



# Working in a State of Flux

## LGBTQ Employment Law Update

By Robin B. Wagner

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othing is settled at the moment when it comes to LGBTQ<sup>1</sup> employment law.

At the state level, the Michigan Civil Rights Commission issued an opinion on May 21, 2018, that Elliott-Larsen Civil Rights Act (ELCRA) protections include discrimination on account of sexual orientation and gender identity, and directed the Michigan Department of Civil Rights (MDCR) to process claims alleging such discrimination.<sup>2</sup> While the MDCR has opened and begun processing cases, the validity of the commission's interpretation is under review.<sup>3</sup>

At the federal level, the Equal Employment Opportunity Commission (EEOC) will investigate claims of discrimination based on sexual orientation and gender identity, even as the current Department of Justice has opposed including these protections under Title VII.<sup>4</sup> Meanwhile, the United States Supreme Court has granted certiorari to three cases, including one from the U.S. Court of Appeals for the Sixth Circuit, that will dramatically clarify Title VII's applicability to sexual orientation and transgender status.<sup>5</sup>

The following matrix provides a summary (with many caveats noted) of current LGBTQ employment law in Michigan:

	Sexual orientation and gay, lesbian, or bisexual persons	Gender identity and transgender status
Federal law generally, as recognized in the Sixth Circuit	<ul style="list-style-type: none"> <li>• EEOC will accept and investigate complaints for nonfederal employees<sup>i</sup></li> <li>• EEOC will accept, investigate, and litigate complaints for federal employees<sup>ii</sup></li> <li>• No protection under Title VII<sup>iii</sup></li> </ul>	<ul style="list-style-type: none"> <li>• EEOC will accept and investigate complaints for nonfederal employees<sup>i</sup></li> <li>• EEOC will accept, investigate, and litigate complaints for federal employees<sup>ii</sup></li> <li>• Protected under Title VII<sup>iv</sup></li> </ul>
Federal executive orders	<ul style="list-style-type: none"> <li>• Exec. Orders 11478 and 11246 protect federal employees and employees of federal contractors<sup>v</sup></li> </ul>	<ul style="list-style-type: none"> <li>• Exec. Orders 11478 and 11246 protect federal employees and employees of federal contractors<sup>v</sup></li> </ul>
Michigan law	<ul style="list-style-type: none"> <li>• MDCR will process claims<sup>vi</sup></li> <li>• ELCRA has not been held to cover</li> </ul>	<ul style="list-style-type: none"> <li>• MDCR will process claims<sup>vi</sup></li> <li>• No caselaw addresses applicability of ELCRA</li> </ul>
Executive directives	<ul style="list-style-type: none"> <li>• State employees are protected</li> </ul>	<ul style="list-style-type: none"> <li>• State employees are protected</li> </ul>

#### NOTES:

- i The EEOC continues to support its opinions in *Baldwin v Dep't of Transp.*, EEOC Appeal No. 0120133080 (July 15, 2015) (holding that Title VII's prohibition against discrimination on the basis of sex applies to sexual orientation) and *Macy v Dep't of Justice*, EEOC Appeal No. 0120120821 (April 20, 2012) (holding that Title VII's protection on the basis of sex applies to gender identity). However, when the commission presses these issues in federal court, it is subject to the controlling caselaw, which varies by circuit.
- ii Executive Order No. 13798, Promoting Free Speech and Religious Liberty, 82 Fed Reg 21675 (May 4, 2017), and US Attorney General Jeff Sessions's guidance on the topic are perceived to have created a broad exemption to the sexual orientation and gender identity protections recognized by the EEOC when the person accused of discrimination is acting under a "sincerely held religious belief" (Federal Law Protections for Religious Liberty, memorandum from Office of the Attorney General, US Dep't of Justice (October 6, 2017)).
- iii *Vickers v Fairfield Med Ctr*, 453 F3d 757, 762 (CA 6, 2006), is the controlling and oft-cited Sixth Circuit case asserting that because Title VII does not state it specifically, "sexual orientation is not a prohibited basis for discriminatory acts under Title VII."
- iv In *EEOC v RG & GR Harris Funeral Homes*, 884 F3d 560, 600 (CA 6, 2018), the Sixth Circuit held unequivocally that "[d]iscrimination against employees, either because of their failure to conform to sex stereotypes or their transgender or transitioning status, is illegal under Title VII." However, the United States Supreme Court will hear this case during the 2019–2020 term.<sup>6</sup>
- v Through Executive Order No. 13782, Revocation of Federal Contracting Executive Orders, 82 Fed Reg 15607 (March 27, 2017), Executive Order 13673 was rescinded, thereby eliminating the compliance and enforcement mandates supporting, among others, Executive Orders 11478 and 11246, which protected federal employees and the employees of federal contractors from workplace discrimination.
- vi See endnote 3.

