

LGBT: THE SCOPE OF SEX DISCRIMINATION


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Early History

No protection for LGBTQ employees under Title VII

- ***DeSantis v. Pacific Telephone***, 608 F.2d 327 (9th Cir. 1979) (Title VII does not protect against sexual orientation discrimination)
- ***Ulane v. Eastern Airlines***, 742 F.2d 1081 (7th Cir. 1984) (Title VII does not protect transsexuals).



2000-2015

Courts Begin to Reconsider

COURTS FIND THAT TRANSGENDERED ARE PROTECTED UNDER TITLE VII

- ***Schwenk v. Hartford***, 204 F.3d 1187 (9th Cir. 2000)
- ***Smith v. City of Salem***, 378 F.3d 566 (6th Cir. 2004)
- ***Barnes v. City of Cincinnati***, 401 F.3d 729 (6th Cir. 2005)
- ***Glenn v. Brumby***, 663 F.3d 1312 (11th Cir. 2011)
- ***Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.***, 542 F. Supp. 2d 653 (S.D. Tex. 2008).

GAYS AND LESBIANS “MAY” BE PROTECTED BY TITLE VII IF THEY DO NOT CONFORM TO SEXUAL STEREOTYPES

- ***Nichols v. Azteca Restaurant Enterprises*, 256 F.3d 864 (9th Cir. 2001)**
- ***Rene v. MGM Grand Hotel*, 305 F.3d 1061 (9th Cir. 2002)**
- ***Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285 (3rd Cir. 2009)**
- ***EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444 (5th Cir. 2013)**

VARIATIONS OF SEXUAL STEREOTYPING

- Employee's non-conforming traits would have been considered positive traits if exhibited by employee of opposite gender.
- Employee's non-conforming traits would not be considered positive traits if exhibited by employee of opposite gender.



2017

180 degree turn?

THE ROY FITZGERALD PROBLEM



- ***Baldwin v. Department of Transportation*** (EEOC 2015)
- ***Hively v. Ivy Tech Community College of Indiana***, 853 F.3d 339 (7th Cir. 2017)
- ***Evans v. Georgia Regional Hospital***, 850 F.3d 1248 (11th Cir. 2017)
- ***Zarda v. Altitude Express***, 855 F.3d 76 (2nd Cir. 2017)

- The “But-for” Sex Argument.
- The “Association” Argument – *Loving v. Virginia*
- The “Gender Stereotyping” Argument
- The “Definitional Argument”

“It is well-nigh certain that homosexuality, male or female, did not figure in the minds of the legislators who enacted Title VII. I had graduated from law school two years before the law was enacted. Had I been asked then whether I had ever met a male homosexual, I would have answered: probably not; had I been asked whether I had ever met a lesbian I would have answered “only in the pages of *À la recherche du temps perdu*.” Homosexuality was almost invisible in the 1960s.”

- “I would prefer to see us acknowledge openly that today we, who are judges rather than members of Congress, are imposing on a half-century-old statute a meaning of “sex discrimination” that the Congress that enacted it would not have accepted. This is something courts do fairly frequently to avoid statutory obsolescence and concomitantly to avoid placing the entire burden of updating old statutes on the legislative branch. We should not leave the impression that we are merely the obedient servants of the 88th Congress (1963–1965), carrying out their wishes. We are not. We are taking advantage of what the last half century has taught.”



Americans with Disabilities Act

Gender Identity Disorders

AMERICANS WITH DISABILITIES ACT

- Under this Act, the term “disability” shall not include:
 - (1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, *gender identity disorders* not resulting from physical impairments, or other sexual behavior disorders;
 - (2) compulsive gambling, kleptomania or pyromania; or
 - (3) psychoactive substance use disorders resulting from current illegal use of drugs.

- ***Blatt v. Cabela's Retail, Inc.***, (E.D. Penn. 2017) (gender dysphoria not excluded from coverage under the ADA if it substantially limits major life activity).



Striking Gay Jurors

BATSON CHARGES

- ***Smithkline Beecham Corp. v. Abbott Laboratories***, 740 F.3d 471 (9th Cir. 2014) (prima facie case was established that drug manufacturer intentionally discriminated against juror based on his sexual orientation).