

EEOC HOLDS SEXUAL ORIENTATION COVERED UNDER TITLE VII

By: Joette S. Doran

On July 15, 2015, in *Complainant v. Anthony Foxx, Secretary, Department of Transportation (FAA)*, the U.S. Equal Employment Opportunity Commission (EEOC) held that discrimination against employees based on sexual orientation is sex discrimination which is prohibited under Title VII. As such, the EEOC found it has jurisdiction over a federal employee's claim of sexual orientation discrimination. The Complainant alleged that after two years of temporary employment, he was not given a permanent position as front-line manager at the Federal Aviation Administration (FAA) facility in Miami, Florida, because he is gay. In his Charge of Discrimination, he claimed that his supervisor who was involved in selection process for the permanent position made several negative comments about his sexual orientation. For example, he stated that, when he mentioned that and his partner attended Mardi Gras in New Orleans, his supervisor said, "We don't need to hear about that gay stuff." He also alleged that his supervisor on a number of occasions said that he was a distraction in the radar room regarding his participation in conversations mentioning his male partner.

The EEOC ruled that, Title VII's prohibition of sex discrimination means that employers may not "rely on sex-based considerations or take gender into account when making employment decisions. This applies equally in claims brought by lesbian, gay, and bisexual (LGB) individuals under Title VII. The EEOC stated, "When an employee raises a claim of sexual orientation discrimination as sex discrimination under Title VII, that question is not whether sexual orientation is specifically listed in Title VII as a prohibited status for employment actions. It is not. Rather, the question for purposes of Title VII in coverage of a sexual orientation claim is the same as any other Title VII case involving allegations of sex discrimination—whether the agency has "relied on sex-based considerations" or "take[n] gender into account" when taking a challenged employment action."

The EEOC stated, "In the case before us, we conclude that Complainant's claim of sexual orientation discrimination filed in the Agency relied on sex-based considerations and took his sex into account on its employment decision regarding the permanent FAA position. The Complainant therefore, has stated a claim of sex discrimination. Indeed, we conclude that sexual orientation is inherently a "sex-based consideration," and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII. A complainant alleging that an agency took his or her sexual orientation into account in an employment action necessarily alleges that the agency has taken his or her sex in account."

The EEOC explained the three bases for sexual orientation discrimination including treating an employee less favorably because of the employee's sex, discrimination based on association with an LGB individual, or sexual stereotypes. The EEOC explained that sexual orientation discrimination is sex discrimination because it necessarily involves discrimination based on gender stereotypes which the EEOC and the courts found Title VII applies. Citing the Supreme Court's 1989 decision in *Price Waterhouse v. Hopkins* in which the courts and the Commission have recognized that LGB individuals can bring claims of gender stereotyping under Title VII if such individuals demonstrate that they were treated adversely because they were viewed—based on their appearance, mannerisms, or conduct—as insufficiently "masculine" or "feminine," the EEOC stated that discrimination based on gender stereotypes constitutes sex discrimination under Title VII.

In concluding the EEOC stated, "We apply the words of the statute Congress has charged us with enforcing. We therefore conclude that Complainants allegations of discrimination on the basis of sexual orientation state a claim of discrimination on the basis of sex. We further conclude that allegations of discrimination on the basis of sexual orientation necessarily state a claim of discrimination on the basis of sex. An employee could show that the sexual orientation discrimination that was sex discrimination because it involved treatment that would not have occurred but for the individual's sex; because it was based on the sex of the person(s) the individual associates with; and/or because it was premised on the fundamental sex stereotype, norm or the expectation that individuals should be attracted only to those of the opposite sex." Agencies should treat claims of sexual orientation discrimination as complaints of sex discrimination under Title VII...."

The EEOC's decision will be binding on all federal agencies and departments regarding federal government employees. Although not binding on private sector employers, we may expect to see an increase of filings with the EEOC based on Title VII claims of sexual orientation discrimination as more district courts may defer to the EEOC's interpretation of Title VII. Like 21 other states, Illinois employers are prohibited from discriminating against employees based on their sexual orientation and gender identity under the Illinois Human Rights Act. The EEOC's ruling further demonstrates that employers should take steps to have policies and practices in place to avoid claims of sexual orientation discrimination.

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