CARLTON FIELDS

What the Supreme Court's LGBT Ruling Means for Future EEOC Title VII Enforcement

July 06, 2020

On June 15, 2020, the U.S. Supreme Court ruled that refusing to hire, firing, or otherwise subjecting an individual to workplace discrimination because of sexual orientation or gender identity is the equivalent of discriminating on the basis of sex — which is illegal under Title VII of the Civil Rights Act of 1964.

The court's holding resolves a disagreement among the lower federal courts regarding whether federal EEO laws can be read to bar anti-LGBT bias. It also validates the policy position adopted several years ago by the Equal Employment Opportunity Commission (EEOC) that "because of sex," as that term is used in Title VII, refers not only to biological sex as assigned at birth but also to sex-based gender preferences and identity.

Thus, even before the Supreme Court's landmark ruling last month, the EEOC in recent years had already begun to process, investigate, and resolve LGBT-based sex discrimination charges. But because the law was quite unsettled, the actual number of LGBT charges the agency received was low compared to those filed on other bases. Now that the Supreme Court has confirmed that LGBT discrimination, harassment, and retaliation violate federal law, the EEOC may soon see a substantial increase in the filing of LGBT-based sex discrimination charges.

To ensure that the public and its staff are fully informed regarding how they are expected to be investigated and resolved, however, the EEOC invariably will need to update numerous policy documents to address their applicability to claims of discrimination on the basis of sexual orientation and gender identity. Indeed, the agency already has revised at least one guidance document in light of the Supreme Court's ruling.

In the meantime, here's what you need to know about LGBT bias, Title VII, and EEOC enforcement.

Title VII bars workplace discrimination, including harassment, because of race, color, religion, sex, or national origin. Title VII is enforced by the EEOC, which receives, investigates, and resolves thousands of workplace bias charges each year.

Although Congress amended Title VII in 1978 to clarify that discrimination "because of sex" includes discrimination based on pregnancy and related conditions, and in 1991 to provide for (among other things) jury trials and the availability of compensatory and punitive damages and attorneys' fees, it has never explicitly amended the statute to include federal protection on the basis of sexual orientation or gender identity — despite ongoing legislative efforts over the last two decades to do so.

At the same time, efforts to establish anti-LGBT bias protections at the state level have flourished, with 23 states and the District of Columbia having laws on the books barring workplace discrimination because of sexual orientation and/or gender identity. In addition, under Executive Order 13672, which was issued by former President Obama in 2014 as an amendment to Executive Order 11246, federal government contractors — including federally assisted and direct federal construction contractors — may not discriminate in employment on the basis of LGBT status.

In its groundbreaking federal sector ruling in the case of *Macy v. Holder*, the EEOC concluded for the first time that the term "sex" as used in Title VII applies both to biological differences between men and women **and** to cultural and social expectations regarding masculinity and femininity, thus making bias based on transgender status a form of illegal discrimination "because of sex."

The EEOC extended its interpretation a few years later to encompass discrimination based on sexual orientation in a different federal sector case, finding there that sexual orientation is "inherently" a sex-based characteristic protected by Title VII. Acknowledging the fact that the statute does not explicitly reference sexual orientation, the agency nevertheless found nothing to suggest that Congress actually intended to *exclude* protection on that basis.

The Supreme Court in its 6–3 ruling effectively adopted the EEOC's view, finding that discrimination based on LGBT status "necessarily entails" sex-based discrimination — because the former cannot happen without the latter.

The symbolic impact of the ruling, of course, is huge. But its practical impact also is significant, especially for employers subject to Title VII but perhaps located in a state that doesn't already bar workplace LGBT discrimination. Those employers may be especially in need of guidance on what it means to discriminate on the basis of an individual's sexual orientation (whether straight, gay, lesbian, or bisexual, for example) or transgender status, as well as what steps they can take to prevent and correct anti-LGBT bias in the workplace.

Even for many large employers and federal contractors subject to Executive Order 11246, the Supreme Court's ruling raises a number of practical compliance and training issues that may benefit from additional guidance from the EEOC.

Responding to and Defending LGBT Bias Claims

Sometimes — as was the case in the trio of lawsuits resolved last month by the Supreme Court — an employee volunteers information about his or her sexual orientation or gender identity, which the employer then uses to carry out some adverse employment action. Other times, an employee's LGBT status will be completely unknown to the employer at the time of the challenged employment action.

While employers often can deduce an individual's biological sex by visual observation, the same is not typically true when it comes to sexual orientation and gender identity. And because most employers have not — at least to this point — invited applicants or employees to voluntarily self-identify LGBT status, there's likely to be no readily available employment document or record confirming LGBT status.

So how will the EEOC evaluate such claims during an administrative investigation? Will it be enough for an employer to assert that it does not ask information about LGBT status and has no way of knowing that information, and thus could not have based the challenged employment action on it? Who will be considered a comparator? Will the EEOC or the charging party have the right to ask other applicants or employees to disclose their sexual orientation or gender identity?

Those are just a few of the questions likely to arise in LGBT discrimination charge investigations.

Will Employers Now Be Required to Collect and Report LGBT Demographic Information?

Many employers are subject to the EEOC's (and other federal agency) demographic data collection and reporting requirements, such as the annual EEO-1 report — which requires covered employers to report on the number of employees in specified EEO-1 job categories by race, ethnicity, and sex.

Given the Supreme Court's interpretation that the term "sex" as it is used in Title VII encompasses sexual orientation and gender identity, will employers somehow now be expected not only to solicit but also to report employee LGBT demographic information as part of the EEO-1 or other report? The EEOC hasn't yet weighed in on this particular question since the *Bostock* decision was announced.

One federal agency has provided some guidance in a different context relating to efforts at the state and local levels to offer a third gender category on government forms and documents that may be used by non-binary gender conforming individuals. In California, for instance, individuals now may

identify their gender as male, female, or "X" — a third, non-binary gender marker — on official documents like birth certificates and driver's licenses.

Responding to questions regarding how government contractors subject to demographic data collection requirements contained in federal affirmative action regulations should report the sex of individuals identifying in the gender X category, the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) posted the following "frequently asked question" (FAQ):

> **How should contractors handle counting employees and/or applicants who identify as a gender other than male or female such as Gender X as is recognized in California?**
>
> Those contractors that must develop and maintain Affirmative Action Programs under Executive Order 11246 are required to invite all applicants and employees to voluntarily self-identify their gender (as well as their race and ethnicity). OFCCP has not mandated a particular method for a contractor to obtain information about a person's gender. If an employee or applicant chooses to self-identify as non-binary, or as a gender other than male or female, the contractor must still include the individual in its AAP submission. However, the contractor may exclude that individual's data from the gender-based analyses required by OFCCP's regulations. OFCCP's FAQs specify that a contractor may not ask applicants or employees for documentation to prove their gender identity or transgender status.

For its part, the EEOC last year included an FAQ on non-binary gender identification in its instructions to covered contractors required to file EEO-1 "Component 2" pay and hours worked data. The FAQ instructed filers simply to report employee non-binary gender information in the "comments" section of the report.

As noted, the EEOC hasn't yet published new or additional instructions on this or other related issues since the *Bostock* decision was released last month, but it has signaled that updated guidance may soon be on the way.

Related Practices

Labor & Employment