



## Chai Feldblum Should Not Be Reappointed to the Equal Employment Opportunity Commission

*Peter Sprigg*

On December 11, 2017, President Trump transmitted to the Senate the nomination of Chai R. Feldblum for reappointment to the Equal Employment Opportunity Commission (EEOC), for a five-year term that would not expire until 2023.<sup>1</sup>

The EEOC, the agency charged with enforcement of federal non-discrimination laws, is required to have bipartisan balance among its five members. One media report has suggested that the reappointment of Feldblum, a Democrat, could be part of a deal with Sen. Chuck Schumer to achieve quick action on one or two Republican appointees to the Commission.<sup>2</sup>

However, Feldblum's record, both before and after her appointment to the EEOC, is an extreme one, and the Trump administration could surely have found a less radical choice to occupy a Democratic seat.

Feldblum has publically advocated that sex discrimination in current law should be redefined to include sexual orientation and gender identity. She also believes that religious liberty exemptions should be extremely narrow.

*Therefore, President Trump should withdraw her nomination; barring that, members of the Senate should not confirm her.*

When President Barack Obama first announced his appointment of Feldblum to the EEOC in September 2009, it drew immediate and sharp opposition from conservative groups concerned about her hostility to religious liberty.<sup>3</sup> Her nomination was held up in the Senate until President Obama finally bypassed the confirmation process, making her a "recess appointment" in March of 2010.<sup>4</sup> Not until December 2010, after the mid-term elections, was her appointment confirmed by the Senate (without a roll call vote).<sup>5</sup> When her first term expired in 2013, she was reappointed, but again faced strong opposition, winning confirmation by a vote of 54-41, with only two Republicans (Susan Collins of Maine and Lisa Murkowski of Alaska) supporting her.<sup>6</sup>

### **Feldblum's record before joining the EEOC**

Before her appointment to the EEOC, Feldblum was a professor at the Georgetown University Law Center. She openly identifies as a lesbian and has long been an LGBT activist. Feldblum has been credited as the principal drafter, in the early 1990's, of the Employment Non-Discrimination Act (ENDA), a federal bill that would have prohibited employment discrimination based on sexual orientation (and later, gender identity).<sup>7</sup>

Feldblum was best known to conservatives, however, for her blunt statements discounting the idea that the free exercise of religion should ever be allowed to trump “rights” asserted by those who identify as homosexual.

The Becket Fund for Religious Liberty held a conference in December 2005 regarding potential conflicts between same-sex marriage and religious liberty. Feldblum participated, and Maggie Gallagher drew attention to Feldblum’s views in a 2006 *Weekly Standard* article.<sup>8</sup>

“Sexual liberty should win in most cases,” Feldblum declared. “There can be a conflict between religious liberty and sexual liberty, but in almost all cases the sexual liberty should win . . .” In fact, she declared, “I’m having a hard time coming up with any case in which religious liberty should win.”<sup>9</sup>

Feldblum understands what this means for religious believers. In a related article, she declared that “we are in a zero-sum game: a gain for one side necessarily entails a corresponding loss for the other side,”<sup>10</sup> adding later, “And, in making the decision in this zero-sum game, I am convinced society should come down on the side of protecting the liberty of LGBT people.”<sup>11</sup> Indeed, she openly endorses government coercion of the believer: “To the extent that forced compliance with an equality mandate burdened an individual’s belief liberty, my argument . . . is that such a burden is likely to be justified.”<sup>12</sup>

Feldblum admitted that the heavy-handed approach she favors goes well beyond Supreme Court precedent, noting that:

[T]he Supreme Court, for the moment, has come down clearly on the side that the liberty protected by the substantive Due Process Clause is solely a negative liberty. . . . But in many circumstances, the only way to achieve real liberty for some individuals will be for the government to take affirmative steps to bring about that liberty – even if such steps might then interfere with the liberty of others.<sup>13</sup>

Feldblum deserves some credit for describing more accurately than most the moral concerns that social conservatives have regarding homosexual conduct, and for at least acknowledging the reality of the conflict between “gay rights” and religious liberty. And she has been gracious to participate in events like the Becket conference, and even in a 2008 panel discussion held at Family Research Council.<sup>14</sup>

