

Seventh Circuit Rules Title VII Bars Sexual Orientation Discrimination, Creating Circuit Split and Setting Stage for Likely Supreme Court Review

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Employment Labor and Benefits at Mintz

In a landmark *en banc* decision rejecting its earlier panel ruling, the U.S. Court of Appeals for the Seventh Circuit became the first federal appellate court to hold that Title VII of the 1964 Civil Rights Act prohibits discrimination in employment on the basis of sexual orientation. While the employer in the case, *Hively v. Ivy Tech Community College, No. 15-1720 (7th Cir. April 4, 2017)*, has indicated that it does not intend to appeal the Seventh Circuit's ruling, the conflict between the court's holding and recent Second and Eleventh Circuit decisions makes it likely that this issue will reach the Supreme Court in the near future.

In a [post](#) last August, we discussed the Seventh Circuit's earlier ruling in this case, in which a three-judge panel wrestled with the contradiction inherent in extending Title VII's protections to gay and lesbian employees who experience discrimination for failing to conform to gender norms while excluding claims based only on the employee's sexual orientation. Concluding that this reasoning amounted to a distinction without a difference, the full Seventh Circuit last week explained that "[o]ur 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."

Building on a series of Supreme Court decisions extending Title VII's protections against sex discrimination beyond the statutory text in other similar realms, the Seventh Circuit determined that the statute's prohibition on sex discrimination encompassed discrimination on the basis of sexual orientation regardless of whether "Congress ... realized or understood the full scope of the words it chose." The court noted, for example, that in *Oncale v. Sundowner Offshore Services* (1998), the late Justice Antonin Scalia extended Title VII's protections to same-sex victims of sexual harassment because, while same-sex harassment "was assuredly not the principal evil Congress was concerned with when it enacted Title VII ... [s]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."

In the court's view, Supreme Court precedent holding that Title VII prohibits same-sex harassment and gender stereotyping, combined with Fourteenth Amendment prohibitions against restricting access to marriage based upon race and sex, led inexorably to the conclusion that Title VII forbids sexual orientation discrimination. The eight-judge majority rested its conclusion on three principal

theories: (1) discriminating against individuals because of their sexual orientation is engaging in sex stereotyping in violation of Title VII; (2) sexual orientation discrimination is “paradigmatic sex discrimination,” meaning the plaintiff was subject to sex discrimination due to the fact that she was a woman dating a woman rather than a man dating a woman; and (3) sexual orientation discrimination is associational discrimination, a theory borne out of Fourteenth Amendment marriage jurisprudence and frequently applied in Title VII cases.

Sex Stereotyping

The court first observed that in *Price Waterhouse v. Hopkins* (1989), the Supreme Court determined that an employer unlawfully discriminated against a female associate when it denied her partnership because she failed to conform to its notions of how a woman should act and dress. The Seventh Circuit reasoned that discriminating against a woman because she is a lesbian is exactly the same: lesbians fail to conform to stereotypes about women; namely, that women should form intimate relationships with men. As such, the court opined, Hively represented the “ultimate case of failure to conform to the female stereotype ... she is not heterosexual.” Moreover, in *Oncale* the Supreme Court rejected earlier cases concluding that Title VII’s drafters intended only to protect women against male-initiated harassment, clarifying that a man can bring a sexual harassment claim against another man. In the Seventh Circuit’s view, together these cases represented a departure from a traditional understanding of sex-based discrimination and opened the door for broader protections under Title VII.

Comparative Analysis

Next, the court applied the “comparative method” to “isolate the significance of the plaintiff’s sex to the employer’s decision.” The court asked, “has she described a situation in which, holding all other things constant and changing only her sex, she would have been treated the same way?” Answering this question in the negative, the court found that Hively prevailed under a simple textual analysis. She was, indeed, denied employment “because of...sex.” In other words, according to Hively’s allegations, if she were a man dating a woman the employer would not have refused to hire her into a full-time position.

Fourteenth Amendment Protections

Finally, the court extrapolated from the holdings in two landmark marriage rights cases to conclude that discrimination against a gay or lesbian person is unlawful associational discrimination because of sex. In *Loving v. Virginia* (1967) and *Obergefell v. Hodges* (2015), the Supreme Court invalidated state marriage laws that forbade, respectively, mixed-race and same-sex marriages. *Loving* established that discrimination on the basis of the race with whom a person associates is a form of racial discrimination. *Obergefell* applied that reasoning to same-sex relationships when it invalidated state laws that discriminated in the provision of marriage licenses based upon sex. In *Hively*, the court noted that its panel had previously identified the illogical legal regime earlier decisions had established “in which a person can be married on Saturday and then fired on Monday for just that act.” While the marriage cases presented federal constitutional questions distinct from *Hively*’s question of statutory interpretation, the court found that the same logic applied. Accordingly, the court concluded that discrimination against someone based on the sex of the person she dates amounts to discrimination because of sex in exactly the same way that discrimination against a white man because he marries a black woman is discrimination because of race.

Takeaways

Employers in Massachusetts, New York, California, the District of Columbia and many other U.S. jurisdictions are already subject to state and local laws that prohibit discrimination on the basis of sexual orientation and therefore the eventual fate of the Seventh Circuit's ruling at the U.S. Supreme Court may not affect their employment policies and practices. Further, most major employers in the United States have already adopted non-discrimination policies and practices that afford greater protections for LGBT individuals than (even pre-*Hively*) federal law requires.

Employers in states where sexual orientation discrimination is not yet expressly prohibited, however, should understand that a Supreme Court decision affirming the Seventh Circuit's ruling will result in a greater share of their workforces being covered under Title VII. Additionally, should the Supreme Court uphold the Seventh Circuit's decision, we can expect a body of federal case law to develop over time that will define the parameters of Title VII sexual orientation discrimination claims and potentially raise new challenges for employers.

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