

Gender Discrimination: Title VII at 50 – Thoughts

By Denise M. Blommel¹

Hollywood has parlayed a Golden Age of comics into retroactive continuity (retcon) stories for movie-going masses. Title VII of the federal Civil Rights Act has its Golden Anniversary this year. Is its usage in gender discrimination issues a retcon?

On July 2, 1964, President Lyndon Baines Johnson signed the landmark Civil Rights Act into law. With that stroke of a pen, Jim Crow died. Discrimination on the basis of race, color, sex, national origin and religion in the workplace became illegal.

The U.S. Equal Employment Opportunity Commission (EEOC), which enforces the law, has identified six priorities for the development of Title VII law, including emerging Lesbian/Gay/Bisexual/Transgender (LGBT) issues. However, 25 years ago, the U.S. Supreme Court found sexual stereotyping to violate Title VII in *Price Waterhouse v. Hopkins*, 490 US 2288 (1989). This emerging civil rights issue is not a true retcon for Title VII but a return to commonsense application of anti-discrimination principles.

Ms. Hopkins was a female manager in a (then) Big Eight accounting firm who was denied a partnership because she was too “macho.” The senior partners wanted her to go to charm school, style her hair and wear jewelry. In holding such behavior to violate Title VII’s prohibition on sex discrimination, the Court said, “[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”

So what does the emerging area of gender discrimination look like 25 years later? It is more than employment decisions based upon one being male or female. New definitions of terms are necessary. “Gender identity” is an individual’s internal sense of his/her gender whether or not it is different from the individual’s assigned sex at birth. “Gender expression” means the manner in which an individual’s gender identity is expressed. “Sexual orientation” is an individual’s actual or perceived homosexuality, heterosexuality or bisexuality. The City of Phoenix has a ordinance prohibiting employment discrimination on the basis of sexual orientation or gender identity or expression. The Cities of Tucson, Flagstaff and Tempe have similar ordinances. Twenty-one states and the District of Columbia prohibit discrimination based upon sexual orientation and 17 states and the District of Columbia prohibit discrimination based upon gender identity. Neither Arizona nor federal law prohibits such discrimination. According to a 2007 study by the Williams Institute, some 68% of LGB individuals report experiencing employment discrimination.

A woman applied for a federal job as a man, later transitioned to female and allegedly lost the position because of her transgender status. The EEOC commissioners ruled in 2012 that Title VII covered the woman’s claim for discrimination based upon gender identity. The EEOC decision is no retcon but in tune with *Price Waterhouse*.

¹ Special thanks to Jeff Brodin and Mary Jo O’Neill who presented to the State Bar of Arizona at Title VII’s 50th Anniversary seminar and whose materials were most helpful.

What about old-fashioned sex discrimination in the Golden Age? As the recent comments by LA Clippers owner Donald Sterling prove, 50 years later the United States, despite a biracial President, is still not a post-racist society. Considering that these offensive remarks were made to an ostensible “mistress,” apparently Americans also do not live in a post-sexist society. The Federal Reporter is still chock-a-block with sexual harassment cases. The Phoenix office of EEOC reported 33.1% of its charges in FY 2012 were about sex discrimination. The Equal Pay Act (which celebrated its Golden Anniversary last year), continues to be relevant with women earning 82 cents for every dollar earned by men in Arizona. Affirmative Action continues as a “hot button” issue. The media asks whether it is systemic discrimination or a lack of confidence that explains why women hold less than four percent of CEO jobs. Why are women underrepresented in Science, Technology, Engineering and Math? Why does the media continue to use scantily clad females to sell almost anything? Women now comprise a majority of college students. According to opinion polls, the biggest challenge for women in today’s workplace is work-life balance (which really revolves around childcare).

President Johnson’s pen killed Jim Crow 50 years ago. Hopefully, greater awareness will kill workplace gender discrimination in something less than 50 years from now.

DENISE M. BLOMMEL (www.azlaborlaw.com), a solo attorney in Scottsdale, Arizona, provides consultation, mediation and training for employers and employees in employment and labor matters. Denise is First Vice Chair of the local Girl Scout Council; belongs to the Arizona, Nevada and Scottsdale bar associations; and is a frequent CLE presenter. The thoughts expressed are her own.