

CLIENT ALERT

Seventh Circuit Extends Title VII Protections to Sexual Orientation

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On April 4, 2017, the U.S. Court of Appeals for the Seventh Circuit became the first federal appellate court in the country to extend the protections afforded by Title VII of the Civil Rights Act of 1964 to discrimination on the basis of sexual orientation. In its landmark en banc decision —*Kimberly Hively v. Ivy Tech Community College*—the Seventh Circuit reversed the July 2016 panel decision in which the court, despite a “paradoxical legal landscape in which a person can be married on Saturday and then fired on Monday for just that act,” held it was bound by its own precedent in finding Title VII did not cover sexual orientation bias. The court’s groundbreaking decision stands in contrast to nearly all other circuit courts, including recent panel decisions in the Second and Eleventh circuits. Notably, in a recent matter, a panel for the Second Circuit observed that it lacked the power to reconsider the circuit’s earlier decision holding that sexual orientation discrimination claims were not cognizable under Title VII, but two of the three judges noted, in concurrence, that they thought their court ought to consider revisiting that precedent in an appropriate case.

Kimberly Hively, an openly gay woman, began teaching as a part-time adjunct professor at Ivy Tech Community College’s campus in South Bend, Indiana in 2000. Between 2009 and July 2014, Hively applied for at least six full-time positions. Despite her efforts, Hively was unsuccessful in obtaining a full-time position. In December 2013, she filed a pro se charge with the Equal Employment Opportunity Commission (EEOC) alleging that the college’s actions—failing to hire/promote her—constituted discrimination based on sexual orientation under Title VII. In July 2014, her part-time contract was not renewed.

After receiving a right-to-sue letter from the EEOC, Hively filed suit in the Northern District of Indiana. Relying on Seventh Circuit precedent that sexual orientation was not protected by Title VII, the district court granted Ivy Tech’s motion to dismiss the case with prejudice. On appeal, the circuit panel noted numerous problems with omitting sexual orientation from Title VII protection, yet concluded that it was ultimately bound by Seventh Circuit precedent. The court opined that “[u]ntil the writing comes in the form of a Supreme Court opinion or new legislation,” it was bound to adhere to earlier decisions. A majority of Seventh Circuit judges then voted to rehear the matter en banc.

The en banc majority began its opinion by considering the issue as one of statutory interpretation, and endeavored to determine what it means to discriminate on the basis of sex and, in particular, whether actions taken on the basis of sexual orientation are a subset of actions taken on the basis of sex.

The majority first looked to the Supreme Court's approach in the case of *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), where the Court addressed the question of whether Title VII covers sexual harassment inflicted by a man on a male victim. In *Oncale*, the Court wrote that:

We see no justification in the statutory language or our precedents for a categorical rule excluding same sex harassment claims from the coverage of Title VII...male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits "discriminat[ion]...because of...sex" in the "terms" or "conditions" of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.

Accordingly, the majority explained that the Supreme Court "could not have been clearer" in its reasoning that "the fact that the enacting Congress may not have anticipated a particular application of the law cannot stand in the way of the provisions of the law that are on the books."

The majority subsequently turned to Hively's use of both the "comparative" and "associational" approaches to support her contention that "sex discrimination" includes discrimination on the basis of sexual orientation. First, in applying the comparative method, the majority considered whether Hively had "described a situation in which, holding all other things constant and changing only her sex, she would have been treated the same way." The majority quickly came to the conclusion that Hively had "described paradigmatic sex discrimination" by alleging that if she had been a man married to a woman and all other variables had remained the same, then Ivy Tech would not have refused to promote her, nor made the decision to terminate her employment.

The court then discussed the "associational theory," which began with *Loving v. Virginia*, 388 U.S. 1 (1967) and provides that "a person who is discriminated against because of the protected characteristic of one with whom she associates is actually being disadvantaged because of her own traits." While the majority recognized that *Loving* and its progeny dealt specifically with *racial* associations, as opposed to those based on sex, the court reiterated that Title VII also prohibited discrimination on the basis of the sex of the associate as "the essence of the claim is that the *plaintiff* would not be suffering the adverse action had his or her sex . . . been different."

Finally, the majority explained that its decision must be understood against the backdrop of other Supreme Court decisions, not only in the employment discrimination context, but also in the area of broader discrimination on the basis of sexual orientation. While acknowledging the existence of contrary authority, the court wrote that "the logic of the Supreme Court's decisions, as well as the common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex, persuade us that the time has come to overrule our previous cases that have endeavored to find and observe that line." Accordingly, the majority reversed the district court's dismissal of the case for failure to state a claim, holding that Hively had adequately put forth a case of sex discrimination by alleging that she experienced employment discrimination on the basis her sexual orientation.

In a dissenting opinion, Judge Diane Sykes wrote that the majority opinion constituted judicial overreach, opining that the court is "not authorized to infuse [statutory] text with a new or unconventional meaning or to update it to respond to changed social, economic, or political conditions." According to the dissent, while it is understandable that the court may be impatient to protect individuals from discrimination on the basis of their sexual orientation, the court cannot amend Title VII by interpretation as "[t]he ordinary, reasonable, and fair meaning of sex discrimination as that term is used in Title VII does not include discrimination based on sexual orientation." Consequently, the dissent ultimately concluded that Hively's case was properly dismissed.

With other federal courts also grappling with the same issues presented in *Hively*, it well may be that the Supreme Court will ultimately address whether sexual discrimination constitutes sex discrimination under Title VII.

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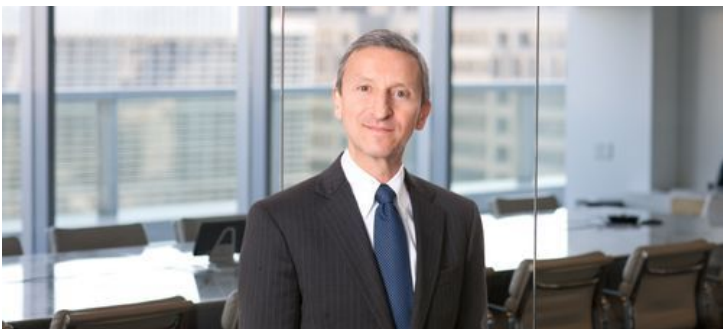
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