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EEOC Holds That Anti-Gay Discrimination Is Prohibited Sex Discrimination Under Federal Law

By Alejandro Valle

The past decade has seen a rapid and significant expansion of legal and cultural recognition for the civil rights of homosexuals and transgender individuals throughout the United States. However, under federal law as it is typically interpreted by the courts, discrimination on the basis of sexual orientation remains permissible. Nevertheless, a recent ruling by the United States Equal Employment Opportunity Commission ("EEOC") challenges that interpretation.

On July 16, 2015, the EEOC issued a ruling in an appeal brought by an employee of the Federal Aviation Administration ("FAA"). (Appeal No. 0120133080) While the case involves the private sector, the legal analysis expressed by the EEOC is applicable to private employers as well, and perhaps even beyond the employment context. (By way of background, claims of discrimination brought by federal employees are handled differently than claims by private-sector employees. Generally speaking, federal employees first have their claims handled by their agency employer. If they are not satisfied, they can then appeal to the EEOC, where they have hearings and other procedures unavailable to private-sector workers.)

The case at issue involved a complainant who was a Supervisory Air Traffic Control Specialist for the FAA's Southern Region in Miami,

Florida. He filed a formal Equal Employment Opportunity complaint with the FAA alleging, in part, discrimination on the basis of sexual orientation in connection with his employer's decision to not select him for a permanent position as a Front Line Manager at the Miami facility. The FAA initially dismissed the complaint on the ground that it was untimely, but it also indicated that sexual orientation (clearly the primary basis for the claim) is not explicitly listed as a protected classification in Title VII of the Civil Rights Act of 1964 (which prohibits sex discrimination and certain other forms of discrimination as a matter of federal law). The employee then appealed the decision to the EEOC.

In addressing the appeal, the EEOC reversed the prior dismissal of the complaint and remanded the matter so that the merits of the claim could be addressed. The EEOC's reasoning supporting its view that sexual orientation discrimination is prohibited by federal law was based upon its view that sexual orientation discrimination inherently involves discrimination on the basis of sex, which is expressly prohibited by federal law. The EEOC explained that sexual orientation discrimination is based on reliance upon stereotypes with respect to sex roles, which it asserts is prohibited by federal law.

It is noteworthy that EEOC rulings are not binding on courts, and that the EEOC cannot change federal law; congressional action is necessary for that to happen (and in recent years the attempts to do that, through adoption of the Employment Non-Discrimination Act of 2009 have not been successful at the federal level). However, EEOC rulings are binding on federal agencies and can be persuasive authority for federal courts (indeed, a prior EEOC ruling recognizing transgender or sexual identity-based discrimination as sex discrimination has gained acceptance in various federal courts), and this latest ruling expresses the EEOC's belief that federal law does not need to change in order to provide protection against discrimination in employment based upon sexual orientation.

This is not a position yet taken by the U.S. Supreme Court, the ultimate authority for interpreting federal laws like Title VII. But if enough courts adopt the EEOC's current reasoning and create a split among federal courts, the Supreme Court could be called upon in coming years to address the issue. In the meantime, employers in both the public and private sector need to be aware that the EEOC, at least, views sexual orientation discrimination in the workplace as unlawful, and that its reasoning could even be applied to decisions with respect to housing and education or other areas governed by federal anti-discrimination laws.

It is noteworthy that despite the lack of federal prohibition for discrimination based upon sexual orientation, such prohibitions can and in many instances do exist at the local or state level. Employers should consult with experienced employment law counsel to identify the level of protections provided by the specific locations in which they have employees to properly tailor their policies and practices in

order to comply with all applicable statutes, regulations, and ordinances.

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