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Employment Law Lookout
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The EEOC Files Historic Lawsuits Testing Theory That Title VII Covers Discrimination Based On Sexual Orientation

By Seyfarth Shaw LLP on March 3rd, 2016

Posted in EEOC

By Gerald L. Maatman, Jr., Sam Schwartz-Fenwick, Michael W. Stevens, and Kylie Byron

As we've been reporting in our blogs, the EEOC continues to pursue an expansive theory of discrimination.

It has taken the position that discrimination on the basis of sexual orientation and gender identity is prohibited sex-discrimination under Title VII of the Civil Rights Act of 1964. On March 1, 2016, the EEOC put its proverbial money on the table and brought two lawsuits alleging sexual orientation discrimination.

These are novel, "first of their kind" lawsuits. Depending on one's view, the EEOC either is trying to effectuate the policies underlying Title VII by seeking an expansive interpretation of the statute's reach, or alternatively, using its powers to re-write the law and regulate employers through the threat of litigation. Clearly, employers need to take notice of this development, and monitor the course of these lawsuits.

Case Background

The first case, *EEOC v. Scott Medical Health Center*, Case No. 2:16-CV-00225 [here], was filed in the U.S. District Court for the Western District of Pennsylvania. The Commission alleges that a gay male employee was subjected to harassment from his supervisor, who allegedly made homophobic comments about the employee, his orientation, and his sex life. *Id.* at 3. The Commission further alleges that when the

employee complained, management refused to take action, thus creating a hostile work environment that forced the employee to quit rather than be subjected to further harassment. *Id.* at 4.

The second suit, *EEOC v. Pallet Companies d/b/a IFCO Systems NA, Inc.*, Case No. 1:16-CV-00595 [here], was filed in the U.S. District Court for the District of Maryland on behalf of a lesbian employee. The EEOC alleges that the employee's supervisor harassed her, made comments about her gender, including that he would "turn [her] back into a woman," and terminated her for reporting the harassment. *Id.* at 3-4.

The EEOC's willingness to file lawsuits based on alleged sexual orientation discrimination is anchored on the rationale of its prior administrative decision in *Baldwin v. Foxx*, Appeal No. 0120133080 (EEOC July 15, 2015). There, the EEOC found sexual orientation discrimination to be sex discrimination, as it relies on gender stereotypes as to how "real men" and "real women" should behave, and in so doing seeks to "enforce heterosexuality defined gender norms." *Id*. at 3. The EEOC further found it to be *per se* sex discrimination in that it involves treating an employee who loves a same-sex partner differently than how the employer would treat an employee who loved an opposite sex-partner.

Implications For Employers

To date, no federal circuit courts have adopted the EEOC's expansive interpretation of Title VII regarding sexual orientation discrimination, although a case which may provide some judicial guidance on this interpretation, *Kimberly Hively v. Ivy Tech Community Colleg*e, No. 3:14-CV-1791 (N.D. Ind. 2015), is currently pending before the Seventh Circuit. The filing of these two suits, however, demonstrates that the EEOC intends to aggressively litigate its theory of Title VII.

Whether or not the federal district and circuit courts agree with the EEOC, employers should be aware that the EEOC is actively watching for potential discrimination cases on the basis of both sexual orientation and gender identity. While many states and cities have laws and ordinances in place prohibiting sexual orientation and gender discrimination in employment, the EEOC is apt to target employers located in jurisdictions where the question of sexual orientation discrimination is not yet settled. As such, even absent judicial authority, in light of EEOC guidance and legal actions regarding sexual orientation, employers should evaluate their policies, practices, and litigation risks.

Employers may wish to consider revising internal equal employment, non-discrimination and anti-harassment policies to include sexual orientation as protected categories, incorporating the topic of sexual orientation into EEO and harassment training programs, and changing health benefits to extend such coverage to same-sex spouses and/or domestic partners.

Stay tuned to this development, as we will continue to actively monitor developments in this space.

