Federal Circuit Courts Continue to Extend Title VII Protections to LGBT+ Individuals

By Amber M. Rogers and Jennifer Jones

While many states and municipalities have created laws protecting LGBT+ employees from workplace discrimination, the federal protections offered to LGBT+ individuals in the workplace remain in a state of flux. Notably, there is no federal law which explicitly prohibits employment discrimination against individuals because they are LGBT+, as Title VII only expressly prohibits employment discrimination on the basis of race, color, religion, sex and national origin. There is, however, a growing trend among federal courts interpreting Title VII to include a prohibition against discrimination on the basis of sexual orientation or transgender status.

The Beginning of the Trend

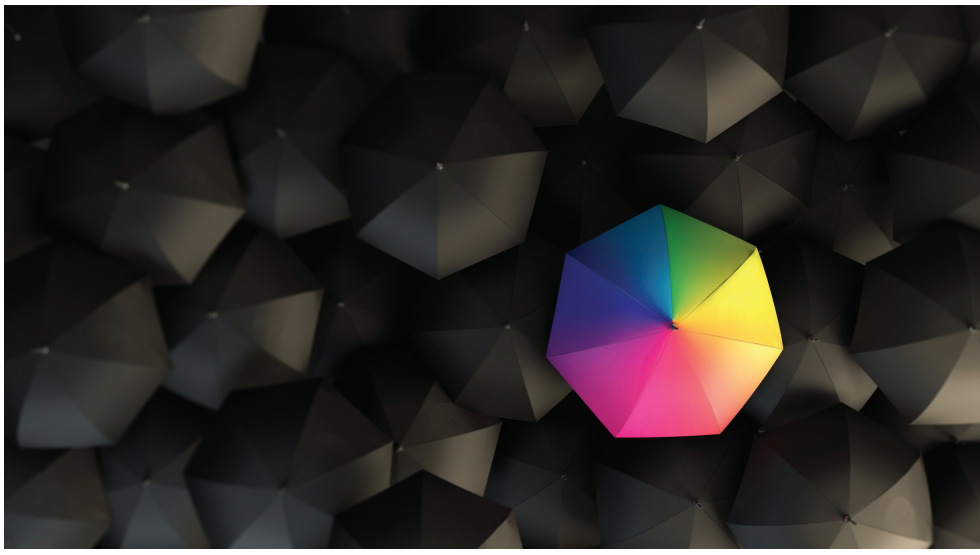
Recent decisions by the Second and Sixth Circuits are on the heels of the Seventh Circuit's landmark decision in *Hively v. Ivy Tech Community College of Indiana* in April of 2017, wherein it became the first federal circuit court to expressly find that Title VII's protections extend to sexual orientation. These decisions were made in a climate where both state and federal agencies are providing a patchwork of protections to LGBT+ individuals in the workplace. For example, the EEOC announced in 2015 that it would begin interpreting and enforcing Title VII as prohibiting employment discrimination based on sexual orientation and gender identity. Also, in May 2018, the Michigan Civil Rights Commission announced it will now process LGBT+ discrimination claims under its state civil rights law, joining approximately 20 other states with similar bans on LGBT+ discrimination.

The Trend Continues

In late February of 2018, the Second Circuit became the second federal circuit court to explicitly find that Title VII's protection extends to employment discrimination based on sexual orientation. *Zarda v. Altitude Express* involved a claim by a sky diving instructor that his former employer terminated his employment because he was gay. In finding that the sky diving instructor had a cognizable claim under Title VII, the Second Circuit held that (1) sexual orientation discrimination is motivated, at least in part, by sex and thus is a subset of sex discrimination for purposes of Title VII, and (2) the plaintiff was therefore entitled to bring a claim for sexual orientation discrimination under Title VII.

The Second Circuit relied on a number of different theories to support its holding. First, the Court found that "the most natural reading" of Title VII, which prohibits discrimination "because of . . . sex," would extend to sexual orientation discrimination because "sex is necessarily a factor in sexual orientation." It reasoned that because an individual's sexual orientation cannot be defined without first identifying the person's sex, "sexual orientation is a function of sex." Additionally, the Court relied on the theory of gender stereotyping first recognized in 1989 in *Price Waterhouse v. Hopkins* by the Supreme Court, wherein the Court concluded that adverse employment actions taken based on the belief that a female accountant should conform to gender stereotypes of females amounted to sex discrimination under Title VII. Applying the *Price Waterhouse* reasoning, the Second Circuit found that an employer who takes an adverse action based on the belief that men should be attracted to women is "directly related to our stereotypes about the proper roles of men and women." Finally, the Second Circuit relied upon the theory of associational discrimination, and concluded that discrimination based on an employer's opposition to association between particular sexes constitutes discrimination "because of . . . sex."

In March of 2018, the Sixth Circuit issued its decision in *EEOC v. R.G. G.R. Harris Funeral Homes*, where a funeral home worker



claimed her former employer terminated her employment because she was transgendered and undergoing gender transition. Relying on many of the same theories as the Second Circuit, the Sixth Circuit found that the employee had a cognizable Title VII claim because the decision to fire her was based on sex stereotyping and gender discrimination, as "it is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex." The funeral home unsuccessfully argued that even if its former employee could state a Title VII sex discrimination claim, requiring compliance with Title VII would substantially burden the funeral home's sincerely held religious beliefs in violation of the Religious Freedom Restoration Act (RFRA). The Sixth Circuit rejected this argument, however, finding that compelling the funeral home to comply with Title VII was "the least restrictive means of furthering the government's compelling interest in eradicating discrimination . . . on the basis of sex." The holding is notable for its potential elimination of a defense employer's may assert to claims of sexual orientation and transgender discrimination.

While these two decisions are a part of a larger trend of federal courts expanding the reach of Title VII to offer its protections to members of the LGBT+ community, not all courts have followed the same logic recently employed by the Second and Sixth Circuits. For example, in March of 2017, in *Evans v. Georgia Regional Hospital*, the Eleventh Circuit declined to extend Title VII protection to the claims of a lesbian employee who alleged she was terminated based on her sexual orientation. While the court recognized that a sex discrimination claim under Title VII alleging an adverse action for failure to confirm to gender stereotypes is cognizable, a claim under Title VII alleging sexual orientation discrimination is not.

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Will the Supreme Court weigh in?

Due to these conflicting outcomes, the issue of whether Title VII prohibits discrimination based on sexual orientation and transgender status is ripe for the Supreme Court to decide. While the Supreme Court denied the plaintiff's petition for a writ of certiorari filed in the *Evans* case, this denial occurred before decisions by the Second and Sixth Circuits. Until the Supreme Court resolves this split in authority, it is critical for practitioners and employers alike to take notice of the various local, state, and now federal laws, which offer protections to LGBT+ individuals to ensure compliance. ■

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