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Is Sexual Orientation Protected by Title VII?

By Deborah B. Koplovitz

If you identify as gay or lesbian, or anything other than "straight," and you are fired from your job, or are subject to harassment on the job because of that fact alone, in the majority of places in the United States you cannot complain that you were discriminated against under federal law, even if you believe you were actually harassed or fired solely because of your sexual orientation.

Although many states and localities already prohibit workplace discrimination on the basis of sexual orientation, the majority of the U.S. Courts of Appeals have concluded that workplace discrimination based on one's sexual orientation is *not* a viable claim under the sex discrimination protections of the applicable federal statute, found in Title VII of the Civil Rights Act of 1964.[1]

The Law

Title VII makes it "an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge . . . or otherwise to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." [2]

What Has Not Been Prohibited by Courts?

The majority of courts have concluded that the language in Title VII, which provides protection to citizens to be free from workplace discrimination "because of . . . sex," does not extend to prohibiting a gay man from being subjected to repeated and frequent anti-gay slurs in a factory, even by his supervisor. Nor has Title VII protected a straight woman from being subjected to overt sexual advances and harassment from her lesbian supervisor. Nor has Title VII enabled a gay man, in the absence of any overt sexual advances, to prevail in a claim that he was discriminated against, where the "sole" issues were that he was subjected to harassment due to his sexual orientation.

A New Hope?

A recent case, however, indicates to the contrary, and also has raised the possibility that there may be a need for a legislative amendment to Title VII to include sexual orientation within the meaning of "sex" discrimination in

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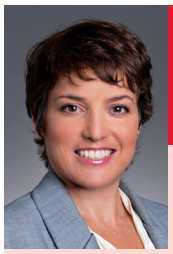

who's who

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employment. As attempts to pass such an amendment have so far been unsuccessful, a definitive ruling by the U.S. Supreme Court could serve the same purpose.

Noting that "[i]t would require considerable calisthenics to remove the 'sex' from 'sexual orientation'," the Seventh U.S. Circuit Court of Appeals in Chicago in *Hively v. Ivy Tech Cmty. College of Ind*[3] concluded on April 4 that it is possible for an individual to bring a federal case claiming workplace discrimination because of one's sexual orientation.

Gender Stereotyping

On March 27, 2017 in *Christiansen v. Omnicom Group, Inc.*[4], the Second U.S. Circuit Court of Appeals in New York concluded that an openly gay male who had alleged that he had been subject to "gender stereotyping" had pleaded enough facts for his Title VII employment discrimination complaint to move forward.

While "gender stereotyping" is not the quite the same concept as "sexual orientation," the Second Circuit did recognize that although being gay, lesbian, or bisexual alone does not give rise to a Title VII claim, where a lesbian, gay or bisexual employee is also gender nonconforming — that is, not acting or dressing in conformance with commonly held ideas or stereotypes as to what is gender-appropriate — then such nonconforming person, heterosexual or otherwise, would have the right to bring a claim under Title VII.

Therefore, for the gender nonconforming person who is also gay, lesbian or bisexual, the Second Circuit has provided a road map for pleading a Title VII claim, at a minimum, and may have also opened a door to the possibility that workplace discrimination based on "sex" may include more than just one's actual gender, or overt sexual advances.

On April 28, 2017, the Plaintiff, Mr. Christiansen, asked the Second Circuit to review this case and revise its precedent that Title VII doesn't protect employees from discrimination based on sexual orientation. The request for review is based on a concurring decision in *Christiansen* as well as *Hively* in the Seventh Circuit. If the Second Circuit reviews, and ultimately revises its own precedent based on *Hively*'s reasoning, it could provide a blueprint for other appellate courts to do so as well. If so, a shift in the employment landscape, if not an outright landslide, may occur, evening out the field so that "discrimination because of sex" includes sexual orientation, and not just gender or gender stereotyping.

What Next?

Since there is clearly a conflict among the circuit courts, these new avenues of expansion of the law relating to workplace discrimination may pave a path for future plaintiffs to seek clarity from the Supreme Court, assuming Congress does not amend Title VII any time soon. Just how the newly composed Supreme

Court would view such a petition is a subject for another article. So too is a discussion of various state and local laws that do protect employees from being subjected to harassment on the job due to their sexual orientation.

Stay tuned!

ENDNOTES

[1] *See, e.g., Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001); *Wrightson v. Pizza Hut of Am.*, 99 F.3d 138, 143 (4th Cir. 1996), *abrogated on other grounds by Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1063-64 (9th Cir. 2002); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Evans v. Ga. Reg'l Hosp.*, 2017 U.S. App. LEXIS 4301, *16-17 (11th Cir. Ga. Mar. 10, 2017).

[2] 42 U.S.C. § 2000e-2(a)(1)

[3] *Hively v. Ivy Tech Cmty. College of Ind.*, 2017 U.S. App. LEXIS 5839, *27 (7th Cir. Ind. Apr. 4, 2017).

[4] No. 16-748, 2017 U.S. App. LEXIS 5278 (2d Cir. Mar. 27, 2017) *(per curiam)*.