

Next stop Supreme Court? The circuit split over Title VII's coverage of sexual orientation discrimination

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The newest employment discrimination law battle is heating up over the question of whether sexual orientation discrimination is barred by Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e.

A trio of federal appellate cases decided within a month of each other — *Hively v. Ivy Tech Community College of Indiana*, *Anonymous v. Omnicom Group Inc.* and *Evans v. Georgia Regional Hospital* — have yielded inconsistent results and set the stage for either an uneven application of Title VII or a showdown in the U.S. Supreme Court.

Before delving into these decisions and their implications for employers, it is critical to understand the theories for why sexual orientation is — or is not — included in Title VII's protections against unlawful employment discrimination. In general, there are three theories on this issue.

The first theory is that sexual orientation discrimination is not covered by Title VII at all because the plain text of the law does not include this term. A second theory is that it is covered, but only through the gender stereotyping/gender nonconformity theory of sex discrimination advanced in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

This theory has been criticized because it does not protect every gay and lesbian

employee, since some largely do outwardly conform to gender stereotypes and thus will not have evidence of nonconformity.

A third theory is that sexual orientation discrimination is fully covered under Title VII's prohibition of sex discrimination because it inherently includes sex-based considerations. The Equal Employment Opportunity Commission advanced this view in *Baldwin v. Foxx*, Appeal No. 0120133080, 2015 WL 4397641 (E.E.O.C. July 15, 2015).¹

Kimberly Hively, an adjunct professor, unsuccessfully applied for a full-time professor position six different times between 2009 and 2014. Hively alleged that Ivy Tech denied her full-time employment because of her sexual orientation in violation of Title VII.

Ivy Tech won its motion to dismiss in the trial court by successfully arguing that Title VII does not apply to sexual orientation discrimination. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, No. 14-cv-1791, 2015 WL 926015 (N.D. Ind. Mar. 3, 2015).

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All of these approaches appeared throughout the opinions of the three federal appeals court cases.

HIVELY V. IVY TECH

Employment law specialists waited with bated breath for the 7th U.S. Circuit Court of Appeals to release its en banc decision in *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017).

Three theories on whether sexual orientation is included in Title VII's protections against unlawful employment discrimination

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- Sexual orientation discrimination is fully covered under Title VII's prohibition of sex discrimination because it inherently includes sex-based considerations.



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On Oct. 11, 2016, a 7th Circuit panel reluctantly affirmed the lower court based on circuit precedent. Shortly thereafter, the full circuit granted en banc review.

En banc review, which consists of a de novo rehearing of a case before every judge of the court, is often granted to consider exceptional matters or reexamine and potentially reverse past precedent.

On April 4, the long-awaited en banc ruling from the full 7th Circuit reversed the panel's opinion and the circuit's long-standing precedent.

with a woman, she did not. As such, Hively was disadvantaged "because she is a woman," which is precisely what Title VII outlaws, the appeals court said.

The 7th Circuit also sided with Hively on her associational discrimination claim 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." This theory is most commonly seen in interracial marriage cases, such as *Loving v. Virginia*, 388 U.S. 1 (1967).

against amending the statute to add sexual orientation as a protected category.

The majority addressed this argument by explaining that an amendment is not the issue. Instead, it said, the issue is interpreting what discrimination based on "sex" means.

The *Hively* court retorted that to add sexual orientation to the text of Title VII would be a "belt-and-suspenders" approach — helpful, but unnecessary given that it could easily interpret the statute utilizing Supreme Court precedent as to the evolution of Title VII.

Not surprisingly, the 7th Circuit's majority holding was met with a lengthy dissent that advocated for an originalist interpretation of the statute.

The dissent said the statute should be interpreted "as a reasonable person would have understood it at the time of enactment," which was 1964.

By creating a new definition of sex-based discrimination, the appeals court violated the separation of powers and impermissibly stepped into Congress' shoes, according to the dissent.

The dissent also pointed out that congressional amendments to include sexual orientation in Title VII have failed, and that various federal, state and local laws differentiate between sex-based discrimination and sexual orientation-based discrimination and define them as two independent forms of discrimination.

The majority and concurring opinions criticized the dissent's advocacy for originalism, conceding that it was "well-nigh certain" that Congress probably did not consider sexual orientation when it authored the Civil Rights Act.

The majority responded that the originalist view is not the prevailing theory of statutory interpretation, and indeed has been expressly refuted by post-1964 Supreme Court decisions expanding "discrimination based on ... sex" to include "sexual harassment ... same-sex workplace harassment ... actuarial assumptions about a person's longevity ... [and] failure to conform to a certain set of gender stereotypes," none of which concerned Congress.

