

Complaints from Transgender Employees by the EEOC: How Can a Company Prepare & Respond?

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In mid-2012, the United States Equal Employment Opportunity Commission (“EEOC” or “Commission”) issued an opinion, *Macy v. Department of Justice*, that declared discrimination against transgender employees is discrimination “based on sex” that is prohibited by Title VII of the Civil Rights Act of 1964.¹ In late 2012, the EEOC issued a “Strategic Enforcement Plan” that noted a “top Commission enforcement priority” is the coverage of lesbian, gay, and transgender (“LGBT”) individuals under Title VII’s sex discrimination prohibition.

Beginning in 2013, the EEOC began to track complaints filed by LGBT employees instead of dismissing those complaints without tracking them. And, in September 2014, the EEOC filed two lawsuits against private employers for discrimination against transgender employees, *EEOC v. Lakeland Eye Clinic* and *EEOC v. R.G. & G.R.*

*Harris Funeral Homes, Inc.*² Although the EEOC’s interpretation may ultimately be determined by the U.S. Supreme Court or be superseded by Congress, companies should prepare for and learn how to respond to Title VII claims from transgender employees given the EEOC’s recent enforcement actions.

EARLY JUDICIAL AND AGENCY ACTION SETS THE STAGE

In 1989, the U.S. Supreme Court held in *Price Waterhouse v. Hopkins* that Title VII protections that prohibited discrimination “on the basis of sex” included claims for sex stereotyping, where a person is discriminated against based on perceived nonconformity with gender stereotypes.³ This case established the framework that many courts use to evaluate discrimination claims that may appear to be based on sexual orientation but may be action-

able under a sex stereotyping theory. In *Hopkins*, the Supreme Court held that a female employee who was denied partnership in an accounting firm because she was too “macho,” told to go to “charm school,” and dress more like a woman, had a valid claim for unlawful discrimination on “the basis of sex” due to the sex stereotyping she experienced.

In *Macy v. Dep’t of Justice*, the EEOC was presented with a Department of Justice employee who applied for and was provisionally hired for a ballistics position within the ATF while presenting as a man. During the background check process, the employee informed her superiors of her transition to a female and was suddenly informed that the position to which she was being cleared was now “unavailable” due to budget cuts. The employee quickly determined that the position had been filled with someone else and filed an internal

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complaint of discrimination on the basis of sex and on the basis of her transgender status. The Department of Justice accepted the complaint of discrimination on the basis of sex under established EEOC policies but would only consider the complaint on the basis of transgender status under internal DOJ policies because of its view that Title VII did not apply to transgender discrimination claims. To hasten the EEOC evaluation of her complaint, the employee dropped her claim for discrimination on the basis of sex and pursued only the claim that she was unlawfully discriminated against on the basis of her gender identity/transgender status. The Department of Justice denied her complaint in accordance with its interpretation that Title VII did not apply. The employee then sought EEOC review of the Department's position.

The EEOC applied the Court's *Hopkins* ruling to conclude that the employee had stated a valid claim for sex discrimination on the basis of sex stereotyping. But the Commission went further and found that "evidence of gender stereotyping is simply one means of proving sex discrimination." Said the Commission: "[A] transgender person who has experienced discrimination based on his or her gender identity may establish a prima

facie case of sex discrimination through any number of different formulations . . . [t]hese different formulations are . . . simply different ways of describing sex discrimination." Explicitly overruling earlier Commission decisions to the contrary, the EEOC held that "that intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination 'based on . . . sex,' and such discrimination therefore violates Title VII."

RECENT ENFORCEMENT ACTIONS

Although the EEOC only has adjudicatory authority with respect to federal employees, the Commission does review administrative complaints filed against private employers and if it finds probable cause for discrimination, the EEOC can file lawsuits against private employers for actions that violate Title VII. In September 2014, following its Strategic Enforcement Plan and the holding of *Macy v. Dep't of Justice*, the Commission filed two lawsuits against private employers who fired transgender employees because of their transgender status. These cases will become the first legal tests of whether the Commission's *Macy* interpretation will be enforced on a private employer by a federal court rather than

cases that have simply applied the *Hopkins* "sex stereotyping" theory.

