

Sex Discrimination in the Federal Workplace

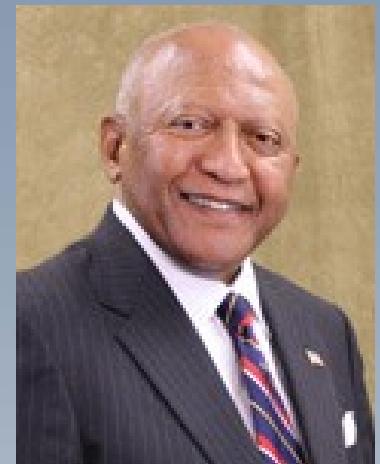
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Title VII of the Civil Rights Act of 1964

- As amended: forbids discrimination when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, and any other term or condition of employment.

Sex Discrimination

- Involves treating someone (an applicant or employee) unfavorably because of that person's sex.
- Treating someone less favorably because of his or her connection with an organization or group that is generally associated with people of a certain sex.
- Discrimination against an individual because that person is transgender

Sexual Harassment

- Can occur in a variety of circumstances, including, but not limited to the following:
 - The victim as well as the harasser may be a woman or a man.
 - The victim does not have to be of the opposite sex.
 - The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker, or a non-employee.
 - The victim does not have to be the person harassed but could be anyone affected by the offensive conduct.
 - Unlawful sexual harassment may occur without economic injury to or discharge of the victim.
 - The harasser's conduct must be unwelcome.

Employer/Agency Defense

- Automatically liable for harassment by a supervisor that results in a negative employment action such as termination, failure to promote or hire, and loss of wages.
- If the supervisor's harassment results in a hostile work environment, the employer can avoid liability only if it can prove that:
 - It reasonably tried to prevent and promptly correct the harassing behavior
 - The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.
 - See *Faragher*, 524 US 775 (1998) and *Ellerth*, 524 US 742 (1998).
- The Agency/Employer will be liable for harassment by non-supervisory employees or non-employees over whom it has control (e.g., independent contractors or customers on the premises), if it knew, or should have known about the harassment and failed to take prompt and appropriate corrective action.

Sex/Gender Stereotyping

- A form of discrimination in which Individual A discriminates against Individual B because Individual B does not conform to a gender stereotype;
 - i.e.: Individual B does not act how Individual A thinks a man or woman is "supposed" to act.
- When gender-stereotyping discrimination involves members of the same sex, it is commonly referred to as same-sex, gender-stereotyping.
 - See also:
http://www.eeoc.gov/federal/training/brown_bag_transgender.cfm

Grooming or Look Policies

- Can be discriminatory when an employer has a grooming or look policy that creates a disparate treatment based upon gender, physical, or cultural characteristics between races.

Sexual Orientation

- **Executive Order 13087**

- Signed by U.S. President Bill Clinton on May 28, 1998, amending Executive Order 11478
- To prohibit discrimination based on sexual orientation in the competitive service of the federal civilian workforce.
- Applies to employees of the government of the District of Columbia, and the United States Postal Service.
- Does not apply to positions and agencies in the excepted service, such as the Central Intelligence Agency, National Security Agency, and the Federal Bureau of Investigation

The Employment Non-Discrimination Act

- Legislation *proposed* in Congress that would prohibit discrimination in hiring and employment on the basis of sexual orientation or gender identity by employers with at least 15 employees.

What would ENDA add?

- ENDA would add two very significant things. First, it would settle, once and for all, that transgender people do have federal employment protections. This means that employers would be more willing to stop discrimination right as it is about to happen for fear of triggering a lawsuit. Employers would also be more likely to settle a complaint when it is filed, and contingency-fee attorneys would be more likely to take a transgender person's case if someone needs to sue.

The Employment Non-Discrimination Act

Second, it would trigger a series of actions by employers that would likely stop discrimination from happening in the first place.

Three things would happen:

- It would trigger nearly every employer to update its non-discrimination policy with the words "gender identity" raising awareness among all employees that they cannot discriminate.
- Those employers who do training on discrimination would now include transgender discrimination and education as standard aspects of that training.
- Employers would have to update existing posters in their workplaces that say workplace laws include "gender identity."
- The occurrence of these last items would represent the true essence of the Employment Non-Discrimination Act. There would be widespread knowledge that anti-transgender discrimination is illegal. Think about how the Americans with Disabilities Act has changed the landscape for people with disabilities — a similar effect is seen here.

