Gender Still Matters: A Primer on Gender Discrimination Law

Written for both employment and non-employment lawyers alike, this article provides an overview of disparate treatment gender discrimination under Title VII, focusing on definitions of sex and gender as well as sex stereotyping and sex-plus theories.

Federal law has prohibited discrimination against women because of their gender for nearly five decades. Sex discrimination jurisprudence has defined the workplace landscape and opened workplace doors during these years. Today, women make up roughly forty-seven percent of the workforce in the United States, and in almost sixty-six percent of families women are the primary or co-primary breadwinners.[1] If that sounds like something close to parity with men, however, experts disagree.[2] In Colorado, more than 208,000 households are headed by women – women who make approximately 79 cents for every dollar paid to men (and far less if the woman is African American or Latina).[3] Additionally, according to the Equal Employment Opportunity Commission ("EEOC"), the federal agency charged with interpreting and enforcing Title VII of the Civil Rights Act ("Title VII"), more women are choosing to work during pregnancy and "[d]espite the passage of the Pregnancy Discrimination Act more than 30 years ago, women still often face demotions, prejudice, and even job loss when they become pregnant."[4] Gender still matters.

Title VII of the Civil Rights Act of 1964

Title VII is a stand-alone title of the Civil Rights Act of 1964 that prohibits discrimination by public and private employers, labor organizations and employment agencies against certain groups of individuals, known as "protected classes."[5] Gender is one such protected class. Specifically, Title VII makes it unlawful to: (i) "fail or refuse to hire or to discharge any individual, or to otherwise discriminate against any individual with respect to his [*sic*]

compensation, terms, conditions or privileges of employment, because of such individual's . . . sex;" and (ii) limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's . . . sex."[6]

History of Sex Discrimination

Unbeknownst to many women in today's workforce, the prohibition on sex discrimination began as something that might today be called a politically improvised explosive device. The day before the Civil Rights Act of 1964 (the "Act") was due to pass Congress, a representative introduced a new concept into the mix: discrimination "because of sex." His goal in inserting the then controversial phrase was to divide Congressional alignments and, hence, kill the Act.[7] Instead, the Act was passed without debate on the meaning of "sex."[8] Consequently, the phrases "because of sex" or "on the basis of sex" were not defined by Title VII. Since that time, courts have interpreted the boundaries of sex discrimination largely without legislative intent.

Over the years, Congress has course corrected the Judicial Branch several times, twice involving issues of sex discrimination.[9] In 1978, Congress adopted the Pregnancy Discrimination Act ("PDA") in order to expand Title VII's reach to pregnant women, women who recently have given birth, and women who have "related medical conditions."[10] In 2009, the Lilly Ledbetter Fair Pay Act clarified that wage or benefits discrimination is triggered under one of three circumstances: i) when the compensation policy or practice is adopted; (ii) when an individual becomes subject to the policy or practice; and (iii) when "an individual is affected by the application of the discriminatory compensation decision . . . including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice."[11]

Definitions of "Sex" in Sex Discrimination

Against this backdrop of minimal to no legislative guidance, courts have held the term "sex" to apply to both men and women.[12] In this context, sex is traditionally seen as a person's biological sex.[13] Additionally, as the PDA later amended it, sex in Title VII now expressly includes, but is "not limited to, because of or on the basis of pregnancy, childbirth or related medical conditions."[14] "Related medical conditions" can include abortions and in vitro fertilization.[15]

In 1989, in the oft-quoted United States Supreme Court case of *Price Waterhouse v. Hopkins*, "because of sex" became something more than one's biological sex.[16] The *Price Waterhouse* Court expanded "sex" to include social constructs of gender.[17] Because gender can be defined as "socially constructed norms associated with a person's sex," sex discrimination reaches gender non-conforming behavior and appearance, as explained below.[18]

Title VII's sex discrimination precepts, however, have been interpreted to *exclude* discrimination "because of" familial status, sexual preference/orientation, sexual practices, or gender identity.[19] These interpretations prevent gay, lesbian, bisexual and pre- and post-operative transgendered ("GLBT"), and heterosexual persons from bringing gender discrimination claims based solely on their GLBT or heterosexual status.[20] For example, the United States Tenth Circuit Court of Appeals has concluded that "Title VII's reference to 'sex' means a class delineated by gender, rather than by sexual affiliations" because the highest court in the land has specified that "Title VII was intended to eliminate disparate treatment of men and women."[21]

Nonetheless, the United States Supreme Court has held that gender discrimination includes same-sex conduct. "[N]othing in Title VII necessarily bars a claim of discrimination 'because of

. . . sex' merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex."[22] Gender-based harassment, in the form of either *quid pro quo* or hostile work environment claims, is actionable whether it is between opposite-sex or same-sex individuals.[23]

