



COMPLIANCE BULLETIN

HIGHLIGHTS

- A federal court has ruled that employers may not discriminate against employees or applicants based on sexual orientation.
- This ruling is consistent with the EEOC's position that Title VII prohibits discrimination based on sexual orientation and gender identity.
- Several state laws also prohibit discrimination based on sexual orientation.

IMPORTANT DATES

April 4, 2017

The U.S. Court of Appeals for the 7th Circuit ruled discrimination based on sexual orientation is a form of discrimination based on sex under Title VII of the Civil Rights Act.

Court Rules Title VII Prohibits Sexual Orientation Discrimination

OVERVIEW

The U.S. Court of Appeals for the 7th Circuit has ruled that Title VII of the Civil Rights Act (Title VII) prohibits employment discrimination based on sexual orientation. The decision in [Hively v. Ivy Tech](#), issued on April 4, 2017, makes it illegal to use an individual's sexual orientation as a basis for employment decisions. The ruling applies to employers with 15 or more employees in Wisconsin, Illinois and Indiana.

The decision is groundbreaking because it overturned prior cases and also conflicts with law from other federal courts. However, it aligns with the Equal Employment Opportunity Commission's (EEOC) position. This makes review of the issue by the U.S. Supreme Court likely in the future.

ACTION STEPS

Affected employers should review their existing policies to ensure they do not allow discrimination based on sexual orientation or gender identity. Employers should also review any applicable state laws and the [EEOC's enforcement guidance](#) to ensure their policies are compliant.

Provided By:

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COMPLIANCE BULLETIN

Background

Title VII is a federal law that prohibits employers with 15 or more employees from discriminating against employees and job applicants on the basis of their race, color, religion, sex or national origin. Since Title VII was enacted in 1964, several federal courts, including the 7th Circuit, have held that the law's inclusion of the word "sex" means that its protections only extend to traditional notions of gender. For example, the 7th Circuit's 1984 decision in [Ulane v. Eastern Airlines](#) had held that Title VII only makes it unlawful to discriminate "against women because they are women and against men because they are men." The U.S. Court of Appeals for the 11th Circuit (which includes Alabama, Florida and Georgia) recently issued a similar holding in its March 2017 decision in [Evans v. Georgia Regional Hospital](#).

Although the U.S. Supreme Court has never specifically addressed whether Title VII prohibits discrimination based on sexual orientation, its decisions in other cases have established that:

- ✓ The practice of "gender stereotyping" falls within Title VII's prohibition against sex discrimination; and
- ✓ Discrimination based on the race of a person with whom another individual associates is a form of racial discrimination under Title VII.

Relying on these and other Supreme Court decisions in its ruling in [Hively v. Ivy Tech](#), the 7th Circuit expressly overturned all of its prior case law that had excluded sexual orientation from Title VII. Instead, the 7th Circuit held, "a person who alleges that she experienced employment discrimination on the basis of her sexual orientation has put forth a case of sex discrimination for Title VII purposes." The court further specified that "it is impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex."

Hively v. Ivy Tech

In 2013, Kimberly Hively, an openly gay woman who had worked as a part-time adjunct professor, filed a Title VII discrimination charge against her former employer, Ivy Tech Community College. Hively alleged that because she was gay, Ivy Tech had rejected her for six full-time positions and refused to renew her part-time employment contract. She argued that these actions constituted unlawful discrimination based on sex under Title VII.

"It is impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex."

A district court dismissed her case based on prior federal court interpretations of Title VII's prohibition against sex discrimination. Hively then appealed to the 7th Circuit, which ruled in her favor on April 4, 2017. Under its comparative analysis, the court concluded that Hively's claim involved discrimination based on her failure to conform to a heterosexual female stereotype. According to the court, this made Hively's claim "no different from the claims brought by women who were rejected for jobs in traditionally male workplaces, such as fire departments, construction and policing."

COMPLIANCE BULLETIN

The 7th Circuit also compared Hively's claims to cases in which the Supreme Court held that employers may not discriminate against an individual based on the race of his or her associates. Noting that the Supreme Court has held that this type of discrimination affects both partners in an interracial marriage, the 7th Circuit applied the same reasoning to Hively's situation.

Considerations for Employers

While the 7th Circuit's decision overturned the court's prior cases to clarify how the federal law applies in the three states under its jurisdiction, two of those states (Wisconsin and Illinois), along with 20 other states in the United States, have already passed laws outlawing sexual orientation discrimination in employment. In addition, the EEOC, which is responsible for the enforcing Title VII, has taken a position that aligns with the 7th Circuit's decision since 2015. Specifically, the EEOC already interprets and enforces Title VII's prohibition against sex discrimination as forbidding any employment discrimination based on **sexual orientation** or **gender identity**.

Therefore, employers should be aware that the 7th Circuit's decision does not necessarily represent a radical shift in the law. Instead, the decision merely reinforces the fact that employers may be penalized for discriminating against individuals based on sexual orientation or gender identity. More information about the EEOC's enforcement policy is available on the EEOC's [website](#).

The 7th Circuit's decision provides additional guidance for employers as well. For example, the court stated that "any discomfort, disapproval or job decision based on the fact that a complainant—woman or man—dresses differently, speaks differently, or dates or marries a same-sex partner, is a reaction purely and simply based on sex."

Finally, employers should be aware that the 7th Circuit's decision does not address the meaning of sex discrimination in the context of social or public services, nor in the context of employment related to a religious mission. In addition, the issue addressed in the case may undergo review by the U.S. Supreme Court in the near future. Therefore, employers should continue to watch for legal developments affecting Title VII.