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Taylor E. Muzzy

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FACULTY EDITORS:

Robert Anthony Bruno and Martin H. Malin

PRODUCTION EDITOR:

Sharon Wyatt-Jordan

STUDENT EDITORS:

Jim Connolly, Ning Ding, Naomi B. Frisch, and Jenna Kim

The Illinois Public Employee Relations Report provides current, nonadversarial information to those involved or interested in employer-employee relations in public employment. The authors of bylined articles are responsible for the contents and for the opinions and conclusions expressed. Readers are encouraged to submit comments on the contents, and to contribute information on developments in public agencies or public-sector labor relations. The Illinois Institute of Technology and the University of Illinois at Urbana-Champaign are affirmative action/equal opportunities institutions.

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**LGBT RIGHTS:
GENDER IDENTITY AND SEXUAL ORIENTATION IN THE
WORKPLACE**

BY TAYLOR E. MUZZY

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RECENT DEVELOPMENTS

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**LGBT RIGHTS:
GENDER IDENTITY AND SEXUAL ORIENTATION IN THE WORKPLACE**

**BY
TAYLOR E. MUZZY**

Taylor Muzzy is a partner at the firm Jacobs, Burns, Orlove & Hernandez and is a 2008 graduate of Chicago-Kent College of Law, Illinois Institute of Technology, with a certificate in Labor and Employment Law.¹ He represents: employees in employment discrimination, FLSA, FMLA, and wage payment collection litigation; labor unions in grievance and interest arbitrations, unfair labor practice proceedings, contract negotiations; and federal and state litigation; and public pension funds with respect to compliance issues and federal and state litigation. Thanks to my colleague Charles P. Burns his help in preparing this paper.

I. INTRODUCTION

Discrimination against lesbian, gay, bisexual, and transgender (“LGBT”) individuals remains a significant factor in U.S. workplaces. According to research conducted by the National Opinion Research Center at the University of Chicago, 42 percent of LGBT individuals reported at least one form of employment discrimination because of their sexual orientation, and 27 percent reported experiencing such discrimination in the past five years.[1] Research shows even more striking results with respect to discrimination against transgender individuals: the 2015 U.S. Transgender Survey revealed that 77 percent of respondents who held or applied for a job in the past year reported experiencing some form of discrimination or taking steps to avoid discrimination at work,[2] and 27 percent reported experiencing an adverse job outcome due to their gender identity or expression in the past year.[3] Transgender individuals are three times more likely than the U.S. adult population to be unemployed, more than twice as likely to be living in poverty, and more than three times as likely to have an annual household income below \$10,000.[4] These numbers increase dramatically when race, disabilities, and status as undocumented residents are considered.[5]

Despite these troubling results, 69 percent of respondents who were fired because of their gender identity or expression took no action in response to being fired and only 14 percent filed a formal complaint, either internally or with the EEOC or state or local human rights agency; 15 percent contacted a lawyer; and a paltry 2 percent contacted their union representative.[6] This low rate of protest may be partially attributed to the fact that there are currently no federal laws that explicitly prohibit discrimination on the basis of sexual orientation, gender identity, or gender

¹ The Supreme Court of Illinois does not recognize certifications of specialties in the practice of law and the certificate is not a requirement to practice law in Illinois.

expression. In the absence of action by Congress, courts have expanded protections under Title VII of the Civil Rights Act of 1964, the Fourteenth Amendment's Equal Protection Clause, 42 U.S.C. § 1983, the First Amendment, and the Family and Medical Leave Act.

This article surveys the current scope of LGBT protections for public employees under federal and state law, and examines potential expansions of these protections. Part II examines the extent to which federal and state laws have been successful in bringing sexual orientation, gender identity, and gender expression under the umbrella of currently-existing legislative or constitutional protections. Part III examines attempts to expand protections for LGBT employees and assesses the potential for collective bargaining to provide expanded benefits in the absence of legislative change.

A. Glossary Of Terms

The language used to describe members of the LGBT community is highly variable, and often incorporates factors of class, race, culture, region, education and age.[7] This article uses the following definitions to provide a structure around which to meaningfully and respectfully discuss LGBT issues in the workplace.[8]

- **Gender Dysphoria:** Clinically significant distress caused when a person's assigned birth gender is not the same as the one with which they identify. According to the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM), the term – which replaces Gender Identity Disorder – "is intended to better characterize the experiences of affected children, adolescents, and adults."
- **Gender Expression:** External appearance of one's gender identity, usually expressed through behavior, clothing, haircut or voice, and which may or may not conform to socially defined behaviors and characteristics typically associated with being either masculine or feminine.
- **Gender Identity:** One's innermost concept of self as male, female, a blend of both or neither – how individuals perceive themselves and what they call themselves. One's gender identity can be the same or different from their sex assigned at birth.
- **Gender Transition:** The process by which some people strive to more closely align their internal knowledge of gender with its outward appearance. Some people socially transition, whereby they might begin dressing, using names and pronouns and/or be socially recognized as another gender. Others undergo physical transitions in which they modify their bodies through medical interventions.

- **Sexual Orientation:** An inherent or immutable enduring emotional, romantic or sexual attraction to other people. A person's sexual orientation is distinct from a person's gender identity and gender expression.
- **Transgender:** An umbrella term for people whose gender identity and/or expression is different from those typically associated with the sex assigned to them at birth (e.g., the sex listed on their birth certificate). Being transgender does not imply any specific sexual orientation. Transgender people may identify as straight, gay, lesbian, bisexual, etc.

II. EXPANDING RIGHTS FOR LGBT EMPLOYEES UNDER FEDERAL AND STATE LAW

A. *Title VII of the Civil Rights Act of 1964*

Under Title VII of the Civil Rights Act of 1964, it is an unlawful employment practice for an employer “to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”[9] Title VII applies to employers with 15 or more employees, including state and local governments, employment agencies, labor organizations, and the federal government.[10] While Title VII does not specifically address sexual orientation, gender identity, or gender expression, courts have interpreted Title VII’s prohibition on sex discrimination to protect against discrimination based on sex stereotypes, and have further expanded that protected classification to cover sexual orientation and gender identity discrimination.

The Supreme Court laid the foundation for LGBT protections under Title VII in two key decisions, *Price Waterhouse v. Hopkins*[11] and *Oncale v. Sundowner Offshore Services*.[12] In *Price Waterhouse*, an accounting firm denied Ann Hopkins a promotion because other partners at the firm felt that she did not act as a woman should act and told her that she needed to “walk more femininely, talk more femininely, [and] dress more femininely” in order to secure a partnership.[13] The Supreme Court held that Title VII’s “because of sex” provision prohibits the “entire spectrum of disparate treatment of men and women resulting from *sex stereotypes*.”[14] As the Court explained, “an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”[15] Nearly a decade later, in *Oncale*, the Supreme Court held that same-sex harassment can be sex discrimination under Title VII.[16] The Court noted that, while same-sex harassment was “assuredly not the principal evil Congress was concerned with when it enacted Title VII, the prohibition on sexual harassment “must extend to sexual harassment of any kind that meets the statutory requirements.”[17]

1. Federal Court Decisions Finding Coverage for Sexual Orientation Discrimination

In response to the *Price Waterhouse* and *Oncale* decisions, many federal courts have found that discrimination on the basis of sexual orientation constitutes a form of discrimination based on sex. Courts are divided, however, as to whether sexual orientation discrimination constitutes sex stereotype discrimination *per se* or whether discrimination is actionable only when it is based on sex stereotyping irrespective of an employee's sexual orientation. For example, in *Heller v. Columbia Edgewater Country Club*, a Title VII sex harassment case brought by a lesbian employee who was subjected to negative comments about her sex life, the court reasoned that the belief that men or women should only be attracted to or date persons of the opposite sex constitutes a gender stereotype.[18] Similarly, in *Terveer v. Billington*, an employee alleged that his employer violated Title VII by denying him promotions and creating a hostile work environment because he was "a homosexual male whose sexual orientation is not consistent with the Defendant's perception of acceptable gender roles." [19] The court held that an employee's claim that his supervisor discriminated against him because he is married to a man and took his husband's last name "is a claim of discrimination because of sex." [20] In both *Heller* and *Terveer*, the courts found that because sexual orientation discrimination is necessarily premised on the gender of the employee and the employee's preferred romantic partners, sexual orientation discrimination is *per se* discrimination based on the sex.

