7th Circuit Rehears Hively Case

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We recently took a close look at Hively v. Ivy Tech Community College, a case where the 7th Circuit Court of Appeals extensively deconstructed the history of Title VII litigation as it pertains to sexual orientation. Ultimately, the Court found against Ms. Hively, even though it noted that it accepted and commended the EEOC's analysis. It even noted the illogical outcome of the analysis it felt obligated by earlier precedent to apply.

Kimberly Hively petitioned the 7th Circuit for a rehearing. Ms. Hively argued in her petition that the 7th Circuit reached an erroneous result and should not have found against Ms. Hively simply because it felt bound by the court's earlier precedent. Ms. Hively further argued that the EEOC's Baldwin v. Foxx decision was a "supervening development" that the Court should take the opportunity presented to "correct a paradoxical legal landscape … by following *Baldwin*" and issue the first federal appellate ruling that recognizes sexual orientation discrimination as falling within the umbrella of discrimination "because of … sex" under Title VII.

The 7th Circuit allowed Ms. Hively's Petition for Rehearing and vacated its July 28th opinion. The case was reheard in the 7th Circuit yesterday. Unsurprisingly, Ms. Hively's attorneys argued that sexual orientation discrimination is a form of sex discrimination, and that sex discrimination is already prohibited under federal law. Their basis for the argument is not unlike the approach taken by the EEOC in Baldwin, where the EEOC found that sexual orientation is "inseparable from and inescapably linked to" discrimination based on sex. In other words, the stereotype that men should love women and women should love men, at its core, is a gender-based stereotype that forms the basis of sexual orientation discrimination and discrimination on that basis should be prohibited under the law. Although Baldwin is not binding precedent in federal court, it can be considered as persuasive authority.

Hively could set the stage to alter significantly the legal landscape for LGBT employees. Even though same sex couples can legally marry anywhere in the United States, there are a significant number of states where they may also lose their job for doing so. That conundrum makes little sense, yet there are currently no federal appellate court cases that have held that discrimination on the basis of sexual orientation is prohibited under Title VII.

Now, we wait.

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