

Denver Law Review

Volume 91
Issue 4 *Symposium - Revisiting Sex: Gender and
Sex Discrimination Fifty Years after the Civil
Rights Act Part I*

Article 9

December 2020

Sexual Orientation

Susannah W. Pollvogt

Follow this and additional works at: <https://digitalcommons.du.edu/dlr>

Recommended Citation

Susannah W. Pollvogt, *Sexual Orientation*, 91 *Denv. U. L. Rev.* 925 (2014).

This Article is brought to you for free and open access by Digital Commons @ DU. It has been accepted for inclusion in *Denver Law Review* by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

CHAPTER INTRODUCTION: SEXUAL ORIENTATION

SUSANNAH W. POLLVOGT[†]

What is the relationship between discrimination based on sex and discrimination based on sexual orientation? To what extent have sexual minorities been able to rely on Title VII's antidiscrimination protections? To what extent *should* they be able to? These and other questions were addressed by the participants in the Sexual Orientation panel at the *Re-visiting Sex* Symposium.

Professor Jessica Clarke launched the discussion with an incisive inquiry into how courts determine sexual orientation for purposes of Title VII. "But wait," you might say. "If Title VII doesn't protect sexual orientation, why would courts be looking into this issue in the first place?" The answer proceeds in several steps. In connection with protecting against sexual discrimination in the workplace, Title VII protects against workplace sexual harassment. Workplace sexual harassment, in turn, is considered discriminatory based on one of three theories: that it uses sex identity to facilitate domination (using sexuality as power); that it enforces stereotypes (generally, of women as sex objects); or that it represents the harasser taking the victim's sex into account. As Professor Clarke pointed out, none of these three theories require the harasser to have a particular, genuinely held sexual orientation. A straight man can use his sexuality to dominate another man; a gay man harassing a woman could be enforcing stereotypes; a gay woman harassing a man could be taking her victim's sex into account.

And yet, despite the irrelevance of sexual orientation to the theories of sexual-harassment-as-sex-discrimination, a number of courts have determined that sexual harassment only "counts" if the harasser's sexual orientation places him in a position to genuinely desire the victim. As Professor Clarke persuasively argues, this is problematic on at least two levels. First, it misunderstands sexual harassment as an expression of genuine sexual desire as opposed to an exercise of power. Second, the method by which courts attempt to assess the "true" sexual orientation of the harasser is flawed.

Specifically, the courts that Professor Clarke examined tended to place a great deal of weight on the harasser's self-identification as heterosexual. Thus, even where a male harasser made repeated, overtly sexual advances to a male colleague, the fact that the harasser was married with

[†] Associate Professor, Washburn University School of Law. J.D., Yale Law School, 1998; B.A., Williams College, 1994.

children verified his heterosexual identity and negated any harassment claim.

Professor Zachary Kramer touched on similar themes, drawing distinctions between “old discrimination” (which tended to be formal and based on one’s membership in a particular social group) and “new discrimination” (which may be informal and based on one’s individual gender or sexual identity). Title VII, Kramer asserts, deals well with old discrimination but is ill-equipped to deal with new discrimination. This is in part because we have come to see gender and sexual identity as much more complicated, making the dynamics of discrimination more complicated as well. Courts perceive these as “hard cases.”

Professor Kramer proposed the model of religious discrimination as an alternative framework for thinking about the dynamics of discrimination. There are several aspects of the way that we conceptualize religious discrimination that make it a useful tool for understanding new discrimination on the basis of other traits. First, this body of law acknowledges that one can be discriminated against both on the basis of status (e.g., because you are Jewish) and on the basis of conduct (e.g., because you observe the Sabbath). Second, it allows the individual wide discretion in defining her religious beliefs and practices. Third, it can protect individuals regardless of whether they are identified with a larger group or are the only one to subscribe to their particular belief system. Thus, it is a vigorous and flexible approach to protecting individual identity.

Professor Erin Buzuvis explored a practical litigation strategy for addressing discrimination on the basis of sexual orientation despite the fact that it is not a protected trait under Title VII. Specifically, Buzuvis discussed the dynamics of retaliation claims under Title VII. If, for example, a gay employee is harassed on the basis of his sexual orientation, that underlying (“predicate”) discrimination is not addressed by Title VII. But, if the employee complains about the harassment to a supervisor, and is then subjected to adverse employment action for lodging the complaint, the employee may have a claim based on retaliation under the Act. The retaliation protection extends not only to reporting of valid discrimination claims but also to colorable (but ultimately invalid) discrimination claims—in the interest of not stifling whistleblowers acting in good faith.

The crux of these arguments is whether the employee had a good faith and “reasonable belief” that the underlying discrimination was actionable—even if that belief was not true as a matter of law. There are two possible scenarios here: that the employee believed that sexual orientation was protected under Title VII, or that what is characterized as harassment on the basis of sexual orientation is actually a form of sex discrimination—in particular, being targeted because of one’s failure to conform to sex roles or stereotypes.

In conclusion, Professor Buzuvis explored the fascinating notion that the legal concept of reasonable belief could be influenced by social practice. That is, the more that gays and lesbians are protected from discrimination in other arenas, the more viable an individual employee's reasonable belief that harassment on the basis of sexual orientation was actionable under Title VII.

The overall theme of our discussion was that claims of sexual orientation discrimination brought under Title VII are pushing our thinking about the relationship between sex and sexual orientation, how courts understand sex and sexual identity, and the ways in which academics and advocates can influence the emerging law in this field.

