



Courts: Discrimination Due To Sexual Orientation or Gender Identity Violates Title VII

For decades, LGBT victims of workplace discrimination had no recourse. In 2001, for instance, the U.S. Court of Appeals for the Third Circuit held in *Bibby v. Philadelphia Coca Cola Bottling Co.* that “Title VII does not prohibit discrimination based on sexual orientation.” The court based its holding, in part, on Congress’ repeated rejection of legislation that would have extended Title VII to cover victims of sexual orientation and gender identity discrimination. But in the past several months, the federal courts have been dramatically reversing their jurisprudence to expand Title VII’s coverage.

A Pennsylvania U.S. District Court, for instance, recently concluded in *EEOC v. Scott Medical* that the 2001 *Bibby* precedent is questionable outdated jurisprudence. In *Scott Medical*, the EEOC sued on behalf of a gay male employee who was allegedly the victim of repeated homophobic slurs and statements throughout his employment. The employer moved to dismiss on the ground that binding authority – *Bibby* – prevented the lawsuit. The court rejected the employer’s argument, holding: “There is no more obvious form of sex stereotyping than making a determination that a person should conform to heterosexuality.” The court further stated that “[f]orcing an employee to fit into a gendered expectation – whether that expectation involves physical traits, clothing, mannerisms or sexual attraction – constitutes sex stereotyping and . . . violates Title VII.”

The reasoning in *Scott Medical* was recently extended to the gender identity context by a Nevada U.S. District Court in *Roberts v. Clark County School District*. The

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court in *Roberts* found that discriminating against a school police officer's transgender status violated Title VII. The officer was born a female, but identified as a male. The school district prohibited him from using the women's restroom because he no longer behaved like a woman. And it banned him from the men's restroom because he was biologically female. The court ruled that the school district was treating the officer differently because he did not conform to gender norms and that this violated Title VII.

It remains to be seen whether President Trump will try to affect this trend of extending Title VII coverage to the LGBT community. There are a number of judicial vacancies he will be filling, including immediately nominating an associate justice to the U.S. Supreme Court. President Trump will have a say in a number of policy decisions related to how the executive branch operates, creating opportunities to impact future litigation. He could, for instance, attempt to reverse the Obama Administration's policy, announced in May 2016, that schools could lose federal money if they discriminate against LGBT students.

There are important upcoming decisions. In an unusual move, the entire U.S. Court of Appeals for the Seventh Circuit has overturned a three-member panel of that court's judges who found claims for sexual orientation discrimination not cognizable under Title VII. The *en banc* Seventh Circuit will rehear the case, *Hively v. Ivy Tech Community College*, and issue a new opinion. And the U.S. Supreme Court has entered the national conversation, announcing that it will hear *GG v. Gloucester County School Board*, a case in which a school district is forcing a transgender boy to use his private bathroom.

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Although that case directly involves Title IX, the ruling will likely impact the meaning of “sex discrimination” under Title VII.

There is uncertainty looking into the immediate future. But given the current trends, employers would be wise to review their policies and practices. There are a number of topics to consider, including bathroom access rights, managing gender transitions, and making sure policies avoid stereotypes and discrimination.

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