The Resource

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The Changing LGBT Legal Landscape: The EEOC and Sexual Orientation Discrimination

The issue of same-sex marriage has been a hot topic in the United States Supreme Court in recent years. For example, in its 2012 decision *United States v. Windsor*, the Supreme Court struck down the Defense of Marriage Act ("DOMA"), which defined marriage for the purposes of federal law as only a legal union between a man and a woman. *Windsor* struck down DOMA to the extent that it prohibited states from recognizing same-sex marriages validly entered into in other states.

The Supreme Court's 2015 decision in *Obergefell v. Hodges* garnered even more public attention. In *Obergefell*, same-sex couples challenged their states' prohibitions of same-sex marriage. By a 5 to 4 vote, the Supreme Court decided that the Fourteenth Amendment of the United States Constitution requires all states to issue marriage licenses to same-sex couples, as well as to recognize as valid same-sex marriages from other states.

One federal agency, the United States Equal Employment Opportunity Commission ("EEOC"), has now made a policy decision that will have an impact on the workplace rights of lesbian, gay, bisexual and transgender ("LGBT") individuals, but its rulings thus far have received considerably less public attention than the Supreme Court decisions in *Windsor* and *Obergefell*. This volume of *The Resource* will discuss the EEOC's position that the gender stereotyping of LGBT employees is an illegal form of employment discrimination under Title VII of the Civil Rights Act of 1964 ("Title VII").

The Prior Legislation and Sexual Orientation Discrimination

As most readers will know, the EEOC is the federal agency responsible for enforcing certain federal discrimination statutes, including Title VII, the Age Discrimination in Employment Act, the Americans With Disabilities Act and the Genetic Information Nondiscrimination Act. These statutes collectively prohibit employment discrimination on the bases of race, color, sex, religion, national origin, age, disability and genetic information.

None of these federal statutes, however, specifically prohibit employment discrimination on the basis of an employee's sexual orientation. For decades, LGBT advocacy groups have attempted to change this through the legislative process. For example, a proposed bill to amend Title VII to prohibit sexual orientation and gender identity discrimination, entitled the Employment Non-Discrimination Act

("ENDA"), has been introduced in all but one Congress since 1994. In each congressional session, however, Congress has failed to enact ENDA in any form. Although some states and local governments have passed laws protecting individuals from employment discrimination based on sexual orientation, no federal statute has explicitly done so to date.[1]

As a result, federal courts regularly denied claims from employees who argued that a termination based on their sexual orientation violated the federal employment discrimination statutes.

The Supreme Court Recognizes Discrimination Based on Sex Stereotyping

However, in its decision in *Price Waterhouse v. Hopkins*, a case that explored the impact of gender stereotypes on employees in the workplace, the Supreme Court opened the door to establishing LGBT rights based on gender stereotyping as actionable sex discrimination.

The facts of the *Hopkins* case illustrate the Court's reasoning. The plaintiff, Ann Hopkins, was a Senior Manager at Price Waterhouse ("PW"), a nationally recognized public accounting firm. Each year, as part of its annual review, PW would select employees to be considered for partnership. For the year at issue, PW considered a pool of 88 individuals; only one, Hopkins, was female.

PW did not select Hopkins as a partner that year, instead holding her nomination for reconsideration the following year. PW provided Hopkins with written feedback regarding its decision. Much of this feedback was extremely positive, citing that Hopkins had secured major contracts for PW, that clients were pleased with her work and that she was highly competent. The negative feedback Hopkins received related to her "interpersonal skills." For example, "[b]oth [s]upporters and opponents of her candidacy . . . indicated that she was sometimes overly aggressive, unduly harsh, difficult to work with and impatient with staff." Many partners' criticism was rooted in Hopkins' sex, noting that it was not appropriate for a "lady" to use profanity. The partner delivering her review counseled her to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."

