

INSIGHTS

EEOC Files First Suits Against Businesses Alleging Sexual Orientation Discrimination

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Previously, federal courts, for the most part, held that Title VII of the Civil Rights Act of 1964, which prohibits discrimination based upon race, color, national origin, religion and sex, does not provide a basis for challenging discrimination based upon sexual orientation.

In 2012, in a case involving a federal employee, the EEOC hinted at its evolving position, holding that discrimination based upon gender identity, in other words transgender status, is an unlawful form of sex discrimination under Title VII.

Consistent with its comprehensive enforcement agenda, in the summer of 2015, the agency went further, still in the context of federal employment, and took the position that discrimination based on sexual orientation constitutes an unlawful form of sex discrimination under Title VII, determining that sexual orientation discrimination is, by its very nature, discrimination because of sex.

Now, on March 1, 2016, the EEOC, for the first time, filed suit against private-sector employers alleging that discrimination based on sexual orientation violated Title VII.

Yesterday, the agency sued Scott Medical Health Center in Pennsylvania contending that a gay male employee was subjected to unlawful harassment based on sexual orientation. The lawsuit alleges that the employee's manager repeatedly referred to him using various anti-gay epithets and made other highly offensive comments about his sexuality and sex life. The employee claims his complaints to the clinic's director were ignored, leaving him with no choice but to resign rather than endure the manager's persistent harassment.

In a separate suit, also filed yesterday, the EEOC sued claiming that a lesbian forklift operator in Maryland was unlawfully harassed by her supervisor because of sexual orientation. According to that suit, the supervisor made a variety of derogatory comments based on the employee's sexual orientation, including telling the employee at issue: "I want to turn you back into a woman" and "You would look good in a dress."

Notably, in addition to filing these lawsuits, the EEOC routinely has been accepting charges of discrimination from individuals alleging discrimination based on LGBT status.

Combating discrimination based upon LGBT status is one of the EEOC's stated priorities under its current Strategic Enforcement Plan, which is focused on emerging and developing issues.

While it is not at all clear that federal courts generally will adopt the agency's view that Title VII prohibits sexual orientation discrimination, importantly 22 states and the District of Columbia already expressly prohibit employment discrimination based on sexual orientation (and 20 of those states, and the District of Columbia, prohibit discrimination based on gender identity).

Additionally, there are numerous municipal ordinances, including in most major cities around the country, that prohibit discrimination based on sexual orientation and gender identity.

Accordingly, many employers with multi-state operations have already committed, through policy pronouncements, to the prohibition of LGBT nondiscrimination.

However, the fact remains that various locales in the United States, including some major cities like Houston, have no currently effective law prohibiting discrimination based on sexual orientation or gender identity.

Therefore, if federal courts ultimately accept the EEOC's position prohibiting LGBT discrimination based upon an interpretation of the Title VII sex discrimination prohibition, then employees throughout the United States will be protected. Further, the damages and other remedies available under Title VII are often more substantial than those available under state law and, in particular, local ordinances.

Given these developments, employers should consider the following steps:

- If your business already prohibits discrimination based on sexual orientation and gender identity, you will want to be vigilant going forward to ensure that your managers and other employees understand and abide by that prohibition.
- If your business does not specifically prohibit discrimination based upon gender identity in addition to sexual orientation, you should consider expanding that prohibition to include gender identity discrimination given the EEOC's position and the rapid proliferation of state and local laws prohibiting both forms of discrimination.
- Your business should consider implementing training consistent with your policies on LGBT discrimination.
- If your business does not already prohibit discrimination based upon sexual orientation and gender identity, you will want to consider adding this type of discrimination to your policies. You should also consider whether you employ individuals in any state or local jurisdiction where such an express prohibition exists.