In contrast, other courts have attempted to distinguish between discrimination targeting sexual orientation and discrimination based on nonconformity with sexual stereotypes. These courts hold that Title VII's prohibition on discrimination based on nonconformity with gender stereotypes "should not be used to 'bootstrap protection for sexual orientation into Title VII.'" [21] Thus, while discrimination on the basis of actual or perceived sexual orientation may be actionable, it must be connected directly to gender stereotypes. For example, in *EEOC v. Boh Brothers Construction Co.*, the heterosexual male plaintiff endured abuse in the form of sexual slurs, acts, and sexual-orientation based epithets from his heterosexual male supervisor. [22] The court held that the conduct was actionable, finding that although

[i]t may be difficult judicially to assess whether and how harassment between two members of the same sex, neither of whom is homosexual, is 'because of' the victim's sex... cruelty and irrationality typify harassment, prejudice, stereotyping and hostility generally ... and we echo the Supreme Court's confidence that "[c]ommon sense, and an appropriate sensitivity to social context will enable courts and juries to distinguish between simple

teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.[23]

A New York District Court recently explained this distinction in *Christiansen v. Omnicom, Group, Inc.*, holding that allegations of harassment that included lewd pictures of the plaintiff drawn on the office white board, remarks about the plaintiff's sexuality, and other derogatory conduct, demonstrated "sexual-orientation-based discriminatory animus." [24] However, the court found that the plaintiff failed to prove he was harassed because he was effeminate or otherwise failed to conform to gender stereotypes and that therefore it was bound to apply Second Circuit precedent disallowing Title VII sex discrimination claims based on sexual orientation.[25] Nevertheless, the court included an extensive critique of that precedent and others, observing, "In light of the EEOC's recent decision on Title VII's scope, and the demonstrated impracticality of considering sexual orientation discrimination as categorically different from sexual stereotyping, one might reasonably ask - and, lest there be any doubt, this Court is asking - whether that line should be erased." [26]

2. Federal Court Decisions Finding Coverage for Transgender Discrimination

Many federal courts have also applied Title VII's prohibition on sex stereotyping to prohibit discrimination on the basis of gender identity and expression.[27] As with sexual orientation, courts are divided as to whether discrimination on the basis of gender identity or expression constitutes *per se* sex discrimination. For some courts, the application of the Supreme Court's Title VII sex discrimination precedent to gender identity and expression is more straightforward than in the case of sexual orientation. For example, in *Finkle v. Howard County*, the court held an employee's allegations she was discriminated against "because of her obvious transgendered status" raised a cognizable claim of sex discrimination because: "it would seem that any discrimination against transsexuals (as transsexuals) - individuals who, by definition, do not conform to gender stereotypes - is proscribed by Title VII's proscription of discrimination on the basis of sex as interpreted by *Price Waterhouse*." [28] Likewise, in *Fabian v. Hospital of Central Connecticut*, the court held that "[e]mployment discrimination on the basis of transgender identity is employment discrimination 'because of sex' and constitutes a violation of Title VII." [29] In *Smith v. City of Salem*, the Sixth Circuit Court of Appeals held that Title VII prohibits discrimination against transgender individuals based on gender stereotyping, stating:

After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex. It follows that employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex.[30]

The court rejected the argument that applying a label such as “transsexual,” “homosexual,” or “transvestite” to gender non-conforming behavior removes it from the protection of Title VII, explaining “discrimination against a plaintiff who is a transsexual - and therefore fails to act and/or identify with his or her gender - is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman.”[31]

Other courts have refused to find that discrimination on the basis of gender identity or expression is *per se* discrimination on the basis of sex stereotypes, but nevertheless endorsed application of Title VII to discrimination based on gender identity and expression. For example, in *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, the court stated, “[I]f the EEOC's complaint had alleged that the Funeral Home fired Stephens based solely upon Stephens's status as a transgender person, then this Court would agree with the Funeral Home that the EEOC's complaint fails to state a claim under Title VII.”[32] However, the court denied the employer’s motion to dismiss, noting that any person – without regard to labels such as transgender – can assert a sex-stereotyping gender-discrimination claim ... if that person’s failure to conform to sex stereotypes was the driving force behind the termination.”[33]

3. EEOC Expands and Prosecutes LGBT Protections Under Title VII

In 2012, the EEOC issued a decision overturning nearly 40 years of EEOC precedent that had rejected sex discrimination claims on the basis of gender identity. In *Macy v. Department of Justice*, the EEOC held that discrimination on the basis of “gender identity, change of sex, and/or transgender status are [*per se*] cognizable under Title VII’s sex discrimination prohibition” and that “[a]lthough most courts have found protection for transgender people under Title VII under a theory of gender stereotyping, evidence of gender stereotyping is simply one means of proving sex discrimination.”[34] The EEOC followed *Macy* with *Jameson v. U.S. Postal Service*, where it held that the “[i]ntentional misuse of the [transgender] employee’s new name and pronoun may cause harm to the employee, and may constitute sex discrimination.”[35] In *Complainant v. Department of Veteran Affairs*, the EEOC further held that an employer’s refusal to allow a transgender employee permission to change his username to his legally changed name states a valid Title VII claim.[36] Finally, in *Lusardi v. Department of the Army*, the EEOC

held that the employer's decision to prevent a transgender woman's access to the women's restroom constitutes "direct evidence of discrimination on the basis of sex" and further held that "supervisory or co-worker confusion or anxiety cannot justify discriminatory terms and conditions of employment." [37]

In the 2015 decision *Baldwin v. Department of Transportation*, the EEOC also reversed its longstanding precedent and held that "sexual orientation is inherently a 'sex-based consideration,' and an allegation of discrimination based on sexual orientation is necessarily and allegation of sex discrimination under Title VII." [38] Since *Baldwin*, the EEOC has reported a 28 percent increase in the number of LGBT charges filed in 2015 [39] and has prosecuted several discrimination claims based on sexual orientation and gender identity, resulting in settlement agreements and consent decrees. [40]

4. Seventh Circuit Decisions

Until recently, the Seventh Circuit Court of Appeals did not favor finding that Title VII's prohibition on sex discrimination protects the LGBT community. [41] In *Ulane v. Eastern Airlines, Inc.*, [42] *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, [43] *Spearman v. Ford Motor Co.*, [44] and *Hamm v. Weyauwega Milk Products, Inc.*, [45] the Seventh Circuit held that there is a distinction between sex and sexuality under Title VII and that the statute only prohibits discrimination because of sex, meaning "biological male or biological female" and not sexual orientation.

However, in 2014, in *Muhammad v. Caterpillar Inc.*, the Seventh Circuit appeared to signal a softening of its position regarding whether sexual orientation discrimination claims are cognizable under Title VII. [46] In *Muhammad*, the plaintiff alleged that hostile work environment harassment relating to his perceived sexual orientation was sex-based harassment in violation of Title VII. Although the Seventh Circuit affirmed the district court's grant of summary judgment to the employer, finding that the employer took prompt remedial action upon being notified of the harassment, the court amended its original decision after the plaintiff's petition for rehearing and eliminated language that had stated that sexual orientation-related discrimination claims are not actionable under Title VII.

In 2017, in *Hively v. Ivy Tech Community College*, the Seventh Circuit sitting *en banc* reversed its prior case law and held "that 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." [47] Hively was an open lesbian and a part-time adjunct professor who alleged that Ivy Tech refused to interview her for open full-time positions and subsequently failed to renew her

contract, “based on my sexual orientation.”[48] The district court dismissed the case on the ground that the Title VII does not apply to claims of sexual orientation discrimination.[49]

In an exhaustive decision involving an extensive discussion of Title VII case law, a Seventh Circuit panel affirmed, noting that “Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation ... even in the face of an abundance of judicial opinions recognizing an emerging consensus that sexual orientation discrimination in the workplace can no longer be tolerated.”[50] The Court concluded that that, while “[i]t seems unlikely that our society can continue to condone a legal structure in which employees can be fired, harassed, demeaned, singled out for undesirable tasks, paid lower wages, demoted, passed over for promotions, and otherwise discriminated against solely based on who they date, love, or marry”, “[u]ntil the writing comes in the form of a Supreme Court opinion or new legislation, we must adhere to the writing of our prior precedent.”[51]

On October 11, 2016, the Seventh Circuit granted the plaintiff’s petition for a rehearing *en banc*,[52] and, on March 30, 2017, a majority of the court reversed the panel’s decision. First, the court reasoned that “the fact that the enacting Congress may not have anticipated a particular application of the law cannot stand in the way of the provisions of the law that are on the books.”[53] In a concurring opinion, Judge Posner agreed that, because Title VII was more than half a century old, the majority properly engaged in “judicial interpretive updating”, which is necessary when “a lengthy interval between enactment and (re)interpretation” occurs such the court must engage in “interpretation that will update it to the present.”[54]

Second, the court applied the “comparative method,”[55] and found that Hively had pleaded sex discrimination because “if she had been a man married to a woman (or living with a woman, or dating a woman) and everything else had stayed the same, Ivy Tech would not have refused to promote her and would not have fired her.”[56] The court further noted,, “Viewed through the lens of the gender nonconformity line of cases, Hively represents the ultimate case of failure to conform to the female stereotype (at least as understood in a place such as modern America, which views heterosexuality as the norm and other forms of sexuality as exceptional): she is not heterosexual.”[57] The court eviscerated the requirement that LGBT plaintiffs characterize their claims as being based on gender stereotypes, stating that while “Our panel described the line between a gender nonconformity claim and one based on sexual orientation as gossamer-thin; we conclude that it does not exist at all.”[58]

Finally, the court held that an action based on sexual orientation is sex discrimination under the associational theory, which holds that a person who is discriminated against because of her association with someone else is actually disadvantaged because of her own traits. The court cited *Loving v. Virginia*[59] as recognizing that “distinctions drawn according to race” are “unjustifiable and racially discriminatory.”[60] The court held that if, instead of race, it was “to change the sex of one partner in a lesbian relationship, the outcome would be different”, revealing “that the discrimination rests on distinctions drawn according to sex.”[61] The majority concluded that “It would require considerable calisthenics to remove the ‘sex’ from ‘sexual orientation’ and that “the common-sense reality [is] that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex.”[62]

5. Equality Act[63]

In July 2015, Rep. Cicilline (D-RI) introduced H.R. 3185, the Equality Act, to amend Title VII to specifically include sexual orientation and gender identity as protected classifications. The Findings section of the Equality Act specifically notes that LGBT employees “have been subjected to a history and pattern of persistent, widespread, and pervasive discrimination on the bases of sexual orientation and gender identity by private sector employers and Federal, State, and local government employers,” and that “[t]he absence of explicit prohibitions of discrimination on the basis of sexual orientation and gender identity under Federal statutory law, as well as some conflicting case law on how broadly sex discrimination provisions apply, has created uncertainty for employers and other entities covered by these laws.”[64] The Equality Act was referred to the House Subcommittee on the Constitution and Civil Justice.

