CASE NOTES

Hively v. Ivy Tech Community College: Losing the Battle but Winning the War for Title VII Sexual Orientation Discrimination Protection

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I. OVERVIEW

In 2014, Kimberly Hively applied, for the sixth time, for full-time employment.[1] She had worked for Ivy Tech Community College as an adjunct professor since 2008, but despite the fact that she had never received a negative evaluation, and had the necessary qualifications for full-time employment, the school denied all six of her applications for full-time employment without even granting her an interview.[2] Then, in July 2014, the school refused to renew her part-time contract.[3] Afterwards, Hively, who is a lesbian, filed a claim under Title VII of the Civil Rights Act of 1964 alleging that she had been denied promotion and full-time employment because of sexual orientation discrimination.[4] The United States District Court for the Northern District of Indiana dismissed the case, citing precedent holding that sexual orientation exceeds the scope of Title VII.[5] On appeal, the United States Court of Appeals for the Seventh Circuit *held* that the dismissal of Hively's claim was proper because the claim was solely for sexual orientation discrimination, which is beyond the scope of Title VII.[6] *Hively v. Ivy*

1. Hively v. Ivy Tech Cmty. Coll., 830 F.3d 698, 699, *reh' g granted,* No. 15-1720 2016 WL 6768628 (7th Cir. Oct. 11, 2016).
2. *Id.*
3. *Id.*
4. *Id.*
5. Hively v. Ivy Tech Cmty. Coll., No. 3:14-CV-1791, 2015 WL 926015, at *1 (N.D. Ind. Mar. 3, 2015).
6. Sitting *en banc*, the 7th Circuit recently reversed their decision, holding that sexual

Tech Community College, 830 F.3d 698 (7th Cir. 2016), *rev'd en banc,* No. 15-1720 2017 WL 1230393 (7th Cir. Apr. 4, 2017).

II. BACKGROUND

Title VII prohibits discrimination based on race, color, religion, sex, and national origin.[7] Despite repeated attempts, Congress has never amended it to include sexual orientation discrimination.[8] The Supreme Court has also never addressed whether Title VII prohibits sexual orientation discrimination, in part because circuit courts had unanimously held that sex, as used in the statute, does not include sexual orientation.[9] This was the state of affairs for years: judges issued brief, summary opinions dismissing sexual orientation claims, often refusing to consider intervening relevant Supreme Court decisions.[10] Then, in 2015, the Equal Employment Opportunity Commission held that sexual orientation discrimination is sex discrimination *per se*.[11] While EEOC decisions do not bind federal courts, the *Baldwin* panel directly criticized

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orientation claims may be brought under Title VII.

7. 42 U.S.C.A. § 2000e-2(a)(1) (2000).

8. Employment Non-Discrimination Act of 1994, H.R. 4636, 103d Cong. (1994); Employment Non-Discrimination Act of 1994, S. 2238, 103d Cong. (1994); Employment Non-Discrimination Act of 1995, S. 932, 104th Cong. (1995); Employment Non-Discrimination Act of 1996, S. 2056, 104th Cong. (1995); Employment Non-Discrimination Act of 1997, H.R. 1858, 105th Cong. (1997); Employment Non-Discrimination Act of 1999, H.R. 2355, 106th Cong. (1999); Employment Non-Discrimination Act of 1999, S. 1276, 106th Cong. (1999); Employment Non-Discrimination Act of 2001, H.R. 2692, 107th Cong. (2001); Protecting Civil Rights for All Americans Act of 2001, S. 19, 107th Cong. (2001); Employment Non-Discrimination Act of 2002, S. 1284, 107th Cong. (2002); Equal Rights and Equal Dignity for Americans Act of 2003, S. 16, 108th Cong. (2003); Employment Non-Discrimination Act of 2003, H.R. 3285, 108th Cong. (2003); Employment Non-Discrimination Act of 2003, S. 1705, 108th Cong. (2003); Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong. (2007); Employment Non-Discrimination Act of 2007, H.R. 3685, 110th Cong. (2007); Employment Non-Discrimination Act of 2009, H.R. 2981, 111th Cong. (2009); Employment Non-Discrimination Act of 2009, S. 1584, 111th Cong. (2009); Employment Non-Discrimination Act of 2011, H.R. 1397, 112th Cong. (2011); Employment Non-Discrimination Act of 2011, S. 811, 112th Cong. (2011); Employment Non-Discrimination Act of 2013, H.R. 1755, 113th Cong. (2013); Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013).

