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## 11th Circuit Upholds Longstanding Precedent: Sexual Orientation Claims Are Not Cognizable Under Title VII

On March 10, 2017, in *Evans v. Ga. Reg'l Hosp.*, No. 15-15234, 2017 U.S. App. LEXIS 4301 (11th Cir. Mar. 10, 2017), the 11th Circuit Court of Appeals in a majority split affirmed a district court's dismissal of a former employee's suit against her employer, which alleged discrimination in violation of Title VII on the basis of her sexual orientation as a lesbian and for failing to carry herself in a "traditionally" womanly manner. In rendering its decision, the 11th Circuit relied on binding precedent in *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979), which expressly holds that "[d]ischarge for homosexuality is not prohibited by the Title VII." *Id.*

The Court in *Evans* explicitly stated that despite the fact that claims for gender non-conformity and same sex discrimination may be brought under Title VII, it does not allow the Court to abandon the longstanding holding in *Blum*. *Id.* at \*15.

In its opinion, the 11th Circuit criticized plaintiff for citing to the Supreme Court decisions in *Price Waterhouse* and *Oncale* for the proposition that sexual orientation is a protected status under Title VII. *Id.* at \*15. The Court explained that plaintiff's citations to those cases were misguided, as they do not squarely address whether sexual orientation discrimination is prohibited by Title VII. *Id.* The Court further explained that because those decisions are neither contrary to nor directly on point with *Blum*, they do not overrule the binding precedent of this Circuit, which does not recognize discrimination based on sexual orientation as a cognizable claim under Title VII. *Id.*

In a concurring opinion, Circuit Court Judge William Pryor explained, "[j]ust as a woman cannot recover under Title VII when she is fired because of her heterosexuality, neither can a gay woman sue for discrimination based on her sexual orientation." *Id.* at \*20.

By contrast, Circuit Court Judge Robin Rosenbaum’s dissent harshly criticized the majority’s opinion and their reliance on 38-year-old precedent that was issued ten years prior to *Price Waterhouse*. Judge Rosenbaum chided the continued use of *Blum*, expressing that the application of *Blum* essentially punishes individuals’ gender non-conformity - attraction to someone of the same sex. Judge Rosenbaum further argued that *Price Waterhouse* “substantially broadened the scope of actionable discriminatory stereotyping under Title VII.” *Id.* at \*32. As such, Judge Rosenbaum opined that discrimination based on an individual’s sexual orientation is discrimination based on a person’s failure to conform to a perceived gender role, which is discrimination because of sex. *See id.* at \*30. According to Judge Rosenbaum, “*Price Waterhouse* requires us to apply the rule that an individual cannot be punished because of his or her perceived gender non-conformity-in this case, sexual attraction to other women.” *Id.* at \*51.

Notwithstanding the Court’s dismissal of plaintiff’s sexual orientation claim, in *Evans*, the Court vacated the district court’s order dismissing plaintiff’s claim for discrimination based on failure to conform to gender stereotypes. *Id.* at \*12. The Court held that “the lower court erred because a gender non-conformity claim is not just another way to claim discrimination based on sexual orientation, but instead, constitutes a separate, distinct avenue for relief under Title VII.” *Id.* at \*12.

The 11th Circuit made it clear that in order for a claim for discrimination based on gender non-conformity to be actionable, the plaintiff must provide enough factual information to plausibly suggest that the adverse employment action was a result of her failure to conform in behavior and/or appearance to gender stereotypes. *Id.* at \*11. Such non-conformity includes, but is not limited to a woman wearing a masculine haircut or a male wearing lipstick. Simply alleging discrimination based on one’s status as a gay man or woman is insufficient to establish a discrimination claim under Title VII in the 11th Circuit.

Employers should be aware that employees who deviate from a particular gender stereotype might correlate disproportionately with a particular sexual orientation. Therefore, while the 11th Circuit stands firm on its position that sexual orientation is not a protected status under Title VII, employers should consider refraining from making adverse employment decisions against any employee based upon his/her sexual orientation. Furthermore, employers should ensure that any adverse action does not discriminate against the employee for deviating from a gender stereotype.

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