B. The Equal Protection Clause and Section 1983

The Equal Protection Clause of the Fourteenth Amendment provides that “[n]o state shall make or enforce any law which shall ... deny to any person within its jurisdiction the equal protection of the laws.”[65] Section 1983 of the Civil Rights Act of 1871 creates a private right of action to remedy deprivations of federal rights (including the rights guaranteed by the Equal Protection Clause) by those acting under the color of state law.[66]

There are three levels of scrutiny that courts apply to Equal Protection claims: (1) strict scrutiny, which requires a regulation to be narrowly tailored to a compelling governmental interest; (2) intermediate scrutiny, which requires a regulation to be substantially related to an important governmental interest; and (3) rational basis review, which requires a regulation to be rationally related to a legitimate

governmental interest.[67] While courts apply strict scrutiny to decisions based on race and intermediate scrutiny to decisions based on gender, courts generally apply the lowest-level, rational basis review to decisions based on sexual orientation.[68]

Courts have applied rational basis review to employment discrimination claims by LGBT public employees and concluded that discrimination and harassment on the basis of sexual orientation may violate the Equal Protection Clause.[69] In *Quinn v. Nassau County Police Department*, the plaintiff was a gay police officer who alleged he was subjected to a vicious campaign of harassment because of his sexual orientation.[70] The district court found that “the United States Constitution and the provisions of 42 U.S.C. § 1983, combined with logic, common sense and fairness dictate the answer: individuals have a constitutional right under the Equal Protection Clause to be free from sexual orientation discrimination causing a hostile work environment in public employment.”[71] In *Lovell v. Comsewogue School District*, the plaintiff was a 27-year art teacher.[72] Students filed a sexual harassment complaint against the plaintiff with the principal, but the principal failed to follow district policy by failing to inform the plaintiff about the complaint and by failing to allow the plaintiff to present facts during the investigation into the complaint.[73] The students then began to harass the plaintiff, using slurs based on her sexual orientation, and the principal took no remedial action against the students.[74] The district court denied the school district’s motion to dismiss, finding that “harassment based on sexual orientation is a basis for an equal protection claim under Section 1983.”[75]

The Equal Protection Clause also protects public employees from discrimination on the basis of gender identity and expression. In *Glenn v. Brumby*, the plaintiff was transitioning from male to female under the supervision of health care providers.[76] While still presenting as a man, the plaintiff was hired as an editor by the Georgia General Assembly’s Office of Legislative Counsel.[77] The plaintiff subsequently informed her direct supervisor that she was transitioning to becoming a woman and started coming to work presenting as a woman.[78] The manager terminated the plaintiff because “[her] intended gender transition was inappropriate, that it would be disruptive, that some people would view it as a moral issue, and that it would make [her] coworkers uncomfortable.”[79] The plaintiff brought a Section 1983 claim alleging unlawful discrimination in violation of the Equal Protection Clause.[80] The Eleventh Circuit Court of Appeals applied intermediate scrutiny and affirmed the district court’s granting of summary judgment to the plaintiff, concluding “that a government agent violates the Equal Protection Clause’s prohibition on sex-based discrimination when he or she fires a transgender or transsexual employee because of his or her gender non-conformity.”[81]

C. *First Amendment*

Public employees have a First Amendment right to speak about sexual orientation and to “come out” publicly.[82] In *Van Ooteghem v. Gray*,[83] the plaintiff was hired by the County Treasurer as Cashier Assistant County Treasurer and later promoted to Assistant County Treasurer. He was a non-tenured employee, “performed his job in a professional manner” and was “recognized to be both hard-working and quite brilliant.”[84] Seven months after being hired, the plaintiff informed the County Treasurer that he was gay and that he intended to address the Commissioners Court on the subject of gay civil rights.[85] The County Treasurer restricted the plaintiff’s work hours to prevent him from addressing the Commissioners Court and later terminated his employment.[86] The Fifth Circuit Court of Appeals affirmed the district court’s finding that the plaintiff’s First Amendment Right to speak about gay civil rights was violated.[87]

In *Weaver v. Nebo School District*,[88] the plaintiff was a teacher with 19 years of service and volleyball coach with an excellent reputation and good to excellent evaluations. While recruiting players for a summer volleyball camp, she was asked by one of the players if she was gay and the plaintiff responded truthfully, “yes.”[89] The team member said she would not play on the team and her parents informed the school district administrators that the plaintiff was gay.[90] The administrators decided that the plaintiff would not be the assigned volleyball coach and, in a letter, advised the plaintiff that “[y]ou are not to make any comments, announcements or statements to students, staff members, or parents of students regarding your homosexual orientation or lifestyle.”[91] The plaintiff filed a First Amendment and Section 1983 action challenging the restraints on her speech and her removal as a volleyball coach.[92] Applying the two-part test from *Pickering v. Board of Education of Township High School District 205*,[93] the district court granted summary judgment to the plaintiff on all her claims and determined that, although sexual orientation is “in essence” a private matter, the ongoing public debate regarding the rights of homosexuals made it a matter of public concern, and that the school system interests did not outweigh the plaintiff’s interests in expressing her sexual orientation outside the classroom.[94]

Weaver was decided prior to the Supreme Court’s decision in *Garcetti v. Ceballos*, which held that the First Amendment does not protect public employees’ statements made pursuant to their official duties.[95] Because the teacher expressed her sexual orientation while attempting to recruit students for the school’s volleyball team, her speech could be considered to have occurred pursuant to her duties as a teacher and coach. In *Garcetti*, however, there was no dispute the speech in question was made pursuant to the employee’s official duties and the

Court noted it had “no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate.”[96] The Court further rejected “the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions.”[97] Accordingly, any First Amendment analysis under *Weaver* should be coupled with *Garcetti* and its progeny.

In *Scarborough v. Morgan County Board of Education*, the plaintiff was a former school superintendent who was asked to say a prayer at a convention breakfast hosted by a church with a predominantly gay congregation.[98] Although the plaintiff declined due to a scheduling conflict, a newspaper incorrectly reported that he would be a speaker at the convention.[99] The plaintiff was subsequently denied the position of director of schools.[100] The plaintiff sued for violations of his rights to freedom of speech and equal protection.[101] Reversing the district court's granting of summary judgment to the employer, the Sixth Circuit Court of Appeals held that the plaintiff's intended “speech concerned religion and perhaps homosexuality, and was to occur on his own free time ... and there is precedent for recognizing that ‘certain private remarks ... touch on matters of public concern.’”[102] The Sixth Circuit applied rational basis scrutiny and held that “[t]he desire to effectuate one's animus against homosexuals can never be a legitimate governmental purpose.”[103]

D. Family and Medical Leave Act (FMLA)

The FMLA entitles public employees, who must have at least 1,250 hours of service during the previous 12-month period,[104] to 12 weeks of unpaid leave to care for their own serious health condition or the serious health condition of the employee's spouse, son, daughter, or parent.[105] The FMLA's definition of “spouse” includes same-sex marriage spouses.[106] In *United States v. Windsor*,[107] the U.S. Supreme Court struck down as unconstitutional Section 3 of the Defense of Marriage Act (DOMA), which defined the term “marriage” under federal law as “only a legal union between one man and one woman as husband and wife,” and the word “spouse” as “only a person of the opposite sex who is a husband or wife.” The U.S. Department of Labor issued a Final Rule, effective March 27, 2015, defining “spouse” under the FMLA to guarantee employees in same-sex marriages full FMLA rights, regardless of whether their marriage is recognized in the state in which they reside, provided that the marriage is “recognized under state law for purposes of marriage in the State in which the marriage was entered into or, in the case of a marriage entered into outside of any State, if the marriage is valid in the place where entered into and could have been entered into in at least one

State.”[108] In *Obergefell v. Hodges*,[109] the U.S. Supreme Court struck down state statutes limiting marriage to heterosexual couples removing any doubt that employment-related benefits tied to marriage must apply equally to same-sex spouses.

