

# A TITLE VII TRANSITION?: PROTECTIONS FOR TRANSGENDER PERSONS IN THE WORKPLACE



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Three years ago, the EEOC issued an opinion which held, for the first time, that discrimination against transgender persons based on gender identity is impermissible sex discrimination under Title VII of the Civil Rights Act of 1964. See *Macy v. Holder* (Apr. 20, 2012). Last month, the EEOC revisited discrimination against transgender persons and released a decision that sheds some light on how the practical applications of this finding may affect employers, holding that certain bathroom restrictions for a transgender employee constituted discrimination. See *Lusardi v. McHugh* (Apr. 1, 2015).

In *Lusardi v. McHugh*,<sup>1</sup> a transgender employee of a civilian contractor at a military facility in Alabama was forced to use a single-use restroom at the facility. When that restroom was out of order or being cleaned, she used the women's restroom, each time receiving confrontation from her supervisor, who suggested that she could not use those facilities until she had proof that she had undergone full gender reassignment surgery. Another supervisor repeatedly referred to her by her former male name and male pronouns in front of other co-workers.

In ruling for the employee in *Lusardi v. McHugh*, the EEOC made a forceful statement on how it viewed the circumstances at issue, stating:

"This case represents well the peril of conditioning access to facilities on any medical

<sup>1</sup> *Lusardi v. McHugh*, EEOC Appeal No. 0120133395 (April 1, 2015)

procedure. Nothing in Title VII makes any medical procedure a prerequisite for equal opportunity (for transgender individuals, or anyone else). An agency may not condition access to facilities — or to other terms, conditions, or privileges of employment — on the completion of certain medical steps that the agency itself has unilaterally determined will somehow prove the bona fides of the individuals' gender identity."<sup>2</sup>

While the employer in *Lusardi v. McHugh* was a federal agency — the Army — this case should serve as a warning to private employers as well — the EEOC will pursue cases where it finds evidence of discrimination as to transgender individuals. In fact, it already has done so in two cases, one of which settled, and the other which is currently pending and recently survived a motion to dismiss.<sup>3</sup>

Although transgender persons are not currently considered a protected class for Title VII purposes, Title VII does protect against sex-based discrimination, a line that both the EEOC and courts seem more willing to walk in these cases. The Justice Department has already taken a stance. Recently, the Justice Department recently brought suit against Southeastern Oklahoma State University and the Regional University System of Oklahoma for violations of Title VII of the Civil Rights Act of 1964 by discriminating against a transgender employee on the basis of her sex and retaliating against her when she complained about the discrimination. Explaining the Justice Department's decision, Attorney General Eric Holder announced that the Department believes Title VII's prohibition against sex discrimination encompasses and includes protection for claims based on an individual's gender identity, including transgender status.

Employers should be cognizant of these cases and learn to effectively and compassionately coordinate with their transgender employees, avoiding discriminatory practices and providing training on employee conduct with respect to transgender employees.

<sup>2</sup> *Ibid.* at 9

<sup>3</sup> *EEOC v. Lakeland Eye Clinic, P.A.* (M.D. Fla. Civ. No. 8:14-cv-2421-T35 AEP filed Sept. 25, 2014); *EEOC v. R.G. & G.R Harris Funeral Homes, Inc.*, (Civ. No. E.D. Mich. 2:14-cv-13710-SFC-DRG)

