# Employment Law
## BRIEFING


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*Title VII claim*

# Appeals court schools community college in sex discrimination

In *Hively v. Ivy Tech Community College of Indiana,* the Seventh Circuit Court of Appeals considered whether discrimination on the basis of sexual orientation is a form of sex discrimination prohibited by Title VII of the Civil Rights Act of 1964 (Title VII). Its decision reflects what may be an important judicial trend.

## PART-TIME ENDS IN NO TIME

The employee, a part-time professor who is openly lesbian, sued her employer, a community college, alleging she was denied full-time employment and promotions based on sexual orientation in violation of Title VII. She applied for six full-time positions in a five-year period and was denied all six. Thereafter, her part-time contract wasn't renewed.

The trial court dismissed the complaint for failure to state a claim. It found that sexual orientation wasn't a protected class under Title VII. The employee appealed.

## EMPLOYEE OFFERS TWO THEORIES

The employee in *Hively* set forth two bases to support her position that sex discrimination included sexual orientation discrimination. The first method was a comparison: All other things the same and changing only her sex, would she have been treated the same way? The employee alleged that, if she were a man married to a woman, and everything else stayed the same, the employer *would* have renewed her contract.

> *The employee's claim was identical to claims in which women were discriminated from employment in traditionally male industries because of their sex.*

The employee also set forth an associational theory to support her position that sexual orientation was sex discrimination. The theory is that a person who is discriminated against because of the protected characteristic of someone with whom she associates is really being disadvantaged because of her own traits.

## SUPREME COURT PROVIDES GUIDANCE

In reviewing the case, the appeals court was guided by Supreme Court decisions regarding sex discrimination, including *Oncale v. Sundowner Offshore Services.* In that case, the Court found that Title VII covered sexual harassment inflicted by a male on a male victim. In its decision, the Court made clear that, just because Congress may not have anticipated a particular application of the law when drafting Title VII, it didn't mean that the law could be used to prevent its application to comparable evils.

Regarding the employee's comparison method, the appeals court found that her claim was identical to claims in which women were discriminated from employment in traditionally male industries because of their sex. The court reasoned that, because the job decisions are based on the fact that the employee was of a certain sex, it fell within Title VII's protections.

As for the associational theory, the court agreed with the employee, stating: "The logic of the Supreme Court's decisions, as well as the common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex, persuade us that the time has come to overrule our previous cases."

So the appeals court reversed the trial court. It concluded that a person who alleges employment discrimination on the basis of sexual orientation has set forth a case of sexual discrimination pursuant to Title VII.

## IMPORTANT TREND

This case is one of many examples suggesting a judicial trend to protect employees from discrimination based on sexual orientation. Many states have also enacted laws prohibiting employment discrimination based on sexual orientation. When making employment decisions, employers should be aware of an employee's protected class, including sexual orientation, and ensure that any adverse employment action isn't taken because of the individual's protected class. ■

## ELEVENTH CIRCUIT GOES THE OTHER WAY

Not all courts rule as the Seventh Circuit Court of Appeals did in *Hively v. Ivy Tech Community College of Indiana*. (See main article.) In another 2017 case, *Evans v. Georgia Regional Hospital*, the Eleventh Circuit decided that a claim for sexual orientation discrimination was *not* actionable under Title VII.

The employee was a lesbian security officer who sued her employer, claiming discrimination based on sexual orientation and gender nonconformity. The employee argued she was targeted because she didn't carry herself in a traditionally womanly manner. Although she didn't publicize the fact that she was gay, she claimed it was evident that she identified with the male gender because she had a short haircut and wore a male uniform.

As evidence of discrimination, the employee related that someone less qualified than her was appointed to be her supervisor and that there were emails saying that one of her supervisors was trying to terminate her by making her job difficult. These emails led to the employee resigning from her position.


Based on precedent, a magistrate judge issued a report finding that Title VII wasn't intended to cover discrimination based on sexual orientation. The trial court adopted this opinion and dismissed the case.

