Appeals Court Refuses To Extend Title VII Coverage To Sexual Orientation

WORKERS LEFT WAITING FOR GROUNDBREAKING DECISION

Insights
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On Friday, the 11th Circuit Court of Appeals declined to extend Title VII's protections to sexual orientation discrimination, but reinforced that employees may allege sex discrimination claims when they face workplace discrimination for failing to conform to gender norms. The court confirmed that employees, regardless of sexual orientation, can sue under the flagship federal civil rights statute to seek relief for harassment, discrimination, and retaliation, but only if the discrimination is related to alleged gender nonconformity. While the decision does not signal a significant change in the law, it stands as a reminder to employers that sex discrimination claims can manifest in various ways (*Evans v. Georgia Regional Hospital*).

Background: What Does "Because of Sex" Really Mean?
The intended purpose of Title VII of the Civil Rights Act of 1964 was to protect employees from race discrimination in the workplace. In a late amendment, Congress added "sex" to the list of protected categories.

While federal courts initially interpreted "because of sex" narrowly, courts have broadened the definition over the decades. In a milestone 1989 decision, the United States Supreme Court found sex discrimination where an employer took issue with a female employee's lack of femininity (*Price Waterhouse v. Hopkins*).

Following the landmark 2015 Supreme Court decision that made same-sex marriage legal across the country, *Obergefell v. Hodges*, federal courts have grappled with determining whether Title VII covers discrimination or harassment claims on the basis of sexual orientation. Meanwhile, the Equal Employment Opportunity Commission (EEOC) issued a July 2015 administrative decision ruling 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 the EEOC's decision was binding only on federal employers, other lower federal courts have discussed the rationale behind the agency's conclusion and seem ready to adopt the same approach in the private sector. On November 4, 2016, in fact, the U.S. District Court for the Western District of Pennsylvania agreed with the EEOC and held that sexual orientation falls within the

District of Pennsylvania agreed with the EEOC and held that sexual orientation falls within the protection of Title VII (*EEOC v. Scott Medical Center*). No federal appellate court, however, has yet gone that far.

Employee Loses The First Round Before It Started

Jameka K. Evans worked as a security office for Georgia Regional Hospital. Representing herself, she filed a federal lawsuit alleging her supervisor terminated her because she is lesbian. She also alleged that she was harassed and otherwise punished for failing to conform to her department head's gender stereotypes. She asked the court to hold Georgia Regional Hospital and three individuals "liable for discriminating against her based on her sex as a gay female in violation of Title VII."

Before the defendants were even served with the lawsuit, the lower court held that her claims were not actionable because "homosexuality is not a protected class under Title VII." It further held that a claim of discrimination on the basis of gender non-conformity is simply a difference without a distinction – specifically, that it is "just another way to claim discrimination based on sexual orientation," which it would not allow. The court dismissed her lawsuit with no opportunity to amend her complaint.

After the dismissal, Evans sought representation by a non-profit organization advocating for LGBT civil rights. With the assistance of new counsel, Evans appealed the district court's ruling to the 11th Circuit Court of Appeals.

Employee Wins Next Round, Although Court Does Not Extend LGBT Protections

Late last week, the court of appeals struck down the portion of the trial court's decision dismissing Evans' gender non-conformity claim. The 11th Circuit remanded the case to the trial court with instructions to allow Evans to amend and pursue that claim, drawing a fine line between sex discrimination and sexual orientation discrimination.

The court agreed, under *Price Waterhouse v. Hopkins* and 11th Circuit precedent, employees are permitted to bring a claim for sex discrimination based on a failure to conform to a gender stereotype. Two of the three-judge panel, however, disagreed that this theory extends to individuals who are discriminated against on the basis of their sexual orientation. Citing a 1979 court decision, the majority held that sexual orientation discrimination is still not actionable under Title VII.

Evans' attorney has already stated they will seek an *en banc* rehearing from the full 11th Circuit Court of Appeals, so we may not have yet heard the last from this court on this issue.

What This Means for Employers

Employers in Georgia, Alabama, and Florida – the states covered by the 11th Circuit's ruling – should consider how their policies and practices may impact individuals whose gender expression does not align with their sex. In doing so, you should review your policies, handbooks, training, workplace investigations, hiring methods, discipline and discharge procedures, revising any as necessary.

While the 11th Circuit declined to expand Title VII to include discrimination on the basis of sexual orientation, the full court may decide to rehear this issue and could reverse the key ruling. Meanwhile, it appears likely that other circuit courts could soon make that leap.

Several other cases are bubbling up in various jurisdictions, including a highly watched case in the 7th Circuit Court of Appeals (hearing cases from Illinois, Indiana, and Wisconsin) argued in November 2016, and a similar case in the 2nd Circuit Court of Appeals (New York, Connecticut, and Vermont) argued on January 20, 2017. It will come as no surprise to those following this issue if these and other federal appeals courts take the plunge that the 11th Circuit declined to take. As a result, many employers across the country are extending protections to LGBT employees in anticipation of the possible change.

Even if other appeals courts share the 11th Circuit's hesitation, employers could still face liability under state laws. Almost half the states 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).

Additionally, plaintiffs who bring sex discrimination claims under Title VII based on a gender non-conformity theory are now emboldened by today's ruling. 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 employers anywhere could face a Title VII claim akin to a sexual orientation discrimination claim, and it is likely a federal court would view such a claim as valid, no matter what the appeals courts say about sexual orientation claims.

While the U.S. Supreme Court or Congress may step in and clarify once and for all whether sexual orientation discrimination claims are covered under Title VII, as Judge Rosenbaum wrote in her dissenting opinion, "it is time that we, as a court, recognized that Title VII prohibits discrimination based on an employee's sexual orientation since that is discrimination 'because of . . . sex.'" Employers should take heed and prepare for what appears to be an inevitable extension of workplace protection rights for LGBT workers based on their sexual orientation.

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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