



## Seventh Circuit Charts New Course For Claims of Sexual Orientation Discrimination Under Title VII

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### Stage Set for Supreme Showdown Before Nation's Highest Court

#### Why It Matters

Does Title VII of the Civil Rights Act of 1964 protect workers from discrimination based on sexual orientation in the workplace? The answer to this question is one of the most hotly contested disputes in all of employment law today. While workplace protections for LGBT employees have rapidly expanded in recent years, for years federal courts

of appeal that have considered the matter have answered the question in the negative, finding in uniform fashion that sexual orientation is not a protected class under Title VII. In one fell swoop, however, that all changed just recently when the Seventh Circuit issued its landmark decision in *Hively v. Ivy Tech Community College of Indiana*.<sup>1</sup> In that case, the Seventh Circuit became the first federal court of appeals to hold that Title VII encompasses claims of sexual orientation discrimination as a form of unlawful employment discrimination based on “sex.” The Hively decision is noteworthy, as the opinion creates a clear circuit

split that lays the groundwork for the U.S. Supreme Court to issue a decisive ruling on the cognoscibility of sexual orientation discrimination claims under Title VII, which would definitively resolve this rigorously litigated issue once and for all. Ultimately, Hively may well serve as the impetus for a seismic shift in the legal landscape of federal employment discrimination law, as the recognition of sexual orientation as a protected class under Title VII would undoubtedly represent one of the most significant expansions of workers’ rights under federal law since the enactment of Title VII more than 50 years ago.

## Factual and Procedural Background

Title VII bars discrimination and harassment in the workplace “because of . . . sex,” and prohibits employers from making adverse employment decisions on the basis of sex. Traditionally, many federal lawsuits alleging unlawful discrimination under Title VII based on a worker’s sexual orientation—especially those at the appellate court level—have been dismissed on the grounds that Title VII does not extend to encompass sexual orientation as a protected class.

Jennifer Hively, a part-time professor at Ivy Tech Community College, brought suit against her former employer, claiming that she had been discriminated against as a result of being denied full-time employment and promotions based on her sexual orientation in violation of Title VII. In response, Ivy Tech argued that Title VII did not apply to claims of sexual orientation discrimination, and therefore Hively had asserted a claim for which there was no legal remedy. The district court agreed with the college, and granted Ivy Tech’s motion to dismiss. Hively appealed.

In July 2016, a panel of Seventh Circuit affirmed the decision of the lower court, holding that Title VII’s bar on “discrimination ‘because of . . . sex’” did not prohibit sexual orientation discrimination. In doing so, the panel reasoned that Title VII’s prohibition on discrimination based on “sex” extends only to discrimination based on a person’s gender, but not discrimination aimed at a person’s sexual orientation. While ultimately declining to add sexual orientation to the list of classes protected by Title VII, the

court spent the strong majority of its opinion highlighting the glaring flaws in the current state of the law that “values the wearing of pants and earnings over marriage.” In light of the importance of the issue, and recognizing the power of the full court to overrule earlier decisions and to “bring [its] law into conformity with the Supreme Court’s teachings,” a majority of the judges on the Seventh Circuit voted to rehear the case en banc.

## The *En Banc* Seventh Circuit Decision

On appeal, the en banc Seventh Circuit was charged with the task of ascertaining the proper interpretation of the phrase discrimination “because of . . . sex” in order to determine whether actions taken on the basis of sexual orientation constitute a subset of actions taken on the basis of sex. The en banc court answered that question in the affirmative, finding that discrimination on the basis of sexual orientation represents a cognizable form of sex discrimination under Title VII.

The Seventh Circuit majority based its conclusion that Title VII encompasses sexual orientation as a protected class on two lines of reasoning. First, the court concluded that Hively’s claim was, at its core, an actionable Title VII gender stereotyping claim. Applying Title VII’s prohibition on gender stereotyping to Hively’s claim, the court found that Hively represented the ultimate case of failing to conform to female stereotypes in that she was not heterosexual. In doing so, the majority determined that Hively’s claim was no different from claims involving employers who attempted to police the boundaries

of what jobs or behaviors they found acceptable for women. Based on this reasoning, the court concluded that when a plaintiff alleges that had she been heterosexual, she would not have been subjected to adverse treatment by her employer, then the plaintiff’s claim entails a failure to conform to female stereotypes—in this case, regarding a woman’s sexuality—and thus constitutes unlawful sex discrimination.

Second, the court found that Hively had asserted an actionable claim of sex discrimination under the associational theory of discrimination, which posits that an individual who is discriminated against because of the protected characteristic of those with whom she associates is actually being disadvantaged because of her own traits. In Hively’s case, she was subjected to discrimination because of sex based on her intimate association with a person of the same sex, which ran contrary to Title VII.

