



# CAN A BUSINESS BE LIABLE to Its Employees for LGBT<sup>1</sup> Discrimination?

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In the not too distant past, the American Psychiatric Association listed homosexuality as a mental illness and classified it as a sociopathic personality disturbance (1952-1973). In 1952, the U.S. Senate issued a report titled “Employment of Homosexuals and Other Sex Perverts in Government.” One year later, President Dwight D. Eisenhower issued an Executive Order banning homosexual individuals from holding any employment with the federal government.

Today, LGBT rights have progressed dramatically, marriage equality is the law of the land and the past two presidential administrations—one Democratic, one Republican—have issued and retained Executive Orders protecting the rights of LGBT federal contractors.<sup>2</sup> Nonetheless, the rights of LGBT employees remain in a state of flux. Employers are left with difficult issues to resolve and little guidance (e.g., the dispute over transgender bathroom use).

## UNCERTAINTY AT THE FEDERAL LEVEL

Federal courts and agencies are wrangling with one fundamental unsettled issue: whether Title VII of the Civil Rights Act of 1964, which prohibits workplace discrimination on the basis of “sex” (as well as a host of other bases, including race, religion, etc.), applies to LGBT employees.<sup>3</sup> In other words, should the word “sex” in the Civil Rights Act be interpreted narrowly, to mean

only one’s status of being male or female; or, should it be interpreted broadly, to also include and protect the sexual characteristics under the LGBT umbrella? If the narrow interpretation applies, then an employee who experiences workplace discrimination because he or she is LGBT has little recourse under federal law. If the broad interpretation applies, then employers face extensive potential liability under a statute that is one of the most frequently-used tools of plaintiffs’ lawyers.

This question has divided both the Judicial and Executive branches of the Federal Government. The Equal Employment Opportunity Commission (EEOC) is the federal agency tasked with enforcing Title VII. EEOC has taken the unequivocal stance that the broad interpretation applies. In late 2012, EEOC issued a Strategic Enforcement Plan that included “coverage of lesbian, gay, bisexual and transgender individuals under Title VII’s sex discrimination provisions.” President Trump’s Acting Chair of the EEOC made clear upon her appointment that the commission would continue to apply the broad Title VII interpretation and prosecute cases against employers who were accused of discriminating against LGBT employees.

Conversely, Attorney General Jeff Sessions issued a memo soon after his confirmation stating that the Department of Justice (DOJ) would adopt the narrow reading of Title VII that excludes LGBT individuals from the statute’s protection. The DOJ also filed a brief in federal court stating that EEOC’s interpretations “lack merit.”

The Courts are similarly divided. The Seventh Circuit Court of Appeals has adopted the broad interpretation whereas the Eleventh Circuit Court of Appeals held that the narrow interpretation is correct. Other cases are pending around the country and it is likely that other federal circuit courts will find themselves at odds with each other.

Ultimately, the Supreme Court of the United States (SCOTUS) will have to resolve this issue.<sup>4</sup> As of today, however, SCOTUS has not agreed to hear any of the pending cases that have worked their way through the lower courts. SCOTUS likely wanted to avoid such a difficult issue and the potential of a 4-4 split while it was shorthanded before Neil Gorsuch’s appointment. The conventional wisdom is that SCOTUS will take one of the relevant cases soon. Once SCOTUS decides to hear the issue, the process will still likely take more than a year from inception and SCOTUS’s decision will probably leave key questions unresolved. For instance, if SCOTUS decides that the broad interpretation applies, there will be questions about how LGBT rights under Title VII interact with applicable religious freedom laws. Indeed, SCOTUS just heard argument on this issue in a different context in the famous “wedding cake” case, where a baker refused to prepare a cake for a same-sex wedding, and the Court appeared deeply divided and has yet to issue its opinion.

## WHAT ARE EMPLOYERS TO DO IN THE MEANTIME?

The conservative approach is to avoid taking any employment action against an employee on the basis of the individual’s LGBT status. Because Title VII claims go through the EEOC, an employer is guaranteed to lose if the only defense is to rely on the narrow reading of Title VII. The employer would then be caught in lengthy, expensive federal litigation which, because the issue is novel, could become a high-profile “test” case with multiple levels of appeal that costs hundreds of thousands of dollars in attorneys’ fees alone. The stance that an employee can be discriminated against because they are LGBT is also a difficult one to maintain in the current era and can lead to deteriorating employee and public relations in general. This guidance does not mean that

LGBT employees are immune from standard workplace policies; rather, LGBT employees, like any employee in a protected class, should be held to the same standards as any other employee irrespective of their protected status.

Ultimately, the goal of any employer should be to provide a workplace free of harassment of any sort so that employees can thrive in their jobs. The best way to attain that goal is to have sound policies in place and a well-trained workforce. If a difficult situation arises despite the employer’s best efforts, then this is an area where consulting counsel is appropriate. ■■

<sup>1</sup> This acronym has grown over the years to include additional groups of people, and many currently use the acronym LGBTQIA+ (Lesbian, Gay, Bisexual, Transgender, Queer, Intersexual, Asexual; the + includes individuals who identify as Pansexual, Polyamorous and members of other communities). For ease of use, this article will rely on the LGBT acronym.

<sup>2</sup> Some LGBT individuals and advocacy organizations have criticized the Trump administration for rolling back executive orders that provided protections for LGBT individuals, but the Obama-era Executive Order prohibiting discrimination for LGBT federal contractors remains in place.

<sup>3</sup> Title VII applies to employers with 15 or more employees.

<sup>4</sup> Congress could act and amend Title VII to clearly state the scope of prohibited sex discrimination, and some senators and representatives have introduced legislation, but it appears that the body as a whole has no collective interest in joining the debate.



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