On April 4, 2017, the Seventh Circuit Court of Appeals issued its highly anticipated en banc decision in *Hively v. Ivy Tech Community College of Indiana*, making the Seventh Circuit the first federal appellate court to find that sexual orientation is encompassed in Title VII of the Civil Right Act of 1964’s definition of sex.

**Background**

Hively taught as an adjunct professor for many years at Ivy Tech Community College. After nine years on the job, she applied for six full-time positions over the next five years. Hively did not receive any of the positions she sought. Hively, who is an out lesbian, attributed Ivy Tech’s failure to hire her for those full-time positions to her sexual orientation. Hively filed a charge of discrimination with U.S. Equal Employment Opportunity Commission (EEOC) alleging sexual orientation discrimination under Title VII. After receiving her notice of right to sue, Hively filed her pro se lawsuit against Ivy Tech for sexual orientation discrimination under Title VII. Notably, she did not allege that she had been subject to gender stereotyping. Ivy Tech moved to dismiss Hively’s complaint for failure to state a claim, arguing that sexual orientation is not a protected class under Title VII. The district court granted Ivy Tech’s motion to dismiss.

The Seventh Circuit initially affirmed dismissal of Hively’s complaint. The Seventh Circuit then granted a rare en banc hearing of the matter and subsequently reversed the district court’s decision dismissing Hively’s suit and remanding it for further proceedings.

**Seventh Circuit Holds Sexual Orientation Discrimination Is Sex Discrimination Under Title VII**

The Seventh Circuit’s holding is very simple: sexual orientation discrimination is discrimination on the basis of sex for purposes of Title VII. Based on Hively’s allegation that she did not obtain the positions she sought due to her sexual orientation, Ivy Tech “is disadvantaging her because she is a woman.” For employers in the Seventh Circuit, this means that adverse actions taken on the basis of sexual orientation are unlawfully taken on the basis of sex. The Seventh Circuit reached this decision based on three cases decided by the Supreme Court of the United States (and their progeny): *Oncale* (same-sex harassment), *Loving* (associational discrimination), and *Obergefell* (fundamental right to marry).
First, the Seventh Circuit looked to Oncale, in which the Supreme Court addressed the issue of whether Title VII covers same-sex sexual harassment (e.g., male-on-male harassment). The Supreme Court in Oncale recognized that male-on-male sexual harassment was not the principal evil with which Congress was concerned when it enacted Title VII. The Supreme Court held, however, that it was a reasonably comparable evil that Title VII clearly prohibited. The Seventh Circuit deployed this reasoning to show that Congress may not have anticipated a particular application of Title VII, such as same-sex harassment or sexual orientation discrimination, but that does not stand in the way of interpreting Title VII in that manner.

Second, the Seventh Circuit looked to Loving and its progeny (including LGBT-related cases) to apply an associational discrimination analysis to support its holding, i.e., an employer discriminating against a female employee marrying another woman is associational discrimination on the basis of sex in violation of Title VII.

Finally, the Seventh Circuit looked to the Supreme Court’s recent LGBT decisions in Windsor and Obergefell for support for its decision. The Seventh Circuit noted that bizarre results could ensue if the law were to protect an individual’s right to “be married on Saturday,” but then allow that an employee be “fired on Monday for just that act.”

**Key Takeaways for Employers**

Employers’ existing non-discrimination obligations remain largely unchanged by Hively. Upwards of 250 state laws, county ordinances, and city codes already prohibit private employers from discriminating on the basis of sexual orientation, as well as gender identity and gender expression depending on the scope of the particular law. Best practice is to vigilantly stay up to date on the laws in the states, counties, and cities in which they operate to ensure compliance with LGBT non-discrimination laws.

Some state non-discrimination laws look to Title VII for interpretative guidance, so employers may want to beware of this impact even if the applicable state laws do not define sex to include sexual orientation. Employers can take action now to ensure their handbooks, policies, and practices afford the same protections for sexual orientation as all other protected characteristics. Employers may wish to consider updating training materials and onboarding modules to include reference to sexual orientation (and gender identity/expression, as applicable) to comport with their legal obligations.

Employers can expect business as usual with the EEOC and any LGBT-related charges and enforcement actions. While many agencies are grappling with changing priorities under the new administration, the EEOC’s Strategic Enforcement Plan for Fiscal Years FY2017-2021 states that the EEOC will continue its strategic focus on the emerging and developing issue of “protecting lesbians, gay men, bisexuals and transgender (LGBT) people from discrimination based on sex.” Acting EEOC Director Victoria Lipnic participated in the EEOC’s unanimous Macy v. Holder decision in 2012 (holding transgender individuals are protected under Title VII) and appears poised to continue the agency’s focus on LGBT issues. Employers may want to keep in mind that the EEOC and legal advocacy groups have begun to focus in recent years on discrimination in benefits. Thus, employers that have not extended benefits to include same-sex spouses (if they extend to other spouses) may want to evaluate the legal risk of such practices—especially in light of Hively. Likewise, employers who continue to extend benefits to only same-sex domestic partners may wish to evaluate the risk of such practices as well.
It seems inevitable that *Hively* (or a similar case) will go to the Supreme Court. While the Seventh Circuit was very careful to say it was not “amending” Title VII to add a new protected category (as it acknowledges that doing so would be beyond its power), the *Hively* decision departs starkly from legal precedent. All circuit courts that have considered the issue of whether sex encompasses sexual orientation and have rejected that argument—even if it expressed remorse or reservations in doing so. Numerous district courts, on the other hand, have held that sexual orientation falls within Title VII’s definition of sex. The Seventh Circuit points out that the Supreme Court has been silent and tees up the issue for ultimate resolution, likely in the near future. While *Hively* may ultimately streamline the current patchwork of legal protections for LGBT employees, until resolution occurs, employers can expect to see more divergence in the courts.