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A FRESH LOOK AT TITLE VII: SEXUAL ORIENTATION DISCRIMINATION AS SEX DISCRIMINATION

By Anthony Michael Kreis

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Recent Developments 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.

A FRESH LOOK AT TITLE VII: SEXUAL ORIENTATION DISCRIMINATION AS SEX DISCRIMINATION

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I. INTRODUCTION

Since 2006, the Illinois Human Rights Act has prohibited discrimination in employment because of an employee's sexual orientation or gender identity.[1] Until 2017, employees discriminated against because of their sexual orientation had no federal cause of action, however. In a landmark decision, *Hively v. Ivy Tech*, the Court of Appeals for the Seventh Circuit became the first appellate court to hold that federal law's prohibition of sex discrimination in the workplace also proscribed sexual orientation discrimination.[2] The *Hively* decision is a substantial departure from decades' worth of Seventh Circuit precedent and created a split between the circuits. The Seventh Circuit's interpretation of Title VII may auger the future of sexual orientation discrimination claims under federal law.

II. TITLE VII'S DOCTRINAL DEVELOPMENT FROM *ULANE* TO *HIVELY*

The Seventh Circuit first addressed whether Title VII's sex discrimination protections extended to employees adversely treated because of their sexual orientation in 1984. In that case, *Ulane v. Eastern Airlines, Inc.*,[3] the court was called on to determine Title VII's scope where an airline pilot claimed she was unlawfully discriminated against because she was transgender. The court ruled in *Ulane* that "homosexuals and transvestites do not enjoy Title VII protection."[4] The panel reasoned that the ordinary meaning of sex did not also mean transgender or sexual orientation because "[t]he phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men."[5] The *Ulane* court further reasoned that the "dearth of legislative history" with respect to Congress' inclusion of sex among Title VII's protected classes "strongly reinforces the view that that section means nothing more than its plain language implies."[6]

This view of Title VII's narrow scope was reaffirmed by the Seventh Circuit in a 1997 decision where the panel emphasized, "Congress had nothing more than the traditional notion of 'sex' in mind when it voted to outlaw sex discrimination, and that discrimination on the basis of sexual orientation and transsexualism, for example, did not fall within the purview of Title VII."[7]

In two subsequent cases decided in 2000, the Seventh Circuit affirmed that Title VII did not afford any protections to covered employees from sexual orientation discrimination.[8] Relying on the dicta in *Ulane*, the panels in *Hamner v. St. Vincent Hospital & Health Care Center and Spearman v. Ford Motor Company* ruled that "harassment based solely upon a person's sexual preference or orientation (and not on one's sex) is not an unlawful employment practice under Title VII."[9] In decisions as late as 2014, the circuit precedent established in *Ulane*, *Hamner*, and *Spearman* that Title VII did not provide a remedy for sexual orientation discrimination was relied upon to block sexual orientation discrimination claims.[10]

Numerous efforts to legislatively amend Title VII to overturn decisions like *Ulane* and expressly protect lesbian, gay, bisexual, and transgender persons from employment discrimination failed.[11] However, in the years since *Ulane*, the Supreme Court began to transform Title VII's sex discrimination doctrine. First, in *Price Waterhouse v. Hopkins*, the Supreme Court ruled that an employer's use of gender expectations while making employment decisions can be an actionable form of employment discrimination.[12]

Price Waterhouse did not produce a majority opinion. A plurality of the Court in *Price Waterhouse* reasoned that under Title VII "gender must be irrelevant to employment decisions" and that "[i]n the specific context of sex stereotyping, 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."[13] Thus, employees who demonstrate gender nonconforming characteristics are protected under Title VII. As the Seventh Circuit ably summarized it, "Title VII does not permit an employee to be treated adversely because his or her appearance or conduct does not conform to stereotypical gender roles."[14]

In *Price Waterhouse's* wake, effeminate gay men and masculine lesbians successfully brought sex discrimination claims as gender non-conformity claims.[15] Courts were tasked with parsing out whether employees were truly discriminated against because of their sexual orientation or because they failed to live up to a sex stereotype. One recent example from the Second Circuit reveals the difficulty in this task. Matthew Christiansen brought a Title VII claim alleging that

he was impermissibly sex-stereotyped, which was dismissed because the district court determined his allegations stemmed more from his supervisor's anti-gay animus than his supervisor's gender role expectations.[16]

