

EEOC Update: EEOC Makes Its Views Known on Transgender Discrimination and an Employer's Use of Arrest and Conviction Records

Wednesday, May 9, 2012

The EEOC recently clarified its views on two significant issues related to Title VII. On April 20, 2012, the EEOC issued a notable decision, *Macy v. Holder*, Appeal No. 0120120821, holding that sex discrimination in violation of Title VII includes discrimination against transgender individuals. On April 25, 2012, the EEOC released updated guidance regarding an employer's use of arrest and conviction records in making employment decisions. Employers should be aware of these developments.

EEOC Rules that Title VII Protects Transgender Employees

Although Title VII prohibits discrimination based on sex, it does not expressly protect discrimination based on gender identity or transgender status. In an important development for transgender individuals, the EEOC ruled in *Macy v. Holder* that discrimination against a transgender individual constitutes discrimination based on sex in violation of Title VII.

Mia Macy, a transgender woman, applied for a position with the Bureau of Alcohol, Tobacco, Firearms and Explosives (the "Bureau") for which she was qualified. Macy interviewed for the position while she was a man and was informed that she would be hired for the position assuming she passed her background check. Macy subsequently informed the contractor responsible for filling the position that she was in the process of transitioning from male to female and she requested the contractor to inform the Bureau of this change. Five days later, Macy received an email from the contractor stating that the position was no longer available due to budget reductions. Macy alleged that the position had not been cut; rather, the Bureau hired another person. Macy filed a complaint with the EEOC, believing the Bureau did not want to hire her because she is transgender.

The EEOC held that Macy could bring a charge of discrimination based on transgender status under Title VII's prohibition against sex discrimination. The EEOC found it significant that Title VII's prohibition on sex discrimination proscribes gender discrimination, rather than just discrimination on the basis of biological sex. The EEOC explained that Title VII prohibits discrimination based on sex whether motivated by hostility, a desire to protect people of a certain gender, assumptions that disadvantage men, gender stereotypes, or the desire to accommodate other people's prejudices or discomfort. Accordingly, the EEOC held that intentional discrimination against a person who is transgender constitutes discrimination based on sex in violation of Title VII. As a result of this decision, Macy can now proceed with her EEOC charge of discrimination against the Bureau as a Title VII sex discrimination claim.

EEOC Cautions Against Employer's Use of Arrest and Conviction Records

In an effort to eliminate the disparate impact on certain races that results from excluding individuals with a criminal record, the EEOC issued enforcement guidance concerning an employer's consideration of arrest and conviction records in making employment decisions (available at http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf).

An employer's use of an individual's criminal history may violate Title VII in two ways. First, an employer could



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treat criminal history information differently for applicants or employees because of their race, color, religion, sex or national origin, thus resulting in disparate treatment. Second, even if an employer has a neutral policy that excludes individuals with criminal records, such a policy may disproportionately impact individuals of a particular race or national origin, thus having a disparate impact.

The EEOC explained that if a disparate impact exists, the employer has the burden to prove that the policy or practice is job related and consistent with business necessity. Based on the EEOC's guidance, employers should eliminate policies or practices that automatically preclude individuals from employment based on any criminal record. Employers should also develop a narrowly tailored written policy and procedure for screening applicants and employees for criminal conduct; the policy should identify essential job requirements and circumstances of the job, determine specific offenses that may demonstrate unfitness for performing the job and determine the duration of exclusions for criminal conduct based on all available evidence. Employers should only ask about criminal records that are job related and consistent with business necessity. Finally, employers should keep criminal records information confidential and only use it for its intended purpose. See *also* the Uniform Guidelines on Employee Selection Procedures (29 CFR § 1607).

Impact on Employers

Although the EEOC's guidance on these issues is not legally binding in the same way as a court ruling or act of Congress, employers should pay attention to these developments. Because the EEOC is responsible for enforcing Title VII, courts may defer to the EEOC's guidance in deciding cases. To minimize liability, employers are advised to comply their practices and policies with the EEOC's positions on such issues.

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