Sexual Orientation in Employment Discrimination Laws

By Katherine McAnallen

When Congress passed Title VII of the Civil Rights Act in 1964, it intended to create equal opportunity in employment for all citizens. Under the act, employers are prohibited from discriminating based on race, color, religion, sex, national origin, age, disability or pregnancy. Today, most of the 50 states, the District of Columbia, Puerto Rico and the U.S. Virgin Islands have their own civil rights acts that include employment discrimination prohibitions.

A plaintiff alleging discrimination can choose whether to file a complaint under Title VII or under his or her state’s law. The potential amount of damages and whether a jury trial is available influences whether a plaintiff’s lawyer will file in federal or state court. In addition to the protected classes in Title VII, some states prohibit discrimination based on other factors. These could include, for example, engaging in lawful activity outside of work, or genetic information, such as cancer risk based on one’s DNA. Under debate in some state legislatures is whether to add protections against discrimination based on sexual orientation or gender identity.

Federal Action

Title VII does not include sexual orientation as a protected class. Although the Equal Employment Opportunity Commission has produced guidelines stating that Title VII covers sexual orientation, many federal courts have declined to interpret it that way. Lower courts are split, with some preferring a strict reading of Title VII’s protections based on sex, which excludes sexual orientation. Other courts interpret sexual orientation discrimination as a form of gender stereotyping covered under Title VII.

The Supreme Court acknowledged Title VII’s applicability to same-sex sexual harassment in *Oncale v. Sundowner Offshore Services, Inc.* The Ninth Circuit held in *Rene v. MGM Grand Hotel* that sexual harassment was illegal under Title VII, regardless of whether it was because of the plaintiff’s sexual orientation. However, other federal circuit courts have held that discrimination based on sexual orientation is outside the parameters of Title VII. The Supreme Court has denied to hear any of these cases on appeal; therefore, the law remains unclear.

The Employment Non-Discrimination Act (ENDA), which would make sexual orientation a protected class under Title VII, has been introduced in every Congress since 1994 except the 109th. President Obama signed an Executive Order in 2014, adding sexual orientation and gender identity protections for all federal employees.
Cases based on gender identity discrimination have been more successful than those based on sexual orientation because gender identity better fits into existing Title VII protections based on sex.

**State Action**

Because the federal law is unclear, state law plays an important part in deciding who is protected from employment discrimination. Starting in the 1970s, many states either outlawed discrimination based on sexual orientation among public employers or included sexual orientation protections in their employment discrimination statutes for all employers. In the 1990s, states began to add gender identity protections. Today, a range of protections are provided for sexual orientation and gender identity in the workplace.

- Nineteen states, the District of Columbia and Puerto Rico prohibit sexual orientation and gender identity discrimination by both public and private employers by state law.
- Three states prohibit sexual orientation discrimination for public and private employers by state law.
- Nine states prohibit sexual orientation discrimination, and five of them also prohibit gender identity discrimination for state employers, by executive order.
- Missouri protects only executive branch employees from sexual orientation discrimination by executive order.
- In addition to having a state law covering sexual orientation, New York prohibits gender identity discrimination for public employers by executive order.

During the 2015 legislative sessions, 11 states proposed adding protections against sexual orientation and gender identity discrimination to their civil rights statutes, nine of which would include both public and private employers. Four of the proposed bills failed, and seven currently are being considered. New York has proposed legislation to add gender identity protections to its civil rights statute. Utah became the most recent state to add these protections to its employment discrimination statute in March 2015.

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**Additional Resources**

Badgett, M.V. Lee, Holning Lau, Brad Sears, and Deborah Ho. *Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination*. Los Angeles, Calif.: The Williams Institute, UCLA School of Law, 2007.