

Defining discrimination

Federal law and LGBTQ+ employee workplace discrimination protections

Many states have discrimination laws that provide protections against discrimination on the basis of sexual orientation. For example, New Jersey's Law Against Discrimination (LAD) specifically prohibits it and, although the Pennsylvania Human Relations Act does not set forth specific protections against discrimination for LGBTQ+ employees and individuals, the Pennsylvania Human Relations Commission (PHRC) has issued guidance that takes the position that it will accept and investigate sex stereotyping claims filed by LGBTQ+ individuals.

Title VII, however, only prohibits employment discrimination on the basis of race, color, religion, sex and national origin. As a result, there is no federal law that expressly prohibits employment discrimination against LGBTQ+ individuals. Nevertheless, certain federal courts have been interpreting Title VII to prohibit employment discrimination on the basis of sexual orientation or transgender status.

Smart Business spoke with Frank P. Spada Jr., an attorney with Semanoff Ormsby Greenberg & Torchia, LLC, about how courts are interpreting employment discrimination for LGBTQ+ individuals.

What are the courts using as a basis to determine what constitutes discrimination?

A 7th Circuit decision, *Hively v. Ivy Tech Community College of Indiana*, along with recent decisions in the 2nd and 6th Circuit Courts, extended protection from employment discrimination based on sexual orientation. The 2nd Circuit

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decision in *Zarda v. Altitude Express* held that sexual orientation discrimination is motivated, at least in part, by sex and should be considered discrimination for the purposes of interpreting Title VII. The Court reasoned that an individual's sexual orientation cannot be defined without identifying that individual's sex and therefore 'sexual orientation is a function of sex.'

In March 2018, the 6th Circuit issued a decision in *EEOC v. R.G. & G.R. Harris Funeral Homes*, which involved a worker that claimed her former employer terminated her employment because she was transgendered and, at that time, undergoing gender transition. The 6th Circuit held that because the defendant's decision to fire the worker was based on sex stereotyping and gender discrimination that it would be 'analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex.'

In which cases has Title VII protection fallen short in the eyes of the courts?

In March 2017 the 11th Circuit, in *Evans v. Georgia Regional Hospital*, declined to extend Title VII protection to the claims of a lesbian employee who

alleged she was terminated based on her sexual orientation. The Court held that a claim under Title VII alleging sexual orientation is not cognizable.

The U.S. Supreme Court denied an invitation to hear an appeal of the *Evans* case, but in May 2018, the 11th Circuit affirmed a lower court's dismissal of a gay plaintiff's claim of sexual orientation discrimination in *Bostock v. Clayton County, Georgia*. Bostock has again filed a petition with the Supreme Court for a writ of certiorari to decide the issue. The Supreme Court may now be forced to take up this issue to resolve the conflict.

What do these decisions mean for employers in Pennsylvania?

At present, the 3rd Circuit, which covers Pennsylvania, New Jersey, Delaware and the Virgin Islands, has not extended Title VII protections to LGBTQ+ individuals for workplace discrimination. But it is important for employers to understand that they must still comply with state law. Also, New Jersey's LAD specifically protects employees against sexual orientation or gender identity discrimination and the PHRC has stated that it will accept and investigate sex stereotype claims filed by LGBTQ+ individuals under the Pennsylvania Human Relations Act. ●