

Addressing Issues That May Arise When Changing Uniforms: Sexual Orientation and Gender Identity Discrimination

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OVERVIEW OF FEDERAL SUPREME COURT AND CIRCUIT COURT RULINGS ON APPLICABILITY OF TITLE VII TO SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION CLAIMS

Supreme Court of the United States

The Supreme Court of the United States has yet to specifically decide whether Title VII prohibits discrimination based on sexual orientation and gender identity. The Court has, however, found that Congress made the “simple but momentous announcement” in passing Title VII that sex, like other protected characteristics, is “not relevant” to employment decisions. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239, 242 (1989). Thus, in making such decisions, employers “may not take gender into account.” *Id.*

In *Price Waterhouse*, the Court made clear that employers cannot discriminate based on gender non-conformity or sex-stereotyping. Under the specific facts of *Price Waterhouse*, the Court found an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination, reasoning the discrimination would not occur but for the victim’s sex. *Price Waterhouse* has proven to be the lynchpin for other courts to find that Title VII prohibits discrimination based on gender identity and sexual orientation.

First Circuit

The First Circuit has yet to find that Title VII covers sexual orientation discrimination. See *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st

Cir. 1999) (“Title VII does not proscribe harassment simply because of sexual orientation.”). The United States District Court of the District of Massachusetts, however, has found that sexual orientation discrimination may fall under the *Price Waterhouse* gender non-conformity framework. See *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) (“Conceivably, a plaintiff who is perceived by his harassers as stereotypically masculine in every way except for his actual or perceived sexual orientation could maintain a Title VII cause of action alleging sexual harassment because of his sex due to his failure to conform with sexual stereotypes about what ‘real’ men do or don’t do.”).

It appears courts in the First Circuit have not addressed whether Title VII prohibits discrimination on the basis of gender identity. It is worth noting, however, that most courts across the country have found that Title VII prohibits discrimination on the basis of gender identity in accordance with the *Price Waterhouse* sex-stereotyping framework.

Second Circuit

On February 28, 2016, the Second Circuit became just the second Court of Appeals to hold that Title VII prohibits discrimination on the basis of sexual orientation. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 114 (2d Cir. 2018) (“For purposes of Title VII, firing a man because he is attracted to men is a decision motivated, at least in part, by sex.”). The Second Circuit also has signaled it is likely to find Title VII precludes discrimination on the basis of gender identity. *Fowlkes v. Ironworkers Local 40*, 790 F.3d 378, 386 (2d Cir. 2015) (acknowledging EEOC’s position that Title VII protects against gender identity discrimination); see also *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509 (D. Conn. 2016) (employment discrimination on the basis of transgender identity was

actionable under Title VII as discrimination based on sex since gender identity was related to or having something to do with sex involving the properties or characteristics typically manifested in sum as male and female).

Third Circuit

The Third Circuit has long held that Title VII does not protect against discrimination based purely on sexual orientation. *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001) (“It is clear ... that Title VII does not prohibit discrimination based on sexual orientation.”). However, the Third Circuit has recognized that homosexual men who are discriminated against based on effeminate characteristics have a gender stereotyping claim under Title VII. *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 292 (3d Cir. 2009) (“There is 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. As long as the employee -- regardless of his or her sexual orientation -- marshals sufficient evidence such that a reasonable jury could conclude that harassment or discrimination occurred ‘because of sex,’ the case is not appropriate for summary judgment.”) (emphasis in original); see also *United States EEOC v. Scott Med. Health Ctr., P.C.*, 217 F. Supp. 3d 834, 841 (W.D. Pa. 2016) (holding Title VII protects against sexual orientation discrimination under a sex stereotyping theory).

Moreover, it appears likely the Third Circuit would find Title VII proscribes gender identity discrimination. See, e.g., *Prowel*, 579 F.3d 285; *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 296 (W.D. Pa. 2017) (analogizing Title IX to Title VII and

recognizing that “[c]ourts have long interpreted ‘sex’ for Title VII purposes to go beyond assigned sex as defined by the respective presence of male or female genitalia.”).

Fourth Circuit

The Fourth Circuit holds that sexual orientation discrimination is not barred by Title VII. *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 751-52 (4th Cir. 1996) (“Title VII does not prohibit conduct based on the employee’s sexual orientation, whether homosexual, bisexual, or heterosexual.”).

