Seventh Circuit's En Banc Decision in Hively Opens Door For Transgender Protection Under Title VII

BY TIMOTHY H. POWELL • JUNE 7, 2017

As we reported a few months ago in a previous article, "7th Circuit Rehears Hively Case", the Seventh Circuit Court of Appeals agreed to rehear the case of *Hively v. Ivy Tech Community College*, on the issue of whether Title VII of the Civil Rights Act of 1964 protects employees from discrimination based on sexual orientation. In a landmark ruling on April 4, the Seventh Circuit became the first U.S. Court of Appeals to buck the trend of prior precedent and hold that Title VII's prohibition on employment discrimination based on "sex" encompassed discrimination based on sexual orientation. The case will inevitably reach the Supreme Court next term. In the meantime, it is worth considering the impact this case may have on the extension of Title VII protection to gender identity.

A quick refresher on the facts of the case: Plaintiff Kimberly Hively states a claim under Title VII alleging that she suffered discrimination when her former employer, Ivy Tech Community College in Indiana, fired her because she is gay. On initial appeal of the case, a panel of the Seventh Circuit reluctantly found against Ms. Hively, as discussed in another previous article, noting that drawing an arbitrary line between discrimination based on "sex" and sexual orientation was "illogical," but finding that it was nevertheless bound by prior precedent on the issue. Upon rehearing en banc, however, the Seventh Circuit found sufficient grounds among the expanding conception of "sex" under the law to extend protection to sexual orientation.

Seventh Circuit Broadens Interpretation of "Sex" Discrimination Under Title VII

The majority opinion identifies at least three independent grounds for the expansion of Title VII to protect employees from discrimination based on sexual orientation:

1. Even under a narrow conception of "sex," discrimination based on sexual orientation is inherently based on sex: "Hively alleges that if she had been a man married to a woman (or living with a woman, or dating a woman) and everything else had stayed the same, Ivy Tech would not have refused to promote her and would not have fired her. . . . This describes paradigmatic sex discrimination."

2. Under existing case law, Title VII protects employees from "sex" discrimination for not adhering to societal gender norms: "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 other forms of sexuality as exceptional): she is not heterosexual."

3. "Sex" discrimination includes discrimination on the basis of intimate association with an individual of the protected classification, a principle illustrated (in the race context) by the Supreme Court in *Loving v. Virginia*, which invalidated laws prohibiting interracial marriage. The majority reasoned that "to the extent that [Title

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> VII] prohibits discrimination on the basis of the race of someone with whom the plaintiff associates, it also prohibits discrimination on the basis of the national origin, or the color, or the religion, or (as relevant here) the sex of the associate."

Overall, the majority memorably concludes that "[i]t would require considerable calisthenics to remove the 'sex' from 'sexual orientation.'"

Further Protection From Gender Identity Discrimination Under Title VII?

The majority explicitly limited its decision to a holding that discrimination based on sexual orientation in the employment context is sufficient to state a claim of "sex" discrimination under Title VII, but nevertheless anticipates that its reasoning could be applied more broadly to protect from discrimination based on gender identity. Indeed, the Court's reasoning as set forth above appears carefully crafted to apply equally in the context of a gender identity discrimination case.

In discussing the gender non-conformity line of cases, the majority recognizes that "[t]he discriminatory behavior does not exist without taking the victim's biological sex (either as observed at birth or as modified, in the case of transsexuals) into account. Any discomfort, disapproval, or job decision based on the fact that the complainant – woman or man – dresses differently, speaks differently, or dates or marries a same-sex partner, is a reaction purely and simply based on sex."

There is no doubt that this language was meant to set the stage for a future gender identity discrimination claim. If the Supreme Court (or other Circuit Courts) adopt the Seventh Circuit's approach to incorporation of sexual orientation discrimination as a form of "sex" discrimination, it is hard to imagine how this reasoning would not be extended to also protect from gender identity discrimination. Keep an eye out for the Supreme Court to pick this case up next term, and for other Circuit Courts to revisit Title VII in the near future.

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