

Insights: Alerts

The Seventh Circuit Holds That Title VII Prohibits Sexual Orientation Discrimination: Key Takeaways for Employers

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On April 4, 2017, the Seventh Circuit, sitting *en banc*, held in *Hively v. Ivy Tech Community College of Indiana* that Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of sexual orientation. In an 8-3 ruling, the court held that a teacher at a community college could move forward with her suit in a federal district court claiming she was denied advancement because she is a lesbian. With this ruling, the Seventh Circuit becomes the first federal appellate court in the country to determine that sexual orientation is protected under Title VII.

Although Title VII is silent with respect to sexual orientation discrimination, the Seventh Circuit concluded that sexual orientation is protected under Title VII's prohibition against discrimination based on "sex". The court looked to both Supreme Court precedent as well as its own common sense in determining that "it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex . . ."

Below, we address key takeaways for employers relating to this ruling:

- **The Seventh Circuit's ruling is not binding in other jurisdictions.** The *Hively* decision establishes a federal remedy for employment-related sexual orientation discrimination only in the states comprising the Seventh Circuit: Illinois, Indiana, and Wisconsin. Of those states, only Indiana does not have a state law expressly prohibiting such discrimination. Courts in other circuits are not bound by the *Hively* decision, but that decision likely will have a wide-spread impact in the growing debate over sexual orientation discrimination.
- **The decision creates a circuit split that may spur Supreme Court action.** Almost every federal circuit court (including, in an earlier ruling, the Seventh Circuit) has held that sexual orientation discrimination is not protected under Title VII, so the *Hively* decision creates a split of authority among the circuits that invites resolution by the Supreme Court. Until such action by the Supreme Court occurs, *Hively* may encourage other circuits to reconsider previous rulings on this issue. The Eleventh Circuit (encompassing Alabama, Florida, and Georgia), for example, is set to hear an appeal on this issue soon, and the Second Circuit (covering Connecticut, New York, and Vermont) has suggested that it may be time to reconsider that court's prior decisions on sexual orientation discrimination under Title VII. Outside of the courts, the EEOC has taken the position since 2015 that sexual orientation discrimination is protected by Title VII, and

roughly half the states and numerous counties and cities have passed legislation protecting against sexual orientation and gender identity discrimination. The employer in *Hively* has announced that it does not intend to appeal the Seventh Circuit's decision, so the present case will not make its way to the Supreme Court, but given the increasing attention sexual orientation discrimination has received in recent years, the Supreme Court may agree to hear a similar case at some point soon.

- **Supreme Court precedent, as outlined in *Hively*, may favor protection.** In support of its ruling, the Seventh Circuit walked through a line of Supreme Court cases that provided protection to individuals in scenarios other than disparate treatment between men and women in the workplace. For example, in *Loving v. Virginia*, the Supreme Court held that discrimination based on an individual's association with individuals of a different race was prohibited by the Equal Protection and Due Process Clauses of the Constitution. In *Price Waterhouse v. Hopkins*, the Supreme Court held that gender stereotyping is prohibited by Title VII. In *Oncale v. Sundowner Offshore Services, Inc.*, the high court held that sex discrimination could occur between a sexual harassment victim and a harasser of the same gender. Both *Hopkins* and *Oncale* have been applied by lower courts to protect LGBTQ individuals. The Seventh Circuit also noted in *Hively* the conflict between the Supreme Court's *Obergefell v. Hodges* decision, which recognized the constitutional right of same-sex couples to marry, and a reading of Title VII that would permit employment discrimination against same-sex couples on the basis of their legal marriages. Nevertheless, the outcome of any future Supreme Court decision is uncertain. With the anticipated confirmation of Neil Gorsuch, the Court will have a potential majority that may disfavor a broad reading of Title VII. Employers should continue to monitor the issue closely.
- **Employers that have not updated policies recently should review their policies for federal, state, and local compliance with nondiscrimination laws.** Even without a definitive decision from the Supreme Court on the issue of sexual orientation discrimination under Title VII, employers should be aware that discrimination based on sexual orientation (and in some instances, gender identity or expression) is already unlawful in numerous jurisdictions throughout the country. Employers should ensure that their handbooks are consistent with applicable law in this regard and that managers are aware of, and are complying with, their legal obligations.

Should you have any questions about the *Hively* decision or need help reviewing and revising outdated policies, please contact your Kilpatrick Townsend attorney.

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