The Fourth Circuit has not yet addressed whether Title VII prohibits discrimination on the basis of gender identity; however, the United States District Court for the District of Maryland has found that it does. *Finkle v. Howard Cty.*, No. SAG-13-3236, 2015 U.S. Dist. LEXIS 76144, *24 (D. Md. June 12, 2015) (“[Plaintiff] as a transgender woman, and, by her own allegations, a person who does not conform to gender stereotypes, is a member of a protected class under Title VII.”). It should be noted, however, that the defendant in *Finkle* conceded this point.

Fifth Circuit

According to the Fifth Circuit, sexual orientation discrimination is not covered by Title VII. *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979) (“Discharge for homosexuality is not prohibited by Title VII....”); *but see Carr v. Humble Indep. Sch. Dist.*, 2018 U.S. Dist. LEXIS 29838, *13 (S.D. Texas Feb. 23, 2018) (questioning continued validity of *Blum* in light of later developments in the law, including *Price Waterhouse* and changed position of EEOC).

The Fifth Circuit has remained silent on the issue of gender identity discrimination. The Western and Southern Districts of Texas have addressed this issue, but they are in conflict with one another. *Compare Eure v. Sage Corp.*, 61 F. Supp. 3d 651, 662 (W.D. Tex. 2014) (neither Supreme court nor Fifth Circuit caselaw have held discrimination based on transgender status *per se* unlawful under Title VII); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008) (Title VII applies to sex stereotyping claim of transgender plaintiff); *Wittmer v. Phillips 66 Co.*, No. H-17-2188, 2018 U.S. Dist. LEXIS 57316, *14 (S.D. Tex. April 4, 2018) (“[T]he court assumes that Wittmer’s status as a transgender woman places her under the protections of Title VII.”)

Sixth Circuit

The Sixth Circuit has held Title VII does not prohibit discrimination on the basis of sexual orientation. *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006) (“[S]exual orientation is not a prohibited basis for discriminatory acts under Title VII.”).

Conversely, the Sixth Circuit in March 2018 held Title VII bars discrimination based on one’s gender identity. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 575-76 (6th Cir. 2018) (“We also hold that discrimination on the basis of transgender and transitioning status violates Title VII.”); *see also Smith v. City of Salem*, 378 F.3d 566, 574 (6th Cir. 2004) (“After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim’s sex. It follows that employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex

discrimination, because the discrimination would not occur but for the victim's sex.") (emphasis in original).

Seventh Circuit

Just last year, the Seventh Circuit ruled that discrimination on the basis of sexual orientation is a form of sex discrimination under Title VII. *Hively v. Ivy Tech Comty. College of Ind.*, 853 F.3d 339, 351 (7th Cir. 2017) (“[A] person who alleges that she experienced employment discrimination based on her sexual orientation has put forth a case of sex discrimination for Title VII purposes.”)

The Seventh Circuit has not specifically addressed whether Title VII extends to reach gender identity; however, it has so held with respect to Title IX and, therefore, is likely to extend Title VII in the same manner. See *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1049 (7th Cir. 2017) (in finding transgender student was likely to succeed on Title IX claim, the Court analogized to Title VII and recognized that “[s]everal district courts have . . . [found] that a transgender plaintiff can state a claim under Title VII for sex discrimination on the basis of a sex-stereotyping theory).

Eight Circuit

The Eight Circuit adheres to the idea that Title VII does not proscribe sexual orientation discrimination. *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) (“Title VII does not prohibit discrimination against homosexuals.”); *Robertson*

v. Siouxland Cmty. Health Ctr., 938 F. Supp. 2d 831, 841-42 (N.D. Iowa 2013) (dismissing Title VII claim based on sexual orientation); *Miller v. Bd. of Regents of the Univ. of Minn.*, No. 15-CV-3740 (PJS/LIB), 2018 U.S. Dist. LEXIS 17531, *4 (D. Minn. Feb. 1, 2018) (same).

The Eighth Circuit has, however, recognized that gender identity discrimination may form the basis of a claim under Title VII. *Tovar v. Essentia Health*, 857 F.3d 771, 775 (8th Cir. 2017) (“we assume for purposes of this appeal that the prohibition on sex-based discrimination under Title VII . . . encompasses protection for transgender individuals”) (citing *Hunter v. UPS*, 697 F.3d 697, 702 (8th Cir. 2012)).

