UNITED STATES DISTRICT
SOUTHERN DISTRICT COURT OF NEW YORK

MATTHEW CHRISTIANSEN,

Plaintiff,

CASE NUMBER: 15 CV 3440

-against-

OMNICOM GROUP, INC., DDB WORLDWIDE COMMUNICATIONS GROUP INC., JOE CIANCIOTTO, PETER HEMPEL and CHRIS BROWN,

Defendants.

DECLARATION OF SUSAN CHANA LASK, ESQ.

Susan Chana Lask, Esq., certifies as follows:

1. Plaintiff voluntarily withdrawals the THIRD and TENTH Causes of Action for Constructive Discharge and Negligent Supervision/Retention.

2. Attached hereto are true and correct copies of the following documents referenced in the Memorandum of Law simultaneously filed herewith:

Exhibit "A" – October 21, 2014 Plaintiff's counsel's letter to Defendant Brown.
Exhibit "B" – November 20, 2014 Plaintiff's Counsel's letter to Defendant Cianciotto.
Exhibit "C" – December 19, 2014 Defendants' Federal EEOC Response.
Exhibit "D" – February 25, 2015 Defendants' State EEOC Response.
Exhibit "E" – July 15, 2015 EEOC Foxx Decision, Appeal No. 0120133080
Exhibit "F" - EEOC recent Pamphlet from the Foxx Decision Citing Nationwide Cases Supporting Sexual Orientation Under Title VII
Exhibit "G" - EEOC recent Pamphlet from the Foxx Decision Explaining that Sexual Orientation is a Title VII Case.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: September 24, 2015

Yours, etc
LAW OFFICES OF SUSAN CHANA LASK

/s Susan Chana Lask

BY: Susan Chana Lask, Esq.
Attorney for Plaintiff
244 Fifth Avenue, Suite 2369
New York, NY 10001
(917) 300-1958

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CONFIDENTIAL

VIA EMAIL chris.brown@ny.ddb.com
October 21, 2014

Mr. Chris Brown, CEO
DDB
437 Madison Avenue
New York, NY 10022

Re: Matt Christiansen/ Joe Cianciotto

Dear Mr. Brown:

I represent Matt Christiansen. On November 1, 2014, I am filing a complaint against DDB, Joe Cianciotto and other parties at DDB, including causes of actions for hostile work environment, discrimination, harassment, invasion of privacy, false light and other causes of action. In an effort to mitigate the damages, kindly inform your management, Joe, to immediately remove the muscle beach picture from his Facebook page. It is a constant reminder of the harassment and hostility towards Matt from Joe, and an invasion of his privacy and false light; particularly as it remains after the AIDs statement. Moreover, we have snapshots showing Joe's Facebook friends are Matt's colleague's and other professionals who view this offensive picture in light of the facts below that makes it harassing to Matt. That includes Patti Dirker Morris, Tammy Miller White, Jeff Greenberg and Tim Thomas, who are the main DDB clients at State Farm that Matt works with and are Facebook friends with Joe. Also, Matt does not give permission for his likeness to be used in that DDB picture created by its management.

I only provide the below facts to support my request for the immediate removal of the muscle beach picture from FaceBook. As it is related to DDB's function and done without his permission, you need to at least direct its removal. It is up to Joe if he wants to face more damages by keeping it up after this notice.

Facts

In about June 2011, Joe Cianciotto, Matt's supervisor, started drawing offensive sketches of Matt and circulating them throughout the office. The drawings had no legitimate purpose in the work environment. Mr. Cianiotto as the supervisor had no business to circulate such absolute stupidity and ignorance having nothing to do with Matt's work, but showing a very disturbed employee in a supervisory position obcessed with urinating and defecating to harass Matt by projecting his own inadequacies, that he later revealed he is clinically diagnosed with the issues he projects on Matt. He circulated a picture in May 2011 with Matt and his creative partner, Bob, saying "I fucking hate you all," and Matt commenting therein. Another picture in May 2011 has Matt talking to Bob while he is urinating and defecating. Another picture in late June

2011 circulated around the time when New York allowed for marriage equality for same-sex couples. That picture has Bob pumping Matt with a manual air pump, giving Matt an erect penis.

In July 2011, Mr. Cianiotto took the liberty of drawing a muscle Beach party poster that featured maps had attached to a female body, where he is on his back in a bikini with his legs up in the air. Considering the prior gay slanders against Matt in Mr. Cianiotto's pictures, this one undoubtedly shows him in the gay receiving position.

In May, 2013, there was a Monday morning status meeting where some 20 people or more attended for the State Farm account, including the account team, the Director of Operations, the creative team, project managers, Matt and his creative partner, and Mr. Cianiotto, who was now Chief Digital Officer at DDB. Tabor Theriot, a project manager, was sitting behind Matt. When Mr. Theriot coughed, Joe commented that it sounded like a very bad cough. He proceeded to get up from his desk and as he approached Matt he informed everybody that he was also ill all weekend with a cold, cough, sinus and body aches. Then he sat beside Matt, looked at him and said, "It feels like I have AIDS. Sorry, you know what that's like, Matt." Matt went into fear and shock of now being exposed as a gay man with Aids. Joe continued to draw more graphic pictures of Matt in compromising positions, including a dog urinating with Mr. Tabor's head on it.

On or about June 25, 2013, Wendy Raye, former Director of Human Resources, contacted Matt "to discuss an issue". Matt was paralyzed with fear. He thought he would lose his job because he was singled-out for having Aids by DDB's management, Joe. Also, he feared further public disclosure of his constitutionally private protected medical facts from DDB's management. Matt met her to express his concern regarding Joe's drawings and his AIDs statement.

Subsequently, Joe approached Matt to ask if he reported him about the pictures and AIDs statement. Matt told him he was upset about Joe's harassment. Joe then revealed that he has a severe phobia of communicable diseases such as AIDS and herpes, and he has severe Attention Deficit Disorder. He said it is so bad that his doctor advises him to carry around cards in his pocket that read "AIDS" and "herpes" so he can pull them out and read them when he starts to obsess about contracting these diseases. He said that his fear is so bad that his doctor recommends he "say it out loud" when he begins to obsess over having AIDS or herpes so that he can process the absurdity of it. He offered to play a voicemail from his doctor where he revealed the recent results of an HIV test to show Matt how overly fearful he was of having it.

On July 26, 2013, a meeting was called with the then CEO, the Director of HR, and the Chief Creative Officer present. Joe gave a public apology in hopes noone was offended and you gave a speech that DDB does not tolerate inappropriate behavior. Joe was not transferred away from Matt nor was anyone held accountable for that serious accusation and the offensive pictures.

Matt has been in fear of the consequences of losing his job, raises and promotions while he is forced to work under Joe for years who terrorized him with lewd pictures and AIDS accusations, then admits he has an aversion against gay men and AIDS. Also, the State Farm account key persons are witness to this, wherein we need to discover just how far this statement that Matt has AIDS has gone to tarnish his career. Matt has no choice but to file suit to protect

his career and himself that DDB has jeopardized. Gay bashers kill people for having AIDS, yet Joe attributed AIDS to Matt and made it public to haram, humiliate and harass him. More disturbing is that DDB management has access to Matt's health insurance information, which those records may reveal he has AIDS. Whether anyone has AIDS or not, DDB's management through Joe should have never made such a statement and once made he should have been terminated as it is beyond the pale of a slur-it is outright dangerous to Matt and his career. There are now 20 people in that meeting to whom that statement was published to and those 20 people could have republished it to another twenty people and that multiplies. The consequences are widespread and permeate Matt's career now as a Gay man with AIDS. Furture employment is tarnished.

Your Employee Handbook prohibits harassment at page therein, to wit:

"Harassing conduct includes but is not limited to:
• Epithets
• Slurs
• Negative stereotyping
• Threatening, intimidating or hostile acts that relate to race, color, religion, gender, national origin, age, sexual orientation or disability or any other protected category
• Written or graphic material that denigrates or shows hostility or aversion toward an individual or group because of race, color, religion, national origin, ancestry, gender, sexual orientation, gender identity and/or expression, age, veteran status, disability or any other protected characteristic and that is placed on walls, bulletin boards, the internet, websites, blogs, etc. or elsewhere on the employer's premises, or circulated in the workplace"

Yet it was ongoing with the disgusting pictures of Matt in compromising positions and was actually condoned that led to Joe to even certify before everyone that Matt has AIDS. More concerning is how DDB still employs Joe after his misconduct directed at a Gay employee, and then revealing he fears communicable diseases such as AIDS as the excuse for his hostility towards Matt in the work place.

CONCLUSION

Making matters worse, any reasonable person would think that Joe would at least remove himself from anything related to Matt after the AIDS incident, but he is so arrogant that he uploaded the Muscle Beach Party poster to his Facebook for the public and Matt's colleague's to see and keeps it posted there to this date. On September 27, 2014 Matt discovered the poster on Joe's Facebook showing Matt in the gay receiving position. It appears to have been up there since 2011.

Has DDB considered the more serious issue of whether Matt, a gay man, actually has Aids and how even more disturbing that statement was to single him out and paralyze him with fear and shame since then?

I am appalled at this history and how strange your manager Joe is to circulate juvenile pictures of a gay man in compromising positions and accuse a gay man of AIDs because of his

own, according to his admission, sick obsessions. I am sure a jury of his peers would be as appalled. Matt's position is that the public should know how disturbing and unacceptable Joe's conduct was to him as a gay man and DDB as the employer is as wrong to condone this. Joe should have been held accountable by a direct apology, a public retraction of the statement and terminating Joe for such intolerable behavior.

In the interim of the lawsuit, **please immediately remove the muscle beach poster from Facebook as it violates your Employee Handbook social media terms as in the least unprofessional (pp. 11-12)**

If you have any response, kindly e-mail it to susanlesq@verizon.net or feel free to call me at anytime before November 1, 2014 to discuss an amicable resolution. As you know, no one is to communicate with Matt about this any further. All communications shall be directed to me.

Very truly yours,
LAW OFFICES OF SUSAN CHANA LASK

SUSAN CHANA LASK

cc: Matt Christiansen

Law Offices of
SUSAN CHANA LASK

244 Fifth Avenue, Suite 2369
New York, N.Y. 10001

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VIA EMAIL Joseph.cianciotto@ny.ddb.com

November 20, 2014

Mr. Joseph Cianciotto
DDB
437 Madison Avenue
New York, NY 10022

Re: Matt Christiansen/ Joe Cianciotto

Dear Mr. Cianciotto:

I represent Matt Christiansen.

I respectfully request that you immediately remove the muscle beach poster from your Facebook page or remove my client's likeness from that picture. That poster depicts him in a way he does not condone. Particularly, it is objectionable as his sexual orientation was at issue at DDB in the pictures you drew of him and circulated, and you accused him before his colleagues of having AIDS.

If you have any response, kindly e-mail it to susanlesq@verizon.net. Kindly do not discuss this matter with my client as I represent him on this issue. All such discussions shall be directed to me, not Mr. Christiansen.

Very truly yours,
LAW OFFICES OF SUSAN CHANA LASK

Susan Chana Lask

SUSAN CHANA LASK

cc: Matt Christiansen

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December 19, 2014

By Federal Express

Mr. Jose Vega
Federal Investigator
United States Equal Employment Opportunity Commission
New York District Office
33 Whitehall Street, 5th Floor
New York, New York 10004

Re: Christiansen v. DDB Worldwide New York, Charge No. 520-2015-00415

Dear Mr. Vega:

This position statement is submitted on behalf of DDB Worldwide Communications Group Inc. ("DDB" or the "Company") in response to the above-referenced charge (the "Charge") filed by Complainant Matthew Christiansen ("Complainant") with the United States Equal Employment Opportunity Commission ("EEOC"). In submitting this position statement, DDB in no way waives its right to present new or additional facts and arguments. Further, this position statement, which is believed to be correct in all respects, does not constitute an affidavit and is not intended to be used as evidence of any kind in any subsequent adjudicative proceeding. Any allegations in the Charge not specifically addressed in this position statement are denied.

Complainant alleges a series of unprofessional conduct by his manager and claims that his manager directed this conduct toward him because he is gay and that he found the conduct to be offensive. Complainant's Charge must be dismissed for several reasons.

First, Title VII of the Civil Rights Act of 1964 does not apply to claims of sexual orientation discrimination or harassment. While the Notice of Charge does not identify a type of discrimination or harassment, a plain reading of the Charge makes clear that his claim is for sexual orientation discrimination or harassment. Second, the conduct alleged took place long before January 2, 2014 (300 days prior to the date Complainant filed the Charge on October 29, 2014). As such, the Charge is time barred. Third, the conduct at issue does not rise to the level of an unlawful hostile work environment. And finally, the Company acted promptly and appropriately after Complainant discussed his supervisor's conduct with the Human Resources Department in June 2013, and neither Complainant nor any other employee has alleged that his supervisor has engaged in further instances of unprofessional conduct since June 2013.

Under these circumstances, the Charge must be dismissed for lack of probable cause.

