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Expansion of Title VII: Whether Sexual Orientation Discrimination is Included in Title VII's Ban on Sex Discrimination

By Christopher Chimeri

Title VII of the Civil Rights Act of 1964 is a federal law that prohibits employers from discriminating against employees based on sex, race, color, national origin, and religion. It generally applies to employers with 15 or more employees, including federal, state, and local governments. Title VII has been legislatively expanded to also protect against discrimination due to pregnancy (Pregnancy Discrimination Act of 1978), age (Age Discrimination in Employment Act) and disability (Americans with Disabilities Act of 1990).

Now, Federal Courts have taken up the question of whether sexual orientation is considered a "protected class" and/or a subset of one of the already protected groups. There is currently no legislation directly on point, though it is worth mentioning that the "Equality Act," which would amend Title VII to add sexual orientation and gender identity or expression was recently reintroduced in Congress.

Recently, the 11th Circuit Court of Appeals denied a petition for rehearing *en banc* in *Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (11th Cir. 2017). The 11th Circuit ruled that binding circuit precedent (from the old 5th Circuit) precluded the panel from reconsidering the question of whether Title VII's ban on sex discrimination includes sexual orientation discrimination. Jameka Evans sued numerous defendants after she served as a security officer at Georgia Regional Hospital from August 1, 2012 to October 11, 2013 and, following voluntary separation from the employer, Evans maintained that she was denied equal pay, harassed and physically battered. She also indicated that she experienced discrimination because she did not carry herself in a "traditional womanly manner." She was homosexual and identified with the male gender.


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The United States District Court for the Southern District of Georgia dismissed her claims, indicating that established case law from all federal circuits "was not intended to cover discrimination against homosexuals." The District Court also reasoned that the gender non-conformity claim was "just another way to claim discrimination based on sexual orientation." The Court of Appeals affirmed.

Evans then sought reconsideration *en banc* based on the recent 7th Circuit decision in *Hively v. Ivy Tech Community College*, 853 F.3d 339 (7th Cir. en banc 2017). Kimberly Hively was openly homosexual and worked as an adjunct professor at Ivy Tech Community College starting in 2000. Starting in 2009, Hively applied for six full-time positions but was declined each time. In July 2014, she was notified that her part-time contract was not being renewed, effectively terminating her employment with the college.

Ms. Hively filed a complaint with the EEOC, and subsequently, sued in the United States District Court for the Northern District of Indiana. The District Court dismissed the action, citing previous 7th Circuit holdings deeming sexual orientation not protected under Title VII. The Court of Appeals first affirmed, reasoning that the legislative intent behind Title VII did not equate "sex" with "sexual orientation." Following *en banc* review, in which the court further reviewed the legislative intent of Title VII and several Supreme Court cases addressing similar, though not controlling issues, the full panel of judges determined that "it would require considerable calisthenics to remove the 'sex' from 'sexual orientation,'" and thus, the 7th Circuit became the first federal circuit court to construe Title VII to apply to such claims.

Prior, the First, Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth and Tenth Circuits had all similarly held that sexual orientation was not a prohibited basis for discriminatory acts under Title VII. However, the 2nd Circuit recently granted *en banc* review of this question in *Zarda v. Altitude Express*, 855 F.3d 76 (2nd Cir. 2017), which is scheduled to be argued in September of 2017. Such review is expected to yield a result like that in *Hively*.

The denial of review by the 11th Circuit means that, regardless of the result in *Zarda*, there will be a circuit split until resolved by Supreme Court decision or legislative enactment.

In this connection, the plaintiff in *Evans* filed a petition for certiorari with the Supreme Court on September 7, 2017. Given the surrounding circuit litigation and SCOTUS's October term already including other important LGBT rights litigation, cert is expected. It is therefore likely that the question will be very shortly resolved, via either a Supreme Court ruling.

Note: Christopher J. Chimeri is partner with the Hauppauge law firm Quatela Chimeri PLLC and heavily focuses on complex trial and appellate work in the matrimonial and family arena. He sits on the Board of Directors of the Suffolk County Matrimonial Bar Association and is a co-founder and co-chair of the Suffolk County Bar Association's LGBT Law Committee. From 2014-2017, he has been peer-selected as a Thomson Reuters Super Lawyers® "Rising Star."