

Federal Appeals Court Includes Sexual Orientation in Title VII Protection for First Time

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A landmark decision from a federal appeals court declared for the first time that sex discrimination includes discrimination on the basis of "sexual orientation" under Title VII.

"Supreme Court 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," wrote the 8-3 majority in the Seventh Circuit Court of Appeals in *Hively v. Ivy Tech Community College*.

Title VII, which became law in 1964, prohibits discrimination with respect to terms and conditions of employment "because of such individual's sex." But there is no mention of sexual orientation, and it arguably was not on the mind of Congress in 1964 when it enacted Title VII. The majority in this latest case, however, cited Supreme Court cases that recognize the concepts embodied in the words of statutes must evolve over time: "This court sits . . . 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."

Kimberly Hively, an openly lesbian adjunct professor at Ivy Tech Community College in Indiana, applied for at least six full-time positions with the college between 2009 and 2014, only to be turned down for each one. In July 2014, the college did not renew her part-time contract. She filed a charge of discrimination, followed by a federal lawsuit claiming that she was discriminated against under Title VII based on her sexual orientation.

The federal district court dismissed the case, ruling that sexual orientation is not a protected class under Title VII. Hively appealed, and the federal appeals court reversed, sending her case back to the district court in Indiana.

The Seventh Circuit covers Illinois, Indiana and Wisconsin. Just last month, two other federal appeals courts - the Eleventh Circuit and the Second Circuit - held that Title VII does *not* prohibit sexual orientation discrimination. Because of the conflicting decisions from other federal appeals courts, the issue likely will work its way to the U.S. Supreme Court for decision.

Similar to the text of Title VII, the [Pennsylvania Human Relations Act](#) (PHRA) does not contain an express prohibition against sexual orientation discrimination. However, a number of local ordinances in Pennsylvania do include sexual orientation as a protected class. In addition, covered contractors doing business with the federal government and the state are also prohibited from discrimination based on sexual orientation. Employers should be aware of any local and contractual requirements that go beyond Title VII and the PHRA, and stay tuned as the U.S. Supreme Court likely will weigh in on this issue.

If you have any questions on how this could affect your business, reach out to [Barley Snyder's Employment Law Group](#) at any time.

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