U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

[redacted]
Complainant
v.

Anthony Foxx,
Secretary,
Department of Transportation
(Federal Aviation Administration),
Agency.

Appeal No. 0120133080

Agency No. 2012-24738-FAA-03

DECISION

Complainant timely filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision, dated July 17, 2013, dismissing his complaint of unlawful employment discrimination alleging a violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. §§ 2000e–2000e-17. For the reasons that follow, the Commission REVERSES and REMANDS the Agency's final decision.

ISSUES PRESENTED

The issues presented in this case are (1) whether Complainant's initial contact with an Equal Employment Opportunity (EEO) Counselor was timely; and (2) whether a complaint alleging discrimination based on sexual orientation in violation of Title VII of the Civil Rights Act of 1964 lies within the Commission's jurisdiction. [1]

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Supervisory Air Traffic Control Specialist at the Agency's Southern Region, Air Traffic Division, Air Traffic Control Tower/International Airport in Miami, Florida.

On August 28, 2012, Complainant contacted an EEO counselor and on December 21, 2012, filed a formal EEO complaint alleging that the Agency subjected him to discrimination on the bases of sex (male, sexual orientation) and reprisal for prior protected EEO activity when, on

[1] This decision addresses only the timeliness and jurisdiction questions raised on appeal. We take no position on the merits of Complainant's claim of discrimination. That is for the Agency to determine upon remand.

July 26, 2012, he learned that he was not selected for a permanent position as a Front Line Manager (FLM) at the Miami Tower TRACON facility (the Miami facility).

The Agency accepted the complaint for investigation. When the investigation was completed, Complainant was given his notice of right to request a hearing before an EEOC administrative judge or an immediate final decision by the Agency based on the investigative report. On May 21, 2013, Complainant requested an immediate final decision from the Agency. The Agency issued its Final Agency Decision (FAD) on July 12, 2013.

The evidence developed during the investigation shows that in October 2010, Complainant was selected for and accepted a temporary FLM position at the Miami facility. The record further reflects that the Agency issued a vacancy announcement for a permanent FLM position in June 2012.

Complainant did not officially apply for the permanent position based on his understanding that all temporary FLMs, such as himself, were automatically considered for any open permanent FLM posting. Complainant claimed that management knew of his desire to obtain a permanent FLM position and that he was well-qualified for the position given his years of experience, as well as his familiarity with the Miami facility. Complainant was not selected for the permanent FLM position. The failure to be selected for the permanent FLM position forms the basis of his discrimination complaint.

The Agency asserts that the permanent FLM position was never filled, and hence no discrimination occurred.

Complainant alleged that he was not selected because he is gay. He alleged that his supervisor who was involved in the selection process for the permanent position made several negative comments about Complainant's sexual orientation. For example, Complainant stated that in May 2011, when he mentioned that he and his partner attended Mardi Gras in New Orleans, the supervisor said, "We don't need to hear about that gay stuff." He also alleged that the supervisor told him on a number of occasions that he was "a distraction in the radar room" when his participation in conversations included mention of his male partner.

In its FAD, the Agency did not address the merits of Complainant's claim. Instead, the Agency dismissed the complaint on the grounds that it had not been raised in a timely fashion with an EEO counselor, as required by EEOC regulations. The Agency reasoned that the 45-day limitation period in which Complainant should have contacted a counselor started to run in October 2010, the date on which the Complainant was aware that his temporary FLM position would expire after two years and he would be returned to his previous position. Therefore, the Agency found that Complainant's EEO counselor contact in August 2012 was made well beyond the 45-day limitation period.

The FAD also notified Complainant that, pursuant to the "Secretary's Policy on Sexual Orientation" and the "Departmental Office of Civil Rights' March 7, 1998 Procedures for

Complaints of Discrimination based on Sexual Orientation," the "sexual orientation portion of the claim is appealable to [the Agency] and the portion of the claim involving reprisal is appealable to the EEOC [pursuant to 29 C.F.R. § 1614.110(b)]."

Complainant appealed the Agency's decision to the Commission.

ANALYSIS AND FINDINGS

Timeliness of EEO Counselor Contact

EEOC's regulations require that complaints of discrimination be brought to the attention of an Equal Employment Opportunity Counselor "within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action." 29 C.F.R. § 1614.105(a)(1). The Commission has long applied a "reasonable suspicion" standard, viewed from the perspective of the complainant, to determine when the 45-day limitation period is triggered. See e.g., Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120093169, 2014 WL 2999934 (EEOC June 27, 2014) (citing Howard v. Dep't of the Navy, EEOC Request No. 05970852, 1999 WL 91430 (EEOC Feb. 11, 1999), citing Ball v. U.S. Postal Serv., EEOC Appeal No. 01871261, 1988 WL 921053 (EEOC July 6, 1988), req. for recon. den., EEOC Request No. 05980247 (July 15, 1988)). Thus, the time limitation is not triggered until a complainant should reasonably suspect discrimination, even if all the facts that might support the charge of discrimination have not yet become apparent.

