

What the Seventh Circuit's Recent Title VII Ruling Means for Sexual Orientation Discrimination in the Workplace

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On July 28, 2015, the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit") ruled that Title VII does not protect against sexual orientation discrimination. *See, Hively v. Ivy Tech Cmty. Coll.*, 2016 BL 244172, 7th Cir., No. 15-1720, 7/28/16. The Seventh Circuit ruling is the first by a federal circuit to address the question since the EEOC held in an [administrative ruling](#) that bias based on sexual orientation is sex discrimination violating Title VII.

The Seventh Circuit did not discuss the merits of Ms. Hively's case, who alleged Ivy Tech Community College did not promote her because she is a lesbian. Instead, the Court discussed the "paradoxical legal landscape in which a person can be married on Saturday and then fired on Monday for just that act." Judge Rovner wrote:

For although federal law now guarantees anyone the right to marry another person of the same gender, Title VII, to the extent it does not reach sexual orientation discrimination, also allows employers to fire that employee for doing so....Many citizens would be surprised to learn that under federal law any private employer can summon an employee into his office and state, "You are a hard-working employee and have added much value to my company, but I am firing you because you are gay." And the employee would have no recourse whatsoever—unless she happens to live in a state or locality with an anti-discrimination statute that includes sexual orientation. . .

In its decision, the Seventh Circuit explained that since 1994, Congress has "repeatedly rejected legislation that would have extended Title VII to cover sexual orientation" despite growing public support for such protections. The Seventh Circuit suggested it may be time for the Supreme Court to weigh in on whether Title VII should apply to suits alleging discrimination based on sexual orientation especially in light of the Supreme Court's gay marriage ruling in *Obergefell v. Hodges*. Ultimately, the judges concluded that they could not deviate from past rulings by the appeals court limiting Title VII's applicability because of the "silence" of the Supreme Court on the issue, and the consistent rejection by Congress of proposed laws to protect employees from discrimination based on their sexual orientation.

At least two other federal appeals courts have pending cases raising the same issue. If these courts reach different decisions, it is possible a circuit split could force the Supreme Court to rule on this issue. Notably, on Wednesday, August 3, 2016, in a bathroom access case brought under Title IX, the U.S. Supreme Court stayed a Fourth Circuit ruling requiring schools to allow transgender students to

use the bathroom that fits their gender identity. The case is stayed while the Gloucester County School Board petitions the high court to consider its appeal of the Title IX decision. The case is *Gloucester County School Board v. G.G., By His Next Friend and Mother, Deirdre Grimm*, case number 16A52. The student's rights in this case may turn on whether or not the definition of "sex" in Title IX refers to gender identity and the deference granted to the Department of Education's interpretation of Title IX. What is clear is that courts, including the country's highest court, are addressing landmark cases involving the rights of LGBTQ citizens and there is a trend towards greater recognition of LGBTQ rights.

Furthermore, there is the possibility that this issue will be addressed through new legislation. The Equality Act currently has 218 congressional co-sponsors. The Equality Act would explicitly add sexual orientation and gender identity as protected categories under the federal civil rights laws, barring discrimination on those grounds in public accommodations, education and housing as well as employment. This would codify into federal law regulations that already exist in many states.

While the Seventh Circuit ruled Title VII does not protect gays and lesbians who face discrimination at the job, [many states have anti-discrimination laws in employment](#). The Seventh Circuit has appellate jurisdiction over Illinois, Indiana, and Wisconsin. Illinois prohibits discrimination based on sexual orientation and gender identity. Wisconsin prohibits discrimination based on sexual orientation (not gender identity); however, [some counties and cities ban discrimination](#) based on gender identity. Indiana provides no statewide protections; however, [some cities and counties have enacted anti-discrimination laws](#). In light of this uncertainty, employers should consider doing three things:

- Sexual orientation may be a protected characteristic in employment under state, county, local law, or executive order depending on where a business operates;
- Develop policies and procedures to prevent sexual orientation discrimination in the workplace, even in jurisdictions where it is not a protected characteristic; and
- Ask legal counsel questions about additional legal developments.