MARCH 5, 2018 | DISCRIMINATION, HARASSMENT & RETALIATION

Second Circuit Rules Title VII Bars Sexual Orientation Discrimination

Although the Supreme Court has not taken up the issue and the status of sexual orientation discrimination remains uncertain, another Circuit Court of Appeals has now affirmatively ruled on the issue. In a 10-3 *en banc* decision, the U.S. Court of Appeals for the Second Circuit recently ruled in *Zarda v. Altitude Express*, No. 15-3775 (2d Cir. 2018) that Title VII of the U.S. Civil Rights Act prohibits sexual orientation discrimination.

The Second Circuit's decision deepens the existing circuit split on this issue. The 10-judge majority aligned itself with the Equal Employment Opportunity Commission's current position and the Seventh Circuit's *en banc* opinion in *Hively v. Ivey Tech Community College*, 853 F.3d 339 (7th Cir. 2017). In contrast, a three-judge panel in the 11th Circuit previously held that Title VII does not protect gay and lesbian employees in *Evans v. Georgia Regional Hospital*, 850 F.2d 1248 (11th Cir. 2017), *cert. denied*, 2017 U.S. LEXIS 7377 (U.S. Dec. 11, 2017). The Supreme Court had the opportunity to resolve the circuit split following the 11th Circuit's decision but it ultimately denied the plaintiff's petition for writ of certiorari. Thus, it remains unclear when, and whether, the Supreme Court will ever decide to take this issue up.

However, the Second Circuit's decision will certainly serve as an important case for other Circuit Courts of Appeals that have not decided whether Title VII prohibits sexual orientation discrimination, and if and when the Supreme Court decides the existing circuit split. The Second Circuit not only affirmed that sex discrimination protects gay and lesbian employees, but it also explained why critics, including the Department of Justice, are operating on a mistaken framework. The Department of Justice ("DOJ") submitted an unsolicited amicus brief to the Second Circuit, in response to the Equal Employment Opportunity Commission's ("EEOC") amicus brief, arguing that sex discrimination is defined by disparate treatment of male and female employees, and that Congress could have included sexual orientation in Title VII or amended the Civil Rights Act to provide further protections but it did not do so. The court rejected the DOJ's position and clarified that discrimination based on one's sexual orientation is discrimination based on sex: "Sexual orientation discrimination is a subset of sex discrimination because sexual orientation is defined by one's sex in relation to the sex of those to whom one is attracted, making it impossible for an employer to discriminate on the basis of sexual orientation without taking sex into account."

EEOC vs. The Department of Justice

The *Zarda* case highlighted the willingness of federal agencies to refuse to walk the line on the Trump

administration's agenda. The EEOC's position that sexual orientation discrimination is covered under Title VII did not change during the transition to the Trump administration. For nearly a decade, the EEOC has interpreted Title VII's prohibition of sex discrimination to encompass a prohibition against discrimination based on gender identity and sexual orientation. The EEOC states that these protections apply "regardless of any contrary state or local laws," and has taken the position that Title VII protects gay, lesbian, bisexual, and transgender ("LGBTQ") employees against workplace discrimination.

During the Obama administration, the EEOC issued two influential decisions that advanced protections for LGBTQ employees. In its 2012 decision in *Macy v. Dep't of Justice* the Commission held that intentional discrimination against a transgender individual because of that person's gender identity is discrimination based on sex in violation of Title VII. Similarly, in its 2015 decision in *Baldwin v. Dep't of Transportation*, the Commission held that a claim of discrimination because of one's sexual orientation is discrimination on the basis of sex under Title VII.

President Trump's position on LGBTQ protections is in stark contrast with that of the EEOC. Shortly after taking office, the Trump Administration took several actions indicating that it did not agree with the Obama administration's or the EEOC's interpretation of Title VII. In particular, the Department of Education and the DOJ rescinded Obama-era guidance requiring public schools to prove transgender students access to restrooms and locker rooms that match their identity. Additionally, one day after Attorney General Jeff Sessions was sworn-in, the DOJ withdrew its opposition to a lawsuit filed by thirteen states and agencies challenging the Obama-era guidance that stated Title VII and Title IX requires that all persons must be "afforded the opportunity to have access to restrooms, locker rooms, showers, and other intimate facilities which match their gender identity rather than their biological sex." *See State of Texas et al. v. United States*, 201 F. Supp. 3d 810 (N.D. Tex. 2016), *appeal dismissed*, 2017 U.S. App. LEXIS 2373 (5th Cir. Feb. 9, 2017).

Additionally, President Trump has tried to reinstate a ban on transgender people joining and openly serving in the military. The Obama administration in 2016 announced plans to reverse the ban in 2017 and to develop a process to permit transgender people to join the military. But President Trump, in a series of tweets in July 2017, announced he would reinstate the ban, arguing that trans-related health care is expensive. Thus far, President Trump's ban has been stymied by the courts, and the Pentagon is allowing transgender people to enroll in the military.

Finally, in a major Supreme Court case that was argued in December 2017, *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Division*, the Trump administration argued in favor of Masterpiece Cakeshop Ltd., a bakery that is claiming First Amendment rights to discriminate against same-sex couples. The case could potentially open a large loophole in anti-discrimination laws, particularly those that protect LGBTQ people, by letting business owners cite religious or moral justifications to discriminate.

Conclusion

While uncertainty and conflicting opinions flourish with respect to what constitutes sex discrimination, the scope of sex discrimination is certainly evolving. With three Circuit Court of Appeals ruling on this issue and the ensuing circuit split, the Supreme Court will likely have to take this issue up sooner rather than later.

Regardless, however, employers must be aware of applicable state and local laws, and any lower federal court decisions regarding sexual orientation protections. Currently, there are several state and local laws providing greater protections for employees, including LGBTQ employees. There are over twenty states and more than 200 cities that currently protect against sexual orientation discrimination.

Employers should carefully evaluate whether they operate in a state or locality that has an anti-discrimination law covering sexual orientation. Regardless, it is wise for employers to implement anti-discrimination policies that encompass sexual orientation. The status of the law under Title VII is far from certain. For employers operating in jurisdictions outside the Second, Seventh, and Eleventh Circuits, it would be prudent to err on the side of caution by implementing an anti-discrimination policy that prohibits sexual orientation discrimination.

Employers should review their existing handbooks and update their workplace discrimination policies to explicitly address and prohibit sexual orientation discrimination. To prevent inquiries into your workplace policies and practices, it is best take these steps now, and ensure that all of your employees feel welcomed in the workplace and are treated fairly.