

Seventh Circuit Court Rules Sexual Orientation Is Protected Class: Kimberly Hively v. Ivy Tech Community College



Article By

[Theresa M. Sprain](#)

[John E. Pueschel](#)

[Patricia I. Heyen](#)

[Womble Bond Dickinson \(US\) LLP](#)

[Client Alert](#)

- [Civil Rights](#)
- [Litigation / Trial Practice](#)
- [Labor & Employment](#)

- [7th Circuit \(incl. bankruptcy\)](#)

Thursday, April 6, 2017

In a significant decision that expands the rights of employees, the U.S. Court of Appeals for the **Seventh Circuit** ruled on April 4, 2017 that discrimination on the basis of sexual orientation is a form of sex discrimination under **Title VII of the Civil Rights Act of 1964**. **Kimberly Hively v. Ivy Tech Community College**, No. 15-1720 (7th Cir. April 4, 2017). The Seventh Circuit is the highest court in the United States to hold that sexual orientation is a form of sex discrimination under Title VII.

Kimberly Hively, a part-time, adjunct professor at Ivy Tech Community College, alleged that she was repeatedly denied consideration for full-time teaching positions and her part-time contract was not renewed due to her sexual orientation.

Hively filed suit in the U.S. District Court for the Northern District of Indiana, alleging violations of Title VII. Ivy Tech filed a motion to dismiss, arguing that sexual orientation is not a protected class under Title VII. The District Court granted Ivy Tech's motion and dismissed Hively's case with prejudice.

Hively appealed the District Court's dismissal to the Seventh Circuit Court, which initially affirmed the District Court's dismissal of Hively's complaint. The Seventh Circuit granted Hively's request for an *en banc* hearing. On April 4, 2017, the Seventh Circuit reversed the District Court's dismissal of Hively's suit against Ivy Tech and remanded the case for further proceedings.

Relying on "common sense reality," the Seventh Circuit held that "a person who alleges that she experienced employment discrimination on the basis of her sexual orientation has put forth a case of sex discrimination for Title VII purposes." The Court noted that although discrimination based on sexual orientation has historically been deemed to be distinct from sex discrimination, the line between sexual orientation and sex has become increasingly blurred. The Court referred to Supreme Court decisions in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), which held that Title VII's protection against sex discrimination applies to harassment in the workplace between members of the same sex, and *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), which held that discrimination based on a person's failure to conform to a certain set of gender stereotypes constitutes sex discrimination under Title VII.

Notably, the Court found that the failure of the language of Title VII to expressly encompass sexual orientation as a protected class to be "neither here nor there," stating that "in the years since 1964, Title VII has been understood to cover far more than the simple decision of an employer not to hire a woman for Job A, or a man for Job B." The Court ultimately concluded that "[t]he logic of the Supreme Court's decisions, as well as the common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex, persuade us that the time has come to overrule our previous cases that have endeavored to find and observe that line."

While the Seventh Circuit is not the first court to hold that Title VII protects sexual orientation, it is the *highest* court to make such a finding. Only a limited number of federal trial courts have made the same ruling, and the U.S. Equal Employment Opportunity Commission held in *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641 (July 15, 2015), that a claim of discrimination on the basis of sexual orientation necessarily states a claim of discrimination on the basis of sex under Title VII.

Traditionally, federal courts have routinely rejected the claim that sexual orientation is a protected class pursuant to Title VII. Indeed, the Eleventh Circuit held as recently as March 2017 that discrimination on the basis of an employee's sexual orientation is not prohibited under Title VII of the Civil Rights Act. See *Jameka Evans v. Georgia Regional Hospital*, No. 15-15234 (11th Cir. March 10, 2017). Due to the split in authority between the federal appellate courts, absent legislative action by Congress, this issue is likely to be resolved by the U.S. Supreme Court.

Source URL: <https://www.natlawreview.com/article/seventh-circuit-court-rules-sexual-orientation-protected-class-kimberly-hively-v-ivy>