

# office memorandum



**Date:** December 4, 2015

**To:** The Honorable Mayor and Councilmembers

**Through:** Jeff Harley Bryant, City Attorney *JHB*

**From:** Kristina L. Bell, Assistant City Attorney *KLB*

**Subject:** Update of recent developments in Sex Discrimination jurisprudence;  
Resolution R-1516-65 Requested by the Norman Human Rights  
Commission

## Background

At the October 26, 2015, meeting of the City of Norman Human Rights Commission ("HRC"), the City Attorney's Office presented a requested legal update of sex discrimination jurisprudence, specifically regarding cases focused on discrimination claims grounded in disparate treatment due to sexual orientation and gender identity. (See attached October 26, 2015, Office Memorandum). The HRC voted unanimously to request that this information be presented to City Council and to encourage City Council to adopt a resolution providing policy clarification regarding the administration of City policies and ordinances as well as the interpretation and enforcement of Chapter 7 of the City's Code of Ordinances in accordance with the information provided.

Troy Stephenson, Executive Director of Freedom Oklahoma, attended the HRC meeting and was supportive of the update and the recommendation from the HRC. Mayor Rosenthal also attended the meeting and concurred that the City Council be briefed on the case law and that a recommendation to provide clarity to the City Ordinances would be timely.

## Discussion

In addition to the memorandum that was provided to the HRC, on November 13<sup>th</sup>, City legal staff had an opportunity to consult with local attorney Don Holladay. Mr. Holladay was involved in litigating a case wherein the Tenth Circuit Court of Appeals held Oklahoma's same-sex marriage ban to be unconstitutional, with certiorari denied by the Supreme Court of the United States ("SCOTUS"). Mr. Holladay had reviewed the Legal Department's memorandum to the HRC, conducted his own independent legal research in this area of the law, and was able to provide additional insights regarding the subject. Mr. Holladay advised that the memorandum was a comprehensive current legal review and added that the Department of Defense ("DOD") also added sexual orientation to the list of nondiscriminatory protections under the military's equal opportunity program in June, 2015.

Mr. Holladay also advised that Norman United, the organization that had requested HRC and the City take action on these issues, expressed a main concern that not all citizens in Norman may receive the same protection depending on their circumstances. For instance, citizens working for the federal government (like postal workers), University of Oklahoma employees whose handbook prohibits sexual

orientation discrimination, and employees of private employers who afford similar protection may receive protection at their jobs in Norman, while other Norman citizens who may work for a smaller private employer that does not meet the 15 employee threshold to be governed by the Equal Employment Opportunity Commission ("EEOC") may not enjoy the same protection. It was expressed that if Norman enforced its Civil Rights ordinance in the same manner as it was being applied by the EEOC, then perhaps there might be an avenue for those employees who could not seek relief from the EEOC to have a remedy under the City Code provision. It was acknowledged that the remedies available in Federal Court under Title VII were significantly broader than Municipal Court criminal penalties that could be levied against a convicted defendant.

Mr. Holladay also noted that although the Tenth Circuit Court of Appeals and SCOTUS have not yet explicitly ruled on whether discrimination based on sexual orientation or gender identity is impermissible sex discrimination, SCOTUS historically has shown a great deal of deference toward EEOC interpretation, saying that the EEOC represents "a body of experience and informed judgment to which courts may properly resort for guidance." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986). Mr. Holladay also noted that SCOTUS's recent ruling on same-sex marriage provides some insight on how the high court views these types of issues and that he believes future federal cases addressing sexual orientation and gender identity discrimination will be viewed in the context of SCOTUS's most recent ruling that for states to not recognize same-sex marriage is a violation of the 14<sup>th</sup> Amendment to the U.S. Constitution.

### **Recommendation**

As requested by the HRC, a draft Resolution acknowledging current federal jurisprudence regarding sexual orientation and gender identity as the basis for discrimination claims under Title VII is provided for City Council review. Staff will be available for presentation and to respond to questions at the Council Conference on December 8, 2015.



# Office memorandum

**Date:** October 26, 2015  
**To:** Norman Human Rights Commission  
**Through:** Jeff Harley Bryant, City Attorney *JHB*  
**From:** Kristina L. Bell, Assistant City Attorney *KLB*  
**Subject:** Legal Update regarding Sexual Orientation and Gender Identity Protection

## I. Background

The following is an analysis of the current law regarding discrimination claims made by Lesbian Gay Bisexual and Transgender ("LGBT") individuals alleging that they were discriminated against based on sexual orientation and/or gender identity. This memorandum addresses President Barack Obama's Executive Order ("EO") addressing federal civilian employees and federal contractors, regulations published by the United States Department of Housing and Urban Development ("HUD"), and guidance and appeal orders issued by the federal Equal Employment Opportunity Commission ("EEOC") as well as a legal analysis of recent federal case law addressing discrimination claims based on sexual orientation and gender identity.

## II. Discussion

### A. Executive Order 13672

On July 21, 2014, President Obama signed Executive Order ("EO") 13672 prohibiting discrimination on the basis of gender identity in the federal civilian work force and prohibiting federal contractors from discriminating on the basis of sexual orientation or gender identity.<sup>1</sup>

The stated purpose of EO 13672 is "to provide for a uniform policy for the Federal Government to prohibit discrimination and take further steps to promote economy and efficiency in Federal Government procurement by prohibiting discrimination based on sexual orientation and gender identity." EO 13672 stated that it was "not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person."

