Movement Analysis:
The Full Impact of the EEOC Ruling on the LGBT Movement’s Agenda

By Lisa Mottet, Transgender Civil Rights Project Director
The Full Impact of the EEOC Ruling, *Macy v. Holder*, on the LGBT Movement’s Agenda

In April 2012, with *Macy v. Holder*, the federal Equal Employment Opportunity Commission (EEOC) announced that the sex discrimination provisions of Title VII of the Civil Rights Act of 1964 protect transgender people, basing its analysis on Supreme Court decisions as well as a series of federal court decisions that had similarly found transgender people were protected by sex.

While *Macy* has been acknowledged, accurately so, as a ground-breaking decision that significantly alters the legal and political landscape for transgender people, the decision also has an impact on the political and legal landscape for lesbian, gay, and bisexual people as well.

This policy paper attempts to explain what *Macy* does, as well as its limitations, for both transgender people as well as the entire lesbian, gay, bisexual, and transgender movement; what it means for local, state and federal advocacy efforts; whether the movement should change its tactics or strategies; and how this ruling should be explained to employers and the general public. Woven throughout the paper are also answers to questions fielded by the Task Force in the wake of the *Macy* ruling.

---

Background on *Macy v. Holder*

Mia Macy, a veteran and former police detective, is a transgender woman who applied for a job with the Federal Bureau of Alcohol, Tobacco, and Firearms (ATF) in late 2010 and was all but officially hired by ATF when she was told the position had been cut due to funding. It was later discovered that the position was not actually cut and instead was filled by another person shortly after. Immediately prior to being told that the position’s funding was cut, Macy had disclosed in her background check that she was in the process of transitioning from male to female. As a result of not getting the position, Macy and her spouse lost their house to foreclosure. Macy has been skillfully represented by the Transgender Law Center throughout the EEOC process.

What is the Equal Employment Opportunity Commission Process?

The Equal Employment Opportunity Commission—commonly referred to as the “EEOC”—is an independent and bipartisan federal agency that enforces federal laws that make it illegal to discriminate in the workplace. It is governed by five Commissioners who are appointed by the President and confirmed by the Senate. The laws that the EEOC enforces prohibit discrimination on a variety of personal characteristics, including race, color, religion, sex, national origin, age, disability and genetic information. To enforce these laws, the EEOC has the authority to investigate accusations of discrimination against covered employers that are submitted by an applicant or employee who believes that unlawful discrimination has occurred. For Title VII of the Civil Rights Act, and most of the other laws that the EEOC enforces, any person who wants to file a lawsuit in court regarding the discrimination they faced must first file a charge with the EEOC.

When the EEOC receives a charge, accepted by phone or in person in one of its 53 field offices, it often offers to mediate between the parties before doing an investigation. If mediation fails or doesn’t occur because it is not agreed to, the EEOC will conduct an investigation. If the investigation determines that discrimination occurred, the EEOC attempts to reach a voluntary settlement with the discriminating employer (the average settlement is $17,000). If a settlement cannot be reached, the case is considered by EEOC’s attorneys for filing in court, where the EEOC will represent the victim of discrimination. Only a few cases are selected for this action. Otherwise, the individual is given a “right-to-sue” letter, which allows the person discriminated against to file a lawsuit.

During the EEOC agency process, for the typical person the only potential for financial compensation comes through mediation and settlement negotiations, and therefore any such award would have to be agreed to by the discriminating employer. If an employer is unwilling to settle, either the EEOC or the person will have to take them to court in order to get relief. The EEOC doesn’t take all cases to court, as explained above, but instead selects a few in which the EEOC’s lawyers will represent the person discriminated against to seek a remedy in court.

If the person who was discriminated against is a federal employee, the EEOC has much broader powers to order relief, including monetary relief such as back pay and compensatory damages. It may also order that the person be reinstated to their position and require the employer to take other corrective actions.

What the EEOC Ruled in *Macy v. Holder*

In *Macy*, the EEOC declared that Title VII’s sex discrimination prohibition encompasses discrimination because a person is transgender. The ruling was precedent-setting because it was decided by the full Commission; all five bi-partisan Commissioners agreed to its issuance. The EEOC based its ruling on well-established Supreme Court precedent

---

3 Derived from data on the total awarded amount, divided by the number of complainants
4 Statistics are available from the EEOC. Out of nearly 100,000 complaints that were filed in 2011, the EEOC filed only approximately 300 lawsuits. See [http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm](http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm) (accessed August 7, 2012). It is not clear on what exact basis the EEOC selects cases to take to court; however, the precedent-setting potential of LGBT related cases may make them more likely to be selected for litigation.
5 The vast majority of cases decided by the EEOC are not brought to the Commissioners for approval. Those that clarify an area of law for employers are more likely to be selected for the full Commission to review so as to settle the issue with precedent.
regarding sex stereotyping and statutory interpretation, as well as on federal court cases involving transgender people from the 1st, 6th, 9th, 11th and DC Circuits.