In his complaint, Christiansen alleged that his supervisor called him "effeminate" around co-workers, described him as "prancing around," and placed an image of his head on a female body with her legs in the air.[17] Christiansen's supervisor drew multiple lewd pictures of Christiansen, including one where Christiansen had an erect penis while holding an air pump with bubble caption that said, "I'm so pumped for marriage equality."[18] Christiansen also claimed that his supervisor said that because he was both gay and effeminate, he likely had AIDS. The message Christiansen's supervisor communicated to his colleagues, as one coworker interpreted it, was that Christiansen was "a submissive sissy."[19]

The district court concluded that because Christiansen proffered more allegations tied to his sexual orientation than to his effeminate demeanor, his claim could not be "transform[ed] into a claim for discrimination that [Christiansen] plainly interpreted—and the facts support—as stemming from sexual orientation animus into one for sexual stereotyping."[20] The Second Circuit reversed, holding that although Christiansen might face trouble at summary judgment or proving at trial that he was discriminated against because of his failure to live up to gender stereotypes and not his sexual orientation, the facts alleged were sufficient to withstand a motion to dismiss.[21]

This case highlights the near impossible task that courts can face in segmenting out allegations arising from an employee's non-conformity to gender stereotypes and an employee's sexual orientation. In a concurring opinion in *Hamm v. Weyauwega Milk Products, Inc.*,[22] Judge Posner criticized this doctrinal development as "absurd:"

> [T]he law protects effeminate men from employment discrimination, but only if they are (or are believed to be) heterosexuals. To impute such a distinction to the authors of Title VII is to indulge in a most extravagant legal fiction. It is also to saddle the courts with the making of distinctions that are beyond the practical capacity of the litigation process. Hostility to effeminate men and to homosexual men, or to masculine women and to lesbians, will often be indistinguishable as a practical matter, especially the former. Effeminate men often are disliked by other men because they are suspected of being homosexual (though the opposite is also true–effeminate homosexual men may be disliked by heterosexual men because they are effeminate rather than because they are homosexual), while mannish women are disliked by some men because they are suspected of being lesbians and by other men merely because they are not attractive to those men; a further complication is that men are more hostile to male homosexuality than they are

> to lesbianism. To suppose courts capable of disentangling the motives for disliking the nonstereotypical man or woman is a fantasy.[23]

Judge Posner's concerns were echoed in a concurring opinion from Chief Judge Robert Katzmann in *Christiansen*. Judge Katzmann wrote that it is an "exceptionally difficult task [to disaggregate sexual orientation and gender non-conformity claims] in light of the degree to which sexual orientation is commingled in the minds of many with particular traits associated with gender."[24]

A second important decision from the Supreme Court was handed down in 1998. In *Oncale v. Sundowner Services*, the Supreme Court held that same-sex harassment was actionable under Title VII, provided the plaintiff could demonstrate that the harassing conduct was motivated "because of sex."[25] Writing for the majority, Justice Scalia illustrated three scenarios where a plaintiff could sustain a same-sex harassment claim. A plaintiff could proffer "credible evidence that the harasser was homosexual," evidence he or she was harassed with "sex-specific and derogatory terms . . . motivated by general hostility to the presence" of men or women in the workplace, or "comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace."[26]

In the aftermath of these decisions, the Equal Opportunity Employment Commission issued an agency interpretation of Title VII in 2015 that discrimination because of a person's sexual orientation is a form of actionable sex discrimination. The EEOC reasoned, "Discrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms."[27] A handful of federal district courts relied on the EEOC's ruling in denying motions to dismiss sexual orientation discrimination claims under Title VII.[28]

These developments notwithstanding, the circuits were consistent and unanimous in ruling against Title VII sexual orientation discrimination claims. Until the Seventh Circuit ruled in favor of Kimberly Hively in 2017, no circuit deviated from the kind of analysis offered in *Ulane* and its progeny. Every circuit held that sexual orientation discrimination claims were not cognizable under Title VII's existing framework.[29]

III. *Hively v. Ivy Tech*: Facts and Procedural Posture

Kimberly Hively began working at Ivy Tech Community College in South Bend, Indiana in 2000.[30] For nine years, Hively's time teaching math as an adjunct teacher at Ivy Tech was seemingly uneventful until she was seen kissing her

girlfriend goodbye in an Ivy Tech parking lot.[31] Hively claimed an Ivy Tech administrator reprimanded her the following day for the incident.[32]

Between 2009 and 2014, Hively unsuccessfully applied for at least six full-time positions.[33] In July 2014, Ivy Tech declined to renew her adjunct teaching contract.[34] Hively believed Ivy Tech refused to hire her for a full-time position because of her sexual orientation.[35] In December 2013, Hively filed a charge with the Equal Employment Opportunity Commission, stating:

