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**Feature Article**

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# Seventh Circuit Expands Title VII of the Civil Rights Act of 1964 to Include Discrimination on the Basis of Sexual Orientation in *Hively v. Ivy Tech Community College of Indiana*

In a landmark *en banc* decision reversing the decision of the district court and a panel of the Seventh Circuit Court of Appeals, the Seventh Circuit held that Title VII of the Civil Rights Act of 1964, which prohibits "sex" discrimination against an employee, includes discrimination on the basis of one's sexual orientation. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017). The Seventh Circuit is the first United States Circuit Court to expand the protections afforded under the Civil Rights Act to include individuals who are subjected to discrimination on the basis of their sexual orientation.

## Facts of the *Hively* case

Kimberly Hively (Hively) began teaching as a part-time adjunct professor at Ivy Tech Community College in South Bend, Indiana in 2000. *Hively*, 853 F.3d at 341. Hively applied at least six times in the span of five years for full-time positions at Ivy Tech without ever successfully being accepted by the school. *Id*. In July 2014, Ivy Tech did not renew Hively's employment contract. *Id*. Hively attributed her unsuccessful attempts for full-time professor and the school's failure to renew her part-time contract to the fact that she is openly lesbian. *Id*.

## Procedural History

On December 13, 2013, Hively filed a *pro se* charge with the Equal Employment Opportunity Commission (EEOC) stating her belief that the school was discriminating against her because of her sexual orientation. *Id*. The EEOC issued Hively a right-to-sue letter and she filed this action with the United States District Court for the Northern District of Indiana. *Id*. In response, Ivy Tech filed a motion to dismiss for failure to state a claim upon which relief may be granted, arguing that sexual orientation is not a protected class under Title VII. The district court granted Ivy Tech's motion to dismiss based upon a line of cases exemplified in *Hammer v. St. Vincent Hosp. and Health Care Ctr., Inc.*, 224 F.3d 701 (7th Cir. 2000). *Hively*, 853 F.3d at 341.

Hively filed an appeal and the Seventh Circuit affirmed Ivy Tech's dismissal. *Id*., *citing Hively v. Ivy Tech Cmty. Coll. of Ind.*, 830 F.3d 698 (7th Cir. 2016). In its holding, the Seventh Circuit distinguished discrimination on the basis of sexual orientation from sex discrimination based upon *dicta* in *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984). *Hively*, 853 F.3d at 341. In *Ulane*, the court stated that the prohibition of sex discrimination "'implies that it is unlawful to discriminate against women because they are women and men because they are men.'" *Id*., *quoting Ulane,*

742 F.2d at 1085. Relying on this supposition, the court believed that Congress did not have anything more in mind than the traditional notions of "sex" when it voted to outlaw sex discrimination. *Hively*, 853 F.3d at 341, *citing Doe v. City of Belleville, Ill*., 119 F.3d 563, 572 (7th Cir. 1997), *cert. granted, judgment vacated sub nom. City of Belleville v. Doe*, 523 U.S. 1001 (1998), *abrogated by Oncale v. Sundowner Offshore Servs. Ins*., 523 U.S. 75 (1998).

Almost all of the other United States Circuit Courts as well as subsequent Seventh Circuit cases followed this precedent. *Hively*, 853 F.3d at 341. In March 2017, the Second Circuit noted in a concurring opinion that they thought that their court should consider revisiting the precedent that sexual orientation discrimination claims are not cognizable under Title VII in an appropriate case. *Id*. at 342, *citing Christiansen v. Omnicom Group, Inc*., 852 F.3d 195 (2d Cir. 2017) (per curiam). While the United States Supreme Court has not interpreted the scope of Title VII's ban on sex discrimination, the Supreme Court has issued several opinions relevant to this issue. *Hively*, 853 F.3d at 342. One key Supreme Court decision is *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), which holds that "the practice of gender stereotyping falls within Title VII's prohibition against sex discrimination." *Hively*, 853 F.3d at 342. Another key Supreme Court decision, *Oncale v. Sundowner Offshore Servs., Inc*., 523 U.S. 75 (1998), expanded this concept in holding that "it makes no difference if the sex of the harasser is (or is not) the same as the sex of the victim." *Hively*, 853 F.3d at 342.

