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SEXUAL ORIENTATION DISCRIMINATION:

WHERE WILL THE ELEVENTH CIRCUIT DRAW THE LINE?

The United States Court of Appeals for the Eleventh Circuit has scheduled oral arguments in *Evans v. Georgia Regional Hospital*,¹ for December 15, 2016. In a case of first impression, the Eleventh Circuit is being asked by the plaintiff—and the Equal Employment Opportunity Commission (EEOC) appearing amicus curiae—to find that Title VII’s prohibition on sex discrimination extends to discrimination based on sexual orientation.²

Plaintiff Jameka Evans sued her former employer and supervisors claiming she was targeted for termination on the basis of her sexual orientation and for failure to conform to gender-based stereotypes held by her co-workers. Acting on a magistrate judge’s report and recommendation, which found that sexual orientation was not a protected class under Title VII, the district court dismissed the case, leading to appellate review.

In its own proceedings and in settlements it has obtained, the EEOC has been successful in pressing the case that Title VII can be read broadly to encompass sexual orientation discrimination.³ It has been less successful, however, in convincing district courts and appellate courts to adopt such a position. Most recently, in a 42-page opinion in *Hively v. Ivy Tech Community College*,⁴ the Seventh Circuit became the latest court to reject the EEOC’s position. Although the *Hively* opinion acknowledged that sexual orientation discrimination had become more socially unacceptable and offered strong support for the position that the time had come to expand Title VII’s protection to prohibit such discrimination, the court ultimately found that a change would require congressional action or a decision by the U.S. Supreme Court. On October 11, 2016, the Seventh Circuit granted en banc review of the *Hively* decision originally issued on July 28, 2016.

It remains to be seen what position the Eleventh Circuit panel will take with respect to Ms. Evans’ claims. It does seem, however, that regardless of how the Eleventh Circuit addresses the issue, this will not be the last time that the courts will be asked to consider claims for sexual orientation discrimination.

~ Aaron W. Tandy, Pathman Lewis, LLP

Endnotes

1 11th Cir. No. 15-15234.

2 Another case raising similar issues, *Burrows v. The Coll. of Cent. Fla.*, 11th Cir. No. 15-14554, was dismissed with prejudice by the plaintiff in April of this year.

3 See, e.g., *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641 (July 16, 2015).

4 830 F.3d 698 (7th Cir. 2016).

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