



Appeals Court Finds That Title VII Prohibits Discrimination Based on Sexual Orientation

William M. Furr

On April 4, 2017, the United States Court of Appeals for the Seventh Circuit became the first federal appeals court to find that Title VII of the Civil Rights Act of 1964 prohibits discrimination based on sexual orientation. In *Hively v. Ivy Tech Community College*, the plaintiff filed suit alleging that she was denied employment because she is a lesbian.

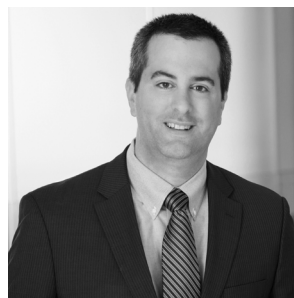
In *Hively v. Ivy Tech Community College*, the plaintiff filed suit alleging that she was denied employment because she is a lesbian.

The lower court dismissed Ms. Hively's complaint on the basis that the United States Supreme Court has never recognized a cause of action under Title VII for sexual orientation discrimination. The United States Court of Appeals for the Seventh Circuit reversed the lower court's decision and allowed Ms. Hively's lawsuit to proceed to trial.

The Seventh Circuit acknowledged that the U.S. Supreme Court has never ruled on this particular issue, but held that if confronted with the issue today, the Supreme Court would find that Title VII protects applicants and employees from discrimination based on sexual orientation. In ruling in favor of the employee, the Seventh Circuit cited U.S. Supreme Court cases finding: 1) that gender stereotyping falls within Title VII's prohibition against sex discrimination; 2) that sexual harassment can occur even when both the harasser and the harassee are the same gender; and 3) that the Constitution protects the right of same sex couples to marry.

The Seventh Circuit's decision does not govern cases in Virginia or any states other than Illinois, Indiana, and

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The Duty to Transfer Under the ADA: Is the ADA an "Affirmative Action" Statute?

David A. Kushner

It is common knowledge that the Americans with Disabilities Act (ADA) requires employers to provide reasonable accommodations to allow disabled employees to perform the essential functions of their *current* job. However, what obligations does an employer have when a disabled employee cannot be accommodated in his/her current job, but requests a transfer to another open position? The potential answer to this question may surprise you.

According to the EEOC and a growing number of courts, an employer is required to preferentially place the disabled employee in an open position, **even if the employee is *not* the most qualified candidate for that position**. Indeed, based on the EEOC's published guidance on "mandatory preferences," as well as a recent high profile court opinion, employers must consider the possibility that: (1) a disabled employee who cannot be accommodated in his/her current position is entitled to be placed in a vacant position even if the employee is not the most qualified candidate; (2) the employer may not require the disabled employee to compete for the position; and (3) the employer may have the duty to help the disabled employee search for vacant positions.

On the other hand, a number of courts (including one in Virginia) have recently pushed back against the EEOC's broad position on so-called "mandatory preferences," and we are expecting a controlling decision from the Fourth Circuit Court of Appeals later this year.

EEOC Guidance on Transfer to a Vacant Position

The EEOC has long taken the position that, when an employee cannot be accommodated in his/her current position, the employer must attempt to transfer that

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Indemnity Plans - Taxable or Non-Taxable?



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Recently, the Internal Revenue Service (IRS) clarified that the tax consequences of fixed indemnity and wellness plans offered by employers depend on whether the fixed indemnity plan is a traditional plan offered by an insurance company or a self-funded indemnity plan.

An example of a traditional fixed indemnity plan is a cancer or hospital policy offered by AFLAC that pays a fixed amount for medical expenses incurred by employees as a result of cancer or hospitalization.

An example of a traditional fixed indemnity plan is a cancer or hospital policy offered by AFLAC that pays a fixed amount for medical expenses incurred by employees as a result of cancer or hospitalization. Under a self-funded indemnity plan, the employer pays employees a fixed amount for engaging in certain activities, such as attending a counseling session, participating in a biometric screening, calling a toll-free number that provides general health information. The fixed payments are not related to the amount of medical expenses incurred by employees.

Scenario 1: Traditional Fixed Indemnity Health Plan

If employees pay premiums for a traditional fixed indemnity health plan offered by an insurance company on an after-tax basis, the payments made by the indemnity plan to the employees are excluded from the employees' gross income. If premiums are paid on a pre-tax basis, the payments made by the indemnity plan to the employees that are in excess of the employees' actual unreimbursed costs are included in gross income.

For example, if the indemnity plan pays an employee \$200 for a medical office visit and the employee does

not incur any costs as a result of the visit because it is covered 100% by the group health plan as preventive care, the entire \$200 is included in gross income if the premiums were paid on a pre-tax basis or is excluded from gross income if the premiums were paid on an after-tax basis.

Scenario 2: Self-funded Fixed Indemnity Health Plan

In recent years, promoters of self-funded fixed indemnity health plans claimed that the benefits paid by the self-funded plans do not constitute income or wages, reducing both the employer and employees share of employment taxes. Under a typical arrangement, employees pay a small after-tax premium for the self-funded fixed indemnity plan and the plan pays a fixed cash payment benefit for participating in certain activities related to health (such as, attending a counseling session or participating in a biometric screening). The fixed dollar amounts received under the plan are greater than the after-tax premiums paid. The plan is administered by the promoter.

The IRS concluded that because the self-funded plan is not insurance, the amounts received are not excluded from income or wages. The benefits received under the plan that are in excess of the after-tax premiums are included in the employee's gross income and wages. In addition, because the plan is not insurance, the promoter is treated as an agent of the employer and the excess payments are subject to income tax withholding as if the employer were making the payments. The excess payment is also subject to FICA and FUTA taxes.

