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Sexual Minority Rights in the Workplace Twenty-First Annual Carl Warns Labor & Employment Institute

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SEXUAL MINORITY RIGHTS IN THE WORKPLACE

Arthur S. Leonard*

This presentation at the Carl A. Warns, Jr. Labor and Employment Law Institute was officially publicized as being about Gay Rights in the Workplace, but the more expansive approach of sexual minorities in the workplace is more appropriate, because the developments involving lesbians, gay men, bisexuals, and transgendered people are interrelated. Confining the discussion narrowly to gay rights would give an incomplete picture. Spectacular changes have occurred concerning transsexual rights, including an important decision by the 6th Circuit Court of Appeals in the week prior to this program.¹

I. CONSTITUTIONAL PROTECTION AND THE PUBLIC SECTOR

Until the late 1960s, when the federal courts began developing a theory of constitutional protection for public employees, one could not even begin to talk about workplace rights for sexual minorities. All of the law went the other way. In the federal sector an executive order issued by President Dwight Eisenhower in the early 1950s mandated the termination of any federal employee found to be gay; security clearances for work in defense industries or any government agencies requiring such clearances were routinely denied to gay people; and when the issue came up, professional licensing agencies at the state level generally found that gay people lacked the good moral character necessary to provide professional services to the public.² Openly gay or transgendered

* Professor, New York Law School. Based on a presentation prepared for delivery on June 11, 2004, Louisville, Kentucky, at the annual Warns Labor & Employment Institute. A faculty research grant from New York Law School supported work on this paper. Research assistance by Joshua Feldman is gratefully acknowledged.

¹ *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) (holding that transsexuals can bring employment discrimination claims under Title VII of the Civil Rights Act of 1964, alleging discrimination on the basis of gender and sex-stereotyping).

² *Exec. Order No. 10450*, 18 Fed. Reg. 2489 (April 27, 1953); *State ex rel. Florida Bar v. Kimball*, 96 So.2d 825 (Fla. 1957).

people could not be public school teachers, and had virtually no legal recourse for adverse employment decisions.

This began to change most decisively in 1969, when a federal appeals court in Washington, D.C. found that the new due process rights that had been previously identified for public employees would cut against a federal agency's ability to discharge an employee for off-duty homosexual conduct merely on the basis that his sexuality was an embarrassment to the agency.³ While not all federal courts agreed with this proposition, by the late 1970s things had advanced to the point where President Jimmy Carter's Civil Service Reform Act had incorporated the concept that civil servants could only be dismissed for reasons that related to their job qualifications and the ability of their agency to function, and it was generally understood beginning at that time that sexual orientation, as such, would no longer be the basis for a discharge from the civil service.⁴ However, this did not hold true for military, national security, or law enforcement employment, and all attempts through litigation to change these policies were then unsuccessful.⁵ The process for granting security clearances for employees of federal defense contractors had also been problematic for gay people, and litigation attempting to mitigate this problem was unsuccessful as well.⁶

At the federal level, a major extension of the protection against discrimination for gay employees occurred during the Clinton administration in the 1990s.⁷ The process for granting security clearances was revised through an executive order,⁸ and individual agency executive orders issued during the early years of the Clinton administration established non-discrimination policies in all executive branch departments for civilian federal employees, including the federal law enforcement and intelligence agencies.⁹ Uniformed military employees were governed by a political compromise negotiated between the Clinton administration and the Congress in 1993, under which gay people can

³ Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969).

⁴ The Civil Service Re-Organization Act of 1978, Pub. L. No. 95-454, 92 Stat. 1192 (codified at 5 U.S.C. § 7101 (2001)).

⁵ See, e.g., High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, *reh'g denied*, 909 F.2d 375 (9th Cir. 1990); Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987).

⁶ High Tech Gays, 895 F.2d at 570-580.

⁷ See *infra* notes 9-11 and accompanying text.

⁸ Exec. Order No. 12968, 60 Fed. Reg. 40,245 (August 7, 1995).

⁹ Federal GLOBE, an organization of sexual minority federal employees, has collected the various agency executive policy statements on sexual orientation discrimination and posted them on its website, www.fedglobe.org (last visited 2/22/2005).

serve in the military so long as they do not do anything to upset the pretense that gay people are not serving.¹⁰ The so-called “don’t ask-don’t tell” policy makes the U.S. Defense Department a laughing-stock before our major military allies, all of whom have over the past ten years or so abandoned prior restrictions on military service by openly-gay personnel.¹¹

Perhaps most significantly, during his second term President Clinton issued an executive order covering all non-military personnel of the Executive Branch, consolidating the non-discrimination policy.¹² President Bush has not rescinded this order, although there has been some question regarding the efficacy of its enforcement in light of developments at the Office of Special Counsel, whose director removed the mention of sexual orientation coverage from the agency’s website, arguing that there was no statutory basis for a statement that federal employees were specifically protected from discrimination on the basis of sexual orientation.¹³

Apart from any statutory or administrative policy statements, in light of the Supreme Court’s 1996 decision in *Romer v. Evans*¹⁴ and 2003 decision in *Lawrence v. Texas*,¹⁵ gay federal employees would have potential due process and equal protection claims against any civilian federal agency that embraced an explicit policy of discrimination on the basis of sexual orientation. In *Romer*, the Supreme Court found that a state constitutional provision that would bar the state and its political subdivisions from adopting any policy against sexual orientation discrimination was a clear violation of the Equal Protection Clause of the Fourteenth Amendment (and, by implication, of the coequal doctrine that the Supreme Court has identified as binding on the federal government under the Fifth Amendment’s Due Process Clause).¹⁶ Although the Court did not discuss whether sexual orientation, as such, would be considered a “suspect classification” for purposes of determining whether official policies

¹⁰ The Don’t Ask, Don’t Tell (Homosexual Conduct) Policy, Army Command Policy, Army Reg. 600-20, ¶¶ 4-19 (May 13, 2002).

