Employment Law Daily
April 11, 2017

TOP STORY

STRATEGIC PERSPECTIVES—Discrimination based on sexual orientation: Not the "principal evil" but protected by Title VII nonetheless?

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With three federal appellate decisions on the issue in the past month, whether Title VII's prohibition on discrimination based on "sex" includes "sexual orientation" as a stand-alone protected class is likely headed for the Supreme Court. While courts have traditionally resisted drawing such a conclusion, the expansion is gaining momentum, with the EEOC interpreting sex to include sexual orientation in its 2015 landmark *Baldwin* decision, and in lower federal courts. A number of federal Circuit Courts of Appeal are considering the issue in a world in which social and legal approaches to sexual orientation are rapidly changing – and thus far they have come to different conclusions.

A. Historical Evolution of the Sex Stereotyping Theory and Supreme Court Jurisprudence Relating to Sexual Orientation

The starting point for statutory analysis must always be the statutory language itself. In relevant part, Title VII states:

> It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's…sex[.]

The scope of the protections offered by Title VII's prohibition against sex discrimination has evolved since the inception of the Civil Rights Act of 1964. As the EEOC and plaintiffs push the envelope again, it is worth considering the historical landscape to venture a guess as to where we are headed.

In the 1970s and 1980s, courts typically held that the prohibition against sex discrimination was limited to discrimination based on physical sex. *See, e.g., Ulane v. E. Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984) (finding that Congress never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex).

In 1989, the Supreme Court dramatically changed the landscape for sex discrimination claims under Title VII. In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Supreme Court established a claim for "sex stereotyping." The plaintiff in *Price Waterhouse*, a female employee of an accounting firm who sought a promotion to partner, was told she was too aggressive and

macho, and that she would be more likely to make partner if she acted and dressed more feminine. The Supreme Court responded strongly, stating:

> We are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes[.]

In its analysis of what constitutes sex discrimination under Title VII, the Court referred to discrimination on the basis of gender.[i] As Title VII sex discrimination jurisprudence evolved, so did scientific and medical understandings about the concepts of sex and gender. Cases that limited the analysis to traditional notions of physical sex were no longer reliable precedent.

Since *Price Waterhouse*, courts have been inconsistent about the application of the sex stereotyping to employees in the LGBTQ community, but a few themes have emerged. In contrast to pre-*Price Waterhouse* cases, which simply barred Title VII recovery by homosexual or transgender plaintiffs, post-*Price Waterhouse* cases have typically not applied such a bar. *But see Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007) (seeming to apply a bar to transgender plaintiffs, stating "There is nothing in the record to support the conclusion that the plain meaning of sex encompasses anything more than male and female."). While courts have removed the bar previously applied to LGBTQ plaintiffs, they primarily remain focused on sex stereotyping. *See, e.g., Eure v. Sage Corp.*, 61 F. Supp. 3d 651 (W.D. Tex. 2014) (courts are reluctant to extend the sex stereotyping theory to cover circumstances where the plaintiff is discriminated against because of the plaintiff's status as a transgender man or woman, without any additional evidence related to gender stereotype); *Smith v. City of Salem*, 378 F.3d 566, 574 (6th Cir. 2004) ("After *Price Waterhouse* an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex. It follows that employers who discriminate against men because they do wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination.").

However, some courts have taken a step beyond that analysis when it comes to transgender plaintiffs, offering such plaintiffs protection as a class. *Schroer v. Billington*, 424 F. Supp. 2d 203 (D.D.C. 2009) (finding that discrimination purely on the basis of gender dysphoria is not sex stereotyping, but discrimination against transsexuals because they are transsexuals is literally discrimination because of sex); *Finkle v. Howard County*, Civil Case No. SAG-13-3236, 2015 WL 3744336 at *8 (D. Md. 2015) ("Plaintiff, as a transgender woman, does not conform to gender stereotypes, is a member of a protected class under Title VII.").

As will be discussed more thoroughly below, the proposition that Title VII prohibits discrimination based on sexual orientation absent evidence of sex stereotyping requires a significantly more creative approach to interpreting Title VII's prohibition on discrimination based on sex. "The rationale … is that such discrimination is based, not on sex, but on sexual orientation, and that discrimination based on sexual orientation is gender-neutral: it impacts homosexual men and women alike." *Schroer*, 424 F. Supp. 2d at 208.