> I have applied for several positions at IVY TECH, fulltime, in the last 5 years. I believe I am being blocked from fulltime employment without just cause. I believe I am being discriminated against based on my sexual orientation. I believe I have been discriminated against and that my rights under Title VII of the Civil Rights Act of 1964 were violated.[36]

After receiving a right-to-sue letter, Hively filed a pro se action under Title VII. Ivy Tech filed a motion to dismiss, which the court granted citing Seventh Circuit precedent that sexual orientation discrimination claims are not cognizable under Title VII.[37] Title VII proscribes discrimination in the workplace because of "race, color, religion, sex, or national origin."[38] However, LGBT civil rights organization Lambda Legal, representing Hively on appeal, argued that sexual orientation discrimination is a form of sex discrimination and, thus, gay, lesbian, and bisexual workers are protected under the federal civil rights law.

On appeal, a Seventh Circuit panel affirmed the lower court's dismissal, citing binding circuit precedent that Title VII's prohibition of sex discrimination did not protect employees against sexual orientation discrimination.[39] The entire court, however, decided to hear Hively's appeal *en banc*.

IV. *HIVELY'S* COMPETING METHODS OF STATUTORY INTERPRETATION

An interesting debate over statutory interpretation unfolded among the Seventh Circuit's judges in *Hively*. The majority and dissent agreed that members of Congress' subjective intent in 1964 was mostly irrelevant. The majority proffered that it is "neither here nor there that the Congress that enacted the Civil Rights Act . . . may not have realized or understood the full scope of the words it chose. Indeed, in the years since 1964, Title VII has been understood to cover far more than the simple decision of an employer not to hire a woman for Job A, or a man for Job B."[40]

Indeed, members of Congress in 1964 may not have foreseen the doctrinal developments that would come in the decades after Title VII's enactment. As the majority explained, in the years since Title VII's enactment, courts interpreted its

sex discrimination provision to reach same-sex sexual harassment, sex-based actuarial assumptions when calculating pension contribution requirements, and sex-stereotypes.[41]

In dissent, Judge Sykes similarly deemphasized congressional intent, writing "[T]he proposed new interpretation is not necessarily incorrect simply because no one in the 1964 Congress that adopted Title VII intended or anticipated its application to sexual-orientation discrimination."[42] The dissent proffered that rather than intent, the proper method for interpreting Title VII "is an objective inquiry that looks for the meaning the statutory language conveyed to a reasonable person at the time of enactment."[43] Here, Judge Sykes diverged with the majority because "sex" and "sexual orientation" had distinct meanings in 1964, and today:

> But the analysis must begin with the statutory text; it largely ends there too. Is it even remotely plausible that in 1964, when Title VII was adopted, a reasonable person competent in the English language would have understood that a law banning employment discrimination "because of sex" also banned discrimination because of sexual orientation? The answer is no, of course not.[44]

Perhaps the most interesting (and unusual) take on the method of interpretation that prevailed in *Hively* came from Judge Richard Posner's concurring opinion, which no other member of the court joined. Judge Posner theorized that the court's interpretation of Title VII in *Hively* was effectively a judicial updating that reflected broader changes in society. Judge Posner wrote:

> Title VII of the Civil Rights Act of 1964, now more than half a century old, invites an interpretation that will update it to the present, a present that differs markedly from the era in which the Act was enacted. But I need to emphasize that this third form of interpretation—call it judicial interpretive updating—presupposes a lengthy interval between enactment and (re)interpretation. A statute when passed has an understood meaning; it takes years, often many years, for a shift in the political and cultural environment to change the understanding of the statute.[45]

As litigation continues to make its way through federal courts calling on judges to reconsider older precedent that rejected Title VII sexual orientation claims, it is likely these battles over the proper methodology for statutory interpretation will continue to take center stage.

V. SEXUAL ORIENTATION DISCRIMINATION AS A FORM OF SEX DISCRIMINATION

Contrary to every appellate court to rule on the question as of the date of the decision,[46] the *en banc* court held that Title VII's sex discrimination protections

extend to sexual orientation discrimination. The majority examined three theories of sex discrimination to support the its holding: the comparative method, gender non-conformity, and associational discrimination.

