

DIVERSITY AND EMPLOYMENT LAW

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The Seventh Circuit's recent decision denying protections for sexual orientation discrimination under Title VII signals that litigation over the rights of gay and lesbian employees is far from over.

[Hively v. Ivy Tech Comty. Coll., S. Bend, 15-1720, 2016 WL 4039703 \(7th Cir. July 28, 2016\):](#)

Sexual Orientation Discrimination not (yet) Covered by Title VII

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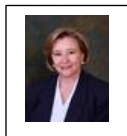
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2016 has been a busy year for expanding the protections of Title VII of the Civil Rights Act, the federal law which governs employment discrimination, and the courts show no signs of slowing down anytime soon. In late July, the Seventh Circuit Court of Appeals (which includes Illinois, Indiana, and Wisconsin) issued a thought-provoking ruling in the case of *Hively v. Ivy Tech Community College, South Bend* that denied Title VII coverage for sexual orientation discrimination but hinted that its ruling may not be binding for long because of inconsistent interpretations that may prompt the United States Supreme Court to settle the final score in a future term. *Hively v. Ivy Tech Comty. Coll., S. Bend*, 15-1720, 2016 WL 4039703 (7th Cir. July 28, 2016).

This case was filed by Kimberly Hively, who was an adjunct professor at Ivy Tech Community College and unsuccessfully applied for a full-time professor position on six separate occasions between 2009 and 2014. Ms. Hively alleged that Ivy Tech denied her full-time employment because of her sexual orientation in violation of Title VII of the Civil Rights Act. Ivy Tech's position in its Motion to Dismiss Ms. Hively's Complaint was simple: Title VII does not apply to sexual orientation discrimination, and therefore, Ms. Hively did not have a case against the College. *Id.* at *1. The District Court, while expressing sympathy for Ms. Hively's situation, quickly dismissed Ms. Hively's case by citing Seventh Circuit precedent instructing that Title VII's sex discrimination provision only means biological sex—not

sexual orientation. *Hively v. Ivy Tech Comty. Coll.*, 3:14-CV-1791, 2015 WL 926015, at *3 (N.D. Ind. Mar. 3, 2015).

On appeal, the Seventh Circuit affirmed the District Court's decision, citing binding precedent from half a dozen Seventh Circuit cases. *Hively*, 2016 WL 403970, at *1. The Court could have stopped there. Instead, the Seventh Circuit went on to exhaustively detail the disorganized national state of sexual orientation discrimination under Title VII. This opinion has a very clear message: do not expect this Court's ruling to be the final word on the subject.

In order to understand the root of this legal question, it is helpful to view how the law is written. Title VII of the Civil Rights Act of 1964, as amended, is the federal law governing employment discrimination for employers with more than 15 employees that prohibits discrimination against five enumerated classes: race, color, religion, sex, and national origin (age and disability are covered by different laws). 42 U.S.C.A. § 2000e-2 (West). The term "sexual orientation" does not appear anywhere in the text of Title VII, and a spectrum of legal interpretation has theorized how the law works in practice, notably: (1) sexual orientation discrimination is not covered by Title VII at all; (2) sexual orientation discrimination can be protected, but only through the gender stereotyping theory of sex discrimination; and (3) sexual orientation discrimination is fully covered under Title VII's prohibition of sex discrimination. The

Hively Court's decision falls in the first category, but the Court spilled a lot of ink to illustrate why employers can expect the law to change soon.

The first theory of Title VII's non-coverage of sexual orientation is perhaps the simplest: sexual orientation discrimination is not covered by Title VII because the law does not include "sexual orientation" in its enumerated list of protected classes. *Id.* at *3. This plain language approach is supported by the fact that Congress repeatedly eschewed attempts to amend Title VII to add sexual orientation as a protected class. Thus, if the very legislative body that writes the law refuses to include sexual orientation, surely there is no legislative intent to include this type of discrimination under Title VII's protections. Decisions in this line of cases are not coldhearted; rather, courts often sympathize with the plaintiff, recognizing "reprehensible" instances of discrimination and harassment while lamenting that the strict language of Title VII does not provide any relief. *Id.*

Gender stereotyping sex discrimination is the next school of thought, and has provided relief to a handful of gay and lesbian employees. *Id.* at *4. This theory stems from the landmark 1989 Supreme Court case of *Price Waterhouse v. Hopkins*, in which the Supreme Court ruled that discrimination based on a person's non-conformity with gender stereotypes constitutes sex discrimination under Title VII. *Id.* (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228

(1989)). In other words, discrimination based on a woman's nonconformity with feminine stereotypes or a man's nonconformity with masculine stereotypes is prohibited under Title VII because gender stereotyping is discrimination based on sex.

Sexual orientation discrimination fits under the gender stereotyping theory of sex discrimination if the employee proves that his or her gender nonconformity was a reason for discrimination or harassment. The *Hively* Court cited the Third Circuit case of *Prowel v. Wise Business Forms, Inc.* as an example of when gender stereotyping can envelop discrimination based on sexual orientation. In *Prowel*, the plaintiff (a gay man) successfully made a plausible claim for sex discrimination because of evidence of his gender nonconformity:

A factory worker who described himself both as gay and effeminate succeeded in defeating summary judgment by proffering just enough evidence of harassment based on gender stereotypes, as opposed to that based on sexual orientation...Notably, *Prowel* succeeded because he convinced the court that he displayed stereotypically feminine characteristics by testifying that he had a high voice, did not curse, was well-groomed, neat, filed his nails, crossed his legs, talked about art and interior design, and pushed the buttons on his factory equipment 'with pizzazz.'

