



EEOC FILES LAWSUITS ALLEGING SEX DISCRIMINATION AGAINST TRANSGENDER INDIVIDUALS

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In advising your clients on HR matters, you will find that most of them are familiar with the list of categories protected from employment discrimination under Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963, the Age Discrimination in Employment Act of 1967, Sections 501 and 505 of the Rehabilitation Act of 1973, Titles I and V of the Americans with Disabilities Act of 1990 (ADA), Title II of the Genetic Information Non-discrimination Act (GINA), and the Civil Rights Act of 1991. These laws prohibit discrimination based on race, color, sex, religion, national origin, age, disability, and genetic information, as well as reprisal for protected activity. Absent from this list is any mention of sexual orientation or gender identity.

However, the EEOC has held that discrimination against an individual because that person is transgender (also known as gender identity discrimination) is discrimination because of sex and therefore is covered under Title VII.¹ The EEOC has also found that claims by lesbian, gay, and bisexual individuals alleging sex-stereotyping state a sex discrimination claim under Title VII.²

Federal legislation, both supported and resisted by advocacy groups, has been proposed for years to protect transgender, lesbian and gay employees. Specifically, the Employment Non-Discrimination Act (ENDA) would prohibit employment discrimination on the basis of sexual orientation and gender identity. But while ENDA has been introduced in every Congress since 1994 (except the 109th), it has never mustered enough votes to make it to the President's desk.

It now appears that the EEOC has decided to take matters into its own hands in that on September 25, 2014, the EEOC made history by filing its first lawsuits against business alleging sex discrimination against transgender employees.

The first lawsuit involves Michigan-based RG & GR Harris Funeral Homes, Inc.³ The EEOC has alleged that the employer discriminated based on sex in violation of federal law by firing a Garden City, Mich., funeral director/embalmer because she is transgender, because she was transitioning from male to female, and/or because she did not conform to the employer's gender-based expectations, preferences, or stereotypes. Employer in this case is a funeral home operator with several locations in Michigan. Employer had employed Amiee Stephens as a Funeral Director/Embalmer since October 2007 and employee had always adequately performed the duties of that position. In 2013, employee gave Harris a letter explaining she was undergoing a gender transition from male to female, and would soon start to present (e.g., dress) in appropriate business attire at work, consistent with her gender



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identity as a woman. Two weeks later, the owner of employer fired employee, telling her that what she was “proposing to do” was unacceptable. The EEOC has alleged that such behavior violates Title VII, which prohibits sex discrimination, including that based on gender stereotyping. The EEOC filed suit seeking both monetary and injunctive relief after first trying to reach a pre-litigation settlement through its conciliation process.

The second lawsuit involves Lakeland Eye Clinic, P.A.⁴ Lakeland, is a Florida based organization of health care professionals. The EEOC alleged that Lakeland discriminated based on sex in violation of federal law by firing an employee because she is transgender, because she was transitioning from male to female, and/or because she did not conform to the employer’s gender-based expectations, preferences, or stereotypes. According to the complaint, Lakeland’s employee had performed her duties satisfactorily throughout her employment. However, after she began to present as a woman and informed the clinic she was transgender, Lakeland fired her. The EEOC has alleged that such conduct violates Title VII, which prohibits sex discrimination, including that based on gender stereotyping. In this case, as in Harris, the EEOC filed suit seeking both monetary and injunctive relief after first trying to reach a pre-litigation settlement through its conciliation process.

The EEOC announced in its news releases for the Harris and Lakeland cases that these cases are part of the EEOC’s ongoing efforts to implement its Strategic Enforcement Plan (SEP) adopted in December of 2012, which SEP included “coverage of lesbian, gay, bisexual and transgender individuals under Title VII’s sex discrimination provisions, as they may apply” as a top Commission enforcement priority.⁵

Up until now, the EEOC’s has made its position known that it believes that transgender individuals are protected by Title VII’s gender discrimination provisions. However, such a position is not clear on the face of Title VII. As such, the EEOC’s position does not carry the weight of law. The EEOC now wishes to test its position in the courts in order to give its position more force.

While these cases work their way through the courts, employers should be ready to deal with issues that arise with transgender employees in their workplace. These issues can range from decisions regarding whether or not a transitioning employee be allowed to use the restroom corresponding to their gender presentation, to an employer’s duty to change an employee’s first name on their employment records based on a request.

John R. LaBar is available to consult with employers regarding a review of their employment law and HR needs.

This publication is a service to our clients and friends. It is designed to give only general information on the topic actually covered and is not intended to be a comprehensive summary of recent developments in the law, to treat exhaustively the subjects covered, to provide legal advice, or to render a legal opinion.



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¹ See *Macy v. Department of Justice*, EEOC Appeal No. 0120120821 (April 20, 2012), <http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt>.

² See *Veretto v. U.S. Postal Service*, EEOC Appeal No. 0120110873 (July 1, 2011), <http://www.eeoc.gov/decisions/0120110873.txt>; *Castello v. U.S. Postal Service*, EEOC Request No. 0520110649 (Dec. 20, 2011), <http://www.eeoc.gov/decisions/0520110649.txt>.

³ *EEOC v. R.G. & G.R. Harris Funeral Homes Inc.*, Case No. 2-14-cv-13710 filed in the United States District Court for the Eastern District of Michigan, Southern Division.

⁴ *EEOC v. Lakeland Eye Clinic, P.A.*, Case No. 8:14-cv-02421 filed in the United States District Court for the Middle District of Florida, Tampa Division.

⁵ In addition to the EEOC's lawsuits, on December 3, 2014, the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) announced a Final Rule that will prohibit federal contractors from discriminating in employment on the basis of sexual orientation or gender identity. This Final Rule implements Executive Order (EO) 13672, signed by President Barack Obama on July 21, 2014, which adds sexual orientation and gender identity to the prohibited bases of discrimination in EO 11246.