

Discrimination Based on Sexual Orientation Not Protected by Title VII, Federal Court Rules

The anti-discrimination protections under Title VII of the Civil Rights Act do not encompass workplace discrimination on the basis of sexual orientation, the U.S. Court of Appeals for the Seventh Circuit, in Chicago, has held. *Hively v. Ivy Tech Community College*, No. 15-1720 (7th Cir. July 28, 2016).

Even though the Court found merit for Title VII coverage for persons discriminated against because of their sexual orientation, it said circuit precedent compelled its ruling.

The Seventh Circuit has jurisdiction over Illinois, Indiana, and Wisconsin.

Background

Kimberly Hively was a part-time adjunct professor at Ivy Tech Community College. She asserted that, in violation of Title VII, her employer denied her renewal of her employment contract and opportunities for promotion to full-time positions because she was openly gay. The trial court granted the employer's motion to dismiss the case. It found that "Title VII does not apply to claims of sexual orientation discrimination and therefore Hively has made a claim for which there is no legal remedy." Hively appealed.

Bound by Precedent

While sympathetic to Hively's plight and condemning workplace harassment and discrimination based on an employee's sexual

orientation, the appellate court nonetheless held that sexual orientation is not a protected class under Title VII and, therefore, Hively failed to present a legally cognizable claim.

The Court explained that it was bound by circuit precedent, particularly *Spearman v. Ford Motor Co.*, 231 F.3d 1080 (7th Cir. 2000), and *Hamm v. Weyauwega Milk Prods.*, 332 F.3d 1058 (7th Cir. 2003). In *Spearman* and *Hamm*, appellate courts in the Seventh Circuit found that discrimination on the basis of sexual orientation is not Title VII discrimination on the basis of sex, and therefore, is not protected by Title VII. The Court noted that, without U.S. Supreme Court or Congressional action, sexual orientation is not a protected class under federal law and workplace protections for lesbian, gay, and bisexual workers will not be recognized.

EEOC Position

On July 15, 2016, the Equal Employment Opportunity Commission announced its position that Title VII sex discrimination *does* encompass discrimination on the basis of sexual orientation and gender identity, regardless of any state and local laws that suggest otherwise.

The Court acknowledged the EEOC's bulletin and recent decisions that have offered protection to lesbian, gay, bisexual, and transgender (LGBT) workers. Noting the agency's *Baldwin v. Foxx*, EEOC Appeal No. 0120133080 (July 16, 2015), found Title VII protected a federal employee who experienced discrimination on the basis of his sexual orientation only, the Court said *Baldwin* and similar EEOC decisions deserved deference. However, "...the rulings of the EEOC are not

binding” on a federal appellate court, the Court stated.

Stereotyping

The Seventh Circuit pointed out that in certain circumstances, LGBT persons are protected by Title VII under a sex stereotyping theory. The U.S. Supreme Court first applied a sex stereotyping theory in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). There, a female executive was denied promotion to partnership based on evaluations criticizing her failure to behave in a stereotypically feminine manner. The Supreme Court noted that while the employer had not sought to intentionally discriminate against the employee, in basing her career progression on sex stereotypes, it effectively had engaged in discrimination “based on ... sex,” in violation of Title VII.

A Title VII sex stereotyping theory may offer protection to LGBT individuals in two broad categories of situations. First, lesbian, gay, and bisexual employees harassed or discriminated against based solely on their failure to conform to traditional societal notions of masculinity or femininity may find recourse. However, as the Seventh Circuit noted, “...these claims tend[ed] to be successful only if those employees could carefully cull out the gender non-conformity discrimination from the sexual orientation discrimination.”

Second, employees who identify as transgender can bring a Title VII claim based on a sex stereotyping theory. Just as the plaintiff in *Price Waterhouse* was penalized for failing to conform to societal notions of femininity, transgender employees often face harassment or discrimination because their gender identity does not conform to societal expectations associated with their biological

sex. As gender non-conformity is almost always at issue for transgender employees, transgender plaintiffs more consistently have been found protected by Title VII than other LGBT individuals.

However, as the Seventh Circuit noted, upholding the distinction between discrimination based on sexual orientation and based on sex stereotyping in any meaningful manner is fraught with problems. For instance, the fact that common stereotypes associated with lesbian, gay, and bisexual individuals are heavily tied to gender expectations, the Court said, courts likely will struggle to determine what characteristics motivated the harassment and what level of protection, if any, consequently flows to each claimant. Further, “extricat[ing] the gender non-conformity claims from the sexual orientation claims,” the Court said, can lead to an “uncomfortable result in which the more visibly and stereotypically gay or lesbian a plaintiff is in mannerisms, appearance, and behavior, and the more the plaintiff exhibits those behaviors and mannerisms at work, the more likely a court is to recognize a claim of gender non-conformity which will be cognizable under Title VII as sex discrimination.”

Gap in Federal Protection

The Seventh Circuit highlighted a gap in the federal protection of workplace rights. The U.S. Supreme Court’s *Obergefell v. Hodges*, 135 S.Ct. 2584 (2014), held the Constitution provided a right of same-sex couples to marry, but “[t]he cases as they stand do, however, create a paradoxical legal landscape in which a person can be married on Saturday and then fired on Monday for just that act.”

LGBT Challenges and Protections

Claims asserting Title VII violations on the basis of gender identity and sexual orientation have grown significantly. According to EEOC statistics, “In FY 2015, [the] EEOC received a total of 1,412 charges that included allegations of sex discrimination related to sexual orientation and/or gender identity/transgender status. This represents an increase of approximately 28% over the total LGBT charges filed in FY 2014 (1,100).” Of the 1,412 charges filed, 1,181 claims (approximately 83%) related to sexual orientation, rather than gender identity.

Since 1990, advocates have proposed adoption of legislation prohibiting discrimination in hiring and employment on the basis of sexual orientation and gender identity (the latter, since 2007). Except for the 2005-2006 session, the Employment Non-Discrimination Act (ENDA) has been before Congress every session since 1994. ENDA would prohibit discrimination in hiring and employment on the basis of sexual orientation or gender identity. ENDA has yet to pass. Also in Congress is the Equality Act. The Equality Act would amend the Civil Rights Act of 1964 to prohibit discrimination on the basis of sexual orientation, gender identity, and sex in employment, housing, and public accommodations, among other areas.

To some, the EEOC’s recent rulings and directives adopting a much broader definition of sex suggest that passing ENDA may not be necessary. The Seventh Circuit’s ruling may push Congress to amend Title VII to include sexual orientation as a protected class. Cases similar to *Hively* are pending in the Second and Eleventh Circuits. If any circuit disagrees

with the Seventh Circuit, a circuit split may put the issue squarely before the Supreme Court.

Title VII applies to all private sector and state and local government employers with at least 15 employees. However, many states’ laws offer workplace protection for LGBT employees. In addition, federal contractors and federally assisted construction contractors who entered into or modified contracts on or after April 9, 2015, are subject to Executive Order 13672, which prohibits employment discrimination based on gender identity or sexual orientation.

Employers should monitor federal and state laws and court decisions and ensure their policies, handbooks, and employment agreements are in compliance.

Please contact Jackson Lewis if you have any questions about this or other workplace developments.

For More Information Contact:

Timothy Domanick
Jackson Lewis P.C.
58 South Service Road, Suite 250
Melville, NY 11747
Email: Timothy.Domanick@jacksonlewis.com
Phone: (631) 247-4630

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