

**Workshop title:** Expanding sex discrimination laws to protect LGBT people

**Short panel description (490 characters):**

A critical piece of the fight for full legal equality for LGBT people is to secure judicial decisions and executive guidance that discrimination because of sexual orientation is sex discrimination. In recent years, district courts and executive agencies have greatly expanded protections for LGBT people in crucial areas including employment, housing, and healthcare. This panel will assess the current legal landscape, discuss its impact on employers and LGBT employees, and highlight the work of advocates and executive agencies to expand sex discrimination protections.

**Full panel description (1,045 characters):**

A critical piece of the fight for full legal equality for LGBT people is to secure judicial decisions and executive guidance that discrimination on the basis of sexual orientation and gender identity is a form of sex discrimination, which already is prohibited under a variety of federal civil rights laws. In recent years, the number of federal district courts recognizing sexual orientation discrimination as sex discrimination nearly doubled, and the U.S. Equal Employment Opportunity Commission and Department of Justice filed their first lawsuits on behalf of LGBT people. At the same time, executive agencies including the U.S. Departments of Health and Human Services, Housing and Urban Development, and Labor have issued groundbreaking regulations that would greatly expand explicit protections for LGBT people. By the time of this conference, we likely will have final regulations on crucial issues including employment and healthcare discrimination as well as new circuit court decisions on this topic. This panel will assess the current legal landscape, discuss its impact on employers and LGBT employees, and highlight the work being done by advocates and executive agencies to expand sex discrimination protections.

**Supplementary CLE materials for workshop:**

1. Omar Gonzalez-Pagan & Ria Tabacco Mar, *Laws Barring Sex Discrimination Also Protect Sexual Orientation*, NEW YORK LAW JOURNAL (Jan. 21, 2016).
2. Seyfarth Shaw LLP, *The EEOC Files Historic Lawsuits Testing Theory That Title VII Covers Discrimination Based on Sexual Orientation* (Mar. 3, 2016).
3. Seyfarth Shaw LLP, *Bathroom Bills: What Employers Need To Know* (Apr. 12, 2016).
4. *Lusardi v. McHugh*, Appeal No. 0120133395 (EEOC Apr. 1, 2015).
5. *Baldwin v. Foxx*, Appeal No. 0120133080 (EEOC July 15, 2015).

Reprinted with permission from the 01/21/2016 edition of the NEW YORK LAW JOURNAL © 2016 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited.

---

Outside Counsel

## Laws Barring Sex Discrimination Also Protect Sexual Orientation

Omar Gonzalez-Pagan and Ria Tabacco Mar, New York Law Journal

January 21, 2016

Over the past few years, we have seen a seismic shift as discriminatory barriers against gay people have crumbled when faced with increased societal acceptance and understanding. The elimination of these barriers is not limited to groundbreaking precedent, most notably *Obergefell v. Hodges*,<sup>1</sup> that recognizes the equal dignity of same-sex relationships. It also includes less noticed, but equally significant, legal developments, including the U.S. Equal Employment Opportunity Commission's (EEOC) recent decision in *Baldwin v. Foxx*, where the commission held that "[s]exual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex."<sup>2</sup> That ruling provides critical protections against discrimination for lesbian, gay, and bisexual workers. (In 2012, the EEOC issued a ruling recognizing that discrimination against transgender people is sex discrimination.).<sup>3</sup>

For advocates for the full recognition of the civil rights of lesbian, gay, bisexual, and transgender (LGBT) people, it is incumbent to communicate to the legal community at large as well as to gay people, and employers in particular, that discrimination on the basis of sexual orientation is unlawful under Title VII. Under Title VII, it is illegal for any 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...sex."<sup>4</sup>

And because "an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII,"<sup>5</sup> discrimination on the basis of sexual orientation is prohibited. That is because discrimination on the basis of sexual orientation necessarily involves consideration of the discrimination target's sex and is rooted in gender stereotypes and the association of one person with another of the same sex, i.e., "Only women may marry men, and only men may marry women."<sup>6</sup>

Recent commentary in these pages suggesting that the EEOC's decision in *Baldwin* is incorrect and should be disregarded is dead wrong.<sup>7</sup> The reasoning that led to the EEOC's conclusion in *Baldwin* is not new. Over the years, numerous federal courts in a variety of contexts—from

cases seeking the freedom to marry for gay people<sup>8</sup> to cases involving claims of sex discrimination in federally funded educational programs under Title IX<sup>9</sup> and in employment under Title VII<sup>10</sup>—have recognized that discrimination against an individual because of his or her sexual orientation is discrimination based on sex. The EEOC and all of these courts are correct in reaching this conclusion for several reasons.