Further, it is well-settled that when, as here, there is an issue of timeliness, "[a]n agency always bears the burden of obtaining sufficient information to support a reasoned determination as to timeliness." Williams v. Dep't of Def., EEOC Request No. 05920506, 1992 WL 1374923, *3 (EEOC Aug. 25, 1992). We conclude the Agency has not met this burden and erred in dismissing the complaint for untimely EEO counseling.

In its FAD, the Agency stated that it considered the date of the alleged adverse action to be October 2010, when Complainant assumed his temporary FLM position and, according to the Agency, knew that he would be returned to his former position at the expiration of the appointment. However, the Agency acknowledged in its FAD that "the date of the incident for the instant complaint is in dispute." It is clear that a permanent FLM vacancy was posted in June 2012 and a selection was made in July 2012, although the selectee later declined the position and the certificate of eligibles expired without any further selection being made.

The Agency argued that Complainant did not apply for the position, but Complainant claims that he did not formally apply because of his understanding that all temporary FLMs were automatically considered for vacant, permanent FLM positions. Further, Complainant stated that his desire for promotion was well known in the Miami facility. Whether, under the facts of this case, Complainant was or was not required to submit an application in order to be considered for the vacant permanent position goes to the merits of his complaint. At this stage of the proceedings, the inquiry is limited to whether Complainant has met the procedural

requisites to bring his EEO complaint in the Part 1614 process and if he has the legal right to come before the Commission. See, e.g., Complainant v. U.S. Equal Employment Opp. Commn., EEOC Appeal No. 0120120403, 2013 WL 6145999 (EEOC Nov. 13, 2013) (citing Ferrazzoli v. U.S. Postal Serv., EEOC Request No. 05910642, 1991 WL 1189594 (EEOC Aug. 15, 1991). We find that he has done so.

According to the affidavits of Complainant's first-level supervisor (S1) and second-level supervisor (S2): Individuals, including Complainant, competed for the temporary FLM appointments. The vacancy announcement for Complainant's temporary FLM appointment stated that appointment could "be extended, terminated, or become permanent without further competition." In February 2012, an announcement was made that a temporary FLM (Employee 1) had been converted to permanent status. Employee 1 did not compete for the permanent position. Subsequently, a second temporary FLM (Employee 2) had been converted to permanent status without competing for the position.[2] Neither S1 nor S2 explained the process by which temporary FLMs were converted to permanent status in their affidavits, although S2 stated that it was a matter of managerial discretion.

It is not reasonable for the Agency to argue that Complainant knew or should have known that he was being discriminated against with regard to conversion to a permanent position at the time he was appointed to a temporary FLM position. Complainant had no reason to know or to suspect at the time of his temporary appointment that he subsequently would not be selected for a permanent FLM position, let alone for discriminatory reasons. As the elevation of the two temporary FLMs demonstrates, conversion to a permanent FLM position was a realistic possibility for Complainant if a vacancy arose during his tenure. The Agency's position might have merit if Complainant's claim were that, when he was given a temporary appointment, other individuals outside of his protected group were given permanent appointments. But that is not the claim at bar. Rather, the claim is whether Complainant was treated disparately when he was not converted to permanent status nearly two years after his appointment.

The standard we apply to determine timeliness is when Complainant *reasonably* should have first suspected discrimination. Here, we find that Complainant could only reasonably have suspected that discrimination occurred after he learned he was not selected for conversion to the permanent FLM position on July 26, 2012, near the end of his two-year temporary assignment. See Howard, EEOC Request No. 05970852, 1999 WL 91430 (EEOC Feb. 11, 1999). Complainant's contact with an EEO Counselor on August 28, 2012, therefore, fell within the 45-day limitation period and was timely. Accordingly, we remand the complaint for further processing by the Agency consistent with the ruling below.

[2] While Employee 2 was converted to permanent status to resolve an EEO complaint he had filed, there is no indication that the reason for his conversion to permanent status was common knowledge. S1 averred that Employee 2 would have qualified for conversion to permanent status in any event.

EEOC Jurisdiction over Complainant's Sex Discrimination Claim

The narrative accompanying his formal complaint makes clear that Complainant believes that he was denied a permanent position because of his sexual orientation. The Agency, in its final decision, indicated it would process this claim only under its internal procedures concerning sexual orientation discrimination and not through the 29 C.F.R. Part 1614 EEO complaint process. The Agency erred in this regard.

Title VII requires that "[a]ll personnel actions affecting [federal] employees or applicants for employment . . . shall be made free from any discrimination based on . . . sex." 42 U.S.C. § 2000e-16(a). This provision is analogous to the section of Title VII governing employment discrimination in the private sector at 42 U.S.C. § 2000e-2(a)(1) (it is unlawful for a covered employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex").

