



## **Heading for a Possible Showdown at the U.S. Supreme Court: Circuit Courts Issue Conflicting Decisions Regarding LGBT Protections from Discrimination under Title VII**

We recently wrote about the evolving law on discrimination based on sexual orientation and gender identity under Title VII, and an update is already in order. Since our last post, three U.S. Circuit Courts of Appeals have issued decisions addressing whether Title VII provides protection from discrimination based on sexual orientation, and, not surprisingly, the courts have not all ruled the same way.

First, on March 10, 2017, the Eleventh Circuit in *Evans v. Georgia Regional Hospital*, Case No. 15-15234 (11th Cir. March 10, 2017), examined the claim of a lesbian former employee who brought suit alleging sexual orientation and gender non-conformity discrimination in violation of Title VII. The court ruled that her gender non-conformity claim, which was based on the argument that she was discriminated against because she did not conform to stereotypes of her gender, may be a viable claim of gender discrimination. The court remanded to the trial court to give the plaintiff an opportunity to amend her complaint, but upheld its prior precedent that discrimination because of sexual orientation is not cognizable under Title VII.

On March 27, the Second Circuit reached a similar decision in the case of *Christiansen v. Omnicom Group, Inc.*, Case No. 16-748 (2nd Cir. Mar. 27, 2017). There the plaintiff was an HIV-positive, openly gay man, who alleged that during his employment at an advertising agency, he was subjected to a pattern of harassment by

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his supervisor in the form of sexually suggestive images and inappropriate remarks that referred to his effeminacy, sexual orientation, and HIV status. The U.S. District Court for the Southern District of New York granted the employer's motion to dismiss, holding that the claims alleged sexual orientation discrimination, which under Second Circuit precedent is not cognizable sex discrimination under Title VII. The Second Circuit disagreed and reversed, finding that the plaintiff adequately alleged discrimination on the basis of gender stereotyping, which is a valid claim under Title VII. In a concurring opinion, Second Circuit Chief Judge Katzmann argued that the Second Circuit should revisit its precedential decisions that sexual orientation claims are not cognizable as sex discrimination under Title VII.

A week later the U.S. Court of Appeals for the Seventh Circuit, in an *en banc* decision in *Hively v. Ivy Tech Community College*, Case No. 15-1720 (7th Cir. Apr. 4, 2017), held that discrimination on the basis of sexual orientation constitutes a form of sex discrimination prohibited under Title VII. The Seventh Circuit was the first Circuit Court of Appeals to do so. The plaintiff was a part-time adjunct professor who was openly lesbian. She applied for and was denied several full-time positions over the years, and her contract was not renewed in 2014. She sued under Title VII, claiming she was discriminated against based on her sexual orientation. The trial court dismissed her claim on the grounds that sexual orientation is not a protected category under Title VII. A three-judge panel of the Seventh Circuit affirmed, stating it was bound by precedent.

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The plaintiff petitioned for an *en banc* hearing, which was granted, and the entire Seventh Circuit overturned the panel decision. The court concluded that adverse employment actions on the basis of sexual orientation were a subset of actions taken because of sex, and therefore constituted sex discrimination. The court explained that the plaintiff was being treated negatively for her nonconformity with the gender stereotype of female heterosexuality, and, therefore, employment discrimination on the basis of sexual orientation takes into account the employee's sex. The court reasoned that it is no different for an employer to discriminate against a female employee for having a female partner than for dressing or speaking differently than other female employees, which is cognizable sex discrimination under Title VII. The court also reviewed U.S. Supreme Court opinions relating to sexual orientation over the last 20 years and noted a gradual extension of protections under the U.S. Constitution. The court concluded that in light of recent U.S. Supreme Court decisions and "common-sense reality," it is impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex. The court overruled prior Seventh Circuit precedent and held that sexual orientation is a form of sex discrimination under Title VII.

The Seventh Circuit's opinion conflicts with holdings of several other U.S. Circuit Courts of Appeal that have ruled on this issue, and the question may very well be decided by the U.S. Supreme Court. For now, the Seventh Circuit ruling applies only in the states of Wisconsin, Illinois, and Indiana. However, some states and municipalities

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have their own prohibitions on discrimination based on sexual orientation and gender identity.

In other news potentially having implications for LGBT employees, in particular transgendered employees, the U.S. Supreme Court has remanded a case involving a transgendered student's right to use the restroom of his gender identity, *GG v. Gloucester County School Board*, 822 F.3d 709 (4th Cir. 2016). The U.S. Supreme Court was expected to hear the case this term, but the Trump Administration reversed an Obama Administration policy that was central to the Fourth Circuit's prior ruling, so the Supreme Court remanded back to the Fourth Circuit for a new opinion. Although that case involves Title IX of the Civil Rights Act, a ruling in that case could impact the meaning of "sex discrimination" under Title VII.

Employers should review their anti-discrimination and anti-harassment policies for compliance with current federal, state, and local laws in the jurisdictions in which they have employees. Employers should also keep in mind that the EEOC considers discrimination based on sexual orientation and gender identity to be forms of gender discrimination. Many employers chose to include sexual orientation and gender identity as categories protected as a matter of company policy, even if not legally protected categories. We will keep you apprised of developments in this rapidly evolving area of the law.

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