E. Americans with Disabilities Act (ADA) of 1990[110]

The ADA prohibits discrimination against public employees on the basis of a “disability,” which means: a physical or mental impairment that substantially limits one or more major life activities; a record of such impairment, or being regarded as having such impairment.[111] However, despite recent enactment of the ADA Amendments Act of 2008 (“ADAAA”), the purpose of which was to make it easier for people with disabilities to obtain protection under the ADA,[112] the ADA specifically provides that the definition of “disability” does not include “[h]omosexuality and bisexuality” or “[t]ransvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders.”[113]

In the 2014 lawsuit *Blatt v. Cabela’s Retail, Inc.*, transgender woman Kate Lynn Blatt, a stocker at Cabela’s who was prohibited from using the women’s restroom and was forced to wear a nametag depicting her name as “James,” even though she had a legal name change to her female name, claimed that the ADA’s exclusion of gender identity disorders from the definition of disability violates the Equal Protection Clause of the Fifth Amendment.[114] The case is still pending.

F. Health Care Taxability and Non-Discrimination

The cost of gender transition medical expenses may be tax deductible. In *O’Donnabhain v. Commissioner of Internal Revenue*, the U.S. Tax Court held that a transgender woman who was diagnosed with gender identity disorder was permitted to deduct the cost of her gender transition therapy and surgeries, including transportation and other related expenses, as a medical expenses deduction under the Internal Revenue Code.[115] The Tax Court held that gender identity disorder was a “disease” within the meaning of the Internal Revenue Code and that the therapy and procedures were for the treatment of the disease and not cosmetic surgery (except for her breast augmentation surgery, which the Court found was cosmetic surgery).[116]

Section 1557 of the Affordable Care Act prohibits discrimination in health care participation and benefits on the basis of race, color, national origin, sex, age or disability, as defined in Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and the Age Discrimination in Employment Act

of 1975, and Section 504 of the Rehabilitation Act of 1973.[117] Effective July 18, 2016, the U.S. Department of Health & Human Services (HHS), Office for Civil Rights (“OCR”), which enforces the non-discrimination provision, issued a final rule that includes gender identity in the definition of “sex” as a protected classification.[118]

The final rule mandates equal access to health programs and that individuals be treated “consistent with their gender identity,”[119] and prohibits denying or limiting coverage, or imposing additional cost sharing or other limitations or restrictions, “for any health services that are ordinarily or exclusively available to individuals of one sex, or a transgender individual based on the fact that an individual’s sex assigned at birth, gender identity, or gender otherwise recorded is different from the one to which such health services are ordinarily or exclusively available.”[120]

Although the final rule does not specifically include sexual orientation in the definition of sex, the OCR concluded that “Section 1557’s prohibition of discrimination on the basis of sex includes, at a minimum, sex discrimination related to an individual’s sexual orientation where the evidence establishes that the discrimination is based on gender stereotypes.”[121] OCR further noted that it “has decided not to resolve in this rule whether discrimination on the basis of an individual’s sexual orientation status alone is a form of sex discrimination under Section 1557” and that it “will enforce Section 1557 in light of those developments [in case law] and will consider issuing further guidance on this subject as appropriate.”[122]

In *Franciscan Alliance, Inc. v. Burwell*, several states and religiously affiliated health care organizations sued HHS claiming that the final rule violates, *inter alia*, the Administrative Procedures Act by expanding the definition of “sex” to include “gender identity.”[123] On December 31, 2016, the U.S. District Court for the Northern District of Texas issued a nationwide preliminary injunction prohibiting HHS from enforcing Section 1557’s prohibition against discrimination on the basis of gender identity.[124]

G. LGBT Protections Under Illinois Law

The Illinois Human Rights Act (“IHRA”) protects public employees from employment discrimination on the basis of “sexual orientation,” which “means actual or perceived heterosexuality, homosexuality, bisexuality, or gender-related identity, whether or not traditionally associated with the person’s designated sex at birth.”[125] Although the IHRA does not provide for punitive damages, it does provide for “make whole” relief, including actual damages, interest, back pay, front

pay, and emotional distress.[126] The IHRA established two administrative agencies: the Illinois Department of Human Rights (“Department”) and the Illinois Human Rights Commission (“Commission”). The Department is responsible for issuing, receiving, investigating, conciliating, and dismissing charges of discrimination and filing complaints of discrimination.[127] The Commission is responsible for hearing and deciding complaints, issuing decisions, and approving settlements proposed by the Department.[128]

In *Sommerville v. Hobby Lobby Stores*, the Commission recently affirmed a decision of one of its Administrative Law Judges finding that an employer discriminated against a transgender employee.[129] On February 28, 2013, Meggan Sommerville filed two charges of discrimination against Hobby Lobby Stores, alleging discrimination in employment and public accommodation on the basis of sexual orientation discrimination related to her gender identity. Hobby Lobby’s restrooms are designated by gender and are used by both employees and the public. Hobby Lobby hired Sommerville in 1998 and, in 2007, Sommerville began a transition from male to female that included medical treatment, having her name legally changed, and obtaining a driver’s license identifying her as female and a social security card with her female name. In 2010, Sommerville informed the store manager that she intended to use the women’s restroom. Hobby Lobby refused to let her use the women’s restroom and disciplined her for doing so, unless she received anatomical surgery. Although Hobby Lobby built a “unisex” restroom for her to use, Sommerville used the women’s restroom at a nearby business.[130]

On May 15, 2015, a Commission Administrative Law Judge (“ALJ”) issued a recommended liability determination and found that Hobby Lobby violated the IHRA because its decision forbidding Sommerville access to and use of its women’s restroom was motivated by her gender-related identity. The ALJ held that the IHRA does not make any anatomical surgery a prerequisite to obtain gender-related identity protection.[131] The ALJ further found that “a co-worker’s discomfort cannot justify discriminatory terms and conditions of employment” and that the “prejudices of co-workers are part of what the Act was meant to prevent.”[132] Finally, the ALJ found that Hobby Lobby’s “segregation of [Sommerville] to a ‘unisex’ restroom is an adverse act and subjects her to different terms and conditions than similarly situated non-transgender employees.”[133]

On February 2, 2016, the ALJ issued a recommended order and decision on damages ordering:

- Hobby Lobby to cease and desist from gender identity discrimination and allow Sommerville access to its women's restroom.
- All Hobby Lobby's managers in Illinois to attend sensitivity training on gender identity discrimination.
- Any of Hobby Lobby's public contracts to be terminated and Hobby Lobby to be barred from participating in any public contract for three years.
- Hobby Lobby to pay Sommerville \$298 in costs and out of pocket expenses, \$220,000 for emotional distress, and \$97,000 in attorney's fees.[134]

On November 2, 2016,[135] the Commission adopted the ALJ's recommended determination with respect to liability. As to damages, the Commission declined to adopt the ALJ's recommendation that Hobby Lobby's managers attend statewide sensitivity training and that Hobby Lobby be barred from participating in public contracts for three years.[136] The Commission remanded the emotional distress damages awarded to the ALJ for further articulation of the evidentiary basis for the amount.[137] The Commission adopted all remaining aspects of the ALJ's decision and has yet to issue a formal decision.[138]

H. LGBT Protections Under Other State Statutes And Executive Orders

Thirty-one other states and the District of Columbia offer various protections for LGBT public employees by way of state statutes and executive orders. Legislation protects public employees on the basis of both sexual orientation and gender identity in the following states and the District of Columbia: California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Utah, Vermont, and Washington.[139] New Hampshire and Wisconsin have state statutes that protect public employees from employment discrimination on the basis of sexual orientation, but not gender identity.[140]

Executive orders protect state employees against discrimination on the basis of both sexual orientation and gender identity in the following states: Indiana, Kentucky, Michigan, Montana, Pennsylvania, and Virginia.[141] Executive orders protect state employees against discrimination on the basis of sexual orientation, but not gender identity, in the following states: Alaska, Arizona, Missouri, and Ohio.[142] State employees covered by these executive orders should beware that some orders are mere statements of policy and may not provide for any claims to be filed or relief to be obtained.

Three states – Arkansas, North Carolina, and Tennessee – have laws that actively prevent the passage or enforcement of nondiscrimination laws on the basis of sexual orientation or gender identity.[143]

III. COLLECTIVE BARGAINING: A RIPE OPPORTUNITY TO EFFECT CHANGE

Collective bargaining presents an opportunity to effect positive change where federal, state, and local governments have been unable to do so, as the parties can bargain for LGBT non-discrimination protections for public employees. Non-discrimination clauses are likely mandatory subjects of bargaining under the National Labor Relations Act.[144] Non-discrimination provisions protect employees from discriminatory employer adverse actions that affect their terms and conditions of employment, and from unions that discriminate in representing employees. Bargained-for non-discrimination provisions also lay the groundwork for employers and unions to push back against state and local laws that would discriminate against employees because such discrimination would violate the collective bargaining agreement.

