

Title VII In Transition? Texas Federal Court Rules That Anti-Discrimination Statute Protects Transgender Individuals

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In a landmark [ruling](#), a federal court judge in Texas issued an opinion holding—unequivocally—that Title VII protects transgender individuals from discrimination based on their gender identity. *Wittmer v. Phillips 66 Company*, No., 4:2017-cv-02188 (S.D.Tex, April 4, 2018). The ruling is the first of its kind in Texas and will likely have a major impact in Texas workplaces. Indeed, recent studies have shown that approximately 430,000 workers in Texas identify either lesbian, gay, bisexual, or transgender (LGBT). Of that number, 79% of transgender workers in Texas have reported—either formally or informally—some kind of discrimination in the workplace, including harassment, discriminatory hiring practices, and promotion denials. Texas employers should take note of the recently-issued decision.

***Wittmer v. Phillips 66 Company* Background & Holding**

Nicole Wittmer, a transgender woman, sued Phillips 66 Company for sex discrimination, claiming her job offer from Phillips was rescinded after the company learned she was transgender. Phillips claimed the offer was withdrawn because Wittmer lied during the interview/application process. Phillips believed that Wittmer had falsely claimed she was still working for her former employer at the time of the interview when, in fact, she had been terminated days prior to the interview. Wittmer claimed that this justification was pretextual because, in her view, Phillips' actually withdrew the offer because she is a transgender woman.

On April 4, 2018, Judge Lee Rosenthal, the Chief Judge for the Southern District of Texas, rejected Phillips' argument that Wittmer's transgender status was not protected under federal law, holding unequivocally that Title VII protects transgender individuals from sex discrimination. Ironically, after issuing this monumental determination, Judge Rosenthal tossed Wittmer's lawsuit, ruling that Wittmer had failed to make a *prima facie* case of sex discrimination and, even if she had, Phillips had put forth a legitimate, nondiscriminatory and non-pretextual reason for rescinding the employment offer.

A Shifting Legal Consensus

This opinion joins a chorus of recent decisions by various federal circuit and district courts expanding Title VII to transgender and homosexual individuals. In her decision, Judge Rosenthal relied heavily on the Supreme Court's seminal 1989 case of [*Price Waterhouse v. Hopkins*](#) in concluding Title VII covers transgender-based sex discrimination. In *Hopkins*, the nation's high court held Title VII protects individuals from discrimination based on their perceived failure to conform to gender stereotypes. As Judge Rosenthal noted, the *Hopkins* holding has recently been expanded by several federal courts to include protection of both transgender and homosexual persons. In particular, both the Sixth and Second circuits, relying on *Price Waterhouse*, ruled this year that Title VII covers gender-identity and sexual-orientation based discrimination claims.^[1] These opinions correspond with the Seventh Circuit's 2017 decision in [*Hively v. Ivy Tech Cmt. Coll. of Ind.*](#), which held discrimination based upon an individual's sexual orientation was a "paradigmatic sex discrimination" claim, squarely within Title VII's ambit. Judge Rosenthal found the reasoning from these recent decisions persuasive.

Future Conflict

The recent national judicial trendline is clear—Title VII coverage is expanding throughout the federal courts to protect individuals from discrimination based on their gender identity and sexual orientation. But the story is not over. First, Texas-based employers in particular should note that the usually-conservative Fifth Circuit Court of Appeals has not weighed in on the issue. And to the extent it does (a question of 'when' and not 'if'), there are no guarantees it will fall in line with this movement. Indeed, Fifth Circuit precedent still holds that a discharge based solely on homosexuality is not prohibited by Title VII. [*Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 \(5th Cir. 1979\)](#). And as recently as last year, the Eleventh Circuit, citing *Blum*, held that a plaintiff-employee could not state a claim under Title VII for workplace discrimination based on sexual orientation. [*Evans v. Georgia Reg'l. Hosp.*, 850 F.3d 1248 \(11th Cir. 2017\)](#).

Second, regardless of trendlines or predictions, one thing is abundantly clear: the Trump Department of Justice believes, unambiguously, that Title VII "does not encompass discrimination based on gender identity [and] transgender status." Specifically, in October 2017, Attorney General Jeff Sessions issued a [memorandum and amicus brief](#) arguing for a narrow interpretation, contending the statute bars only discrimination between men and women. The memorandum retracts a position established during the Obama administration and, further, remains at odds with the EEOC. Accordingly, the not-too-distant future will likely involve a battle before the Supreme Court to settle Title VII's scope in the context of sexual orientation and gender identity once and for all.

[1] *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. Mar. 7, 2018); *Zarda v. Altitude Express, Inc.*, 2018 U.S. App. LEXIS 4608 (2d Cir. Feb. 26, 2018).