Disparate Treatment Theory

Gender discrimination claims can be maintained on the legal theories of disparate treatment and disparate impact.[24] Disparate treatment occurs when the employer treats some people less favorably than others because of a protected trait or characteristic. As the United States Supreme Court has explained, it can

> The employer may have relied upon a formal, facially discriminatory policy requiring adverse treatment of employees with that trait. Or the employer may have been motivated by the protected trait on an ad hoc, informal basis. Whatever the employer's decision-making process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in the process and had a determinative influence on the outcome.[25]

In other words, "[p]roof of discriminatory motive is critical."[26]

A plaintiff can prove sex discrimination under a disparate treatment theory with direct or circumstantial evidence. Direct evidence demonstrates on its face that the adverse employment action was discriminatory.[27] Where a plaintiff relies on circumstantial evidence, courts employ a three-step burden-shifting framework for determining whether that evidence raises an inference of invidious discriminatory intent sufficient to survive summary judgment.[28]

Although flexible, the *prima facie* case of "traditional" disparate treatment gender discrimination requires a woman to demonstrate that (i) she is female; (ii) she is qualified for the

position; (iii) she suffered an adverse employment action; (iv) under circumstances giving rise to an inference of discrimination.[29] A female plaintiff can satisfy the fourth element by establishing that she was treated less favorably than her similarly situated male counterparts.[30]

In the Tenth Circuit, the corresponding *prima facie* case of gender discrimination for a male requires evidence of something more than that required of female plaintiffs. That is because when a "plaintiff is a member of a historically favored group, by contrast, an inference of invidious intent is warranted only when 'background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority.'"[31] Specifically, under the fourth prong of the prima facie test, it is insufficient for a male plaintiff to allege "that he was a qualified man who was treated differently than a similarly situated woman. Instead, he must allege and produce evidence sufficient to support a reasonable inference that, *but for* his status as a man, the challenged decision would not have occurred."[32]

"Sex-Plus" Discrimination

"Sex-plus" discrimination is an evolving theory that refers to policies, practices or actions by which an employer classifies employees on the basis of sex *plus* another characteristic, such as age, parenthood, marital status or race, for example. This discrimination concept was elucidated in *Phillips v. Martin Marietta Corporation,*[33] a decision in which the Supreme Court held that the employer violated Title VII where it refused to hire women with pre-school-age children, but hired men with pre-school-age children.[34] The Court reasoned that Title VII prohibited using one hiring policy for women and a different policy for hiring men.[35] Because the sex-plus theory focuses on subclasses of women, it allows plaintiffs to show discriminatory treatment despite the fact that the employer treats other women favorably. To state a sex-plus claim in most courts, including the Tenth Circuit, a plaintiff must show that the employer treats

one gender more favorably than a similarly situated subclass of the opposite sex.[36] The Tenth Circuit has stated emphatically that "gender-plus plaintiffs can never be successful if there is no corresponding subclass of members of opposite gender."[37] That is because "when one proceeds to cancel out the common characteristics of the two classes being (*e.g.,* married men and married women), as one would do in solving an algebraic equation, the cancelled-out element proves to be that of married status, and *sex remains the only operative factor in the equation*."[38]

Sex Stereotyping

Another evolving theory of gender discrimination involves sex stereotyping, in which a cause of action is "based on an employee's failure to conform to stereotypical gender norms. . ."[39] This theory is not a separate cause of action, rather it provides a framework for introducing evidence that an employer relied upon gender in taking an adverse action. Sex stereotyping gained prominence with the Supreme Court's *Price Waterhouse* opinion in which the Court emphasized that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."[40] The plaintiff, Hopkins, was nominated for partnership at Price Waterhouse in part because she played a key role in the procurement of a multi-million dollar contract – something no other partnership candidate had achieved that year.[41] While Hopkins was "sometimes overly aggressive, unduly harsh, difficult to work with and impatient with staff," it was clear that "some of the partners reacted negatively to Hopkins' personality because she was a woman. One partner described her as 'macho' . . .; another suggested that she overcompensated for being a woman . . . ; a third advised her to take 'a course at charm school' . . . ."[42] The partner who presented her candidacy said Hopkins should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[43] This, the Supreme Court held, was a form of

impermissible gender discrimination because "[i]n the context of sex stereotyping, an employer who 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."[44]

Similarly, employers who act on the basis of a belief that men should not "wear dresses or makeup, or otherwise act femininely, are also engaging sex discrimination, because the discrimination would not occur but for the victim's sex."[45] In a recent opinion, the EEOC extensively analyzed sex-stereotyping theories to conclude that transgendered persons are covered by Title VII's gender discrimination prohibitions.[46] The EEOC held that:

