmation surgery still face difficulties in gaining access to care. Insurers may deny coverage for surgery for a variety of reasons discussed below, and transgender individuals have seen little success in challenging insurance determinations in court. LGBT individuals are also particularly affected by the issue of paid family and/or sick leave.

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192. That is, because only thirty-four states and the District of Columbia have statutes or executive orders that expressly prohibit workplace discrimination based on sexual orientation, there may be a lack of a clearly enunciated public policy in those states that do not afford such protection. *See* statutes cited *supra* note 131.

193. Hicks v. Arthur, 843 F. Supp. 949, 957 (E.D. Pa. 1994) (quoting Freeman v. McKellar, 795 F. Supp. 733, 741 (E.D. Pa. 1992)).

194. *Id.*

195. *Id. But see* Kovatch v. Cal. Casualty Mgmt. Co., 77 Cal. Rptr. 2d 217, 230 (Cal. Ct. App. 1998) ("A claim for wrongful termination in violation of public policy is one type of claim that is not barred by the exclusive remedy provisions of the Workers' Compensation Act.").

196. *Hicks*, 843 F. Supp. at 957.

197. *Kovatch*, 77 Cal Rptr. 2d at 224.

A. THE CURRENT STATE OF EMPLOYMENT BENEFITS FOR FAMILIES HEADED BY SAME-SEX COUPLES

Following the Supreme Court's ruling in *Obergefell v. Hodges* in June 2015, all states must now perform and recognize same-sex marriages.[198] Because same-sex couples can now enter into marriages across the country, LGBT persons face fewer obstacles when trying to extend their employer-provided health insurance to their spouse and family. The logical conclusion of the Court's decision in *Obergefell* is that any benefits provided by employers to opposite-sex married couples should be provided to same-sex married couples.[199] If employers with self-insured plans only offer their plans to opposite-sex couples, the employers could face state and federal discrimination lawsuits.[200] For example, in *Schuett v. FedEx Corporation*, the United States District Court for the Northern District of California held that FedEx violated its duty to administer its benefit plan in accordance with applicable law when it denied the plaintiff's claim for qualified pre-retirement survivor annuity benefits.[201] The court ruled that California law recognized the plaintiff as her deceased wife's spouse for the purposes of her wife's pension plan even though the pension plan language still defined "spouse" according to the Defense of Marriage Act (DOMA).[202] At the federal level, section 1557 of the Affordable Care Act (ACA) also expressly prohibits insurers from discriminating on the basis of sexual orientation or gender identity in coverage.[203] In fact, under the ACA, the rate of uninsured LGBT persons fell from 19% to 10% from 2016 to 2019.[204] However, a new federal regulation proposed in May 2019 would eliminate section 1557, removing protections for LGBT individuals against discrimination by hospitals, doctors, and insurance providers.[205] Additionally, only fourteen states have implemented state laws or policies prohibiting private insurance companies from discriminating on the basis of sexual orientation.[206]

198. Obergefell v. Hodges, 135 S. Ct. 2584, 2607–08 (2015).

199. *Employee Benefits Implications of Supreme Court Decision on Same-Sex Marriage*, MCDERMOTT, WILL & EMERY, LLP (June 30, 2015), https://www.mwe.com/insights/employee-benefits-implications-of-supreme-court.

200. *Id.*

201. Schuett v. FedEx Corp., 119 F. Supp. 3d 1155, 1165 (N.D. Cal. 2016).

202. *Id.*

203. Lindsey Dawson, Jennifer Kates, & Anthony Damico, *The Affordable Care Act and Insurance Coverage Changes by Sexual Orientation*, KAISER FAMILY FOUND. (Jan. 18, 2018), https://www.kff.org/disparities-policy/issue-brief/the-affordable-care-act-and-insurance-coverage-changes-by-sexual-orientation/.

204. *Id.*

205. Press Release, Nat'l Ctr. for Lesbian Rights, Trump Administration to Eliminate LGBT Healthcare Anti-Discrimination Protections (May 23, 2019), http://www.nclrights.org/press-room/press-release/trump-administration-to-eliminate-lgbt-healthcare-anti-discrimination-protections/.

