

Expanding the Reach of Title VII: Seventh Circuit Recognizes Sexual Orientation as a Protected Class

In a shift from its earlier interpretations, the U.S. Court of Appeals for the Seventh Circuit overruled its prior precedent and held in *Hively v. Ivy Tech Community College of Indiana*, No. 15-1720, 2017 U.S. App. LEXIS 5839 (7th Cir Apr. 4, 2017) (en banc) that Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating on the basis of a person's sexual orientation. The decision by the Seventh Circuit is the first federal appellate court decision to come to this conclusion, and may influence other federal courts of appeals, including New York's Second Circuit. The decision comports with the EEOC's view—over the last several years, the EEOC has taken the position that Title VII prohibits discrimination on the basis of sexual orientation.

Title VII of the Civil Rights Act of 1964 makes it unlawful for employers to discriminate on the basis of a person's "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e(2)(a). Prior to the *Hively* decision, every federal court of appeals that had considered the issue had concluded that Title VII's prohibition against sex discrimination did not include a prohibition on discrimination based on a person's sexual orientation.

The plaintiff, Kimberly Hively, is a lesbian woman who worked as an adjunct professor at Ivy Tech Community College. She applied for at least six full time positions between 2009 and 2014. Hively did not obtain any of these positions, and eventually lost her adjunct professorship, as her contract was not renewed. Hively claimed that she did not get the full time teaching positions and lost her adjunct position due to her sexual orientation. She filed suit under Title VII. Ivy Tech Community College moved to dismiss the case, arguing that sexual orientation is not a protected class under Title VII.

In conducting its analysis, the Seventh Circuit concluded that discrimination on the basis of sexual orientation is a subset of discrimination on the basis of sex, and is thus protected by Title VII's prohibition on discrimination on the basis of sex. In part of its analysis, the majority looked to the Supreme Court's recent decisions in *United States v. Windsor*, 133 S. Ct. 2675 (2013) and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), in which the Supreme Court found the Defense of Marriage Act to be unconstitutional and ruled that there is a constitutional right to same sex marriage. The Seventh Circuit found that the logic of those cases necessitated its decision.

Three judges dissented. The dissent emphasized that when Title VII was adopted in 1964, a reasonable person would not have believed that banning employment discrimination "because of sex" would have also banned discrimination because of sexual orientation. In retort, the majority acknowledged that Congress may not have intended to include discrimination based on sexual orientation when it enacted Title VII, but indicated that the fact that Congress may not have anticipated a certain application of a law does not stand in the way of enforcing the law as enacted.

As the court's opinion applies only to the states within the jurisdiction of the Seventh Circuit (Illinois, Indiana, and Wisconsin), other courts are likely to weigh in on this issue in the coming months and years. *Hively* may persuade other courts to reconsider their prior precedent that claims of discrimination based on sexual orientation cannot be brought under Title VII. Just a few weeks ago, in *Christiansen v. Omnicom Group*, No. 16-748, 2017 U.S. App. LEXIS 5278 (2d Cir. Mar. 27, 2017), the Second Circuit (whose jurisdiction includes New York) considered the same issue and held that discrimination based on sexual orientation is not covered by Title VII. However, two of the judges on the panel noted

that the full court should consider reexamining the prior precedent, in light of the “changing legal landscape”; we expect that the full Second Circuit and (eventually) the Supreme Court are likely to reconsider this precedent in the future.

Separate from its ultimate treatment under Title VII, sexual orientation remains an explicitly protected classification under the New York State Human Rights Law and the New York City Human Rights Law. New York employers should continue to treat sexual orientation as a protected characteristic. Given the changing legal landscape, employers should be cautioned that they may now be subjected to suit in federal court if they are accused of discriminating against a person on the basis of his or her sexual orientation.

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<u>Lisa E. Cleary</u>	212-336-2159	<u>lecleary@pbwt.com</u>
<u>Catherine A. Williams</u>	212-336-2207	<u>cawilliams@pbwt.com</u>
<u>Helen P. O’Reilly</u>	212-336-2739	<u>horeilly@pbwt.com</u>
<u>Adam E. Pinto</u>	212-336-2156	<u>apinto@pbwt.com</u>
<u>Sam A. Yospe</u>	212-336-2471	<u>syospe@pbwt.com</u>

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