1. The Claim Is Not Covered By Title VII

Title VII prohibits employers from discriminating "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." 42 U.S.C. § 2000e-2(a). The plaintiff bears the initial burden of establishing a prima facie case of discrimination. *McDonell Douglas v. Green*, 411 U.S. 792, 802-03 (1973). It is well-settled law that Title VII does not prohibit sexual orientation discrimination. *See e.g.*, *Jantz. v. EmblemHealth*, 2012 U.S. Dist. LEXIS 14977, 19 (S.D.N.Y., Feb. 6, 2012).

While Complainant's Notice of Charge does not identify a type of discrimination, Complainant alleges that he believes the conduct at issue was directed at him because he is gay. And he does not indicate or even suggest that he was discriminated against or harassed based on any other protected characteristic. It is therefore clear that Complainant's claim is for sexual orientation discrimination or harassment, and, as such, Complainant "cannot satisfy the first element of a prima facie case ... because the statute does not recognize homosexuals as a protected class." *Id.* at 217-18 (affirming summary judgment for employer on Title VII sexual orientation claim). The Charge must therefore be dismissed.

2. The Charge Is Time Barred

Under Title VII of the Civil Rights Act of 1964, an employee must file a charge within 180 calendar days from the day the discrimination took place. *Pryor v. Nat'l Grid*, 2011 U.S. Dist. LEXIS 82853, 6 (S.D.N.Y. Jun. 29, 2011). The 180 day filing deadline is extended to 300 calendar days if a state or local agency enforces a law that prohibits employment discrimination on the same basis. As set forth above, Title VII does not prohibit employment discrimination on the basis of sexual orientation. Regardless, even assuming the 300 day period was to apply, it is clear that Complainant's Charge is time barred.

In the Charge, Complainant alleges that his supervisor, Joe Cianciotto, circulated several offensive pictures referencing Complainant within the Company in 2011, and made an offensive comment to him in May 2013. He then alleges that when Mr. Cianciotto apologized for his behavior to employees in the Creative Department in July 2013, but that he did not direct an apology toward him specifically. Complainant does not allege that Mr. Cianciotto engaged in any instances of offensive conduct since then. The only fact alleged in the Charge that occurred since July 2013 was that Complainant discovered a poster on

Mr. Cianciotto's Facebook page. However, Complainant admits that the poster was drawn by Mr. Cianciotto in July 2011 and that he was aware of the poster in July 2011. [1]

All of Complainant's allegations therefore relate to conduct that occurred long before January 2, 2014, which is 300 days before Complainant filed the Charge with the EEOC on October 29, 2014. Accordingly, the Charge must be dismissed.

3. Complainant Has Not Been Subjected To A Hostile Work Environment

Even if Title VII covered this type of discrimination, and even if the Charge was not time barred, the conduct that Complainant alleges does not rise to the level of actionable discrimination or harassment.

A hostile work environment exists under Title VII when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive so as to alter the condition of the victim's employment and create an abusive working environment. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22-23 (1993). The Supreme Court of the United States has stated that "[c]onduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive – is beyond Title VII's purview." *Id.* at 21. To determine whether the conduct alleged rises to the level, factors to be analyzed include: "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* at 22-23.

Complainant alleges that Mr. Cianciotto drew several offensive pictures of him in 2011, and that he made an offensive comment to him in May 2013. Much of the alleged conduct is plainly unprofessional behavior that had nothing to do with Complainant's sexual orientation (e.g., Mr. Cianciotto sketching a picture and including the words "I fucking hate you all" and Mr. Cianciotto drawing a picture of Complainant talking to another employee while he is urinating).

There are two primary allegations that relate to Complainant's sexual orientation. The first is the poster that Complainant drew in July 2011 that included a picture of Complainant's head attached to a female body in a bikini. The poster was created by Mr. Cianciotto on July 18, 2011 and sent by email to DDB employees and posted to Facebook to promote a DDB happy hour that had been planned as a social event. The poster was intended to serve as a humorous parody of a campy beach poster for the happy hour with

[1] Complainant alleges that on October 21, 2014 he requested by letter that DDB direct Mr. Cianciotto to remove the poster from his Facebook page. DDB is not aware of any such letter being sent to it or any such request. If DDB had received such a letter, it would have looked into Complainant's request and addressed the matter. In any case, after receiving the Charge and learning for the first time that Complainant found the poster to be offensive, Mr. Cianciotto promptly removed it from his Facebook page.

numerous DDB employees. (Attached as Exhibit A is both the original (Frankie Avalon and Annette Funicello) poster and the one that Mr. Cianciotto had parodied for the happy hour with various employees' faces.) The poster contained pictures of the heads of 4 male DDB employees who appeared in female bathing suits, including Complainant. Of the 4 men, Mr. Cianciotto's understanding is that the other 3 men depicted as women besides Complainant are heterosexual. As such, the inclusion of Complainant in the poster clearly had nothing to do with his sexual orientation. Neither Mr. Cianciotto nor DDB received any complaints about the poster until Complainant filed the Charge.

And the second primary allegation was a comment that Mr. Cianciotto made in May 2013 about having AIDS. Mr. Cianciotto had gone through a period of time during which he had a profound fear of having AIDS and dealt with that fear by joking about contracting AIDS. Complainant himself has joked with Mr. Cianciotto about his sexual orientation and the sexual conduct of his gay friends, and Mr. Cianciotto did not think Complainant would be offended by his comment about AIDS.

Complainant's conduct – while certainly unprofessional – does not rise to the level actionable discrimination or harassment. Indeed, Complainant himself essentially acknowledged as such when he spoke with Wendy Raye, DDB's Director of Human Resources for the New York office, in June 2013 about Complainant. At the time, he indicated that he felt that Mr. Cianciotto acts "like a little kid" and an "asshole." (Attached hereto as Exhibit B is a copy of Ms. Raye's interview notes.) Moreover, Complainant did not initiate a complaint about Mr. Cianciotto to the Human Resources Department in June 2013, as he claims, nor any other time. Instead the Human Resources Department reached out to him to discuss Mr. Cianciotto as part of its investigation into Mr. Cianciotto's conduct generally.

In any case, the Company acted promptly and appropriately in addressing Mr. Cianciotto's behavior. It issued him strong verbal and written warnings, it required that he attend individualized harassment training, and it provided him with ongoing professional coaching. Further, Mr. Cianciotto recognized that his unprofessional behavior had upset several employees and, as a result, he arranged a meeting with the creative department staff in July 2013 during which he apologized for his behavior. The apology was well received.

In the Charge, Complainant claims that Mr. Cianciotto never apologized to him and suggests that his apology to the team was somehow deficient. However, immediately after Mr. Cianciotto's apology, Complainant sent him a text message in which he stated as follows:

> "I just want to say, I truly appreciated what you did this morning. Thank you for doing that."

(Annexed hereto as Exhibit C is a copy of Complainant's text message to Mr. Cianciotto on July 26, 2013.) This contemporaneous text message speaks for itself and demonstrates that Complainant did not in fact feel the apology was deficient but instead "truly appreciated" it.

Significantly, Mr. Cianciotto has not engaged in any conduct of the type alleged by Complainant since his July 2013 apology. Indeed, neither Complainant nor any other DDB employee has reported any claims of inappropriate conduct by Mr. Cianciotto since that time. And Complainant does not even allege that Mr. Cianciotto has engaged in any inappropriate conduct toward him or any other employee since then. In other words, Complainant has effectively acknowledged that Mr. Cianciotto has not engaged in any conduct in the past 15 months that he considers to be offensive. It is therefore apparent that DDB's handling of this matter was effective as the conduct has completely ceased.

CONCLUSION

For the foregoing reasons, we urge that the Charge be dismissed for lack of probable cause.

If you have any questions or require additional information, please do not hesitate to contact me at (212) 468-4885. If Complainant submits anything to the EEOC, please provide me with a copy.

Very truly yours,

Daniel A. Feinstein

Exhibits

cc: DDB Worldwide Communications Group Inc.

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February 25, 2015

BY FEDERAL EXPRESS

Joyce Yearwood-Drury
Director O.S.H.I.
New York State Division of Human Rights
55 Hanson Place, Room 900
Brooklyn, New York 11217
Fax: 718-722-4525

Re: Matthew Christiansen v. DDB Worldwide Communications Group Inc.
Case No. 10172229
3016

Dear Ms. Yearwood-Drury:

This position statement is submitted on behalf of DDB Worldwide Communications Group Inc. ("DDB" or the "Company") in response to the above-referenced complaint (the "Complaint") filed by Complainant Matthew Christiansen ("Complainant") with the New York State Division of Human Rights (the "Division"). In submitting this position statement, DDB in no way waives its right to present new or additional facts and arguments. Further, this position statement, which is believed to be correct in all respects, does not constitute an affidavit and is not intended to be used as evidence of any kind in any subsequent adjudicative proceeding. Any allegations in the Complaint not specifically addressed in this position statement are denied.

Complainant alleges a series of unprofessional acts by his manager and claims that his manager directed these acts toward him because he is gay and has AIDS and that he found the conduct to be offensive. The Complaint must be dismissed for several reasons. First, it is plainly time barred by the Division's statute of limitations since all of conduct at issue occurred well more than 1 year before Complainant filed the Complaint with the Division. Second, the conduct at issue does not rise to the level of an unlawful hostile work environment, the Company acted promptly and appropriately to address his manager's conduct, and his manager has not engaged in any further instances of unprofessional conduct in over 1½ years (and Complainant does not even allege otherwise). Third, Complainant's disability claim fails because his manager did not know or regard Complainant as having AIDS or any other disability. And finally, Complainant's retaliation claim fails because he does not – and cannot – allege that any adverse action was taken against him.

Under these circumstances, the Complaint must be dismissed for lack of probable cause.

I. FACTUAL BACKGROUND

DDB is an advertising agency and hired Complainant as an Associate Creative Director on or about April 27, 2011, reporting to Joe Cianciotto.

Complainant and Mr. Cianciotto maintained a friendly and playful relationship. Mr. Cianciotto's background is as a cartoonist and Complainant, along with other employees in the Creative Department at DDB, regularly encouraged Mr. Cianciotto to draw funny caricatures and other pictures that were sometimes off color. Complainant never informed or even suggested to Mr. Cianciotto that he found any of his drawings to be offensive.

Likewise, Complainant frequently joked with Mr. Cianciotto and other employees at DDB about his sexual orientation and other things of a sexual nature. For example, in 2012, in response to an email that Mr. Cianciotto sent to a number of Creative Department employees, including Complainant, thanking them for their hard work for a particular client and informing them that as a result they could take a half day off that Friday and jokingly stated that instead he could give them another hug, Complainant stated "Can I get a minge instead of a hug?" According to the Urban Dictionary, a "minge" is "not the actual [female] vagina, but the hair surrounding the area." Complainant apparently introduced the word "minge" to colleagues at DDB, including Mr. Cianciotto, and explained that he and his friends would hide their genitalia between their legs to recreate the appearance of a "minge". (Annexed as Exhibit A is a copy of Complainant's email to Mr. Cianciotto.)

A. Complainant Originally Filed An EEOC Charge

On or about October 29, 2014, Complainant filed a discrimination charge with the EEOC in which he alleged that he found a number of Mr. Cianciotto's 2011 drawings, as well as a comment he made in 2013, to be offensive as a gay man (the "EEOC Charge").

DDB submitted a position statement in response to the EEOC Charge in which it demonstrated that the EEOC Charge must be dismissed because (1) Title VII of the Civil Rights Act of 1964 does not apply to claims of sexual orientation discrimination or harassment, (2) it is time barred by Title VII's 300 day statute of limitations, (3) much of the alleged conduct was simply unprofessional conduct that was intended to be funny and had nothing to do with Complainant sexual orientation, and, in any case, the conduct did not rise to the level of a hostile work environment.

Complainant then filed this Complaint with the Division on or about December 17, 2014. In his Complaint with the Division, Complainant tries to fine tune his allegations in an unsuccessful attempt to satisfy New York state law.

B. Complainant's Allegations Of Unprofessional Conduct

There are three allegations in the Complaint that arguably relate to Complainant's sexual orientation or medical condition.

The first is a cartoon Mr. Cianciotto drew in 2011 on a whiteboard in Complainant's office that showed Complainant with bulging muscles. (Complainant regularly lifts weights and has a muscular appearance.) Mr. Cianciotto does not recall that the cartoon included an erect penis but, regardless, it was part of the ongoing reciprocal playful banter between Complainant and Mr. Cianciotto. Complainant in no way intended the drawing to be offensive, and Complainant himself appeared to have thought the drawing was funny and enjoyed it because he left it up on his whiteboard for an extended period of time.

