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Let's Talk About Sex: LGBT Rights at Work in Texas

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Introduction

What claims do people who are lesbian, gay, bisexual, or transgender have against an employer if they are discriminated against or harassed at work? It depends, and this paper aims to explain why.

Some jurisdictions have explicit protections for individuals who are discriminated against or harassed because of their LGBT status, and some governmental employees may have viable constitutional claims that others may not have. In either of those cases, individuals should pursue those explicit protections with any other theories that might apply.

In other jurisdictions – including in Texas – no explicit protections exist for individuals who are discriminated against or harassed because of their LGBT status, causing many to wonder whether any claims even exist. As this paper reflects, the claims likely do exist, but success will usually depend on whether the conduct can be characterized as sex discrimination under federal or state law.

In the paper below, you will see that individuals who are lesbian, gay, bisexual, or transgender can often use existing sex discrimination laws to protect themselves from workplace discrimination and harassment, even in jurisdictions that do not have explicit protections against discrimination based on LGBT status. In the first two sections of the paper, I look backwards, discussing prior LGBT cases in Texas and important sex discrimination cases that developed outside the LGBT context. The third and fourth sections show how the two issues have intersected in recent years, with a discussion of some specific cases in Texas and in the federal sector. In the fifth and final section, I include EEOC-specific facts and figures and make some predictions about additional LGBT protections that may or may not exist in the not-too-distant future.

The paper is not exhaustive. It does not include every possible case or every possible theory on the topic of workplace discrimination against individuals in the LGBT community. Instead, it is meant simply to present an overview of the issues, evidence, and case decisions over time, so that no matter what jurisdiction you are in, you will better understand discrimination against individuals in the LGBT community and will be better prepared when you encounter your first or your next LGBT-related case.

Early LGBT Cases in TX: a "Frivolous" Claim?

In 1979, in *dicta*, the Fifth Circuit stated that "[d]ischarging an employee for homosexuality is not prohibited by Title VII of the Civil Rights Act of 1964 or under Section 1981 [of the Civil Rights Act of 1865]." *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979), *citing Smith v. Liberty Mutual Ins. Co.*, 569 F.2d 325, 327 (5th Cir. 1978) and *DeGraffenreid v. General Motors Assembly Division*, 558 F.2d 480, 486 n.2 (8th Cir. 1977). The court upheld the trial court's decision denying the employee any relief, determining that even if he had established a *prima facie* case of discrimination, the employee had not demonstrated that the employer's legitimate non-discriminatory reason for firing him was a pretext for discrimination. It is not clear what evidence the employee relied on in showing that his discharge was motivated by his homosexuality, and the court did not squarely address whether discrimination against a homosexual could be considered sex discrimination.

A few years later, a federal district court in Dallas addressed that issue and characterized the sex discrimination theory in the LGBT context as a "frivolous" argument. *Childers v. Dallas Police Dept.*, 513 F.Supp. 134, 147 n. 22 (N.D. Tex. 1981), *aff'd*, 669 F.2d 732 (5th Cir. 1982). In that case, a gay man applied multiple times for a storekeeper position within the police department, and the supervisor who interviewed him freely admitted that the applicant's homosexuality – specifically, his "homosexual conduct" – was the reason he was not hired. The court awarded him no relief, concluding that "no rights … have been violated" *id.* at 148 and stating:

> Childers' allegation that the police department's actions violated Tex. Rev. Civ. Stat. Ann. art. 6252-16 is frivolous. That statute protects persons from discrimination on the basis of sex. This court has found no cases, and none are cited, that even imply that the Texas legislature intended to include "sexual preference" within the definition of sex. "Sex", as used by the Texas legislature, refers to gender.

Id. at 147.

