

INTRODUCTION

Historically, the Equal Employment Opportunity Commission's (EEOC's) Office of Federal Operations (OFO), its appellate body for federal sector matters, has been at the forefront of expanding protections for workers under anti-discrimination statutes. Before federal courts regularly found that employees were protected from discrimination based on their transgender status, the EEOC issued its seminal decision in *Macy v. DOJ*, EEOC App. No. 0120120821 (Apr. 20, 2012), finding that discrimination based on transgender status is discrimination based on sex. Likewise, in *Baldwin v. Dept. of Transp.*, EEOC App. No. 0120133080 (July 15, 2015), the EEOC found that an allegation of discrimination based on sexual orientation states a claim of sex discrimination under Title VII of the Civil Rights Act of 1964s.

This book addresses both substantive legal issues, as well as procedural issues, that LGBTQIA+ employees, their representatives, and agency representatives litigating cases involving LGBTQIA+ matters should be aware of when participating in the federal sector EEOC process. Throughout this book, the reader will learn about the history and evolution of legal protections for federal sector LGBTQIA+ employees, including the various types of claims they can pursue. More practically, the book will provide a detailed guide to how an employee or their representative must pursue those claims within the federal sector EEOC process, and what type of relief an employee might receive if they prevail in the process.

This book comes at a pivotal moment. Under the current administration's leadership, the EEOC has attempted to walk back many of the protections discussed in this book. It has gone so far as to issue guidance and memorandum calling into question the EEOC's own previous decisions and guidance on protections for LGBTQIA+ employees. However, at the time of writing this book, the law remains settled—it is illegal for an employer, including the federal government, to discriminate against an employee due to their sexual orientation and/or because of their gender identity. As such, this book addresses the rights and responsibilities of federal sector LGBTQ+ employees and their employers as the law currently mandates, regardless of the current EEOC's efforts to remove longstanding protections from federal employees.

CHAPTER 1

PROTECTIONS OF LGBT EMPLOYEES

Given the unavailability of data regarding self-identified LGBTQ+ individuals within the federal government until 2012, it is difficult to accurately assess the full scale of discriminatory mistreatment of LGBTQ+ individuals employed by the federal government. Peter Stanley Federman and Nicole M. Rishel Elias, *Beyond the Lavender Scare: LGBT and Heterosexual Employees in the Federal Workplace*, 19 PUBLIC INTEGRITY 22 (2016). However, like many minority groups, LGBTQ+ employees have suffered a history of discrimination within the federal government. This reached a precipice during the “Lavender Scare”—an era of targeted purging of LGBTQ+ individuals working in the federal government that continues having detrimental effects to this day. Judith Adkins, *Congressional Investigations and the Lavender Scare*, PROLOGUE MAGAZINE, Vol. 48, No. 2 (2016). This section will cover the historical mistreatment of LGBTQ+ individuals in the federal government, how that mistreatment impacted the progression of legal protections for LGBTQ+ individuals working in the federal workforce, and how recent changes in protections for LGBTQ+ individuals in the federal workforce implemented by the federal government may impact those protections moving forward.

I. HISTORICAL TREATMENT OF LGBTQ+ IN THE FEDERAL GOVERNMENT

The 21st century has seen its fair share of systemic discrimination against the LGBTQ+ community by the federal government. “Don’t Ask, Don’t Tell” and the Defense of Marriage Act, for example, are only a couple examples of discriminatory policies targeted at LGBTQ+ individuals adopted and implemented by the federal government. However, systemic discriminatory treatment against LGBTQ+ individuals within the federal government dates as far back as late 1940s at a time when awareness of homosexuality amongst the general public began increasing. <https://www.archives.gov/publications/prologue/2016/summer/lavender.html>.

In 1947, President Harry Truman signed Executive Order 9835, which implemented a “Loyalty Program in the Executive Branch of the Government.” <https://www.trumanlibrary.gov/library/executive-orders/9835/executive-order-9835>. This Executive Order targeted “any disloyal or subversive person[s]” who “constitute[ed] a threat to our democratic process” and authorized “a loyalty investigation” into applicants for employment with the Executive Branch and “persons entering the competitive service,” as well as any “disloyal civil officers or employees” within the Executive

