The State of Legal Protections for LGBTQ Employees

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LGBTQ rights in the workplace and employers' corresponding obligations became more defined through three federal court rulings this spring.

Until now, many courts have dismissed lawsuits alleging sexual orientation discrimination under Title VII of the Civil Rights Act of 1964, a federal law proscribing employment discrimination against an individual because of, among other things, his or her sex.[1]

For example, on March 10, 2017, a three-judge panel of the U.S. Court of Appeals for the Eleventh Circuit, which handles federal appeals in Florida, Georgia and Alabama, held Title VII does not prohibit sexual orientation discrimination – a ruling in step with many other federal appellate courts.[2] In *Evans v. Georgia Regional Hospital*, Ms. Jameka Evans, a lesbian who worked as a hospital security guard until her resignation, alleged she was discriminated against because of her sex, sexual orientation and gender nonconformity. Ms. Evans alleged it was "'evident' that she identified with the male gender, because of how she presented herself – '(male uniform, low male haircut, shoes, etc.')." She also alleged she was targeted because she failed to "carry herself in a 'traditional woman[ly] manner.'" Upon a *sua sponte* review of the complaint, the magistrate judge recommended the lawsuit be dismissed because Title VII does not prohibit sexual orientation discrimination and the gender nonconformity claim was "just another way to claim" sexual orientation discrimination. The district court, over Ms. Evans's objection and without further comment, adopted the recommendation and dismissed the case.

Ms. Evans appealed. Although the Eleventh Circuit ruled the alleged gender nonconformity discrimination was a viable claim under Title VII (and remanded the case so Ms. Evans could amend her complaint to state the claim properly), the court affirmed the dismissal of Ms. Evans's sexual orientation discrimination claim. The Eleventh Circuit disagreed with the position that U.S. Supreme Court decisions allowing same-sex and gender nonconformity discrimination under Title VII support sexual orientation claims. Instead, the court opined, without a contrary *en banc* ruling or U.S. Supreme Court precedent, it could not ignore binding precedent that sexual orientation discrimination is not actionable under Title VII.[3]

However, on April 4, 2017, the U.S. Court of Appeals for the Seventh Circuit, which handles federal appeals in Illinois, Indiana and Wisconsin, declined to follow the Eleventh Circuit and other federal courts, becoming the first federal appellate court to hold sexual orientation discrimination is actionable under Title VII as a form of sex discrimination.[4] In *Hively v. Ivy Tech Community College of Indiana*, Ms. Kimberly Hively, a part-time adjunct professor, alleged she was discriminated against based on her sexual orientation. Ms. Hively alleged she was denied full-time employment and her part-time contract was not renewed because she was openly lesbian. The community college moved to dismiss Ms. Hively's claims

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[1] 42 U.S.C. § 2000e-2(a)(1).
[2] *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248 (11th Cir. 2017).
[3] Ms. Evans filed a petition for rehearing *en banc* seeking the Eleventh Circuit's full panel review. The petition has garnered support from four members of Congress, the American Civil Liberties Union and several other special interest groups.
[4] *Hively v. Ivy Tech Comty. Coll. of In.*, 853 F.3d 339 (7th Cir. 2017).

because sexual orientation is not protected under Title VII. The district court agreed and dismissed the lawsuit.

Ms. Hively appealed. Initially, the Seventh Circuit panel, bound by legal precedent, affirmed the dismissal. However, a majority of the Seventh Circuit judges voted to rehear the case *en banc*. Recognizing it was beyond the court's power to rewrite Title VII to include a new protected category, the Seventh Circuit instead evaluated "whether actions taken on the basis of sexual orientation are a subset of actions taken on the basis of sex." Analyzing the issue under both comparative and associational theories, the court concluded they are. In deciding only the issue before them, the Seventh Circuit overruled its previous precedent and held "a person who alleges that she experienced employment discrimination on the basis of her sexual orientation has put forth a case of sex discrimination for Title VII purposes." The Seventh Circuit reversed the district court's dismissal of the complaint and remanded the case for further proceedings.

The U.S. Supreme Court has not decided whether Title VII prohibits sexual orientation discrimination as part of the law's prohibition against sex discrimination. While the conflict between *Evans* and *Hively* creates a circuit court split and sets the stage for possible U.S. Supreme Court resolution on this issue, it also causes some uncertainty going forward. Regardless, state and local laws in many jurisdictions already prohibit sexual orientation discrimination. Resolution of the circuit court split likely will not impact employment policies and procedures in those areas.

Florida does not have a state law prohibiting sexual orientation discrimination in employment. However, several Florida local governments have enacted anti-discrimination ordinances that protect against sexual orientation discrimination. As the law continues to evolve on legal protections afforded LGBT employees, Florida employers should review their policies to ensure compliance with local ordinances.

In addition to the evolving state of Title VII sexual orientation discrimination claims, over time employers may also face new challenges regarding the rights of transgender employees under the Americans with Disabilities Act of 1990, as amended. Title I of the ADA generally prohibits employment discrimination against a qualified individual with a disability.[5] The ADA defines "disability" as a physical or mental impairment that substantially limits one or more major life activities, as well as a record of or being regarded as having such impairment.[6] However, the term "disability" specifically excludes "gender identity disorders not resulting from physical impairments."[7] As a result, historically, gender dysphoria has been specifically excluded from the ADA's protections.[8]

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[5] 42 U.S.C. § 12112(a). Similarly, the Florida Civil Rights Act prohibits discrimination against any individual because of such individual's handicap. Fla. Stat. § 760.10.

[6] 42 U.S.C. § 12102(1)(A)-(C).

[7] 42 U.S.C. § 12211(b)(1) (emphasis added).

[8] Gender Dysphoria is a diagnosis for those whose gender at birth is contrary to the one with which they identify. Gender Dysphoria Fact Sheet, American Psychiatric Association, available at http://www.dsm5.org/Documents/Gender%20Dysphoria%20Fact%20Sheet.pdf.

However, on May 18, 2017, the U.S. District Court for the Eastern District of Pennsylvania denied an employer's motion to dismiss ADA claims based on gender dysphoria.[9] In *Blatt v. Cabela's Retail, Inc*., Kate Lynn Blatt, a transgender employee, alleged she was discriminated against, in part, because of her gender dysphoria in violation of the ADA. The employer moved to dismiss Ms. Blatt's ADA claims and argued gender dysphoria was excluded from the ADA's scope. The district court disagreed. In doing so, the court interpreted the ADA's exclusions narrowly and noted, "Congress was careful to distinguish between excluding certain sexual identities from the ADA's definition, on the one hand, and not excluding disabling conditions that persons of those identities might have, on the other hand." Because the court found Ms. Blatt's gender dysphoria to be a disabling condition, the court denied dismissal. For now, the effect of this ruling varies significantly depending on jurisdiction and specific circumstances. Even employers not bound by *Blatt* should recognize a possible trend expanding cognizable ADA claims and engage in the interactive process with employees requesting accommodations for gender dysphoria.

[9] *Blatt v. Cabela's Retail, Inc*., No. 5:14-cv-04822-JFL (E.D. Pa. Aug. 18, 2017).