

# Seventh Circuit Holds Title VII Does Not Protect Sexual Orientation

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On July 28, 2016, the Seventh Circuit issued its decision in *Hively v. Ivy Tech Community College* holding Title VII does not prohibit employment discrimination on the basis of sexual orientation. The Seventh Circuit's opinion is the first to address this issue since the Equal Employment Opportunity Commission held in July 2015 sexual orientation is sex discrimination and therefore violates Title VII.

The plaintiff, Kimberly Hively, argued she was denied full-time employment and promotions based on her sexual orientation. The court explained prior cases dictated the outcome stating:

"Since *Hamner* and *Spearman*, our circuit has, without exception, relied on those precedents to hold that the Title VII prohibition on discrimination based on 'sex' extends only to discrimination based on a person's gender, and not that aimed at a person's sexual orientation."

The court also mentioned Congress has not amended Title VII to include sexual orientation in the list of protections along with race, color, national origin, sex, and religion. Additionally, there is no precedent from the Supreme Court Title VII protection extends to employees on the basis of their sexual orientation.

"Perhaps the writing is on the wall" for a change in federal law, but that change must come from Congress or the Supreme Court, Judge Rovner wrote, in an opinion joined by Judges Bauer and Ripple. Judge Rovner acknowledged "a paradoxical legal landscape in which a person can be married on Saturday and then fired on Monday for just that act."

At least two other federal appeals courts are looking at the same issue, including the Second Circuit in New York.

Absent congressional action or guidance from the Supreme Court, employers continue to face uncertainty as to the viability of these claims – which some courts may find persuasive. Even if not covered by Title VII, employers should remember sexual orientation may be a protected characteristic in the workplace under state, county, or local law depending on the jurisdiction.