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The Future Of LGBT Protections: Will High Court Weigh In?

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In late October, The New York Times reported that the U.S. Department of Health and Human Services is seeking to narrow the definition of "sex" with the agencies that enforce Title IX's proscription against discrimination in any education program or activity receiving federal funds. This article explores how new rules would affect the interpretation of "sex" under both Title VII and Title IX and how the U.S. Supreme Court's decisions on three pending petitions for certiorari will affect the administration's push to exclude sexual orientation and transgender status as a subset of unlawful "sex" discrimination.

The Trump administration's intention to narrow the definition of "sex" under Title IX is on the heels of the previous administration's more relaxed interpretation. Two agencies, the U.S. Departments of Education and Health and Human Services, reportedly are in the final stages of drafting proposed new rules limiting sex discrimination prohibitions. These regulations would write out the possibility of protection for sexual orientation and transgender status and limit "sex" to the "biological, immutable condition determined by genitalia at birth," according to the New York Times.

The administration's move is in part a reaction to three federal courts of appeal determinations that transgender status and sexual orientation are protected civil right classifications, a subset of "sex" discrimination, in Title VII cases. All three cases, which conflict with rulings in other circuits, are before the Supreme Court on petitions for certiorari.

In the Sixth Circuit, *U.S. Equal Employment Opportunity Commission v. R.G. &. G.R. Harris Funeral Homes Inc.*, a funeral director alleged she was fired after transitioning from male to female and refusing to comply with the male dress code. She opted to comply with the female dress code, consistent with the female life she lived. The funeral home did not dispute the reason for the termination, but defended that transgender status is not protected under Title VII "because of sex."

Employers cannot apply their personal stereotypical notions of how sexual organs and gender

identity should align, according to the Sixth Circuit. It is "impossible" to fire an employee based on transgender status without being motivated, "at least in part," by the employee's sex. As such, the court of appeal concluded the funeral director's termination was impermissible sex stereotyping based on her gender nonconforming behavior.

Aside from the sex stereotyping, the Sixth Circuit also held the funeral director was fired "because of sex." The inquiry, according to the court, is whether the funeral director would have been fired for complying with the women's dress code if she had been biologically female. The inquiry is rhetorical, however. "[T]he answer quite obviously is no." This alone confirmed "sex impermissibly affected" the decision to fire the employee, according to the court.

A similar rationale was used in the Second and Seventh Circuits to hold sexual orientation discrimination is prohibited under Title VII. In *Zarda v. Altitude Express Inc.*, a skydiving instructor alleged he was fired for telling a client he is gay. The Second Circuit determined sexual orientation discrimination is motivated, at least in part, by sex and is a subset of sex discrimination for purposes of Title VII. And, in the Seventh Circuit, *Hively v. Ivy Tech Community College*, an adjunct professor brought an action against a community college, alleging she had been denied full-time employment and promotions based on sexual orientation in violation of Title VII. The court determined that treating employees differently because of a nonbiological attribute, for example dressing or speaking "differently," is sex discrimination.

If the Supreme Court reviews the Second, Sixth and Seventh Circuit decisions and determines transgender status and sexual orientation are protected "because of sex" under Title VII, contrary to holdings of other circuit courts of appeals, this will affect not just all employers subject to Title VII, but also employers subject to Title IX — where prohibitions against sex discrimination apply beyond students in schools to employment at covered schools.

Title IX is patterned after Title VII. Therefore, Title VII is often used to interpret what constitutes Title IX discrimination on the basis of "sex," including sexual harassment, pregnancy, marital or parental status, and dress codes. A ruling in favor of employee protections under Title VII, will likely prompt LGBTQ protections against unlawful "sex" discrimination in Title IX matters too.

The administration's efforts to foreclose LGBTQ protections through regulations will then be mostly meaningless. The Supreme Court will have ruled that LGBTQ protections are a subset of Title VII and by extension a subset of Title IX. Courts will not enforce regulations enacted by the Departments of Education and Health and Human Services in direct contradiction of a Supreme Court decision.

The administration would likely have to pass legislation specifically excluding LGBTQ status from unlawful "sex" discrimination under Title VII and by appendage Title IX. Only that act of Congress would vitiate the Supreme Court's ruling. And legislation curtailing rights to the LGBTQ community

will likely result in constitutional challenges to any such law (which is beyond the scope of this article).

If the court denies certiorari review of the Second, Sixth and Seventh Circuit decisions, the administration will likely continue its push to define "sex" narrowly in federal regulations despite three circuit decisions holding sexual orientation and/or transgender status are subsets of "sex" discrimination. A definition of "sex" that only includes one's "biological ... condition" would then, if implemented in the regulations, likely permeate case law and further reinforce the law in the circuits that have already held that sexual orientation and transgender status do not constitute unlawful "sex" discrimination.

That being said, employees protected under Title IX are usually also guarded by Title VII. If the court denies certiorari, and the Second, Sixth and Seventh circuit decisions stand, LGBTQ employees covered under both statutes will elect coverage under Title VII in those three circuits.

LGBTQ employees in the remaining circuits, where sexual orientation and transgender status have not been recognized as a subset of those protected against unlawful "sex" discrimination, will continue to be foreclosed from relief absent their circuits' recognition of them as falling within a protected class under Title VII.

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