9. *See* Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 762 (6th Cir. 2006); Medina v. Income Support Div., N.M., 413 F. 3d 1131, 1135 (10th Cir. 2005); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 261 (3d Cir. 2001); Simonton v. Runyon, 232 F.3d 33, 36 (3d Cir. 2000); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999); Hopkins v. Balt. Gas & Elec. Co., 77 F.3d 745, 751-52 (4th Cir. 1996); U.S. Dep't. of Hous. & Urban Dev. v. Fed. Labor Relations Auth., 964 F.2d 1, 2 (D.C. Cir. 1992); Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989); Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979).

10. Baldwin v. Foxx, EEOC Doc. No. 0120133080, 2015 WL 4397641, at *8 n.11 (EEOC July 16, 2015).

11. *Id.* at *5-6.

federal courts for failing to re-examine sexual orientation discrimination under Title VII, providing the impetus for courts to revisit the issue.[12]

A. Title VII and Sexual Orientation Discrimination

Title VII was designed to protect named categories of individuals equally from employment discrimination.[13] Unlike the other named categories, sex was added at the last minute by Congressman Howard W. Smith. Accordingly, the legislative history contains little discussion about what constitutes sex discrimination, leaving the definition open to judicial interpretation.[14] Because of this ambiguity, judges have unevenly expanded the sex category since the enactment of the Civil Rights Act.[15] However, courts have consistently refused to include sexual orientation discrimination.[16]

Despite an "emerging consensus"[17] that sexual orientation discrimination is wrong, and recent decisions expanding other constitutional protections for LGBT people, members of this class of plaintiffs usually must try to fit their cases under a narrow interpretation of sex discrimination, which has led to inconsistent and sometimes absurd results across the circuits.[18] For example, to successfully pursue a sexual orientation discrimination claim as a sex discrimination case, plaintiffs were often required to totally elide any hint that the discrimination they faced was the result of their sexual orientation.[19] Under *Price Waterhouse v. Hopkins*, victims of sexual orientation

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12. Hively v. Ivy Tech Cmty. Coll., 830 F.3d 698, *reh'g granted*, 2016 WL 6768628 (7th Cir. Oct. 11, 2016); *see id.* at *8 n.11; J. Levi Stoneking, Baldwin v. Department of Transportation*: Is Sexual Orientation Already Protected by Title VII?*, 25 TUL. J.L. & SEXUALITY 181, 184 (2016).

13. Shawn Clancy, *The Queer Truth: The Need To Update Title VII To Include Sexual Orientation*, 37 J. LEGIS. 119, 120 (2011); *see* 42 U.S.C. § 2000e-2(a)(1) (2006).

14. Clancy, *supra* note 13, at 120.

15. *Id.* at 120.

16. Sources cited *supra* note 8; cases cited *supra* note 9.

17. *Hively*, 830 F.3d at 702 (7th Cir. 2016).

18. Clancy, *supra* note 13, at 128-29; *see* Hamm v. Weyauwega Milk Prods., Inc., 332 F.3d 1058, 1067 (7th Cir. 2003) (Posner, J., concurring) (stating that the law only protects effeminate men from employment discrimination if they are believed to be heterosexual); Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 763 (6th Cir. 2006) (holding that plaintiff did not introduce enough evidence of gender nonconformity to recover for sex discrimination under Title VII); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 264 (3d Cir. 2001) (stating that plaintiff did not adequately allege sex discrimination under Title VII because he failed to claim that he was harassed for gender nonconformity); Johnson v. Hondo, Inc., 125 F.3d 408, 413-14 (7th Cir. 1997) (finding that gay slurs did not sustain gender discrimination claim without evidence of gender nonconformity).

19. Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 AM. U. L. REV. 715, 726 (2014).

discrimination can recover if they successfully allege that they were discriminated against not because of their sexual orientation, but because they failed to conform to gender stereotypes.[20] However, because courts often deny plaintiffs' claims if they sense that sex discrimination claims are really camouflaged sexual orientation claims, *Price Waterhouse* provides only a narrow path to victory. Plaintiffs must carefully focus their complaints only on the aspects of their claims that can be presented as gender stereotyping.[21] However, because sexual orientation discrimination is arguably inextricable from sex discrimination, confusion in the courts with regard to Title VII and sexual orientation discrimination only increased.[22]

A requirement that plaintiffs plead their cases along this narrow interpretation of sex discrimination resulted in some circuits simply rejecting all cases that combined sexual orientation and sex discrimination claims,[23] and other circuits carefully trying to extricate sex discrimination claims from sexual orientation claims.[24] The difficulty in making this distinction causes courts to more frequently find in favor of plaintiffs who present as more stereotypically LGBT than for people who apparently conform to gender stereotypes, a situation that the EEOC addressed in 2015 in *Baldwin v. Foxx*.[25]

B. Baldwin and the Deference Due to the EEOC

In *Baldwin*, the EEOC issued a ruling instructing courts to interpret sexual orientation discrimination as sex discrimination. David Baldwin filed a formal complaint with the EEOC against his employer, the Department of Transportation, after it failed to be promote him to full-time employment as an air traffic controller at the Miami International Airport.[26] Despite unanimity among the federal circuit courts that Title

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20. *Id.* (stating that an employer cannot require that employees adhere to gender stereotypes, and that such discrimination is a cognizable claim for sex discrimination under Title VII).

21. *Id.*

22. *See Hamm*, 332 F.3d at 1065; Prowel v. Wise Bus. Forms, Inc., 579 F.3d. 285, 291 (3d Cir. 2009); Dawson v. Bumble & Bumble, 398 F.3d 211, 217 (2d Cir. 2005); Centola v. Potter, 183 F. Supp. 2d 403, 408 (D. Mass. 2002); Clancy, *supra* note 13, at 129.

23. *See Dawson*, 398 F.3d at 218; *Vickers*, 453 F.3d at 764; Simonton v. Runyon, 232 F.3d 33, 38 (2d Cir. 2000); Spearman v. Ford Motor Co., 231 F.3d 1080, 1085-86 (7th Cir. 2000).

24. *E.g.*, EEOC v. Boh Bros. Const. Co., L.L.C., 731 F.3d 444, 457-59 (5th Cir. 2013).

25. *See Vickers*, 453 F.3d at 763; Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 264 (3d Cir. 2001).

26. Baldwin v. Foxx, EEOC Doc. No. 0120133080, 2015 WL 4397641, at *1 (EEOC July 16, 2015); *Prowel*, 579 F.3d at 292.

VII does not cover sexual orientation discrimination, Baldwin based his claim on his sexual orientation, alleging that he was not promoted because he is gay.[27] The Department of Transportation initially dismissed Baldwin's claim for procedural reasons. When he requested a Final Agency Decision, it held that he did not timely file his claim.[28] However, when Baldwin appealed to the EEOC, it held that he had not only timely filed his complaint, but went several steps further, issuing an opinion that stipulated that sexual orientation discrimination is sex discrimination *per se*, and therefore within the scope of Title VII.[29]

The EEOC gave three reasons that Title VII protects against sexual orientation discrimination.[30] First, sexual orientation discrimination is inextricably linked to sex, and "necessarily entails treating an employee less favorably because of the employee's sex."[31] Second, "sexual orientation discrimination is also sex discrimination because it is associational discrimination on the basis of sex."[32] Since Title VII "on its face treats each of the enumerated categories"—race, color, religion, sex, and national origin—"exactly the same,"[33] associational sex discrimination should also be barred.[34] Finally, sexual orientation discrimination is sex discrimination because it requires gender stereotyping, which the Supreme Court already declared to be sex discrimination.[35]