The appeals court affirmed as to the sexual orientation claim, stating that it was bound by precedent that held that discrimination based on sexual orientation wasn't actionable under Title VII. The employee argued that the Supreme Court decisions in *Price Waterhouse v. Hopkins* and *Oncale v. Sundowner Offshore Services* provide for such protection. But the court disagreed, holding that these decisions weren't directly on point and didn't address whether sexual orientation discrimination was prohibited by Title VII. The court stated it was bound by precedent until directly addressed by the Supreme Court.

However, the appeals court vacated the trial court's order dismissing the employee's gender nonconformity claim. It held that gender nonconformity isn't just another way to claim discrimination based on sexual orientation, but is a separate claim for sex-based discrimination based on a failure to conform to a gender stereotype, which is protected by Title VII. This ruling provided the employee with the opportunity to amend her complaint.

# Don't shoot the messenger

## *Court decides whether FLSA protects laid-off employee*

Can a terminated employee who complained to her employer claim retaliation under the Fair Labor Standards Act (FLSA) if the complaint was made on a co-worker's behalf? When a trial court granted summary judgment to the employer, the Fifth Circuit Court of Appeals had to decide whether the employee had, in fact, established a *prima facie* case of retaliation.

### INDIRECT ACTION

The employee in *Starnes v. Wallace* worked for the employer as a risk manager. Her job duties included:

- Investigating, reviewing and denying injury claims,
- Reviewing liability for the company,
- Drafting opposition statements for discrimination claims, and
- Attending mediations involving the Risk Management Department.

In October 2010, a co-worker complained to the employee that her husband, who also worked for the employer, wasn't being paid overtime correctly. The employee spoke with Human Resources on her co-worker's husband's behalf. About a year later in December 2011, the employer settled the dispute with the co-worker's husband.

On January 6, 2012, the employer, alleging financial difficulties, laid off five employees, including the employee and her co-worker. Thereafter, two of the five employees were rehired and the third employee had accepted another job before he was laid off. Therefore, only the employee and the co-worker were permanently laid off. The employee and co-worker sued the employer, claiming retaliation.

The trial court found in favor of the employer on summary judgment, holding that the employee couldn't establish a *prima facie* case. It didn't dismiss the co-worker's case. But because the employee acted within her job duties, the court decided that she hadn't engaged in a protected activity. It also determined that

the employee couldn't establish causation because she was laid off more than one year after the alleged protected activity. The employee appealed.

### A QUESTION OF DUTIES

A *prima facie* case of retaliation pursuant to the FLSA requires an employee to prove that she'd engaged in a protected activity and suffered an adverse employment action, and that there was a causal link between the activity and adverse action. The appeals court stated that to engage in a protected activity the employee had to make a "complaint." Such a complaint is made when:

1. There's an assertion of rights protected by the FLSA,
2. The employer has notice that a complaint could subject the employer to a claim of retaliation, and
3. The complaint is sufficiently clear and detailed for the employer to understand its content and context.

The court further stated that an assertion of rights required that the employee act outside of her normal job duties.

The appeals court found that, when the employee spoke with Human Resources in 2010, she asserted that the employer was violating the FLSA by not paying her co-worker's husband for overtime. The appeals court also decided that the trial court may have erroneously relied on a job description to find that the employee hadn't acted outside of her job duties. The employee

signed a job description in March 2011 adding the duty that she was to report "all allegations and findings related to violations of Federal and State law including Anti-Kickback and fraud."

Earlier job analyses drafted by the employee — which included the amount of time she spent on various job duties — didn't contain anything about reporting violations of the law. Thus, the appeals court found there were factual disputes regarding the employee's job description at the time she made the complaint. Therefore, summary judgment dismissing her claim wasn't proper because she may have been acting outside of her job duties when making the complaint.

The court further found that the employee had established causation. When finding a lack of causation, the trial court had focused on the fact that the layoff occurred more than a year after the employee had complained on behalf of her co-worker's husband. However, the appeals court found that focusing only on temporal proximity was too rigid an analysis, particularly considering that the trial court hadn't dismissed the employee's co-worker's case, which had similar time elements. Furthermore, the employer had settled with the co-worker's husband just ten days before the layoff, which the appeals court stated could have triggered the employer's "retaliatory impulse" because the money had just been paid out. As such, the court found that the employee *had* established a causal link between the protected activity and the layoff.

