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Congress to Weigh Title VII Protection for Sexual Orientation

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Special to the Legal

In 1964, Congress ratified Title VII of the Civil Rights Act, which prohibits discrimination in the workplace on the basis of sex, race, color, religion and national origin.

In the fall, nearly 40 years later, it is anticipated that Congress will consider whether Title VII should be expanded to include discrimination based on sexual orientation. Recent lawsuits have prompted our courts to consider whether Title VII's protection can be afforded to gay and lesbian employees under alternate theories of relief. This has resulted in conflicting opinions from our judiciary and has left some courts to intimate that congressional review of Title VII's coverage is necessary.

After the passage of Title VII, a number of decisions handed down by the Supreme Court have attempted to impart judicial meaning to the term "sex" as it appears in the act. In common use, the term "sex" is simplistic. In the legislative and judicial context, it has proved to be multifarious.

In a significant decision, the Supreme Court concluded that sexual harassment in the form of a hostile work environment indeed constituted sexual discrimination under Title VII. Although sexual discrimination has been molded to include male on female or female on male harassment, courts have been reluctant to expand the scope of Title VII to include sexual orientation within the meaning of the word "sex." Indeed, it is well settled that claims

of sexual harassment and sexual discrimination cannot be predicated upon an employee's sexual orientation.

ALTERNATE THEORIES

However, in recent years, faced with a growing number of lawsuits, courts have been willing to consider a variety of sexual discrimination claims asserted under what have been termed alternate theories of relief. These have included claims of same-sex sexual harassment and claims based on gender non-conformity. In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Supreme Court permitted a female employee to sue her employer for sexual discrimination based on her assertion that she was perceived as being too masculine. This decision has prompted litigation by male employees, claiming that they were victims of discrimination and harassment because they were perceived as being too effeminate by their male co-workers.

An intriguing decision was recently issued by the 9th U.S. Circuit Court of Appeals in the case of *Rene v. MGM Grand Hotel*, 243 F.3d 1206 (9th Cir. 2001).

In *Rene*, a case that originated in Nevada, an openly gay male claimed he was sexually harassed by his co-workers for being too effeminate. The defendant moved for summary judgment on grounds that the harassment experienced by the plaintiff was not the result of his sex, but rather, his sexual orientation: The plaintiff admitted during his deposition that he was

gay and that his co-workers harassed him only because of his sexual preference. The harassment experienced by the plaintiff in that case was of the most egregious variety. It included name-calling, insults and numerous physical sexual assaults.

Acknowledging such egregious behavior, the 9th Circuit nevertheless dismissed the plaintiff's case and granted summary judgment. The decision was predicated upon an opinion it rendered nearly 20 years ago. The court concluded in the previous case that claims based on sexual orientation were not actionable. The majority reasoned that although the harassment claimed by the plaintiff was "appalling" and "disturbing" and that societal attitudes toward homosexuality have "undergone some changes" since its prior ruling, the law still dictated that such claims could not be maintained under Title VII.

DISSENTERS' REASONING

A strong dissent argued reasons for an expansion of Title VII to include those who openly identify themselves as gay and who experience physical harassment as a result of their sexual orientation. The dissent questioned why various sexual assaults on an openly gay employee by male co-workers should not constitute discrimination on the basis of sex. The dissent reasoned that the majority glossed over a prior Supreme Court decision in *Oncale v. Sundowner Off-Shore Services Inc.*, 532 U.S. 75 (1998), a case resolving the issue of same-sex sexual harassment, with the only difference being that the

plaintiff in *Rene* was openly gay.

The dissent reasoned that that being openly gay should not in and of itself defeat a Title VII claim. It reasoned that the "subjective belief of the victim of sexual harassment that there is a non-sex-related reason for the harassment is immaterial. ...The only subjective component relevant to the determination of sexual harassment involves whether the employee perceives his or her workplace as hostile or abusive."

The dissent drew a clear distinction between what it termed "gay-baiting" insults and abuse of a physical nature. The dissent also reasoned that the plaintiff's attackers "may have targeted him for sexual pleasure, as an outlet for rage, as a means of affirming their own heterosexuality, or in any combination of a myriad of factors, the determination of which falls far beyond the competence of any court. The effect was to humiliate [the plaintiff] as a man."

Nevertheless, the decision rendered by the majority in *Rene* stands in sharp contrast to another 9th Circuit case involving similar issues.

In *Nichols v. Azteca Restaurant Enterprises Inc.*, 256 F.3d 864 (9th Cir. 2001), a Washington state case, one of three plaintiffs claimed that he was being

subjected to sexual harassment by his male co-workers because he was too effeminate and did not conduct himself as a stereotypical male. In *Nichols*, the plaintiff was subjected to insults, name-calling and mockery in being referred to as "she" and "her."

It is significant that the sexual orientation of that male plaintiff in *Nichols* was not disclosed. In that case, the plaintiff asserted that the verbal abuse he experienced was a result of a perception that he was too effeminate and therefore was the product of sex discrimination.

Deriving its guidance from the Supreme Court decision in *Price Waterhouse*, the 9th Circuit ruled that discrimination on the basis of sexual stereotype was impermissible and could form the basis of a Title VII claim for sexual discrimination.

In its ruling, the court reasoned that the abuse directed at the plaintiff reflected a belief among his male co-workers that he "did not act as a man should." Accordingly, the court concluded that the action could be maintained under Title VII because the abuse was "closely linked to gender."

The *Nichols* and *Rene* decisions represent different views when the harassment is perpetrated on the basis of a person's sexual preference. While the *Nichols* court was

willing to extend protection under Title VII to what was arguably harassment based on sexual orientation, it is apparent that it did so only because the plaintiff's sexual orientation was not at issue. In contradistinction, the court in *Rene* was reticent to afford Title VII's protection to an openly gay employee.

GUIDELINE NEEDED

These contradictory decisions demonstrate the need for Congress to bring order and clarity to the issue of sexual orientation discrimination. With its inception more than 25 years ago, the Employee Non-Discrimination Act represents an opportunity for Congress to take affirmative measures in this regard. Although ENDA has been rejected by Congress in the past, the political and social climate of the day might suggest a greater willingness to ratify this provision.

If finally ratified by Congress in the fall, ENDA would definitively protect employees from sexual orientation discrimination and would further obviate the need for our courts to create exceptions in the law in order to afford gay and lesbian employees with protection from discrimination. •