

April 2012

The EEOC Opens the Door to Title VII Protection for Transgender Employees

By Denise Visconti and Emily Chaloner

The U.S. Equal Employment Opportunity Commission (EEOC or Commission) recently ruled, in what many have described as a ground-breaking decision by the Commission, that a complaint of discrimination based on “gender identity, change of sex, and/or transgender status” is cognizable under Title VII of the Civil Rights Act of 1964 (Title VII).¹ Previously, the EEOC had ruled to the contrary.²

In this case, the complainant, Mia Macy, who completed a telephone interview for a position with the Bureau of Alcohol, Tobacco, Firearms and Explosives (Agency) in December 2010 while she presented as a man, was told the position was hers barring any issues with her background check. While her background check was being conducted, Macy notified the Agency that she was in the process of transitioning from male to female.³ Five days later, Macy was told the position no longer was available; another person was hired for the position soon thereafter.⁴

The EEOC Complaint

Macy filed a complaint with the Agency on June 13, 2011. In her complaint, Macy checked the box for “sex” as the basis of her discrimination claim. In addition, Macy typed onto her complaint form that “gender identity” and “sex stereotyping” also formed the basis of her complaint against the Agency. Macy further explained in her complaint that she had been discriminated against on the basis of her “sex, gender identity (transgender woman) and on the basis of sex stereotyping.”

The Agency issued a series of communications to Macy in which it characterized the nature of her complaint alternatively as “gender identity stereotyping,” and “sex (female) and gender identity stereotyping;” the Agency further indicated that the gender identity stereotyping aspect of her claim would be processed outside of the EEOC’s standard Title VII adjudication process.⁵ Upon notification that the Agency did not intend to follow the process applicable to Title VII complaints for a portion of her complaint, Macy appealed to the EEOC, seeking to have her claim adjudicated in accordance with the EEOC’s Title VII process in its entirety.

The Appeal to the Commission

On appeal, the EEOC reviewed the Agency’s characterization of Macy’s claim and found the Agency had improperly separated her claims into two distinct claims, one for discrimination based

on “sex,” and one for discrimination based on “sex stereotyping,” “gender transition/change of sex,” and/or “gender identity.” The EEOC further concluded that each of these formulations of Macy’s claims were merely different ways of stating the same claim for discrimination “based on . . . sex,” which clearly was cognizable under Title VII.

In so concluding, the EEOC first evaluated whether, under Title VII, only the “sex” discrimination portion of Macy’s complaint fell under the umbrella of Title VII’s prohibitions, or whether Macy’s complaint in its entirety properly was cognizable under Title VII’s prohibition against discrimination “based on . . . sex.” Relying on a number of notable decisions, including the U.S. Supreme Court’s decision in *Price Waterhouse v. Hopkins*,⁶ which found that discrimination against an individual for failing to conform to gender-based expectations violated Title VII, the EEOC found, resoundingly, in the affirmative. As the EEOC stated:

[a]s used in Title VII, the term ‘sex’ ‘encompasses both sex—that is, the biological differences between men and women—and gender.’ As the Eleventh Circuit noted . . . 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.’ As such, the terms ‘gender’ and ‘sex’ are often used interchangeably to describe the discrimination prohibited by Title VII. That Title VII’s prohibition on sex discrimination proscribes gender discrimination, and not just discrimination on the basis of biological sex, is important. If Title VII proscribed only discrimination on the basis of biological sex, the only gender-based disparate treatment would be when an employer prefers a man over a woman, or vice versa. But the statute’s protections sweep far broader than that, in part because the term ‘gender’ encompasses not only a person’s biological sex but also the cultural and social aspects associated with masculinity and femininity.⁷

The Commission then reviewed a series of decisions by federal appellate and district courts that relied on *Price Waterhouse* to evaluate claims of discrimination brought by transgender individuals.⁸ Based upon *Price Waterhouse* and its progeny, the EEOC found that, although most of the courts affording protection to transgender individuals under Title VII relied on a theory of “gender stereotyping,” gender stereotyping was only one way to prove sex discrimination under Title VII. According to the EEOC, whether the alleged discrimination is motivated by “hostility, a desire to protect people of a certain gender, by assumptions that disadvantage men, by gender stereotypes, or by the desire to accommodate other people’s prejudices or discomfort,” all such behavior is evidence of sex discrimination in violation of Title VII.⁹ The EEOC, thus, concluded that a transgender person who has experienced discrimination based on his or her gender identity may be able to establish a *prima facie* case of sex discrimination in a number of ways, all of which simply are different ways of describing discrimination “based on . . . sex” under Title VII.

