

SEVENTH CIRCUIT RULES TITLE VII PROHIBITS SEXUAL ORIENTATION DISCRIMINATION

On Tuesday, April 4, 2017, the Court of Appeals for the Seventh Circuit ruled that Title VII prohibits discrimination based on sexual orientation. This contradicts a recent Eleventh Circuit ruling^[1]—not to mention longstanding Seventh Circuit precedent—which means that this issue could eventually land before the Supreme Court.

BACKGROUND

Title VII is a federal law that prohibits employment discrimination based on race, color, religion, sex and national origin; the prohibitions apply to all private sector and state and local government employers with at least 15 employees. Although Title VII prohibits employment discrimination based on sex, courts have historically considered discrimination based on sexual orientation to be outside of Title VII's prohibitions.

SEVENTH CIRCUIT CASE: *HIVELY V. IVY TECH COMMUNITY COLLEGE*

In *Hively v. Ivy Tech Community College*, plaintiff Kimberly Hively, a former part-time professor, claimed that Ivy Tech denied renewal of her employment contract and opportunities for promotion to full-time positions because she was openly gay (all allegedly in violation of Title VII).

After a unique procedural history (see Hall Render's previous blog on this case [here](#)), the Seventh Circuit heard the case *en banc* (by the full court) and concluded that "discrimination on the basis of sexual orientation is a form of sex discrimination."^[2]

In arriving at its conclusion, the Seventh Circuit analyzed Hively's case under two legal theories presented: gender nonconformity discrimination and the right to associate intimately with a person of the same sex. The Seventh Circuit drew upon landmark Supreme Court decisions such as *Price Waterhouse v. Hopkins* (holding that the practice of gender stereotyping falls within Title VII's prohibition against sex discrimination), *Oncale v. Sundowner* (clarifying that it makes no difference if the sex of the harasser is (or is not) the same as the sex of the victim) and *Obergefell v. Hodges* (recognizing that the Due Process and Equal Protection Clauses of the Constitution protect the right of same-sex couples to marry). The Seventh Circuit acknowledged the difficulty in extricating "the gender nonconformity claims from the sexual orientation claims" and also the "paradoxical legal landscape in which a person can be married on Saturday and then fired on Monday for just that act."

In addressing Hively's gender nonconformity theory more specifically, the Seventh Circuit stated that "Hively represents the ultimate case of failure to conform to the female stereotype...: she is not heterosexual." Although prior case law suggested that there was a line between a gender nonconformity claim and one based on sexual orientation, the Seventh Circuit concluded that such a line "does not exist at all." And, "[a]ny discomfort, disapproval, or job decision based on the fact that the complainant ... dates or marries a same-sex partner, is a reaction purely and simply based on sex. That means that it falls within Title VII's prohibition against sex discrimination. ..."

As for the associational theory, the Seventh Circuit referenced significant Supreme Court and circuit court opinions such as *Loving v. Virginia* and stated that "[i]t is now accepted that a person who is discriminated against because of the protected characteristic of one with whom she associates is actually being disadvantaged because of her own traits." Ultimately, the Seventh Circuit concluded that "to the extent that [Title VII] prohibits discrimination on the basis of the race of someone with whom the plaintiff associates, it also prohibits discrimination on the basis of the national origin, or the color, or the religion, or (as relevant here) the sex of the associate."

PRACTICAL TAKEAWAYS

In addition to Title VII (federal law), employers should be aware of their own state laws and local ordinances addressing sexual orientation discrimination.

Employers should be proactive in combatting discrimination in the workplace, including sexual orientation discrimination. This may require the creation of, or amendments to, specific employer policies, as well as related employee training.

Please stay tuned for future updates on this litigation and related matters.

If you have questions regarding this topic, please contact Nick Johnston at (317) 429-3618 or njohnston@hallrender.com or your regular Hall Render attorney.

[1] In contrast to the Seventh Circuit's conclusion, on March 10, 2017, the Court of Appeals for the Eleventh Circuit in *Evans v. Georgia Regional Hospital* held that sexual orientation discrimination is not actionable under Title VII.

[2] The case has been remanded to the trial court for further proceedings.