

ATTORNEY GENERAL SESSIONS AND JUSTICE DEPARTMENT CHANGE COURSE ON RECOGNIZING TRANSGENDER WORKER RIGHTS UNDER TITLE VII

Working Together

10.05.2017

United States Attorney General Jeff Sessions has advised United States Attorneys across the country as well as federal agency heads that the Justice Department is reversing its prior position that Title VII of the Civil Rights Act of 1964 – which prohibits gender discrimination in the workplace -- protects transgender workers from discrimination. In his memorandum, Mr. Sessions noted that he “withdraws” former Attorney General Eric Holder’s December 15, 2014 memorandum, which provided in relevant part:

The most straightforward reading of Title VII is that discrimination ‘because of . . . sex’ includes discrimination because an employee's gender identification is as a member of a particular sex, or because the employee is transitioning, or has transitioned, to another sex.

According to Mr. Sessions, “Title VII’s prohibition on sex discrimination encompasses discrimination between men and women but does not encompass discrimination based on gender identity *per se*, including transgender status.” This is somewhat peculiar phrasing, given that as long ago as 1998, the United States Supreme Court held in *Oncale v. Sundowner Offshore Services* that Title VII also applies to harassment between members of the same gender.

In any event, the Attorney General went on to direct the United States Attorneys that the “Department of Justice will take that position in all pending and future matters (except where controlling lower-court precedent dictates otherwise, in which event the issue should be preserved for potential future review).” This interpretation of Title VII not only reverses the Justice Department’s own, less than three-years-old position, it is also at odds with the United States Equal Employment Opportunity Commission’s stance. Furthermore, a growing number of federal courts have held that adverse employment actions based upon gender stereotyping constitute gender discrimination, a theory under which they have extended Title VII’s protections to transgender workers.

Attorney General Sessions’ memorandum essentially serves as a directive to United States Attorneys to refrain from pursuing matters involving transgender worker rights, potentially placing them in the awkward position of doing an about-face in pending cases. At the same time, although courts typically defer to agencies when it comes to interpreting agency regulations, courts are not required to extend any such deference when the issue pertains to the proper application of federal statutes. Thus, while federal courts

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would presumably take notice of the Justice Department's new position, they are not bound by it.

Furthermore, Attorney General Sessions' proclamation will essentially have no effect on employers in states such as Connecticut that have their own state proscriptions against employment discrimination based on gender identity. In those states, however, that do not have any such legislation, workers alleging discrimination or harassment based upon their gender identity will find themselves in a situation in which the federal government is speaking with two voices -- the EEOC viewing such discrimination as a violation of Title VII and the Justice Department saying that it is not. It will, therefore, ultimately be up to the courts to decide which perspective on Title VII is the correct one.

Posted in Discrimination, Transgender

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