The appeals court reversed the trial court's dismissal, finding that genuine issues of material fact existed as to whether the employee had engaged in a protected activity.

### BEFORE TAKING ADVERSE ACTION

The FLSA protects not only employees who believe they're paid incorrectly, but also employees who complain on another employee's behalf. Before you take an adverse action, determine whether the employee has engaged in a protected activity. Also recognize that your organization may have liability for retaliation even if the protected activity occurred more than a year before the adverse action. ■

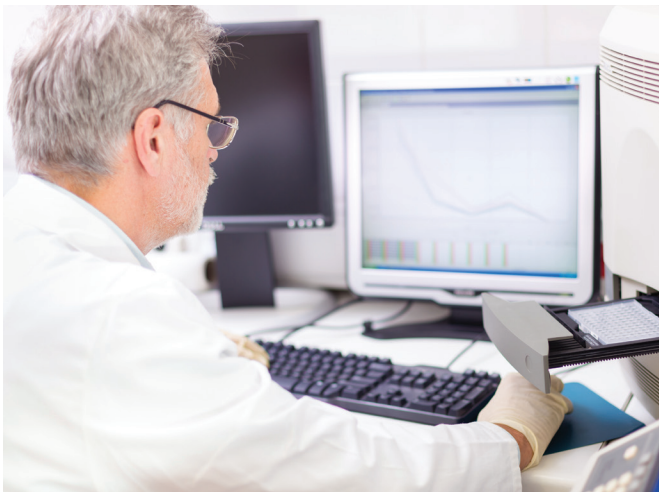
# Growth — not age — motivates employer to take adverse action

Job positions and corresponding duties can change over time, particularly as a company grows. But if employers don't communicate such changes with employees, they could end up in court. Such was the case in *Nash v. Optomec, Inc.*, where the Eighth Circuit Court of Appeals decided an age discrimination claim.

### INTERN RETURNS AS EMPLOYEE

The plaintiff was a paid intern for two semesters when he was 54 years old. He was hired for the internship — which didn't guarantee future employment — by the company's 49-year-old Vice President of Engineering (VPE). The intern claimed that, during his internship, the VPE treated the other interns, who were in their twenties, more favorably than him. He asserted that the other interns were able to go on trips and were paid more than he was. (The other interns didn't, in fact, go on trips, and they were paid the same as the plaintiff.)

After receiving his degree, the former intern applied for a lab technician position with the employer. Even though the VPE was unsure about the former intern's ability to perform the job, he decided to hire him as a lab technician at the age of 55. Six months after the employee became a lab technician, he was terminated. The employer claimed the employee could follow explicit instructions, but didn't have the critical thinking and troubleshooting abilities the employer believed the



position required for the company to grow. The employee sued the employer, claiming age discrimination.

The trial court granted the employer's motion for summary judgment, finding that the employee had failed to establish a *prima facie* case of age discrimination. And even if he had established a case, the employer had proffered a lawful reason for its decision, which the employee couldn't prove was pretext for discrimination. The employee appealed.

## NOT IN THE JOB DESCRIPTION

On appeal, the employee argued that the employer's reasons for termination had no basis because the inabilities the employer cited weren't part of the job description. The court held that, even though some of the employee's inabilities weren't part of his job description, the employer's future vision for the lab technician, and the employee's inability to fit into that vision, led to his termination.

The employee also argued that the employer's explanation for his termination changed, leading to an inference of discriminatory animus. When he was terminated, the employee was told that the action wasn't performance related. But he was later told that he lacked the skills necessary to meet the challenges of his position. The court determined that the employee's performance was satisfactory but the employer believed that he lacked the skills to grow with the company, which led to his termination. According to the court, the two statements weren't contradictory.

The court also pointed out two facts that were contrary to an inference of age discrimination:

1. The employee was hired and fired within a short period of time, and
2. The VPE who made the hiring and firing decisions was only five years younger than the employee.

The court found these facts significant and affirmed the trial court's grant of summary judgment in favor of the employer.