206. *Healthcare Laws and Policies: Nondiscrimination in Private Insurance*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/img/maps/citations-nondisc-insurance.pdf (last updated Jan. 14. 2020).

B. MEDICAL SERVICES FOR GENDER CONFIRMATION TREATMENTS

Transgender persons wishing to undergo gender confirmation treatments, including surgery, frequently face health insurance policies that label such treatments as cosmetic[207] or medically unnecessary, and therefore outside coverage parameters.[208] In *Mario v. P & C Food Markets, Inc*., an employee who was denied coverage filed suit under the Federal Employee Retirement Income Security Act (ERISA)[209] and Title VII.[210] The court rejected the ERISA claim, finding that the plaintiff's mastectomy and hormone therapy were not "medically necessary."[211] The court's ruling was based upon controversy within the medical community regarding the efficacy of that particular treatment plan;[212] however, the American Medical Association (AMA) has subsequently declared the denial of coverage based solely on the patient's gender identity to be discrimination.[213] More recent cases have ruled in favor of transgender patients seeking coverage, and section 1557 of the ACA prohibits most insurers from discriminating on the basis of gender identity, giving transgender patients an avenue for enforcing their rights to health insurance coverage for confirmation treatments.[214] In addition, twenty-one states and the District of Columbia have enacted laws prohibiting blanket exclusions for gender affirming services.[215] Nevertheless, individual insurers continue to deny or delay confirmation treatments for transgender patients on a case-by-case basis.[216] Even more concerning, under the Trump Administration, the Department of Health and Human Services proposed a new rule in May 2019 that would dramatically revise section 1557, eliminating protection from sex—and therefore gender identity—discrimination.[217]

The prevalence of coverage denials under private plans is unclear, due to a relative lack of settled case law on the matter. It is within individual companies' purview whether to include gender confirmation surgery in their health insurance

207. *See* Davidson v. Aetna Life & Cas. Ins. Co., 420 N.Y.S.2d 450 (N.Y. Sup. Ct. 1979).

208. Mario v. P & C Food Mkts. Inc., 313 F.3d 758, 765–66 (2d Cir. 2002).

209. *Id*. at 763.

210. *Id*. at 764.

211. *Id*. at 764–66.

212. *Id*. at 766.

213. *Removing Financial Barriers to Care for Transgender Patients*, AM. MED. ASS'N, http://www.tgender.net/taw/ama_resolutions.pdf (last visited Oct. 13, 2019) (resolving that the AMA "support[s] public and private health insurance coverage for treatment of gender identity disorder" as recommended by the patient's physician).

214. *Federal Case Law on Transgender People and Discrimination*, NAT'L CTR. FOR TRANSGENDER EQUALITY, https://transequality.org/federal-case-law-on-transgender-people-and-discrimination (last visited Nov. 17, 2019).

215. *State Maps of Laws & Policies*, HUM. RTS. CAMPAIGN, https://www.hrc.org/state-maps/transgender-healthcare (last updated Jan. 2, 2020).

216. *See Accessing Coverage for Transition-Related Health Care*, LAMBDA LEGAL, https://www.lambdalegal.org/know-your-rights/article/trans-health-care (last visited Jan. 26, 2020).

217. *Trump Administration Plan to Roll Back Health Care Nondiscrimination Regulation: Frequently Asked Questions*, NAT'L CTR. FOR TRANSGENDER EQUALITY, https://transequality.org/HCRL-FAQ (last visited Jan. 26, 2020).

plans, and many large companies do include it.[218] However, a case challenging employer policies that exclude transgender-related healthcare was filed in October 2019 in the United States District Court for the Middle District of Georgia and may lead to a change in employers' ability to use discretion regarding coverage for gender affirming treatments.[219] In stark contrast, a myriad of cases have considered claims for Medicaid and Medicare denials of gender confirmation services plentiful,[220] as have cases articulating the government's responsibility to provide prisoners with access to confirmation services.[221] Current Trump administration may hinder transgender military personnel from accessing funds for confirmation surgery, provided those individuals will be permitted to continue serving in the Armed Forces. The White House notably called to "halt . . . resources to fund sex-reassignment surgical procedures" for military personnel.[222] Additionally, transgender and non-binary military veterans may also struggle to access these services because the Veterans Health Administration specifically deny coverage for gender confirmation surgery.[223]

