

EEOC Declares that Title VII Covers Discrimination based on an Individual's Sexual Orientation

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On July 15, 2015, the United States Equal Employment Opportunity Commission (EEOC) officially declared that it now considers Title VII's prohibition on sex discrimination to apply to discrimination based on sexual orientation. As a result of this decision, the EEOC has posted on its homepage a link to the document entitled, [What You Should Know - The EEOC and the Enforcement Protections for LGBT Workers](#).

The recent ruling stems from a 2012 decision in which the EEOC concluded that discrimination against an individual because the individual is transgender (also known as gender identity discrimination) constitutes sex discrimination in violation of Title VII. The EEOC reasoned that this type of discrimination was based on sex stereotyping premised on non-conforming gender conduct (e.g., a male wearing dresses and make up). The United States Court of Appeals for the Sixth Circuit (the federal court of appeals governing Michigan) made similar rulings in 2004 and 2005.

Still, the 2015 ruling significantly expands the 2012 decision as evidenced by the EEOC's 2012 Strategic Enforcement Plan, which stopped well short of declaring that Title VII prohibited discrimination based on sexual orientation. Instead, when discussing its enforcement issues on emerging issues, the EEOC simply stated that it "recognize[d] that elements of the following issues are emerging and developing . . . coverage of lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions, as they may apply."

The EEOC's new reasoning is that sexual orientation discrimination is inseparable from and inescapably linked to sex as it is premised on "sex-based preferences, assumptions, expectations, stereotypes, or norms." In determining the sexual orientation discrimination is sex discrimination, the EEOC relied on the following:

- Sexual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex, i.e. a lesbian employee can allege that her employer took an adverse action against her that the employer would not have taken had she been male;
- Sexual orientation discrimination is sex discrimination because it is associational discrimination on the basis of sex, i.e. discrimination based on the sex of the person the employee associates with; and

- Sexual orientation is sex discrimination because it involves discrimination based on gender stereotypes, i.e. the employee was treated adversely because he/she was viewed – based on appearance, mannerisms, or conduct – as insufficiently “masculine” or “feminine” or treated adversely because of the employer’s motivation to enforce heterosexually defined gender norms.

The EEOC’s new position on sexual orientation discrimination has been rejected previously by the United States Court of Appeals for the Sixth Circuit. Therefore, it is uncertain whether the courts will ultimately agree with the EEOC’s position. One thing is certain; significant litigation will ensue relying upon the EEOC’s pronouncement.

Many employers’ internal EEO policies already prohibit, on a voluntary basis, discrimination based on sexual orientation. For other employers, care should be taken into considering what, if any, changes to internal policies should be made.

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