By a resounding 8-3 margin, the majority opinion considered the evolving definition of sex discrimination to expand Title VII's protections to include sexual orientation.

In *Hively* the en banc 7th Circuit ruled that sexual orientation discrimination is discrimination based on sex.

The appeals court ruled that sexual orientation discrimination is discrimination based on sex, explaining that it is "common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex."

This is the first federal appellate decision to specifically hold that sexual orientation discrimination is sex discrimination covered by Title VII.

The en banc court reasoned that discrimination on the basis of sexual orientation is necessarily the sex-based discrimination described in *Price Waterhouse*.

The 7th Circuit explained that, "*Hively* represents the ultimate case of failure to conform to the female stereotype (at least as understood in a place such as modern America, which views heterosexuality as the norm and the other forms of sexuality as exceptional)."

Just as in *Price Waterhouse*, where the employer did not promote a female employee because she was viewed as too masculine and not conforming to the stereotypical female image, Ivy Tech did not promote Hively because she did not conform to the gender stereotype that women are romantically involved only with men, the court said.

Moreover, Ivy Tech's decision not to promote Hively was determined to be sex discrimination because its decision would have differed if Hively were a man.

If Hively were a man in a relationship with a woman, she would have received the promotion, but as a woman in a relationship

For example, if a white employee has a black spouse and is terminated because of the interracial marriage, the employee has been discriminated against because of his race. If the white employee were also black, there would not have been an adverse employment action.

The appeals court analogized its previous decisions on interracial associational discrimination in the workplace and expanded those holdings to Hively's situation, explaining that "if we were to change the sex of one partner in a lesbian relationship, the outcome would be different. That reveals that the discrimination rests on distinctions drawn according to sex."

The *Hively* court quickly dispensed with Ivy Tech's two "technical defenses" of waiver and sovereign immunity. It rejected the waiver defense, recognizing the court's discretion to address issues for the first time on appeal under de novo review. And it rejected the sovereign immunity defense based on clear Supreme Court precedent dating back to 1976.

The majority opinion acknowledged that the panel "correctly noted that it was bound by [its] precedents" in making its ruling. But it used developments in case law, such as the Supreme Court's decision in *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998), to build a new definition of sex discrimination in the en banc setting.

An argument frequently advanced against expanding Title VII to cover sexual orientation discrimination is that Congress did not intend for it to be covered and has repeatedly voted

Hively is not the only federal appeals court case on this subject. As the 7th Circuit finished writing its en banc decision, two other federal circuit courts issued panel decisions on the issue — and reached the opposite conclusion.

ANONYMOUS V. OMNICOM GROUP

In *Anonymous v. Omnicom Group Inc.*, 852 F.3d 195 (2d Cir. Mar. 27, 2017) (previously captioned *Christiansen v. Omnicom Group Inc.*), the 2nd Circuit adopted the second theory on sexual orientation discrimination described above. It held that sexual orientation is covered only to the extent that it is gender nonconformity discrimination under *Price Waterhouse*.

This holding thereby reinforced the age-old and oftentimes confusing distinction that sexual orientation discrimination is generally not covered but is covered if the cloak of gender stereotyping is overlaid.

Matthew Christiansen alleged that he was humiliatingly harassed as a result of his “effeminacy and sexual orientation.” He said his supervisor made crude drawings of him and also made belittling remarks about HIV/AIDS (even though Christiansen had not told his boss that he was HIV positive).

In his lawsuit, he claimed that he suffered harassment prohibited by Title VII because he did not conform to gender stereotypes. He added a claim under the Americans with Disabilities Act based on his HIV-positive status.

Initially, the District Court granted Omnicom’s motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). It said sexual orientation discrimination is entirely different than gender nonconformity discrimination.

It further found that Christiansen’s lawsuit really alleged only sexual orientation discrimination and not sex stereotyping. Thus, it concluded that the discrimination he alleged was not covered by Title VII. *Anonymous v. Omnicom Grp. Inc.*, 167 F. Supp. 3d 598 (S.D.N.Y. 2016).

The court summed up its analysis by stating that “gay, lesbian, and bisexual individuals do not have *less* protection under *Price Waterhouse* against traditional gender stereotype discrimination than do heterosexual individuals. ... Being gay, lesbian, or bisexual, standing alone, does not constitute nonconformity with a gender stereotype that can give rise to a cognizable gender stereotyping claim.”

Although the 2nd Circuit panel agreed that sexual orientation discrimination is not a cause of action under Title VII, it held that Christiansen had successfully identified “multiple instances” of gender nonconformity discrimination, which it said were cognizable Title VII claims.