## AVOIDING COURT

Employers are able to dictate what they envision for particular positions and the skills employees in that position should have. However, to avoid costly discrimination claims, they should make their vision and requirements clear to employees. ■

# Why employers can never be too careful when it comes to disability leave

A serious illness required one employee to request multiple leaves of absence from his job. But when his employer terminated him, did it violate the Americans with Disabilities Act (ADA)? That was the question before the Sixth Circuit Court of Appeals in *Green v. BakeMark USA, LLC.*

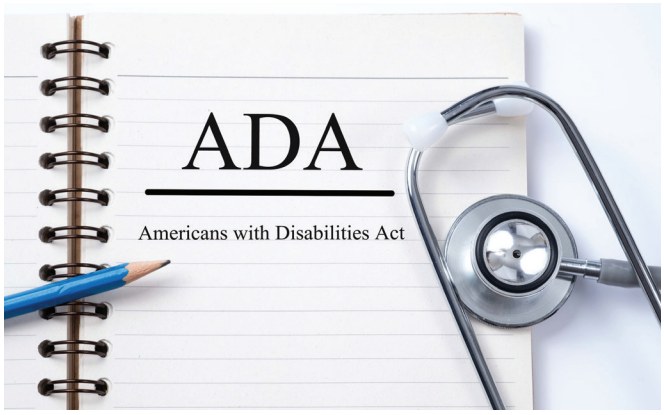
## SERIES OF LEAVES

The plaintiff was employed by *BakeMark* as an operations manager at its Ohio warehouse. He was responsible for directing and coordinating all warehouse activity.

In September 2011, the employee requested a leave of absence until October 17 to undergo surgery for thyroid cancer. Leave was granted and the employee returned to work. On November 25, he requested additional leave due to complications and was placed on leave until January 2, 2012. This leave was then extended through March 16.

However, on March 16, he submitted a doctor's note stating that he could return to work, but only for eight hours per day. The employer asked for clarification as to whether the restrictions were permanent or temporary. The doctor clarified that the eight-hour-per-day restriction was only until March 30.

The employee returned to work on March 24. However, on May 2, he collapsed at home and submitted a doctor's note stating that he could return to work on May 7 with an eight-hour-per-day restriction. But he didn't return and produced another doctor's note requesting that his employer provide him with the hours and days that he was expected to work. The employer informed the doctor that the employee could be expected to work 50 to 60 hours per week and again extended the employee's leave.




On June 24, the doctor told the employer that the employee could return to work with a four-hour-per-day restriction for 14 days and then an eight-hour-per-day restriction for the following six months.

## ATTEMPTS TO RESOLVE DISPUTE

The employer then asked the employee to participate in a telephone conference call on July 3 to discuss his doctor's proposed restrictions. The employee refused. After several other unsuccessful attempts to schedule a meeting, the parties agreed to participate in mediation.

At the mediation in September, the employee informed the employer that he was completely unable to work and didn't know if — or when — he would be able to return to his job. On September 25, the company notified the employee that it was unable to accommodate an indefinite leave of absence and terminated his employment.

## CASE GOES TO COURT

In October 2013, the employee filed suit against his former employer, alleging a violation of the ADA. The trial court granted the employer's motion for summary judgment, concluding that the employee's claim that the company had failed to accommodate his disability lacked merit. The employee appealed the case.

But the appeals court agreed with the trial court. It determined that the employee couldn't succeed on his failure-to-accommodate claim because he hadn't shown that he was qualified for the operations manager position within the meaning of the ADA. The ADA defines a qualified individual as someone who "with or without reasonable accommodation, can perform the essential functions of the employment position [he] holds or desires." A reasonable accommodation may entail "job restructuring, part-time or modified work schedules [or] reassignment to a vacant position," but it doesn't include removing an "essential function" from the position. Such removal is, *per se,* unreasonable.

Based on the employee's statements at the September 2012 mediation, it was beyond dispute that he couldn't perform the essential functions of his job, as he was unable to work. Thus, according to the court, summary judgment was warranted.

## GREAT LENGTHS

In this case, the employer appeared to go to great lengths to provide the employee with many leaves and extensions of leaves so that he could deal with his medical issues. Despite all these efforts, the employer became embroiled in litigation. The lesson? Your organization can never be too careful when attempting to accommodate disability requests. ■