

# Who Am I? EEOC Recognizes Gender Identity Discrimination

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An Equal Employment Opportunity Commission ruling in April 2012 determined that employers found to be discriminating against an employee or applicant because of that person's gender identity are violating Title VII of the Civil Rights Act of 1964.

## Background

Title VII of the Civil Rights Act of 1964 prohibits discrimination based on sex (along with other protected classifications such as religion, race, age, pregnancy, and national origin). Title VII has not yet been extended to sexual preference. Further, several courts ruled back in the 1980s that the ban on sex discrimination did not protect transgendered individuals – that is, individuals who, because they believe they were born the wrong sex, undergo medical procedures to "correct" what they see as a physical defect and become the opposite sex.

However, now, and because of an Equal Employment Opportunity Commission ("EEOC") ruling in April of this year, employers found to be discriminating against an employee or applicant because of that person's change in gender identity will be held to be in violation of Title VII.

In addition, although North Carolina is not one of them, some states now ban employment discrimination based on gender identity. Finally, while the federal Employment Non-Discrimination Act has not yet passed in Congress, if passed and signed into law, it would also offer additional protections regarding gender identity and expression.

## The *Macy* Case

The April 2012 EEOC ruling arose when Ms. Mia Macy, a transgendered woman born a male, was denied employment as a ballistics technician at the Federal Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF"). When Macy initially applied for the ballistics technician position, she appeared to be a man. Macy also appeared to be qualified for the job (by way of example, he already worked for the U.S. Department of Justice and had received ballistics training). He disclosed his gender transition to female to ATF after a conditional offer of employment had already been made and while ATF was waiting on the results of Macy's background check. Macy disclosed her transition in order to advise ATF of her upcoming name change. She was then told that she would not be hired because the position had lost its funding.

When Macy followed up with ATF's Human Resources Department, ATF admitted that the first explanation was false and that another individual had been given the job. Macy was told this time that the individual who was hired simply had been farther along in the application process.

The Transgender Law Center brought the EEOC case on Macy's behalf. Eventually, the EEOC determined that ATF had violated Title VII. The EEOC decision reads, in part, that "Title VII does not only prohibit

discrimination on the basis of an individual's biological sex...Gender discrimination occurs any time an employer treats an employee differently for failing to conform to any gender-based expectations or norms." The EEOC continued, "Thus, we conclude that intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination 'based on...sex,' and such discrimination therefore violates Title VII."

Although the EEOC's decision focused on Macy's public employment with the federal government and an ACLU press release stated that the Macy "ruling means that all transgender people working for the federal government are now protected against discrimination....," there is nothing to suggest that the Macy decision and EEOC's reasoning will not be applied to private sector employers.

### **What Does *Macy* Mean for Private Employers?**

So where does the EEOC Macy ruling leave private employers? First, employers subject to EEOC jurisdiction (essentially, every employer that employs 15 or more employees) should update their anti-discrimination policies to include references protecting transgendered individuals. Second, employees, and especially those involved in the application and review process as well as those in other positions of authority, should be trained on how to react appropriately when transgender issues arise in the workplace. Finally, although North Carolina has not adopted a rule similar to the EEOC Macy decision, North Carolina employers not subject to EEOC jurisdiction should also update their anti-discrimination policies to include references protecting transgendered individuals in order to avoid becoming, and having to pay to defend, the inevitable "test case." And be aware that entities such as the Transgender Law Center are waiting for test cases to arise. Don't be that test case.

It is unclear how this EEOC ruling will affect private employers over the long run. Many scenarios that can be contemplated have not yet been addressed by the courts, and may not even have arisen yet. For example, should employers even address or acknowledge such an employee's/applicant's transition? If so, how? Further, one can imagine scenarios whereby employers could have EEOC charges brought against them because of their handling of the use of restroom facilities. At what point is it appropriate to have an employee undergoing such a transition begin to use the opposite sex's restroom facilities? At that point, would it be advisable to make all restrooms unisex restrooms? What role, if any, should the sensitivities of other employees, accustomed to knowing the transitioning employee as a member of the opposite sex, play?

The bottom line is that the safest approach is to allow the transgendered employee an avenue whereby concerns can be raised (i.e., Human Resources or its equivalent). At the same time, other employees must be given the same avenues for complaints or questions.

### **Management and Employee Education**

Employers should advise their workforce that discriminating against transgendered employees is now viewed by the EEOC as a violation of Title VII, and should instruct their managers and employees on how to deal with transgender issues.

### **Conclusion**

Recently, Cher's daughter (and now son) Chastity/Chaz Bono participated on Dancing with the Stars. And although conflicts involving transgendered individuals are not common occurrences in North Carolina, it is likely that the Macy ruling, which has been touted by the ACLU and other like-minded institutions and publications, will, in providing protection to transgendered applicants and employees, cause more transgendered individuals to feel more comfortable in revealing the transition that they plan on undertaking. The Macy ruling makes one point clear: Gender has just taken an even more prominent step into the spotlight

for employment issues, and it will be interesting to see what ancillary effects this EEOC ruling brings.

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