

# Seventh Circuit Issues Landmark Decision Holding that Title VII Prohibits Discrimination Based on Sexual Orientation

## Labor & Employment Law Update

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On April 4, 2017, the United States Court of Appeals for the Seventh Circuit, sitting *en banc*, held that discrimination based on sexual orientation is a form of sex discrimination prohibited by Title VII of the Civil Rights Act of 1964. The seventh circuit decision is significant as the first of its kind. The United States Supreme Court has never ruled whether Title VII prohibits discrimination based on sexual orientation, and the seventh circuit, as well as the other United States Circuit Courts of Appeals had previously established a long line of precedent holding that claims alleging sexual orientation discrimination fail to state a claim under Title VII.

In Hively v. Ivy Tech Community College of Indiana, Kimberly Hively, a lesbian, worked as a part-time adjunct professor. She believed that Ivy Tech discriminated against her because of her sexual orientation when they denied her applications for full-time positions and later failed to renew her part-time teaching contract. Hively filed a Title VII lawsuit alleging sexual orientation discrimination, and the district court dismissed the case for failure to state a claim. The seventh circuit originally heard Hively's appeal and a panel of three judges affirmed the district court's decision, holding that it was bound by prior precedent. A majority of judges sitting on the seventh circuit voted to rehear the case *en banc*, enabling the court to overrule its prior decisions.

In reaching its holding that Title VII's proscription against sex discrimination includes mistreatment based on sexual orientation, the majority noted that Title VII cases already preclude discrimination based on associating with someone of a protected class. The majority cited an eleventh circuit case holding that discriminating against an employee because of his interracial marriage is a form of race discrimination under Title VII as an example. The majority also reasoned that Hively alleged discrimination based on her sex because she claimed that Ivy Tech would not have denied her promotions or terminated her employment if she were a man in a romantic relationship with a woman. The majority equated discrimination based on sexual orientation to discrimination based on gender

non-conformity, which the Supreme Court had previously ruled was a type of sex discrimination. Specifically, in Price Waterhouse v. Hopkins, the Supreme Court held that gender stereotyping, such as discriminating against a woman because she is perceived as too manly, is prohibited under Title VII, and in Oncale v. Sundowner Offshore Services, Inc., the Court held that same-sex harassment is prohibited under Title VII. Judge Posner's concurring opinion added that changing societal norms justify updated interpretations of federal law. The dissent criticized the majority for overstepping the role of the judiciary, arguing that any change in the meaning of sex discrimination needed to come from Congress.

Ivy Tech has indicated that it will not appeal the decision to the Supreme Court and instead plans to defend the case on its merits following the remand to the trial court. Therefore, Hively will be the law of Illinois, Indiana, and Wisconsin until a different sexual orientation discrimination case makes it way to the Supreme Court – an event likely to happen now that there is clear division between the circuit courts on this issue.

Employers in Illinois and Wisconsin should already maintain policies prohibiting discrimination based on sexual orientation because Illinois and Wisconsin state law prohibit this type of discrimination. Nevertheless, all employers, especially private employers in Indiana who are not currently bound by a state sexual orientation non-discrimination law, should ensure that all employee handbooks, non-discrimination policies, and job application forms explicitly state that the company will not discriminate based on sexual orientation, and should train management and human resources personnel on the same. Following the reasoning of Hively, employers should be cautious to guard against discrimination or harassment based not only on sexual orientation, but also sexual identity.

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