



## “Gender Identity” in the Workplace: Is Religious Freedom at Risk from Unelected Bureaucrats?

### OVERVIEW IN BRIEF:

It has been a disappointing summer for the millions of Americans who believe in traditional ideas of gender and family. In late June, a closely divided Supreme Court issued an opinion which recognized same-sex marriage. In doing so, five judges forever altered the social fabric of our country, prompting widespread protests and around-the-clock media coverage.

Given this extensive coverage, it may come as a surprise that the Supreme Court decision was not the only major threat to emerge this summer to our religious freedom. Less than three weeks later, the Equal Employment Opportunity Commission (EEOC) declared that making employment decisions based on homosexuality was a violation of federal law. The protections afforded to people based on such fundamental traits as race and national origin would now be extended to lifestyles based on homosexuality.

This comes shortly after a second EEOC decision, one pursuing an even more extreme agenda: declaring those who are changing their “gender identity” to be protected. Viewed together, these EEOC actions make it clear that our society is being changed rapidly, and the Obama administration is a key force pushing for that change. Even with the special place marriage has in both society and scripture, the EEOC may be having an even wider impact on the day-to-day lives of people of faith than the Supreme Court itself.

### Quick Facts

- **Less than a month** after the Supreme Court approved gay marriage, another government decision has threatened the traditional view of gender in society.
- Employers may **lose the right to make decisions based on sexual orientation** or gender identity.
- The Equal Employment Opportunity Commission which made the decision is **an unelected group which is unaccountable** to the people affected by its decisions.
- Decisions by the EEOC are **often followed by federal courts** when deciding the same type of cases, making them highly important.
- **The decision included no safeguards for those whose sincere religious beliefs will be violated.**
- The decision could **hurt the people it purports to help**, as employers may avoid hiring someone they cannot discipline for fear of a discrimination lawsuit.
- **These lawsuits are already happening**, and they are costing small businesses across the country vast amounts of money.

### BELOW THE RADAR

The Supreme Court is the most famous of the institutions which evaluate our nation's laws, but it is far from the only one. Nor is it the only place where five unelected officials can make sweeping decisions. The EEOC meets barely a mile away from the Supreme Court building in Washington,

D.C., but its actions often go unnoticed despite their importance. No protests occurred and no flags were waved outside its headquarters on July 16 when its five commissioners decided that sexual orientation would be treated the same as race, national origin, and even religious belief when it

came to the employment protections provided by federal law.<sup>1</sup>

Given the past decisions of the EEOC, this was unsurprising. A mere three months earlier, the same commission forced a private health care organization in Florida to pay the government \$150,000 to settle a lawsuit brought by the EEOC itself.<sup>2</sup> The crime these health care professionals committed? Choosing not to recognize a changeable “gender identity” after a male executive declared himself to be a woman.

### HOW OBAMA APPROVED THE IDEA OF “GENDER IDENTITY”

- The case is known as *EEOC v. Lakeland Eye Clinic*.
- The EEOC sued in September 2014 to force the clinic to keep employing a man who had decided he was a woman.
- The clinic was pushed into adopting new policies and training to conform to the government’s agenda.
- Despite quickly making these changes, the clinic was still fined \$150,000.
- All five EEOC commissioners were appointed by President Obama.

These two EEOC actions set a precedent which paves the way for those who have chosen a different gender or lifestyle to work with the most vulnerable in our society – the sick, the poor, and even children. Nowhere in the EEOC’s proud announcement of its massive fine against a small business does it say anything about protecting genuinely-held religious beliefs or religious institutions which act as employers.<sup>3</sup> It instead

<sup>1</sup> Baldwin v. Fox, <http://www.eeoc.gov/decisions/0120133080.pdf>, cited 26 August 2015.

<sup>2</sup> U.S. Equal Employment Opportunity Commission, “EEOC Sues Lakeland Eye Clinic for Sex Discrimination Against Transgender Employee,” <http://www.eeoc.gov/eeoc/newsroom/release/9-25-14e.cfm>, cited 24 August 2015.

<sup>3</sup> U.S. Equal Employment Opportunity Commission, “Lakeland Eye Clinic will Pay \$150,000 to Resolve Transgender / Sex Discrimination Lawsuit,” <http://www.eeoc.gov/eeoc/newsroom/release/4-13-15.cfm>, cited 24 August 2015.

dismisses any concerns about allowing gender-swapping as a “preconceived gender stereotype.”

The reaction to this government validation of gender-swapping? Almost total silence. Not only was there no groundswell against the decision, but even those mainstream media outlets which might be expected to loudly cheer such a ruling largely failed to notice it. The New York Times ran a single brief article which it didn’t even write.<sup>4</sup> The Washington Post ran nothing at all.<sup>5</sup> For those trying to undermine traditional values, this silence is golden, as the EEOC and agencies like it continue to push a gender identity and homosexual agenda right under our noses.

