

EEOC: Title VII Prohibits Employment Discrimination Based on Sexual Orientation

In a groundbreaking decision on July 15, the EEOC ruled that sexual orientation discrimination is a form of “sex” discrimination prohibited by Title VII. Even though the ruling takes a more expansive view of Title VII protections than federal courts have, employers will want to review their equal employment opportunity, nondiscrimination and other employment practices given EEOC enforcement priorities and state and local laws prohibiting sexual orientation discrimination.

Background

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination by private employers as well as federal, state and local governments on the basis of race, color, religion, sex and national origin. Title VII, which is enforced by the Equal Employment Opportunity Commission (EEOC), generally permits an individual who claims to have been the subject of workplace discrimination to file a charge with the EEOC. The special procedural rules that govern federal sector discrimination claims generally require a complaint to be filed with the government agency that allegedly discriminated against the individual and require that agency to investigate the complaint. However, an agency's final action or dismissal of a complaint may be appealed to the EEOC.

While Title VII does not explicitly list sexual orientation or gender identity (transgender status) as a prohibited basis for employment actions, EEOC guidance generally interprets the law to provide protections for employees who have been discriminated against on those bases. In 2012, the EEOC addressed protections for the transgender community in the government sector context, ruling for the first time that discrimination claims based on gender identity, sex change and/or transgender status are cognizable under Title VII. (See our *For Your Information* from [May 11, 2012](#).) Last month, the EEOC addressed employment protections for lesbians, gays and bisexuals in another government sector case.

The EEOC Weighs In

In 2012, a supervisory air traffic control specialist at Miami's International Airport charged that the Federal Aviation Administration (FAA) denied him a permanent position as a frontline manager because he was gay. Dismissing



the complaint as untimely, the FAA did not decide the merits of his claim. The complainant appealed the decision to the EEOC.

EEOC's Enforcement Priorities

The EEOC's FY 2013-2016 [Strategic Enforcement Plan](#) lists "coverage of lesbian, gay, bisexual and transgender (LGBT) individuals under Title VII's sex discrimination provisions, as they may apply" as an enforcement priority. This is consistent with positions the EEOC has taken in recent years on the intersection of LGBT-related discrimination and Title VII protections.

In a 3-2 [decision](#) on July 15, the EEOC ruled that the complaint was timely, and held for the first time that Title VII prohibits employment discrimination based on sexual orientation. In *Baldwin v. Department of Transportation*, the EEOC found that "sexual orientation is inherently a 'sex-based consideration,' and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII."

The EEOC relied on three theories to support its decision that sexual orientation discrimination is sex discrimination. It maintained that:

- Sexual orientation is "premised on sex-based preferences, assumptions, expectations, stereotypes, or norms."
- Discrimination based on sexual orientation is "associational discrimination on the basis of sex," analogizing sexual orientation discrimination to race-based discrimination.
- Sexual orientation discrimination impermissibly relies on gender stereotyping. In support of that proposition, the EEOC relied heavily on a 1989 Supreme Court [ruling](#) that held that a plaintiff can rely on gender-stereotyping evidence to show that discrimination occurred.

Technically, this decision applies only to federal employees' claims. However, the EEOC is expected to extend its reasoning more broadly to investigations, conciliations and litigation involving private sector employees. Moreover, this ruling may encourage private employees to file sexual orientation discrimination complaints with the EEOC and trigger an uptick in the number of discrimination charges filed. In investigating and processing such claims, the EEOC can be expected to take the position that all sexual orientation discrimination is unlawful under Title VII.

State and Local Laws

Eighteen states, the District of Columbia, and a growing number of cities have laws prohibiting employment discrimination on the basis of sexual orientation and gender identity. Three states have employment nondiscrimination laws covering sexual orientation, but not gender identity.

While the EEOC's decision will likely have a lesser impact on employers in these states, those employers will want to ensure that their current policies and practices reflect applicable state and local laws protecting LGBT employees.

Comment. Following this decision, the EEOC, in conjunction with the Office of Personnel Management, the Office of Special Counsel, and the Merit Systems Protection Board issued revised guidance on [Addressing Sexual Orientation and Gender Identity Discrimination in Federal Civilian Employment: A Guide to Employment Rights, Protections, and Responsibilities](#). The guidance unequivocally states that "Title VII's prohibition on sex discrimination protects persons who have been discriminated against based on sexual orientation and gender identity."

The EEOC ruling embraces a more expansive view of Title VII protections than federal courts have adopted to date. As the EEOC noted, a number of federal courts have rejected sexual orientation claims under Title VII, and

Congress has not passed federal legislation extending employment protections on the basis of sexual orientation. Whether and to what extent future courts will defer to the EEOC's interpretation of Title VII's proscriptions remains to be seen.

In Closing

The EEOC decision suggests how the agency will approach sexual orientation discrimination claims and is likely to have a significant impact on its enforcement activities. Although the decision was made in the government sector context, the EEOC is expected to extend its reasoning and application to the private sector as well. Employers will want to review their equal employment opportunity, nondiscrimination and other employment policies and practices in light of current EEOC enforcement priorities as well as state and/or local prohibitions on sexual orientation discrimination.

Authors

Nancy Vary, JD
Abe Dubin, JD

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