PUBLICATION

Circuit Split: Expansion of Title VII Protections and Sexual Orientation as a Subset of a Protected Class

May 19, 2017

Title VII of the Civil Rights Act of 1964 prohibits discrimination based on race, color, religion, sex or national origin. Title VII has been supplemented via legislative action to also prohibit discrimination due to pregnancy (Pregnancy Discrimination Act of 1978), age (Age Discrimination in Employment Act) and disability (Americans with Disabilities Act of 1990). Now the question is whether sexual orientation should be considered a "protected class" and/or a subset of one of the aforementioned already-protected classes. At present, there is no determinative legislative guidance on this specific question, while two federal circuit courts have addressed this exact issue in the last 60 days and reached conflicting results.

No Cause of Action: *Evans v. Georgia Regional Hospital*

Jameka Evans was a security officer at Georgia Regional Hospital from August 1, 2012, to October 11, 2013. After leaving the hospital voluntarily, Ms. Evans maintained that she was denied equal pay, harassed and physically battered. She also alleged discrimination because she did not carry herself in a "traditional womanly manner," she was homosexual and she identified with the male gender. Ultimately, Ms. Evans sued Georgia Regional (among other defendants) for such alleged discriminatory actions.

The United States District Court for the Southern District of Georgia dismissed Ms. Evans' Title VII claims, determining that then-established case law from all of the federal circuits "was not intended to cover discrimination against homosexuals." Reasoning that a claim of discrimination based on gender, non-conformity was really "just another way to claim discrimination based on sexual orientation" regardless of the way it was characterized, her case was dismissed.

Ms. Evans timely appealed the district court's ruling and the U.S. Equal Employment Opportunity Commission (EEOC) filed an amicus curiae brief in support of her position. The EEOC took the position that Ms. Evans presented two cognizable causes of action for discrimination under Title VII based upon her sexual orientation and gender identity/non-conformity.

The Eleventh Circuit disagreed, relying upon its prior opinion holding that Title VII does not prohibit discharge for homosexuality. *Evans v. Georgia Regional Hospital*, No. 15-15234 (11th Cir. Mar. 10, 2017). The court also distinguished two decisions issued by the United States Supreme Court, holding that, while these decisions may allow a plaintiff to bring a claim under Title VII due to discrimination arising from gender non-conformity and sexual orientation, the Eleventh Circuit nonetheless is not permitted to deviate from precedent established in its prior rulings. At the time the opinion was issued, on March 10, 2017, the First, Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth and Tenth Circuits had all similarly held that sexual orientation was not a prohibited basis for discriminatory acts under Title VII. *Such uniformity among the circuit courts lasted less than a month* after the Eleventh Circuit issued its opinion in *Evans*.

Cause of Action: *Hively v. Ivy Tech Community College of Indiana*

On April 4, 2017, the Seventh Circuit issued an opinion holding that a person who alleges they experienced employment discrimination based on their sexual orientation has put forth a claim of sex discrimination for Title VII purposes. *Hively v. Ivy Tech Community College of Indiana*, No. 15-1720 (7th Cir. Apr. 4, 2017).

Kimberly Hively was openly homosexual and began teaching as an adjunct professor at Ivy Tech Community College in 2000. From 2009 to 2014, Ms. Hively applied for six full-time positions, however she was not chosen for any of these opportunities. In July 2014, she was notified that her part-time contract was not being renewed, effectively terminating her employment with the College. Ms. Hively filed a complaint with the EEOC, followed by a complaint in the United States District Court for the Northern District of Indiana. The District Court promptly dismissed Ms. Hively's complaint, relying on a line of previous Seventh Circuit holdings that stand for the proposition that sexual orientation is not a protected class under Title VII.

An appeal to the Seventh Circuit followed. The court initially affirmed the lower court's decision, reasoning that in enacting Title VII, "Congress had nothing more than the traditional notion of 'sex' in mind when it voted to outlaw sex discrimination.…" In essence, sexual orientation did not legally equate to "sex" as a protected class as specifically identified in Title VII. However, "[i]n light of the importance of the issue," a majority of the judges voted to rehear the case en banc.

The task before the Seventh Circuit on rehearing was not to establish a new protected class, but rather one of statutory interpretation to determine whether sexual orientation should be considered a subset of the protected class of sex. In evaluating the legislative intent of Title VII and a number of Supreme Court cases addressing similar, though not controlling issues, the full panel of judges determined that "it would require considerable calisthenics to remove the 'sex' from 'sexual orientation.'" Accordingly, the Seventh Circuit concluded that a person who alleges that they experienced employment discrimination based on their sexual orientation has put forth a case of sex discrimination for Title VII purposes.

What Do These Opinions Mean for You as an Employer?

As it currently stands, the law applicable to any employer will be determined by their physical location. Since there is currently a split among the federal circuits and this appears to be a rapidly changing area of the law, employers should stay up-to-date on opinions issued by their controlling courts. This may include an ultimate opinion by the Supreme Court, as well as legislative guidance that may be issued on the topic. Even those employers located in a geographic footprint encompassed by a federal circuit that does not recognize a cause of action for sexual orientation discrimination under Title VII should expect fierce opposition from not only the aggrieved employee, but also entities such as the EEOC, should a similar legal issue arise within their place of employment.