The ruling clarified that illegal sex discrimination occurs if adverse action taken against an applicant or employee occurs because:

1. a person expresses his or her gender in a non-stereotypical manner;
2. a person has transitioned gender or is planning to transition gender; or
3. the person is transgender.

The decision describes how, in each of these instances, a sex stereotype is being applied to the transgender person and how federal courts have recognized each as such.

Importantly, the decision makes clear that all of the above descriptions of discrimination are simply different ways of saying that the gender of the employee played a part in the discriminatory actions/decisions of the employer. Simply put, when the employer took into account the employee’s gender or sex, the employer took the action “because of sex,” which is precisely what Title VII forbids.

In addition, the decision also explains that regardless of whether there is any specific evidence of gender stereotyping in a particular case, treating a person differently because the person has changed their sex or intends to change their sex is automatically unlawful sex discrimination under Title VII—just as discrimination against a person who is of one religion, and converts to another, is considered a type of religious discrimination. This comparison had also been made clearly by at least two federal courts.

The 
Macy decision was also clear that transgender people, and all people, did not need to rely on sex-stereotyping claims to show that sex discrimination was taking place. The decision explains that what really matters is whether the employer relied on the employee’s gender when making its decision to discriminate; so, if an employer was taking into account the person’s gender when deciding whether or not their identity or conduct was appropriate, then it was sex discrimination.

Not only is 
Macy solidly reasoned, it is a particularly valuable addition to the legal jurisprudence on transgender people’s protections under sex discrimination because it eloquently, and concisely, explains and synthesizes the several court decisions that had each examined only certain aspects of this discrimination. The 
Macy decision weaves all of the best aspects of the court cases together for easy digestion and application in future cases.

The Impact of the Ruling for the Transgender Community
There are immediate practical effects of the ruling for transgender people across the country and in U.S. territories. The ruling formally opens the doors and services of the EEOC and its 53 field offices to transgender people who are experiencing harassment or discrimination on the job, or in applying for a job, with any employer, public or private, that has 15 or more employees anywhere in the U.S.

Those who contact the EEOC should expect to have their complaints taken seriously and investigated in the same professional manner that all others are investigated. Previously, the EEOC typically only issued a “right to sue” letter,

9 The EEOC does not get into detail about what this means. However, it appears that this means that if an employer is okay with a woman doing something that it is not okay with a man doing, then that would be sex discrimination.
10 After the decision, the EEOC made LGBT culturally competency training available to its investigative staff. The training was provided by myself as well as Mara Keisling at the National Center for Transgender Equality. This and future trainings are critical to ensuring that investigative staff are able to properly handle complaints from LGBT people.
meaning that transgender people received little support and had to find a lawyer to take their case to court—a costly endeavor that many transgender people found themselves unable to afford.

Because the EEOC authority is national, the Macy ruling impacts the entire country, unlike the federal court cases which held similarly but primarily affected the states in their respective circuits. The Macy ruling means new, national access to the real prospect of remedies and resolution under Title VII for transgender people living in any of the 34 states that lack clear protections for “gender identity and/or expression”\(^{11}\) and even for those who do live in one of those jurisdictions.\(^{12}\)

Employers faced with an EEOC investigation that is taken seriously, and by an agency that unequivocally views discrimination against transgender people as illegal, are significantly more likely to mediate, give people their jobs back, stop the harassment that is occurring on the job, settle the case for a monetary amount, and generally work to make the situation better. The power of the EEOC to help change a workplace environment when a charge has been filed should not be understated.

In addition to the impact on individual employers caught discriminating, federal agencies are fully bound by the EEOC decision. While the federal government had already taken steps to eradicate discrimination over the past several years, such as by updating the overall non-discrimination policy to include gender identity\(^{13}\) and issuing the tremendously important “Guidelines on the Employment of Transgender Individuals,”\(^{14}\) both done by the Office of Personnel Management, federal agencies have not universally updated their non-discrimination policies and anecdotal evidence of discrimination has continued to accumulate. Now, the Equal Employment Opportunity counselors which process claims in each federal agency are required to accept these complaints by transgender people as forbidden sex discrimination.

