

TRANSGENDERS: THE NEXT PROTECTED GROUP UNDER TITLE VII?

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On April 20, 2012 the U.S. Equal Employment Opportunity Commission issued a decision ruling applicable to federal-agency employees that an employee can pursue a complaint of discrimination based on "gender identity, change of sex, and/or transgender status."

The decision was based on the following facts: Mia Macy was a male police detective in Phoenix, Arizona who applied for a position with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) at a lab in Walnut Creek, California. At the time Macy made her application with the Agency (the ATF), she was physically a man and presented as such. By all accounts, she was well-qualified for the position. After interviewing Macy by phone, Macy alleged that the Director of the lab had told her that the job was hers (his), absent any problems with Macy's background check. Before the background check was finalized, Macy informed the lab that she was in the process of changing her name and her gender. A few days after informing the lab of these changes, Macy was informed that, due to federal budget reductions, the position at the lab was no longer available. Macy later discovered that the position had not been cut but that another applicant had been hired in her place.

Macy filed a formal complaint with the Agency, noting discrimination based on "sex," "gender identity," and "sex stereotyping" as the basis for her complaint. Ultimately, ATF determined that discrimination based on "gender identity stereotyping" was not within the purview of Title VII of the Civil Rights Act and the EEOC (which enforces the requirements of Title VII). Macy appealed the Agency decision, and it was reviewed by the EEOC.

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The EEOC determined that each of Macy's claims ("sex stereotyping," "gender transition/change of sex," "gender identity," "gender identity stereotyping," and "gender, identity, change of sex and/or transgender status") were merely different ways of stating the same claim of discrimination based on sex, which is clearly actionable under Title VII.

In the same way, EEOC's reasoning goes, discrimination "based on sex" would encompass discrimination because of a change of sex. EEOC in its decision applied the holdings of some courts interpreting Title VII as applying to claims of transgender discrimination. While this decision was made with regard to a governmental employer, it is virtually certain that EEOC will apply its thinking to any employer subject to Title VII, private as well.

This decision by the EEOC will clarify application of Title VII sex-discrimination principles by local EEOC agencies and will likely lead to more consistent decisions among the federal courts. Employers should keep an eye on upcoming decisions from the courts to see if they agree with the EEOC and reverse decades of decisions holding that transgenders and homosexuals are not protected groups.

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