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4 Takeaways From 2nd Circ. Ruling Rejecting Anti-Gay Bias

By **Vin Gurrieri**

Law360 (February 27, 2018, 11:07 PM EST) -- By adopting the U.S. Equal Employment Opportunity Commission's stance that workplace sexual orientation bias is within Title VII's reach, the Second Circuit moved the ball forward on an evolving legal issue that affects workplaces nationwide and will likely land at the U.S. Supreme Court before long, experts say.

The Second Circuit's en banc decision Monday, which featured four concurrences and three dissents, upended the circuit's precedent on the reach of Title VII and established that sexual orientation discrimination is covered under the statute's existing ban on sex-based bias. Written by Chief Circuit Judge Robert A. Katzmann, the decision revived a discrimination lawsuit initially filed by Donald Zarda, a skydiving instructor who was allegedly fired for telling a client he was gay.

With the ruling, the Second Circuit joined the Seventh Circuit in adopting the position the EEOC has advanced in recent years that Title VII should be interpreted as protecting against sexual orientation bias. Thus far, only the Eleventh Circuit has rejected that position.

Greg Nevins, director of Lambda Legal's Employment Fairness Project, which filed an amicus brief in support of Zarda, told Law360 that the issue could move forward either through a circuit-by-circuit approach or eventual resolution in the Supreme Court if another circuit were to reject the EEOC's position. The high court rejected an appeal of the Eleventh Circuit case in December.

"That would be a pretty stark split that I think the Supreme Court would address it," Nevins said, although there is "always the possibility that they never will."

Here, Law360 looks at four key takeaways from the Second Circuit's decision.

Validation for the EEOC

The EEOC initially adopted the position that a claim of discrimination based on an individual's sexual orientation is covered under Title VII's prohibition of sex discrimination in a 2015 administrative ruling in Baldwin v. Foxx, and filed its first lawsuits asserting that legal theory the following year.

Former EEOC Chair Jenny Yang, whose term on the commission expired several months ago, cited the Baldwin decision in an interview with Law360 last year as her greatest success.

In April, the Seventh Circuit became the first appellate court to adopt the EEOC's position when it revived a suit by professor Kimberly Hively accusing Indiana's Ivy Tech Community College of denying her promotions because she is a lesbian. That decision came just a few weeks after the Eleventh Circuit rejected a bid by former Georgia Regional Hospital security guard Jameka Evans to revive her suit alleging she was discriminated against because she is a lesbian.

"What may have been a surprise to some, although wasn't completely unexpected, was the extent to which the majority opinion explored the issues and adopted each of the justifications that have been put forth by the EEOC for finding that sexual orientation discrimination is covered by Title VII," said Nathaniel Glasser of Epstein Becker Green, adding that it serves as "an indication of how much weight employers should be giving to guidance that is issued by the EEOC."

Split Federal Government

Following the Second Circuit's decision, acting EEOC Chair Victoria Lipnic, the commission's current lone Republican, issued a statement "commend[ing] the fine lawyering by the agency" that led to the ruling, while adding that it is "a generous view of the law of employment protections, and a needed one."

But one notable aspect of the Zarda case was the U.S. Department of Justice's decision several months into the Trump administration to argue against the EEOC's position on the reach of Title VII.

DOJ spokesman Devin O'Malley told Law360 Tuesday that the Justice Department "remain[s] committed to the fundamental principle that the courts cannot expand the law beyond what Congress has provided."

"The Department of Justice is committed to protecting the civil and constitutional rights of all individuals and will continue to enforce the numerous laws Congress has enacted that prohibit discrimination on the basis of sexual orientation," O'Malley said. "The position that the department advocated in this case has been its long-standing position across administrations and remains the law of nine different courts of appeals."

A similar concern was shared by Second Circuit Judge Gerard E. Lynch, who wrote in his dissenting opinion that Congress had not included a provision providing protections for sexual orientation, while noting that he would have been pleased if that were to ever occur.

"From an appellate lawyer and an employment lawyer's perspective, that is very,

very rare to find the federal government against itself in any case, let alone a case of this significance," said Jay Holland, chair of Joseph Greenwald & Laake PA's employment practice.

Just a Matter of Time

Given that the Second Circuit's ruling is the second time a court has sided with the EEOC on the sexual orientation issue, attorneys told Law360 that any further appellate court decisions that deepen that split could spur the Supreme Court to settle it.

"Now that we have a third circuit opinion on the issue ... at some point we're going to see this issue before the Supreme Court. The question is when," Glasser said.

Many employment law observers had expected the high court to grant a certiorari petition that was filed last year by Evans, who had sought to revive her suit accusing Georgia Regional Hospital of discriminating against her because she was gay, but the justices chose not to.

Miriam Edelstein of Reed Smith LLP noted that at the time the high court declined to take up Evans' case, the Eleventh Circuit had been the only one to consider and rule against the EEOC's position.

The sexual orientation issue, she said, hasn't "really wound its way through the circuits" yet the way that same-sex marriage cases did for years before the high court's landmark 2015 Obergefell ruling legalizing same-sex marriage, or the way sodomy laws were challenged before the Supreme Court waded into that issue.

"With these big cultural questions, the Supreme Court does tend to wait until something has percolated through a lot of appellate courts," Edelstein said. "You now have this increased split in the circuits [on the sexual orientation issue]. I think most people are I think wondering how many circuits need to weigh in before the Supreme Court decides to take up a case."

Edelstein also pointed out that a case can even reach other circuits or the high court only if an employer puts itself in the difficult position of arguing against a position promoting protection for LGBT individuals, something many may not be willing to do.

"It's a risky position for employers to take," Edelstein said, noting that a company likely to take such a position will be one that raises an objection claiming sincerely held religious beliefs.

"For sure, we're going to see this play out in the courts, and in legislation, and in politics, and in society," she said. "But I do think eventually, the track record of civil rights evolution shows us that if you choose to be in the public marketplace that it is incumbent upon you to be tolerant of others."

National Impact but Little Practical Change

Although the Second Circuit's decision is notable in its importance, Glasser said it doesn't really change much on a day-to-day basis for employers that operate within the court's confines. While it gives individuals the ability to bring a federal Title VII lawsuit alleging sexual orientation bias, all three states in the circuit have state laws

that include sexual orientation as a protected category.

"So employers operating in those jurisdictions should already have policies that prohibit such discrimination," Glasser said.

But even for employers that operate in whole or part outside the Second or Seventh Circuits and in cities where bias based on sexual orientation isn't legally protected, Edelstein said employers risk reputational harm and should expect legal challenges if they take any adverse actions against workers because of their sexuality.

"My advice to employers as a best practice is as much as possible to provide uniform policies to its workforce, particularly around cultural questions," Edelstein said.

But having the Second Circuit set the standard that sexual orientation bias is illegal under Title VII doesn't mean that all employers will simply stop discriminating in that manner, Nevins said, drawing a comparison to the fact that racial and gender discrimination didn't suddenly end after passage of the Civil Rights Act.

"We need to go into this exercise with a sense of realism and an understanding of what the law can accomplish and what it can't," Nevins said. "The reason why rulings like yesterday were so important and why we need more of them is because people want to have a right to go to court and redress discrimination when it happens, but what they really want is to not be discriminated against in the first place. Having it be clear-cut and no doubt about it that this is unlawful, that does matter."

--Editing by Brian Baresch and Alanna Weissman.
