A Conflicted 7th Circuit Holds Title VII Does Not Cover Sexual Orientation Discrimination

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In a precedent-setting decision, the U.S. Court of Appeals for the Seventh Circuit ruled on July 28th that Title VII does not protect against sexual orientation discrimination. The case is *Kimberly Hively v. Ivy Tech Community College*, No. 15-1720 (7th Cir. July 28, 2016).

The 7th Circuit upheld a district court's decision to dismiss a lawsuit brought by Kimberly Hively, a lesbian professor, who had sued Ivy Tech Community College, in August 2014. Hively claimed that she was repeatedly passed over for promotions and a full-time position because of her sexual orientation.

The 42-page unanimous decision is interesting, as while the Court upheld the dismissal of the case, it clearly felt conflicted over what it described as "a paradoxical legal landscape in which a person can be married on Saturday and then fired on Monday for just that act." (Order at 33.) Indeed, since *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), federal law now guarantees anyone the right to marry another person of the same gender. However, Title VII also permits an employer to fire an employee for exercising this right.

As we have covered in this blog, the EEOC has been clear that it views sexual orientation discrimination as discrimination on the basis of "sex," within the meaning of Title VII. This was most recently confirmed in the EEOC decision, *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641, at *5, *10 (July 16, 2015).

This 7th Circuit ruling is the first federal appeals court decision to come in the wake of these decisions and to specifically consider whether Title VII's protections extend to sexual orientation bias. There are currently two other federal appeals courts which have pending cases considering this same question.

The *Hively* Court engaged in a lengthy discussion of how the distinction between discrimination on the basis of gender nonconformity, which is prohibited under Title VII, and sexual orientation discrimination, which is not prohibited under Title VII, was a thorny distinction to make "because, in fact, it is exceptionally difficult to distinguish between these two types of claims." (Order at 15.) However, despite this acknowledgment, the Court still concluded that "[b]ecause we recognize that Title VII in its current iteration does not recognize any claims for sexual orientation discrimination, this court must continue to extricate the gender non-conformity claims from the sexual orientation claims." (Order at 23.)

Judge Rovner stated that "[p]erhaps the writing is on the wall," meaning that it is time for either Congress or the Supreme Court to step in and provide guidance. However, the Court held that "writing on the wall is not enough. Until the writing comes in the form of a Supreme Court opinion or new legislation, [this Court] must adhere to the writing of our prior precedent." (Order at 42.)

The new legislation the Court is referring to is the passing of the Equality Act, which is legislation that would amend the Civil Rights Act to include sexual orientation and gender identity as prohibited categories of discrimination.

Even if the Equality Act is not passed, it is now likely that the Supreme Court will weigh in. The Supreme Court has already taken up the case of *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, No. 16A52, 2016 WL 4131636, at *1 (S. Ct. Aug. 3, 2016), where the Court will address the subject of the accommodation of transgender students. Thus, the High Court is clearly poised to address these issues. As Judge Rovner put it: "the district courts – the laboratories on which the Supreme Court relies to work through cutting-edge legal problems – are beginning to ask whether the sexual orientation-denying emperor of Title VII has no clothes." (Order at 31.)

So what do employers need to take away from the 7th Circuit ruling?

While the law under Title VII may be unsettled, the EEOC plainly takes the position that sexual orientation discrimination is covered under Title VII. Thus, when making policy, question whether you want to "make law" by getting in the crosshairs of the EEOC.

In addition, almost half of the states have laws prohibiting sexual orientation discrimination in employment (California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Utah, Vermont, Washington and Wisconsin). So, you need to be aware of the law in every state where you do business.

While *Hively* may be considered a "win" for employers, the prevalent view is that sexual orientation discrimination is unlawful and the legal landscape is rapidly changing and a Supreme Court decision may soon be on the horizon.