Title VII's prohibition of sex discrimination means that employers may not "rel[y] upon sex-based considerations" or take gender into account when making employment decisions. See Price Waterhouse v. Hopkins, 490 U.S. 228, 239, 241–42 (1989); Macy v. Dep't of Justice, EEOC Appeal No. 0120120821, 2012 WL 1435995, at *5 (EEOC Apr. 20, 2012) (quoting Price Waterhouse, 490 U.S. at 239).[3] This applies equally in claims brought by lesbian, gay, and bisexual individuals under Title VII.

When an employee raises a claim of sexual orientation discrimination as sex discrimination under Title VII, the question is not whether sexual orientation is explicitly listed in Title VII as a prohibited basis for employment actions. It is not. Rather, the question for purposes of Title VII coverage of a sexual orientation claim is the same as any other Title VII case involving allegations of sex discrimination—whether the agency has "relied on sex-based considerations" or "take[n] gender into account" when taking the challenged employment action.[4]

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[3] As used in Title VII, the term "sex" "encompasses both sex- that is, the biological differences between men and women - and gender." See Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000); see also Smith v. City of Salem, 378 F.3d 566, 572 (6th Cir. 2004) ("The Supreme Court made clear that in the context of Title VII, discrimination because of 'sex' includes gender discrimination."). As the Eleventh Circuit noted in Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011), six members of the Supreme Court in Price Waterhouse agreed that Title VII barred "not just discrimination because of biological sex, but also gender stereotyping—failing to act and appear according to expectations defined by gender." As such, the terms "gender" and "sex" are often used interchangeably to describe the discrimination prohibited by Title VII. See, e.g., Price Waterhouse v. Hopkins at 239 (1989) ("Congress' intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute.") (plurality opinion). We do the same in this decision.

[4] As we observed in Macy, 2012 WL 1435995 at *6:

In the case before us, we conclude that Complainant's claim of sexual orientation discrimination alleges that the Agency relied on sex-based considerations and took his sex into account in its employment decision regarding the permanent FLM position. The Complainant, therefore, has stated a claim of sex discrimination. Indeed, we conclude that sexual orientation is inherently a "sex-based consideration," and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII. A complainant alleging that an agency took his or her sexual orientation into account in an employment action necessarily alleges that the agency took his or her sex into account.

Discrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms. "Sexual orientation" as a concept cannot be defined or understood without reference to sex. A man is referred to as "gay" if he is physically and/or emotionally attracted to other men. A woman is referred to as "lesbian" if she is physically and/or emotionally attracted to other women. Someone is referred to as "heterosexual" or "straight" if he or she is physically and/or emotionally attracted to someone of the opposite-sex. See, e.g., American Psychological Ass'n, "Definition of Terms: Sex, Gender, Gender Identity, Sexual Orientation" (Feb. 2011), available at http://www.apa.org/pi/lgbt/resources/ sexuality-definitions.pdf ("*Sexual orientation* refers to the *sex* of those to whom one is sexually and romantically attracted." (second emphasis added). It follows, then, that sexual orientation is inseparable from and inescapably linked to sex and, therefore, that allegations of sexual orientation discrimination involve sex-based considerations. One can describe this inescapable link between allegations of sexual orientation discrimination and sex discrimination in a number of ways.

Sexual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex. For example, assume that an employer suspends a lesbian employee for displaying a photo of her female spouse on her desk, but does not suspend a male employee for displaying a photo of his female spouse on his desk. The lesbian employee in that example can allege that her employer took an adverse action against her that the employer would not have taken had she been male. That is a

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"'Title VII . . . identif[ies] one circumstance in which an employer may take gender into account in making an employment decision, namely, when gender is a 'bona fide occupational qualification [(BFOQ)] reasonably necessary to the normal operation of th[e] particular business or enterprise."' Price Waterhouse, 490 U.S. at 242 (quoting 42 U.S.C. §2000e-2(e)). Even then, "the [BFOQ] exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex."' [Dothard v. Rawlinson, 433 U.S. 321, 334 (1977).] See Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (Marshall, J., concurring) "The only plausible inference to draw from this provision is that, in all other circumstances, a person's gender may not be considered in making decisions that affect her." Price Waterhouse, 490 U.S. at 242.

legitimate claim under Title VII that sex was unlawfully taken into account in the adverse employment action. See Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 711 (1978) ("Such a practice does not pass the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'"). The same result holds true if the person discriminated against is straight. Assume a woman is suspended because she has placed a picture of her husband on her desk but her gay colleague is not suspended after he places a picture of his husband on his desk. The straight female employee could bring a cognizable Title VII claim of disparate treatment because of sex.

