

EMPLOYER LAW BLOG

Sexual Orientation Discrimination Now Recognized Under Title VII

AUTHOR: JOHN L. GILBERT

On April 4, 2017, the United States Court of Appeals for the Seventh Circuit for the first time recognized that sexual orientation discrimination is covered under Title VII of the 1964 Civil Rights Act. The case is *Hively v. Ivy Tech Community College of Indiana*. Although the court which heard the case en banc reached the result via three routes, the holding confirms that sexual orientation discrimination is cognizable under Title VII in the Seventh Circuit.

Chief Judge Wood led a five-member majority in holding that sexual orientation discrimination is sex discrimination under Title VII and, therefore, covered by the statute. She based her reasoning on, among other things, Supreme Court precedent. Judge Posner took a more realistic approach and recognized that what the court was doing was legislating by interpretation and approved that approach. Judges Flaum and Ripple took a more conservative approach and argued that sex discrimination necessarily includes discrimination on the basis of sexual orientation.

Finally, the dissenting opinion written by Judge Sykes and joined by Judges Bauer and Kanne took the position that the court was engaged in judicial legislation, and as desirable as the outcome is from a policy standpoint, the court overreached its constitutional authority in essentially amending Title VII by judicial opinion.

Employers need to be aware of this ruling and plan accordingly.