



on the job

TRACKING DEVELOPMENTS IN EMPLOYMENT LAW

The Seventh Circuit Holds that Title VII Applies to Discrimination Based on Sexual Orientation

By: Bruce A. Truex and Dane Lepola
April 13, 2017

On April 4, 2017, the United States Court of Appeals for the Seventh Circuit found that Title VII is violated by discrimination based on sexual orientation. Specifically, the Seventh Circuit found that passing an employee over for promotion due to sexual orientation is a Title VII violation. *Hively v. Ivy Tech Community College of Indiana*. ___ F.3d___ (7th Cir. 2017) (*en banc*).

In *Hively*, the Plaintiff claimed that her employer violated Title VII by discriminating against her based on her sexual orientation. Plaintiff, a part-time employee, applied for full-time employment numerous times, but was continually denied a job by her employer. The District Court found that Title VII did not protect against discrimination based on sexual orientation, and a three judge panel of the Seventh Circuit, relying on historic case law, affirmed. The *en banc* Seventh Circuit reversed, holding that sexual orientation is a protected class under Title VII.

In reaching its decision the panel cited *Onacle v. Sundowner Offshore Services, Inc.*, where the Supreme Court explained that it makes no difference in Title VII harassment cases whether the sex of the harasser is the same as the sex of the victim. The court also recognized, that in *Price Waterhouse v. Hopkins*, the U.S. Supreme Court held that the practice of gender stereotyping falls within Title VII's prohibition against sex discrimination. Further, the decision referenced a series of cases beginning with *Loving v. Virginia* that established that discrimination on the basis of the protected

SECRET WARDLE NOTES

In the 50-plus years since Title VII's inception there have been vast changes not only in the workplace but in the nation generally. The circuit split created by the Seventh Circuit can be resolved by only one body, the Supreme Court of the United States. The EEOC has led the charge to broaden the reach of Title VII and from its decisions provided the rationale for the *Hively* decision in the Seventh Circuit. Although Michigan and the Sixth Circuit have yet to rule on this issue, it is safe to assume that the EEOC will continue to push this agenda. Whether the final interpretation of sex discrimination under Title VII will include sexual orientation will ultimately be resolved by the Supreme Court. Until the Supreme Court has the opportunity to offer guidance, the split created by the Seventh Circuit will persist, which in turn will lead to ample litigation. Employers need to recognize that probably sooner rather than later a case will reach an appellate court with an uncertain outcome. Adopting non-discriminatory policies relating to sexual orientation issues now may ultimately be the most economical approach.

characteristics of someone with whom a person associates could also be a form of impermissible discrimination. These cases, in conjunction with the Supreme Court’s holding in *Obergefell v. Hodges* of the Due Process and Equal Protection clauses of the U.S. Constitution which protect the rights of same-sex couples to marry, have created a confused legal landscape in which homosexuals are permitted to marry under the law, but can then be punished at work for exercising that right. Despite these decisions, the panel held that it was bound by precedent and could not interpret Title VII to protect sexual orientation until directed by the Supreme Court or Congress.

The Seventh Circuit en banc overturned the panel’s decision, explaining that it was not adding “sexual orientation” as a new protected category under Title VII. Instead, the Court concluded that adverse employment actions taken on the basis of sexual orientation were in fact a “subset of actions taken on the basis of sex.”

The Seventh Circuit noted that historically, sexual discrimination under Title VII was limited to traditional discrimination against someone simply for being a member of a certain gender. This “historic” approach was adopted by a vast majority of the Circuits, including the Sixth Circuit. In reaching its holding in *Hively*, the Seventh Circuit created a split amongst jurisdictions that will ultimately end up before the United States Supreme Court. The Seventh Circuit joined the Equal Opportunity Employment Commission in holding Title VII forbids discrimination based on sexual orientation. With this holding, the Seventh Circuit finds itself in opposition to holdings in the Second and Eleventh Circuits, both of which have recently held that discrimination based on sexual orientation is not a violation of Title VII.

PLEASE CLICK HERE TO SIGN UP FOR SECREST WARDLE NEWSLETTERS PERTINENT TO OTHER AREAS OF THE LAW



We welcome your questions -

Please contact Bruce A. Truex at

btruex@secrestwardle.com or 248-539-2818





Secretst Wardle



Email



YouTube



LinkedIn



Twitter



Troy 248-851-9500
Lansing 517-886-1224
Grand Rapids 616-285-0143
www.secretwardle.com

CONTRIBUTORS

Employment Law Practice Group
Bruce A. Truex, Chair
Christopher M. Hogg, Vice Chair

Editors
Linda Willemsen
Sandie Vertel

This newsletter is for the purpose of providing information and does not constitute legal advice and should not be construed as such. This newsletter or any portion of the newsletter is not to be distributed or copied without the express written consent of Secretst Wardle.

Copyright © 2017 Secretst Wardle. All rights reserved.