The court in Hall v. BNSF Ry. Co., No. 13-2160, 2014 WL 4719007 (W.D. Wash., Sept. 22 2014) adopted this analysis of Title VII. In that case, the court found that the plaintiff, a male who was married to another male, alleged sex discrimination under Title VII when he stated that he "experienced adverse employment action in the denial of the spousal health benefit, due to sex, where similarly situated females [married to males] were treated more favorably by getting the benefit." Id. at *2. The court recognized that the sexual orientation discrimination alleged by the plaintiff constituted an allegation that the employer was treating female employees with male partners more favorably than male employees with male partners simply because of the employee's sex. See also Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212, 1223 (D. Or. 2002) ("One way (but certainly not the only means) of [alleging a claim under Title VII] is to inquire whether the harasser would have acted the same if the gender of the victim had been different. A jury could find that [Heller's manager] would not have acted as she (allegedly) did if Plaintiff were a man dating a woman, instead of a woman dating a woman.") (internal citations omitted).[5]

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[5] Courts have also adopted this analysis in claims of sex discrimination under Title IX, the Due Process Clause, and the Equal Protection Clause. See Videckis v. Pepperdine Univ., ___ F. Supp. 3d ___, No. 15-298, 2015 WL 1735191 (C.D. Cal., 2015) ("[D]iscrimination based on a same-sex relationship could fall under the umbrella of sexual discrimination [prohibited by Title IX] even if such discrimination were not based explicitly on gender stereotypes. 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, ___ F. Supp. 3d ___, 2014 WL 5810215, at *8 (W.D. Mo. Nov. 7, 2014) ("The State's permission to marry depends on the genders of the participants, so the restriction is a gender-based classification," and it violates the Equal Protection Clause); Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010) ("Sexual orientation discrimination can take the form of sex discrimination. Here, for example, Perry is prohibited from marrying Stier, a woman, because Perry is a woman. If Perry were a man, Proposition 8 would not prohibit marriage. Thus, Proposition 8 operates to restrict Perry's choice of marital partner because of her sex."), aff'd sub nom., Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), vacated and remanded sub nom, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013); cf. Obergefell v. Hodges, 576 U.S. ___, 2015 WL 2473451, *19 (2015) ("[I]t must be further acknowledged that [laws prohibiting same-sex marriage] abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right.").

Sexual orientation discrimination is also sex discrimination because it is associational discrimination on the basis of sex. That is, an employee alleging discrimination on the basis of sexual orientation is alleging that his or her employer took his or her sex into account by treating him or her differently for *associating* with a person of the same sex. For example, a gay man who alleges that his employer took an adverse employment action against him because he associated with or dated men states a claim of sex discrimination under Title VII; the fact that the employee is a man instead of a woman motivated the employer's discrimination against him. Similarly, a heterosexual man who alleges a gay supervisor denied him a promotion because he dates women instead of men states an actionable Title VII claim of discrimination because of his sex.

In applying Title VII's prohibition of race discrimination, courts and the Commission have consistently concluded that the statute prohibits discrimination based on an employee's association with a person of another race, such as an interracial marriage or friendship. See, e.g., Floyd v. Amite County School Dist., 581 F.3d 244, 249 (5th Cir. 2009) ("This court has recognized that . . . Title VII prohibit[s] discrimination against an employee on the basis of a personal relationship between the employee and a person of a different race."); Holcomb v. Iona Coll., 521 F.3d 130, 138 (2d Cir. 2008) ("We . . . hold that an employer may violate Title VII if it takes action against an employee because of the employee's association with a person of another race.").[6] This is because an employment action based on an employee's relationship with a person of another race necessarily involves considerations of the employee's race, and thus constitutes discrimination because of the employee's race.

This analysis is not limited to the context of race discrimination. Title VII "on its face treats each of the enumerated categories"—race, color, religion, sex, and national origin—"exactly the same." Price Waterhouse, 490 U.S. at 243 n.9 ("[O]ur specific references to gender throughout this opinion, and the principles we announce, apply with equal force to discrimination based on race, religion, or national origin."); see also Whidbee v. Garzarelli Food Specialties, Inc., 223 F.3d 62, 69 n.6 (2d Cir. 2000) ("[T]he same standards apply to both race-based and sex-based hostile environment claims."); Williams v. Owens-Illinois, Inc., 665 F.2d 918, 929 (9th Cir. 1982) ("[T]he standard for proving sex discrimination and race discrimination is the same."); Horace v. City of Pontiac, 624 F.2d 765, 768 (6th Cir. 1980)

[6] See also Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick & GMC Trucks, Inc., 173 F.3d 988, 994 (6th Cir.1999) ("A white employee who is discharged because his child is biracial is discriminated against on the basis of his race . . . ."); Hancock v. Dep't of Transp., EEOC Appeal No. 01922416, 1992 WL 1371812 (EEOC Dec. 2, 1991), req. for recon. den., EEOC Request No. 05930356, 1993 WL 1510013 (EEOC Sept. 30, 1993) ("[A]n individual may be entitled to protection by virtue of association with a member of a protected class . . . ."); Robertson v. U.S. Postal Serv., EEOC Appeal No. 0120113558, 2013 WL 3865026 (EEOC Jul. 18, 2013), n. 1 (association discrimination may be established where evidence permits the inference that an agency's act or omission would not have occurred if the complainant and associate were of the same race).

