

Is Sexual Orientation Discrimination Really Sex Discrimination? The EEOC Wants Courts To Think So

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**Douglas M.
Oldham**
Of Counsel

Although sexual orientation is not specifically listed as a protected class under Title VII, the Equal Employment Opportunity Commission (EEOC) is fighting to expand the law through judicial interpretation to protect sexual orientation. The EEOC's latest efforts came in an amicus brief filed in *Burrows v. College of Central Florida*, an Eleventh Circuit case in which the plaintiff claims she lost her job because she is a lesbian. The EEOC makes the following arguments in its attempt to persuade the court that sexual orientation should be covered by Title VII, despite Title VII's omission of sexual orientation as a specifically-referenced protected class. Paraphrasing from the EEOC statements:

- Sexual orientation discrimination is really just sex discrimination, which is already protected. Sexual orientation discrimination is a form of sex stereotyping because it is a way of discriminating against people who do not conform to accepted gender norms. It is generally assumed that women will be attracted to men, and if a woman is attracted to women and is discriminated against for it, then she is being discriminated against because she did not meet her employer's expectation of what is expected of a woman, which is sex discrimination.
- Sexual orientation discrimination is associational discrimination, which already violates Title VII. Courts have held for years that an employee cannot be discriminated against for having a partner of a different race. It is therefore the logical next step that an employer cannot discriminate against an employee because of the sex of his or her partner.
- Cases that have explicitly held that Title VII does not cover sexual orientation discrimination because it is not specifically enumerated as a protected class are not binding or persuasive because they rely on old, outdated logic and they use as precedent case law from the 1980s that has been mooted by more progressive opinions holding that discrimination based on gender stereotypes is unlawful.

This is not the first time the EEOC has made these arguments, as they largely mirror a summer 2015 EEOC commissioners' ruling that sexual orientation discrimination violated Title VII. The amicus brief is significant, though, because it signals that the EEOC is stepping up its efforts to expand Title VII's coverage, not through legislative changes but through judicial interpretation. The Eleventh Circuit's ruling in *Burrows* will be an important indicator of whether the EEOC's position will be accepted by the courts, so it

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is a case to follow.