The following is sample LGBT-inclusive non-discrimination language:

There shall be no discrimination against any employee with respect to compensation, terms, conditions privileges of or opportunities for employment because of race, color, religion, sex, (including pregnancy), gender, gender identity, gender expression, veteran status, medical condition (including genetic characteristics), sexual orientation, age, national origin, disability as defined in the Americans with Disabilities Act, linguistic characteristics (such as accent or limited English proficiency, where not substantially job-related), marital status or any other basis prohibited by law.[145]

Although not a public employment relationship, professional and NCAA sports provide an example as to how collective bargaining can effect positive change for the LGBT community. The Major League Baseball[146], National Football League[147], National Basketball Association[148], Major League Soccer[149], and National Hockey League[150] collective bargaining agreements all prohibit discrimination on the basis of sexual orientation, although none of these collective bargaining agreements prohibit discrimination on the basis of gender identity or gender expression. In 2016, the NBA relocated the 2017 All-Star Game from Charlotte as a result of North Carolina House Bill 2, which was signed into law on March 23, 2016, and mandated that multiple occupancy restrooms and changing facilities be used only by individuals based on their biological sex[151], stating that

the All-Star Game “is intended to be a global celebration of basketball, our league, and the values for which we stand, and ... we do not believe we can successfully host our All-Star festivities in Charlotte in the climate created by HB2.”[152]

While it is unsettled whether National Collegiate Athletic Association players who receive grant-in-aid scholarships are statutory employees under the National Labor Relations Act,[153] the NCAA has taken steps outside of the collective bargaining process to effect positive change for the LGBT community. In April 2016, the NCAA Board of Directors approved an anti-discrimination process for bidding on all NCAA events, from the Final Four to educational conferences, stating that it “considers the promotion of inclusiveness in ... sexual orientation and gender identity as a vital element to protecting the well-being of student-athletes, promoting diversity in hiring practices and creating a culture of fairness.”[154] On September 12, 2016, the NCAA announced that it was relocating all seven previously awarded championship events from North Carolina during the 2016-2017 academic year “because of the cumulative actions taken by the state concerning civil rights protections.”[155] On March 20, 2017, in response to the pressure from the NBA and the NCAA, North Carolina repealed House Bill 2 and the mandate that multiple occupancy restrooms and changing facilities be used only by individuals based on their biological sex; however, North Carolina still prohibits local governments and the University of North Carolina, from regulating access to multiple occupancy restrooms or changing facilities until December 1, 2020.[156]

IV. CONCLUSION

Despite alarming rates of discrimination, unemployment, and poverty, no federal laws explicitly prohibit discrimination on the basis of sexual orientation or gender identity. While various courts and the EEOC have interpreted Title VII’s prohibition on sex discrimination to cover LGBT discrimination, many of those decisions do not cover such discrimination *per se*, but rather, cover it only to the extent discrimination against LGBT employees can be made to fit the framework of gender stereotype discrimination. In some circumstances, such as when transgender employees experience discrimination because they do not conform with stereotypes associated with their gender assigned at birth, the gender stereotype framework may clearly apply. In other cases, the gender stereotype paradigm cannot be made to fit discrimination against LGBT employees, leaving them without a remedy. Until this gap is filled by either the U.S. Supreme Court or legislative amendment such as the Equality Act, protections will not be complete under federal law for LGBT employees. While public employees can look to a patchwork of other federal laws and state laws and executive orders for protection,

those protections are often insufficient and incomplete. Collective bargaining presents an opportunity for labor unions and public employers to fill these gaps and bargain for protections for LGBT employees that do not exist under federal and state law.

[1] Brad Sears & Christy Mallory, *Employment Discrimination Against LGBT People: Existence and Impact*, in GENDER IDENTITY AND SEXUAL ORIENTATION DISCRIMINATION IN THE WORKPLACE: A PRACTICAL GUIDE ch. 40, at 40-3 (Christine Michelle Duffy ed. 3024) (reporting on 2008 General Social Survey), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/CH40-Discrimination-Against-LGBT-People-Sears-Mallory.pdf>.

[2] SANDY E. JAMES ET AL., NATIONAL CENTER FOR TRANSGENDER EQUALITY, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 148 (2016), available at <http://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF>.

[3] *Id.* at 151.

[4] *Id.* at 140.

[5] *Id.* at 140-141.

[6] *Id.* at 152.

[7] See JAIME M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 180-81 (National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011), available at http://www.transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf.

[8] Adapted from: GLAAD MOVEMENT ADVANCEMENT PROJECT, AN ALLY'S GUIDE TO TERMINOLOGY: TALKING ABOUT LGBT PEOPLE & EQUALITY (2012), available at http://www.glaad.org/sites/default/files/allys-guide-to-terminology_1.pdf; Glossary of Terms, Human Rights Campaign, <http://www.hrc.org/resources/glossary-of-terms>. (last visited Apr. 7, 2017).

[9] 42 U.S.C. §2000e-2(a)(1).

[10] 42 U.S.C. §2000e(b).

[11] 490 U.S. 228 (1989).

[12] 523 U.S. 75 (1998).

[13] *Price Waterhouse v. Hopkins*, 490 U.S. at 235.

[14] *Id.* at 251 (emphasis added).

[15] *Id.* at 250.

[16] *Oncale*, 523 U.S. at 82.

[17] *Id.* at 79-80.

[18] 195 F. Supp. 2d 1212, 1224 (D. Or. 2002).

[19] *Terveer v. Billington*, 34 F. Supp. 3d 100, 116 (D.D.C. Mar. 31, 2014); see also *Boutillier v. Hartford Public Schools*, 2014 U.S. Dist LEXIS 134919 (D. Conn. Sept. 25, 2014) (denying employer's motion to dismiss a Title VII sex discrimination claim the plaintiff's allegation that she was "subjected to sexual stereotyping during her employment on the basis of her sexual orientation" sets forth "a plausible claim that she was discriminated against based on her non-conforming gender behavior.")

[20] *Koren v. Ohio Bell Telephone Co.*, 894 F. Supp. 2d 1032 (N.D. Ohio Aug. 14, 2012).

[21] See *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005) (quoting *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000)).

- [22] 731 F.3d 444, 449-451 (5th Cir. 2013).
- [23] *Id.* at 455 n.5 (quoting *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 82 (1998) (altercation in original)).
- [24] 167 F. Supp. 3d 598, 621 (S.D.N.Y. 2016).
- [25] *Id.* at 621-22.
- [26] *Id.* at 622.
- [27] *See Schroer v. Billington*, 77 F. Supp. 2d 293 (D.D.C. 2008).
- [28] 12 F. Supp. 3d 780, 788 (D. Md. 2014).
- [29] 172 F. Supp. 3d 509, 527 (D. Conn. 2016).
- [30] 378 F.3d 566, 574 (6th Cir. 2004); *see also Barnes v. City of Cincinnati*, 401 F.3d 729, 733 (6th Cir. 2005) (holding that plaintiff, who "was a male-to-female transsexual who was living as a male while on duty but often lived as a woman off duty [and] had a reputation throughout the police department as a homosexual, bisexual or cross-dresser," stated a claim for sex discrimination by alleging he was demoted because of his failure to conform to sex stereotypes).
- [31] *Smith*, 378 F.3d at 575.
- [32] 100 F. Supp. 3d 594, (E.D. Mich. Apr. 21, 2015).
- [33] *Id.* at 595; *see also Lewis v. High Point Regional Health Sys.*, 79 F. Supp. 3d 588 (E.D.N.C. 2015) (denying employer's motion to dismiss claim by transgender employee because the employer had only argued that sexual orientation was not covered under Title VII and sexual orientation and gender identity are two distinct concepts.)
- [34] *Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821, 2012 WL 1435995 at *10 (Apr. 20, 2012).
- [35] *Jameson v. U.S. Postal Serv.*, EEOC Appeal No. 0120130992, 2013 WL 2368729 at *2 (May 21, 2013).
- [36] *Complainant v. Dep't of Veterans Affairs*, EEOC Appeal No. 0120133123, 2014 WL 1653484 (Apr. 16, 2014).
- [37] *Lusardi v. Dep't of the Army*, EEOC Appeal No. 0120133395, 2015 WL 1607756 at *9 (Mar. 27, 2015).
- [38] *Baldwin v. Dep't of Transp.*, EEOC Appeal No. 0120133080, 2015 WL 4397641 at *5 (July 15, 2015).
- [39] U.S. Equal Employment Opportunity Commission, What You Should Know About EEOC and the Enforcement Protections for LGBT Workers, https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm#charges (last visited Apr. 7, 2017).
- [40] *EEOC v. Lakeland Eye Clinic, P.A.*, M.D. Fla., Civ. No. 8:14-cv-2421-T35 AEP, filed Sept. 25, 2014, settled April 9, 2015; *EEOC v. Deluxe Financial Services Corp.*, (D. Minn., Civ. No. 0:15-cv-02646-ADM-SER, filed June 4, 2015, settled January 20, 2016); *EEOC v. Pallet Cos. d/b/a IFCO Sys. North Am., Inc.* (hereinafter "IFCO"), (D. Md., Civ. No. 1:16-cv-00595-CCB, filed Mar. 1, 2016, settled June 28, 2016); *EEOC v. Scott Med. Health Ctr., P.C.*, 2016 U.S. Dist. LEXIS 153744 (W.D. Pa. Nov. 4, 2016); *EEOC v. Bojangles Restaurants, Inc.*, (E.D. N.C., Civ. No. 5:16-cv-00654-BO, filed July 6, 2016). For further reading, *see* U.S. Equal Employment Opportunity Commission, Fact Sheet: Recent EEOC Litigation Regarding Title VII & LGBT-Related Discrimination. https://www.eeoc.gov/eeoc/litigation/selected/lgbt_facts.cfm. (last visited Apr.7, 2017).
- [41] *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, (citing *Ulane v. Eastern Airlines, Inc.*).
- [42] 742 F.2d 1081 (7th Cir. 1984).
- [43] 224 F.3d 701 (7th Cir. 2000).