<http://transgenderequality.wordpress.com/2013/09/24/four-things-you-should-know-to-understand-the-eeoc-decision-and-the-need-for-enda/>

The Employment Non-Discrimination Act

- Introduced in various incarnations in every congressional session since the 103rd Congress, the proposed Employment Non-Discrimination Act (ENDA; H.R. 1755/S. 815) would prohibit discrimination based on an individual's actual or perceived sexual orientation or gender identity by public and private employers in hiring, discharge, compensation, and other terms and conditions of employment. The stated purpose of the legislation is "to address the history and persistent, widespread pattern of discrimination, including unconstitutional discrimination, on the basis of sexual orientation and gender identity by private sector employers and local, State, and Federal Government employers," as well as to provide effective remedies for such discrimination. Patterned on Title VII of the Civil Rights Act of 1964, the act would be enforced by the Equal Employment Opportunity Commission (EEOC).

<https://www.fas.org/sqp/crs/misc/R40934.pdf>

Pregnancy Discrimination Act of 1978

- Amends Title VII and prohibits sex discrimination on the basis of pregnancy:
 - (k) The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title shall be interpreted to permit otherwise.

Patient Protection and Affordable Care Act

- Amended section 7 of the Fair Labor Standards Act (FLSA) to require employers to provide:
 - "Reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk."
 - "A place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk."
 - *See also,* <http://www.dol.gov/whd/nursingmothers/faqBTNM.htm>

Case Highlights

Price Waterhouse

- The Court held that the employer, accounting firm Price Waterhouse, must prove by a preponderance of the evidence that the decision regarding employment would have been the same if sex discrimination had not occurred.
- The accounting firm failed to prove that the same decision to postpone Ann Hopkins' promotion to partnership would have still been made in the absence of sex discrimination, and therefore, the employment decision constituted sex discrimination under Title VII of the Civil Rights Act of 1964.
- The significance of the Supreme Court's ruling was twofold:
 - It established that gender stereotyping is actionable as sex discrimination.
 - It established the mixed-motive framework as an evidentiary framework for proving discrimination under a disparate treatment theory even when lawful reasons for the adverse employment action are also present

Case Highlights

Schroer v. Billington (D.D.C.)

- Resulted in a landmark ruling that Title VII's prohibition on sex discrimination, also protects individuals who are undertaking / have undertaken a gender transition.

Case Highlights

- The Commission has also found that claims by lesbian, gay, and bisexual individuals alleging sex-stereotyping state a sex discrimination claim under Title VII.
 - *See Veretto v. U.S. Postal Service*, EEOC Appeal No. 0120110873 (July 1, 2011); *Castello v. U.S. Postal Service*, EEOC Request No. 0520110649 (Dec. 20, 2011),
 - <http://www.eeoc.gov/decisions/0520110649.txt>.

Case Highlights

- **Adams v. Dep't of Health & Human Serv., EEOC Appeal No. 0120112249 (March 19, 2013)**
 - Complainant was subjected to sexual harassment by a Supervisor, and was awarded \$500 in compensatory damages.
 - On appeal, the Commission found that the award was not adequate.
 - The Commission noted that Complainant's petition for damages was not in the record or submitted on appeal.
 - The Commission found that the record contained relevant evidence in the form of Complainant's affidavit that was sufficient to support an award for emotional harm.
 - Complainant stated that she suffered emotional harm from being physically touched and sexually degraded by the Supervisor for a period of one to two years.
 - Complainant felt embarrassed and violated, and feared for her safety.
 - She was scared to go to work and to leave the facility after work, and was one of several employees who sought a temporary protection order against the Supervisor.
 - The Commission concluded that Complainant was entitled to an award of \$30,000 in non-pecuniary damages.
 - The Commission noted that the lack of medical testimony or documentation in the record reduced what could have been a higher award.

Case Highlights

- **Baker v. Soc. Sec. Admin., EEOC Appeal No. 0120113378 (January 11, 2013)**
 - On appeal, the Commission found that the AJ's issuance of a decision on summary judgment was improper.
 - The Commission initially determined that Complainant's allegations stated a viable claim of sex discrimination and Complainant's characterization of the basis as sexual orientation did not defeat the otherwise valid sex discrimination claim.
 - Complainant alleged that he was mocked as effeminate and told he had "flamboyant" mannerisms which were unsuited to the work place.
 - These allegations were sufficient to state a claim of discrimination for failure to match gender-conforming behavior and, thus, stated a claim of sex discrimination.
 - The record revealed that there were material facts in dispute regarding Complainant's allegation of hostile work environment harassment based on sex, such as whether a Supervisor used terms such as "honey," "sweetie," or "baby," or made "overtly gay" gestures.