Many private sector employers are also bound by the decision. If an employer has a federal contract and wants to continue being a federal contractor, it needs to follow Macy. Analysis by the Williams Institute at UCLA School of Law explains that Macy is binding on all federal contractors because federal contractors are prohibited from discriminating on the basis of sex and the agency\(^{15}\) in charge of enforcing contracts looks to the EEOC for its interpretation of what constitutes sex discrimination.\(^{16}\)

**What Does the EEOC Ruling Mean for Lesbian, Gay, and Bisexual People?**

Discrimination against lesbian, gay and bisexual (LGB) people may also be understood as a type of sex discrimination and there have been a couple of less-noticed EEOC decisions that have already recognized this fact.

These decisions were less-noticed because, unlike Macy, they were not precedent-setting cases issued by the full Commission, but rather were just issued as a matter of course by the staff of the EEOC. One case involved a gay man who was physically threatened as well as harassed and the other involved a lesbian who was verbally harassed.\(^{17}\)

---

12. Those who have a clear state law protecting gender identity can simultaneously file a federal Title VII claim through the dual filing process (The U.S. Equal Employment Opportunity Commission, How to File a Charge of Employment Discrimination, (available at: http://www.eeoc.gov/employees/howtofile)(accessed June 7, 2012)). This has the advantage of being able to benefit from the EEOC mediation and investigation process, which may not be as comprehensive through a similar state agency.
15. The agency that enforces federal contracts is the Department of Labor, Office of Federal Contract Compliance Programs.
17. Castello v. Postmaster General, EEOC Appeal No. 0120111795, Agency No. 1G-701-0071-10 (Dec. 20, 2011);
In the first case, Jason Veretto, a gay man, was pushed, physically threatened, and called a “fucking queer” after his wedding announcement ran in the society section of a Hartford, CT newspaper. In this non-precedent setting decision, the EEOC said:

Complainant [Mr. Veretto] has alleged a plausible sex stereotyping case which would entitle him to relief under Title VII if he were to prevail. He alleges that he was subjected to a hostile work environment because [his coworker] learned that he was marrying a man. He has essentially argued that [the coworker] was motivated by the sexual stereotype that marrying a woman is an essential part of being a man, and became enraged when Complainant did not adhere to this stereotype by announcing his marriage to a man in the society pages of the local newspaper. In other words, Complainant alleges that [coworker]’s actions were motivated by his attitudes about stereotypical gender roles in marriage.18

In the second, Cecile Castello, a lesbian, was harassed by her coworkers in crude language referring to her relationships with women. Using language that was similar to that used in the case of Mr. Veretto, the EEOC said:

We find that Complainant [Castello] has alleged a plausible sex stereotyping case which would entitle her to relief under Title VII if she were to prevail. Complainant alleged that she was subjected to a hostile work environment when [a supervisor] made an offensive and derogatory comment about her having relationships with women. Complainant has essentially argued that [the supervisor] was motivated by the sexual stereotype that having relationships with men is an essential part of being a woman, and made a negative comment based on Complainant’s failure to adhere to this stereotype. In other words, Complainant alleged that [the supervisor]’s comment was motivated by his attitudes about stereotypical gender roles in relationships.

These cases are public signals that the full Commission also may be ready to rule, rightly so, that discrimination against lesbian, gay and bisexual people is also properly understood as discrimination based on sex. There are many federal court cases involving LGB people and sex stereotypes upon which the EEOC could base a ruling like Macy for LGB people. Thus, LGB people should also know that they can and should file complaints with the EEOC when they experience discrimination.

Are Gender Identity Non-Discrimination Laws and Policies No Longer Legally Necessary?
Is the EEOC ruling so definitive and wide-reaching that the transgender movement can end advocacy efforts to pass federal, state, and local laws prohibiting gender identity discrimination? What about efforts to enact and implement employer-level policies? Unfortunately, the answer is no—in order to adequately protect transgender people across the country laws and policies plainly protecting transgender people are still necessary.

As a legal matter, Macy does not definitively determine that Title VII protects transgender people. Ultimately the U.S. Supreme Court decides what a federal statute means—and the Court may eventually be asked whether “sex” in existing statutes includes the discrimination that transgender people face. While Macy may be the most important decision the movement sees on this question for several years, eventually the Supreme Court will receive an appeal that raises this question, and it may decide to take the case to issue a final ruling on the question.

Until the Supreme Court rules, other courts should give the ruling significant respect, but it is not guaranteed that when these judges rule that they will agree with the EEOC. Although the EEOC decision and the string of federal court cases it is based on are legally correct, there will not be a decision that is fully binding on all federal courts until the Supreme Court issues a decision, which may not happen for many years.

