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Eleventh Circuit Denies Sexual Orientation Discrimination Claim, but Is This the Final Word?

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If you have been keeping track of how the federal courts have handled employment discrimination claims under Title VII of the Civil Rights Act of 1964 (and we know you have), you have probably noticed that many courts have refused to recognize claims of sexual orientation discrimination under this federal statute. However, you might also recall that the Supreme Court legalized same-sex marriage in 2015. And you might have also heard that the Equal Employment Opportunity Commission (EEOC) released a decision shortly thereafter stating that, in its opinion, sexual orientation discrimination is protected under Title VII. In light of these recent developments, you might have wondered whether the federal courts would begin to treat sexual orientation claims differently. A recent decision from the Eleventh Circuit, which has jurisdiction over federal courts in Florida, Georgia, and Alabama, suggests otherwise.

On March 10, 2017, a three-judge panel of the Eleventh Circuit decided the case of *Evans v. Georgia Regional Hospital, et. al.*, 2017 WL 943925 (11th Cir. 2017). Ms. Evans was a hospital security officer who sued her employer for sexual orientation discrimination, gender non-conformity discrimination, and retaliation. The trial court dismissed her case, and Ms. Evans appealed to the Eleventh Circuit. In a 2-1 decision, the Eleventh Circuit held that sexual orientation is not protected under Title VII and upheld the dismissal of that claim. However, unlike the trial court, the Eleventh Circuit recognized that gender non-conformity is a valid, separate claim under Title VII, and it sent the case back to the trial court to allow Ms. Evans to better plead her gender non-conformity claim.

The difference between the two types of claims is essentially one of motive. In the case of a claim for sexual orientation discrimination, the employee must show that discrimination was based solely on the employee's status as a gay or lesbian individual, without regard to any other individual characteristics. The Eleventh Circuit and other courts have held that there is no such claim under Title VII, because Title VII does not specify sexual orientation as a distinct, protected category. In the case of a gender non-conformity claim, however, the employee must show that they suffered discrimination based on their failure to conform to traditional social norms of what it means to be either masculine or feminine. There is a long line of cases going back over 25 years recognizing that gender non-conformity claims are a form of sex discrimination covered under Title VII, regardless of the employee's sexual orientation.

If the distinction between these two claims seems unclear, you are not alone. In fact, many district courts have recently held that maintaining a clear line between these two types of claims has proved to be unworkable in practice, because virtually every instance of discrimination against a gay or lesbian employee can be viewed as based on the perpetrator's belief as to how a man or woman "should" behave, including by engaging in relationships only with the opposite sex. *E.g. U.S. Equal Employment Opportunity Comm'n v. Scott Med. Health Center, P.C.*, 2016 WL 6569233 (W.D. Pa. Nov. 4, 2016). Thus, these courts view the two

types of claims considered by the Eleventh Circuit in *Evans* as essentially a distinction without a difference. These courts have also agreed with the EEOC's position that sexual orientation discrimination is inherently a form of prohibited sex discrimination under Title VII. In other words, an employer who treats a gay male employee worse than a straight female employee is treating the two sexes differently for the exact same behavior, specifically, engaging in relationships with men. Thus, the employer is engaging in discrimination based on the sex of the employee. However persuasive this logic may have become to district courts in recent years, it had not been adopted by any federal appellate court…until this month.

On April 4, the Seventh Circuit Court of Appeals adopted the arguments advanced by the EEOC and held that a claim for sexual orientation discrimination is cognizable under Title VII precisely because it is a form of sex discrimination, for all of the reasons outlined above. *Hively v. Ivy Tech. Comm. College of Ind.*, 2017 WL 1230393 (7th Cir. 2017). Thus, sexual orientation discrimination is now prohibited under Title VII for employers in Illinois, Indiana, and Wisconsin. Interestingly, *Hively* was initially decided by a three-judge panel in July 2016, which reached the opposite result (and the same result as *Evans*). However, the entire court elected to reconsider the matter, and the full Seventh Circuit became the first appellate court in the nation to adopt the arguments that the EEOC has been advancing for several years now, with increasing success at the trial court level. Will *Hively* be the first crack in the dam that causes a flood of similar rulings?

There are some indications that it might. First, Ms. Evans might get another bite at the apple. Like most federal appellate decisions, *Evans* was decided by a limited three-judge panel of the 11-judge Eleventh Circuit. On March 31, Ms. Evans filed a motion asking for all 11 of the court's judges to rehear the case, as was done in *Hively*. As of the time of publication of this Alert, that motion has not yet been decided, but the subsequent issuance of the Seventh Circuit's opinion in *Hively* may be a strong incentive for the entire Eleventh Circuit to rehear the Evans case. There is an almost identical case pending in the Second Circuit that, like *Evans*, was just decided against the plaintiff on March 27. *Anonymous v. Omnicom Group, Inc.*, 2017 WL 1130183 (2d Cir. 2017). As of the time of publication of this Alert, the plaintiff in *Anonymous* has sought and been granted an extension of time through April 28 to file a motion for rehearing. Given that two of the three panel judges expressly stated in the opinion that the entire Second Circuit should consider the matter, and in light of the intervening decision in *Hively*, a full rehearing of the case seems likely. While the outcome of these decisions remains to be seen, there is a reasonable chance that within the next few months, the Seventh, Eleventh, and Second Circuits may have all ruled in favor of the EEOC's position.

Unless and until that happens, however, the law is fairly clear after *Evans* for Florida employers at the present time: employees may not sue for sexual orientation discrimination under Title VII but may do so for gender non-conformity discrimination. Nevertheless, employers should make sure their non-discrimination policies cover sexual orientation discrimination for a variety of reasons. In addition to the rapidly changing nature of the legal landscape on this issue as explained above, sexual orientation discrimination is still protected under several local ordinances. For example, Hillsborough County, Pinellas County, and the cities of Tampa and Sarasota all have ordinances prohibiting sexual orientation discrimination and providing remedies for employees who fall victim to it. In light of this, employers should ensure that their employee handbooks reflect an appropriate non-discrimination policy, and they should update their handbooks if such a policy is not already included. We are happy to help with any questions you might have about this.