WEB EXCLUSIVE: The Changing Face Of Discrimination

Insights
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As all hospitality employers know, Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of "sex." However, the statute does not specifically mention sexual orientation or gender identity. What does this mean for your business?

Federal Agency Has Long Considered LGBT Employees Protected
The Equal Employment Opportunity Commission (EEOC) has long taken the position that "sex," as it is used in Title VII, includes sexual orientation and gender identity. Since 2013, the agency has identified the protection of lesbian, gay, bisexual, and transgender employees under Title VII as one of its top strategic enforcement priorities, and has filed a number of lawsuits in this pursuit. In fact, in a July 2015 administrative proceeding involving a federal employee (*Baldwin v. Foxx*), the agency specifically ruled that "sexual orientation is inherently a 'sex-based consideration' and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII."

Are Courts Coming Around?
Until recently, federal courts addressing the issue have been reluctant to categorically hold that discrimination based on sexual orientation is prohibited by Title VII. Instead, the courts often concluded that, while an employee could bring a claim of sex discrimination based on their "failure to comport with gender stereotypes," they could not do so based solely on sexual orientation, as the 10th Circuit Court of Appeals did in 2005 (*Medina v. Income Support Div., New Mexico*). For obvious reasons, that distinction has caused a great deal of uncertainty for the lower courts and employers.

Last month, however, the 7th Circuit Court of Appeals (which covers Illinois, Indiana, and Wisconsin) became the first federal court of appeals in the nation to rule that sexual orientation claims are actionable under Title VII (*Hively v. Ivy Tech Community College*). In a full-panel, *en banc* decision, the court opened the door for lesbian, gay, and bisexual applicants and employees to use Title VII to seek relief for allegations of employment discrimination, harassment, or retaliation.

In the opinion, the court concluded that "discrimination on the basis of sexual orientation is a form of discrimination" and it "would require considerable calisthenics" to remove the "sex" from "sexual orientation" when applying Title VII. In addition, the court noted that efforts to do so had led to confusing and contradictory results, as noted above. In the end, the court concluded that practical realities necessitated it rule as it did.

What Hospitality Employers Need To Know

This ruling is most significant for employers in Illinois, Indiana, and Wisconsin because it broadens the class of potential plaintiffs able to bring discrimination, harassment, and retaliation claims against you. If you operate in any of these states, you must ensure sexual orientation is treated the same as any other protected class, and further ensure fair and equal treatment to all applicants and employees regardless of sexual orientation.

Among other things, you should immediately review your written policies, handbooks, training materials, hiring methods, discipline and discharge procedures, and all other aspects of your human resources practices to make sure lesbian, gay, and bisexual individuals are treated the same as all other applicants and employees. Moreover, you should consider training managers to heighten awareness of the issue.

Employers in other states need to keep this issue on their radar as well. Many states (California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Utah, Vermont, Washington, and Wisconsin) already have their own laws on the books prohibiting discrimination based on sexual orientation.

Regardless of whether your state has such a law, you must prepare for the likelihood that other courts of appeal will follow the lead of the 7th Circuit. As one court recently stated, "it seems unlikely that our society can continue to condone a legal structure in which employees can be fired, harassed, demeaned, singled out for undesirable tasks, paid lower wages, demoted, passed over for promotions, and otherwise discriminated against solely based on who they date, love, or marry." Ultimately, this issue may have to be resolved by the Supreme Court.

Finally, you should recognize that many federal courts have held that Title VII covers claims in which plaintiffs allege discrimination or harassment based on "failure to comport with gender stereotypes." This includes, for example, situations where employees are harassed for failing to conform to stereotypical gender norms. Courts have noted that drawing a line between these "sex-stereotyping" claims and pure sexual orientation claims is "exceptionally difficult" because the distinction is often "elusive." Consequently, employers anywhere could face Title VII claims akin to claims for sexual orientation discrimination.

Conclusion

As mentioned above, the 7th Circuit's decision serves as a good reminder to employers located in states that, in one way or another, prohibit discrimination based on sexual orientation. You should take this opportunity to review your policies and practices, and train your managers with respect to this important issue. Many employers across the country have already committed to providing equal employment opportunities for lesbian, gay, bisexual, and transgender applicants and employees. To the extent you have not, you should pay close attention to legal developments in this area and be prepared to modify your policies and practices as soon as an applicable decision comes down.

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