- [44] 231 F.3d 1080 (7th Cir. 2000).
- [45] 332 F.3d 1058 (7th Cir. 2003).
- [46] 767 F.3d 694 (7th Cir. 2014).
- [47] *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 351-52 (7th Cir. 2017).
- [48] *Id.* at 341.
- [49] *Hively v. Ivy Tech Cmty. Coll.*, No. 3:14-cv-1791, 2015 U.S. Dist. LEXIS 25813, at *2 (N.D. Ind. Mar. 3, 2015).
- [50] *Hively v. Ivy Tech Cmty. Coll.*, , 830 F.3d 698,701-02 (7th Cir. 2016).
- [51] *Id.* at 718.
- [52] *Hively v. Ivy Tech Cmty. College*, No. 15-1720, 2016 U.S. App. LEXIS 20302, at *1 (7th Cir. Oct. 11, 2016).
- [53] *Hively*, 853 F.3d at 345.
- [54] *Id.* at 353.
- [55] *Id.* at 345.
- [56] *Id.*
- [57] *Id.* at 346.
- [58] *Id.*
- [59] 388 U.S. 1 (1967).
- [60] *Hively*, 853 F.3d at 348.
- [61] *Id.* at 349
- [62] *Id.* at 350.
- [63] H.R.3185 – Equality Act, 114th Congress (2015-16), <https://www.congress.gov/bill/114th-congress/house-bill/3185>. (last visited Apr. 4, 2017).
- [64] *Id.*
- [65] United States Const. Amend. 14.
- [66] 42 U.S.C. § 1983.
- [67] *See e.g. Daly v. DelPonte*, 624 A.2d 876, 883 (Conn. 2004) (identifying three levels of scrutiny for equal protection purposes).
- [68] *Romer v. Evans*, 517 U.S. 620, 632-635 (1996); *see also Quinn v. Nassau County Police Dept.*, 53 F. Supp. 2d 347, 357 (E.D.N.Y. 1999) (collecting cases).
- [69] *Romer v. Evans*, 517 U.S. 620, 632-635 (1996).
- [70] 53 F. Supp. 2d 347 (E.D.N.Y. 1999).
- [71] *Id.* at 350.
- [72] 214 F. Supp. 2d 319 (E.D.N.Y. 2002).
- [73] *Id.* at 321.
- [74] *Id.*
- [75] *Id.* at 323; *see also Martin v. N.Y. State Dep't of Corr. Servs.*, 224 F. Supp. 2d 434 (N.D.N.Y. 2002) (recognizing that creation of a hostile working environment based on an employee's sexual orientation may violate the Equal Protection clause but dismissing claim by corrections officer because there was no evidence the plaintiff ever complained to the employer about such conduct).
- [76] 663 F.3d 1312 1314 (11th Cir. 2011).
- [77] *Id.*
- [78] *Id.*
- [79] *Id.*
- [80] *Id.*
- [81] *Id.* at 1317-20.

- [82] See Lamda Legal, The Rights of LGBT Public Employees, <http://www.lambdalegal.org/publications/the-rights-of-lgbt-public-employees>. (last visited Apr. 7, 2017).
- [83] 774 F.2d 1332, 1333-1334 (5th Cir. 1985).
- [84] *Id.* at 1333.
- [85] *Id.*
- [86] *Id.* at 1333-34.
- [87] *Id.* at 1334.
- [88] 29 F. Supp. 2d 1279, 1280 (D. Utah 1998).
- [89] *Id.* at 1281.
- [90] *Id.*
- [91] *Id.*
- [92] *Id.* at 1282.
- [93] 391 U.S. 563 (1968).
- [94] *Id.* at 1286, 1289-91.
- [95] *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).
- [96] *Id.* at 424.
- [97] *Id.*
- [98] 470 F.3d 250, 253 (6th Cir. 2006).
- [99] *Id.* at 253-54.
- [100] *Id.* at 254.
- [101] *Id.*
- [102] *Id.* at 257.
- [103] *Id.* at 261.
- [104] 29 U.S.C. §2611(2).
- [105] 29 U.S.C. §2612(a)(1)(C).
- [106] 29 C.F.R. §§ 825.102, 825.122(b).
- [107] 133 S.Ct. 2675, 2683 (2013).
- [108] 80 Fed. Reg., 9989-99 (February 25, 2015); 29 C.F.R. §825.102.
- [109] 135 S.Ct. 2584 (2015).
- [110] 42 U.S.C. §12101.
- [111] *Id.* §12102(1).
- [112] Pub. L. 110-325, 122 Stat. 3553 (2008); 42 U.S.C. § 12101(a)-(b).
- [113] *Id.*, §12211(a), (b)(1).
- [114] Case No. 14-cv-04822-JFL (E.D. Penn.)
- [115] 134 T.C. 4 (2010).
- [116] *Id.* at 60, 73.
- [117] 42 U.S.C. §18116(a).
- [118] 45 C.F.R. §92.4.
- [119] 45 C.F.R. §§92.206.
- [120] *Id.* § 92.207(b)(3).
- [121] Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31390 (May 18, 2016).
- [122] *Id.*
- [123] No. 7:16-cv-00108-O, 2016 WL 7638311 (N.D. Tex. Dec. 31, 2016).
- [124] *Id.*
- [125] 775 ILCS 5/1-103(O-1).
- [126] 775 ILCS 5/8A-104(B), (G), (J).
- [127] 775 ILCS 5/7-101.

[128] 775 ILCS 5/8-102.

[129] Charge Nos. 2011CN2993, 2011CP2994, ALS No. 13-0060C (Illinois Human Rights Commission).

[130] *Sommerville v. Hobby Lobby Stores*, IHRC ALS No. 13-0060C (IHRC ALJ May 15, 2015), slip. op. at 1 – 3.

[131] *Id.* at 8.

[132] *Id.* at 11.

[133] *Id.*

[134] *Sommerville v. Hobby Lobby Stores*, IHRC ALS No. 13-0060C (IHRC ALJ Feb. 2, 2016), slip. op. at 15-16.

[135] State of Ill., Human Rights Comm'on Minutes of Meeting of Panel C, November 2, 2016, <https://www.illinois.gov/ihr/ Documents/D%2020161102%20Panel%20C%20Minutes.pdf> (last visited Apr. 7, 2017).

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] See CAL. GOV'T. CODE § 12940; C.R.S. 24-34-402; CONN. GEN. STAT. § 46a-60; DEL. CODE ANN. tit. 19, § 711; D.C. CODE § 2-1402.11; HAW. REV. STAT. §378-2; IOWA CODE §216.6; ME. REV. STAT. tit. 5, § 4572; MD. CODE ANN. § 20-606; MASS. GEN. LAWS ch. 151B, §4; MINN. STAT. § 363A.08; NEV. REV. STAT. § 613.330; N.J. STAT. §10:5-12; N.M. STAT. ANN. §28-1-7; N.Y. EXEC. LAW § 296; OR. REV. STAT. § 659A.030; R.I. GEN. LAWS §28-5-7; UTAH CODE ANN. § 34A-5-106; VT. STAT. ANN. TIT. 21, §495; WASH. REV. CODE §49-60-180.

[140] N.H. REV. STAT. ANN. § 354-A:7; WIS. STAT. §111.321, 111.322, 111.36.

[141] Ind. Governor's Policy Statement (Apr. 26, 2005); Ky. Exec. Order 2008-473 June. 2, 2008); Mich. Executive Directive 2007-24 (Nov. 11, 2007); Mont. Exec. Order No. 04-2016 9Jan. 18, 2016); Mont. Admin. R. 2.21.4005 (Oct. 16, 2016); Pa. Exec. Order 2016-04 (Apr. 7, 2016); Va. Exec. Order No. 1 (2014).

[142] Alaska Admin. Order 195 (Mar. 5, 2002); Ariz. Exec. Order 2003-22 (June 21, 2003); Mo. Exec. Order 10-24 (July 9, 2010); Ohio Exec. Order 2011-05K (Jan. 21, 2011).

[143] ARK. CODE ANN. § 14-1-403; N.C. GEN. STAT. § 143-422.2; TENN. CODE ANN. §7-51-1802.

[144] See *Star Tribune*, 295 NLRB 543, 548 (1989) (citing *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50 (1975)).

[145] Shellea Allen et al., *It's Time to Stand Up and Fight Back*, AFLCIO.ORG (Nov. 9, 2015), <http://www.aflcio.org/Blog/Organizing-Bargaining/It-s-Time-to-Stand-Up-and-Fight-Back>.

[146] Major League Clubs and MLB Players Ass'n 2012-2016 CBA, http://mlb.mlb.com/pa/pdf/cba_english.pdf. (last visited Mar. 3, 2017).

[147] NFL and NFL Players Ass'n 2011-2020 CBA, <https://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf>. (last visited Mar. 3, 2017).

[148] NBA and NBA Players Ass'n 2011-2021 CBA, <http://nbpa.com/cba/>. (last visited Mar. 3, 2017).

[149] MLS and MLS Players Union 2015-2020 CBA, [https://www.mlssplayers.org/images/Collective %20Bargaining%20Agreement%20-%20February%201,%202015.pdf](https://www.mlssplayers.org/images/Collective%20Bargaining%20Agreement%20-%20February%201,%202015.pdf). (last visited Mar. 3, 2017).

