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Sexual Orientation Discrimination: Landmark Decision from Federal Court of Appeals

Last week, the U.S. Court of Appeals for the Seventh Circuit issued its decision in *Hively v. Ivy Tech Community College of Indiana*. The decision tackles the issue of whether Title VII of the Civil Rights Act of 1964's ban on "sex discrimination" includes a ban on discrimination on the basis of sexual orientation. On an 8-3 vote, the Judges from the Seventh Circuit determined that sexual orientation discrimination is virtually indistinguishable from sex discrimination because both rely on stereotyped concepts of the sexual behavior and lives of men and women.

The *Hively* case involved a lesbian, part-time adjunct professor at a community college in South Bend, Indiana. The professor applied for multiple full-time positions at the Community

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College but was denied each position and subsequently terminated. Believing that the Community College's actions were due to discrimination on the basis of her sexual orientation, the professor filed a charge with the Equal Employment Opportunity Commission ("EEOC"). She received a right to sue letter, and filed a claim against the Community College in federal court. The Community College successfully argued in the lower court that sexual orientation was not a protected category under Title VII. The Seventh Circuit's determination last week overturns this earlier ruling and any other ruling finding that sexual orientation is not a Title VII protected class in courts under jurisdiction of the Seventh Circuit (that is in, Illinois, Indiana and Wisconsin).

The decision is a landmark one because it is the first decision in any U.S. Court of Appeals ruling that sexual orientation is protected under Title VII. However, the ruling's practical impact on Illinois employers is likely to be slight because Illinois already included "sexual orientation" as a protected category under the Illinois Human Rights Act. Under the Human Rights Act, Illinois declared it public policy of the State that all individuals within Illinois are entitled to freedom from

discrimination on the basis of seventeen protected categories, including sexual orientation. Because of the protections afforded under State law, employment claims alleging workplace discrimination on the basis of sexual orientation were most frequently brought under an investigation by the Illinois Department of Human Rights or the Human Rights Commission, which are the entities charged with investigating complaints filed under the Human Rights Act. The Seventh Circuit's ruling in *Hively*, however, means that there may be future claims of discrimination arising under federal law and actively investigated by the EEOC.

The decision is also important because of the tension it creates with the other so-called Sister Circuits of the U.S. Courts of Appeals. In March 2017, the U.S. Court of Appeals for the Second Circuit (covering Connecticut, New York and Vermont) refused to overturn a precedential decision in that Circuit holding that Title VII does not prohibit discrimination on the basis of sexual orientation. In *Christiansen v. Omnicom*, the Second Circuit affirmed that being gay, lesbian or bisexual does not, in and of itself, constitute nonconformity with a gender stereotype that can give rise to a sex discrimination claim.

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Because of the tension between the two Circuit Court decisions, this issue may soon be ripe for an appeal to the U.S. Supreme Court. However, it appears that battle will wait for another day: the Ivy Tech Community College of Indiana has indicated to multiple news sources that it will not seek Supreme Court review of the Seventh Circuit's determination.

If you have additional questions about the Seventh Circuit's determination, the state of the law in Illinois, or this issue in general, please contact one of our attorneys in Flossmoor (708-799-6766) or Oak Brook (630-928-1200).