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Seventh Circuit Speaks Out on Sexual Orientation Claims Under Title VII

On April 4, 2017, the Seventh Circuit Court of Appeals issued an en banc decision that was the first of its kind, holding that workplace discrimination that is based on sexual orientation violates the dictates of Title VII of the Civil Rights Act of 1964. Although some individual states have prohibitions against discrimination in the workplace based on sexual orientation, no federal appellate court had ruled that this protected class was included under the rubric of Title VII, because sexual orientation is not mentioned in the Act.

The decision arose from a lawsuit brought by Kimberly Hively, who had worked as an adjunct instructor at Ivy Tech Community College of Indiana for 14 years. During that time, she received uniformly good reviews and was recognized by the college as being an outstanding teacher. In spite of this, Hively was repeatedly passed over when applying for a full-time position at the college. After ultimately losing her adjunct position, Hively brought suit based on comments made by administrators concerning her being a lesbian and in a relationship with another woman. It was Hively's belief that she had suffered adverse employment actions and discrimination because of her sexual orientation. Specifically, Hively alleged discrimination based on her identification as a lesbian. The defendant, Ivy Tech, not only fought the charges of discrimination but also challenged Hively's right to sue based upon Title VII.

Prior to this ruling, no federal court of appeals had ruled that Title VII barred sexual orientation discrimination, but instead courts had ruled that it was outside of the purview of the statute. In the majority opinion, Chief Judge Diane P. Wood noted the similarities between Hively's claims of being fired for her sexual orientation and claims brought under Title VII that were based on gender. Specifically, Chief Judge Wood noted that "Hively's claim is no different from the claims brought by women who were rejected for jobs in traditionally male workplaces . . . . The employers in those cases were policing the boundaries of what jobs or behaviors they found acceptable for a woman." In a concurring opinion, Judge Posner went one step further and openly endorsed the idea of modernizing a dated statute to give it a fresh meaning. His opinion states that, while Title VII on its face forbids only sex discrimination, "we now understand discrimination against homosexual men and women to be a form of sex discrimination." This is because, in Judge Posner's view, our culture's definition of "sex" encompasses sexual orientation, something that was not true in 1964 when the statute was drafted. Courts have the authority to interpret statutes in this way "to avoid statutory obsolescence and concomitantly to avoid placing the entire burden of updating old statutes on the legislative branch."

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Although this case may well end up in front of the United States Supreme Court, it is a matter that employers must be aware of. Currently, cases involving this issue are pending in other federal jurisdictions. At this juncture, there is no way for employers to know whether other courts will follow the lead of the Seventh Circuit. In an abundance of caution, Peckar & Abramson's Employment Practice Group recommends that employers should modify their employment policies to ensure that they expressly prohibit workplace discrimination based on sexual orientation.