The EEOC also directly criticized courts, both for trying to disentangle sex discrimination claims from sexual orientation discrimination claims, and for failing to revisit the issue of whether Title VII covers sexual orientation discrimination even in the face of relevant intervening Supreme Court decisions.[36] *Baldwin* specifically criticized the Seventh Circuit for perfunctorily rejecting all Title VII sexual orientation discrimination claims since before *Price Waterhouse*.[37] This rote refusal of all sexual orientation discrimination claims under Title VII

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27. *Baldwin* at *2.
28. *Id.*
29. *Id.* at *10.
30. *Id.* at *5-7.
31. *Id.* at *5 (Discriminating against a man who is married to a man, but not against a woman who is married to a man, meets the "but-for" gender discrimination test.)
32. *Id.* at *6. Associational discrimination—discrimination against a person based on their association with a protected class of persons—on the basis of race has long been held impermissible under Title VII. *See*, *e.g.*, Floyd v. Amite County School Dist., 581 F.3d 244, 249 (5th Cir. 2009); Holcomb v. Iona Coll., 521 F.3d 130, 138 (2d Cir. 2008).
33. Price Waterhouse v. Hopkins, 490 U.S. 228, 243 n.9. (1989).
34. *Id.* at *6-7.
35. *Id.* at *6.
36. *Id.* at *8.
37. *Id.* at *8 n.11.

was particularly indefensible in light of *Oncale v. Sundowner Offshore Services, Inc.*,[38] which held that statutory provisions can be legitimately stretched, even absent congressional action, to cover "reasonably comparable evils."[39]

Despite the emphatic nature of *Baldwin*, the EEOC has limited powers of persuasion over federal courts. EEOC decisions are entitled some deference but, unlike judicial precedents, EEOC decisions are not binding.[40] Where Congress hasn't delegated power to an agency to resolve controversies, courts may apply the *Skidmore* standard to allocate weight to an agency interpretation if that interpretation has "the power to persuade."[41] However, where Congress intended to delegate its authority to an agency, the Court created a more stringent two-step analysis for determining whether a court must defer to that agency.[42] The *Chevron* test requires courts to first adhere to unambiguously stated congressional intent; only if the intent is unclear can a court decide whether the agency's reasoning is persuasive.[43] Additionally, judicial deference is only accorded to agency opinions when "Congress delegated authority to the agency generally to make rules carrying the force of law, and . . . the agency interpretation claiming deference was promulgated in the exercise of that authority."[44] The Seventh Circuit ultimately did not concern itself with these competing tests.

III. COURT'S DECISION

In the noted case, the Seventh Circuit affirmed summary judgment in favor of Hively's employer and held that, absent a congressional amendment or Supreme Court action, only its own precedent was binding.[45] Hively only alleged a claim of sexual orientation discrimination in her complaint.[46] Given that its precedents had consistently held that sexual orientation discrimination is not sex

38. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998).

39. Baldwin v. Foxx, EEOC Doc. No. 0120133080, 2015 WL 4397641, at *9 (EEOC July 16, 2015); *Oncale*, 523 U.S. at 79.

40. Stoneking, *supra* note 12, at 184.

41. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

42. Chevron U.S.A., Inc. v. Nat. Red. Def. Council, 467 U.S. 837, 842 (1984); David Borgen and Jennifer Liu, *Significant Legal Developments in Wage and Hour Law: Deference Standards* (Oct. 19, 2007), http://gbdhlegal.com/wp-content/uploads/article/NELA_Paper.2007.pdf.

43. *Chevron*, 467 U.S. at 843.

44. United States v. Mead Corp., 533 U.S. 218, 226-27 (2001).

45. Hively v. Ivy Tech Cmty. Coll., 830 F.3d 698 (7th Cir. 2016), *rev'd en banc,* No. 15-1720 2017 WL 1230393 (7th Cir. Apr. 4, 2017).

