In the midst of a legal, political and cultural landscape expanding the rights of LGBT individuals, the Seventh Circuit U.S. Court of Appeals has held to prior precedent in reaffirming that Title VII does not prohibit sexual orientation discrimination. Kimberly Hively v. Ivy Tech Community College, __ S.Ct. __, No. 15-720 (July 28, 2016). According to the court, though “the writing is on the wall” that sexual orientation discrimination should not be tolerated, because the writing is not in a Supreme Court opinion or Title VII, the court’s hands are tied.

In two 2000 opinions, Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc. and Spearman v. Ford Motor Co., the Seventh Circuit had previously held that Title VII offers no protection from sexual orientation discrimination. The court revisited the issue now in order to provide a more detailed analysis in light of recent trends and decisions advancing LGBT rights.

The court recognized the merits of many of Ms. Hively’s arguments, and acknowledged that in light of the recognition of other rights of LGBT individuals the current legal landscape does not make sense. In recent years, the U.S. Supreme Court struck down the Defense of Marriage Act as unlawful (U.S. v. Windsor) and...
legalized gay marriage (Obergefell v. Hodges). In 2015, the EEOC held that sexual orientation discrimination is a form of sex discrimination under Title VII. Baldwin v. Foxx (July 16, 2015). Many judicial decisions at the district court level have repeatedly recognized that sexual orientation discrimination cannot be tolerated. Yet, Congress has repeatedly rejected new legislation that would extend Title VII to cover sexual orientation discrimination, and it has not amended the language of Title VII to include sexual orientation.

This creates “a paradoxical legal landscape in which a person can be married on Saturday and then fired on Monday for just that act.” The court observed, “From an employee’s perspective, the right to marriage might not feel like a real right if she can be fired for exercising it.”

Nonetheless, the court stated that Congress’ failure to amend Title VII to include sexual orientation cannot be due to its unawareness of the issue. Thus, Congress must have intended a very narrow reading of the term “sex” when it passed Title VII.

In excluding sexual orientation discrimination from the coverage of Title VII, the Seventh Circuit conveyed its apparent reluctance in doing so:

“Perhaps the writing is on the wall. It seems unlikely that our society can continue to condone a legal structure in which employees can be fired, harassed, demeaned, singled out for undesirable tasks, paid lower wages, demoted, passed over for promotions, and otherwise discriminated against solely based on who they date, love, or marry. The agency tasked with enforcing Title VII does not condone it, ... many of the federal courts to consider the matter have stated that they do not condone it ...; and this court undoubtedly does not condone it.... But writing on the wall is not enough. Until the writing comes in the form of a Supreme Court opinion or new legislation, we must adhere to the writing of our prior precedent[.]

The Seventh Circuit went on to offer its further observations:

“Many citizens would be surprised to learn that under federal law any private employer can summon an employee into his office and state, “You are a hard-working employee and have added much value to my company, but I am firing you because you are gay.” And the employee would have no recourse whatsoever—unless she happens to live in a state or locality with an anti-discrimination statute that includes sexual orientation.”

Those states are currently California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Utah, Vermont, Washington and Wisconsin. Other states apply the prohibition to public employment only: Alaska, Arizona, Indiana, Kentucky, Louisiana, Michigan, Montana, North Carolina, Ohio; Pennsylvania, and Virginia. Some local city and county ordinances contain similar anti-discrimination provisions.

The bottom line for both employers and LGBT individuals, in the Seventh Circuit and elsewhere, is that the employment protections afforded to individuals based on
sexual orientation remains determined, for now, at the state and local level.

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