



The EEOC Weighs In on Sexual Orientation and Title VII

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On July 16, 2015, the Equal Employment Opportunity Commission (“EEOC”) issued a [3-2 decision](#) finding that under Title VII, sex discrimination includes actions based on sexual orientation. The decision involved an appeal from a Federal Aviation Administration (“FAA”) dismissal of a sexual orientation discrimination complaint. The issue before the EEOC was whether a complaint alleging discrimination based on sexual orientation in violation of Title VII lies within the EEOC’s jurisdiction. Apparently buoyed by the U.S. Supreme Court’s recent decision on same sex marriage, the EEOC unequivocally answered that question with a resounding “Yes.”

In finding that Title VII’s prohibitions on sex discrimination include sexual orientation, the EEOC acknowledged that sexual orientation is not explicitly listed in Title VII as a prohibited basis for employment actions. Instead, the EEOC refocused the question as whether the employer has “relied on sex-based considerations” or “taken gender into account” when taking the challenged employment action. In undertaking that analysis, the EEOC concluded “that 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.”

The EEOC also looked at “sexual orientation” in the context of “associational discrimination,” determining that “[s]exual orientation discrimination is also sex discrimination because it is associational discrimination on the basis of sex.” Further explaining, the EEOC stated, “[t]hat is, an employee alleging discrimination on the basis of sexual orientation is alleging that his or her employer took his or her sex into account by treating him or her differently for *associating* with a person of the same sex.”

While the EEOC took a strong position on the inclusion of sexual orientation in Title VII’s protections in its July 16 decision, it is important to note that the EEOC’s decision is not binding on federal or state courts. It is also important to note that there is a substantial amount of existing case law that holds that sexual orientation is not a protected category under Title VII, and the EEOC even noted in a footnote in their decision that the EEOC itself had previously determined that Title VII’s protections did not extend to sexual preference or orientation. Time will tell as to whether courts will agree with and adopt the EEOC’s analysis.

Action Items and Take Away for Employers

While the EEOC’s decision does not carry the same force of law as legislation or a U.S. Supreme Court opinion, employers should not wait for court determinations on this issue before considering revising existing non-discrimination policies. Employers should also understand that the most significant immediate impact of the EEOC’s decision is that the EEOC’s intake officers will immediately accept sexual orientation discrimination charges, the EEOC will investigate those charges, and it is likely that the EEOC will file sexual orientation discrimination lawsuits against employers to force the courts to take a position on this issue. Finally, employers should understand that the EEOC’s decision is consistent with recent momentum on the issue of sexual orientation discrimination, and employers who choose not to make revisions to policy based on this decision should closely monitor court rulings and legislation on this issue.

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