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# High Court Won't Decide If Title VII Bars Anti-Gay Bias

By **Braden Campbell**

Law360, New York (December 11, 2017, 10:28 AM EST) -- The U.S. Supreme Court on Monday declined to review an Eleventh Circuit ruling affirming dismissal of a lesbian security guard's allegations that a Georgia hospital violated Title VII by effectively firing her over her sexuality, leaving in place a circuit split over whether federal law bars discrimination against gay workers.



The U.S. Supreme Court on Monday refused to hear a case that could resolve a circuit split over whether discrimination against gay workers is barred by federal law. (Law360)

The decision is a blow to gay workers and their advocates, who have lately worked — with some success — to challenge precedent that blocks gay workers from pursuing discrimination claims under the federal Civil Rights Act of 1964.

The Seventh Circuit earlier this year **broke with precedent** to find an Indiana professor could allege her employer discriminated against her because she is a lesbian, though every other circuit to consider the Civil Rights Act of 1964's reach has found it does not cover bias based on sexual orientation. The Second Circuit **held an en banc rehearing** in a gay skydiver's suit in September, but has not issued an opinion.

Lambda Legal's Gregory Nevins, who represents worker Jameka Evans **in her suit** against Georgia Regional Hospital, framed the denial as a temporary setback in a Monday call with Law360.

"There are fewer mantras in the law more established than 'a denial of cert doesn't mean anything on the merits,'" said Nevins, who directs the gay rights group's employment fairness project. "It means a lot to my client, it means a lot to how we're going to strategize going forward, but on the merits it means nothing."

Evans, then representing herself, sued Georgia Regional Hospital in Georgia federal court in April 2015 alleging the hospital violated Title VII by forcing her out of her job because she is a lesbian and because she dresses and acts out of line with feminine stereotypes.

An Eleventh Circuit majority in March affirmed the lower court's dismissal of her sexual orientation claim, relying on the Fifth Circuit's 1979 holding in *Blum v. Gulf Oil Corp.* that "discharge for homosexuality is not prohibited by Title VII." The Eleventh Circuit spun off from the Fifth Circuit in 1981.

But the court let Evans replead her claim that she was discriminated against for not conforming to gender norms, citing the Supreme Court's 1989 ruling in *Price Waterhouse v. Hopkins* that Title VII bars employers from discriminating against workers who don't fit sex stereotypes. Evans petitioned the Eleventh Circuit to rehear its precedent, but **was denied** in July, **later appealing** to the Supreme Court.

Evans argued in her petition for certiorari that Title VII's ban on "discrimination because of ... sex" includes sexual orientation, citing heavily to the Seventh Circuit's April decision in *Hively v. Ivy Tech Community College* setting aside its precedent. Writing for the en banc court's majority, Chief Circuit Judge Diane P. Wood in *Hively* called it "common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex."

Nevins said Monday he could only speculate why the Supreme Court denied Evans cert, suggesting the justices may let the circuits flesh out the issue further.

"We had high hopes we'd get better news this week," Nevins said. "It didn't work out, but we've always had our sleeves rolled up for a circuit-by-circuit slog, and we still do."

Joseph Greenwald & Laake PA employment practice chair Jay Holland said Monday that he believes it's a matter of when — not if — the justices take up the Title VII question, noting that plaintiff's attorneys and the U.S. Equal Employment Opportunity Commission treat the law as though it covers sexual orientation.

"It may well be that for reasons none of us could know, the court felt that the Eleventh Circuit case wasn't the right vehicle to decide the issue," Holland said. "I don't think that this is the end of the story as it relates to whether or not the Supreme Court will hear it."

A representative for the Georgia Department of Behavioral Health and Developmental Disabilities, which runs Georgia Regional Hospital, did not respond to a request for comment.

The hospital is represented by Annette M. Cowart, Bryan K. Webb, Courtney Poole, Christopher M. Carr, Sarah Hawkins Warren and Andrew Pinson of the Office of the Georgia Attorney General.

Evans is represented by Jeffrey L. Fisher and Pamela S. Karlan of the Stanford Law School Supreme Court Litigation Clinic and Jon W. Davidson, Gregory Nevins, Omar Gonzalez-Pagan, Susan L. Sommer and Karen L. Loewy of the Lambda Legal Defense and Education Fund.

The case is *Jameka Evans v. Georgia Regional Hospital, et al.*, case number 17-370, before the U.S. Supreme Court.

--Additional reporting by Diana Novak Jones and Adam Lidgett. Editing by Rebecca Flanagan.

*Update: This story has been updated with additional background and comment from attorneys.*

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