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EEOC Rules That Title VII Applies to Gender Identity Claims

By Jeffrey Campolongo All Articles

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Jeffrey Campolongo

A former male police officer applied for and was offered a job with a federal government agency, which was then rescinded days after the agency was informed the job applicant was transitioning to female. The Equal Employment Opportunity Commission, in what is being lauded as a groundbreaking step in protecting the rights of employees to express their gender, has ruled that adverse employment decisions based upon one's gender identity are violations of Title VII's prohibition against sex discrimination in the workplace. (See *Macy v. Dept. of Justice (Bureau of Alcohol, Tobacco, Firearms and Explosives)*, Appeal No. 0120120821, Agency No. ATF-2011-00751 (April 20, 2012).)

According to the EEOC decision, which was based on a jurisdictional appeal and therefore treated the complainant's allegations as true, Mia Macy applied for a position with the Bureau of Alcohol, Tobacco, Firearms and Explosives with the Department of Justice in California (the agency). She was offered the position as the result of a telephonic interview, pending the results of an extensive background check. Macy had multiple communications with the entity conducting the background investigation and the government contractor providing the position.

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The EEOC decision indicates that in March 2011, Macy informed the contractor that she was transitioning from male to female. That information was relayed from the contractor to the agency. Only a few days later, she was informed that the position had been eliminated because of budgetary issues. Suspicious of the timing of the rescission of the job offer, Macy contacted an agency EEO officer, who informed her that the position was not closed and the agency gave the position to someone else.

The commission's decision explains that in June 2011, Macy filed an EEO complaint with the agency, alleging discrimination based on her sex, female, as well as "gender identity" and "sex stereotyping." The agency notified Macy that the EEOC cannot adjudicate claims of gender identity stereotyping, so only the claim for discrimination based on sex would be processed as a Title VII claim and Department of Justice policy would determine the outcome of the gender identity claim. In December 2011, Macy appealed the agency's determination, requesting that the EEOC adjudicate all of her claims. She alleged that not adjudicating her gender identity stereotyping claim under Title VII was a "de facto dismissal."

The EEOC agreed with Macy that all of her claims fell within Title VII: "The commission hereby clarifies that claims of discrimination based on transgender status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII's sex discrimination prohibition."

Title VII prohibits discrimination on the basis of sex, and the EEOC determined that, based upon a plain reading of

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the statute as well as a review of case law, Title VII applies to discrimination based upon "sex" in term of both biological sex and gender, citing 42 U.S.C. § 2000e-16(a) (stating that applications for employment shall be free from sex discrimination); *Schwenk v. Hartford* , 204 F.3d 1187, 1202 (9th Cir. 2000); and *Smith v. City of Salem* , 378 F.3d 566, 572 (6th Cir. 2004).

The EEOC decision discussed the U.S. Supreme Court's findings in *Price Waterhouse v. Hopkins* , 490 U.S. 228, 239 (1989), a seminal case in the application of Title VII, that discrimination based upon gender stereotyping is discrimination based on sex. In *Price Waterhouse* , the Supreme Court agreed with the plaintiff that she was discriminated against for not acting in the "feminine" way expected of her in the workplace. Drawing on the holding of *Price Waterhouse* , the EEOC acknowledged that the reach of Title VII goes beyond biological sex, "in part because the term 'gender' encompasses not only a person's biological sex but also the cultural and social aspects associated with masculinity and femininity."

Since *Price Waterhouse* , courts have found violations of Title VII due to an employer's sexual stereotyping, but have reached differing results when considering the more politically charged issues of transgender identity. (See, e.g., *Lewis v. Heartland Inns of Am.* , 591 F.3d 1033 (8th Cir. 2010) (finding discrimination when a female employee was terminated for having a tomboyish appearance rather than the stereotypical "Midwestern" girl look); and *Etsitty v. Utah Trans. Auth.* , No. 2:04-CV-616, 2005 WL 1505610 (D. Utah, June 24, 2005) (denying the applicability of Price Waterhouse to alleged discrimination against transsexual individuals).)

The EEOC decision in *Macy* clarified that it is not creating a new class of individuals protected under Title VII, but is "applying the plain language of a statute prohibiting discrimination on the basis of religion to practical situations in which such characteristics are unlawfully taken into account." The EEOC acknowledged that the legislators likely did not consider discrimination against transgender individuals when enacting Title VII, but the "provisions of our laws rather than the principal concerns of our legislators" are what govern, citing *Oncale v. Sundowner Offshore Services* , 523 U.S. 75, 79-80 (1998).

The decision concluded by saying that "intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination 'based on ... sex,' and such discrimination therefore violates Title VII." The *Los Angeles Times* quoted an EEOC spokesperson, Christine Nazer, as saying the decision set forth in *Macy* is now "the EEOC's position, and we will apply it in all our enforcement activities." (See Sam Quinones, "EEOC rules job protections also apply to transgender people," *Los Angeles Times* , April 25.)

While EEOC decisions are not binding upon the courts, its rulings are given great deference because it is the federal government's enforcement authority for Title VII claims. In the EEOC's view, it is unlawful discrimination for an employer to take adverse action based on a supervisor's discomfort with an employee's gender transition, or for an employee or applicant identifying him or herself as a transgender individual. It is advisable, therefore, for employers to include information about gender transitioning and gender sensitivity in human resources training and to instruct management not to take actions based upon employees' or applicants' gender identity. •

Jeffrey Campolongo concentrates his practice in the areas of employment discrimination, specializing in the Americans with Disabilities Act, the Family and Medical Leave Act and Title VII of the Civil Rights Act of 1964.

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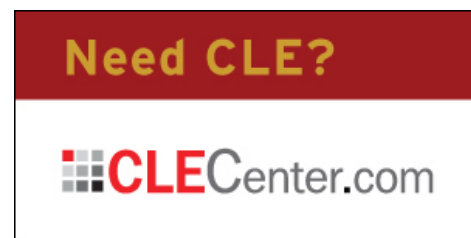
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