The following year, PW did not even consider Hopkins for partnership. In response, Hopkins sued PW for sex discrimination. In its opinion, the Supreme Court agreed that gender was a motivating factor in PW's decision not to make Hopkins a partner. The Court's opinion stated that it did not "require expertise in psychology to know that, if an employee's flawed 'interpersonal skills' can be corrected by a soft-hue suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism." For these reasons, the Supreme Court held that sex stereotyping could be discrimination based on sex in violation of Title VII.

[1] However, in 2014, by Executive Orders, protection against discrimination in hiring and employment was extended to gender identity in the civilian federal workforce on the basis of both sexual orientation and gender identity for federal contractors. These protections do not apply to non-government contractors in the private sector.

The EEOC's Enforcement Efforts Regarding Sexual Orientation Discrimination

In the EEOC's 2012 Strategic Enforcement Plan, the EEOC announced that it was prioritizing cases of LGBT employees under Title VII's sex discrimination provisions. This was a significant break from the EEOC's prior enforcement position that claims for sexual orientation or transgender discrimination were not actionable under Title VII. The logic behind the EEOC's changed approach was that differential treatment of LGBT employees was based on outdated gender stereotypes, which the United States Supreme Court's decision in the *Hopkins* case found unlawful under Title VII.

The EEOC, in its capacity as an arbiter of discrimination claims for employees of the federal government, has decided two high profile cases enforcing this Guidance. For example, in a 2012 case, *Macy v. Holder*, the EEOC held that the Department of Justice violated Title VII when it discriminated against an employee on the basis of his transgendered status. In doing so, the EEOC explicitly overturned its prior decisions holding that sexual orientation discrimination was not actionable.

In a decision issued in the summer of 2015, *Baldwin v. Foxx*, the EEOC extended the logic of its *Macy* decision to include not only transgendered but also gay employees. The plaintiff in the *Baldwin* case, David Baldwin was an employee of the Federal Aviation Agency who was not selected for a promotion. In his complaint filed with the EEOC, he alleged that he was not selected for the promotion, despite being well qualified, because he was gay. As evidence, he cited the fact that his supervisor had told him not to talk about "gay stuff" when describing a trip with his partner, as well as the fact that his supervisor had told him that discussion of his male partner was "a distraction in the radar room."

The EEOC ruled that the FAA violated Title VII's sex discrimination provisions when it failed to promote Mr. Baldwin. In doing so, it adopted some sweeping language regarding sexual orientation discrimination. Such discrimination, the EEOC ruled, is inherently "sex discrimination because it necessarily involves discrimination based on gender stereotypes." The EEOC noted that sexual orientation discrimination is "often . . . motivated by a desire to enforce heterosexually defined gender norms." Addressing the issue of gay marriage, the EEOC stated that discrimination on the basis of whom an employee marries is "by definition" discrimination because of the employee's sex. This language provides a clear sign that the EEOC intends to enforce Title VII strongly to protect LGBT individuals from discrimination under Title VII.

Advice For Employers

There is no doubt that many employers will disagree with the EEOC's approach to sexual orientation employment discrimination. It is important to note that the EEOC merely enforces the federal discrimination statutes. It does not legislate the scope of rights provided by these statutes. As such, courts are free to disagree with the EEOC's interpretation of the federal discrimination statutes where appropriate.

Thus, employers wishing to challenge the EEOC's interpretation of Title VII with regard to sexual orientation discrimination still have that option. Before pursuing such a challenge, however, employers need to consider the substantial strategic advantages that the EEOC has in this area. Because the EEOC investigates all claims of alleged discrimination under Title VII, it is likely to find any substantiated allegations of sexual orientation discrimination to violate the law. While the employer can still litigate an employment discrimination matter, even after an adverse ruling from the EEOC, such litigation can be expensive and time-consuming. Furthermore, as discussed above, the trend among many federal courts is to accept the EEOC's logic in these cases.

Thus, employers wishing to challenge the EEOC on the issue of sexual orientation discrimination may face a steeply uphill battle. For this reason, employers should strongly consider revising their policies and practices to conform to the EEOC's guidance regarding sexual orientation discrimination.

Current and past issues of The Resource are available at www.wyrick.com under News & Publications. For more information on the topics addressed in this newsletter, please contact:

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