

# LGBT employee rights in transition as courts weigh in on bias

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An estimated 9 million adults in the United States are lesbian, gay, bisexual or transgender. Eighty-seven percent of U.S. residents report knowing someone who is lesbian or gay, and half report having a close lesbian or gay friend.

In 2015, the U.S. Supreme Court declared the fundamental right to marry is guaranteed to same-sex couples under the 14th Amendment in *Obergefell v. Hodges*. Twenty-four states and the District of Columbia explicitly cover sexual orientation in their anti-discrimination laws, as do numerous cities and counties across the country.

While the U.S. Department of Justice, reversing the Obama administration, has taken the position that Title VII does not prohibit sexual orientation and gender identity discrimination, other federal agencies have not followed suit. Ensuring anti-discrimination protection under Title VII of the Civil Rights Act of 1964 for lesbian, bisexual, gay and transgender employees remains a strategic priority for the EEOC.

Guidance documents from the EEOC and the Occupational Safety and Health Administration state that transgender employees should be granted access to the bathroom facility that corresponds with their gender identity or expression.

Many employers prohibit discrimination against LGBT employees (and some against gender expression) even in the absence of clear legal requirements.

## Early rulings on LGBTQ bias

In its 1989 *Price Waterhouse v. Hopkins* decision, the U.S. Supreme Court held discrimination due to gender nonconformity/stereotyping is prohibited as gender discrimination under Title VII. However, the Supreme Court has not ruled on whether Title VII's prohibition on sex discrimination encompasses discrimination based on sexual orientation. There is currently a split among circuit courts on that issue.

The evolution of this area of law spans nearly 40 years. In 1979, the 5th Circuit became the first federal court of appeals to examine whether sexual orientation is covered under Title VII. In *Blum v. Gulf Oil Corp.*, the court declared that "discharge for homosexuality is not prohibited by Title VII."

Later that year, in *DeSantis v. Pacific Telephone and Telegraph Co., Inc.*, the 9th Circuit Court of Appeals also found that Title VII's sex discrimination provisions "were intended to place women on an equal footing with men" and could not be extended to cover sexual orientation.

In 1989, the 8th Circuit Court of Appeals followed suit in *Williamson v. A.G. Edwards & Sons*, finding that sexual orientation was not protected under Title VII.

## 2017: The tide turns

In March 2017, a split 11th Circuit Court of Appeals in *Evans v. Georgia Regional Hospital* declared that Title VII does not protect employees against sexual orientation discrimination. However, it did allow the plaintiff to re-plead her claim based on gender nonconformity. At the end of 2017, the Supreme Court turned down Evans' petition for review.

In April 2017, the 7th Circuit Court of Appeals in *Hively v. Ivy Tech Community College* became the first federal appellate court to find that sexual orientation is encompassed in Title VII's definition of sex. It held discrimination based on sexual orientation is prohibited by Title VII.

In February 2018, the 2nd Circuit Court of Appeals issued its holding in *Zarda v. Altitude Express, Inc.* In an en banc opinion, citing *Hively*, the appeals court ruled 10-3 that "because sexual orientation is a function of sex and sex is a protected characteristic under Title VII, it follows that sexual orientation is also protected." Each state in the 2nd Circuit—Connecticut, New York and Vermont—explicitly protects sexual orientation under state anti-discrimination laws. However, *Zarda* gave employees a way to get their case to federal court. The defendant has petitioned the Supreme Court for review.

## Upcoming cases

The 8th Circuit will revisit its earlier *Williamson* decision when it hears *Horton v. Midwest Geriatric Management LLC*. In *Horton*, the plaintiff was offered the position of vice president of sales and marketing. A few days after he disclosed that he had a male partner, Midwest Geriatric allegedly rescinded the job offer.

The Missouri district judge dismissed Horton's claims. Citing its 1989 binding decision in *Williamson*, lower court decisions and congressional rejection of proposed amendments to Title VII to prohibit discrimination on the basis of sexual orientation, the court found sexual orientation was not covered under Title VII's prohibition against discrimination on the basis of sex.

Undeterred by *Williamson*, Horton appealed the ruling to the 8th Circuit.

Attorneys general from 15 states, the EEOC, various LGBTQ rights groups and 47 businesses have joined amicus briefs in support of Horton. Various states and entities also filed amicus briefs in support of Midwest Geriatric. Briefing was completed by the parties in July 2018. Oral argument is expected later this term.

We can expect cases on this issue to continue into 2019—and until the Supreme Court provides guidance to the circuit court.

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