¹¹ *Id.* The principal military ally of the U.S. at present in Iraq is the United Kingdom, which not only allows gays to serve, but actively recruits gay people to serve. *British Royal Navy Will Recruit Gays*, L.A. TIMES, Feb. 22, 2005, available at 2005 WL 56331162.

¹² *Exec. Order No. 13087*, 63 Fed. Reg. 30,097 (June 2, 1998).

¹³ Brad Sears and Alan Hirsch, *Commentary: If Gays Are OK, Job Bias Can’t Be*, L.A. TIMES, April 29, 2004, at B13, available at 2004 WL 55909542; T. Shawn Taylor, *Federal Office Confirms Laws Cover Lesbian Gay Workers*, CHI. TRIBUNE, April 13, 2004, at 4, available at 2004 WL 75721214.

¹⁴ *Romer v. Evans*, 517 U.S. 620 (1996).

¹⁵ *Lawrence v. Texas*, 539 U.S. 558 (2004).

¹⁶ *Romer*, 517 U.S. at 631-636.

that discriminate on the basis of sexual orientation should be subjected to heightened levels of judicial review, at least one member of the Court, Justice Sandra Day O'Connor, has opined in her concurring opinion in *Lawrence v. Texas*, that sexual orientation should call forth "more searching" inquiry into the government's justifications for the policy.¹⁷ *Lawrence*, by overruling the Court's 1986 Georgia sodomy law decision, *Bowers v. Hardwick*,¹⁸ removed an important part of the theoretical foundation for earlier federal court decisions that had rejected discrimination claims by gay federal employees.¹⁹

These constitutional principles are also applicable to state and local governments, by virtue of both the Fourteenth Amendment's Equal Protection Clause and by state constitutional equal protection principles, and are supplemented in several states by executive orders or state statutes that establish policies of non-discrimination on the basis of sexual orientation and, in a few cases, gender identity, in public employment.²⁰

II. THE PRIVATE SECTOR

There is less protection against discrimination in the private sector. From an early point, the ban on sex discrimination enacted by Congress in Title VII of the Civil Rights Act of 1964²¹ was construed by federal courts to provide no protection against discrimination for sexual minorities.²² The lack of any detailed legislative history for the floor amendment that added "sex" to Title VII led courts to take a narrowly literal view of the meaning of the phrase "because of sex," rejecting claims by people whose sexual orientation or gender

¹⁷ *Lawrence*, 539 U.S. at 580.

¹⁸ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

¹⁹ The rhetorical move, pioneered by the U.S. Court of Appeals for the D.C. Circuit in 1987 in *Padula*, was to find that a group whose common identity was defined by conduct that was not constitutionally protected would not be accorded any sort of "special protection" under the Equal Protection Clause. In *Romer*, the Court rejected the idea that protection from discrimination was "special," and in *Lawrence*, the Court found a constitutional bar to criminalizing the relevant conduct.

²⁰ See, e.g., *Quinn v. Nassau County*, 53 F. Supp. 2d 347 (E.D.N.Y. 1999) (County held liable for sexual-orientation based discrimination against county police officer).

²¹ The Civil Rights Act of 1964, Pub. L. No. 88-352, Tit. 7, §701, Stat. 253 (codified at 42 U.S.C. 2000e (2001)).

²² See, e.g., EEOC Dec. 76-75, CCH Emp. Prac. Para 6495 (1976); *Voyles v. Ralph K. Davies Medical Center*, 403 F. Supp. 456 (N.D.Cal. 1975); *Smith v. Liberty Mutual Insurance Co.*, 569 F.2d 325 (5th Cir. 1987).

nonconformity had resulted in adverse personnel decisions against them.²³ The leading case was *DeSantis v. Pacific Telephone*.²⁴ To illustrate the gravity of change, in the recent Sixth Circuit decision referred to at the outset, *DeSantis* is referred to as having been overruled in 2001 by the Ninth Circuit, in a case involving workplace harassment of a man who was perceived by co-workers as effeminate and possibly gay.²⁵

The big change in the private sector came first at the municipal, then the state level, with the federal government very much on the sidelines. By the late 1970s, a handful of municipalities and counties had passed ordinances banning sexual orientation discrimination in employment, and in the 1980s, some states had joined them. Although the passage of some of these measures stimulated voter initiatives that repealed some of them, the general trend was for more to be enacted and by the 1990s, most of the voter repeal initiatives were being defeated. By the early 1990s, so many cities had banned sexual orientation discrimination that a substantial plurality of the American population was working in jurisdictions where such discrimination was illegal.²⁶

In 1993, in an article published in the *Labor Law Journal*, this writer asserted based on a study of state and local laws and 1990 U.S. Census figures that about 23 % of the U.S. population lived in jurisdictions where it was unlawful for employers to discriminate based on sexual orientation.²⁷ In the intervening years, with the prominent additions of California, New York, Illinois, and the extension of coverage through all but one New England state, it is now likely that a majority of American workers are in jobs that are covered by some statutory prohibition on sexual orientation discrimination in the private sector or some degree of constitutional protection in the public sector.²⁸ In Kentucky, Louisville passed such an ordinance in 1999, and several other local jurisdictions in the state have legislated on the subject, including Lexington-

²³ See *infra* notes 25-26.

²⁴ *Desantis v. Pacific Telephone*, 608 F.2d 327 (9th Cir. 1979).

²⁵ *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F. 3d 864 (9th Cir. 2001).

²⁶ Arthur S. Leonard, *Sexual Orientation and the Workplace: A Rapidly Developing Field*, 44 *LABOR L. J.* 574 (September 1993).

²⁷ *Id.*

²⁸ A current list of jurisdictions that have enacted statutory bans on workplace discrimination on account of sexual orientation (and, in some cases, gender identity) is maintained by Human Rights Campaign, under the title "Equality in the States: Gay, Lesbian, Bisexual and Transgendered Americans and State Laws and Legislation," and can be found on its website, www.hrc.org (last visited 2/22/2005).