A. The Comparative Method

In applying the comparative method, the plaintiff's sex is changed to isolate whether an employer making an adverse employment decision took the plaintiff's protected characteristic into consideration. Thus, if an employer mistreats a female worker because she has an intimate relationship with another woman, but the employer would not mistreat a male employee who had a substantially similar relationship with a woman, the causation of that discrimination is the employee's sex.[47] In the instant case, Hively argued that if she were a man in a relationship with a woman, she would not have been denied a promotion to a full-time position or a contract extension.[48] The Court held that Hively's argument "describe[d] paradigmatic sex discrimination" because if her allegations were true, Ivy Tech "disadvantage[ed] her because she is a woman."[49]

In a dissenting opinion joined by Judge Joel Flaum and Judge Kenneth Ripple, Judge Diane Sykes proffered the majority's comparative method as flawed because it requires altering a plaintiff's sexual orientation and the plaintiff's sex while holding all other variables constant. Judge Sykes wrote:

> For the comparison to be valid as a test for the role of sex discrimination in this employment decision, the proper comparison is to ask how Ivy Tech treated qualified gay men. If an employer is willing to hire gay men but not lesbians, then the comparative method has exposed an actual case of sex discrimination. If, on the other hand, an employer hires only heterosexual men and women and rejects all homosexual applicants, then no inference of sex discrimination is possible, though we could perhaps draw an inference of sexual-orientation discrimination.[50]

The majority, however, rejected the Sykes dissent's logic because, "it makes no sense to control for or rule out discrimination on the basis of sexual orientation if the question before us is *whether* that type of discrimination is nothing more or less than a form of sex discrimination. Repeating that the two are different, as the dissent does at numerous points, also does not advance the analysis."[51]

B. Gender Stereotyping

Federal courts have long cautioned against viewing homosexuality as an all-purpose, non-conforming characteristic under *Price Waterhouse* to impermissibly bootstrap sexual orientation discrimination protections into Title VII.[52] However, a number of judges have recently rejected those bootstrapping concerns.

For example, Chief Judge Katzmann's concurrence in a recent Second Circuit sexual orientation Title VII case, *Christiansen v. Omnicom Group. Inc.*,[53] reasoned "that negative views of sexual orientation are often, if not always, rooted in the idea that men should be exclusively attracted to women and women should be exclusively attracted to men—as clear a gender stereotype as any.[54] Judge Katzmann's opinion reflects a view, as expressed by one district court, that sexual orientation discrimination is sex discrimination because "homosexuality is the ultimate gender non-conformity, the prototypical sex stereotyping animus."[55]

The *Hively* court echoed this line of thinking, reasoning that social expectations that men should be sexually attracted to women and women should be sexually attracted to men, inform individuals' bias against gay, lesbian, and bisexual persons. As a consequence, sexual orientation discrimination is fundamentally indistinguishable from actionable sex discrimination arising from other gendered workplace expectations. The court explained:

> Viewed through the lens of the gender non-conformity 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. 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. Hively's claim is no different from the claims brought by women who were rejected for jobs in traditionally male workplaces, such as fire departments, construction, and policing. The employers in those cases were policing the boundaries of what jobs or behaviors they found acceptable for a woman (or in some cases, for a man).[56]

Judge Sykes forcefully rejected the majority linking sex-stereotypes with non-heterosexual sexual orientation. Indeed, the dissent criticized the majority approach as wholesale detached from sex-discrimination all together:

> To put the matter plainly, heterosexuality is not a *female* stereotype; it is not a *male* stereotype; it is not a *sex-specific* stereotype at all. An employer who hires only heterosexual employees is neither assuming nor insisting that his female and male employees match a stereotype specific to their sex. He is instead insisting that his employees match the dominant sexual orientation *regardless of their* sex. Sexual-orientation discrimination does not classify people according to invidious or idiosyncratic *male* or *female* stereotypes. It does not spring from a sex-specific bias at all.[57]

C. Associational Discrimination

Finally, the *Hively* court examined whether an associational theory of discrimination could support a sexual orientation discrimination claim under Title VII's existing framework. Here, the court turned to associational claims in the race

context, noting the Eleventh Circuit's 1988 decision in *Parr v. Woodmen of the World Life Insurance Company*.[58]

Don Parr, a white man, applied for an insurance salesman position but was not hired after the company, which did not employ or sell insurance to African-Americans, became aware he was in an interracial marriage.[59] The district court granted the company's motion to dismiss concluding Parr was not discriminated against because of his *race*.[60] The circuit court reversed on appeal, holding, "Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of *his* race."[61] The court rejected Woodman's argument that, because Woodman refused to hire blacks, it would have refused to hire any man married to an African-American woman regardless of the man's race. The court reasoned, "Title VII proscribes race-conscious discriminatory practices. It would be folly for this court to hold that a plaintiff cannot state a claim under Title VII for discrimination based on an interracial marriage because, had the plaintiff been a member of the spouse's race, the plaintiff would still not have been hired."[62]