---

<sup>1</sup> Proposed federal Congressional legislation prohibiting discrimination in hiring and employment on the basis of sexual orientation or gender identity by employers with at least 15 employees, called The Employment Non-Discrimination Act ("ENDA") has been introduced multiple times since 1994 but has not passed. President Obama has publicly supported the bill.

## **1. Federal Civilian Employees**

President Richard Nixon issued EO 11478 (1969) that originally prohibited discrimination in the competitive service of the federal civilian workforce on the basis of race, color, religion, sex, national origin, handicap, and age. EO 11478 was amended by President Bill Clinton's EO 13087 (1998) adding the protected classification of sexual orientation. EO 13672 added the protected classification of gender identity. This provision went into effect upon the signing of the EO.

## **2. Federal Contractors**

EO 13672 also amended President Lyndon B. Johnson's EO 11246 (1965), which originally prohibited discrimination by federal government contractors and sub-contractors on the basis of race, color, religion, sex, or national origin. EO 13672 added the protected classifications of "sexual orientation" and "gender identity."

The provisions pertaining to federal contractors became effective on April 8, 2015, 120 days after the United States Department of Labor ("DOL") promulgated the Final Rule. It applies to covered contracts entered into or modified on or after April 8, 2015.

### **B. HUD's Equal Access Rule**

HUD adopted the Equal Access Rule ("Rule"), 77 FR 5662, on February 3, 2012. HUD implemented this final rule to implement policy "to ensure that its core programs are open to all eligible individuals and families regardless of sexual orientation, gender identity, or marital status." This rule went into effect on March 5, 2012. This Rule was enacted after HUD published a proposed rule on January 24, 2011, which advised of evidence suggesting that LGBT individuals and families did not have equal access to housing. "Such information concerned HUD because HUD is charged with promoting the federal goal of providing decent housing and a suitable living environment for all." HUD noted that many state and local governments shared this concern regarding equal housing opportunities and that 20 states, the District of Columbia, and over 200 localities had enacted laws prohibiting discrimination in housing on the basis of sexual orientation or gender identity. HUD initiated the rulemaking in January, 2011, "in an effort to ensure that HUD's rental housing and homeownership programs remain open to all eligible persons regardless of sexual orientation, gender identity, or marital status."

At the Final Rule stage, new § 5.105(a)(2) was revised to "make explicit that eligibility determinations for HUD-assisted or -insured housing must be made without regard to *actual* or *perceived* sexual orientation, gender identity, or marital status." (emphasis added). Section 5.105(a)(2)(iii) included the



prohibition of inquiries regarding sexual orientation or gender identity for the purpose of determining eligibility or otherwise making housing available but allows inquiries related to an applicant or occupant's sex for the limited purpose of determining placement in temporary, emergency shelters with shared bedrooms or bathrooms, or for determining the number of bedrooms to which a household may be entitled. The Rule also revised and added new definitions:

1. **"Family"** – 24 CFR § 5.403's definition of "family" was slightly reorganized to make clear that "'family' includes but is not limited to the following, regardless of actual or perceived sexual orientation, gender identity, or marital status." This revised language makes explicit that perceived, as well as actual, sexual orientation, gender identity, and marital status cannot be factors for determining eligibility for HUD-assisted housing or FHA-insured housing.

2. **"Gender Identity"** – 24 CFR § 5.403 defines "gender identity" as "actual or perceived gender-related characteristics." This definition was based on the definition of "gender identity" in the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, 18 U.S.C. § 249(c)(4), which was enacted in 2009 to protect LGBT individuals from targeted violence. The definition "is intended to cover actual or perceived gender-related characteristics of all persons, including transgender persons," so HUD "will interpret it to include those gender-related characteristics not stereotypically associated with a person's designated sex at birth."

3. **"Sexual Orientation"** – 24 CFR § 5.403 defines "sexual orientation" as "homosexuality, heterosexuality, or bisexuality." This definition is based on federal policy provided by the Office of Personnel Management ("OPM") in its publication, "Addressing Sexual Orientation in Federal Civilian Employment: A Guide to Employee Rights," which was written "to implement the Federal Government's commitment to equal employment opportunity for LGBT individuals in the federal civil service." Like gender identity, the Rule covers both perceived and actual sexual orientation. The rule therefore covers situations in which an applicant identifies as transgender; is perceived as transgender, multi-gendered, or between genders; or who has had a history of same-sex relationships.

Although the Rule adds these additional program requirements, it "does not create additional protected classes in existing civil rights laws such as the Fair Housing Act, . . . which [explicitly] prohibits discrimination based on race, color, national origin, religion, sex, disability, and familial status." HUD acknowledges, however, that even though sexual orientation and gender identity are expressly identified protected classes in the Fair Housing Act ("FHA"), the FHA's "prohibition of discrimination on the basis of sex prohibits discrimination against LGBT persons in certain circumstances, such as those involving nonconformity with gender stereotypes." HUD also may "have jurisdiction to process a complaint filed under the [FHA] if an LGBT person obtains housing but then experiences discrimination in the form of sexual harassment." Sexual

harassment under the FHA is illegal “if the conduct is motivated by sex and is either so severe and pervasive that it creates a hostile environment or the provision of housing or its benefits is conditioned on the receipt of sexual favors (for example, as a *quid pro quo*).” HUD acknowledges that harassment may also be motivated by sex if it is due to “a landlord’s view that the tenant’s appearance or mannerisms fail to conform with stereotypical expectations of how a man or woman should look or act.”

