PAUL HASTINGS

STAY CURRENT

April 2017

Follow @Paul_Hastings

Title VII Prohibits Discrimination on the Basis of Sexual Orientation, Seventh Circuit Finds

By Neal D. Mollen & Daniel J. Emam

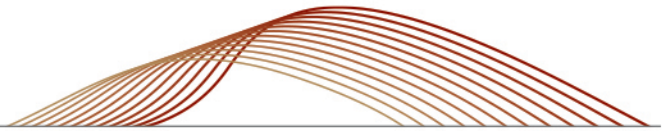
Discrimination based on sexual orientation is unlawful "sex" discrimination and accordingly violates Title VII of the Civil Rights Act of 1964, the *en banc* Seventh Circuit Court of Appeals has held. This holding departs from more than 50 years of authority defining the scope of that statute[1] and creates a division of authority on the question among the federal courts of appeals that only the Supreme Court (or Congress) can resolve. Given this circuit split, the case, *Hively v. Ivy Tech Community College of Indiana*,[2] will not be the last word on the subject, but it nonetheless marks a watershed moment in the expansion of Title VII's reach.

"Adaptation" or Judicial "Amendment"

No one seriously claims that in the summer of 1964, when the 88th Congress proscribed "sex" discrimination, it intended to reach sexual orientation discrimination as well. Indeed, "[i]t has been speculated that ['sex'] was added [to the list of prohibited considerations] as an attempt to thwart passage of Title VII."[3]

The *Hively* majority, however, felt that it was "neither here nor there that the Congress that enacted [Title VII] may not have realized or understood" that the language it wrote would proscribe discrimination based on sexual orientation.[4] Indeed, in his concurrence, Judge Posner admitted that to the 88th Congress, "sex discrimination meant discrimination against men or women as such and not against subsets of men or women such as effeminate men or mannish women,"[5] but the statute "now more than half a century old, invites an interpretation that will update it to the present, a present that differs markedly from the era in which the Act was enacted."[6] Accordingly, Judge Posner construed the Act to protect the "significant numbers of both men and women who have a sexual orientation [which] is not evil and does not threaten our society. Title VII in terms forbids only sex discrimination, but we now understand discrimination against homosexual men and women to be a form of sex discrimination; and to paraphrase [Justice Oliver Wendell] Holmes, '[w]e must consider what this country has become in deciding what that [statute] has reserved.'"[7]

The dissent, on the other hand, began with a caution about "the limits on the court's role" in construing statutes.[8] That role is a narrow one: courts must give effect to the statutory language "as a reasonable person would have understood it when it was adopted."[9] By importing society's evolving standards into the Act, the majority had achieved "a statutory amendment courtesy of unelected judges."[10] To the dissent, the "striking cultural change [in a]ttitudes about gay rights . . . informs a case for legislative change and might eventually persuade the people's representatives to amend the



statute to implement a new public policy."[11] The court, however, is "not authorized to infuse the text with a new or unconventional meaning or to update it to respond to changed social, economic, or political conditions."[12]

(Re)defining "Sex"

The majority opinion in *Hively*, written by Chief Judge Diane Wood, employs three distinct approaches to show that Title VII's definition of "sex" includes "sexual orientation." First, the court found that discrimination against a lesbian is necessarily discrimination against a woman. "Hively allege[d] 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."[13]

Second, the court found that since *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), Title VII has protected individuals who do not adhere to societal gender norms. Here, "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."[14]

Finally, the majority found support for its view in *Loving v. Virginia*.[15] There, the Supreme Court held that the Constitution had been violated by legislation that discriminated "on the basis of the race [of individuals] with whom a person associates . . . ."[16] Citing *Loving*, the court held that "to the extent that [Title 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 . . . sex of the associate."[17]

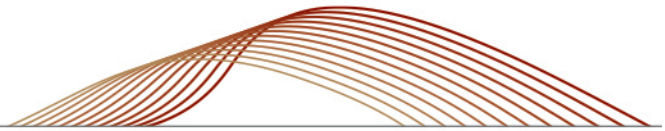
Dissent: Traditional Approach to Construction Yields Traditional Result

After chastising the majority for assuming a legislative responsibility—upending decades of unbroken authority to accommodate the statute to recently prevailing social norms—Judge Diane Sykes, writing for the dissent, claimed that ordinary principles of statutory construction made the majority's result untenable. First, the dissent noted that the term "sex," though undefined in the statute, had a settled and unambiguous meaning in 1964, and it did not include "sexual orientation." "To a fluent speaker of the English language—then and now—the ordinary meaning of the word 'sex' does not fairly include the concept of 'sexual orientation.'"[18]

Second, since 1964, Congress has repeatedly enacted legislation that refers separately to "two [distinct] categories," "sex" and "sexual orientation."[19] If the former is construed to include the latter, the latter statutory term becomes "needless surplusage."[20] Moreover, starting with the Equality Act of 1974, Congress has attempted repeatedly to prohibit sexual orientation discrimination, usually by attempting to add sexual orientation to the list of protected categories specified by Title VII. If Title VII's prohibition on sex discrimination reached discrimination based on sexual orientation, this legislation would have been unnecessary.

