

Sexual Orientation Discrimination Prohibited by Title VII

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Practice Area: Labor and Employment

On April 4, 2017, the Seventh Circuit Court of Appeals issued a decision in *Hively v. Ivy Tech Community College of Indiana*, holding that Title VII of the Civil Rights Act ("Title VII") protects employees who have been discriminated against on the basis of sexual orientation. The Seventh Circuit's prior decisions limited Title VII's sex discrimination protections to sex stereotyping, same-sex harassment, and gender-based longevity. Until now, the Seventh Circuit, as well as the other circuit courts, previously avoided extending this protection to include sexual orientation. With this decision, the Seventh Circuit has broadened the protections of Title VII.

The Underlying Lawsuit

Plaintiff Kimberly Hively, an out lesbian, was employed as a part-time adjunct professor at Ivy Tech Community College ("Ivy Tech"). Ms. Hively previously applied for at least six full-time positions but was not hired. In July 2014, Ms. Hively's part-time contract was not renewed. Ms. Hively subsequently filed a claim with the Equal Employment Opportunity Commission alleging that she was not renewed because of her sexual orientation.

After filing a lawsuit in federal court, Ms. Hively's case was dismissed on the grounds that Title VII does not provide protection based on sexual orientation. Ms. Hively appealed to the Seventh Circuit, arguing that Title VII's prohibitions on discrimination "because of sex" should also include protection based on sexual orientation.

The Full Seventh Circuit Weighs In

Typically, cases before a federal appeals court are heard by a panel of three judges. When the three-judge panel reviewed Ms. Hively's case, they recognized that the underlying decision likely would have wide-reaching significance. Accordingly, the three-judge panel took the unusual step of requiring the case to be heard by the entirety of the ten-judge Seventh Circuit. In doing so, the Seventh Circuit recognized the impact its decision could have.

The Arguments

The Seventh Circuit considered two arguments for extending Title VII protection on the basis of sexual orientation. First, Ms. Hively argued that treating her differently on the basis of her sexual orientation was the same thing as treating her differently on the basis of her sex because Ivy Tech did not treat her—a *woman* sharing her life with a woman—the same way as it would have treated a male applicant—a *man* sharing his life with a woman. Thus, Ivy Tech was disadvantaging her because she is a woman. In agreeing with this argument, the court noted that this case represented "the ultimate case of failure to conform to the female stereotype", because Ms. Hively did not conform with the expectation that a woman would be heterosexual. The court also noted that "a policy that discriminates on the basis of sexual orientation . . . is based on assumptions about the proper behavior for someone of a given sex." The Seventh Circuit relied on United States Supreme Court's decision in *Price Waterhouse v. Hopkins*, which held that Title VII protects on the basis of sex stereotyping. The Seventh Circuit concluded that this concept extends Title VII protection to sexual orientation because discrimination on this basis indeed is sex stereotyping.

Second, Ms. Hively argued that any employment action taken based on sexual orientation is sex discrimination under the associational theory of discrimination. Simply put, because Title VII provides protection based on who one associates with, the associational theory also applies to claims based on sex. Thus, if a white man can bring a claim based on race because he is married to a black woman, a woman can bring an associational discrimination claim based on sex if she is married to another woman. The Seventh Circuit also agreed with this argument, noting that "[i]f we were to change the sex of one partner in a lesbian relationship, the outcome would be different. This reveals that the discrimination rests on distinctions drawn according to sex."

How Does This Affect the Workplace?

For Wisconsin employers, *Hively* has limited impact because state law under the Wisconsin Fair Employment Act has long provided protection based on sexual orientation. However, employers with locations in other states might see an increase in claims.

Additionally, employees will no longer be restricted to the limited remedies available under state law. Now employees bringing sexual orientation claims may seek compensatory damages through federal lawsuits, drastically increasing an employer's exposure.

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