Appeals Court Upholds Illogical Definition of "Sex Discrimination" Under Title VII

BY CHELSIE A. VOKES • AUGUST 9, 2016

On July 28, 2016, the 7th Circuit became the latest circuit court to rule that Title VII does not bar workplace discrimination based on sexual orientation. The case, Hively v. Ivy Tech Community College, was the first to extensively address the "groundswell of questions" raised by the EEOC's conflicting interpretation of "sex" discrimination under Title VII. In the end, the court maintained the status quo and held that Congress did not intend "sex" to include sexual orientation. The court struggled to reach a solid basis for their conclusion in an opinion as confusing as the legal conundrum they attempted to dissect.

As described in a post by Jennifer Garner on July 29, 2015, the EEOC first decided that sexual orientation discrimination claims were cognizable under Title VII in the case Baldwin v. Foxx. In Baldwin, the court held that sexual orientation is "inseparable from and inescapably linked to" discrimination based on sex. Specifically, the gender-based stereotype that men should love women and women should love men forms the basis of sexual orientation discrimination.

Although the EEOC's reasoning is only binding on federal agencies, the Hively court wholeheartedly accepted and commended the EOCC's analysis. They proclaimed that any line between discrimination based on "sex" and sexual orientation was "invisible" and attempts to separate sexual orientation claims as beyond the realm of Title VII would "essentially throw out the baby with the bathwater." Nevertheless, the Hively court proceeded to draw this invisible line between gender and sexual orientation: discrimination based on the gay and lesbian "lifestyle" was not protected under Title VII, while discrimination based on a failure to comply with "gender norms" of masculinity and femininity was cognizable as a gender-based concern. The court noticeably failed to explain how this "lifestyle" stigma could be attributed to an employee without first deciphering that employee's sexual orientation; a construct inherently based on gender stereotypes.

The arbitrary line that the Hively court describes, thoroughly criticizes and eventually adopts, provides "effeminate" males and "masculine" females with Title VII protection, and leaves individuals who do not fit this stereotype without Title VII recourse. The court noted the "illogical" outcome of the test, of which they "undoubtedly [do] not condone,"

and passed the buck to the Supreme Court to make a change.

Responding to the Hively decision, EEOC Commissioner Chai Feldblum spoke with Reuters Legal and suggested that a Supreme Court ruling on this issue might not be far off. A district court case currently on its way to the Second Circuit, Christiansen v. Omnicom Group, condemned the majority Title VII interpretation and called for the Second Circuit to adopt the EEOC interpretation. If the Second Circuit complies with the lower court's request, a Circuit split could bring this issue before the Supreme Court. At the very least, the Hively court's confused opinion, coupled with the growing number of district courts adopting the EEOC interpretation, conveys a clear call for change.