

CLIENT NEWS BRIEF

Federal Court Holds Discrimination on the Basis of Sexual Orientation is Prohibited under Title VII

In *Hively v. Ivy Tech Community College of Indiana* (7th Cir., April 14, 2017, No. 15-1720) ___ F.3d __ <<http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2017/D04-04/C:15-1720:J:Wood:aut:T:fnOp:N:1942256:S:0>>, a federal appeals court evaluated whether federal antidiscrimination laws protect an individual against discrimination on the basis of sexual orientation under Title VII (42 U.S.C. § 2000e-2(a)). In a landmark decision, the court held that under Title VII, such discrimination is unlawful.

Kimberly Hively was an openly lesbian adjunct professor at Ivy Tech Community College (Ivy Tech). After unsuccessfully applying for at least six full-time positions between 2009 and 2014, and after her part-time contract was not renewed in July 2014, Hively initiated legal action against Ivy Tech alleging that she was discriminated against based on her sexual orientation in violation of Title VII. Ivy Tech filed a motion to dismiss for failure to state a claim, arguing that sexual orientation is not a protected class under Title VII. The district court agreed with Ivy Tech and dismissed the complaint, and Hively appealed.

On appeal, the circuit court was not asked to determine if Ivy Tech had actually discriminated against Hively in its decision not to hire her as a full-time professor or in its failure to renew her part-time contract. Instead, the court was tasked with addressing the scope of sex discrimination under Title VII. The court held there is no difference between a claim based on sexual orientation and those cases finding sex discrimination due to gender nonconformity, such as women not getting jobs typically held by men. The court said that “a policy that discriminates on the basis of sexual orientation does not affect every woman, or every man, but it is based on assumptions about the proper behavior for someone of a given sex.”

The court also evaluated Hively’s claim under the theory of discrimination by association, which prohibits discriminating against an individual based on the characteristics of someone with whom they associate. These characteristics include sex, race, color, national origin and religion. In association discrimination, an individual would not be suffering the adverse action had the trait in question been different for one person in the relationship (male instead of female, for example). The court analyzed this issue by using the history of interracial marriage cases to show that discrimination based on those with whom one associates is not limited to race, but is also prohibited on the basis of sex. “The logic of the Supreme Court’s decisions, as well as the common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex, persuade us that the time has come to overrule our previous cases that endeavored to find and observe that line,” the court said.

While this is a groundbreaking decision under federal law, California’s Fair Employment and Housing Act (Gov. Code, § 12900 et seq.) already explicitly prohibits employment discrimination on the basis of sexual orientation in this

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state. Nevertheless, this case is important because it reflects a possible shift in the federal courts' treatment and view of employment discrimination based on sex by expanding the scope of prohibited discrimination.

It remains to be seen whether this case will be taken up to the United States Supreme Court and, if so, whether review will be granted. Lozano Smith will be closely tracking this decision for any subsequent action or associated federal legislation.

For more information on the *Hively* decision or anti-discrimination law in general, please contact the authors of this Client News Brief or an attorney at one of our [nine offices](#) located statewide. You can also visit our [website](#), follow us on [Facebook](#) or [Twitter](#) or download our [Client News Brief App](#).

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