However, this should not be allowed to mask the extremism of her positions. After she wrote that the courts should essentially ignore the Free Exercise clause of the First Amendment (recognizing only a more nebulous “belief liberty” instead),<sup>15</sup> she admitted that “my suggestions are radical.”<sup>16</sup>

During the debates over redefining marriage, Feldblum reflected the ambivalence that many LGBT activists had about the institution of marriage, even while demanding access to it:

I, for one, am not sure whether marriage is a normatively good institution. . . . I also believe all of us are harmed, as members of a society seeking a common good, when society fails to acknowledge the wide array of non-marital intimate social structures . . .<sup>17</sup>

It thus seemed entirely consistent with that view when Feldblum signed a controversial statement endorsing legal recognition of polygamy (“Committed, loving households in which there is more than one conjugal partner”).<sup>18</sup> However, Feldblum renounced any support for polygamy after her appointment to the EEOC was announced.<sup>19</sup>

## Feldblum's record since joining the EEOC

The EEOC is charged by statute with enforcing federal laws against employment discrimination – most notably, the prohibitions in Title VII of the Civil Rights Act of 1964 against discriminating “because of such individual’s race, color, religion, sex, or national origin.” However, Feldblum has worked not just at enforcing the law, but at redefining and essentially rewriting it. A recent *Bloomberg* news profile said,

Today, Feldblum is Washington’s strongest champion for the idea that antigay and antitrans biases constitute discrimination “because of sex,” something Congress banned in the workplace in 1964.<sup>20</sup>

A 2015 article in the gay newspaper the *Washington Blade* paid similar tribute to Feldblum’s role:

The U.S. Equal Employment Opportunity Commission delivered a landmark ruling last week establishing that workplace discrimination against gay, lesbian and bisexual people is prohibited under current law. Part of the credit for the decision goes to Chai Feldblum, a longtime LGBT rights advocate and lesbian member of the commission. . . .

The decision caps off decades of work in LGBT activism from Feldblum . . .<sup>21</sup>

As the *Bloomberg* article pointed out, “The EEOC used to dismiss such arguments, and federal courts largely followed suit.” Yet Feldblum asserts, with an apparently straight face, that Congress outlawed “sexual orientation” and “gender identity” discrimination in 1964. In an October 2017 podcast, she declared,

So, when Congress passed the 1964 Civil Rights Act, Title VII, right then in 1964, when the statute said you may not discriminate on the basis of sex – at that moment, discrimination based on sexual orientation and discrimination based on gender identity should have been prohibited. Because that’s just the plain meaning of, “You can’t take sex into account.” Right?<sup>22</sup>

If true, this would suggest that her own legislative creation, ENDA, was superfluous. However, she acknowledges, grudgingly, that such an interpretation would have been inconceivable at the time: “While that might have been logically correct, it was not something that the agency, the EEOC at the time, or the courts, could at all imagine.”<sup>23</sup>

Reporter Chris Geidner described this earlier (altogether logical) view regarding a gender identity case in the 1970’s:

When the Ninth Circuit looked at Title VII, . . . the court concluded that “the provisions were intended to place women on an equal footing with men.” In light of this, the court dismissed Holloway’s claim because, as the court held, “Giving the statute its plain meaning, this court concludes that Congress had only the traditional notions of ‘sex’ in mind.”<sup>24</sup>

Several federal circuit courts have now followed the EEOC’s lead in treating “gender identity” discrimination as a form of “gender stereotyping,” and thus concluding that it is a form of sex discrimination. However, only one federal circuit court, the 7th, has so far reached the same conclusion regarding sexual orientation, in *Hively v. Ivy Tech Community College*. The dominant view in courts where the issue has been adjudicated is not Feldblum’s, but that of Judge Diane Sykes, as expressed in her dissent in April 2017 from the *Hively* ruling:

When a statute supplies the rule of decision, our role is to give effect to the enacted text, interpreting the statutory language as a reasonable person would have understood it at the time of enactment.<sup>25</sup>