C. PAID FAMILY AND SICK LEAVE

An issue that is particularly pertinent to LGBT workers is paid sick leave and paid family leave. Overall, in 2012, "sixty percent of workers without fully paid leave reported difficulty making ends meet."[224] Furthermore, LGBT persons are generally more vulnerable to poverty than heterosexual persons, so the absence of paid leave is especially difficult for LGBT families.[225] Millions of women are low-wage workers who lack access to paid leave,[226] and sixty-nine percent of

218. *See Finding Insurance for Transgender-Related Healthcare*, HUM. RTS. CAMPAIGN, http://www.hrc.org/resources/entry/finding-insurance-for-transgender-related-healthcare (last updated Aug. 1, 2015).

219. *TLDEF Files Federal Lawsuit Against Houston County, Georgia for Excluding Medically-Necessary Transgender Health Care in Employee Health Plan*, TRANSGENDER LEGAL DEF. & EDUC. FUND (Oct. 2, 2019), http://www.transgenderlegal.org/headline_show.php?id=985.

220. *See* Charles Thomas Little, *Transsexuals and the Family Medical Leave Act*, 24 J. MARSHALL J. COMPUT. & INFO. L. 315, 322 n.45 (2006).

221. *See, e.g.*, Fields v. Smith, 712 F. Supp. 2d 830, 867 (E.D. Wis. 2010).

222. *Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security: Military Service by Transgender Individuals*, WHITE HOUSE (Aug. 25, 2017), https://www.whitehouse.gov/presidential-actions/presidential-memorandum-secretary-defense-secretary-homeland-security/ (Section 2(b) of the memorandum provides an exception "to the extent necessary to protect the health of an individual who has already begun course of treatment to reassign his or her sex").

223. Ariana Marini, *Denial of Medically Necessary Gender-Affirming Surgeries Hurts US Veterans*, MEDICALBAG (June 26, 2018), https://www.medicalbag.com/home/more/ethics/denial-of-medically-necessary-gender-affirming-surgeries-hurts-us-veterans/.

224. U.S. DEP'T OF LABOR, THE COST OF DOING NOTHING 5 (2015) (*available at* https://www.dol.gov/wb/resources/cost-of-doing-nothing.pdf).

225. *See Lesbian, Gay, Bisexual, and Transgender Persons & Socioeconomic Status*, AM. PSYCH. ASS'N, https://www.apa.org/pi/ses/resources/publications/lgbt(last visited Jan. 31, 2020).

226. *Paid Sick Days Promote Women's Health*, PAID SICK DAYS (May 16, 2018) http://www.paidsickdays.org/blog/i.html?id=874816897.

workers in the lowest ten percent wage category do not have access to paid sick leave.[227] People at the intersection of these identities, namely LGBT women of color, have an extremely hard time providing for themselves and their families.[228] This idea is underscored by the fact that the children of nearly one-third of African-American female same-sex couples and of nearly one-fourth of Latina same-sex couples are living in poverty.[229]

No federal legislation guarantees paid sick or paid family leave. However, a patchwork of state and local laws provides for these kinds of leave. Currently, over three dozen states and municipalities have laws that provide paid sick leave.[230] While the characteristics of these laws vary by jurisdiction, many of them include one hour of sick leave accrual for a specific amount of hours worked (usually between thirty and fifty hours); however, almost all jurisdictions exclude some classes of workers.[231] For example, unmarried and low-wage earners, who are disproportionately likely to identify as LGBT, are less likely to have access to paid leave.[232] Furthermore, only four states—California, New Jersey, New York, and Rhode Island—have laws that provide for paid leave in order to care for a

227. *Employee Benefits in the United States – March 2019*, BUREAU OF LABOR STATISTICS (Sept. 19, 2019), https://www.bls.gov/news.release/pdf/ebs2.pdf.

