

Sexual Orientation Bias Destined For High Court, If Not Capitol

By **Matthew Bultman**

Law360, New York (August 2, 2016, 9:28 PM ET) -- The Seventh Circuit has ruled that Title VII's protections don't extend to sexual orientation, but the court's apparent displeasure in upholding precedent and the shifting public opinion toward gay rights makes clear the issue is destined for Congress or the U.S. Supreme Court.

In a **unanimous decision** Thursday, the appeals court upheld the dismissal of a lawsuit brought by Kimberly Hively, a part-time adjunct professor who claimed she was blocked from a full-time position at an Indiana college because of her sexual orientation.

Emphasizing that legal precedent demanded its decision, the court dedicated much of its 42-page decision to noted oddities in the law, acknowledging "a paradoxical legal landscape in which a person can be married on Saturday and then fired on Monday for just that act."

"The court was so clearly conflicted," said Amy Epstein Gluck, an attorney with FisherBroyles LLP. "They seemed so reluctant to make the ruling they did saying that sexual orientation discrimination is not prohibited by Title VII. They seemed so reluctant, they're almost begging Congress to pass the Equality Act or for the Supreme Court of the United States to rule definitively on the issue."

The case highlighted a gap in federal civil rights law, which protects against discrimination on the basis of race, color, religion, sex and national origin. The law does not explicitly cover sexual orientation.

And it comes amid sharp gains in public approval for same-sex marriage and broad support for banning discrimination against lesbian and gay workers. Legal efforts for same-sex marriage culminated last summer with the Supreme Court's decision in *Obergefell v. Hodges*. About a month later, the U.S. Equal Employment Opportunity Commission said firing someone because they are gay or lesbian was sex discrimination.

Until the Seventh Circuit's decision on Thursday, no federal appeals court had decided the issue of whether Title VII's employment protections extended to discrimination on the basis of sexual orientation in the wake of those decisions.

"Perhaps the writing is on the wall" for a change, U.S. Circuit Judge Ilana Rovner wrote for the court. "Until that writing comes in the form of a Supreme Court opinion or new legislation, we must adhere to the writing of our prior precedent."

At least two other circuit courts are currently considering the issue, including the Second Circuit, which is weighing whether to revive a lawsuit that advertising executive Matthew Christiansen filed against DDB Worldwide Communications Group Inc.

The EEOC, for its part, **has held** sexual orientation was "inherently a sex-based consideration." It concluded in an administrative ruling last July that an allegation of discrimination based on sexual orientation was an allegation of sex discrimination under Title VII.

Sam Schwartz-Fenwick, a partner at Seyfarth Shaw LLP, said the Seventh Circuit seemed to accept the EEOC's framing of the issue. But ultimately, the court appeared hamstrung by its precedent.

"I thought it was a very interestingly formulated opinion," Schwartz-Fenwick said. "It seems to me to really be asking for another level of review. That seemed to be what the court was signaling in this decision — that it either wanted an en banc review by the Seventh Circuit or to encourage the plaintiffs to file a petition for cert with the Supreme Court."

Felicia Medina, the managing partner of Sanford Heisler LLP's office in San Francisco, said it appeared the court was trying to grapple with various inconsistencies in an uncertain area of the law. She said the judges' ultimate conclusion wasn't entirely surprising. The doctrine of precedent — known as *stare decisis* — is a basic principle in the legal system.

That being said, it “is surprising that the court, with the arsenal of authority, still felt that its hands were tied,” Medina said.

For the majority of employers, the decision is not likely to have a significant impact, according to Steven W. Suflas, the managing partner of Ballard Spahr LLP’s Denver office. More than half of states, as well as the District of Columbia and numerous cities, have already banned discrimination based on sexual orientation. And many businesses have expanded their discrimination policies to cover sexual orientation, he said.

The more practical effect is that the Seventh Circuit has provided a guide to plaintiffs on how to plead their case in one of those jurisdictions where there is no state law to protect against sexual orientation discrimination, Suflas added.

“It’s a road map for plaintiffs to say, ‘Do not plead your case as sexual orientation discrimination,’” he said. “Plead your case as a gender stereotype. And if you do that, you now are in a loophole to the statute big enough to drive a truck through.”

Still, in the wake of the ruling, LGBT advocates called for Congress to pass the Equality Act, legislation that would amend the Civil Rights Act to explicitly include sexual orientation and gender identity among the prohibited categories of discrimination.

Some attorneys expressed optimism that legislation might be passed. But Schwartz-Fenwick noted that bills expressly calling for federal protection based on claims of sexual orientation discrimination have been brought up in Congress since the 1970s.

To date, none have made it to law.

“I think that given the growing litigation in this area, if Congress doesn’t act soon, this is definitely going to be in a position where the Supreme Court may have no choice but to address it,” Schwartz-Fenwick said.

Gluck said she wouldn’t be surprised if high court intervention came in the next year or so.

“We’re looking at a national issue, and ... especially with the district courts ruling every which way and

the EEOC decision providing a good precedent and all the amicus briefs filed, I think a Supreme Court decision can't be far off," she said.

In the meantime, don't expect the EEOC to backpedal on its position regarding sexual orientation and Title VII.

In March, the agency filed its first lawsuits accusing private employers of gender bias for sexual orientation discrimination. And it has urged the Second Circuit in its case to revise its "outdated" precedent and expand its interpretation of Title VII.

"They've made the litigation of sexual orientation claims one of the hallmarks of what they intend to push and what they continue to push," Schwartz-Fenwick said. "They're very committed to this."

The case is Kimberly Hively v. Ivy Tech Community College, case number 15-1720, in the U.S. Court of Appeals for the Seventh Circuit.

--Editing by Mark Lebetkin and Christine Chun.

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