




U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Office of
Field Programs

February 3, 2015

MEMORANDUM

TO: District Directors
FROM: 
Nicholas M. Inzeo, Director
Office of Field Programs
SUBJECT: Update on Intake and Charge Processing of Title VII Claims
Of Sex Discrimination Related to LGBT Status

The purpose of this memorandum is to reiterate the importance of proper handling of LGBT-related discrimination claims and to update the internal coordination process for such cases in light of recent Commission enforcement efforts and rapidly developing case law.

My memorandum of November 9, 2012, in accordance with then-Chair Berrien's October 27, 2011 memorandum and the EEOC's federal sector decisions, provided charge processing instructions for such cases. There have been a number of developments at the EEOC and in the courts since that time, so this memorandum updates and supersedes my previous memorandum.

Specifically, the basic instructions from those earlier memos remain in effect with modifications below that reflect subsequent EEOC and court activity. Field offices are instructed to handle LGBT charges as follows:

- (1) Complaints of discrimination on the basis of transgender status or gender-identity-related discrimination should be accepted under Title VII and investigated as claims of sex discrimination in light of Commission precedent (discussed below); and**
- (2) Individuals who believe they have been discriminated against because of their sexual orientation should be counseled that they have a right to file a charge with the EEOC, and their charges should be accepted under Title VII and investigated as claims of sex discrimination in light of Commission precedent (discussed below).**

These instructions are based on a number of Commission actions. In *Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (April 20, 2012), the Commission ruled that employment discrimination against employees because they are transgender, because of their gender identity, and/or because they have transitioned (or intend to transition) is discrimination because of sex in violation of Title VII. Following *Macy*, the Commission in December 2012 approved the Strategic Enforcement Plan and its designation of the issue of "coverage of lesbian, gay, bisexual, and transgender individuals under Title VII's sex discrimination provisions, as they may apply," as an Emerging and Developing Issue priority. The Commission has since

issued a series of additional federal sector decisions explicating its views on LGBT issues. See *Federal Sector Cases Involving Transgender Individuals and Federal Sector Cases Involving Lesbian, Gay, or Bisexual Individuals*, www.eeoc.gov/federal/reports/lgbt_cases.cfm. Similarly, in private sector litigation, the Commission has filed lawsuits and amicus briefs addressing Title VII sex discrimination cases involving LGBT status. See *Fact Sheet on Recent EEOC Litigation-Related Developments Regarding Coverage of LGBT-Related Discrimination under Title VII*, www.eeoc.gov/eeoc/litigation/selected/lgbt_facts.cfm; *Jamal v. Saks & Co.* (S.D. Texas No. 4:14-cv-02782) (Brief of the U.S. Equal Employment Opportunity Commission as Amicus Curiae submitted Jan. 22, 2015). The U.S. Department of Justice has joined the EEOC in both its enforcement and defensive litigation in asserting that discrimination based on transgender status is sex discrimination in violation of Title VII. See, e.g., *Burnett v. City of Philadelphia-Free Library* (E.D. Pa. No. 2:09-cv-04348) (Statement of Interest of United States filed Apr. 4, 2014) (arguing discrimination against a transgender individual because she does not conform to gender stereotypes is discrimination because of sex under Title VII); *Jamal v. Saks & Co.* (S.D. Texas No. 4:14-cv-02782) (Statement of Interest of United States filed Jan. 26, 2015) (same); Memorandum from the Attorney General re: “Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964” (dated Dec. 15, 2014), www.justice.gov/opa/pr/attorney-general-holder-directs-department-include-gender-identity-under-sex-discrimination.