It should be noted that when commentators discuss Title VII and sexual orientation, they frequently mention the 1998 Supreme Court decision in *Oncale v. Sundowner Offshore Services Inc.* for the proposition that Title VII covers "same sex" discrimination. 523 U.S. 75 (1998). In *Oncale*, a male employee was subjected to extreme harassment of a sexual nature by male coworkers and supervisor. The Supreme Court unanimously held that he could state a claim against his employer for "same-sex" harassment. In other words, Title VII allows claims of discrimination by someone of the Plaintiff's sex, which is not to be confused with discrimination on basis of sexual orientation. Despite its narrow holding that Title VII sex discrimination relief is available to a Plaintiff who is the same sex as the alleged discriminator, the following statement by Justice Scalia in *Oncale* often garners much attention, and as discussed below, has become essential dicta in the current litigation strategy aimed to persuade courts to hold that Title VII prohibits discrimination on the basis of sexual orientation independently of a gender stereotyping theory.

> Male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.

Since *Price Waterhouse* and *Oncale*, the Supreme Court has recently been receptive of arguments supporting equal treatment of individuals based on sexual orientation. *United States v. Windsor*, 133 S. Ct. 2675 (2013) (striking down Section 3 of the Defense of Marriage Act); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (establishing right to same sex marriage). For a host of reasons that are beyond the scope of this article, these recent cases cannot be neatly analogized to employment discrimination under Title VII. Yet, they provide important insights into the Court's shifting views toward sexual orientation.

B. Recent Developments

a. The EEOC Takes the Position in a Federal Sector Case that Discrimination Based on Sexual Orientation is Discrimination "Because of" Sex

On July 15, 2015, the EEOC took the position for the first time that Title VII prohibits discrimination based on sexual orientation as a protected class by issuing a federal sector decision, *Baldwin v. Dep't of Trans*., Appeal No. 0120133080.[ii]

Although some point to several failed attempts in Congress to pass legislation explicitly designating sexual orientation as a protected category as a justification that Title VII does not currently provide sexual orientation protection, the EEOC rejected the notion that Title VII must explicitly list "sexual orientation" for such discrimination to be actionable.[iii] In doing so, the Commission stated the purpose was "whether the agency has 'relied on sex-based considerations' or 'take[n] gender into account' when taking the challenged employment action." The Commission clearly stated its new position "that sexual orientation is inherently a 'sex-based consideration,' and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII."

In so holding, the Commission relied upon three rationales. First, the Commission stated that "'sexual orientation'" as a concept cannot be defined or understood without reference to sex," and "sexual orientation is inseparable from and inescapably linked to sex and, therefore, that allegations of sexual orientation discrimination involve sex-based considerations." Interestingly, the decision notes that this can extend to heterosexual discrimination as well; for example, a heterosexual employee may state a claim of sex discrimination by alleging she was suspended because she placed a picture of her husband on her desk, whereas her gay colleague is not suspended after he places a picture of his husband on his desk.

Next, the Commission applied the theory of "associational discrimination" to discrimination based on sex, and in particular, to those in a same-sex marriage, relationship, or personal association.

Finally, and relying upon *Price Waterhouse*, the Commission stated that "sexual orientation discrimination also is sex discrimination because it necessarily involves discrimination based on gender stereotypes."

Apparently anticipating the argument that applying Title VII to sexual orientation goes beyond the legislative intent, the Commission responded that:

> Congress may not have envisioned the application of Title VII to these situations. But as a unanimous Court stated in *Oncale v. Sundowner Offshore Services, Inc*., "statutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." 523 U.S. 75, 79, 78-80 (1998) (holding that same-sex harassment is actionable under Title VII). Interpreting the sex discrimination prohibition of Title VII to exclude coverage of lesbian, gay or bisexual individuals who have experienced discrimination on the basis of sex inserts a limitation into the text that Congress has not included. Nothing in the text of Title VII "suggests that Congress intended to confine the benefits of [the] statute to heterosexual employees alone." *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d. 1212, 1222 (D. Or. 2002).