The *Hively* court reasoned that, like in *Parr*, if an employer discriminated against an employee because he or she was in an interracial relationship, the employer's conduct would be unlawful because the employer took race into account.[63] Extending that logic to Hively's claim, the court reasoned, "If we were to change the sex of one partner in a lesbian relationship, the outcome would be different. This reveals that the discrimination rests on distinctions drawn according to sex."[64] As a result, "to the extent that [Title VII] prohibits discrimination on the basis of the race of someone with whom the plaintiff associates, it also prohibits discrimination on the basis of the national origin, or the color, or the religion, or (as relevant here) the sex of the associate. No matter which category is involved, the essence of the claim is that the *plaintiff* would not be suffering the adverse action had his or her sex, race, color, national origin, or religion been different."[65]

Ultimately, in concluding that sexual orientation discrimination claims are actionable under Title VII's prohibition of sex discrimination, the *Hively* court reasoned that "[i]t would require considerable calisthenics to remove the 'sex' from 'sexual orientation'" because "it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex."[66]

VI. CONCLUSION

Ivy Tech declined to petition the Supreme Court to review the Seventh Circuit's decision in *Hively*; meanwhile the issue continues to percolate in federal courts throughout the country—in the Third, Eighth, and Fifth circuits— and may reach the Supreme Court soon.[67] Recently, the Second Circuit joined the Seventh Circuit in holding Title VII protects employees from sexual orientation discrimination in *Zarda v. Altitude Express*.[68] *Hively* is unlikely to dramatically shift public employers' non-discrimination practices given the longstanding, express protections in Illinois law against sexual orientation discrimination in employment. For employees, however, the decision opens the doors to federal court for them to pursue state and federal sexual orientation discrimination claims. Despite that little may change in employer policies after the Seventh Circuit's ruling, *Hively* is a landmark decision that may signal a significant national shift in Title VII's interpretation in favor of gay rights.

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1. Illinois Human Rights Act, 775 ILL. COMP. STAT. 5/1-103(Q) (defining "[u]nlawful discrimination" as "discrimination against a person because of his or her race, color, religion, national origin, ancestry, age, *sex*, marital status, order of protection status, disability, military status, *sexual orientation*, pregnancy, or unfavorable discharge from military service").

2. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017).

3. 742 F.2d 1981 (7th Cir. 1974).

4. *Id.* at 1084.

5. *Id.* at 1085.

6. *Id.*

7. *Doe v. City of Belleville*, 119 F.3d 563, 572 (7th Cir. 1997) (citing *Ulane*, 742 F.2d at 1085–86), *abrogated by Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

8. *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 708 (7th Cir. 2000); *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1087 (7th Cir. 2000).

9. *Hamner*, 224 F.3d at 704; *Spearman*, 231 F.3d at 1084.

10. *Muhammad v. Caterpillar, Inc.*, 767 F.3d 694, 697 (7th Cir. 2014); *Hamm v. Weyauwega Milk Prods*, Inc., 332 F.3d 1058, 1062 (7th Cir. 2003) ("The protections of Title VII have not been extended, however, to permit claims of harassment based on an individual's sexual orientation."); *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 951 (7th Cir. 2002) ("Title VII

does not, however, provide for a private right of action based on sexual orientation discrimination.").

11. Employment Non-Discrimination Act of 1994, H.R. 4636, 103rd Cong. (1994); Employment Non-Discrimination Act of 1994, S. 2238, 103rd Cong. (1994); Employment Non-Discrimination Act of 1995, H.R. 1863, 104th Cong. (1995); 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 1997, S. 869, 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. 3017, 111th Cong. (2009); 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).

12. 490 U.S. 228 (1989).

13. *Id*. at 240, 250.

14. *Doe v. City of Belleville*, 119 F.3d 563, 580 (7th Cir. 1997).

15. *See, e.g., Evans v. Georgia Reg'l Hosp.*, 850 F.3d 1248, 1251 (11th Cir. 2017) (holding a lesbian plaintiff with masculine traits could pursue a gender non-conformity claim under Title VII despite circuit precedent foreclosing sexual orientation discrimination claims under Title VII).

16. *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 196-99 (2d Cir. 2017).

17. Id. at 198.

18. *Id*.

19. *Id*.

20. *Christiansen v. Omnicom Grp., Inc.*, 167 F.Supp.3d 598, 621 (S.D.N.Y. 2016).

21. *Christiansen*, 852 F.3d at 201.

22. 332 F.3d 1058 (7th Cir. 2003).

23. *Id.* at 1067 (Posner, J., concurring), *overruled by Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017).

24. *Christiansen*, 852 F.3d 195, 205–06 (2d Cir. 2017) (Katzmann, J., concurring).

25. 523 U.S. 75 (1998).

26. *Id.* at 80-81.

