Sexual Orientation, Gender Identity, And Diversity In The Workplace

Iván Espinoza-Madrigal
is a Staff Attorney for Lambda Legal, the oldest and largest national legal organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender (LGBT) people, and those with HIV. He is developing an initiative on behalf of LGBT people of color, LGBT immigrants, and low-income LGBT people. He has successfully litigated complex civil rights cases in federal courts across the country. His work has been featured in the New York Times, the New York Law Journal, and the Huffington Post. Rebeccah Golubock Watson, a legal intern at Lambda Legal, assisted in the preparation of this article.

Iván Espinoza-Madrigal

LGBT equality in the workplace is not optional — the law demands it.

IN 1974, Mechelle Vinson, an African-American woman, accepted a bank teller position. During her four years working at the bank, Ms. Vinson was subjected to constant sexual harassment and physical assault by Sidney Taylor, a vice president at the bank. She had sex with Mr. Taylor in response to "repeated demands upon her for sexual favors," and Mr. Taylor touched her sexually at work, exposed himself to her, followed her into the bathroom alone, and raped her on several occasions. *Meritor Sav. Bank, FSB v. Vinson,* 477 U.S. 57, 60 (1986). She never reported him for fear of losing her job. The Supreme Court held that Mr. Taylor's sexual advances towards Ms. Vinson created a "hostile environment," in violation of a federal anti-discrimination law commonly known as Title VII.

Ms. Vinson's experience as a woman and as an African-American placed her in a unique position with respect to her relationship with her manager and the sexual harassment she experienced. The lack of job opportunities she likely encountered as an African-American woman in 1974 may have contributed to her hesitation to report Mr.

Taylor and, ultimately, to remain in her job. This vulnerability undoubtedly left her more at risk of sexual harassment in the workplace.

Ms. Vinson's experience as both a woman and as an African-American offers a window into the way that some people experience workplace harassment and discrimination. Indeed, women, racial minorities and those who identify or are perceived as lesbian, gay, bisexual or transgender ("LGBT") may not experience discrimination solely on the basis of one element or dimension of their identity. Although the U.S. Supreme Court did not pay particular attention to Ms. Vinson's experience as an African-American woman in 1986, courts across the country are increasingly recognizing and addressing how an individual with multiple identities can experience discrimination in the workplace. It is essential that employers and employment lawyers understand the growing and important role of intersectional analysis in discrimination cases. This article explains how courts are increasingly moving towards protecting LGBT employees, and how people who identify across intersecting lines of race, sex, gender identity and sexual orientation are particularly vulnerable to discrimination. At the end of this article, the content of the discussion is incorporated into ten practical suggestions to help promote diversity and inclusion in the workplace.

AN OVERVIEW OF FEDERAL WORKPLACE PROTECTIONS • Work is an essential part of almost every person's life. Work plays an important and defining role; it can carry both professional and personal significance and meaning. Luckily, for many people, work is an accepting and reaffirming place — a community away from home. But for others, the workplace is an unwelcoming and hostile place. Many people experience a toxic work environment: bullying, teasing, harassment, and discrimination are not uncommon. These experiences not only negatively affect employee morale and performance, but also create a harmful environment that can weaken productivity and even expose employers to liability.

Under federal law, employees are protected from discrimination on the basis of their race, sex, religion, and national origin. *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq. In relevant part, federal employment discrimination law mandates that personnel actions cannot be based on sex. Title VII prohibits an employer from failing or refusing "to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment" or "to limit, segregate, or classify his 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." *Id.* at §§2000e-2(a)(1), (2). This is a broad and powerful measure designed to combat discrimination and promote equality in the workplace. Federal law aims to create equal opportunity for employment and advancement, regardless of an employee's sex, and courts have recognized that sex discrimination protections are available to all workers independent of sexual orientation and gender identity. Employers and employment lawyers should realize that LGBT employees are covered by Title VII's prohibition against discrimination on the basis of sex. To understand how courts are interpreting Title VII to cover some LGBT employees, it is important to know the evolution of Title VII jurisprudence.

