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### *Labor and Employment Alert: EEOC Decision Recognizes Discrimination Based on Transgender Status as a Form of Discrimination under Title VII*

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According to a recent EEOC decision, discrimination against a transgender individual because that person is transgender constitutes a cognizable form of sex discrimination, and is, therefore, prohibited by Title VII.

In *Macy v. Holder*, Mia Macy, a transgender woman, worked as a police detective in Phoenix, Arizona. Wishing to relocate, she learned of an open position at a crime laboratory near San Francisco. In December 2010 and January 2011, while still presenting as a man, Macy alleged that she was assured in two separate conversations by the director of the crime laboratory that the job was hers pending a background check.

On March 29, 2011, Macy stated that she communicated via email to the staffing firm handling her background check that she was in the process of transitioning from male to female and requested that the firm communicate this to the director. Macy alleges that this information was passed along on April 3, 2011. Five days later she received an email stating that due to federal budget cuts, the position was no longer available. Macy claims that she later discovered the position had not been eliminated, but rather, filled by someone else. Macy filed a formal complaint with the EEOC, alleging "gender identity" and "sex stereotyping," further claiming that she was discriminated against on the basis of her "sex, gender identity (transgender woman) and on the basis of sex stereotyping."

The EEOC held that claims of discrimination based on transgender status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII's sex discrimination prohibition, and therefore may be processed under the EEOC complaint process.

The EEOC explained that the term "sex" encompasses both sex, the biological differences between men and women, and gender, the cultural and social aspects associated with masculinity and femininity. To support this position, the EEOC relied on the U.S. Supreme Court's

opinion in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989), which recognized that Title VII barred discrimination because of biological sex *and* gender stereotyping. Therefore, the Commission explained, gender discrimination occurs any time an employer treats an employee differently for failing to conform to any gender-based expectations or norms.

The EEOC further reasoned that "sex stereotyping" is only one way of proving sex discrimination. In fact, the Commission acknowledged that transgender individuals might also point to evidence of discrimination motivated by hostility, by a desire to protect people of a certain gender, by assumptions that disadvantage men (or women), or by the desire to accommodate other people's prejudices or discomfort. Importantly, however, these formulations are not independent causes of action under Title VII. Rather, such formulations may serve as *evidence* of discrimination based on sex. The ultimate inquiry is whether, in the mind of the discriminator, the discrimination relates to the sex of the victim.

The EEOC's decision has far reaching implications for employers because it serves to permit a broader array of formulations on which individuals may base charges of sex discrimination under Title VII. That said, the EEOC's decision is not necessarily dispositive, as federal courts have yet to address the EEOC's interpretation of this issue.

For more information regarding this or any other employment-related issue, please contact your Vorys attorney or a member of the Vorys labor and employment group by calling 614.464.6400.