46. *Id.* at 699.

discrimination, the Seventh Circuit held that the trial court properly dismissed Hively's claim.[47] Despite acknowledging both the persuasiveness of the EEOC's reasoning, and that in rare circumstances circuit courts can reverse their precedents absent superseding congressional or Supreme Court action, the court still disregarded *Baldwin* and held that Hively did not state a cognizable Title VII claim.[48]

A. Applying Binding 7th Circuit Precedent

The court began by noting that it is not bound by the EEOC and could have summarily dismissed Hively's claim based on two of its precedents[49] holding that sexual orientation discrimination is not protected by Title VII, consistent with all the other circuits.[50] Then, the court discussed Congress' repeated rejection of amendments that would have added sexual orientation to Title VII's protected categories.[51] Given Congress' failure to act in light of the increasing number of courts opposing sexual orientation discrimination in principle,[52] the court concluded its hands were tied by the text of Title VII, reasoning that Congress' inaction implicitly blessed the circuit courts' narrow interpretation of the statute's sex category.[53] Despite this, *Baldwin* prompted the court to take a more in-depth look at Hively's claim than it would have otherwise.[54]

B. Acknowledging Baldwin's Persuasive but Non-Binding Reasoning

The court first discussed Baldwin's holding, summarizing the three rationales that had led to its holding: sexual orientation discrimination is sex discrimination because it "necessarily entails treating an employee less favorably because of the employee's sex," because it is associational

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47. *Id.*; *see* Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc., 224 F.3d 701, 704 (7th Cir. 2000); Spearman v. Ford Motor Co., 231 F.3d 1080, 1085 (7th Cir. 2000).

48. *Hively*, 830 F.3d at 703, 718.

49. *Id.* at 699-700 (citing *Hamner*, 224 F.3d at 704; *Spearman*, 231 F.3d at 1085).

50. *Id.* at 701.

51. *Id.* at 701; *see* 42 U.S.C.A. § 2000e-2(a)(1) (2000).

52. *Hively*, 830. F.3d at 702 (citing Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 764-65 (6th Cir. 2006); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 265 (3d Cir. 2001); Simonton v. Runyon, 232 F.3d 33, 35 (3d Cir. 2000); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 19g 99); Rene v. MGM Grand Hotel, Inc., 243 F.3d 1206, 1209, *reh'g granted*, 255 F.3d 1069 (9th Cir. 2001); Kay v. Indep. Blue Cross, 142 Fed. Appx. 48, 51 (3d Cir. 2005); Silva v. Sifflard, No. 99-1499, 215 F.3d 1312, 2000 WL 525573, at *1 (1st Cir. Apr. 24, 2000); Christiansen v. Omnicom Grp., Inc., 167 F. Supp. 3d 598, 617 (S.D.N.Y. Mar. 2016); Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1084 (7th Cir. 1984)).

53. *Hively*, 830 F.3d at 702.

54. *Id.*

sex discrimination, and because it necessarily includes gender non-conformity discrimination.[55] However, while the court acknowledged the logic of each of the EEOC's points, it stated that any level of deference it could afford the EEOC would not be enough to overturn its own binding precedent, given its alignment with all of the other circuits, Congress' inaction, and the lack of Supreme Court interference.[56]

Then, the court began its own analysis with gender non-conformity claims, and the inconsistency in the court system resulting from recognizing gender non-conformity but not sexual orientation claims.[57] While *Price Waterhouse* allowed LGBT plaintiffs to allege sex discrimination on the basis that they fail to conform to gender stereotypes, the court emphasized the absurdity and inconsistency that results because these claims generally only succeed when they extract gender non-conformity from sexual orientation discrimination.[58] The court focused on the difficulty of separating the two types of claims, examining a range of circuit and district court opinions all indicating the elusive distinction between sexual orientation and gender non-conformity discrimination.[59] As a result, courts view all gender non-conformity claims brought by LGBT persons with suspicion, leading to the undesirable conclusion that in some cases sexual orientation is the sole determining factor in whether a person can succeed on a gender non-conformity claim.[60]

