

Seventh Circuit rules that sexual orientation is a protected class under Title VII



Ryan Neumeyer | Monday, June 19, 2017

Recently, the United States Court of Appeals for the Seventh Circuit, in *Hively v. Ivy Tech Cmty. Coll. of Indiana* (853 F.3d 339 (7th Cir. 2017)), found that it was illegal to discriminate in employment based on sexual orientation. The Seventh Circuit Court of Appeals covers Illinois, Indiana, and Wisconsin.

In *Hively*, the plaintiff Kimberly Hively, a lesbian, taught part-time at Ivy Tech Community College. She applied for at least six full-time positions at Ivy Tech but was never offered full-time employment and her part-time teaching contract was not renewed. Hively filed a claim in federal district court and it was dismissed for failing to state a claim because discrimination based on sexual orientation was not a violation of Title VII of the 1964 Civil Rights Act.

Generally, Title VII prohibits discrimination based on sex. Traditionally, courts have held that this encompasses gender, which did not formally include sexual orientation. However, the Equal Employment Opportunity Commission (EEOC) recently has disagreed with the prevailing view that Title VII did not include sexual orientation and held that discrimination against an individual because of that person's sexual orientation is discrimination because of sex.^[1] In addition, various courts have held discrimination within employment based on sexual orientation is prohibited under employment discrimination law.^[2]

In arguing against the prevailing view that discrimination based on sexual orientation is not discrimination based on sex, Hively argued that had she been a man (instead of a woman) in a relationship with a woman, then Ivy Tech would not have discriminated against her. Hively, who was openly gay, also

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argued that had her partner been a man, her contract would have been renewed, and thus she was discriminated against because of a protected characteristic of person he or she chooses to be associated. Seventh Circuit agreed with Hively's arguments.

The Seventh Circuit reversed the dismissal, and in so doing stated, "common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex," the time had come for it to overrule its previous cases that found that sexual orientation discrimination was distinct from sex discrimination.

As stated above, the Seventh Circuit's decision only encompasses Illinois, Indiana and Wisconsin. Many courts have ruled that sexual orientation is NOT a protected class and therefore, employment discrimination laws do not protect such individuals.^[3] Recently, a panel of the Eleventh Circuit – which covers Alabama, Georgia and Florida – reaffirmed that it could not recognize sexual orientation employment discrimination claims under existing law.^[4]

Best practice for handling sexual orientation in your policies

Even though a majority of courts that have addressed the issue have found that sexual orientation is not a protected class under Title VII, given the EEOC's position and the fact that numerous states and local governments have made sexual orientation a protected class^[5], it is a best practice to treat sexual orientation as a protected class under the law. Accordingly, employers may want to review their policies and include sexual orientation in its non-discrimination policies and equal employment opportunity statements in their handbooks. In addition, as with other protected classes, employers should ensure that it analyzes each termination decision so that it is defensible should a complaint or EEOC charge be filed for wrongful termination.

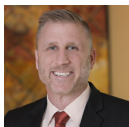
[1] See *David Baldwin v. Dep't of Transportation*, EEOC Appeal No. 120133080 (July 15, 2015)

[2] See, e.g., *Boutillier v. Hartford Pub. Sch.*, No. 3:13-CV-01303-WWE, --- F.Supp.3d ---, 2016 WL 6818348 (D. Conn. Nov. 17, 2016); *U.S. Equal Emp't Opportunity Comm'n v. Scott Med. Ctr., P.C.*, No. CV 16-225, --- F.Supp.3d ---, 2016 WL 6569233 (W.D. Pa. Nov. 4, 2016); *Winstead v. Lafayette Cnty. Bd. of Cnty. Comm'rs*, 197 F.Supp.3d 1334 (N.D. Fla. 2016); *Isaacs v. Felder Servs., LLC*, 143 F.Supp.3d 1190 (M.D. Ala. 2015); see also *Videckis v. Pepperdine Univ.*, 150 F.Supp.3d 1151 (C.D. Cal. 2015) (Title IX case, applying Title VII principles and *Baldwin*).

[3] See, e.g., *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217 (2d Cir. 2005); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 290 (3rd Cir. 2009); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979); *Kalich v. AT&T Mobility, LLC*, 679 F.3d 464, 471 (6th Cir. 2012); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Fredette v. BVP Mgmt. Assocs.*, 112 F.3d 1503, 1510 (11th Cir. 1997).

[4] *Evans v. Georgia Reg'l Hosp.*, 850 F.3d 1248, 1255-57 (11th Cir. 2017).

[5] California, Colorado, Connecticut, Delaware, Hawaii, Maine, Maryland, Massachusetts, Hawaii, Maine, Maryland, Minnesota, Nevada, New Hampshire, New Jersey, New York; Oregon; Rhode Island; Utah, Vermont; Washington; Wisconsin have all passed statutes making sexual orientation a protected class under their states' non-discrimination laws. In addition, numerous local governments have passed such laws.



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