[150] NHL and HNL Players Ass'n 2012-2022 CBA, <http://www.nhlpa.com/inside-nhlpa/collective-bargaining-agreement>. (last visited Mar. 3, 2017).

[151] N.C.S.L 2016-3.

[152] See *NBA statement regarding 2017 NBA All-Star Game*, NBA.com (July 21, 2016), <http://pr.nba.com/nba-statement-2017-nba-all-star-game-charlotte/>.

[153] *Northwestern Univ.*, 362 N.L.R.B. No. 167 (2015).

[154] See Brian Hendrickson, *Board of Governors Approves Anti-Discrimination Process for Championship Bids*, NCCC.ORG (Apr. 27, 2016, 9:40 PM), <http://www.ncaa.org/about/resources/media-center/news/board-governors-approves-anti-discrimination-process-championships-bids>.

[155] See *NCAA to Relocate Championships from North Carolina for 2016-17*, NCAA.COM (Sept. 12, 2016, 7:22 PM), <http://www.ncaa.com/news/ncaa/article/2016-09-12/ncaa-relocate-championships-north-carolina-2016-17>.

[156] N.C.S.L 2017-4.

RECENT DEVELOPMENTS

By the Student Editors

Recent Development is a regular feature of the Illinois Public Employee Relations Report. It highlights recent legal developments of interest to the public employment relations community. This issue focuses on developments under the public employee collective bargaining statutes and the equal employment opportunity laws.

I. IELRA DEVELOPMENTS

A. *Protected Activity*

In *Moraine Valley Community College v. IELRB*, 2017 IL App (1st) 152845-U, the First District Appellate Court affirmed the IELRB's finding that Moraine Valley Community College violated sections 14(a)(3) and 14(a)(1) of the IELRA by terminating Robin Meade, the local union president after she wrote a letter stating that the College was not innovative toward adjunct faculty and that adjunct faculty did not receive adequate wages, health benefits, and work schedules.

The College was a member of the League for Innovation in Community College, a consortium promoting excellence and innovation in community colleges. When the college replaced its president, it had to reapply for membership in the league. Meade was employed by the college as an adjunct faculty member since 2003. On August 20, 2013, Meade sent a letter to the league, stating that adjunct faculty did not receive adequate wages, health benefits, and work schedules. As a result of this letter, the college terminated Meade on the ground that her letter "went far beyond responsible advocacy" and "was a personal attempt to falsely discredit" the college and "undermine its relationship with the [l]eague." Consequently, the Union filed an unfair practice charge. The IELRB decided that the college violated sections 14(a)(3) and 14(a)(1) and the college appealed.

Section 14(a)(1) prohibits educational employers from taking adverse action against an employee as a result of protected concerted activity; section 14(a)(3) prohibits discrimination based on union activity. To establish a *prima facie* case of a section 14(a)(3) violation, the Union must prove that: 1) the employee was engaged in activity protected by section 14(a)(3); 2) the employer was aware of that activity; and 3) the employer took adverse action against the employee for engaging in that activity.

In addition, attempts by employees and labor organizations to enlist the aid of third parties or the public fall under the protection of the IELRA, as long as: 1) the communications clearly indicate the existence of a labor dispute with the employer; and 2) the critical statements are not maliciously untrue. Additionally, the communication must constitute a concerted activity, which must be for the purpose of inducing or preparing for action on behalf of the group to correct a grievance or complaint.

The dispute in this case only concerned whether Meade engaged in protected activity. The court held that Meade's communication qualified as a concerted activity, which was protected by the Act. First, her letter discussed the issues experienced by the adjunct faculty as a group. Second, the matters raised in the letter concerned the adjunct faculty's wages, benefits and hours, as well as the claim that the college reduced adjunct faculty hours to avoid providing health care benefits under the Affordable Care Act. These facts demonstrated the college and the union were engaged in labor dispute at the time of the letter.

The court found that the critical statements included in the letter were not so maliciously untrue as to lose the protection under the IELRA. In the current case, there was nothing in the record to demonstrate that Meade's letter was maliciously untrue or made with the knowledge that its contents were false or with reckless disregard for their truth or falsity. Therefore, the court held the IELRB's decision was not clearly erroneous and affirmed.

In *AFSCME Council 31 and Board of Trustees of the University of Illinois, Respondent*, 33 PERI ¶ 93 (IELRB 2017), the IELRB reversed a recommended decision of its ALJ which had found that the university had violated sections 14(a)(5) and 14(a)(1) of the IELRA by unilaterally replacing bargaining unit account technicians (ATs) with non-bargaining unit business administrative associates (BAAs). The IELRB held that the unfair labor practice charge was untimely.

April Moore negotiated and signed the 2011-2014 collective bargaining agreement (CBA) between the union and the university as a union bargaining team member. She was also a union steward from 2011 or 2012 to February or March 2014, and a member of the union's executive board until January 2014. Moore knew that BAAs performed the same work as ATs since December 2012 because some BAAs talked about their work with her at that time.

On December 18, 2012, the Union signed the CBA, which contains the following language: "During the course of negotiations, the Union expressed concern that

the University is seeking to erode the bargaining unit by purportedly assigning bargaining unit work to non-bargaining unit personnel. . . . “

On February 25, 2015, the union filed the unfair labor practice charge in this case. The IELRB observed that under section 15 of the IELRA, it does not have jurisdiction over unfair labor practice charges filed more than six months after the charging party knew or should have known of the actions which allegedly constitute the unfair labor practice. In this case, at least as early as December 10, 2012, Moore knew that BAA was working in the same work area as the AT at the university.

The IELRB held that Moore acted as the union’s agent since 2011. An individual is an agent of a party when he or she has actual or apparent authority to act on that party’s behalf; and apparent authority exists when a party has created a reasonable impression that an individual is acting as its agent. In addition, the union stewards have consistently been regarded as agents of the union that they represent. In this case, Moore served as a steward from approximately 2011 or 2012 until February or March 2014. Moreover, she also negotiated and signed the CBA as a union bargaining team member. Therefore, the IELRB regarded Moore as the union’s agent.

Moore’s knowledge that BAAs did the same work as ATs since at least as early as December 10, 2012 could be imputed to the union because the law of agency in Illinois holds that the knowledge of an agent, acting within the scope and extent of his or her authority, is attributable to his or her principal. Therefore, the union knew or should have known the alleged violation since at least as early as December 10, 2012. However, the union filed the unfair labor practice charge on February 25, 2015; therefore, the charge was untimely regarding the University’s actions of which the Union knew or should have known before August 25, 2014.

IELRB Member Sered dissented. She maintained that although Moore had observed BAAs performing TA work, there was no evidence that she knew the university intended to have the work performed exclusively by BAAs until the summer of 2014 and by that time she had ceased to be an agent of the union. Member Sered observed that the language in the CBA merely stated the union’s suspicions that the university was eroding the bargaining unit and such suspicions did not constitute unequivocal notice of the alleged unfair labor practice. Member Sered would have upheld the ALJ’s finding that the charge was timely.

II. IPLRA DEVELOPMENTS

A. *Duty to Bargain*

In *International Brotherhood of Teamsters, Local 700 v. ILRB*, 2017 Ill App (1st) 152993, the First District Appellate Court reversed the ILRB Local Panel's dismissal of an unfair labor practice charge over the employer's enactment on one new work rule but affirmed the Panel's dismissal of the charge regarding a second new work rule.

The union filed unfair labor practice charges over the announcement of two new employment rules: the "Gang Order" and the "Rules of Conduct Order." The ALJ held that the employer, Cook County Department of Corrections ("CDOC"), had committed an unfair labor practice by unilaterally implementing the new rules. The Local Panel reversed, and the union appealed. The Gang Order imposed a new requirement on the CDOC employees: filling out a disclosure form regarding the known or suspected gang affiliations of family members, friends, and several other classes of acquaintances. The employer claimed that, because of the grave danger gang activity poses to the public in the Chicago area these days, this rule was necessary for the safety of the corrections officers, the inmates, and the general public. However, the union urged that the requirements were overly burdensome, requiring employees in some cases to investigate their own family members. The Rules of Conduct Order included a provision expanding the reach of discipline for on and off duty conduct to "any internet activity" including "electronic social media and networking sites." The union argued that this language was overly broad and chilled employees' rights under the IPLRA to engage in concerted activity. The employer asserted that this did not change the nature of the activities the employees were allowed to engage in, but only clarified *where* they could or could not engage in those activities. Given that the parties were involved in negotiations at the time the orders were announced, an opportunity for meaningful bargaining over both orders was certainly available.

Applying the balancing test established in *Central City Education Ass'n v. IELRB*, 149 Ill. 2d 496, 599 N.E.2d 892 (1992), the court held that because the Gang Order could result in discipline against the employees, the benefits of bargaining outweighed the burden on the department's inherent managerial authority to create safety rules. Illinois precedent had not yet considered the lawfulness of simply creating a rule, as opposed to enforcing that rule, without bargaining. Looking at precedent under the National Labor Relations Act and other jurisdictions with similar labor laws, the court held that creating this rule was enough to be an unfair labor practice. However, the court upheld the Local

Panel's finding as to the Rules of Conduct order, looking at NLRA precedent to hold that, without a challenge to the chilling effect of the rules of conduct in general, the social media/internet policy by itself could not be reasonably construed to interfere with employees' rights to engage in protected concerted activity.

