



# Seventh Circuit Issues Landmark Decision Holding Title VII Prohibits Sexual Orientation Discrimination

05.16.2017 | By [Allison C. Callaghan](#), [Veronica M. Gray](#), [John T. Kennedy](#)

In a landmark decision, the Seventh Circuit recently held that discrimination on the basis of sexual orientation is a form of actionable sex discrimination under Title VII of the federal Civil Rights Act of 1964. Unlike the law in California (and several other states), Title VII does not expressly enumerate sexual orientation alongside its protections for sex, race, color, national origin, and religion.

The Seventh Circuit is the first federal appeals court to rule in such a manner, directly contradicting recent decisions of the Second and Eleventh Circuits.<sup>1</sup> The circuit split likely paves the way for the United States Supreme Court to address the scope of Title VII.

The facts of the Seventh Circuit case are simple. The plaintiff, Kimberly Hively, is openly lesbian. She claimed her employer, Ivy Tech Community College, denied her a full-time teaching position and ultimately did not renew her employment contract based on her sexual orientation.

The district court dismissed the case. A panel of the Seventh Circuit affirmed based on established circuit precedent holding that sexual orientation is not a protected class under Title VII. Ms. Hively then successfully sought reconsideration *en banc*.

The Seventh Circuit concluded that Title VII prohibits discrimination on the basis of sexual orientation under three separate theories.

First, the Court applied the comparative method, which seeks to isolate the impact of a protected characteristic on an employer's decision. The Court asked if Ms. Hively had been a man married to a woman and all other facts being equal, would Ivy Tech have refused to promote her and not renewed her

employment contract? Ms. Hively argued that if her sex had been different, she would have been treated differently. The Court characterized this as paradigmatic sex discrimination.

Second, the majority considered whether discrimination on the basis of sexual orientation is a form of unlawful sex stereotyping under *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228 (holding discrimination based on an individual's failure to conform to gender stereotypes e.g., a woman who does not wear makeup or feminine clothing is actionable sex discrimination under Title VII). The Seventh Circuit observed that Ms. Hively represented the ultimate case of failure to conform to a female stereotype. The Court concluded that any adverse employment decision based on the fact that a person presents differently in dress or speech or has a same-sex partner is a decision based on sex.

Third, looking to a line of cases beginning with *Loving v. Virginia* (1967) 388 U.S. 1, the Court reasoned that just as changing the race of one individual in an interracial relationship would change the outcome, changing the sex of one partner in a lesbian relationship would similarly alter the result. Thus, the court concluded that discrimination based on an individual's sexual orientation is discrimination resting on distinctions drawn according to sex.

Although the Seventh Circuit's decision is a sea change under federal law, the California legislature amended the Fair Employment and Housing Act in 2000 to expressly include sexual orientation as an unlawful basis for employment discrimination. Although it remains to be seen how the federal debate will conclude, California employers are, without question, expressly prohibited from engaging in sexual orientation discrimination.

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<sup>1</sup>On March 10, 2017, in *Jameka Evans v. Georgia Regional Hospital*, the Eleventh Circuit held that discrimination on the basis of an employee's sexual orientation is not prohibited under Title VII. Likewise, on March 27, 2017, in *Christiansen v. Omnicom Group, Inc.*, the Second Circuit also held that Title VII did not cover sexual orientation discrimination. On the other hand, the Equal Employment Opportunity Commission has repeatedly recognized sexual orientation discrimination as a cognizable form of sex discrimination under Title VII.