Fayette Urban County, Jefferson County, and Covington.²⁹ A bill is pending in the Kentucky legislature to add protection against discrimination based on sexual orientation and gender identity, although it is not likely to pass anytime soon.³⁰

A new element in the movement for sexual minority workplace rights emerged with the transgender rights movement. Transgendered persons are individuals whose gender identity differs from their biological sex in such a strong way that they seek to live as a member of the other sex. By the 1950s, plastic surgery and hormone therapy had become sufficiently advanced to make this increasingly possible, although expensive and difficult. Of course, there are also historical reports from earlier times of women living as men in some unusual cases. The number of people who experience this condition, called "gender dysphoria" by medical experts, is very small, but significant enough that many large cities now have active transgender rights organizations.

Initially rebuffed by the leaders of the gay rights movement from their demand to add gender identity to the text of proposed civil rights laws at the state and federal level, the transgender movement pursued a dual strategy: to work for acceptance by the gay rights movement, which by the mid-1980s was relatively well-organized politically and far larger in numbers, and to lobby legislators directly for transgender rights. The first major payoff, after a few successes at the municipal level, came in Minnesota, which adopted a broad definition of sexual orientation in its 1993 civil rights law that clearly intended to include gender identity as a forbidden basis for discrimination.³¹ Over the past ten years, the movement for transgender inclusion in sexual minority civil rights protection has grown apace, adding more states and many more municipalities.³²

At the same time, the federal courts were beginning to see new meanings in Title VII's ban on sex discrimination. The 1980s brought a critical mass of appellate precedent for the proposition that sexual harassment in the workplace was a form of sex discrimination if it was sufficiently severe and pervasive to be said to have altered terms and conditions of employment of a particular

²⁹ LOUISVILLE, KY., § 98.01 (1999); LEXINGTON, KY., *Ordinance No. 201-99* (1999); and JEFFERSON COUNTY, KY., § 92.01 (1999).

³⁰ Kentucky Civil Rights Act, Ky. Rev. Stat. § 344.010, H.B. 14, 2003 Leg. Sess. (Ky. 2003).

³¹ MINN. STAT. Ann. § 363 A.03 (West 2004).

³² See *supra* note 28.

worker or group of workers because of their sex.³³ In another line of development, the courts began to adopt a broader understanding of sex discrimination as including discrimination against people whose expression of their gender diverged from the expectations of their peers.³⁴

The two main theoretical lines of sexual harassment law, *quid pro quo*, and hostile environment, lent themselves to two distinctly different kinds of cases where sexual minorities were concerned. There were cases where men (usually) found themselves, either because they were or were perceived to be gay or were perceived as sexually enticing, to be the recipients of unwanted sexual attention from other men in the workplace. Sometimes this could involve a gay supervisor trading on a position of authority to seek sexual favors, but sometimes it might involve a non-gay supervisor making advances toward a gay employee in an expression of control or hierarchy. Either way, these cases could lend themselves to the same *quid pro quo* analysis that had characterized the first successful sexual harassment cases brought by women, where continued employment, favorable assignments, pay increases, or promotions were conditioned on the employee submitting to a supervisor's sexual demands.

As early as 1981, federal courts were finding that employees who were the targets of such attention from supervisors of the same sex could have a claim of sex discrimination under Title VII.³⁵

The more controversial extension was the hostile environment theory, which overlaps with *quid pro quo* but goes beyond it to more generalized hostility that has a sexual flavor but does not necessarily involve a demand for sexual favors. These cases have proved quite difficult for the courts, even in the setting of women being harassed by men that first won judicial approval for the application of Title VII.³⁶ But it turns out that one of the major workplace issues for sexual minority employees, and especially gay men, has been hostile

³³ The lead Supreme Court case was *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

³⁴ The lead Supreme Court case was *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

³⁵ *Wright v. Methodist Youth Serv.*, 511 F. Supp. 307 (N.D. Ill. 1981). Federal circuit courts continue to accept to *quid pro quo* theory in same-sex harassment cases. *See, e.g.*, *Cooke v. Stefani Mgmt. Serv.*, 250 F.3d 564 (7th Cir. 2001).

³⁶ *E.g., compare*, *Clark County School District v. Breeden*, 532 U.S. 268 (2001); *Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777 (1st Cir. 1990), with *Little v. Windermere Relocation, Inc.*, 301 F.3d 958 (9th Cir. 2002).

environment harassment, ranging from name-calling and practical jokes all the way to outright physical assaults.³⁷

Ironically, the case that brought this most forcibly to the attention of the legal profession and the public did not involve a gay man. Joseph Oncale's sexual harassment claim, based on verbal and physical assaults directed against him by male co-workers while employed on an oilrig in the Gulf of Mexico, brought an historic Supreme Court ruling.³⁸ In that case, the Court held that Title VII should be interpreted according to its express language and structure in such cases.³⁹ That is, if an employee of either sex is singled out by co-workers or supervisors for harassment because of his or her sex, and the harassment is sufficiently severe and pervasive to have adversely changed their terms and conditions of employment, then there could be a valid claim under Title VII, regardless whether the victim of the harassment is gay or not gay.⁴⁰

The lower federal courts have been neither unanimous nor consistent in applying these principles to harassment cases brought by individuals who were either gay or perceived to be so, and many cases seem to go off on the nature of the initial pleadings and the kind of testimony given by the complainant during pre-trial discovery.⁴¹ The courts having unanimously concluded that sexual

³⁷ The paradigm case for hostile environment same-sex harassment is *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), although the plaintiff was not actually gay, merely perceived as such by others.

³⁸ *Id.*

³⁹ *Id.* at 79.

