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According to the EEOC, Sexual Orientation Discrimination is Prohibited By Title VII

There are many protected categories under the federal employment discrimination laws, but none of those laws mentions "sexual orientation" as a protected category. Versions of the Employment Non-Discrimination Act (ENDA), which would explicitly prohibit employment discrimination on the basis of sexual orientation, have been introduced in almost every session of Congress since about 1994. However, the legislation has never made it to the President's desk.

According to the Equal Employment Opportunity Commission (EEOC), federal legislation explicitly prohibiting employment discrimination based on sexual orientation is unnecessary because such discrimination is already prohibited under Title VII of the Civil Rights Act (Title VII). In a December 2, 2014 New York Labor and Employment Law Report blog post, we wrote about a decision issued by the EEOC against a federal agency (the Bureau of Tobacco, Firearms and Explosives) holding that transgender discrimination is a form of sex discrimination prohibited by Title VII. Therefore, it should come as no surprise that the EEOC has now also issued a decision against another federal agency (the Federal Aviation Administration) on July 16, 2015, holding that sexual orientation discrimination is also a form of sex discrimination prohibited by Title VII.

In the case, an employee who worked for the Federal Aviation Administration alleged that he was passed over for a permanent position as a Front Line Manager because of his sexual orientation. The EEOC determined that it had jurisdiction over the claim even though sexual orientation is not listed as one of the protected categories under Title VII, because "sexual orientation is inseparable from and inescapably linked to sex." The EEOC further stated: "A complainant alleging that an agency took his or her sexual orientation into account in an employment action necessarily alleged that the agency took his or her sex into account."

The EEOC discussed a number of ways in which discrimination based on sexual orientation could be considered sex discrimination. For example, the EEOC theorized that sexual orientation discrimination is a form of "associational discrimination on the basis of sex" because it involves an employee being treated differently based on his or her association with a person of the same sex. The EEOC also opined that sexual orientation discrimination is sex discrimination because it "necessarily involves discrimination based on gender stereotypes" and is often motivated by a desire to enforce heterosexually defined gender norms.

This recent EEOC decision was issued in the context of an appeal from a federal agency's decision, and is not binding on employers in the private sector. However, the reasoning used by the EEOC in its decision suggests that it will likely exercise jurisdiction over discrimination charges filed against private sector employers alleging sexual orientation discrimination and could commence enforcement proceedings against private sector employers in sexual orientation discrimination cases. As the EEOC noted in its decision, many federal courts (including the Second Circuit Court of Appeals, which is the federal appellate court that hears appeals from cases decided in the U.S. District Courts in New York) have already rejected claims that Title VII prohibits sexual orientation discrimination. It remains to be seen whether any federal courts will be persuaded by the EEOC's interpretation of Title VII's sex discrimination provision and whether the Supreme Court will eventually address the issue.

The EEOC's decision will also likely have less of an impact on employers in New York than on employers in some other states, because sexual orientation discrimination is already prohibited by the New York Human Rights Law (NYHRL). However, because Title VII includes punitive damages and recovery of attorneys' fees as potential remedies (and the NYHRL does not), it is possible that plaintiffs' lawyers may start asserting sexual orientation discrimination claims under both Title VII and the NYHRL in order to obtain federal court jurisdiction and to take advantage of the additional remedies under Title VII that are not available under the NYHRL.

Employers in New York should periodically review their equal employment opportunity, anti-discrimination, and anti-harassment policies to make sure that they are in compliance with all applicable federal, state, and local laws. Employers should also make sure that all employees — especially managers who make hiring and other employment decisions — are regularly trained regarding those policies.

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