Following *Baldwin*, the Commission announced it filed a pair of lawsuits alleging discrimination on the basis of sexual orientation on March 1, 2016.

The *Baldwin* decision provides the roadmap for the EEOC's amicus briefs in the three recent Circuit Court of Appeal cases discussed *infra*.

b. The Eleventh Circuit Rejects Sexual Orientation as Protected Under Title VII

On March 10, 2017, the Eleventh Circuit found that prior circuit precedent compelled the holding that sexual orientation was not protected under Title VII. *Evans v. Georgia Regional Hospital, Charles Moss, et al*., No. 15-15234 (Mar. 10, 2017). The 55-page decision expresses a panoply of divergent viewpoints and, perhaps, provides a glimpse into a future Supreme Court

opinion with a slim majority, pragmatic concurrence, and impassioned dissent in support of coverage.

The author of the two-judge majority, a district judge from the Southern District of Florida sitting by designation, wrote that every circuit in the country has concluded sexual orientation is not protected under Title VII, including the Fifth Circuit (which previously covered both the current Fifth Circuit and the Eleventh Circuit). The majority further noted that Congress "repeatedly rejected legislation that would have extended Title VII to cover sexual orientation."

Evans and the EEOC, which filed an amicus brief on behalf of the plaintiff, maintained that the Supreme Court decisions of *Price Waterhouse* and *Oncale* support a cause of action for sexual orientation discrimination.

Judge Pryor issued a fascinating concurrence. He chastised the dissent and Commission's amicus for relying "on false stereotypes of gay individuals." He also rejected the dissent because it would create a new form of relief that is counter to binding precedent and "would undermine the relationship between the doctrine of gender nonconformity and the enumerated classes protected by Title VII."

He took issue with the position, urged by the Commission and the dissent, that sexual orientation discrimination is always discrimination based on gender nonconformity, citing the Commission's amicus brief, which states "all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices." The problem, according to Judge Pryor, is that this statement "stereotypes all gay individuals in the same way that the Commission and the dissent allege that the Hospital stereotyped Evans." The concurrence cited journal articles discussing the wide variety of experiences by gay individuals, noting that some choose not to marry, or date, or enter into mixed-orientation marriages.

Judge Pryor, relying upon *Price Waterhouse* and Eleventh Circuit precedent, made a clear distinction between status (e.g., sexual orientation) and behavior (e.g., failure to confirm to gender stereotypes). He fully embraced the gender nonconformity theory while rejecting the creation of a "new, status-based class of protection." Concluding that "[b]ecause Congress has not made sexual orientation a protected class, the appropriate venue for pressing the argument raised by the Commission and the dissent is before Congress, not this Court."

Judge Rosenbaum dissented as to the sexual orientation holding, citing numerous district court cases that have concluded that discrimination based on sexual orientation is discrimination based on sex.

c. The Second Circuit Recognizes Sex Stereotyping Theory But Not Sexual Orientation Under Title VII

In a *per curiam* opinion issued on March 27, 2017 for similar reasoning as the *Evans* decision, the Second Circuit concluded it "neither appropriate nor possible for [a panel] to reverse an existing Circuit precedent." *Christiansen v. Omnicom Group, Inc., et al*., No. 16-748 (Mar. 27, 2017). Finding Christiansen had a cause of action under a *Price Waterhouse* sex stereotyping theory, the Second Circuit noted that not all gay individuals had claims under *Price Waterhouse*

because, for example, "not all homosexual men are stereotypically feminine." However, stereotypically feminine gay men and stereotypical masculine lesbian women could pursue claims under *Price Waterhouse*—not because of their sexual orientation but because of their failure to conform to traditional gender roles.

A two-judge concurrence in *Christiansen* found appellant's arguments "persuasive," wrote to state that, when appropriate, the Second Circuit should revisit its previous cases, "especially in light of the changing legal landscape that has taken shape" in the subsequent years. The concurrence embraces all three of the EEOC's arguments—which come from the *Baldwin* decision and were raised in both *Hively* and *Evans*—wholesale. None of these theories had been considered by the Second Circuit. These are: 1) sexual orientation discrimination is traditional sex discrimination; 2) sexual orientation discrimination is associational discrimination, relying upon, *inter alia*, *Obergefell*, 135 S. Ct. at 2602; 3) sexual orientation discrimination is "inherently rooted in gender stereotypes."