⁴⁰ *Id.*

⁴¹ The extraordinary diversity of views can be traced through numerous circuit court of appeals decisions. *See, e.g.*, *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999) (gay employee in Maine who suffered workplace same-sex harassment was not protected by civil rights laws); *Schmedding v. Tnemec Co.*, 187 F. 3d 862 (8th Cir. 1999) (homophobic harassment actionable as sex discrimination under Title VII); *Shermer v. Illinois Dept. of Transp.*, 171 F.3d 475 (7th Cir. 1999) (affirming summary judgment in favor of employer in same-sex sexual harassment case post-Oncale); *Simonton v. Runyon*, 232 F. 3d 33 (2nd Cir. 2000) (anti-gay workplace harassment does not violate Title VII's ban on sex discrimination unless plaintiff can show that harassment was due to his sex); *Spearman v. Ford Motor Co.*, 231 F.3d 1080 (7th Cir., 2000), *cert. denied*, 532 U.S. 995 (2001) (homophobic workplace harassment not actionable under Title VII when it was apparently motivated by dislike of plaintiff's sexual orientation, rather than discrimination on account of sex); *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257 (3rd Cir. 2001) (gay man's hostile environment sexual harassment claim failed under Title VII because he showed only that he was victimized because of his sexual orientation, not because of his sex; plaintiff made no allegations of gender nonconformity or other defining aspects of actionable same-sex harassment as required by *Oncale v. Sundowner*); Equal Employment Opportunity Commission

orientation discrimination, as such, is not covered by Title VII, and they tend to reject those harassment cases that are premised solely on anti-gay motives, and to accept those that can plausibly be structured as more like what might be called perceived gender identity cases—cases in which the harassers are motivated by discomfort due to gender non-conformity of the victim of the harassment.⁴² A recent example from the Sixth Circuit is *King v. Super Service, Inc.*,⁴³ where the court held that the plaintiff's case was clearly one of anti-gay harassment, thus a Title VII claim was properly dismissed.⁴⁴

The second major development under Title VII involves the expansion of the meaning of "because of sex" to include issues of gender non-conformity, through the theory of sex-stereotyping. This won Supreme Court endorsement in 1989 in *Price Waterhouse v. Hopkins*.⁴⁵ The Court ruled in *Price Waterhouse* that if a woman was disadvantaged in the competition for partnership by the opposition of partners who sought to impose their own stereotyped views of properly gendered female behavior, the disadvantaged woman had suffered a form of sex discrimination.⁴⁶ Justice William J. Brennan, Jr. wrote that Title VII was intended by Congress to eliminate the barriers that kept women from equal participation and success in the workplace, including stereotyped attitudes about women's place and appropriate feminine conduct and behavior.⁴⁷ For the first time, the Court referred to gender, not just

v. Harbert-Yeargin, Inc., 266 F.3d 498 (6th Cir. 2001) (reversing verdict for EEOC in same-sex harassment case); *Lack v. Wal-Mart Stores, Inc.*, 240 F.3d 255 (4th Cir. 2001) (Same-sex harassment jury verdict overturned on ground that supervisor's harassing comments were not based upon male employee's sex); *Nichols v. Azteca Rest. Ent., Inc.*, 256 F. 3d 864, (9th Cir. 2001) (homophobic harassment inspired by the victim's perceived gender non-conformity is actionable sex discrimination under Title VII; frequently name-calling and other verbal harassment is sufficiently severe and pervasive to affect employment conditions adversely, and employer's ineffective response subjects it to liability for harassment by plaintiff's co-workers); *Davis v. Coastal Int'l Sec., Inc.*, 275 F. 3d 1119 (D.C. Cir. 2002) (rejecting same-sex harassment claim, absent evidence plaintiff was selected for harassment because of his sex); *La Day v. Catalyst Tech., Inc.*, 302 F.3d 474 (5th Cir. 2002) (reversing a dismissal of a same-sex harassment claim brought by a male employee based upon sex by virtue of his male supervisor's apparent homosexuality and whether supervisor subjected employee to a hostile work environment); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002), *cert. denied*, 538 U.S. 922 (2003) (ruling that a gay man may sue his employer for sexual harassment by fellow male employees under Title VII of the Civil Rights Act of 1964).

⁴² See *infra* note 43.

⁴³ *King v. Super Service, Inc.*, 68 Fed. Appx. 659 (6th Cir. 2003) (a 2003 decision, not officially published but available from Westlaw and Lexis).

⁴⁴ See *id.*

⁴⁵ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

⁴⁶ *Id.* at 239.

⁴⁷ *Id.* at 251.

as sex, but as a part of the concern of Title VII.⁴⁸ “Gender” implicates how society constructs the roles to be played by the different anatomical sexes, and it is changeable over time. Recall the long, powdered wigs worn by traditional English barristers and judges to get a whiff of the variation in socially constructed gender roles for professional men in different places and times.

By the mid-1990s, courts were beginning to entertain arguments, primarily from male plaintiffs who had been subjected to hostile environment harassment mainly by male co-workers, that harassment inspired by the plaintiff’s gender non-conformity, either in dress, gesture, or grooming, is a form of sex discrimination in line with the *Price Waterhouse* precedent.⁴⁹ Again, not every federal judge was willing to accept this argument, and some, most notably Richard Posner of the Seventh Circuit in a recent concurring opinion, have argued that this is just a way to bootstrap sexual orientation discrimination into Title VII.⁵⁰ But several circuits have begun to embrace the argument, and the Sixth Circuit appears to have taken it the next step and recently ruled, for the first time by any federal circuit, that gender identity discrimination, as such, violates Title VII, and that transsexuals, who by definition are persons whose gender identity is discordant from their biological sex, can assert sex discrimination claims under Title VII using the *Price Waterhouse* theory.⁵¹

This development was surprising as just a few weeks earlier, in an unpublished opinion, a different panel of the Sixth Circuit had perfunctorily rejected just such a theory in *Johnson v. Fresh Mark Inc.*⁵² Circuit Judges Ryan, Daughtrey, and Clay found in a per curiam opinion that the trial court had correctly applied existing precedent to rule that Title VII does not prohibit discrimination based on an individual’s status as a transsexual, citing three prominent cases from other circuit courts that predate *Price Waterhouse*, and specifically rejecting the application of *Price Waterhouse* to the plaintiff’s claim.⁵³ This case involved a male to female transsexual who was hired as a woman but ran into problems because she used whichever restroom facility was

⁴⁸ *Id.* at 280.