In *Price Waterhouse v. Hopkins,* a landmark sex discrimination case, the U.S. Supreme Court found that an employer can violate Title VII by relying on sex stereotyping to assess an employee. 490 U.S. 228 (1989). Ann Hopkins, a white female senior manager, brought suit against Price Waterhouse when the company failed to consider her candidacy for partnership. Price Waterhouse partners felt that Ms. Hopkins was insufficiently "feminine" because her behavior and appearance clashed with

the partners' view of how a woman should look and act. The partners at Price Waterhouse commented that Ms. Hopkins was "macho," "overcompensated for being a woman," and should take "a course at charm school." *Id.* at 235. Ms. Hopkins was told that, in order to make partner, she had to comport with traditional notions of femininity — she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* In Ms. Hopkins' case, the Supreme Court held that discrimination based on stereotypes about sex and gender conformity falls squarely within the scope of sex discrimination. Indeed, Title VII is not limited to discrimination on the basis of the sex a person is assigned or presumed to be at birth — typically, male or female – it also encompasses the "entire spectrum of disparate treatment" on the basis of sex, including discrimination based on gender stereotypes and characteristics. *Id.* at 251. The Court found 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." *Id.* This was — and remains today — a powerful assertion that discrimination on the basis of sex also encompasses discrimination on the basis of gender stereotypes or gender non-conformity.

The Court's decision in *Price Waterhouse* informs our contemporary understanding of the challenges that women, racial minorities, and LGBT individuals routinely face in the workplace. Notably, LGBT and gender non-conforming people may face problems in the workplace because some employers may fire, refuse to hire or promote, or take other adverse actions against employees who fail to conform to stereotypical notions and expectations of gender identity, gender expression, and sexual orientation. There are many ways that an LGBT individual may fail to meet an employer's stereotypical expectations: an employer could deem an individual's characteristics, conduct, mannerisms, dress or lifestyle to violate out-dated notions of "masculinity" and "femininity." Indeed, traditional notions of sex and gender are quickly changing in mainstream society. *See, e.g.,* Jennifer Conlin, *The Freedom to Choose Your Pronoun,* New York Times (Sept. 30, 2011), available at http://www.nytimes.com/2011/10/02/fashion/choosing-a-pronoun-he-she-or-other-after-curfew.html (noting the "growing number of high school and college students who are questioning the gender roles society assigns individuals simply because they have been born male or female"). Employers can minimize liability and maximize corporate competitiveness by staying attuned to both social and legal trends.

TITLE VII AND LGBT EMPLOYEES • Although Title VII does not expressly enumerate sexual orientation, gender identity or gender expression as protected characteristics, courts across the country are increasingly finding that LGBT and gender non-conforming employees are entitled to protection under Title VII. To be clear, these legal advances have not always been won by self-identified LGBT plaintiffs. For example, in *Oncale v. Sundowner Offshore Services,* a man working on an oil platform in the Gulf of Mexico was forcibly subjected to humiliating sex-related acts, physically assaulted in a sexual manner, and threatened with rape by other men in his work team. 523 U.S. 75, 77 (1998). In *Oncale,* the Supreme Court did not discuss the sexual orientation of any of the men, and the holding covers all employees regardless of sexual orientation or gender identity/expression: an employee may bring a Title VII claim where sexual harassment was perpetrated by a person of the same sex.

Although the Court recognized that "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII," it concluded that there was simply "no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII." *Id.* at 79. This outcome makes

clear that "statutory prohibitions often go beyond the principal evil 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." *Id.* Thus, Title VII does not only encompass what Congress intended in 1964; the law also covers any discrimination "because of … sex." *Id.* at 80 (ellipsis in original); *see also Schroer v. Billington,* 577 F. Supp. 2d 293, 307 (D.D.C. 2008) (noting that "Supreme Court decisions … have applied Title VII in ways Congress could not have contemplated"). Following *Oncale* and *Price Waterhouse,* courts have found that employees who are sexually harassed by persons of their same sex, or discriminated against because they do not conform to stereotypical notions of gender, have legal protection and recourse under Title VII.

