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## TITLE VII PROTECTS TRANSGENDER EMPLOYEES, EEOC SAYS

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In a recent landmark decision, the U.S. Equal Employment Opportunity Commission found that discrimination against transgender employees is a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964. Although courts are not bound by the decision, it essentially creates a new “protected class” as far as the EEOC is concerned and thus can be expected to have a significant impact on private, as well as public, employers.

### The Case

In *Macy v. Holder*, a police detective who was born a male and still presented as a male at the time, applied for a position as a ballistics technician at the Bureau of Alcohol, Tobacco, Firearms, and Explosives. Macy was assured that the position would be his assuming no problems arose during the background check. However, during the hiring process, Macy disclosed that he was in the process of transitioning from male to female. Shortly thereafter, Macy was informed that the position was no longer available due to federal budget reductions. Macy later learned that another applicant was hired for the position.

Macy, by now a transgender woman, filed a discrimination complaint against the ATF, claiming that the ATF failed to hire her based on “gender identity” and “sex stereotyping.” The EEOC accepted the complaint but required that it be processed under the policies of the U.S. Department of Justice, which offer more limited remedies than are available under Title VII and do not provide the right to a hearing. Then the EEOC issued a “correction,” saying that it would accept the case but under the agency’s “policy and practice” rather than Title VII. After Macy’s appeal, however, the EEOC agreed with Macy that the complaint was more appropriately a discrimination claim based on “gender identity” and “sex stereotyping.” The EEOC relied heavily on the 1989 U.S. Supreme Court decision, *Price Waterhouse v. Hopkins*, in determining that discrimination against transgender workers is tantamount to sex discrimination. In *Price Waterhouse*, the Supreme Court held that Title VII barred not only discrimination based on biological sex, but also discrimination based on gender stereotyping. Following the reasoning of *Price Waterhouse*, the EEOC concluded that discrimination against transgender employees amounts to gender stereotyping, which is prohibited by Title VII.

The *Macy* holding is binding on the EEOC and its offices but not on the courts. How-

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ever, courts frequently defer to the EEOC's interpretations. Moreover, some federal courts have already held that Title VII protects transgender employees, and some **state laws** prohibit transgender discrimination.

### **Impact on Employers**

*Macy* will open the door for the EEOC to accept charges against private employers based on transgender discrimination. Employers should continue to demand equality and respect among all employees in the workplace, and ensure that supervisors and managers are aware of this new "protected category." Here are some additional suggestions:

1. Educate managers and supervisors about what it means to be a transgender individual.
2. Make sure that even non-management employees understand that discrimination or harassment based on transgender status or "sexual stereotypes" is strictly against company policy and may be illegal.
3. Revise and supplement employee handbooks, applications, orientation and training materials, personnel forms, and policies and procedures to include gender identity.
4. Avoid "overcorrecting" by, for example, requiring employees to "affirm" "diverse" behavior that may violate their religious beliefs. It's sufficient to prohibit discrimination and harassment, and to require employees to treat each other with respect and courtesy. Being more aggressive than that, however, could bring on a religious discrimination charge.

If you have a question about gender identity or sex stereotyping in the workplace, please contact any member of Constangy's **Litigation Practice Group**, or the Constangy attorney of your choice.

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