WHAT THE HECK HAPPENED?
2016 EMPLOYMENT LAW UPDATE

by

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I. CIRCUIT COURT REVERSES ITSELF AND GIVES "PROTECTED CLASS STATUS" TO SEXUAL ORIENTATION UNDER TITLE VII

In Hively v. Ivy Tech Community College, No. 15-1720 (7th Cir. July 28, 2016) Ms. Kimberly Hively worked as an adjunct professor for 14 years at Ivy Tech Community College. She had been denied fulltime employment and promotions on six different occasions and was eventually terminated because she is a lesbian.

Hively filed a lawsuit against Ivy Tech claiming discrimination in federal district court. Hively claimed that the EEOC's recent opinion in Baldwin v. Foxx, FAA-2012-24738 (EEOC, June 15, 2015) which held that "sexual orientation is inherently a 'sex-based consideration,' and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII."

However, the federal district court dismissed Hively's case on the grounds that the Seventh Circuit Court of Appeals had previously held that Title VII's coverage of "sex discrimination" only covers discrimination against "men" and "women," and does not extend to sexual orientation.

Hively appealed to the Seventh Circuit Court of Appeals. The Seventh Circuit held against her.

In writing the opinion for the Seventh Circuit, Judge Ilana Rovner claimed that precedent on this issue of sexual orientation had been unequivocal in holding that Title VII **did not** protect sexual orientation discrimination. The court reasoned that this precedent and holding is in line with several other circuit courts. (1st, 2nd, 3rd, 4th, 5th, 6th, 8th, 10th, and DC Circuits.)

The court observed that these holdings reflected the fact that despite multiple efforts, Congress had repeatedly rejected legislation that would extend Title VII to cover sexual orientation, even in the face of an abundance of judicial opinions recognizing an emerging consensus that sexual orientation in the workplace could no longer be tolerated.

However, the court said that it would need a "compelling reason" to overturn circuit precedent, which would typically come in the form of a decision by the Supreme Court or a change in the law by Congress. Until that happens, the court must adhere to its prior precedent.

The Seventh Circuit reasoned that Title VII's prohibition against discrimination "because of ... sex" reaches only instances of gender non-conformity, not sexual orientation. Even though the Seventh Circuit respected the EEOC's opinion that sexual-orientation discrimination punishes people for being attracted to the "wrong" sex, from an employer's point of view, the court held that the EEOC in Baldwin went too far in interpreting Title VII.

Title VII has long been recognized, as in the 1989 U.S. Supreme Court's decision in Price Waterhouse v. Hopkins, to ban discrimination based on "gender stereotyping," *i.e.*, that employees must meet norms about "about what men and women ought to do." Cases afterwards were therefore "framed ... in terms of discrimination based on gender non-conformity," such as in dress, manners, or speech, could succeed under Title VII.

The irony, conceded by the court, is that gay and lesbian employees who actually conform to employers' gender norms, such as with dress, mannerisms, hair, nails etc., are given ***less*** job protection under Title VII than their more "flamboyant" co-workers who deny societies' norms regarding their dress and behavior.

The court also recognized the irony in the law where an LGBTQ person can be legally married on Saturday, under Obergefell v. Hodges, 135 S. Ct. 2584 (2015), and then legally fired on Monday under Title VII.

In short, the court ruefully notes, "[w]e are left with a body of [Title VII] law that values the wearing of pants and earrings over marriage."

The Seventh Circuit then reasoned that it is not up to the EEOC to change this aspect of Title VII.

However, on October 11, 2016, the Seventh Circuit Court of Appeals agreed to hear Hively's case again, but this time by all 11 justices (This is referred to as hearing the case "en banc.").

On November 30, 2016, all 11 Seventh Circuit Court of Appeals justices heard oral arguments.

For the next four months, the court was silent. Then, on April 4, 2017, the Seventh Circuit ruled in favor of Ms. Hively by an 8-3 margin.

Chief Judge Diane Wood wrote the opinion for the majority. Judge Wood wrote that the strongest point made by Ms. Hively was the following:

> "Hively alleges that if she had been a man married to a woman (or living with a woman, or dating a woman) and everything else had stayed the same, Ivy Tech would not have refused to promote her and would not have fired her…. This describes paradigmatic sex discrimination."

Judge Wood supported this argument by citing the United States Supreme Court's precedents in:

- Price Waterhouse v. Hopkins, which "held that the practice of gender stereotyping falls within Title VII's prohibition against sex discrimination,"
- Oncale v. Sundowner Offshore Services, which "clarified that it makes no difference if the sex of the harasser is (or is not) the same as the sex of the victim"
- Loving v. Virginia, which struck down Virginia's miscegenation statute and vindicated the "associational theory of discrimination," and
- The line of LGBT rights cases, which most recently includes Obergefell v. Hodges, which recognized that the Constitution protects the right of same-sex couples to marry.

Judge Joel Flaum's concurrence said:

> "Ivy Tech allegedly refused to promote Professor Hively because she was homosexual, or (A) a woman who is (B) sexually attracted to women. Thus, the College allegedly discriminated against Professor Hively, at least in part, because of her sex. I conclude that Title VII, as its text provides, does not allow this."

However, Judge Diane Sykes's dissent took a different look at this case. Judge Sykes claimed that Title VII's ordinary use of the word "sex" in 1964, and now, means whether someone is biologically male or female. It does not also refer to sexual orientation.

Judge Sykes reasoned that to a fluent speaker of the English language, in 1964 and now, the ordinary meaning of the word "sex" does not fairly include the concept of "sexual orientation. The two terms are never used interchangeably. There is not overlap in meaning.

Judge Sykes then cited a long list of federal and state statutes that "distinguish between sex discrimination and sexual-orientation discrimination by listing them separately as distinct forms of unlawful discrimination."

Judge Sykes then cited this example of how confusing the law could be if the courts interpreted "sex" discrimination to also include "sexual orientation" discrimination.

> "If the facts [brought out on remand] show that Ivy Tech hired heterosexuals for the six full-time positions, then the community college may be found liable for discriminating against Hively "*because of her sex*." That will be so even if *all six positions were filled by women*. Try explaining that to a jury."

WHAT DOES THIS MEAN TO HR?

Keep watching! It is very likely this case will be moving onto the U.S. Supreme Court.

Of course, if you do business in the Seventh Circuit Court of Appeals, which includes Indiana, Illinois and Wisconsin, this is the law of the land for you.

Also, It is also important to remember that there is often a "fine line" difference between harassment or discrimination based on someone's sexual orientation and harassment or discrimination based on "gender norms," which is still illegal under Title VII.

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Scott Warrick combines the areas of law and human resources to assist organizations in **"Solving Employee Problems BEFORE They Happen."** Scott uses his unique background of **LAW** and **HUMAN RESOURCES** to help organizations get where they want to go, which includes coaching and training managers and employees in his own unique, practical, entertaining and humorous style.

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