

Clearing Up Sexual Orientation Discrimination Confusion

In response to my last article, "Legal for Agencies to Discriminate Based on Sexual Orientation," I received numerous comments questioning whether it is "really" legal for agencies to discriminate on the basis of sexual orientation under the current law. The final answer, for now, is somewhere in between yes and no.

On May 28, 1998, President Bill Clinton signed Executive Order 13087, amending Executive Order 11478, which prohibited the federal government from discriminating based on sexual orientation. Nevertheless, a Presidential Executive Order, by its very nature, does not afford enforcement rights. In a statement released by the White House, President Clinton explicitly laid this out:

The Executive Order states Administration policy but does not and cannot create any new enforcement rights (such as the ability to proceed before the Equal Employment Opportunity Commission). Those rights can be granted only by legislation passed by Congress, such as the Employment Non-Discrimination Act. I again call upon Congress to pass this important piece of civil rights legislation which would extend these basic employment discrimination protections to all gay and lesbian Americans.

That piece of legislation, the Employment Non-Discrimination Act (ENDA), failed to make it past the introductory phases of the legislative process and has been reintroduced to every Congress except the 109th since it was first introduced in 1994 (103rd Congress). The current version, the ENDA of 2009 (H.R. 3017 and S.1584) includes language that would provide enforcement rights to those who are facing discrimination on the basis of sexual orientation. Both the House and Senate versions of the bill are still in the introductory phases of the legislative process, but Reps. Barney Frank and Tammy Baldwin have called for an immediate House vote following the spring recess.

Additionally, as I stated in my previous article, federal employees who believe they are being discriminated against because of their sexual orientation may file a claim of sex discrimination under Title VII. To prevail, the employee would have to show that the discrimination is based on a person's failure to comply with gender stereotypes, see, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). For example, a woman who wears neckties and other clothing usually worn by men can prevail under Title VII by showing that she was harassed because she failed to comply with stereotypical female attire; however, she could not win if she asserted that she was harassed because she was openly gay.

Many point to *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998), as the first Supreme Court decision protecting homosexuals in the workplace. The case arose out of a suit for sex discrimination by a male oil-rig worker, who claimed that he was repeatedly sexually harassed by his male coworkers with the acquiescence of his employer. The Court held that Title VII's protection against discrimination "because of... sex" applied to harassment

between members of the same sex. Thus, although Oncale provided another possible avenue to obtain Title VII protection by alleging sex discrimination, the Court did not bar discrimination based on sexual orientation. In the Court's eyes, it is a coincidence that the plaintiff was homosexual, not a cornerstone of its holding. Instead, this case extended the premise that individuals can discriminate against others in their same protected class, e.g., it is illegal for an African- American supervisor to hold African-American employees to a higher standard, just as it would be for a white supervisor to do the same. Therefore, under Oncale, heterosexual men and women can claim same-sex discrimination as well.

While many states and the District of Columbia have enacted statutes banning sexual orientation discrimination, and even gender identity discrimination, federal employees have no cause of action against federal agencies under state or D.C. law. Federal employees are limited to federal statutes, such as Title VII, to obtain relief. The Office of Personnel Management interpreted the Civil Service Reform Act of 1978 (CRSA) to prohibit sexual orientation discrimination, but unlike Title VII and the other antidiscrimination statutes, the Equal Employment Opportunity Commission (EEOC) has no authority to enforce the CRSA. Instead, the Office of Special Counsel (OSC) and the Merit Systems Protection Board (MSPB) have been charged with enforcing the CRSA. To date, the MSPB has yet to find in favor of an appellant alleging sexual orientation discrimination.

The bottom line is that while there are some protections for federal employees facing sexual orientation discrimination, because there is no definitive legal recourse to enforce them, you may want to seek the assistance of private counsel.