**First, discrimination on the basis of sexual orientation is literally discrimination on the basis of sex.** Sexual orientation cannot be understood without reference to sex. Professor Andrew Koppelman put it this way: "If a business fires Ricky...because of his sexual activity with Fred, while th[is] action[] would not be taken against Lucy if she did exactly the same thing with Fred, then Ricky is being discriminated against because of his sex."<sup>11</sup> In *Baldwin*, the EEOC used a similar explanation by providing an example of two coworkers, a man and a woman, each displaying a picture on their desk of their respective wives, resulting in only the woman being disciplined. Such a disparity is sex discrimination under the "simple test" articulated by the Supreme Court—whether a person is treated "in a manner which but for that person's sex would be different."<sup>12</sup>

As the EEOC held in *Baldwin*, "[i]t follows, then, that sexual orientation is inseparable from and inescapably linked to sex and, therefore, that allegations of sexual orientation discrimination involve sex-based considerations."<sup>13</sup>

**Second, discrimination on the basis of sexual orientation is rooted in gender stereotypes.** It is well established that discrimination on the basis of gender stereotypes is prohibited discrimination on the basis of sex. In its 1989 decision in *Price Waterhouse v. Hopkins*, the U.S. Supreme Court recognized that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."<sup>14</sup> As U.S. Court of Appeals Judge Marsha S. Berzon recently said, the notion underlying the prohibition on gender-stereotyping "is simple, but compelling."<sup>15</sup> "Nobody should be...punished for failing to conform to prescriptive expectations of what behavior is appropriate for one's gender."<sup>16</sup>

Nearly a decade ago, the U.S. Court of Appeals for the Sixth Circuit observed in *Vickers v. Fairfield Medical Center* what is oft-ignored, yet so obvious—that lesbians and gay men "by definition, fail to conform to traditional gender norms in their sexual practices."<sup>17</sup> When an employer discriminates against an employee because he or she is gay or lesbian, they are discriminating because the individual's attraction to people of the same sex is inconsistent with traditional gender norms. Or, as the EEOC explained in *Baldwin*, "[d]iscrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms."<sup>18</sup>

Numerous federal courts across the country, from Alabama to Washington, have held that discrimination against lesbians and gay men is prohibited by Title VII once the courts understood that the discrimination stems from the failure of lesbians and gay men to conform to gender stereotypes, such as being attracted to or in a relationship with someone of the same sex.<sup>19</sup> The EEOC's conclusion that sexual orientation discrimination is rooted in gender stereotypes and, thus, prohibited by Title VII is not new.

**Third, sexual orientation discrimination is also associational discrimination based on**

**sex.** The EEOC in *Baldwin* also analogized to case law holding that Title VII forbids discrimination against those in interracial marriages and relationships, because such bias takes into account the race of the employee involved (as well as the race of the employee's spouse or friend).<sup>20</sup> "Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of his race."<sup>21</sup> The EEOC reasoned that a man fired because he "dated men states a claim of sex discrimination under Title VII; the fact that the employee is a man instead of a woman motivated the employer's discrimination against him."<sup>22</sup>

That discrimination against lesbians and gay men also is associational discrimination is particularly apparent in the employee benefits context. When employers refuse to provide insurance coverage to employees' same-sex spouses or partners, but provide such benefits to different-sex spouses or partners, the association itself is the target of the discrimination. As a federal court in Seattle ruled, an employee states a Title VII claim in such a context when he "alleges disparate treatment based on his sex, not his sexual orientation, specifically that he (as a male who married a male) was treated differently in comparison to his female coworkers who also married males."<sup>23</sup> Or as the EEOC concluded prior to *Baldwin*, a female employee is "subjected to employment discrimination [where] she was treated differently and denied benefits because of her sex, since such coverage would be provided if she were a woman married to a man."<sup>24</sup>

## Entitled to Deference

The EEOC's interpretation of Title VII merits deference under *Skidmore v. Swift & Co.*<sup>25</sup> The EEOC's position reflects "a body of experience and informed judgment to which courts and litigants may properly resort for guidance."<sup>26</sup> Any insinuation that *Baldwin* has "little impact" or is "not entitled to any deference"<sup>27</sup> overlooks the EEOC's wealth of experience as the administrative agency responsible for enforcing Title VII or its thorough analysis in *Baldwin*. Indeed, several federal courts have already found the EEOC's interpretation in *Baldwin* to be persuasive and warranting deference.

