Seventh Circuit Rules Sexual Orientation Workplace Discrimination Is Illegal

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In a precedent setting decision, *Hively v. Ivy Tech*, the Seventh Circuit Court of Appeals, the federal appeals court having jurisdiction for Wisconsin, Indiana, and Illinois, ruled on April 4, 2017, that Title VII of the Civil Rights Act of 1964 protects employees from workplace discrimination on the basis of sexual orientation.

Title VII protects employees from discrimination based on "race, color, religion, national origin or sex." The Second and Eleventh Circuits previously ruled that the term "sex" referred only to whether an employee was a male or female. In *Hively*, the Seventh Circuit instead expanded the definition of "sex" to include sexual orientation, making it the first federal appellate court to do so.

Practical Implications: Wisconsin

Wisconsin employers may wonder what practical effect this decision has because Wisconsin banned discrimination on the basis of sexual orientation in employment, housing, education, credit and public accommodations for many years. The answer to that question has to do with what remedies are available to employees who prove that they have been subjected to sexual orientation discrimination. The *Hively* decision provides such employees with the right to sue not just under state law but under federal law. Federal law, unlike the Wisconsin Fair Employment Act, allows the successful plaintiff to recover compensatory damages, such as those for emotional distress, and allows for punitive damages.

Practical Implications: Illinois

Illinois employers may also wonder about the practical effect of the *Hively* decision as the Illinois Human Rights Act ("IHRA") banned discrimination on the basis of sexual orientation in employment, real estate transactions, credit, education and public accommodations. The remedies available under the IHRA largely track the remedies available under federal law. However, the *Hively* decision now provides employees the ability to seek punitive damages, which are not permitted under the IHRA. Additionally, IHRA awards for noneconomic damages, such as emotional distress, have historically been much smaller than federal awards. Employers should recognize that they may now be exposed to greater damages if a federal action is brought by an employee.

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Practical Implications: Indiana

Until now, while multiple cities and counties in Indiana had bans on sexual orientation discrimination in employment, no statewide ban existed. After *Hively*, all Indiana employers with 15 or more employees are now barred from discriminating in employment on the basis of sexual orientation. As with Wisconsin and Illinois, Indiana employees now have a federal cause of action in the event of workplace discrimination that will permit actual, compensatory and punitive damages.

While *Hively* creates a federal action, federal court is a more complex forum and sometimes cases are dismissed on motions generally not available in the applicable state agency. Plaintiff attorneys will now face the same strategic decisions in sexual orientation cases as they have in other Title VII cases.

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