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Fifty years ago, when Title VII was passed, no one thought that sexual orientation discrimination was unlawful sex discrimination. The Seventh Circuit's decision to re-interpret Title VII challenges traditional approaches to statutory interpretation that should put Seventh Circuit litigants on notice of future uncertainty.

It seemed an unlikely setting for a bombshell opinion. Kimberly Hively, a part-time adjunct professor at an Indiana community college, alleged that she was denied consideration for full-time teaching positions, and that her part-time contract was not renewed, because of her sexual orientation. The U.S. District Court for the Northern District of Indiana had granted Ivy Tech's motion to dismiss, holding that Hively had not alleged employment discrimination on the basis of sex as required by Title VII. A three-judge panel of the United States Court of Appeals for the Seventh Circuit then affirmed the district court's dismissal, citing prior precedent over many decades in the Seventh Circuit that sexual orientation discrimination was not covered by Title VII of the Civil Rights Act of 1964.[1]

Then, on April 4, 2017, in the first decision of its kind by a federal circuit court, the Seventh Circuit, sitting *en banc*, rejected its precedents over the last thirty years and ruled that employment discrimination on the basis of sexual orientation is a form of unlawful sex discrimination under Title VII.[2] Of most long-term importance to Wisconsin lawyers may not be the holding itself, as the split among the federal circuits no doubt means that, someday, this issue will be addressed by the United States Supreme Court. (Ivy Tech has publicly announced that it will not seek a writ of *certiorari* in this case.) Rather, the Seventh Circuit's approach to statutory interpretation laid out in the *Hively* opinions will likely have more long-term impact. In the Seventh Circuit, do statutes mean what they say, or does their meaning change as society changes? This article will highlight the approaches to landmark statutory interpretation laid out in *Hively* and identify questions raised by the decision and its opinions.

The majority opinion

Writing for the court, and in light of what the opinion called "the Supreme Court's authoritative interpretations" of Title VII, "not what someone thought it meant one, ten, or twenty years ago," Chief Judge Diane Wood said that the court was "tak[ing] a fresh look at our position in light of

[1] 42 USC § 2000e-2(a).

[2] *Hively v. Ivy Tech Community College of Indiana*, No. 15-1720 (7th Cir. Apr. 4, 2017) (*en banc*).

developments at the Supreme Court extending over two decades."[3] Overruling "a line of this court's cases,"[4] the majority called the issue before the court "a pure issue of statutory interpretation."[5] After highlighting various techniques used in statutory interpretation,[6] the majority opinion then concluded that none of them were of help in interpreting the statute because "it is simply too difficult to draw a reliable inference" from them.[7]

Rather, the court turned to other US Supreme Court precedents, in particular *Oncale v. Sundowner Services, Inc*.,[8] a unanimous opinion written in 1998 by Justice Antonin Scalia. In *Oncale*, the Court concluded that Title VII covered same-sex harassment of a sexual nature. The majority opinion quoted language from *Oncale* that said that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[9] The majority also pointed to the *Obergefell* decision of the Court in 2015[10] and the now "paradoxical legal landscape in which a person can be married on Saturday and then fired on Monday for just that act."[11]

Relying on these cases, as well as *Loving v. Virginia*,[12] the majority ultimately concluded that "the essence of [Hively's] claim is the plaintiff would not be suffering adverse action had…her sex, race, color, national origin, or religion been different." Consequently, the majority said that sexual orientation discrimination is a kind of sex discrimination, in much the same way that the US Supreme Court had previously determined that same-sex harassment and gender stereotyping harassment were forms of sexual harassment covered by Title VII.[13]

Judge Posner's concurrence

The concurrence from Judge Richard Posner indicates, however, that amending the meaning of Title VII was exactly what the court was doing. Judge Posner first outlines "three flavors" of statutory interpretation. The first involves "extract[ing]…the original meaning of the statute," which is done by focusing on the exact words used.[14] The second involves determining the "unexpressed intent" of the statute, and he quoted Blackstone to say that "where words bear either, none, or a very absurd signification, if literally understood, we must a little deviate from

