SEXUAL-ORIENTATION DISCRIMINATION: THE LESSONS FOR MOST EMPLOYERS WILL BE CLEAR EVEN IF FEDERAL LAW REMAINS UNSETTLED

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Attitudes toward same sex relationships have experienced enormous change in recent years. Perhaps the most dramatic manifestation of this shift is the Supreme Court's decision this June in Obergefell v. Hodges striking down state laws banning same sex marriages.

Federal anti-discrimination law, however, is still not settled concerning sexual-orientation. Only this July, in the wake of Obergefell, did the U.S. Equal Employment Opportunity Commission issue a ruling that Title VII prohibits discrimination based on sexual orientation.* Before then, federal courts had consistently concluded that Title VII's prohibitions against sex discrimination did not extend to sexual orientation.

So far courts have not rushed to embrace the EEOC's position.

For example, on December 16, 2015, the Second Circuit upheld the dismissal of Title VII claims based on perceived sexual-orientation discrimination without so much as mentioning the EEOC's ruling.** In doing so, the Second Circuit also allowed the dismissal of the plaintiff's Title VII retaliation claim because the plaintiff could not plausibly plead a "good faith reasonable belief" that he had complained about conduct prohibited by the statute. That seems curious considering that the EEOC—whose interpretation of Title VII and other anti-discrimination laws are generally owed deference even if they are not binding on the courts—has concluded that Title VII does protect against discrimination based on sexual orientation.

So, where does all this leave employers? To begin with, as a practical matter if not conclusively as a legal matter, the EEOC's ruling is binding on employers as the agency has broad enforcement powers and is often the first instance of redress for aggrieved employees. Additionally, at least twenty-two states—including New York—and the District of Columbia already prohibit employment discrimination based on sexual orientation. Moreover, some district courts may be poised to adopt the EEOC's position, even if higher level appellate courts so far have avoided the issue.*** Accordingly, while federal law may not be settled, the lessons for most

employers will be clear. They should adopt and implement clear policies prohibiting workplace discrimination based on sexual orientation.

* See EEOC Appeal No. 020133080 (2015)

** Dingle v. Bimbo Bakeries USA, 14-1215-cv; 14-1216-cv, 2015 U.S. App. LEXIS 21787 (Dec.16, 2015)

*** See Roberts v. United Parcel Service, Inc., 2015 U.S. Dist. LEXIS 9789 (E.D.N.Y. July 27, 2015) (Jack B. Weinstein, J.) (citing extensively from the EEOC's ruling even while deciding claims under state and local law); Isaacs v. Felder Servs., LLC, 2015 U.S. Dist. LEXIS 146663 (M.D. Ala. Oct. 29, 2015) (holding that sexual-orientation claims to be cognizable under Title VII); Videckis v. Pepperdine Univ., 2015 U.S. Dist. LEXIS 167672 (C.D. Cal. Dec. 15, 2015) (holding claims for sexual orientation discrimination to be actionable under Title IX consistent with EEOC's ruling); but see Burrows v. Coll. of Cent. Fla., 5:14-cv-197, 2015 U.S. Dist. LEXIS 119940 (M.D. Fla. Sept. 9, 2015) (holding that the EEOC's ruling to be not controlling and refusing to reconsider prior dismissal on that basis)