Branch. *Id.* Although not explicitly focused on federal employees within the LGBTQ+ community, the federal government viewed such individuals as “displaying immoral or disgraceful conduct” and perceiving them as “a threat to the nation’s wellbeing” without any supporting evidence. <https://www.nps.gov/articles/000/cold-war-lavender-scare-and-lgbtq-activism.htm#:~:text=In%201953%2C%20President%20Eisenhower%20signed,losing%20their%20jobs%20and%20reputations.&text=This%20is%20now%20known%20as%20the%20Lavender%20Scare>. As a result of this unfounded view, the federal government used the Executive Order to separate LGBTQ+ employees from federal service. *Id.*

The “Loyalty Program” served as the beginning of a series of congressional investigations and other executive actions targeted at LGBTQ+ individuals in the federal government. In 1950, Congress began conducting investigations into LGBTQ+ individuals within the federal government, and the first congressional inquiry commenced around March 1950. <https://www.archives.gov/publications/prologue/2016/summer/lavender.html>. U.S. Senators Kenneth Wherry (Republican) and J. Lister Hill (Democrat), the sole members of the Subcommittee on Appropriations for the District of Columbia at the time, spearheaded the initial inquiry—questioning State Department officials, Defense Department officials, Civil Service Commission (CSC) officials, and more. *Id.* Testifying to the subcommittee, Lt. Roy Blick, head of the vice squad of the D.C. Metropolitan Police Department, made the unsupported claim that approximately 3,700 of the 5,000 homosexual individuals who lived in D.C. worked within the federal government. *Id.* Before this initial inquiry concluded, different executive branch departments began identifying procedures for removing “moral perverts” employed within the federal government. For example, the CSC suggested coordination with the Federal Bureau of Investigation (FBI), whereby the FBI would report “the real nature” of each arrest made, alerting the CSC so that it could take “appropriate action to pursue removal.” *Id.* According to Lt. Blick, between 90 and 100 “moral perverts” had resigned due to the congressional inquiry. *Id.* Given these results, the U.S. Senate, at the recommendation of Senators Wherry and Hill, commenced a more extensive investigation into identifying homosexual individuals within the federal government. *Id.*

On June 7, 1950, the Senate passed Senate Resolution 280, which authorized the Senate Investigations Subcommittee, chaired by Senator Clyde Hoey (Democrat), “to make an investigation into the employment by the Government of homosexuals and other sex perverts.” “Employment of Homosexual and Other Sex Perverts in Government,” Interim Report (Dec. 15, 1950). According to the Interim Report submitted to the Senate Committee on Expenditures in the Executive Departments:

The primary objective of the subcommittee in this inquiry was to determine the extent of the employment of homosexuals and other sex perverts in Government; to consider reasons why their employment by the Government is undesirable; and to examine into the efficacy of the methods used in dealing with the problem.

Id. at 1.

The Subcommittee determined that it was not proper to employ "homosexuals and other sex perverts" in the federal government based on two main reasons: (1) those individuals were "generally unsuitable"; and (2) those individuals "constitute[d] security risks." *Id.* at 3.

As to general unsuitability, the Subcommittee believed that the "social stigma attached to sex perversion is so great that many perverts go to great lengths to conceal their perverted tendencies," and this act of concealment resulted in individuals being blackmailed and extorted for large sums of money in exchange for continued concealment. *Id.* at 4. The Subcommittee also viewed homosexual individuals as having a "corrosive influence upon his fellow employees" because they "will frequently attempt to entice normal individuals to engage in perverted practices." *Id.* Other concerns included the fear that homosexual individuals who "attain[] a position in Government where he can influence the hiring of personnel" will make it "almost inevitable that he will attempt to place other homosexuals in Government jobs." *Id.*

In addition to general unsuitability, the Subcommittee dubbed homosexual individuals as a security risk. *Id.* In their view, given the susceptibility of homosexual individuals to blackmail, espionage agents could use such tactics to extort confidential information. *Id.* at 5. The Subcommittee concluded that this risk of blackmail is exacerbated by the "lack of emotional stability which is found in sex perverts and the weakness of their moral fiber," as well as the tendency "to congregate at the same restaurants, night clubs, and bars[.]" *Id.* Ultimately, the Subcommittee arrived at the following conclusion: "There is no place in the United States Government for persons who violate the laws or the accepted standards of morality, or who otherwise bring disrepute to the Federal service by infamous or scandalous personal conduct." *Id.* at 19. The cumulative effect of the congressional investigations and Truman administration's policies regarding LGBTQ+ individuals resulted in approximately 425 employees fired by the State Department for "allegations of homosexuality," with alleged homosexual individuals being dismissed for "security concerns at about twice the rate of any other security or loyalty risks, including communists." <https://williamsinstitute.law.ucla.edu/wp-content/uploads/ENDA-5-History-Sep-2009.pdf#:~:text=From%201947%20to%201961%2C%20more%20than%205%2C000,for%20federal%20employment%20for%20the%20same%20reason.>