Harassment and discrimination against LGBT and gender non-conforming people can take many forms. For example, Antonio Sanchez brought a lawsuit against his employer, Azteca Restaurant in Washington State, because he was constantly called obscene and derogatory names, including "faggot" and "female fucking whore," while serving as a waiter at the restaurant. *Nichols v. Azteca Rest. Enter., Inc.,* 256 F.3d 864, 870 (9th Cir. 2001). Mr. Sanchez's coworkers and his supervisor consistently referred to him with female pronouns, taunted him for behaving "like a woman," and ridiculed him for "walking and carrying his serving tray 'like a woman.'" *Id.* The court found that, just as it was illegal for Price Waterhouse to discriminate against Ms. Hopkins for exhibiting stereotypical "masculine" qualities, Azteca Restaurant could not discriminate against Mr. Sanchez for expressing stereotypical "feminine" qualities. *Id.* at 874. Mr. Sanchez's successful claim is important for all employees — LGBT and straight alike — whose conduct or presentation is somehow perceived as departing from traditional or stereotypical gender roles and expectations.

Notably, courts have also applied the sex discrimination framework in cases involving openly gay employees. In *Prowel v. Wise Business Forms, Inc.,* a gay man, Brian Prowel, sued his employer for sex discrimination. 579 F.3d 285 (3d Cir. 2009). Mr. Prowel identified as an "effeminate" gay man, and his "mannerisms caused him not to 'fit in' with the other men" at work: Mr. Prowel "had a high voice and did not curse; was very well-groomed; wore what others would consider dressy clothes; was neat; filed his nails instead of ripping them off with a utility knife; crossed his legs and had a tendency to shake his foot 'the way a woman would sit'; walked and carried himself in an effeminate manner; drove a clean car; had a rainbow decal on the trunk of his car; talked about things like art, music, interior design, and decor; and pushed the buttons on [his work machine] with 'pizzazz.'" *Id.* at 287. Mr. Prowel's co-workers subjected him to verbal and written attacks, called him "princess," "rosebud," and "fag," and wrote messages "on the wall of the men's bathroom, claiming Prowel had AIDS and engaged in sexual relations with male co-workers." *Id.* at 287-288. His co-workers left "a pink, light-up feather tiara with a package of lubricant jelly" on his work machine, and he also "found anonymous prayer notes on his work machine on a daily basis" saying he "will burn in hell." *Id.* Mr. Prowel overheard a co-worker say: "[t]hey should shoot all the fags." *Id.* at 287.

In this case, the court recognized that the record was "replete with evidence of harassment motivated by Prowel's sexual orientation," but ultimately found that "Prowel was harassed because he did not conform to [his employer's] vision of how a man should look, speak and act — rather than harassment based solely on his sexual orientation." *Id.* at 292. The court noted that there was "no basis in the statutory or case law to support the notion that an effeminate *heterosexual* man can bring a gender stereotyping claim while an effeminate *homosexual* man may not." *Id.* (emphasis in original). Indeed, "once a plaintiff shows that harassment is motivated by sex, it is no defense that it may also have been mo-

tivated by anti-gay animus." *Id.* at 289. Thus, an employee's sexual orientation does not vitiate the sex discrimination claim, and "has no legal significance under Title VII." *Centola v. Potter,* 183 F. Supp. 2d 403, 410 (D. Mass. 2002).

Essentially, the rule is: "If an employer acts upon stereotypes about sexual roles in making employment decisions, or allows the use of these stereotypes in the creation of a hostile or abusive work environment, then the employer opens itself up to liability under Title VII's prohibition of discrimination: on the basis of sex." *Id.* at 409.

Several federal courts have applied this legal framework to claims brought by transgender employees — people whose gender identity, or inner sense of being male or female, differs from their assigned or presumed sex at birth. *See, e.g., Schwenk v. Hartford,* 204 F.3d 1187, 1201-02 (9th Cir. 2000) (finding that Title VII, under *Price Waterhouse,* bars "not just discrimination based on the fact that Hopkins was a woman, but also discrimination based on the fact that she failed 'to act like a woman' — that is, to conform to socially-constructed gender expectations") (citing *Price Waterhouse,* 490 U.S. at 240); *see also Rosa v. Park W. Bank & Trust Co.,* 214 F.3d 213, 215-16 (1st Cir. 2000) (holding that, if plaintiff did not receive a loan application because the bank treated "a woman who dresses like a man differently than a man who dresses like a woman," then this conduct is prohibited under Title VII because "stereotyped remarks [including statements about dressing more 'femininely'] can certainly be *evidence* that gender played a part") (quoting *Price Waterhouse,* 490 U.S. at 251) (brackets and emphasis in original). Courts have found that Title VII protects transgender employees when they are discriminated against at work on the basis of their gender identity.