Finally, *Christiansen* addressed the issue of Congressional inaction, citing *Pension Ben. Guar. Corp.* for the proposition that relying upon subsequent legislative history is a "hazardous basis for inferring the intent of an earlier Congress," particularly when Congress does not pass a proposal. 496 U.S. at 650.

The concurrence concluded by noting that its prior precedent was considered many years ago, before *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) changed the legal landscape with respect to sexual orientation.

d. The Seventh Circuit's *En Banc* Opinion Concludes that Sexual Orientation Discrimination Is Covered Under Title VII and Creates A Circuit Split

Both the Second and Eleventh Circuit opinions were issued by three judge panels, and plaintiff/appellant Evans has asked the full Eleventh Circuit for *en banc* review, while it is highly likely that Christiansen will do the same, which is precisely what happened in *Hively v. Ivy Tech Community College*, Case No. 15-1720. Following a panel ruling that sexual orientation was not covered and a request for rehearing *en banc*, the full Seventh Circuit heard *Hively* in November 2016 and issued its groundbreaking opinion on April 4, 2017, concluding that "discrimination on the basis of sexual orientation is a form of sex discrimination" under Title VII. This opinion further highlights the disparate judicial philosophies at play with regard to this issue.

The majority opinion begins with the task of deciding "what it means to discriminate on the basis of sex, and in particular, whether actions taken on the basis of sexual orientation are a subset of actions taken on the basis of sex" – a matter that it deemed to be one of statutory interpretation only. Similar to the *Christiansen* court, the majority rejected the use of legislative history, including Congress' repeated and unsuccessful attempts to amend Title VII, in its analysis, noting that it was "simply too difficult to draw a reliable inference from these truncated legislative initiatives to rest our opinion on them."

Rather, the majority relied upon Supreme Court precedent, notably quoting the "principal evil" language from the *Oncale* decision discussed above. The majority went on to explain that, "The

[Supreme] Court could not have been clearer: the fact that the enacting Congress may not have anticipated a particular application of the law cannot stand in the way of the provisions of the law that are on the books."

The majority then applied two different approaches to the statutory interpretation analysis. First, the majority utilized the comparative method of proof – would the employee have been treated the same way if only her sex were different? Hively alleged that she would not have been subjected to the adverse employment actions at issue if she were a man, which the majority found "describes paradigmatic sex discrimination."

Applying the comparator method in the context of gender non-conformity cases, the majority found that Hively "represents the ultimate case of failure to conform to the female stereotype" in that she is not heterosexual. It further noted that its panel decision "described the line between a gender nonconformity claim and one based on sexual orientation as gossamer-thin; we conclude that it does not exist at all." The majority went on to state: "Any discomfort, disapproval, or job decision based on the fact that the complainant – woman or man – dresses differently, speaks differently, or dates or marries a same-sex partner, is a reaction purely and simply based on sex," and thus falls within the ambit of Title VII.

The second approach utilized by the majority was sex discrimination under the associational theory – that a person who is discriminated against because of the protected characteristic of one with whom she associates, and this also necessarily means that the person "is actually being disadvantaged because of her own traits." The associational theory was first articulated in the Supreme Court case of *Loving v. Virginia*, 388 U.S. 1 (1967), in which the court rejected state law prohibiting interracial marriage as race discrimination in violation of the Equal Protection Clause. It was subsequently applied in race discrimination cases under Title VII, and, as the majority explained, to the extent that Title VII prohibits associational discrimination on the basis of race, it must also prohibit associational discrimination based on other characteristics, including sex.

Finally, the majority looked to Supreme Court cases addressing sexual orientation beyond the employment context, such as *Windsor* and *Obergefell*, *supra*. The majority observed that, "It would require considerable calisthenics to remove the 'sex' from 'sexual orientation'" and attempts to do so have "led to confusing and contradictory results." Rather, the majority stated that it must "consider what the correct rule of law is now in light of the Supreme Court's authoritative interpretations, not what someone thought it meant one, ten or twenty years ago." And ultimately, the majority relied on the Supreme Court's decisions and "the common sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex" to find Title VII coverage.