Other cases also show the past difficulty of prevailing on LGBT claims in Texas where actual or perceived LGBT-based discrimination issues were present. *See, e.g.*, *Polly v. Houston Lighting & Power Co.*, 825 F.Supp. 135 (S.D. Tex. 1993) (in same-sex sexual harassment case, court granted summary judgment for the employer because the employee failed to raise genuine fact issue showing harassment was based on his gender);

Mims v. Carrier Corp., 88 F.Supp.2d 706 (E.D. Tex. 2000) (similar holding); *Sarff v. Continental Express*, 894 F.Supp. 1076 (S.D. Tex. 1995), *aff'd*, 85 F.3d 624 (5th Cir. 1996) (granting summary judgment for employer in discriminatory and retaliatory discharge case).

In *Polly*, when recommending summary judgment for the employer, a Magistrate Judge ruled that Title VII does not offer a remedy for same-sex sexual harassment, stating that "Title VII claims have been limited to discrimination based upon sex, meaning between members of the opposite sex." 825 F.Supp. at 136. The District Judge stated that there was "substantial doubt" that this conclusion was correct, *id.* at 136, but even though the court rejected that idea, the District Judge still granted summary judgment for the employer and stated, in *dicta*, that "[i]t is well established, absent any change in the law by Congress, that Title VII does not protect homosexuals from harassment or discrimination in the workplace, since such treatment arises from their affectional preference rather than their sex. Title VII does not apply to harassment based on sexual orientation." *Id*. at 137.

In *Mims*, the court reached similar conclusions, holding that the law afforded no protection to an employee allegedly targeted for harassment because he was perceived to be homosexual and stating that "[n]either sexual orientation nor perceived sexual orientation constitute protected classes under the Civil Rights Act." 88 F.Supp.2d at 714.

In *Sarff*, the District Judge noted that he was "fully aware that neither Title VII nor Texas state law afford relief for employment discrimination based on sexual orientation." 894 F.Supp. at 1081, *citing Smith v. Liberty Mutual Ins. Co.*, 395 F.Supp. 1098 (N.D. Ga.1975), *aff'd* 569 F.2d 325, 326–27 (5th Cir.1978); *Polly v. Houston Lighting & Power Co.*, 825 F.Supp. 135, 137 n. 2 (S.D.Tex.1993). The court went on to say that "an employer can clearly fire an employee for being gay, and such an employee has *no* statutory protection in the vast majority of states whatsoever from such action or from being harassed by a member of his or her own sex." 894 F.Supp. at 1081, *citing Polly*, 825 F.Supp. at 135. The court included several statements that left the distinct impression that the court believed that discrimination against an individual on the basis of his or her sexual orientation was both immoral and illogical, yet the court still granted summary judgment in the employer's favor, stating:

> … the absence of a legal duty on an employer's part is not coterminous with the scope of a duty of good faith and fair dealing. This Court deeply believes that discrimination against *all* Americans, despite their gender,

> race, religion, or sexual orientation, is profoundly wrong and that it violates the fundamental and essential right of individuals to engage in the full rights and privileges of citizenship. In addition, it makes little economic sense for employers to discriminate against the 15–25 million gay and lesbian people in this country, many of whom hold positions at the highest levels of professional, scientific, academic, and political enterprises.
>
> In this case, however, the strong suggestion that Sarff encountered a work environment hostile to his sexual orientation is greatly outweighed by the reality that his own highly inappropriate—and oft-repeated—behavior was the determining factor in his dismissal…."

Id. at 1081.

Sex Stereotyping Outside the LGBT Context

As these early LGBT-related cases were developing around the country, sex discrimination law was also developing, and in the late 80s and 90s, the Supreme Court issued two cases that had potentially wide-ranging effects on LGBT cases.

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Supreme Court ruled that Title VII's protections against sex discrimination prohibited an employer from taking adverse actions based on sex stereotypes, ruling that an employer's decision not to promote Ms. Hopkins to partner could be the result of sex discrimination where certain employer representatives described her as "macho," said she should "take a course in charm school" and "overcompensated for being a woman", and suggested that she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* at 230-31, 235. This reasoning has paved the way for many of the LGBT cases in recent years, particularly those involving transgender individuals.

