

# LGBT Issues in Michigan Employment Law

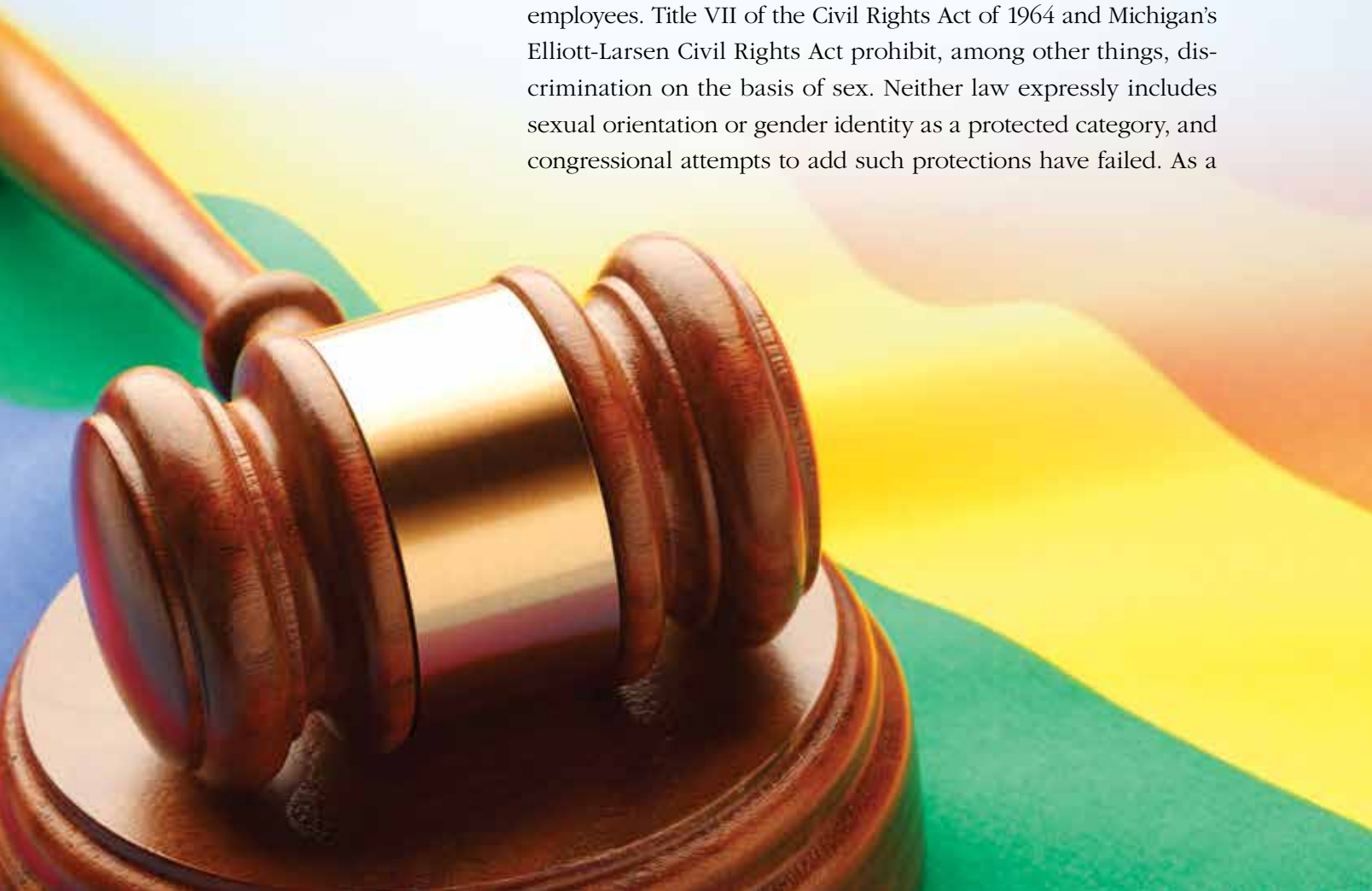
## A Guide

By Brett Miller

### Background

In 2015, the United States Supreme Court legalized same-sex marriages in *Obergefell v Hodges*.<sup>1</sup> State bans on same-sex marriage, such as Michigan's, were struck down, and the definition of "spouse" for employment law and benefits purposes was expanded to include marriage of same-sex couples.