The second is a poster that Mr. Cianciotto created in July 2011 and sent by email to DDB employees and posted to Facebook to promote a DDB happy hour that had been planned as a social event. The poster was intended to serve as a humorous parody of the 1964 Frankie Avalon and Annette Funicello movie "Muscle Beach Party" and contained the faces of numerous DDB employees photoshopped onto the bodies of characters in the movie poster. The poster contained pictures of the faces of 4 male DDB employees who appeared in female bathing suits, including Complainant. Of the 4 men, Mr. Cianciotto's understanding is that the other 3 men depicted as women besides Complainant are heterosexual. As such, the inclusion of Complainant in the poster clearly had nothing to do with his sexual orientation. Moreover, the poster was not altered in any way to suggest sexual conduct. The body positions of the characters remain exactly as they were in the 1964 movie poster, and the only changes were the photoshopping of the faces of the various DDB employees onto the bodies of the movie characters and the verbiage to promote the happy hour. (Annexed as Exhibit B is a side-by-side comparison of the original movie poster and the one that Mr. Cianciotto had parodied for the happy hour.) Complainant did not complain about the poster to Mr. Cianciotto or DDB's Human Resources Department, and Mr. Cianciotto and DDB's Human Resources Department did not receive any complaints from any other DDB employees about the poster.[1]

The third was a comment that Mr. Cianciotto made in May 2013 about being sick over the prior weekend and feeling like he had AIDS. Mr. Cianciotto had gone through a period of time during which he had a severe case of obsessive compulsive disorder and profound fear of having AIDS and, consistent with the treatment he was receiving from medical professionals who were treating him at the time, he dealt with that fear in part by joking about contracting AIDS. As set forth above, Complainant himself joked with Mr. Cianciotto about his sexual orientation and other things of a sexual nature, and Mr. Cianciotto did not think Complainant would be offended by his comment about AIDS. Mr. Cianciotto did not know or regard Complainant as having AIDS or any other medical conditions, and the first time he learned of Complainant's apparent medical condition was after receiving the Complaint in January 2015.

[1] Complainant alleges that in October 2014 his attorney sent DDB several letters requesting that Mr. Cianciotto remove the poster from his Facebook page. DDB is not aware of any such letters being sent to it or any such request. If DDB had received such a letter, it would have looked into Complainant's request and addressed the matter. DDB and Mr. Cianciotto learned for the first time that Complainant allegedly found the poster to be offensive after receiving the EEOC Charge on or about November 19, 2014. Mr. Cianciotto then promptly removed it from his Facebook page.

C. DDB Responded Appropriately And The Conduct Has Completely Ceased

Complainant never initiated a complaint about Mr. Cianciotto to the Human Resources Department in June 2013, as he claims, or at any other time. Instead the Human Resources Department reached out to him in June 2013 to discuss Mr. Cianciotto as part of its investigation into Mr. Cianciotto's conduct generally in response to a complaint that another employee had made.

In any case, the Company acted promptly and appropriately in addressing Mr. Cianciotto's conduct. It issued him strong verbal and written warnings, it required that he attend individualized harassment training, and it provided him with ongoing professional coaching. Further, Mr. Cianciotto recognized that his unprofessional behavior had upset several employees and, as a result, he arranged a meeting with the creative department staff in July 2013 during which he apologized for his behavior. The apology was well received.[2]

In Complainant's EEOC Charge, he claimed that Mr. Cianciotto never apologized to him and suggests that his apology to the team was somehow deficient. However, immediately after Mr. Cianciotto's apology, Complainant sent him a text message in which he stated as follows:

> "I just want to say, I truly appreciated what you did this morning. Thank you for doing that."

(Annexed as Exhibit C is a copy of Complainant's text message to Mr. Cianciotto on July 26, 2013.) This contemporaneous text message speaks for itself and demonstrates that Complainant did not in fact feel the apology was deficient but instead "truly appreciated" it. Having been caught making this false allegation in his EEOC Charge, Complainant does not repeat the allegation in his Complaint with the Division.[3]

Significantly, Mr. Cianciotto has not engaged in any conduct of the type alleged by Complainant since his July 2013 apology. Indeed, neither Complainant nor any other DDB employee has reported any claims of unprofessional conduct by Mr. Cianciotto since that time. And Complainant does not even allege that Mr. Cianciotto has engaged in any offensive conduct toward him or any other employee since then. In other words, Complainant has effectively acknowledged that Mr. Cianciotto has not engaged in any conduct in over 1½ years that he considers to be offensive. It is therefore apparent that DDB's handling of this matter was effective as the conduct has completely ceased.

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[2] Mr. Cianciotto also apologized individually to Complainant both in 2013 and again more recently after receiving the EEOC Charge.

[3] A copy of the EEOC Charge in which Complainant makes this false allegation is annexed as Exhibit D.

D. Mr. Cianciotto Has Been a Longstanding Supporter of Complainant at DDB and Gay Rights Generally

Not only did Complainant and Mr. Cianciotto have a friendly and playful relationship, but Mr. Cianciotto was very supportive of Complainant's career at DDB. In this regard, Mr. Cianciotto was largely responsible for the decision to promote Complainant from an Associate Creative Director to a Creative Director in early 2013. Further, in April 2013, Complainant was 1 of only 2 employees in Mr. Cianciotto's creative group of over 20 employees to receive a bonus. And, in August 2013, Complainant was 1 of only 4 employees in Mr. Cianciotto's creative group to receive a salary increase. (Complainant's raise was $25,000, which represented a 12% increase.) Needless to say, Mr. Cianciotto's support of Complainant through this promotion and salary increases wholly belies any claim that Complainant discriminated against Complainant because of his sexual orientation or any other protected characteristic.

Mr. Cianciotto has also been a longstanding supporter of gay rights. For example, in March 2013, Mr. Cianciotto's profile picture on his Facebook page was changed to include the "red equal sign" demonstrating his support for gay marriage. And since January 2012, Mr. Cianciotto has donated his time pro bono to combat bullying by creating the "Be More than a Bystander' TV and online campaign, partnering with the Ad Council (the leading provider of public service communications). Likewise, in May 2012, Mr. Cianciotto partnered with Dr. Eliza Byard, Executive Director of the Gay, Lesbian and Straight Education Network, to create a support module addressing bullying for parents. And again in October 2013, Mr. Cianciotto donated his time pro bono to create a third public service TV commercial in partnership with the Ad Council and the Bully Project that focused on the plight of the LGBT (Lesbian, Gay, Bisexual, and Transgender) community and a young boy who was bullied for having two mothers. Once again, Mr. Cianciotto's actions demonstrate that he is a strong supporter of gay rights and undermine Complainant's allegations of discrimination.

II. COMPLAINANT'S LEGAL CLAIMS HAVE NO MERIT

A. The Complaint Is Time Barred

The NYSHRL provides for a one-year statute of limitations. N.Y. Exec. Law §297(5).[4] Complainant filed his complaint with the NYSDHR on or about December 17, 2014.

In the Complaint, Complainant alleges that Mr. Cianciotto, circulated several offensive pictures referencing Complainant within the Company in 2011, and made an offensive comment to him in May 2013. Complainant does not allege that Mr. Cianciotto engaged in any instances of offensive conduct since then. The only fact alleged in the Charge that occurred since May 2013 was that Complainant discovered the muscle beach party poster to promote the DDB happy

[4] Complainant's claim of discrimination under the ADA is subject to a 300 day statute of limitations period. *See Tewksbury v. Ottaway Newspapers, Inc.*, 192 F.3d 322, 325-29 (2d Cir. 1999).

hour on Mr. Cianciotto's Facebook page. However, Complainant admits that the poster was drawn by Mr. Cianciotto in July 2011 and he was indisputably aware of the poster in July 2011.

All of Complainant's allegations therefore relate to conduct that occurred long before December 17, 2013, which is 1 year before Complainant filed the Complaint with the Division on December 17, 2014. Accordingly, the Complaint must be dismissed.

B. Complainant Has Not Been Subjected To A Hostile Work Environment

To prevail on a claim of hostile work environment under the New York State Human Rights Law ("NYSHRL"), a complainant must show that the "workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" *Mahoney v. Metropolitan Tr. Auth.*, 2014 N.Y. Misc. LEXIS 4690, at *15 (N.Y. Sup. Ct. Oct. 22, 2014), quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). To be actionable, the incidents of harassment "must be repeated and continuous; isolated acts or occasional episodes will not merit relief." *Mahoney*, 2014 N.Y. Misc. LEXIS 4690, at *15, quoting *Kotcher v Rosa & Sullivan Appliance Ctr.*, 957 F2d 59, 62 (2d Cir 1992). "Whether an environment is hostile or abusive can be determined only by looking at all the circumstances, including 'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" *Mahoney*, 2014 N.Y. Misc. LEXIS 4690, at *15, quoting *Forrest v Jewish Guild for the Blind*, 3 N.Y.3d 295, 310-11 (2004).

Even assuming arguendo that the Complaint is not time barred, Mr. Cianciotto's conduct – while unprofessional – does not rise to the level of actionable discrimination or harassment. Indeed, Complainant himself essentially acknowledged as such when he spoke with Wendy Raye, DDB's Director of Human Resources for the New York office, in June 2013 about Complainant. At the time, he indicated that he felt that Mr. Cianciotto acts "like a little kid" and an "asshole." (Annexed as Exhibit E is a copy of Ms. Raye's interview notes.)

Moreover, given that Complainant himself regularly joked with Mr. Cianciotto and other employees at DDB about his sexual orientation and other things of a sexual nature, including, for example, the "minge" email to Mr. Cianciotto referenced above, Mr. Cianciotto certainly had no reason to believe that Complainant would be offended by his attempts at similar humor. Indeed, it is well settled under New York law that where a complainant himself or herself engaged in the alleged "harassing" conduct, no claim will lie. *See, e.g., Giudice v. Red Robin Int'l, Inc.*, 2013 U.S. Dist. LEXIS 26972, at * 26 (W.D.N.Y. Feb. 27, 2013) (dismissing claims brought under Title VII and the NYHRL noting that "[w]here an employee has admitted that he participated in the alleged 'harassing' conduct, and did not find that alleged behavior 'unwelcome,' no reasonable juror could conclude that he had an objectively reasonable and good faith belief that the same conduct constituted sexual harassment").

Finally, as set forth above, DDB took appropriate action to address Mr. Cianciotto's conduct, and Mr. Cianciotto has not engaged in any conduct since May 2013 that Complainant or

any other employee has complained about or indicated he or she found to be offensive. Indeed, it is apparent that DDB handled the matter effectively, and Complainant has himself for all intents and purposes acknowledged that he has not been subjected to any offensive conduct for more than 1 ½ years. *Porfilio v. Mt. St. Mary's Hospital, et. al.,* Case No. 10107052 (NYSDHR Feb. 29, 2008) (dismissing complaint finding that male doctor's offensive sexual jokes to female nurse did not create a "hostile work environment" and that hospital successfully remedied the situation by severely warning the doctor which caused the offensive behavior to cease).

C. Mr. Cianciotto Had No Knowledge Of Complainant's Medical Situation

In order to state a *prima facie* claim for disability discrimination, a complainant must show that he suffers from a disability and that the disability engendered the behavior for which he was discriminated against in the terms, conditions, or privileges of his employment. *See Garcia v Peninsula New York Partners*, 2008 N.Y. Misc. LEXIS 9150, at *6 (N.Y. Sup. Ct. Aug. 20, 2008) (dismissing complaint where plaintiff failed to demonstrate that he was discriminated against or otherwise subject to a hostile work environment due to any disability). It is, of course, axiomatic that in order to sustain a claim for disability discrimination, the alleged discriminator must have known or regarded the plaintiff as having a disability.

In this instance, Mr. Cianciotto did not know or regard Complainant as having AIDS or any other medical conditions, and the first time he learned of Complainant's apparent medical condition was after receiving a copy of this Complaint in January 2015. Moreover, Complainant's claim that DDB has access to his medical records indicating that he has AIDS is simply not true. Complainant's personnel file at DDB does not indicate in any way that he has AIDS or any other medical conditions, and DDB does not have access to any health insurance records indicating that Complainant has AIDS. In this regard, for privacy purposes, DDB has maintained a longstanding practice of having employees and/or their medical providers submit medical claims directly to the insurance company and DDB does not receive a copy of or have access to such claims.

Under these circumstances, any disability claim by Complainant clearly must fail. *See Idlisan v. Mount Sinai Med. Ctr.*, 2015 U.S. Dist. LEXIS 3241, at *13-14 (S.D.N.Y. Jan. 9, 2015) (dismissing disability discrimination claim because there was no evidence that defendant was even aware of plaintiff's disability, let alone that it discriminated against plaintiff because of it); *Klemme v. W. Irondequoit Cent. Sch. Dist.*, 2014 U.S. Dist. LEXIS 164132, at *13 (W.D.N.Y. Nov. 24, 2014) (same).

D. Complainant Has Not Been Retaliated Against

In order to establish a *prima facie* retaliation claim under NYSHRL, "a plaintiff must show that (1) [he] was engaged in protected activity, (2) [his] employer was aware that [he] participated in such activity, (3) [he] suffered an adverse employment action based upon [his] activity, and (4) there is a casual connection between the protected activity and the adverse action." *See Williams v Columbia University*, 2014 N.Y. Misc. LEXIS 109, at *10-11 (N.Y.

Sup. Ct. Jan. 13, 2014) (dismissing retaliation claim under the NYSHRL where plaintiff failed to allege any adverse action was taken against her).

An "adverse employment action" under the NYSHRL is defined as "a materially adverse change in the terms and conditions of an individual's employment. It is more disruptive than a mere inconvenience, and might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices unique to a particular situation." *Chin v New York City Hous. Auth.*, 2011 N.Y. Misc. LEXIS 3444, at *22-23 (N.Y. Sup. Ct. July 7, 2011) (dismissing retaliation claim where employer's alleged retaliatory conduct amounted to nothing more than "inconveniences" and where plaintiff "did not lose any salary or benefits").