("Both cases concern Title VII cases of race discrimination, but the same standards and order of proof are generally applicable to cases of sex discrimination.").

Therefore, Title VII similarly prohibits employers from treating an employee or applicant differently than other employees or applicants based on the fact that such individuals are in a same-sex marriage or because the employee has a personal association with someone of a particular sex. Adverse action on that basis is, "by definition," discrimination because of the employee or applicant's sex. Cf. Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 892 (11th Cir. 1986) ("Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of *his* race [in violation of Title VII]."); Schroer v. Billington, 577 F. Supp. 2d 293, 307 n.8 (D.D.C. 2008) ("Discrimination because of race has never been limited only to discrimination for being one race or another. Instead, courts have recognized that Title VII's prohibition against race discrimination protects employees from being discriminated against because of an interracial marriage, or . . . friendships.").

Sexual orientation discrimination also is sex discrimination because it necessarily involves discrimination based on gender stereotypes. In Price Waterhouse, the Court reaffirmed that Congress intended Title VII to "strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." 490 U.S. at 251 (quoting Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)). In the wake of Price Waterhouse, courts and the Commission have recognized that lesbian, gay, and bisexual individuals can bring claims of gender stereotyping under Title VII if such individuals demonstrate that they were treated adversely because they were viewed—based on their appearance, mannerisms, or conduct—as insufficiently "masculine" or "feminine."[7] But as the Commission[8] and a number

[7] See Smith v. City of Salem, Ohio, 378 F.3d 566, 574 (6th Cir. 2004) ("It follows [from Price Waterhouse] that employers who discriminate against men because they . . . act femininely[ ] are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex."); EEOC v. Boh Brothers, 731 F.3d 444, 459-60 (5th Cir. 2013) (en banc) ("[A] jury could view Wolfe's behavior as an attempt to denigrate Woods because — at least in Wolfe's view — Woods fell outside of Wolfe's manly-man stereotype" and that would constitute sex discrimination in violation of Title VII).

[8] See Veretto v. United States Postal Service, EEOC Appeal No. 0120110873, 2011 WL 2663401 (EEOC July 1, 2011) (complainant's allegation of sexual orientation discrimination was a claim of sex discrimination because it was based on the sex stereotype that marrying a woman is an essential part of being a man); Castello v. U.S. Postal Service, EEOC Request No. 0520110649, 2011 WL 6960810 (EEOC Dec. 20, 2011) (complainant's allegation of sexual orientation discrimination was a claim of sex discrimination because it was based on the sex stereotype that having relationships with men is an essential part of being a woman); Baker v. Social Security Administration, EEOC Appeal No. 0120110008, 2013 WL 1182258 (EEOC January 11, 2013) (complainant's allegation of sexual orientation discrimination was a claim of sex discrimination because it was based on his gender non-conforming behavior); Dupras v. Dep't of Commerce, EEOC Request No. 0520110648, 2013 WL 1182329 (EEOC March 15, 2013) (complainant's allegation that she was subjected to stereotyping on

of federal courts[9] have concluded in cases dating from 2002 onwards, discrimination against people who are lesbian, gay, or bisexual on the basis of gender stereotypes often involves far more than assumptions about overt masculine or feminine behavior.

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the basis of sex because of her sexual orientation is sufficient to state a claim of sex discrimination under Title VII); Culp v. Dep't of Homeland Security, EEOC Appeal No. 0720130012, 2013 WL 2146756 (EEOC May 7, 2013) (complainant's allegation of sexual orientation discrimination states a claim of sex discrimination because it was an allegation that her supervisor was motivated by stereotypes that women should only have relationships with men); Brooker v. U.S. Postal Service, EEOC Request No. 0520110680 , 2013 WL 4041270 (EEOC May 20, 2013), (complainant's allegation that coworkers were spreading allegations about his sexual orientation was properly framed as a claim of sex discrimination); Complainant v. Dep't of Homeland Security, EEOC Appeal No. 0120110576, 2014 WL 4407457 (EEOC August 19, 2014) (reaffirming the analysis in the cases cited above).