In HUD’s Affirmatively Furthering Fair Housing Rule (“AFFH”), 80 FR 42284, promulgated on July 16, 2015, HUD confirmed its “policy to ensure equal access [to housing] on the basis of sexual orientation, gender identity, and marital status” by referring to its 2012 Equal Access Rule. HUD reiterated that the Equal Access Rule “did not and could not, . . . expand statutory fair housing protections to all persons on the bases [of sexual orientation and gender identity], but noted again that the FHA’s prohibition of discrimination based on sex “prohibit[ed] discrimination against LGBT individuals in certain circumstances, such as those involving nonconformity with gender stereotypes.”

### C. EEOC Interpretation

The EEOC is the federal agency charged with the enforcement of federal laws prohibiting unlawful discrimination by federal government agencies and by private employers with more than 15 employees. The EEOC adopted a Strategic Enforcement Plan (“SEP”) in December, 2012, that listed “coverage of lesbian, gay, bisexual and transgender individuals under Title VII’s sex discrimination provisions, as they may apply” as an enforcement priority for the FY2013-2016 and has actively filed lawsuits<sup>2</sup> on behalf of transgender employees, filed amicus briefs related to coverage of sexual orientation and transgender status, and has issued federal sector administrative decisions in these areas. The EEOC enforces federal laws that make it illegal to discriminate against a job applicant or employee because of the person’s race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability, or genetic information. Federal law also prohibits retaliation by employers against employees who oppose discriminatory employment practices. Title VII prohibits an employer from “discriminat[ing] against any individual with respect to his compensation, terms,

---

<sup>2</sup> In *EEOC v. Lakeland Eye Clinic, P.A.*, Civ. No. 8:14-cv-2421-T35 AEP, filed on Sept. 25, 2014, in the Middle District of Florida, the EEOC sued an organization of health care professionals, alleging that it discriminated based on sex by firing an employee who was transgender. On April 9, 2015, the U.S. District Court in Tampa approved an agreement in which the clinic will pay \$150,000 to settle the lawsuit and agreed to implement a new gender discrimination policy and provide training to its management and employees regarding transgender/gender stereotype discrimination. In *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, Civ. No. 2:14-cv-13710-SFC-DRG, filed on Sept. 25, 2014, the EEOC sued a funeral home company for alleged sex discrimination for firing a funeral director/embalmer for being transgender.

conditions, or privileges of employment, because of such individual's ... sex." 42 U.S.C. § 2000e-2(a)(1). Although Title VII of the Civil Rights Act of 1964 does not explicitly identify "sexual orientation" or "gender identity" as separate protected classes, the EEOC interprets the prohibition against discrimination on the basis of "sex" as prohibiting discrimination against employees on the basis of sexual orientation or gender identity.

## 1. EEOC Appeal Decisions

### A. Sexual Orientation Discrimination as Sex Discrimination

On July 15, 2015, the EEOC decision in *David Baldwin v. Anthony Foxx*, EEOC Appeal No. 0120133080, reiterated the EEOC's position that Title VII's prohibition against sex discrimination incorporates a prohibition against discrimination on the basis of an employee's sexual orientation or gender identity. The EEOC reasoned that "sex" under Title VII includes "sex" (biological differences between men and women) as well as gender and gender stereotyping (the failure to act and appear according to societal expectations defined by gender) and noted that the two terms "gender" and "sex" are often used interchangeably in the Title VII context. *Baldwin* at p. 5. The EEOC stated that the issue is not whether sexual orientation is explicitly listed in Title VII; it clearly is not, but rather whether the agency has "relied on sex-based considerations" or "[t]aken gender into account" when taking the challenged employment action." *Id.* at p. 6. The EEOC reasoned that "[s]exual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex" and noted that the same would be true if the complainant was straight. *Id.* at p. 7. The EEOC noted that federal courts have adopted the same analysis in claims of sex discrimination under Title IX, the Due Process Clause, and the Equal Protection Clause. *Id.* at p. 7 n.6 (citing *Videckis v. Pepperdine Univ.*, Case No. CV 15-00298 DDP (JCx), 2015 WL 1735191, at \*8 (C.D. Cal. Apr. 16, 2015) (Title IX – "For example, a policy that female basketball players could only be in relationships with males inherently would seem to discriminate on the basis of gender."); *Lawson v. Kelly*, 58 F. Supp. 3d 923, 934-35 (W.D. Mo. 2014) (Equal Protection Clause – "The State's permission to marry depends on the genders of the participants, so the restriction is a gender-based classification" and violates the Equal Protection Clause).<sup>3</sup>

<sup>3</sup> The United States Supreme Court ("SCOTUS") ruled on June 26, 2015, that the Fourteenth Amendment requires a State to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-State. *Obergefell, et al., v. Hodges*, 135 S. Ct. 2584 (2015). In *Obergefell*, the SCOTUS addressed a Circuit split on the issue and held that the right to marry is a fundamental right inherent in the liberty of the person and that therefore same-sex marriage was protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment, thereby legalizing same-sex marriage across the country.