The 11th Circuit reached the same conclusion as Judge Sykes and rejected reasoning like that of the *Hively* majority just a month earlier in March 2017 in *Evans v. Georgia Regional Hospital*. Judge William Pryor stated, in his concurrence,

Because Congress has not made sexual orientation a protected class, the appropriate venue for pressing the argument raised by the Commission and the dissent is before Congress, not this Court.<sup>26</sup>

Although no federal appeals court had accepted the radical idea that “sexual orientation discrimination” is “sex” discrimination until April 2017, Feldblum has been pushing the idea, laying the groundwork within the Commission, for years. For example, in an April 2014 interview with National Public Radio, she noted a change in EEOC procedures:

Well, for many years, I think if they had come to the EEOC [with a claim based on sexual orientation], the EEOC just told them that there was no jurisdiction for the EEOC to hear those claims. . . . Now charges are coming in to our offices and they’re not being turned away. . . .

Interviewer Michael Martin zeroed in on the key question: “So what is your authority in this area?”

Feldblum admitted the EEOC was trying to push the courts, rather than responding to them:

So we are addressing these charges as claims of sex discrimination. . . . [In cases contending sexual harassment was a form of sex discrimination, w]e took in charges. We investigated. Some courts agreed with us, some courts didn’t. Ultimately, the Supreme Court agreed. So I expect the same trajectory to happen here.<sup>27</sup>

In a *Bloomberg* report in February 2016, Feldblum made clear that the EEOC was not waiting for the courts, but was pushing ahead with its own interpretation:

Workers alleging sexual orientation discrimination by private employers have been obtaining some relief through the EEOC’s administrative process, Feldblum said. . . .

The EEOC has obtained approximately \$6.5 million in monetary relief for workers alleging sexual orientation and/or gender identity bias and gotten hundreds of employers to change their policies so LGBT discrimination would not recur, Feldblum said.

The EEOC historically has “been ahead of the courts” in identifying new forms of discrimination under Title VII, Feldblum said. The courts “often defer” to the agency’s interpretations of the act, and she hopes that will be true regarding the EEOC’s view that bias based on sexual orientation or gender identity is sex discrimination, Feldblum said.<sup>28</sup>

Feldblum has continued to state her view that religious liberty exemptions should be extremely narrow. For example, at an “LGBT Summit” sponsored by *The Atlantic* magazine in December 2015, she participated in a panel discussion with David Boaz of the Cato Institute, who identifies both as gay and

as a libertarian (and who supported the redefinition of marriage). The issue of private businesses impacted by non-discrimination laws, such as those in the wedding industry, was discussed, as *Reason* magazine reported:

Boaz stated: "I think we have millions of small businesses, and I would like to leave the heavy hand of government out of their relationships with their customers and their employees as much as possible."

. . . Feldblum, however, dismissed the idea that religious beliefs could ever justify discrimination. "When someone has not been educated [about tolerance of LGBT individuals] and wants to keep discriminating," she said, "there is only one federal government, there is only one state government, one local government that can say: We will not tolerate this in our society."

Feldblum then referred to an EEOC case against a funeral home charged with "gender identity" discrimination:

With a religious exemption to non-discrimination laws, the funeral home owner "could say, 'well, actually, we're religiously based,'" said Feldblum, raising her arms high and rolling her eyes. "It's a *funeral home!* We do not want to allow that and the only thing that can protect us is a law that doesn't have [a religious] exemption."<sup>29</sup>

It should be noted that the religious exemption for the funeral home, at which Feldblum scoffed in 2015, was in fact *granted* (under the federal Religious Freedom Restoration Act) in the U.S. District Court's decision in *EEOC v. Harris Funeral Homes* in August of 2016.<sup>30</sup>

## Conclusion

Chai Feldblum's narrow view of religious liberty is inconsistent with the text of the Constitution and with Supreme Court precedent. At the same time, her expansive view of "sex discrimination" is inconsistent with the text of the Civil Rights Act and with both active and passive expressions of congressional intent.

She should not be given another five years at the EEOC to promote her radical theories.

