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ANALYSIS

Stars Align for EEOC to Ratchet Up Transgender-Discrimination Enforcement

The EEOC flipped to Democratic control in August, one of several developments leading employment lawyers to predict the agency will be filing more transgender-discrimination cases.

February 08, 2024 at 11:06 AM

Employment Law



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The original version of this story was published on [Corporate Counsel](#)

The Equal Employment Opportunity Commission recently settled a transgender-harassment lawsuit, extracting \$25,000 from an upstate New York pizzeria accused of forcing an employee to quit to escape endless harassment.

While that suit against T.C. Wheelers Bar & Pizzeria was the first trans-discrimination case the agency had filed since 2017, employment attorneys expect many more as the EEOC files more lawsuits overall, follows through on its new Strategic Enforcement Plan's focus on protecting vulnerable workers, and as the number of Americans [identifying themselves as trans swells](#).

When the EEOC filed the case last March, chair Charlotte Burrows said, "In the current climate, where transgender individuals face increasing attacks on their rights and basic humanity," the EEOC will vigorously enforce Title VII of the Civil Rights Act of 1964's prohibition on trans discrimination.

A recently released report from Seyfarth Shaw listed the Wheelers lawsuit as among the agency's most important last year.

According to the EEOC's lawsuit, one of the restaurant's owners repeatedly harassed the male employee, saying he "wasn't a real man," described him using female pronouns and asked invasive questions about his transition, such as "Does she have female parts?" In addition, the suit said Wheelers' owners took no action when employees and customers did the same.

Under the settlement announced Jan. 22, Wheelers agreed to pay the employee \$3,500 in back pay, \$21,500 in compensatory damages, and to hire a human resources consultant to investigate employee complaints and to provide staff training on anti-discrimination laws.

Wheelers told Business Insider that it denies the allegations and doesn't tolerate discrimination, but settled anyway to avoid the costs of going to trial.

While the suit involved just one workplace and the settlement amount was modest, Ben Green, who speaks and consults on transgender inclusion, told the Society for Human Resource Management that he's hopeful the outcome will cause other employers to rethink their practices.

"So many trans folks deal with workplaces that fall somewhere between unwelcoming and hostile," he said. "I hope this ruling will act as a beacon of hope for those people and a kick into action for their employers."

Employment attorneys expect the EEOC to pursue more trans cases in part because it has become more aggressive overall since Kalpana Kotagal joined the EEOC's five-person board in August, flipping the panel to Democratic control for the first time since President Joe Biden took office in 2021.

While the EEOC always files a flurry of cases each year in the weeks before its fiscal year ends Sept. 30, the spike was especially pronounced this year, with 71 cases filed in September, nearly half of the 144 filed during the entire year. The 144 cases represented a 52% increase from 2022.

"With a [Democratic] majority of votes at the commissioner level, we're seeing the floodgates open up," Seyfarth Shaw partner Andrew Scroggins said.

While the EEOC has pursued trans-discrimination cases going back to the Obama administration, the U.S. Supreme Court's ruling in *Bostock v. Clayton County* in 2020 strengthened its legal hand. In a 6-3 decision, the court found that the prohibition against sex discrimination in Title VII of the Civil Rights Act of 1964 includes employment discrimination against an individual on the basis of sexual orientation or transgender status.

The SHRM says employers can reduce the risk of running afoul of the law by leaving it to employees when or if they want to tell others about their gender status. The SHRM advises against outing anyone.

Also avoid asking employers personal questions about medical or surgical histories and be careful with word choices, the SHRM said. For example, asking for an employee's "real" name may suggest that a chosen name is not real.

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