In *EEOC v. Lakeland Eye Clinic*,⁴ the Commission alleged that an employer, by discriminating against a transgender woman, discriminated on the basis of sex in violation of Title VII. According to the complaint, an employee named Michael Branson—who presented as a male and complied with traditional male gender norms—was hired by Lakeland Eye Clinic in July 2010 and successfully performed her job duties. After Branson began to wear feminine clothes, the employer confronted her about the changed appearance. Branson informed the employer that she was undergoing a gender transition from male to female and would soon legally change her first name to Brandi. The complaint further alleged that the managers and other employees made derogatory comments to her, began to stop making referrals to her division within the clinic, and within two months of Branson's announcement about her transition, the employer fired her on the purported basis that it was closing that division and not hiring a replacement. Soon after her termination, Branson found out that Lakeland had, in fact, hired a replacement for her position who was a male employee that complied with traditional gender norms. Having

been unable to resolve the dispute between the Branson and Lakeland, the EEOC filed its suit alleging discrimination on the basis of sex under all three possible theories: that the employer acted because Branson is transgender; because of Branson's transition from male to female; and/or because Branson did not conform to the employer's sex- or gender-based preferences, expectations, and stereotypes. The employer response to the complaint was due December 1, 2014.

In *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*,⁵ the Commission again alleged discrimination on the basis of sex due to the firing of a transgender employee. According to this complaint, the employee (Stephens) was a funeral director/embalmer since October 2007 at Harris Funeral Homes. On July 31, 2014, according to the complaint, Stephens informed her employer that she would be undergoing a transition from male to female and intended to dress in appropriate business attire for a woman. About two weeks later, the EEOC alleged that the owner of Harris Funeral Homes fired Stephens and told her that what she was "proposing to do" was unacceptable. The EEOC alleged discrimination against Stephens on the basis of sex under all three possible theories: that the em-

ployer acted because Stephens is transgender; because of Stephens' transition from male to female; and/or because Stephens did not conform to the employer's sex- or gender-based preferences, expectations, and stereotypes. In lieu of responding to the factual allegations in court, the employer has filed a motion to dismiss the case on the basis that gender identity disorder is not covered by Title VII, that the EEOC's prosecution of the gender identity claim is without authority, and that the claim is not covered even under the *Price Waterhouse* sex stereotyping theory. The EEOC's response to the employer's legal arguments was due in late December.

The EEOC's suits in these two cases will present the first legal tests of the EEOC's new interpretation of the sex discrimination provision in Title VII. Given the lack of any complicated factual history for the suits, the cases should provide a meaningful precedent that could establish national case law on the issue of transgender rights under Title VII. With the EEOC's increased enforcement action, employers today should consider how to take preemptive action to prevent discrimination against a transgender employee or applicant before complaints arise.

PREEMPTIVE ACTION CAN PREVENT DISCRIMINATION OF TRANSGENDER EMPLOYEES BEFORE COMPLAINTS

Employers can best prevent discrimination complaints by fostering a workplace environment that encourages diversity, respects every individual, and discourages any type of employment discrimination. Employers can and should adopt some simple, commonsense policies today that can prevent illegal discrimination complaints tomorrow. Given the enforcement priorities of the EEOC, employers cannot afford to ignore the potential discrimination that LGBT employees—especially transgender employees—face in the workplace.

Audit policies to ensure compliance with antidiscrimination laws.

A pre-emptive equal employment opportunity policy that prohibits discrimination, harassment and other related conduct demonstrates is a necessary first step. The policy should: 1) include the classes specifically protected under state and/or federal law, but also include sexual orientation and gender identity as protected statuses (which some states, cities and counties protect by statute), 2) describe and give examples of the prohibited conduct; 3) outline a complaint procedure that

provides for the investigation of complaints; 4) uphold confidentiality as much as feasible; 5) explain disciplinary action for policy violations; and 6) prohibit retaliation. It is extremely important that company policy should encourage employees to report complaints without fear of reprisal and make sure this anti-retaliation provision is followed.

Train employees about anti-discrimination policies to establish expectations.

Teaching managers how to recognize discrimination and prohibit it shows that the employer is committed to preventing it. Similarly, training employees about prohibited conduct and outlining reporting requirements proves the employer's commitment. Employers should underscore this training commitment in performance reviews and discipline. Issues involving discrimination for LGBT employees—especially transgender employees—should be included in any general anti-discrimination training.

Investigate complaints in a timely manner and institute remediation if warranted.

Responding to an employee complaint in a timely manner demonstrates a sincere resolve about addressing the issues. Strong corrective action, where warranted, sends a meaningful signal to the workforce and can

be a useful defense in litigation. While confidentiality considerations exist at this stage, the complainant-employee should still be notified that the investigation is underway, or has been concluded, and that appropriate action is being taken if a complaint has merit.

