

## **FIFTH CIRCUIT REAFFIRMED ITS POSITION THAT TITLE VII DOES NOT INCLUDE PROTECTION FROM DISCRIMINATION BASED UPON SEXUAL ORIENTATION.**

The Fifth Circuit recently reaffirmed its position that Title VII does NOT protect against discrimination on the basis of sexual orientation or transgender statuses. During recent years, plaintiffs, attorneys, and advocates alike have endeavored to expand the reach of Title VII of the Civil Rights Act by arguing for courts to include transgender and sexual orientation statuses under the umbrella of “sex” as a protected classification. Although some circuits have held and reasoned Title VII protects such statuses, the Fifth Circuit addressed its reasoning for declining to extend such protections recently in *Wittmer v. Phillips 66 Company*.

### **WHAT HAPPENED**

In 2015, Plaintiff Nicole Wittmer applied for an instrument and reliability engineer position with Defendant Phillips 66 Company. The company extended Ms. Wittmer an offer of employment contingent upon passing background checks. Ms. Wittmer identifies as transgender.

Shortly after extending the offer of employment, Phillips 66 discovered a discrepancy between what Ms. Wittmer reported to Phillips 66 about her employment status with her then former employer. Phillips 66 ultimately rescinded the employment offer based upon what it believed to be Ms. Wittmer’s misrepresentations. Shortly thereafter, Ms. Wittmer sent an e-mail to Phillips 66 accusing the Company of transgender discrimination. Phillips 66 responded by denying it knew about Ms. Wittmer’s transgender status prior to making its decision, and reaffirming its decision to rescind the employment offer. Ms. Wittmer then filed an EEOC charge and subsequently a lawsuit, alleging discrimination under Title VII on the basis of her transgender status.

### **WHAT THE COURT SAID**

Ms. Wittmer appealed the trial court’s grant of summary judgment in Phillips 66’s favor. Phillips 66 did not challenge Ms. Wittmer’s attempt to bring a discrimination claim on the basis of transgender status under Title VII, but instead focused on the legal and factual allegations of the claim itself. The trial court merged transgender and sexual orientation statuses as part of its analysis, and proclaimed that the Fifth Circuit had “not yet addressed the issue” of whether Title VII protects against discrimination on the basis of transgender or sexual orientation statuses.

When the case reached the Fifth Circuit on appeal, the Court rejected this notion and reaffirmed its position from a ruling 40 years prior that held Title VII did not (and still does not) prohibit discrimination on the basis of sexual orientation (and by association of the arguments at the trial court and what the parties alleged, transgender status). The Wittmer Court stated it “addressed the issue” and held “Title VII does not prohibit discrimination on the basis of sexual orientation.” The Court acknowledged the split of authority between the Fifth Circuit and the Second, Sixth, and Seventh Circuits with regard to the latter circuits’ recognition of Title VII protecting either “sexual orientation” or “transgender” status.

Ultimately, the Court upheld summary judgment on the basis of the factual and legal analysis of the burden-shifting framework of Title VII discrimination claims, without regard to whether transgender status is protected.

### **WHAT THIS MEANS FOR EMPLOYERS**

Given the activity and movement of this issue and the current split of authority among the circuit courts, it is likely the Supreme Court will address this issue in coming years. As best practice—especially for employers that operate facilities and offices nationwide or in multiple states—employers should apply the same equal employment opportunity policies to transgender and sexual orientation statuses as they would race, color, national origin, religion, or any of the other officially and undisputedly recognized protected classifications under Title VII.

**CONTACT INFORMATION**

Jay M. Wallace  
*Board Certified -  
Labor & Employment Law*  
Dir: (214) 740-1407  
E: jwallace@bellnunnally.com

Tom L. Case  
*Board Certified - Trial Law*  
Dir: (214) 740-1465  
E: tcase@bellnunnally.com

Tammy S. Wood  
Dir: (214) 740-1465  
E: twood@bellnunnally.com

Sonja J. McGill  
Dir: (214) 740-1497  
E: smcgill@bellnunnally.com

Mark A. Shoffner  
Dir: (214) 740-1483  
E: mshoffner@bellnunnally.com

Alana K. Ackels  
Dir: (214) 740-1412  
E: aackels@bellnunnally.com

John D. Smart  
Dir: (214) 740-1475  
E: jsmart@bellnunnally.com

Brent D. Hockaday  
*Board Certified -  
Labor & Employment Law*  
Dir: (214) 740-1446  
E: bhockaday@bellnunnally.com

Katie R. Beaird  
Dir: (214) 740-1478  
E: kbeaird@bellnunnally.com