EEOC Makes Protecting Rights of LGBT Workers a Top Priority

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As the debate over gay marriage continues to intensify throughout the country, so does the issue of workplace rights for the lesbian, gay, bisexual and transgender (LGBT) community. LGBT workers currently face substantial legal uncertainty when it comes to workplace discrimination. They do not currently benefit from nationwide protections against discrimination. Instead, LGBT protections consist of a confusing patchwork of judicial and agency interpretations combined with state, municipal and local laws that make discrimination actionable only under certain theories or in specific geographic locations. Protections can vary widely by location, sometimes even by county within the same state. As a result, LGBT workers continue to face discrimination in employment with relatively few, if any, legal protections.

The United States Equal Employment Opportunity Commission (EEOC) has taken notice of this blind spot in workplace discrimination laws and has reversed course. Recently, it has amplified its interest in protecting the rights of LGBT workers.

Philadelphia Passes Ordinance Expanding LGBT Rights

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On April 25, 2013, Philadelphia City Council passed the LGBT Equality Bill, Bill No. 130224, which Philadelphia Mayor Michael Nutter signed into law on May 9, 2013. This ordinance amends various titles of the Philadelphia Code “to provide for equality of treatment of all persons in the City of Philadelphia regardless of gender identity or sexual orientation.”

The LGBT Equality Bill expands upon the protections that had already been afforded to transgender individuals under the Philadelphia Fair Practices Ordinance, which the City amended in May 2002 to prohibit discrimination based on gender identity in public accommodations, housing, and employment. Under the Fair Practices Ordinance, “employer” is defined broadly and now includes “any person who does business in the...
nationwide by broadly interpreting Title VII of the Civil Rights Act of 1964 (Title VII). It is no coincidence that the EEOC’s Strategic Enforcement Plan for 2013-2016 lists “coverage of lesbian, gay, bisexual, and transgender individuals under Title VII” as one of its top six national enforcement priorities. This means that employers should expect the EEOC to take significant enforcement actions in the near future and litigate issues more aggressively in this area going forward.

**The Legal Status Quo**

As mentioned, there is no national law explicitly proscribing workplace discrimination based on sexual orientation or gender identity. The language of Title VII only protects individuals on the basis of “race, color, religion, sex, or natural origin.” Efforts by LGBT advocates to amend Title VII in order to add sexual orientation, expression, and identity through laws such as The Employment Non-Discrimination Act (ENDA) have failed consistently since 1994. Nevertheless, at least 21 states and more than 166 municipalities have covered this gap by enacting local laws covering sexual orientation, and 16 states have gone as far as including prohibitions on gender identity or expression to protect transgender employees. In addition, some private and public employers have voluntarily adopted internal policies forbidding discrimination on those bases.

**The EEOC’s Efforts**

Despite the lack of national uniformity, the EEOC is attempting to provide LGBT workers with a national remedy by broadly interpreting Title VII’s prohibition on “sex” discrimination. Contrary to its previous position, the EEOC is now accepting and investigating charges filed by LGBT individuals concerning workplace harassment and discrimination by treating them as sex-based discrimination claims under a “sex stereotyping” theory.

In April 2012, the EEOC issued a landmark ruling concerning the protections of transgender employees under Title VII. In an appeal filed by a transgender woman who was denied a job at a federal agency, the EEOC ruled that complaints of discrimination based on gender identity, change of sex, and/or transgender status are cognizable under Title VII. This ruling was significant because it marked the first time that the EEOC provided direct guidance on transgender protection.
Previously, the EEOC already had concluded that claims by lesbian, gay, and bisexual individuals alleging harassment stated valid sex discrimination claims under Title VII provided the allegations related to sex stereotyping.\(^3\) Consistent with case law, these rulings clarified that impermissible “sex” discrimination included disparate treatment based on “sex stereotyping.” They reinforced the notion that employers nationwide could not discriminate against individuals whose actions are inconsistent with traditional notions of gender-specific conduct, because of a person’s claimed gender identity or status as transgender, or because of a planned or recent sex change.

