

# Sexual Orientation As A Protected Class

The Honorable Charlotte Burrows,  
Commissioner, Equal Employment Opportunity Commission

The Honorable William J. Borah,  
Administrative Law Judge, Illinois Human Rights Commission

December 3, 2020



Charlotte A. Burrows was first nominated to serve as a Commissioner of the U.S. Equal Employment Opportunity Commission (EEOC) in 2014 and re-nominated in 2019. By unanimous vote, the U.S. Senate confirmed her to a second term ending in 2023.

At the Commission, she has advocated for strong federal enforcement of employment laws - focusing in particular on initiatives to combat harassment and retaliation, foster pay equity, and promote diversity in employment.

Before joining EEOC, Commissioner Burrows served as Associate Deputy Attorney General at the U.S. Department of Justice in the Obama Administration, where she worked on a broad range of civil and criminal matters, including employment discrimination, voting rights, and implementation of the Violence Against Women Act. Commissioner Burrows is also a veteran of Capitol Hill, where she worked for the late Senator Edward M. Kennedy on a variety of high-profile legislative issues, including the Lilly Ledbetter Fair Pay Act of 2009 and the Americans with Disabilities Act Amendments Act of 2008.

Earlier in her career, she was a litigator in the Justice Department's Civil Rights Division and an associate with the law firm of Debevoise & Plimpton, LLP.

Commissioner Burrows is a former judicial clerk on the U.S. Court of Appeals for the Third Circuit and a graduate of Princeton University and Yale Law School.

Honorable William J. Borah has been a judge with the IHRC since 2009. Several of his decisions have received national attention, and first impression, including Sommerville v. Hobby Lobby, one of his four cases addressing transgender issues.

Prior to joining the Commission, Judge Borah was in private practice for 27 years, as a founding partner of a firm concentrating in employment law. In that capacity, he filed numerous public interest cases. Those cases included opposing harassment of gay high school students, challenging the discharge of a 40-year-old teacher for a pot conviction at the age of 19, and allowing the use of a transgender girl's name on her high school transcript.

Among his many bar leadership positions, Judge Borah was Chair of the ISBA Labor & Employment Law Section Council in 2005 - 2006. He returned to serve again as Chair of the council in 2014 - 2015. As president of the South Suburban Bar Association, Judge Borah was recognized by the ISBA for his work to enhance the Pro Bono Program at the Markham courthouse. He was also recognized for his *pro bono* work on behalf of people with AIDS and his advocacy of the 2006 amendment to the Human Rights Act that added "sexual orientation" as a protected class. In addition, Judge Borah has been a speaker, author, moot court trial judge, and the recipient of numerous awards and recognitions.

# Sexual Orientation at the EEOC

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# Key Federal Decisions Related to Sexual Orientation and Gender Identity as Forms of Sex Discrimination

- ▶ Chronological Order
  - ▶ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).
  - ▶ *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).
  - ▶ *Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821 (Apr. 12, 2012).
  - ▶ *Baldwin v. Dep't of Transportation*, EEOC Appeal No. 0120133080 (July 15, 2015).
  - ▶ *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017).
  - ▶ *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018).
  - ▶ *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).
  - ▶ *Demkovich v. St. Andrew the Apostle Parish*, 973 F.3d 718 (7th Cir. 2020).

# LGBT-Based Sex Discrimination Charges

## (Both Sexual Orientation & Gender Identity Claims)

	FY 2013*	FY 2014	FY 2015	FY 2016	FY 2017	FY 2018	FY 2019
Receipts	808	1,100	1,412	1,768	1,762	1,811	1,868
Resolutions	337	846	1,135	1,649	2,016	2,101	2,013
Resolutions By Type							
Settlements	31	71	96	118	147	165	157
	9.2%	8.4%	8.5%	7.2%	7.3%	7.9%	7.8%
Withdrawals w/Benefits	17	46	57	74	106	111	125
	5.0%	5.4%	5.0%	4.5%	5.3%	5.3%	6.2%
Administrative Closures	69	164	203	282	304	287	336
	20.5%	19.4%	17.9%	17.1%	15.1%	13.7%	16.7%
No Reasonable Cause	216	544	737	1,114	1,373	1,462	1,352
	64.1%	64.3%	64.9%	67.6%	68.1%	69.6%	67.2%
Reasonable Cause	4	21	42	61	86	76	43
	1.2%	2.5%	3.7%	3.7%	4.3%	3.6%	2.1%
Successful Conciliations	1	13	13	26	24	30	16
	0.3%	1.5%	1.1%	1.6%	1.2%	1.4%	0.8%
Unsuccessful Conciliations	3	8	29	35	62	46	27
	0.9%	0.9%	2.6%	2.1%	3.1%	2.2%	1.3%
Merit Resolutions	52	138	195	253	339	352	325
	15.4%	16.3%	17.2%	15.3%	16.8%	16.8%	16.1%
Monetary Benefits (Millions)	\$0.9	\$2.2	\$3.3	\$4.4	\$5.3	\$6.1	\$7.0

