

## Legal for Agencies to Discriminate Based on Sexual Orientation

Despite the Pentagon's steps toward repealing the military's controversial "don't ask, don't tell" policy regarding gay and lesbian service members, it remains, to the surprise of many, legal for agencies to discriminate against federal employees based on sexual orientation. This was reiterated by the U.S. District Court for the Southern District of Florida, which recently granted summary judgment in favor of the Department of Homeland Security (DHS) in a case filed by a Federal Air Marshal (FAM) who alleged discrimination based on sexual orientation. See *Anderson v. Napolitano, Secretary, Department of Homeland Security*, Case No. 09-60744.

In *Anderson*, plaintiff brought a claim under Title VII of the Civil Rights Act of 1964 for sex discrimination on the basis of gender stereotyping. Specifically, he alleged that DHS "undertook a campaign of harassment and discrimination" against him "because it perceived Plaintiff, as a homosexual, to be a man who did not conform with gender stereotypes associated with men in our society." While the law is clear that Title VII does not prohibit discrimination based on sexual orientation, see, e.g., *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000), a plaintiff can state a Title VII claim for discrimination based on a person's failure to comply with gender stereotypes.

Plaintiff, who began working as a FAM in 2000, was promoted in 2001 to Supervisory FAM and transferred to the Miami Field Office. Plaintiff asserted that within a few days after he reported for duty, the Special Agent in Charge (SAC) learned of his sexual orientation and "immediately began to shun and isolate him." The plaintiff also alleged that, over the next several years, the SAC publicly referred to him as a "fag" and encouraged coworkers not to associate with him. Additionally, Plaintiff claimed that the SAC told him, "It's my perception, and I could be wrong--that because you're gay you're super sensitive to issues of discrimination," as well as saying, "You're too gay. You're too flamboyant. You're too 'in your face' around other [Federal Air Marshals]." In another incident, two of plaintiff's coworkers allegedly entered the Operations Room, lisping and saying in a "stereotypically flamboyant voice, "Oh my God, we've got to clean up in here now."

Gender stereotyping has been cognizable under Title VII since the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), a case in which a woman was denied partnership in an accounting firm because she did not behave in a feminine manner. Courts have since recognized that a gay man can bring a claim for sex discrimination if he alleges that he suffered harassment based on exhibiting female characteristics. See, e.g., *Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285, 290-92 (3d Cir. 2009) (reversing a district court's grant of summary judgment in favor of the defendant because the plaintiff, a homosexual man, had adduced sufficient evidence to create a question of fact on whether he was harassed for failure to conform to gender stereotypes).

According to DHS, the plaintiff tried to "place his own interpretive spin" on his alleged

“harassment and classify it as harassment based on sex or gender rather than as harassment based on sexual orientation.” The Court agreed, finding that plaintiff's allegations consist of instances of harassment based on his sexual orientation. The Court explained that the SAC used the term "flamboyant" to indicate behavior associated with a gay man, not a woman, and that, therefore, the acting SAC did not make the alleged comments "because of sex." Additionally, the Court rationalized:

. . . Anderson points to the incident in which two of his coworkers were allegedly lisping and talking in a "stereotypically flamboyant voice," but then stopped when they saw Anderson . . . Even if they were, the logical conclusion is that his coworkers were lisping because of the stereotype that gay men speak with a lisp. Lisp is not a stereotype associated with women. Thus, again, the coworkers' actions were not "because of sex," but because of Anderson's sexual orientation.

Finally, the Court claimed that plaintiff seemed to imply “that all gay men fail to comply with male stereotypes simply because they are gay.” However, the Court explained, “that would mean ‘that every case of sexual orientation discrimination [would] translate into a triable case of gender stereotyping discrimination, which would contradict Congress's decision not to make sexual orientation discrimination cognizable under Title VII.’”

Despite this ruling, which seems more likely to have been issued in 1980 than 2010, the Civil Service Reform Act of 1978 (CSRA), as amended, prohibits federal employees who have authority to take, direct others to take, recommend or approve any personnel action from discriminating against applicants and employees on the basis of conduct which does not adversely affect the performance of the applicant or employee. The Office of Personnel Management (OPM) has interpreted the prohibition of discrimination based on "conduct" to include discrimination based on sexual orientation. Additionally, many of the Cabinet level agencies have issued policy statements prohibiting discrimination based on sexual orientation.

If you are facing sexual orientation discrimination at work, you should check with your agency's EEO Office to see if processes exist to handle complaints. In addition, grievance procedures may sometimes be invoked to address these issues. Another possible recourse is to contact the Office of Special Counsel (OSC), the investigative agency charged with protecting federal employees from prohibitive personnel practices. Any of these paths, however, may require you to retain private counsel to help you navigate through any of these processes.