Ninth Circuit

The Ninth Circuit has held “Title VII’s prohibition of ‘sex’ discrimination applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference such as homosexuality.” *DeSantis v. Pacific Tel. & Tel Co., Inc.* 608 F.2d 327, 330 (9th Cir. 1979) (overruled with respect to separate ruling on gender stereotyping in *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 874 (9th Cir. 2001)); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1063-64 (9th Cir. 2002) (“[A]n employee’s sexual orientation is irrelevant for purposes of Title VII. It neither provides nor precludes a cause of action for sexual harassment. That the harasser is, or may be, motivated by hostility based on sexual orientation is similarly irrelevant, and neither provides nor precludes a cause of action.”) (plurality opinion); *but see Hall v. BNSF Railway Co.*, No. C13-2160 RSM, 2014 U.S. Dist. LEXIS 132878, *6-9 (W.D. Wash. Sep. 22, 2014) (plaintiff, a man married to another man, successfully alleged sex discrimination under

Title VII when he was denied a spousal health benefit available to similarly situated women married to men); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1223 (D. Or. 2002) (woman claiming sexual harassment could prove her claim if she could show her manager would have treated her differently if she were a man dating a woman instead of a woman dating a woman); *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015) (“[C]laims of discrimination based on sexual orientation are covered by Title VII and IX, but not as a category of independent claims separate from sex and gender stereotype. Rather, claims of sexual orientation discrimination are gender stereotype or sex discrimination claims.”).

The Ninth Circuit has indicated that a claim for discrimination based on gender identity would state a claim under Title VII. *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (holding that a transgender individual stated claim under the Gender Motivated Violence Act, and noting that “under *Price Waterhouse*, ‘sex’ under Title VII encompasses both sex – that is, the biological differences between men and women – and gender. Discrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII.”) (emphasis in original).

Tenth Circuit

The Tenth Circuit has held Title VII does not proscribe discrimination on the basis of gender identity or sexual orientation. *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007) (“[D]iscrimination against a transsexual because she is a transsexual is not ‘discrimination because of sex.’ Therefore, transsexuals are not a protected class

under Title VII and Etsitty cannot satisfy her prima facie burden on the basis of her status as a transsexual.”); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005) (“Title VII’s protections... do not extend to harassment due to a person’s sexuality.”); *Larson v. United Air Lines*, 482 Fed. App’x 344, 348 n.1 (10th Cir. 2012) (“Title VII discrimination is only cognizable on the basis of sex, not sexual orientation.”).

Eleventh Circuit

Just last year, the Eleventh Circuit held Title VII does not apply to discrimination claims based on sexual orientation. *Evans v. Georgia Reg’l Hosp.*, 850 F.3d 1248, 1256-57 (11th Cir. 2017) (citing *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979)).

On the other hand, the Eleventh Circuit has acknowledged that sex discrimination under Title VII includes discrimination based on gender identity. *Evans*, 850 F.3d at 1256 (“The fact that claims for gender non-conformity and same-sex discrimination can be brought pursuant to Title VII does not permit us to depart from *Blum*.”); *Chavez v. Credit Nation Auto Sales, LLC*, 641 Fed. App’x 883, 884 (11th Cir. 2016) (“Sex discrimination includes discrimination against a transgender person for gender nonconformity.”); *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (“Accordingly, 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.”).

District of Columbia Circuit

The Court of Appeals for the District of Columbia Circuit has recognized in *dicta* that Title VII does not protect sexual orientation. *United States Dep’t of Hous. & Urban*

Dev. v. Fed. Labor Relations Auth., 964 F.2d 1, 2 (D.C. Cir. 1992) (“Although not covered by Federal statute or EEOC regulation, Management and Union agree that no discrimination will be tolerated on the basis of sexual preference and/or orientation. In arguing this provision before the FLRA, the Secretary concluded that because Congress specifically protects federal employees from several specific types of discrimination in the 1972 amendments to Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e-16, and because Title VII does *not* cover sexual orientation, the provision is inconsistent with existing federal law.”) (emphasis in original).

The United States District Court for the District of Columbia, however, has found that a complaint alleging the plaintiff’s sexual orientation was not consistent with the defendant’s perception of acceptable gender roles stated a valid claim of sex discrimination. *Terveer v. Billington*, 34 F. Supp. 3d 100, 116 (D. D.C. 2014).

The United States District Court for the District of Columbia has also held that Title VII applies to gender identity claims. *Schroer v. Billington*, 577 F. Supp. 2d 293 (D. D.C. 2008) (finding in a claim involving a “male-to-female transsexual” that it did not matter for purposes of Title VII liability whether plaintiff was discriminated against based on the perception plaintiff was (1) an insufficiently masculine man, (2) an insufficiently feminine woman, or (3) an inherently gender-nonconforming transsexual).

