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EMPLOYMENT LAWSCENE ALERT: ARE TRANSGENDER EMPLOYEES PROTECTED UNDER THE LAW?

In April 2015, the EEOC also settled one of the first cases in which it attempted to litigate that transgender discrimination is protected under Title VII. The EEOC filed an amicus brief in a previous case claiming that sex discrimination includes discrimination against those who do not conform to gender stereotypes and, therefore, would include transgender individuals who are either physically male and gender-identify as female or are physically female and gender-identify as male. In March, the U.S. Department of Justice also sued Southeastern Oklahoma State University and the Regional University System of Oklahoma for denying tenure to and eventually terminating an employee because of her gender identity. Although none of these cases have received decisions on the merits of the case, the EEOC has made its position clear, and employers need to take stock of their policies or prepare for litigation.

These and other cases that have been filed raise interesting and challenging questions for employers. Gender expression is not specifically covered under Title VII, but that doesn't necessarily mean that transgender employees can't be covered by the statute. The two Circuit Courts of Appeals that have addressed the issue, the Sixth and the Eleventh, have held that a transgender plaintiff can state a claim for sex bias if the defendant took an adverse action against them because the worker-plaintiff didn't conform to a sex stereotype or norm. However, this does not mean that the law is settled, and district courts across the country may be faced with interpreting the law in these cases sooner rather than later. Employers should also make sure to take state law into account.

With the backing of the EEOC, discrimination suits by transgender employees could be a rising trend that employers should be aware of. Employers should review their policies and practices as they relate to discrimination and harassment and take complaints of harassment and discrimination of any kind seriously and investigate them thoroughly.