For example, in *Schroer v. Billington,* a transgender woman named Diane Schroer applied for a position as a terrorism research analyst with the Congressional Research Service, a division of the Library of Congress. 577 F. Supp. 2d 293, 295-296 (D.D.C. 2008). At the time she applied, Ms. Schroer, who identifies as female, was planning to transition. Once she accepted the position, Ms. Schroer informed her supervisor that she would begin her gender transition. The next day, Ms. Schroer's supervisor rescinded the job offer.

After hearing the evidence presented at trial, the court held that Ms. Schroer "was discriminated against because of sex in violation of Title VII …. whether viewed as sex stereotyping or as discrimination literally 'because of … sex.'" *Schroer,* 577 F. Supp. 2d at 300 (second ellipsis in original). The court explained that, after *Price Waterhouse,* "punishing employees for failure to conform to sex stereotypes is actionable sex discrimination under Title VII." *Id.* at 303. Ultimately, it did not matter "whether the Library withdrew its offer of employment because it perceived Schroer to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual." *Id.* at 305. The court also found that "the Library's refusal to hire Schroer after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was *literally* discrimination 'because of … sex.'" *Id.* at 308 (emphasis and ellipsis in original).

Ms. Schroer's case illustrates that transgender employees may be protected under Title VII when they experience the kind of discrimination that Ms. Hopkins and Mr. Sanchez experienced — simply put, discrimination based on gender stereotypes and sex. Other cases have made clear that "[t]here is nothing in existing case law setting a point at which a man becomes *too* effeminate, or a woman becomes *too* masculine, to warrant protection under *Title VII* and *Price Waterhouse.*" *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.,* 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008) (emphasis in original).

More recently, on April 20, 2012, the U.S. Equal Employment Opportunity Commission ("EEOC"), a federal agency that is responsible for interpreting and enforcing federal employment discrimination

laws, including Title VII, found that a "complaint of discrimination based on gender identity, change of sex, and/or transgender status is cognizable" under Title VII's sex discrimination prohibition. *Macy v. Holder,* 2012 WL 1435995 (EEOC Apr. 20, 2012). The facts in this EEOC case closely resemble those at issue in *Schroer*: Mia Macy, a transgender woman who is a trained and certified ballistics investigator, was denied employment in a crime laboratory after disclosing that she was "in the process of transitioning from male to female." *Id.* at 1. Ms. Macy filed an equal employment opportunity complaint alleging employment discrimination in violation of Title VII on the basis of sex, gender identity, and sex stereotyping. Following "a steady stream of district court decisions," *id.* at 9, the EEOC ruled in Ms. Macy's favor making clear that Title VII covers gender identity discrimination claims: "If Title VII proscribed only discrimination on the basis of biological sex, the only prohibited gender-based disparate treatment would be when an employer prefers a man over a woman, or vice versa. But the statute's protections sweep far broader than that, in part because the term 'gender' encompasses not only a person's biological sex but also the cultural and social aspects associated with masculinity and femininity." *Id.* at 6. Clearly, as the EEOC recognized, sex and gender are complex.

