

Landmark Seventh Circuit Decision Holds Sexual Orientation Discrimination Prohibited by Title VII

On April 4, 2017, the United States Court of Appeals for the Seventh Circuit (which has jurisdiction over Wisconsin, Indiana and Illinois), issued a landmark decision, holding that discrimination on the basis of sexual orientation is actionable under Title VII of the Civil Rights Act of 1964 ("Title VII") as a form of sex discrimination. The Seventh Circuit is the first federal circuit court in the United States to hold that sexual orientation discrimination is prohibited by Title VII. The Seventh Circuit's decision has created a circuit split. Earlier this year, the Eleventh Circuit held that sexual orientation discrimination is not an actionable claim under Title VII.

Title VII prohibits employment discrimination on the basis of an individual's sex, race, color, religion or national origin. Historically, courts have held that Title VII's protections do not extend to sexual orientation discrimination because "sexual orientation" is not explicitly listed as a protected class under Title VII. However, as the Seventh Circuit noted in its decision in *Hively v. Ivy Tech Community College of Indiana*, recent legal decisions have acknowledged the "common-sense reality" that sex and sexual orientation are inextricably connected.

In *Hively*, the plaintiff, a part-time adjunct professor at Ivy Tech Community College ("Ivy Tech"), was openly lesbian. During her employment at Ivy Tech, Hively applied for at least six full-time teaching positions between 2009 and 2014. Hively was never offered a full-time teaching position and, in 2014, her part-time teaching contract was not renewed. Hively brought a claim under Title VII against Ivy Tech, alleging that Ivy Tech discriminated against her on the basis of her sexual orientation. The United States District Court for the Northern District of Indiana granted Ivy Tech's motion to dismiss. Hively appealed the dismissal. A Seventh Circuit panel affirmed the lower court's dismissal of Hively's lawsuit. The Seventh Circuit later decided to rehear the case.

In an en banc decision, the Seventh Circuit held that "a person who alleges that she experienced employment discrimination on the basis of her sexual orientation has put forth a case of sex discrimination for Title VII purposes." The Seventh Circuit stated that "it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex."

The Seventh Circuit's decision means that employees in Wisconsin, Indiana and

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Illinois can bring claims of discrimination on the basis of sexual orientation under federal law. The Wisconsin Fair Employment Act ("WFEA") had already recognized sexual orientation as a protected class well before the Seventh Circuit's decision in Hively. However, the WFEA limits an employee's remedies to back pay, reinstatement, interest, attorney's fees and, in some cases, front pay. Title VII permits employees to recover punitive damages and compensatory damages for emotional harm.

Employers in Wisconsin, Illinois and Indiana should review their handbooks and equal employment opportunity policies to ensure that such policies comply with the Hively decision. Employers should also consider training human resources and supervisory personnel on any updated equal employment opportunity policies, and on how to address complaints of sexual orientation discrimination.

If you have any questions about the Hively decision and how it will impact your business, or if you would like us to review your equal employment opportunity policies, please contact your Reinhart attorney.

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