Title VII Prohibits Discrimination against Transgender Workers, EEOC Decides

By Michelle E. Phillips

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Transgender discrimination is discrimination on the basis of "sex" under Title VII of the Civil Rights Act, the U.S. Equal Employment Opportunity Commission ("EEOC") has decided in an historic opinion. *Macy v. Holder*, Appeal No. 0120120821 (Apr. 20, 2012).

The case arose out of a dispute between job applicant Mia Macy and the federal agency that would have been her employer, the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATFE"). When Macy applied for a job, she presented as male. Shortly thereafter, Macy informed ATFE that she was transitioning from male to female. Subsequently, ATFE informed Macy that another applicant had been hired because that applicant was farther along in the background check process. Macy filed a complaint against ATFE with the EEOC alleging that the reasons proffered for not hiring her were pretextual and that the true reason was because of her "sex, gender identity (transgender woman) and on the basis of sex stereotyping."

The EEOC agreed with Macy. Relying heavily on the U.S. Supreme Court's *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989), and its progeny, the EEOC held that Title VII bars discrimination not only on the basis of biological sex, but because of gender stereotyping, as well. *See also Glenn v. Brumby,* 663 F.3d 1312, 1318 (11th Cir. 2011); *Smith v. City of Salem,* 378 F.3d 566, 572 (6th Cir. 2004); *Schwenk v. Hartford,* 204 F.3d 1187, 1202 (9th Cir. 2000); *but see Etsitty v. Utah Trans. Auth.,* 2005 U.S. Dist. LEXIS 12634, at *4-5 (D. Utah June 24, 2005) (*Price Waterhouse* is inapplicable to transsexuals), *aff'd on other grounds,* 502 F.3d 1215 (10th Cir. 2007).

The EEOC then reasoned that Macy could establish a viable sex discrimination claim on the ground that ATFE believed that biological men should present as men and wear male clothing, or, alternatively, that ATFE was willing to hire a man, but not a woman. Either way, the EEOC concluded, transgender discrimination is discrimination "based on . . . sex" and violates Title VII.

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This case has far-reaching implications for employers, yet the EEOC's interpretation of Title VII is not necessarily dispositive. If a federal court determines that Congress in Title VII did not intend to include transgender bias within its prohibition on sex discrimination, then the EEOC's interpretation will be rejected. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 842-44 (1984). Alternatively, if a court determines that Title VII is silent or ambiguous on this issue, it will defer to the EEOC's interpretation if it is a "permissible construction of the statute." *Id.* at 843. If the EEOC's interpretation is impermissible, however, the court will decide the issue without regard for the EEOC's opinion.

Macy v. Holder signals a turning point in employment discrimination law on a national level. The EEOC undoubtedly will view any allegation of transgender discrimination as unlawful sex discrimination in negotiations with employers and in agency-sponsored litigation. Employers should consider the following best practices:

1. Train all employees on gender identity and gender expression and sexual stereotyping issues in the workplace;
2. Where applicable, revise anti-harassment policies to include gender identity and expression as a protected classification; and
3. Audit hiring, promotion, and termination practices to ensure that no personnel activity has an adverse impact on transgender employees.

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Practices

Workplace Training

In additional to federal law, employers also should continue to be mindful of changes in state and local fair employment practice laws that may address this issue. Jackson Lewis attorneys are available to provide additional information, answer questions, provide training, and assist employers in their efforts to comply with this newest interpretation of Title VII.