# Baccarat to Pay \$100,000 to Settle EEOC Lawsuit for Race, Sexual Orientation and Disability Harassment

- ▶ Manhattan Store Forced Employee to Quit Due to Abuse, Federal Agency Charged
- ▶ NEW YORK - Baccarat, Inc., which operates a retail store in Manhattan that sells luxury crystal products, will pay \$100,000 and furnish other relief to settle a lawsuit for employment discrimination filed by the U.S. Equal Employment Opportunity Commission (EEOC), the federal agency announced today. The EEOC had charged Baccarat with harassing a sales consultant at its Manhattan store based on race, sexual orientation and disability harassment.
- ▶ According to the EEOC's lawsuit, the sales consultant was subject to constant and virulent verbal harassment by two co-workers for close to three years, with the knowledge of the supervisor, to whom the sales consultant complained on several occasions. The harassment victim was forced to quit to escape the abuse, the EEOC said.
- ▶ The EEOC filed suit (U.S. EEOC v. Baccarat, Inc., Civil Action No. 1:20-CV-02918) in the U.S. District Court for the Southern District of New York after first attempting a pre-litigation settlement through its conciliation process. The EEOC's lawsuit initially charged Baccarat with failing to take prompt action to end race and disability harassment following numerous employee complaints to management and human resources. The EEOC amended the complaint to include an allegation of sexual orientation harassment following the U.S. Supreme Court's June 15, 2020 decision in *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020).
- ▶ The consent decree settling the suit, entered by Judge Paul G. Gardephe, will remain in effect for two and a half years and, in addition to the \$100,000 payment to the harassment victim, requires significant non-monetary relief designed to prevent further harassment. These provisions include the implementation of an 800 hotline for employee complaints; training for all employees, including management and human resources staff, on the requirements of Title VII and the ADA and their prohibition against harassment in the workplace; and specific one-on-one training for the manager who failed to report or stop the harassment. The company must also report to the EEOC any complaints of race, sexual orientation, or disability harassment it receives in the next two and a half years.
- ▶ The lawsuit was settled prior to the parties engaging in substantial pre-trial discovery.
- ▶ "Baccarat's willingness to resolve this matter early on enabled the parties to jointly craft an effective resolution designed to prevent harassment," said EEOC New York Regional Attorney Jeffrey Burstein. "When it is possible to negotiate an effective settlement, as was the case here, the employer expends fewer resources responding to the lawsuit and the impacted employee receives compensation much sooner than if the parties had engaged in protracted litigation."
- ▶ EEOC New York District Director Judy Keenan added, "There are still far too many complaints filed with our office in which an employee makes his or her employer aware that harassment is occurring but management fails to take prompt, effective steps to end it. The EEOC is committed to vigorously investigating complaints in which a victim charges harassment based on race, sexual orientation, disability or other protected categories."
- ▶ The EEOC's New York District Office is responsible for processing discrimination charges, administrative enforcement, and the conduct of agency litigation in Connecticut, Maine, Massachusetts, New Hampshire, New York, northern New Jersey, Rhode Island and Vermont. The New York District Office, located in Manhattan, conducted the investigation resulting in this lawsuit.



# What You Should Know: The EEOC and Protections for LGBT Workers

- ▶ **Overview**
- ▶ Title VII prohibits discrimination because of an “individual’s ... sex.” 42 U.S.C. § 2000e-2(a)(1).
- ▶ In *Bostock v. Clayton County, Georgia*, No. 17-1618 (S. Ct. June 15, 2020)<sup>[1]</sup>, the Supreme Court held that firing individuals because of their sexual orientation or transgender status violates Title VII’s prohibition on discrimination because of sex. The Court reached its holding by focusing on the plain text of Title VII. As the Court explained, “discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second.” For example, if an employer fires an employee because she is a woman who is married to a woman, but would not do the same to a man married to a woman, the employer is taking an action because of the employee’s sex because the action would not have taken place but for the employee being a woman. Similarly, if an employer fires an employee because that person was identified as male at birth, but uses feminine pronouns and identifies as a female, the employer is taking action against the individual because of sex since the action would not have been taken but for the fact the employee was originally identified as male.
- ▶ The *Bostock* decision does not address related issues under Title VII such as dress codes, bathroom access, or locker room access, which were raised by Justice Alito’s dissent. The Court also noted that its decision did not address various religious liberty issues, such as the First Amendment, Religious Freedom Restoration Act, and exemptions Title VII provides for religious employers.

<sup>[1]</sup> This also served as the decision for *Altitude Express, Inc., et al. v. Zarda et al.* (No. 17-1623) and *R. G. & G. R. Harris Funeral Homes, Inc. v. EEOC et al.* (No. 18-107).