Baker v. Soc. Sec. Admin., EEOC Appeal No. 0120113378 (January 11, 2013) - Continued

- In addition, there was a dispute as to whether another Supervisor referred to Complainant as "flamboyant" to mock him based upon his perceived sexual orientation.
- The Commission noted that the second Supervisor had passed away since Complainant filed his complaint making this the type of situation in which a hearing was required to judge the credibility of available witnesses and make findings regarding the material issues in contention.
- The Commission also found that there were genuine issues of material fact regarding claims concerning Complainant's working conditions, including facts that went to the motivation based on race and reprisal.
- The Commission concluded that the AJ could not have reached a finding of no discrimination in this case except by resolving significant conflicting evidence in the Agency's favor, which was inappropriate in a grant of the Agency's motion for summary judgment.
- Therefore, the complaint was remanded for an administrative hearing.
- *Baker v. Soc. Sec. Admin.*, EEOC Appeal No. 0120110008 (January 11, 2013).

Case Highlights

- **Smith v. U.S. Postal Service, EEOC Appeal No. 0120113378 (November 21, 2012)**
 - Complainant's allegation that the Postmaster gave better work hours and assignments to a younger female clerk to whom he was sexually attracted stated a viable claim of discrimination.
 - The Commission has taken the position that sexual favoritism in the workplace which adversely affects the employment opportunities of a third party may, under certain circumstances, constitute sexual harassment.
 - While Complainant checked only the box for age discrimination on the complaint form, the Commission found implicit in her complaint, a claim of sexual favoritism where she was alleging she was disadvantaged because she is an older woman.

Case Highlights

- **Charvat v. Dep't of Veterans Affairs, EEOC Appeal Nos. 0120120075 & 0120122771 (January 4, 2013)**
 - Complainant alleged a series of sexual overtures by an Agency Director, followed by allegations of professional misconduct after they were rebuffed, as well as a series of denied or withdrawn professional opportunities.
 - When considered together and viewed in a light most favorable to Complainant, the allegations were sufficiently severe or pervasive to state a viable claim of discriminatory harassment.
 - In addition, the allegation contained in a second complaint concerning the termination of her appointment was entirely related to the first complaint such that the complaints should be investigated together in order to avoid fragmentation

Case Highlights

- **Gender Discrimination: Assignments**
 - The Commission found that the male complainant was a victim of gender-based disparate treatment discrimination when he was required to pull weeds on at least six different occasions, while a female comparative was never assigned this duty.
 - The Commission rejected as pretextual the agency's reason for having complainant pull weeds,
 - *i.e.*, that having finished his route early he was available for grounds maintenance at the agency's facility.
 - In finding pretext the Commission noted that: no one else in his class was made to pull weeds; and on at least three occasions, even while performing his primary duties, complainant was redeployed to pull weeds while his primary duties were reassigned to an outside contractor; the agency posted a vacancy announcement for complainant's position while complainant was performing weed-pulling duties.
 - *Rowan v. Department of Veterans Affairs*, EEOC Appeal No. 01A45684, request to reconsider denied, EEOC Request No. 05A60365 (March 21, 2006).

Case Highlights

- **Gender Discrimination: Hostile Work Environment (Pregnancy)**
 - Complainant, a podiatric physician, testified that she was verbally harassed by another physician ("Dr. A") who always made an issue of her pregnancy and once yelled at her because she went to an obstetrician.
 - An AJ also found that Dr. A threatened to terminate complainant because of her pregnancy.
 - Complainant provided extensive testimony regarding the emotional harm she suffered from Dr. A's harassment.
 - Complainant testified that the threats to her career and the constant harassment about her pregnancy caused her to fear that she would lose her job and her baby.
 - The Commission found that an award of \$70,000.00 in non-pecuniary damages was appropriate.
 - *Crear v. Department of Veterans Affairs*, EEOC Appeal No. 07A50079 (January 26, 2006).

Where to File

- **Federal – Your Agency's EEO Office.** Federal employees have 45 days to contact an EEO Counselor.
- **Private – Your local EEOC or State Fair Employment Practice Agency (FEPA)** within 180 days, which may be extended to 300 days by state law.

How an Experienced Attorney Can Help You:

- Counseling You on Recognizing and Preserving Your Claims
 - Identifying your claims
 - Counseling you through difficult situations
 - Determining whether exception to the rules applies
 - Acquiring and developing evidence to prove your claims
- Negotiating with the Agency to Settle Your Dispute
 - Evaluating the strengths and weaknesses of your case
 - Counseling you on the pros and cons of early resolution
 - Leveraging your case and its facts to your benefit
 - Ensuring a settlement is in YOUR best interest
 - Protecting you in the event the Agency breaches the agreement
- Ensuring Timeliness
 - Missing a deadline may result in dismissal or significant harm
 - Navigating complex deadlines
- Leveling the Playing Field to Prevent Injustice
 - Neutralizing aggressive defense tactics
 - Recognizing improper evidence requests and developing an accurate record



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Questions?

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