THE COURTS’ VIEWS

Courts, however, have been reluctant to extend Title VII protections to discrimination claims based solely on sexual orientation. As such, LGBT individuals cannot currently maintain claims unless their discriminatory treatment was the result of impermissible “sex stereotyping” or “gender nonconformity.” This logic is based mostly on the U.S. Supreme Court’s 1989 decision in *Price Waterhouse v. Hopkins*,\(^4\) which found that Title VII barred not just discrimination because of biological sex, but also gender stereotyping—failing to act and appear according to expectations defined by gender.\(^5\) The issue in *Price Waterhouse* was whether an employer’s refusal to promote a female senior manager to partner because she did not act as some partners thought a woman should amounted to “sex” discrimination. The Supreme Court ruled that discrimination for a woman’s failure to conform to gender-based expectations violates Title VII. The majority of courts have extended this ruling to cover LGBT employees discriminated against for noncompliance with gender stereotypes or failure to meet stereotypical expectations of femininity or masculinity.\(^6\)

In contrast, courts are split as to whether complaining about discrimination based on sexual orientation—which admittedly is not covered by federal statute—is nevertheless actionable “protected activity” under Title VII. The Ninth Circuit and district courts within the Second Circuit have found that such action is protected, while the Sixth and Seventh Circuits disagree.

WASHINGTON) and the District of Columbia have laws prohibiting discrimination against transgendered people, and at least 150 cities and counties have passed their own laws prohibiting gender identity discrimination.\(^1\)

Municipalities have also taken the lead in passing laws prohibiting discrimination based on sexual orientation, which is still not a protected class under federal law or under the laws of 29 states. While currently there is no federal law prohibiting discrimination based on sexual orientation or gender identity, the U.S. Senate and the House of Representatives recently reintroduced the Employment Non-Discrimination Act that would prohibit discrimination on the basis of sexual orientation and gender identity. Despite the absence of a federal law protecting LGBT employees from discrimination, the Equal Employment Opportunity Commission (EEOC)’s strategic enforcement plan (passed in December 2012) provides that the EEOC intends to continue its focus on the protection of LGBT persons under Title VII. The EEOC has taken the position that LGBT discrimination is covered by Title VII’s existing prohibitions against sex discrimination. For example, in *Macy v. Holder*, EEOC Appeal No. 0120120821 (April 20, 2012), the EEOC took the position that discrimination against an individual because that person is transgender constitutes discrimination because of sex in violation of Title VII.

For now, Philadelphia employers should educate their supervisory employees on this new ordinance and confirm that their antidiscrimination policies include sexual orientation and gender identity.

ENDNOTES

Going forward, the EEOC’s publicly stated emphasis on LGBT protections will necessarily shape its future enforcement and litigation activities with respect to private employers, especially in states where protections for gender identity or sexual orientation are lacking. One should expect the EEOC to spend significant resources educating the LGBT community about these recent rulings. Chances are this will lead to an increase in charges and more vigorous investigations.

Likewise, the EEOC is poised to scrutinize employer conduct for signs of proscribed “gender stereotyping.” Its expansive interpretation of what constitutes sex discrimination will undoubtedly impact the EEOC’s evaluation of employers’ policies and practices concerning hiring, advancement, harassment, training, dress/appearance standards, restroom access, employee benefits, and employer conduct. To avoid potential legal challenges, employers should ensure that their policies are neutral with respect to sexual orientation, gender identity or expression, and sufficiently prohibit harassing conduct based on sexual preference, gender stereotypes or intolerance. Further, employers should consider planning their potential response to the needs of transgender employees. This preparation could include developing guidelines and procedures for managing the transition process, reevaluating dress codes and bathroom access policies, determining leave, maintaining confidentiality, and providing sensitivity training to coworkers and management in order to increase tolerance and awareness.

Cultivating a work environment of acceptance of and respect for LGBT workers will not only help to minimize possible legal liability and a negative public image, but will also help employers attract and retain a more diverse, productive, and qualified workforce.

**Endnotes**

1. According to the Human Rights Campaign Foundation, an organization that advocates on behalf of LGBT Americans, discriminating based on sexual orientation remains legal in 29 states, and doing so based on gender identity or expression is lawful in 34 states.


3. See Veretto v. U.S. Postal Service, EEOC Appeal No. 0120110873 (Jul. 1, 2011) (claim by gay man alleging he was harassed because he intended to marry a man rather than a woman viable under Title VII); Castello v. U.S. Postal Service, EEOC Appeal No. 0120111795 (Dec. 20, 2011) (refusing to dismiss hostile work environment claim where lesbian complainant was subjected to offensive and derogatory comments about her having relationships with women because the conduct could be seen as motivated by the sexual stereotype that having relationships with men is an essential part of being a woman, or by complainant’s failure to adhere to this stereotype).


5. See Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011) (concluding that firing from a Georgia legislature job due to employee’s disclosure of intended gender change was sex discrimination).

