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STRATEGIC PERSPECTIVES—Updated Seventh Circuit case law on sexual orientation discrimination

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As a follow-up to my previous *Employment Law Daily* article (*Strategic Perspectives – The State of Federal Transgender and Sexual Orientation Discrimination Case Law*, (October 11, 2016)), please allow this to serve as a supplement and update of the Seventh Circuit case referenced in that article, *Hively v. Ivy Tech Cmty. College of Ind.* (2017 U.S. App. Lexis 5839).

Of note, in *PriceWaterhouse v. Hopkins*, (490 U.S. 228, 230-31, 1989), the United States Supreme Court recognized that discrimination based on sex stereotypes (assumptions or expectations about how a person of a certain gender should dress, behave, conduct themselves, etc.), is unlawful sex discrimination under Title VII. While circuits have allowed Title VII discrimination claims to proceed on the "sex stereotypes" theory, none have allowed a case to proceed solely on the basis of "sexual orientation" discrimination—until now.

Procedural posture. On July 28, 2016, U.S. Court of Appeals for the Seventh Circuit issued its initial decision in *Hively*, finding that due to Seventh Circuit precedent, Hively's claims for sexual orientation discrimination, in and of themselves, were *not* actionable or cognizable under Title VII. Further, the court reasoned that while deference was owed to the EEOC's adjudication concluding that sexual orientation was inherently a sex-based consideration, Title VII, absent amendment by Congress or decision by the U.S. Supreme Court, did not reach discrimination based solely on sexual orientation. However, it was clear in reading the decision that the Seventh Circuit did not believe that this was a "just" result.

On October 11, 2016, Hively's Petition for Re-Hearing *En Banc* was granted. This is rare and demonstrates the significance of this decision. The previous Opinion and Judgment were vacated, and oral argument was granted and heard on November 30, 2016.

Allegations. The plaintiff, Hively, was a part-time adjunct professor at Ivy Tech Community College and began teaching in 2000. Between 2009 and 2014, she unsuccessfully applied for six full-time positions. In July 2014, her part-time contract was not renewed. Hively, who was openly lesbian, alleged that Ivy Tech did not promote her and did not renew her contract due to her sexual orientation. She filed a charge with the EEOC in December 2013. In her *pro se* charge, she stated that she believed she was "being blocked from full time employment without just cause. I believe I am being discriminated against because based on my sexual orientation. I believe I have been discriminated against and that my rights under Title VII of the Civil Rights Act of 1964 were violated."

Gender stereotyping. The Seventh Circuit noted that for many years courts of appeal understood the prohibition against sex discrimination to exclude discrimination on the basis of a person's sexual orientation. However, the Supreme Court has *never* spoken on that specific question. The Seventh Circuit

also noted the Supreme Court's decisions in *PriceWaterhouse v. Hopkins*, 490 U.S. 228 (1989) and *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), respectively, where the Court held that the practice of *gender stereotyping* falls within Title VII's prohibition against sex discrimination, and that it makes no difference if the sex of the harasser is or is not the same as the sex of the victim.

"On the basis of sex." The question before the *en banc* Seventh Circuit was not whether the court could or should "amend" Title VII to add a new protected category. Rather, the Seventh Circuit said it must decide "what it means to discriminate on the basis of sex, and in particular, whether actions taken on the basis of sexual orientation are a subset of actions taken on the basis of sex." It pointed out that it did not need to decide whether discrimination on the basis of "gender" is for legal purposes the same as discrimination on the basis of "sex," as many courts have used those terms synonymously or interchangeably.

Title VII not amended. Ivy Tech put great faith in the fact that Congress failed to amend Title VII to specifically add the phrase "sexual orientation" to the list of prohibited characteristics, the court emphasized, stating, however, "It is simply too difficult to draw a reliable inference from these truncated legislated initiatives to rest our opinion on them. The goal posts have been moving over the years, as the Supreme Court has shed more light on the scope of the language that is already in the statute: no sex discrimination." Further, the agency most closely associated with Title VII, the EEOC, in 2015 announced its position that Title VII's prohibition against sex discrimination encompasses discrimination on the basis of sexual orientation (See *Baldwin v. Fox*, EEOC Appeal No. 0120133080. 2015 WL 4397641 (July 15, 2015)).

While the Seventh Circuit has no duty to defer to the EEOC's position, it noted that the commission's position could have caused some in Congress to provide legislation specifically to carve sexual orientation out of the statute. Consequently, the Seventh Circuit has "no idea what inference to draw from congressional inaction or later enactments, because there is no way of knowing what explains each individual member's votes, much less what explains the failure of the body as a whole to change this 1964 statute." Consequently, the Seventh Circuit's interpretive task was instead guided by the Supreme Court's approach in the case of *Oncale.* To the appeals court, it is therefore "neither here nor there that the Congress that enacted the Civil Rights Act of 1964, and chose to include sex as a prohibited basis for employment discrimination (no matter why it did so), may not have realized or understood the full scope of the words it chose."

Supreme Court precedent. Further, the Seventh Circuit's decision must be understood against the backdrop of the Supreme Court's decisions, not only in the field of employment discrimination, but also in the area of broader discrimination on the basis of sexual orientation. Not only of the cases of *Hopkins* and *Oncale*, but of the cases beginning with *Romer v. Evans*, 517 U.S. 620 (1996) in which the Court held that a provision of the Colorado Constitution forbidding any organ of government in the State from taking action designed to grant protected status "homosexual, lesbian or bi-sexual" persons violated the Federal Equal Protection Clause. The Seventh Circuit stated that "the logic of the Supreme Court's decisions, as well as the common sense reality that it is actually *impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex*, persuades us that the time has come to overrule our previous cases that have endeavored to find and observe that line." [Emphasis added.]

Consequently, the Seventh Circuit concluded that discrimination on the basis of sexual orientation is a form of sex discrimination, and therefore it reversed the district court's judgment dismissing *Hively's* suit against Ivy Tech College and remanded for further proceedings.

Conclusion

It is clear that in the Seventh Circuit, Title VII bars sexual orientation bias. As noted in my previous article, other Circuits have not reached the same conclusion. In fact, both the Second Circuit, in *Christiansen v. Omnicom Group, Inc.*, and the Eleventh Circuit, in *Evans v. Georgia Regional Hospital*, ruled in March that Title VII's prohibition against discrimination "because of sex" does not encompass discrimination

based on sexual orientation. Accordingly, there is now a split in the Circuits, and the Supreme Court could review a case involving sexual orientation discrimination to resolve the split.

In the meantime, employers should assume that sexual orientation discrimination is covered by Title VII until Congress and/or the Supreme Court decide definitively on the issue. Further, employers should also review state or local jurisdiction laws concerning sexual orientation discrimination.

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