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Same-Sex Marriage and Employment Discrimination: The Future of Sexual Orientation Bias Claims

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On June 26, 2015, the Supreme Court of the United States legalized same-sex marriage throughout the country. In *Obergefell v. Hodges*, the Court held that Section 1 of the Fourteenth Amendment – commonly referred to as the Equal Protection Clause[1] – rendered all state bans on same-sex marriage unconstitutional. The Court ruled that same-sex couples are entitled to "equal dignity under the law," and that their desire to be included in "one of civilization's oldest institutions" was guaranteed by the Constitution. This ruling instantly made same-sex marriage the law of the land and further required every state to recognize same-sex marriages performed elsewhere in the country.

The *Obergefell* decision is, no doubt, a watershed moment in American cultural history, but what the decision did not say is almost as interesting as what it did. Ordinarily, cases decided under the Equal Protection Clause invoke a specific level of scrutiny by the Supreme Court – either strict scrutiny, intermediate scrutiny or rational basis review. Which level applies depends on what rights are infringed by the law in question and whether it has the effect of discriminating against people based on protected characteristics – like race, religion, sex and so forth. In *Obergefell*, however, the Supreme Court invoked no level of scrutiny. Instead, it simply extended the right of marriage to same-sex couples and left it at that. This leaves many questions unanswered about how other laws – particularly, employment discrimination laws – should be analyzed if they afford different protections to people with different sexual orientations. Those questions will undoubtedly provide the basis for much litigation in the future.

The Equal Protection Clause applies to government actions that (disparately) infringe individuals' rights to "life, liberty or property." In *Obergefell*, the Court concluded that state bans on homosexual marriage violated the Equal Protection Clause because they infringed the liberty of same-sex couples. The dissenting justices, however, disagreed – arguing that Equal Protection applies only to liberty which "has long been understood as an individual freedom from government action, not ... to a particular government entitlement." (C. Thomas, dissenting). The distinction between government's provision of rights versus its intrusion of rights was a core matter of controversy in the case. This will be significant going forward because some may argue that the government's provision of private employment protections to people based on race, religion, sex and other categories unequally excludes sexual orientation. To use the Supreme Court's own language, such may give homosexual workers less than "equal dignity under the law." To successfully advance this argument, proponents would also have to establish that 'equal employment opportunity' is a right inherent to an individual's liberty or property. While that would be far from easy to do, it would not be a stretch either. Constitutional challenges to the exclusion of sexual orientation from America's discrimination laws – both at the state and federal level – are likely on the horizon as a result.

Congress has previously introduced legislation that would include sexual orientation and gender identity as protected characteristics under Title VII: the Employment Non-Discrimination Act (ENDA). Despite being introduced many times since 1994, ENDA has never passed or even reached a vote in both houses. However, most commentators agree that ENDA will become law in the near future. Popular and political support for LGBT rights has increased dramatically in the past decade, and the *Obergefell* decision will only increase that momentum. It is, in all likelihood, a mere matter of time before sexual orientation becomes a protected classification under our nation's employment discrimination laws.

Before then, however, it is important for employers to understand that claims for sexual orientation bias can still survive. Sexual orientation is already a protected classification in 23 different states, so causes of action for discrimination on that basis are live in each of those jurisdictions. Furthermore, the EEOC believes Title VII protects LGBT individuals from workplace discrimination, even though the statute itself does not list sexual orientation or gender identity as protected characteristics. The Commission is actually pursuing multiple lawsuits in that regard, and some lower federal courts have extended Title VII's protections to LGBT plaintiffs. To be fair, an equal – if not, greater – number of these cases have failed, but there are two distinct theories which have enjoyed some success.

The first is based on the Supreme Court's ruling in *Price Waterhouse v. Hopkins*. There, the Supreme Court held that Title VII prohibits employers from stereotyping individuals based on their sex, meaning it is unlawful to make adverse employment decisions because an individual is too masculine (as a woman), too feminine (as a man), or otherwise does not behave in a manner the employer thinks is acceptable for their gender. Notably, there is no requirement of an anti-gay animus or that the plaintiff be homosexual. But plenty of overlap exists.

The other theory is a little more nuanced. It invokes sex-based discrimination by pointing out that employers who distinguish between heterosexual and homosexual conduct treat men and women differently for doing the same thing. Specifically, proponents of this theory claim that women who date women engage in the same activity as men who date women (and vice versa). The only difference between the two is their sex, which is an unlawful basis for employment decisions under Title VII. The defense to this argument, of course, is to point out that employers who draw lines in this regard treat men and women the exact same way – they are both equally discouraged from, and sometimes penalized for, same-sex relationships. Whether that amounts to sex-based discrimination, frankly, depends on your perspective, but it is worth noting that this theory has prevailed in the past and may prevail again in the future.

Whether under one of these two Title VII theories, pre-existing state law, or newly enacted legislation, claims for sexual orientation discrimination are on their way to courts across America. Planning is paramount for employers as a result. Developing fair policies – that balance employees' rights with your legitimate interest in a productive, professional workplace – is essential. Training supervisors and orienting employees is essential too. Indeed, everyone in your organization should know what is important to you, and why you value (and could stop valuing) their employment. These steps will help ensure that your workplace is, in fact, the workplace you want it to be.

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[1] The Fourteenth Amendment provides, in pertinent part: *No State shall make or enforce any law which shall abridge the privileges or immunities 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.*