



Everything you always
wanted to know about sex*

*but were afraid to ask

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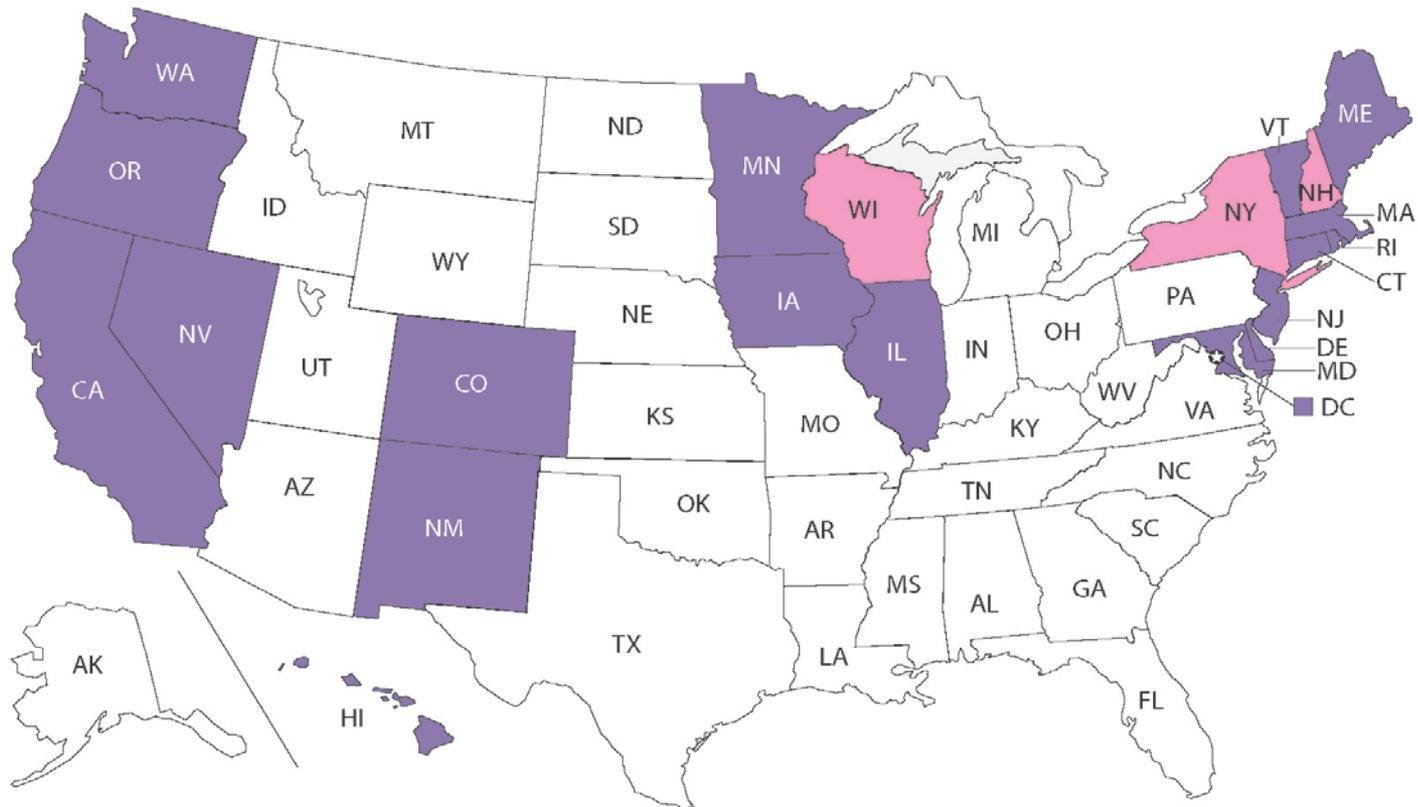
EEOC Deputy Director Houston District

Federal, State, and Local Laws

- Title VII – no explicit coverage
- Executive Order—sexual orientation, not gender identity (only federal employees)
- Many states and some local governments provide varying levels of coverage

State Nondiscrimination Laws in the U.S.

This map was last updated on May 21, 2014



States banning discrimination based on sexual orientation and gender identity/expression (18 states and the District of Columbia)
Minnesota (1993); Rhode Island (1995, 2001)¹; New Mexico (2003); California (1992, 2003)¹; District of Columbia (1977, 2005)¹; Illinois (2005); Maine (2005); Hawaii (1991, 2005, 2006, 2011)²; New Jersey (1992, 2006)¹; Washington (2006); Iowa (2007); Oregon (2007); Vermont (1992, 2007)¹; Colorado (2007); Connecticut (1991, 2011)¹; Nevada (1999, 2011)¹; Massachusetts (1989, 2011)¹; Delaware (2009, 2013)¹; Maryland (2001, 2014)¹

Laws banning discrimination based on sexual orientation (3 states)
Wisconsin (1982); New Hampshire (1997); New York (2002)

¹California, Connecticut, Delaware, DC, New Jersey, Massachusetts, Nevada, Rhode Island and Vermont first passed sexual orientation nondiscrimination laws, then later passed gender identity/expression laws.

