

PUBLICATION

Is Sexual Orientation a Protected Category under Title VII?

Authors: Jennifer G. Hall

August 9, 2016

That question has been asked for many years, especially after the U.S. Supreme Court struck down the Defense of Marriage Act in 2013 (*U.S. v. Windsor*) and subsequently held state bans of same-sex marriages are unconstitutional last summer (*Obergefell, et al. v. Hodges*). Additionally, in 2014, President Obama signed Executive Order 13672 prohibiting federal contractors from discriminating on the basis of sexual orientation or gender identity, and several courts have held that Title VII does protect against discrimination based upon gender stereotype ("gender non-conformity claims"). For example, the Fifth Circuit Court of Appeals held that "a plaintiff may establish a sexual harassment claim with evidence of sex-stereotyping." (*EEOC v. Boh Brothers*). Further, same-sex bans on adoption are being overturned (*Campaign for Southern Equality v. Miss. Dept. of Human Services*) as are religious accommodation acts which allow businesses to discriminate against LGBT members because of religious beliefs (*Barber v. Phil Bryant, Governor*).

But what is the status of sexual orientation discrimination in private employment? In July 2015, the EEOC held that "a claim of discrimination on the basis of sexual orientation necessarily states a claim of discrimination on the basis of sex under Title VII" and issued its "What You Should Know about EEOC and the Enforcement Protections for LGBT Workers." The EEOC has accepted sexual orientation as a protected category, and it has brought, and continues to bring, suits on behalf of LGBT individuals. But, do the courts agree with the EEOC's interpretation of Title VII?

The first of the 13 federal courts to address the issue does not. On July 28, 2016, the Seventh Circuit Court of Appeals (which includes Wisconsin, Illinois and Indiana) issued its opinion, holding that Title VII does not recognize sexual orientation as a protected category (*Hively v. Ivy Tech Community College*). The Seventh Circuit's 42-page opinion traced the legal history and recognized that "Title VII protects gay, lesbian and bisexual people, but frequently only to the extent that those plaintiffs meet society's stereotypical norms about how gay men or lesbian women look or act." However, the Court declined to interpret Title VII as currently written to prevent sexual orientation discrimination.

What does this mean for employers? Businesses need to be extremely mindful of the current flux in this area. As the Seventh Circuit recognized, "the writing is on the wall." Sexual orientation discrimination will likely be recognized, either by an act of Congress or a United States Supreme Court decision, and many businesses are adopting sexual orientation and gender identity protections in their equal employment opportunity policies.