In its panel decision in *Hively*, the Seventh Circuit acknowledged the difficulty in extricating gender nonconformity claims from sexual orientation claims. *Hively*, 830 F.3d at 709. The Court noted that bizarre results have occurred from the current legal regime particularly since the Supreme Court held that the United States Constitution protects the right of same-sex couples to marry. *Id*. at 714. The Seventh Circuit has described the quandary as a "paradoxical legal landscape in which a person can be married on Saturday and then fired on Monday for just that act." *Id*. The panel also noted "[t]he sharp tension between a rule that fails to recognize that discrimination on the basis of the sex with whom a person associates is a form of sex discrimination, and the rule, recognized since *Loving v. Virginia*, 388 U.S. 1 (1967), that discrimination on the basis of the race with whom a person associates is a form of racial discrimination." *Hively,* 853 F.3d at 342. Despite these principles, the panel recognized that the court's precedent bound it until there was new legislation or a new Supreme Court opinion. *Id*. at 342.

A majority of the judges in regular active service voted to rehear *Hively en banc* based upon the importance of the issue and in recognition of the power of the court to overrule earlier decisions in order to bring the law into conformity with the Supreme Court's teachings. *Id*. at 343. In framing the issue before the court, Judge Wood stated,

> The question before us is not whether this court can, or should 'amend' Title VII to add a new protected category to the familiar list of 'race, color, religion, sex, or national origin.' 42 U.S.C. § 2000e-2(a). Obviously that lies beyond our power. We must decide instead what it means to discriminate on the basis of sex, and in particular, whether actions taken on the basis of sexual orientation are a subset of actions taken on the basis of sex.

*Id*. The court found this issue within its purview as a pure question of statutory interpretation.

## The Law Before *Hively*

"Title VII is not a panacea for bad behavior in the workplace." *Coffman v. Indianapolis Fire Dept.*, 578 F.3d 559, 564 (7th Cir. 2009). It only forbids discrimination "because of [the employee's] race, color, religion, sex, or national

origin." *Id*; *see also,* 42 U.S.C. § 2000e-2(a)(1). In a claim alleging sex discrimination, the defendant is entitled to entry of summary judgment in its favor where the plaintiff is unable to link her treatment—through direct or circumstantial evidence – with the fact she is female, which is a protected class under the statute. *Coffman*, 578 F.3d at 564.

Congress intended the term "sex" in Title VII to mean "biological male or biological female," and not one's sexuality or sexual orientation. *Spearman v. Ford Motor Company*, 231 F.3d 1080, 1084 (7th Cir. 2000). As a result, in the context of Title VII, the Seventh Circuit has consistently held that discrimination based upon one's sexual preference or orientation is not actionable. *Hamm v. Weyauwega Milk Products, Inc.*, 332 F.3d 1058, 1062 (7th Cir. 2003); *Howell v. North Central College*, 320 F. Supp. 2d 717, 722 (N.D. Ill. 2004).

In *Spearman*, a homosexual plaintiff who never disclosed his sexual orientation to his employer claimed that sexually explicit insults he received from his co-workers constituted actionable gender stereotyping in violation of Title VII. *Spearman*, 231 F.3d at 1085. Specifically, plaintiff alleged that a co-worker called him a "little bitch" and stated he hated plaintiff's "gay ass." *Id*. at 1082. He further claimed that workplace graffiti linked him with AIDS and labeled him as gay; and that he was assigned duties he believed should be reserved for women. *Id*. at 1085. Plaintiff also contended that he was discriminated against because his co-workers perceived him to be too feminine to fit the masculine image at the auto plant where he worked. *Id*.

The district court granted summary judgment to plaintiff's employer, and the Seventh Circuit affirmed. *Id*. at 1087. The court held that plaintiff's evidence had not established discrimination based upon plaintiff's sex or that plaintiff was treated in the manner he was because he did not fit male gender stereotypes. *Id*. at 1085. To the contrary, the Seventh Circuit concluded that the evidence "clearly demonstrate[d] that [plaintiff's] problems resulted from his altercations with co-workers over work issues and because of his apparent homosexuality," which are not actionable. *Spearman,* 231 F.3d at 1085. The court explained that the evidence had shown "[plaintiff's] co-workers directed stereotypical statements at him to express their hostility to his perceived homosexuality, and not to harass him because he is a man." *Id*.