⁴⁹ *See, e.g., Doe v. City of Belleville, Ill.*, 119 F.3d 563 (7th Cir. 1997), cert. granted, judgment vacated for reconsideration, sub nom. *City of Belleville v. Doe*, 523 U.S. 1001 (1998).

⁵⁰ *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058 (7th Cir. 2003).

⁵¹ *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004).

⁵² *Johnson v. Fresh Mark, Inc.*, No. 03-334, 2004, U.S. App. LEXIS 9997 (6th Cir. May 18, 2004) (per curiam).

⁵³ *Id.* at 3.

most handy, leading to complaints by co-workers.⁵⁴ When management checked her driver's license and saw the designation of male, it determined that Ms. Johnson could use only the men's room.⁵⁵ She refused to return to work under such conditions and was fired for absenteeism.⁵⁶ She claimed violations of the Americans With Disabilities Act (ADA) and Title VII.⁵⁷ The trial court correctly found that the ADA did not apply, since it includes an express exclusion of coverage for transsexualism, and, following precedent, that Title VII did not apply to cases of transsexual discrimination,⁵⁸ a conclusion that was affirmed by a Sixth Circuit panel.⁵⁹

Just weeks later, a different Sixth Circuit panel, consisting of Circuit Judges Cole and Gilman and Senior District Judge Schwarzer from California, sitting by designation, ruled the other way in *Smith v. City of Salem, Ohio*.⁶⁰ (Perhaps this shows that the Sixth Circuit really attributes no precedential weight to its unpublished opinions.) Perhaps Judge Schwarzer was introducing Ninth Circuit views here, because it is the Ninth Circuit that has so enthusiastically used the *Price Waterhouse* stereotyping theory as a way of expanding the meaning of sex discrimination under Title VII, in sexual harassment cases.⁶¹ In any event, Judge Cole is credited as author of the opinion.⁶²

Jimmie Smith, a lieutenant in the Salem Fire Department, began the process of transitioning from male to female, and as soon as higher management in the Fire Department found out, they tried to figure out, in collaboration with city officials, a way to get rid of Smith.⁶³ The court does not say why they wanted to get rid of Smith, but one presumes they believed that Smith's gender transition on the job would adversely affect the operation of the fire department, or perhaps they were just uncomfortable with having a transsexual as a firefighter.⁶⁴

⁵⁴ *Id.* at 1.

⁵⁵ *Id.* at 2.

⁵⁶ *Id.*

⁵⁷ *Id.* at

⁵⁸ *Id.* at 3.

⁵⁹ *Id.*

⁶⁰ *Smith*, 378 F. 3d at 566.

⁶¹ See *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002), *cert. denied*, 538 U.S. 922 (2003).

⁶² *Smith*, 378 F.3d at 567.

⁶³ *Id.* at 568.

⁶⁴ *Id.* at 569.

In this case, a group of top city officials held a special meeting to try to figure out a way to get rid of Smith without provoking a lawsuit.⁶⁵ They decided to require Smith to submit to a series of intrusive psychological evaluations as a condition of continued employment, hoping Smith would quit.⁶⁶ An official who was sympathetic to Smith thought this had the flavor of a witch-hunt, and telephoned Smith to warn about what was coming.⁶⁷ Smith retained a lawyer, who contacted the mayor to warn about potential legal liability.⁶⁸ Within a few days, on a pretext of some violation of a policy that had not been uniformly enforced, the department immediately suspended Smith, who filed a complaint of sex discrimination and retaliation in violation of Title VII and the US Constitution.⁶⁹ The trial judge, ironically the same trial judge who had ruled in the *Johnson v. Fresh Mark* case, granted the city's motion to dismiss, on the ground that all precedent held that transsexuals are not protected from discrimination under Title VII.⁷⁰

But the Sixth Circuit panel accepted a more nuanced interpretation of sex discrimination. Transsexuals, of course, are protected from sex discrimination under Title VII, the same as everybody else.⁷¹ Indeed, homosexuals are also protected under Title VII from discrimination on the basis of any of the characteristics enumerated in that statute: race or color, sex, national origin, or religion.⁷² Sex has been read by the Supreme Court in *Price Waterhouse* to include gender, and specifically to include discrimination against those who fail to live up to the sex stereotypes their employers or co-workers would favor.⁷³ Given such a reading, the Sixth Circuit panel found it clear that any discrimination against Jimmie Smith for transitioning from one sex to another had to be covered under Title VII, and that taking adverse personnel action against such a person for retaining legal counsel and complaining about potential discrimination constituted forbidden retaliation under the statute.⁷⁴

Additionally, as Smith was a public employee, the court had to consider whether the actions taken against him might also be prohibited under the

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 570.

⁷² *Id.* at 571.

⁷³ *Id.* at 573.

⁷⁴ *Id.* at 577.