Complaint does not – because he cannot – allege that any adverse action has been taken against him. It appears he is attempting to support his unfounded retaliation claim by referencing Mr. Cianciotto's apologies to him. Needless to say, a manager apologizing to a subordinate when he became aware that he said something that he did not mean to be offensive but the subordinate apparently found to be offensive is plainly insufficient to support a retaliation claim.

In any case, it is indisputable that Complainant has not suffered any demotions or decreases in salary or any other adverse changes in the terms of conditions of his employment. To the contrary, as stated above, Complainant has been promoted and was 1 of only 2 employees in Mr. Cianciotto's creative group at DDB to receive a bonus and significant salary increase in 2013. And Mr. Cianciotto was largely responsible for those decisions. Under these circumstances, he cannot establish a prima facie retaliation claim under the NYSDHRL.

CONCLUSION

For the foregoing reasons, we urge that the Complaint be dismissed for lack of probable cause.

If you have any questions or require additional information, please do not hesitate to contact me at (212) 468-4885. If Complainant submits anything to the Division, please provide me with a copy pursuant to the Freedom of Information Law of the State of New York ("FOIL"). We will pay for all copying costs.

Very truly yours,

Daniel A. Feinstein

Exhibits

cc: DDB Worldwide Communications Group Inc.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

[redacted]
Complainant
v.

Anthony Foxx,
Secretary,
Department of Transportation
(Federal Aviation Administration),
Agency.

Appeal No. 0120133080

Agency No. 2012-24738-FAA-03

DECISION

Complainant timely filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision, dated July 17, 2013, dismissing his complaint of unlawful employment discrimination alleging a violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. §§ 2000e–2000e-17. For the reasons that follow, the Commission REVERSES and REMANDS the Agency's final decision.

ISSUES PRESENTED

The issues presented in this case are (1) whether Complainant's initial contact with an Equal Employment Opportunity (EEO) Counselor was timely; and (2) whether a complaint alleging discrimination based on sexual orientation in violation of Title VII of the Civil Rights Act of 1964 lies within the Commission's jurisdiction. [1]

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Supervisory Air Traffic Control Specialist at the Agency's Southern Region, Air Traffic Division, Air Traffic Control Tower/International Airport in Miami, Florida.

On August 28, 2012, Complainant contacted an EEO counselor and on December 21, 2012, filed a formal EEO complaint alleging that the Agency subjected him to discrimination on the bases of sex (male, sexual orientation) and reprisal for prior protected EEO activity when, on

[1] This decision addresses only the timeliness and jurisdiction questions raised on appeal. We take no position on the merits of Complainant's claim of discrimination. That is for the Agency to determine upon remand.

July 26, 2012, he learned that he was not selected for a permanent position as a Front Line Manager (FLM) at the Miami Tower TRACON facility (the Miami facility).

The Agency accepted the complaint for investigation. When the investigation was completed, Complainant was given his notice of right to request a hearing before an EEOC administrative judge or an immediate final decision by the Agency based on the investigative report. On May 21, 2013, Complainant requested an immediate final decision from the Agency. The Agency issued its Final Agency Decision (FAD) on July 12, 2013.

The evidence developed during the investigation shows that in October 2010, Complainant was selected for and accepted a temporary FLM position at the Miami facility. The record further reflects that the Agency issued a vacancy announcement for a permanent FLM position in June 2012.

Complainant did not officially apply for the permanent position based on his understanding that all temporary FLMs, such as himself, were automatically considered for any open permanent FLM posting. Complainant claimed that management knew of his desire to obtain a permanent FLM position and that he was well-qualified for the position given his years of experience, as well as his familiarity with the Miami facility. Complainant was not selected for the permanent FLM position. The failure to be selected for the permanent FLM position forms the basis of his discrimination complaint.

The Agency asserts that the permanent FLM position was never filled, and hence no discrimination occurred.

Complainant alleged that he was not selected because he is gay. He alleged that his supervisor who was involved in the selection process for the permanent position made several negative comments about Complainant's sexual orientation. For example, Complainant stated that in May 2011, when he mentioned that he and his partner attended Mardi Gras in New Orleans, the supervisor said, "We don't need to hear about that gay stuff." He also alleged that the supervisor told him on a number of occasions that he was "a distraction in the radar room" when his participation in conversations included mention of his male partner.

In its FAD, the Agency did not address the merits of Complainant's claim. Instead, the Agency dismissed the complaint on the grounds that it had not been raised in a timely fashion with an EEO counselor, as required by EEOC regulations. The Agency reasoned that the 45-day limitation period in which Complainant should have contacted a counselor started to run in October 2010, the date on which the Complainant was aware that his temporary FLM position would expire after two years and he would be returned to his previous position. Therefore, the Agency found that Complainant's EEO counselor contact in August 2012 was made well beyond the 45-day limitation period.

The FAD also notified Complainant that, pursuant to the "Secretary's Policy on Sexual Orientation" and the "Departmental Office of Civil Rights' March 7, 1998 Procedures for

Complaints of Discrimination based on Sexual Orientation," the "sexual orientation portion of the claim is appealable to [the Agency] and the portion of the claim involving reprisal is appealable to the EEOC [pursuant to 29 C.F.R. § 1614.110(b)]."

Complainant appealed the Agency's decision to the Commission.

ANALYSIS AND FINDINGS

Timeliness of EEO Counselor Contact

EEOC's regulations require that complaints of discrimination be brought to the attention of an Equal Employment Opportunity Counselor "within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action." 29 C.F.R. § 1614.105(a)(1). The Commission has long applied a "reasonable suspicion" standard, viewed from the perspective of the complainant, to determine when the 45-day limitation period is triggered. See e.g., Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120093169, 2014 WL 2999934 (EEOC June 27, 2014) (citing Howard v. Dep't of the Navy, EEOC Request No. 05970852, 1999 WL 91430 (EEOC Feb. 11, 1999), citing Ball v. U.S. Postal Serv., EEOC Appeal No. 01871261, 1988 WL 921053 (EEOC July 6, 1988), req. for recon. den., EEOC Request No. 05980247 (July 15, 1988)). Thus, the time limitation is not triggered until a complainant should reasonably suspect discrimination, even if all the facts that might support the charge of discrimination have not yet become apparent.

Further, it is well-settled that when, as here, there is an issue of timeliness, "[a]n agency always bears the burden of obtaining sufficient information to support a reasoned determination as to timeliness." Williams v. Dep't of Def., EEOC Request No. 05920506, 1992 WL 1374923, *3 (EEOC Aug. 25, 1992). We conclude the Agency has not met this burden and erred in dismissing the complaint for untimely EEO counseling.

In its FAD, the Agency stated that it considered the date of the alleged adverse action to be October 2010, when Complainant assumed his temporary FLM position and, according to the Agency, knew that he would be returned to his former position at the expiration of the appointment. However, the Agency acknowledged in its FAD that "the date of the incident for the instant complaint is in dispute." It is clear that a permanent FLM vacancy was posted in June 2012 and a selection was made in July 2012, although the selectee later declined the position and the certificate of eligibles expired without any further selection being made.

The Agency argued that Complainant did not apply for the position, but Complainant claims that he did not formally apply because of his understanding that all temporary FLMs were automatically considered for vacant, permanent FLM positions. Further, Complainant stated that his desire for promotion was well known in the Miami facility. Whether, under the facts of this case, Complainant was or was not required to submit an application in order to be considered for the vacant permanent position goes to the merits of his complaint. At this stage of the proceedings, the inquiry is limited to whether Complainant has met the procedural

requisites to bring his EEO complaint in the Part 1614 process and if he has the legal right to come before the Commission. See, e.g., Complainant v. U.S. Equal Employment Opp. Commn., EEOC Appeal No. 0120120403, 2013 WL 6145999 (EEOC Nov. 13, 2013) (citing Ferrazzoli v. U.S. Postal Serv., EEOC Request No. 05910642, 1991 WL 1189594 (EEOC Aug. 15, 1991). We find that he has done so.

According to the affidavits of Complainant's first-level supervisor (S1) and second-level supervisor (S2): Individuals, including Complainant, competed for the temporary FLM appointments. The vacancy announcement for Complainant's temporary FLM appointment stated that appointment could "be extended, terminated, or become permanent without further competition." In February 2012, an announcement was made that a temporary FLM (Employee 1) had been converted to permanent status. Employee 1 did not compete for the permanent position. Subsequently, a second temporary FLM (Employee 2) had been converted to permanent status without competing for the position.[2] Neither S1 nor S2 explained the process by which temporary FLMs were converted to permanent status in their affidavits, although S2 stated that it was a matter of managerial discretion.

It is not reasonable for the Agency to argue that Complainant knew or should have known that he was being discriminated against with regard to conversion to a permanent position at the time he was appointed to a temporary FLM position. Complainant had no reason to know or to suspect at the time of his temporary appointment that he subsequently would not be selected for a permanent FLM position, let alone for discriminatory reasons. As the elevation of the two temporary FLMs demonstrates, conversion to a permanent FLM position was a realistic possibility for Complainant if a vacancy arose during his tenure. The Agency's position might have merit if Complainant's claim were that, when he was given a temporary appointment, other individuals outside of his protected group were given permanent appointments. But that is not the claim at bar. Rather, the claim is whether Complainant was treated disparately when he was not converted to permanent status nearly two years after his appointment.

The standard we apply to determine timeliness is when Complainant *reasonably* should have first suspected discrimination. Here, we find that Complainant could only reasonably have suspected that discrimination occurred after he learned he was not selected for conversion to the permanent FLM position on July 26, 2012, near the end of his two-year temporary assignment. See Howard, EEOC Request No. 05970852, 1999 WL 91430 (EEOC Feb. 11, 1999). Complainant's contact with an EEO Counselor on August 28, 2012, therefore, fell within the 45-day limitation period and was timely. Accordingly, we remand the complaint for further processing by the Agency consistent with the ruling below.

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[2] While Employee 2 was converted to permanent status to resolve an EEO complaint he had filed, there is no indication that the reason for his conversion to permanent status was common knowledge. S1 averred that Employee 2 would have qualified for conversion to permanent status in any event.

EEOC Jurisdiction over Complainant's Sex Discrimination Claim

The narrative accompanying his formal complaint makes clear that Complainant believes that he was denied a permanent position because of his sexual orientation. The Agency, in its final decision, indicated it would process this claim only under its internal procedures concerning sexual orientation discrimination and not through the 29 C.F.R. Part 1614 EEO complaint process. The Agency erred in this regard.

Title VII requires that "[a]ll personnel actions affecting [federal] employees or applicants for employment . . . shall be made free from any discrimination based on . . . sex." 42 U.S.C. § 2000e-16(a). This provision is analogous to the section of Title VII governing employment discrimination in the private sector at 42 U.S.C. § 2000e-2(a)(1) (it is unlawful for a covered employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex").

Title VII's prohibition of sex discrimination means that employers may not "rel[y] upon sex-based considerations" or take gender into account when making employment decisions. See Price Waterhouse v. Hopkins, 490 U.S. 228, 239, 241–42 (1989); Macy v. Dep't of Justice, EEOC Appeal No. 0120120821, 2012 WL 1435995, at *5 (EEOC Apr. 20, 2012) (quoting Price Waterhouse, 490 U.S. at 239).[3] This applies equally in claims brought by lesbian, gay, and bisexual individuals under Title VII.

When an employee raises a claim of sexual orientation discrimination as sex discrimination under Title VII, the question is not whether sexual orientation is explicitly listed in Title VII as a prohibited basis for employment actions. It is not. Rather, the question for purposes of Title VII coverage of a sexual orientation claim is the same as any other Title VII case involving allegations of sex discrimination—whether the agency has "relied on sex-based considerations" or "take[n] gender into account" when taking the challenged employment action.[4]

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[3] As used in Title VII, the term "sex" "encompasses both sex- that is, the biological differences between men and women - and gender." See Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000); see also Smith v. City of Salem, 378 F.3d 566, 572 (6th Cir. 2004) ("The Supreme Court made clear that in the context of Title VII, discrimination because of 'sex' includes gender discrimination."). As the Eleventh Circuit noted in Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011), six members of the Supreme Court in Price Waterhouse agreed that Title VII barred "not just discrimination because of biological sex, but also gender stereotyping—failing to act and appear according to expectations defined by gender." As such, the terms "gender" and "sex" are often used interchangeably to describe the discrimination prohibited by Title VII. See, e.g., Price Waterhouse v. Hopkins at 239 (1989) ("Congress' intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute.") (plurality opinion). We do the same in this decision.

[4] As we observed in Macy, 2012 WL 1435995 at *6:

In the case before us, we conclude that Complainant's claim of sexual orientation discrimination alleges that the Agency relied on sex-based considerations and took his sex into account in its employment decision regarding the permanent FLM position. The Complainant, therefore, has stated a claim of sex discrimination. Indeed, we conclude 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. A complainant alleging that an agency took his or her sexual orientation into account in an employment action necessarily alleges that the agency took his or her sex into account.

Discrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms. "Sexual orientation" as a concept cannot be defined or understood without reference to sex. A man is referred to as "gay" if he is physically and/or emotionally attracted to other men. A woman is referred to as "lesbian" if she is physically and/or emotionally attracted to other women. Someone is referred to as "heterosexual" or "straight" if he or she is physically and/or emotionally attracted to someone of the opposite-sex. See, e.g., American Psychological Ass'n, "Definition of Terms: Sex, Gender, Gender Identity, Sexual Orientation" (Feb. 2011), available at http://www.apa.org/pi/lgbt/resources/ sexuality-definitions.pdf ("*Sexual orientation* refers to the *sex* of those to whom one is sexually and romantically attracted." (second emphasis added). It 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. One can describe this inescapable link between allegations of sexual orientation discrimination and sex discrimination in a number of ways.

Sexual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex. For example, assume that an employer suspends a lesbian employee for displaying a photo of her female spouse on her desk, but does not suspend a male employee for displaying a photo of his female spouse on his desk. The lesbian employee in that example can allege that her employer took an adverse action against her that the employer would not have taken had she been male. That is a

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"'Title VII . . . identif[ies] one circumstance in which an employer may take gender into account in making an employment decision, namely, when gender is a 'bona fide occupational qualification [(BFOQ)] reasonably necessary to the normal operation of th[e] particular business or enterprise."' Price Waterhouse, 490 U.S. at 242 (quoting 42 U.S.C. §2000e-2(e)). Even then, "the [BFOQ] exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex."' [Dothard v. Rawlinson, 433 U.S. 321, 334 (1977).] See Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (Marshall, J., concurring) "The only plausible inference to draw from this provision is that, in all other circumstances, a person's gender may not be considered in making decisions that affect her." Price Waterhouse, 490 U.S. at 242.

legitimate claim under Title VII that sex was unlawfully taken into account in the adverse employment action. See Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 711 (1978) ("Such a practice does not pass the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'"). The same result holds true if the person discriminated against is straight. Assume a woman is suspended because she has placed a picture of her husband on her desk but her gay colleague is not suspended after he places a picture of his husband on his desk. The straight female employee could bring a cognizable Title VII claim of disparate treatment because of sex.

The court in Hall v. BNSF Ry. Co., No. 13-2160, 2014 WL 4719007 (W.D. Wash., Sept. 22 2014) adopted this analysis of Title VII. In that case, the court found that the plaintiff, a male who was married to another male, alleged sex discrimination under Title VII when he stated that he "experienced adverse employment action in the denial of the spousal health benefit, due to sex, where similarly situated females [married to males] were treated more favorably by getting the benefit." Id. at *2. The court recognized that the sexual orientation discrimination alleged by the plaintiff constituted an allegation that the employer was treating female employees with male partners more favorably than male employees with male partners simply because of the employee's sex. See also Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212, 1223 (D. Or. 2002) ("One way (but certainly not the only means) of [alleging a claim under Title VII] is to inquire whether the harasser would have acted the same if the gender of the victim had been different. A jury could find that [Heller's manager] would not have acted as she (allegedly) did if Plaintiff were a man dating a woman, instead of a woman dating a woman.") (internal citations omitted).[5]

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[5] Courts have also adopted this analysis in claims of sex discrimination under Title IX, the Due Process Clause, and the Equal Protection Clause. See Videckis v. Pepperdine Univ., ___ F. Supp. 3d ___, No. 15-298, 2015 WL 1735191 (C.D. Cal., 2015) ("[D]iscrimination based on a same-sex relationship could fall under the umbrella of sexual discrimination [prohibited by Title IX] even if such discrimination were not based explicitly on gender stereotypes. For example, a policy that female basketball players could only be in relationships with males inherently would seem to discriminate on the basis of gender."); Lawson v. Kelly, ___ F. Supp. 3d ___, 2014 WL 5810215, at *8 (W.D. Mo. Nov. 7, 2014) ("The State's permission to marry depends on the genders of the participants, so the restriction is a gender-based classification," and it violates the Equal Protection Clause); Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010) ("Sexual orientation discrimination can take the form of sex discrimination. Here, for example, Perry is prohibited from marrying Stier, a woman, because Perry is a woman. If Perry were a man, Proposition 8 would not prohibit marriage. Thus, Proposition 8 operates to restrict Perry's choice of marital partner because of her sex."), aff'd sub nom., Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), vacated and remanded sub nom, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013); cf. Obergefell v. Hodges, 576 U.S. ___, 2015 WL 2473451, *19 (2015) ("[I]t must be further acknowledged that [laws prohibiting same-sex marriage] abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right.").

Sexual orientation discrimination is also sex discrimination because it is associational discrimination on the basis of sex. That is, an employee alleging discrimination on the basis of sexual orientation is alleging that his or her employer took his or her sex into account by treating him or her differently for *associating* with a person of the same sex. For example, a gay man who alleges that his employer took an adverse employment action against him because he associated with or 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. Similarly, a heterosexual man who alleges a gay supervisor denied him a promotion because he dates women instead of men states an actionable Title VII claim of discrimination because of his sex.

In applying Title VII's prohibition of race discrimination, courts and the Commission have consistently concluded that the statute prohibits discrimination based on an employee's association with a person of another race, such as an interracial marriage or friendship. See, e.g., Floyd v. Amite County School Dist., 581 F.3d 244, 249 (5th Cir. 2009) ("This court has recognized that . . . Title VII prohibit[s] discrimination against an employee on the basis of a personal relationship between the employee and a person of a different race."); Holcomb v. Iona Coll., 521 F.3d 130, 138 (2d Cir. 2008) ("We . . . hold that an employer may violate Title VII if it takes action against an employee because of the employee's association with a person of another race.").[6] This is because an employment action based on an employee's relationship with a person of another race necessarily involves considerations of the employee's race, and thus constitutes discrimination because of the employee's race.

This analysis is not limited to the context of race discrimination. Title VII "on its face treats each of the enumerated categories"—race, color, religion, sex, and national origin—"exactly the same." Price Waterhouse, 490 U.S. at 243 n.9 ("[O]ur specific references to gender throughout this opinion, and the principles we announce, apply with equal force to discrimination based on race, religion, or national origin."); see also Whidbee v. Garzarelli Food Specialties, Inc., 223 F.3d 62, 69 n.6 (2d Cir. 2000) ("[T]he same standards apply to both race-based and sex-based hostile environment claims."); Williams v. Owens-Illinois, Inc., 665 F.2d 918, 929 (9th Cir. 1982) ("[T]he standard for proving sex discrimination and race discrimination is the same."); Horace v. City of Pontiac, 624 F.2d 765, 768 (6th Cir. 1980)

[6] See also Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick & GMC Trucks, Inc., 173 F.3d 988, 994 (6th Cir.1999) ("A white employee who is discharged because his child is biracial is discriminated against on the basis of his race . . . ."); Hancock v. Dep't of Transp., EEOC Appeal No. 01922416, 1992 WL 1371812 (EEOC Dec. 2, 1991), req. for recon. den., EEOC Request No. 05930356, 1993 WL 1510013 (EEOC Sept. 30, 1993) ("[A]n individual may be entitled to protection by virtue of association with a member of a protected class . . . ."); Robertson v. U.S. Postal Serv., EEOC Appeal No. 0120113558, 2013 WL 3865026 (EEOC Jul. 18, 2013), n. 1 (association discrimination may be established where evidence permits the inference that an agency's act or omission would not have occurred if the complainant and associate were of the same race).

("Both cases concern Title VII cases of race discrimination, but the same standards and order of proof are generally applicable to cases of sex discrimination.").

Therefore, Title VII similarly prohibits employers from treating an employee or applicant differently than other employees or applicants based on the fact that such individuals are in a same-sex marriage or because the employee has a personal association with someone of a particular sex. Adverse action on that basis is, "by definition," discrimination because of the employee or applicant's sex. Cf. Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 892 (11th Cir. 1986) ("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 [in violation of Title VII]."); Schroer v. Billington, 577 F. Supp. 2d 293, 307 n.8 (D.D.C. 2008) ("Discrimination because of race has never been limited only to discrimination for being one race or another. Instead, courts have recognized that Title VII's prohibition against race discrimination protects employees from being discriminated against because of an interracial marriage, or . . . friendships.").

Sexual orientation discrimination also is sex discrimination because it necessarily involves discrimination based on gender stereotypes. In Price Waterhouse, the Court reaffirmed that Congress intended Title VII to "strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." 490 U.S. at 251 (quoting Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)). In the wake of Price Waterhouse, courts and the Commission have recognized that lesbian, gay, and bisexual individuals can bring claims of gender stereotyping under Title VII if such individuals demonstrate that they were treated adversely because they were viewed—based on their appearance, mannerisms, or conduct—as insufficiently "masculine" or "feminine."[7] But as the Commission[8] and a number

[7] See Smith v. City of Salem, Ohio, 378 F.3d 566, 574 (6th Cir. 2004) ("It follows [from Price Waterhouse] that employers who discriminate against men because they . . . act femininely[ ] are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex."); EEOC v. Boh Brothers, 731 F.3d 444, 459-60 (5th Cir. 2013) (en banc) ("[A] jury could view Wolfe's behavior as an attempt to denigrate Woods because — at least in Wolfe's view — Woods fell outside of Wolfe's manly-man stereotype" and that would constitute sex discrimination in violation of Title VII).

[8] See Veretto v. United States Postal Service, EEOC Appeal No. 0120110873, 2011 WL 2663401 (EEOC July 1, 2011) (complainant's allegation of sexual orientation discrimination was a claim of sex discrimination because it was based on the sex stereotype that marrying a woman is an essential part of being a man); Castello v. U.S. Postal Service, EEOC Request No. 0520110649, 2011 WL 6960810 (EEOC Dec. 20, 2011) (complainant's allegation of sexual orientation discrimination was a claim of sex discrimination because it was based on the sex stereotype that having relationships with men is an essential part of being a woman); Baker v. Social Security Administration, EEOC Appeal No. 0120110008, 2013 WL 1182258 (EEOC January 11, 2013) (complainant's allegation of sexual orientation discrimination was a claim of sex discrimination because it was based on his gender non-conforming behavior); Dupras v. Dep't of Commerce, EEOC Request No. 0520110648, 2013 WL 1182329 (EEOC March 15, 2013) (complainant's allegation that she was subjected to stereotyping on

of federal courts[9] have concluded in cases dating from 2002 onwards, discrimination against people who are lesbian, gay, or bisexual on the basis of gender stereotypes often involves far more than assumptions about overt masculine or feminine behavior.

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the basis of sex because of her sexual orientation is sufficient to state a claim of sex discrimination under Title VII); Culp v. Dep't of Homeland Security, EEOC Appeal No. 0720130012, 2013 WL 2146756 (EEOC May 7, 2013) (complainant's allegation of sexual orientation discrimination states a claim of sex discrimination because it was an allegation that her supervisor was motivated by stereotypes that women should only have relationships with men); Brooker v. U.S. Postal Service, EEOC Request No. 0520110680 , 2013 WL 4041270 (EEOC May 20, 2013), (complainant's allegation that coworkers were spreading allegations about his sexual orientation was properly framed as a claim of sex discrimination); Complainant v. Dep't of Homeland Security, EEOC Appeal No. 0120110576, 2014 WL 4407457 (EEOC August 19, 2014) (reaffirming the analysis in the cases cited above).

[9] See Centola v. Potter, 183 F. Supp. 2d 403, 410 (D. Mass. 2002); Heller, 195 F. Supp. 2d at 1224 (D. Or. 2002) ("[A] jury could find that Cagle repeatedly harassed (and ultimately discharged) Heller because Heller did not conform to Cagle's stereotype of how a woman ought to behave. Heller is attracted to and dates other women, whereas Cagle believes that a woman should be attracted to and date only men."); Koren v. Ohio Bell, 894 F. Supp. 2d 1032, 1038 (N.D. Ohio 2012) ("And here, Koren chose to take his spouse's surname—a "traditionally" feminine practice—and his co-workers and superiors observed that gender non-conformance when Koren requested to be called by his married name."); Terveer v. Billington, 34 F. Supp. 3d 100, 116, 2014 WL 1280301 (D.D.C. 2014) (plaintiff stated a claim of discrimination on the basis of sex when he "alleged that he is a homosexual male whose sexual orientation is not consistent with the Defendant's perception of acceptable gender roles, that his status as a homosexual male did not conform to the Defendant's gender stereotypes associated with men under Mech's supervision or at the LOC, and that his orientation as homosexual had removed him from Mech's preconceived definition of male.") (internal citations and quotes omitted); Boutillier v. Hartford Public Schools, 2014 WL 4794527 (D. Conn. 2014) (denying an employer's motion to dismiss by finding that plaintiff, a lesbian, had set forth a plausible claim that she was discriminated against based on sex due to her non-conforming gender behavior); Deneffe v. SkyWest, Inc., 2015 WL 2265373, at *6 (D. Colo. May 11, 2015) (denying employer's motion to dismiss by finding that plaintiff, a homosexual male, had sufficiently alleged that he failed to conform to male stereotypes by not taking part in male "braggadocio" about sexual exploits with women, not making jokes about gay pilots, designating his same-sex partner as beneficiary, and flying with his same sex partner on employer flights) cf. Latta v. Otter, 771 F.3d 456, 474 (9th Cir. 2014) (finding that plaintiffs had sufficiently established that marriage laws in Idaho and Nevada violated the Equal Protection Clause of the Fourteenth Amendment by discriminating on the basis of sexual orientation, but also stating that "the constitutional restraints the Supreme Court has long imposed on sex-role stereotyping . . . may provide another potentially persuasive answer to defendant's theory."); Id. at 495 (Berzon, J. concurring) ("[I]t bears noting that the social exclusion and state discrimination against lesbian, gay, bisexual, and transgender people reflects, in large part, disapproval of their nonconformity with gender-based expectations.").

