Insights: Alerts

EEOC Holds That Title VII Prohibits Discrimination Based on Sexual Orientation

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On July 16, 2015, the Equal Employment Opportunity Commission ("EEOC"), in a 3-2 decision, held that Title VII prohibits employers from discriminating against an employee based on the employee's sexual orientation. Although the EEOC's decision arose in the context of the EEOC's review of a federal employee's discrimination claim, it will likely have practical implications for private employers that are required to comply with Title VII.

EEOC's Holding

The complainant in the case before the EEOC, a temporary employee of a federal agency, alleged that he was discriminated against based on his sexual orientation in violation of Title VII when his employer denied him a permanent position. Title VII prohibits employers from discriminating against employees and applicants on the basis of the individual's "race, color, religion, sex, or national origin." Although Title VII does not explicitly prohibit discrimination based on sexual orientation, the EEOC held that sexual orientation is inherently a sex-based consideration that is prohibited by Title VII and that an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII.

The EEOC gave three separate reasons why discrimination based on an individual's sexual orientation is sex discrimination prohibited by Title VII. First, sexual orientation discrimination necessarily entails treating an employee less favorably because of the employee's sex. For example, if a female employee is reprimanded for having a picture on her desk of her female spouse, but a male employee is not reprimanded for having a picture of his female spouse on his desk, the female employee has been discriminated against because of her sex.

Second, sexual orientation discrimination is prohibited by Title VII because it is associational discrimination based on sex. Historically, courts around the country and the EEOC have held that Title VII prohibits discrimination based on an employee's association with a member of a protected class because an action based on an employee's relationship with a person of, for example, another race necessarily involves consideration of the employee's race. The EEOC held that the same logic applies to claims of discrimination based on sexual orientation. If a gay man is fired because he dates men, it is the fact that he is a man instead of a woman (his sex) that motivated the discrimination against him.

Finally, the EEOC explained that sexual orientation discrimination is sex discrimination because it necessarily involves discrimination based on gender stereotypes. The EEOC and the courts have held that Title VII applies to disparate treatment resulting from gender stereotypes. The EEOC explained that discrimination based on sexual orientation is no different because it stems "from a desire to enforce heterosexually defined gender norms" and "the expectation that individuals should be attracted only to those of the opposite sex."

Practical Implications

Although the EEOC's holding in this case arose in the context of federal employment, which is subject to different administrative procedures than private employment, and is not binding on the courts, it is a glimpse into the way that the EEOC likely will view claims of discrimination based on sexual orientation brought by employees of private companies. Employers should therefore be aware that the EEOC will probably now accept and investigate charges of discrimination based on sexual orientation and that efforts to have such charges dismissed at the administrative level on the grounds that sexual orientation is not protected by Title VII are likely to be unsuccessful. Whether the EEOC's interpretation of Title VII in this regard will be adopted by the courts remains to be seen.

Many private employers already include prohibitions against discrimination and harassment based on sexual orientation in their policies and handbooks in an effort to foster an environment of inclusiveness (and, in some instances, because discrimination based on sexual orientation is expressly prohibited by an applicable state or local law). Employers that do not already prohibit discrimination and harassment based on sexual orientation may want to consider changing their policies to include such a prohibition and providing antidiscrimination and antiharassment training relating to sexual orientation to employees.

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