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3 Takeaways From 7th Circ.'s Watershed Gay Bias Ruling

By **Braden Campbell**

Law360, New York (April 5, 2017, 8:55 PM EDT) -- The Seventh Circuit on Tuesday became the first appeals court in the country to find Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of sexual orientation in a historic en banc decision attorneys say will be felt far outside the circuit's bounds.

The judges voted 8-3 to overturn precedent that allows employers to discriminate against workers on the basis of their sexuality, remanding to Indiana federal court teacher Kimberly Hively's suit alleging Ivy Tech Community College passed her over for jobs because she is a lesbian.

The ruling opens a circuit split that may not be immediately bridged and shines a spotlight on two clashing schools of judicial philosophy that may do battle should this issue reach the U.S. Supreme Court, experts say. Here, Law360 looks at employment attorneys' biggest takeaways from the Seventh Circuit's decision.

A Split Emerges

The Civil Rights Act of 1964 "prohibits employment discrimination based on race, color, religion, sex and national origin," though whether a particular practice violates the statute often proves a complicated question. Several times, the appeals courts have ruled a previously tolerated practice illegal. The U.S. Supreme Court in 1967 ruled miscegenation laws violated the statute's prohibition on "discrimination based on race" in Loving v. Virginia. In 1989, the high court ruled in Price Waterhouse v. Hopkins that discrimination for failure to conform to gender stereotypes violates the law's ban on discrimination "based on ... sex." In 1998, it ruled in Oncale v. Sundowner Offshore Services that discrimination between members of the same sex is still sex discrimination.

Prior to Tuesday, no federal appeals court had said the same about sexual orientation. Just the opposite: Every appeals court to consider whether Title VII bars sexual orientation discrimination had ruled it outside the statute's reach.

As society has grown more accepting of homosexuality, the appeals courts have grown increasingly skeptical of precedent that Tile VII does not cover sexual orientation discrimination. The ruling was little surprise to court watchers after the judges signaled a willingness to overturn precedent in oral arguments last fall, but it's still a bombshell.

"It's extremely significant in that no federal, circuit, appellate court prior to yesterday has held that sexual orientation is covered," said Joseph Greenwald & Laake PA's Jay P. Holland. "Which, when you look back on the history of the case law, it’s still pretty interesting that no court had

gone that way previously."

Other courts have allowed gay workers to claim sex discrimination based on a gender stereotyping theory under Hopkins, but the Seventh Circuit said no such back door is necessary.

Relying primarily on a hypothetical that substituted a man for Hively — would a man in Hively's shoes be discriminated against for having a female partner? — the court ruled "it is ... impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex."

The Seventh Circuit's decision may have opened a rift between the circuits, but its immediate impact is minimal. Of the three states that make up the circuit, only Indiana lacks a state law barring employers from discriminating on the basis of sexual orientation. But the ruling will soon have life outside of the Seventh Circuit.

A Long Road Ahead

It may not be long before the Hively decision begins swaying the debate, but the road to resolution is a winding one. A circuit split like the one created by the Hively decision can be bridged either by Congress or the Supreme Court, though neither is a foregone conclusion at this point, experts say.

Despite the circuit split, the high court may feel the question needs a little more ripening before it weighs in. Though the circuits are nearly unanimous, because some precedent predates the Supreme Court's Hopkins and Oncale decisions, the justices could decide to let the issue marinate.

"It's hard to predict whether the court will take it up at this point, or allow more circuits to weigh in," said Littler Mendelson PC shareholder Mark Phillis.

Ivy Tech has said it will not petition the Supreme Court to review the Seventh Circuit's decision, but there are two other cases high up in the appeals system that could be vehicles for Supreme Court review.

Last week, former Georgia Regional Hospital security guard Jameka Evans asked the Eleventh Circuit to rehear en banc her case alleging she was harassed because she's a lesbian after the court said its precedent barred her claim. And a reluctant-sounding Second Circuit dismissed gay ad executive Matthew Christiansen's claim he was harassed by a supervisor over his sexuality earlier in March, though it revived his gender stereotyping claim. Christiansen has not filed for en banc review.

The Seventh Circuit’s decision in Hively is likely to weigh on the Eleventh Circuit as it considers Evans' petition and could likewise factor into the Second Circuit's decision should Christiansen make a push. The ruling could be persuasive should either court grant a rehearing.

"Courts more recently have bemoaned the fact they felt forced to follow precedent in this instance," Holland said. "I think this will give other courts an outlet to say those precedents no longer hold weight."

There's a chance Congress answers the sexual orientation question through legislation, though attorneys say past failures to pass such a law in more progressive climates don't bode well for a new bill's chances in a majority Republican Congress and with President Donald Trump in the White House.

That Ivy Tech isn't petitioning the Supreme Court to review the Seventh Circuit suggests losers at

the appellate level may not be eager to mount a test case on such a heated issue, but someone will.

"This is an issue that now is going to be ripe for presentation to the Supreme Court," said Gould & Ratner LLP litigation practice co-chair David Michael. "I understand ... that Ivy Tech doesn't intend to appeal it further, but at some point, someone's going to."

The Seventh Circuit has set the stage for other appellate courts to deepen the discourse, but attorneys say the Supreme Court is the likeliest venue for resolution. When it gets there, it won't be a simple one to decide.

A Brewing Battle

Should the Supreme Court grant certiorari or a circuit court opt to rehear en banc, it will have to answer a question that polarized the Seventh Circuit: Whether the judges must infer the intentions of the 88th Congress, or whether they can codify an interpretation of a law that its drafters may not have envisioned.

The eight-member majority fell in the latter camp, arguing that the Supreme Court has often expanded the understanding of the statute past what it was in 1964. In a concurring opinion, U.S. Circuit Judge Richard Posner openly endorsed the idea of modernizing a dated statute. In a dissent, three judges said courts should not have the power to "alter the original public meaning of a statute."

The next court to hear the question will find consensus no simpler.

"This is a fantastic, law school example," Paul Hastings LLP employment partner Neal Mollen said. "If you're teaching a class on judicial philosophy, you couldn't really do any better than this setting for teaching the two principal countercurrents of judicial philosophy."

If U.S. Circuit Judge Neil Gorsuch is confirmed to the seat left vacant by Justice Antonin Scalia, the strict construction school could prevail when this question makes it to the high court. The Tenth Circuit judge is widely viewed as having been cut from the same cloth as the late justice in many respects, suggesting the court's originalists could make up the majority with him installed.

In the Supreme Court's Oncale decision that brought same-sex harassment under Title VII, Justice Scalia wrote that "statutory prohibitions often go beyond the principal evil to cover reasonable comparable evils." It's a passage that proved instructive to all members of the Seventh Circuit: The majority, Judge Posner, and the dissenters all cited the passage in support of their respective findings.

That the Seventh Circuit could be so polarized on this foundational legal questions sets the stage for a showdown at the high court, attorneys say.

"What this exquisitely exposes is the clash of judicial philosophies ... the question is: Will one judicial philosophy prevail over another?" Holland asked.

--Editing by Katherine Rautenberg and Kelly Duncan.