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Seventh Circuit First Federal Court of Appeals to Recognize Sexual Orientation Discrimination Under Title VII

For the first time, a federal Court of Appeals has held that discrimination on the basis of sexual orientation is prohibited under Title VII. In *Hively v. Ivy Tech Community College of Indiana*, the Seventh Circuit held that Hively's allegation she was passed up for full-time teaching positions and not retained in her part-time position because she is a lesbian stated a viable claim under Title VII. As the opinion noted, this decision breaks with the Seventh Circuit's own precedent and every other federal appeals court that has directly addressed this issue.

While most federal courts have expressly declined to hold that sexual orientation is a protected class under Title VII, federal courts have recognized protections for LGBT employees under a gender-stereotyping theory of sex discrimination. This theory of sex discrimination stems from the United States Supreme Court's landmark 1989 decision in *Price Waterhouse v. Hopkins*, in which the Supreme Court held that employers could not discriminate against employees because they did not conform to traditional notions of gender.

In recent years, LGBT employees have, with varying success, used the gender-stereotyping theory to allege sex discrimination claims. Courts remained steadfast, however, in their position that LGBT employees could not "bootstrap" sexual orientation discrimination claims into gender stereotyping claims. Despite the reluctance of courts to arguably expand Title VII's protections to sexual orientation claims, the EEOC has recognized sexual orientation as a protected class since 2015 and has successfully pursued charges of sex discrimination based on sexual orientation.

In *Hively*, the Seventh Circuit rejected any distinction between sex discrimination based on sexual orientation and sex discrimination

based on gender stereotyping noting that while courts have previously “described the line between a gender nonconformity claim and one based on sexual orientation as gossamer-thin; we conclude that it does not exist at all.” The Court explained that *Hively*’s claim is no different than other gender-stereotyping claims because discrimination based on sexual orientation flows from the premise that all men should date or marry women and that all women should date or marry men. As such, it is precisely the LGBT employee’s sex, i.e. gender, that precipitates discrimination on the basis of sexual orientation. In short, according to the Court, sexual orientation discrimination *is* sex discrimination. As such, *Hively* was permitted to proceed with her claim.

While the *Hively* decision only applies to employers within the Seventh Circuit, including those in Indiana, Illinois, and Wisconsin, employers nationwide should be mindful that the EEOC currently takes the position that claims of discrimination based on sexual orientation are covered by Title VII and the EEOC is accepting and investigating sex discrimination charges on that basis regardless of the employer’s location. Because the *Hively* decision created a split among the Courts of Appeal, it is likely the Supreme Court will look for an opportunity to resolve the issue.

For more information about the *Hively* decision and how it impacts your workplace, please contact [Steven T. McDevitt](#), [Anne E. McNab](#), or any other member of Frost Brown Todd’s [Labor and Employment](#) practice group.

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