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Is Sexual Orientation Discrimination Covered by Title VII? *What Employers Should Do While Federal Agencies and Courts Figure it Out*

As of now, sexual orientation and gender identity are not specifically listed as a “protected class” under Title VII of the Civil Rights Act, the law that makes it illegal for employers to discriminate against applicants, employees and former employees based on race, color, religion, sex (including pregnancy), or national origin.

BUT WAIT! First, the Equal Employment Opportunity Commission (EEOC) took the stance that Title VII covers gender identity and sexual orientation. Then, three Federal Appellate Circuits (2nd, 6th, and 7th) ruled Title VII’s use of the term “sex” includes sexual orientation or gender identity. What is an employer outside of these circuits to do?

For many years, Title VII’s use of the term “sex” was limited to biological sex, meaning male or female. This began to change in 1989, with the seminal U.S. Supreme Court case, *Price Waterhouse v. Hopkins*, which held Title VII also prohibited discrimination based on “sexual stereotyping.” This ruling meant individuals who did not conform to an employer’s notion of a “typical” male or female could not be discriminated against.

RECENT APPELLATE RULINGS

Both *Hively v. Ivy Tech Community College of Indiana* (7th Cir. 2017) (*en banc*) and *Zarda v. Altitude Express Inc.* (2d Cir. 2018) (*en banc*) used essentially the same three lines of reasoning to find protection for **sexual orientation**:

1. Sexual discrimination constitutes sex discrimination because “sexual orientation is a function of sex.” Firing a man because he’s attracted to men “is a decision motivated, at least in part, by sex,” and the fired male employee would not have been fired “but for” his sex.
2. Sexual-discrimination constitutes sex discrimination because it’s based on sex stereotypes – “a policy that discriminates on the basis of sexual orientation does not affect every woman, or every man, but it is based on assumptions about the proper behavior for someone of a given sex.”
3. Sexual orientation discrimination constitutes sex discrimination under the “associational” theory of discrimination. Such discrimination flows from “an employer’s opposition to association between particular sexes, and thereby discriminates against an employee based on their own sex.”

In *EEOC v. R.G. & G.R. Harris Funeral Homes Inc.* (6th Cir. 2018), the Sixth Circuit held Title VII also protected an employee’s **gender identity**. In that case, a funeral home fired an employee who was born male (and hired while presenting male) after the employee informed the director she would begin dressing and presenting as a woman. The employer openly admitted the employee was fired because of her gender identity. The Sixth Circuit held discrimination on the basis of transgender and transitioning status is prohibited sex discrimination because:

1. “[I]t is analytically impossible to fire an employee based on that employee’s status as a transgender person without being motivated, at least in part, by the employee’s sex,” and
2. “[D]iscrimination against transgender persons necessarily implicates Title VII’s proscriptions against sex stereotyping.”

BEST PRACTICES FOR EMPLOYERS

In light of these recent decisions, employers should consider whether their employment practices are designed to sufficiently protect these characteristics. As these cases are reported in the news, the potential for complaints increases.

In hiring, employers should minimize any inquiry into these areas; asking questions seeking self-identification during the hiring process may call into question any legitimate decision the employer ultimately makes.

Employers should update neutral policies to prevent discrimination based on these classes and train on these policies. Employers should consider:

1. **Individual preference regarding names and pronouns.** Although employers may have policies in place regarding legal name changes, such as those following marriage, they should update these to accommodate individuals who are transitioning and may not have changed their legal name, and, importantly, may not intend to. This policy should apply not only to workplace interactions but also circumstances such as assignment of email addresses. Policies should ensure HR treats disfavored birth names confidentially.

A policy regarding names is also an opportunity to limit use of nicknames; gendered nicknames are frequently used as evidence in gender nonconformance allegations. A chosen name policy allows employees to identify whether a shortened version or middle name is acceptable or their preference; employers can instruct coworkers and, especially supervisors, to rely solely on an employee’s chosen names. A corollary policy should allow designation of preferred pronouns, including the option to request gender neutral pronouns.

2. **Bathroom policies.** Myriad issues arise from gendered bathrooms. If an employer has any single stall bathrooms, the first and easiest step is to remove any gender designations from those bathrooms. If an employer does not have any single stall restrooms and does not wish to convert bathrooms to all gender, it should institute a policy permitting employees to utilize the bathroom of their choice. To the extent an employer remains concerned regarding employees’ comfort and safety in using the restroom, it should consider adding a lock indicating “occupied” to the external door which effectively converts a multi-stall restroom into a private non-gendered area.
3. **Spouse or partner participation in employer events.** Although the Supreme Court’s *Obegerfell* decision, which held marriage is a fundamental right, likely prompted revisions to benefits coverage, employers should also align their policies regarding participation in informal employer events such as holiday parties.
4. **Training talent acquisition.** In addition to workplace interactions, employers should consider training their talent acquisition and HR teams to ensure discrimination does not occur during the hiring process. Hiring policies prohibiting discrimination should be updated to include sexual orientation and gender identity/expression. Additionally, employers should review their application materials to limit any requests for information which could be construed as seeking self-identification.



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