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Transgender Bias Charges Under Review at EEOC After Trump Order

- Agency shifts away from Biden-era gender identity protections
- Uncertain future for some LGBTQ+ bias charges under Trump

By Rebecca Klar

(Bloomberg Law) --

Discrimination charges filed by transgender workers will be "elevated for review" by the EEOC as the agency implements a Trump executive order calling on the federal government to recognize only two sexes, a commission spokesperson said Friday.

President Donald Trump's order signed on Jan. 20 stated that male and female are the only "two sexes" that will be recognized by the government, and directed the Equal Employment Opportunity Commission to rescind anti-harassment guidance finalized in April that included gender identity protections.

EEOC Acting Chair Andrea Lucas, named by Trump, said she would propose rescission of that guidance when she has a quorum of three commissioners to vote on it. The commission is down to Lucas and only one other member after Trump fired two Democratic commissioners on Monday.

"In the interim, Acting Chair Lucas has directed that all charges that implicate these executive orders be elevated for review at EEOC headquarters to determine how to comply with these executive orders prior to the rescission or revision of the Harassment Guidance," EEOC spokesperson Victor Chen said in a statement.

"To the extent that a charging party requests a notice of right to sue for one of those charges, EEOC will issue that notice of right to sue, as statutorily required," he added.

Chen declined to comment on the scope of the subject matter of the LGBTQ+ related charges under review at the agency, or on who would be reviewing them.

The guidance states that using a name or pronoun inconsistent with an employee's known gender identity or denying them access to a bathroom consistent with their gender identity can amount to sex-based harassment under Title VII of the 1964 Civil Rights Act.

In the guidance, the EEOC cited the US Supreme Court's decision in *Bostock v. Clayton County,* which held that Title VII'sprohibition on sex discrimination extended to bias based on sexual orientation and gender identity.

Trump's order, though, said the Biden administration's interpretation of the protections under *Bostock* was "legally untenable," questioning the scope of the protections, and calling on the attorney general to issue guidance to "correct the misapplication" of the decision.

Lucas reiterated that argument Tuesday in a statement saying "it is neither harassment nor discrimination for a business to draw distinctions between the sexes in providing single-sex bathrooms or other similar facilities which implicate these significant privacy ans safety interests."

"And the Supreme Court's decision in *Bostock v. Clayton County* does not demand otherwise: the Court explicitly stated that it did not 'purport to address bathrooms, locker rooms, or anything else of the kind," she wrote.

Private-sector workers must file discrimination charges with the EEOC before they can pursue claims in federal court. The agency received more than 3,000 charges alleging LGBTQ+ bias in fiscal year 2023, a total that has increased over the past decade.

The EEOC issues right to sue letters to workers in the many instances where the agency receives a charge from a worker, but chooses not to bring litigation on their behalf.

Even as Lucas can't yet call a vote revoking the harassment guidance, as affirmed by a new banner added to the commission's website, the agency is already pulling back from bringing litigation that cites protections outlined in the document.

On Thursday the EEOC requested a stay in a case the agency filed during the previous administration accusing a a pig farm of discriminating against a transgender woman by "deadnaming" and criticizing her for pursing gender-affirming care.

The EEOC attorneys cited Trump's order and the call for rescinding the harassment guidance in its bid for a stay.

Justice Department attorneys representing the EEOC also successfully petitioned the US District Court for the Eastern District of Tennessee to cancel oral arguments scheduled for Jan. 27 on a red state attorney generals' ongoing challenge to the harassment guidance.

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