Eleventh Circuit Court of Appeals Decision Lends Further Confusion to Title VII Protections

BY AIVI NGUYEN • MARCH 20, 2017

In a rather disconnected decision on March 10, the United States Court of Appeals for the 11th Circuit ruled, in the case of Evans v. Georgia Regional Hospital, that while Title VII bars an employer from discriminating against an employee for failure to conform to gender stereotypes, it does not prohibit an employer from discriminating against an employee on the basis of sexual orientation.

Title VII of the Civil Rights Act of 1964 is a federal law that bars employers from discriminating against employees on the basis of sex, race, color, national origin, or religion. There has been much debate in recent years about whether sexual orientation or gender identity is included under the umbrella of "sex" in Title VII. Up until this 11th Circuit decision, courts and government agencies were trending towards a broad reading of "sex" to include sexual orientation and gender identity. In fact, the Equal Employment Opportunity Commission (EEOC), a federal agency tasked with investigating workplace discrimination, filed amicus curiae briefs in the case supporting the plaintiff.

The *pro se* plaintiff, Jameka Evans, a lesbian who presents as traditionally masculine, sued her employer for violation of Title VII alleging that she endured harassment and retaliation amounting to a hostile work environment because of her sexual orientation. Ms. Evans alleges that during her employment, she was denied equal pay, harassed, assaulted and battered because she did not carry herself in a "traditionally woman[ly] manner."

The court held that her gender non-conformity claim could be a valid one under Title VII – that she was discriminated against for presenting as traditionally masculine – but her sexual orientation one could not, citing the 1979 case of Blum v. Gulf Oil Corp., out of the 5th Circuit, which held, *in dicta*, that "discharge for homosexuality is not prohibited by Title VII."

"*In dicta*" means commentary on matters not directly before the court and can be thought of as made "in passing" or "side notes." Usually, dicta made by a court on issues that are not directly before it are not given the same binding precedence as explicit rulings of the court. Of course, the 11th Circuit went through lengthy discussion as to why the

Blum court's holding was not dicta, but was legal precedent.

It appears that the majority of the 11th Circuit is unwilling to make the connection that discriminating against a person for being gay necessarily means discriminating against that person for failing to conform with gender stereotypes.

Judge Rosenbaum's dissenting opinion says it best: "Plain and simple, when a woman alleges, as Evans has, that she has been discriminated against because she is a lesbian, she necessarily alleges that she has been discriminated against because she failed to conform to the employer's image of what women should be—specifically, that women should be sexually attracted to men only. And it is utter fiction to suggest that she was not discriminated against for failing to comport with her employer's stereotyped view of women."

The 11th Circuit found that Ms. Evans failed to plead enough facts to support her gender non-conformity claim but is allowing her to amend her complaint to support that claim.

The 11th Circuit's ruling confuses the reach of Title VII especially given the holdings of the EEOC. If the decision is appealed, it would go to the Supreme Court of the United States.