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Current Title VII May Soon Protect Sexual Orientation

Authors: Chad E. Wallace
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The familiar language of Title VII of the Civil Rights Act of 1964 prohibits employment discrimination because of a person's "race, color, religion, sex, or national origin." As many courts and commentators have pointed out, the plain text of this federal statute does not include the term "sexual orientation." Thus far, no federal court of appeals, the step before the United States Supreme Court, has found that Title VII's protections extend to sexual orientation. That may soon change with the Seventh Circuit's anticipated en banc decision in *Hively v. Ivy Tech Community College*.

The plaintiff in *Hively* is a part-time adjunct professor who identifies as a lesbian. She sued Ivy Tech Community College in 2014 after it failed to interview her for numerous full-time positions, despite her qualifications and good employment record. In response to a motion to dismiss by Ivy Tech, a federal district court in Indiana dismissed Hively's claims based on the current language of Title VII and previous cases decided by the Seventh Circuit, which in addition to Indiana, covers Illinois and Wisconsin. In 2000, the Seventh Circuit held in two different cases decided two months apart that Title VII's protections do not extend to sexual orientation discrimination. The federal appeals courts for the First Circuit, Second Circuit, Third Circuit, Fourth Circuit, Fifth Circuit, Sixth Circuit, Eighth Circuit, Tenth Circuit and D.C. Circuit have all reached similar conclusions – Title VII does not protect against discrimination based on sexual orientation.

On appeal to the Seventh Circuit, the initial three-judge panel reluctantly agreed that dismissal of Hively's claims was proper based on the Seventh Circuit's previous decisions addressing the issue. However, most of the court's 42-page opinion was dedicated to the "paradoxical legal landscape in which a person can be married on Saturday and then fired on Monday for just that act." The court described the line between gender nonconformity and sexual orientation as "arbitrary and unhelpful." That court concluded by saying that "[p]erhaps the writing is on the wall. It seems unlikely that our society can continue to condone a legal structure in which employees can be fired, harassed, . . . and otherwise discriminated against solely based on who they date, love, or marry."

Much of the referenced "paradoxical legal landscape" stems from the United States Supreme Court's 1989 decision in *Price Waterhouse v. Hopkins*. In that case, the Court held that Title VII's prohibition against "sex" discrimination in the workplace includes protection against gender stereotyping, or simplistic generalizations about each gender's attributes, differences or roles. In Hopkins' case, although admittedly qualified, she did not receive a promotion to partnership because she allegedly needed to wear make-up, walk and talk more femininely, have her hair styled and wear jewelry. In short, in the defendant's eyes, Hopkins needed to act more like a woman. For Hively's case, the alleged oddity is that the law currently "protects a lesbian who faces discrimination because she fails to meet some superficial gender norms . . . but not a lesbian who meets cosmetic gender norms, but violates the most essential of gender stereotypes by marrying another woman."

In addition, in 2015 the EEOC issued an administrative opinion in *Baldwin v. Foxx*, which is applicable only to federal employees and not the private sector, concluding that "sexual orientation is inherently a 'sex-based consideration,' and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII." In other words, based on *Hopkins* and the EEOC's current interpretation of sex discrimination, Title VII does not need to be amended to include the term "sexual orientation" and a more

"current" reading of the act would bring sexual orientation within the protections of sex discrimination. Several states, including California, Illinois and New York, have extended their versions of civil rights legislation to protect against sexual orientation discrimination in the employment context. Also looming largely in the analysis is the Supreme Court's 2015 decision in *Obergefell v. Hodges*, in which the Court held that the fundamental right to marry is guaranteed to same-sex couples by the United States Constitution.

Despite ongoing efforts, Congress has not changed the wording of Title VII. The proposed Employment Non-Discrimination Act (ENDA), which is modeled on the Civil Rights Act of 1964, would extend federal protection to prohibit employment discrimination in the private sector because of a person's "actual or perceived sexual orientation or gender identity." ENDA was first introduced in Congress in 1994 and several times since then. To date, though, Congress has not passed ENDA.

In response to Hively's petition, the Seventh Circuit, on October 11, 2016, set aside its previous ruling of the initial three-judge panel and agreed to rehear the case en banc, meaning that all of the judges on the Seventh Circuit would hear the case together, including the three judges on the original panel that reluctantly agreed with dismissal of Hively's claims.

That rare en banc hearing took place on November 30, 2016, and based on the questions and comments from several of the judges, the Seventh Circuit seems poised to be the first federal appeals court in the country to include sexual orientation within Title VII's ban on sex discrimination. For example, in response to the argument that a person's sex and sexual orientation are two completely different things, one judge asked Ivy Tech's attorney, "How do you draw the line you want us to draw without sounding arbitrary and, occasionally, silly?" Another Seventh Circuit judge flatly rejected the argument that the meaning of Title VII was somehow frozen as of the day it was enacted in 1964 and told Ivy Tech's attorney that judges routinely reinterpret statutes as times change. The judge asked, "Why isn't this the perfect case for that?"

As discussed, despite Congress's failure to amend the wording of Title VII, the writing may in fact be on the wall in the Seventh Circuit. Such a decision would be the beginning of a circuit split that ultimately would need to be resolved by the Supreme Court. This assumes Congress does not amend the wording of Title VII in the meantime, and that seems unlikely. With one vacancy on the Supreme Court ready to be filled and others possibly coming in the near future, President-elect Trump's nominee(s) may have a significant impact on this issue. Stay tuned, and please be on the lookout for future Baker Donelson newsletters and employment law alerts when the Seventh Circuit releases its decision in *Hively*.