

# Sexual Orientation and Gender Identity Are Not Protected Classes under Title VII ... Or Are They?



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# Sexual Orientation and Gender Identity Are Not Protected Classes under Title VII...Or Are They?

*Written by Danielle M. Vugrinovich, Esq.\**

## **Key Points:**

- Treat complaints of discrimination based upon sexual orientation and gender identity the same as other complaints based upon Title VII.
- Employers should update and distribute all discrimination policies to include sexual orientation and gender identity.
- Employers should Implement policies and procedures consistently and fairly.

As of late, the topics of sexual orientation and gender identity have been at the forefront of media attention. Employers need to take note and educate themselves on the manner in which to respond to employee complaints relative to discrimination based upon sexual orientation and gender identity. It is widely assumed that neither group is subject to the protections of Title VII. However, the courts and the EEOC are interpreting complaints of this nature as discrimination “because of sex,” which is the exact phrase included in the text of Title VII itself.

In light of the EEOC’s position with respect to the prohibition of discrimination based upon sexual orientation and gender identity, it is reasonable to assume that discrimination claims of this type will be

found actionable as sex discrimination under Title VII. Recently, the United States District Court for the Western District of Pennsylvania addressed the issue of whether complaints by a male employee claiming that he was targeted for harassment due to his intimate relationship with another male were actionable under Title VII. *United States EEOC v. Scott Medical Health Center, P.C.*, 2016 U.S. Dist. LEXIS 153744 (W.D. Pa. Nov. 4, 2016). On behalf of the employee, the EEOC argued that: (1) had the employee been female, he would not have been subject to such discrimination; (2) he was harassed because of his relationship with a member of the same sex, which takes sex into account; and (3) he was targeted because he did not conform to the harasser's idea of how a male should conduct himself. The court explained that the central issue in determining whether the lawsuit could move forward was whether the employee would have been subjected to the harassment or discrimination had he been a female under the same circumstances.

In its opinion, the court detailed how the United States Supreme Court has broadened the interpretation of the phrase "because of sex" from Title VII over the years (i.e., men and women are protected from discrimination, same-sex discrimination and gender stereotyping). Sex stereotyping has been used by the courts to characterize behaviors toward women who do not conform with the harasser's perception of how a woman should look and act. Therefore, it is logical to apply the same standard to a male subject to harassment because he does not conform to the harasser's beliefs about how a man should appear and act. Likewise, courts have applied Title VII protection to transgendered individuals based upon theories of discrimination "because of sex" and gender stereotyping.



As with other types of discrimination or harassment under Title VII, illegal actions based on sexual orientation and gender identity can include failure to hire, failure to promote, pervasive inappropriate comments, denying such an individual conditions or privileges of employment that others enjoy, and termination. Additionally, discrimination based upon gender identity can also include preclusion from use of the restroom of the sex with which he/she identifies, use of the name previously used by the individual after being advised of a name change, and continued use of the pronoun associated with the gender with which the individual previously identified after the individual presents at work as the opposite gender.

In light of recent decisions across the country regarding the interpretation of Title VII, employers must be vigilant in performing an investigation when they receive complaints regarding harassment or discrimination that in any way could relate to the sex of the individual complaining of such behavior. Policies and procedures must be applied consistently and fairly among employees without regard to sexual orientation or gender identity. If an individual reports that he or she is being subjected to harassment or discrimination regarding sexual orientation, perceived sexual orientation, gender identity or perceived gender identity, an employer must conduct an investigation in the same manner as for any other type of discrimination or harassment falling under the protection of Title VII.

Additionally, employers should update their employee manuals and any other documentation that explains anti-discrimination and harassment policies to reflect that the employer will not tolerate harassment or discrimination based upon sexual orientation or gender

identity and how to report it. If the employer requires its employees to sign an acknowledgement of anti-discrimination policies, those acknowledgments should be updated to include sexual orientation and gender identity. As with all employment relations activities, it is of the utmost importance to apply policies consistently and fairly, promulgate written anti-discrimination and harassment policies, and ensure that employees understand the policies.

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