UNDERSTANDING FEDERAL PROTECTIONS FOR LGBT EMPLOYEES

A number of cases brought by lesbian, gay, bisexual and transgender (LGBT) employees who have been discriminated against because of their sexual orientation or gender identity are working their way through federal courts. Title VII is a federal law that prohibits employment discrimination on the basis of sex, among other protected characteristics. The Equal Employment Opportunity Commission (EEOC) and several courts have found that discrimination based on sexual orientation and gender identity violate Title VII’s prohibition on discrimination based on sex. These cases are important for LGBT employees across the country because a positive interpretation of Title VII would cover employees even in states with no state nondiscrimination law.

MANY LGBT EMPLOYEES EXPERIENCE DISCRIMINATION IN THE WORKPLACE

25% of LGBT people report experiencing discrimination based on sexual orientation or gender identity in the past year—half of whom said it negatively impacted their work environment.

27% of transgender workers report being fired, not hired, or denied a promotion in the past year.

SOME FEDERAL COURTS HAVE RULED THAT TITLE VII PROTECTS LGBT WORKERS

Currently, the Second and Seventh Circuits hold that Title VII protections extend to sexual orientation.

Four circuit courts, covering 20 states, hold that discrimination based on sex includes discrimination against transgender people.
When someone is discriminated against for being LGBT, that discrimination is a form of sex discrimination because “but for” their sex, they would not face such discrimination. Take the example of a lesbian being fired after being seen holding hands with her wife. If she were a man, she would not be fired. “But for” her being a woman, she would not have experienced that discrimination. The same is true for workers are who are seen as qualified until they begin a gender transition and then are discriminated against for being transgender. “But for” their gender, they would not have faced such discrimination.

Title VII’s prohibition on discrimination based on sex is not only about one’s sex, but also about sex stereotypes and whether one adheres to those stereotypes. For example, discrimination based on sexual orientation rests on the stereotype that men are or should be attracted only to women, and that women are or should be attracted only to men. Similarly, gender identity discrimination is sex discrimination because it is rooted in views that transgender people don’t fit the idea of how a man or woman “should” be. Discriminating against a transgender employee who fails to conform to stereotypes in the workplace, including hair style and style of dress, is discrimination based on sex because the discrimination is rooted in stereotypes about how men and women should appear, act, and dress.

In 2012, the Equal Employment Opportunity Commission (EEOC), a federal agency charged with enforcing Title VII, ruled that transgender discrimination is discrimination on the basis of “sex” under Title VII in Macy v. Holder. In 2015, the EEOC ruled that Title VII prohibits bias based on sexual orientation in Baldwin v. Foxx. In 2017, in a brief to the Second Circuit in the Zarda case (see below), the Department of Justice (DOJ) argued that sexual orientation is not covered under Title VII. Later, the DOJ announced that they would no longer protect transgender Americans from workplace discrimination under Title VII. These unprecedented attacks are aimed at systematically eroding the legal equality and even the basic dignity of LGBT Americans.