

# EEOC Finds Current Law Prohibits Workplace Discrimination Based on Sexual Orientation

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Workplace discrimination based on an employee's sexual orientation is prohibited under Title VII of the Civil Rights Act of 1964, according to a July 15, 2015, Equal Employment Opportunity Commission (EEOC) decision.

This extension of *current* federal law to include sexual-orientation discrimination, after 50 years of consistently excluding it, impacts employers nationwide.

## Background

Title VII prohibits employers from discriminating because of "race, color, religion, sex, or national origin." Since the 1970s, federal appellate courts have consistently determined that Title VII does not protect against sexual-orientation discrimination.

A recent example is *Pedreira v. Kentucky Baptist Homes for Children*, in which a non-profit corporation was successfully defended before the Sixth Circuit Court of Appeals in a suit brought by two women claiming they were discriminated against because of sexual orientation. The Sixth Circuit unanimously sided with the nonprofit corporation, determining that neither Title VII nor the Kentucky Civil Rights Act prohibits sexual-orientation discrimination. The U.S. Supreme Court refused to hear the case.

The EEOC also has issued similar rulings. In 1976, the EEOC issued a decision holding that Title VII did not prohibit sexual-orientation discrimination. As recently as November 2013, the EEOC ruled that claims of sexual-orientation discrimination were "not within the EEOC's purview."

For decades, Congressional inaction confirmed that Title VII does not extend to sexual-orientation discrimination. Beginning with the proposed Equality Act of 1974, Congress repeatedly rejected legislation extending Title VII to include sexual orientation. However, Congress did enact OSHA, FMLA, ERISA, COBRA and other laws to protect employees by prohibiting discrimination based on age, disability, veteran status, genetic information and pregnancy.

## The Decision's Impact

The EEOC reached its decision that sexual-orientation discrimination violates Title VII in *Baldwin v. Foxx*, a case where a temporary line manager at a federal air-traffic facility alleged he was denied a promotion because he is homosexual. Without addressing the claim's merits, the EEOC ruled that workplace discrimination based on sexual orientation is a form of illegal "sex discrimination" under Title VII.

Because the case involves a U.S. government employee, federal-sector employment is immediately impacted. And because Title VII also governs the private sector, the EEOC is likely to investigate sexual-orientation discrimination claims from employees against private businesses.

## Religious Accommodation

Title VII also requires employers to "reasonably accommodate" an employee's "religious observance and practice, as well as belief."

While the EEOC's recent decision did not address religious accommodation in the workplace, it created competing obligations regarding employees' sexual orientations and religious beliefs. For example, if a company's benefits coordinator's

religious beliefs prevent him or her from recognizing same-sex marriage, the employer may be obligated to avoid discrimination against the same-sex employee while accommodating the benefits coordinator's religious beliefs.

## Since the Decision

The pressure on federal and state courts to revisit the sexual-orientation discrimination issue has increased since the EEOC's decision in *Baldwin*. Following up on the decision, *Baldwin* filed a complaint in federal court on October 13, 2015. Similar lawsuits are likely to follow, forcing federal and state courts to determine

sexual-orientation discrimination include:

- Commenting negatively about a person's homosexuality
- Extending spousal benefits to a male employee's wife while denying benefits to a same-sex spouse
- Suspending an employee for displaying photos of a same-sex spouse but not suspending a male employee for displaying photos of his wife

Sexual-orientation discrimination against straight employees



whether the EEOC's decision extends to non-governmental employees alleging sexual-orientation discrimination.

Indeed, in *Hively v. Ivy Tech Community College*, a case now fully briefed before the Seventh Circuit, a former employee submitted the *Baldwin* decision as supplemental authority to support her claim of sexual-orientation discrimination against her *private employer*. In *Dew v. Edmunds*, a case decided by the U.S. District Court of Idaho, the court acknowledged the *Baldwin* decision but dismissed the suit against a state-government employer on basis of sovereign immunity.

Further, in *Pittman v. Cook Paper Recycling Corp.*, a Missouri state appellate court held that the Missouri Human Rights Act does not prohibit sexual-orientation discrimination. Notably, the dissenting judge, relying on *Baldwin*, would have found that Missouri state law does prohibit such discrimination.

As different decisions are reached by different courts, employers will need the advice of their attorneys to ensure they are in compliance with the law in their jurisdiction.

## Conclusion

Employers must assure that all employees are treated equally and recognize discrimination when it occurs. Examples of

also can occur. If a woman is suspended for placing a picture of her husband on her desk but a gay colleague displaying a photo of his husband is not suspended, the straight woman could file a Title VII claim.

Training managers and employees to recognize and prevent sexual-orientation discrimination is critical to preventing occurrences. Employers should take employee complaints of sexual-orientation discrimination and harassment seriously and investigate accordingly. Also, employers must be aware that employees retain the right to reasonable religious accommodation.

Finally, employers should review existing policies and procedures to assure conformance to the EEOC's decision, including:

- anti-discrimination and harassment policies
- workplace conduct standards
- health care policies

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