

April 6, 2017

The Seventh Circuit Court of Appeals Rules that Title VII Protects Employees from Sexual Orientation Discrimination

By **Drahcir M. Smith**

On Tuesday, the Seventh Circuit issued a monumental opinion holding that Title VII of the Civil Rights Act of 1964 prohibits sexual orientation discrimination. It is the first [and only] federal circuit court decision to reach this conclusion; and purports to resolve years of seemingly contradictory results in the federal court system.

For employers—particularly those located within the Seventh Circuit—the ruling suggests the need for a hurried review of employment handbooks, practices, policies, and procedures to ensure Title VII compliance. Of course, the law is not entirely settled on this issue; and multi-state employers with operations in non-Seventh Circuit jurisdictions will be faced with the additional burden of deciding whether to implement uniform national policies which comply with the Seventh Circuit decision; or to limit policy revisions to operations in Illinois, Indiana, and Wisconsin.

Kimberly Hively Alleges Title VII Discrimination Based on Her Protected Status as a Lesbian

Hively v. Ivy Tech Community College of Indiana started out as a relatively common [and nondescript] Equal Employment Opportunity Commission (EEOC) charge. The Charging Party, Kimberly Hively, alleged simply, “I have applied for several positions at IVY TECH, fulltime, in the last 5 years. I believe I am being blocked from fulltime employment without just cause. I believe I am being discriminated against based on my sexual orientation. I believe I have been discriminated against and that my rights under Title VII of the Civil Rights Act of 1964 were violated.”

After receiving a right-to-sue letter from the EEOC, Ms. Hively filed suit in the United States District Court for the Northern District of Indiana, alleging that Ivy Tech discriminated against her on the basis of her sexual orientation. Ms. Hively’s lawsuit was dismissed by the federal district court on the grounds that sexual orientation was not a Title VII protected category.

The Appeal

Lambda Legal, a national not-for-profit organization which advocates, primarily, for LGBTQ and HIV-related rights, filed an appeal on Ms. Hively’s behalf. Relying on precedent, the Seventh Circuit’s three-judge panel affirmed the district court’s dismissal of the case in July 2016.

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In October 2016, the Seventh Circuit granted en banc review of the matter, and on April 4, 2017, reversed the district court's decision in an 8-3 vote—holding that sexual orientation is, indeed, a protected category under Title VII. Though in direct contravention with multiple federal court decisions, the majority opinion, written by Chief Judge Diane Wood, noted that the panel was not imposing new Title VII obligations on employers, but interpreting existing law. This comes only one week after the Second Circuit Court of Appeals, in *Christiansen v. Omnicom Group, Inc.*, refused to recognize sexual orientation as a protected category under Title VII.

“The question before us is not whether this court can, or should, ‘amend’ Title VII to add a new protected category to the familiar list of race, color, religion, sex, or national origin,” wrote Chief Judge Wood. “Obviously that lies beyond our power. We must decide instead what it means to discriminate on the basis of sex, and in particular, whether actions taken on the basis of sexual orientation are a subset of actions taken on the basis of sex.”

Performing a close examination of Supreme Court cases, in which the Court analyzed Title VII prohibitions on same-sex discrimination, gender stereotyping, and associational discrimination, the Seventh Circuit determined, that so too, was sexual orientation discrimination prohibited by Title VII's “sex” discrimination protections.

“Hively's claim is no different from the claims brought by women who were rejected for jobs in traditionally male workplaces, such as fire departments, construction, and policing [based on gender stereotyping],” the majority opinion states. Nor, according to the Seventh Circuit panel, can sexual orientation discrimination be distinguished from associational discrimination based on an employee's interracial relationship under Title VII.

Despite performing this extensive analysis, Judge Wood suggested that the panel need not have gone so far to form its conclusion. “Hively alleges that if she had been a man married to a woman (or living with a woman, or dating a woman) and everything else had stayed the same, Ivy Tech would not have refused to promote her and would not have fired her.” Wood concluded, therefore, that Ms. Hively's claim, as alleged, “describes paradigmatic sex discrimination.”

In a concurring opinion, Judge Richard Posner emphasized the Court's reliance on a changing cultural landscape to reach its decision. “We should not leave the impression that we are merely the obedient servants of the 88th Congress (1963-1965), carrying out their wishes...We are not. We are taking advantage of what the last half century has taught.”

Judge Diane Sykes, joined by two others, issued a dissenting opinion, in which she states that the majority wrongfully expanded the meaning of “sex” under Title VII.

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Practical Considerations for Employers

The EEOC has maintained that Title VII prohibits discrimination on the basis of sexual orientation since 2015 (*Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641 (July 15, 2015)); and several states have enacted legislation that makes sexual orientation discrimination unlawful. However, this unprecedented federal circuit court ruling has far-reaching implications for numerous employers; and will require the prompt revision of many employment and/or benefits-related policies that could be construed to be discriminatory.

Drahcir M. Smith has advised numerous Fortune 100 and 500 companies regarding state and federal employment law, prevention of workplace discrimination, and the development of effective personnel practices. She has substantial experience representing employers in wage and hour actions, discrimination charges and lawsuits, and in litigation involving post-employment restrictive covenants.

Riley Safer Holmes & Cancila LLP's employment team has extensive experience reviewing, analyzing, drafting, and revising employment-related policies for compliance with applicable law.

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