

PUBLICATION

Expansion of Title VII Protection to LGBT Employees

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As 2014 comes to a close, it has become quite clear that there is a legal trend towards expanding Title VII protection to LGBT employees. Earlier this year, the Employee Non-Discrimination Act (ENDA) was proposed to ban anti-gay workplace discrimination on a federal level. Although the bill failed to become law, in July of 2014, President Obama signed an executive order amending Executive Order 11246 to add sexual orientation and gender identity to the list of protected categories covering federal contractors. Under this executive order, recipients of federal contracts are required to have policies that prohibit discrimination based on sexual orientation and gender identity. The Department of Labor also vowed to crack down on employment bias against transgendered federal contractor employees. The DOL's Office of Federal Contract Compliance Programs (OFCCP) issued a directive, in which it stated that the OFCCP will fully investigate any instances of sex discrimination against transgendered employees, which may be discovered during scheduled compliance evaluations.

The trend towards prohibiting discrimination against sexual orientation and gender identity is a logical step from the U.S. Supreme Court's decision in *Price Waterhouse v. Hopkins*, which recognized sex-stereotyping as a form of sex discrimination. In the case of *Hopkins*, a female employee alleged that her employer did not promote her because of her unfeminine behavior. This gender stereotype theory has been applied by district courts and the EEOC to protect LGBT employees from employment discrimination. In April of this year, a district court judge in Washington D.C. refused to dismiss a former employee's claim that he was fired because he was a homosexual male whose sexual orientation was not consistent with his former employer's perception of acceptable gender roles. In September, the EEOC filed sexual discrimination lawsuits on behalf of two transgendered employees. In one of the cases, a funeral director was fired after she informed her employer, in writing, that she would be transitioning from male to female and would wear different clothing to work. The second EEOC lawsuit involves a director at an eye clinic who was fired after wearing feminine clothes to work while making her transition from male to female. These cases illustrate that gender identity and sexual orientation may form the basis of sex-stereotyping discrimination claims. Despite the absence of any federal law expanding Title VII protection to gender identity and sexual orientation, it is evident that some courts and the EEOC find such claims within the purview of Title VII.

This current trend poses new questions for employers, especially when dealing with transgendered employees. How do you handle an employee who informs you that he or she is undergoing a transition from male to female or vice versa? As seen in the EEOC cases above, the transition period for transgendered employees is not just anatomical, but is manifested in the employees' physical appearance--including their work attire. Many employers have dress codes that are gender specific. These employers must avoid inconsistent application of their dress codes with respect to transgendered employees. For instance, supervisors who are aware of a transgendered employee's transition from female to male should not require such an employee to wear feminine clothes to work. Another question employers may encounter is the use of public restrooms. Employers who try to prevent transgendered workers from using a gender specific bathroom may find themselves eventually dealing with an EEOC claim. According to the EEOC, employees should be able to use the restroom of their choice for the gender they are presenting.

In light of the direction towards protecting LGBT employees, here are some helpful tips for employers:

- Ensure that anti-discrimination and non-harassment policies include protections against discrimination and harassment based on sexual orientation and gender identity.
- Communicate these policies to employees during orientation or team meetings, and encourage employees to address any questions to HR or other appropriate personnel.
- Train managers and supervisors on internal procedures to address discrimination or harassment complaints from LGBT employees.
- Consider a gender neutral dress code to avoid the risk of supervisors or managers inconsistently enforcing gender-specific dress codes against transgendered employees.

Set up a meeting with employees undergoing a transition to discuss issues such as: (1) the timing of his or her gender re-assignment surgery, (2) the employee's new name, or (3) whether co-workers should be informed about his or transition. Only discuss such issues if welcomed by the employee.