

7th Circuit Becomes First Appellate Court To Extend Title VII Protection To Sexual Orientation

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On April 4, 2017, the United States Court of Appeals for the Seventh Circuit, sitting *en banc*, issued a landmark opinion becoming the first appellate court to hold that Title VII of the Civil Rights Act prohibits discrimination on the basis of sexual orientation, *Kimberly Hively v. Ivy Tech Community College of Indiana*.

Writing for the majority, Chief Judge Wood acknowledged that the absence of Title VII protection against sexual orientation discrimination appeared at first blush to be well-settled law. She then reviewed the cases on which that apparent consensus was based against the evolving definition of “sex” applied in Title VII and constitutional cases. Her analysis led the majority to conclude that the concept of “sex” in both Title VII and related areas of federal law had expanded from a purely biological definition to include sex-related characteristics and “gender non-conforming behavior.” The majority relied primarily on two US Supreme Court cases, *Price Waterhouse v. Hopkins* and *Oncale v. Sundowner Offshore Servs., Inc.* Each case held that for purposes of Title VII, discrimination on account of sex included discrimination on account of the particular plaintiff’s failure to conform to gender stereotypes. In *Oncale*, the Court had held that male-on-male sex harassment was actionable when motivated by the harasser’s perception that his male victim was unduly effeminate. In *Hopkins*, the Court held that discrimination against a woman accountant because she was overly masculine in demeanor and appearance could constitute a form of sex discrimination prohibited by Title VII.

From these premises the eight-judge majority concluded that discrimination against persons due to their sexual orientation was inherently discrimination based on sex. The majority used two theories. First, the court suggested a “but for” rationale: assuming everything else being equal, would the plaintiff have been fired had she been a man. The court then framed the defendant’s motivation as being based on the fact that the plaintiff was romantically attracted to and pursued intimate relations with women. The majority had no trouble concluding that a man who engaged in the same behavior would not have been fired for doing so, and therefore the plaintiff had been disadvantaged on account of her sex. The second rationale relied more heavily on the gender non-conformity line of cases, suggesting that for much of America homosexuality remains the ultimate gender non-conformity and therefore a motivation already prohibited by existing Supreme Court interpretation of Title VII.

The majority expressly stated that it was not ruling on whether the same prohibition would apply to discrimination on account of transsexual status or behavior.

The three judges who dissented from the decision largely relied upon the notion that the majority was re-writing the statute in a way which the 1964 drafters of the law would disagree as well as the consistent rejection by courts and Congress to add sexual orientation as a protected status. In their view, any change needed to come from Congress, not the courts.

What does this case mean for employers?

The immediate practical effects of the decision are limited. A circuit court decision is binding only in the geographic jurisdiction of the court which renders it. Of the three states which comprise the Seventh Circuit (Illinois, Indiana, and Wisconsin), two, Illinois and Wisconsin, already prohibit discrimination on account of sexual orientation under state law. Thus, in those two states, the only difference will be the availability of a federal remedy in addition to state law

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remedies. (For a summary of the state by state status of the law on this subject see: <http://www.hrc.org>). However, the decision might act as persuasive authority in other Circuits. For example, the Court of Appeals for the Second Circuit (New York, New Jersey, and Connecticut) has a similar case currently under *en banc* review. Whether the Seventh Circuit's decision is adopted elsewhere remains to be seen. Employers in states which do not prohibit sexual orientation discrimination and are outside the Seventh Circuit should thus take note of the risk that a decision made on the basis of sexual orientation today could lead to Title VII liability if the law in their circuit shifts to follow *Hively*.

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