

Transgender Workers are Protected by Title VII, EEOC Says

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By Scott T. Silverman and Richard D. Tuschman

The EEOC has ruled that claims of discrimination based on transgender status, also known as “gender identity,” are cognizable under Title VII.

In a decision issued on April 20, 2012, the agency found that the claims of Mia Macy (“Macy”), a transgender woman who had applied for a position with the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATFE”), were cognizable under Title VII. Macy alleged that she had discussed an open position with the Director of an ATFE crime laboratory, while presenting as a man. According to Macy, she was told during the conversation that she would have the position, as long as no issues arose during a background check, and that an ATFE investigator was assigned to complete the background check. However, within five (5) days of informing the ATFE that she was transitioning from a male to female, Macy claimed that she was informed that the position was no longer available due to federal budget reductions. Macy asserted that this explanation was a pretext and that the real reason she was denied the position was her transgender status.

In reaching its conclusion, the EEOC reasoned that Title VII prohibits not merely discrimination based on sex, which constitutes the biological differences between men and women, but also on gender, which encompasses the “cultural and social aspects associated with masculinity and femininity.” The EEOC noted that in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989), six members of the Supreme Court concluded 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.” Thus, because decisions based on transgender status necessarily involve a failure to act and appear according to gender expectations and norms, they unmistakably constitute gender discrimination, according to the EEOC.

The EEOC concluded that when an employer discriminates against an individual because the person is transgender, the employer has engaged in disparate treatment related to the sex of the victim. This is true regardless of whether the employer discriminates because the individual has expressed gender identity in a non-stereotypical fashion, because the employer is uncomfortable with the transitioning, or because the employer simply does not like that the person is identifying as a transgender person. The EEOC cited numerous court decisions that have reached the same conclusion, including the Eleventh Circuit’s recent decision in *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011,) which we discussed in a prior Practice Update.

But what does “transgender” mean? A male who is in the process of converting to female through surgery and hormone treatments is clearly transgender, but what about a cross-dresser? Are employers prohibited from taking into account the fact that a male applicant is a “drag queen”, or that a female applicant wears her hair short, applies no make-up, and appears androgynous?

The answer would appear to be yes. According to the American Psychological Association (“APA”) web site, “transgender” is “an umbrella term for persons whose gender identity, gender expression, or

behavior does not conform to that typically associated with the sex to which they were assigned at birth.” That definition would seem to cover a wide range of people apart from those who have physically converted, or are in the process of converting, from one sex to another – including cross-dressers and people who appear androgynous. Indeed, note again the EEOC language stating that discrimination exists where the employer makes a decision based on the individual's expression of gender identity in a non-stereotypical fashion. This statement covers both situations.

The lesson of the Macy decision is clear: Employers faced with an applicant or an employee who does not meet gender-based cultural and social norms should be aware that discriminating against such persons based on their identity, behavior, or appearance may constitute a violation of Title VII.

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