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<sup>1</sup> "PN1318 – Chai Rachel Feldblum – Equal Employment Opportunity Commission," Congress.gov, December 11, 2017, accessed December 21, 2017, <https://www.congress.gov/nomination/115th-congress/1318?r=11>.

<sup>2</sup> Paul Mirengoff, "Report: White House trying to sneak LGBT activist through committee," *PowerLine*, December 12, 2017, accessed December 21, 2017, <http://www.powerlineblog.com/archives/2017/12/report-white-house-trying-to-sneak-lgbt-activist-through-committee.php>.

<sup>3</sup> "Obama EEOC Appointee Chai Feldblum Would Turn Christians and Moral Foes of Homosexuality into Second-Class Citizens," Americans for Truth About Homosexuality, October 13, 2009, accessed December 21, 2017, <https://americansfortruth.com/2009/10/13/obama-eec-appointee-chai-feldblum-would-turn-christians-and-moral-foes-of-homosexuality-into-second-class-citizens/>.

<sup>4</sup> Chris Geidner, "Recess Appointment for Feldblum," *Metro Weekly*, March 27, 2010, accessed December 21, 2017, <http://www.metroweekly.com/2010/03/recess-appointment-for-feldblu/>.

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- <sup>5</sup> Lisa Keen, "Senate confirms Feldblum for EEOC," *Keen News Service*, December 23, 2010, accessed December 21, 2017, <http://www.keennewsservice.com/2010/12/23/senate-confirms-feldblum-for-eec/>.
- <sup>6</sup> "Roll Call Vote 113th Congress - 1st Session," United States Senate, accessed December 21, 2017, [https://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=113&session=1&vote=00258](https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=113&session=1&vote=00258).
- <sup>7</sup> "Chai R. Feldblum, Commissioner," U.S. Equal Employment Opportunity Commission, accessed December 20, 2017, <https://www.eeoc.gov/eeoc/feldblum.cfm>.
- <sup>8</sup> Maggie Gallagher, "Banned in Boston," *The Weekly Standard*, May 15, 2006, accessed December 21, 2017, <http://www.weeklystandard.com/article/13329>.
- <sup>9</sup> Apparently, years later, Feldblum asserted on Twitter that Gallagher had misquoted her, although she did not say in what way. However, the quotes in the Gallagher article seem compatible with statements in her academic writings. See: Maggie Gallagher, "On Chai Feldblum's Claim That I Misquoted Her," *National Review*, October 28, 2014, accessed December 21, 2017, <http://www.nationalreview.com/corner/406765>.
- <sup>10</sup> Chai R. Feldblum, "Moral Conflict and Liberty: Gay Rights and Religion," *Brooklyn Law Review* 72 (2006): 87, accessed December 21, 2017, <http://brooklynworks.brooklaw.edu/blr/vol72/iss1/4>.
- <sup>11</sup> *Ibid.*, 119.
- <sup>12</sup> *Ibid.*, 115.
- <sup>13</sup> *Ibid.*, 98.
- <sup>14</sup> Family Research Council, "Change Watch: Chai Feldblum, Commissioner, Equal Employment Opportunity Commission," YouTube, November 17, 2009, accessed December 21, 2017, <https://www.youtube.com/watch?v=dBZ98qADxbs>.
- <sup>15</sup> Feldblum writes that courts should "analyze religious people's claims as belief liberty interests under the Due Process Clauses of the Fifth and Fourteenth Amendments, rather than as free exercise claims under the First Amendment." This not only discounts the fundamental nature of the "free exercise" right, but it is a stealthy means of putting religious liberty (a clearly enumerated right under the First Amendment) on the same plane as "gay rights" (which are mentioned nowhere in the text of the Constitution), as well as allowing judges complete freedom to strike whatever balance between the two they personally prefer. Later in the article, she explains her problem with the Free Exercise clause: "The First Amendment right to free exercise necessarily protects . . . any religious belief, no matter how trivial. By contrast, I believe it is appropriate that the belief liberty protected under the Due Process Clause be limited . . ." See Feldblum, "Moral Conflict and Liberty," 63, 101.
- <sup>16</sup> *Ibid.*, 122.
- <sup>17</sup> Chai R. Feldblum, "Gay Is Good: The Moral Case for Marriage Equality and More," *Yale J.L. & Feminism* 17 (2005): 142-43, accessed December 21, 2017, <http://scholarship.law.georgetown.edu/facpub/1091>.
- <sup>18</sup> "Beyond Same-Sex Marriage: A New Strategic Vision for All Our Families & Relationships," *Monthly Review*, August 8, 2006, accessed December 20, 2017, <https://mronline.org/2006/08/08/beyond-same-sex-marriage-a-new-strategic-vision-for-all-our-families-relationships/>.
- <sup>19</sup> Nancy Polikoff, "Chai Feldblum coasting toward confirmation as member of the Equal Employment Opportunity Commission," *Beyond (Straight and Gay) Marriage*, November 20, 2009, accessed December 20, 2017, <http://beyondstraightandgaymarriage.blogspot.com/2009/11/chai-feldblum-coasting-toward.html>.
- <sup>20</sup> Josh Eidelson, "How to Prove That LGBT Discrimination Is Really Sex Bias," *Bloomberg*, October 9, 2017; accessed December 21, 2017, <https://www.bloomberg.com/news/articles/2017-10-09/the-eeoc-commissioner-out-to-prove-that-lgbt-discrimination-is-sex-discrimination>.
- <sup>21</sup> Chris Johnson, "Feldblum explains new gay employment protections," *Washington Blade*, July 20, 2015, accessed December 21, 2017, <http://www.washingtonblade.com/2015/07/20/feldblum-explains-it-all-on-gay-employment-protections/>.
- <sup>22</sup> "Episode 25: EEOC Commissioner Chai Feldblum Part II: Other Emerging EEOC Trends + Takeaways," Interview with Matt Steinberg, *Akerman WorkedUp Podcast*, October 26, 2017, accessed December 21, 2017, <https://soundcloud.com/user-642020138/episode-25-eeoc-commissioner-chai-feldblum-part-ii-other-emerging-eeoc-trends-takeaways>.
- <sup>23</sup> *Ibid.*
- <sup>24</sup> Chris Geidner, "Transgender Breakthrough," *Metro Weekly*, April 23, 2012, accessed December 21, 2017, <http://www.metroweekly.com/2012/04/transgender-breakthrough/>.
- <sup>25</sup> Chris Johnson, "In first, fed'l appeals court rules anti-gay bias barred under current law," *Washington Blade*, April 4, 2017, accessed December 21, 2017,

