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ALERT

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SEVENTH CIRCUIT HOLDS THAT TITLE VII PROHIBITS SEXUAL ORIENTATION DISCRIMINATION

By Karen Baillie

On April 4, 2017, the United States Court of Appeals for the Seventh Circuit (which serves three states – Indiana, Illinois and Michigan), ruled that sexual orientation discrimination is a form of sex discrimination under Title VII because it is "impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex." *Hively v. Ivy Tech Community College of Indiana*. This decision is the first by a federal court of appeals to hold that sexual orientation discrimination is actionable under Title VII. In fact, as the majority opinion notes, all of their earlier decisions as well as decisions by almost all other circuits had long held that Title VII did not support a claim for sexual harassment discrimination.

Although this decision is a first, it is not unexpected. Several lower courts had already allowed claims of sexual orientation discrimination based on gender stereotyping and harassment theories. Since 2015, the Equal Employment Opportunity Commission has taken the position that sexual orientation discrimination is prohibited under Title VII. And many states and cities include sexual orientation in their lists of protected classifications in their anti-discrimination laws.

The majority decision in *Hively* largely followed the reasoning set forth in a recent decision in the Western District of Pennsylvania, *EEOC v. Scott Medical Center*, that ruled sexual orientation discrimination was a form of sex discrimination under Title VII:

> That someone can be subjected to a barrage of insults, humiliation, hostility and/or changes to the terms and conditions of employment, based upon nothing more than the aggressor's view of what it means to be a man or a woman, is exactly the evil Title VII was designed to eradicate. …. [T]his Court concludes that discrimination on the basis of sexual orientation is a subset of sexual stereotyping and thus covered by Title VII's prohibitions on discrimination 'because of sex.'

Over time the United States Supreme Court has broadly interpreted Title VII's words discrimination 'because of sex.' For example, the US Supreme Court ruled in 1983 that "male as well as female employees are protected against discrimination." *Newport News Shipbuilding and Dry Dock v. EEOC,* 462 US 669 (1983). In 1986, the Supreme Court clarified that a hostile work environment is a form of discrimination 'because of sex.' *Meritor Savings Bank FSB v. Vinson,* 477 U.S. 57 (1986). In 1989, the Court made it clear that gender stereotyping was a form of discrimination 'because of sex.' *Price Waterhouse v. Hopkins,* 490 US 228 (1989). In 1998, the Court clarified that same-sex harassment was included in the definition of

discrimination 'because of sex.' *Oncale v. Sundowner Offshore Services, Inc.* 523 US 75 (1998).

Likewise, outside of Title VII, in 2015, the United States Supreme Court expanded LGBTQ rights when it held that due process and the equal protection clause protected the rights of same sex couples to marry. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

Given this back drop, the Seventh Circuit found three reasons to overrule Seventh Circuit precedent.

First, the Court reasoned that these U.S. Supreme Court precedents mean that the circuit courts were getting it wrong when they held that sexual orientation discrimination was not actionable under Title VII. She concluded that sexual orientation discrimination is a form of gender stereotyping which is unlawful under Title VII.

Second, the Court used a comparison to interpret the language of Title VII which prohibits discrimination "because of sex." If a man is substituted for the female plaintiff, a cause of action becomes apparent. The plaintiff alleges that she was not promoted because she is romantically involved with a woman. If the plaintiff were a man romantically involved with a woman, she would have been promoted. Therefore, the plaintiff alleges that her employer is "disadvantaging her because she is a woman" – that is because of her sex.

Third, the Court reasoned that associational discrimination is also discrimination. Judge Wood cited *Loving v. Virginia*, 388 U.S. 1 (1967), which held that Virginia's law prohibiting inter-racial marriages was unconstitutional and *Holcomb v Iona College,* 521 F.3d 130, 132 (2d. Cir. 2008), which held that an employer violates Title VII when it takes "action against an employee because of the employee's association with a person of another race." In *Hively,* Judge Wood concluded, that to the extent that the statute prohibits discrimination on the basis of the sex/race of someone with whom the plaintiff associates, it also prohibits discrimination on the basis of the sex/race of the plaintiff herself. Slip op. at 18-19.

Although attorneys for Ivy Tech have indicated to news media that they do not intend to file an appeal, we may see this issue before the Supreme Court in the near future given the earlier decisions with opposite holdings by the others courts of appeal.◆

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For more information about Schnader's Labor and Employment Practices Group or to speak with a member of the firm, please contact:

Anne E. Kane
Co-Chair, Labor and Employment Practices Group
215-751-2397
akane@schnader.com

Michael J. Wietrzychowski
Co-Chair, Labor and Employment Practices Group
856-482-5723
mwietrzychowski@schnader.com

Karen Baillie
412-577-5118
kbaillie@schnader.com

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