The systemic mistreatment of LGBTQ+ individuals only worsened during the Eisenhower administration. In April 1953, President Eisenhower signed Executive Order 10450, entitled “Security Requirements for Government Employment.” <https://www.archives.gov/federal-register/codification/executive-order/10450.html#page-header>. Through this executive order, President Eisenhower authorized investigations into individuals in federal service at the time to gather information regarding whether those individuals exhibited characteristics “clearly consistent with the interests of the national security.” *Id.* One characteristic explicitly identified by the order was “sexual perversion.” *Id.* Federal agencies relied on this basis to deny LGBTQ+ individuals security clearances. *Consideration of Sexual Orientation in the Clearance Process*, Government Accountability Office, at 2 (Mar. 1995) (<https://www.gao.gov/assets/nsiad-95-21.pdf>). Because of the executive order’s threat of investigating “consultants” to government agencies, *i.e.*, government contractors, regarding adherence to the security requirements, the federal government’s discriminatory practices against LGBTQ+ individuals stretched well beyond the federal government. <https://www.archives.gov/publications/prologue/2016/summer/lavender.html>.

The cumulative impact of the “Lavender Scare” cannot be overstated. Historians estimate that anywhere between 5,000 and tens of thousands of gay workers lost their jobs, with thousands of those individuals either being former federal civil servants or applicants for federal government employment through 1961. [https://williamsinstitute.law.ucla.edu/wp-content/uploads/ENDA-5-History-Sep-2009.pdf#:~:text=From%201947%20to%201961%2C%20more%20than%205%2C000,for%20federal%20employment%20for%20the%20same%20reason](https://williamsinstitute.law.ucla.edu/wp-content/uploads/ENDA-5-History-Sep-2009.pdf#:~:text=From%201947%20to%201961%2C%20more%20than%205%2C000,for%20federal%20employment%20for%20the%20same%20reason;); Prologue, <https://www.archives.gov/publications/prologue/2016/summer/lavender.html>.

II. EXCLUSION OF LGBTQ+ INDIVIDUALS IN FEDERAL GOVERNMENT FROM TITLE VII PROTECTIONS

Notwithstanding its undeniably important role in the expansion of Title VII’s protections, the EEOC has not always viewed sexual orientation and transgender status as being protected under Title VII. In the early 1980s, the EEOC issued appellate decisions finding that claims of sexual orientation discrimination fell outside the EEOC’s Part 1613 regulations and therefore could not be accepted for complaint processing. *See Campbell v. DHHS*, EEOC No. 01831816 (Dec. 13, 1983). The EEOC maintained this position unequivocally into the 1990s. *See Yost v. USPS*, EEOC Req. Nos. 05970940, 05970942 (Oct. 2, 1997) (finding claim of harassment based on perceived sexual orientation not protected under Title VII); *Morrison v. Dept. of Navy*, EEOC Req. No. 05930964 (June 16, 1994) (same); *Bafus v. USPS*, EEOC No.

01911492 (Aug. 23, 1991) (same); *Dillon v. USPS*, EEOC No. 01900157 (Feb. 14, 1990) (same).

In finding sexual orientation was not protected under Title VII, the EEOC viewed the concepts of sex and sexual orientation as distinct and unrelated. In reversing its prior decision, the EEOC in *Morrison* explained its error in finding a complainant who was homosexual had raised a viable claim of sex discrimination:

We find that the previous decision erroneously concluded that the alleged derogatory comments or statements were directed at appellant because of his sex and not because of his perceived sexual orientation. *Clearly, the derogatory comments and statements directed at appellant were based on his co-worker's perception that he is a homosexual.* As such, appellant can not invoke Title VII as a basis for his claim of harassment based on sex (male). While the Commission is not unsympathetic to appellant's plight, the allegations complained of are beyond our jurisdiction. As the statutes and case law governing this set of circumstances mandate, we can offer appellant no relief.