Tags: Civil Rights Act of 1964, EEOC, Seventh Circuit, Title VII

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Bathroom Bills: What Employers Need To Know

By Seyfarth Shaw LLP on April 12th, 2016

Posted in EEOC, OSHA Compliance

By Sam Schwartz-Fenwick and Kylie Byron

Seyfarth Synopsis: *The passage of "Bathroom" or "Religious Freedom" bills raises issues for employers operating in impacted states. Employers in these states may wish to consider taking proactive and affirmative steps in the wake of these laws.*

The belief of many pundits that the issue of LGBT rights was settled following the Supreme Court's June, 2015 same-sex marriage ruling, has proved false. Indeed, in the nine months since the Supreme Court's ruling nearly 200 bills have been introduced in state legislatures that limit LGBT rights. Recently, two of these bills have been signed into law, one in North Carolina and one in Mississippi. These bills have far reaching implications for employers, both in these states and nationwide, as more states look to enact copycat bills.

In a special one-day session on March 23, 2016, the North Carolina legislature proposed, drafted, passed, and enacted the Public Facilities Privacy and Security Act. The Act directly restricts restroom and locker room usage in public facilities to individuals based on the sex listed on that individual's birth certificate. In addition, the Act provides that no city or municipality in North Carolina may enact any ordinance or regulation that would prohibit discrimination in employment or public accommodation on the basis of sexual orientation or gender identity. The Act further expressly repeals all local anti-discrimination ordinances that extended protection on the basis of gender identity or sexual orientation. The Act thus invalidated Charlotte's discrimination ordinance, an ordinance which previously covered places of public accommodation rather than employment generally. The ACLU has already filed a suit challenging North Carolina's statute, including a Title IX employment claim against the University of North Carolina. The Attorney General of North Carolina has stated he will not defend the Act as he considers it unconstitutional.

On April 4, 2016, the state of Mississippi enacted an even more restrictive law, titled the "Protecting Freedom of Conscience from Government Discrimination Act." The Mississippi Act states that it seeks to protect the "religious beliefs" that same-sex marriage is impermissible and that gender is immutable and determined at birth. To effectuate this goal, the Mississippi Act protects employment decisions whose effect is to discriminate against LGBT individuals. In addition, the Act provides a cause of action to any person against any "third party" that attempts to enforce a rule of the state, or any division thereof, that would grant protection on the basis of sexual orientation or gender identity.

Importantly, prior to these bills being passed, neither Mississippi nor North Carolina extended anti-discrimination protections to LGBT individuals. Indeed, it remains the case that state anti-discrimination laws cover LGBT individuals in only 20 states and the District of Columbia. Nevertheless, the decision to expressly exclude LGBT individuals from the law is sure to encourage and even incentivize discrimination against members of the LGBT community.

In addition, the express state attempts to limit the protections of the LGBT community, are in sharp contrast to the efforts by the federal government to interpret existing anti-discrimination laws as extending protections on the basis of gender identity and sexual orientation. Indeed, in previous blogs we have detailed the positions of the EEOC and the Department of Education that respectively Titles VII and IX, prohibit discrimination on the basis of both gender identity and sexual orientation. In addition, OSHA has issued employer guidelines providing that employers are to provide restroom accommodations based upon gender identity. Similarly, the Department of Health and Human Services is drafting forthcoming regulations under the Affordable Care Act barring transgender discrimination in healthcare plans by entities that receive federal funds.

Stay tuned to this blog, as we will be actively monitoring further developments in this evolving legal field. In the meantime, given the growing divide between federal and state interpretations of law, employers may specifically wish to consider revising internal equal employment, non-discrimination and anti-harassment policies to include sexual orientation as protected categories, incorporating the topic of sexual orientation into EEO and harassment training programs. For help evaluating your benefit policies and practices, please reach out to one of the authors of this post, or another Seyfarth attorney.

Tags: ACLU, Affordable Care Act, Department of Education, EEOC, LGBT, OSHA, Protecting Freedom of Conscience from Government Discrimination Act, Public Facilities Privacy and Security Act, Title IX, Title VII

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