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Ending Sexual Orientation Discrimination in Employment

Twenty-two states, including California, and the District of Columbia, Guam, and Puerto Rico, protect both public and private employees from discrimination on the basis of their sexual orientation.

By Gay Crosthwait Grunfeld and Marc J. Shinn-Krantz

Twenty-two states, including California, and the District of Columbia, Guam, and Puerto Rico, protect both public and private employees from discrimination on the basis of their sexual orientation. But in more than half the country, a gay person can get married legally on Saturday, and for doing so be fired legally on Monday, so far as state and local law are concerned. For gay employees in 28 states, Title VII of the Civil Rights Act of 1964 is the only possible protection. Indeed, the U.S. Equal Employment Opportunity Commission (EEOC) received 1,762 LGBT-based sex discrimination charges in FY 2017, up from 1,100 in FY 2014.

(Photo Diego M. Radzinschi/ALM)

Gay Crosthwait Grunfeld, managing partner, left, and associate Marc Shinn-Krantz, right, of Rosen Bien Galvan & Grunfeld.

Prior to 2017, every federal circuit to consider the question of whether Title VII's prohibition of discrimination based on sex includes sexual orientation answered negatively. But since the U.S. Supreme Court's holding in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) that same-sex marriage is a constitutionally protected fundamental right, the EEOC began asserting that sexual orientation discrimination is inherently sex discrimination under Title VII. Courts, the EEOC and the U.S. Department of Justice (DOJ) are grappling with the issue.

There is a circuit split over whether Title VII makes it illegal for employers to discriminate based on sexual orientation. Last year, the U.S. Court of Appeals for the Seventh Circuit held en banc by a vote of 8 to 3

that it does, *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017), while panels of the Second and Eleventh circuits held to the contrary. The Eleventh Circuit denied *en banc* rehearing, and in December 2017, the Supreme Court denied certiorari. The Second Circuit reheard arguments en banc in September—a decision is pending. Supreme Court review of the question is inevitable.

The plaintiff in the Seventh Circuit *Hively* case was a female lesbian part-time adjunct professor who alleged sexual orientation discrimination. The court held that two separate analyses—a comparator analysis, which analyzes the variable of sex by comparing the plaintiff to an otherwise identically situated person, and an associational analysis—each led to the conclusion that sexual orientation discrimination is sex discrimination under Title VII.

Citing *Hively*, a First Circuit panel recently noted "the tide may be turning" on this issue. *Franchina v. City of Providence*, No. 16-2401, 2018 WL 550511, at *13 n.19 (1st Cir. Jan. 25, 2018). *Franchina's* procedural posture precluded considering sexual orientation as a standalone claim; nevertheless, the panel upheld a jury verdict awarding emotional and front pay damages to a female firefighter claiming sexual orientation as a "plus-factor" under Title VII.

Under *Hively's* comparator analysis, a plaintiff successfully claims sex discrimination if she alleges a set of facts whereby changing only her sex would lead to different treatment. The court noted it is critical to the comparator analysis that the only variable be the plaintiff's gender. The court noted that a policy could constitute sex discrimination even if it did not discriminate against *every* member of a gender. A policy discriminating against the subset of women like Hively—just like a policy discriminating against the subset of women not wearing high heels—is sex discrimination. In Hively's case—that of a woman attracted to women—the plaintiff could allege sex discrimination by claiming she would have been treated differently if she were a man attracted to women. The court also noted that, viewing this case through the lens of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (establishing the gender nonconformity theory of liability), there is no distinction between a gender nonconformity claim and a sexual orientation claim; Hively's homosexuality was itself nonconformance with the gender stereotype of female heterosexuality.

In its associational analysis, the *Hively* court drew on a line of cases beginning with the Supreme Court's holding in *Loving v. Virginia*, 388 U.S. 1 (1967), that a prohibition on interracial marriage violates the Constitution. Subsequent circuit court cases held that discrimination based on a plaintiff's interracial associations constitutes discrimination because of the plaintiff's *own* race. The Hively court held it follows that discrimination against Hively because of the sex of a person she associates with is discrimination based on her *own* sex.

