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Second and Eleventh Circuits Rule They are Bound by Prior Precedent that Title VII Does Not Prohibit Sexual Orientation Discrimination, but Some Judges Suggest It Should

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Executive Summary: As these authors have previously reported, several cases analyzing whether sexual orientation is protected by Title VII of the Civil Rights Act of 1964 have been winding their way through the courts. The Eleventh Circuit, in *Evans v. Georgia Regional Hospital*, and the Second Circuit, in *Christiansen v. Omnicom Group, Inc.*, have now ruled on the cases before them. But they offer little more clarity on the subject. While both held that they are bound by prior precedent that Title VII does not prohibit sexual orientation discrimination, the dissenting opinion in *Evans*, and the concurring opinion in *Christiansen*, suggest that it should.

Background: Title VII prohibits discrimination "because of sex." Historically, both the courts and the Equal Employment Opportunity Commission (EEOC) refused to recognize sexual orientation as a protected class under Title VII. This changed in July 2015, when, in *Baldwin v. Foxx*, the EEOC took the position that "sexual orientation is inherently a 'sex-based consideration'" under Title VII, and that "[s]exual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorable because of the employee's sex." This sparked an onslaught of court litigation, with the plaintiff's bar and EEOC arguing that sexual orientation discrimination should be a cognizable claim under Title VII. FordHarrison has been following these cases closely as they make their way through the courts.

Current Developments: The Second and Eleventh Circuits have now weighed in, but the decisions provide little help in clarifying the issue. Like the Seventh Circuit's panel decision in *Hively v. Ivy Tech Community College* (which has now been heard *en banc*), the courts held that they were bound by prior precedent. Their dissenting and concurring opinions, however, offer a glimmer into why this perhaps is changing.

In *Evans v. Georgia Regional Hospital*, Evans claimed that she was constructively discharged because of her homosexuality and male presentation. The claim was dismissed by the U.S. District Court for the Southern District of Georgia, holding that Title VII does not prohibit sexual orientation discrimination. On March 10, 2017, in a brief opinion, the Eleventh Circuit affirmed. It held that it was constrained by the binding precedent of *Blum v. Gulf Oil Corp.*, which held in 1979 that sexual orientation is not protected by Title VII. The *Evans* court rejected the argument that the U.S. Supreme Court decisions in *Price Waterhouse v. Cooper* (recognizing a Title VII cause of action for gender stereotyping) and *Oncale v. Sundowner Offshore Servs., Inc.* (recognizing a Title VII cause of action for same-sex harassment) provided a basis to overrule *Blum*. However, Evans was allowed to amend her complaint to re-plead her discrimination claim based on gender stereotyping.

Judge Pryor, concurring, opined that a person who experiences discrimination because of sexual orientation does not necessarily experience discrimination for gender nonconformity. Thus, in his opinion, Evans's and the EEOC's argument that *Price Waterhouse* provides a basis to overrule Blum is nonsensical. In contrast, however, Judge Rosenbaum, dissenting in part, picked apart Judge Pryor's concurrence, concluding that based on the holding in *Price Waterhouse*, recognizing sexual orientation discrimination as prohibited by Title VII is not precluded by the court's earlier *Blum* opinion because discrimination based on gender nonconformity cannot be separated from discrimination based on sexual orientation.

Evans has petitioned for rehearing *en banc*.

Just 17 days later, on March 27, 2017, the Second Circuit decided Christiansen v. Omnicom. The U.S. District Court for the Southern District of New York had previously dismissed Christiansen's sexual orientation claim, relying on its prior precedent in *Simonton v. Runyon* and *Dawson v. Bumble & Bumble*, which, like *Blum*, held that Title VII does not prohibit sexual orientation discrimination. Similar to *Evans* and the *Hively* panel, the Second Circuit majority held *(per curiam)* that it was bound by this precedent, and lacked the power to reconsider it because the court was not sitting *en banc*. For the same reasons in *Evans*, the court remanded Christiansen's gender stereotyping case.

