Seventh Circuit extends Title VII protections to sexual orientation discrimination: what employers need to know

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On Tuesday, the Seventh Circuit Court of Appeals became the first federal appeals court to hold that Title VII of the Civil Rights Act of 1964 protects against workplace discrimination on the basis of sexual orientation. Title VII explicitly prohibits discrimination on the basis of “race, color, religion, sex[,] or national origin…” 42 USC §2000e-2(a). Historically, courts at all levels had held that Title VII’s prohibition against sex discrimination did not extend protection to those experiencing discrimination or retaliation on the basis of their sexual orientation, making the Seventh Circuit’s decision a landmark one. The U.S. Supreme Court has never addressed this issue.

In *Hively v. Ivy Tech Community College of Indiana*, a former adjunct professor at Ivy Tech alleged that the school discriminated against her because of her sexual orientation, in violation of Title VII, by denying her a full-time position at the school (passing over her application for at least six open positions over the course of five years) and by failing to renew her part-time contract when it expired. The district court granted Ivy Tech’s motion to dismiss on the basis that sexual orientation is not a protected class under Title VII, and the Seventh Circuit initially affirmed the district court’s decision. Noting the “importance of the issue” and the desire to “bring [the] law into conformity with the Supreme Court’s teachings,” a majority of the Seventh Circuit judges voted to rehear the case en banc.

The en banc court voted 8–3 to reverse the lower court’s dismissal of the former professor’s Title VII claims, concluding that the statute’s protection against sex discrimination includes protection against discrimination on the basis of sexual orientation.

The immediate legal impact of this ruling will vary state-by-state. Of the three states falling within the Seventh Circuit’s jurisdiction (Illinois, Wisconsin, Indiana), Indiana is the only state that does not already offer state law protection for sexual orientation discrimination. In both Illinois and Wisconsin, state law has long prohibited employers from engaging in discrimination on the basis of sexual orientation. In 1981, the Wisconsin legislature added protection for sexual orientation discrimination to its Fair Employment Law. In 2005, the Illinois legislature followed suit, adding sexual orientation as a protected class to the Illinois Human Rights Act.
As a result, the *Hively* decision will most directly affect employers in Indiana, adding legal protection for sexual orientation discrimination that their employees did not have previously. For employers in other states, however, the Seventh Circuit’s decision does not automatically create federal protection for sexual orientation discrimination across the country. The prohibition of sexual orientation discrimination will continue to primarily be governed by state and local law.

The probable (indirect) reach of the Seventh Circuit’s decision should not be taken lightly, however. The Equal Employment Opportunity Commission (EEOC) similarly takes the position that Title VII includes a cause of action for sexual orientation discrimination, and *Hively* now provides an arguable basis for other federal appellate courts across the country to follow suit. Employers are advised to review and revise their equal employment opportunity and anti-harassment and retaliation policies to expressly prohibit discrimination on the basis of an employee’s sexual orientation. Additionally, employers should review and update any harassment training materials or courses provided to its employees to include references to harassment and retaliation on the basis of sexual orientation. Employers will likely save themselves time and money if they begin to treat employee complaints of sexual orientation discrimination like any other discrimination complaint, ensuring that all applicable complaint and investigation procedures are followed in order to minimize the possibility of employer liability.

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