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THE EEOC'S NEW FOCUS ON LGBTQ DISCRIMINATION: HOW TO STAY OUT OF THE HEADLINES

By Joseph Pazzano

The year 2015 was a breakthrough year for the lesbian, gay, bisexual, transgender, and queer (LGBTQ) community. Just over a year ago, in *Obergefell v. Hodges*, the U.S. Supreme Court issued its landmark decision on marriage equality, extending marriage rights to same-sex couples nationwide. Caitlyn Jenner focused the nation's attention on the transgender community, with her public coming out and transition. President Obama became the first president to mention the word "transgender" in the State of the Union address, and the White House made a gender-neutral restroom available for the first time. Even Donald Trump has apparently jumped on the bandwagon, as he was the first Republican nominee to mention "LGBTQ" issues in his acceptance speech at the Republican National Convention.

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But the legal landscape for the LGBTQ community is far from settled. Recently, the North Carolina state legislature passed HB-2, which, among other things, eliminated anti-discrimination measures for LGBTQ people and required transgender individuals to use bathrooms in state facilities that correspond to the gender assigned to them at birth. Along with Tennessee and Arkansas, North Carolina also banned municipalities from passing anti-discrimination measures.

In other states, because Congress has not passed federal legislation banning discrimination in employment based on sexual orientation and gender identity, there exists a hodgepodge of anti-discrimination measures. Twenty-two states offer protections based on sexual orientation and/or gender identity, while 28 states offer no employment protections for LGBTQ individuals.

Against this backdrop, there has been increased public pressure on employers to provide protections for their LGBTQ employees, and there is heightened awareness of employers' anti-discrimination and diversity practices amongst employees and the general public. A recent national annual survey of in-house counsel, human resources professionals, and C-level executives found that almost three-quarters of respondents cited an increased number of discrimination claims by LGBTQ people as one of their chief concerns for the coming year. That represents a substantial increase from the 31 percent of respondents who cited the same concern in 2015.

With this increased public attention, employers' concerns about sexual orientation and gender identity discrimination complaints are well founded. As the survey highlighted, the concern may be animated in part by the Equal Employment Opportunity Commission (EEOC) becoming increasingly active in bringing LGBTQ-related actions against employers. In particular, the EEOC has recently filed a series of high-profile lawsuits involving sexual orientation and gender identity discrimination.

This article explores the background of the EEOC's involvement in LGBTQ-related cases, summarizes the key developments in the recent filings, and offers some

recommendations for employers seeking to develop best practices for their LGBTQ employees.

For employers in California or the other 21 states (and D.C.) with state employment laws already prohibiting discrimination on the basis of sexual orientation and gender identity, the EEOC developments do not radically change the ways in which employers must comply with anti-discrimination measures. While the EEOC decisions and lawsuits may provide additional federal avenues of recovery, employers should, practically speaking, already have protections in place to comply with these existing state laws. You may visit www.lgbtmap.org/equality-maps to see the current employment non-discrimination laws in your state.

BACKGROUND: EEOC STEPS UP ITS INVOLVEMENT

The EEOC is charged with enforcing Title VII of the Civil Rights Act of 1964 (Title VII). Title VII prohibits employment discrimination on the basis of "race, color, religion, sex, and national origin." The EEOC has not historically brought sexual orientation cases under Title VII. But in July 2015, on the heels of the Supreme Court's decision legalizing same-sex marriage nationwide, the EEOC announced for the first time that it considered sexual orientation discrimination to be covered by Title VII's prohibition against sex discrimination.

In that case, *Baldwin v. Foxx*, an air traffic control specialist filed an EEOC complaint against the Federal Aviation Administration (FAA). He claimed that he was not selected for a permanent position as a front line manager with the agency because of his sexual orientation. He alleged that he was told that discussions about his male partner were "a distraction" and that his colleagues did not need to "hear about that gay stuff."