Notably, the EEOC did not pay particular attention to Ms. Macy's identity documents, medical treatments or anatomy — this is an implicit recognition that there is no set formula for gender transition. There is medical consensus that hormone therapy and sex reassignment surgery are medically necessary for many transgender people. Gender Identity Disorder ("GID") is a medical diagnosis that describes the extreme distress some people experience when their bodies do not match their gender identity. *See* Am. Psychiatric Ass'n, Diagnostic & Statistical Manual of Mental Disorders (4th ed. 2000). The treatment for GID involves some combination of hormone therapy, sex reassignment surgery, and/or real life experience (living for a period of time in accordance with your gender identity). Each patient must be evaluated on a case-by-case basis, with expert medical judgment required for both reaching a diagnosis and determining a course of treatment. *See* World Prof'l Ass'n for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* (7th version 2012), available at http://www.wpath.org/documents/Standards%20of%20Care_FullBook_1g-1.pdf. This information is important for employers because transgender people are becoming increasingly visible. *See* Alissa Quart, *When Girls Will be Boys,* New York Times (Mar. 16, 2008), available at http://www.nytimes.com/2008/03/16/magazine/16students-t.html?pagewanted=all (noting that "[t]he number of young people who openly identify as transgendered has grown").

Additionally, transgender employees are being protected outside of the Title VII context. In an important case involving a transgender employee, *Glenn v. Brumby,* the court held that "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender." 663 F.3d 1312, 1317 (11th Cir. 2011). In this case, Vandiver Elizabeth Glenn, an editor in the Georgia General Assembly's Office of Legislative Counsel, claimed that she was terminated, in violation of her Constitutional rights under the Fourteenth Amendment's Equal Protection Clause, "because of sex discrimination." *Id.* at 1313-14. Ms. Glenn did not sue under Title VII; she raised these claims in a Constitutional action. The court ruled strongly in Ms. Glenn's favor: "An individual cannot be punished because of his or her perceived gender-nonconformity. Because these protections are afforded to everyone, they cannot be denied to a transgender individual …. discrimination on this basis is a form of sex-based discrimination that is subject to heightened scrutiny under the Equal Pro-

tection Clause." *Id.* at 1319. Ms. Glenn's case shows that transgender employees may be protected not only under Title VII, but also under a Constitutional framework.

Schroer, Glenn, and *Macy* are expected to result in greater protection for transgender and gender non-conforming employees. In response, employers should:

- Consider adopting a non-discrimination policy that explicitly bars treating transgender people differently from other workers;
- Ensure that employees have access to restrooms in accordance with their gender identity, and add a gender-neutral restroom option;
- Use a health insurance company that provides coverage for transition-related healthcare, and make sure to opt-in for the coverage; and
- Foster a trans-inclusive workplace culture by providing mandatory training on transgender issues.

See, e.g., Lambda Legal, *Transgender Rights Toolkit: A Legal Guide for Trans People and their Advocates, Workplace Rights & Wrongs* (Feb. 1, 2011), available at http://www.lambdalegal.org/publications/trans-toolkit (outlining "best practices" for transgender inclusion in the workplace).

EMPLOYEES WHO IDENTIFY ACROSS INTERSECTING LINES OF RACE, SEX, GENDER IDENTITY, SEXUAL ORIENTATION AND/OR OTHER IDENTITY CHARACTERISTICS • Another common misconception held by employers is that employees can be easily categorized along one axis of identity usually related to race, sex, gender identity, or sexual orientation. This is an oversimplification of identity. In an increasingly diverse workplace, individuals may identify along multiple axes and identity characteristics. A Latina woman, for example, may identify along complex and intersecting lines of sex, race, national origin, and/or sexual orientation. Thus, employers should resist the urge to compartmentalize discrimination, and should not assume that people can only experience discrimination along one axis of identity.

Eunice Hollins, an African-American woman, experienced discrimination based on multiple axes of identity firsthand when she was threatened with termination, all because of her hair. Ms. Hollins worked as a machine operator in Willoughby Hills, Ohio, and was told that she must "seek advance approval for her hairstyles" before she wore them to work. *Hollins v. Atlantic Co., Inc.,* 188 F.3d 652, 656 (6th Cir. 1999). She first encountered this problem when she wore her hair to work in a "finger waves" hairstyle. *Id.* at 655. Ms. Hollins' supervisor informed her that her hair was "too different" and "eye catching," and therefore violated the company's grooming and personal appearance policies, which required women to have a "neat and well groomed hair style." *Id.* Ms. Hollins was told to "present to her supervisor pictures of any styles she might wish to try," and repeatedly cautioned to "present pictures for pre-approval." *Id.* at 656. Ms. Hollins was reprimanded when she wore her hair in a ponytail, which many white female employees wore to work. *Id.* According to her supervisor, a ponytail was "too drastic" for her hair. *Id.* She was also told that her failure to follow the grooming policy could result in termination and affect future wage increases. Ultimately, Ms. Hollins was threatened with termination, and her job performance ratings dropped. *Id.*