For example, Christiansen’s complaint alleged that “his supervisor described him as ‘effeminate’ to others in the office and depicted him in tights and a low-cut shirt ‘prancing around,’ ... [and] that [a] poster, depicting Christiansen’s head attached to a bikini-clad female lying on the ground with her legs in the air, was seen by at least one co-worker as portraying Christiansen ‘as a submissive sissy.’”

The court said these allegations were actionable Title VII claims under the *Price Waterhouse* gender nonconformity theory of discrimination regardless of Christiansen’s sexual orientation.²

The 2nd Circuit stopped short of expanding sex discrimination to include sexual orientation discrimination, noting that there was “confusion in our circuit about the relationship between gender stereotyping and sexual orientation discrimination claims.”

The appeals court maintained that the two are distinct causes of action, the first of which is actionable under Title VII and the latter of which is not.

Indeed, 2nd Circuit precedent indicated that gender stereotyping under *Price Waterhouse* “would not bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically feminine.”³

The appeals court remanded the case to give Christiansen an opportunity to prove his gender stereotyping claim at trial.

EVANS V. GEORGIA REGIONAL HOSPITAL

In *Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (11th Cir. 2017), the 11th U.S. Circuit Court of Appeals issued a similar opinion to *Anonymous v. Omnicom*, preserving gender nonconformity discrimination claims but dismissing sexual orientation discrimination claims. Citing to its precedent, the appeals court refused to recognize sexual orientation as a basis for Title VII discrimination.

Jameka Evans alleged employment discrimination based on sexual orientation

and gender nonconformity. She also alleged retaliation. Specifically, Evans claimed that she suffered harassment and discrimination because she is a lesbian for “failing to carry herself in a ‘traditional woman[ly] manner,’” such as by wearing masculine clothes.

In the trial court, the magistrate judge issued a report and recommendation that advocated dismissing Evans’ case on the pleadings, explaining that Title VII does not cover sexual orientation and concluding that her gender nonconformity claims were “just another way to claim discrimination based on sexual orientation.” *Evans v. Ga. Reg’l Hosp.*, No. 15-cv-103, 2015 WL 5316694 (S.D. Ga. Sept. 10, 2015).

The magistrate judge also recommended denying Evans, who was proceeding pro se, leave to amend her complaint. The district judge adopted the magistrate’s report and recommendation, and Evans appealed. The EEOC joined in her appeal as amicus.

Similar to the 2nd Circuit, the 11th Circuit held that Evans’ gender nonconformity claims were cognizable and that sexual orientation claims were not, based on precedent. In fact, it quickly rebuffed sexual orientation discrimination with a massive string-cite of its and other circuit precedent denying Title VII’s coverage of sexual orientation claims.

However, the court gave Evans one chance to amend to allege gender nonconformity on remand.

The *Evans* court relied on its 2011 decision in *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011), a case brought by a public employee under the 14th Amendment and 42 U.S.C.A. § 1983. In *Brumby*, the 11th Circuit held that “discrimination based on failure to conform to a gender stereotype is sex-based discrimination.

The real legal fireworks exploded in the *Evans* concurring and dissenting opinions, with concurring Judge William Pryor penning a unique explanation of why sexual orientation and gender nonconformity are two distinct legal concepts.

The problem with shoehorning sexual orientation into gender nonconformity, according to Judge Pryor, is that gay individuals “experience a variety of sexual desires,” such as celibacy or mixed-orientation marriages, and therefore do not all “engage in the same behavior” that is considered gender nonconforming.

In other words, he posited, assuming that homosexuality means being sexually attracted to the same sex ignores the diversity among homosexual individuals.

Judge Robin S. Rosenbaum, dissenting, admonished that the concurring opinion's assertion that gay and lesbian individuals experience "diverse" sexual attractions belies the very definitions of "gay" and "lesbian."

She explained that "when an employer discriminates against a woman because she is sexually attracted to women but does not discriminate against a man because he is sexually attracted to women, the employer treats men and women differently 'because of ... sex.'"

The dissenting opinion also disagreed with the majority's reliance on *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979), contending that *Blum* was abrogated by *Price Waterhouse*.

Specifically, *Blum* had relied on *Smith v. Liberty Mutual Insurance Co.*, 569 F.2d 325 (5th Cir. 1978),⁴ a sex stereotyping case, to refute sexual orientation discrimination under Title VII. Once *Price Waterhouse* reversed *Smith*, the house of cards should have fallen.

