
Seventh Circuit Finds that Title VII Covers Sexual Orientation Discrimination

By Scott Cruz / Apr 05, 2017

This week, in *Hively v. Ivy Tech Community College of Indiana* (Docket No. 15-1720), the Seventh Circuit Court of Appeals held that adverse or discriminatory actions taken because of an individual's "sexual orientation" constitute unlawful discrimination on the basis of "sex" under Title VII of the Civil Rights Act of 1964. The Seventh Circuit noted that it was not amending Title VII to include "sexual orientation" as a new protected category to the current list of protected classifications (race, color, religion, sex, or national origin), as only Congress has that authority. Rather, it was deciding solely what it means to discriminate on the basis of an individual's "sex" under Title VII.

In *Hively*, a lesbian alleged that Ivy Tech Community College discriminated against her on the basis of her sexual orientation when it repeatedly denied her requests to be considered for a full-time teaching position. The district court dismissed her complaint, relying on a long line of cases finding that sexual orientation is not a protected class under Title VII. Hively appealed that dismissal to the Seventh Circuit Court of Appeals. Last summer, a three-judge panel of the Seventh Circuit initially affirmed the district court's decision, recognizing that it is bound by prior precedent holding that Title VII does not recognize any claims for sexual orientation discrimination. Hively then requested a rehearing *en banc* so that the issue could be decided by the entire panel of Seventh Circuit judges.

This week, the majority of the Seventh Circuit *en banc* panel reversed the earlier decision and held that "a person who alleges that she experienced employment discrimination on the basis of her sexual orientation has put forth a case of sexual discrimination for Title VII purposes." The court reasoned, "[T]he common sense reality [is] that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex."

This is the first decision from any federal court of appeals to hold that discrimination on the basis of an individual's "sex" includes an individual's "sexual orientation." There is now a split of authority among the federal circuits on this issue. As recently as March 27, 2017, the Second Circuit held in *Christiansen v Omnicom Group, Inc.*, that Title VII does not prohibit bias based on sexual orientation. And, on March 10, 2017, the Eleventh Circuit ruled similarly in *Evans v. Georgia Regional Hospital*. The Seventh Circuit's decision is, however, consistent with the Equal Employment Opportunity Commission's position that Title VII's prohibition against sex discrimination encompasses discrimination on the basis of sexual orientation.

The recent surge in conflicting decisions among the various federal courts of appeal could mean that this issue will land in the United States Supreme Court for a final decision. In the interim, employers must be cognizant that depending on the jurisdiction where they are located and the decision is made, a claim may now be pursued alleging that an adverse employment action constitutes illegal discrimination based on an individual's sexual orientation.

If you have any questions regarding the content of this alert, please contact Scot Cruz at (312) 985-5910 | scruz@clarkhill.com or another member of Clark Hill's Labor & Employment Law practice group.