PUBLICATION

Federal Appeals Court Rules that Title VII Protects Employees from Sexual Orientation Discrimination

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How the Court Got There and What to Do About It

Title VII of the Civil Rights Act of 1964 prohibits covered employers from discriminating against an employee because of her race, color, religion, sex or national origin. Until this month, no federal court of appeals had ruled that discrimination based on an employee's sex included treating the employee differently because of her sexual orientation. The United States Court of Appeals for the Seventh Circuit changed that on April 4.

Kimberly Hively, who is openly lesbian, began teaching as an adjunct professor at Ivy Tech Community College in South Bend, Indiana in 2000. Over the following 14 years, she applied for six full-time positions but was never selected. Then, in 2014, Ivy Tech declined to renew her contract to continue as an adjunct. In response, Hively sued, alleging that she had been discriminated against because of her sexual orientation in violation of Title VII. Ivy Tech moved to dismiss her lawsuit based on the argument that sexual orientation is not a protected class under Title VII. The district court granted the motion and Hively's case was dismissed.

Hively appealed to the Seventh Circuit. A three-judge panel found that the district court's decision was correct. It reached this conclusion by dutifully – though reluctantly – relying on previous decisions that found discrimination based on sexual orientation to be different from discrimination based on sex. The panel noted, though, that as a three-judge panel it had no authority to overturn these decisions which, in its view, had produced a "paradoxical legal landscape in which a person can be married on Saturday and then fired on Monday for just that act." This and other language in the panel's opinion invited Hively to request that the court reconsider the decision en banc, which would allow all of the judges on the court to weigh in and possibly overturn the prior decisions. Hively did just that, and in October of last year the court set aside the panel's opinion.

Seventh Circuit's Opinion

In its en banc opinion, the 11 active judges on the Seventh Circuit concluded in an eight to three decision "that discrimination on the basis of sexual orientation is a form of sex discrimination." The majority opinion made clear that it was not amending Title VII to include a new protected class, as only Congress could do, but was instead considering whether discrimination based on sexual orientation is a "subset" of actions taken based on sex. At Ivy Tech's urging, the Court considered Congress's failure to pass several bills that would have amended Title VII to include sexual orientation, but it was not persuaded that Congress's lack of action was determinative. The majority was persuaded, though, by the Supreme Court's statements in *Oncale v. Sundowner Offshore Servs., Inc*. that Title VII covered sexual harassment of a man by another man. In *Oncale*, the Supreme Court explained that "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." The majority construed this language as permission to expand Title VII's definition of sex discrimination to include sexual orientation discrimination even if Congress had no intention of doing so when it passed the law.

In sum, the court concluded that discrimination based on an employee's sexual orientation cannot be separated from discrimination based on sex. After all, the court reasoned, if Hively had been a man married to

a woman and all else remained the same, Ivy Tech would not have refused to promote her. Thus, taking her allegations as true, Ivy Tech was treating her differently *because* she is a woman. The court therefore reversed the district court's dismissal of Hively's claim and returned the case to the district court.

Other Circuits' Positions on the Issue

The Seventh Circuit handles appeals from federal courts in Indiana, Illinois and Wisconsin. Illinois and Wisconsin has each passed a law prohibiting discrimination based on sexual orientation, so the opinion's effect there will be minimal. Of course, if you have employees in Indiana, you should inform your managers of this opinion and equip them to treat sexual orientation as they would race, gender and other protected traits. Currently, every other federal appeals court to consider the issue has held that Title VII does not protect against discrimination based on sexual orientation but that may soon change. The Seventh Circuit's opinion provides a blue print for expanding the law that other circuits will likely follow. Ultimately, the Supreme Court will have to weigh in to resolve the issue, but such a resolution may be years away.

Practical Advice

If you are outside of the Seventh Circuit, the law has not changed. However, be sensitive to making decisions that could be construed as being based on sexual orientation or gender stereotypes. Even the relatively conservative Fifth Circuit – covering Mississippi, Louisiana and Texas – has held that a plaintiff can state a claim of sex discrimination under Title VII by showing that same-sex harassment was motivated by the harasser's perception that the plaintiff did not conform to gender stereotypes. Plus, more than half of the states have passed laws that protect against sexual orientation discrimination. So, going forward, keep these tips in mind:

1. Be consistent in your employment decisions the same way you would be with regard to other protected traits. Make sure employees are treated equally no matter their sexual orientation or gender identity.
2. Consider amending your policies, handbooks, training materials and hiring practices to prohibit discrimination and harassment based on sexual orientation and gender identity. Also, train your employees on the new policies.
3. Enforce policies against harassment broadly to include any comments, emails or other conduct that disparages LGBT employees.
4. More specifically, be alert to comments or actions by supervisors and co-workers regarding transgender employees. For instance, at least one court has found that intentionally misusing a transgender employee's new name may be sex-based discrimination and harassment. Check out 5 Things to Know About Transgender Rights in the Workplace by Emma Redden for more.
5. Finally, consider in advance accommodations that employees who fall into this protected group may seek, including gender neutral restrooms and dress code requirements.

For more back story on the case, see Chad Wallace's article entitled Current Title VII May Soon Protect Sexual Orientation.

Also, if you're particularly interested in the issue, the majority opinion, Judge Posner's concurring opinion and the three-judge dissent are all skillful explanations of the competing positions. The opinion is linked above. Plus, Chief Judge Wood's majority opinion is a master work in writing clearly about difficult issues and anyone who writes often would benefit from reading it no matter their views on the topic.