

EEOC Finds Discrimination Against Transgendered Employee Unlawful Under Title VII

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Employers should take note that the Equal Employment Opportunity Commission (EEOC) recently concluded that discrimination against transgendered employees is sex discrimination under Title VII of the Civil Rights Act of 1964 (Title VII).

Title VII prohibits employment discrimination by private employers, as well as federal, state and local governments on the basis of race, color, religion, sex and national origin.

Transgender is a term for people whose gender identity, expression or behavior is different from those generally associated with their sex at birth. Gender transition is the period during which a person begins to live in their new gender.

In *Macy v Eric Holder*, the EEOC held that discrimination based on gender identity, change of sex, and/or transgender status is unlawful under Title VII as discrimination based on sex.

The complainant, Mia Macy (Macy), a transgendered female, applied for a position with a federal agency: the Bureau of Alcohol, Tobacco, Firearms and Explosives (the Bureau). At the time, Macy was still presenting herself as a male. Because Macy was well qualified, the director of the crime lab allegedly told her the job was hers as long her background check was clear. In January 2011, the director repeated this promise, and Aspen, the staffing firm responsible for filling the vacancy at the Bureau, provided Macy with the necessary paperwork to complete.

In late March, Macy informed Aspen that she was in the process of transitioning from male to female and suggested that the Bureau be notified. On April 3, Aspen confirmed that the Bureau had been notified of her name and gender change. Five days later, Macy was informed that the position at the Bureau would not be filled due to budget cuts.

According to Macy, she was told that someone else was hired for the job. As a result, in June 2011, Macy filed a complaint with the Bureau, alleging that she was discriminated against on the basis of her sex, gender identity and sex stereotyping.

Due to special procedural rules that govern federal employment discrimination claims, Macy was required to file her complaint with the Bureau, who was then required (as opposed to the EEOC) to investigate the complaint.

The Bureau confirmed that it would process the sex discrimination claim under Title VII; however it would process the gender identity and sex stereotyping claims under the Bureau's "policy and practice" procedures, which provided fewer remedies and no right for a hearing before or appeal to the EEOC.

Macy appealed this decision to the EEOC, and requested that the EEOC process her claim in full under its Title VII rules. The EEOC determined that the crux of Macy's complaint was that she suffered discrimination because she made her transgender status known. It then ruled that "claims based on transgender status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII's sex discrimination prohibition..." Relying in part on a Sixth Circuit Court of Appeals decision, the EEOC found that the Bureau had erred by separating Macy's complaint into two separate causes: one based on sex discrimination, and another based on "sex stereotyping," "gender transition/change of sex," and "gender identity."

Each of the formulations is simply a different way of saying discrimination based on sex, which states a claim under Title VII. "Sex" under Title VII includes both biological differences between men and women, and gender (which encompasses not only biological sex, but also social and cultural aspects of masculinity and femininity).

When an employer discriminates against someone because they are transgendered, it is making a decision because it is uncomfortable that the individual is transitioning from one gender to another or because the individual is identifying as a transgendered person. It is a gender based decision and involves unlawful sex stereotyping.

The EEOC rejected the argument that applying Title VII to transgendered individuals creates a new protected status under the law any more than applying Title VII's prohibition against religious discrimination to a "class" of employees "who have converted from Islam to Christianity or from Christianity to Judaism." Therefore, discrimination because the individual is transgendered is discrimination on the basis of sex and unlawful under Title VII.

While lesbians, gays, bi-sexuals and transgendered individuals (LGBT) are not *per se* protected under state or federal civil rights laws, theories continue to develop which afford such individuals protection against discrimination. Many progressive employers prohibit discrimination on the basis of a LGBT status. Employers are encouraged to consult the author or their Plunkett Cooney employment attorney as policies are developed or LGBT issues arise.

EEOC FINDS DISCRIMINATION AGAINST TRANSGENDERED EMPLOYEE UNLAWFUL UNDER TITLE VII Cont.

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