## What legal theories are in play?

With the Supreme Court set to weigh in on LGBTQ employment rights, a close look at the recent Sixth Circuit case *EEOC v R.G. & G.R. Harris Funeral Homes*—one of the three cases to be heard during the 2019–2020 term—sheds some light on where Title VII jurisprudence may be headed. In *Harris*, a long-term employee of the funeral home was fired two weeks after she began her transition from male to female.<sup>7</sup>

The first and arguably most essential line of cases employed by the Sixth Circuit in its decision relies on *Price Waterhouse v Hopkins*, which held that Title VII protects against discrimination based on sex stereotyping.<sup>8</sup> The *Harris* court reiterated and strengthened *Smith v City of Salem*, which held that, in light of *Price Waterhouse*, a transgender individual who was born male and began expressing more feminine traits was able to bring suit under Title VII.<sup>9</sup> "Title VII proscribes discrimination both against women who 'do not wear dresses or makeup' and men who do."<sup>10</sup> Importantly, the court also squarely rejected the idea that Title VII was not implicated if gender dress codes and expectations are similarly enforced for men and women: "It is apparent from both *Price Waterhouse* and *Smith* that an employer engages in unlawful discrimination even if it expects both biologically male and female employees to conform to certain notions of how each should behave."<sup>11</sup>

Second, the Supreme Court has a long history of broadly defining "sex" when interpreting Title VII. The Supreme Court has famously reasoned that "statutory prohibitions often go beyond the principal evil, . . . and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed" in holding that Title VII covers same-sex harassment.<sup>12</sup> As the Seventh Circuit noted in its 2017 en banc decision extending Title VII's protections to sexual orientation, this law "has been understood to cover far

## At a Glance

The United States Supreme Court has granted certiorari to three cases, including one from the U.S. Court of Appeals for the Sixth Circuit, that will dramatically clarify Title VII's applicability to sexual orientation and transgender status.

Elliott-Larsen Civil Rights Act protections against discrimination based on "marital status" may in some circumstances protect individuals who are married to spouses of the same sex or gender identity.

Religious-freedom defenses are gaining traction rapidly and will play an increasingly larger role in the area of employment discrimination based on LGBTQ status.

more than the simple decision of an employer not to hire a woman for Job A, or a man for Job B.<sup>13</sup> The Sixth Circuit quoted this tenet in support of its holding that “sex” included transgender status and transitioning identity.<sup>14</sup>

Title VII cases often employ analyses focused on comparators, and such an approach appears to be effective in cases involving LGBTQ issues. For instance, the *Harris* court employed a counterfactual asking whether “Stephens would have been fired if Stephens had been a woman who sought to comply with the women’s dress code. The answer quite obviously [was] no.” Thus, the court determined that it was the plaintiff’s sex—specifically, her transgender status—that caused her termination.<sup>15</sup> After all, Title VII prohibits discrimination “because of such individual’s race, color, religion, sex, or national origin.”<sup>16</sup>

Title VII jurisprudence also recognizes that legal theories applicable to one type of discrimination apply to the others. The *Price Waterhouse* court explained that “our 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.”<sup>17</sup> The Seventh Circuit took this to mean “that to the extent that the statute prohibits discrimination on the basis of the race of someone with whom the plaintiff associates, it also prohibits discrimination on the basis of the national origin, or the color, or the religion, or (as relevant here) the sex of the associate.”<sup>18</sup> In other words, it may be possible to allege discrimination based on association in a case in which an individual is discriminated against because of his or her partner’s sex.

Finally, marital status is not included in Title VII’s protection, but it may be a viable approach for some LGBTQ-related claims under Michigan’s ELCRA. If a plaintiff is able to show that he or she has faced discriminatory treatment because of his or her marital status, then the ELCRA might provide protections.<sup>19</sup> Such a claim would likely involve comparisons to unmarried individuals or to married couples whose spouses were of a different sex.

## A note on the religious freedom defense

Employers are increasingly asserting a “sincerely held religious belief” defense to Title VII sexual orientation and gender identity claims, arguing that if they are required to tolerate LGBTQ employees, their religious beliefs and those of their customers will be invaded. Defendants are seeking to expand the applicability of the Religious Freedom Restoration Act to Title VII cases as the funeral home did in *Harris*, arguing that the EEOC, a government entity, was imposing on its religious beliefs.<sup>20</sup> And while the Sixth Circuit rejected that defense in *Harris*, the Trump administration’s broad promulgation of religious freedom guidance across federal functions, combined with a significant number of amici briefs by religious-freedom advocates in the three LGBTQ cases, makes it likely that this argument will need to be addressed.<sup>21</sup> ■



