



BURR ALERT

Does Title VII Prohibit Discrimination Based on Sexual Orientation: the Eleventh Circuit Says No, While the Seventh Circuit Says Yes

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Since its inception, Title VII of the Civil Rights Act of 1964 (Title VII) has prohibited employers from discriminating against employees and applicants because of their sex. In the past couple of years, plaintiffs, affinity groups including Lambda Legal, as well as the Equal Employment Opportunity Commission (EEOC), have argued that Title VII's prohibition against sex discrimination should be read to prohibit discrimination based on sexual orientation.

Although the Supreme Court has not yet ruled on this issue, two recent and contrasting Court of Appeals' opinions have. Specifically, in Evans v. Georgia Reg'l Hosp., 850 F.3d 1248 (11th Cir. 2017), the Eleventh Circuit Court of Appeals - the federal court system covering Alabama, Florida and Georgia - followed the overwhelming majority of courts in holding that Title VII **does not** prohibit discrimination based on sexual orientation. A month after the Eleventh Circuit Court of Appeals decided Evans v. Georgia Reg'l Hosp., the Seventh Circuit Court of Appeals - the federal court system covering Illinois, Indiana, and Wisconsin - was presented with a similar case in Hively v. Ivy Tech Cmty. Coll. of Indiana, No. 15-1720, 2017 WL 1230393 (7th Cir. Apr. 4, 2017), and became the first circuit to hold that Title VII **does** prohibit discrimination based on sexual orientation.

This article discusses the contrasting opinions, and the current state of law surrounding Title VII and sexual orientation discrimination.

Evans v. Georgia Reg'l Hosp.

Jameka Evans, a lesbian, worked for Georgia Regional Hospital (GRS) as a security officer. During her time with GRS, Ms. Evans wore a men's security officer uniform and adopted a low cut hairstyle. Ms. Evans claimed that she was subjected to workplace mistreatment including, among other things, general rudeness from her coworkers, continued scheduling issues and shift changes, and coworkers tampering with her equipment which, she claimed, was designed to get her to quit. Eventually, Ms. Evans filed suit against GRS claiming, among other things, that GRS violated Title VII's prohibition against sex discrimination by (a) discriminating against her because of her sexual orientation, and (b) discriminating against her because her outward appearance did not comport with traditional female characteristics. The District Court dismissed her Title VII claim in its entirety after finding that Title VII's prohibition against sex discrimination neither extends to sexual orientation, nor gender non-conformity.

The Court of Appeals affirmed the dismissal of Ms. Evans' Title VII claim to the extent it was based on her sexual orientation. In doing so, the Court noted that they had reached a similar conclusion in Blum v. Gulf Oil Corp., 597 F. 2d 936 (5th Cir. 1979). Further, the Court found that its decision in Blum has not been effected

by subsequent Supreme Court decisions extending Title VII's sex discrimination to include discrimination between employees of the same sex, and based on gender non-conformity. Finally, the Court relied on the fact that every other circuit who had addressed the issue up to that point (the First, Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, and Tenth) had reached a similar conclusion. Accordingly, the Court "held that sexual orientation discrimination is not actionable under Title VII."

In a separate portion of the opinion, however, the Court reversed the District Court's decision to dismiss Ms. Evans' suit in its entirety. Specifically, the Court found that Ms. Evans should have a chance to flesh out her Title VII claim based on gender non-conformity. In doing so, the Court held that "that discrimination based on gender non-conformity is actionable [under Title VII]."

Hively v. Ivy Tech Cmty. Coll. of Indiana

Kimberly Ivey, a lesbian, was a part time adjunct professor with Ivey Tech Community College of Indiana (the College). During her time as an adjunct professor, Ms. Ivey unsuccessfully applied for multiple openings for a full time professor. Eventually, her part time contract was terminated. Ms. Ivey then filed suit against the College claiming that the College discriminated against her because of her sexual orientation in violation of Title VII by denying her job opportunities and terminating her employment. The District Court dismissed her complaint.

The Court of Appeals reversed the District Court's decision and held "that discrimination on the basis of sexual orientation is a form of sex discrimination." In doing so, the Court found that "[i]f we were to change the sex of one partner in a lesbian relationship, the [workplace] outcome would be different" and that "[t]his reveals that the discrimination rests on distinctions drawn according to sex."

Key Takeaways

The Seventh Circuit Court of Appeals decision to extend Title VII's prohibition against sex discrimination to include discrimination based on sexual orientation could have serious ramifications. Specifically, now that the Courts of Appeals differ in their approach to sexual orientation, the Supreme Court could soon choose to take up the issue and determine if Title VII covers sexual orientation discrimination. Until then, employers should be aware that:

- In most circuits, including the Eleventh Circuit, Title VII's prohibition against sex discrimination **does not cover** sexual orientation discrimination.
- In most circuits, including the Eleventh Circuit, Title VII's prohibition against sex discrimination **does cover** gender non-conformity discrimination.
- In the Seventh Circuit, which covers Indiana, Illinois, and Wisconsin, Title VII's prohibition against sex discrimination **covers both** sexual orientation discrimination and gender non-conformity discrimination.

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