228. Sharon J. Lettman-Hicks, *The State of Black LGBT People and Their Families*, HUFFINGTON POST (May 13, 2014), https://www.huffpost.com/entry/the-state-of-black-lgbt-p_b_4949992.

229. *LGBT Families of Color: Facts at a Glance*, MOVEMENT ADVANCEMENT PROJECT (Jan. 2012), http://www.lgbtmap.org/file/lgbt-families-of-color-facts-at-a-glance.pdf.

230. *See* S.F., Cal., Admin. Code Chapter 12W.l-.16 (2006); D.C. CODE § 32-131.01-.17 (2014); CONN. GEN. STAT. § 31-57r-w (2011); Seattle, Wash., Ordinance 123698 (Sept. 23, 2011); Portland, Or. Code § 9.01.010-.140 (2013); N.Y.C. Admin. Code tit. 20, Ch. 8, § 20-911-924. (2013); Jersey City, N.J., Ordinance 13.097 (Sept. 25, 2013); Newark, N.J., Ordinance 13-2010 (Jan. 28, 2014); Irvington, N.J., Ordinance MC 3513 (Sept. 10, 2014); Passaic, N.J., Ordinance 1998-14 (Sept. 5, 2014); East Orange, N.J., Ordinance 21 Ch. 140-1-140-15 (Sept. 8, 2014); Paterson, N.J. Code § 412-1-13 (2014); Trenton, N.J. Ordinance Ch. 230-1-230-13 (Nov. 4, 2014); Montclair, N.J. Paid Sick Leave Ordinance Ch. 131-1-132-13 (Nov. 4, 2014); Milwaukee, Wis., Ordinance Ch. 350 (Dec.16, 2014); Bloomfield, N.J., Ordinance Ch. 160-1-160-16 (Mar. 2, 2015); CAL. LAB. CODE§ 245-249 (West, 2015); Eugene, Or., Ordinance 20537 (July 29, 2014); MASS. GEN. LAWS ch. 149, § 148c-d (2015); Oakland, Cal. Municipal Code ch. 5.92 (2014); Tacoma, Wash., Ordinance 28275 (Jan. 27, 2015); Phila., Pa., Ordinance 141026 (Feb. 12, 2015); S.B. 454, 78th Ore. Leg. Assemb., Reg. Sess. (Ore. 2015); Emeryville, Cal., Ordinance 15-004 (June 2, 2015); Montgomery Cnty., Code Ch. 27, Art. XIII (2015); Pittsburgh, Pa. File 2015-1825 (2015); New Brunswick, N.J., Title 8, Ch. 56 (Dec. 16, 2015); Spokane, Wash., Ch. 09.01 (Nov. 14, 2016); Plainfield, N.J. Ordinance Ch. 8 (Jan. 29, 2016); Santa Monica Mun. Code 4.62.025; Minneapolis, Minn., Ordinance 2016-040 (May 31, 2016); L.A., Cal., Ordinance 184320 (May 20, 2016); San Diego, Cal., Ordinance 20390 (Aug. 18, 2014); Chi., II., Ordinance 02016-2678 Ch. 1-24 (Aug. 21, 2016); Berkeley, Cal., Mun. Code Ch. 13.100 (2016); Saint Paul, Minn., Ordinance Ch. 233 (2016); Cook County, II., Ordinance 42 Art. 1 Div. 1 (2016); *see also Paid Sick Leave*, NAT'L CONFERENCE OF STATE LEGIS. (May 29, 2018), https://www.ncsl.org/research/labor-and-employment/paid-sick-leave.aspx; *Paid Sick Time Legislative Success*, A BETTER BALANCE (Oct. 24, 2017), https://www.abetterbalance.org/resources/paid-sick-time-legislative-successes/.