Morrison, EEOC Req. No. 05930964 (emphasis added). The EEOC relied on this reasoning to continue finding sexual orientation discrimination as distinct from sex discrimination and, therefore, outside the protections of Title VII. See *Yost*, EEOC Req. Nos. 05970940, 05970942 (“[W]e find that this case is controlled by *Morrison* in that alleged incidents of harassment directed at appellants were based on appellants perceived sexual orientation” and outside Title VII’s protections).

Even after the U.S. Supreme Court’s decision in *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), which held Title VII’s prohibition against sexual harassment includes same-sex harassment, the EEOC continued finding sexual orientation as not protected by Title VII. See *Greer v. USPS*, 0120064392 (Jan. 9, 2007) (“Sexual orientation is not covered by the regulations enforced by this Commission.”); *Riss v. USPS*, EEOC App. No. 01A46175 (Dec. 22, 2004) (same); *Angle v. USDA*, EEOC App. No. 01A32644 (Apr. 5, 2004) (same); *Shutzer v. USDA*, EEOC App. No. 01A30666, n.1 (Mar. 10, 2004) (same). The EEOC continued this trend, albeit in a non-linear fashion, into the 2010s. See *Culp v. DHS*, EEOC App. No. 0720130012 (May 7, 2013) (affirming “Title VII does not explicitly include sexual orientation as a basis for protection” but finding claims alleging sexual orientation discrimination viable under sex stereotype theory); *Veretto v. USPS*, EEOC App. No. 0120110873 (July 1, 2011) (“Title VII’s prohibition of discrimination does not include sexual preference or orientation as a basis...[but] Title VII does, however, prohibit sex stereotyping discrimination.”).

For similar reasons, the EEOC likewise consistently determined transgender

status to be outside the protections of Title VII. For example, in *LaBate v. USPS*, EEOC No. 01851097 (Feb. 11, 1987), a transgender female employed with the U.S. Postal Service experienced discriminatory treatment following her return from leave. *Id.* The appellant had undergone successful gender affirming surgery during her approved leave, and she received approval to handle her mail route with certain medical restrictions. *Id.* However, when she began taking excessive amounts of time to perform her mail carrier duties, her employer assigned her to light duty. *Id.* Appellant subsequently filed a complaint of discrimination based on sex. *Id.* The EEOC ultimately declined to find transgender status as protected under Title VII. *Id.* Specifically, the EEOC agreed with a Seventh Circuit decision, *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), which held “the words of Title VII prohibit discrimination against women because they are women and against men because they are men.” *LaBate*, EEOC No. 01851097.

In many decisions following *LaBate*, the EEOC continuously maintained the position that Title VII did not protect transgender status. See *Kowalczyk v. VA*, EEOC App. No. 01942053 (Dec. 27, 1994) (“Allegations of discrimination based on an individual’s sexual identity disorder or discontent with their own sex is not synonymous with sex discrimination under Title VII.”); *Bell v. DHHS*, EEOC App. No. 01941146 (Sept. 9, 1994) (same); *Campbell v. USDA*, EEOC No. 01931730, n.2 (Aug. 31, 1993) (same).

III. EEOC’S EXPANSION OF TITLE VII’S PROTECTIONS FOR LGBTQ+ INDIVIDUALS IN THE FEDERAL GOVERNMENT

While the EEOC had maintained consistently that sexual orientation and transgender status were not protected categories under Title VII, the EEOC nonetheless declined to dismiss complaints alleging discrimination based on sex stereotypes following the U.S. Supreme Court’s decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality), even if the discriminatory conduct related to or overlapped with a complainant’s sexual orientation or transgender status. See, e.g., *Castello v. USPS*, EEOC Req. No. 0520110649 (Dec. 20, 2011) (finding actionable sex stereotyping claim where complainant experienced offensive and derogatory comments about her having relationships with women). In following this line of reasoning, the EEOC eventually issued decisions finding both sexual orientation and transgender status as protected characteristics under Title VII.

