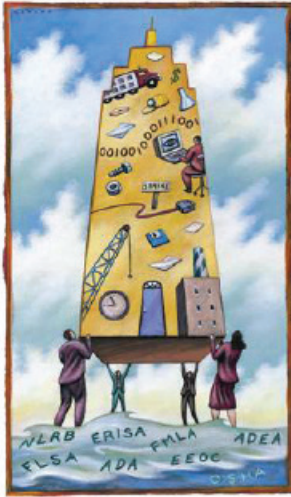


EMPLOYMENT BULLETIN

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Babst Calland
Attorneys at Law

babstcalland.com

Pittsburgh, PA

Two Gateway Center
603 Stanwix Street, 6th Floor
Pittsburgh PA 15222
412-394-5400
FAX 412-394-6576

State College, PA

330 Innovation Blvd., Suite 302
State College, PA 16803
814-867-8055
FAX 814-867-8051

Charleston, WV

Suite 1000
300 Summers Street
Charleston, WV 25301
681-205-8888
FAX 681-205-8814

Canton, OH

3711 Whipple Avenue NW
Canton, OH 44718
234-352-1650
FAX 234-352-1640

Sewell, NJ

380-A Tylers Mill Road
Sewell, NJ 08080
856-256-2495
FAX 412-586-1082

EEOC Rules Discrimination Based on Sexual Orientation is Sex Discrimination under Title VII

Less than one month after the United States Supreme Court issued its landmark decision legalizing gay marriage nationwide, the U.S. Equal Employment Opportunity Commission (EEOC) issued a controversial interpretation in *Complainant v. Anthony Foxx, Secretary, Department of Transportation (Federal Aviation Administration)* in which it found that Title VII of the Civil Rights Act of 1964 prohibits discrimination based on an individual's sexual orientation. The EEOC's decision is a significant development in the law because it rejected several previous courts of appeals decisions holding that Title VII does not prohibit discrimination based upon sexual orientation. In this case, a supervisory air traffic control specialist with the Department of Transportation's Federal Aviation Administration (FAA) filed an Equal Employment Opportunity (EEO) complaint alleging that the FAA subjected him to discrimination on the basis of sex. Specifically, the complainant alleged that he was discriminated against when he was denied a permanent position as a front line manager because he is gay. The EEO complaint was initially dismissed on timeliness grounds. The complainant appealed the dismissal to the EEOC, which reversed, concluding that the complainant's allegations of discrimination on the basis of his sexual orientation stated a claim of discrimination on the basis of sex within the meaning of Title VII, and that such claim was timely. In light of its conclusion, the EEOC remanded the case for a decision on the merits.

In concluding that Title VII's coverage extends to discrimination based on an individual's sexual orientation, the EEOC focused on the purpose of Title VII's prohibition against sex discrimination – to prohibit employers from relying upon “sex-based considerations” or taking an employee's “gender into account when making employment decisions.” In doing so, the EEOC found that discrimination based on sexual orientation constitutes sex discrimination for three distinct reasons: (1) sexual orientation, as a concept, cannot be defined or understood without reference to or consideration of an individual's sex; (2) an employment action based on an employee's relationship or association with a person of the same sex necessarily requires consideration of the employee's sex; and (3) adverse employment treatment based on an employee's appearance, mannerisms, or conduct being viewed as insufficiently masculine or feminine necessarily involves consideration of the employee's sex.

(over)

The EEOC's new interpretation, although not binding on the courts, represents a shift in the manner in which the EEOC will consider allegations of sexual orientation discrimination and has laid the theoretical foundation for future litigation seeking to extend Title VII's coverage to sexual orientation claims. Employers subject to the EEOC's jurisdiction (those employing 15 or more employees) should anticipate a rise in the number of complaints alleging sexual orientation discrimination in the workplace, and should therefore review their employment practices, including their non-discrimination and harassment policies, to ensure that they adequately address sexual orientation discrimination.

Babst Calland's Employment and Labor Services Group will continue to keep employers apprised of further developments related to this and other issues. If you have any questions or need assistance in addressing the above-mentioned area of concern, please contact John A. McCreary, Jr. at 412-394-6695 or jmccreary@babstcalland.com or Alyssa E. Golfieri at 412-773-8701 or agolfieri@babstcalland.com.