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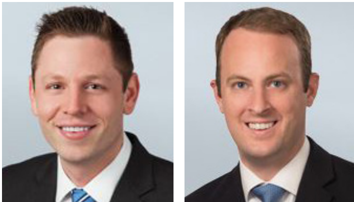
Cavaliere Strader

Eleventh Circuit Declines to Reconsider Sexual Orientation Discrimination Decision; Plaintiff Will Appeal to U.S. Supreme Court

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In April, we reported that a three-judge panel of the Eleventh Circuit held that sexual orientation discrimination is not prohibited under Title VII of the Civil Rights Act of 1964 in *Evans v. Georgia Regional Hospital, et. al.*, 2017 WL 943925 (11th Cir. 2017). However, we also noted that Ms. Evans had requested that all 11 of the court's judges rehear the case. The Eleventh Circuit has now considered Ms. Evans' request and, on July 6, 2017, refused to revisit its decision. Ms. Evans' attorneys announced that they will appeal to the U.S. Supreme Court. Although the Supreme Court is not required to review the case, it might very well do so. As you might recall, the Eleventh Circuit's decision is in direct conflict with the Seventh Circuit, which recently held that sexual orientation discrimination is prohibited under Title VII in *Hively v. Ivy Tech. Comm. College of Ind.*, 2017 WL 1230393 (7th Cir. 2017).

After *Evans*, the law is fairly clear for Florida employers, at least at the present time: employees may not sue for sexual orientation discrimination under Title VII but may sue for gender non-conformity discrimination. What remains unclear, as you might imagine, is the difference between these two claims, and many courts have struggled with it. The difference is essentially one of motive. In the case of a claim for sexual orientation discrimination, the employee must show that the discrimination was based solely on the employee's status as a gay male or lesbian individual, without regard to any other behavioral characteristics.

In the case of a gender non-conformity claim, on the other hand, the employee must show that he or she suffered discrimination based on his or her failure to behave in accordance with traditional gender norms. If this distinction seems unclear, you are not alone—many courts continue to struggle with it.

Even though the *Evans* decision makes it clear that Florida employees cannot bring a claim for sexual orientation discrimination under Title VII, Florida employers should still make sure their non-discrimination policies cover sexual orientation discrimination for a variety of reasons. In addition to the rapidly changing legal landscape on this issue, sexual orientation discrimination is still protected under many city and county 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 are harmed by 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.

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