



# Discrimination Based on Sexual Orientation - The Wave Grows

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# **Discrimination Based on Sexual Orientation -- The Wave Grows**

*Written by BENNETT L. EPSTEIN 5/15/17*

Back in March we explored the question, "So – Are LGBTQ Rights Protected Under Federal Employment Law or Not?" In that article, which unpacked a recent federal court decision on LGBTQ workplace protections, we concluded that "it depends." While the issue is far from settled and the answer still remains "it depends," two additional federal decisions over the past two months indicate what may be a growing wave of courts finding that LGBTQ status is protected under federal employment discrimination law.

On April 4, 2017, the United States Court of Appeals for the Seventh Circuit (covering Illinois, Indiana, and Wisconsin) cast aside its own precedents as well as the positions of almost every other appellate court by finding that sexual orientation is covered by Title VII of the Civil Rights Act of 1964 (Title VII). Within the states covered by the Seventh Circuit, sexual orientation is now accorded the same protections as race, color, religion, national origin and gender. Having been decided a little more than a month ago, that case is now "old news" in this readily-evolving area of law.

A few weeks ago, on May 5, 2017, a New York federal district court judge chose not to follow Second Circuit law (to which generally it is bound to follow) and took its lead from the April Seventh Circuit finding that sexual orientation is protected by Title VII. The district judge in that case permitted a former State University of New York employee to pursue a claim against the university alleging that he was discriminated against, harassed and retaliated against because he was gay.

In permitting the employee to pursue his claim, the judge broke ranks from a March 27, 2017 Second Circuit (covering Connecticut, Vermont, and New York) decision in which a three judge panel a gay advertising executive's claims, stating that it lacked the authority to overturn its own precedent denying gays coverage under Title VII. However, it permitted the plaintiff to advance his claims that he was harassed based on "sexual stereotypes" (failing to fit a male stereotype). The district court judge deciding the May 5 case relied upon the concurring decision of the Chief Judge of the Second Circuit who found a basis in Title VII for protecting sexual orientation in the workplace.

Meanwhile, on May 1, 2017, the unsuccessful litigant in the March case petitioned the full Second Circuit to reevaluate its recent decision to bar him from pursuing claims that he was discriminated against because of his sexual orientation.

The fissure created by the Seventh Circuit appears to be gaining momentum in the courts. Given the nascent trend, it is advisable for employers to anticipate that more courts will recognize sexual orientation as a protected classification and should make employment decisions accordingly.

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