

# CLIENT ALERT: Seventh Circuit Is First Federal Appeals Court to Recognize Sexual Orientation Discrimination Under Title VII - By Damien DiGiovanni

In *Hively v. Ivy Tech Community College of Indiana*, the United States Court of Appeals for the Seventh Circuit held that Title VII of the 1964 Civil Rights Act prohibits sexual orientation discrimination as a form of sex discrimination. The decision sets new federal law precedent in that jurisdiction (Illinois, Indiana and Wisconsin), and conflicts with every other federal appeals court that has directly addressed this issue.

## Background

The plaintiff, Kimberly Hively, contended that she was denied adjunct professor positions from 2009 through 2014 because of her sexual orientation (“openly lesbian”). Ms. Hively brought a claim of sex discrimination under Title VII. Title VII forbids employers from discriminating on the basis of a person’s “race, color, religion, sex, or national origin,” but does not identify “sexual orientation” as a protected category.

## The Seventh Circuit’s Reasoning

In concluding that “sexual orientation” discrimination is protected by Title VII, the court used the “comparative method” to determine the “significance of the plaintiff’s sex to the employer’s decision.” The “comparative method” analyzes whether the plaintiff has “described a situation in which, holding all other things constant and changing only her sex, she would have been treated the same way[.]” So here the question was, if she were male and thus heterosexual, would she have been discriminated against?

The court also applied “associational discrimination” analysis based upon the Supreme Court’s decision in *Loving v. Virginia*, 388 U.S. 1 (1967), which protected the rights of individuals to associate intimately with members of a different race. In that case, “both parties to the interracial marriage were being denied important rights by the state solely on the basis of their race.” It is settled law that a person “who is discriminated against because of the protected characteristic of one with whom she associates is actually being disadvantaged because of her own traits.” The court found that *Loving* and its progeny were analogous and similarly “protect[ed] the plaintiff’s right to associate intimately with a person of the same sex.”

The court also considered gender stereotyping cases, in which a female is discriminated against because she does not conform to archaic stereotypical views of women. The court held that the difference between a gender nonconformity claim and one based on sexual orientation “does not exist at all[,]” and that the plaintiff’s claim was “no different from the claims brought by women who were rejected for jobs in traditionally male workplaces, such as fire departments, construction, and policing,” and found that the employers in those cases “were policing the boundaries of what jobs or behaviors they found acceptable for a woman (or in some cases, for a man).”

## Impact

This case was decided at a preliminary stage of the litigation, and was not a ruling on the ultimate merits. The critical point was that a plaintiff *could* make the case for sexual orientation discrimination under Title VII, allowing a case to move forward to fact-finding. The court noted, the “logic of the Supreme Court’s decisions, as well as the common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex, persuade us that the time has come to overrule our previous cases....”

Now that the Seventh Circuit has split from the other Courts of Appeal, it seems likely this question about the scope of Title VII protection will ultimately be decided by the Supreme Court.

Regardless, sexual orientation discrimination is already widely recognized as a viable claim. Even without agreement from the federal courts (until now), the EEOC for several years has interpreted Title VII to pursue charges of sex discrimination based on sexual orientation. Many state anti-discrimination laws, including Chapter 151B of the Massachusetts General Laws, also prohibit discrimination on the basis of sexual orientation.

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