The EEOC also stated that sexual orientation discrimination is sex discrimination because it is associational discrimination on the basis of sex, treating an employee less differently for associating with a person of the same sex and recognized that this could also apply to heterosexuals. *Id.* at pp. 8-9 (comparing this to prohibited race discrimination based on interracial marriage or friendships as recognized in *Floyd v. Amite Cty. Sch. Dist.*, 581 F.3d 244, 249 (5<sup>th</sup> Cir. 2009); *Holcomb v. Iona Coll.*, 521 F.3d 130, 138 (2d Cir. 2008)). In *Floyd* and *Holcomb*, those Circuit Courts found the discrimination unlawful because it was based on an employee's relationship with a person of another race and therefore necessarily involved considerations of the employee's race.

The EEOC also found that sexual orientation discrimination is sex discrimination because it necessarily involves discrimination based on gender stereotypes. *Id.* at p. 9 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239, 241-42 (1989) (plurality opinion)). LGBT employees could bring gender stereotyping claims under Title VII if they are able to demonstrate that they were treated adversely because they were viewed, based on their appearance, mannerisms, or conduct, as insufficiently "masculine" or "feminine." *Id.* at p. 9. The EEOC emphatically stated that it did "not view the borders between sex discrimination and sexual orientation as 'imprecise' ... [D]iscrimination based on the basis of sexual orientation necessarily involves discrimination on the basis of sex." *Id.* at p. 12 n.12. The EEOC noted that it and the federal courts have gone away from the traditional view that Title VII offered no protection simply because sexual orientation was not an enumerated protected class. *Id.* at p. 12. "Congress may not have envisioned the application of Title VII to these situations. But as a unanimous Court stated in *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78-80 (1998) ("[S]tatutory prohibitions often go beyond the principal evil [they were passed to combat] 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.") The EEOC determined that the law does not need to create a new class of covered persons for every situation (ie: interracial relationships, which are covered by race; "masculine women," which are covered by sex; or non-believers, which are covered by religion). *Id.* at p. 14. The EEOC held that allegations of discrimination based on sexual orientation state a claim of discrimination on the basis of sex if the complainant can show that the treatment would not have occurred but for the individual's sex; the discrimination was based on the sex of the person(s) the individual associates with; or the discrimination is premised on the fundamental sex stereotype, norm, or expectation that individuals should be attracted to only those of the opposite sex. *Id.* at p. 14. The EEOC's *Baldwin* ruling directs federal agencies to treat claims of sexual orientation discrimination as complaints of sex discrimination under Title VII and to process them accordingly.

Although the EEOC's decision in *Baldwin* was focused on timeliness and jurisdictional issues on appeal, the EEOC discussed in detail current federal case law and the EEOC's position on these issues. The EEOC did not render a



decision on the merits of the employee's claim but rather remanded it back to the agency.

### **B. Gender Identity Discrimination as Sex Discrimination**

The EEOC held in *Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821 (Apr. 20, 2012) that discriminating against an individual because that person is transgender (in other words, discriminating on the basis of the individual's gender identity) is unlawful discrimination based on sex and violates Title VII. The *Macy* decision recognizes a limited exception for an employer to take gender into account only when gender is a "bona fide occupational qualification ("BFOQ") reasonably necessary to the normal operation of the particular business or enterprise. *Id.* (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality decision)). The BFOQ exception is extremely narrow. *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977) (referencing Justice Marshall's concurring opinion in *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971)). This opinion also cited various federal cases recognizing that sex discrimination included gender discrimination. *Id.* (citing *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9<sup>th</sup> Cir. 2000) (sex encompasses both the biological differences between men and women and gender); *Smith v. City of Salem*, 378 F.3d 566, 572 (6<sup>th</sup> Cir. 2004) ("The Supreme Court made clear that in the context of Title VII, discrimination because of 'sex' includes gender discrimination."); *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11<sup>th</sup> Cir. 2011) (*Price* stated gender discrimination includes gender stereotyping.); *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) ("Such practice does not pass the simple test of whether the evidence shows 'treatment of a person in a manner which but for the person's sex would be different.'"))

### **C. Federal Case Law**

In *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79-80 (1998), the SCOTUS held that same-sex harassment is sex discrimination under Title VII. Justice Scalia noted in the majority opinion that while same-sex harassment was "assuredly not the principal evil Congress was concerned with when it enacted Title VII ... statutory prohibitions often go beyond the principal evil [they were passed to combat] 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." The next year, in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239, 241-42 (1989), a plurality opinion, the SCOTUS recognized that employment discrimination based on sex or gender stereotypes, such as assumptions and/or expectations about how persons of a certain sex should dress, behave, etc., is unlawful sex discrimination under Title VII. In *Price*, an accounting firm employee was denied a promotion because the partners felt that she did not act as a woman should act. The Court found that "sex stereotyping, [when] an employer acts on the basis of a belief that a woman cannot be

aggressive, or that she must not be, has acted on the basis of gender” and that such discrimination constituted sex discrimination under Title VII.

Several federal district courts in other jurisdictions have likewise recognized protection against discrimination on the basis of sexual orientation and/or gender identity.

### 1. Gender Identity

In *Glenn v. Brumby*, 663 F.3d 1312 (11<sup>th</sup> Cir. 2011), a transgender female brought a claim under 42 U.S.C. § 1983 alleging unlawful sex discrimination in violation of the Equal Protection Clause when she was terminated from her position with the Georgia General Assembly. Relying on *Price Waterhouse* and other Title VII precedent, the court concluded that the defendant discriminated against the complainant based on her sex by terminating her because she was transitioning from male to female. The court stated that a person is considered “transgender precisely because of the perception that his or her behavior transgresses gender stereotypes.” *Id.* at 1316. “There is thus a transruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms.” *Id.* “The nature of the discrimination is the same; it may differ in degree but not in kind, and discrimination on this basis is a form of sex-based discrimination that is subject to heightened scrutiny under the Equal Protection Clause.” *Id.* at 1319.