231. *Id.*

232. *See* Sabia Prescott, *Queer Families Still Struggle to Access Leave*, SLATE (Feb. 7, 2018), https://slate.com/human-interest/2018/02/even-after-gay-marriage-many-queer-families-cant-access-leave.html.

new child.[233] The relative dearth of paid leave laws for childcare disproportionately impacts LGBT workers who are also less likely to have supportive, extended family networks to provide free or emergency childcare.[234]

The federal Family and Medical Leave Act (FMLA) gives workers the right to leave work to take sick leave for themselves or family members for twelve or twenty-six weeks in a twelve-month period depending on the reasons for the leave.[235] However, the Act only provides for unpaid leave for civilian workers.[236] Furthermore, leave for employees caring for a sick minor child only covers those who have a biological or legal relationship to the child or those who have day-to-day childcare responsibilities.[237] LGBT parents are more likely to be excluded from FMLA protections because they are less likely to have a biological or legal relationship to their children and employers are free to interpret "day-to-day responsibilities" so narrowly as to exclude adoptive parents.[238]

V. LOOKING FORWARD

Many federal courts do not recognize claims for sexual orientation and gender identity discrimination under Title VII. However, courts are increasingly willing to extend Title VII's protections to LGBT plaintiffs if the discrimination they experience results from a failure to conform to sex and gender stereotypes.[239] Still, to win on this rationale, plaintiffs often must carefully craft arguments that downplay their actual or perceived sexual orientation, and instead focus on their external behavior. Furthermore, only a few federal courts have found the EEOC's holding in *Complainant v. Foxx*—finding that discrimination on the basis of sexual orientation is sex discrimination under Title VII—persuasive and applied it to LGB employment discrimination cases.[240]

The Trump Administration has taken the position that Title VII does not protect employees from discrimination on the basis of sexual orientation. In *Zarda v. Altitude Express* and *Bostock v. Clayton County, Georgia*, two cases heard by the Supreme Court in October 2019, the administration argued that discrimination

233. *See* Insurance-Disability-Compensation, 2002 Cal. Legis. Serv. Ch. 901 (S.B. 1661) (West) (codified as amended in scattered sections of Cal. Unemp. Ins. Code Ch. 7); New Jersey Temporary Disability Benefits Law, 2008 N.J. Laws Ch. 17, § 5 (codified in scattered sections of N.J. Stat. Ann. § 43:21); Rhode Island Temporary Disability Insurance Act, 2013 R.I. Pub. Laws Ch. 13-213 (codified in scattered sections of 28 R.I. Gen. Laws) (amendment providing "temporary caregiver insurance."). New York recently passed the Paid Family Leave Benefits Law, which took effect on Jan. 1, 2018. *See State Family and Medical Leave Laws*, NAT'L CONFERENCE OF STATE LEGIS. (July 19, 2016), https://www.ncsl.org/research/labor-and-employment/state-family-and-medical-leave-laws.aspx.

234. *See* Prescott, *supra* note 232.

235. Family and Medical Leave Act of 1993, 29 U.S.C. § 2612 (2018).

236. The National Defense Authorization Act for Fiscal Year 2020 included tT'he "Federal Employee Paid Leave Act," which provides for twelve weeks of paid leave for certain caregivers. *See* 133 Stat. 1198 § 7601 *et seq*. (2019).

237. *See* Prescott, *supra* note 232.

238. *See id*.

239. *See supra* Part II.A. and Part II.C.

240. *See supra* Part II.B.

because of sexual orientation is not discrimination because of sex protected by Title VII.[241] The administration went even further in its arguments for *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC*, contending that employers should be able to discriminate based on sex stereotypes as long as they do so for both men and women.[242] In addition to endangering LGBT and other individuals who do not conform to their employer's desired gender presentation standards, it would also allow employers to fire LGBT employees who fail to conform to the stereotype that men are attracted to women and vice versa.[243]

The Trump Administration has taken a similar position on Title VII and employment discrimination on the basis of gender identity. In October 2017, the Attorney General issued a memorandum explaining that, as a matter of law, though it "provides various protections to transgender individuals, Title VII does not prohibit discrimination based on gender identity *per se*." [244]As previously discussed, President Trump has also moved to exclude transgender individuals from military service.[245] The full impact of these guiding principles on LGBT employment discrimination law and federal civilian and military employment decisions remains to be seen as the administration works to implement the policy change.