In *State of Illinois v. AFSCME Council 31*, 2017 IL App (4th) 160827, the Fourth District Appellate Court stayed the decision of the ILRB State Panel which had found that the State of Illinois and AFSCME Council 31 had reached impasse over a single critical issue in their negotiations for a successor to the collective bargaining agreement that expired on June 30, 2015. An ALJ had found that the State had violated section 10(a)(4) when it failed to provide AFSCME information relevant to such issues as wages and health insurance. But the ALJ also found that the parties had bargained to impasse on subcontracting and other issues. The ALJ ordered the parties to resume bargaining on those issues on which she found that they were not at impasse and on wages and health insurance because any impasse was not legitimate due to the State's failure to provide requested information. However, she allowed the State to unilaterally implement its final offer with respect to those issues on which she found the parties to be at impasse.

The State Panel affirmed the ALJ's findings with respect to the State's failure to provide information but held that the State had not breached its duty to bargain when it broke off negotiations and declared impasse in January 2016 because the parties had reached impasse over subcontracting which was a single critical issue in their negotiations. AFSCME appealed to the First District Appellate Court which granted AFSCME's motion to stay the ILRB's decision. The State appealed to the Fourth District Appellate Court and the Illinois Supreme Court consolidated that cases in the Fourth District.

The Fourth District granted AFSCME's renewed request for a stay. The court cited section 3-111(a)(1) of the Code of Civil Procedure (735 ILCS 5/3-111(a)(1), which provides that a stay of the ILRB's decision should be granted only if the union shows, among other things, "a reasonable likelihood of success on the merits." See Ill. S. Ct. R. 335(i)(2) (eff. Jan. 1, 2016). The court stated that the question of whether the parties had arrived at an impasse was a question of fact. Thus, the court held that the ILRB's finding of an impasse would be upheld unless it was "clearly evident" from the record that the parties were not at an impasse.

Ultimately, the Fourth District determined that the union raised a "fair question" as to whether the ILRB properly invoked the private sector's single critical issue exception to the requirement that any impasse occur with respect to all issues in

dispute. The court looked to the Seventh Circuit's decision in *Duffy Tool & Stamping, L.L.C. v. NLRB*, 223 F.3d 995, 999 (7th Cir. 2000), where the court held that "piecemeal impasse" should not give the employer a right to unilaterally implement changes in the terms and conditions of employment. A ruling otherwise would undercut the employer's duty to bargain in good faith with the union. Thus, *Duffy* meant that impasse is required on all issues, as a whole, before there can be unilateral implementation.

The Fourth District held that the union showed "good cause" under section 3-111(a)(1); and therefore, granted the union's motion to stay the ILRB's decision.

In *IAFF Local 413 and City of Rockford*, Case No. S-CA-15-030 (ILRB State Panel Apr. 11, 2017), the State Panel reversed a recommended decision of its ALJ which had found that the city violated sections 10(a)(4) and 10(a)(1) of the IPLRA by refusing to include agreed to language in the collective bargaining agreement. The State Panel held that although the parties had agreed to the language itself, they had not agreed on whether the language would be included in the CBA or would be included in the employer's rules and regulations.

The city had unilaterally changed its sick leave policy to require that whenever an employee who had taken two sick leaves in the calendar year provide medical certification upon returning from sick leave. The union had grieved the change and the parties agreed to discuss the change during their negotiations for a successor CBA. During those negotiations the parties agreed on language governing the medical certification requirement but the city refused to incorporate that language into the successor CBA. The City believed that the agreed-to language should go in the city's rules and regulations. The State Panel held that because the parties failed to reach a meeting of the minds as to where the agreed-to language should appear, the city did not breach its duty to bargain by refusing to incorporate the language in the successor contract.

B. ULP Procedures

In *Amalgamated Transit Union, Local 241 v. ILRB*, 2017 Ill App (1st) 160999, the First District Appellate Court held that issuing a Request For Proposals ("RFP") does not constitute a sufficient "unambiguous announcement" of an employer's intent to subcontract so as to trigger the statute of limitations for an unfair labor practice charge for failure to bargain.

The Union filed unfair labor practice charges when the Chicago Transit Authority ("CTA"), in the fall of 2013, subcontracted and replaced twenty-four bargaining unit positions in eight job classifications without bargaining. The replacements

occurred in conjunction with the implementation of the new *Ventra* card system across the CTA. Three years earlier, in 2010, the CTA had published an RFP, which it made available to the union, outlining its plan and calling for proposals to implement an “open fare” system. The RFP was over 100 pages long, and included many details of the new system, including a reduction in labor costs. The CTA argued that providing the RFP to the union in 2010 was sufficient notice of the intent to subcontract bargaining unit work, making the union’s 2013 unfair labor practice charge untimely. The ALJ agreed, the ILRB Local Panel adopted the ALJ’s recommended decision and order in March of 2016, and the union appealed.

Illinois law requires that the statute of limitations for filing an unfair labor practice begins to run when a change in policy is “unambiguously announced.” The court considered, for the first time in Illinois, whether an RFP over 100 pages long can constitute an “unambiguous” announcement of the intention to subcontract. The ILRB had reasoned that informing the union of a request for subcontracting proposals was sufficient notice unless the employer expressly stated it was not. The court disagreed. Analyzing precedent from out of state, the court reasoned that the CTA had plenty of opportunities to make its intentions clear but failed to do so. Rather than adopting the Local Panel’s interpretation, the court asserted the rule that the statute of limitations for filing an unfair labor practice charge over an employer’s failure to bargain over subcontracting bargaining unit work begins to run when the employer makes an “explicit announcement” of its intention to subcontract. The case was remanded to the ILR for hearing on the merits of the charge.

III. EEO DEVELOPMENTS

A. *Sexual Orientation Discrimination*

In *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017), The Seventh Circuit U.S. Court of Appeals issued a landmark decision holding that employment discrimination on the basis of sexual orientation falls within sex discrimination under Title VII of the Civil Rights Act of 1964. Title VII of the Civil Rights Act of 1964 makes it unlawful for employers to discriminate on the basis of a person’s “race, color, religion, sex, or national origin....” 42 U.S.C. § 2000e-2(a).

Kimberly Hively was a part-time, adjunct professor at Ivy Tech Community College’s (“Ivy Tech”) South Bend, Indiana campus since 2000. Hively was openly lesbian. Between 2009 and 2014, Hively unsuccessfully applied for at least six full-time positions with the school. Hively believed she was discriminated against based on her sexual orientation. Hively filed a pro se charge with the Equal

Employment Opportunity Commission and received a right-to-sue letter. She sued in U.S. District Court in the Northern District of Illinois. The district court dismissed the suit with prejudice for failure to state a claim under Title VII for sex discrimination. Hively appealed the dismissal to Seventh Circuit. The Seventh Circuit analyzed, *de novo*, what it means to discriminate on the basis of sex and whether actions taken on the basis of sexual orientation are a subcategory of actions taken on the basis of sex.

In her majority opinion, Chief Judge Wood stated the interpretation of this issue is guided by the Supreme Court's approach in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79-80 (1998) when addressing whether Title VII covers same-sex sexual harassment inflicted by a man on another man. In *Oncale*, the Court held that male-on-male sexual harassment in the workplace was "assuredly not the principal evil" Congress had in mind when it enacted Title VII, Title VII extends to sexual harassment of any kind that meets the statutory requirements.

Hively argued that discrimination based on sexual orientation is sex discrimination under both a comparative and associational theory. Under the comparative theory, Hively argued that if she had been a man and was sexually attracted to women, Ivy Tech would have neither refused to promote, nor terminate her. Judge Wood stated that the discriminatory behavior cannot not exist without accounting for Hively's biological sex and her lack of conformity to those gender stereotypes. Judge Wood determined then that one cannot discriminate on the basis of sexual orientation without doing so on the basis of sex.

Under the associational theory, Hively argued that she was discriminated against because of whom she associates with. This theory comes from *Loving v. Virginia*, 388 U.S. 1 (1967), where the Supreme Court held that discriminating against an individual for associating with a different race has discriminated against that individual on the basis of race. Judge Wood applied the same logic to this case and concluded that Ivy Tech discriminated against Hively for intimately associating with other women. Therefore, the Seventh Circuit reversed and remanded the district court's judgment for further proceedings.

Judge Posner, in a concurring opinion, agreed with the majority to reverse the district court's judgment, but analyzed an alternate approach. Judge Posner insisted that statutory interpretation of Title VII should be "infused" with how the law is significant today rather than an "originalism" approach of interpretation. He concluded that discrimination based on sexual orientation is essentially a discriminating against an individual for failure to fulfill stereotypical gender roles.

In a dissenting opinion, Judge Sykes, joined by Judges Bauer and Kanne, stated that sexual-orientation discrimination is an independent category of discrimination and does not fall under sex discrimination. Judge Sykes claimed that the court was impatient to protect homosexuals from workplace discrimination, and that the majority was not authorized to amend Title VII by statutory interpretation. Judge Sykes concluded that Title VII's language does not prohibit sexual orientation-discrimination and that Hively's case was properly dismissed in district court.