*Obergefell*, however, did not clarify the law regarding employment protections for lesbian, gay, bisexual, and transgender (LGBT) employees. Title VII of the Civil Rights Act of 1964 and Michigan's Elliott-Larsen Civil Rights Act prohibit, among other things, discrimination on the basis of sex. Neither law expressly includes sexual orientation or gender identity as a protected category, and congressional attempts to add such protections have failed. As a



result, a patchwork of caselaw, administrative rules, local ordinances, and legislation by administrative enforcement has left employers confused about what is actually protected.

In addition, there has been a backlash against the new protections that have focused on defenses (so far unsuccessful) that certain employers should be excused from employing LGBT employees because of sincerely held religious beliefs. The most vocal criticism, however, relates to transgender employees and the use of restrooms. Given the uncertainty in the law and the passionate views on both sides of the LGBT debate, it is critical that employers understand what conduct is prohibited and how best to navigate this quickly changing area of law.

### What is “sex discrimination” now?

In Michigan and the U.S. Sixth Circuit Court of Appeals, sexual orientation is not a protected category for private-sector employees who do not work for federal contractors.<sup>2</sup> However, the Supreme Court has held that same-sex harassment is actionable under Title VII in certain circumstances.<sup>3</sup> In same-sex harassment cases, “sexual orientation is irrelevant for purposes of Title VII. It neither provides nor precludes a cause of action for sexual harassment.”<sup>4</sup> Instead, a plaintiff alleging same-sex harassment in hostile work environment cases can establish the inference of discrimination on the basis of sex in three ways: (1) a harasser made sexual advances out of sexual desire, (2) the harasser was motivated by general hostility to the

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### Fast Facts:

The laws regarding lesbian, gay, bisexual, and transgender (LGBT) issues in the workplace are changing rapidly.

The Equal Employment Opportunity Commission is of the position that sexual orientation discrimination is a form of “sex discrimination” under Title VII—a position directly contrary to current Sixth Circuit and Michigan caselaw.

However, gender stereotyping and same sex harassment claims are actionable.

presence of [one sex] in the workplace, and (3) comparative evidence of the treatment of both sexes.<sup>5</sup>

“Sex discrimination” now includes discrimination on the basis of gender identity and gender stereotypes.<sup>6</sup> In *Price Waterhouse v Hopkins*, the Supreme Court held that “[i]n the specific 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.”<sup>7</sup> The Sixth Circuit has also found that sex discrimination includes gender identity.<sup>8</sup> Under the gender identity theory, transgender employees are protected “from discrimination for failing to act in accordance and/or identify with their perceived sex or gender.”<sup>9</sup>

The problem in litigating sex stereotype and gender identity claims, as explained by the Court in *Vickers v Fairfield Medical Center*, is that “stereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality.”<sup>10</sup> The Court went on to hold that “a gender stereotyping claim should not be used to bootstrap protection for sexual orientation into Title VII.”<sup>11</sup>

To summarize, in Michigan and the Sixth Circuit, claims based on same-sex harassment and sex stereotyping are actionable under the rubric of sex discrimination, while sexual orientation is not. Employers, however, must also consider that approximately 35 localities in Michigan have certain ordinance protections for LGBT employees.<sup>12</sup> To add to the confusion, employees working for federal contractors are also protected from sexual orientation or gender identity discrimination and may file a complaint with the Office of Federal Contract Compliance Programs.<sup>13</sup>

The Equal Employment Opportunity Commission (EEOC) has also weighed in on the definition of sex discrimination under Title VII, finding that “[s]exual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee’s sex.”<sup>14</sup> In April 2016, the EEOC, for the first time, filed lawsuits against private companies alleged to have discriminated on the basis of sexual orientation.<sup>15</sup> One case has since settled for \$202,000; at the time of this writing, the second case remains ongoing.<sup>16</sup>

In addition to filing lawsuits, the EEOC continues to accept charges of alleged sexual orientation discrimination. This leaves employers in the awkward position of responding to an EEOC charge for allegations that are not protected under Sixth Circuit caselaw.

