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7th Circuit Holds That Title VII's Prohibition on Sex Discrimination Includes A Prohibition on Sexual Orientation Discrimination

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On April 4, 2017, the *en banc* Seventh Circuit Court of Appeals overruled its own precedent and became the first Circuit to hold that discrimination on the basis of sexual orientation can constitute unlawful sex discrimination under Title VII. *See Hively v. Ivy Tech. Cmty. College of Indiana, II*, 853 F.3d 339, 351 (7th Cir. 2017) (overruling *Hively v. Ivy Tech. Cmty. College of Indiana, I* 830 F.3d 698, 709 (7th Cir. July 28, 2016).). All other Circuits that have addressed the issue have held sexual orientation is not protected under Title VII. Although Ivy Tech Community College of Indiana ("Ivy Tech") has indicated that it does not plan to petition the Supreme Court for certiorari, employers should pay close attention to this issue. The EEOC had previously adopted the position in 2015 now taken by the Seventh Circuit. The Supreme Court and the Circuit Courts have held that Title VII protects employees who are discriminated against because they do not conform to the stereotype for their gender and this often may overlap with sexual orientation. Some states and local governments prohibit discrimination on the basis of sexual orientation. Furthermore, many employees likely believe that discrimination on the basis of sexual orientation is wrong or unjust. Therefore, employers should be prepared to defend against claims of sexual orientation discrimination even if there is not yet a definitive ruling from the Supreme Court on whether sexual orientation discrimination qualifies as unlawful sex discrimination under Title VII.

Unsuccessful Job Applications & Non-Renewal of Part-Time Contract

This lawsuit arose from Kimberly Hively's multiple attempts to obtain a full-time teaching position at Ivy Tech. Ms. Hively was a part-time adjunct professor at Ivy Tech. She was also openly gay. Between 2009 and 2014, she applied for at least six full-time positions at Ivy Tech but was never selected. Additionally, in July of 2014, Ivy Tech refused to renew her part-time contract.

The Charge of Discrimination

On December 13, 2013, Ms. Hively filed a charge of discrimination with the EEOC. Notably, she did not allege unlawful sex discrimination. In her charge of discrimination Ms. Hively, without qualification, alleged that she believed she was denied full-time employment by Ivy Tech because of her sexual orientation. The EEOC ultimately issued Ms. Hively a right-to-sue letter and she subsequently filed suit in federal district court.

The Litigation

In response, Ivy Tech filed a motion to dismiss for failure to state a claim. It argued that her claim failed as a matter of law because Title VII, by definition, does not prohibit discrimination on the basis of sexual orientation. The district court, relying on a prior Seventh Circuit case (*Hamner v. St. Vincent Hospital and Health Care Ctr., Inc.*, 224 F.3d 701 (7th Cir. 2000), agreed with Ivy Tech and granted its motion to dismiss.

Ms. Hively appealed the dismissal. Initially, a Seventh Circuit panel affirmed the district court. *See Hively v. Ivy Tech Cmty. College of Indiana, I*, 830 F.3d 698, 709 (7th Cir. 2016). However, on October 11, 2016, the Seventh Circuit granted Ms. Hively's petition for en banc review and ultimately reversed the panel decision and the Circuit's precedent on the issue.

AUTHORS

- Brian Peterson

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- Brian Peterson

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Title VII's Prohibition on Sex Discrimination Implicitly Includes A Prohibition on Sexual Orientation Discrimination

In *Hively I*, a Seventh Circuit panel concluded that it was bound by prior precedent to hold that, without amendment by Congress or a decision from the Supreme Court, Title VII did not prohibit discrimination on the basis of sexual orientation. But in *Hively II*, the *en banc* majority opinion pointed out that the *Hamner* decision created a paradoxical legal landscape regarding sexual orientation discrimination. *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that the practice of "gender stereotyping" falls within Title VII's prohibition against sex discrimination); see *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (holding that same-sex sexual harassment is actionable under Title VII); *see Obergefell v. Hodges*, 135 S.Ct. 2584 (2015) (holding that same-sex couples have a fundamental right to marry and that state laws which prohibit it are unconstitutional to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples). Therefore, as it stood prior to *Hively II*, the law of the Seventh Circuit allowed "a person [to] be married on Saturday and then fired on Monday for just that act." *Hively II*, at 342.

Problematic logical inconsistencies, like the same-sex marriage hypothetical, and the difficulty of distinguishing sexual orientation discrimination from unlawful "gender stereotyping" caused the Circuit to overrule *Hamner* and hold that a plaintiff who alleges discrimination because of sexual orientation states a claim under Title VII. *Id*. at 346, 350-51:

> "Our panel described the line between a gender nonconformity claim and one based on sexual orientation as gossamer-thin; we conclude that it does not exist at all. . . . It would require considerable calisthenics to remove the 'sex' from 'sexual orientation.' The effort to do so has led to confusing and contradictory results, . . . The 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."

The Comparative Test for Sexual Orientation Discrimination as Sex Discrimination

According to the Seventh Circuit, the question that must be answered in order to determine whether unlawful sexual orientation discrimination has occurred under Title VII is to determine whether the plaintiff would have been treated differently if everything, except for sex, is held constant. In this case, the question would be whether Ivy Tech would have refused to hire Ms. Hively for a full-time teaching position and not renewed her part-time teaching contract if she were a man that was in a romantic relationship with a woman? "Any discomfort, disapproval, or job decision based on the fact that the complainant – woman or man – dresses differently, speaks differently, or dates or marries a same-sex partner, is a reaction purely and simply based on sex. That means that it falls within Title VII's prohibition against sex discrimination, if it affects employment in one of the specified ways." *Id*. at 347.

Implications for Employers

The *Hively* ruling applies only in the Seventh Circuit, covering Wisconsin, Illinois, and Indiana. However, employers with employees outside the Seventh Circuit should hesitate in relying on existing case law that sexual orientation discrimination is not prohibited under Title VII. While the law under Title VII may be unsettled, the EEOC takes the position that sexual orientation discrimination is covered under Title VII. The EEOC will likely use the *Hively II* opinion to support its position that sexual orientation discrimination is a form of sex discrimination. Additionally, an employer may be subject to a state statute or local ordinance that prohibits discrimination in employment based on an employee's sexual orientation.

It also appears likely that the ruling in *Hively II* will be followed by decisions in other circuit courts similarly extending Title VII rights to cover sexual orientation. The Second Circuit recently announced it will reconsider *en banc* its precedent that Title VII does not cover sexual orientation in the case of a gay skydiving instructor whose bias suit the Circuit had previously declined to revive.

Key Takeaways

- Even if *Hively* is not followed in other jurisdictions, employers must still comply with state laws and local ordinances that prohibit discrimination on the basis of sexual orientation.

- Employers should proactively plan how to comply with any changes given the state of the law. Since the EEOC considers sexual orientation to be a protected class, employers should consider including sexual orientation as a protected class in their anti-discrimination policies.
- *Hively* is a good reminder to employers that they should review and update their anti-discrimination and anti-harassment policies with employment counsel annually. Employers who decide to treat sexual orientation the same as another protected class should evaluate and revise their workplace policies, procedures, and training materials.

This blog post was drafted by Rosemary Orsini and Brian Peterson. Ms. Orsini is Of Counsel in Spencer Fane's Denver – Republic Plaza Office. Brian Peterson is an Associate in Spencer Fane's Kansas City Office. For more information please visit spencerfane.com.