Sexual orientation discrimination and harassment "[are] often, if not always, motivated by a desire to enforce heterosexually defined gender norms." Centola v. Potter, 183 F. Supp. 2d 403, 410 (D. Mass. 2002). The Centola court continued:

> In fact, stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women. While one paradigmatic form of stereotyping occurs when co-workers single out an effeminate man for scorn, in fact, the issue is far more complex. The harasser may discriminate against an openly gay co-worker, or a co-worker that he perceives to be gay, whether effeminate or not, because he thinks, "real" men should date women, and not other men.

Id.

Those deeper assumptions and stereotypes about "real" men and "real" women were similarly noted by the court in Terveer v. Library of Congress in rejecting the government's motion to dismiss:

> Under Title VII, allegations that an employer is discriminating against an employee based on the employee's non-conformity with sex stereotypes are sufficient to establish a viable sex discrimination claim. See Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) ("we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."). Here, Plaintiff has alleged that he is "a homosexual male whose sexual orientation is not consistent with the Defendant's perception of acceptable gender roles," that his "status as a homosexual male did not conform to the Defendant's gender stereotypes associated with men under [his supervisor's] supervision or at the LOC," and that "his orientation as homosexual had removed him from [his supervisor's] preconceived definition of male." As Plaintiff has alleged that Defendant denied him promotions and created a hostile work environment because of Plaintiff's nonconformity with male sex stereotypes, Plaintiff has met his burden of setting forth "a short and plain statement of the claim showing that the pleader is entitled to relief."

Terveer v. Billington. 34 F. Supp. 3d 100, 116 (D.D.C. 2014) (citations omitted) (first quoting Pl.'s Am. Compl.; then quoting Fed. R. Civ. P. 8(a)).

In the past, courts have often failed to view claims of discrimination by lesbian, gay, and bisexual employees in the straightforward manner described above.[10] Indeed, many courts

[10] A review of cases cited for the proposition that sexual orientation is excluded from Title VII reveals that many courts simply cite earlier and dated decisions without any additional analysis. For example,

have gone to great lengths to distinguish adverse employment actions based on "sex" from adverse employment actions based on "sexual orientation." The stated justification for such intricate parsing of language has been the bare conclusion that "Title VII does not prohibit . . . discrimination because of sexual orientation." Dawson v. Bumble & Bumble, 398 F.3d 211, 217 (2d Cir. 2005) (quoting Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000)). For that reason, courts have attempted to distinguish discrimination based on sexual orientation from discrimination based on sex, even while noting that the "borders [between the two classes] are . . . imprecise." Id. (alteration in original).[11]

Some of these decisions reason that Congress in 1964 did not intend Title VII to apply to sexual orientation and, therefore, Title VII could not be interpreted to prohibit such discrimination. See, e.g., DeSantis v. Pacific Telephone & Telegraph Co., 608 F.2d 327, 329 (9th Cir. 1979) ("Congress had only the traditional notions of 'sex' in mind" when it passed Title VII and those "traditional notions" did not include sexual orientation or sexual preference.) abrogated by Nichols v. Azteca Restaurant Enterprises, Inc., 256 F.3d 864, 875 (9th Cir. 2001).[12]

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in a brief to the Seventh Circuit Court of Appeals requesting rehearing based on various broad declaratory statements that Title VII does not cover sexual orientation, the EEOC pointed out that only one previous Seventh Circuit case had analyzed the question of coverage of sexual orientation discrimination under Title VII and that case, decided in 1984, had not been reviewed in light of subsequent decisions such as Price Waterhouse. Instead, a string of Seventh Circuit panel decisions had simply reiterated the holding in the first case without any further discussion. Br. EEOC Supp. Reh'g 8-9, Muhammad v. Caterpillar Inc., ECF No. 49, No. 12-1723 (7th Cir. Oct. 7, 2014). The Seventh Circuit denied the request for rehearing but reissued its decision without the statements that sexual orientation discrimination is not covered under Title VII. See Muhammad v. Caterpillar, 767 F.3d 694 (7th Cir. 2014), 2014 WL 4418649 (7th Cir. Sept. 9, 2014, as Amended on Denial of Rehearing, Oct. 16, 2014).

[11] We do not view the borders between sex discrimination and sexual orientation as "imprecise." As we note above, discrimination on the basis of sexual orientation necessarily involves discrimination on the basis of sex.

[12] Indeed, the Equal Employment Opportunity Commission's own understanding of Title VII's application to sexual orientation discrimination has developed over time. Compare Johnson v. U.S. Postal Serv., EEOC Appeal No. 01911827, 1991 WL 1189760, at *3 (EEOC Dec. 19, 1991) (holding that Title VII's prohibition of discrimination based on sex does not include sexual preference or sexual orientation), and Morrison v. Dep't of the Navy, EEOC Appeal No. 01930778, 1994 WL 746296, at *3 (EEOC June 16, 1994) (affirming that Title VII's discrimination prohibition does not include sexual preference or orientation as a basis), with Morris v. U.S. Postal Serv., EEOC Appeal No. 01974524, 2000 WL 226001, at *1-2 (EEOC Feb. 9, 2000) (distinguishing Johnson and Morrison and holding that complainant stated a valid Title VII claim by alleging that her female supervisor and former lover discriminated against her on the basis of her sex). Former Acting Chairman of the EEOC Stuart Ishimaru acknowledged the varying protections to protect LGBT employees and explained that federal decisions have been inconsistent in this area. See Employment Non-Discrimination Act of 2009:

Congress may not have envisioned the application of Title VII to these situations. But as a unanimous Court stated in Oncale v. Sundowner Offshore Services, Inc., "statutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." 523 U.S. 75, 79, 78-80 (1998) (holding that same-sex harassment is actionable under Title VII). Interpreting the sex discrimination prohibition of Title VII to exclude coverage of lesbian, gay or bisexual individuals who have experienced discrimination on the basis of sex inserts a limitation into the text that Congress has not included.[13] Nothing in the text of Title VII "suggests that Congress intended to confine the benefits of [the] statute to heterosexual employees alone." Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d. 1212, 1222 (D. Or. 2002).

Some courts have also relied on the fact that Congress has debated but not yet passed legislation explicitly providing protections for sexual orientation. See Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 261 (3d Cir. 2001) ("Congress has repeatedly rejected legislation that would extend Title VII to cover sexual orientation.").[14] But the Supreme Court has ruled that "[c]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990) (citation omitted) (internal quotation marks omitted).

The idea that congressional action is required (and inaction is therefore instructive in part) rests on the notion that protection against sexual orientation discrimination under Title VII would create a new class of covered persons. But analogous case law confirms this is not true. When courts held that Title VII protected persons who were discriminated against because of their relationships with persons of another race, the courts did not thereby create a new

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Hearing on H.R. 3017 Before the H. Comm. on Educ. & Labor, 111th Cong. (2009) (statement of Stuart J. Ishimaru, Acting Chairman, U.S. Equal Employment Opportunity Commission).

[13] Title VII prohibits discrimination on the basis of "sex" without further definition or restriction and it is not our province to modify that text by adding limitations to it. As the Supreme Court noted recently in a different context, "[t]he problem with this approach is the one that inheres in most incorrect interpretations of statutes: It asks to add words to the law to produce what is thought to be a desirable result. That is Congress's province." EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. ___ (2015), 135 S.Ct. 2028, 2033, 2015 WL 2464053, *4 (2015).

[14] See also Medina v. Income Support Div., 413 F.3d 1131, 1135 (10th Cir. 2005) (citing Bibby and Simonton (see infra) with approval); Rene v. MGM Grand Hotel, Inc., 243 F.3d 1206, 1209 (9th Cir. 2001) ("Title VII has not been amended to prohibit discrimination based on sexual orientation."); Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000) ("Congress's refusal to expand the reach of Title VII is strong evidence of congressional intent.").

protected class of "people in interracial relationships." See e.g., Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581, 588-89 (5th Cir. 1998), reinstated in relevant part, Williams v. Wal-Mart Stores, Inc., 182 F.3d 333 (5th Cir. 1999) (en banc). And when the Supreme Court decided that Title VII protected persons discriminated against because of gender stereotypes held by an employer, it did not thereby create a new protected class of "masculine women." See Price Waterhouse, 490 U.S. at 239-40 (plurality opinion). Similarly, when ruling under Title VII that discrimination against an employee because he lacks religious beliefs is religious discrimination, the courts did not thereby create a new Title VII basis of "non-believers." See e.g., EEOC v. Townley Eng'g & Mfg. Co., 859 F. 2d. 610, 621 (9th Cir. 1988). These courts simply applied existing Title VII principles on race, sex, and religious discrimination to these situations. Further, the Supreme Court was not dissuaded by the absence of the word "mothers" in Title VII when it decided that the statute does not permit an employer to have one hiring policy for women with pre-school children and another for men with pre-school children. See Phillips v. Martin-Marietta, 400 U.S. 542, 543-44 (1971) (per curiam). The courts have gone where the principles of Title VII have directed.

Our task is the same. We apply the words of the statute Congress has charged us with enforcing. We therefore conclude that Complainant's allegations of discrimination on the basis of sexual orientation state a claim of discrimination on the basis of sex. We further conclude that allegations of discrimination on the basis of sexual orientation necessarily state a claim of discrimination on the basis of sex. An employee could show that the sexual orientation discrimination he or she experienced was sex discrimination because it involved treatment that would not have occurred but for the individual's sex; because it was based on the sex of the person(s) the individual associates with; and/or because it was premised on the fundamental sex stereotype, norm or expectation that individuals should be attracted only to those of the opposite sex.[15] Agencies should treat claims of sexual orientation discrimination as complaints of sex discrimination under Title VII and process such complaints through the ordinary Section 1614 process.

We recognize that many agencies also have separate complaint processes in place for claims of sexual orientation discrimination. Agencies may maintain, and employees may still utilize, these procedures if they wish. But the 1614 process is the most appropriate method for resolving these claims. Agencies should make applicants and employees aware that claims of sexual orientation discrimination will ordinarily be processed under Section 1614 as claims of sex discrimination unless the employee requests that the alternative complaint process be used.

CONCLUSION

Accordingly, we conclude that Complainant's allegations of discrimination on the basis of his sexual orientation state a claim of discrimination on the basis of sex within the meaning of Title

[15] There may be other theories for establishing sexual orientation discrimination as sex discrimination, on which we express no opinion.

VII. Furthermore, we conclude that Complaint's initial EEO counselor contact was timely. We remand the Complainant's claim of discrimination to the Agency for further processing to determine its validity on the merits.

ORDER

The Agency is ordered to continue processing the remanded claims. The Agency shall acknowledge to the Complainant that it has received the remanded claims **within thirty (30) calendar days** of the date this decision becomes final. The Agency shall reissue to Complainant a copy of the investigative file and also shall notify Complainant of the appropriate rights **within thirty (30) calendar days** of the date this decision becomes final, unless the matter is otherwise resolved prior to that time. If the Complainant requests a final decision without a hearing, the Agency shall issue a final decision on the merits of his discrimination claims **within sixty (60) days** of receipt of Complainant's request.

A copy of the Agency's letter of acknowledgment to Complainant and a copy of the notice that transmits the investigative file and notice of rights must be sent to the Compliance Officer as referenced below.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0610)

Compliance with the Commission's corrective action is mandatory. The Agency shall submit its compliance report **within thirty (30) calendar days** of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. The Agency's report must contain supporting documentation, and the Agency must send a copy of all submissions to the Complainant. If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated. See 29 C.F.R. § 1614.409.

STATEMENT OF RIGHTS - ON APPEAL

RECONSIDERATION (M0610)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which tends to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or

2. The appellate decision will have a substantial impact on the policies, practices, or operations of the Agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) within thirty (30) calendar days of receipt of this decision or within twenty (20) calendar days of receipt of another party's timely request for reconsideration. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you instead wish to file a civil action, you have the right to file such action in an appropriate United States District Court within ninety (90) calendar days from the date that you receive this decision. In the alternative, you may file a civil action after one hundred and eighty (180) calendar days of the date you filed your complaint with the Agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. Filing a civil action will terminate the administrative processing of your complaint.

RIGHT TO REQUEST COUNSEL (Z0610)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request from the Court that the Court appoint an attorney to represent you and that the Court also permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(f)(1) ("Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security"); the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). **The grant or denial of the request is within the sole discretion of the Court.** Filing a request for an attorney with the Court does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File a Civil Action").

FOR THE COMMISSION:

Bernadette B. Wilson
Acting Executive Officer
Executive Secretariat

July 16, 2015
Date

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Examples of Court Decisions Supporting Coverage of LGBT-Related Discrimination Under Title VII

Supreme Court Decisions on the Scope of Title VII's Sex Discrimination Provision

Oncale v. Sundowner Offshore Services, 523 U.S. 75 (1998). The Supreme Court held that same-sex harassment is sex discrimination under Title VII. Justice Scalia noted in the majority opinion that, while same-sex harassment was "assuredly not the principal evil Congress was concerned with when it enacted Title VII . . .statutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits 'discriminat[ion] . . . because of . . . sex.' [This] . . . must extend to [sex-based] discrimination of any kind that meets the statutory requirements." Id. at 79-80.

