



TITLE VII NOW COVERS DISCRIMINATION BASED ON SEXUAL ORIENTATION

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The Seventh Circuit Court of Appeals has determined that Title VII of the Civil Rights Act bars discrimination on the basis of sexual orientation. On April 4, 2017, the Chicago-based court, which presides over federal matters in the states of Wisconsin, Illinois and Indiana, became the first federal court of appeals to determine that the protections of Title VII extend to sexual orientation.

The case, *Hively v. Ivy Tech Community College of Indiana*, No. 15-1720 (7th Cir. Apr. 4, 2017), was brought by Kimberly Hively, a lesbian and a part-time adjunct instructor at Ivy Tech, a public institution in Indiana with thirty campuses statewide. She alleged that the college refused to hire her for six full-time positions she sought over five years and then refused to renew her part-time contract because of her sexual orientation.

In its decision, the court held that consideration of sexual orientation centers on the issue of gender and sexual stereotypes, meaning that an employer who takes an adverse action against a homosexual employee is taking an action based upon that employee's gender or sex, which are covered by Title VII, and the employee's failure to conform to a particular gender stereotype. Hively argued, and the court agreed, that had Hively been

a man married to, dating, or cohabitating with a woman, Ivy Tech would not have taken the actions it did. The court stated that while this decision may appear to write into the law the term sexual orientation, it actually does no such thing as the law already protects an individual from discrimination on the basis of sex, which cannot be separated from sexual orientation.

This decision, issued following oral argument before the full panel of Seventh Circuit judges, overruled the Circuit's previous decision in the same case and the lower court's decision which granted Ivy Tech's motion to dismiss, both of which held that Title VII did not cover sexual orientation. This decision means that Hively now has the opportunity to litigate her claims in the district court. Whether she ultimately will prevail is to be determined, but now, in the Seventh Circuit at least, it is clear that she has a viable claim to litigate under federal law.

Twenty-two states have laws that bar discrimination based on sexual orientation, including Wisconsin, Illinois and Minnesota. Employers in these states, therefore, have already been prohibited from discriminating against employees on the basis of sexual orientation. The Seventh Circuit's extension of federal protection to



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sexual orientation creates additional means for employees claiming such discrimination to seek remedies before the Equal Employment Opportunity Commission and in federal court. In federal court, compensatory (i.e. emotional distress) and punitive damages may be available to plaintiffs where before state agencies such damages are generally unavailable. Therefore, if this decision changes anything for those in states already prohibiting

discrimination, it potentially increases the risk for employers who run afoul of the law.

Even though many employers have known that sexual orientation is a protected class in their states, this decision serves as a reminder that employers should make sure their handbooks, policies, and employee and supervisor training include reference to this protected class.