One problem, the court noted, is that "attempts to identify behaviors that are uniquely attributable to gay men and lesbians [in order to discern whether the discrimination was because of their sexual orientation or their gender non-conformity] often lead to strange discussions of sexual orientation stereotypes."[61] For example, the court discussed a Florida decision holding that because a gay employee had a lisp, and a lisp is a stereotype associated with gay men rather than women, the discrimination the employee faced was not because of sex but because of

55. *Id.* at 703 (quoting Baldwin v. Foxx, EEOC Doc. No. 0120133080, 2015 WL 4397641, at *5-7 (EEOC July 16, 2015)).
56. *Hively*, 830 F.3d at 703-04.
57. *Id.* at 704.
58. *Id.*
59. *Id.* at 705 (citing Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285, 291 (3d Cir. 2009); Dawson v. Bumble & Bumble, 398 F.3d 211, 217 (2d Cir. 2005); Centola v. Potter, 183 F. Supp. 2d 403, 408-09 (D. Mass. 2002); Hamm v. Weyauwega Milk Prods., Inc., 332 F.3d 1058, 1065 (7th Cir. 2003)).
60. *Hively*, 830 F.3d at 707 (citing *Hamm*, 332 F.3d at 1067 (Posner, J. concurring); Estate of D.B. by Briggs v. Thousand Islands Cent. Sch. Dist., 169 F. Supp. 3d 320, 334 (N.D.N.Y. Mar. 2016)).
61. *Id.* at 709.

sexual orientation.[62] Still, the *Hively* court said that, despite the problems with disentangling gender non-conformity from sexual orientation, this was still a more preferable approach than automatic denial of claims brought by LGBT individuals.[63]

Then, the court then addressed the difficulty that apparently gender conforming LGBT plaintiffs have pursuing their claims under the gender non-conformity paradigm.[64] The court discussed a Sixth Circuit case where a plaintiff failed in his gender non-conformity claim because, aside from his sexual orientation, he conformed too well to gender norms,[65] along with other cases from circuit and district courts across the country where plaintiffs could not succeed in their claims because their only apparent acts of gender non-conformity were their preference for partners of the same sex.[66] However, the court noted that in a few instances, courts have allowed claims to go forward when the plaintiff's only act of gender non-conformity was their sexual preference.[67] Ultimately, the court indicated that it and other courts have found attempts to extricate the two types of claims nearly impossible and unsatisfactory.[68]

Even though the court identified the absurdity and inconsistency that results from the current paradigm, and the overlap between sexual orientation and gender non-conformity, it refused to change its course.[69] The court repudiated the Sixth Circuit's practice of simply denying all gender non-conformity claims where they coincided with sexual orientation discrimination.[70] It also acknowledged the rationality of treating all sexual orientation discrimination as gender non-conformity claims, but it still refused to change its stance.[71] It further highlighted the

62. *Id.* (citing Anderson v. Napolitano, No. 09-60744-CIV, 2010 WL 431898, at *6 (S.D. Fla. Feb. 8, 2010).

63. *Hively*, 830 F.3d at 709.

64. *Id.*

65. *Id.* at 710 (citing Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 763 (6th Cir. 2006)).

66. *Hively*, 830 F.3d at 710 (citing Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 264 (3d Cir. 2001); Hamm v. Weyauwega Milk Prods., Inc., 332 F.3d 1058, 1063-64 (7th Cir. 2003); Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc., 224 F.3d 701, 705 (7th Cir. 2000); Johnson v. Hondo, Inc., 125 F.3d 408, 413-14 (7th Cir. 1997); Simonton v. Runyon, 232 F.3d 33, 38 (3d Cir. 2000); Pambianchi v. Ark. Tech Univ., 95 F. Supp. 3d 1101, 1114 (E.D. Ark. 2015)).

67. *Hively*, 830 F.3d at 710-711 (citing Boutillier v. Hartford Pub. Sch., No. 3:13CV1303, 2014 WL 4794527, at *2 (D. Ct. Sept. 25, 2014); Terveer v. Billington, 34 F. Supp. 3d 100, 116 (D.D.C. 2014); Centola v. Potter, 183 F. Supp. 2d 403, 410 (D. Mass. 2002).