### A NEW BRANCH OF GOVERNMENT

Administrative agencies have an impact far beyond their name recognition. This is especially true for the EEOC, which has been called both “persuasive”<sup>6</sup> and a body whose decisions get “significant deference [in] federal courts.”<sup>7</sup>

This is a dangerous example of what experts call “the administrative state.” The term has existed since at least 1948, when a book was published by that title which began detailing the extent to which unelected officials were making significant decisions about people’s lives.<sup>8</sup> It is striking that it barely took three years from the end of the FDR administration for a book to appear detailing the worrying consequences of unaccountable agencies. The administrative state

<sup>4</sup> A search of the NYT archives reveals a single AP story run on the day the settlement and fine were announced by the EEOC, <http://mobile.nytimes.com/search?query=lakeland+eye+clinic&sort=dsc>, cited 26 August 2015.

<sup>5</sup> A search of both Google and the Washington Post website itself for “Lakeland Eye Clinic,” the business in question, shows nothing.

<sup>6</sup> The Washington Post, “Anti-gay discrimination is sex discrimination, says the EEOC,”

<https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/07/16/anti-gay-discrimination-is-sex-discrimination-says-the-eeoc/>, cited 24 August 2015.

<sup>7</sup> The National Law Review, “EEOC Rules Discrimination Based On Sexual Orientation Illegal Under Title VII,” <http://www.natlawreview.com/article/eeoc-rules-discrimination-based-sexual-orientation-illegal-under-title-vii>, cited 24 August 2015.

<sup>8</sup> Dwight Waldo, “The Administrative State.”

is not merely a new set of organizations but an entire new branch of government, one not established by our Constitution.

Since the time of The New Deal, Congress has continued to delegate power to agencies. As mentioned, the courts are often willing to grant them significant deference. The result is decisions being made on fundamental social issues which are hugely out of step with the religious preferences and traditional values of a massive number of Americans.

Despite this, there is no meaningful method for voters to hold these commissions accountable. Even voting in a new president next year will not immediately affect who sits on the commission, as each of its appointees serves their own five-year term. Members who sat on the commission when it validated the idea of “gender identity” in July will continue to make this type of decision until as late as 2019.

## **NO RELIGIOUS PROTECTION**

Nowhere in these two EEOC actions – the decision about homosexuality and the lawsuit regarding “gender identity” – is there any mention of protecting those whose genuinely held religious beliefs do not support homosexuality or any sexual activity outside of the marital union of a man and a woman. With the EEOC declaring that acting on these beliefs is against federal law, what will happen to believers? It is a very real and very dangerous possibility that these EEOC actions may lead to ruinous lawsuits being filed against small business owners who are simply trying to live by their centuries-old religious values – the values on which this country was originally founded.

If you just read the EEOC decisions, you wouldn't know religious believers even exist. The announcement of the government “gender identity” lawsuit said nothing about the beliefs which often underpin feelings on sexuality, nor does the 17-

page decision elevating homosexuality to the level of race and national origin.

These omissions reveal a fundamental misunderstanding of religious freedom. Our beliefs consider sexual activity to be a behavior within one's control and thus something for which people must be held accountable. This makes sexual activity the diametric opposite of a characteristic like race or national origin. Whatever temptations may exist in one's heart regarding sexual activity, the scriptures show us what outward behaviors are ultimately acceptable.

## **UNINTENDED CONSEQUENCES**

One of the problems with decisions being made by such a little-known tribunal as the EEOC is the level of unintended consequences which may result. Unlike laws passed by Congress or high-profile court decisions, few administrative agency decisions have received the level of scrutiny and analysis required for Americans to fully be aware of what is happening.

Ironically, the EEOC may be hurting transgendered and homosexual people despite supposedly trying to help them. Would an employer hire such an individual knowing that any kind of disciplinary action against them, no matter how legitimate, could be protested as discrimination? How many businesses will be unwilling to take that risk?

The risk has already become reality for a number of businesses. The first sidebar on page 2 describes the case of the Lakeland Eye Clinic and how the government strong-armed it into adopting a new set of values while also fining it \$150,000. Even more notorious is the case of the government action against Sweet Cakes by Melissa, which included a fine of \$135,000 after refusing to bake a cake for a “commitment ceremony.”<sup>9</sup>

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<sup>9</sup> Politico, “Oregon bakery that refused to make gay wedding cake raises \$352K,” <http://www.politico.com/story/2015/07/oregon->

The faith-based community rallied to raise over three times that much in order to pay the fine and otherwise support the couple who ran Sweet Cakes by Melissa, but the faith community should not have to pay huge amounts for the right to exercise its beliefs. Yet with decisions like those by the EEOC, this is the future.

## **CONCLUSION**

The Supreme Court decision recognizing same-sex marriage was the most discussed attack on traditional values this summer, but it was not the only one, nor possibly the most worrying. As an administrative agency with little oversight, the EEOC has been an effective tool of President Obama's administration in weakening the values which have sustained America since its founding.

In April, it was the decision to fine a health care business and dictate new values to it, ones which legitimated the notion of a changeable "gender identity." In July, it barred employers from making decisions based on sincerely-held religious beliefs regarding homosexuality. Not only were religious freedom concerns not valued, they were never even mentioned at all.

The EEOC commissioners serve a longer term than even the president himself, and they using this power to conduct a grand social experiment. The only way to counter this tactic is for those in power to hear from the millions of Americans who believe that the only proper context for sexual activity to be a relationship between a man and a woman – as recognized by God through the gender of their creation. If we remain silent, a small panel of unelected officials will continue to change the basic values of our country from the comfort of their nearly-anonymous office in the depths of Washington, D.C..