

LEGAL UPDATES

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## Service

Labor &amp; Employment

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# Seventh Circuit Holds That Title VII Covers Employment Discrimination on the Basis of Sexual Orientation

On April 4, 2017, the Seventh Circuit became the first federal appellate court to hold that employment discrimination on the basis of sexual orientation is a form of sex discrimination that is prohibited by Title VII of the Civil Rights Act of 1964. The decision overturned a prior ruling by a Seventh Circuit panel and is a departure from previous court rulings.

### *Hively v. Ivy Tech Community College of Indiana*

As described in the court's ruling, Kimberly Hively is openly lesbian and began teaching at Ivy Tech as a part-time adjunct in 2000. She unsuccessfully applied for six full-time positions between 2009 and 2014. In July 2014, her part-time contract was not renewed. Shortly thereafter, Hively filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging that she was being discriminated against based on her sexual orientation and that this discrimination violated Title VII.

After being granted a right-to-sue letter from the EEOC, Hively filed a lawsuit. Ivy Tech—relying on a line of previous cases—filed a motion to dismiss, arguing that sexual orientation is not a protected class under Title VII. The District Court granted the motion to dismiss, and Hively appealed to the Seventh Circuit.

A panel of three judges affirmed the District Court's decision. Notwithstanding, the panel—seemingly concerned with the prior rulings in light of today's realities—noted that “[t]he cases as they stand ... create a paradoxical legal landscape in which a person can be married on Saturday and then fired on Monday for just that act.”

Following the panel's decision, a majority of the judges in the Seventh Circuit in regular active service voted to rehear the case *en banc*. Upon review by the full court, an 8-3 majority found that sexual orientation discrimination is protected by Title VII. In particular, the court was deciding "whether actions taken on the basis of sexual orientation are a subset of actions taken on the basis of sex." As it had done previously, Ivy Tech relied on the argument that when Congress passed Title VII, it was not considering discrimination on the basis of sexual orientation; thus, applying Title VII to sexual orientation discrimination would be amending the statute, something only Congress has the power to do. Further, Ivy Tech argued, Congress has considered adding "sexual orientation" to Title VII but has chosen not to do so.

Following a thorough discussion of pertinent Supreme Court rulings, the Seventh Circuit stated that "[t]he 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." It then held "that a person who alleges that she experienced employment discrimination on the basis of her sexual orientation has put forth a case of sex discrimination for Title VII purposes." In doing so, the District Court's decision was reversed and Hively's case was remanded for further proceedings.

### **What This Means to You**

While the Seventh Circuit ruling is not binding nationwide, rulings from other circuits suggest that they may be persuaded by and inclined to follow the Seventh Circuit's lead on this issue. In addition, this ruling provides a strong basis for an employee to claim under federal law that an employer engaged in discrimination on the basis of sexual orientation. To protect against discrimination claims based on any type of protected class, employers should ensure that employment decisions are based on legitimate and nondiscriminatory reasons and carefully document those reasons. In addition, employers should review relevant policies and training content to ensure legal compliance.

### **Contact Us**

For more information on the effect of this ruling or other employment discrimination matters, contact Ben Irwin, Julianne Story or another attorney in Husch Blackwell's Labor & Employment group.