# What You Should Know: Laws the Commission Enforces

- ▶ 42 U.S.C. § 2000e-2 (Section 703)
- ▶ This is the section of the law that was at issue in *Bostock* and applies to the private sector, state and local governments, employment agencies, and labor organizations. *Bostock* made clear that section 703's prohibition of discrimination based on sex includes discrimination based on sexual orientation and transgender status.
- ▶ 42 U.S.C. § 2000e-16 (Section 717)
- ▶ Section 717 covers employees of the federal government. The Commission has issued several federal sector decisions under section 717 finding discrimination based on the sexual orientation and transgender status of federal employees. <https://www.eeoc.gov/federal-sector/reports/federal-sector-cases-involving-transgender-individuals>.

# What You Should Know: What to Do if You Think You Have Been Discriminated Against

- ▶ If you believe you have been discriminated against, you may take action to protect your rights under Title VII by filing a complaint:
- ▶ **Private sector and state/local government employees** may file a charge of discrimination by contacting the EEOC at 1-800-669-4000 or go to <https://www.eeoc.gov/how-file-charge-employment-discrimination>.
- ▶ **Federal government employees** may initiate the complaint process by contacting an EEO counselor at your agency; more information is available at <https://www.eeoc.gov/federal-sector/overview-federal-sector-eeo-complaint-process>.

# What You Should Know: Other Laws

- ▶ Other laws that also may apply:
- ▶ Federal contractors and sub-contractors are covered by a separate, explicit prohibition on transgender or sexual orientation discrimination in employment pursuant to Executive Order (E.O.) 13672 enforced by the U.S. Department of Labor's Office of Federal Contract Compliance.
- ▶ State or local fair employment laws also may prohibit discrimination based on sexual orientation or transgender status. Contact information for state and local fair employment agencies can be found on the page for EEOC's [field office](#) covering that state or locality.

# Sexual Orientation under the Illinois Human Rights Act

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# Illinois Human Rights Act

▶ The IHRA, as amended, prohibits discrimination in Illinois with respect to employment, financial credit, public accommodations, and real estate transactions on the bases of race, color, religion, sex (including sexual harassment), national origin, ancestry, military status, age (40 and over), order of protection status, marital status, sexual orientation (including gender-related identity), unfavorable military discharge, and physical and mental disability. It also prohibits sexual harassment in education, discrimination because of citizenship status and arrest record in employment, and discrimination based on familial status in real estate transactions.

▶ The IHRA also protects against retaliation.

# Illinois Human Rights Commission (IHRC)

- The IHRC is a quasi-judicial agency and a neutral forum for the litigation of Complaints filed pursuant to the Act following the IDHR's investigation of a charge of discrimination. The IHRC is not a party to any litigation and cannot provide legal advice to any party to a Complaint.
- Procedures for proceedings before the IHRC are found at 775 ILCS 5/Article 8. IHRC proceedings are also guided by its Rules and Procedures, found at 56 Ill. Admin. Code 5300 et al.

# "Sex" defined under the Illinois Human Rights Act

- 775 ILCS 5/1-103(O) "Sex" means the status of being male or female.

(O-1) "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...

- *Exceptions:*

Religious Organizations in Real Estate and Employment matters 775 ILCS 3/-106(E) and 2-102(B)(2);

Owner Occupied residential building with four or fewer units 775 ILCS 3/-106(H-1).



# Sexual Orientation/ Gender Identity and Public Accommodation

- ▶ 775 ILCS 5/5-103(B) Facilities Distinctly Private. "Any facility, as to discrimination based on sex, which is distinctly private in nature such as restrooms, shower rooms, bath houses, health clubs and other similar facilities..."
- ▶ Consider 775 ILCS 5/1-103(O-1) "whether or not traditionally associated with the person's designated sex at birth..."

# History of IHRC Decisions on Sexual Orientation

- ▶ Chronological Order
  - ▶ *Venessa Fitzsimmons v. Universal Taxi Dispatch, Inc.*, HRC ALS 09-0661 (2011).
  - ▶ *Timothy Scheidegger v. Menard, Inc.*, HRC ALS 12-0684 (2014).
  - ▶ *Meggan Sommerville v. Hobby Lobby Stores*, HRC ALS 13-0060C (2016 & 2017)\*.
  - ▶ *Michael S. and Andrea S., on behalf of P.S. a minor v. Komarek School District #94*, HRC 16-0003 (2019).

*\*Pending in Illinois Appellate Court*

# Non-Defenses and Damages under the Illinois Human Rights Act

- ▶ Non-Defenses
- ▶ Damages:
  - ▶ Actual damages;
  - ▶ Back pay and benefits;
  - ▶ Emotional distress;
  - ▶ Attorney's fees and costs;
  - ▶ Admission to a place of Public Accommodation;
  - ▶ Cease and desist order;
  - ▶ Real Estate-fines

# Question & Answer