A little under a decade later, in *Oncale v. Sundowner Offshore Drilling, Inc.*, 523 U.S. 75 (1998), the Supreme Court held that same-sex sexual harassment is actionable under Title VII, with former Justice Scalia writing that, while same-sex sexual harassment was "assuredly not the principal evil Congress was concerned with when it enacted Title VII … statutory prohibitions often go beyond the principal evil … to cover reasonably comparable evils." *Id.* at 79.

EEOC: LGBT Discrimination = Sex Discrimination

In recent years, the EEOC has taken a special interest in the issue of LGBT discrimination as sex discrimination and has used the above sex stereotyping cases to support their efforts to show that LGBT individuals are discriminated against on the basis of their sex when they are targeted because of their LGBT status. On its website, the EEOC states:

> While Title VII of the Civil Rights Act of 1964 does not explicitly include sexual orientation or gender identity in its list of protected bases, the Commission, consistent with Supreme Court case law holding that employment actions motivated by gender stereotyping are unlawful sex discrimination and other court decisions, interprets the statute's sex discrimination provision as prohibiting discrimination against employees on the basis of sexual orientation and gender identity.
>
> Over the past several years the Commission has set forth its position in several published decisions involving federal employment. These decisions explain the **legal basis for concluding that LGBT-related discrimination constitutes sex discrimination under Title VII,** and give examples of what would be considered unlawful. In so ruling, **the Commission has not recognized any new protected characteristics under Title VII. Rather, it has applied existing Title VII precedents to sex discrimination claims raised by LGBT individuals.** The Commission has reiterated these positions through recent *amicus curiae* briefs and litigation against private companies.

See https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm for this quote (emphasis added above).

Recent Texas/5th Circuit Cases

In contrast to earlier cases, more recent LGBT-related cases in Texas appear to reflect a better acceptance of the argument that discrimination against LGBT individuals may constitute unlawful sex discrimination. As the cases below demonstrate, though, LGBT-related claims remain difficult unless sufficient evidence of sex-based discrimination exists.

- *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.*, 542 F.Supp.2d 653 (S.D. Tex. 2008)

In *Lopez*, a medical clinic rescinded its job offer to a transgender female applicant as a front office scheduler because the clinic learned during the background check that she was born a male. After her background check was conducted, Ms. Lopez received a call from a Human Resources employee telling her that River Oaks was withdrawing its job offer because it concluded that Lopez had "misrepresented" herself as a woman during the interview process. The company sent Ms. Lopez a letter stating that the "offer was rescinded because we believe you misrepresented yourself to us during the interview process. You presented yourself as a female and we later learned you are a male." Lopez sued for sex discrimination under Title VII, and the parties' filed cross motions for summary judgment.

The court denied both motions, ruling that a fact issue on Lopez's sex discrimination claims precluded summary judgment for either party.

With regard to the employer's letter, Lopez claimed that direct evidence of discrimination existed, while River Oaks denied that and claimed that the letter demonstrated that the offer was rescinded because of Lopez's misrepresentation. The court acknowledged that the letter could be viewed as direct evidence of discrimination when the facts were viewed in Lopez's favor but also acknowledged that a fact issue existed when viewing the evidence in the employer's favor, as the court was required to do in the context of cross summary judgment motions. *Id*. at 662-63.

Lopez is helpful for its analysis and discussion of other cases involving transgender employees and their relation to certain Title VII cases involving gender stereotyping, including *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The court noted that the Fifth Circuit had not yet addressed the issue and that another district court in the circuit had determined that Title VII offered no protected for transgender individuals either directly or via application of a sex stereotyping theory under *Price Waterhouse*. *Id*. at 659, n.10, citing *Oiler v. Winn-Dixie La., Inc.*, No. 00-3114, 2002 WL 31098541, 2002 U.S. Dist. LEXIS 17417 (E.D.La. Sept. 16, 2002) (Africk, J.). However, the court implicitly rejected *Oiler*, noting that it was not appealed and did not bind the court and stating:

> Lopez's 'transsexuality is not a bar to her sex stereotyping claim. Title VII is violated when an employer discriminates against any employee, transsexual or not,

because he or she has failed to act or appear sufficiently masculine or feminine enough for an employer.'