In a concurring opinion, Judge Posner offers a strikingly different approach to reach the same result – what he terms "judicial interpretive updating" to give fresh meaning to an old law in order "to satisfy modern needs and understandings." Boldly, Judge Posner states, "I would prefer to see us acknowledge openly that today we, who are judges rather than members of Congress, are imposing on a half-century-old statute a meaning of 'sex discrimination' that the Congress that enacted it would not have accepted. This is something courts do fairly frequently to avoid

statutory obsolescence and concomitantly to avoid placing the entire burden of updating old statutes on the legislative branch."

Judge Flaum, in a separate concurrence joined by Judge Ripple, sets forth yet another judicial approach – that of textualism. Looking to multiple dictionary definitions, Judge Flaum determined that the statutory language prohibiting discrimination on the basis of "sex" necessarily includes "homosexuality."

The dissent sees their role differently: "When a statute supplies the rule of decision, our role is to give effect to the enacted text, interpreting the statutory language as a reasonable person would have understood it at the time of enactment. We are not authorized to infuse the text with a new or unconventional meaning or to update it to respond to changed social, economic, or political conditions." Under this approach, the dissent rejected the majority's conclusion that sexual orientation discrimination is sex discrimination under Title VII. As the dissent noted, "In common, ordinary usage in 1964 – and now, for that matter – the word 'sex' means biologically *male* or *female*; it does not also refer to sexual orientation… . To a fluent speaker of the English language—then and now—the ordinary meaning of the word "sex" does not fairly include the concept of "sexual orientation. The two terms are never used interchangeably, and the latter is not subsumed within the former; there is no overlap in meaning."

The *Hively* opinion beautifully captures the various approaches to the question of whether sexual orientation discrimination is covered by Title VII, and eloquently articulates the arguments in support of each perspective. It also creates a Circuit split, making the issue ripe for Supreme Court review.

C. Best Practices For Employers

Without Congressional action (which is currently highly unlikely) or a Supreme Court decision, courts are bound to adhere to existing jurisprudence, which, now in every Circuit but one, has found that Title VII does not prohibit discrimination on the basis of sexual orientation absent some evidence of sex stereotyping. And it is possible that other Circuits will choose to follow the bold stance taken by the Seventh Circuit, leading to additional confusion at the federal level.

As a practical matter for employers, however, this may not matter much. Numerous state and local jurisdictions expressly prohibit discrimination on the basis of sexual orientation. We also frequently advise our clients that it can be enormously burdensome to become a target of a governmental investigation or lawsuit. Indeed, as reported in the Employment Law Daily on March 31, 2017, Mercer's *LGBT Benefits Around the World Survey*, "two-thirds of global organizations have a separate anti-discrimination policy that covers LGBT employees and an additional 6 percent plan to adopt such a policy within the next 12 months." Failure to adopt such policies may make companies less competitive to employees—whether they identify as LGBT or not—who value diversity.

Moreover, existing federal law, whether under the sex stereotyping or same-sex harassment theories, makes intentional discrimination on the basis of sexual orientation a risky proposition. Our clients find that adopting a policy preventing discrimination on the basis of sexual orientation, regardless of Title VII's interpretation, reduces workplace complaints and exposure

to charges of discrimination and litigation, boosts morale, fosters a more harmonious work environment, and helps to attract and retain talent.

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[i] Here, it is important to note that more recently, there has been relatively broad recognition that the terms sex and gender have distinct meanings. It is now understood that sex refers to one's physical characteristics, while gender refers to one's internal identity and the outward expression of that identity.

[ii] Decision available at available at https://www.eeoc.gov/decisions/0120133080.pdf. The Commission took the same approach with transgender protections, issuing a federal sector decision, *Macy v. Dep't of Justice*, Appeal No. 0120120821, which provided the springboard for its private sector litigation on behalf of transgender individuals under Title VII. *See* https://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt.

[iii] *See Pension Ben. Guar. Corp. v. LTV Corp.,* 496 U.S. 633, 650 (1990) ("subsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress. It is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns, as it does here, a proposal that does not become law. Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.")