

EEOC Takes Sexual Orientation Discrimination to Federal Court



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EMPLOYERS SHOULD CONSIDER IMPLEMENTING ANTI-DISCRIMINATION AND ANTI-HARASSMENT POLICIES IN THE WORKPLACE THAT INCLUDE PROTECTIONS FOR EMPLOYEES BASED ON THEIR SEXUAL ORIENTATION AND GENDER IDENTITY AND EXPRESSION.

On March 1, the Equal Employment Opportunity Commission (EEOC) filed two federal lawsuits alleging employment discrimination on the basis of sexual orientation. These are the first sexual orientation discrimination suits that the EEOC has ever filed in federal district court, and they reflect the agency's continued efforts in pursuing Title VII protections for lesbian, gay, bisexual and transgender (LGBT) individuals in the workplace.

The Cases

The first case is *EEOC v. Scott Medical Health Center, P.C.* (2:16-cv-00225-CB), filed in the U.S. District Court for the Western District of Pennsylvania. The EEOC alleges that

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the plaintiff, Dale Baxley, a gay man who was employed by Scott Medical Center in a telemarketing position, was subjected to routine and unwelcome derogatory slurs related to his sexual orientation, including having his supervisor regularly call him names. After enduring the alleged remarks for more than two months, Baxley reported the behavior to the defendant's president, who purportedly refused to take any remedial action. Unable to continue working under those conditions, Baxley resigned. The EEOC alleges that Baxley was constructively discharged and seeks injunctive relief, back pay and compensatory and punitive damages.

The second case is *EEOC v. Pallet Companies d/b/a IFCO Systems NA, Inc.* (1:16-cv-00595-RDB), filed in the U.S. District Court for the District of Maryland. In this case, Yolanda Boone, a lesbian, was hired by the defendant as a forklift operator. Three months after she was hired, Boone's supervisor allegedly began making harassing comments related to her sexual orientation, including stating such things as wanting her to "like men again." The complaint states that Boone reported the behavior to another supervisor, but no action was taken. The allegedly harassing behavior continued, culminating in Boone reporting it to the general manager and the HR employee hotline. In response, Boone's supervisors purportedly asked her to resign from her position, and, when she refused, she was terminated and escorted off the defendant's property by the police. The complaint also seeks injunctive relief, back pay and compensatory and punitive damages

Legal Background

Twenty-two states and a number of major cities and other municipalities have enacted laws expressly prohibiting discrimination on the basis of sexual orientation and/or gender identity. Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of sex. Title VII does not expressly prohibit sexual orientation discrimination, however, and currently there are no federal laws that explicitly ban sexual orientation discrimination. Similarly, the majority of states do not prohibit sexual orientation discrimination. A proposed federal law, titled the "Employment Non-Discrimination Act (ENDA)," would prohibit employment discrimination on the basis of sexual orientation or gender identity. But despite being introduced in almost every Congress since 1994, it has not been passed into law. Without action from Congress, the EEOC has looked to Title VII's prohibition of sex discrimination as a means of stopping workplace sexual orientation discrimination.

For more than 20 years after its passage, courts viewed Title VII's sex discrimination provision as pertaining to discrimination in favor of one sex over the other. In 1989, however, the U.S. Supreme Court decided that sex discrimination also includes discriminatory

behavior on the basis of gender stereotypes. In *Price Waterhouse v. Hopkins*, a female employee was denied a promotion because she was not “feminine” enough. The Court found that the employer’s use of stereotypes about how a female is supposed to act was itself a form of prohibited sex discrimination.

The *Price Waterhouse* decision has been the main vehicle through which many plaintiffs have attempted to establish that sexual orientation discrimination is a form of sex discrimination under Title VII. These efforts have had mixed results. Federal courts in the Second, Third, Sixth and Seventh Circuits have rejected claims that Title VII prohibits all sexual orientation discrimination. Many courts have also rejected more nuanced arguments that sexual orientation discrimination is a form of gender stereotyping prohibited by *Price Waterhouse v. Hopkins*. Other courts have left the door open for sexual orientation discrimination claims framed as gender stereotyping, and a few have explicitly ruled that discrimination based on sexual orientation is sexual stereotyping discrimination prohibited by Title VII. In a similar vein, a number of federal courts have found that transgender discrimination, which also is not explicitly prohibited under Title VII, is an unlawful form of gender stereotyping. The Supreme Court has not decided the issue, at least not yet.

Changing Attitudes on LGBT Rights

With these two new cases, the EEOC is pressing the argument that sexual orientation discrimination is a form of gender stereotyping prohibited by Title VII under the Supreme Court’s ruling in *Price Waterhouse*. These cases come on the heels of several administrative developments, including the EEOC’s own July 2015 decision in *Baldwin v. Department of Transportation*, which concluded that sexual orientation discrimination is rooted in stereotypes and failure to comply with gender norms. Simply put, the EEOC is taking a more aggressive approach to strengthening rights and protections for the LGBT community.

The EEOC’s actions reflect a much broader shift of public opinion relating to the fair treatment of the LGBT community. According to the National Opinion Research Center at the University of Chicago, almost 70 percent of the U.S. population in 1973 said same-sex relationships were “always wrong,” versus 43.5 percent in 2010. The Pew Research Center also compiled statistics on public attitudes, finding that, from 2001 to 2015, opposition to gay marriage fell from 57 percent to 39 percent, while acceptance rose from 35 percent to 55 percent. It was in the midst of these changing attitudes that one of the biggest achievements in LGBT rights occurred — the Supreme Court’s July 2015 decision in *Obergefell v. Hodges*, which found that the Fourteenth Amendment requires states to recognize and license marriage between two people of the same sex.

What This Means for Employers

The EEOC's lawsuits were filed in Maryland and Pennsylvania. Maryland already has enacted a statewide law prohibiting sexual orientation discrimination. Pennsylvania does not have an analogous statewide law, but multiple counties and municipalities in the state have enacted sexual orientation discrimination laws.

Although the two new EEOC cases may not be resolved for some time, given current state laws and the renewed focus by the EEOC on broadening the scope of Title VII's protections for the LGBT community, employers that have not already done so should consider implementing anti-discrimination and anti-harassment policies in the workplace that include protections for employees based on their sexual orientation and gender identity and expression. This is especially important when considering the trend in public opinion. A clear policy prohibiting sexual orientation discrimination can ensure that all employees are treated fairly and prevent both legal and social incidents from disrupting the workplace. Such policies should be included in employee handbooks, and both managerial and non-managerial employees should receive appropriate training.