



The KLJ Blog

Online Originals

Submissions

The Print Archive

Membership ▾

Symposium ▾

Subscriptions

About ▾

Home » Content » Featured » The KLJ Blog » The Seventh Circuit: Expanding Protections for LGBT Individuals in Title VII and Title IX Discrimination Cases

# The Seventh Circuit: Expanding Protections for LGBT Individuals in Title VII and Title IX Discrimination Cases

July 24, 2018

Akesha Kirkpatrick, *Senior Staff Editor*<sup>[1]</sup>

Just last year, The Seventh Circuit ruled in *Hively v. Ivy Tech Community College* that sexual orientation discrimination claims are protected under Title VII employment discrimination cases.<sup>[2]</sup> Title VII of the Civil Rights Act of 1964 makes it unlawful for any employer to discriminate against an employee because of her “race, color, religion, sex, or national origin.”<sup>[3]</sup> Kimberly Hively, an openly gay former employee of Ivy Tech Community College, was refused the position of permanent teacher.<sup>[4]</sup> Hively believed the reason she was refused the position was due to her sexual orientation, and filed a pro se discrimination charge against Ivy Tech with the Equal Employment Opportunity Commission.<sup>[5]</sup> After given the green light from the EEOC, Hively filed her complaint in district court, which dismissed her complaint due to failure to state a claim.<sup>[6]</sup> The district court dismissed the claim because sexual orientation was not considered within the provisions of Title VII.<sup>[7]</sup> The case eventually reached the Seventh Circuit, which historically reversed the decision of the lower courts, making it the first circuit court to hold that sexual orientation discrimination claims are protected under Title VII cases.<sup>[8]</sup> The Seventh Circuit illuminated the flawed analysis of the origins of the distinction between sexual orientation and sex discrimination claims.

The idea that sexual orientation is a separate form of discrimination than sex discrimination was taken from a previous Seventh Circuit decision in *Ulane v. Eastern Airlines, Inc.*<sup>[9]</sup> In *Ulane*, the court noted that the direct language of the statute “implies that it is unlawful to discriminate against women because they are women and against men because they are men.”<sup>[10]</sup> The logic behind this is simple; sexual orientation isn’t included within the words of Title VII. Yet, many courts have seemed to rely on this phraseology from *Ulane* even though it was technically dicta.<sup>[11]</sup> The majority in *Hively*, however, cautioned against the dangers of upholding this distinction with little analysis.<sup>[12]</sup> Justice Wood, writing for the majority, compared courts’ assumptions that the distinction is true to the logical fallacy of begging the question, or “assuming the conclusion it sets out to prove.”<sup>[13]</sup>

Instead, Justice Wood shifts the analysis of ruling out a particular form of discrimination if the question can instead be refocused to whether that type of discrimination is “nothing more or less than a form of sex discrimination.”<sup>[14]</sup> The majority ultimately answered this precisely by finding that sexual orientation is a form of sex discrimination.<sup>[15]</sup> Sex discrimination claims are viewed through the lens of gender nonconformity; a woman would typically prevail on a claim of sex discrimination if she can show that she possesses certain traits or characteristics that are more masculine, and her employer discriminated



## Contact Us

620 S. Limestone  
40508 Lexington, Kentucky

editors@kentuckyjournal.org

(859) 257-1678



against her because of those traits.<sup>[16]</sup> *Hively* reasoned that the sexual orientation of an employee can similarly be seen as a gender nonconforming trait.<sup>[17]</sup> By definition, Hively doesn't conform to the traditional roles of a woman because of her orientation, and by discriminating against her, Ivy Tech would be attempting to police "the boundaries of what...behaviors they found acceptable for a woman."<sup>[18]</sup>

The Seventh Circuit also entertained a second argument furthered by Hively, or sexual orientation discrimination as a form of associational discrimination, similar to race association discrimination.<sup>[19]</sup> The Eleventh Circuit ruled in *Parr v. Woodmen of the World Life Ins. Co.* that an employer who was fired because of his marriage to an African-American woman constituted discrimination "on the basis of *his* [own] race."<sup>[20]</sup> Taken at face value, that argument seems to be applicable to an employer who is romantically associated to a member of the same sex. Consequently, that employer would be discriminated against on the basis of *their own* sex.