68. *Hively*, 830 F.3d at 711 (citing Doe by Doe v. City of Belleville, 119 F.3d 563, 593 (7th Cir. 1997)).

69. *Hively*, 830 F.3d at 711.

70. *Id.*

71. *Id.* at 712 (citing *Vickers*, 453 F.3d at 764).

inconsistency courts create within Title VII doctrine, which is supposed to treat all named categories equally, by banning associational discrimination for race but not sex. However, despite demonstrating the practical unworkability of treating sexual orientation discrimination separately from sex discrimination, despite repeatedly calling the current paradigm absurd and inconsistent, and despite admitting that it could overturn its own precedent,[72] the *Hively* court refused to reverse.

Nevertheless, it did appear favorable to nascent changes in other courts, particularly in district courts that have agreed with *Baldwin* that sexual orientation discrimination is sex discrimination *per se*.[73] Thus, while the *Hively* court applauded the progressiveness of district court decisions, it also emphasized the necessity of a Supreme Court decision to settle the issue.[74]

IV. ANALYSIS

While the noted case once read like a defeat, now it reads like a road map. Sitting *en banc*, the Seventh Circuit used the noted case's reasoning to reverse its holding and circuit precedent, becoming the first circuit to hold that Title VII covers sexual orientation discrimination. Other circuits still maintain that Title VII does not cover sexual orientation discrimination,[75] but the *en banc Hively* decision and resultant circuit split bring hope that the Supreme Court will finally review the issue. When it does, the Court should extend protection not just for the reasons stated in *Baldwin* and *Hively,* but also because the Court itself has created a "paradoxical legal landscape in which a person can be married on Saturday and then fired on Monday for just that act."[76] While Title VII's sex category did not include sexual orientation when it was written, it should now because both society and the law have changed.

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72. *Hively*, 830 F.3d at 718 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854-55 (1992) ("But it is also true that precedent can be overturned when 'the rule has proven to be intolerable simply in defying practical workability . . . whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine . . . or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.'")).

73. *Hively*, 830 F.3d at 712-13 (citing Videckis v. Pepperdine Univ., 100 F. Supp. 3d 927 (C.D. Cal. 2015); Isaacs v. Felder Servs., LLC, 143 F. Supp. 3d 1190, 1193 (M.D. Ala. 2015); Koke v. Baumgardner, No. 15-CV-9673, 2016 WL 93094, at *2 (S.D.N.Y. Jan. 5, 2016)).

74. *Hively*, 830 F.3d at 713.

75. *See* Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1255 (11th Cir. 2017); Anonymous v. Omnicom Grp., Inc., No. 16-748, 2017 WL 1130183 (2d Cir. Mar. 27, 2017) (holding that, despite circuit precedent that Title VII does not include sexual orientation discrimination protection, plaintiff had alleged sufficient facts to allege a gender non-conformity claim).

76. *Hively*, 830 F.3d at 714.

The *en banc* majority's reasoning did not stray far from the noted case, and the majority quoted the prior decision approvingly.[77] The significant difference is that the court sitting *en banc* had the power to reverse precedent where the three judge panel did not.[78] The *en banc* majority also refused to give any weight to Congress' failure to amend Title VII to include sexual orientation discrimination as an indication of legislative intent.[79] Framing the issue as a "pure question of statutory interpretation" that it was qualified and empowered to decide, the court accepted Hively's arguments that sexual orientation discrimination is sex discrimination because it is "but for" discrimination and associational discrimination.[80] It also emphasized that in its view, reversing its precedent was logical and consistent with Supreme Court precedent.[81]

Judge Posner joined the majority *en banc* opinion and wrote a separate concurrence to emphasize that the court was not just engaging in rote statutory interpretation, it was actively and appropriately broadening Title VII's scope.[82] Acknowledging that this kind of "judicial interpretive updating" is a controversial approach, he also stated that it happens "fairly frequently to avoid statutory obsolescence and concomitantly to avoid placing the entire burden of updating old statutes on the legislative branch."[83] In the instance of Title VII, which was written over fifty years ago to protect people from employment discrimination, Posner's arguments are persuasive. As Posner stated, while a statute when enacted may have one meaning, after a long amount of time passes, political and cultural shifts can lead to a necessary re-interpretation.[84]