Notably, in October 2014, the Commission approved participation as amicus curiae in support of panel rehearing in *Muhammad v. Caterpillar, Inc.* (7th Cir. 12-1723) to challenge language in the Seventh Circuit panel opinion that stated categorically that Title VII does not prohibit sexual orientation discrimination or related retaliation. The petition for rehearing resulted in modification of the Seventh Circuit panel’s opinion to delete this language. See 767 F.3d 694 (7th Cir. 2014), 2014 WL 4418649 (7th Cir. Sept. 9, 2014, as Amended on Denial of Rehearing, Oct. 16, 2014). In *Muhammad*, the Commission took the position that intentional discrimination based on an individual’s sexual orientation can be proved to be grounded in sex-based norms, preferences, expectations, or stereotypes and thus violate Title VII’s prohibition on discrimination because of sex. As reflected in the foregoing and in the Commission’s other recent decisions, such norms and expectations can include the expectation that men should be sexually attracted to women and that women should be sexually attracted to men, and do not require that the person claiming sex discrimination has been viewed as insufficiently masculine or feminine by others based on the person’s dress or manners. See *Muhammad* brief at 5; see also *Terveer v. Billington*, 2014 WL 1280301 (D.D.C. Mar. 31, 2014) (relied upon by the Commission in *Muhammad* for the proposition that plaintiffs do not need to plead specific facts relating to views about “behavior, demeanor, or appearance” to support a claim of sex discrimination under a sex-stereotyping theory). Additionally, in our brief to the 5th Circuit in *EEOC v. Boh Brothers* (5th Cir. 11-30770), the Commission stated that terms historically used against gay and lesbian persons, such as “fag” or “faggot,” are degrading sex-based epithets and constitute evidence of discrimination on the basis of sex. See also *Complainant v. USPS*, EEOC Appeal No. 0120132452 (Nov. 18, 2014).

Addressing the issue of retaliation, the Commission also stated in its brief in *Muhammad*, above, that employee complaints about sexual orientation discrimination can constitute “protected activity” for purposes of a retaliation claim. The brief stated that in light of the EEOC’s

enforcement efforts and recent court decisions, individuals who complain may at least have an objectively reasonable belief that Title VII prohibits sexual-orientation discrimination.

A document compiling all of these developments, *What You Should Know About EEOC and the Enforcement Protections for LGBT Workers*, with additional links to documents compiling the private and federal sector EEOC cases on this topic, is available on our website at www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm, and should be a useful resource for investigations, litigation, and outreach. Another good outreach resource is the brochure, "Gender Stereotyping: Preventing Employment Discrimination of Lesbian, Gay, Bisexual or Transgender Workers," available at www.eeoc.gov/eeoc/publications/brochure-gender_stereotyping.cfm.

Charges should be processed in accordance with these Commission positions.

Charge coordination: The November 2012 and October 2011 memoranda required that all charges raising issues related to LGBT discrimination be shared with Sharon Alexander in the Office of the Chair. We have been advised by the Office of the Chair that this step is no longer required given the ability of the field to track LGBT charges in IMS (outlined below). Thus, LGBT charges no longer need to be shared with the Chair's staff. Charges should be coordinated with legal units in the field, as appropriate, and staff should also feel free to consult with members of the General Counsel's LGBT work group, who are listed on OGC's "Emerging Issues" inSite page on LGBT, at <http://insite/OGC/SEP-Emerging-Issues.cfm>, and reachable by e-mail at WORKGROUP.CHICPO.EEOCCHIC@EEOC.GOV.

However, we remain interested in learning of particular charges involving issues of first impression or other issues of significance regarding LGBT-related discrimination. These would include claims related to discriminatory policies; insurance issues including benefits for same-sex couples or transgender individuals; access to facilities based on gender identity; questions of coverage (i.e., whether the alleged discrimination related to transgender status, gender identity, or sexual orientation constitutes sex discrimination under Title VII); and any other unsettled issue on which stakeholders could benefit from policy guidance, technical assistance, or outreach. Additionally, to enable the Commission to articulate policy on emerging or novel issues of this nature, we want to identify possibly appropriate vehicles for a Commission Decision.

