

Title VII Prohibits Employment Discrimination Based on Sexual Orientation - So Says the 7th Circuit

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On Tuesday, the Seventh Circuit Court of Appeals became the first federal circuit court of appeals to decide that Title VII of the Civil Rights Act of 1964 prohibits workplace discrimination based on an employee's "sexual orientation." In *Hively v. Ivy Technical Community College of Indiana*, the Court ruled 8 to 3 that Title VII's prohibition of employment discrimination based on "sex" includes a person's "sexual orientation." The Seventh Circuit's ruling, while consistent with the Equal Employment Opportunity Commission's position, is in conflict with every other federal circuit court of appeal which has addressed the issue.

Kimberly Hively, an adjunct part-time professor at Ivy Technical Community College of Indiana, alleged that she was denied a full time position on six separate occasions and subsequently fired because she was openly a lesbian. According to Hively, if she was a man (rather than a woman) living with or married to a woman, Ivy Tech would have promoted and continued to employ her.

The trial court and a three judge panel of the Seventh Circuit had previously dismissed Hively's claim on the ground that Title VII prohibits discrimination based on sex, but not expressly upon "sexual orientation." The lower court and three judge appellate panel both adopted the long-standing, majority view that Congress intended Title VII to prohibit sex discrimination against "women because they are women" and "men because they are men."

Upon Hively's petition, the full eleven judge Seventh Circuit agreed to re-hear the case. In reaching its decision, the Court reasoned that there is little difference between assigning significance to an employee's sexual orientation and gender stereotyping an employee, which has been illegal for over twenty-five years. The Court noted that the Supreme Court has recognized an employee's right to bring a same-sex sexual harassment claim and the right of same-sex couples to marry. The common-sense reality, according to the Court, is that it is "impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex."

In *Hively*, the Seventh Circuit has taken a position directly in conflict with the decisions of federal courts in the First, Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth and Eleventh Circuit Courts of Appeal - all of which held that Title VII does not prohibit discrimination based on sexual orientation. The Seventh Circuit covers federal courts in Indiana, Illinois, and Wisconsin. The conflict between circuits opens the door for the Supreme Court to eventually weigh in, although it may not be anytime soon as Ivy Tech has stated it will not appeal the Seventh Circuit's decision in *Hively*.

Twenty states, including the District of Columbia, currently have statutes prohibiting employment discrimination based on sexual orientation in the private sector. Many municipalities similarly extend such protection to employees in the private sector workplace. All employers, but especially

employers in these states, should consider contacting legal counsel to review whether their employment policies and procedures are up to date and comply with current federal, state and local laws. To speak with a Benesch attorney about reviewing your company's policies and procedures, please contact an attorney in Benesch's [Labor and Employment Practice Group](#).

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