In *Smith v. City of Salem*, 378 F.3d 566 (6<sup>th</sup> Cir. 2004), the Sixth Circuit relied on *Price Waterhouse* to determine that Title VII prohibits discrimination against transgender individuals based on gender stereotyping. In *Smith*, the plaintiff alleged that he was suspended based on sex after he began to express a more feminine appearance and notified his employer that he would eventually undergo a complete physical transformation from male to female. *See also Barnes v. City of Cincinnati*, 401 F.3d 729 (6<sup>th</sup> Cir. 2005) (finding that a police officer who presented as a male on duty but often lived as a woman off duty and who had a reputation in the police department as a homosexual, bisexual, or cross-dresser had stated sex discrimination under Title VII for discrimination based on his failure to conform to sex stereotypes). In *Rosa v. Parks W. Bank & Trust Co.*, 214 F.3d 213 (1<sup>st</sup> Cir. 2000), the First Circuit held that a transgender plaintiff, who was biologically male, stated a claim of sex discrimination under the Equal Credit Opportunity act by alleging that he was denied a loan application because he was dressed in traditionally female attire. In *Schwenk v. Harford*, 204 F.3d at 1202, the Ninth Circuit found that a transgender woman stated a claim of sex discrimination under the Gender Motivated Violence Act based on the perception that she was a “man who ‘failed to act like one.’”

### 2. Sexual Orientation

In *Hall v. BNSF Ry. Co.*, No. 13-2160, 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014), the court recognized sexual orientation discrimination as sex

discrimination when a male married to a male was not afforded health care benefits. The Court found this unlawful because the employer was treating female employees with male partners more favorably than male employees with male partners simply because of the employee's sex. In *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002), the federal district court stated that "stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women. While one paradigmatic form of stereotyping occurs when co-workers single out an effeminate man for scorn, in fact, the issue is far more complex. The harasser may discriminate against an openly gay co-worker, or a co-worker that he perceives to be gay, whether effeminate or not, because he thinks 'real' men should date women and not other men."

### 3. Tenth Circuit and the Western District of Oklahoma

The federal courts with jurisdiction over the City of Norman, the Western District of Oklahoma and the Tenth Circuit Court of Appeals, have also addressed the issue. In *Medina v. Income Supp. Div.*, 413 F.3d 1131, 1135 (10<sup>th</sup> Cir. 2005), the Tenth Circuit found that sexual orientation is not a protected class. "We construe Ms. Medina's argument as alleging she was discriminated against because she is a heterosexual. Title VII's protections, however, do not extend to harassment due to a person's sexuality." (quoting *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 263-64 (3<sup>rd</sup> Cir. 2001) for the proposition that "Congress has repeatedly rejected legislation that would have extended title VII to cover sexual orientation."). The Tenth Circuit confirmed this ruling in an unpublished opinion in 2006. "[S]exual orientation discrimination is not a recognized cause of action under Title VII." *Essary v. Fed. Expr. Corp.*, Case No. 05-2091, 2006 WL 31128, at \*4 (10<sup>th</sup> Cir. Jan. 6, 2006) (citing *Medina*, 413 F.3d at 1135). The only Western District case found citing the discussion in *Medina* is *Thomas v. Corrs. Corp. of America, Inc.*, Case No. CIV-07-1378-D, 2010 WL 565272, at \*4 (W.D. Okla. Feb., 11, 2010) wherein Judge DeGiusti acknowledged that same-sex harassment may be actionable under Title VII (citing *Oncale*, 523 U.S. at 80 and *Medina*, 413 F.3d at 1131).

Two years after *Medina*, in 2007, the Tenth Circuit held that transsexuals could not claim Title VII protection based solely on their status as a transsexual but acknowledged that, "like all other employees, [Title VII] protection [against sex discrimination] extends to transsexual employees only if they are discriminated against because they are male or because they are female." *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10<sup>th</sup> Cir. 2007). The Tenth Circuit found that discrimination against a transsexual based on the person's status as a transsexual is not discrimination because of sex under Title VII." *Id.* at 1221. "[T]here is nothing in the record to support the conclusion that the plain meaning of 'sex' encompasses anything more than male and female. In light of the traditional binary conception of sex, transsexuals may not claim protection under Title VII from discrimination based solely on their status as a transsexual." *Id.* at

1221-22. The Court explicitly rejected the argument that transsexuals were a protected class under Title VII. *Id.* at 1222.

The Tenth Circuit acknowledged in *Etsitty*, however, that a number of courts had relied on *Price Waterhouse* to expressly recognize a Title VII cause of action for discrimination based on an employee's failure to conform to stereotypical gender norms. *Id.* at 1223. The Court also found, though, that it did not need to "decide whether discrimination based on an employee's failure to conform to sex stereotypes always constitutes discrimination 'because of sex'" or whether "such a claim may extend Title VII protection to transsexuals who act and appear as a member of the opposite sex" because the Court found that the plaintiff had not presented a genuine issue of material fact as to whether her employer's stated motivation for termination was pretextual. *Id.* at 1224.