When considering claims of sexual orientation discrimination, the EEOC decided that sexual orientation discrimination is covered under sex discrimination because (1) "sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms"; (2) sexual orientation "cannot be defined or understood without reference to sex"; and (3) sexual orientation

discrimination arises out of animus toward employees as a result of their associational relationships with others of the same sex. The EEOC stressed that it was not creating a new class of claims but instead highlighting that allegations of sexual orientation discrimination, by their very nature, “necessarily state a claim of discrimination on the basis of sex.”¹

Even before the EEOC considered sexual orientation discrimination to be covered under Title VII’s prohibition against sex discrimination, it also considered anti-transgender bias and discrimination to be covered as well. In a 2012 EEOC decision, *Macy v. Holder*, the EEOC followed the lead of a number of federal courts in upholding transgender rights under Title VII. The EEOC held that “because the term ‘gender’ encompasses not only a person’s biological sex but also the cultural and social aspects associated with masculinity and femininity,” a transgender employee “may establish a prima facie case of sex discrimination” under Title VII.²

Having decided that both sexual orientation and gender identity discrimination fell within the purview of Title VII, the EEOC announced that combatting discrimination on both of these issues was one of its main priorities. As part of its enforcement priority to “address emerging and developing issues,” the EEOC has committed, in particular, to bringing Title VII actions against employers that discriminate against their LGBTQ employees.³

EEOC TESTS ITS THEORY: SCOTT MEDICAL HEALTH CENTER AND IFCO SYSTEMS

On March 1, 2016, the EEOC filed its first two cases based on its theory that sexual orientation discrimination is prohibited under Title VII’s prohibition against sex discrimination.

In *EEOC v. Scott Medical Health Center*, the EEOC alleged that the defendant constructively discharged a telemarketing manager by creating a sexually hostile work environment. The plaintiff, a gay male, was allegedly subjected to a wide variety of unwelcome comments about his sexual orientation, including “fag,” “faggot,” and “queer,” three to four times a

week. His supervisor also allegedly inquired about the plaintiff’s sex life and the normative gender roles that each partner played in the plaintiff’s relationship. The EEOC alleged that the defendant refused to take action when the plaintiff brought the issues to the attention of management and that they thus created a hostile work environment for the plaintiff.

For damages, the EEOC sought an injunction enjoining the company’s management from engaging in discriminatory employment practices, a directive to create new training and policy programs to eliminate hostile working environments, and compensation for the plaintiff’s monetary and non-monetary costs. The case is pending in the Western District of Pennsylvania.⁴

In the other case filed in March, *EEOC v. IFCO Systems*, the EEOC alleged that a lesbian employee had been unlawfully discriminated against, was subjected to harassment, and was retaliated against for complaining about the harassment. According to the EEOC, the employee began working the night shift soon after beginning her job with IFCO Systems. Her night shift manager harassed her on a weekly basis, stating that he would like to change her sexual orientation, telling her she did not have breasts, and stating that he wanted to turn her “back into a woman.” He also quoted bible passages to her, which he claimed were opposed to her identity, and he touched his genitals while speaking to her.

Just three months after the lawsuit was filed, the EEOC negotiated a \$202,000 settlement in the *IFCO Systems* case, marking the first resolution of a sexual orientation discrimination case filed by the EEOC under Title VII. The settlement included a \$20,000 donation to the Human Rights Campaign Foundation, a training program for top managers, and the retention of an expert on LGBTQ workplace issues.⁵

While the outcome of *Scott Medical Health Center* is still unknown, the quick and robust settlement in *IFCO Systems* likely means that the EEOC has found some momentum with its Title VII strategy and will continue to file similar sexual orientation discrimination cases.

CONTINUED FOCUS ON TRANSGENDER ISSUES

Since its 2012 decision that gender identity discrimination is covered under Title VII, the EEOC has consistently brought lawsuits on behalf of transgender employees, alleging sex discrimination under Title VII. The EEOC has seen repeated success in this area and has achieved settlements of \$115,000 and \$150,000 in two cases filed in 2014 and 2015. In one of these cases, the EEOC also received a consent decree that the defendant would not exclude health care benefits for medically necessary care arising from a transgender individual's transition or related health issues.⁶

The EEOC continues to be active in pursuing gender identity discrimination cases and has recently filed a number of high-profile cases.

