

# Love Won't Let Me Wait (for Congress): EEOC Files 'Sexual Orientation' Employment Discrimination Lawsuits Based on Title VII of Civil Rights Act

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On March 1, 2016, the U.S. Equal Employment Opportunity Commission ("EEOC") did something that many in the world of employment law have anticipated for a long time but still find remarkable: it sued two employers in federal court for having engaged in "sexual orientation discrimination" based on Title VII of the Civil Rights Act of 1964 ("Title VII"). Title VII is undeniably landmark legislation that, over the last 50+ years, has accomplished many laudable goals by prohibiting employment discrimination based on race, color, religion, sex, and national origin. Title VII, however, does not explicitly prohibit employment discrimination based on "sexual orientation" (or "gender identity").

A bill entitled the "Employment Non-Discrimination Act" ("ENDA"), that would prohibit discrimination in hiring and employment on the basis of sexual orientation and gender identity by employers with at least 15 employees, has been routinely proposed in the U.S. Congress for years, and in fact passed the Senate with bipartisan support in 2013, but has never become law. Nonetheless, the EEOC and the Obama administration have apparently decided that they cannot and need not await further legislative hand-wringing and that they have all the authority they need to file these two new lawsuits based on Title VII's prohibition of employment discrimination based on "sex". That this is the EEOC's view is hardly a shock, as its website plainly indicates that the "EEOC interprets and enforces Title VII's prohibition of sex discrimination as forbidding any employment discrimination based on **gender identity or sexual orientation.**" See [http://www.eeoc.gov/eeoc/newsroom/wysk/enforcement\\_protections\\_lgbt\\_workers.cfm](http://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm).

The EEOC's press release of March 1, 2016, well describes what the EEOC has done and why:

## EEOC Files First Suits Challenging Sexual Orientation Discrimination as Sex Discrimination

In Two Separate Lawsuits, Federal Agency Charges That a Gay Male Employee and a Lesbian Employee Were Subjected to Hostile Work Environments Because of Sex

The [EEOC] ... announced today that it has filed its first two sex discrimination cases based on sexual orientation. The federal agency's Philadelphia District Office filed suit in U.S. District Court for the Western District of Pennsylvania against Scott Medical Health Center, and, in a separate suit, in U.S. District Court for the District of Maryland, Baltimore Division, against Pallet Companies, d/b/a IFCO Systems NA.

In its suit against Scott Medical Health Center, EEOC charged that a gay male employee was subjected to harassment because of his sexual orientation. ...

In its suit against IFCO Systems, EEOC charged that a lesbian employee was harassed by her supervisor because of her sexual orientation. ...

Title VII of the Civil Rights Act of 1964 prohibits discrimination because of sex. As the federal law enforcement agency charged with interpreting and enforcing Title VII, EEOC has concluded that harassment and other discrimination because of sexual orientation is prohibited sex discrimination.

See <http://www.eeoc.gov/eeoc/newsroom/release/3-1-16.cfm>.

The alleged facts on which the claims are based are, if true, appalling, and no doubt have much to do with why the EEOC selected these cases as the examples on which to test its theory (argued in both lawsuits) that "sexual orientation discrimination necessarily entails treating an employee less favorably because of his [or her] sex" and therefore amounts to unlawful "sex discrimination." That theory admittedly claims some logical appeal and may prove persuasive, although it has met with little success so far, at least in federal courts that have considered it in the context of Title VII.

Please check our blog again soon for further analysis of these significant developments. In the meantime, consider this: If you are (or handle HR matters for) an employer that is covered under Title VII, then, if the EEOC gets its way, your company will now have to be careful to avoid (and can be the subject of an EEOC charge and potential lawsuit alleging) discrimination against job applicants and employees based on race, color, religion, sex, national origin, and "**sexual orientation**." That last prospect raises many nettlesome questions (to be explored in this space further). One of them is surely whether an employer is in *any position to know* an applicant's or employee's "sexual orientation." The answer to that question may prove critical when an employer is alleged to have engaged in deliberate unlawful discrimination based on the assumption that the employer could have known.

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