In this case, the court found that Ms. Hollins had successfully raised an inference of unlawful discrimination because several "white women on Hollins's shift, working under the same supervisors, came to work repeatedly wearing the same hairstyle as that for which [supervisors] reprimanded Hollins." *Id.* at 660. The white women who wore their hair in the exact same style as Ms. Hollins "were never reprimanded, never required to present pic-

tures of proposed hairstyles, or otherwise required to provide notice or request approval in advance for a hairstyle change." *Id.*

Ms. Hollins encountered discrimination because she was an African-American woman whose hairstyles were deemed "too different" and "too drastic" by her employer — even when her hairstyle was indistinguishable from that of her white female co-workers. *Id.* at 655-656. Ms. Hollins' discrimination cannot be considered along a single dimension or axis of identity. Her sex and race cannot be separated; rather, race and sex are inextricably intertwined in her discrimination. Her race and sex — coupled together — worked in tandem to trigger a unique form of discrimination. Finding that the employer "singled her out for different treatment," the court implicitly recognized that Ms. Hollins was treated differently on the basis of both her race and sex. *Id.* at 661. Since Ms. Hollins was "singled out" as an African-American woman, the court implicitly incorporated an intersectional approach and analysis to Title VII to find that Ms. Hollins' experience was shaped by both her race and sex.

When an employee alleges both sex and race discrimination, it is not appropriate to separate the two bases for discrimination. "Rather than aiding the decisional process, the attempt to bisect a person's identity at the intersection of race and gender often distorts or ignores the particular nature of their experiences." *Lam v. Univ. of Hawaii,* 40 F.3d 1551, 1562 (9th Cir. 1994). Sex and race cannot be viewed as separate and distinct elements: "when a plaintiff is claiming race *and* sex bias, it is necessary to determine whether the employer discriminates on the basis of that *combination* of factors, not just whether it discriminates against people of the same race or of the same sex." *Id.* (emphasis in original). Thus, "when a Title VII plaintiff alleges that an employer discriminates against black females, the fact that black males and white females are not subject to discrimination is irrelevant and must not form any part of the basis for a finding that the employer did not discriminate against the black female plaintiff." *Jefferies v. Harris County Cmty. Action Comm'n,* 615 F.2d 1025, 1034 (5th Cir. 1980). Courts have found that "an employer should not escape from liability for discrimination against black females by a showing that it does not discriminate against blacks and that it does not discriminate against females." *Id.* at 1032.

To better understand how discrimination is experienced by those who identify across intersecting lines of race, sex, gender identity, or sexual orientation, employers and employment lawyers should consider incorporating an intersectional analysis in employment discrimination cases. This may help explain or determine how a multiplicity of identities could contribute to workplace problems or dynamics. This practical approach is supported by Title VII cases that involve people who identify along multiple axes or characteristics.

PROMOTING DIVERSITY AND INCLUSION IN THE WORKPLACE • As the workplace becomes more diverse, it is essential that employers and employment lawyers understand the contours of Title VII to better address the complex issues that may arise when dealing with LGBT and gender non-conforming employees, and those who identify across intersecting lines of race, sex, gender identity, and/or sexual orientation. Here are 10 practical suggestions that summarize the content of this article to help promote diversity and inclusion in the workplace:

- Do not assume that discrimination can only exist along a single-axis of identity. Keep in mind that race and sex — coupled together — can work in tandem to trigger a complex and unique form of discrimination. *See, e.g., Hollins v. Atlantic Co.*, supra; *Lam v. Univ. of Hawaii*, supra; *Jefferies v. Harris County Cmty. Action Comm'n*, supra;

