



Landmark Appeals Court Ruling Extends Title VII Protections To LGBT Employees

GROUNDBREAKING DECISION COULD LEAD OTHER FEDERAL COURTS TO FOLLOW SUIT

Insights

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Late yesterday, the 7th Circuit Court of Appeals became the first federal court of appeals in the nation to rule that sexual orientation claims are actionable under Title VII. In a full panel *en banc* decision, the court opened the door for LGBT plaintiffs to use Title VII to seek relief for allegations of employment discrimination and retaliation.

The April 4 ruling is important to employers because it broadens the class of potential plaintiffs who can bring workplace claims against them, and will require employers to ensure fair and equal treatment to all applicants and workers regardless of their sexual orientation (*Hively v. Ivy Tech Community College*).

Background: What Does Title VII Cover?

The initial aim of Title VII of the Civil Rights Act of 1964 was to protect employees from race discrimination in the workplace. Just before it was enacted, however, Congress added a provision prohibiting discrimination based on “sex.” Initially, federal courts took the position that “sex” should be interpreted narrowly.

However, over the years, plaintiffs have sought a much broader interpretation of what should be covered as sex discrimination. Following the [landmark 2015 Supreme Court decision](#) which made same-sex marriage legal across the country, federal courts have grappled with determining which types of claims are actionable under the “sex” provision of Title VII. 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 this decision involved a federal employee and was only binding on federal employers, other lower federal courts have discussed the rationale behind the EEOC’s conclusion and seemed ready to adopt the same approach. Indeed, on November 4, 2016, the U.S. District Court for the Western District of Pennsylvania agreed with the EEOC and held that sexual orientation falls within the protection of Title VII (*EEOC v. Scott Medical Center*). However, no federal appellate court went that far – until now.

Employee Loses First Two Rounds Of Her Battle...

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, even though she said she had all the necessary qualifications and had never even received a negative evaluation.

Hively filed a federal lawsuit alleging sexual orientation discrimination under Title VII, and in 2015, the trial court dismissed her case. She appealed to the 7th Circuit Court of Appeals (which oversees federal courts in Illinois, Indiana, and Wisconsin), which initially agreed with the lower court by upholding the dismissal of her claim in July 2016.

The three-person panel of judges indicated that it had no choice but to deny Hively's claim after reviewing a string of cases stretching back almost 40 years from across the country. The panel concluded that no other federal appellate court had decided that sexual orientation discrimination is covered under Title VII. The judges noted 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," but indicated they were all but powerless to rule otherwise absent a Supreme Court directive or a congressional amendment to Title VII.

...But Wins Crucial Third Round

In October 2016, the full collection of 7th Circuit judges set aside the ruling and agreed to re-hear the case *en banc*, which means all the judges would hear the case together. Late yesterday, the *en banc* panel issued a final ruling overturning its initial decision by an 8 to 3 vote and breathing new life into Hively's case. More importantly, however, the 7th Circuit created a new cause of action under Title VII for other LGBT employees in Illinois, Indiana, and Wisconsin.

In the opinion, drafted by Chief Judge Wood, the court concluded that "discrimination on the basis of sexual orientation is a form of discrimination" and that it "would require considerable calisthenics" to remove the "sex" from "sexual orientation" when applying Title VII. In addition, the court noted that efforts to do so had led to confusing and contradictory results.

In the end, the court concluded that the practical realities of life necessitated that it reverse its prior decision. It remanded Hively's case back to the trial court for a new hearing under this broad new standard.

What This Means For Employers

Employers in Illinois and Wisconsin are already subject to state laws protecting private workers based on sexual orientation, so yesterday's decision should simply reaffirm their commitment to ensuring fairness and equality for these employees. For private employers in Indiana, however, the time is now to take proactive steps to ensure sexual orientation is treated the same as any other protected class – this includes reviewing your written policies, handbooks, training sessions,

workplace investigations, hiring methods, discipline and discharge procedures, and all other aspects of your human resources activities.

As for employers in the rest of the country, it appears likely that yesterday's ruling will be followed by decisions in other circuit courts similarly extending Title VII rights to cover sexual orientation. In fact, the plaintiff in a prominent case recently decided by the 11th Circuit Court of Appeals (hearing cases from Florida, Georgia, Alabama) has indicated she could seek a full *en banc* review of her case in the hopes of extending Title VII to cover LGBT workers in that circuit. It would not be surprising for the *Hively* case to be the first in a series of dominoes that brings about a new day for Title VII litigation across the country.

We can expect to see further judicial rulings in the coming years fleshing out this issue in more detail. For example, one issue not addressed by the 7th Circuit is how this new theory will affect religious institutions given that different standards apply to them under federal antidiscrimination laws. These and other considerations will be debated in courts across the country in the near future.

Even if these appeals court decisions do not immediately materialize, there are two other avenues whereby employers could still face immediate liability for such claims. The first is through state law. 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).

Second, plaintiffs have successfully argued to various federal courts 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. 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," meaning that employers anywhere could face a Title VII claim akin to sexual orientation discrimination that would be accepted as valid by a federal court no matter what the federal appeals courts say. This concept was discussed in the 11th Circuit's recent Evans v. Georgia Regional Hospital decision, and the court in fact permitted the plaintiff to proceed with her case on a stereotyping theory.

While possible that the Supreme Court or Congress will step in and reverse this trend, as a recent court 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." 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.

Related People



Arthur V. Lambert
Senior Counsel
214.220.8324
[Email](#)



Richard R. Meneghello
Chief Content Officer
503.205.8044
[Email](#)

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