6. See, e.g., Glenn v. Brumby, supra; Prowel v. Wise Business Forms, Inc., 579 F.3d 285 (3rd Cir. 2009) (effeminate gay man who failed to conform to employer’s expectations of how men should look, speak, and act had sufficient evidence to maintain gender stereotyping harassment claim under Title VII); Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004) (finding discrimination against transsexual firefighter who failed to act or identify with his male gender actionable sex discrimination under Title VII).
New Jersey Bill Could Put an End to the Use of Non-Compete Agreements As We Know It

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Last month, the New Jersey Legislature introduced a bill that could drastically limit the enforceability of non-compete, non-solicitation, and non-disclosure agreements that New Jersey employers routinely enter into with their employees. Such agreements are typically entered into between an employer and certain executive-level employees and/or employees who have access to confidential/trade secret information or important customer relationships. These agreements protect an employer by preventing the employee from working for the employer’s competitors for a finite period of time after termination of employment, soliciting its employees and/or customers for a finite period of time after termination of employment, and disclosing the employer’s confidential information at any time after the employment relationship ends. Employers consider these agreements to be necessary to protect legitimate business concerns.

Under the current law, a non-compete agreement is generally enforceable in New Jersey so long as it is reasonable in scope, protects the legitimate business interest of the employer in confidential information or customer relationships, does not impose an undue hardship on the employee, and is not injurious to the public. Recently, however, a bill was introduced in the New Jersey State Legislature that would significantly curb an employer’s ability to enforce these types of agreements.

On April 4, 2013, Assemblymen Peter J. Barnes III, Joseph V. Egan, and Wayne DeAngelo introduced a bill (A3970) to the New Jersey Assembly which, if passed, would render non-competition, non-solicitation, and non-disclosure agreements between employers and their employees invalid if the employee qualifies for unemployment compensation. The bill does, however, provide for a grandfather clause, which permits any agreements that were in effect on or before the date of enactment to remain valid. The bill has been referred to the Assembly Labor Committee. The Governor’s Office of New Jersey has not commented on the proposed legislation. The bill can be found at http://www.njleg.state.nj.us/2012/Bills/A4000/3970_I1.PDF.

New Jersey’s proposed legislation is not the only recent bill to curtail the enforceability of restrictive covenants for employees. Minnesota, Massachusetts, and Virginia also have proposed such legislation, albeit less expansive than New Jersey’s. In Minnesota, Bill H.F. No. 506 would void contracts, including employment agreements containing restrictive covenants, that prohibit parties from “exercising a lawful profession, trade, or business” except when a business is sold or a partnership or limited liability is dissolved. Proposed legislation in Virginia (House Bill 1187) would make any contract that serves to restrict an employee or former employee from engaging in a lawful profession, trade, or business of any kind unlawful, except in the following circumstances: persons selling a business, former partners in a
partnership, and former members in a limited liability company, who agree to refrain from carrying on a similar business within a specified geographic area in which the original entity carries on business. Finally, Massachusetts House Bill 2293, the least expansive of the proposed legislation, codifies Massachusetts’ common law requiring that non-compete agreements must be necessary to protect one or more of the following legitimate business interests of the employer: (i) trade secrets to which the employee had access while employed; (ii) confidential information that would otherwise not qualify as a trade secret; or (iii) goodwill and/or customer relationships. The most recent draft of the Massachusetts bill limits the duration of non-compete agreements to six months.

All of these bills are currently in the committee stage and have yet to be passed. New Hampshire passed a law (RSA 275:70) that went into effect in July 2012 that requires employers to provide a copy of any noncompetition agreement to employees before or contemporaneously with any offer of employment. The failure to abide by this notification requirement renders any such agreement void.

In comparison to other states’ legislation relating to the enforceability of non-compete agreements, New Jersey’s proposed legislation is by far the most far reaching. If passed, this bill will have a significant effect on employers’ abilities to protect their most valuable business assets. Notably, unlike the other states, New Jersey’s bill covers not only non-compete agreements, but also non-disclosure and non-solicitation agreements. Moreover, tying the agreements’ enforceability to an employee’s eligibility for unemployment compensation is troubling on several levels. An employee whose employment is terminated by the employer is eligible for unemployment benefits unless the employee committed “gross misconduct,” a standard that is very difficult for the employer to establish. Unemployment compensation tribunals generally err on the side of granting benefits. These tribunals decide matters without any significant discovery, and, while they may be adequate to determine whether an ex-employee receives unemployment compensation for a limited period of time, they are not equipped to make decisions that affect very important employer interests, such as the protection of confidential information and/or customer relationships. As a result, tying enforceability of non-competition, non-disclosure, and non-solicitation covenants to unemployment compensation eligibility will very likely result in many agreements being deemed unenforceable.

