

Seventh Circuit's Historic Decision Prohibits Sexual-Orientation Discrimination

Article By:

Miguel A. Manriquez

Farrah N.W. Rifelj

On April 4, 2017, the Seventh Circuit Court of Appeals in *Hively v. Ivy Tech Community College of Indiana* became the first U.S. Court of Appeals to explicitly conclude that discrimination on the basis of sexual orientation is a form of sex discrimination and violates Title VII of the Civil Rights Act of 1964.

Openly lesbian Plaintiff Kimberly Hively taught as an adjunct professor at Ivy Tech Community College's South Bend, Indiana campus. After Ivy Tech had rejected Ms. Hively for a full-time position for the sixth time and decided to not renew her part-time contract, Ms. Hively filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging discrimination on the basis of her sexual orientation. The case proceeded to the district court, where it was dismissed on the grounds that sexual orientation is not a protected class under Title VII. Ms. Hively appealed the district court's decision to the Seventh Circuit. In July 2016, a three-judge panel of the Seventh Circuit initially upheld the district court's ruling. On October 11, 2016, the Seventh Circuit granted Ms. Hively's petition for rehearing en banc and vacated the panel's July 2016 opinion and judgment. On April 4, 2017, the full panel for the Seventh Circuit issued its opinion reversing the district court's judgment and remanding the case for further proceedings.

Although the U.S. Supreme Court has not explicitly held that discrimination on the basis of sexual orientation is a form of sex discrimination, in *Hively*, the Seventh Circuit cited several analogous Supreme Court decisions which have expanded the scope of sex discrimination under Title VII beyond "the simple decision of an employer not to hire a woman for Job A, or a man for Job B." For example, the Supreme Court has held that the prohibition against sex discrimination reaches sexual harassment in the workplace, including same-sex workplace harassment, and it reaches discrimination based on a person's failure to conform to a certain set of gender stereotypes. The Seventh Circuit refused to limit its statutory interpretation to what Congress was concerned with when it enacted Title VII: "It is therefore neither here nor there that the Congress that enacted the Civil Rights Act in 1964 and chose to include sex as a prohibited basis for employment discrimination (no matter why it did so) may not have realized or understood the full scope of the words it chose."

The Seventh Circuit determined that the "comparative method" appropriately frames the legal

question regarding sexual-orientation discrimination, i.e., if Ms. Hively were a man and everything else remained the same including the gender of her partner, would Ivy Tech have refused to promote her? The Court stated that there is no difference between a gender-nonconformity claim (a.k.a. gender stereotyping) and one based on sexual orientation. The court emphasized that the Supreme Court has recognized gender-nonconformity discrimination as a form of sex discrimination, and sexual-orientation discrimination is no different.

Because the Seventh Circuit's decision creates a clear split among the circuit courts with respect to sexual orientation (e.g., the Sixth and Eleventh Circuits have held that sexual orientation is not protected under Title VII), this case is a prime candidate for review by the Supreme Court. For now, employers in the Seventh Circuit and other jurisdictions need to be aware that sexual orientation is recognized by the EEOC, the Seventh Circuit, and other federal district courts as protected under Title VII. In addition, 22 states have employment laws prohibiting discrimination on the basis of sexual orientation, and 20 states have employment laws prohibiting gender-identity discrimination. As of January 2016, at least 225 cities and counties nationwide prohibit employment discrimination on the basis of gender identity. Federal contractors are also obligated not to discriminate on the basis of sexual orientation and/or gender identity. This decision also has major implications for cases involving gender identity or transgender discrimination because the same rationale for expanding the protections of Title VII may be used by plaintiffs seeking similar treatment for transgender status.

©2025 MICHAEL BEST & FRIEDRICH LLP

National Law Review, Volume VII, Number 97

Source URL: <https://natlawreview.com/article/seventh-circuit-s-historic-decision-prohibits-sexual-orientation-discrimination>