It is not necessary to follow Posner's reasoning to reach the same conclusion as the rest of the *en banc* majority, but it is a refreshing analysis at a time when originalists increasingly decry judicial activism and advocate for interpreting statutes only according to their original meaning. Posner addresses potential originalist critiques head on and cleverly uses the words of ardent originalist Justice Scalia to make his

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77. Hively v. Ivy Tech Cmty. Coll., No. 15-1720, 2017 WL 1230393, at *2 (7th Cir. Apr. 4, 2017).

78. *Id.*

79. *Id.* at *3.

80. *Id.* at *3, *5-7.

81. *Id.* at *9 ("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 that have endeavored to find and observe that line.").

82. *Id.* at *10 (Posner, J., concurring).

83. *Id.* at *14.

84. *Id.* at *11.

point, comparing the re-interpretation of Title VII to Scalia's vote to protect flag burning as speech under the First Amendment.[85] Just as the Founders did not consider flag burning as speech at the time the First Amendment was written, Title VII's authors did not consider that sex encompassed sexual orientation; thus, original meaning is not persuasive evidence.

Judicial interpretations have also helped other areas of the law evolve, such as by requiring warrants to search homes under the Fourth Amendment, revising the meaning of the Sherman Act, re-interpreting the meaning of "cruel and unusual" punishment, and expanding Second Amendment protections.[86] Posner's point is well-taken: one role of the judiciary is to exercise its judgment; rather than detailing all of the reasons the law is wrong but denying it has the ability to change things, the judiciary has the ability and responsibility to respectfully and carefully interpret statutes in light of social and political change. It is time to update Title VII to protect victims of sexual orientation discrimination The Supreme Court should step in and resolve the inconsistency that it has helped create.

Although *Obergefell v. Hodges*[87] granted same-sex couples the constitutional right to marry, it focused on the stigma resulting from the denial of marriage and omitted any reference to stigma resulting from sexual orientation employment discrimination.[88] The narrowness of that holding hurts plaintiffs like Hively. The Court, by expanding constitutional rights for LGBT people while failing to clarify whether sexual orientation discrimination is covered by Title VII, has created a situation where people can choose to marry the person they love but be freely discriminated against for that choice. Furthermore, attempts to separate sex from sexual orientation lead to absurd and logically untenable results. During oral arguments for *Obergefell*, even conservative Justice John Roberts appeared to recognize that sexual orientation discrimination is sex discrimination, further suggesting that the Court is ready to resolve this issue.[89]

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85. *Id.*
86. *Id.* at *12.
87. Obergefell v. Hodges, 135 S. Ct. 2584, 2696 (2015).
88. *Hively*, 830 F.3d at 717.
89. *See* Transcript of Oral Argument at 62: Obergefell v. Hodges, 135 S. Ct. 2584, 2696 (2015) (No. 14-566), https://www.supremecourt.gov/oral_arguments/argument_transcripts/14-556q1_7l48.pdf ("If Sue loves Joe and Tom loves Joe, Sue can marry him and Tom can't. And the difference is based upon their different sex. Why isn't that a straightforward question of sexual discrimination?").

The Court need not accept Posner's statutory interpretation philosophy to find that Title VII prohibits sexual orientation discrimination. The reasoning in the noted case and in *Baldwin*, accepted by the full Seventh Circuit, provides ample justification to the Court, which has never addressed the topic itself. When Congress added the sex category to Title VII over fifty years ago, it may not have contemplated protecting against sexual orientation discrimination. But today, Title VII should. Given the changes in the social understanding of both sex and sexuality that the justices recognized in *Obergefell*, the Supreme Court should take the opportunity created by *Hively* to formally hold that Title VII protects victims of sexual orientation discrimination.

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