It remains to be seen whether the bill will pass in its current form, some amended version or at all. In the meantime, employers should monitor New Jersey state legislation and continue to enter into non-compete/non-solicitation/non-disclosure agreements when appropriate.

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**Pepper Attorneys Presented at New York Law Journal’s In-House Counsel CLE Seminar**


To view the PowerPoint slides of the presentation, visit: http://www.pepperlaw.com/pdfs/NYLJ_SocialMediaPresentation043013.pdf.
The Third Circuit Court of Appeals recently ruled that a shareholder-director of a closely held family corporation was not an “employee” under Title VII, and therefore could not sue for discrimination. See Mariotti v. Mariotti Building Products, Inc., No. 11-3148, 2013 WL 1789440 (3d Cir. April 29, 2013).

Mariotti Building Products, Inc. is a “closely held family business” started by Louis S. “Babe” Mariotti in 1947. In the 1960s, Babe’s sons, plaintiff Robert Mariotti, Sr. and his two brothers, Eugene and Louis, joined the business, which eventually grew to be worth more than $60 million. In his more than 45 years with the company, Robert developed a number of business areas, training staff in the day-to-day management of several product lines. He principally managed the manufactured housing sales division, as well as customer credit, bill paying, purchasing, and the inbound transportation of product lines. He was a shareholder and an officer of the corporation, serving as both vice president and secretary and as a member of the board of directors. He was employed pursuant to an agreement that provided for termination only for “cause.”

In 1995, Robert had a religious “spiritual awakening,” which he alleged was derided by the officers, directors and employees of the company. In 2008, Babe passed away. Two days after the funeral, the company’s shareholders convened a meeting in Robert’s absence and voted unanimously to terminate his employment. In the letter of termination, the company explained that various benefits would cease, including the use of a company car, health insurance coverage, a cellular telephone, access to company credit cards, and the availability of an office. The letter further indicated that “[y]our share of any draws from the corporation or other entities will continue to be distributed to you.” (The court noted that, in a closely held corporation, a “draw” is a withdrawal of money from the business to the business owner.)

Despite his termination, Robert continued to serve as a member of the company’s board of directors until August 2009, when the shareholders did not re-elect him as a director. Two months later, Robert filed a charge of religious discrimination in violation of Title VII of the Civil Rights Act of 1964. After exhausting his administrative remedies, he filed suit against the company. The company moved to dismiss the complaint, arguing that Robert was not an “employee” for purposes of Title VII. The District Court granted the motion and Robert appealed.

The Third Circuit decided that the six-part test identified by the United States Supreme Court in Clackamas Gastroenterology Associates, P.C. v. Wells, 538 U.S. 440 (2003) (brought under the Americans with Disabilities Act) governs whether Robert was an employee entitled to sue under Title VII. The six Clackamas factors are:

1. whether the organization can hire or fire the individual or set the rules and regulations of the individual’s work
2. to what extent the organization supervises the individual’s work
3. whether the individual reports to someone higher in the organization
4. to what extent the individual is able to influence the organization
5. whether the parties intended that the individual be an employee, as expressed in a written agreement, and
6. whether the individual shares in the profits, losses and liabilities of the organization.

The Supreme Court noted that no one factor was dispositive and cautioned against using an individual’s title as a determinative factor.
Applying the Supreme Court’s six-factor test, the Third Circuit determined that Robert’s status as a shareholder, director and corporate officer gave him substantial authority at the company and the right to control the enterprise. He participated in the management, development and governance of the company, and he had the ability to participate in fundamental decisions of the business. After his termination as a day-to-day manager of the company, Robert continued to receive distributions from the corporation in the form of draws. The court also noted that Robert continued to serve as a member of the board of directors. As a result, the court concluded that the complaint failed to allege that Robert was “the kind of person that the common law would consider an employee.” Id. at *5.

While the Mariotti case is helpful to employers, for closely held companies, the issue of whether shareholders who perform work for the company will be given the broad protections afforded employees under the discrimination laws is fact-sensitive. As the Third Circuit warned, such cases rarely are subject to a motion to dismiss. In addition, it should be noted that Pennsylvania and New Jersey have minority shareholder oppression laws that provide protection to minority shareholders in closely held corporations. Accordingly, closely held corporations should carefully review these potential protections with counsel before terminating or significantly altering the services provided to the closely held corporation by a shareholder.