Scenario 3: Self-funded Fixed Indemnity Health Plan Plus Wellness Plan

A variation of the arrangement in scenario 2 includes offering a wellness plan in combination with the self-funded fixed indemnity plan. The premiums for the wellness plan are paid on a pre-tax basis. The wellness plan provides that if the net take-home pay after receiving the fixed cash payment from the self-funded plan exceeds the amount of the net take-home pay prior to implementing the plans, the excess is paid in the form of flex credits that can be used for benefits under a cafeteria plan. As a result, the net take-home pay of employees participating in the plans is the same, but the amount of FICA taxes paid by both the employer and employee is reduced.

The IRS concluded that the tax consequences of this type of arrangement are the same as in scenario 2

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employee to a vacant position, for which the employee cannot be required to compete. According to the EEOC, such an employee gets a "mandatory preference" for an open position for which s/he is minimally qualified. The key elements of the EEOC's guidance are described below:

- **The Disabled Employee Need Not Compete for the Position:** In its guidance, the EEOC states that for reassignment to be a viable accommodation, an employee need only be minimally "qualified" for the new position. An employee is "qualified" for a position if s/he: (1) satisfies the requisite skill, experience, education, and other job-related requirements of the position, and (2) can perform the essential functions of the new position, with or without reasonable accommodation. According to the EEOC, **"the employee does not need to be the best qualified individual for the position in order to obtain it as a reassignment."**
- **"Vacant" is Defined Broadly:** The EEOC defines "vacant" as meaning "the position is available when the employee asks for reasonable accommodation, or . . . the employer knows that it will become available within a reasonable amount of time." The EEOC takes the position that an employer must consider transfers to other locations or other business units. A position would be considered vacant, even if the employer has already begun interviewing for the position.
- **The Employer Must First Offer a Transfer to Equivalent Positions:** According to the EEOC, an employer must first attempt to reassign a qualified individual to a vacant position of equivalent pay, benefits, and status. If no equivalent vacancy exists, the employer must reassign the employee to a vacant lower level position for which he or she is qualified. If transferred to a lower level position with a lower salary, the employer does not need to maintain the higher salary. The employer does not have any obligation to reassign the employee to a higher position, and "an employee must compete for any vacant position that would constitute a promotion." The EEOC also takes the position that, when an employee cannot be accommodated in his/her current position, the employer may be required to bring up the possibility of a transfer even if the employee has not requested it.

Recent Case Law on Mandatory Preferences

In the 2012 case of *EEOC v. United Airlines*, the United States Court of Appeals for the Seventh Circuit addressed the question of whether the EEOC's position on mandatory preferences was valid law in that circuit. Like many employers, United Airlines had a policy that it always hires the most qualified applicant for an open position. When disabled employees requested a transfer, United consistently required the disabled employee to compete for the position. The EEOC challenged this practice, citing to the United's failure to follow the EEOC's guidance on mandatory preferences.

In a highly publicized case from 2000, the Seventh Circuit had already ruled that the EEOC's position was invalid, and that disabled employees could be required to compete for open positions. Thus, when the Seventh Circuit reversed itself in its 2012 *United Airlines* decision (and adopted the EEOC's position), it sent shockwaves through the legal and HR community. It also made it more likely that a Virginia Court would adopt the EEOC position.

To date the Fourth Circuit Court of Appeals (with jurisdiction over Virginia, West Virginia, North Carolina, Maryland and South Carolina) has not ruled directly on this issue. However, there has been some helpful recent guidance from a Virginia district court, which is pending appeal to the Fourth Circuit. In *Woody v. United States*, the plaintiff had a heart condition that made it impossible for her to continue to perform the essential functions of her sheriff-deputy position. The plaintiff requested that she be transferred to a vacant position as a payroll clerk. Although she met the minimum qualifications for that position, she was not the most qualified candidate, and her employer refused to transfer her. The plaintiff sued, citing to the EEOC guidance and arguing that her employer violated the ADA by requiring her to compete for the payroll position. The court in the Eastern District of Virginia disagreed, ruling that (contrary to the EEOC position) an employer need not place a less qualified candidate in a vacant position. The plaintiff appealed this decision, and an opinion from the Fourth Circuit is expected later this year.

Guidance

Until the Fourth Circuit issues its opinion in *Woody*, employers will need to continue to proceed with caution when analyzing how to deal with a disabled employee who cannot be accommodated in his/her current position, but who may be minimally qualified for an alternative position. ■

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Wisconsin. However, other appellate courts may consider the Seventh Circuit's reasoning in determining whether to revisit their prior rulings on this issue.

Whether Title VII prohibits discrimination based on sexual orientation will ultimately be decided by the United States Supreme Court. The fact that the Seventh Circuit has now split from the other circuits in holding that sexual orientation is a protected status under Title VII may lead to a speedier review by the Supreme Court. Stay tuned for further developments. ■

Indemnity Plans - Taxable or Non-Taxable?

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and the flex credits awarded under the wellness plan are excluded from income and wages unless the credits were used to purchase taxable benefits under the cafeteria plan. For example, if an employee used the flex credit to purchase a gym membership, the flex credit would be included in the employee's gross income and wages.

Employers offering self-funded indemnity plans that fail to treat benefits paid under the indemnity plans in accordance with IRS guidance may be subject to potential penalties and should contact legal and tax counsel. ■

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