On April 4, 2017, the Seventh Circuit court handed down an en banc decision in Hively v. Ivy Tech College, South Bend, making it the first federal appellate court in the United States to decide that the protections of Title VII of the Civil Rights Act of 1964 extend to workers on the basis of sexual orientation.

Title VII of the Civil Rights Act of 1964 protects employees from job discrimination on the bases of “race, color, religion, sex or national origin.” Throughout the years, protections on the basis of “sex” had been interpreted two ways. The first was that employers could not discriminate against employees on the basis of gender, such as whether the employee was male or female. The second was that employers could not discriminate against employees for not conforming to gender stereotypes; in other words, employers could not discriminate against a woman for not acting "like a woman.”

But until this decision, neither the Supreme Court nor any appellate court has ever before held that Title VII prohibited discrimination on the basis of sexual orientation under its prohibition of discrimination on the basis of sex. The prior approach to sex discrimination had met with criticism from the EEOC and others, who argued that it was illogical to interpret Title VII's guarantee of protection from discrimination on the basis of "sex" to include gender non-conformity, but not to extend it to sexual orientation.

The plaintiff in this case, Hively, was a part-time adjunct professor at Ivy Tech Community College at the South Bend campus. She unsuccessfully applied for several full-time positions between 2009 and 2014, and then her part-time contract was not renewed in 2014. Hively is openly lesbian, and filed a charge with the EEOC and then a case in district court, arguing that she was being discriminated against on the basis of her sexual orientation. The district court dismissed the claim on the basis that sexual orientation is not a protected class under Title VII.

The district court's decision was affirmed by a panel of three appellate judges in July 2016, which noted that recent Supreme Court decisions seemed to create "bizarre results” for individuals seeking protection from discrimination on the basis of sexual orientation. For example, the decision noted that Obergefell v. Hodges, 135 S.Ct. 2584 (2015) held same-sex couples have a right to marry, but the state of Title VII law then allowed those individuals to be fired for marrying a same-sex partner. Nevertheless, the appellate court affirmed the district court because of precedent.

The case was then heard at an en banc hearing, meaning it was in front of all eleven judges on the Seventh Circuit. Seven judges joined the majority opinion, with several judges writing concurring opinions.

The en banc majority held that simply because the enacting Congress could not anticipate how a law would be applied did not mean that it could not be applied in such a way. Therefore, it did not matter that the Congress of 1964 likely did not predict protections on the basis of "sex" would extend to sexual orientation. The court reasoned that it is impossible to remove the individual's sex from the concept of sexual orientation, and therefore, the straightforward language of Title VII...
Seventh Circuit Rules Title VII Prohibits Sexual Orientation Bias

must necessarily include sexual orientation.

Judge Posner’s concurrence focused on the need to interpret Title VII’s protections broadly to keep them from becoming anachronistic as understandings and attitudes on sexuality change. Judges Flaum and Ripple also wrote a concurring opinion, joining Parts I and II of the majority opinion and arguing that discrimination on the basis of sexual orientation is not a free standing concept, but necessarily tied to discrimination on the basis of sex. This concurrence emphasized that gender only has to be a factor in the employment decision to be illegal under Title VII.

Three judges dissented from the opinion. Their dissent focuses on the issues of judicial interpretation and argue that the majority opinion is not faithful to the statutory text of Title VII. The judges argue that the unanimity of the precedent "strongly suggests" that the interpretation that sexual orientation is not protected under Title VII is correct.

What does this decision mean? The most immediate impact is for employers in the Seventh Circuit (Indiana, Wisconsin, and Illinois). In those states, employees now have a basis to sue for discrimination on the basis of sexual orientation under Title VII. The decision could also have a longer-reaching impact, as it creates a circuit split. The circuit split could lead to the issue being heard at the Supreme Court, where a decision to include sexual orientation claims under Title VII’s protections of “sex” would impact employers in all fifty states.

If you have concerns or questions about how the Seventh Circuit’s decision impacts you or your business, please do not hesitate to contact us for guidance and advice.

To learn more about Morgan A. Davenport and her practice, please visit her profile.