

Warn against mocking sexual orientation

While the courts sort out whether sexual orientation is a protected category under Title VII, employers should take steps to prevent harassment and retaliation based on sexual orientation and gender stereotyping.

Regardless of sexual orientation's uncertain protected status, it is well-settled that mocking someone's nonconformity to society's gender stereotypes is sex discrimination.

Recent case: Frank, who is gay, worked as an activity director in a Pennsylvania nursing home. His supervisor, upon learning of Frank's sexual orientation, began mocking Frank by calling him Frances while speaking in a high-pitched, feminine voice. Frank frequently asked the supervisor to stop, but he did not.

Then the supervisor fired Frank, allegedly for sleeping on the job.

Frank sued, alleging sex discrimination based on sexual stereotyping and retaliation for complaining.

He pointed out that his disciplinary record was clean and that the supervisor failed to follow the company's progressive discipline system when he fired Frank. The nursing home countered that sexual orientation discrimination is not covered by Title VII's sex discrimination provisions. It asked the court to dismiss the case.

The judge refused, reasoning that Frank was alleging he had been harassed because of preconceived notions of feminine and masculine behavior and traits, not his sexual orientation. Frank's case will move forward. (*Doe v. Meadowview Rehabilitation and Nursing Center*, ED PA, 2017)

Final note: Federal appeals courts are split on whether sexual orientation discrimination is sex discrimination. The 2nd, 7th and 11th Circuit Courts of Appeal have reached differing conclusions. The Trump Department of Justice has concluded it is not. The U.S. Supreme Court could decide to take up the question this term.