

Virginia court examines whether sexual orientation is protected by federal law

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You might be surprised to learn that federal courts have not yet definitively decided whether Title VII of the Civil Rights Act of 1964, which prohibits discrimination based on sex, also prohibits discrimination based on sexual orientation. Recently, the U.S. district court in Lynchburg had the opportunity to address the issue but declined to do so, instead deciding the case before it on other grounds. However, the court's opinion still provides important lessons for compliance with federal antidiscrimination law.

Facts

Carla Bee Spencer, an openly gay woman, worked as the deputy chief of police in the town of Bedford for eight months before she was terminated in August 2016. She claimed that while she was employed, her coworkers and her supervisor often ignored and openly resented her because she is a gay woman. She also asserted that she was paid less than comparable heterosexual male employees, and her supervisor clearly favored her heterosexual male coworkers.

After she was terminated, Spencer filed suit, arguing that the police department and the town of Bedford violated Title VII by discriminating against her on the basis of her sexual orientation. The text of Title VII prohibits employers from discriminating against employees "because of [their] . . . race, color, religion, sex or national origin." The town asked the court to dismiss the lawsuit because Spencer failed to state a viable legal claim since sexual orientation isn't protected under Title VII.

Court's ruling

U.S. District Court Judge Norman K. Moon rejected the town's argument and ruled the case should continue. The court found that Spencer had sufficiently alleged she was discriminated against, not just because she is gay, but because she is a gay woman. Accordingly, the district court reasoned that "for present purposes, it is unnecessary to determine whether Title VII prohibits discrimination based on sexual orientation because [Spencer], as a woman who experienced discrimination based on her gender, sufficiently alleges membership in a protected class."

In reaching that conclusion, Judge Moon relied on one of the seminal U.S. Supreme Court opinions laying out the law prohibiting sex discrimination. That 1989 case, *Price Waterhouse v. Hopkins*, stands for the proposition that a Title VII claim exists even if the discrimination isn't based "solely" on the employee's sex. It's sufficient that the employee's sex contributed to the discrimination. *Spencer v. Town of Bedford*, Case No. 6:18-cv-31 (W.D.VA., Nov. 2, 2018).

Local laws afford protection

Because the federal prohibition against employment discrimination based on sexual orientation remains uncertain, aggrieved employees must look to state and local laws to find protection. The Commonwealth of Virginia has yet to pass any statutes affirmatively establishing sexual orientation as a characteristic protected from acts of discrimination by private-sector employers. However, state government employees are protected by an Executive Order issued by then-Governor Terry McAuliffe in 2014.

Both the city of Alexandria and Arlington County have enacted local ordinances that specifically prohibit employment discrimination based on sexual orientation. Charlottesville has also prohibited discrimination against its employees on the basis of sexual orientation. It remains to be seen whether other localities in Virginia will enact similar provisions banning sexual orientation discrimination.

Bottom line

When it comes to this gray area, you are well-advised to err on the side of caution. As the *Spencer* case shows, employees can claim that the discrimination they faced was based on a combination of their gender and their sexual orientation to state a viable claim that could lead to prolonged litigation. The time, money, and public relations nightmare that can result from a sexual orientation discrimination case often simply isn't worth the legal fight.

Internal policies prohibiting sexual orientation discrimination can proactively prevent issues from occurring in the first place and will allow you to better deal with them internally if they do. Given the legal and practical complexities in this area of the law, it's wise to consult with experienced employment counsel who can guide you to a solution that's best for your company going forward.

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