Fourteenth Amendment's Equal Protection Clause.⁷⁵ This was a case of direct discrimination on the basis of Smith's gender non-conformity, and the court found that it fell within the theory of "disparate treatment" sex discrimination, which would be subjected to heightened scrutiny under the Equal Protection Clause.⁷⁶

One presumes the City of Salem will try to appeal these rulings if it decides not to settle immediately with Ms. Smith, but for now this is the precedent in the Sixth Circuit. The prior Johnson case, as an unpublished opinion, does not have the same authority.⁷⁷ Consequently, both public and private sector employers within the geographical jurisdiction of the Sixth Circuit are subject to an enforceable requirement not to discriminate in employment on the basis of gender identity.⁷⁸

In the Sixth Circuit, transgendered employees may now enjoy more protection against discrimination in the workplace than lesbian or gay employees. The later cannot always make the same sort of sexual stereotyping arguments that transgender employees can make, and their protection against discrimination relies on a less powerful view of the Equal Protection Clause, inasmuch as the lower federal courts have usually construed *Romer* as not having established sexual orientation as a suspect classification, and state, county or municipal civil rights ordinances, which are not universally available.⁷⁹ A gay or lesbian employee who encounters workplace adversity because of their sexual orientation, as such, has no recourse under Title VII, but a transgendered employee automatically would have recourse, under this ruling.⁸⁰

Although the Sixth Circuit might be seen as venturing into uncharted territory with this ruling, there is a foundation of prior cases to build upon.⁸¹ In addition to *Price Waterhouse* itself (which did not involve a transsexual or a lesbian, just a woman who presented a somewhat "macho" workplace personality style), in 2000 the Ninth Circuit found that the Violence Against Women Act could be invoked by a transsexual crime victim,⁸² and the First

⁷⁵ *Id.* at 576-577.

⁷⁶ *Id.* at 577.

⁷⁷ *See supra* note 52.

⁷⁸ *See supra* note 2.

⁷⁹ *See supra* note 15.

⁸⁰ *See supra* note 2.

⁸¹ *Infra* notes 83-84.

⁸² *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000).

Circuit found that a cross-dressing male who was denied service could bring a sex discrimination claim against a bank under the federal statute banning sex discrimination in credit transactions.⁸³ The court could also draw from the growing body of hostile environment cases where men who were either gay or were perceived by co-workers as being gay were allowed to make their sex discrimination claims based on the sex stereotyping theory.⁸⁴

From the early 1970s until 1996, gay rights advocates tried without success to get Congress to amend the Civil Rights Act of 1964 to add sexual orientation,⁸⁵ and since 1995 a proposed Employment Non-Discrimination Act (ENDA) has been introduced in each session to accomplish a more narrowly targeted ban on some forms of sexual orientation discrimination.⁸⁶ The legislative sponsors of these bills have resisted broadening it to include gender identity, to the consternation of transgender rights groups, but these groups may now have the last laugh; if the Sixth Circuit's bold move holds up, they will not need the gay rights movement to achieve their aim of statutory protection, while ENDA remains mired in committee, having never even achieved a committee vote in the House of Representatives in the ten years that it has been pending.

III. SPECIFIC WORKPLACE ISSUES

There is continuing litigation over religious opposition to the employment of sexual minorities.⁸⁷ One such case litigated in Kentucky is *Pedreira v. Kentucky Baptist Homes for Children, Inc.*⁸⁸ The defendant, a Baptist-affiliated social services agency that received extensive state funding, discharged in 1988, solely on religious grounds, a staff member who was discovered to be lesbian, before the enactment of Louisville's ordinance banning sexual orientation discrimination.⁸⁹ The employee, Alice Pedreira, sued under Title VII, claiming that she had been discriminated against on the basis of religion; that is, that her failure to conform her lifestyle to Baptist tenets opposing homosexuality was the cause of her termination.⁹⁰ Chief Judge Simpson of the

⁸³ *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000).

⁸⁴ *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002), *cert. denied*, 123 S.Ct. 1573 (2003).

⁸⁵ See H.R. 166, 94th Cong. (1975), H.R.1454, 97th Cong. (1982).

⁸⁶ Employment Non-Discrimination Act of 1995, H.R. 3285, 104th Cong. (1995).

⁸⁷ See *infra* notes 88-93 and accompanying text.

⁸⁸ *Pedreira v. Ky. Baptist Homes for Children*, 186 F. Supp. 2d 757 (W.D. Ky. 2001).

⁸⁹ *Id.* at 759.

⁹⁰ *Id.*

U.S. District Court for the Western District of Kentucky in Louisville rejected her argument, finding that she was discharged due to her lesbian lifestyle, not due to her religious beliefs.⁹¹ However, in the same opinion, Judge Simpson accepted, at least preliminarily, the argument that Kentucky Baptist Homes' use of federal and state money for religious proselytizing among the children who received its services might violate the Establishment Clause of the Constitution, and there has been ongoing controversy since the decision about government funding for the institution.⁹²

This case takes on particular significance in light of the Bush Administration's announced policy of extending eligibility for federal financial assistance to a wide array of faith-based organizations, some of which maintain personnel policies that discriminate against sexual minorities. Lambda Legal, a national gay rights litigation group, brought a similar complaint against a faith-based social services organization in Georgia on grounds of sexual orientation discrimination by a recipient of public funding, a case that was so strengthened by *Lawrence v. Texas* that a settlement was achieved a few months after that decision was issued.⁹³

Another issue arises from a new legislative phenomenon in a few major cities, the enactment of local ordinances that condition the awarding of city contracts on the extension of employee benefits eligibility to the same-sex domestic partners of gay employees.⁹⁴ San Francisco was the first to enact such a requirement, soon followed by some other west coast cities.⁹⁵ Portland, Maine, enacted a requirement that contractors receiving certain public housing funds provide such benefits.⁹⁶ Domestic partnership benefits have come to be a major issue in many workplaces. According to recent reports, a substantial minority of Fortune 500 corporations has voluntarily extended such benefits to their employees,⁹⁷ and many localities and a few states have extended the

⁹¹ *Id.* at 760.

⁹² *Id.* at 763.

⁹³ *Bellmore v. United Methodist Children's Home and Dep't. of Human Resources of Ga.*, Complaint submitted July 31, 2002; settled November 11, 2003.

⁹⁴ See *infra* notes 94-99 and accompanying text.