The Tenth Circuit has not yet made an affirmative ruling on this issue of whether a transsexual could assert a Title VII sex discrimination claim for failure to conform to gender stereotypes.<sup>4</sup> There is a recent district court decision in the Western District, however, where Judge Cauthron found that the plaintiff's allegations of discrimination were based on the fact that she was female, yet her employers regarded her as a male. *United States of America and Dr. Rachel Tudor v. Southeastern Okla. State Univ.*, Case No. CIV-15-324-C, 2015 WL 4606079, at \*2 (W.D. Okla. July 10, 2015). In this case, the plaintiff alleged sex discrimination and retaliation under Title VII following her transition from male to female. Dr. Tudor alleged that at the time she announced her intent to change gender, her employer began treating her differently, ultimately denying her tenure application. *Id.* at \*1. Her employer filed a Motion to Dismiss, arguing that she was not a member of a protected class since the Tenth Circuit held in *Etsitty* that a transsexual individual is not a member of a protected class. *Id.* at \*2. Judge Cauthron stated that "the reasoning relied on by the Tenth Circuit is inapposite here." *Id.* at \*2. Judge Cauthron denied the Motion to Dismiss, finding that the Tenth Circuit's *Etsitty* decision merely held that transsexuals could not claim protection under Title VII based solely on their status as a transsexual but that they, like other employees, could assert a claim of discrimination based on their gender. *Id.* at \*2. "[L]ike all other employees, such [Title VII] protection extends to transsexual employees only if they are discriminated against because they are male or because they are female.' Here, it is clear that Defendants' actions as alleged by Dr. Tudor occurred because she was female, yet Defendants regarded her as male. Thus, the actions Dr. Tudor alleges Defendants took

---

<sup>4</sup> In an unpublished 2012 decision in *Larson v. United Air Lines*, Case No. 11-1313, 2012 WL 1959471, at \*3 n.1 (10<sup>th</sup> Cir. June 1, 2012), the Tenth Circuit noted that Title VII discrimination is only cognizable on the basis of sex, not sexual orientation, and that to the extent the plaintiff attempted to argue that he was furloughed because of his status as a gay male and not just a male, he did not present a claim under federal law. *Larson* at \*3 n.1 (citing *Etsitty*, 502 F.3d at 1222).



against her were based upon their dislike of her presented gender.” *Id.* at \*2 (quoting *Etsitty*, 502 F.3d at 1222). Judge Cauthron noted that the Tenth Circuit’s discussion in *Etsitty* cited *Smith v. City of Salem*, 378 F.3d 566, 575 (6<sup>th</sup> Cir. 2004) and its holding that “sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as ‘transsexual,’ is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.” *Id.* at \*2 (quoting *Smith*, 378 F.3d at 566). Judge Cauthron denied the Motion to Dismiss, finding that “the discrimination occurred because of Dr. Tudor’s gender, and she falls within a protected class.” *Id.* at \*2. This case is still pending. A Scheduling Order [Doc. No. 39] was entered on July 28, 2015. Dispositive motions are due by August 1, 2016.

### III. Summary and Analysis

The EEOC has consistently taken the position that even though they are not specifically enumerated protected classes in Title VII, discrimination based on both sexual orientation and gender identity constitute impermissible sex discrimination. There are several federal cases at both the district court and appellate levels that are consistent with this analysis. The Tenth Circuit Court of Appeals, which governs claims brought within the geographical boundaries of the City of Norman, however, has explicitly rejected the arguments that sexual orientation and gender identity are protected under Title VII, although the Tenth Circuit did state in *Etsitty* that a transgender employee, like any employee, could assert a sex discrimination case if the discrimination was based on the employee’s gender. One pending Western District of Oklahoma case has recognized that a transgender employee can fall into a protected class for asserting that she suffered discrimination due to gender non-conformity.

The EEOC appellate decisions are only binding on federal agencies, but they clearly reveal the EEOC’s position on these issues and are consistent with interpretation provided by other federal courts. Although neither sexual orientation nor gender identity are specific protected classes, consistent with *Price Waterhouse* and its progeny, LGBT individuals could assert a cause of action for sex discrimination if they can show that they were treated differently or less favorably due to their gender or to their failure to conform to gender stereotypes. In other words, even though sexual orientation and gender identity are not protected classes themselves, LGBT individuals can seek protection under Title VII’s prohibition against sex discrimination.

Similarly, HUD’s administrative regulations do not, and can not, create additional protected classes for sexual orientation and gender identity under the FHA, but LGBT individuals are still protected from discrimination in housing based on these characteristics under HUD’s Equal Access Rule.

Federal civilian employees and employees of federal contractors are specifically protected from discrimination based on sexual orientation and gender identity by President Obama's EO 13672.

Section 7-101(a) of the City's Code of Ordinances provides that "[i]t is the policy of the City of Norman that all citizens of this community shall have an equal opportunity to purchase, rent, lease or occupy housing accommodations, or to avail themselves of public accommodations, and have an equal opportunity in the job market and the social and economic life of the City, without regard to race, color, religion, ancestry, sex, national origin, age, place of birth, handicap, or familial status. It is further declared and determined to be the policy of the City of Norman that all citizens of this community should be provided with an opportunity to reach their full potential as human beings, without being inhibited by conditions relating to race, color, religion, ancestry, sex, national origin, age, place of birth, handicap, or familial status." Subsection (b) provides that "[t]he provisions and sections of this chapter shall be liberally construed in order to further the general purpose of this declaration of policy and objectives."