[9] See Centola v. Potter, 183 F. Supp. 2d 403, 410 (D. Mass. 2002); Heller, 195 F. Supp. 2d at 1224 (D. Or. 2002) ("[A] jury could find that Cagle repeatedly harassed (and ultimately discharged) Heller because Heller did not conform to Cagle's stereotype of how a woman ought to behave. Heller is attracted to and dates other women, whereas Cagle believes that a woman should be attracted to and date only men."); Koren v. Ohio Bell, 894 F. Supp. 2d 1032, 1038 (N.D. Ohio 2012) ("And here, Koren chose to take his spouse's surname—a "traditionally" feminine practice—and his co-workers and superiors observed that gender non-conformance when Koren requested to be called by his married name."); Terveer v. Billington, 34 F. Supp. 3d 100, 116, 2014 WL 1280301 (D.D.C. 2014) (plaintiff stated a claim of discrimination on the basis of sex when he "alleged that he is a homosexual male whose sexual orientation is not consistent with the Defendant's perception of acceptable gender roles, that his status as a homosexual male did not conform to the Defendant's gender stereotypes associated with men under Mech's supervision or at the LOC, and that his orientation as homosexual had removed him from Mech's preconceived definition of male.") (internal citations and quotes omitted); Boutillier v. Hartford Public Schools, 2014 WL 4794527 (D. Conn. 2014) (denying an employer's motion to dismiss by finding that plaintiff, a lesbian, had set forth a plausible claim that she was discriminated against based on sex due to her non-conforming gender behavior); Deneffe v. SkyWest, Inc., 2015 WL 2265373, at *6 (D. Colo. May 11, 2015) (denying employer's motion to dismiss by finding that plaintiff, a homosexual male, had sufficiently alleged that he failed to conform to male stereotypes by not taking part in male "braggadocio" about sexual exploits with women, not making jokes about gay pilots, designating his same-sex partner as beneficiary, and flying with his same sex partner on employer flights) cf. Latta v. Otter, 771 F.3d 456, 474 (9th Cir. 2014) (finding that plaintiffs had sufficiently established that marriage laws in Idaho and Nevada violated the Equal Protection Clause of the Fourteenth Amendment by discriminating on the basis of sexual orientation, but also stating that "the constitutional restraints the Supreme Court has long imposed on sex-role stereotyping . . . may provide another potentially persuasive answer to defendant's theory."); Id. at 495 (Berzon, J. concurring) ("[I]t bears noting that the social exclusion and state discrimination against lesbian, gay, bisexual, and transgender people reflects, in large part, disapproval of their nonconformity with gender-based expectations.").

Sexual orientation discrimination and harassment "[are] often, if not always, motivated by a desire to enforce heterosexually defined gender norms." Centola v. Potter, 183 F. Supp. 2d 403, 410 (D. Mass. 2002). The Centola court continued:

> In fact, 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.

Id.

Those deeper assumptions and stereotypes about "real" men and "real" women were similarly noted by the court in Terveer v. Library of Congress in rejecting the government's motion to dismiss:

> Under Title VII, allegations that an employer is discriminating against an employee based on the employee's non-conformity with sex stereotypes are sufficient to establish a viable sex discrimination claim. See Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) ("we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."). Here, Plaintiff has alleged that he is "a homosexual male whose sexual orientation is not consistent with the Defendant's perception of acceptable gender roles," that his "status as a homosexual male did not conform to the Defendant's gender stereotypes associated with men under [his supervisor's] supervision or at the LOC," and that "his orientation as homosexual had removed him from [his supervisor's] preconceived definition of male." As Plaintiff has alleged that Defendant denied him promotions and created a hostile work environment because of Plaintiff's nonconformity with male sex stereotypes, Plaintiff has met his burden of setting forth "a short and plain statement of the claim showing that the pleader is entitled to relief."

Terveer v. Billington. 34 F. Supp. 3d 100, 116 (D.D.C. 2014) (citations omitted) (first quoting Pl.'s Am. Compl.; then quoting Fed. R. Civ. P. 8(a)).

In the past, courts have often failed to view claims of discrimination by lesbian, gay, and bisexual employees in the straightforward manner described above.[10] Indeed, many courts

[10] A review of cases cited for the proposition that sexual orientation is excluded from Title VII reveals that many courts simply cite earlier and dated decisions without any additional analysis. For example,

have gone to great lengths to distinguish adverse employment actions based on "sex" from adverse employment actions based on "sexual orientation." The stated justification for such intricate parsing of language has been the bare conclusion that "Title VII does not prohibit . . . discrimination because of sexual orientation." Dawson v. Bumble & Bumble, 398 F.3d 211, 217 (2d Cir. 2005) (quoting Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000)). For that reason, courts have attempted to distinguish discrimination based on sexual orientation from discrimination based on sex, even while noting that the "borders [between the two classes] are . . . imprecise." Id. (alteration in original).[11]

Some of these decisions reason that Congress in 1964 did not intend Title VII to apply to sexual orientation and, therefore, Title VII could not be interpreted to prohibit such discrimination. See, e.g., DeSantis v. Pacific Telephone & Telegraph Co., 608 F.2d 327, 329 (9th Cir. 1979) ("Congress had only the traditional notions of 'sex' in mind" when it passed Title VII and those "traditional notions" did not include sexual orientation or sexual preference.) abrogated by Nichols v. Azteca Restaurant Enterprises, Inc., 256 F.3d 864, 875 (9th Cir. 2001).[12]

