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A Brave New World: Developments in the Circuits (and Soon the Supreme Court?) on Title VII Coverage

Federal Bar Association - The Labouring Oar

One of the most controversial debates in employment law in recent years is whether Title VII of the Civil Rights Act of 1964, the key federal employment discrimination statute, protects employees against discrimination based upon their sexual orientation. The *Supreme Court in United States v. Windsor* and *Obergefell v. Hodges* issued groundbreaking decisions securing the rights of homosexuals to public benefits, including marriage, but it has been a matter of debate whether the constitutional principles of those decisions are applicable in the Title VII statutory context. The Equal Employment Opportunity Commission has expressed its position that Title VII does provide such protections. A trio of decisions this spring from the Second, Seventh, and Eleventh Circuits, has now teed up the issue of Title VII sexual orientation coverage for Supreme Court review, and this important issue appears to have entered its endgame.

Title VII explicitly prohibits discrimination based on an employee's or applicant's race, color, national origin, religion, and, most critically to this analysis, sex. Sexual orientation is not expressly included as a Title VII protected class, and the case law thus far has focused on whether sexual orientation discrimination is encompassed by Title VII's prohibition of sex discrimination. Congress has on multiple occasions considered legislation, such as the Employment Non-Discrimination Act, which would explicitly add sexual orientation as a Title VII protected class, but those measures have never succeeded.

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