For these reasons, enforcement staff should alert Susan Murphy and Evangeline Hawthorne in OFP when they encounter charges with potential for policy development, and OFP will coordinate with OGC and OLC. For monitoring purposes, this notification should be provided as early in the process as possible and may be made by brief e-mail with the charge number.

I would also like to summarize ongoing requirements for tracking and handling charges:

- **Charge basis coding in IMS:** In January 2013, we began collecting information on charges filed alleging discrimination related to gender identity or sexual orientation. Ensuring accurate and consistent data entry on these charges remains very important. As you know, we created two new Title VII sex discrimination basis codes in IMS: (1) **GT – Sex – Gender Identity/Transgender** for sex discrimination claims based on transgender status

(also known as gender identity discrimination); and (2) **GO – Sex – Sexual Orientation** for sex discrimination claims by lesbian, gay, and bisexual individuals, including sexual harassment or other kinds of sex discrimination, such as adverse actions taken because of the person’s failure to conform to sex stereotypes. This code should also be used for an allegation by a heterosexual individual of sex discrimination related to sexual orientation.

Please remind your staff of the appropriate steps to take when using these codes:

First, as for any sex discrimination claim, enter the applicable sex discrimination basis code (**GF – Sex – Female** or **GM – Sex – Male**). It is important to include the sex discrimination basis code in all charges alleging sex discrimination.

Note: For **Sex - Gender Identity/Transgender** charges, the Sex-Female or Sex-Male code selection is derived from how the Charging Party identifies himself or herself at the time the alleged discrimination occurred. If the information is known, it is helpful to include in the IMS Notes section that the CP has transitioned from "male to female" or "female to male."

Second, enter the appropriate code for the type of discrimination alleged: **GT – Sex -- Gender Identity/Transgender**; or **GO – Sex – Sexual Orientation**. Thus, LGBT-related charges will have two basis codes: either GF or GM, **and** GT or GO.

- **Charge prioritization under SEP:** As noted, the Strategic Enforcement Plan lists “coverage of lesbian, gay, bisexual, and transgender individuals under Title VII’s sex discrimination provisions, as they may apply” as an enforcement priority. Charges should be identified in IMS as “Emerging and Developing Issues – LGBT (SEP 3C).” The SEP designation is in addition to the basis coding.
- **FEPA Charge Processing:** FEPAs have been informed that they should advise Charging Parties that they have a right to file with the EEOC under Title VII because of sex discrimination based on sexual orientation or gender identity. Where a state or local law prohibits discrimination based on sexual orientation or gender identity, EEOC staff should counsel individuals that they may also have a right to file a charge under the state or local law. As previously advised, Directors and State and Local Program Managers/Coordinators should work out an arrangement with FEPAs having such laws to ensure that charges are filed under the FEPA’s explicit provisions, in order to protect the rights of Charging Parties under state or local law.

For more information: A collection of internal resources, including OFP’s LGBT Cultural Competence Training, IMS Codes Training, and OGC’s iClasses on LGBT Claims under Title VII, can be found on the [SEP Team inSite pages](http://insite.eeoc.gov/Chair/SEP/sephome.cfm), under “Emerging Issues,” at <http://insite.eeoc.gov/Chair/SEP/sephome.cfm>, as well as on OGC’s inSite page on LGBT, <http://insite.eeoc.gov/OGC/SEP-Emerging-Issues.cfm>.

Please share these instructions with your managers to ensure that all staff members are made aware of the Commission's policies and apply them consistently to inquiries and charges. If you have any questions about this guidance, please contact Susan Murphy in OFP.

cc: P. David Lopez
General Counsel

Peggy R. Mastroianni
Legal Counsel

Carlton M. Hadden
Director, Office of Federal Operations

Cynthia G. Pierre
Chief Operating Officer

Cathy Ventrell-Monsees
Senior Counsel
Office of the Chair

Antoinette Eates
Senior Attorney-Advisor
Office of the Chair