Public-sector employees also have separate rules governing sex discrimination. In Michigan, sexual orientation and gender identity are protected classifications for state employees.<sup>17</sup> These classifications are also protected for public-sector employees in Ingham, Washtenaw, and Wayne counties and for nearly all college and university employees. At the federal level, discrimination on the basis of sexual orientation, sex stereotyping, and gender identity is prohibited for civilian federal employees by executive order.<sup>18</sup>

### The rise of religious objections to gender identity claims and the restroom issue

In the wake of *Obergefell* and the expanding protections for LGBT employees, there has been a rise in state laws and legal defenses relating to religious objections to LGBT issues.

According to OSHA, all employees, “including transgender employees, should have access to restrooms that correspond to their gender identity.”

For instance, in the ongoing matter of *EEOC v RG & GR Harris Funeral Home*,<sup>19</sup> the EEOC alleged that a Michigan-based funeral home discriminated on the basis of sex by terminating a transgender employee who was transitioning from male to female and, allegedly, did not conform to the employer’s gender-based expectations. The court dismissed the EEOC’s lawsuit based on the Religious Freedom Restoration Act,<sup>20</sup> which is a defense available only against a governmental plaintiff. The court held that the funeral home had a sincerely held religious belief that precluded the applicability of Title VII in that case. The case is now on appeal to the Sixth Circuit.

In addition, religious objections to LGBT protections have gained media attention. For instance, Mississippi passed the Protecting Freedom of Conscience from Government Discrimination Act, which, among other things, would allow employers to set sex-specific grooming standards and limit access to



locker rooms or restrooms for transgender employees based on the employer's "sincerely held religious belief or moral conviction."<sup>21</sup> That law was enjoined before it could take effect on July 1, 2016, and litigation will likely continue.<sup>22</sup>

The Mississippi bill highlights the biggest legal battle relating to LGBT issues in employment: restroom access for employees and the public. In the employment context, the Occupational Safety and Health Administration (OSHA) published *A Guide to Restroom Access for Transgender Workers*, finding that all employees, "including transgender employees, should have access to restrooms that correspond to their gender identity."<sup>23</sup> Significantly for employers, OSHA also addressed the issue of potential discomfort by coworkers in allowing transgender employees to use a restroom corresponding with his or her chosen gender identity. OSHA referenced an April 2015 EEOC interpretation of federal law that stated that "a transgender employee cannot be denied access to the common restrooms used by other employees of the same gender identity regardless of whether that employee has had any medical procedure or whether the employees may have negative reactions to allowing the employee to do so."<sup>24</sup> In fact, the EEOC decision held that denying a transgender employee the right to use the restroom of her choice based on the belief that the employee was "a male, physically," and due to the discomfort of others, constituted direct evidence of sex discrimination under Title VII.<sup>25</sup> Finally, forcing a transgender person to use a gender-neutral restroom is also unacceptable according to the OSHA guidance, although offering a gender-neutral restroom for all employees to use is acceptable.

