

# Sexual Orientation Discrimination Prohibited by Title VII, 7th Circuit Finds

Prepared by:  
Paul Patten and Michelle E. Phillips  
Jackson Lewis P.C.



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Published on [www.lorman.com](http://www.lorman.com) - August 2017

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# Sexual Orientation Discrimination Prohibited by Title VII, 7<sup>th</sup> Circuit Finds

*Written by Paul Patten and Michelle E. Phillips - 4-5-17*

Observing that it would require “considerable calisthenics” to remove “sex” from “sexual orientation,” the U.S. Court of Appeals for the Seventh Circuit, in Chicago, has ruled that “discrimination on the basis of sexual orientation is a form of sex discrimination” and unlawful under Title VII of the Civil Rights Act of 1964.

The Seventh Circuit’s ruling was issued by an *en banc* panel of all active judges of the Court. Eight judges agreed with the result and three judges dissented. This is the first Court of Appeals to hold that sexual orientation discrimination is prohibited under Title VII. The Seventh Circuit has jurisdiction over Illinois, Indiana, and Wisconsin.

The case came before the full panel of the Seventh Circuit after the district court, following Seventh Circuit precedent, dismissed the complaint of a part-time college professor who claimed violations of Title VII. The plaintiff, who is a lesbian, alleged that she had been denied full-time positions and terminated due to her sexual orientation.

An earlier panel of three Seventh Circuit judges had upheld dismissal of her complaint, and the Seventh Circuit then agreed to rehear the case *en banc*. Because of the procedural posture, the Court was required to accept the facts as presented by the plaintiff and nothing

from the Court's ruling prevents the employer from contesting the points in later proceedings.

Chief Judge Diane Wood authored the Court's principal opinion, finding two approaches supported the plaintiff's ability to state a claim under Title VII.

First, Judge Wood found the plaintiff's claim was supported by a comparable method; that is, the plaintiff was able to describe a situation in which her sex led to her being treated differently. Had the plaintiff been a man married to or living with a woman, and everything else stayed the same, she would have been promoted and not fired. According to Judge Wood, "This describes paradigmatic sex discrimination."

Second, Judge Wood found the plaintiff's claims supported by an associational discrimination theory. Fifty years ago, the U.S. Supreme Court struck down state laws restricting interracial marriage as violating the Constitution's Equal Protection Clause. *Loving v. Virginia*, 388 U.S. 1 (1967). Just as *Loving* found anti-miscegenation laws to be inherently racist because those laws rested on "distinctions drawn according to race," the alleged adverse employment decisions against the plaintiff, a lesbian, rested on distinctions drawn according to sex, stating a claim under Title VII.

Judge Wood rejected common arguments of those who argue sexual orientation discrimination is not encompassed by Title VII. For example, regarding the legislative intent of Title VII to prohibit sexual orientation discrimination, Judge Wood noted that the Supreme Court has ruled in other contexts that Title VII protects against alleged discrimination that goes beyond the principal evils envisioned by the

Congress that enacted Title VII. Regarding the rejection of amendments to Title VII that would have made sexual orientation a specific protected category, Judge Wood found that “truncated legislative initiatives” do not permit a reliable inference against coverage. She added that while the Seventh Circuit would not address whether the Equal Employment Opportunity Commission’s 2015 declaration of Title VII coverage for sexual orientation was entitled to deference, she found it was notable that Congress has not bothered to expressly reject the EEOC’s position.

Employers should ensure their Equal Employment Opportunity and Harassment policies and training cover sexual orientation discrimination. Sexual orientation discrimination can be direct or subtle. Employers should be mindful of all the different types of discrimination within the workplace.

Employers should regularly review their policies and practices with employment counsel to ensure they address specific organizational needs effectively and comply with applicable law.

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