Although the City's Civil Rights Ordinance does not specifically provide protection for sexual orientation and gender identity, the City has taken other steps in support of being a more inclusive community, particularly for LGBT citizens. In addition to the City's Civil Rights Ordinance, initially passed in 1986, City Council also passed Resolution R-0809-12 on July 22, 2008, to participate in the National League of Cities' Partnership for Working toward Inclusive Communities, confirming its commitment "to inclusion as a fundamental aspect of our community" and noting that the National League of Cities and its members "believe an inclusive community promotes equal opportunity and fairness . . . and promotes citizen participation and engagement." The HRC has hosted various Inclusive Community Dialogues with different citizen populations to gain input from the public on how the City could serve those populations better. In regards to LGBT issues, the City issued a proclamation P-1011-3, declaring October, 2010, as Gay, Lesbian, Bisexual, and Transgendered History Month in the City of Norman. In June, 2013, the City amended its Harassment Policy, § 301 of the Personnel Manual, to specifically state that disparate treatment of an employee in areas of human resources management motivated by an employee's sex, sexual orientation, or gender identity will not be tolerated. The City conducted City-wide training of all employees to make them aware of the new policy language. The City of Norman was rated by the Human Rights Campaign, a national LGBT advocacy group in Washington, D.C., with a rating of 61 out of 120 total possible points on its 2014 Municipal Equality Index, a scorecard that ranks cities on their progress toward equality for LGBT citizens. This was the highest ranked City in Oklahoma.

In light of the authorities cited above and the actions taken by federal enforcement agencies, an aggrieved LGBT individual alleging discrimination based on sexual orientation or gender identity could pursue civil rights remedies under Title VII and the FHA in certain instances. An aggrieved individual

complaining of employment discrimination can file a charge with the EEOC. An aggrieved individual complaining of housing violations can file a complaint with HUD. An aggrieved individual complaining of discrimination in public accommodations could pursue a civil lawsuit against that establishment or could file a complaint with the Oklahoma Attorney General Office of Civil Rights Enforcement ("OCRE"), which enforces the Oklahoma Anti-Discrimination Act, 25 O.S. §§ 1101-1706, which prohibits discrimination in employment, housing, and public accommodation, as well as enforces other civil rights related laws.

Discrimination on the basis of sexual orientation or gender identity, through interpretation of the City's Civil Rights Ordinance, could be found if in accordance with case law cited above. Although the Tenth Circuit has not taken as explicit a stance on protection of LGBT individuals as some other circuits have taken, LGBT individuals already have some protection if they can show that the discrimination was based not on the fact that they are LGBT but rather on the fact that they have been treated differently or less favorably because of their sex or gender or a failure to conform to certain gender stereotypes.








Please let us know if you have additional questions or concerns.

Cc: Steve Lewis, City Manager

## LEGAL UPDATE

### Sexual Orientation & Gender Identity Protection

October 26, 2015

<p><b>Executive Order 13672</b></p>  <ul style="list-style-type: none"> <li>-Issued by President Obama</li> <li>-July 21, 2014</li> <li>-Prohibits SO &amp; GI discrimination against federal civilian employees &amp; federal contractors</li> </ul> 	<p><b>HUD's Equal Access Rule</b></p>  <ul style="list-style-type: none"> <li>-77 FR 5662</li> <li>-February 3, 2012</li> <li>-Applies to HUD-assisted &amp; insured housing</li> <li>-Housing eligibility can not be based on actual or perceived SO, GI, or marital status</li> <li>-Definitions of "family," "SO," and "GI"</li> </ul>
<p><b>EEOC Interpretation</b></p>  <ul style="list-style-type: none"> <li>-Employees of federal agencies &amp; private employers with &gt; 15 EEs</li> <li>-<b>David Baldwin v. Anthony Foxx</b>, EEOC Appeal No. 0120133080 (July 15, 2015): "sex discrimination" includes discrimination based on sexual orientation</li> <li>-<b>Macy v. Dep't of Justice</b>, EEOC Appeal No. 0120120821 (Apr. 20, 2012): "sex discrimination" incorporates discrimination based on gender identity</li> <li>-Limited Bona Fide Occupational Qualification ("BFOQ") exception</li> </ul>	<p><b>Federal Case Law</b></p>  <ul style="list-style-type: none"> <li>-<b>Oncale v. Sundowner Offshore Servs.</b>, 523 U.S. 75 (1998): same-sex harassment = sex discrimination under Title VII</li> <li>-<b>Price Waterhouse v. Hopkins</b>, 490 U.S. 228 (1989) (plurality): employment discrimination based on sex or gender stereotypes = unlawful sex discrimination under Title VII</li> <li>-<b>Glenn v. Brumby</b>, 663 F.3d 1312 (11<sup>th</sup> Cir. 2011): held GI discrimination (transgender female) = sex-based discrimination</li> <li>-<b>Hall v. BNSF Ry. Co.</b>, No. 13-2160, 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014): SO discrimination = sex discrimination (health care benefits)</li> </ul>
<p><b>Tenth Circuit</b></p>  <ul style="list-style-type: none"> <li>-<b>Medina v. Income Supp. Div.</b>, 413 F.3d 1131 (10<sup>th</sup> Cir. 2005)</li> <li>-Held SO not a protected class under Title VII</li> <li>-<b>Etsitty v. Utah Transit Auth.</b>, 502 F.3d 1215, 1222 (10<sup>th</sup> Cir. 2007): discrimination vs. a transsexual based on status as a transsexual is not sex discrimination under Title VII...</li> <li>-... but "like all other employees, [Title VII] protection [against sex discrimination] extends to transsexual employees only if they are discriminated against because they are male or because they are female"</li> <li>-GI not a protected class under Title VII</li> </ul>	<p><b>Western District of Oklahoma</b></p> <ul style="list-style-type: none"> <li>-<b>Thomas v. Corrs. Corp. of Amer., Inc.</b>, Case No. CIV-07-1378-D, 2010 WL 565272 (W.D. Okla. Feb. 11, 2010): same sex harassment may be actionable under Title VII</li> <li>-<b>U.S.A. &amp; Tudor/Southeastern Okla. State Univ.</b>, Case No. CIV-15-324-C, 2015 WL 4606079 (W.D. Okla. July 10, 2015): denied Employer's Motion to Dismiss, finding that allegation (that transgender female was denied tenure) was an allegation that the employer's actions occurred because she was female yet defendants regarded her as male &amp; was based on dislike of her presented gender</li> <li>-Still pending</li> <li>-Dispositive motions due 08/01/16</li> </ul> 