⁹⁵ SAN FRANCISCO ADMIN. CODE § 12B.1(d) (1997); SEATTLE WA. MUN. CODE § 20.45.020 (2000); LOS ANGELES MUNICIPAL CODE, EQUAL BENEFITS ORDINANCE, § 10.8.2.1 (Revision 8, 2004).

⁹⁶ PORTLAND MUNICIPAL CODE, Ch. 13.6, ¶ 6-21 (2002).

⁹⁷ According to the Human Rights Campaign Foundation, which systematically collects data that can be accessed on its website, www.hrc.org, the following numbers had been reached as of September 6, 2004: 217 of the Fortune 500 companies offered domestic partnership benefits to same-sex partners of their employees, 211 colleges and universities did so, as did 132

benefits either through legislation or collective bargaining.⁹⁸ In Hawaii, Vermont, and California, statutes provide that state employees who register their non-marital domestic partnerships with their employers are entitled to receive spousal benefits.⁹⁹ Such large cities as New York, Atlanta, and Philadelphia have also legislated such benefits.¹⁰⁰ Many large universities and other non-profit organizations almost routinely provide them now.

The question whether there is any legal obligation for an employer to provide such benefits in the absence of direct legislative requirements arises under two possible theories: that the failure of a *public* employer to do so violates equal protection requirements; and that the failure of a *private* sector employer to do so may require the employer to forego lucrative contracts to provide goods or services to one of the municipalities that requires it. States and localities cannot directly require private sector employers to provide these benefits, due to the Employee Retirement and Income Security Act, ERISA, a federal statute that preempts states and localities from passing laws affecting employee benefit plans.¹⁰¹ The question whether states or localities can premise public contracts on the provision of such benefits is an issue that has been litigated, albeit in specialized contexts.¹⁰² San Francisco's Equal Benefits Law has partially survived court challenge on this ground,¹⁰³ the courts have

municipal and county governments and ten state governments. As of this date, HRC had counted 7,057 private sector employers that had adopted domestic partnership benefits plans.

⁹⁸ In New York City, for example, Mayor David Dinkins responded to an adverse interlocutory ruling in a benefits suit by the Gay Teachers Association by concluding an agreement on domestic partnership benefits with unions representing city workers, the result later being codified in an ordinance during the administration of Mayor Rudolph Giuliani, Local Law 27 of 1998, codified at N.Y. Code Tit. 3, Ch. 2, Subch. 3.

⁹⁹ The Hawaii Reciprocal Beneficiaries Act, 1997 HAW. SESS. LAWS § 4, 383; The Vermont Civil Union Law, VT. SESS. LAWS HB 847, Act 91 § 3 (codified as 15 VT. STAT. ANN. § 1204) (1999); The California Registered Domestic Partner Rights and Responsibilities Act, AB 205, CAL. FAM. CODE § 297 (Deering 2003).

¹⁰⁰ For N.Y.C., see *supra* note 98.

¹⁰¹ The Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144(a) (1974) (preemption provision).

¹⁰² See *infra* notes 104-108 and accompanying text.

¹⁰³ See *Air Transp. Ass'n of America v. City and County of San Francisco*, 992 F. Supp. 1149 (N.D. Cal. 1998), *aff'd but remanded in part*, 266 F.3d 1064 (9th Cir. 2001). This litigation raised special issues under the Air Line Transportation Act as well as the ERISA preemption issues mentioned above. The court upheld San Francisco's requirements inasmuch as the city was acting as a consumer of goods or services as opposed to a regulator of private sector conduct, but only with respect to a contractor's activities that related to work on contracts for San Francisco. The opinions are complex and reach certain conclusions due to the specialized interaction of federal regulation of airline operations, which were involved because the plaintiffs' coverage under the city ordinance was related to contracts involving operations at

rejected the argument that subsequent enactment by the state of a Domestic Partnership law has preempted the ability of localities to legislate on this subject,¹⁰⁴ and reportedly more than 3,000 private sector employers have adopted domestic partnership benefits programs in order to continue trading with San Francisco.¹⁰⁵ Portland's ordinance was also sustained, at least in part.¹⁰⁶ However, the question of ERISA preemption has not been definitely resolved. In the meantime, New York's city council passed a similar bill, which was vetoed by Mayor Mike Bloomberg, whose veto was subsequently overridden by the council.¹⁰⁷ Litigation will likely commence to test whether the ordinance was within the council's legislative power.

The recent arrival of legal same-sex marriages in Massachusetts,¹⁰⁸ civil unions in Vermont,¹⁰⁹ registered domestic partnerships in California,¹¹⁰ and reciprocal beneficiaries in Hawaii,¹¹¹ as well as same-sex marriages in foreign countries,¹¹² raise additional issues for employers. Setting aside the legal question whether an employer in Kentucky would have any obligation to recognize such a marriage for purposes of workplace benefits and privileges, there is the question whether it makes good personnel policy to do so. The legal obligation for a private sector employer to give extraterritorial effect to such marriages is probably nil at this point, but the policy reasons for doing so

the municipal airport. In a companion case, *S.D. Myers, Inc. v. City and County of San Francisco*, 253 F.3d 461 (9th Cir. 2001), the court rejected various other challenges to the ordinance, and held that the plaintiff, a disappointed city contract bidder based in Ohio, lacked standing to raise the ERISA preemption issue.

¹⁰⁴ *S.D. Myers, Inc. v. City and County of San Francisco*, 336 F.3d 1174 (9th Cir. 2003).

¹⁰⁵ This number is based on anecdotal reports from the gay press.

¹⁰⁶ *Catholic Charities of Me., Inc. v. City of Portland*, 304 F. Supp. 2d 77 (D. Me. 2004).

¹⁰⁷ N.Y.C. ADMIN. CODE, Title 6, § 6-126 (2004).

¹⁰⁸ Pursuant to the ruling by the Supreme Judicial Court of Massachusetts in *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003), same-sex couples began to marry in that state on May 17, 2004.