Many advocacy organizations are accordingly focusing their efforts on securing passage of a comprehensive federal bill that would protect LGBT persons from discrimination at work.[246] This bill, known as the Equality Act, would provide protection from discrimination based on sexual orientation, gender identity, and sex by writing these forms of discrimination into many of the 1964 Civil Rights Act's antidiscrimination provisions.[247] Rep. David Cicilline (D-RI) and Senator Jeff Merkley (D-OR) introduced the Equality Act in the House and Senate during the 116th Congress.[248] The House passed the Equality Act on May 17, 2019.[249] The Senate, however, has declined to act on the bill.[250] The push for The Equality Act comes after years of trying and failing to pass the Employment

241. Transcript of Oral Argument at 52–53, Bostock v. Clayton Cty., No. 17-1618 (U.S. argued Oct. 8, 2019).

242. Anna North, *How the LGBTQ rights cases before the Supreme Court affect all Americans*, VOX (Oct. 8, 2019), https://www.vox.com/2019/10/8/20903088/supreme-court-lgbt-lgbtq-case-scotus-stephens.

243. *See id.*

244. *Memorandum on Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964*, U.S. DEP'T OF JUSTICE (Oct. 4, 2017), https://assets.documentcloud.org/documents/4067401/DOJ-memo.pdf.

245. *See supra* Part II.D.

246. *See The Equality Act*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/the-equality-act (last updated Oct. 1, 2019).

247. *Id.*

248. *See* Equality Act, H.R. 5, 116th Cong. (2019); Equality Act, S. 788, 116th Cong. (2019).

249. *Final Vote Results for Roll Call 217*, Clerk of U.S. House of Reps (May 17, 2019), http://clerk.house.gov/evs/2019/roll217.xml.

250. *See* Jacob Knutson, *Pelosi lists House-passed bills stalled in Senate amid impeachment attacks*, AXIOS (Nov. 3, 2019), https://www.axios.com/pelosi-house-bills-republican-impeachment-attacks-9516374b-9d68-4ad7-a4ba-ff3caddefac4.html (listing the Equality Act as stalled in the Senate).

Non-Discrimination Act (ENDA).[251] However, despite the large number of cosponsors for the Senate version of the Equality Act,[252] passage is unlikely in the current congressional session.[253]

By contrast, a growing number of states and municipalities have successfully implemented explicit protections against sexual orientation discrimination in employment. However, some states and municipalities continue not to provide such protections, and even more leave transgender individuals unprotected.[254]

The disparate treatment of claims under federal and state law has left uncertain the legal remedies available to LGBT persons facing discrimination at work due to their sexual orientation or gender identity. Whether these continuing conflicts result in federal legislation, further state and municipal protections, or a decisive Supreme Court ruling remains to be seen.

251. Though it similarly prohibited employment discrimination on the basis of gender identity or sexual orientation, ENDA was largely abandoned by activists and failed to pass in Congress following the Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc*., 134 S. Ct. 2751 (2014). Following this decision, ENDA's previous supporters felt that the exemptions for persons of faith included in the bill, which were similar to those included in the Affordable Care Act and challenged in *Hobby Lobby*, would be too broad to provide adequate legal protections for LGBT persons if challenged under the Religious Freedom Restoration Act. *See* Alex Reed, *RFRA v. ENDA: Religious Freedom and Employment Discrimination*, 23 VA. J. SOC. POL'Y & L. 2, 38 at 2-3 (2016).

252. *See* S. 788, *supra* note 248 (listing 46 cosponsors).

253. Govtrack.us and Skopos Labs estimates the House version has a two percent chance of being enacted into law. *H.R. 5: The Equality Act*, GOVTRACK.US, https://www.govtrack.us/congress/bills/116/hr5 (last visited Jan. 31, 2020).

254. *See supra* Part II.B.