

Virginia Attorney General Says Virginia Law Prohibits Discrimination on the Basis of Gender Identity and Perhaps Sexual Orientation

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For Virginia employers who have not already updated their EEO policies to include prohibitions against discrimination on the basis of gender identity and sexual orientation, the time may have come to make those changes. Last week, Virginia Attorney General Mark Herring made it official, issuing an advisory opinion in which he concluded that the Virginia's Human Rights Act's ban on discrimination on the basis of "sex" also prohibits discrimination on the basis of gender identity and, possibly, sexual orientation. The advisory opinion relies, in part, on last month's decision by the U.S. Court of Appeals for the 4th Circuit in the case of *G.G. v. Gloucester County School Board*. In *G.G.*, the Court ruled that a school board regulation limiting the use of student rest rooms and locker facilities to a student's "biological or birth gender" violated Title IX of the Education Amendments of 1972 ("Title IX"), which has been interpreted by the federal government to require schools to treat transgender students consistent with their "gender identity."

Virginia Human Rights Act

The Virginia Human Rights Act ("VHRA") forbids discrimination on the basis of "sex." The statute does not define "sex," but there are indications that the Virginia legislature intended it to prohibit discriminatory conduct to the same extent as federal anti-discrimination laws, such as Title IX and Title VII of the Civil Rights Act of 1964. Therefore, Attorney General Herring relied on federal authority to answer the question of what the term "sex" means under the VHRA.

Gender Identity Discrimination

While acknowledging that neither the U.S. Supreme Court nor the 4th Circuit have squarely decided whether federal law bars discrimination based on gender identity, Attorney General Herring pointed out that there have been federal cases that have decided the issue implicitly, most notably the Supreme Court's decision in *Price Waterhouse v. Hopkins*, a case in which the Court concluded that federal law prohibited gender discrimination that relied on impermissible sex-stereotyping. Subsequent to *Price Waterhouse*, a number of different federal courts nationwide have allowed sex discrimination claims brought by transgender plaintiffs to move forward on the theory of sex-stereotyping.

The Equal Employment Opportunity Commission ("EEOC") has taken the gender identity issue one step further, deciding in the 2012 case of *Macy v. Holder* that "intentional discrimination against a transgender individual because that person is

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transgender is, by definition, discrimination 'based on sex,' and such discrimination therefore violates Title VII." With the combined weight of these federal authorities, Attorney General Herring concluded to his satisfaction that under Virginia law "sex" encompasses "gender identity."

Sexual Orientation Discrimination

On the other hand, whether discrimination on the basis of sexual orientation is prohibited by the VHRA remains an open question because neither the Supreme Court nor the 4th Circuit has concluded that Title VII's proscription against discrimination on the basis of "sex" bars discrimination on the basis of "sexual orientation." However, Attorney General Herring found it significant that an increasing number of federal courts across the country have begun to apply the sexual stereotyping theory from *Price Waterhouse v. Hopkins* to find discriminatory treatment in cases involving gays and lesbians. Those decisions are in accord with the position taken by the EEOC: sexual orientation discrimination is discrimination on the basis of sex.

Yet, Attorney General Herring ultimately concluded that the issue of whether Virginia law prohibits discrimination on the basis of sexual orientation remains an open question, because no federal court has yet to adopt the EEOC's all-encompassing view that "sex" includes "sexual orientation." Similarly undecided, in his view, is whether the VHRA's prohibition on discrimination on the basis of gender identity and, perhaps, sexual orientation, will extend to Virginia anti-discrimination statutes other than the VHRA. Attorney General Herring made clear his belief that a Virginia court faced with the issue of sexual orientation discrimination "would likely find that discriminatory conduct against gay and lesbian Virginians based on sex-stereotyping or treating them less favorably on account of their sex violates the Commonwealth's anti-discrimination statutes."

While the scope of the Virginia's anti-discrimination laws has yet to be determined with finality, momentum clearly seems to be trending toward expanding the prohibition against discrimination on the basis of "sex" to also include a ban on discrimination because of "gender identity and sexual orientation." The 4th Circuit recently became the first federal circuit court in the country to decide the issue of bathroom access for transgender students. Whether other federal circuit courts – or, ultimately, the Supreme Court – will take a similar position remains to be seen. Still, even with some continuing uncertainty following the issuance of Attorney General Herring's advisory opinion, it may be prudent for Virginia employers to consider expanding their EEO policies to prohibit discrimination in employment on the basis of gender identity and sexual orientation.