THE INDIANA LAWYER.com

Bankovich and Pauli: Ruling on sexual orientation leaves landscape unsettled

March 21, 2018

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A recent Second Circuit case adds to Title VII's interpretation of protected classes and holds that discrimination based on sexual orientation is prohibited by federal law. In *Zarda v. Altitude Express, Inc*., No. 15-3775, 2018 WL 1040820 (2d Cir. Feb. 26, 2018), the Second Circuit, which includes Connecticut, New York and Vermont, joined the Seventh Circuit in prohibiting discrimination based on sexual orientation. In *Zarda*, the plaintiff was a skydiving instructor who alleged he was fired after a customer complained about his sexual orientation. The Second Circuit reasoned that sexual orientation is a protected class and should be treated as a subset of sex discrimination. While the Second Circuit's decision relieves plaintiffs from fitting their sexual orientation claims into the "sex stereotyping" theory of discrimination, the court explains that sexual orientation discrimination is based on gender assumptions and stereotypes.

The Second Circuit's opinion comes after a March 2017 decision by the Eleventh Circuit and a ruling by the Seventh Circuit in April 2017. In *Evans v. Georgia Regional Hospital*, 850 F.3d 1249 (11th Cir. 2017), the Eleventh Circuit held that Title VII does not protect sexual orientation, but there is a claim for gender non-conformity, which is sex-based discrimination. Counter to the Eleventh Circuit decision and one month later, the Seventh Circuit, which includes Indiana, Illinois and Wisconsin, held that sexual orientation is a protected class under Title VII. *Hively v. Ivy Tech Community of College of Indiana*, 853 F.3d 339 (7th Cir. 2017).

The Equal Employment Opportunity Commission ("EEOC") has attempted to provide guidance in this uncertain landscape. While the words "sexual orientation" and "gender identity" are not found within the text of Title VII, the EEOC interprets and enforces Title VII's prohibition of sex discrimination as forbidding employment discrimination based on gender identity or sexual orientation. The EEOC has found the following actions unlawful: failing to hire someone because of his or her transgender status; harassing an employee because of a gender transition; and denying an employee equal access to a common restroom corresponding to the employee's gender identity.

The EEOC has had success in enforcing its interpretation. Very recently, the Sixth Circuit revived a discrimination lawsuit involving a transgender person who announced her transition to her employer and was fired shortly thereafter. *EEOC v. R.G. & G.R. Harris Funeral Homes Inc*., No. 16-2424, 2018 WL 1177669 (6th Cir. Mar. 7, 2018). The Sixth Circuit held that discrimination based on transgender and transitioning status violates Title VII and the employer was not protected by the Religious Freedom Restoration Act. This decision signals that courts are likelier to find discrimination based on transgender status, regardless of an employer's religious beliefs.

Consistent with the EEOC's guidance, the U.S. Department of Education ("ED") has issued direction to schools stating that federal law requires schools to allow students to use restrooms and locker rooms "consistent with their gender identity." This guidance will likely be tested in a recently filed case against the Evansville School Corporation. An Indiana student, who identifies as male, alleges that the school refused to allow him to use the men's restroom as he requested and instructed him to use a private restroom that was far from his classes and frequently locked. As a result, the student was forced to use the women's restroom.

While the EEOC and ED guidelines align, not all government agencies agree on the issue of whether sexual orientation and gender identity are protected under federal law. The Department of Justice ("DOJ") is completely at odds with both the EEOC and the ED. According to the DOJ, legislation since 1974 has not included sexual orientation under Title VII, despite what it called "notable changes in societal and cultural attitudes."

While it is clear agencies and courts are inconsistent, the status of what is protected is certainly evolving and unsettled. This creates uncertainty for employers and lawyers who advise in this area of law. With two federal circuits holding that sexual orientation is a protected class and one explicitly holding otherwise, it is likely only a matter of time before the Supreme Court of the United States weighs in on the issue.

With the unpredictability of government agencies and courts, employers should be proactive to avoid issues related to discrimination and be aware state and local laws can be broader than federal law. For example, Marion and Monroe counties prohibit discrimination based on gender identity and sexual orientation. Therefore, employers in Indiana should update handbooks to reflect the protected category of sexual orientation and possibly gender identity.

When defining unacceptable employee conduct in handbooks, employers should note that it does not need to rise to the level of "illegality." Rather, employers are better served to have a clear policy that ensures a workplace free of any conduct that is potentially harassing or discriminatory based upon legally protected classes and classes the employer chooses to identify beyond those protected by law. A policy that guards categories that are on the "fringe" of becoming protected could have a positive cultural impact for employers in hiring, retention, and public relations. We find that employers with this type of approach are likelier to have happier employees, fewer lawsuits, and a fatter bottom line. And, isn't that what all employers want?•

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