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## ENDNOTES

1. lesbian, gay, bisexual, transgender, and queer (or questioning).
2. Mich Civil Rights Comm, Interpretive Statement: 2018-1: Meaning of “Sex” in the Elliot Larsen Civil Rights Act (May 21, 2018) <[https://www.michigan.gov/documents/mdcr/MCRC\\_Interpretive\\_Statement\\_on\\_Sex\\_05212018\\_625067\\_7.pdf](https://www.michigan.gov/documents/mdcr/MCRC_Interpretive_Statement_on_Sex_05212018_625067_7.pdf)> [<https://perma.cc/PR9M-FXLC>]. All websites cited in this article were accessed April 16, 2019.
3. In early February 2019, Attorney General Dana Nessel stated that she would review this interpretation, which former Attorney General Bill Schuette had declared invalid. Meanwhile, the interpretation has not won support from GOP leadership in the state house and senate. See, e.g., Opalewski, *AG Nessel to Reconsider Predecessor’s Opinion on LGBTQ Protections*, PrideSource (February 2, 2019) <<https://pridesource.com/article/ag-nessel-to-reconsider-predecessors-opinion-on-lgbtq-protections/>> [<https://perma.cc/33PA-BT65>].
4. US Equal Employment Opportunity Comm, *Fact Sheet: Recent EEOC Litigation Regarding Title VII & LGBT-Related Discrimination* (July 8, 2016) <[https://www.eeoc.gov/eeoc/litigation/selected/lgbt\\_facts.cfm](https://www.eeoc.gov/eeoc/litigation/selected/lgbt_facts.cfm)> [<https://perma.cc/42TX-R4LC>]; Feuer, *Justice Department Says Rights Law Doesn’t Protect Gays*, *The New York Times* (July 27, 2017) <<https://www.nytimes.com/2017/07/27/nyregion/justice-department-gays-workplace.html>> [<https://perma.cc/E6WK-NF88>]; and Opfer, *DOJ: Businesses Can Discriminate Against Transgender Workers*, *Bloomberg Law* (October 24, 2018) <<https://www.bna.com/justice-department-says-n57982093230/>> [<https://perma.cc/7M6V-LZAQ>].
5. *EEOC v RG & GR Harris Funeral Homes*, 884 F3d 560 (CA 6, 2018) (holding that Title VII prohibits discrimination on the basis of transgender and transitioning status); *Bostock v Clayton Co Bd of Commrs*, 723 Fed App’x 964 (CA 11, 2018) (holding that Title VII does not address discrimination on the basis of sexual orientation); *Zarda v Altitude Express*, 883 F3d 100 (CA 2, 2018) (holding that Title VII prohibits discrimination on the basis of sexual orientation). *Harris*, *Bostock*, and *Zarda* have been granted certiorari for the 2019–2020 Court term; however, oral arguments have not yet been scheduled at the time this article was finalized for publication.
6. See n 5.
7. *Harris Funeral Homes*, 884 F3d at 560.
8. *Price Waterhouse v Hopkins*, 490 US 228, 235; 109 S Ct 1775; 104 L 2d 268 (1989).
9. *Harris Funeral Homes*, 884 F3d at 572 (discussing *Smith v City of Salem*, 378 F3d 566, 573 (CA 6, 2004)).
10. *Id.* (quoting *Smith*, 378 F3d at 575).
11. *Harris Funeral Homes*, 884 F3d at 574.
12. *Oncale v Sundowner Offshore Servs*, 523 US 75, 79; 118 S Ct 998; 140 L Ed 2d 201 (1998).
13. *Hively v Ivy Tech Community College*, 853 F3d 339, 345 (CA 7, 2017) (citing *Meritor Savings Bank, FSB v Vinson*, 477 US 57; 106 S Ct 2399; 91 L Ed 2d 49 (1986)) (workplace harassment); *Oncale*, 523 US at 79 (same-sex workplace harassment); *City of Los Angeles v Manhart*, 433 US 702; 97 S Ct 2912; 53 L Ed 2d 1054 (1978) (assumptions about longevity); and *Price Waterhouse*, 490 US at 228 (gender stereotypes).
14. *Harris Funeral Homes*, 884 F3d at 580.
15. *Harris Funeral Homes*, 884 F3d at 575 (discussing *Hively*, 853 F3d at 345).
16. *Smith v City of Salem, Ohio*, 378 F3d 566, 571 (CA 6, 2004) (quoting 42 USC 2000e-2(a)).
17. *Price Waterhouse*, 490 US at 243, n 9. See also *Hively*, 853 F3d at 349.
18. *Hively*, 853 F3d at 349.
19. MCL 37.2202.
20. *Harris Funeral Homes*, 884 F3d at 585–597.
21. See nn 5 and 6.