



Is Gender Identity and Sexual Orientation Employment Discrimination Prohibited? It Depends on Whom You Ask

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There have been many news stories over the past couple of years about sexual orientation and gender identity discrimination in the workplace and in schools. Yet, in none of those stories is it ever made clear what the actual current state of the law is. Frankly, that is because there is no clear answer – it depends on whom you ask, where you are geographically located, and whether you work for a public or private employer. This deluge of seemingly conflicting court decisions and government agency orders is unlikely to end any time soon, which can make it difficult to stay abreast of the constantly changing landscape.

The EEOC's Priorities Are Likely to Remain the Same: LGBTQ Discrimination is Illegal

The new presidential administration has brought many changes in policy across all governmental agencies. However, senior representatives of the U.S. Equal Employment Opportunity Commission (EEOC) have stressed that the agency's strategic enforcement plan (SEP) for 2017-2021, which was released in October 2016, will remain the guidepost for the types of cases and issues on which the EEOC will focus – at least until they are instructed otherwise by the new administration. One of the areas identified in the SEP was emerging and developing issues, which specifically included the active enforcement of LGBTQ protections in the workplace.

The EEOC has interpreted Title VII's prohibition against "sex" discrimination as also prohibiting discrimination against employees who identify as LGBTQ. Some appeals courts have accepted the EEOC's interpretation and given it deference, while others have not. In May 2016, for example, the United States District Court for the Eastern District of Virginia (Richmond) very clearly held that the EEOC's guidance is not binding on the courts and refused to adopt the EEOC's interpretation of the law. The Court found that whether gender identity and sexual orientation are covered by Title VII is a matter for Congress to decide; not the courts.

Executive Order for Government Contractors: LGBTQ Discrimination is Illegal

On July 21, 2014, then-President Obama signed Executive Order 13672 which provided that any company that is a contractor or subcontractor of the federal government is prohibited from discriminating against its employees on the basis of sexual orientation and gender identity. The Order also requires covered employers to add sexual orientation and gender identity to their EEO policies and postings. This Executive Order went into effect on April 8, 2015. While an Executive Order of one President (which is executed without the input of Congress) can be undone with the flick of a pen of a subsequent

President; so far, President Trump has not given any indication that he intends to rescind EO13672.

The Continuing Divide of the Courts: No Clear Answer

There are simply no clear answers in the U.S. judicial system. So, if employers were hoping that 2017 would bring clarification from the courts regarding protections for the LGBTQ community under Title VII, this seems unlikely. The last few weeks have showed us this.

On April 4, 2017, the 7th Circuit Court of Appeals became the first federal appellate court to hold that discrimination based on a person's sexual orientation is a form of sex discrimination and violates Title VII. "The Supreme Court's decisions, as well as the common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex, persuade us that the time has come to overrule our previous cases that have endeavored to find and observe that line," said Judge Wood in the majority opinion. Importantly, the 7th Circuit's opinion did not equate sexual orientation discrimination to a form of sex stereotyping discrimination, which the Supreme Court has previously acknowledged violates Title VII. Instead, the 7th Circuit allowed sexual orientation discrimination to stand on its own as a type of sex discrimination. Thus, if you live in Indiana, Illinois, or Wisconsin, it is now the law of the land that an employer can be held liable for discrimination and retaliation against an employee due to that person's sexual orientation.

The recent decisions of the 2nd and 11th Circuits similarly signaled that Title VII may prohibit discrimination against an employee based on his or her sexual orientation, but these opinions did not take as bold of a stance as the 7th Circuit. In *Jameka K. Evans v. Georgia Regional Hospital, Charles Moss, et al.*, the 11th Circuit held: "[T]here is no sexual orientation action under Title VII." But the Court clarified that an employee could bring a claim that alleges discrimination based on gender nonconformity – basically a sex stereotyping analysis. The 2nd Circuit Court of Appeals similarly held *en banc* that employment discrimination based on sexual orientation is almost certainly prohibited under Title VII's ban on sex stereotyping. The claims brought in the case *Christiansen v. Omnicom Group* stemmed from an HIV-positive gay man experiencing repeated harassment and taunting. For example, "Christiansen's supervisor also made remarks about the connection between effeminacy, sexual orientation, and HIV status."

In short, while appellate courts have been taking steps to cloak sexual orientation discrimination in the protections afforded by Title VII, there are marked differences in the approaches used to get there. This debate is far from over, as long as Congress leaves a question for whether and how sexual orientation discrimination should violate federal law. As such, we can expect that the Supreme Court will be called upon to decide this debate in the near future.

State and Local Laws May Afford Protections to LGBTQ Employees

Employers also need to be aware that the states and localities in which their companies operate may have enacted employment non-discrimination laws that specifically cover or address sexual orientation and gender identity. By the end of 2016, approximately twenty-two states and the District of Columbia, as well as approximately 200 municipalities, have adopted laws covering, to varying degrees, employees who identify as LGBTQ.

Virginia state law does not currently address discrimination based on gender identity or sexual orientation in private sector employment. Nevertheless, Arlington County and the City of Alexandria, for example, prohibit discrimination in employment for sexual orientation. Further, on January 11, 2014, Governor Terry McAuliffe signed an executive order that prohibited employment discrimination for sexual orientation and gender identity in state offices. In addition, in an Attorney General's Opinion Letter dated May 10, 2016, the Virginia Attorney General opined that, while the Virginia Human Rights Act does not specifically prohibit sexual orientation and gender identity discrimination, it was intended to

track federal law. As such, he opined that, if federal law develops such that sexual orientation and gender identity are covered by Title VII, Virginia will follow.

Practical Issues for Human Resources Professionals

Despite the uncertainty of the protections afforded to employees who identify as LGBTQ under Title VII, many employers still enact and enforce company policies that prohibit discrimination against employees on any basis covered by Title VII, as well as sexual orientation and gender identity.

- **EEO Statements:** Consider acknowledging protection and non-discrimination based on sexual orientation, gender identity and gender expression among other traditional classes.
- **Management Philosophy:** Encourage free and direct communication with management to promote openness and fairness.
- **Anti-Harassment Policies:** Consider specifically covering harassment based on sexual orientation and gender-specific traits.
- **Gender Neutral Dress and Appearance Policies:** Dress policies should: (1) be reasonable; (2) be non-stereotypical; and (3) serve a legitimate business purpose, subject to reasonable accommodation. Policies that are gender-neutral will be legal.
- **Restrooms:** This is a very sensitive issue today. Policies addressing the safety of bathroom users raise the question of whose safety is being protected. At the end of the day, co-worker apprehension is almost always outweighed by the risk of discrimination, and company policies should reflect this. Communication and training are critical to this point. OSHA has taken the position in written guidance that employees should be given permission to use the restroom that conforms to their gender identity.

In sum, although the law on gender identity and sexual orientation discrimination and harassment is still quite fluid in the judiciary, because the EEOC and other federal and state government agencies have taken the position that LGBTQ employees are protected from discrimination by Title VII, Human Resources professionals should consider reviewing their company EEO policies and analyzing whether those policies offer adequate protection for LGBTQ employees.

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- Laura D. Windsor – 804.420.6466 – lwindsor@williamsmullen.com

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