On July 6, 2016, the EEOC sued Bojangles Restaurants on behalf of a transgender woman who was allegedly subjected to derogatory comments about her gender identity and appearance. The woman was asked to engage in stereotypically male behaviors and grooming practices, even though the woman clearly identified as female to her supervisors. When the comments did not abate, she complained and was subsequently terminated. The EEOC seeks injunctive relief, back pay, compensatory damages, and punitive damages.⁷

Also, on July 18, 2016, the EEOC sued Rent-A-Center East on behalf of another transgender woman who was allegedly terminated because of her gender identity. The woman identified and presented as male when she was first employed with the company but transitioned to female during her employment. She informed her supervisors that she was in the midst of a gender transition. The EEOC alleges that the defendant then successfully manufactured a pretext for terminating her but that the ultimate reason for her dismissal was her gender transition.⁸

Accessing gender neutral bathrooms has been another major area of litigation for transgender individuals and may continue to grow in prominence following North Carolina's bill restricting such use. The EEOC held in *Lusardi v. Department of the Army* that Title VII requires employers to provide transgender individuals

with equal access to a common restroom that matches their gender identity. Furthermore, employers cannot fulfill this obligation by providing a single-use restroom stall specifically for transgender employees because it would deny the individual access to resources available to others, segregate the individual from other persons with the same gender identity, and lead the individual to feel unequal and disrespected.⁹

TAKEAWAYS FOR EMPLOYERS

One main takeaway for all employers is that the state of anti-discrimination laws for the LGBTQ community remains in flux. While the EEOC is strongly committed to the idea that Title VII provides protection against sexual orientation discrimination, the federal courts are not in complete agreement. Some courts have accepted the EEOC's *Baldwin* decision and applied Title VII to sexual orientation while others have expressly repudiated the decision. Unless and until there is more definitive guidance from federal courts about Title VII's applicability to sexual orientation cases, or until Congress passes a federal LGBTQ non-discrimination law, employers will have to contend with a state of legal limbo.

Practically speaking, given that the EEOC has demonstrated its commitment to bringing prominent lawsuits against sexual orientation and gender identity discrimination, employers may want to take the following steps to minimize their risk of being the subject of the EEOC's next major lawsuit:

- Ensure that any transgender employee has access to a common restroom that matches his or her own gender identity. Employers should not ask for proof of any surgical or other medical procedure to confirm the employee's presented identity;¹⁰
- Develop and maintain corporate policies that prohibit consideration of sexual orientation and gender identity in hiring, promotion, and retention considerations;
- Modify orientation programs, training sessions, and employee handbooks to clarify that anti-harassment measures apply to LGBTQ employees;

- Ensure that benefit programs are available in equal measure to all employees, regardless of sexual orientation or gender identity, and allow transgender employees to use benefit programs and leave policies for any transition-related medical needs; and
- Develop affinity groups for LGBTQ employees to enable them to discuss their needs and concerns, maintain an open door to hear about employees' concerns, and ensure that there is a meaningful process through which to discuss and address such concerns.

The EEOC will clearly continue to maintain its focus on cases involving discrimination against LGBTQ employees. To ensure that they are minimizing their risk in this area, employers may want to continue monitoring these developments.

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To view prior issues of the ELC, click [here](#).

1 See Complainant, EEOC DOC 0120133080, 2015 WL 4397641 (July 15, 2015).

2 See Mia Macy, EEOC DOC 0120120821, 2012 WL 1435995 (Apr. 20, 2012).

3 U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan, FY 2013-2016, available at <https://www.eeoc.gov/eeoc/plan/sep.cfm>.

4 *EEOC v. Scott Medical Health Center*, No. 2:16-cv-00225-CB, 2016 WL 822096 (W.D. Pa. March 1, 2016).

5 *EEOC v. Pallet Companies d/b/a IFCO Systems NA, Inc.*, No. 1:16-cv-00595-RDB, 2016 WL 822896 (D. Md. March 1, 2016); settlement discussions at News Release, 2016 WL 3518330 (EEOC), June 28, 2016.

6 See *EEOC v. Deluxe Financial Services Corp.*, No. 0:15-cv-02646-ADM-SER (D. Minn. June 4, 2015); *EEOC v. Lakeland Eye Clinic, P.A.*, No. 8:14-cv-2421-T35 AEP (M.D. Fla. Sept. 25, 2014).

7 See News Release, 2016 WL 3626510 (EEOC).

8 See *EEOC v. Rent-a-Center East, Inc.*, No. 16-cv-2222 (C.D. Ill. July 18, 2016).

9 *Lusardi v. Dep't of the Army*, EEOC Appeal No. 0120133395, 2015 WL 1607756 (Mar. 27, 2015).

10 See *Lusardi*.

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