¹⁰⁹ An Act Relating to Civil Unions, VT. STAT. ANN. Tit. 15, § 1204(a) (Supp. 2001).

¹¹⁰ California Domestic Partner Rights and Responsibilities Act, A.B. 206, Ch. 421, codified in CAL. FAMILY CODE, Div. 2.5 – Domestic Partners Registration (2003).

¹¹¹ HAW. SESS. LAWS 1997, § 383.

¹¹² As of the summer of 2004, citizens or legal residents of the Netherlands and Belgium could contract lawful same-sex marriages, including with non-citizens or non-residents of those countries. Beginning in the summer of 2003, pursuant to court decisions construing Canada's Charter of Rights and Freedoms to require a modification of the common law definition of marriage in Canada to become gender-neutral, same-sex partners could marry in several provinces in Canada, and because there was no residency requirement, an indeterminate number of same-sex couples from the United States have gone to such popular tourist destination cities as Vancouver, Toronto, Montreal, and Quebec to marry. The leading Canadian case is *Halpern v. Toronto (City) Clerk*, 2003 CarswellOnt 2159 (O.A.C. 2003).

may be substantial, the same concerns for competitiveness and employee morale that have driven so many corporations to adopt domestic partnership initiatives in response to competitive pressures, the lobbying of internal employee groups, or the bargaining demands of labor unions. For public sector employers, the issue may be more complicated, because principles of comity have routinely been applied by courts to require governments to recognize marriages that were lawful where they were performed, but comity allows for public policy reservations, and in a state that has adopted a statute expressly stating a public policy against recognizing same-sex marriages, the practice of comity would probably not be strong enough to require such recognition.¹¹³

Finally, one of the most significant issues for transgender employees is the ability to use restroom facilities in the workplace. There are not many published decisions involving transgender workplace discrimination claims, but some of the few published decisions revolve around this issue.¹¹⁴ The transgendered employee who is in the process of transitioning will most likely desire to use the restroom facilities provided for their desired gender. That means a male to female transgendered person will want to use the women's facilities. The transition process has many stages, and not all male to female transgenders want to take the final plastic surgery steps or can afford to do so. Nonetheless, due to hormone therapy and castration of their body shape, voice and appearance may have become significantly feminized, and their gender identity would make it difficult or inappropriate to use the men's room. On the other hand, female employees may object to having people they do not fully accept as women using the women's restroom. The solution that may work best is some modest renovation into unisex restroom facilities, although this would be more difficult in employee locker room situations.

The immediate legal question is whether the employer is obligated to accommodate a transgendered employee by providing acceptable restroom facilities, and what that would consist of. This question takes on new

¹¹³ So far, only one reported court decision has discussed the comity question, with respect to a same-sex marriage from Canada, and it deals with federal rather than state comity practices. On Aug. 17, 2004, the U.S. Bankruptcy Court in Tacoma, Washington, ruling in *In re Lee Kandu*, 315 B.R. 123, noted both the federal and state laws banning recognition of same-sex marriages and held that comity did not require recognition the marriage for purposes of a federal bankruptcy filing.

¹¹⁴ *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982); *Sommers v. Iowa Civil Rights Comm'n*, 337 N.W.2d 470 (Iowa 1983). ARTHUR S. LEONARD, *Sexuality and the Law: An Encyclopedia of Major Legal Cases*, 422-425 (Garland Pub.) (1993) (the saga of Audra Sommers' unsuccessful attempt to vindicate her discrimination claims is recounted).

immediacy with the recent Sixth Circuit decision finding that discrimination against transgendered employees violates Title VII of the Civil Rights Act of 1964.¹¹⁵ There is a decision from Minnesota, one of the handful of states with a statutory prohibition on discrimination based on gender identity.¹¹⁶ In *Goins v. West Group*,¹¹⁷ the Minnesota Supreme Court ruled that so long as the employer provided some restroom facility that the transgendered employee could use, the statute was not violated by the fact that the facility in question was less desirable or convenient than the restrooms provided to other workers, or by the exclusion of the employee from the restroom that she preferred consistent with her gender identity when other employees objected.¹¹⁸ This ruling reversed a decision by the state's court of appeals, which held that the employer had discriminated in a case where the employee encountered unacceptable inconvenience in using the only restroom made available to her.¹¹⁹

Obviously, the best way to avoid litigation over this issue is to respond sensitively to the restroom needs of transgendered employees, which requires some empathetic consideration from the employer and perhaps the expenditure of some money. However, at this point the limits of legal obligation in this regard are not well established.

IV. CONCLUSION

Over the past half century there has been a radical change regarding the legal rights of sexual minorities in the workplace. In both the public and private sectors, many, perhaps most—employees now work for employers who are legally bound not to discriminate on the basis of sexual orientation, and employers now subject to Title VII are also subject to the ban on gender identity discrimination. These obligations are becoming most firmly established in the area of workplace harassment, where federal courts are increasingly seeing Title VII's ban on sex discrimination as imposing obligations on employers to deal with workplace harassment of sexual minorities. Clearly, employers that operate in jurisdictions that specifically protect sexual minority workers have to become cognizant of these issues, and any large employer with operations in many states is likely to be operating in at

¹¹⁵ See *supra* note 2.

¹¹⁶ See *infra* note 117.

¹¹⁷ *Goins v. Westgroup*, 635 N.W.2d 717 (Minn. 2001), *rev'g* 619 N.W.2d 424 (Minn. Ct. App. 2000).

¹¹⁸ *Id.* at 721.

¹¹⁹ *Id.* at 720.

least some jurisdictions with pertinent legislation. This is a field where the legal rules are in significant flux; so vigilance by Human Resources professionals is definitely necessary to ensure that employers are in compliance with current law. Furthermore, as a matter of good personnel practice, employers may want to consider outpacing the legal requirements and, as many employers have done, voluntarily adopt non-discrimination policies and practices that take into account the workplace participation of sexual minorities.