The EEOC, therefore, determined that Macy might be able to establish a case of discrimination based on any number of theories, including, for example, that she did not get the job because the Agency believed biological men should present and dress as men, or because the Agency was willing to hire her when it thought she was a man, but refused her employment once it found out she was a woman; all Macy was required to demonstrate was that the Agency impermissibly used gender in making its employment decision. By way of example, the EEOC likened gender to religion, quoting from the District of Columbia federal district court’s decision in *Schroer v. Billington*:

Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only ‘converts.’ That would be a clear case of discrimination ‘because of religion.’ No court would take seriously the notion that ‘converts’ are not covered by [Title VII]. Discrimination ‘because of religion’ easily encompasses discrimination because of a change of religion.¹⁰

In the same manner, the EEOC concluded that intentional discrimination against Macy – and any other transgender individual – because she is transgender, if proven, was discrimination “based on . . . sex,” and a violation of Title VII. The EEOC remanded Macy’s complaint to the Agency for processing under Title VII.

Implications for Employers

The Commission’s decision appears to represent a significant change in how the EEOC views claims of discrimination brought by transgender individuals. Historically, the EEOC deemed claims of discrimination based on gender identity, or the transgender status of an individual, not actionable under Title VII; but, as the Commission noted, the *Macy* decision expressly overturns those prior decisions.¹¹ Therefore, based on the ruling in *Macy*, a claim of intentional discrimination by an employer because an individual is transgender may be actionable as discrimination under Title VII.

Importantly for employers across the country, the *Macy* decision has the potential to impact the EEOC's enforcement and litigation activities, both at the Commission level as well as throughout its field offices. The decision certainly will be binding on all federal agencies and departments, and will have a direct impact on government employers. The decision also may be entitled to at least some deference by federal courts.¹² A number of federal appellate courts already have found that Title VII affords some protection against discrimination toward transgender individuals.¹³

As a result, it is conceivable that the *Macy* decision will apply to public and private employers alike. This is particularly true given the position taken by the EEOC in *Macy* that the cognoscibility of claims by transgender employees under Title VII is not limited to federal employees.¹⁴ Moreover, the language in the *Macy* decision was not limited to the specific facts of that case; rather, the EEOC clearly announced a broader interpretation that applies to any transgender individual who has suffered intentional discrimination, and affords such individuals recourse under Title VII.¹⁵

As a result, both public and private employers should review and consider revising their policies and practices to conform to the EEOC's decision in *Macy*.¹⁶ The policies and procedures that should be reviewed include, but are not limited to:

- Non-discrimination, harassment, and EEO policies;
- Pre-employment screening and background or security clearance policies and procedures;
- Codes of conduct applicable to employees;
- Dress codes and other appearance standards;
- Policies regarding proper use of pronouns and non-discriminatory terminology;
- Policies and procedures for changing identification cards, personnel records, name changes, and issuance of new email addresses;
- Policies with respect to nondisclosure of medical information and/or relating to general employee privacy;
- Health insurance coverage for transition-related procedures; and
- Policies governing the use of restrooms, locker rooms, and other gender-specific facilities.

Because not all transgender people elect to have sex-reassignment surgery, employers should apply their policies and procedures equally to all transgender employees, regardless of surgical status.

Employers also should consider their response, and the expected response by their managers, when applicants or current employees approach them regarding their intention to undergo a gender transition. Employers should consider developing a policy that establishes workplace guidelines for how they will address the needs and issues that arise in the workplace when a transgender employee transitions on the job. Employers should keep in mind, however, that not all transgender individuals choose to transition in the same way; therefore, any policies relating to transitioning on the job should be regarded as a guide that can be adapted to accommodate the specific needs of each transitioning employee.

Most importantly, employers should take all steps necessary – including training their managers and employees – to guard against possible harassment, discrimination, or retaliation of transgender employees and applicants.

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¹ *Macy v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, EEOC Appeal No. 0120120821 (Apr. 20, 2012).

² "Transgender" is an umbrella term used to refer to individuals whose gender identity and/or expression does not match their sex assigned at birth.

