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DIVERSITY

The State of Sexual Orientation Discrimination Under Title VII

BY ELIZABETH LIVINGSTON
Special to the Legal

Until recently, no U.S. Court of Appeals for the Federal Circuit had extended Title VII to include sexual orientation as a protected class, meaning that LGBTQ individuals who suffer discrimination could not avail themselves of Title VII protection from bias. On the heels of *Obergefell v. Hodges*—the landmark U.S. Supreme Court decision favoring gay marriage—the Equal Employment Opportunity Commission (EEOC) issued a July 2015 administrative decision styled as *Baldwin v. Foxx* in which the agency held for the first time that a person alleging sexual orientation discrimination had a cognizable claim under Title VII. This administrative decision is not binding in a court of law but it underscores a societal shift toward greater protections for LGBTQ individuals and foreshadows a break from the significant body of case law holding that Title VII does not cover sexual orientation discrimination.

Title VII makes it "an unlawful employment practice for an employer ... to fail or refuse to hire or to discharge ... or otherwise to discriminate against any individual with respect to his [or her] compensation, terms, conditions or privileges of employment, because of such individual's ... sex," 42 U.S.C. Section 2000e-2(a)(1). Many courts have said the word "sex" cannot be construed to mean "sexual orientation" and therefore have held that Title VII does not prohibit discrimination based on a person's identification as gay, lesbian or bisexual.

ELIZABETH A. LIVINGSTON *is a senior associate in the litigation and dispute resolution practice group at Griesing Law. Livingston brings her extensive conflict-management experience to bear on risk assessment and business advisement, and she has successfully defended multiple clients in employment discrimination matters.*

To afford LGBTQ individuals some modicum of protection from bias, litigants have relied on U.S. Supreme Court jurisprudence indicating that Title VII does protect against claims for gender nonconformity and same-sex discrimination. Gender nonconformity means that a person does not behave in a way that aligns with traditional views about how a man or woman should behave, see *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1999). Same-sex discrimination is when on-the-job harassment occurs by a supervisor or co-worker who is a member of the same sex as the alleged victim, as in *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998). Commentators—and even some judges—have called for reform because the current methods for addressing unfair treatment of LGBTQ individuals under Title VII "embrace an 'illogical' and artificial distinction" between sexual orientation discrimination and gender nonconformity discrimination, as in *Philpott v. New York*, No. 16 -6778, U.S. Dist. LEXIS 67591 at *6-7 (SDNY May 3, 2017).

SEVENTH CIRCUIT EMBRACES THE ZEITGEIST

Last summer, a three-judge panel of the Seventh Circuit addressed this topic when it affirmed dismissal of a case alleging sexual orientation discrimination but issued a lengthy dictum that questioned the continued viability of precedent barring

Title VII protection. In October 2016, the Seventh Circuit granted a petition to rehear that matter en banc, which happens when the question presented concerns a matter of exceptional public importance or when the panel decision being reviewed may conflict with prior case law. Based on that rehearing, just two months ago, the Seventh Circuit became the first federal appellate court to hold that Title VII prohibits discrimination based on sexual orientation, see *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017). Judge Diane Wood authored the 8-3 decision and Judge Richard Posner filed a concurring opinion. Judge Diane Sykes, Judge William Joseph Bauer and Judge Michael Stephen Kanne dissented.

In *Hively*, an "openly lesbian" adjunct professor at Ivy Tech Community College alleged she had suffered discrimination based on her sexual orientation because she applied for promotion to a full-time position six times without receiving the job and because her part-time contract was not renewed after five years of teaching at the college. The Seventh Circuit was asked to "take a fresh look" at its position concerning Title VII prohibitions against sexual orientation discrimination "in light of developments at the Supreme Court extending over two decades." In so doing, the Seventh Circuit determined "a person who alleges that she [or he] experienced employment discrimination on the basis of her [or his] sexual orientation has put forth a case of sex discrimination for Title VII purposes."

Ivy Tech representatives have said the school will not appeal the Seventh Circuit's decision to the U.S. Supreme Court; rather Ivy Tech maintains: it already bans discrimination based on sexual orientation; it did not discriminate against Hively; and it will defend the case on the merits at trial. This Seventh Circuit decision is a coup for gay rights activists but it creates a circuit split concerning anti-gay employment discrimination.

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THE ELEVENTH CIRCUIT TAKES A STRICT CONSTRUCTIONIST'S VIEW

In March 2017, before the Seventh Circuit's en banc decision in *Hively*, a three-judge panel of the Eleventh Circuit affirmed prior precedent holding that Title VII does not protect against workplace discrimination arising out of a person's homosexuality, see *Evans v. Georgia Regional Hospital*, 850 F. 3d 1248, 1251 (11th Cir. 2017). Jameka Evans, a former security officer at Georgia Regional Hospital, alleged she was denied equal pay, harassed and physically assaulted at work because she is gay (even though she "did not broadcast her sexuality") and because she wore a "male uniform, low male haircut, shoes, etc." and did not "carry herself in a traditional woman[ly] manner" during her approximately one-year tenure at the hospital. Evans also alleged that her employer retaliated against her after she complained to human resources about unfair treatment.