For example, a federal district court in Alabama rejected "the magistrate judge's conclusion that '[s]exual orientation discrimination is neither included in nor contemplated by Title VII,'" and "agree[d] instead with the view of the Equal Employment Opportunity Commission that claims of sexual orientation-based discrimination are cognizable under Title VII."<sup>28</sup> Similarly, Judge Jack B. Weinstein of the Eastern District of New York wrote favorably of the EEOC's "landmark ruling" in *Baldwin*, recognizing that the EEOC applied the "words of the statute Congress [] charged [it] with enforcing."<sup>29</sup>

## Statutory Interpretation

It is of no moment that Congress has yet to explicitly include sexual orientation by name in Title VII. It is foolhardy to rely on congressional inaction in any statutory interpretation endeavor. For one, a limitation in the minds of the 88th Congress—or any subsequent Congress—that is not in the statutory words is irrelevant. To the contrary, it very well could reflect the understanding that sexual orientation discrimination already is barred by the prohibition against sex discrimination. While Congress specifically overruled part of *Price Waterhouse* (regarding

mixed-motive liability) in 1991, it left intact the holding that employers cannot punish employees for their failure to conform to prevailing gender norms.

Support for the Equality Act,<sup>30</sup> which amends federal civil rights laws to explicitly prohibit discrimination on the basis of sexual orientation and gender identity, is consistent with the EEOC's interpretation of Title VII's prohibition on sex discrimination. The Equality Act provides clarity that should prevent discrimination from happening in the first place. And while it explicitly lists sexual orientation and gender identity as federally protected characteristics in employment, housing, and other areas of public life (including those that don't currently protect against sex discrimination, such as public accommodations), the Equality Act also defines "sex" to include "sexual orientation or gender identity."

So, employers, take heed. When we talk about discrimination on the basis of sexual orientation or gender identity, we are talking about sex.

#### **Endnotes:**

1. 135 S. Ct. 1039, 576 U.S. \_\_\_\_ (2015).
2. EEOC Doc. 0120133080, 2015 WL 4397641, at \*5 (EEOC July 15, 2015).
3. *Macy v. Holder*, EEOC Doc. 0120120821, 2012 WL 1435995 (EEOC April 20, 2012).
4. 42 U.S.C. §2000e-2(a)(1).
5. *Baldwin*, 2015 WL 4397641, at \*5.
6. *Latta v. Otter*, 771 F.3d 456, 480 (9th Cir. 2014) (Berzon, J., concurring).
7. Nancy V. Wright and Janice P. Gregerson, "[Sexual Orientation Discrimination in the Summer of #LoveWins](#)," N.Y.L.J. (Oct. 19, 2015).
8. See, e.g., *Latta*, 771 F.3d at 480 (9th Cir. 2014) (Berzon, J., concurring); *Jernigan v. Crane*, No. 13-cv-00410, 2014 WL 6685391, at \*23-24 (E.D. Ark. Nov. 25, 2014); *Rosenbrahn v. Daugaard*, No. 14-cv-04081, 2014 WL 6386903, at \*10-11 (D.S.D. Nov. 14, 2014); *Lawson v. Kelly*, No. 14-cv-00622, 2014 WL 5810215, at \*8 (W.D. Mo. Nov. 7, 2014); *Kitchen v. Herbert*, 961 F.Supp.2d 1181, 1206 (D. Utah 2013), aff'd on other grounds, 755 F.3d 1193 (10th Cir.), cert. denied, 135 S. Ct. 265 (2014); *Perry v. Schwarzenegger*, 704 F.Supp.2d 921, 996 (N.D. Cal. 2010), appeal dismissed sub nom. *Perry v. Brown*, 725 F.3d 1140 (9th Cir. 2013).
9. See *Videckis v. Pepperdine Univ.*, No. 15-cv-00298, 2015 WL 1735191, at \*8 (C.D. Cal. 2015) ("[A] policy that female basketball players could only be in relationships with males inherently would seem to discriminate on the basis of gender.").
10. See, e.g., *Boutillier v. Hartford Public Sch.*, No. 13-cv-01303, 2014 WL 4794527, at \*2 (D. Conn. Sept. 25, 2014); *Hall v. BNSF Ry. Co.*, No. 13-cv-02160, 2014 WL 4719007, at \*3-4 (W.D. Wash. Sept. 22, 2014); *Terveer v. Billington*, 34 F.Supp.3d 100, 115-16 (D.D.C. 2014); *Koren v. Ohio Bell Tel. Co.*, 894 F.Supp.2d 1032, 1038 (N.D. Ohio 2012); *Heller v. Columbia Edgewater Country Club*, 195 F.Supp.2d 1212, 1223 (D. Or. 2002); *Centola v. Potter*, 183 F.Supp.2d 403, 409 (D. Mass. 2002).
11. Andrew Koppelman, "Why Discrimination Against Lesbians and Gay Men Is Sex

Discrimination," 69 N.Y.U. L. Rev. 197, 208 (1994).

