

Employment Practices Liability

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Full Seventh Circuit To Consider Whether Title VII Protects Sexual Orientation

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Executive Summary: Title VII of the Civil Rights Act of 1964 does not specifically include sexual orientation as one of its protected traits. In July 2015, the Equal Employment Opportunity Commission (EEOC) for the first time took the position that Title VII protects federal employees from sexual orientation discrimination in the workplace. However, courts have considered this non-binding precedent, instead maintaining that sex-based discrimination does not include sexual orientation – but that could soon change. On October 11, 2016, in *Hively v. Ivy Tech Community College, South Bend*, the Seventh Circuit vacated **its own** prior ruling that sexual orientation is not protected by Title VII, and granted a motion to have all of the sitting Seventh Circuit judges consider the issue. LGBTQ advocates, Human Resources professionals and employment lawyers should take note and keep their eye on this emerging area of the law.

Background: Among other things, Title VII prohibits employers from discriminating against an individual “because of such individual’s... sex...” Since this statute was enacted in 1964, the courts and EEOC have routinely interpreted the term “because of...sex” literally, and have refused to recognize either sexual orientation or gender identity as a protected class. With sexual orientation and gender identity issues taking center stage in our society, both politically and socially, the EEOC changed its tune in July 2015. For the first time, in *Baldwin v. Fox*, the EEOC enunciated its position that “sexual orientation is inherently a ‘sex-based consideration’” under Title VII, and that “[s]exual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorable because of the employee’s sex.” The EEOC’s finding has sparked a string of court litigation, with parties arguing that sexual orientation discrimination should now be a cognizable claim under Title VII. One of the most prominent cases is currently in making waves in the Seventh Circuit. *Hively* was originally filed in the Northern District of Indiana in August 2014. *Hively* claimed she was denied promotions and full time employment with Ivy Tech because of her sexual orientation. Ivy Tech filed a motion to dismiss on the ground that sexual orientation is not protected by Title VII. The lower court noted that while it was “sympathetic to the arguments made by *Hively*... , this [c]ourt is bound by Seventh Circuit precedent” which does not recognize “sexual orientation...as a protected class under Title VII.” The court dismissed the claim, and *Hively* appealed. On July 28, 2016, a three-member panel of the Seventh Circuit affirmed the district court’s ruling, dismissing *Hively*’s claim on the same grounds. The Seventh Circuit wrote that “our circuit has, without exception...h[e]ld that the Title VII prohibition on discrimination based on ‘sex’ extends only to discrimination based on a person’s gender, and not that aimed at a person’s sexual orientation.” The Seventh Circuit noted that the EEOC’s finding in *Baldwin v. Fox* is persuasive authority that many courts are taking seriously, and that the social landscape has changed in such a way that workplace

discrimination based on sexual orientation is no longer acceptable. Nevertheless, the court held that Congress’s failure to amend Title VII to include sexual orientation as a protected class and prior Seventh Circuit decisions holding that sexual orientation is not protected precluded it from finding in favor of *Hively*. Most courts to address the issue since *Baldwin* have taken the same stance.

Current Developments: However, supported by both the EEOC and other LGBTQ advocates, *Hively* moved for a rehearing *en banc*. On October 11, 2016, that motion was granted. The Seventh Circuit vacated **its own** prior ruling and ordered a new hearing before all sitting Seventh Circuit judges – not only a rare occurrence and one often used for cases considered to be of great importance, but one which may signal the Seventh Circuit’s intention to address the issue directly, establish clarity on the topic and, perhaps, shift away from the current position that sexual orientation is not protected by Title VII.

Adding to the necessity for stability on the topic is the friction arising from the U.S. Supreme Court’s recognition and prohibition of gender stereotyping discrimination in *Price Waterhouse v. Hopkins*. Since that decision, courts have broadly read the law to protect against this form of discrimination under Title VII. Courts have even used the *Price Waterhouse* law on gender stereotyping to hold that gender identity is now protected by Title VII. This is very much at odds, however, with courts’ position that Title VII does not prohibit sexual orientation discrimination. This has left the dilemma of how to differentiate between gender stereotyping and sexual orientation claims to the courts, with varying results, and certainly supports an inference that developments in the law soon may arrive. The *Hively* rehearing *en banc* may provide the stage.

Other Circuits to Watch: The issue of sexual orientation as a protected class under Title VII is also currently being considered by the Second Circuit in the case of *Christiansen v. Omnicom Group, Inc.*, and the Eleventh Circuit in the case of *Evans v. Georgia Regional Hospital*. The EEOC has filed amicus briefs in both cases urging those Circuits to recognize sexual orientation discrimination as discrimination “because of sex” under Title VII.

Employers’ Bottom Line: Once an issue lacking clarity, the possibility that a discrimination claim based on sexual orientation will be cognizable under Title VII may come to fruition in the very near future. This emerging area of the law should be watched, as it has the ability to expand employee protections from workplace discrimination. Oral arguments in *Hively* before the full Seventh Circuit are set for November 30, 2016.

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