In *Hamm*, a heterosexual male plaintiff alleged that one of his co-workers "constantly" referred to him and another co-worker as "faggots," and sometimes referred to him as "girl scout." *Hamm*, 332 F.3d at 1063-64. He argued that his "coworkers did not believe he fit the sexual stereotype of a man, and that their sexual stereotyping [was] evidence of discrimination 'because of' sex." *Id*. at 1062. However, the plaintiff admitted that he perceived his coworkers' conduct to relate to their mistaken belief about his homosexuality. *Id*. at 1063. The district court granted summary judgment for the defendant, and the Seventh Circuit affirmed. *Id*. at 1065. The Seventh Circuit held that plaintiff's characterization of the harassment as being based upon perceptions of his sexual orientation (rather than stereotypes based upon his gender) did not give rise to an actionable Title VII claim. *Id*. The court also flatly rejected plaintiff's argument that his case was distinguishable from *Spearman* because the plaintiff in that case was a homosexual, and he was not. *Id*. at 1065. The court explained that "we do not focus on the sexuality of the plaintiff in determining whether a Title VII violation has occurred." *Hamm,* 332 F.3d at 1065.

## The *Hively En Banc* Decision

The *en banc* decision greatly departed from the panel's holding on this issue. The court began by discussing the different methods of statutory interpretation, including applying a strict interpretation of the statute or reviewing the legislative history. *Hively*, 853 F.3d at 343. Having explored the various methods, the court noted that the agency most familiar with the statute is the EEOC. *Id*. at 344. In 2015, the EEOC took the position that "sex" discrimination as set

forth in Title VII encompasses discrimination on the basis of a person's sexual orientation. *Id*., *referencing Baldwin v. Foxx*, EEOC appeal no. 01201133080, 2015 WL 4397641 (July 15, 2015). The court acknowledged that it is not required to follow the Commission's position. *Hively*, 853 F.3d at 344. However, the court also found that "the Commission's position may have caused some in Congress to think that legislation is needed to carve sexual orientation *out* of the statute, not to put it *in*." *Id*. (emphasis in original).

The court relied upon the Supreme Court's approach in a closely related case, *Oncale*, which addressed the issue of whether Title VII covers sexual discrimination by a man on a male victim. *Id*., *citing Oncale*, 523 U.S. at 79-80. In *Oncale*, the Supreme Court noted that "'statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils.'" *Hively*, 853 F.3d at 344, *quoting Oncale*, 523 U.S. at 79-80. There, the Supreme Court found that "Title VII prohibits 'discriminat[ion]…because of…sex' in the 'terms' or 'conditions' of employment." *Hively*, 853 F.3d at 344, *quoting Oncale*, 523 U.S. at 79-80.

The *Hively* court applied a comparative method in analyzing whether Hively's sex played a role in Ivy Tech failing to promote Hively and eventually firing her. *Hively*, 853 F.3d at 345. Hively argued that if she was a man and married to a woman, and everything else stayed the same, she would not have suffered the adverse employment consequences that she did. *Id*. The court noted that Hively represents the essence of a non-conformity case as she is allegedly being discriminated based upon the "ultimate case of failure to conform to the female stereotype"—that a woman be in a heterosexual relationship with a man. *Id*. at 346. The court concluded that there is no difference between a claim based upon ones sexual orientation and a gender non-conformity claim. *Id*.

The court referenced the Supreme Court's opinion in *Price Waterhouse v. Hopkins* in which the plaintiff alleged that Price Waterhouse discriminated against employees for being too "masculine." *Id.*, *citing Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). It pointed to other Supreme Court precedent finding that an employer violated Title VII for refusing to hire women with pre-school age children, but not men. *Hively*, 853 F.3d at 346, *citing Phillips v. Martin Marietta Corp*., 400 U.S. 542 (1971). Following that, the Seventh Circuit held that United Airlines violated Title VII by requiring female employees to be unmarried. *Hively*, 853 F.3d at 346, *citing Sprogis v. United Air Lines, Inc*., 444 F.2d 1194, 1198 (7th Cir. 1971).

The court noted that the rules in these two cases do not affect every woman in the workforce. *Hively*, 853 F.3d at 346. Similarly, in this case, discrimination based upon one's sexual orientation does not affect every woman or every man. *Id*. However, sexual orientation discrimination is based upon assumptions regarding the appropriate behavior for someone of a given sex. *Id*. The discrimination does not occur in the absence of taking the employee's biological sex into account. *Id*. at 346-47. In referencing a person's "biological sex" the court recognized that sex is either "as observed at birth or as modified, in the case of transsexuals." *Id*. at 347. The court stated that, "[a]ny discomfort, disapproval, or job decision based on the fact that the complainant— woman or man—dresses different, speaks differently, or dates or marries a same-sex partner, is a reaction purely and simply based on sex." *Id*.

The court also agreed with Hively's argument that sexual orientation discrimination is prohibited based upon the associational theory. *Hively,* 853 F.3d at 347. This theory is that a "person who is discriminated against because of the protected characteristic of one with whom she associates is actually being disadvantaged because of her own traits." *Id*. This type of case was first acknowledged based upon racial discrimination in the *Loving* line of cases. *Id*. In *Loving*, the Supreme Court held that "'restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.'" *Id*. *quoting Loving*, 388 U.S. at 12.

