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Seventh Circuit Indicates It May Conclude that Sexual Orientation Discrimination is Sex Discrimination Under Title VII

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Executive Summary: Since its enactment, courts have followed the premise that Title VII of the Civil Rights Act of 1964 does not prohibit sexual orientation discrimination. A changing of the tides began in July 2015, when the Equal Employment Opportunity Commission (EEOC) took the opposite position. Since that time, courts have struggled with the impracticality of considering sexual orientation discrimination as categorically different from sexual stereotyping and, therefore, outside the scope of Title VII. Oral argument before the Seventh Circuit Court of Appeals sitting *en banc* in *Hively v. Ivy Tech Community College, South Bend,* suggests that this country may soon have its first appellate level decision recognizing sexual orientation discrimination as being prohibited by Title VII.

Background: Among other things, Title VII prohibits employers from discriminating against an individual "because of…sex." Since the statute was enacted in 1964, courts and the EEOC routinely have refused to recognize sexual orientation as a protected class under Title VII. This changed in July 2015, when, in *Baldwin v. Foxx,* the EEOC took the 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." This sparked an onslaught of court litigation, with the plaintiffs' bar and EEOC arguing that sexual orientation discrimination should now be a cognizable claim under Title VII.

FordHarrison has been following these cases as they make their way through the courts. Of particular interest is *Hively*, which originally was 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. The lower court expressed sympathy for Hively's argument that sexual orientation is protected by Title VII, but held that it "is bound by Seventh Circuit precedent" which does not recognize "sexual orientation…as a protected class under Title VII." On appeal to the Seventh Circuit, in the panel's opinion, authored by Judge Rovner, the panel expressed frustration with the "paradox" created by the existing precedent in this area by which "a person can be married on Saturday and then fired on Monday for just that act." Nonetheless, the court, noting that it was bound by existing case law, affirmed the lower court's ruling.

Perhaps not surprisingly given the apparent frustration expressed by the three-member panel, as previously reported by FordHarrison FordHarrison, on October 11, 2016, the Seventh Circuit made a rare move and vacated the panel decision, ordering rehearing *en banc*.

Current Developments: A highly charged and animated, and at times comical, oral argument before the Seventh Circuit *en banc* was held on November 30, 2016. While the Seventh Circuit majority is filled by conservative Republican appointees, the judges' questions during oral argument implied a liberal position that was highly favorable to Hively. Although the court remained relatively silent during the initial arguments by Hively and the EEOC (appearing as *amicus curie*), a heated discussion began as the court decimated Ivy Tech's argument that the phrase "because of sex" in Title VII does not include sexual orientation.

The court focused primarily on three points. The first related to the disparate treatment theory of discrimination. To prove purposeful discrimination under this theory, there must be similarly situated comparators. During oral argument, the court suggested that the appropriate comparator to a homosexual female would be a heterosexual male. Both are attracted to women, but only the homosexual female is discriminated against because of this. The court argued, therefore, that "but for" the homosexual female's sex, she would not have suffered discrimination.

Second was the comparison of Hively's case with that of *Loving v. Virginia*. In *Loving*, the U.S. Supreme Court held that a state law banning interracial marriages was *per se* race discrimination, and therefore, a violation of the Equal Protection Clause. Since Title VII and Equal Protection law are nearly identical, under the holding in *Loving*, discriminating against someone for being attracted to, engaging in relations with, and possibly marrying a person of the same sex is sex discrimination.

Third was the *Price Waterhouse v. Hopkins and Oncale v. Sundower Offshore Servs., Inc.* analysis. In *Price Waterhouse,* the U.S. Supreme Court held that gender stereotyping is sex discrimination under Title VII. A number of judges pointed out that assuming a female should be attracted to a male, love a male, engage in sexual relations with a male and marry a male is, on its face, gender stereotyping. Therefore, treating a female who is attracted to, loves, engages in sexual relations with and/or marries a female differently because this behavior is outside the supposed "gender norm" could be sex discrimination. The court further noted that the majority of the cases from the Seventh Circuit holding that sexual orientation is not protected by Title VII were decided to prior to *Price Waterhouse*, and the outcome likely would have been different under that analysis. The court also noted that finding in favor of Hively based on the *Price Waterhouse* theory would be the smallest legal jump for the court to make in interpreting Title VII to encompass sexual orientation discrimination.

In *Oncale*, led by Justice Scalia, the U.S. Supreme Court held that same-sex harassment is actionable under Title VII. Justice Scalia noted that while male-on-male sexual harassment was not the "principal evil" imagined by the drafters of Title VII in 1964, "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." Thus, the Court noted that the meaning of the word "sex" as it was used in 1964 is not stagnant, and *stare decisis* requires, not prohibits, a revisit of prior decisions as the meaning of words, law, and society evolve. While sexual orientation discrimination clearly was not a "principal evil" taken into consideration by Congress in 1964, it now must be.

Furthermore, in an interesting cautionary tale to employers who prohibit sexual orientation discrimination in their policies, whether or not legally required to do so, one Seventh Circuit judge was highly critical and found it "odd" that Ivy Tech would defend this lawsuit on the grounds that sexual orientation discrimination is not illegal when it had a policy prohibiting just that activity. It will be interesting to see if this fact plays any role in the court's decision.

Other Circuits to Continue Watching: A The issue of sexual orientation as a protected class under Title VII is being heard on

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December 15, 2016, by the Eleventh Circuit in the case of *Evans v. Georgia Regional Hospital* and on January 20, 2017, by the Second Circuit in the case of *Christiansen v. Omnicom Group, Inc.* 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. Additionally, on October 24, 2016, an appeal was filed with the Second Circuit in *Carrigan v. Brietling USA, Inc.* A date for oral argument in that case has not yet been set, and it is possible that the outcome of that case will be governed by the decision in *Christiansen*.

Bottom Line: It is more likely than not that the Seventh Circuit will be the first federal appeals court to rule that sexual orientation discrimination is discrimination "because of sex" in violation of Title VII. Depending on when this decision is released, it will be interesting to see whether it influences the Eleventh and Second Circuit courts as they ponder the same issues. Should the decisions result in a split of authority among the federal appeals courts, the issue likely will come before the U.S. Supreme Court in the near future.

We will continue to keep you updated as the Seventh Circuit issues its opinion, *Evans, Christiansen* and *Carrigan* make their way through the circuit courts, and, very likely, certification is sought to the U.S. Supreme Court.

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