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). The Supreme Court recognized that employment discrimination based on sex stereotypes (e.g., assumptions and/or expectations about how persons of a certain sex should dress, behave, etc.) is unlawful sex discrimination under Title VII. Price Waterhouse had denied Ann Hopkins a promotion in part because other partners at the firm felt that she did not act as woman should act. She was told, among other things, that she needed to "walk more femininely, talk more femininely, [and] dress more femininely" in order to secure a partnership. Id. at 230-31, 235. The Court found that this constituted evidence of sex discrimination as "[i]n the . . . context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." Id. at 250. The Court further explained that Title VII's "because of sex" provision strikes at the "entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Id.* (quoting City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978) (internal citation omitted)).

Federal Court Decisions Supporting Coverage for Transgender Individuals as Sex Discrimination

Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011). The plaintiff, a transgender female,

brought a claim under 42 U.S.C. § 1983 alleging unlawful discrimination based on sex in violation of the Equal Protection Clause when she was terminated from her position with the Georgia General Assembly. Relying on Price Waterhouse and other Title VII precedent, the court concluded that the defendant discriminated against the plaintiff based on her sex by terminating her because she was transitioning from male to female. The court stated that a person is considered transgender "precisely because of the perception that his or her behavior transgresses gender stereotypes." As a result, there is "congruence" between discriminating against transgender individuals and discrimination on the basis of "gender-based behavioral norms." Because everyone is protected against discrimination based on sex stereotypes, such protections cannot be denied to transgender individuals. "The nature of the discrimination is the same; it may differ in degree but not in kind." The court further concluded that discrimination based on sex stereotypes is subject to heightened scrutiny under the Equal Protection Clause, and government termination of a transgender person for his or her gender nonconformity is unconstitutional sex discrimination. Although in this case the defendant asserted that it fired the plaintiff because of potential lawsuits if she used the women's restroom, the record showed that the plaintiff's office had only single-use unisex restrooms, and therefore there was no evidence that the defendant was actually motivated by litigation concerns about restroom use. The defendant provided no other justification for its action, and therefore, the plaintiff was entitled to summary judgment.

Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004). The plaintiff alleged that he was suspended based on sex after he began to express a more feminine appearance and notified his employer that he would eventually undergo a complete physical transformation from male to female. The court held that Title VII prohibits discrimination against transgender individuals based on gender stereotyping. The court determined that discrimination against an individual for gender-nonconforming behavior violates Title VII irrespective of the cause of the behavior. The court reasoned that the "narrow view" of the term "sex" in prior case law denying Title VII protection to transgender employees was "eviscerated" by Price Waterhouse, in which the Supreme Court held that Title VII protected a woman who failed to conform to social expectations about how women should look and behave.

Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005). Plaintiff, who "was a male-to-female transsexual who was living as a male while on duty but often lived as a woman off duty [and] had a reputation throughout the police department as a homosexual, bisexual or cross-dresser," alleged he was demoted because of his failure to conform to sex stereotypes. The court held that this stated a claim of sex discrimination under Title VII.

Rosa v. Parks W. Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000). Citing Title VII case law, the court concluded that a transgender plaintiff, who was biologically male, stated a claim of sex discrimination under the Equal Credit Opportunity Act by alleging that he was denied a loan application because he was dressed in traditionally female attire.

Schwenck v. Hartford, 204 F.3d 1187, 1201-02 (9th Cir. 2000). Citing Title VII case law, the court concluded that a transgender woman stated a claim of sex discrimination under the Gender Motivated Violence Act based on the perception that she was a "man who 'failed to act like one.'" The court noted that "the initial approach" taken in earlier federal appellate

Title VII cases rejecting claims by transgender plaintiffs "has been overruled by the language and logic of Price Waterhouse."

EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., ___ F. Supp. 3d ___, 2015 WL 1808308 (E.D. Mich. Apr. 21, 2015). Denying the employer's motion to dismiss a Title VII sex discrimination claim brought on behalf of a terminated funeral home employee who was a transgender woman, the court held: "[I]f the EEOC's complaint had alleged that the Funeral Home fired Stephens based solely upon Stephens's status as a transgender person, then this Court would agree with the Funeral Home that the EEOC's complaint fails to state a claim under Title VII. But the EEOC's complaint also asserts that the Funeral Home fired Stephens 'because Stephens did not conform to the [Funeral Home's] sex- or gender-based preferences, expectations, or stereotypes' (Compl. at ¶ 15). And binding Sixth Circuit precedent establishes that any person without - regard to labels such as transgender - can assert a sex-stereotyping gender-discrimination claim under Title VII, under a Price Waterhouse theory, if that person's failure to conform to sex stereotypes was the driving force behind the termination. This Court therefore concludes that the EEOC's complaint states a claim as to Stephens's termination."

Lewis v. High Point Regional Health System, ___ F. Supp. 3d ___, 2015 WL 221615 (E.D.N.C. Jan. 15, 2015). Plaintiff, a certified nursing assistant, alleged she was denied hire for several positions because of her transgender status. At the time of her interviews, she was anatomically male, and was undergoing hormone replacement therapy in preparation for sex reassignment surgery in the future. Denying the employer's motion to dismiss her Title VII sex discrimination claim, the court ruled that Title VII's sex discrimination provision prohibits discrimination related to transgender status.

Finkle v. Howard Cnty., Md., 122 Fair Empl. Prac. Cas. (BNA) 861, 2014 WL 1396386 (D. Md. Apr. 10, 2014). Denying the county's motion to dismiss or for summary judgment on a Title VII claim brought by a volunteer auxiliary police officer, the court ruled that the officer was an "employee" for Title VII purposes, and that her claim that she was discriminated against "because of her obvious transgendered status" raised a cognizable claim of sex discrimination. The court reasoned: "[I]t would seem that any discrimination against transsexuals (as transsexuals) - individuals who, by definition, do not conform to gender stereotypes - is proscribed by Title VII's proscription of discrimination on the basis of sex as interpreted by Price Waterhouse. As Judge Robertson offered in Schroer[v. Billington, 577 F. Supp. 2d 293 (D.D.C. 2008)], '[u]ltimately I do not think it matters for purposes of Title VII liability whether the Library withdrew its offer of employment because it perceived Schroer to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual.'"

Parris v. Keystone Foods, 2013 WL 4010288 (N.D. Ala. Aug. 7, 2013), appeal docketed, No. 13-14495-D (Oct. 1, 2013). Plaintiff, a transgender female, alleged that she was discharged from her job at a chicken processing facility because of her "gender non-conformity." The district court, citing Glenn v. Brumby, recognized that the plaintiff's claims were covered by Title VII's sex discrimination prohibitions, but granted summary judgment to the employer on the ground that plaintiff's comparator evidence and evidence of discriminatory remarks by coworkers did not show that her discharge was motivated by her gender identity as opposed

to the legitimate non-discriminatory reason proffered by the employer.

Radtke v. Miscellaneous Drivers & Helpers Union Local #638 Health, Welfare, Eye, & Dental Fund, 867 F. Supp. 2d 1023 (D. Minn. 2012). Assessing a claim under ERISA for wrongful termination of benefits to a legal spouse of a transgender individual, the court quoted the language from Smith v. City of Salem that the Supreme Court's decision in Price Waterhouse "eviscerated" the "narrow view" of "sex" articulated in earlier Title VII cases, and observed: "An individual's sex includes many components, including chromosomal, anatomical, hormonal, and reproductive elements, some of which could be ambiguous or in conflict within an individual."

Schroer v. Billington, 577 F. Supp. 2d 293 (D.D.C. 2008). The plaintiff, a transgender female, was offered a position as a terrorism research analyst before she had changed her name and begun presenting herself as a woman. After the plaintiff notified the employer that she was under a doctor's care for gender dysphoria and would be undergoing gender transition, the employer withdrew the offer, explaining that the plaintiff would not be a "good fit." The court stated that since the employer refused to hire the plaintiff because she planned to change her anatomical sex by undergoing sex reassignment surgery, the employer's decision was literally discrimination "because of ... sex." The court analogized the plaintiff's claim to one in which an employee is fired because she converted from Christianity to Judaism, even though the employer does not discriminate against Christians or Jews generally but only "converts." Since such an action would be a clear case of discrimination "because of religion," Title VII's prohibition of discrimination "because of sex" must correspondingly encompass discrimination because of a change of sex. The court concluded that decisions rejecting claims by transgender individuals "represent an elevation of 'judge-supposed legislative intent over clear statutory text,'" which is "no longer a tenable approach to statutory construction."

Lopez v. River Oaks Imaging & Diagnostic Group, Inc., 542 F. Supp. 2d 653 (S.D. Tex. 2008). The plaintiff alleged that she was subjected to sex discrimination when the employer rescinded its job offer after learning that she was transgender. Denying the employer's motion for summary judgment, the court concluded that the plaintiff's claim was actionable as sex discrimination under Title VII on the theory that she failed to comport with the employer's notions of how a male should look. A finder of fact might reasonably conclude that the employer's statement that the job offer was rescinded because she had "misrepresented" herself as female reflected animus against individuals who do not conform to gender stereotypes.

Mitchell v. Axcan Scandipharm, Inc., No. 05-243, 2006 WL 456173, at *2 (W.D. Pa. 2006). Plaintiff alleged sex-based harassment and termination in violation of Title VII after the employer learned that plaintiff had been diagnosed with gender identity disorder and plaintiff began presenting at work as a female after having presented as a male during the first four years of employment. Denying the employer's motion to dismiss, the court held that because the complaint "included facts showing that his failure to conform to sex stereotypes of how a man should look and behave was the catalyst behind defendant's actions, plaintiff has sufficiently pleaded claims of gender discrimination."

Tronetti v. TLC HealthNet Lakeshore Hosp., No. 03-cv-375E, 2003 WL 22757935, at *4 (W.D.N.Y. 2003). Relying on the reasoning in Schwenck v. Hartford, 204 F.3d 1187, 1201-02 (9th Cir. 2000), the court ruled that plaintiff's sex discrimination claims of hostile work environment harassment and discriminatory discharge arising from her transition and sex reassignment surgery were actionable under Title VII, based on factual allegations that she was discriminated against for "failing to act like a man." See also Doe v. United Consumer Fin. Servs., No. 1:01-cv-1112, 2001 WL 34350174, at *2-5 (N.D. Ohio 2001).

Creed v. Family Express Corp., 101 Fair Empl. Prac. Cas. (BNA) 609, 2007 WL 2265630 (N.D. Ind. Aug. 3, 2007). The plaintiff, a transgender female, alleged facts permitting an inference that she was terminated because of gender stereotypes; specifically, that she was perceived by her employer to be a man while employed as a sales associate and was fired for refusing to present herself in a masculine way. See also Hunter v. United Parcel Serv., 697 F.3d 697 (8th Cir. 2012) (affirming summary judgment for the employer under both Title VII and state law, the court did not rule that such discrimination was not actionable under Title VII, but rather that there was no evidence that the prospective employer knew or perceived that plaintiff was transgender during the job interview, and therefore a prima facie case of sex discrimination was not established).

Miles v. New York Univ., 979 F. Supp. 248, 249-50 (S.D.N.Y. 1997). Noting that the phrase "on the basis of sex" in Title IX is interpreted in the same manner as similar language in Title VII, the court held that a transgender female student could proceed with a claim that she was sexually harassed "on the basis of sex" in violation of Title IX.

Federal Court Decisions Supporting Coverage of Sexual Orientation-Related Discrimination as Sex Discrimination

Muhammad v. Caterpillar Inc., 767 F.3d 694 (7th Cir. Sept. 9, 2014, as amended on denial of rehearing, Oct. 16, 2014). Plaintiff alleged that hostile work environment harassment relating to his perceived sexual orientation was sex-based harassment in violation of Title VII. Affirming the district court's grant of summary judgment to the employer, the appellate court ruled that the employer took prompt remedial action once on notice of the harassment. As urged by the EEOC in an amicus brief filed in connection with plaintiff's petition for rehearing, the court denied the petition but amended its original decision to delete language that had stated sexual orientation-related discrimination claims are not actionable under Title VII.

Latta v. Otter, 771 F.3d 456 (9th Cir. 2014). The 9th Circuit Court of Appeals held that statutes and constitutional amendments in Idaho and Nevada prohibiting same-sex marriages and refusing to recognize same-sex marriages validly performed in other states violated the Equal Protection Clause. The opinion of the court held that the laws were invalid as they discriminated on the basis of sexual orientation without sufficient justification. It also noted that "the constitutional restraints the Supreme Court has long imposed on sex-role stereotyping . . . may provide another potentially persuasive answer to defendant's theory." Id. at 474. A concurrence by Judge Berzon focused exclusively on the sex discrimination argument. Her opinion stated that she would have found that the Idaho and Nevada laws unlawfully discriminated on the basis of sex as, among other reasons, "the social exclusion and state discrimination against lesbian, gay, bisexual, and transgender people reflects, in

large part, disapproval of their nonconformity with gender-based expectations." Id. at 495.