> [w]hen an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment "related to the sex of the victim." . . . This is true regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person. In each of these circumstances, the employer is making a gender-based evaluation. . . .[47]

Indeed, under sex-stereotyping theories, gender discrimination occurs where a woman (or a man) suffers disparate treatment because she fails to look or act like a woman (or a man).[48]

Conclusion

In the end, gender still matters and, regardless of the theory used, "[t]he critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."[49]

End Notes

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[1] Press Release, U.S. Equal Opportunity Commission, Unlawful Discrimination Based on Pregnancy and Caregiving Responsibilities Widespread Problem, Panelists Tell EEOC (February 15, 2012).
[2] Press Release, 9News.com, Data: Unequal Wages Hurt Colorado Women, Families (April 16, 2012).
[3] *Id.*
[4] Press Release, *supra* note 1. In fiscal year 2010, the EEOC received 29,029 sex-based charges of discrimination and 28,534 in 2011. U.S. Equal Opportunity Commission, Enforcement and litigation statistics, http://www.eeoc.gov/eeoc/statistics/enforcement/. In fiscal year 2010, sexual harassment charges numbered 11,717 and 11,364 in 2011 (83.7% and 83.6%, respectively, were filed by women). *Id*.
[5] 42 U.S.C. § 2000e-2(a)(1).
[6] *Id.; see also* 29 C.F.R. § 1604.
[7] *See* 110 Cong. Rec. 2577 (1964) (remarks of Rep. Smith); *see also* Olivia Szwalbnest, *Discriminating Because of "Pizzazz": Why Discrimination Based on Sexual Orientation Evidences Sexual Discrimination under the Sex-Stereotyping Doctrine of Title VII,* 20 Tex. J. Women & L. 80 (2010-2011).
[8] Szwalbnest, *supra* note 7.
[9] In 1972, Title VII was amended to cover public employers, lengthen time limitations, and authorize the EEOC to file lawsuits, among other details. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103 (1972) (current version at 42 U.S.C. § 2000e). In 1991, Title VII was amended to allow for jury trials and damages for intentional discrimination, to redefine the burdens in disparate impact claims and the liability in "mixed motive" disparate treatment cases, as well as several other substantive changes. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, 1077 (1991) (current version at 42 U.S.C. § 2000e).
[10] 42 U.S.C. § 2000e(k).
[11] 42 U.S.C. § 2000e-5(e).
[12] Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 682 (1983).
[13] In denying a claim for sex discrimination brought by a transsexual, the Seventh Circuit held, in an early decision, that "if the term 'sex' as it is used in Title VII is to mean more than biological male or biological female, the new definition must come from Congress." Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1087 (7th Cir. 1984). Some courts have held that the approach used by the United States Supreme Court in the *Price Waterhouse* opinion eviscerated the narrow approach used by the Ulane Court. *See, e.g.,* Smith v. City of Salem, 378 F.3d 566, 573 (6th Cir. 2004).
[14] 42 U.S.C. § 2000e(k).

[15] *See* Hall v. Halco, 534 F.3d 644 (7th Cir. 2008); *see also* Turic v. Holland Hospitality, Inc., 85 F.3d 1211, 1214 (6th Cir. 1996). The PDA does not require employers to make accommodations for pregnancy, childbirth, or other pregnancy-related conditions, however. *See* Serednyj v. Beverly Healthcare, LLC, 656 F.3d 540 (7th Cir. 2011) (employer does not violate Title VII or the PDA by refusing to provide light duty work to a pregnant employee, where it also refuses to provide light duty work to employees with work-related injuries).

[16] 490 U.S. 228 (1989).

[17] *Id.* at 250.

[18] City of Salem, 378 F.3d at 573.

[19] Taken v. Okla. Corp. Com'n, 125 F.3d 1366, 1369 (10th Cir. 1997) (holding that "Title VII's reference to 'sex' means a class delineated by gender, rather than sexual affiliations"); Adamson v. Multi Cmty. Diversified Servs., Inc., 514 F.3d 1136, 1148 (10th Cir. 2008) (holding that "familial status is not a classification based on sex any more than being a sibling or relative generally; it is, by definition, gender neutral.").

[20] *See* Thomas v. Metroflight, Inc., 814 F.2d 1506 (10th Cir. 1987); Etsitty v. Utah Transit Auth., 502 F.3d 1215 (10th Cir. 2007); EEOC Policy Guidance on Employer Liability under Title VII for Sexual Favoritism (1990), http://www.eeoc.gov/policy/docs/sexualfavor.html.

[21] Parker v. Salazar, 431 Fed. Appx. 697, 698-99 (10th Cir. 2011) (quoting Taken v. Okla. Corp. Com'n, 125 F.3d 1366, 1369-70 (10th Cir. 1997)). The Parker Court held that a plaintiff had not engaged in protected activity when he reported co-workers' open and consensual affair because he presented no evidence to show that he could reasonably have believed that he had reported sex discrimination. *Id.* at 699.

