

OCTOBER 19, 2016

CHANGING COURSE? SEVENTH CIRCUIT TO REHEAR TITLE VII SEXUAL ORIENTATION CASE

The Court of Appeals for the Seventh Circuit will rehear a once-dismissed Title VII sexual orientation case, possibly signaling that the Seventh Circuit will change course and read Title VII as prohibiting sexual orientation discrimination.

BACKGROUND

Title VII 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 considered discrimination based on sexual orientation to be outside of Title VII's prohibitions.

RECENT NOTEWORTHY SEVENTH CIRCUIT CASE: *HIVELY V. IVY TECH COMMUNITY COLLEGE*...DISMISSED?

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). The trial court granted Ivy Tech's motion to dismiss the case, finding that "Title VII does not apply to claims of sexual orientation discrimination and therefore Hively has made a claim for which there is no legal remedy." Ms. Hively appealed.

Despite the Court of Appeals' sympathy for Ms. Hively's position (and its condemnation of discrimination based on sexual orientation), a three-judge panel affirmed longstanding precedent and held that sexual orientation is not a protected class under Title VII (a holding that is in line with all other circuit courts to have decided or opined about the matter).

SEVENTH CIRCUIT AGREES TO REHEAR THE CASE *EN BANC*

With the Seventh Circuit's dismissal, the case appeared to be gone for good. However, on October 11, the Seventh Circuit reversed and vacated its holding and also decided to rehear the case *en banc* (by the full court) on November 30, 2016. The court is allowing the EEOC to participate in oral argument, which may be significant given the EEOC's position 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."

PRACTICAL TAKEAWAY

All of this could signal that the Seventh Circuit is considering expanding its interpretation of Title VII to prohibit sexual orientation discrimination. This would go against long-standing Seventh Circuit precedent and contradict the Seventh Circuit's position that it needs Congressional or U.S. Supreme Court action in order to find sexual orientation a protected class under federal law. If the Seventh Circuit changes course, it would impact current claims pending against—as well as future claims to be filed against—employers within the Seventh Circuit. Ultimately, the issue will likely need to be addressed by Congress¹ or by the U.S. Supreme Court.

In any event, 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 Pending before Congress is the Employment Non-Discrimination Act ("ENDA") and also the Equality Act. ENDA would prohibit discrimination in hiring and employment on the basis of sexual orientation or gender identity; it has been pending before Congress since 1994 and it has yet to pass. Introduced in 2015, the Equality Act would amend the Civil Rights Act of 1964 to prohibit discrimination on the basis of sexual orientation, gender identity and sex in employment, housing and public accommodations, among other areas.