Before delving into the EEOC cases finding that Title VII prohibits discrimination based on transgender status and sexual orientation, it is important to address briefly the Supreme Court’s decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), as many of the EEOC’s decisions relied heavily on the decision. In *Price Waterhouse*, the Supreme Court recognized that employment discrimination based on sex stereotypes,

i.e., assumptions and/or expectations about how persons of a certain sex should dress, speak, or otherwise behave due to their sex, is unlawful sex discrimination under Title VII. In the case before the Court, rather than promote Ann Hopkins to partner, Price Waterhouse “held” her application “for reconsideration the following year.” *Id.* at 233. The decision was due in part to other partners at the firm feeling that Ms. Hopkins did not behave as woman should behave. *Id.* at 233–236. Partners believed she was abrasive, did not like that she used “foul language,” and described her as “macho,” believing she “overcompensated for being a woman.” *Id.* at 234–235. Ms. Hopkins was told, among other things, that she needed to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry,” in order to secure a partnership. *Id.* at 235. The Court found that this constituted evidence of sex 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.” *Id.* at 250. The Court further explained that Title VII’s “because of sex” provision strikes at the “entire spectrum of disparate treatment of men and women resulting from sex stereotypes.” *Id.* at 251 (quoting *City of Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

A. TRANSGENDER STATUS RECOGNIZED AS PROTECTED CLASS UNDER TITLE VII

In 2012, the EEOC paved the way for transgender federal employees to invoke directly Title VII’s protections from discrimination based on their transgender identity, through its decision in *Macy v. DOJ*, EEOC App. No. 0120120821 (Apr. 20, 2012). In finding that discrimination based on transgender status violates Title VII, the EEOC made several notable observations about the terminology of “sex” and “gender” within the context of Title VII and everyday life. *Id.* However, before diving into the reasoning in *Macy*, it is important to touch on a few federal appellate decisions that influenced the EEOC’s reasoning and overall decision.

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

In *Rosa*, the plaintiff, a male who dressed in traditionally feminine attire, inquired with the Park West Bank & Trust Co. about applying for a loan. When the plaintiff provided an employee of the bank with the requested forms of identification, the employee told the plaintiff she would not provide a loan application until plaintiff “went home and changed” into more traditionally male attire to align with the plaintiff’s forms of identification. The plaintiff sued under the Equal Credit Opportunity Act and Massachusetts antidiscrimination statutes. 214 F.3d at 214.

In reversing the district court's decision granting the bank's motion to dismiss under FRCP 12(b)(6), the First Circuit explained that the plaintiff may have a viable claim if the evidence shows that the bank employee turned the plaintiff away because the plaintiff was a biological male who dressed in female attire, which did not accord with the male gender. Indeed, the First Circuit acknowledged that the plaintiff may have a claim if evidence shows that the bank would treat a woman who dresses like a man differently for credit purposes than a man who dresses like a woman. *Id.* at 215.

- *Schwenk v. Hartford*, [204 F.3d 1187](#) (9th Cir. 2000).

In *Schwenk*, a transgender female was incarcerated in the all-male Washington State Penitentiary and subsequently transferred to the prison's medium security Baker Unit. 204 F.3d at 1193. Robert Mitchell, a guard employed at the Baker Unit, began subjecting Schwenk to a series of unwanted sexual harassment and sexual advances, such as referring to Schwenk by her deadname, performing explicit acts imitating oral sex, and forcibly grinding his exposed penis against Schwenk's exposed buttocks, among other things. *Id.* at 1193–94. Schwenk brought suit under the Gender Motivated Violence Act ("GMVA"), which provided a federal cause of action for victims of violence "because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender." *Id.* 1198.

In finding that Schwenk had stated a viable claim under the GMVA, the Ninth Circuit, in part, found that Congress intended proof of gender motivation under GMVA to mirror that of discrimination on the basis of sex or race under Title VII. *Id.* at 1200–01. The Ninth Circuit interpreted *Price Waterhouse* as interpreting "sex" under Title VII as encompassing biological sex and gender, and the Ninth Circuit found this interpretation applied with equal force to the GMVA. *Id.* at 1202. The Ninth Circuit also concluded that the alleged crime in the case being sexual assault was alone sufficient to support the existence of gender-based animus under the GMVA. *Id.* at 1203. In summary, the Ninth Circuit found Schwenk had provided sufficient evidence, if proven, to establish a violation of GMVA but ultimately concluded that the law was not "clearly established" so as to justify denial of qualified immunity. *Id.* at 1203–05.

- *Smith v. City of Salem*, [378 F.3d 566](#) (6th Cir. 2004).

The plaintiff in *Smith* was a transgender female who worked as a Lieutenant in the Salem Fire Department in Salem Ohio. 378 F.3d at 568. After being diagnosed with gender identity disorder, Smith's expression at work became more feminine, which led to Smith's coworkers questioning her about her appearance and commenting that her appearance and mannerisms were not "masculine enough." *Id.* After disclosing her coworkers' behavior, as well as her intention to fully transition to female, to her supervisor, her employer