[22] Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 79 (1998).

[23] *See* Hicks v. Gates Rubber Co., 833 F.2d 1406, 1413 (10th Cir. 1987). *Quid pro quo* sexual harassment involves the conditioning of tangible employment benefits upon submission to sexual conduct. *Id.* at 1413. Hostile work environment harassment occurs where sexual conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. For sexual harassment to be actionable, "it must be sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment." *Id.* (quoting Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986)). The *Oncale* Court clarified that same-sex harassment need not be motivated by sexual desire to support an inference of discrimination. Rather, the Court laid out three different methods of proof available to a plaintiff claiming same-sex sexual harassment. Oncale, 523 U.S. at 80-81.

[24] Carpenter v. Boeing Co., 456 F.3d 1183, 1186 (10th Cir. 2006).

[25] Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993) (quoting Teamsters v. U.S., 431 U.S. 324, 335-336 (1977)). "[C]laims that stress 'disparate impact' [by contrast] involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive . . . is not required under a disparate-impact theory." *Id.* Title VII allows employers to hire on the basis of sex where sex is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business. 42 U.S.C. § 2000e-(2)(e). This defense, called the BFOQ, is narrowly interpreted. *See* UAW v. Johnson Controls, Inc., 499 U.S. 187, 201 (1991).

[26] Teamsters v. United States, 431 U.S. 324, n. 15 (1977).

[27] Adamson v. Multi Cmty. Diversified Servs., Inc., 514 F.3d 1136, 1145 (10th Cir. 2008).
[28] *Id.*
[29] E.E.O.C. v. Horizon/CMS Healthcare Corp., 220 F.3d 1184, 1192, (10th Cir. 2000).
[30] *Id.* at 1195 nn. 6 & 7
[31] Adamson, 514 F.3d at 1149.
[32] *Id.* at 1150 (emphasis original) (quoting from Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).
[33] 400 U.S. 542, 544 (1971).
[34] *Id.*
[35] *Id.* Parenthood as a "plus" factor has taken on its own name in the family rights discrimination arena and is addressed by the article in this issue entitled: *"Family Responsibility Discrimination: Enforcing the Rights of Caregivers in the Workplace."*
[36] Coleman v. B-G Maintenance Mgmt. of Colo., Inc., 108 F.3d 1199, 1203 (10th Cir. 1997).
[37] *Id.* at 1204.
[38] *Id.* at 1203 (emphasis in original) (quoting Lex K. Larson, *Employment Discrimination* § 40.04, at 40-42 (2d ed. 1996). Interestingly, at least one court has analyzed a sex-plus age claim under the Age Discrimination in Employment Act by using an analogous analysis. The court held that "[p]laintiff cannot compare herself to younger men because the ADEA prohibits employers from treating older women differently than younger women, but it does not protect from differential treatment based solely on gender." Smith v. Bd. of Cnty. Com'rs, 96 F.Supp.2d 1177, 1188 (D. Kan. 2000). *But see* Sibilla v. Follett Corp., 2012 WL 1077655 (E.D.N.Y. Mar. 3, 2012) (denying sex plus weight claim). This recent opinion provided a different approach to sex-plus claims by discrediting plaintiffs for failing to provide "case law to support their theory that the "plus" in a gender plus case can be some factor unrelated to the stereotypes associated with the protected class. Under Plaintiffs' theory, any sub-class of women, *i.e.,* women who drive blue cars or women who live in a certain town, are a protected class who may be singled out for comparison." *Id.* at 14.
[39] Etsitty, 502 F.3d at 1223.
[40] Price Waterhouse, 490 U.S. 228, 251 (1989) (plurality opinion of four Justices).
[41] *Id.* at 234.
[42] *Id.* at 235.
[43] *Id.*
[44] *Id.* at 250.
[45] City of Salem, 378 F.3d at 574.
[46] Macy v. Holder, Appeal No. 0120120821 (EEOC April 20, 2012).
[47] *Id.* at 7.
[48] *See* Price Waterhouse, 490 U.S. at 250-51. While the Tenth Circuit has discussed sex stereotyping claims favorably in *dicta*, the court has declared that it "need not decide whether discrimination based on an employee's failure to conform to sex stereotypes always constitutes discrimination 'because of sex. . .'" Etsitty, 502 F.3d at 1224 (declining to decide whether Title VII sex stereotyping claims protect "transsexuals who act and appear as a member of the opposite sex").
[49] Oncale, 523 U.S. at 80 (citing Harris v. Forklift Systems, Inc., 510 U.S. 17, 25 (Ginsburg, J., concurring)).