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in a brief to the Seventh Circuit Court of Appeals requesting rehearing based on various broad declaratory statements that Title VII does not cover sexual orientation, the EEOC pointed out that only one previous Seventh Circuit case had analyzed the question of coverage of sexual orientation discrimination under Title VII and that case, decided in 1984, had not been reviewed in light of subsequent decisions such as Price Waterhouse. Instead, a string of Seventh Circuit panel decisions had simply reiterated the holding in the first case without any further discussion. Br. EEOC Supp. Reh'g 8-9, Muhammad v. Caterpillar Inc., ECF No. 49, No. 12-1723 (7th Cir. Oct. 7, 2014). The Seventh Circuit denied the request for rehearing but reissued its decision without the statements that sexual orientation discrimination is not covered under Title VII. See Muhammad v. Caterpillar, 767 F.3d 694 (7th Cir. 2014), 2014 WL 4418649 (7th Cir. Sept. 9, 2014, as Amended on Denial of Rehearing, Oct. 16, 2014).

[11] We do not view the borders between sex discrimination and sexual orientation as "imprecise." As we note above, discrimination on the basis of sexual orientation necessarily involves discrimination on the basis of sex.

[12] Indeed, the Equal Employment Opportunity Commission's own understanding of Title VII's application to sexual orientation discrimination has developed over time. Compare Johnson v. U.S. Postal Serv., EEOC Appeal No. 01911827, 1991 WL 1189760, at *3 (EEOC Dec. 19, 1991) (holding that Title VII's prohibition of discrimination based on sex does not include sexual preference or sexual orientation), and Morrison v. Dep't of the Navy, EEOC Appeal No. 01930778, 1994 WL 746296, at *3 (EEOC June 16, 1994) (affirming that Title VII's discrimination prohibition does not include sexual preference or orientation as a basis), with Morris v. U.S. Postal Serv., EEOC Appeal No. 01974524, 2000 WL 226001, at *1-2 (EEOC Feb. 9, 2000) (distinguishing Johnson and Morrison and holding that complainant stated a valid Title VII claim by alleging that her female supervisor and former lover discriminated against her on the basis of her sex). Former Acting Chairman of the EEOC Stuart Ishimaru acknowledged the varying protections to protect LGBT employees and explained that federal decisions have been inconsistent in this area. See Employment Non-Discrimination Act of 2009:

Congress may not have envisioned the application of Title VII to these situations. But as a unanimous Court stated in Oncale v. Sundowner Offshore Services, Inc., "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." 523 U.S. 75, 79, 78-80 (1998) (holding that same-sex harassment is actionable under Title VII). Interpreting the sex discrimination prohibition of Title VII to exclude coverage of lesbian, gay or bisexual individuals who have experienced discrimination on the basis of sex inserts a limitation into the text that Congress has not included.[13] Nothing in the text of Title VII "suggests that Congress intended to confine the benefits of [the] statute to heterosexual employees alone." Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d. 1212, 1222 (D. Or. 2002).

Some courts have also relied on the fact that Congress has debated but not yet passed legislation explicitly providing protections for sexual orientation. See Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 261 (3d Cir. 2001) ("Congress has repeatedly rejected legislation that would extend Title VII to cover sexual orientation.").[14] But the Supreme Court has ruled that "[c]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990) (citation omitted) (internal quotation marks omitted).

The idea that congressional action is required (and inaction is therefore instructive in part) rests on the notion that protection against sexual orientation discrimination under Title VII would create a new class of covered persons. But analogous case law confirms this is not true. When courts held that Title VII protected persons who were discriminated against because of their relationships with persons of another race, the courts did not thereby create a new

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Hearing on H.R. 3017 Before the H. Comm. on Educ. & Labor, 111th Cong. (2009) (statement of Stuart J. Ishimaru, Acting Chairman, U.S. Equal Employment Opportunity Commission).

[13] Title VII prohibits discrimination on the basis of "sex" without further definition or restriction and it is not our province to modify that text by adding limitations to it. As the Supreme Court noted recently in a different context, "[t]he problem with this approach is the one that inheres in most incorrect interpretations of statutes: It asks to add words to the law to produce what is thought to be a desirable result. That is Congress's province." EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. ___ (2015), 135 S.Ct. 2028, 2033, 2015 WL 2464053, *4 (2015).

