Is There a Change in the Wind for LGBTQ Law?

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Unlike many of us, the courts were not on vacation during the month of August in the area of LGBTQ law. We have seen a number of rulings which seem to signal that the courts are trying to "slow down" the EEOC and other federal agencies as they pursue their stated goal of advancing the rights of LGBTQ employees in the workplace. These decisions also should send a message to Congress and the Supreme Court that it is time for one or both of these bodies to act and clarify the obligations of an employer to gay, lesbian and transgender employees.

We reported on the Seventh Circuit's ruling in *Hively v. Ivy Tech,* where the Court (reluctantly) held that Title VII did not cover discrimination on the basis of sexual orientation. In so doing, the Court was openly conflicting with the EEOC on this important issue and signaled that either Congress or the Supreme Court needed to address this question. The EEOC on August 30 asked the full 7th Circuit to reconsider that ruling. *Hively v. Ivy Tech Community College*, No. 15-1720 (7th Cir. July 28, 2016)

We have also reported on the progress of the 4th Circuit case of *Gloucester County School Board v. G.G.*, which was just accepted by the Supreme Court for consideration next term. The issue in that case is where a local school board must, as ordered by the Department of Education, allow a transgender female (who is still biologically a male) to use the female bathrooms and locker rooms in the high school. Noting the thorny issue this presents for the school, SCOTUS not only took the case, but issued an order staying the 4th Circuit's decision so the school did not have to change its locker room policies when school started in September. The locker room remains in limbo until the high court speaks.

However, the Supreme Court rules, it will be a pivotal decision which has the potential to create a whole new protected class.

The Harris Decision

Now, in the latest twist in the law, the district judge in *EEOC v. RG & GR Harris*, another case we have been following, has ruled against the EEOC and a transgender employee in her fight with her employer over her demand to be allowed to wear female clothing at work. The district court refused to dismiss the case in 2015. However, in a bit of an about-face, in late August the court denied the EEOC's motion for summary judgment, and ruled that the Christian-owned funeral home had the right under the Religious Freedom Restoration Act to refuse the employee's demand, to come to work in a skirt while transitioning.

The judge found that the EEOC's strict demand that the employer 'must' allow plaintiff to wear female clothing actually was not 'gender neutral,' as the EEOC was in effect demanding that the employee be allowed to dress like a female. The judge faulted the EEOC for not considering other ways to accommodate the employee while also accommodating the owner's religious beliefs.

“If the compelling governmental interest is truly in removing or eliminating gender stereotypes in the workplace in terms of clothing (i.e., making gender ‘irrelevant’), the EEOC’s chosen manner of enforcement in this action does not accomplish that goal,’ Judge Cox said. “This court finds that the EEOC has not met its demanding burden. As a result, the funeral home is entitled to a RFRA exemption from Title VII, and the body of sex-stereotyping case law that has developed under it, under the facts and circumstances of this unique case.”

The judge was also critical of the EEOC’s rigid approach to the issue: “The EEOC’s briefs do not contain any indication that the EEOC has explored the possibility of any accommodations or less restrictive means that might work under these facts,” Judge Cox said. “Perhaps that is because it has been proceeding as if gender identity or transgender status are protected classes under Title VII, taking the approach that the only acceptable solution would be for the funeral home to allow Stephens to wear a skirt-suit at work, in order to express Stephens’s female gender identity.”

“If the compelling interest is truly in eliminating gender stereotypes, the court fails to see why the EEOC couldn’t propose a gender-neutral dress code as a reasonable accommodation that would be a less restrictive means of furthering that goal under the facts presented here,” Judge Cox said. “But the EEOC has not even discussed such an option, maintaining that Stephens must be allowed to wear a skirt-suit in order to express Stephens’s gender identity.”

This was one of the first cases which the EEOC had brought to court to enforce its views of the rights of transgender workers. Thus, the agency likely views this as a significant loss.

Other Developments

On the heels of the *Harris* decision, a federal judge in Texas held that the federal government had violated the Administrative Procedure Act when it issued guidance stating that “sex included gender identity.” In so doing, District Judge O’Connor found that it was wrong for the DOE to issue these guidelines – effectively compelling schools to offer transgender students access to the locker room of their chosen gender – without allowing for a period of public commentary on the guidelines. **The judge enjoined the guidelines**. *Texas et. al. v. U.S.*

Also in August, signaling that it has not changed its views, the EEOC sued Dignity Health (a hospital) alleging that it had violated Title VII by refusing to pay for gender reassignment surgery. The EEOC argued that the employee is trying to “conform his body to his gender identity.” He wanted a double mastectomy and penis construction. This will also be a case to watch, as the issue of whatever such surgery is “medically necessary” or merely “cosmetic” will surely be debated. Many polices and FMLA do not provide coverage for cosmetic surgery.

We will be watching all of these cases closely, as this ever evolving area of the law continues to develop.