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Seventh Circuit Addresses EEOC's Stance That Sexual Orientation Is Protected By Title VII

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Douglas M. Oldham
Of Counsel

In a recent opinion, the Seventh Circuit held that a plaintiff who claimed she was discriminated against on the basis of her sexual orientation had failed to state a claim under Title VII, reaffirming the Seventh Circuit's stance that sexual orientation is not a protected classification. However, Judge Rovner's opinion presents a more nuanced opinion than the Court has taken on the issue in the past, acknowledging logical difficulties in the state of the law. The plaintiff was a former community college employee who claimed she was denied full-time employment and promotions because of her sexual orientation. She did not claim sex discrimination, which is currently a popular route to bring a Title VII claim of sexual orientation discrimination, and one that has been endorsed by the Equal Employment Opportunity Commission ("EEOC"). The Northern District of Indiana granted the community college's motion to dismiss, and the Seventh Circuit affirmed on the basis that Title VII does not include sexual orientation as a protected class. Judge Rovner summarized previous Seventh Circuit case law on the subject and stated that the Court was bound by its precedent for several reasons. Judge Rovner continued, addressing a recent EEOC opinion holding that sexual orientation discrimination is sex discrimination barred by Title VII and criticizing courts such as the Seventh Circuit. Judge Rovner's opinion recognized the EEOC's *Price Waterhouse v. Hopkins* argument that mannerisms associated with gender can lead to a sex discrimination claim and she addressed different circuit courts' muddled and often conflicting views on whether and how to separate claims regarding gender norms from those about sexual orientation: And so for the last quarter century since *Price Waterhouse*, courts have been haphazardly, and with limited success, trying to figure out how to draw the line between gender norm discrimination, which can form the basis of a legal claim under *Price Waterhouse's* interpretation of Title VII, and sexual orientation discrimination, which is not cognizable under Title VII.

Although Judge Rovner opined that the distinction between gender discrimination and sexual orientation discrimination is often trivial and can vary dramatically from case to case, the Court held that the Seventh Circuit would continue to make the distinction: Although it seems likely that most of the causes of discrimination based on sexual orientation ultimately stem from employers' and co-workers' discomfort with a lesbian woman's or a gay man's failure to abide by gender norms, we cannot say that it must be so in all cases. Therefore we cannot conclude that the two must necessarily be coextensive unless or until either the legislature or the Supreme Court says it is so.

Judge Rovner went on to discuss other theories by which sexual orientation

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could potentially be a protected class, but stated that both Congress and the Supreme Court have had repeated opportunities to change the law and to cover sexual orientation and they have repeatedly declined to do so. While previous Seventh Circuit panels have ruled rather summarily that sexual orientation claims fail because sexual orientation is not a protected class, Judge Rovner's opinion was more nuanced. It is noteworthy that the plaintiff in this case plainly alleged sexual orientation discrimination and did not alternatively allege sex discrimination. The case is *Hively v. Ivy Tech Community College*, Case Number 15-1720.