



EEOC Seeks To Expand Reach Of Sexual Orientation Claims

Insights

4.05.16

A new wave of litigation may result in sexual orientation discrimination being prohibited at most workplaces across the country. The last month has seen a historic series of lawsuits filed by the Equal Employment Opportunity Commission (EEOC) addressing this issue head on, arguing that existing federal law covers this type of employment discrimination.

Background

Title VII is the main federal anti-discrimination statute covering most private employers with 15 or more workers. It protects against, among other things, gender discrimination in the workplace. However, the federal civil rights statute does not explicitly include sexual orientation as a protected category.

Although many state and local laws have already done so, federal courts have yet to extend Title VII's protection in the private sector to sexual orientation discrimination. Laws establishing such protections have been introduced in Congress, but, to date, none have passed.

EEOC's Initial Attempts To Broaden Coverage

In 2013, the EEOC announced that establishing protections relating to sexual orientation would be one of its major priorities. Since then, the EEOC has been accepting and investigating charges of discrimination alleging that employees were discriminated against because of their sexual orientation.

Since the EEOC and some state and local laws protect against workplace sexual orientation discrimination, but federal courts have not held that this is protected under Title VII, it is easy to see how employers can be confused as to their obligations.

Groundbreaking Lawsuits

In a coordinated series of actions that may help to standardize the law, the EEOC filed two lawsuits in federal court on March 1, 2016, claiming that Title VII protects employees from discrimination based on their sexual orientation.

In a lawsuit filed in the Western District of Pennsylvania, *EEOC v. Scott Medical Center*, the agency claimed that the employer violated Title VII when a male manager allegedly made offensive remarks to a gay male employee regarding that employee's sexual orientation, including derogatory remarks about his gay life and choice of partner.

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In the other lawsuit, filed in the District Court of Maryland, *EEOC v. Pallet Companies d/b/a/ IFCO Systems, NA Inc.*, the EEOC claimed that the employer likewise violated Title VII when a supervisor made comments regarding a gay female employee's sexual orientation, including comments regarding the manager's intention to "turn her back into a woman" and quotations from the Bible that the supervisor believed condemned homosexuality.

Because these cases were only very recently filed, it may be some time before the courts make rulings on whether Title VII indeed protects against sexual orientation discrimination in the workplace. It is also possible that these cases will need to wind their way up to appellate courts, if not the U.S. Supreme Court, before the picture is clear.

What Have Other Courts Said?

Previously, a number of federal courts have recognized that Title VII's prohibition against discrimination on the basis of sex extends to situations in which employees are discriminated against because they do not comport with traditional gender stereotypes. For example, several courts have held that Title VII's prohibition against gender discrimination applies when a female employee is harassed for being too "masculine," among other similar situations when an employee is discriminated against for acting contrary to gender norms.

This rationale has also been used to find that employers violate Title VII if they discriminate against transgender employees. In making these rulings, federal courts have reasoned that discriminating against an employee who, in an employer's view, does not conform to traditional gender stereotypes violates Title VII's prohibition against sex discrimination.

Courts may not have to make too much of a jump from this rationale in extending Title VII protections to workers' sexual orientation. Many courts have even alluded to a seeming inconsistency in not protecting an employee's sexual orientation that deviates from traditional gender norms when other aspects of an employee's behavior that deviate from traditional gender norms are already protected.

Signs Point To A Broader Standard

The national trend likewise seems to encourage protecting individuals against sexual orientation discrimination. One federal court has already held that federal employers may not discriminate against their employees based on sexual orientation (though this decision does not apply to state or private employees).

Further, in last year's *Obergefell v. Hodges* decision, the U.S. Supreme Court held that same-sex couples could not be denied the right to marry. While this holding was based on Constitutional and not Title VII protections, it exemplifies the recent trend towards protecting individuals against discrimination based upon their sexual orientation.

Ultimately, although there seems to be an inconsistency as to whether you could be sued under federal law by employees who believe you took adverse action against them based on their sexual

orientation, it seems likely that the law will generally move towards prohibiting such actions, perhaps sooner rather than later.

Unless you want to be on the receiving end of one of these leading-edge lawsuits, it would be wise to promote policies protecting against discrimination or harassment based on an employee's sexual orientation, just as you already protect against discrimination based on an employee's gender, race, ethnicity, etc. Further, in addition to being proactive in conforming to law that could soon be applicable, preventing discrimination of any kind in the workplace is generally a good business practice that promotes positive employee morale.

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