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Labor and Employment Alert: Seventh Circuit Holds That Title VII Protects Sexual Orientation

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On April 4, 2017, the Seventh Circuit Court of Appeals held that discrimination on the basis of sexual orientation is a form of sex discrimination prohibited by Title VII of the Civil Rights Act. *Hively v. Ivy Tech Community College* is the first decision by a federal appellate court holding that sexual orientation discrimination is actionable under Title VII. As such, it directly conflicts with a decision by the Eleventh Circuit Court of Appeals in March 2017 as well as holdings by the First, Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, and Tenth Circuit Courts of Appeal – all of which held that Title VII does not prohibit discrimination based on sexual orientation.

In the lawsuit, Kimberly Hively claimed that Ivy Tech terminated her employment because she is a lesbian and that her termination violates Title VII. Title VII prohibits discrimination because of sex and doesn't mention sexual orientation. So the trial court dismissed her case, finding there was no cause of action under Title VII for sexual orientation discrimination. Last year, the Seventh Circuit affirmed this dismissal. But the Court later agreed to rehear the case en banc (before the entire 11-judge panel).

In its new 8-3 opinion, the Court discussed the evolving nature of Title VII jurisprudence and whether Title VII should now be interpreted to include sexual orientation as a form of discrimination based on sex. The Court explained that it "sits en banc to consider what the correct rule of law is now in light of the Supreme Court's authoritative interpretations, not what someone thought it means one, ten, or twenty years ago." Consequently, "it is neither here nor there that the Congress that enacted the Civil Rights Act in 1964 and chose to include sex as a prohibited basis for employment discrimination (no matter why it did so) may not have realized or understood the full scope of the words it chose." The Supreme Court has already recognized same-sex harassment, sexual harassment and sexual stereotyping as discriminatory, even though none of those are mentioned in Title VII. Given this, the Court concluded, being a lesbian is a form of gender nonconformity that is likewise covered by Title VII.

Ultimately, the Court found that “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.” This means that, at least within the Seventh Circuit, “a person who alleges that she experienced employment discrimination on the base of her sexual orientation has put forth a case of sex discrimination for Title VII purposes.”

Nineteen states and the District of Columbia (including Illinois and Wisconsin) as well as local jurisdictions (including Chicago, Illinois; Indianapolis/Marion County, Bloomington/Monroe County, and Evansville, Indiana; and Milwaukee and Madison, Wisconsin) already protect against sexual orientation discrimination. The Seventh Circuit’s ruling expands those protections across Illinois, Indiana, and Wisconsin. And, notable, it creates a conflict with the other federal circuits, setting the stage for a potential review by the Supreme Court. Contact your Vorys lawyer if you have questions about discrimination or harassment in the workplace.