Lopez, 542 F.Supp.2d at 660, *quoting Schroer v. Billington*, 525 F.Supp.2d 58, 63 (D.D.C. 2006). Further, the court held, "Lopez has pled, and developed facts in support of, a claim that River Oaks discriminated against her, not because she is transgendered, but because she failed to comport with certain River Oaks employees' notions of how a male should look." *Id*. at 660-61.

Lopez is also notable for its discussion about the application process and whether an employer can require employees to reveal their biological sex for various reasons that an employer may argue are important. There, the employer argued that disclosure should be required so that employers would know in advance what bathroom a potential employee would use and also so that the employer could accurately complete healthcare benefits forms. *Id*. at 664, n.15. The court dismissed these arguments for a number of reasons, including that River Oaks had not offered any evidence that these reasons actually motivated its decision to rescind Lopez's job offer.

- *EEOC v. Boh Bros.*, 731 F.3d 444 (5th Cir. 2013) (*en banc*)

Though not necessarily an LGBT-related case, *EEOC v. Boh Bros.* is helpful in demonstrating possible claims that may exist if a person is perceived as not fitting in with typical gender stereotypes. The court, sitting *en banc*, determined that the employee raised a fact issue on whether he had been targeted because of his sex because of that non-conformity to traditional gender stereotypes, and the *en banc* court reversed the prior panel's decision. *Id*. at 454 (employee could prevail on gender-stereotyping theory).

- *Brandon v. Sage Corp.* 61 F.Supp.3d 632 (W.D. Tex. 2014), *aff'd*, 808 F.3d 266 (5th Cir. 2015) and *Eure v. Sage Corp.*, 61 F.Supp.3d 651 (W.D. Tex. 2014)

In these related cases, Margie Brandon, a Hispanic female, and Loretta Eure, a transgender woman who reported to Brandon, sued their former employer for various discrimination, retaliation, and common law claims. Though the court granted the employer's motions for summary judgment in both cases, the cases are helpful here because of the court's discussions in the two opinions about the rights of transgender employees under Title VII.

Brandon worked as a School Director for The Sage Corp., which owns and operates truck driving schools in San Antonio and elsewhere. As part of her job, she hired Eure, a

transgender female, as an instructor. During their employment, one of the company's National Project Directors, Carmela Campanian, came to the San Antonio location to conduct some specialized training. During that visit, Campanian reacted very negatively to Eure and to Brandon, who had hired her, saying things like: "What is that and who hired that?," "Please don't tell me that is a Sage instructor," and "[the company] does not hire cross genders." *Id*. at 639. In response to Brandon telling her that she hired Eure because she was qualified, Campanian said, "We will deal with you seriously for hiring that." *Id.* She later told Brandon that her pay would be cut in half as punishment for hiring Eure, and when Brandon called her attention to her failure to place Eure on the schedule, Campanian asked Brandon if she "understood the severity of the impending consequences for hir[ing] a cross gender." *Id.* Brandon resigned later that afternoon and then sued.

At one point, Campanian prohibited Eure from using a particular truck to train a student. Eure used another truck instead, causing Campanian to inform her that she had been insubordinate. The two met about the situation, and afterwards, Eure filed a complaint but did not return to work, despite encouragement to do so by senior managers. She sued as well.

Ultimately, the court granted the company's summary judgment motion on all of Brandon's claims, largely because Brandon resigned. The court did not believe under the circumstances that the resignation constituted a constructive discharge or that the mere threat of a pay reduction constituted a materially adverse action.

The court did, however, suggest that Brandon's retaliation claim might have had some potential if the company had reduced Brandon's pay or taken other adverse action as Campanian threatened. Brandon's retaliation claim was based, in part, on Brandon's actions and resistance to the supervisor's negative and discriminatory comments about Eure, the transgender employee.