12. *Baldwin*, 2015 WL 4397641, at \*5 (citing *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978)) (internal quotation marks and citation omitted).

13. *Baldwin*, 2015 WL 4397641, at \*5.

14. 490 U.S. 228, 251 (1989).

15. *Latta*, 771 F.3d at 486 (Berzon, J., concurring).

16. *Latta*, 771 F.3d at 486 (citing Ruth Bader Ginsburg, "Gender and the Constitution," 44 U. Cin. L. Rev. 1, 1 (1975)).

17. 453 F.3d 757, 764 (6th Cir. 2006).

18. *Baldwin*, 2015 WL 4397641, at \*5.

19. See, e.g., *Isaacs v. Felder Servs.*, No. 13-cv-00693, 2015 WL 6560655, at \*4 (M.D. Ala. Oct. 29, 2015) ("To the extent that sexual orientation discrimination occurs not because of the targeted individual's romantic or sexual attraction to or involvement with people of the same sex, but rather based on her or his perceived deviations from 'heterosexually defined gender norms,' this, too, is sex discrimination, of the gender-stereotyping variety."); *Deneffe v. SkyWest*, No. 14-cv-00348, 2015 WL 2265373, at \*6 (D. Colo. May 11, 2015) (denying motion to dismiss where plaintiff alleged that he failed to conform to male stereotypes by designating his same-sex partner as beneficiary); *Hall*, 2014 WL 4719007, at \*3 (denying motion to dismiss where plaintiff alleged that "he (as a male who married a male) was treated differently in comparison to his female coworkers who also married males"); *Terveer*, 34 F.Supp.3d at 116 (denying motion to dismiss where "Plaintiff has alleged that he is 'a homosexual male whose sexual orientation is not consistent with the defendant's perception of acceptable gender roles....'"); *Koren*, 894 F.Supp.2d at 1038 (finding genuine issue of material fact under sex stereotyping theory where plaintiff failed to conform by taking his same-sex spouse's surname after marriage); *Heller*, 195 F.Supp.2d at 1224 (finding genuine issue of material fact under sex stereotyping theory where plaintiff failed to conform by being attracted to and dating other women and not only men).

20. *Baldwin*, 2015 WL 4397641, at \*6.

21. *Baldwin*, 2015 WL 4397641, at \*21 (quoting *Parr v. Woodmen of World Life Ins.*, 791 F.2d 888, 892 (11th Cir. 1986)).

22. *Baldwin*, 2015 WL 4397641, at \*6.

23. *Hall*, 2014 WL 4719007, at \*9.

24. Final Determination, *Cote v. Wal-Mart Stores East*, EEOC Charge No. 523-2014-00916 (Jan. 29, 2015), available at <http://www.glad.org/uploads/docs/?cases/cote-v-walmart/cote-v-walmart-probable-cause-notice.?pdf>.

25. 323 U.S. 134, 140 (1944).

26. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (internal quotation marks

omitted).

27. Nancy V. Wright and Janice P. Gregerson, "Sexual Orientation Discrimination in the Summer of #LoveWins," N.Y.L.J. (Oct. 19, 2015).

28. *Isaacs*, 2015 WL 6560655, at \*3.

29. *Roberts v. UPS*, No. 13-cv-06161, 2015 WL 4509994, at \*18 (E.D.N.Y. July 27, 2015).

30. See Equality Act, S. 1858, 114th Cong. §2(8) (2015) (finding that "Federal agencies and courts have correctly interpreted...prohibitions on sex discrimination to include discrimination based on sexual orientation, gender identity, and sex stereotypes."); Equality Act, H.R. 3185, 114th Cong. §2(8) (2015) (same).

---

*Omar Gonzalez-Pagan is a staff attorney with Lambda Legal Defense and Education Fund. Ria Tabacco Mar is a staff attorney with the American Civil Liberties Union's LGBT & HIV Project in New York.*

---

---

Copyright 2016. ALM Media Properties, LLC. All rights reserved.