But the majority relied on it "39 years later and 28 years after the Supreme Court issued *Price Waterhouse*," the dissenting opinion said.

Of course, these opinions do not represent binding 11th Circuit rationale. But each presents an interpretation of Title VII that demonstrates the difficulty that courts have had with these concepts.

FUTURE OF SEXUAL ORIENTATION DISCRIMINATION LITIGATION

The battle regarding whether Title VII covers sexual orientation discrimination is far from over. On March 31 Evans filed a petition for en banc review by the 11th Circuit, and Christiansen filed a petition for en banc review by the 2nd Circuit on April 28, which means that the courts could reverse their precedent just as the 7th Circuit did in *Hively*.

IMPACT ON EMPLOYERS

As the ultimate decision on this timely societal issue remains in limbo, employers have many questions on how to move forward.

Employers in the 7th Circuit (which includes Illinois, Indiana and Wisconsin), cannot discriminate based on sexual orientation. The question is murkier not only for employers in the 2nd Circuit (Connecticut, New York and Vermont) and 11th Circuit (Alabama, Florida and Georgia), but also for those throughout the remainder of the country.

Even though no nationwide rule has been established, there are several reasons why employers outside the 7th Circuit should not ignore *Hively*.

First, the EEOC still views sexual orientation discrimination as a form of sex discrimination. Indeed, prioritizing the investigation of these charges of discrimination is part of the EEOC's current Strategic Enforcement Plan.⁵

The plan designates "[p]rotecting lesbians, gay men, bisexuals and transgender (LGBT) people from discrimination based on sex" as a "selected emerging and developing issue" that the commission will address.

Some EEOC settlements for sexual orientation discrimination claims have exceeded \$200,000.⁶

The agency investigates charges of discrimination across the country — not just in the 7th Circuit. Therefore, employers nationwide will likely see an uptick in EEOC investigations on sexual orientation discrimination charges despite the varying holdings in the courts.

Second, claims based on theory of gender nonconformity are still actionable. Both the *Omnicom* and *Evans* courts remanded the cases to the district courts for further development of gender nonconformity claims.

Under the second theory described at the beginning of this analysis, a gay individual could successfully advance a discrimination claim past the pleading stage and into discovery if the plaintiff alleges that the failure to conform to gender stereotypes was a basis for discrimination. Consequently, employers must take corrective action when discriminatory acts or harassment occur on the basis of gender nonconformity, such as a security guard wearing masculine clothes, like in *Evans*, or a manager harassing a male co-worker for being effeminate, like in *Omnicom*.

One unanswered question from the *Hively* decision is whether a religious institution would have a defense against discriminating based on sexual orientation because complying with such a ban would compromise its religious mission.

Such a defense has been successful under the Religious Freedom Restoration Act, 42 U.S.C.A. § 2000bb, in a case of discrimination based on transgender status, but an appeal of the decision is currently pending.⁷

None of the defendants in the three sexual orientation discrimination cases pleaded a RFRA defense, but the defense may be asserted in future sexual orientation discrimination cases.

Hopefully, a nationwide standard will materialize over the next few years as the 2nd and 11th Circuit cases continue or Ivy Tech seeks Supreme Court review based on a circuit split. Until then, employers should heed the *Hively* decision — even if they are outside the 7th Circuit. **WJ**

NOTES

¹ *Hively*, 2017 WL 1230393 at *8 (As noted by the *Hively* en banc opinion, many federal district courts have reached the same conclusion as *Baldwin* as to sexual orientation discrimination being covered by Title VII.)

² Interestingly, neither the 2nd Circuit nor the District Court appeared to consider the allegations as same-sex sexual harassment, which is a recognized form of sexual harassment under the U.S. Supreme Court's decision in *Oncale* and *EEOC v. Boh Brothers Construction Co.*, 731 F.3d 444 (5th Cir. 2013).

³ *Anonymous* at 198 (citing *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000); *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005)).

⁴ *Smith* at 327. Decisions from the 5th Circuit prior to Sept. 30, 1981, are binding precedent in the 11th Circuit, which was established Oct. 1, 1981. See *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981).

⁵ U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan Fiscal Years 2017–2021, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <http://bit.ly/2eEl3pc>.

⁶ IFCO Systems Will Pay \$202,200 in Landmark Settlement of One of EEOC's First Sexual Orientation Discrimination Lawsuits, U.S. EQUAL EMP. OPPORTUNITY COMM'N (June 28, 2016), <http://bit.ly/29ABClj>.

⁷ *Equal Emp't Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes*, 201 F. Supp. 3d 837 (E.D. Mich. 2016), *appeal filed*, Oct. 13, 2016.