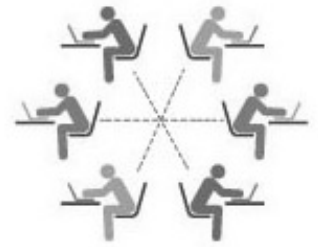


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EEOC Pushes Its Strategic Enforcement Plan And Advocates For Transgender Workplace Protections Under Title VII

By Seyfarth Shaw LLP on September 30th, 2014

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No federal statute explicitly prohibits employment discrimination based on gender identity or expression. Nevertheless, in recent years, the EEOC has advocated — including as part of its strategic plan — that it would pursue protections for transgender workers under Title VII’s prohibition against “sex” discrimination and harassment. Indeed, on April 20, 2012, the agency issued a landmark administrative ruling titled *Macy v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, EEOC Appeal No. 0120120821 (April 23, 2012) in which it held that transgender individuals may state a claim for sex discrimination under Title VII. Read our prior analysis of the *Macy* decision [here](#).

Following *Macy*, on September 25, 2014, the EEOC filed two separate lawsuits—*EEOC v. Lakeland Eye Clinic, P.A.* (Middle District of Florida, Tampa Division) and *EEOC v. R.G. & G.R. Harris Funeral Homes Inc.* (Eastern District of Michigan, Southern Division) — on behalf of transgender workers. The crux of the EEOC’s theory is that Title VII protects transgender workers based on “sex.”

Facts And Claims Alleged

In *EEOC v. Lakeland Eye Clinic P.A.*, the EEOC asserts that the employer fired its director of hearing services, Brandi M. Branson, after she began wearing feminine clothing to work and informed the clinic she was transitioning from male to female. Managers and employees allegedly made derogatory comments about Branson’s appearance, and Branson was thereafter deprived of her client base by the employer. Branson was terminated, and the EEOC alleges that, two months after Branson was terminated, the clinic hired a male worker in the same position who conformed to traditional gender norms.

In *R.G. & G.R. Harris Funeral Homes*, the EEOC alleges that a Detroit-based funeral home illegally fired a funeral director and embalmer named Aimee Stephens, weeks after Stephens gave the funeral home a letter

saying she was undergoing a gender transition from male to female. She was allegedly terminated, and told by the owner of the employer that what she was “proposing to do” was “unacceptable.”

In both cases, the EEOC alleges various theories of “sex” discrimination on behalf of the claimants. The EEOC alleges that the decision to terminate each of these employees was motivated by “sex-based” considerations because the employee is transgender, because of the employee’s transition from male to female, and/or because the employees did not confirm to the employers sex- or gender-based preferences, expectations or stereotypes.

Implications For Employers

The theories of liability articulated in these lawsuits clearly follow the EEOC’s prior ruling in *Macy*, in which the EEOC found that discrimination against a transgender worker was — per se — sex discrimination. *See Macy* at *6. The EEOC also uses as a basis for liability the decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989), in which the U.S. Supreme Court held that Title VII bars discrimination based on gender stereotypes, in other words, failing to act and appear according to expectations defined by gender — a form of sex discrimination that has since been described as “sex stereotyping,” and one alternative way of proving sex discrimination. The EEOC has made clear that, while gender identity and/or expression are not independent classifications for protection under federal law, the agency will attempt to establish a case of sex discrimination through a variety of different formulations.

In order to avoid potential pitfalls in this emerging area of law, employers must be mindful of issues related to gender identity and/or expression that might arise during interviewing, hiring, discipline, promotion and termination decisions. Employers should be particularly vigilant when an employee identifies as transgender, or announces a plan to undergo a gender transition. Moreover, the theories articulated in these cases are not just limited to transgender employees—many forms of “sex stereotyping” may give rise to actionable claims, not just discrimination or harassment against individuals who identify as transgender. Employers must also be aware that transgender individuals may be affirmatively protected under state or local laws (see our analysis of a recent California case here), and that any allegations concerning transgender discrimination, gender stereotyping or gender identity, require the same analysis, investigation and response as a traditional sex discrimination complaint. Finally, employers should consider whether to implement gender transition guidelines for human resources and/or management that define a process through which employees and management approach an employee gender transition in the workplace.

Readers can also find this post on our EEOC Countdown blog here.

Tags: discrimination, EEOC, Title VII

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