In addition, a separate concurrence was also written to discuss the application of the “judicial interpretive updating” approach to statutory interpretation, which the concurrence posited was the more direct path to reaching the conclusion that Title VII extended to encompass sexual orientation discrimination. Under this approach, the task of statutory interpretation focuses on giving a fresh meaning to a constitutional or statutory text that infuses the text with vitality and significance appropriate for the present time, without regard for the original meaning of the text. In the context of Title VII, the concurrence found that it was necessary to provide the federal anti-discrimination statute



with a new, broader interpretation of the word “sex” which took into account homosexuality and recognized today’s more expansive understanding of the term that reached beyond simply gender, which the concurrence opined “almost certainly” did not figure into the minds of the legislators who created Title VII. Accordingly, the concurrence supported an interpretation of Title VII that discarded the more than half-century-old, original meaning of the term “sex discrimination” in favor of a modern, up-to-date interpretation of the key word “sex.” As such, the concurrence concluded, pursuant to the modern, current understanding of the word “sex,” discrimination based on an individual’s sexual orientation constituted discrimination based on “sex.”

Finally, the opinion concluded with a lengthy and poignant dissent that focused on what the dissent viewed as egregious flaws in the methods of statutory interpretation employed by both the majority and concurrence in finding that sexual orientation discrimination fell within the contours of Title VII. According to the dissent, the court’s role was strictly limited to interpreting the statutory language of Title VII as a reasonable person would have understood it at the time of the statute’s enactment. In the dissent’s view, it was not even remotely plausible that in 1964—when Title VII was adopted—a reasonable person would have understood the word “sex” to refer to “sexual orientation”—a different immutable characteristic from one’s biological gender. Accordingly, Title VII’s prohibition on discrimination



“because of sex” was limited to barring discrimination against women because they are women and discrimination against men because they are men, but not discrimination based on an individual’s sexual orientation. Therefore, the dissent concluded, the majority erred when it held that sexual orientation discrimination fell within the scope of Title VII because, in doing so, the majority arrogated to itself the power to create a new protected category under Title VII by amending the federal anti-discrimination statute through judicial interpretation. Similarly, the dissent also took issue with the concurrence’s principle of “judicial statutory updating,” as the practice could not be reconciled with the constitutional design which provided that statutory amendments could only be instituted by legislative enactment, but not by the judiciary.

## Takeaways

To date, 10 different federal courts of appeal have all concluded that Title VII does not extend to claims of sexual orientation discrimination in the workplace. Accordingly, the Seventh Circuit’s decision in *Hively* is in direct conflict with the vast majority of its sister courts. Importantly, the Seventh Circuit’s split from the approach taken by almost every other federal court of appeals to date sets up the issue to be settled conclusively by the U.S. Supreme Court. With that said, it may take some time for the issue to make its way all the way up to the nation’s highest court, as *Ivy Tech* has indicated that it will not appeal the Seventh Circuit’s decision. Even then, however, the circuit split that has been created by *Hively* will without question be leveraged at some point

in the future to obtain Supreme Court review of the issue, which will allow for a definitive ruling on the matter and, in turn, consistent application of the law across all federal courts throughout the nation.

Ultimately, while *Hively* represents a momentous win for LGBT workers, the state of the law as it relates to protections against sexual orientation discrimination in the workplace still remains uncertain. For workers residing outside of the states of Indiana, Illinois, and Wisconsin, it is highly likely that claims of workplace sexual orientation discrimination instituted in federal court will continue to be rejected at the outset of litigation for the foreseeable future, as every federal court of appeals other than the Seventh Circuit that has considered the issue has held that such claims are not cognizable under Title VII.

With that said, outside of the federal court system the legal landscape is rapidly shifting in favor of a broader interpretation of Title VII that includes sexual orientation discrimination under its umbrella of protection. In this respect, the U.S. Equal Employment Opportunity Commission (EEOC)—the federal law enforcement agency charged with interpreting and enforcing Title VII—has come out in full force in favor of Title VII protections for LGBT workers, concluding that harassment and other discrimination because of sexual orientation is a prohibited form of sex discrimination. Importantly, combatting sexual orientation discrimination constitutes one of the EEOC’s “Selected Emerging and Developing Issues” as articulated in the Commission’s Strategic Enforcement Plan covering

the period between 2017 and 2021. This provides a strong indication that the EEOC will continue to vigorously pursue remedies for workplace sexual orientation discrimination for the foreseeable future, even in those jurisdictions that favor a narrower interpretation of Title VII. In addition, many federal district courts have agreed with the EEOC’s position, finding that sexual orientation falls within the prohibitions of sex discrimination under Title VII. Furthermore, many states and local governments have also enacted their own statutory protections against workplace sexual orientation discrimination.

With the significant shift in the cultural and social viewpoint of the nation on sexual orientation and gender identity in recent years, it appears to be only a matter of time before the federal courts align themselves with the overriding attitude of the present era. Ultimately, however, while the writing is on the wall in terms of the essential need to extend LGBT protections against discrimination and harassment to the workplace, at least for the time being LGBT employees will continue to lack comprehensive affirmative protections across the country under federal law against discrimination in the employment setting.

## Endnote

<sup>1</sup>*Hively v. Ivy Tech Community College of Indiana*, No. 15-1720, 2017 U.S. App. Lexis 5389 (7th Cir. April 4, 2017).