A concurring opinion was also filed in *Christiansen*. Judges Katzmann and Brodie agreed with the *Evans* dissent that *Price Waterhouse* provides a basis for recognizing a claim for sexual orientation discrimination under Title VII because sexual orientation and gender stereotyping are intertwined with each other. They also provided two other reasons cases like *Blum*, *Simonton* and *Dawson* should be overturned: sexual orientation discrimination is "because of sex"; and sexual orientation discrimination is "because of the sex" of the person's associates.

As to the first, relying primarily on *Baldwin*, Judges Katzmann and Brodie opined that "sexual orientation discrimination is sex discrimination for the simple reason that such discrimination treats otherwise similarly-situated people differently solely because of their sex." They equated the situation to that in *Loving v. Virginia*, in which the U.S. Supreme Court held that a state law banning interracial marriages was *per se* race discrimination in violation of the Equal Protection Clause. Second, the judges relied on the theory set out by the Second Circuit in *Holcomb v. Iona College* that discrimination because one associates with a person of another race is racial discrimination prohibited by Title VII. Citing to *Obergefell v. Hodges* (legalizing same-sex marriage) and United States v. Windsor (holding that the Defense of Marriage Act violated the Equal Protection Clause), the concurrence reasoned that "if it is race discrimination to discriminate against interracial couples, it is sex discrimination to discriminate against same-sex couples" which "would encompass discrimination on the basis of sexual orientation."

Thus, the *Evans* and *Christiansen* opinions are largely consistent with each other. The courts are bound by prior precedent holding that sexual orientation discrimination is not protected by Title VII until an *en banc* panel or the U.S. Supreme Court decides otherwise. However, both highlighted the difficulty – what the *Hively* panel referred to as a "paradoxical legal landscape" – created by the "blurry," and at times "indiscernible" line between gender stereotyping claims (which are recognized) and those based on sexual orientation (which are not). Moreover, in both cases some judges took the opportunity to provide their opinion that in light of social, political and legal change, such precedent should be overturned and encouraged, perhaps, certification to the U.S. Supreme Court.

***Gloucester City School Board v. G.G.* Update:** On March 6, 2017, further delaying an opinion by the U.S. Supreme Court on the issue of whether the term "because of sex" in Title IX (and, by association,

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Title VII) includes gender identity and sexual orientation, the Supreme Court dismissed the appeal in *Gloucester County School Board v. G.G.* In that case, a high school student challenged his school's requirement that students use the restroom that corresponds to their biological sex rather than their gender identity, and argued that such a requirement violates Title IX. In holding that it does, the Fourth Circuit relied heavily on Obama-era guidance that gender identity discrimination is inherently discrimination "because of…sex." However, on February 22, 2017, just a month before the Supreme Court was set to hear oral argument, the Trump Administration rescinded that guidance. While all parties urged the Supreme Court to hear oral argument despite the change in guidance, the Court did not agree. In a one-sentence order, the Supreme Court dismissed the appeal and remanded it to the Fourth Circuit for further consideration.

The next chance for appeal to the U.S. Supreme Court will likely come with the Seventh Circuit's *en banc* decision in *Hively*. As reported in previous Legal Alerts by these Authors, including that on December 12, 2016, based on the tone and content of the court's questions at oral argument, it appears likely that the Seventh Circuit may conclude that the definition of sex in Title VII does include sexual orientation. We expect to see the Seventh Circuit's ruling soon.

Employers' Bottom Line: Even with the continued ambiguity in the law, employers should remain aware of local and state laws in the locations where they operate. Many state and local governments already provide protection for applicants and employees from discrimination based on sexual orientation and/or gender identity. Thus, employers with multi-state operations may be bound by state LGBTQ anti-discrimination laws in some locales but not in others. Irrespective of federal, state and local protections, it remains good practice to provide internal policies and procedures prohibiting LGBTQ discrimination and providing a complaint and investigation procedure when such discrimination is alleged to have occurred.

Furthermore, federal contractors subject to EO 11246 should note that it remains in effect. On January 31, 2017, President Trump issued a press release assuring that his administration will continue to enforce Executive Order 13672, which augments EO 11246 to protect applicants and employees from anti-LGBTQ workplace discrimination while applying to work for or working for covered federal contractors. This includes providing equal bathroom access to applicants and employees based on gender identity.

We will continue to provide updates as the status of Title VII and Title IX LGBTQ rights continues to evolve.

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