By ruling that Title VII protections include sexual orientation claims, the Seventh Circuit created a significant victory for the LGBT community. The Seventh Circuit seems to insinuate that the law should be moving towards broader protection for LGBT individuals.<sup>[21]</sup> For example, the court mentioned its decision needs to be "considered against the backdrop" of the Supreme Court's recent decision in *Obergefell v. Hodges*, indicating the circuit's support for expanding protections for LGBTs within the field of employment discrimination.<sup>[22]</sup>

The Seventh Circuit provided additional support for the LGBT community in its decision shortly after *Hively* in *Whitaker v. Kenosha Unified School District No. 1 Board of Education* concerning Title IX discrimination.<sup>[23]</sup> Title IX protects against gender discrimination in educational institutions.<sup>[24]</sup> In *Whitaker*, the plaintiff, a transgender high school student, was directed to use either the women's restrooms or a private restroom, even though he identified as male.<sup>[25]</sup> Transgender rights traditionally fell into the same distinction created by *Ulane*, as unprotected under Title VII and Title IX. The Seventh Circuit relied on its decision in *Hively*, however, and determined that transgender discrimination is no different than sex discrimination, since transgender individuals similarly do not conform to traditional sex stereotypes.<sup>[26]</sup>

The *Hively* and *Whitaker* decisions are a step in the right direction for increased protection for LGBT individuals in both employment and education discrimination cases. The Seventh Circuit's decision, while its impacts are strong, will only take effect in Wisconsin, Illinois, and Indiana. In order for the issue to be resolved further, the Supreme Court will need to decide whether Title VII includes sexual orientation claims. While the parties in *Hively* indicated they do not intend to petition to the Supreme Court<sup>[27]</sup>, the battle isn't necessarily lost. The decision in *Hively* may influence other circuit court decisions and provide hope for other employees to potentially prevail upon their own discrimination claims.

<sup>[1]</sup> J.D. expected May 2019.

<sup>[2]</sup> See *Hively v. Ivy Tech Cmty. C. of Ind.*, 853 F.3d 339, 352 (7th Cir. 2017) (holding that a person who alleges employment discrimination on the basis of sexual orientation has put forth a claim for Title VII sex discrimination purposes).

<sup>[3]</sup> 42 U.S.C.S. § 2000e-2 (2012).

<sup>[4]</sup> *Hively*, 853 F.3d at 341.

<sup>[5]</sup> *Id.*

<sup>[6]</sup> *Id.*

<sup>[7]</sup> *Id.*

<sup>[8]</sup> See generally *id.* at 352.

<sup>[9]</sup> *Id.* at 341.

<sup>[10]</sup> *Ulane v. Eastern Airlines*, 742 F.2d 1081, 1085 (7th Cir. 1984).

<sup>[11]</sup> *Hively*, 853 F.3d at 341.

<sup>[12]</sup> *See id.*

<sup>[13]</sup> *Id.* at 347.

<sup>[14]</sup> *Id.*

<sup>[15]</sup> *Id.* at 345 (“Our panel described the line between a gender nonconformity claim and one based on sexual orientation as gossamer-thin; we conclude that it does not exist at all.”).

<sup>[16]</sup> *Id.* at 346.

<sup>[17]</sup> *Id.*

<sup>[18]</sup> *Id.*

<sup>[19]</sup> *Id.* at 347.

<sup>[20]</sup> *See Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986).

<sup>[21]</sup> *Hively*, 853 F.3d at 349.

<sup>[22]</sup> *Id.*

<sup>[23]</sup> *See generally Whitaker v. Kenosha Unified Sch. District No. 1 Board of Educ.*, 858 F.3d 1034 (7th Cir. 2017).

<sup>[24]</sup> 20 U.S.C. § 1681 (2012).

<sup>[25]</sup> Kathleen Conn, *After Ruling on Title VII Protection for Gender Orientation, the Seventh Circuit Opens the Door to Title IX Protection for Gender Identity*, 343 ED. LAW REP. 641, 643 (2017).

<sup>[26]</sup> *Id.* at 645.

<sup>[27]</sup> Jenny Goltz, *Seventh Circuit Sets up Sexual Orientation Split for SCOTUS*, AM. BAR. (Apr. 2017), [https://www.americanbar.org/content/newsletter/groups/labor\\_law/ll\\_flash/2017/flash\\_apr2018/hively.html](https://www.americanbar.org/content/newsletter/groups/labor_law/ll_flash/2017/flash_apr2018/hively.html).

\*Featured image provided by [Ted Eytan](#), licensed under [CC BY-SA 2.0](#)

Tags: [Akesha Kirkpatrick](#), [civil rights](#), [Discrimination](#), [Hively v. Ivy Tech Community College](#), [LGBTQ](#), [Seventh Circuit](#), [sexual orientation](#)

---

## Related Posts