When affirming dismissal of discrimination claims based on Evans' status as a lesbian, the *Evans* court reasoned that "binding precedent forecloses" such actions brought under Title VII to address "workplace discrimination because of [one's] sexual orientation." The *Evans* court primarily relied on a Fifth Circuit opinion issued almost 40 years ago that held discharge for homosexuality is not prohibited by Title VII, as in *Blum v. Gulf Oil,* 597 F.2d 936, 938 (5th Cir. 1979)). The *Evans* court also collected more recent cases from other circuits with similar holdings.

However, the *Evans* court vacated the portion of the district judge's order that dismissed with prejudice the plaintiff's count based on gender nonconformity and provided plaintiff with an opportunity to amend that "actionable" claim for which she had failed to plead facts sufficient to support a plausible inference of discrimination.

To date, Evans has not filed an amended complaint; she and her legal team have adopted a different strategy. On March 31, Lambda Legal petitioned for rehearing en banc, asking the full U.S. Court of Appeals for the Eleventh Circuit to reconsider Evans' case. The Eleventh Circuit has not indicated whether it will grant or deny the request.

THE SECOND CIRCUIT'S HANDS ARE TIED

Also in March, when considering whether Title VII prohibitions encompass discrimination based on sexual orientation, a three-judge panel of

the Second Circuit concluded that it "lacked the power to reconsider" two earlier decisions by Second Circuit panels and therefore could not hold that Title VII protections extend to sexual orientation discrimination, see *Christiansen v. Omnicom Group*, 852 F.3d 195, 199 (2d Cir. 2017); see also *Simonton v. Runyun*, 232 F.3d 33 (2d Cir. 2000) (holding Title VII does not prohibit sexual orientation discrimination); *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005) (holding sexual orientation is not protected category under Title VII).

In *Christiansen*, an "openly gay man who is HIV-positive" and who worked as a creative director at an international advertising agency alleged that his direct supervisor taunted him because of his "effeminacy and sexual orientation." The *Christiansen* court found that "gender stereotyping allegations" in the complaint were cognizable, allowing the ad executive to proceed with his gender nonconformity claims under *Price Waterhouse* and related Second Circuit precedent. As of early April, Christiansen's counsel announced a plan to petition for a rehearing en banc but no further developments have been released.

In a 15-page concurring opinion, Chief Judge Robert A. Katzmann and District Judge Margo K. Brodie (sitting by designation) noted that views have shifted on legal protections and rights for gay people, opined that "other federal courts are also grappling with this question," and predicted "it may well be that the Supreme Court ultimately will address it."

DISTRICT COURTS CHALLENGE THIRD CIRCUIT PRECEDENT

Here in the Third Circuit, prior precedent directly holds that Title VII does not prohibit discrimination based on sexual orientation, see *Bibby v. Philadelphia Coca Cola Bottling*, 260 F.3d 257, 261 (3d Cir. 2001). However, within the past year, the U.S. District Court for the Western District of Pennsylvania denied a motion to dismiss a gay man's claims that he experienced a hostile work environment and was constructively discharged because "Title VII's 'because of sex' provision prohibits discrimination on the basis of sexual orientation," as "there is no more obvious form of sex stereotyping than making a determination that a person should conform to heterosexuality," in *EEOC v. Scott Medical Health Center*, No.16-225, U.S. Dist. LEXIS 153744 at *5-6 (W.D. Pa. Nov. 4, 2016).

Similarly, the U.S. District Court for the Eastern District of Pennsylvania recently denied a motion to dismiss a heterosexual woman's sexual orientation and gender nonconformity claims brought under Title VII, see *Ellingsworth v. Hartford Fire Insurance,* No. 16-3187, U.S. Dist. LEXIS 42061 at *1-2 (E.D. Pa. March 23). Over the course of a year, the plaintiff's supervisor allegedly cultivated the perception that the plaintiff was a lesbian, ridiculed her and used disparaging slang terms for lesbians in front of and when talking about the plaintiff, among other inappropriate conduct. In arriving at its decision to allow the case to proceed, the *Ellingsworth* court reasoned that "the alleged harassment and discrimination in this case is analogous to the harassment recognized in other viable gender stereotyping cases" and determined plaintiff "presented a plausible claim that she was discriminated against and harassed because of her sex" in violation of Title VII. Both of these district court cases evidence a growing challenge to existing Third Circuit precedent concerning Title VII and sexual orientation discrimination.

CONCLUSION & RECOMMENDATIONS

Public pressure and—albeit slow moving–judicial change are pushing corporate America toward equality for LGBTQ individuals. Chad Griffin, president of The Human Rights Campaign, has said: "the nation's largest employers have demonstrated through their actions that LGBTQ people are not just tolerated, but welcomed in their workplaces and communities." Companies are implementing new policies to avoid discrimination claims even though Title VII coverage issues persist. Amid uncertainty as to whether LGBTQ individuals are entitled to Title VII protections employers should consider the following:

- Provide sensitivity trainings to personnel, especially supervisory-level employees and those above them;
- Develop and implement a comprehensive antidiscrimination policy that includes protections for LGBTQ individuals;
- Be prepared to investigate complaints of discrimination or harassment without delay and with the right type of investigator; and
- Analyze business decisions for unintentional discrimination.

— Genna Garofalo, law clerk at Griesing Law, contributed to this article. ●