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<http://www.washingtonblade.com/2017/04/04/first-fedl-appeals-courts-rules-anti-gay-bias-barred-current-law/>.

<sup>26</sup> *Evans v. Georgia Regional Hospital*, Case No. 15-15234 (11th Cir., March 10, 2017), p. 27,

<http://media.ca11.uscourts.gov/opinions/pub/files/201515234.pdf>.

<sup>27</sup> "Equal Employment Agency No Longer Turning Away Gay Discrimination Claims," *Tell Me More*, National Public Radio, April 2, 2014, <https://www.npr.org/2014/04/02/298328951/equal-employment-agency-no-longer-turning-away-gay-discrimination-claims>.

<sup>28</sup> Kevin McGowan, "EEOC Sex Orientation Bias Suit Is Likely 'Coming Soon,'" *Bloomberg*, February 29, 2016, accessed December 21, 2017, <https://www.bna.com/eec-sex-orientation-n57982067887/>.

<sup>29</sup> Elizabeth Nolan Brown, "LGBT Rights vs. Religious Freedom Looms Large at #AtlanticLGBT Summit," *Reason*, December 12, 2015, accessed December 21, 2017, <https://reason.com/blog/2015/12/12/atlantic-lgbt-summit-dispatches>.

<sup>30</sup> *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc.*, Case No. 14-13710 (E.D. Mich., So. Div., August 18, 2016), <https://cases.justia.com/federal/district-courts/michigan/miedce/2:2014cv13710/295088/76/0.pdf?ts=1471609069>.