Videckis v. Pepperdine University, 2015 WL 1735191 (C.D. Cal. 2015). Pepperdine University filed a motion to dismiss plaintiff's Title IX claim, stating that the plaintiff alleged sexual orientation discrimination and not sex discrimination. The district court granted the motion but gave the plaintiff leave to amend the complaint, noting that "discrimination based on a same-sex relationship could fall under the umbrella of sex[] discrimination." Id. at 8. The court further stated that plaintiffs could frame an argument of sexual orientation discrimination as sex discrimination using either a gender-stereotype approach or a plain-text argument. To illustrate the plain-text example, the court noted that "a policy that female basketball players could only be in relationships with males inherently would seem to discriminate on the basis of gender . . . the gender discrimination would be that female players would be prevented from entering into relationships with other females because their chosen partner was female." Id.

Boutillier v. Hartford Public Schools, 2014 WL 4794527 (D. Conn. Sept. 25, 2014). The court denied the employer's motion to dismiss a Title VII sex discrimination claim alleging adverse employment actions occurring after management learned of her sexual orientation. The allegation that plaintiff was "subjected to sexual stereotyping during her employment on the basis of her sexual orientation" was held actionable as sex discrimination under Title VII because it sets forth "a plausible claim that she was discriminated against based on her non-conforming gender behavior."

Hall v. BNSF Railway Co., 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014). Denying an employer's motion to dismiss a Title VII sex discrimination claim challenging the employer's policy of providing health insurance coverage for employees' legally married opposite-sex spouses but not same-sex spouses, the court found that the allegations were sufficient to allege discrimination based on the sex of the employee.

Terveer v. Billington, 2014 WL 1280301 (D.D.C. Mar. 31, 2014). Denying the employer's motion to dismiss the plaintiff's Title VII sex discrimination claims for denial of promotion and harassment because of non-conformance with sex stereotypes, the court found sufficient the plaintiff's allegations that he is "a homosexual male whose sexual orientation is not consistent with the Defendant's perception of acceptable gender roles," that his "status as a homosexual male did not conform to the Defendant's gender stereotypes associated with men [at his workplace]," and "his orientation as homosexual had removed him from [his supervisor's] preconceived definition of male."

Centola v. Potter, 183 F. Supp. 2d 403 (D. Mass. 2002). In dicta, the court explained: "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 stereotype about the proper roles of men and women."

Koren v. Ohio Bell Telephone Co., 2012 WL 3484825 (N.D. Ohio Aug. 14, 2012). Denying defendant's motion for summary judgment where plaintiff alleged his supervisor discriminated against him based on sex stereotypes because he is married to a man and took his husband's last name, the court held: "That *is* a claim of discrimination because of sex." (emphasis in original).

Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002). In a Title VII sex harassment case brought by a lesbian employee who was subjected to negative comments about her sex life, the court stated that the belief that men or women should only be attracted to or date persons of the opposite sex constitutes a gender stereotype. "If an employer subjected a heterosexual employee to the sort of abuse allegedly endured by Heller-including numerous unwanted offensive comments regarding her sex life-the evidence would be sufficient to state a claim for violation of Title VII. The result should not differ simply because the victim of the harassment is homosexual." In this case, the court held, a jury could find that [the manager] repeatedly harassed (and ultimately discharged) Heller because Heller did not conform to Cagle's stereotype of how a woman ought to behave. Heller is attracted to and dates other women, whereas Cagle believes that a woman should be attracted to and date only men."

Strong v. Grambling State University, 2015 WL 1401335 (W.D. La. Mar. 25, 2015). The court analyzed on the merits plaintiff's claim that he was subject to sex discrimination in violation of Title VII based on his "gender status as heterosexual" because "women and homosexuals earn higher salaries than he does and receive pay increases where he does not." Granting the employer's motion for summary judgment, the court found there was insufficient evidence to support an inference of discriminatory intent.

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What You Should Know About EEOC and the Enforcement Protections for LGBT Workers

Recent activities by EEOC, including the filing of lawsuits on behalf of transgender employees, the filing of amicus briefs related to coverage of sexual orientation and transgender status, and the issuance of federal sector decisions in these areas, have triggered increased interest about protections for lesbian, gay, bisexual and transgender (LGBT) individuals under federal employment-discrimination laws. The information below highlights what you should know about the EEOC's enforcement efforts on behalf of LGBT individuals.

Overview

The EEOC is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. These federal laws also prohibit employers from retaliating against workers who oppose discriminatory employment practices - for example, by reporting incidents of sexual harassment to their supervisor or human resources department - or against those who file EEOC charges or cooperate with an EEOC investigation. Where these federal laws apply, they protect all workers, regardless of sexual orientation or gender identity.

Employers and employees often have questions about whether discrimination related to LGBT status is prohibited under the laws the EEOC enforces. While Title VII of the

See Also:

- Recent EEOC Litigation-Related Developments Regarding Coverage of LGBT-Related Discrimination under Title VII
- Examples of Court Decisions Supporting Coverage of LGBT-Related Discrimination Under Title VII
- Federal Sector Cases Involving LGBT Individuals
- Addressing Sexual Orientation and Gender Identity Discrimination in Federal Civilian Employment: A Guide to Employment Rights, Protections, and Responsibilities

Civil Rights Act of 1964 does not explicitly include sexual orientation or gender identity in its list of protected bases, the Commission, consistent with case law from the Supreme Court and other courts, interprets the statute's sex discrimination provision as prohibiting discrimination against employees on the basis of sexual orientation and gender identity.

The Commission's Strategic Enforcement Plan (SEP), adopted by a bipartisan vote in December of 2012, lists "coverage of lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions, as they may apply" as an enforcement priority for FY2013-2016. This enforcement priority is consistent with positions the Commission has taken in recent years regarding the intersection of LGBT-related discrimination and Title VII's prohibition on sex discrimination.

In 2012, the EEOC held that discrimination against an individual because that person is transgender (also known as gender identity discrimination) is discrimination because of sex and therefore is prohibited under Title VII. *See Macy v. Department of Justice*, EEOC Appeal No. 0120120821 (April 20, 2012). The Commission has also held that discrimination against an individual because of that person's sexual orientation is discrimination because of sex and therefore prohibited under Title VII. See *David Baldwin v. Dep't of Transportation*, EEOC Appeal No. 0120133080 (July 15, 2015).

Consistent with case law from the Supreme Court and other courts, the Commission takes the position that discrimination against an individual because that person is transgender is a violation of Title VII's prohibition of sex discrimination in employment. Therefore, the EEOC's district, field, area and local offices will accept and investigate charges from individuals who believe they have been discriminated against because of transgender status (or because of gender identity or a gender transition).

The Commission also takes the position, consistent with case law from the Supreme Court and other courts referenced at the previous link, that discrimination against an individual because of that person's sexual orientation is a violation of Title VII. The Commission accepts and investigates charges alleging sexual-orientation discrimination in employment.

Charge Data

In January 2013, the EEOC began tracking information on charges filed alleging discrimination related to gender identity and/or sexual orientation. In the final three quarters of FY 2013 (January through September), EEOC received 643 charges that included allegations of sex discrimination related to sexual orientation and 147 charges that included allegations of sex discrimination based on gender identity/transgender status. In FY 2014, the EEOC received 918 charges that included allegations of sex discrimination related to sexual orientation and 202 charges that included allegations of sex discrimination based on gender identity/transgender status. For the first two quarters of FY 2015, EEOC received 505 charges that included allegations of sex discrimination related to sexual orientation and 112 charges that included allegations of sex discrimination based on gender identity/transgender status.

The chart below shows charges received or resolved between January 2013 and March 31, 2015 that included an allegation of sex discrimination related to gender identity/transgender

or sexual orientation:

	FY2013*			FY2014	
	Total LGBT	Sex-Gender Identity/ Transgender	Sex-Sexual Orientation	Total LGBT	Sex-Gender Identity/ Transgender
Total Receipts	765	147	643	1,093	202
Total Resolutions	337	74	272	846	153
Settlements	2	2	2	2	2
% Settlements	9.2%	5.4%	9.9%	8.4%	9.2%
Withdrawal w/Benefits	17	2	15	46	7
% Withdrawal w/Benefits	5.0%	2.7%	5.5%	5.4%	4.6%
Administrative Closure	69	19	51	165	32
% Administrative Closure	20.5%	25.7%	18.8%	19.5%	20.9%
No Reasonable Cause	216	46	178	543	89
% No Reasonable Cause	64.1%	62.2%	65.4%	64.2%	58.2%
Reasonable Cause	4	3	1	21	11
% Reasonable_Cause	1.2%	4.1%	0.4%	2.5%	7.2%
Successful Conciliation	1	0	1	13	6
% Successful Conciliation	0.3%	0.0%	0.4%	1.5%	3.9%
Unsuccessful Conciliation	3	3	0	8	5
% Unsuccessful Conciliation	0.9%	4.1%	0.0%	0.9%	3.3%

Merit Resolutions	52	9	43	138	32
% Merit Resolutions	15.4%	12.2%	15.8%	16.3%	20.9%
Monetary Benefits	$897,271	$194,449	$702,822	$2,197,149	$540,995

***FY 2013 data covers 1/1/13-9/30/13**

****FY 2015 data covers 10/1/14-3/31/15**

Note: Charges may have multiple allegations under multiple statutes, so totals will not tally with breakdowns of specific bases or issues and are subject to updates. Monetary benefits include amounts which have been recovered exclusively or partially on non-LGBT claims included in the charge.

Further information on our charge receipts and resolutions under Title VII can be found here.

Litigation Activity

The Commission has begun to file LGBT-related lawsuits under Title VII challenging alleged sex discrimination.

- EEOC v. Lakeland Eye Clinic, P.A. (M.D. Fla. Civ. No. 8:14-cv-2421-T35 AEP filed Sept. 25, 2014). The EEOC sued Lakeland Eye Clinic, a Florida-based organization of health care professionals, alleging that it discriminated based on sex in violation of Title VII by firing an employee because she is transgender, because she was transitioning from male to female, and/or because she did not conform to the employer's gender-based expectations, preferences, or stereotypes. The EEOC's lawsuit alleged the employee performed her duties satisfactorily throughout her employment. However, after she began to present as a woman and informed the clinic she was transgender, Lakeland fired her. On April 9, 2015, the U.S. District Court in Tampa approved an agreement in which Lakeland Eye Clinic will pay $150,000 to settle the lawsuit. Lakeland also agreed to implement a new gender discrimination policy and to provide training to its management and employees regarding transgender/gender stereotype discrimination.

- EEOC v. R.G. & G.R. Harris Funeral Homes Inc. (E.D. Mich. Civ. No. 2:14-cv-13710-SFC-DRG filed Sept. 25, 2014). The EEOC sued Detroit-based R.G. & G.R. Harris Funeral Homes Inc., alleging that it discriminated based on sex in violation of Title VII by firing a Garden City, Mich., funeral director/embalmer because she is transgender, because she was transitioning from male to female, and/or because she did not conform to the employer's gender-based expectations, preferences, or stereotypes. The lawsuit alleges that an individual had been employed by Harris as a funeral Director/Embalmer since October 2007 and had always adequately performed the duties of that position. In 2013, the worker gave Harris a letter explaining she was undergoing a gender transition from male to female, and would soon start to present (e.g., dress) in appropriate business attire at work, consistent with her gender identity as a woman. Two weeks later, Harris's owner fired the transgender employee, telling her that what she was "proposing to do" was unacceptable.

Additionally the Commission has filed several amicus briefs and successfully conciliated charges involving these issues. A more detailed discussion of the Commission's lawsuits, amicus briefs and conciliations is available here.

Federal-Sector Enforcement

In the Federal Sector, EEOC has been implementing the SEP priority with regard to the coverage of LGBT individuals in a variety of ways:

- Tracking gender identity and sexual orientation appeals in the federal sector.
- Issuing federal sector decisions finding that gender identity-related complaints and sexual orientation discrimination-related complaints can be brought under Title VII through the federal sector EEO complaint process.
- Establishing an LGBT workgroup to further the EEOC's adjudicatory and oversight responsibilities, with the goal of issuing an LGBT federal sector report.
- Issuing guidance, including instructions for processing complaints of discrimination by LGBT federal employees and applicants available on EEOC's public web site.
- Providing technical assistance to federal agencies in the development of gender transition policies and plans.
- Providing LGBT related outreach to federal agencies through briefings, presentations and case law updates.

Training and Outreach

Finally, EEOC staff are addressing LGBT legal developments in numerous outreach and training presentations to the public. During FY 2014 and the first two quarters of FY 2015, field office staff conducted more than 900 events where LGBT sex-discrimination issues were among the topics discussed. In the federal sector during FY 2014, 21 presentations were delivered to different agencies or audiences. In FY 2015, 7 presentations have been delivered with at least 7 more currently scheduled. These events reached a wide variety of audiences, including employee advocacy groups, small employer groups, students and staff at colleges and universities, staff and managers at federal agencies and human resource professionals. To assist in this outreach the EEOC developed a brochure, Gender Stereotyping: Preventing Employment Discrimination of Lesbian, Gay, Bisexual or Transgender Employees.