STATE LAWS BANNING DISCRIMINATION BASED ON SEXUAL ORIENTATION OR GENDER IDENTITY

The following is a list of states that have statutes specifically banning discrimination on the basis of sexual orientation, gender identity, or both as of April 2018¹:

- California** Cal. Code § 12940. It is an unlawful employment practice for an employer to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment because of the gender identity, gender expression, or sexual orientation of the person.
- Colorado** C.R.S. 24-34-402 (2007). It is a discriminatory or unfair employment practice for an employer to refuse to hire, to discharge, to promote or demote, to harass during the course of employment, or to discriminate in matters of compensation, terms, conditions, or privileges of employment against any person otherwise qualified because of sexual orientation.
- Connecticut** Conn. Gen. Stat. § 46a-60, §46a-81c. It shall be a discriminatory practice in violation of this section for an employer, by the employer or the employer's agent, except in the case of a bona fide occupational qualification or need, to refuse to hire or employ or to bar or to discharge from employment any individual or to discriminate against such individual in compensation or terms, conditions or privileges of employment because of the individual's gender identity or expression or because of the individual's sexual orientation or civil union status.

¹ This list includes only those states with statutes specifically prohibiting discrimination based on sexual orientation or gender identity. Some states may have executive or administrative orders prohibiting discrimination on various bases, which are not listed here. This list also does not include local or municipal laws that may prohibit discrimination based on sexual orientation or gender identity. ALFA's 2017 50-State Compendium, available on line at <https://www.alfainternational.com/labor-employment-law-compendium>, lists some of the municipal laws prohibiting sexual orientation or gender identity discrimination. In addition, a helpful on-line resource identifying states that prohibit discrimination based on sexual orientation or gender identity can be found at http://www.lgbtmap.org/equality-maps/non_discrimination_laws.

- Delaware** DE Code Tit. 19 Sec. 711. It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to compensation, terms, conditions or privileges of employment because of such individual's sexual orientation or gender identity.
- Hawaii** Hawaii Rev. Stat. § 378-2. It shall be an unlawful discriminatory practice because of sex including gender identity or expression, or sexual orientation for any employer to refuse to hire or employ or to bar or discharge from employment, or otherwise to discriminate against any individual in compensation or in the terms, conditions, or privileges of employment.
- Illinois** 775 ILCS 5/1-103, 5/2-102. It is a civil rights violation for any employer to refuse to hire, to segregate, or to act with respect to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure or terms, privileges or conditions of employment on the basis of unlawful discrimination. Unlawful discrimination means discrimination against a person because of his or her sexual orientation. Sexual orientation means actual or perceived heterosexuality, homosexuality, bisexuality, or gender-related identity, whether or not traditionally associated with the person's designated sex at birth. Sexual orientation does not include a physical or sexual attraction to a minor by an adult.
- Iowa** Iowa Code § 216.6a. It shall be an unfair or discriminatory practice for any person to refuse to hire, accept, register, classify, or refer for employment, to discharge any employee, or to otherwise discriminate in employment against any applicant for employment or any employee because of the sexual orientation or gender identity of such applicant or employee.
- Maine** Me. Rev. Stat. tit. 5, § 4571, § 4572. The opportunity for an individual to secure employment without discrimination because of sexual orientation is declared to be a civil right. It is unlawful employment discrimination, in violation of this Act, except when based on a bona fide occupational qualification for an employer to fail or refuse to hire or otherwise discriminate against any applicant for employment because of sexual orientation.
- Maryland** Annotated Code of Maryland, State Government Article §20-606. An employer may not fail or refuse to hire, discharge, or otherwise discriminate against any individual with respect to the individual's compensation, terms, conditions, or privileges of employment because of the individual's sexual orientation or gender identity.

