US Supreme Court rejects appeal by gay woman in employment discrimination case

Ed Hightower
14 December 2017

On Tuesday, the United States Supreme Court denied a request to hear the case of a female security guard, Jameka Evans, who alleges employment discrimination because of her homosexuality. The high court's refusal to hear the case leaves the ruling from the Eleventh Circuit Court of Appeals, against Evans, in place.

Plaintiff Jameka Evans worked as a security guard for Georgia Regional Hospital in Savannah, where a supervisor refused to promote her and mistreated her for being a lesbian. Specifically, Evans was ridiculed for having a masculine appearance and mannerisms.

When she complained to the hospital's management, a senior Human Resources Manager asked Evans if she was a homosexual, an intrusive and irrelevant question. When the mistreatment escalated, Evans resigned and sued her former employer in 2015.

The Equal Opportunity Employment Commission, the federal agency charged with enforcing the work-related provisions of the Civil Rights Act of 1964, intervened in the case in support of Evans.

Eventually, a three-judge panel of the Eleventh Circuit Court of Appeals ruled two-to-one against Evans. In March 2017, the Eleventh Circuit declined to rehear Evans' case *en banc*, that is, with all of the Circuit's judges hearing and deciding the case.

The specific legal question at issue was whether the Civil Rights Act of 1964, which explicitly prohibits discrimination on the basis of race, gender, religion and national origin, also prohibits discrimination on the basis of sexual orientation. At present, the 11 United States Courts of Appeals have come to different answers on this question, with the Second and Seventh finding that the Act prohibits such discrimination, while the remaining Circuits do not.

The Second Circuit is reviewing a case *en banc* after a three judge panel found that the Act protects homosexuals. The Trump administration's Justice Department filed an amicus brief opposing this view.

In the normal course of Supreme Court procedure, such an instance of conflicting opinions among the appellate courts would invite the highest court in the nation to step in and resolve the issue, making clear the meaning of a federal statute or constitutional principle.

As Evans' attorneys argue in their petition for Supreme Court review, the present legal landscape presents a bizarre and untenable (not to mention unjust) situation, where a gay person living in Wisconsin, Illinois or Indiana loses protections from discrimination for sexual orientation if he or she commutes across a state border to work. Even an employee of a national corporation can be treated differently in Miami than in Chicago.

Attorneys with the non-profit group Lambda Legal Defense and Education Fund represented Evans, along with two law professors from Stanford University. Lambda Legal successfully represented Kimberly Hively, in a discrimination claim against Ivy Tech Community College, in a case decided by the full Seventh Circuit Court of Appeals in April. Lambda also represents the plaintiff in the Second Circuit case mentioned previously.

While the Civil Rights Act of 1964 does not explicitly mention homosexuals as a protected category, a number of precedential cases imply that discrimination against homosexuals is a form of gender-based discrimination, because it treats people differently based on whom they partner with.

For example, the 1983 case *Newport News Shipbuilding & Dry Dock Co v. EEOC* held that a company health insurance policy discriminated against men because it did not cover medical care relating to a covered spouse's pregnancy. This was gender-based

discrimination *against the men employees*, based on their association with their pregnant female spouses.

Likewise, the seminal 1967 *Loving v. Virginia* case held that if a state imprisons someone for marrying outside of their race, then the state has engaged in racial discrimination against the person based on his association with a minority.

In both instances, the law forbids what is known as *associational discrimination*, which should logically extend to the type of mistreatment that Jemeka Evans suffered at work.

American public opinion strongly favors equal treatment of homosexuals.

In order for the US Supreme Court to be able to consider a case, a minimum of four of the court's nine judges have to recommend that the case be heard. Therefore, the Court's "liberal bloc," consisting of Ruth Bader Ginsburg, Elena Kagan, Stephen Breyer and Sonia Sotomayor, could have had the *Evans* case put on the docket. In all likelihood, they concluded that they could not count on the vote of the "swing" justice, Anthony Kennedy, who typically breaks a tie between these judges and the reactionary bloc of John Roberts, Clarence Thomas, Samuel Alito and Neil Gorsuch.

The result of Tuesday's judicial evasion is that anti-gay employment discrimination is not forbidden by federal law outside the states of Wisconsin, Illinois, Indiana, New York, Vermont and Connecticut.