Protect the company complainant from retaliation.

After an employee complains, the employer must protect the complainant from retaliation and ensure that managers are treating the employee fairly in accordance with company policies. In addition, the employer should let the complainant know about the prohibition against retaliation and that the company will not retaliate for the good-faith filing of a complaint. Furthermore, employers should monitor subsequent employment actions taken against the employee to avoid the appearance of retribution. Retaliation complaints are rising rapidly and the EEOC will scrutinize an employer's steps to ensure compliance with the prohibition against retaliation. Employers should advise the employee to promptly report any claim of retaliation.

Protect and preserve the company's lawfully made decisions by documenting the investigation and its results.

Maintaining a written record

of the witnesses interviewed and documents reviewed, as well as providing summaries of findings validates the investigation. Documenting the investigation can also prove the frequency and duration of time spent interviewing the complainant, especially when companies are challenged about the thoroughness of the investigation. Before taking any disciplinary action, a company should document all the reasons for the action and provide objective evidence supporting the reasons that are not contradicted by any other documentation.

HOW TO RESPOND TO AN EEOC CHARGE

Even an employer who does everything right might not be able to avoid a charge of discrimination—whether filed by an employee with a proper or reasonable claim or not. In the event your company faces a charge or complaint of discrimination, some key considerations are:

If an EEOC claim is pursued, consult counsel and respond with diligence but not haste and carelessness.

First, consult legal counsel. Any response will be used in any subsequent proceedings and you do not want to waive any defenses or state your defenses in an incomplete manner.

Second, avoid the temptation to respond quickly. A well-reasoned and well-documented response makes for a better defense. The EEOC is more likely to dismiss a claim where the employer presents thorough evidence: interviews of relevant witnesses, reviews and analysis of pertinent documentation, and assessments of facts and their relationship to the EEO laws at issue. It is also important to document sound employment decisions based on legitimate business factors such as poor job performance or workplace misconduct.

Welcome an early resolution in the event of a charge filing.

Even when these strategies have been implemented, sometimes employers face possible monetary exposure from an EEOC claim. When this happens, the employer should weigh the risks and rewards of resolving the EEOC claim quickly. Often, the cost to resolve the EEOC claim early is considerably less than the ultimate cost to the employer's organization, should litigation ensue. Litigation can distract the employer's key staff, diverting time and resources unrelated to the company's daily

operations to fight the claim. Litigation can hamper employee morale, decrease productivity and create publicity that can have costly results.

The suggestions above are the first line of defense. Following them will not guarantee that the EEOC will be satisfied. However, taking the suggested steps to prevent and remedy employment discrimination could still serve the employer well in avoiding the EEOC's intervention.

CONCLUSION

Unless and until Congress or the Supreme Court reject the EEOC's new interpretations of sex discrimination—and because many employees consider it the right thing to do for applicants and employees—all employers covered by Title VII should act under the theory that discrimination on the basis of sexual orientation or gender identity is specifically prohibited by federal law. Additionally, numerous state statutes and local ordinances protect LGBT individuals from discrimination. As such, employers should update their policies to prohibit discrimination on the basis of sexual orientation and gender identity, should train their man-

agers and employees on the strict prohibition on discrimination of all types (including on the basis of gender stereotyping, sexual orientation, or gender identity), and have in place robust investigation protocols that can rectify any alleged discrimination before the filing of an EEOC complaint.

In the wake of the EEOC's increased focus on transgender issues and its pursuit of the goals of the Strategic Enforcement Plan, complaints on behalf of LGBT employees are expected to increase. Employers can prepare ahead of time to prevent those complaints in their workplaces and be better positioned to respond to any unfounded claims by taking the steps outlined here.

NOTES:

¹See *Macy v. Department of Justice*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (April 20, 2012).

²*EEOC v. Lakeland Eye Clinic*, Civ. No. 8:14-cv-2421 (M.D. Fla.) and *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, Civ. No. 2:14-cv-13710 (E.D. Mich.).

³*Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268, 49 Fair Empl. Prac. Cas. (BNA) 954, 49 Empl. Prac. Dec. (CCH) P 38936 (1989).

⁴*EEOC v. Lakeland Eye Clinic*, Civ. No. 8:14-cv-2421 (M.D. Fla.).

⁵*EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, Civ. No. 2:14-cv-13710 (E.D. Mich.).