

Federal Appeals Court Takes a Stand, Holding that Title VII Prohibits Discrimination on the Basis of Sexual Orientation

by Melissa Raphan

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees on the basis of sex. For decades, federal courts across the country have consistently held that “sex” does not include “sexual orientation,” leaving LGBT employees without protection against discrimination under federal law. On April 4, 2017, the U.S. Court of Appeals for the Seventh Circuit became the first federal court to break this trend. In *Hively v. Ivy Tech Community College of Indiana*, the *en banc* Seventh Circuit concluded that employees could bring claims under Title VII alleging discrimination on the basis of their sexual orientation. This decision signals a trend that will change the landscape of federal employment discrimination law.

In *Hively*, an openly gay professor filed suit, alleging that the college had failed to promote her, and had later fired her, because of her sexual orientation. The college moved to dismiss the case because Title VII did not prohibit discrimination on the basis of sexual orientation. The trial court reluctantly agreed with the college, noting that existing precedent foreclosed the employee’s claim. On appeal, a three-judge panel of the Seventh Circuit—with equal reluctance—upheld the trial court’s decision. The employee asked for a rehearing *en banc*, in front of all 11 active judges of the Seventh Circuit. The court granted her request and, in an 8-3 decision (with some members of the majority also writing separate concurring opinions), reversed the trial court’s ruling and held that the term “sex” in Title VII includes “sexual orientation.”

In a results-oriented decision, the Seventh Circuit focused on Supreme Court precedent interpreting Title VII as prohibiting employers from discriminating against employees who do not conform to gender stereotypes. According to the court, the professor represented “the ultimate case of failure to conform to the female stereotype (at least as understood in a place such as modern America, which views heterosexuality as the norm and other forms of sexuality as exceptional): she is not heterosexual.” The court also pointed to cases involving race discrimination, such as *Loving v. Virginia*, a landmark Supreme Court case that struck down a state law restricting interracial marriages. Federal courts have announced similar rules in the context of Title VII, recognizing that an employer

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cannot discriminate against an employee based on the race of the employee's spouse. By the same token, the Seventh Circuit concluded that Title VII prohibits discriminating against an employee based on the sex of the employee's spouse or partner.

In reaching its decision, the Seventh Circuit rejected arguments that have historically supported excluding sexual orientation from Title VII's list of protected classes. For example, over the past several years, Congress has repeatedly considered and failed to enact legislation amending Title VII to include sexual orientation. And Congress *has* included sexual orientation in other federal statutes, such as the Violence Against Women Act and the Hate Crimes Act. The court gave little weight to Congress's inaction, noting that legislative history is often an inadequate means of interpreting a statute. Moreover, given that the EEOC itself considers sexual orientation discrimination to be a form of sex discrimination, Congress may have thought that its intervention was not necessary.

The opinion in *Hively* emphasized a consistent trend in Supreme Court decisions striking down discrimination (outside of the workplace) on the basis of sexual orientation. Most recently, the Court held in *Obergefell v. Hodges* that marriage is a fundamental right, which cannot be denied to citizens on the basis of their sexual orientation. According to the Seventh Circuit, this trend weighed strongly in favor of interpreting Title VII to prohibit sexual orientation discrimination in employment.

What does this mean going forward?

The *Hively* decision is important for several reasons. Although it is binding only within the Seventh Circuit (Illinois, Indiana, and Wisconsin), the decision represents a growing eagerness among federal courts across the country to reevaluate whether Title VII prohibits discrimination on the basis of sexual orientation. Indeed, similar cases are already working their way to and through other federal appellate courts. Moreover, now that the Seventh Circuit has parted company with its sister courts, there is a greater chance that the Supreme Court may take up the question. If the Court chooses to address this issue, its decision would bind every court in the country. Finally, although unlikely, the decision could spur Congress to amend Title VII to expressly exclude sexual orientation, which would override judicial interpretations of the statute.

Going forward, employers should be aware of two key considerations:

1. The Seventh Circuit acknowledged a decade-long trend of Supreme Court decisions protecting the rights of LGBT citizens. This trend suggests that if asked to do so, the Court may well interpret Title VII as prohibiting discrimination on the basis of sexual orientation. Employers should be aware of the potential for a significant change in the law, and begin proactively planning how to comply with any changes. National employers should have policies prohibiting sexual orientation in place, and all employers are well served to keep an eye on the issue. Given that the EEOC considers sexual orientation to be a protected class under federal law, the recommended path is to include sexual orientation as a protected class in company policies now.

2. Twenty-two states (including Minnesota) prohibit discrimination on the basis of sexual orientation. Even if other courts refuse to follow the *Hively* holding, employers must still comply with applicable state laws.

Hively will almost certainly not be the last case to address the definition of “sex,” as the term is used in Title VII. Yet the decision marks the first step in what could be a considerable shift in employment law. Even for employers who are not within the Seventh Circuit and who do not have employees in states that already prohibit discrimination on the basis of sexual orientation, this issue will be an important one to watch over the next few years.