27. See *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641 (July 16, 2015).

28. *Coleman v. Caritas*, No. CV 16-3652, 2017 WL 2423794, at *1 (E.D. Pa. June 2, 2017); *Winstead v. Lafayette Cty. Bd. of Cty. Commissioners*, 197 F. Supp. 3d 1334 (N.D. Fla. 2016); *Isaacs v. Felder Servs., LLC*, 143 F. Supp. 3d 1190 (M.D. Ala. 2015).

29. *See Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006); *Medina v. Income Support Div.*, 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, 35 (2d 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. Lab. Rel. 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. 1998).

30. *See* Elyssa Cherney, *In Case Involving Indiana Teacher, Judges Consider Workplace Protections for LGBT Community*, CHI. TRIB. (Dec. 1, 2016), www.chicagotribune.com/news/nationworld/midwest/ct-kimberly-hively-lgbt-workplace-bias-appeal-20161130-story.html.

31. *Id.*

32. *Id.*

33. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 341 (7th Cir. 2017).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Hively v. Ivy Tech Cmty.* Coll., No. 3:14-CV-1791, 2015 WL 926015, at *3 (N.D. Ind. Mar. 3, 2015) ("While this Court is sympathetic to the arguments made by Hively in her response brief, this Court is bound by Seventh Circuit precedent. Because sexual orientation is not recognized as a protected class under Title VII, that claim must be dismissed."), *aff'd sub nom. Hively v. Ivy Tech Cmty. Coll., S. Bend*, 830 F.3d 698 (7th Cir. 2016), *reh'g en banc granted, opinion vacated,* No. 15-1720, 2016 WL 6768628 (7th Cir. Oct. 11, 2016), *on reh'g en banc rev'd sub nom. Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017).

38. 42 U.S.C. § 2000e-2(a).

39. *Hively v. Ivy Tech Cmty. Coll., S. Bend*, 830 F.3d 698, 716 (7th Cir. 2016), *reh'g en banc granted, opinion vacated*, No. 15-1720, 2016 WL 6768628 (7th Cir. Oct. 11, 2016), *on reh'g en banc rev'd sub nom. Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017).

40. 853 F.3d at 345.

41. *Id.*

42. *Id.* at 361 (Sykes, J., dissenting).

43. *Id.*

44. *Id.* at 362.

45. *Id.* at 353 (Posner, J., concurring).

46. *See Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006); *Medina v. Income Support Div.*, 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, 35 (2d 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. Lab. Rel. 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 Co.*, 597 F.2d 936 938 (5th Cir. 1979).

47. A similar application of Title VII was used in *Hall v. BSNF Railway Co.*, No. C13-2160 RSM, 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014), where an employer denied healthcare benefits to married same-sex couples otherwise provided to married opposite-sex couples. *Id.* at *3.The company moved to dismiss the Title VII sex discrimination claim, arguing that the thrust of the plaintiff's case was really about sexual orientation discrimination, which is not expressly proscribed by federal law. *Id.* at *2 The court denied the motion to dismiss, noting that "[p]laintiff alleges disparate treatment based on his sex, not his sexual orientation, specifically that he (as a male who married a male) was treated differently in comparison to his female coworkers who also married males." *Id.* at *3.

48. *Hively*, 853 F.3d at 345.

49. *Id.*

50. *Id.* at 366–67 (Sykes, J., dissenting).

51. *Id.* at 347 (majority opinion).

52. *See, e.g., Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000) ("The Court in *Price Waterhouse* implied that a suit alleging harassment or disparate treatment based upon nonconformity with sexual stereotypes is cognizable under Title VII as discrimination because of sex. This theory would not bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine."), *overruled by Zarda v. Altitude Express, Inc.*, 883 F.3d 100, (2d Cir. 2018) (en banc).

53. 852 F.3d 195 (2d Cir. 2017).

54. *Id*. at 205–06 (Katzmann, J., concurring). Other courts have echoed this idea. *See Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 705 (7th Cir. 2016) (explaining that "almost all discrimination on the basis of sexual orientation can be traced back to some form of discrimination on the basis of gender nonconformity"), *reh'g en banc granted, opinion vacated*, No. 15-1720, 2016 WL 6768628 (7th Cir. Oct. 11, 2016), *rev'd on reh'g en banc*, 853 F.3d 339 (7th Cir. 2017); *EEOC v. Scott Med. Health Ctr.*, 217 F. Supp. 3d 834, 841 (W.D. Pa. 2016) ("There is no more obvious form of sex stereotyping than making a determination that a person should conform to heterosexuality."). *See also Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015) (criticizing the workability of courts trying to distinguish sexual orientation discrimination claims and sex stereotyping because "[s]imply put, the line between sex discrimination and sexual orientation discrimination is 'difficult to draw' because that line does not exist, *save as a lingering and faulty judicial construct*") (emphasis added).