## Best practices

While the law is changing rapidly, here are a few best practices to help avoid liability under the expanding definition of sex discrimination:

- Allow employees to use the restroom corresponding to their gender choice.
- Consider workplace training regarding transgender employees to ease concerns from coworkers.
- Reinforce employment policies on respectful conduct and legal compliance.
- Weigh the potential costs of defending an EEOC charge for sexual orientation and review whether the employer is a federal contractor or in a locality with LGBT protections before taking adverse action against an LGBT employee. ■



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## ENDNOTES

1. *Obergefell v Hodges*, 576 US \_\_\_\_; 135 S Ct 2584; 192 L Ed 2d 609 (2015).
2. *Vickers v Fairfield Med Ctr*, 453 F3d 757, 765 (CA 6, 2006); *Barbour v Dept of Soc Servs*, 198 Mich App 183; 497 NW2d 216, 218 (1993); *Kalich v AT & T Mobility, LLC*, 679 F3d 464, 470 (CA 6, 2012).
3. See *Oncale v Sundowner Offshore Servs, Inc*, 523 US 75, 82; 118 S Ct 998; 140 L Ed 2d 201 (1998).
4. *Id.*, quoting *Rene v MGM Grand Hotel, Inc*, 305 F3d 1061, 1063 (CA 9, 2002) (en banc).
5. *Vickers*, 453 F3d at 765, quoting *Oncale*, 523 US at 80–81.
6. *Price Waterhouse v Hopkins*, 490 US 228; 109 S Ct 1775; 104 L Ed 2d 268 (1989).
7. *Id.* at 250.
8. *Smith v City of Salem*, 378 F3d 566, 575 (CA 6, 2004); see also *Barnes v City of Cincinnati*, 401 F3d 729, 737 (CA 6, 2005).
9. *Myers v Cuyahoga Cty*, 182 F Appx 510, 519 (CA 6, 2006).
10. *Vickers*, 453 F3d at 763–764, quoting *Dawson v Bumble & Bumble*, 398 F3d 211, 218 (CA 2, 2005).
11. *Id.*
12. MAP, *State Policy Profile—Michigan* <[http://www.lgbtmap.org/equality\\_maps/profile\\_state/23](http://www.lgbtmap.org/equality_maps/profile_state/23)>. All websites cited in this article were accessed October 6, 2016.
13. Executive Order No. 13672, amending Executive Order No. 11246.
14. See, e.g., *Baldwin v Foxx*, EEOC Decision (No. 0120133080), issued July 16, 2015; *Baker v Social Security Admin*, EEOC Decision (No. 0120110008), issued January 11, 2013; see also EEOC, *What you Should Know About EEOC and the Enforcement Protections for LGBT Workers* <[https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement\\_protections\\_lgbt\\_workers.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm)>.
15. See *EEOC v Pallet Cos, d/b/a IFCO*, Case 1:16-cv-00595-CCB (D Md, 2016); *EEOC v Scott Medical Health Ctr*, Case 2:16-cv-00225-CB (WD PA, 2016).
16. EEOC, *IFCO Systems Will Pay \$202,200 in Landmark Settlement of One of EEOC's First Sexual Orientation Discrimination Lawsuits* <<https://www.eeoc.gov/eeoc/newsroom/release/6-28-16.cfm>>.
17. Executive Order No. 2003-24; Executive Order No. 2007-24.
18. Executive Order No. 11478, as amended; see also DOJ Office of the Attorney General Memorandum (December 15, 2014) <<http://www.washingtonblade.com/content/files/2014/12/Title-VII-Memo.pdf>>.
19. *EEOC v RG & GR Harris Funeral Home*, 100 F Supp 3d 594 (ED Mich, 2014).
20. 42 USC 2000bb *et seq.*
21. Miss 2016 HB 1523, § 3(6).
22. *Swayze & Fowler, Judge Blocks Mississippi "Religious Freedom" Law*, USA Today (July 1, 2016) <<http://www.usatoday.com/story/news/nation-now/2016/07/01/mississippi-religious-freedom-gay-marriage-law/86589602/>>.
23. OSHA, *A Guide to Restroom Access for Transgender Workers* (June 2015), p 1 <<https://osha.gov/Publications/OSHA3795.pdf>>.
24. *Id.* at 2.
25. *Lusardi v McHugh*, EEOC Decision (No. 0120133395), issued April 1, 2015.