



Arkansas Association of Defense Counsel

April 4, 2016

Current State of the Law Regarding Workplace Protections for LGBT Employees

By Justin E. Parkey

The Human Resources Director of one of our corporate clients recently asked whether she needed to update the company's equal employment opportunity policy to include a prohibition against discrimination based upon sexual orientation and/or gender identity. Title VII of the Civil Right Act of 1964 ("Title VII"), of course, does not include explicit protections against sexual-orientation and gender-identity discrimination.¹ However, the U.S. Equal Employment Opportunity Commission ("EEOC") has interpreted Title VII as protecting employees from gender identity and sexual orientation discrimination in the workplace. This article will briefly touch on the current state of the law with regard to workplace discrimination against lesbian, gay, bisexual and transgender ("LGBT") employees and the best practices for employers.

Title VII expressly prohibits workplace discrimination against an employee based on the employee's race, color, religion, sex, or national origin.² Again, Title VII contains no explicit prohibition against workplace discrimination on the stand-alone basis of sexual orientation or gender identity. However, it has been the law for some time that an employee may assert a claim under Title VII for workplace discrimination based on the employee's gender non-conforming behavior and appearance.³ "Sexual orientation alone cannot be the alleged gender non-conforming behavior that gives rise to an actionable Title VII claim under a sex-stereotyping theory."⁴ Instead, the inquiry is focused on the employee's readily demonstrable characteristics in the workplace, such as the employee's "appearance or behavior" as revealed,

for example, through the employee's "manner of walking and talking at work, as well as [his/her] work attire and [his/her] hairstyle."⁵ In short, the line between discrimination based on gender stereotyping and discrimination based on sexual orientation is blurry, at best.

The EEOC, in December 2012, recognized "coverage of lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions" as an emerging and developing issue as part of the EEOC's Strategic Enforcement Plan for fiscal years 2013–2016.⁶ In the face of countervailing federal case law, the EEOC has issued opinions holding that workplace discrimination against an individual because that person is transgender (gender-identity discrimination) and discrimination against an individual because of that person's sexual orientation are prohibited under Title VII's sex discrimination category.⁷ Statistics from the EEOC show that the number of claims it is receiving each year based on gender-identity and sexual-orientation discrimination is growing.⁸ For fiscal year 2014, the EEOC received a total of 1,100 charges that included allegations of sex discrimination related to an employee's sexual-orientation and/or gender-identity/transgender status.⁹ The number of LGBT-related discrimination charges received in fiscal year 2015

⁵ *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 763 (6th Cir. 2006).

⁶ U.S. Equal Employment Opportunity Commission, Strategic Enforcement Plan FY 2013–2016, <http://www.eeoc.gov/eeoc/plan/upload/sep.pdf>.

⁷ *Macy v. Department of Justice*, EEOC Appeal No. 0120120821 (April 20, 2012); *David Baldwin v. Department of Transportation*, EEOC Appeal No. 0120133080 (July 15, 2015).

⁸ U.S. Equal Employment Opportunity Commission, What You Should Know About EEOC and the Enforcement Protections for LGBT Workers, http://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm.

⁹ *Id.*

¹ 42 U.S.C. § 2000e-2.

² 42 U.S.C. § 2000e-2(a).

³ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality).

⁴ *Pambianchi v. Arkansas Tech Univ.*, 95 F. Supp. 3d 1101, 1114 (E.D. Ark. 2015).

grew by roughly 28%, for a total of 1,412.¹⁰ For fiscal year 2015, the total amount of monetary benefits paid by employers stemming from LGBT-related charges totaled more than \$3.3M, which represented an increase of 51% from fiscal year 2014.¹¹

Despite the EEOC's progressive decisions regarding gender-identity and sexual-orientation discrimination in the workplace, those decisions, while relevant, are not binding upon the federal courts and are, instead, simply persuasive authority.¹² Indeed, since the EEOC's groundbreaking July 2015 decision holding that sexual-orientation discrimination is barred by existing Title VII law, most federal courts considering the issue found that Title VII does not prohibit sexual-orientation discrimination.¹³ However, at least two district courts—the Central District of California and the Middle District of Alabama—have adopted the EEOC's position and found that sexual-orientation discrimination is prohibited pursuant to Title VII under the sex-discrimination category.¹⁴ There has yet to be a single federal appellate court to address directly the

¹⁰ *Id.*

¹¹ *Id.*

¹² *Univ. of Tennessee v. Elliott*, 478 U.S. 788, 793 (1986); *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141–42 (1976), *superseded by statute on other grounds as recognized in Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983).

