The Seventh Circuit's Recent Ruling on Sexual-Orientation Discrimination: What School Districts Need to Know

On April 4, 2017, the United States Court of Appeals for the Seventh Circuit became the first federal appellate court in the country to hold that Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees and job applicants based on their sexual orientation. The effects of this much-anticipated decision are likely to be felt nationwide.

The Seventh Circuit Breaks New Ground

Prior to last week's Seventh Circuit ruling, every federal court of appeals to address the issue had concluded that Title VII's prohibition on "sex" discrimination does not extend to discrimination based on a person's sexual orientation. In *Hively v. Ivy Tech Community College of Indiana*, No. 15-1720 (7th Cir. Apr. 4, 2017), the full Seventh Circuit broke with its sister circuits, ruling 8-3 that sexual- orientation discrimination is indeed a form of sex discrimination under Title VII.

The Seventh Circuit relied on prior Supreme Court precedents interpreting Title VII to prohibit discrimination based on an individual's nonconformity to gender stereotypes and same-sex harassment, as well as on the constitutional right to same-sex marriage. The Seventh Circuit reasoned that discrimination based on sexual orientation is indistinguishable from discrimination based on gender nonconformity, and that it would be "paradoxical" to hold that a person who has a constitutional right to enter into a same-sex marriage can be fired from a job for doing so.

The Seventh Circuit also held that Title VII prohibits "associational" discrimination based on the sex (or race, color, religion, or national origin) of a person with whom the individual associates. *Hively* allowed a part-time community college instructor to proceed with her Title VII claim that her former employer denied her a full-time post and ultimately let her go because she was openly lesbian, because the essence of her claim was that she would not have suffered those adverse employment actions had she been a woman in a relationship with a man.

The Decision's Impact

Hively applies only in the three States comprising the Seventh Circuit (Illinois, Indiana, and Wisconsin), but other courts of appeals may soon be revisiting the question of Title VII's reach. The full Eleventh Circuit (which includes Alabama, Florida, and Georgia) is currently being asked to reconsider the recent rejection of a Title VII sexual-orientation discrimination claim by a panel of that court in *Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (Mar. 10, 2017), *pet'n for reh'g en banc filed* (11th Cir. Mar. 31, 2017). A panel of the Second Circuit (Connecticut, New York, Vermont) likewise recently rejected a Title VII sexual-orientation discrimination claim in *Anonymous v. Omnicom Group, Inc.*, No. 16-748 (Mar. 27, 2017), although the panel allowed the employee to proceed on a claim of discrimination based on gender nonconformity. A petition for full court reconsideration of that case is expected by the end of this month.

If the current circuit split that *Hively* created persists, and Congress does not act to amend the statute, the Supreme Court may ultimately step in to resolve the question whether Title VII's proscription of sex discrimination includes sexual-orientation discrimination.

Takeaways for School Districts

Given the current unsettled state of the law, employers across the country, including school districts, need to have strong policies and procedures in place to prevent and redress sexual-orientation discrimination. The Equal Employment Opportunity Commission (EEOC) already interprets Title VII to cover sexual-orientation discrimination and vigorously pursues enforcement actions when it finds evidence of such discrimination. In addition, nearly half of the States, the District of Columbia, and many local jurisdictions have laws expressly proscribing sexual-orientation discrimination in employment.

Accordingly, school districts should ensure that their written policies include an explicit prohibition of sexual-orientation discrimination. Employees should receive regular training on the meaning of sexual-orientation discrimination and harassment, which can include, for example, refusing to hire or firing a person because of his or her sexual orientation; making disparaging remarks about gays or lesbians; using derogatory names or gestures; or denying benefits to same-sex spouses that are available to opposite-sex spouses. School districts should also have clear complaint procedures in place for addressing concerns about sexual-orientation discrimination in the workplace.

The authors of this memorandum are available to answer any questions and to assist you with developing anti-discrimination policies and procedures consistent with the laws applicable to your district.

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