²In 1991, Hawaii enacted a law prohibiting sexual orientation discrimination in employment. In 2005, it enacted a law prohibiting sexual orientation and gender identity/expression discrimination in housing. In 2006, public accommodations protections were added for sexual orientation and gender identity/expression. In 2011, gender identity was added to the employment discrimination law.

Sexual Orientation and Gender Identity Coverage Under Title VII

- Agency policy shift
- Coverage through Title VII's sex category
- Agency policy since April 2012
- We will find cause, attempt conciliation, and litigate these types of cases—this is now an agency priority

EEOC Strategic Enforcement Plan (SEP) Nationwide Priorities

1. Eliminating systemic barriers in recruitment and hiring
2. Protecting Immigrant, migrant, and other vulnerable workers
3. Addressing Emerging Issues
4. Enforcing the Equal Pay Laws
5. Preserving Access to the Legal System
6. Combating Systemic Harassment through targeted outreach.

How We Got There

- Conduct is discriminatory because of sex (sex is sex)
- Conduct is discriminatory because the employer uses gender stereotypes

What Do The Courts Stand on Same Sex Sexual Harassment?

- *EEOC v. Boh Brothers Construction Co., LLC*, 731 F.3d 444 (2013):
Houston District received a 2011 jury verdict of \$451,000 in its Title VII lawsuit against Boh Brothers Construction alleging that construction site superintendents subjected an employee to verbal abuse and gestures of a sexual nature.
- *Oncale v. Sundowner*, 523 US 75 (1998)

Legislative History of Title VII

- Sex dropped in at the last minute
- EPA passed a year before
- Most likely intended to scuttle Title VII
- Clear that Congress meant women, but they did not say so
- When interpreting statutory language, use plain meaning first.

History of Sexual Stereotyping

- Early LGBT case application
 - Courts said legislature didn't mean LGBT
Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, (7th Cir. 1984)—“sex” means only born biological sex
 - But: Seventh Circuit offered no real rationale for this interpretation
 - Not the right interpretation

Conform with Other Laws

- Race
- National Origin
- Age
- Religion
- Disability

- So why demand sex information?

Analogy: How Do We Treat People Who Change Religion?

- I'm fine with Christians
- I also like Jewish people

- But I cannot abide a person who converts from Judaism to Christianity.

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)

- Straight woman accountant denied promotion—not feminine enough
- SCOTUS holds: Title VII applies to gender stereotyping.

Gender Stereotyping

- The EEOC takes the position that transgender, sexual orientation, and sexual identity discrimination is sex discrimination because it is based on gender stereotyping

Methods of Proving Sex Discrimination

- Direct evidence
 - Almost never present
- Indirect evidence
 - Comparator(s)
 - Hostile work environment
 - Pretext [*McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)]
- Sex stereotyping [*Price Waterhouse*]

Macy v. Holder, EEOC Appeal No. 0120120821, April 20, 2012

- Man offered job at ATF&E – advised transitioning to female – lied and told him job had been cut for budget reasons – hired someone else
- Title VII prohibition against discrimination based on sex includes gender identity, change of sex, transgender status
- Unanimous, bipartisan decision of the Commission

Rationale #1 from Macy

- Discharging a transgender employee because he or she fails to identify, look, or live in conformance with a preferred or expected gender norm is discrimination because of sex under Title VII

Rationale #2 From Macy

- Discharging an employee because of a change in aspects of his or her gender, including a change in gender expression, is discrimination because of sex

Transgender Coverage*

A Sex discrimination claim exists if the employer discriminates...

- because the individual has expressed gender in a non-stereotypical fashion
- out of discomfort because the person has transitioned or is in the process of transitioning;
- because the employer simply does not like that the person is identifying as a transgender person.

**Macy v. Holder*, EEOC Appeal No. 0120120821 (April 20, 2012)

What It Means

- Binding on federal agencies
- Deference by federal courts
- Extension to federal discrimination laws for housing, education, and credit
- Extension to sexual orientation
- ENDA?

How Big is the LGBT Population?

- May 2011 Gallup Poll:

Americans think 24.7% of the population is LGBT

How Big is the LGBT Population?

- April 2011 Williams Institute of the UCLA School of Law did a study and estimates:
 - ~3.5% of adults identify as LGBT
 - Split is roughly even between GL v. B
 - 1.7% gay and lesbian
 - 1.8 % bisexual
 - 0.3% of adults identify as transgender



Questions?

Thank you!

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