PALEY ROTHMAN
ATTORNEYS AT LAW

Does Title VII Cover Sexual Orientation? Courts Weigh In. EEOC says Yes. Trump DOJ says No.

By Hope Eastman

Takeaway: Splits in the federal Courts of Appeals may send the issue of Title VII Protection of Sexual Orientation to the Supreme Court. In the meantime, however, the EEOC is basing its enforcement actions on its position that Title VII covers sexual orientation as a form of sex discrimination. It has filed a number of amicus briefs in support of plaintiffs who have asserted sexual -orientation discrimination claims under Title VII. Employers also need to follow their state and local laws. For example, Maryland and the District of Columbia ban sexual orientation discrimination. Virginia does not, but both the City of Alexandria and Arlington County do. This pattern is repeated across the country. For now, employers should retain their policies on sexual orientation discrimination, include them in any EEO training and continue to investigate allegations of such discrimination.

Discussion: This issue has reached a new level of public attention because, on July 26, 2017, the U.S. Department of Justice (DOJ) filed a brief in the Second Circuit Court of Appeals in the case of *Zarda v. Altitude Express*, No. 15-3775 (2nd Cir. 2017) taking a strong position that Title VII does not cover sexual orientation. The brief rejected the EEOC position that Title VII does prohibit sexual orientation discrimination because it is a form of sex discrimination.

The 2nd Circuit is currently reviewing *en banc* a district court opinion which ruled Title VII does not cover sexual orientation and which was affirmed by a three-judge appellate panel. For its en banc review of this decision, the Court of Appeals sought an amicus brief from the EEOC.

The DOJ filed a separate brief without invitation by the Court or either party. Rather, in an unusual move, the Trump administration elected to weigh in with an aggressively anti-gay stance, arguing that gay Americans have no protection against workplace discrimination under federal law. The DOJ argues that firing a man because he is gay is not the same as firing him because he is a man (which is unquestionably prohibited by Title VII). Nor, it argues, is it the same as firing him because he fails to conform to his gender's stereotype, which would be barred under the Supreme Court's 1989 decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The DOJ brief went so far as to say that "the EEOC is not speaking for the United States."

As for the EEOC, despite a long history of viewing sexual orientation as not being covered by Title VII, it reversed its position in 2015 in *Baldwin v. Foxx*, EEOC Appeal No. 2012-24738-FAA-03 (July 15, 2015), a decision that articulated the Commission's new stance that Title VII prohibits sexual orientation discrimination as a form of sex discrimination. The EEOC, after being invited to do so by the 2nd Circuit, filed an amicus brief taking that position.

Two other Circuits have previously ruled in totally opposite ways:

- A three-judge panel of the Eleventh Circuit ruled 2-1 in March 2017 in *Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (11th Cir. 2017) that Title VII does not cover discrimination based on sexual orientation. On July 6, 2017, the 11th Circuit denied a request for en banc review. The original 11th Circuit decision occasioned a blistering dissent:
  "Plain and simple, when a woman alleges, as Evans has, that she has been discriminated against because she is a lesbian, she necessarily alleges that she has been discriminated against because she failed to conform to the employer's image of what women should be—specifically, that women should be sexually attracted to men only. And it is utter fiction to suggest that she was not discriminated against for failing to comport with her employer's stereotyped view of women. That is discrimination "because of … sex." 850 F.3d at 1261.
- In contrast to the 11th Circuit's decision in *Evans* and the panel decision in the 2nd Circuit, the

Seventh Circuit has ruled en banc that Title VII does prohibit sexual orientation discrimination, adopting the EEOC reasoning. In *Hively v. Ivy Tech. Cmty. College of Indiana, II*, 853 F.3d 339, 351 (7th Cir. 2017), the 7th Circuit adopted the EEOC's position and rejected both the district court and a three-judge panel of its own Circuit.

A circuit split is emerging that will send the issue to the Supreme Court. While it appears that Ivy Tech is not planning to seek certiorari of the 7th Circuit's decision in *Hively*, the plaintiff in the 11th Circuit intends to do so in *Evans* before the Supreme Court's October 2017 term begins.

Conclusion: The existing circuit split comes against the backdrop now of the Trump Administration's position in the 2nd Circuit. The Administration has also rolled back rights for the transgender community, pulling guidance directing schools to let transgender students use the bathroom of their choice and, more recently, stated its intent to bar transgender people from serving in the military. Retraction of executive orders prohibiting discrimination against LGBT workers in federal employment, or by federal contractors, is a possibility. And lastly, the EEOC will soon have a Republican majority. What they might do is only a matter of speculation.

As we said above, employers are still at risk if they allow discrimination on the basis of sexual orientation under federal, state and local laws. Also, federal contractors continue to be prohibited from discriminating on the basis of sexual orientation. So for now, the best advice for employers is to continue their policies that ban sexual orientation discrimination and to focus on making their workplaces inclusive.