¹³ *Pambianchi v. Arkansas Tech Univ.*, 95 F. Supp. 3d 1101, 1112 (E.D. Ark. 2015); *see also Tinory v. Autozoners*, Case No. CV 13-11477-DPW, 2016 WL 320108, at *4 (D. Mass. Jan. 26, 2016); *Igasaki v. Illinois Dep't of Fin.*, Case No. 15-CV-03693, 2016 WL 232434, at *3 (N.D. Ill. Jan. 20, 2016); *Phipps v. Hous. Auth. of New Orleans*, Case No. CA 15-3296, 2016 WL 164916, at *5 (E.D. La. Jan. 13, 2016); *Luna v. Bridgevine, Inc.*, Case No. 15-22859-CIV-COOKE/TORRES, 2016 WL 128460, at *3 (S.D. Fla. Jan. 12, 2016); *Bland v. Burwell*, Case No. 14-0226-CV-W-ODS, 2016 WL 110597, at *1 (W.D. Mo. Jan. 8, 2016); *Reed v. South Bend Nights, Inc.*, ___ F. Supp. 3d ___, ___, Case No. 15-10443, 2015 WL 9302392, at *2 (E.D. Mich. Dec. 22, 2015); *Pastoriza v. Keystone Steel & Wire*, Case No. 15-CV-1174, 2015 WL 8490902, at *5 n.2 (C.D. Ill. Dec. 10, 2015); *Maldonado-Catala v. Municipality of Naranjito*, Case No. CIV. 13-1561 (BJM), 2015 WL 6454074, at *8 (D.P.R. Oct. 26, 2015); *Moore v. Greyhound Bus Lines*, Case No. 15-CV-5512 JG, 2015 WL 6128874, at *3 n.1 (E.D.N.Y. Oct. 16, 2015); *Rodriguez v. New York City Health & Hospitals Corp.*, Case No. 14 CIV. 4960 (BMC), 2015 WL 5229850, at *4 (E.D.N.Y. Sept. 8, 2015); *Harder v. New York*, 117 F. Supp. 3d 157 (N.D.N.Y. 2015); *Roberts v. United Parcel Serv., Inc.*, 115 F. Supp. 3d 344, 362 (E.D.N.Y. 2015).

¹⁴ *Videckis v. Pepperdine Univ.*, Case No. CV 15-00298 DDP (JCx), 2015 WL 8916764 (C.D. Cal. Dec. 15, 2015); *Isaacs v. Felder Servs., LLC*, Case No. 2:13-cv-693-MHT, 2015 WL 6560655 (M.D. Ala. Oct. 29, 2015)

EEOC's new position as set forth in its *Baldwin* decision. Until then, this issue will remain open and unsettled.

There is yet another angle to consider—the United States Supreme Court's recent same-sex marriage ruling.¹⁵ To be certain, the United States Supreme Court's historic 2015 *Obergefell* decision, in which the Court held that the U.S. Constitution guarantees a nationwide right to same-sex marriage, was a watershed moment. As the *Obergefell* decision has yet to reach its first anniversary, the full measure of the Court's ruling remains to be seen. So far, it seems that the *Obergefell* decision is not being applied in the employment-law context with regard to the interpretation and enforcement of Title VII workplace-discrimination claims. However, one thing is certain: the *Obergefell* decision moved the needle in terms of providing greater protections for the LGBT community as a whole. With the EEOC's aggressive pursuit of sexual-orientation and gender-identity discrimination claims, the next gay-rights battle will probably center on increasing workplace protections for the LGBT community. Indeed, efforts to add explicit sexual orientation protections to Title VII through the Employment Non-Discrimination Act ("ENDA")¹⁶ or some other congressional action will likely intensify going forward.

Returning to the original question posed by the Human Resources Director, our answer was that—technically speaking—there was no need to amend the company's equal employment opportunity policy to include gender identity and sexual orientation as bases for prohibited discrimination. A federal district court in Michigan said it best: "[s]exual orientation is not a protected class under Title VII. And while discrimination on the basis of sexual orientation has no place in our society, Congress has not yet seen fit to provide protection against such harassment."¹⁷ However, our response to our client came with a caveat: because of the EEOC's aggressive pursuit of gender-identity and sexual-orientation discrimination claims, the employer must be on guard. For all intents and purposes, employers should treat claims of gender-identity and/or

¹⁵ *Obergefell v. Hodges*, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015).

¹⁶ *See* Employment Non-Discrimination Act of 1994, H.R. 4636, 103rd Congress (1994), *available at* www.govtrack.us/congress/bills/103/hr4636.

¹⁷ *Reed v. South Bend Nights, Inc.*, Case No. 15-10443, 2015 WL 9302392, at *2 (E.D. Mich. Dec. 22, 2015) (citations, quotations, and alterations omitted).

sexual-orientation discrimination just as seriously as it would, for example, a race-discrimination claim. Looking forward, these issues are far from settled and will continue to evolve in the coming years. In the meantime, an ounce of prevention is worth a pound of cure.

The thanks of the AADC go out to Justin Parkey of Waddell, Cole & Jones for writing this article.



We welcome your articles and thoughts for future editions.

**We Are Better Together:
Support The AADC**

Membership Applications available at <http://www.arkansasdefensecounsel.net/application.php> Please share this with friends and colleagues.