PUBLICATION

Seventh Circuit Becomes First Circuit Court to Extend Title VII Protection to Sexual Orientation Claims

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On April 5, 2017, the Seventh Circuit Court of Appeals (sitting en banc) became the first appeals court in the country to hold that Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of sexual orientation. The 8-3 ruling is a landmark decision that creates a split among circuit courts, thereby increasing the odds that the Supreme Court will take up this issue in the near future.

Hively v. Ivy Tech

In *Hively v. Ivy Tech Cmty. Coll. of Indiana*, No. 15-1720, 2017 WL 1230393 (7th Cir. Apr. 4, 2017), Kimberly Hively alleged that Ivy Tech Community College discriminated against her on the basis of sexual orientation. Hively is an openly gay professor who worked as a part-time adjunct for the college beginning in 2000. Throughout her employment, she applied for at least six full-time positions, but her efforts were unsuccessful. In July 2014, her part-time contract was not renewed.

A district court ruled against Hively in 2015, concluding that sexual orientation is not a protected class under Title VII. Before the case was heard en banc, a panel of judges for the Seventh Circuit affirmed the district court's ruling in 2016 – but noted that it was only doing so because it was bound by Seventh Circuit precedent. The panel engaged in a lengthy analysis of this precedent, ultimately stating that the rationale used "seems illogical" and could be seen "as defying practical workability." Additionally, the panel cited the Equal Employment Opportunity Commission's recent decision in which the EEOC concluded that "sexual orientation is inherently a 'sex-based consideration,' and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII."

Reversing the panel's decision and holding that discrimination based on sexual orientation is covered by Title VII, the court relied on two theories. First, the court held that discrimination on the basis of sexual orientation is impermissible "sex stereotyping." Second, discrimination on the basis of sexual orientation is a form of associational discrimination based on sex.

In its discussion of "sex stereotyping," the court relied on the Supreme Court's 1989 ruling in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), which recognized that the practice of gender stereotyping falls within Title VII's prohibition against sex discrimination. The Seventh Circuit stated that Hively "represents the ultimate case of failure to conform to the female stereotype (at least as understood in a place such as modern America, which views heterosexuality as the norm and other forms of sexuality as exceptional): she is not heterosexual." Finding that Hively was not conforming to a stereotype based on the sex of her partner, the court ruled that employment discrimination based on Hively's sexual orientation is actionable under Title VII.

The court went on to hold that discrimination based on sexual orientation is sex discrimination under the associational theory. The court cited Supreme Court precedent, including *Loving v. Virginia*, 388 U.S. 1 (1967), for the general proposition that a person who is discriminated against because of the protected characteristic of a person with whom she associates is being disadvantaged because of her own traits. In Hively's case, if the sex of her partner (female rather than male) led to her being treated unfavorably in the workplace, then that distinction is "because of sex." The Seventh Circuit stated: "No matter which category is involved, the essence

of the claim is that the plaintiff would not be suffering the adverse action had his or her sex, race, color, national origin or religion been different."

Implications for Employers

The circuit courts are now split on this topic and the law in this area is quickly evolving. The Eleventh Circuit dismissed a similar lawsuit in March and held that Title VII does not protect against discrimination on the basis of sexual orientation. In that case, *Evans v. Georgia Reg'l Hosp.*, 850 F.3d 1248 (11th Cir. 2017), the Eleventh Circuit rejected the argument that sexual orientation discrimination is another form of gender stereotyping. The plaintiff, however, has filed a petition for rehearing en banc. In a recent case, before the Second Circuit, *Christiansen v. Omnicom Group, Inc.*, No. 16-748, 2017 WL 1130183 (2d Cir. Mar. 27, 2017), the court conceded that discrimination on the basis of sexual orientation does not, in and of itself, give rise to a gender discrimination claim under Title VII. However, the Second Circuit upheld the plaintiff's sex discrimination claim based on the gender stereotyping theory.

Given the split among circuit courts, it is likely that the issue as to whether sexual orientation is a protected category under Title VII may eventually land at the Supreme Court for resolution. Alternatively, Congress could pass legislation amending Title VII to specifically include sexual orientation as a protected category. Although legislative action may seem unlikely given the current makeup of Congress, it is of note that this issue is not entirely a partisan one, as five of the eight justices who joined in the majority of *Hively* were Republican appointees.

Beyond the judicial realm, employers should review their anti-discrimination and anti-harassment policies to ensure that they comply with state and local laws in the jurisdictions in which they have employees, as many states, counties and municipalities have enacted laws explicitly prohibiting discrimination on the basis of sexual orientation.