In analyzing the retaliation claim, the court discussed whether Brandon could have reasonably believed that Campanian's actions regarding Eure was in violation of Title VII. The court found that she could, explaining that "[a]lthough transgendered persons are not a per se protected class for Title VII purposes, transgendered persons can prevail on discrimination claims by showing that the discrimination occurred because of a failure to conform to gender stereotypes." *Id.* at 648, n. 7 (citations omitted). The court concluded that "[b]ecause there is a potential basis for recovery under Title VII through a gender stereotyping theory, her belief was reasonable." *Id*. The court noted, however,

that her resignation did not amount to a constructive discharge and thus did not raise a fact issue on her retaliation claim, causing the court to grant summary judgment against Brandon.

With regard to Eure's claims, the court noted that transgender individuals can succeed in sex discrimination claims when there is proof that they are subjected to adverse actions due to their gender non-conformity. The court ruled, however, that Eure had failed to do that, finding instead that the evidence addressed Eure's transsexual status more than any gender non-conformity. Thus, the court determined that the evidence did not raise a sufficient fact issue on the issue of sex and granted the employer's summary judgment motion.

- *Arredondo v. Estrada*, 120 F.Supp.3d 637 (S.D. Tex. 2015)

Though not necessarily a LGBT-related case, *Arrendondo* demonstrates that same-sex sexual harassment may be actionable sex discrimination even in a single-gender work environment, where the harasser appeared to be motivated by a desire to pick on and assault men he perceived to be weaker. *Arredondo*, 120 F.Supp.3d at 645-46 (stating that "humiliation based on gender stereotyping meant to separate those who are deemed less manly from the rest of a crew is actionable"), *citing Boh Bros.*, 731 F.3d at 454.

EEOC's Federal Sector Cases

In FY2015 alone, the EEOC issued approximately 20 separate opinions in dealing with LGBT discrimination in the federal sector employment context, with approximately 75% of those opinions on issues involving lesbian, gay, or bisexual employees, and the other approximate 25% of those opinions on transgender issues. *See, e.g. Macy v. Dept. of Justice*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (April 20, 2012) (holding that discrimination against a transgender individual because that person is transgender is, by definition, discrimination based on sex); *Lusardi v. Dept. of the Army*, EEOC Appeal No. 0120133395, 2015 WL 1607756 (April 1, 2015) (holding that the agency subjected transgender female employee to disparate treatment on the basis of sex by restricting her ability to use a common female restroom and created a hostile work environment on the basis of sex when doing that in conjunction with hostile remarks that included intentional misuse of the wrong gender pronoun to describe her); *Baldwin v. Dept. of Transportation*, EEOC Appeal No. 0120133080 (July 15, 2015) (holding that a claim alleging discrimination on the basis of sexual orientation necessarily states a claim of discrimination on the basis of sex under Title VII).

The EEOC's federal sector opinions on LGBT issues can be accessed online at https://www.eeoc.gov/federal/reports/lgbt_cases.cfm

Trends, Resources, Conclusion

LGBT-related charges have increased in number in recent years. In FY2015, the EEOC received 1,412 LGBT-related charges, an increase of approximately 28% more than FY2014. The EEOC also resolved 1,135 such charges, recovering more than $3 million in monetary relief, and achieving policy changes to prevent future discrimination.

Given the EEOC's own interest in this issue, and the recent legal developments and guidance on this issue, I fully expect that number will continue to rise in the near term, even without any additional legislative changes that may occur. Explicit state-level protections for jurisdictions that do not have them may be a possibility in certain states, and federally, legislation such as the Employment Non-Discrimination Act ("ENDA") and the Federal Equality Act have been proposed.

However, given today's political climate, it appears doubtful that any LGBT-related workplace legislation will be passed anytime soon either within Texas or federally. Thus, for now, it remains important for LGBT employees to use the tools that are already available to them in order to try to remedy unlawful sex-based harassment or discrimination, either through a sex stereotyping theory or otherwise. The law is developing quickly in this area, particularly in the federal sector, and if you are interested in this topic, you should check the EEOC page frequently for new developments.

You can access the EEOC's page here: https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm#overview

Also, you can access the EEOC's bathroom access guide for transgender employees here: https://www.eeoc.gov/eeoc/publications/fs-bathroom-access-transgender.cfm