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Seventh Circuit: Title VII Prohibits Sexual-Orientation Discrimination

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Sexual orientation discrimination is discrimination on the basis of sex for the purposes of Title VII. So ruled the majority of federal judges for the Seventh Circuit Court of Appeals on April 4, 2017. This groundbreaking ruling is the first time that a federal appellate court has held that Title VII protects workers against discrimination due to their sexual orientation. *Hively v. Ivy Tech Comm. College*, No. 15-1720 (7th Cir. April 4, 2017).

Title VII Prohibits Discrimination Because of Sex

Title VII of the Civil Rights Act of 1964 makes it unlawful for employers to discriminate on the basis of a person's "race, color, religion, sex, or national origin … ." The question before the Seventh Circuit was whether discrimination on the basis of sexual orientation is a form of discrimination on the basis of "sex," and, therefore, prohibited by Title VII.

In 2015, the Equal Employment Opportunity Commission (EEOC) began to assert the position that Title VII does indeed prohibit sexual orientation discrimination. But, the EEOC's position is not binding law. The U.S. Supreme Court has not ruled on this question, but all eleven federal courts of appeal, including the Seventh Circuit, had previously ruled that Title VII does not protect employees against sexual orientation discrimination. The full panel of regular judges on the Seventh Circuit, however, agreed to address this issue anew, with the majority concluding that sex discrimination includes discrimination on the basis of a person's sexual orientation.

Lesbian Professor Claimed Discrimination Based on Her Sexual Orientation

To put a face to the case before the court, we look to Kimberly Hively, a part-time adjunct professor at Ivy Tech Community College in South Bend, Indiana. Hively is openly gay. She began teaching at Ivy Tech in 2000. Between 2009 and 2014, she applied for at least six full-time positions but was not selected for any of them. In late 2013, Hively filed a charge with the EEOC, alleging that she was being discriminated against on the basis of her sexual orientation in violation of Title VII for being denied a full-time position. Then, in July 2014, Ivy Tech did not renew Hively's part-time contract.

After receiving her right to sue letter, Hively filed her discrimination lawsuit in federal district court. Ivy Tech sought to dismiss the lawsuit on grounds that Title VII did not protect against sexual orientation discrimination. The district court agreed, and dismissed Hively's lawsuit. On appeal to a three-judge panel of the Seventh Circuit, the dismissal was upheld, but the panel wrote that it was bound by earlier Seventh Circuit precedent to so rule. That panel, however, criticized the circuit's precedent as inconsistent and impractical and opined that the "handwriting was on the wall" to recognize that sexual orientation discrimination was a subset of sex discrimination under Title VII.

The full panel of Seventh Circuit judges then agreed to hear Hively's case *en banc*. They concluded that Title VII's prohibition on sex discrimination also prohibited sexual orientation discrimination for two reasons. First, discrimination on the basis of sexual orientation is impermissible "sex stereotyping." Second, discrimination on the basis of sexual orientation is a form of associational discrimination based on sex.

Ultimate Case of Sex Stereotyping

In its discussion of "sex stereotyping," the Court relied on the Supreme Court's 1989 ruling in *Price Waterhouse v. Hopkins*, 490 U.S. 228, which recognized that discrimination based on an employee's failure to act in a manner that was stereotypical of his or her sex was prohibited as sex discrimination under Title VII. In that case, Hopkins had alleged that her employer was discriminating only against women who behaved in what her employer viewed as too "masculine" by not wearing makeup, jewelry, and traditional female clothing. The Seventh Circuit stated that Hively "represents the ultimate case of failure to conform to the female stereotype (at least as understood in a place such as modern America, which views heterosexuality as the norm and other forms of sexuality as exceptional): she is not heterosexual." Finding that Hively was not conforming to a stereotype based on the sex of her partner, the Court ruled that employment discrimination based on Hively's sexual orientation is actionable under Title VII.

Associational Discrimination

Hively also argued that discrimination based on sexual orientation is sex discrimination under the associational theory. After Supreme Court cases, including the *Loving* case in which the Court held that laws restricting the freedom to marry

based on race were unconstitutional, it is accepted law that a person who is discriminated against because of the protected characteristic of a person with whom he or she associates is being disadvantaged because of her own traits. In Hively's case, if the sex of her partner (female rather than male) led to her being treated unfavorably in the workplace, then that distinction is "because of sex." The Seventh Circuit stated: "No matter which category is involved, the essence of the claim is that the plaintiff would not be suffering the adverse action had his or her sex, race, color, national origin, or religion been different."

What This Ruling Means For Employers

For employers located in Indiana, Illinois, and Wisconsin, the Seventh Circuit's decision is binding precedent. Employers with fifteen or more employees (and hence covered by Title VII) in those states should update their policies and practices immediately to ensure that they do not permit discrimination, harassment, or retaliation on the basis of sexual orientation.

For employers located outside of those three states, existing court rulings denying application of Title VII to sexual orientation employment discrimination claims still apply. That said, the tide is turning. Indeed, as Judge Posner explained in his concurrence, as the courts have continued to grapple with the scope of Title VII's prohibition on sex discrimination, they have failed "to maintain a plausible, defensible line between sex discrimination and sexual-orientation discrimination" and begun to realize that "homosexuality is nothing worse than failing to fulfill stereotypical gender roles." Other courts are beginning to reach the same conclusion. The Chief Judge of the Second Circuit Court of Appeals, in a recent concurrence, noted significant merit to the arguments that sexual-orientation discrimination was a form of impermissible sex discrimination and invited his court to reconsider the issue: "I respectfully think that in the context of an appropriate case our Court should consider reexamining the holding that sexual orientation discrimination claims are not cognizable under Title VII." *Christiansen v. Omnicom Group*, No. 16-748 (7th Cir. Mar. 27, 2017).

Beyond the judicial realm, many state and local anti-discrimination laws explicitly cover sexual orientation discrimination and the EEOC continues to take the position that Title VII prohibits sexual-orientation discrimination. Should the U.S. Supreme Court take up the issue or Congress pass legislation amending Title VII, we may get a uniform nationwide interpretation of "sex discrimination" under Title VII. Until that occurs, employers are on notice that they cannot safely rely on existing case law to conclude that sexual-orientation discrimination is permissible under Title VII.