

Seventh Circuit holds that Title VII prohibits discrimination based on sexual orientation

On April 4, 2017, the Seventh Circuit Court of Appeals (with jurisdiction over federal courts in Illinois, Indiana and Wisconsin) held that Title VII prohibits sexual orientation discrimination. In *Hively v. Tech Community College of Indiana*, a part-time adjunct professor filed a lawsuit against a community college, claiming she was denied full-time employment and promotions based on her sexual orientation.

Title VII prohibits discrimination in employment “because of . . . sex.” The Seventh Circuit concluded that sex discrimination includes discrimination based on sexual orientation.

The court found that the community college treated Hively adversely because she is a woman, explaining that “Hively’s claim is no different from the claims brought by women who were rejected for jobs in traditionally male workplaces, such as fire departments, construction, and policing. The employers in those cases were policing the boundaries of what jobs or behaviors they found acceptable for a woman (or in some cases, for a man).”

The majority concluded: “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, persuade us that the time has come to overrule our previous cases that have endeavored to find and observe that line.”

In a concurring opinion, Judge Posner added the following insightful observation:

I would prefer to see us acknowledge openly that today we, who are judges rather than members of Congress, are imposing on a half-century-old statute a meaning of “sex discrimination” that the Congress that enacted it would not have accepted. This is something courts do fairly frequently to avoid statutory obsolescence and concomitantly to avoid placing the entire burden of updating old statutes on the legislative branch. We should not

leave the impression that we are merely the obedient servants of the 88th Congress (1963–1965), carrying out their wishes. We are not. We are taking advantage of what the last half century has taught.

While this case is not binding on federal courts in Ohio and Michigan, it may signal a shift in federal court interpretation of Title VII and a willingness to extend Title VII to prohibit discrimination based on sexual orientation.

For additional guidance on this decision and its implications for Ohio and Michigan employers, please contact a member of our firm’s Labor and Employment Law Practice Group at (419) 249-7100.

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