Judge Richard Posner concurred in *Hively*, powerfully applying a third and more straightforward analytical approach to conclude that Title VII prohibits sexual orientation discrimination. He considered that Title VII's original meaning may not have prohibited such discrimination. He asserted that the courts should not act as "obedient servants" of the 88th Congress, which passed the Civil Rights Act of 1964. Instead, courts should take advantage of over a half century of evolving views on homosexuality—and consider what the country has become—to interpret the statutory language for today's era and culture.

In sharp contrast to the Seventh Circuit, a divided Eleventh Circuit panel held that Title VII does *not* protect sexual orientation. *Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (11th Cir. 2017) involved a female lesbian former security officer alleging discrimination based on her sexual orientation. The panel decided it was

bound by precedent to hold that, although gender nonconformity claims are actionable under Title VII, sexual orientation claims are not. This holding drew a dissent from Judge Robin S. Rosenbaum, who asserted that the Supreme Court's 1989 gender stereotyping decision in *Price Waterhouse*, "eviscerated" the majority's main precedent, *Blum v. Gulf Oil*, 597 F.2d 936 (5th Cir. 1979) (pre-division of the Fifth and Eleventh circuits in 1981). Judge Rosenbaum reasoned that a woman alleging sexual orientation discrimination necessarily fails to conform with the gender stereotype that women should only be sexually attracted to men.

Two Second Circuit panels held that they are bound by circuit precedent to hold that Title VII does not encompass sexual orientation. *Zarda v. Altitude Express*, 855 F.3d 76 (2d Cir. 2017); *Christiansen v. Omnicom Group*, 852 F.3d 195 (2d Cir. 2017). The Second Circuit granted rehearing *en banc* of *Zarda*, a case about a male gay former skydiving instructor asserting sexual orientation discrimination. In an unusual executive branch split, both the EEOC and the DOJ filed conflicting amicus briefs and appeared at argument in September 2017.

As one district court within the Second Circuit observed, "the law with respect to this legal question is clearly in a state of flux, and the Second Circuit, or perhaps the Supreme Court, may return to this question soon," *Philpott v. New York*, 252 F. Supp. 3d 313, 316 (S.D.N.Y. 2017) (finding sexual orientation claim cognizable). The Second Circuit's *en banc* decision in *Zarda* is pending.

Despite the variegated decisions and opinions of judges in different circuits, the dueling positions of the DOJ and the EEOC, and congressional inability to clarify the law, the trend in public opinion is clear. In 1996, when Gallup first polled the issue, only 27 percent of respondents indicated support for same-sex marriage. By 2017, 64 percent of respondents thought same-sex marriage should be legal and 72 percent supported same-sex relations. Increasing enactment or enforcement of state and local laws prohibiting workplace discrimination based on sexual orientation reflect this trend. It behooves employers throughout the country to begin acting now as though such discrimination is illegal as well as unwise.

Even employers in states lacking anti-discrimination statutes have no business reason to permit discrimination. As Apple CEO Tim Cook wrote in support of federal legislation to prohibit sexual orientation discrimination, "embracing people's individuality is a matter of basic human dignity and civil rights. It also turns out to be great for the creativity that drives our business." Given the increasing legal risks of permitting sexual orientation discrimination, the lack of any business reason for doing so, and this country's evolving consensus in support of equal rights, employers should not wait for the remaining states and federal circuits to catch up to *Hively*. Employers throughout the country should adopt policies and practices that protect their employees from employment discrimination based on sexual orientation. Certainly for national employers, this is the only sensible approach; it will reduce possible administrative burdens and risks of getting it wrong as to some employees who may move within the company from state to state, with unexpected legal cost, and it will enhance consistency and fairness within the enterprise. All employers that follow *Hively's* holding will benefit from reduced liability, increased equality, and a more competitive workforce.

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