A RESOLUTION OF THE COUNCIL OF THE CITY OF NORMAN  
ACKNOWLEDGING RECENT DEVELOPMENTS IN FEDERAL LAW  
INTERPRETING TITLE VII SEX DISCRIMINATION PROTECTION  
PROHIBITING SEX BASED CONSIDERATIONS IN EMPLOYMENT  
AND IN CHAPTER 7 OF THE CITY OF NORMAN CODE OF  
ORDINANCES TO INCLUDE GUARDING AGAINST  
CONSIDERATION OF SUCH ASSUMPTIONS OR STEREOTYPES  
STEMMING FROM SEXUAL ORIENTATION OR GENDER  
IDENTITY AND SETTING FORTH THE POLICY OF THE CITY OF  
NORMAN THAT THE REASONING PROVIDED THEREIN BE  
INCORPORATED INTO CITY POLICY WHEN ADDRESSING SUCH  
ISSUES.

- § 1. WHEREAS, on August 19, 1986, the City of Norman adopted Ordinance O-8687-2 prohibiting discrimination against citizens based on race, color, religion, ancestry, sex, national origin, age, place of birth, handicap, or familial status; and
- § 2. WHEREAS, in Chapter 7, Section 7-101 of the Code of the City of Norman, it is the stated policy that all citizens of this community shall have an equal opportunity to purchase, rent, lease or occupy housing accommodations, or to avail themselves of public accommodations, and have an equal opportunity in the job market and the social and economic life of the City, without regard to race, color, religion, ancestry, sex, national origin, age, place of birth, handicap, or familial status; and
- § 3. WHEREAS, on July 22, 2008, the City of Norman adopted Resolution R-0809-12 joining the National League of Cities' Partnership for Working toward Inclusive Communities and affirming inclusion as a fundamental aspect of the community; and
- § 4. WHEREAS, under the Norman City Charter, the City Council, as the governing body for the City of Norman, is the policy making body, and the City Manager is charged with administrative responsibility to administer and enforce City policies and ordinances; and
- § 5. WHEREAS, the City Council, as governing body, desires to formally express to the City Manager its intent regarding certain City policies and ordinances related to sex discrimination issues; and
- § 6. WHEREAS, the U. S. Supreme Court has recently extended federal protection under the 14<sup>th</sup> Amendment to the U. S. Constitution to include the fundamental right of all citizens to have equal access to marriage regardless of sexual orientation, and to protect such marriages and the children being raised in those marriages; and
- § 7. WHEREAS, interpreting the City of Norman's existing prohibition against sex discrimination in Chapter 7 of the City of Norman Code of Ordinances to include assumptions and stereotypes associated with discrimination based on sexual orientation and gender identity would be consistent with the interpretation given such language under

Title VII of the Civil Rights Act of 1964 by the Equal Employment Opportunity Commission (EEOC) for all workplaces with 15 or more employees and with the federal government's policy to prohibit discrimination based on sexual orientation and gender identity within executive branch civilian employment and employees of federal contractors; and

- § 8. WHEREAS, interpreting the City of Norman's existing prohibition against sex discrimination in Chapter 7 of the City of Norman Code of Ordinances to include assumptions or stereotypes associated with sexual orientation and gender identity would be consistent with the interpretation of such language under the Fair Housing Act by the federal Department of Housing and Urban Development (HUD), EEOC guidance, and trends in U.S. Supreme Court jurisprudence and would further the City's policy of inclusion to ensure that all citizens shall enjoy equal rights.

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF NORMAN, OKLAHOMA:

- § 9. THAT the City Manager of the City of Norman be directed to administer all City personnel policies prohibiting discrimination based on sex in such a manner that respects the Council's policy guidance to guard against use of assumptions or stereotypes associated with sexual orientation and gender identity; and
- § 10. THAT the City Manager of the City of Norman be directed to administer City policy consistent with this Resolution, and further be directed to administer Chapter 7 of the City of Norman Code of Ordinances, wherein sex discrimination is prohibited, in such a manner that respects the Council's policy guidance to guard against use of assumptions or stereotypes associated with sexual orientation and gender identity.
- §11 THAT notice of this Resolution shall be made accessible to the public on the City's website and in its relevant public documents.

PASSED AND ADOPTED this \_\_\_\_\_ day of \_\_\_\_\_, 2015.

\_\_\_\_\_

Mayor

ATTEST:

\_\_\_\_\_  
City Clerk