

PUBLICATION

Court Says No Protection for Sexual Orientation Discrimination

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On July 28, the Seventh Circuit became the first of the thirteen federal appellate courts to address whether Title VII protects against discrimination on the basis of sexual orientation since the EEOC administratively ruled that it does, which was just over a year ago in July 2015.

In *Hively v. Ivy Tech Community College*, — F.3d — (7th Cir. July 28, 2016), Kimberly Hively, a part-time adjunct professor and lesbian, sued Ivy Tech Community College under Title VII, alleging she was denied full-time employment and promotions based upon her sexual orientation. In affirming the dismissal of her claim, the Seventh Circuit highlighted that its own precedent "has been unequivocal in holding that Title VII does not redress sexual orientation discrimination"—a position consistent with every other federal appellate court to consider the issue.

But recognizing that the EEOC's July 2015 ruling is entitled to some level of deference, the appellate court addressed the EEOC's position that discrimination based upon sexual orientation is an allegation of sex discrimination under Title VII. In doing so, the Court of Appeals retraced the history of the legal distinction between gender non-conformity claims, which can form the basis for a claim under Title VII, and sexual-orientation claims, ultimately concluding that the distinction between the two claims "has created an odd state of affairs in the law in which Title VII protects gay, lesbian, and bisexual people, but frequently only to the extent that those plaintiffs meet society's stereotypical norms about how gay men or lesbian women look or act." As an example of the oddity, the Court noted that case law has created the "paradoxical legal landscape in which a person can be married on a Saturday and then fired on Monday for just that act."

That paradox, however, was not the Court's concern. The Court's task was to interpret Title VII as drafted by Congress. As it did over thirty years before, the Seventh Circuit again held that Title VII provides no protection from, nor redress for, discrimination on the basis of sexual orientation. In doing so, the Court said that even though the "writing is on the wall" that it is time to reconsider precedent, the "writing on the wall is not enough"—the writing for change must come from either the Supreme Court or Congress.

While the EEOC's July 2015 ruling may not be enough to create liability for employers under Title VII for discrimination on the basis of sexual orientation in the Seventh Circuit, employers should be cognizant that the "writing is on the wall" that employers may soon face liability for such claims of discrimination.