Third, "[a]n employer who refuses to hire homosexuals is not drawing a line based on the job applicant's sex."[21] "Sexism (misandry and misogyny) and homophobia are separate kinds of prejudice that classify people in distinct ways based on different immutable characteristics."[22]

Finally, the dissent took issue with the majority's use of the "comparative" method for determining whether Hively had been the victim of discrimination. "[T]he comparative method of proof is an evidentiary test; it is not an interpretive tool. It tells us nothing about the meaning or scope of



Title VII. In ordinary English usage, sexual-orientation discrimination is a distinct form of discrimination and is not synonymous with sex discrimination. That's the plain meaning of Title VII's text as originally understood. An evidentiary test like the comparative method of proof has no work to do here and is utterly out of place."[23]

In any event, the dissent said, in comparing the plaintiff's treatment to a hypothetical heterosexual man, "the majority distort[ed] the comparative method by opportunistically framing the comparison."[24] "If the aim is to isolate actual discriminatory motive based on the plaintiff's sex, then we must hold everything constant *except* the plaintiff's sex."[25] The majority "load[ed] the dice by changing *two* variables—the plaintiff's sex *and* sexual orientation—to arrive at the hypothetical comparator."[26]

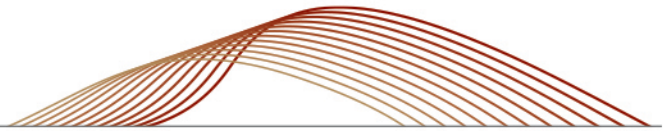
An Unavoidable Circuit Split

The *Hively* case will not wind up at the Supreme Court—it has been remanded to the district court where the college intends to defend the case—but the issue it presents will, and likely soon. Cases posing the issue are currently pending in the Eleventh and Second Circuits. The circuit split created by *Hively* will no doubt be used in these or similar cases to get Supreme Court review. It is also theoretically possible for Congress to resolve this issue legislatively, but that route seems most unlikely.

Takeaway for Employers

Hively undeniably represents a landmark in Title VII jurisprudence, but its practical impact may be somewhat more limited than that status might suggest. Currently, 24 states and an estimated 255 municipalities ban discrimination on the basis of sexual orientation. Employers that do business in any of these jurisdictions should already have policies in place to ensure that such discrimination does not occur, and complaint procedures should be in place to provide redress when issues arise. Even where state and local laws do not directly address sexual orientation discrimination, many employers have adapted their policies to address the subject to conform to human resources best practices and the evolving societal norms the *Hively* opinion noted. These steps are now more important than ever. The visibility of *Hively*, however, may well result in more complaints of sexual orientation discrimination; employers should ensure that managers are attuned to their responsibilities in this regard. As always, Paul Hastings will keep its clients abreast of these matters as they develop.

✧ ✧ ✧



If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

Los Angeles

Leslie L. Abbott
1.213.683.6310
leslieabbott@paulhastings.com

Elena R. Baca
1.213.683.6306
elenabaca@paulhastings.com

New York

Patrick W. Shea
1.212.318.6405
patrickshea@paulhastings.com

Washington, D.C.

Neal D. Mollen
1.202.551.1738
nealmollen@paulhastings.com

Kenneth M. Willner
1.202.551.1727
kenwillner@paulhastings.com

Daniel J. Emam
1.202.551.1890
danielemam@paulhastings.com

[1] The first reported Title VII decision on point is *Smith v. Liberty Mut. Ins. Co.*, 395 F. Supp. 1098 (N.D. Ga. 1975).

[2] No. 15-1720 (7th Cir. Apr. 4, 2017).

[3] *Cty. of Washington v. Gunther*, 452 U.S. 161, 190 n. 4 (1981) (Rehnquist, J., dissenting); *see*, *also* Michael Evan Gold, *A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implication for the Issue of Comparable Worth*, 19 DUQ. L. REV. 453–477 (1980); *but see* Robert C. Bird, *More Than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, WM. & MARY J. WOMEN & L. 137 (1997).

[4] *Hively*, No. 15-1720 at 10.

[5] *Id.* at 33.

[6] *Id.* at 25–26.

[7] *Id.* at 33–34.

[8] *Id.* at 41.

[9] *Id.*

[10] *Id.*

[11] *Id.* at 44.

[12] *Id.* at 41.

[13] *Hively*, No. 15-1720 at 11.

[14] *Id.* at 12.

[15] 388 U.S. 1 (1967).

[16] *Hively*, No. 15-1720 at 18–19.

[17] *Id.*

[18] *Id.* at 47.

[19] *Id.* at 48.

[20] *Id.*

[21] *Id.* at 51.

[22] *Id.*

[23] *Id.* at 54.

[24] *Id.*

[25] *Id.*

[26] *Id.*