55. *Boutillier v. Hartford Pub. Schs.*, 221 F. Supp. 3d 255, 269 (D. Conn. 2016).

56. *Hively*, 853 F.3d at 346.

57. *Id*. at 370 (Sykes, J., dissenting).

58. 791 F.2d 888 (11th Cir. 1986).

59. *Id*. at 892.

60. *Id*. at 889.

61. *Id*. at 892.

62. *Id*.

63. *Hively*, 853 F.3d at 347.

64. *Id*. at 348–49.

65. *Id*. at 349.

66. *Id*. at 350-351.

67. Matthew Haag & Niraj Chokshi, *Civil Rights Act Protects Gay Workers, Court Rules*, N.Y. TIMES (Apr. 4, 2017), https://www.nytimes.com/2017/04/04/us/civil-rights-act-gay-workers-appeals-court.html.

68. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc). In *Zarda*, the Second Circuit ruled in a 10-3 decision that Title VII supports a cause of action for sexual orientation discrimination, but divided on the rationale. A majority held that sexual orientation claims are cognizable under an associational discrimination theory and that a person's sexual orientation cannot be known without taking into account a person's sex. Only six judges would have held

that sexual orientation discrimination is a form of unlawful sex stereotyping and five judges would have adopted the traditional comparator theory.

RECENT DEVELOPMENTS

By Student Editorial Board:

Nicholas Coronado, Yuting Li, Jeremiah Shavers, and Nicolas Ustaski

I. IELRA DEVELOPMENTS

A. Grievance Processing

In *Dave and Board of Trustees of Southern Illinois University Carbondale*, 34 PERI ¶ 95 (IELRB 2017), the IELRB held that a complaint should issue over the charging party's allegations that the employer failed to process his grievances in retaliation for his protected activity.

Dave worked for the university as a chemistry professor. The university terminated Dave, the union grieved and an arbitrator ruled in Dave's favor, ordering, in part, that Dave be reinstated with back-pay.

Upon Dave's return, issues arose over what his reinstatement entailed. The university assigned Dave a lab space in his previous building, but it was not his original workspace. However, Dave insisted that the award meant that he should be returned to his old lab. The university and union asked the arbitrator to clarify the award. The arbitrator stated that the award allowed Dave to be assigned a similar, although not the same, workspace. Dave continued to complain about not being assigned his old lab, claiming that the new workspace was making him ill. The university also assigned Dave a workload that did not include a class he had previously taught for many years. The new workload also shifted one of Dave's classes to a different semester. Dave filed a grievance on his own behalf to challenge the new work assignments. The employer did not respond to the grievance.

The IELRB Executive Director dismissed the charges. The IELRB affirmed as it related to the refusal to comply with the arbitration award, and the retaliation for union activities claims. The IELRB found that neither of the claims was timely filed and that there was insufficient evidence to support a claim of retaliation for union activities.

The IELRB reversed the dismissal of the charge that the university refused to process Dave's grievances. The IELRB had not previously determined whether such a refusal could be considered a violation of the IELRA. Section 14(a)(1) of the IELRA prohibits educational employers from "[i]nterfering, restraining or coercing employees in the exercise of the rights guaranteed under this Act."

Section 10(c) of the Act requires a grievance procedure in collective bargaining agreements. Further, Section 3(b) allows employees to present grievances to their employers and to have them adjusted without interference by a bargaining representative. In light of this, the IELRB held there was a facially plausible argument that the employer's refusal to process the grievances could be considered an interference or restraint upon Dave's exercise of his rights granted by section 14(a)(1). Therefore, the case was remanded to the Executive Director to issue a complaint on this issue.

II. IPLRA DEVELOPMENTS

B. Arbitration

In *Teamster Local 700 and Chief Judge of the Circuit Court of Cook County*, 34 PERI ¶ 136 (ILRB State Panel 2018), the ILRB State Panel held that the Circuit Court of Cook County did not violate the IPLRA during a period when the Juvenile Temporary Detention Center (JTDC) was overseen by a Transitional Administrator (TA) appointed by a federal court and the TA refused to arbitrate discipline and discharge grievances.

This case began in 2002, when class action plaintiffs filed a lawsuit seeking redress for violations of their constitutional rights due to living conditions and practices at the JTDC. The parties entered into a settlement agreement and a Memorandum of Agreement (MOA) to ensure the Detention Center housed and cared for the residents consistent with constitutional standards. In 2007, a U.S. District Court Judge entered an agreed order appointing the TA to bring the JTDC into substantial compliance with the MOA and other related orders. The TA also received approval from the federal court to suspend certain provisions of the collective bargaining agreement. In 2009, the TA refused to arbitrate all grievances and any terminations and the union filed unfair labor practice charges against the Circuit Court.