Additionally, while important, this ruling does not answer many of the more practical questions about discrimination

---

18 Veretto, Appeal No. 0120110873 (2011).
against transgender people in the workplace that are often answered by laws and their interpretive regulations and guidance. Such questions include those relating to dress codes, what constitutes harassment, confidentiality, and sex-segregated facilities.

We should be asking the EEOC to offer this guidance in the coming months and years. But laws and interpretive guidance and regulations often answer many if not all of those questions—a model example are the regulations enforcing the D.C. Human Rights Act. A federal law, when it finally passes, and its regulations that come out after passage, are very likely to address these questions.

*Another Reason for Gender Identity Protections: The Cultural Impact of Clear and Visible Protections*

It is easy to forget that, while legal remedies are important to giving LGBT workers the tools to seek compensation when discriminated against, an equally important purpose of passing laws for the rights of LGBT people is to change society’s culture and attitudes towards the community. Laws against discrimination—think about the Americans with Disabilities Act—can change entire workplace cultures about what is appropriate and not appropriate in an employment setting.

Given the pervasiveness and intransigence of the problem of discrimination against transgender people—of whom 78% report mistreatment, harassment, or discrimination at work—a massive cultural change is needed.

The cultural change triggered by the passage of a law is just as important as the creation of legal recourse and the ability to win a case in court. The passage of a law, especially a federal law, creates an educational moment that motivates employers to make immediate changes in policies and conduct training to make sure discrimination doesn’t occur in the first place. And, it isn’t just about that initial educational moment that occurs right after passage—laws that remain on the books continue to act as an “instruction book” or reference book about what is legal and illegal.

The passage of a new law generally causes employers to do several things that lead to cultural change. Employers may decide to embrace the following practices according to their size:

1. Update workplace policies to include “sexual orientation” and “gender identity,” and include such information in employee personnel handbooks;
2. Provide staff training for hiring officers, supervisors (and ideally, all staff) about non-discrimination policies; and
3. Include “gender identity” and “sexual orientation” as protected categories in visual explanations of employee rights (think of the “know your rights” posters in the break rooms).

The reason explicit laws can do so much more than court decisions or rulings is that too few people are aware of how laws have been interpreted by courts and administrative agencies. If it is not in the text of the law itself, it can seem as if the protection does not exist. Generally speaking, employers are not aware of what EEOC rulings hold about the meaning of a law, unless they have found themselves being charged with discrimination and have the need to do that research. Generally, lawyers that specialize in civil rights or employment rights should be up-to-speed on cases like *Macy* (and in fact, many law firms have put out helpful analyses on *Macy* and what it means for employers), but most businesses do not employ attorneys to advise them on these types of matters.

In fact, the experience of advocates in California demonstrates the importance of visible protections in the law. In 2003, California added transgender protections to the state fair housing and employment laws by expanding the definition of “gender” to include gender identity and expression, which it did by cross-referencing another statute that had a broad definition of gender. But many transgender people and employers covered by the law did not know the coverage was there.

---

19 D.C. Code Ann. §§ 2-1403.0l(c); 53 DCR 8751-8755 (October 27, 2006) (providing clear guidance on questions such as dress standards, access to sex-segregated housing and facilities, and what constitutes harassment).

because it was included in the definition of gender. In 2011, in order to fix this problem, California changed how the law was written to include “gender identity” and “gender expression” as explicit, stand-alone characteristics listed along with all of the other protected characteristics (sex, race, religion, etc.). Although this California situation is slightly different than determining the impact of a ruling like *Macy*, it certainly demonstrates the importance of having visible, clear protections in the text of the law.

**How Should the EEOC Ruling Affect the Employment Non-Discrimination Act (ENDA)?**

It is critical to embody specific and clear protections for transgender people in federal law. Rather than waiting for the Supreme Court to provide an affirmation that Title VII protects transgender people, we need Congress to act to enact specific protections into federal law, which is the most secure means of providing protection. Thankfully, *Macy* helps build our case for passage of ENDA.

First of all, it demonstrates that there is a continuing need for non-discrimination protections overall. Although most of us who are immersed in the LGBT community fully understand the continuing problem of employment discrimination—against LGB and T people—many non-LGBT people think it no longer is a problem. Her compelling story of discrimination and its human consequences has been described in many newspapers and should continue to help paint the picture of discrimination to society.

