Attorney General Reverses DOJ Policy On Protection Of Transgender Employees Under Title VII

BY TIMOTHY H. POWELL • OCTOBER 10, 2017

On October 4, Attorney General Jeff Sessions issued a memorandum to all U.S. Attorneys announcing a new Department of Justice policy that Title VII of the Civil Rights Act of 1964 does not protect employees from discrimination based on their transgender status. This announcement reverses prior DOJ policy announced by former Attorney General Eric Holder on December 15, 2014 that Title VII "encompasses discrimination based on gender identity, including transgender status."

Title VII has become a battleground for LGBTQ rights in recent years, due in no small part to the ambiguity of its wording. As drafted, Title VII makes it unlawful for employers to discriminate in the employment of an individual "because of such individual's . . . sex." The law contains no expressly-stated protection for employees based on their sexual orientation or gender identity. Nevertheless, recognizing that discrimination based on an employee's sexual orientation or gender identity inherently involves issues of "sex" and gender stereotypes, several federal courts have ruled that such discrimination is unlawful under Title VII. The federal agency charged with enforcing Title VII, the EEOC, has taken the position since 2012 that gender identity discrimination constitutes "sex" discrimination under the law, and first ruled that sexual orientation discrimination was prohibited under similar reasoning in 2015. After considering the text of Title VII and recent case law, then-Attorney General Holder had concluded in 2014 that "[t]he most straightforward reading of Title VII is that discrimination 'because of . . . sex' includes discrimination because an employee's gender identification is as a member of a particular sex, or because the employee is transitioning, or has transitioned, to another sex."

Sessions' memorandum, by contrast, takes a particularly narrow reading of the law's language, announcing the position that "Title VII's prohibition on sex discrimination encompasses discrimination between men and women but does not encompass discrimination based on gender identity *per se*, including transgender status." In other words, because Congress did not use the words "gender identity" or "transgender" in the statute, which it could have, its silence on the issue will be interpreted as an intended omission. "This is a conclusion of law, not policy," Sessions states, adding that "the Department of Justice must interpret Title VII as written by Congress."

Given that the DOJ's new position runs counter to existing federal court decisions and the policy of the EEOC, it will no doubt face legal challenges in the months to come. The Supreme Court has not yet weighed in on whether "sex" discrimination includes gender identity or sexual orientation discrimination, although a 1989 decision in Price Waterhouse v. Hopkins may have set the stage by ruling that the ban on "sex" discrimination does encompass discrimination against people who fail to conform to gender stereotypes. We will be on the lookout for such a case to hit the high court's docket in the near future.

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