Sexual Orientation Discrimination Not Covered Under Title VII, Court Says

BUT DECISION PROVIDES AMPLE WARNING TO EMPLOYERS

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A federal court of appeals recently announced that it had no choice but to deny an LGBT plaintiff's request to proceed with a sexual orientation discrimination claim against her former employer because it concluded that such claims could not be brought under Title VII. However, the court went out of its way to note the many ways in which employers could still face cognizable claims from LGBT employees, and indicated that "perhaps the writing is on the wall" for Title VII to soon include a prohibition on sexual orientation discrimination. While this case counts as a "win" for the employer, it should stand as a warning for all employers to recognize that the legal landscape is rapidly changing.

Case Background: Claim Cannot Survive

The legal claim is easy enough to understand. Kimberly Hively began working as a part-time adjunct professor for Ivy Tech Community College in South Bend, Indiana in 2000. She worked there for 14 years until her part-time employment contract was not renewed in 2014. During her employment, she applied for six full-time positions but claims never to have even been offered an interview, despite the fact that she said she had all the necessary qualifications and had never even received a negative evaluation.

Hively filed a claim with the Equal Employment Opportunity Commission (EEOC) alleging sexual orientation discrimination and then filed a lawsuit in federal court. In 2015, the trial court dismissed her case, and she appealed to the 7th Circuit Court of Appeals. In a 42-page opinion issued on July 28, 2016, the 7th Circuit (which oversees federal courts in Illinois, Indiana, and Wisconsin) agreed with the lower court and upheld the dismissal of her claim.

Here are three things you need to know about this decision:

1. Court Based Decision On Past Precedent And Other Courts' Decisions

The 7th Circuit's panel of judges indicated that it had no choice but to deny Hively's claim. In looking back at earlier 7th Circuit decisions on the same topic, the court noted that each one had already decided that discrimination or harassment based upon sexual orientation is not covered as an unlawful employment practice under Title VII. The court examined in depth five cases spanning

from 2000 to 2014, all of which came to the same conclusion. "We are presumptively bound by our own precedent," the court said, and must "give considerable weight to prior decisions of this court."

The 7th Circuit's panel also noted that this "holding is in line with all other circuit courts that have decided or opined about the matter," reviewing a string of cases stretching back almost 40 years and covering just about every other judicial circuit across the country.

2. Court Points Out That Congress And The Supreme Court Have Not Acted

At the same time, the court noted that the country's view of sexual orientation discrimination seems to be evolving at a rapid pace, and that "perhaps the writing is on the wall" for Title VII to be read in a more expansive format. However, the panel of judges said, "writing on the wall is not enough." Until the writing comes in the form of a Supreme Court opinion or new federal legislation, the court said that it could not rule in Hively's favor.

The court noted that Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation as a protected class, citing over 20 instances where the Employment Non-Discrimination Act (ENDA) has been introduced but not passed. The court also noted that the Supreme Court has thus far opted not to weigh in on this question, but that "perhaps it is time for the Supreme Court to step in" and render a ruling.

3. Employers Should Proceed Cautiously

Despite this setback for LGBT advocates, this case should still serve as a warning to all employers that they could still face a claim of sexual orientation discrimination. The court noted that the EEOC issued a decision in 2015 holding that such claims of discrimination filed by federal government employees are covered by Title VII, and while the case does not apply to private employers, the tide seems to be turning in a liberal favor.

For example, even though the SCOTUS has not (yet) ruled that Title VII covers claims of sexual orientation discrimination, it recently struck down the Defense of Marriage Act in 2013 and then ruled that same-sex couples have the right to marry in every state of the country in 2015. The court noted that the decisions (and the Supreme Court's failure to extend Title VII rights) "create a paradoxical legal landscape in which a person can be married on Saturday and then fired on Monday for just that act." However, the court noted, perhaps these rulings "could be read as a forecast" as to how the SCOTUS will one day decide the matter.

The court also pointed out a line of cases where plaintiffs successfully argued that Title VII sex discrimination covers claims where plaintiffs allege mistreatment based on gender non-conformity actions. This includes situations where employers are alleged to have discriminated against workers for failing to live up to stereotypical gender norms. More importantly, the court noted that drawing a line that separates these "sex-stereotyping" claims from sexual orientation claims is "exceptionally difficult" because the distinction is often "elusive," meaning that employers could face a Title VII claim akin to sexual orientation discrimination that would be accepted as valid by a federal court.

Finally, the court reminded employers that almost half of the states in the country have laws prohibiting sexual orientation discrimination in employment (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 some additional states protect state workers from such discrimination (Alaska, Arizona, Indiana, Kentucky, Louisiana, Michigan, Missouri, Montana, North Carolina, Ohio, Pennsylvania, and Virginia).

The court concluded by saying that "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." Employers would be wise to heed this caution, as it appears inevitable that the law will soon evolve to cover claims of sexual orientation discrimination.

If you have any questions about this decision, or how it may affect your business, please contact your Fisher Phillips attorney.

This Legal Alert provides an overview of a specific federal court decision. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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