Id. at *7 (citing Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285, 291-92 (3d Cir. 2009) (emphasis added). The sex stereotyping theory has been criticized because it does not protect every gay and lesbian employee, since some largely do outwardly conform with gender stereotypes and thus will not have evidence of nonconformity. Not all gay men speak in a high voice and push buttons “with pizzazz,” and sex stereotyping assumes that gay and lesbian people conform to the opposite gender. Thus, Title VII does not cover discrimination based solely on sexual orientation under a gender stereotyping theory. While some plaintiffs may be able to “tease apart...gender stereotype allegations,” this theory certainly does not wholly encompass sexual orientation or gender identity discrimination. Id. at 5.

The final theory is the expansive view that Title VII covers all discrimination based on sexual orientation, as was recently propounded by the EEOC in its decision of Baldwin v. Foxx. EEOC DOC 0120133080, 2015 WL 4397641, at *2 (E.E.O.C. July 16, 2015). The EEOC can hear cases involving federal employees, and the decisions that result are only binding on federal government employers; however, these decisions are highly persuasive and cannot be ignored. In this case, a federal employee filed a charge of discrimination with the EEOC alleging he was not selected for a permanent Front Line Manager position with the Department of Transportation (DOT) because he was gay. Id. at *2. The EEOC reasoned that discrimination based on

sexual orientation necessarily involves discrimination based on sex in several ways.

First, any sexual orientation discrimination includes “sex-based considerations” because men and women are treated differently based on their sex. The EEOC used the example of an employer punishing a lesbian female employee for keeping a picture of her wife on her desk while a male employee faced no consequences for having a picture of his wife on his desk. In this scenario, the female employee would have been treated differently if she were a man. Second, sexual orientation discrimination is covered by Title VII as a form of “associational discrimination,” which punishes an employee for who they associate with outside of work. The EEOC likened this situation to prior rulings on interracial marriage: just as an employer cannot fire a white employee for being married to a black person (which is racial discrimination), an employer cannot fire a male employee because he is married to a man because that (in theory) is sex discrimination. Last, the EEOC concluded that sexual orientation discrimination is a form of gender stereotyping discrimination because “sexual orientation discrimination and harassment are often, if not always, motivated by a desire to enforce heterosexually defined gender norms” that men should not date men and women should not date women. Id. at *8. The Seventh Circuit described Baldwin as a decision that “threw fuel on the flames” and caused “more and more district court judges...to scratch their heads and wonder

whether the distinction between [gender nonconformity and sexual orientation discrimination] claims does indeed make any sense.” Hively, 2016 WL 4079703, at *10.

The Seventh Circuit discussed this spectrum precedent in order to highlight the “odd state of affairs” resulting from the three interpretations of the “hodge podge of cases.” Id. at *9. Not only are protections for gay and lesbian employees different depending on where they are employed, but Title VII’s failure to cover sexual orientation discrimination clashes with the recent cases legalizing same sex marriage that have greatly expanded rights for gay and lesbian people. Id. at 10-11 (citing U.S. v. Windsor, 133 S.Ct. 2675 (2013); Obergefell v. Hodges, 135 S.Ct. 2584 (2015)). Even though the Supreme Court has ruled on blockbuster civil rights cases concerning the constitutional protections for gay and lesbian Americans, Title VII remained untouched in recent years. The Seventh Circuit illustrated how this disconnect between marriage protections and employment protections creates and compounds confusion:

The cases as they stand do, however, create a paradoxical legal landscape in which a person can be married on a Saturday and then fired on a Monday for just that act. For although federal law now guarantees anyone the right to marry another person of the same gender, Title VII, to the extent it does not reach sexual orientation discrimination, allows employers to fire that employee for doing so.

Id. at *11. Moreover, until Title VII’s sexual orientation coverage is uniformly determined, the rights of gay and lesbian people are incomplete. The Seventh Circuit sorrowfully pointed out that despite the Supreme Court’s progress in recent years, “from an employee’s perspective, the right to marriage might not feel like a real right if she can be fired for exercising it.” Id.

Despite the disjointed protections for gay and lesbian individuals in the employment context and the need for a unified interpretation of Title VII, the Seventh Circuit’s hands were tied due to its precedent. The Court lamented that overturning precedent is not easy because the Court must have a “compelling reason” to overrule itself, *i.e.* a Supreme Court decision or legislative amendment to change or clarify the law.

The *Hively* decision certainly is not the last word on whether Title VII covers sexual orientation discrimination; rather, it is a part of the constellation of Title VII interpretations currently in existence. As of the date of publication of this article, no courts have substantively cited the *Hively* decision. The Supreme Court may take the bait on this issue if divergent rulings continue to be issued among the Circuits—which is looking increasingly likely. In fact, in a recent interview, EEOC Commissioner Chai Feldblum explained that there are two pending cases (*Christiansen v. Omnicom Group* in the Second Circuit and *Evans v. Georgia Regional Hospital* in the Eleventh



Circuit) that could add to the already widening Circuit split. Daniel Wiessner, “Q&A: EEOC’s Feldblum says gay bias law at a tipping point,” Reuters Legal (Aug. 3, 2016). If there continues to be a lack of consensus among the Circuit courts, the Supreme Court may be more willing to accept an application for supervisory writs and issue a determinative ruling on the scope of Title VII as to the meaning of the prohibition of discrimination “because of sex” in the not-so-distant future. Stay tuned.

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