- Do not act based on stereotypes or assumptions. Notions of "masculinity" and "femininity" are ever-evolving, and sex and gender can be fluid. *See Price Waterhouse v. Hopkins*, supra; *see also* Jennifer Conlin, *The Freedom to Choose Your Pronoun*, New York Times (Sept. 30, 2011), supra;

- Employees — regardless of their sexual orientation or gender identity/expression — may bring employment discrimination claims based on sex and gender stereotypes. *See Oncale v. Sundowner Offshore Servs.*, supra; *see also Nichols v. Azteca Rest. Enter., Inc.*, supra. To be clear, LGBT employees may be able to bring employment discrimination claims even though sexual orientation and gender identity are not specifically enumerated in Title VII. *See Prowel v. Wise Bus. Forms, Inc.*, supra;

- Transgender and gender non-conforming employees are protected under Title VII. *See Macy v. Holder*, supra. Employers should consider adopting an LGBT nondiscrimination policy that explicitly bars treating transgender people differently from other workers; ensure that employees have access to restrooms in accordance with their gender identity, and add a gender neutral restroom option; use a health insurance company (such as Aetna, Cigna or Blue Cross/Blue Shield) that provides coverage for transition-related healthcare, and make sure to opt-in for the coverage; and foster a trans-inclusive workplace culture by providing mandatory training on transgender issues;

- State or local laws may recognize additional protected classes and provide broader employment discrimination protection than Title VII. In fact, some state and local laws expressly prohibit discrimination on the basis of sexual orientation and/or gender identity/expression. *See* Nat'l Gay & Lesbian Task Force, *State Nondiscrimination Laws in the U.S.*, available at http://www.thetaskforce.org/downloads/reports/issue_maps/non_discrimination_1_12_color.pdf; *see also* Nat'l Gay & Lesbian Task Force, *Jurisdictions with Explicitly Transgender-Inclusive Non-discrimination Laws*, available at http://www.thetaskforce.org/downloads/reports/fact_sheets/all_jurisdictions_w_pop_8_08.pdf. Additionally, federal and state laws protect people living with HIV/AIDS, a disability under the law. *See Bragdon v. Abbott*, 524 U.S. 624 (1998). Employers should, therefore, be prepared to make accommodations for people living with HIV/AIDS;

- Adopt an equal employment opportunity policy that includes sexual orientation and gender identity/expression;

- Stay tuned to developments in the movement for LGBT equality. Federal recognition of LGBT equality is evolving, and the law is changing quickly. On February 23, 2011, U.S. Attorney General Eric Holder announced that the so-called Defense of Marriage Act ("DOMA") is unconstitutional. *See* U.S. Department of Justice, *Statement of the Attorney General on Litigation Involving the Defense of Marriage Act* (Feb. 23, 2011), available at http://www.justice.gov/opa/pr/2011/February/11-ag-222.html. The constitutionality of DOMA is also the subject of significant ongoing litigation. Most recently, on February 22, 2012, a federal court found that DOMA was unconstitutional as applied to a woman who was barred from adding her wife to her federal employer's health insurance plan solely because their same-sex marriage was not recognized under federal law. *Golinski v. Office*

of Pers. Mgmt., 824 F. Supp. 2d 968 (N.D. Cal 2012);

- Implement diversity competency and cultural sensitivity trainings that are LGBT inclusive. Employees should undergo training that clearly explains the company's non-discrimination policy. Performance and accountability measures should include diversity metrics that are LGBT inclusive. To help improve employee morale and productivity, provide resources and support for employee affinity groups;

- Promote employee recruitment efforts that have a demonstrated outreach to and inclusion of minorities, including LGBT and gender non-conforming people;

- Express public engagement and community involvement by marketing and advertising to diverse communities, including LGBT clients and consumers. Provide philanthropic support for organizations that support low-income, minority and LGBT communities.

CONCLUSION • Recent legal developments demonstrate that Title VII can encompass discrimination based on sex stereotypes, gender identity, gender expression, and transgender identity. As the law evolves, intersectional considerations can be expected to play a greater role in Title VII claims. Employers can minimize liability and maximize corporate competitiveness by staying attuned to social and legal trends, particularly, the movement for LGBT equality.