

CHEW ON IT WITH CRISTAL ROBINSON

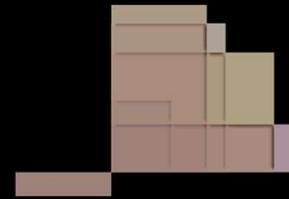
Current Federal Employment Discrimination Law for LGBTQ and Women

WHAT DO THESE ALL HAVE IN COMMON?

Blacks To Go Only



Walk more femininely



pwc

Male only harassment



BILL OF RIGHTS AMENDMENT 14 (1868)

- **Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; **nor deny to any person within its jurisdiction the equal protection of the laws.**
- Other Sections not shown based on relevancy.

CIVIL RIGHTS ACT OF 1964

- **EMPLOYER PRACTICES** - It shall be an unlawful employment practice for an employer—
- **(1)** to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to **his** compensation, terms, conditions, or privileges of employment, **because of such individual's race, color, religion, sex, or national origin**; or
- **(2)** to limit, segregate, or classify **his** employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, **because of such individual's race, color, religion, sex, or national origin.**



ENFORCEMENT OF THE CIVIL RIGHTS ACT

- An act to enforce the constitutional right to vote,
- to confer jurisdiction upon the **district courts** of the United States of America to provide injunctive relief against discrimination in public accommodations,
- to authorize the **Attorney General to institute suits** to protect constitutional rights in public facilities and public education,
- to extend the **Commission on Civil Rights**,
- to prevent discrimination in federally assisted programs,
- to establish a **Commission on Equal Employment Opportunity**, and for other purposes.

HOW DID SEX GET INTO THE ACT?

Howard Smith proposed changes to four pages of Title VII, the section of the bill barring hiring and firing “because of” race, creed, religion, or color.

- “After the word *religion*, insert *sex*,” Smith urged his colleagues to rectify “this grave injustice ... particularly in an election year.”
 - Smith was greeted by **laughter** when he introduced the amendment.
 - The clause was opposed by labor unions.
- Co-sponsor Rep. Martha Griffiths argued that without this addition the new law would protect black women but not white women, and that was **unfair to white women**.
- For twenty years Smith had sponsored the Equal Rights Amendment (with no linkage to racial issues) in the House while working with the author.

Now was the moment.

SMITH'S WORDS ON THE ADDITION OF SEX

- “[would] do some good for the minority sex.”
- If [the employer] does not employ th[e] colored woman . . . that employer will say “Well now, if I hire the colored woman I will not be in any trouble, but if I . . . hire the white woman, then the [Equal Employment Opportunity] Commission is going to be looking down my throat and will want to know why I did not. I may be in a lawsuit.”
- That will happen as surely as we are here this afternoon. You all know it.”
- **OPPOSITION:** [i]magine the upheaval that would result from adoption of blanket language requiring total equality”

CASES ON RACE

Katzenbach v. McClung, 379 U.S. 294 (1964)

- “Where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.”

Griggs v. Duke Power Co., 401 U.S. 424 (1971)

- “The Act proscribes not only overt discrimination, but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.”

CASES OVER THE 55 YEARS

LA Dept of Water & Power v. Manhart, 435 U.S. 702 (1978)

“the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”

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

... “**gender** play[ing] a motivating part in an employment decision”, saying that it meant that if, at the moment the decision was made, one of the reasons for making the decision was that the applicant or employee was a woman, then that decision was motivated by **gender** discrimination.

This definition includes stereotypes based on sex, which previous definitions had not.

Oncale v. Sundowner Offshore Services, 523 U.S. 75 (1998)

“Male-on-male sexual harassment was assuredly not the principal evil Congress was concerned with. But statutory prohibitions often go beyond the principal evil 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.”

CASES AND ACTIONS THAT ARE NOT GOOD

Ulane v. Eastern Airlines 7th Circuit (1984)

- “not discriminated against as a female, and since Title VII is not so expansive in scope as to prohibit discrimination against **transsexuals**.”

Vickers V Fairfield Medical Center, 6th Circuit (2006)

- “... a gender stereotyping claim should not be used to bootstrap protection for **sexual orientation** into Title VII.”
- “...the gender non-conforming behavior ... not behavior observed at work or affecting his job performance.... Rather, ... perceived homosexuality, rather than based on gender non-conformity.”

EXECUTIVE ORDERS

Clinton: Executive Order 13087 (1998)

- Prohibit discrimination based on **sexual orientation** in the competitive service of the federal civilian workforce

Obama: Executive Order 13672 (2014)

- Prohibited discrimination in the civilian federal workforce on the basis of **gender identity** and in hiring by federal contractors on the basis of both **sexual orientation** and **gender identity**

EEOC ACTIONS

Macy v. Holder (2012)

- "A **transgender person** who has experienced discrimination based on his or her gender identity may establish a prima facie case of sex discrimination through any number of different formulations.
- These different formulations are not, however, different claims of discrimination that can be separated out and investigated within different systems.
- Rather, they are simply different ways of describing sex discrimination.

EEOC v. Bojangles (2017)

- "All employees have the right to work in an environment free from sexual harassment and gender stereotypes,"
- "Federal law provides **transgender employees** protection from sex discrimination in the workplace."

OCTOBER 8 SUPREME COURT CASES

BOSTOCK V. CLAYTON COUNTY, GA

Whether discrimination against an employee because of **sexual orientation** constitutes prohibited employment discrimination "because of... sex" within the meaning of *Title VII of the Civil Rights Act of 1964*, 42U.S.C. § 2000e-2.

ALTITUDE EXPRESS, INC. V. ZARDA

Whether the prohibition in *Title VII of the Civil Rights Act of 1964*, 42 U.S.C. § 2000e-2(a) (1), against employment discrimination "because of . . . sex" encompasses discrimination based on an individual's **sexual orientation**.

R.G. & G.R. HARRIS FUNERAL HOMES INC. V. EEOC

1. Whether the word "sex" in *Title VII's* prohibition on discrimination "because of ... sex," 42 U.S.C. 2000e-2(a)(1), meant "**gender identity**" and included "**transgender status**" when Congress enacted Title VII in 1964.

2. Whether *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), prohibits employers from applying sex-specific policies according to their employees' sex rather than their **gender identity**.

WHAT NEEDS TO HAPPEN?

- Congress must pass the Equality Act or at least The Employment Non-Discrimination Act, which was introduced in 1994.
- One more state needs to ratify The Equal Rights Amendment which was passed in 1972.
- Watch the October 8 Supreme Court Cases – The opinions will be out in 2020.