Federal Court Rulings Growing in Favor of LGBT+ Employees

Skadden

04 / 25 / 18

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

David E. Schwartz
Partner / New York
212.735.2473
david.schwartz@skadden.com

Risa M. Salins
Counsel / New York
212.735.3646
risa.salins@skadden.com

Clara Kang Wee
Associate / New York
212.735.2638
clara.kang@skadden.com

Four Times Square
New York, NY 10036
212.735.3000

skadden.com

As members of the lesbian, gay, bisexual and transgender community (LGBT+) are increasingly open at work about their identities, circuit courts are recognizing that Title VII of the Civil Rights Act protects them from discrimination. Currently, approximately 20 states and the District of Columbia prohibit discrimination based on gender identity and sexual orientation. While Title VII does not explicitly protect LGBT+ individuals, the Equal Employment Opportunity Commission (EEOC) — the agency charged with enforcing federal employment discrimination laws — has ruled that Title VII's prohibition on employment discrimination "because of sex" encompasses discrimination based on gender identity and sexual orientation.

The question of whether sexual orientation and gender identity discrimination is prohibited under Title VII is a relatively new area of jurisprudence among circuit courts, which are not bound by the EEOC's decisions. Last year the U.S. Court of Appeals for the Eleventh Circuit ruled in *Evans v. Ga. Reg'l Hosp*. that discrimination based on sexual orientation does not violate Title VII, while the U.S. Court of Appeals for the Seventh Circuit pronounced just the opposite in *Hively v. Ivy Tech Cmty. Coll. of Ind.* The Second and Sixth circuits weighed in recently, potentially teeing up the question for the U.S. Supreme Court to resolve.

In February 2018, the U.S. Court of Appeals for the Second Circuit in *Zarda v. Altitude Express*, *en banc*, extended Title VII's prohibition of employment discrimination "because of sex" to discrimination based on sexual orientation. It held that a skydiving instructor who claimed he was fired from his job for failing to conform, as a gay man, to certain male gender stereotypes had a viable claim under Title VII. The Second Circuit embraced the Seventh Circuit's decision in *Hively* and held that sexual orientation discrimination, while not explicitly addressed in Title VII, is prohibited under the statute as a subset of its prohibition of sex discrimination.

First, the court found discrimination on the basis of sexual orientation is necessarily motivated, at least in part, by a person's sex. Second, the court reasoned that sexual orientation discrimination is predicated upon gender stereotypes of how men and women should behave. It relied on U.S. Supreme Court precedent in the 1989 case *Price Waterhouse v. Hopkins*, holding that adverse employment actions stemming from gender stereotypes constitute impermissible sex discrimination under Title VII because they are based on "stereotyped impressions about the characteristics of males or females" — such as appearance or behavior — that are a function of sex and thus can be used as proxies for sex. Finally, the *Zarda* court looked to its 2008 ruling in *Holcomb v. Iona College*, that an employer violates Title VII if it takes action against an employee because of the employee's association or relationship with a person of another race, and held that such prohibition on associational discrimination applies with equal force to all classes protected by Title VII, including sex.

In March 2018, the U.S. Court of Appeals for the Sixth Circuit in *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc*., went a step further and held not only that Title VII's proscription of discrimination on the basis of sex encompasses a prohibition on discrimination based on transgender status but also that the Religious Freedom Restoration Act (RFRA) has minimal impact on the EEOC's authority to enforce the anti-discrimination laws under Title VII. In this case, a funeral director alleged a religious owner of a funeral home violated Title VII by terminating her employment after she conveyed her intent to transition from male to female and to represent herself accordingly at work. The Sixth Circuit held that Title VII protects transgender persons, because discrimination based on sex "inherently includes discrimination against employees because of a change in their

sex." It also found that discrimination against transgender persons necessarily implicates Title VII's proscriptions against sex stereotyping because transgender or transitioning status "constitutes an inherently gender non-conforming trait."

In its defense, the funeral home and certain *amici* argued that even if transgender discrimination is actionable under Title VII, the funeral home should not be required to comply with the statute's requirements because (i) it qualifies for the ministerial exception to Title VII, and (ii) application of Title VII in this case would impose an unjustified substantial burden on the funeral home's sincerely held religious beliefs in violation of the RFRA. The court rejected both arguments. First, the Sixth Circuit found, notwithstanding the funeral home owner's religious beliefs, neither the funeral home nor the funeral director position there embodied sufficiently "clear or obvious religious characteristics" to qualify for the ministerial exception. Second, the court found the employer had failed to show that complying with Title VII would substantially burden its owner's religious exercise, and even assuming it had made such a showing, the EEOC had successfully shown that enforcing Title VII was the least restrictive means of furthering the government's compelling interest in eradicating workplace discrimination, including against transgendered persons.

The *Zarda* and *Harris* cases may signal the direction in which federal law regarding LGBT+ protections is headed, and either one of these cases may come before the U.S. Supreme Court. In light of the current uncertainty regarding the ultimate interpretation of Title VII as it applies to LGBT+ individuals, employers should regularly review their policies to ensure that adequate protections are provided to employees on the basis of their LGBT+ status. To the extent not already done, employers should consider including sexual orientation, gender identity and gender expression (among other protected categories) in nondiscrimination and nonharassment policies and also providing for specific reporting procedures and prohibitions against retaliation for reporting such complaints.

In addition, employers are advised to (i) allow a transgender individual to wear the clothing associated with the gender with which the individual identifies, (ii) allow a transgender individual to use the restroom appropriate for the gender with which the individual identifies, and (iii) use a transgender employee's correct name and pronoun, as refusal to allow each of these was identified by the EEOC as discriminatory in its 2012 *Macy v. Holder* decision. Incorporating training on LGBT+ issues into existing equal employment opportunity training programs also is good practice.