

EEOC gets Aggressive, will Start Treating all Sex Orientation Claims as Title VII Discrimination

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Once upon a time, there was a plaintiff. This plaintiff had been passed over for a promotion because she was gay, so she sued her employer. When she looked at federal law, however, she found that Title VII did not include “sexual orientation” on its list of protected classes. So this plaintiff came up with a clever idea: she claimed that she actually was discriminated against based on her *gender* (a class listed in Title VII), arguing that the action was taken against her because she did not *conform to gender stereotypes*.

Her case went to the Supreme Court in a case called Price Waterhouse v. Hopkins, and the Court approved of her claim. And, since 1989, that clever theory has been the sole means of bringing sexual orientation-related claims in federal courts — rather than bringing a claim based on sexual orientation itself, plaintiffs have been required to prove that they were discriminated against based upon failure to conform to *gender norms*, thereby reshaping their claim into one based on “sex.” If a plaintiff couldn’t shoehorn their claim into one involving gender stereotypes, he or she was out of luck.

In a bombshell decision issued on July 15, though, the EEOC forcefully stated that it was doing away with the legal gymnastics explained above. Instead, as far as the EEOC is concerned, “**sexual orientation is inherently a ‘sex-based consideration,’ and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII.**” Thus, the EEOC will hear and act on claims brought by employees for alleged sexual orientation discrimination just like any other claim.

Now, a few caveats regarding this decision: (i) the EEOC isn’t making new law, but rather announcing its own interpretation of existing law; (ii) even the EEOC wasn’t united on this — the decision was issued 3-2, with two dissenting commission members; and (iii) it remains to be seen whether federal courts will follow the EEOC’s lead, and that isn’t a sure thing given courts’ prior unwillingness to recognize direct sexual orientation claims. Still, the EEOC’s decision provides forceful language for LGBTQ advocates, such as the following passage:

Discrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms. “Sexual orientation” as a concept cannot be defined or understood

without reference to sex. A man is referred to as “gay” if he is physically and/or emotionally attracted to other men. A woman is referred to as “lesbian” if she is physically and/or emotionally attracted to other women. It follows, then, that sexual orientation is inseparable from and inescapably linked to sex and, therefore, that allegations of sexual orientation discrimination involve sex-based considerations.

So does this mean that employers need to change their practices? No. Does it mean that a whole new group of plaintiffs will start bringing claims? Nope. Is it even surprising that the EEOC under the Obama administration made this statement? Not really. Does it mean that the EEOC is going to be pushing these “direct” sexual orientation claims in federal court? **You better believe it.** And in that regard, employers should be doubly alert for discrimination against LGBTQ employees in the workplace going forward — one of the only remaining brakes on the EEOC’s push for greater legal rights for LGBTQ employees has been removed. While the courts will have the final say on this, as the EEOC itself acknowledges, we’ve said it before and we’ll say it again: what the EEOC thinks matters. They’re the ones knocking on doors and investigating claims, and employers should be aware that they may come knocking soon.

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