This type of case was illustrated in *Parr v. Woodmen of the World Life Ins. Co.*, which involved a white man who filed a claim for discrimination relating to his marriage to an African American woman. *Hively*, 853 F.3d at 347, *citing Parr v. Woodmen of the World Life Ins. Co*., 791 F.2d 888 (11th Cir. 1986). The district court dismissed Parr's claim because he was white. *Hively*, 853 F.3d at 347. The court of appeals reversed, holding that "'[w]here a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of *his* race.'" *Id*. at 347-48, *quoting Parr*, 791 F.2d at 892. Similarly, in *Holcomb v. Iona College*, the Second Circuit found that a white college basketball coach was discriminated against because he was married to an African American woman. *Hively*, 853 F.3d at 348, *citing Holcomb v. Iona Coll.*, 521 F.3d 130 (2d Cir. 2008). "The court held 'that an employer may violate Title VII if it takes action against an employee because of the employee's association with a person of another race.'" *Hively*, 853 F.3d at 348, *citing Holcomb*, 521 F.3d at 132.

The Seventh Circuit has not considered a case exactly like *Parr* or *Holcomb*. *Hively*, 853 F.3d at 348. However, the Seventh Circuit has decided a similar case, *Drake v. Minn. Mining & Mfg. Co.*, 134 F.3d 878 (7th Cir. 1998). In *Drake*, white employees sued their employer claiming that they were subjected to a hostile work environment because they associated with African American co-workers. *Hively*, 853 F.3d at 348, *citing Drake*, 134 F.3d 878. The defendant agreed that employees had properly asserted an associational race discrimination claim under Title VII. Therefore, the Seventh Circuit did not have much to do other than state that the key question in an association discrimination case is whether the employee experienced discrimination and, if so, whether it was because of race. *Hively*, 853 F.3d at 348, *citing Drake*, 134 F.3d at 884.

As in *Loving*, where the Supreme Court considered the race of only one individual in order to determine the legality of the conduct, the Hively court found the same analogy present. *Hively*, 853 F.3d at 348. Here, if either Hively or her spouse were a different sex, then the outcome would be different. *Id*. at 349. The court found that "the discrimination rests on distinctions drawn according to sex." *Id*. An association discrimination case exists if the alleged discrimination involves a person's race, national origin, religion, or as in this case, the sex of the associate. *Id*. The court described the essence of the claim as, "the *plaintiff* would not be suffering the adverse action had his or her sex, race, color, national origin, or religion been different." *Id*.

The court not only considered the Supreme Court's decisions in the area of employment discrimination, but also in a broader context of sexual orientation discrimination. *Id*. For instance, the Supreme Court held that a provision in Colorado's Constitution, which prohibited any act by the government to protect homosexuals, lesbian or bisexual persons, violated the Equal Protection Clause. *Id*. *citing Romer v. Evans*, 517 U.S. 620, 624 (1996). Similarly, the Supreme Court held that a Texas statute banning homosexual intimacy violated the Due Process Clause. *Hively*, 853 F.3d at 349, *citing Lawrence v. Texas*, 539 U.S. 558 (2003). In 2013, the Supreme Court held that a provision in the Defense of Marriage Act excluding a same-sex partner from the definition of "spouse" in other federal statutes violated basic due process and equal protection principles. *Hively*, 853 F.3d at 349, *citing U.S. v. Windsor*, 133 S. Ct. 2675 (2013). Finally, the Supreme Court held that the right to marry is a fundamental liberty right protected both by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Hively*, 853 F.3d at 349, *citing Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015). Based upon these precedents from the Supreme Court, which showed a change in the handling of cases involving sexual orientation, the Seventh Circuit felt compelled to reverse its prior precedents and the decision of the panel in *Hively* to hold that sexual orientation is protected under Title VII.

## Effect of *Hively* Decision

As this is the first decision to recognize such a claim and because it is in conflict with every other decision before it, it is likely that a *writ of certiorari* will be filed and it has a better than normal chance of being granted. If the Seventh Circuit is correct in predicting how the Supreme Court will decide this matter, employers and their counsel will need to amend policy manuals and procedures to reflect this change. This, of course, assumes employers have not already done so for legal and/or business reasons. If this decision stands, it may also implicate changes for how sexual orientation will be handled by the courts in the Title IX context.

## About the Authors

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