[14] See also Medina v. Income Support Div., 413 F.3d 1131, 1135 (10th Cir. 2005) (citing Bibby and Simonton (see infra) with approval); Rene v. MGM Grand Hotel, Inc., 243 F.3d 1206, 1209 (9th Cir. 2001) ("Title VII has not been amended to prohibit discrimination based on sexual orientation."); Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000) ("Congress's refusal to expand the reach of Title VII is strong evidence of congressional intent.").

protected class of "people in interracial relationships." See e.g., Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581, 588-89 (5th Cir. 1998), reinstated in relevant part, Williams v. Wal-Mart Stores, Inc., 182 F.3d 333 (5th Cir. 1999) (en banc). And when the Supreme Court decided that Title VII protected persons discriminated against because of gender stereotypes held by an employer, it did not thereby create a new protected class of "masculine women." See Price Waterhouse, 490 U.S. at 239-40 (plurality opinion). Similarly, when ruling under Title VII that discrimination against an employee because he lacks religious beliefs is religious discrimination, the courts did not thereby create a new Title VII basis of "non-believers." See e.g., EEOC v. Townley Eng'g & Mfg. Co., 859 F. 2d. 610, 621 (9th Cir. 1988). These courts simply applied existing Title VII principles on race, sex, and religious discrimination to these situations. Further, the Supreme Court was not dissuaded by the absence of the word "mothers" in Title VII when it decided that the statute does not permit an employer to have one hiring policy for women with pre-school children and another for men with pre-school children. See Phillips v. Martin-Marietta, 400 U.S. 542, 543-44 (1971) (per curiam). The courts have gone where the principles of Title VII have directed.

Our task is the same. We apply the words of the statute Congress has charged us with enforcing. We therefore conclude that Complainant's allegations of discrimination on the basis of sexual orientation state a claim of discrimination on the basis of sex. We further conclude that allegations of discrimination on the basis of sexual orientation necessarily state a claim of discrimination on the basis of sex. An employee could show that the sexual orientation discrimination he or she experienced was sex discrimination because it involved treatment that would not have occurred but for the individual's sex; because it was based on the sex of the person(s) the individual associates with; and/or because it was premised on the fundamental sex stereotype, norm or expectation that individuals should be attracted only to those of the opposite sex.[15] Agencies should treat claims of sexual orientation discrimination as complaints of sex discrimination under Title VII and process such complaints through the ordinary Section 1614 process.

We recognize that many agencies also have separate complaint processes in place for claims of sexual orientation discrimination. Agencies may maintain, and employees may still utilize, these procedures if they wish. But the 1614 process is the most appropriate method for resolving these claims. Agencies should make applicants and employees aware that claims of sexual orientation discrimination will ordinarily be processed under Section 1614 as claims of sex discrimination unless the employee requests that the alternative complaint process be used.

CONCLUSION

Accordingly, we conclude that Complainant's allegations of discrimination on the basis of his sexual orientation state a claim of discrimination on the basis of sex within the meaning of Title

[15] There may be other theories for establishing sexual orientation discrimination as sex discrimination, on which we express no opinion.

VII. Furthermore, we conclude that Complaint's initial EEO counselor contact was timely. We remand the Complainant's claim of discrimination to the Agency for further processing to determine its validity on the merits.

ORDER

The Agency is ordered to continue processing the remanded claims. The Agency shall acknowledge to the Complainant that it has received the remanded claims **within thirty (30) calendar days** of the date this decision becomes final. The Agency shall reissue to Complainant a copy of the investigative file and also shall notify Complainant of the appropriate rights **within thirty (30) calendar days** of the date this decision becomes final, unless the matter is otherwise resolved prior to that time. If the Complainant requests a final decision without a hearing, the Agency shall issue a final decision on the merits of his discrimination claims **within sixty (60) days** of receipt of Complainant's request.

A copy of the Agency's letter of acknowledgment to Complainant and a copy of the notice that transmits the investigative file and notice of rights must be sent to the Compliance Officer as referenced below.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0610)

Compliance with the Commission's corrective action is mandatory. The Agency shall submit its compliance report **within thirty (30) calendar days** of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. The Agency's report must contain supporting documentation, and the Agency must send a copy of all submissions to the Complainant. If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

STATEMENT OF RIGHTS - ON APPEAL

RECONSIDERATION (M0610)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which tends to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or

2. The appellate decision will have a substantial impact on the policies, practices, or operations of the Agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) within thirty (30) calendar days of receipt of this decision or within twenty (20) calendar days of receipt of another party's timely request for reconsideration. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you instead wish to file a civil action, you have the right to file such action in an appropriate United States District Court within ninety (90) calendar days from the date that you receive this decision. In the alternative, you may file a civil action after one hundred and eighty (180) calendar days of the date you filed your complaint with the Agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. Filing a civil action will terminate the administrative processing of your complaint.

RIGHT TO REQUEST COUNSEL (Z0610)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request from the Court that the Court appoint an attorney to represent you and that the Court also permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(f)(1) ("Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security"); the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). **The grant or denial of the request is within the sole discretion of the Court.** Filing a request for an attorney with the Court does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File a Civil Action").

FOR THE COMMISSION:

Bernadette B. Wilson
Acting Executive Officer
Executive Secretariat

July 16, 2015
Date