Is Same-Sex Discrimination Considered "Sex Discrimination" Under Title VII?

Insights
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The Supreme Court made clear in 2015 that same-sex marriage is legal across the nation. However, two years later, we still are not clear whether a person's sexual orientation is protected under Title VII's "sex discrimination" prohibition. In fact, one judge recently wrote that we live in "a paradoxical legal landscape in which a person can be married on Saturday and then fired on Monday for just that act."

The question whether sexual orientation discrimination claims are actionable under Title VII has given rise to a number of claims and lawsuits across the country. In fact, several federal appeals courts are presently considering potentially landmark cases. At the core, these courts are deciding whether to follow the long-established precedent precluding claims of sexual orientation discrimination, or to move in a new direction and broaden the scope of Title VII.

Title VII's Protections
Title VII of the Civil Rights Act of 1964 was enacted primarily to protect minorities from discrimination in the workplace. Just before it passed, however, Congress added a provision prohibiting discrimination based on "sex." From the beginning, our federal courts interpreted the "sex" provision narrowly.

However, over the years, plaintiffs have pushed the courts for a much broader interpretation. In the last few years – especially after the landmark 2015 *Obergefell v. Hodges* decision extending same-sex marriage rights nationwide – federal courts have grappled with determining which types of claims are actionable under the sex provision of Title VII. Proving to be far from a straightforward issue, courts across the nation have offered varying interpretations.

Laying The Foundation: Important Decisions
In a July 2015 administrative decision, the Equal Employment Opportunity Commission (EEOC) held 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" (*Baldwin v. Foxx*). Although this case involved a federal employee and only applies to federal employers, other federal courts have discussed it favorably, which seems to suggest the decision will influence cases in other jurisdictions.

More recently, the U.S. District Court for the Western District of Pennsylvania held in *EEOC v. Scott Medical Center* that sexual orientation falls within the protection of Title VII. Although this November 4, 2016, decision is considered historic, the opinions of lower court judges do not carry as much weight as the opinions of federal appeals courts. No such appeals court has yet approved a sexual orientation discrimination claim under Title VII, although several are poised to weigh in on the topic anew.

7th Circuit Signals It Might Change Its Mind

In *Hively v. Ivy Tech,* an Indiana math instructor alleged she was denied a promotion and ultimately fired for being a lesbian. She filed a Title VII lawsuit against Ivy Tech Community College alleging sexual orientation discrimination. Initially, in July 2016, the 7th Circuit Court of Appeals (which hears cases from Illinois, Indiana, and Wisconsin) concluded that Title VII does not protect employees from such discrimination.

However, on October 11, the court set aside the ruling of the three-judge panel and agreed to rehear the case *en banc* (before all of the judges on the court). The full court recently heard oral arguments in the case, and a decision is expected soon. Hively's attorneys argue that sex stereotyping based on sexual orientation should be considered the same as garden-variety sex discrimination. Some judges appeared inclined to agree.

During oral argument, in fact, one judge compared same-sex marriages to interracial marriages in a manner favorable to Hively, citing the famous 1967 Supreme Court case that struck down laws banning interracial unions (*Loving v. Virginia*). Many court observers believe the 7th Circuit is poised to become the first federal appeals court to approve sexual orientation coverage under Title VII.

Is The 11th Circuit Also On Precipice Of Changing Course?

In a non-related but factually similar case, Jameka Evans filed a lawsuit against her former employer, Georgia Regional Hospital, alleging she was subjected to discrimination and ultimately terminated because of her sexual orientation. Just as in *Hively*, the trial court dismissed the lawsuit, holding that Evans' sexual orientation claim was not protected by Title VII. Evans appealed the case to the 11th Circuit Court of Appeals (which hears cases from Alabama, Florida, and Georgia), and the court heard oral arguments on December 15.

This case is more difficult to predict, although during questioning one judge seemed to suggest that he would defer to the past decisions that concluded sexual orientation discrimination is not actionable under Title VII.

What Does The Future Hold For Employers?

Whether decisions in these and other cases (including one currently pending before the 2nd Circuit Court of Appeals) are decided in favor of employers or employees, you should be aware that you could still face a claim of sexual orientation discrimination through several other avenues. The first is through state law.

Almost half of the states in the country have laws prohibiting sexual orientation discrimination in the workplace (California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Utah, Vermont, Washington, and Wisconsin), and others protect state workers from such discrimination (Alaska, Arizona, Indiana, Kentucky, Louisiana, Michigan, Missouri, Montana, North Carolina, Ohio, Pennsylvania, and Virginia).

Employers in these states should take proactive steps to ensure sexual orientation is treated the same as any other protected class – this includes reviewing written policies, handbooks, training sessions, workplace investigations, hiring methods, discipline and discharge procedures, and all other aspects of your human resources activities.

The second avenue of exposure comes from plaintiffs successfully arguing that Title VII sex discrimination covers claims where plaintiffs allege mistreatment based on gender non-conformity standards. This includes situations where employers are alleged to have discriminated against workers for failing to live up to stereotypical gender norms. Courts have noted that drawing a line that separates these sex-stereotyping claims from pure sexual orientation claims is "exceptionally difficult" because the distinction is often elusive. This means that employers anywhere could face a Title VII claim akin to sexual orientation discrimination that would be accepted as valid by a federal court, despite what the federal appeals courts say.

Finally, it is possible the Supreme Court will step in to resolve any of the cases mentioned above or some other similar case, or Congress could intervene and amend Title VII. As a court recently stated, "it seems unlikely that our society can continue to condone a legal structure in which employees can be fired, harassed, demeaned, singled out for undesirable tasks, paid lower wages, demoted, passed over for promotions, and otherwise discriminated against solely based on who they date, love, or marry." Regardless of the rulings in *Hively* and *Evans,* employers should take heed and prepare for what appears to be an inevitable extension of workplace protection rights for workers based on their sexual orientation.

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