- Massachusetts** Mass Gen. Laws, chapter 151B, § 4. It shall be an unlawful practice, for an employer, by himself or his agent, because of gender identity or sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions, or privileges of employment, unless based upon a bona fide occupational qualification.
- Minnesota** Minn. Stat. § 363A.08. Except when based on a bona fide occupational qualification, it is an unfair employment practice for an employer, because of sexual orientation, to refuse to hire or to maintain a system of employment which unreasonably excludes a person seeking employment, or discharge an employee, or discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment.
- Nevada** NRS 613.330. It is an unlawful employment practice for an employer to fail or refuse to hire or to discharge any person, or otherwise to discriminate against any person with respect to the person's compensation, terms, conditions or privileges of employment, because of his or her sexual orientation or gender identity or expression.
- New Hampshire** New Hampshire Statutes Section 354-A:7. It shall be an unlawful discriminatory practice for an employer because of the age, sex, race, color, marital status, physical or mental disability, religious creed, or national origin of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification. In addition, no person shall be denied the benefit of the rights afforded by this paragraph on account of that person's sexual orientation.
- New Jersey** N.J. Stat. § 10:5-12. It shall be an unlawful employment practice, or as the case may be, an unlawful discrimination for an employer, because of affectional or sexual orientation or gender identity or expression to refuse to hire or employ or to bar or to discharge or require to retire, unless justified by lawful considerations other than age, from employment such individual or to discriminate against such individual in compensation or in terms, conditions, or privileges of employment.
- New Mexico** New Mexico Statutes Section 28-1-7. It is an unlawful discriminatory practice for an employer, unless based on a bona fide occupational

qualification or other statutory prohibition, to refuse to hire, to discharge, to promote or demote or to discriminate in matters of compensation, terms, conditions or privileges of employment against any person otherwise qualified because of race, age, religion, color, national origin, ancestry, sex, physical or mental handicap or serious medical condition, or, if the employer has fifty or more employees, spousal affiliation; provided, however, that 29 U.S.C. Section 631(c)(1) and (2) shall apply to discrimination based on age; or, if the employer has fifteen or more employees, to discriminate against an employee based upon the employee's sexual orientation or gender identity.

New York

New York State Human Rights Law § 296. It shall be an unlawful discriminatory practice for an employer or licensing agency, because of an individual's sexual orientation to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

Oregon

Oregon Revised Statutes § 659A.030. It is an unlawful employment practice for an employer, because of an individual's sexual orientation, to refuse to hire or employ the individual or to bar or discharge the individual from employment.

Rhode Island

Rhode Island General Laws § 28-5-7. It shall be an unlawful employment practice for any employer: To refuse to hire any applicant for employment because of his or her sexual orientation or gender identity or expression. Because of those reasons, to discharge an employee or discriminate against him or her with respect to hire, tenure, compensation, terms, conditions or privileges of employment, or any other matter directly or indirectly related to employment. However, if an insurer or employer extends insurance related benefits to persons other than or in addition to the named employee, nothing in this subdivision shall require those benefits to be offered to unmarried partners of named employees. In the recruiting of individuals for employment or in hiring them, to utilize any employment agency, placement service, training school or center, labor organization, or any other employee referring source which the employer knows, or has reasonable cause to know, discriminates against individuals because of their race or color, religion, sex, sexual orientation, gender identity or expression, disability, age, or country of ancestral origin.

Utah

Utah Code Annotated 34A-5-106. An employer may not refuse to hire, promote, discharge, demote, or terminate a person, or retaliate against, harass, or discriminate in matters of compensation or in

terms, privileges, and conditions of employment against a person otherwise qualified because of sexual orientation or gender identity.

Vermont

21 V.S.A. § 495. It shall be an unlawful employment practice, except where a bona fide occupational qualification requires persons of a particular sexual orientation or gender identity, for any employer, employment agency, or labor organization to discriminate against any individual because of sexual orientation or gender identity.

Washington

Wash. Rev. Code § 49.60.180. It is an unfair practice for any employer: To refuse to hire any person because of sexual orientation, unless based upon a bona fide occupational qualification: PROVIDED, that this section shall not be construed to require an employer to establish employment goals or quotas based on sexual orientation. To discharge or bar any person from employment because of sexual orientation. To discriminate against any person in compensation or in other terms or conditions of employment because of sexual orientation: PROVIDED, That it shall not be an unfair practice for an employer to segregate washrooms or locker facilities on the basis of sex, or to base other terms and conditions of employment on the sex of employees where the commission by regulation or ruling in a particular instance has found the employment practice to be appropriate for the practical realization of equality of opportunity between the sexes.

Wisconsin

Wis. Stat. § 111.321 - § 111.322; §111.36. No employer, labor organization, employment agency, licensing agency, or other person may engage in any act of employment discrimination as specified in §111.322 against any individual on the basis of sex. Employment discrimination on the basis of sex includes for any employer, labor organization, licensing agency or employment agency or other person to refuse to hire, employ, admit or license, or to bar or terminate from employment, membership, licensure any individual, or to discriminate against an individual in promotion, compensation or in terms, conditions, or privileges of employment because of the individual's sexual orientation.