Second, the EEOC is now enforcing Title VII under the *Macy* interpretation and may do so for what may become several years before ENDA is next considered in Congress. Those in opposition to ENDA chronically and repeatedly state that it would cause tremendously negative consequences for businesses if it were to pass. However, the experience with the EEOC enforcing these transgender protections over the next few years will inevitably result in no such widespread negative outcomes for employers, thus making it easier for the movement to demonstrate to federal lawmakers that gender identity discrimination protections are effective and reasonable and are implemented without harming or unnecessarily restricting businesses. Even though there is an ample state/local record on this question already, showing no harms to businesses, the federal EEOC ruling should provide the LGBT movement with a more extensive body of evidence.

Third, we can use *Macy* to bolster our argument that ENDA is important to clarify that federal law prohibits discrimination *for employers* who may otherwise face liability of which they are unaware. The LGBT movement has made—and will continue making—this argument based on the existence of federal court cases referred to before. However, the EEOC ruling makes the interpretation uniform across the U.S. and more likely that an employer will face liability throughout the U.S. The movement can now better argue that it isn’t fair for businesses to not be aware that discrimination against transgender people is prohibited by federal law. To put it bluntly, right now nearly every business in the U.S. is at risk of liability if it discriminates against a transgender person, and right now, nearly every business is not aware that sex discrimination laws have been interpreted to cover transgender people. The only way to clarify for businesses that this is the law is to put “gender identity” in federal law.

**What the Movement Should Do to Capitalize on this Ruling**

There are at least five things the LGBT movement should do in response to the EEOC ruling.

First, the movement should educate employers and attorneys about the ruling, what it means, and what they should do in response. Savvy employers and human resource attorneys should:

- Add gender identity or expression to their employment non-discrimination policies;
- Train/retrain hiring officers, supervisors, and as much of their staff as possible; and
- Write up policies related to gender transition on the job or let employees know that the employer will follow the policy of the Office of Personnel Management,\(^{21}\) which should be workable for most employers.

Of course many employers have already taken these actions based on the known business advantages of non-discrimination policies that enforce fairness on the job, which includes retaining employees and helping to attract the most qualified applicants. In fact, 50% of Fortune 500 businesses have gender identity/expression protections. In addition, some human resource attorneys have already been advising their clients to take these actions, especially in the 6th, 11th and DC Circuit courts. However, for employers that have not yet taken these steps, the time is now. In response to the Macy ruling, several law firms have begun the process of educating their clients that these steps need to be taken. Employers should be referred to the many resources available to help write these policies and conduct effective trainings.

Second, the movement needs to educate transgender people that there are real remedies available now—that they now have a place to go to resolve an employment issue no matter where they are in the U.S. Of course, it is important to be realistic that the ruling does not guarantee that their employer will not discriminate if they come out on the job, but they should know that their cases will be taken seriously by the EEOC and they may be able to have it successfully resolved.

Third, the movement should fully understand and start educating the rest of society that all LGBT people should be understood to have protections under sex discrimination. We should explain this to federal agencies, to state agencies, employers, and any other institution that has or should have a non-discrimination policy.

Fourth, the movement should ensure that more LGBT people bring their cases to the EEOC. LGBT people should know that the EEOC staff is being trained and will treat their cases professionally. It is also a good idea to remind people to contact LGBT legal groups for assistance on how to best present the case before the EEOC.

Fifth, the movement should continue its work to codify gender identity and sexual orientation protections in local, state, and federal law, as well as any other institution which has or should have a non-discrimination policy.

Conclusion

The truth is that the Macy ruling is an incredibly important legal development for the transgender and LGBT movements. It is a ground-breaking decision that provides new avenues for relief for many transgender and LGB people who are suffering job discrimination right now. However, efforts to pass laws and policies at the local, state and federal levels must continue in full force because the Macy ruling is not legally definitive and will never be widely known, like the language of a statute is known. Given the incredibly persistent and pervasive nature of the discrimination that transgender people face in particular, every legal and policy tool must be utilized in an attempt to end this discrimination once and for all. Strong clear laws and policies that cover both sexual orientation and gender identity are amongst the strongest tools we have at our disposal and must continue to be utilized by the LGBT movement as one of the primary tools to dismantle this discrimination.

Note:
The National Gay and Lesbian Task Force is tracking LGBT discrimination complaints being filed with the EEOC, with the U.S. Department of Housing and Urban Development, the U.S. Department of Health and Human Services and other federal agencies. Please let us know if you have filed such a complaint by emailing Lisa Mottet, Transgender Civil Rights Project Director, at lmottet@thetaskforce.org.

The Task Force is also seeking any stories of discrimination against LGBT people. Please send your story to us by visiting http://www.thetaskforce.org/our_work/public_policy/tell_us_your_story.