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Seventh Circuit Invites Supreme Court to Make Sexual Orientation Discrimination Actionable Under Title VII

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Bound by its own precedent, the Seventh Circuit Court of Appeals again held that Title VII of the Civil Rights Act of 1964 does not redress sexual orientation discrimination in Hively v. Ivy Tech Community College, (7th Cir. July 28, 2016). The opinion could have ended there, and perhaps it would have, if penned by any other judge.

Bound by its own precedent, the Seventh Circuit Court of Appeals again held that Title VII of the Civil Rights Act of 1964 does not redress sexual orientation discrimination in *Hively v. Ivy Tech Community College*, (7th Cir. July 28, 2016). The opinion could have ended there, and perhaps it would have, if penned by any other judge. Instead, Judge Rovner, writing for the panel, made a case for the Supreme Court of the United States to review the Seventh Circuit's decision in *Hively*:

> Perhaps the writing is on the wall. It seems unlikely that our society can continue to condone a legal structure in which employees can be fired, harassed, demeaned, singled out for undesirable tasks, paid lower wages, demoted, passed over for promotions, and otherwise discriminated against solely based on who they date, love, or marry.... But writing on the wall is not enough.

> Until the writing comes in the form of a Supreme Court opinion or new legislation, we must adhere to the writing of our prior precedent, and therefore, the decision of the district court is AFFIRMED.

(Judge Ripple joined only in the result. He did not join Judges Rovner and Bauer in the remainder of the decision, which invites the Supreme Court to make sexual orientation discrimination actionable under Title VII.)

The Conflict Is Ripe for Review

Hively calls for a "fresh look" at whether Title VII covers sexual orientation discrimination due to changing workplace norms and recent legal developments. In *United States v. Windsor* (2013), the Supreme Court struck down the Defense of Marriage Act (DOMA), and in *Obergefell v. Hodges* (2015), the Court held that all 50 states are required to perform and recognize same-sex marriages. Meanwhile, to date, Congress has not amended Title VII to prohibit sexual orientation discrimination. The resulting "paradoxical legal landscape" allows "two women or two men to marry" and, at the same time, does not prohibit employers from discriminating against employees for entering into same-sex marriages under Title VII.

According to the *Hively* court, the need to revisit longstanding Seventh Circuit precedent on this issue became more apparent when the "EEOC, the body charged with enforcing Title VII" held that sexual orientation discrimination is "sex" discrimination under Title VII in *Baldwin v. Foxx*, EEOC Appeal No. 0120133080 (July 15, 2015). *Hively* further criticizes the complicated line-drawing by courts attempting to bring sexual orientation discrimination claims within Title VII's protection by framing them as impermissible gender stereotyping under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

In *Price Waterhouse*, a senior manager, whose record of securing major contracts was unmatched by the other 87 partner candidates, alleged she was denied partnership because she was not "feminine" enough. The Supreme Court held that gender stereotyping is illegal sex discrimination under Title VII. Since then, many courts have applied *Price Waterhouse* to sex discrimination claims brought by lesbian, gay, bisexual, and transgender (LGBT) individuals to deny dispositive motions when there are sufficient facts to show that the plaintiffs did not conform to traditional, stereotypical gender roles.

A Path for Reversal

As explained in *Hively*, reliance on gender stereotypes — purported "societal norms about appropriate masculine and feminine behaviors, mannerisms, and appearances" — has proved problematic in these cases. The need to distinguish between sexual orientation discrimination and impermissible gender stereotyping often creates illogical and "uncomfortable result[s]," such as protecting only those employees — both LGBT and heterosexual — who do not conform to gender stereotypes at work. By

contrast, those gender-conforming employees who are fired or harassed because they are gay or perceived to be gay are not protected under Title VII. For example, an employer can fire a male employee on the "hunch" that he is gay, even if he is not, but an employer cannot fire a male employee because he "had a high voice, did not curse, was well-groomed, neat, filed his nails, crossed his legs, talked about art and interior design, and pushed the buttons on his factory equipment 'with pizzazz.'"

The *Hively* court essentially invites the Supreme Court to revisit *Price Waterhouse* to recognize sexual orientation discrimination under Title VII. Another approach, the court urges, would be for the Court to see that "sexual orientation discrimination is, in fact, discrimination based on the gender stereotype that men should have sex only with women and women should have sex only with men." According to *Hively*, this result would align with the existing application of Title VII. For instance, Title VII protects employees who associate with a person of another race. It follows that Title VII should also protect employees because they associate with a person of the same sex.

What *Hively* Means for Employers

Hively, as written, serves as an open invitation to the Supreme Court to grant certiorari and reverse the Seventh Circuit's own decision. Regardless of whether the Supreme Court takes the case, the *Hively* court has outlined a strategy for gender-conforming LGBT employees to plead Title VII sex discrimination based on the purported gender stereotype that men should have sex only with women and women should have sex only with men.

While federal Title VII case law continues to develop, employers need to be aware of applicable state and local laws affecting LGBT employees. On June 22, 2016, Chicago amended its Human Rights Ordinance to enable individuals to use the restroom of their gender identity in places of public accommodation. Chicago's longstanding ordinance was among the first in the nation to include gender identity as a protected class. However, it provided that places of public accommodation, such as restaurants, hotels and stores, could ask individuals for their driver's licenses (or other government-issued identification cards) to ensure that they used the restroom, fitting room, etc. corresponding to the gender identified on their own identification card. As amended, the Chicago Human Rights Ordinance now provides that individuals may choose the restroom that corresponds with their gender identity.

Last but not least, employers should continue to implement and enforce policies that foster respect and equality and that prohibit harassment and discrimination in the workplace.

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