SEYFARTH SHAW

Management Alert

Seventh Circuit Finds Discrimination on the Basis of Sexual Orientation Prohibited by the Civil Rights Act

By Alexius O'Malley, Michael W. Stevens, Sam Schwartz-Fenwick, and Laura Maechtlen

***Seyfarth Synopsis**: The Seventh Circuit becomes the first appellate court to hold that discrimination on the basis of sexual orientation is prohibited as sex discrimination under Title VII. The decision establishes a circuit split that may ultimately lead to Supreme Court review.*

On Tuesday, April 4, 2017, in a landmark *en banc* decision, the Seventh Circuit became the first appellate court to decide that discrimination on the basis of sexual orientation is a form of sex discrimination, forbidden by Title VII of the Civil Rights Act of 1964.

Background

In reaching this seminal decision, the court reversed the district court's decision dismissing Kimberly Hively's suit against her former employer, Ivy Tech Community College. Hively was an adjunct professor and openly lesbian. She applied for six full-time positions over the course of five years, and was passed over each time. In July 2014, her part-time adjunct contract was not renewed. She filed a charge with the EEOC claiming she was discriminated against because of her sexual orientation, and received a right-to-sue letter.

Litigation History

Hively proceeded *pro se* in the Northern District of Indiana. Ivy Tech brought a motion to dismiss, claiming that sexual orientation is not a protected class under Title VII or section 1981. The district court agreed, holding that under Seventh Circuit precedent, *Hamner v. St. Vincent Hosp. and Health Care Center, Inc.*, 224 F.3d 701, 704 (7th Cir. 2000), Title VII did not prohibit discrimination based on "one's sexuality or sexual orientation." The court granted the motion to dismiss without leave to amend.

Hively appealed, represented by the Lambda Legal Defense & Education Fund. In July 2016, a panel of the Seventh Circuit affirmed, but suggested that the issue was more complicated than simply following precedent. The court ultimately relied on *Hamner* and other similar authority, but also examined the EEOC's 2015 decision in *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, in which the EEOC determined that "sexual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex." The panel expressly noted the difficulty in separating discrimination on the basis of gender norms, which was already illegal under Title VII, versus

discrimination based on sexual orientation, which was not. The panel also noted how recent Supreme Court decisions created the paradoxical situation where an LGB person could be legally married to a person of the same sex, but could also be legally fired for getting married. Nonetheless, the panel found that it was ultimately bound by previous precedent, and declined to find that Title VII prohibited discrimination based on sexual orientation.

The *En Banc* Decision

In seeking *en banc* review, Hively asked the Seventh Circuit to revisit its precedent, in light of the EEOC's decision in *Baldwin*, as well as the dramatic change in Supreme Court jurisprudence regarding the treatment of LGB people, as manifested in the marriage equality decisions.

The Seventh Circuit, in an opinion by Chief Judge Wood, largely adopted the EEOC's rationale presented in *Baldwin*. The court found that sexual orientation discrimination was a form of sex stereotyping and thus barred under Title VII. To reach this conclusion, the court applied the "comparative method" approach. The court examined the counterfactual "situation in which Hively is a man, but everything else stays the same: in particular, the sex or gender of the partner." The court found that Hively's non-conformity to the female stereotype — that she should have a male partner — was cognizable as sex discrimination under the gender non-conformity line of cases.

The court also adopted Hively's theory that discrimination based on sexual orientation is sex discrimination under the associational theory. The court examined the application of this line of cases, beginning with *Loving v. Virginia*, 388 U.S. 1 (1967), and found that the Civil Rights Act prohibits discrimination based on the sex of someone with whom a plaintiff associates. The court noted that it was inapposite that the *Loving* line of cases dealt with associational race discrimination, rather than sex discrimination.

In reversing its previous precedent such as *Hamner*, the court noted both the Supreme Court's recent marriage equality decisions, as well as the EEOC's action in *Baldwin*, and stated that "this court 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 meant one, ten, or twenty years ago."

The court was unpersuaded by the notion that Congress has not expressly added the phrase "sexual orientation" to the list of protected categories under the Civil Rights Act, while it has used the phrase in other legislation. Instead, the court noted that the "goalposts" of Title VII "have been moving over the years," but the key concept — "no *sex* discrimination" — remains.

The Court declined to decide whether there would be an exemption if Ivy Tech were a religious employer, and whether the meaning of discrimination in the context of the provision of social or public services might be the same.

A Path To The Supreme Court?

The Seventh Circuit is now at odds with the Eleventh Circuit's recent decision in *Evans v. Georgia Regional Hospital*, which held that Title VII does not cover discrimination based on sexual orientation. The Second Circuit also recently declined to interpret Title VII as covering sexual orientation discrimination, but left open the possibility that certain allegations regarding gender stereotyping related to sexual orientation may state a claim.

Although a circuit split is thus emerging, it appears that Ivy Tech is not planning to seek certiorari. It is thus unlikely that this case will be the vehicle for Supreme Court to resolve the circuit split. However, it is possible that a petition for certiorari will be filed in *Evans*. If such a petition is filed it is likely to stress the circuit split that has emerged with *Hively*.

Key Takeaways

In light of *Hivley*, discrimination based on sexual orientation is now prohibited under Title VII in the Seventh Circuit. However, the issue remains in flux in the rest of the country.

Absent Supreme Court review or legislative action by Congress, it is likely that the law will remain unsettled. Employers should consult with counsel to evaluate their internal policies, practices, and procedures with an eye toward sexual orientation claims.

If you would like further information, please contact your Seyfarth attorney, Alexius O'Malley at aomalley@seyfarth.com, Michael W. Stevens at mwstevens@seyfarth.com, Sam Schwartz-Fenwick at sschwartz-fenwick@seyfarth.com, or Laura Maechtlen at lmaechtlen@seyfarth.com.