³ *Macy*, at 2.

⁴ *Id.* at 1-2.

⁵ *Macy* first was told her claim for "gender identity stereotyping" would be processed by the Department of Justice (DOJ). The DOJ process differs substantially from the EEOC's Title VII process in that the Department of Justice allows for fewer remedies than are available from the EEOC and does not include the right to request a hearing before the EEOC or the

right to appeal the final Agency decision to the Commission. Macy then was told only part of her claim for discrimination based on “sex (female)” would be processed pursuant to the EEOC’s Title VII process; the remainder of her claim based on “gender identity stereotyping” was to be processed under the Agency’s “policy and practice” procedures.

⁶ 490 U.S. 228, 239 (1989).

⁷ *Macy*, at 6-7 (citing *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (finding that, when an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment “related to the sex of the victim”); *Smith v. Salem*, 378 F.3d 566, 572 (6th Cir. 2004) (finding that a transgender individual who was suspended because of her gender non-conforming behavior had stated a claim for impermissible discrimination under Title VII); *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (employer who fired a transgender individual because he considered it “inappropriate” for her to come to work dressed as a woman and found it “unsettling” and unnatural that she would wear women’s clothing was direct evidence of discrimination based on gender in violation of Title VII); and *Price Waterhouse*, 490 U.S. at 239 (1989)).

⁸ *Macy*, at 7-11.

⁹ *Macy*, at 12.

¹⁰ *Macy*, at 13 (quoting *Schroer*, 577 F. Supp. 2d 293, 306 (D.D.C. 2008)).

¹¹ *Macy*, at 14 n.16 (expressly overturning “any contrary earlier decisions from the Commission,” and citing *Casoni v. United States Postal Serv.*, EEOC Decision No. 01840104 (Sept. 28, 1984); *Campbell v. Dep’t of Agriculture*, EEOC Appeal No. 01931703 (July 21, 1994); *Kowalczyk v. Dep’t of Veterans Affairs*, EEOC Appeal No. 01942053 (March 14, 1996)). The EEOC provided a glimmer of its position in the *Macy* case in October 2011, when it filed an amicus brief with the United States District Court for the Western District of Texas, explaining that “[i]t is the position of the EEOC that disparate treatment of an employee because he or she is transgender is discrimination ‘because of . . . sex’ under Title VII.” See Brief for EEOC as Amicus Curiae Supporting Plaintiff, *Pacheco v. Freedom Buick GMC Truck*, No. 07-116 (W.D. Tex. Oct. 17, 2011), ECF No. 30, at p. 1, 2011 WL 5410751.

¹² The U.S. Supreme Court has been reluctant to afford deference to the EEOC’s interpretation of federal antidiscrimination laws, including Title VII. Under the most deferential standard, a federal court must defer to the EEOC’s interpretation of Title VII when the language of the statute does not clearly speak to the issue at hand; such deference typically is reserved for those situations when the EEOC engages in notice-and-comment rulemaking or formal adjudication, as in the *Macy* ruling. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842 (U.S. 1984). Even absent such deference, the EEOC’s interpretation of Title VII’s provisions in *Macy* likely would be “entitled to respect” to the extent such interpretation has the “power to persuade” a court construing it. See *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

¹³ See *Smith*, 378 F.3d at 572 (6th Cir. 2004); *Barnes v. Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005) (upholding a nearly one million dollar verdict and finding a transgender police officer was discriminated against on the basis of sex in violation of Title VII; “[p]laintiff established that he was a member of a protected class by alleging discrimination against the City for his failure to conform to sex stereotypes.”); *Schwenk*, 204 F.3d at 1202 (9th Cir. 2000); *Glenn*, 663 F.3d at 1316 (11th Cir. 2011).

¹⁴ See Brief for EEOC as Amicus Curiae Supporting Plaintiff, *Pacheco v. Freedom Buick GMC Truck*, at p. 1.

¹⁵ *Macy*, at 14 (“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”).

¹⁶ Employers also should be certain to comply with any state and local laws regarding discrimination of transgender employees. 16 states and the District of Columbia ban discrimination based on gender identity and expression: California, Colorado, Connecticut, Hawaii, Illinois, Iowa, Maine, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont and Washington. In addition, over 100 city and county laws afford explicit prohibitions against discrimination of transgender employees.