The union argued that the Circuit Court's refusal to arbitrate grievances, during the TA's tenure, constituted a repudiation of the collective bargaining obligation because the Circuit Court was a successor in interest to the union's collective bargaining agreement. The Circuit Court argued in response, that there was no basis on which to impute liability from the TA to the Circuit Court. The TA was not a joint employer or agent of the Circuit Court. The Circuit Court did not share the TA's power to hire, fire, discipline, promote or demote, only handled the arbitrations for a short amount of time, and had no control over the TA's actions. The State Panel concluded that the Circuit Court did not exercise control over employees' terms and conditions of employment through the TA's actions because

the TA was not an agent of the Circuit Court. The State Panel dismissed the charges.

C. Managerial Employees

In *AFSCME Council 31 v. Department of Central Management Services (Illinois Commerce Commission)*, 2018 Il. App (1st) 140656, the First District Appellate Court held that six directors in the Illinois Commerce Commission (ICC) were managerial employees and properly excluded from an AFSCME-represented bargaining unit. AFSCME Council 31 filed a representation petition which sought to include nine directors of the ICC in one of its existing bargaining units. After opposition from the ICC, the union stipulated that three of the nine directors should be excluded from the unit. The administrative law judge recommended that the Board find that three of the directors were managerial employees and the other three directors were public employees with full collective bargaining rights. The ILRB State Panel found that all six directors were managerial employees. The Appellate Court affirmed.

The court explained that exclusion of managerial employees is "intended to maintain the distinction between management and labor and to provide the employer with undivided loyalty from its representatives." The court used the two-part test established by Section 3(j) of the IPLRA. To determine if the directors were managerial employees, "the person must be both 1) engaged predominately in executive and management functions and 2) charged with the responsibility of directing the effectuation of management policies and practice."

The union argued that the State Panel incorrectly read "predominantly" to mean, "superiority in importance or numbers." The union argued that this qualitative interpretation threatened to erase the longstanding practice of quantifying "predominately" through assessing whether the employees spent most of their time conducting managerial work and tasks. Second, the union argued that the Board improperly decided that two of the employees were managerial solely because they functioned as informational "gatekeepers."

The court concluded that managerial employees "possess and exercise authority and discretion which broadly effects a department's goals and means of achieving its goals." The court further concluded that "predominately" has never been subject to a "strict numerical approach" when determining an employee's managerial status. The court stated that "the amount of time an employee spends on managerial tasks is not determinative of the employee's managerial status."

The court agreed with the union's position that an employee's functioning as an informational gatekeeper does not automatically classify that employee as a managerial employee. The employee must also have some decision-making power regarding what action should be taken with the information. Merely passing on that information to another supervisor was not enough to make the gatekeeper a managerial employee. Ultimately, despite the two directors being incorrectly classified by the ILRB, the court still found all six directors to be managerial employees because of the nature of their tasks. All of the six directors had a mix of decision-making power, manners in which to influence the Commissions' policy and objectives, and presenting and implementing recommendations to the administration of the Commission. These six directors satisfied the two-part test outlined above.

D. Right to Strike

In *AFSCME Council 31 v. ILRB*, 2017 IL App (5th) 160046, 90 N.E.3d 576, the Fifth District Appellate Court held that the State of Illinois violated sections 10(a)(1) and (2) of the IPLRA when is posted a list of FAQs on its website which advised employees that if they struck, they would be charged for the employer's contribution to health insurance premiums in addition to their own contributions for any pay period in which they were on strike, regardless of whether they struck for the entire pay period. The ILRB Executive Director had dismissed the union's unfair labor practice charge and the State Panel upheld the dismissal. The court reversed.

The court determined that the policy would effectively chill and restrain the employees from engaging in their statutorily protected right to strike. The State argued that the health care benefits policy was akin to a policy that was already in place, that employees would not be paid while they were on strike, and that the public employer did not have a duty to effectively subsidize a strike.

However, the court concluded that this no pay during a strike policy was different than having employees pay for the health insurance premiums that the public employer was responsible for for the entire insurance premium period. This policy would cause the employees to pay for the premiums they were responsible for, on top of the employer contributions for the entire health insurance period, even if the employees were not on strike the entire period. In contrast, the no pay policy denied employees pay for the days they were on strike rather than for the entire pay period.The court concluded that this policy unlawfully threatened employees by making them pay for employer health insurance contributions for the entire

insurance assessment period instead of just the days they were on strike. Therefore, the court reversed and remanded the case to the ILRB.