[3] *Id.* at 2.
[4] *Hamner v. St. Vincent Hosp. and Health Care Ctr., Inc.*, 224 F.3d 701 (7th Cir. 2000); *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1085 (7th Cir. 2000); *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984).
[5] *Hively* at 6.
[6] *Id.*
[7] *Hively* at 8.
[8] *Oncale v. Sundowner Services, Inc.*, 523 U.S. 75 (1998).
[9] *Id*. at 79; *Hively* at 9.
[10] *Obergefell v. Hodges*, 576 U.S. ___, 135 S.Ct. 2584 (2015).
[11] *Hively* at 5.
[12] *Loving v. Virginia*, 388 U.S. 1 (1967).
[13] *Oncale*; *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).
[14] *Id.* at 24.

the perceived sense of them."[15] Finally, "and most controversially," Judge Posner says that interpretation "can mean giving a fresh meaning to a statement (which can be a statement found in a constitutional or statutory text)—a meaning that infuses the statement with vitality and significance today."[16]

In Judge Posner's view, Title VII invites an "interpretation that will update it to the present, a present that differs markedly from the era in which the Act was enacted." Calling this "judicial interpretative updating," Judge Posner gives a series of examples to illustrate how he believes that this has occurred in connection with Title VII since its enactment.[17] He concludes that failing to give the word "sex" in Title VII a "broader understanding" than what it might have had in 1964 "would make the statute anachronistic, just as interpreting the Sherman Act by reference to its nineteenth-century framers' understanding of competition and monopoly would make the Sherman Act anachronistic."[18] Judge Posner acknowledges that "we, who are judges rather than members of Congress, are imposing on a half-century old statute a meaning of 'sex discrimination' that the Congress that enacted it would not have accepted."[19] He defends this action by saying that "[w]e are taking advantage of what the last half century has taught."[20]

The dissent

Judge Diane Sykes, in her dissent, argues that the court's approach is "a judge-empowering, common-law decision method that leaves a great deal of room for judicial discretion" and that is not "faithful to the statutory text, read fairly, as a reasonable person would have understood it when it was adopted. The result is a statutory amendment courtesy of unelected judges" based on "an aggressive reading of loosely related Supreme Court precedents."[21]

Judge Sykes relies primarily on what she calls "the first principle of statutory interpretation: When a statute supplies the rule of decision, our role is to give effect to enacted text, interpreting the statutory language as a reasonable person would have understood it at the time of enactment." She notes that judges are "not authorized to infuse the text with a new or unconventional meaning or to update it to respond to changed social, economic, or political contexts."[22] Judge Sykes distinguishes the Sherman Act, saying that "Congress has vested the federal courts with authority to consider and make new rules of law in the common-law way" but that Title VII is not one of these "common-law statutes."[23] She concludes that Judge Posner's "judicial statutory updating … cannot be reconciled with the constitutional design" and amounts

[15] *Id.*
[16] *Id.* at 25.
[17] *Id.* at 26-31.
[18] *Id.* at 30.
[19] *Id.* at 34.
[20] *Id.*
[21] *Id.* at 41.
[22] *Id.*
[23] *Id.*

to the courts "assum[ing] a power that is not ours[,] …at a great cost to representative government."[24]

Judge Sykes notes two other problems with the majority and concurring opinions. Congress, as well as many states, have in other cases specifically legislated against discrimination on the basis of sexual orientation and has always used the term "sexual orientation" in addition to "sex" or "gender."[25] Consequently, finding that "sex" means not just gender but also sexual orientation would render such language in other statutes "needless surplusage," contrary to a standard canon of statutory construction.[26] Finally, Judge Sykes notes that *stare decisis* has "'special force' in the domain of statutory interpretation 'for Congress remains free to alter what we have done.'"[27]

Theory and principles of statutory construction

For the three judges who dissented in *Hively*, "[s]tatutory interpretation is an objective inquiry that looks for the meaning of the statutory language conveyed to a reasonable person at the time of enactment." Further, "it is a fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."[28]

In fact, "[t]he hard truth … is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation."[29] While a full exposition of the theory of statutory interpretation is beyond the scope of this article, two commonly recognized principles of statutory interpretation are rejected by the Seventh Circuit's decision in *Hively*.

The first is the "Omitted-Case Canon" of statutory interpretation discussed by Bryan A. Garner and the late Justice Antonin Scalia in their treatise *Reading Law.*[30] It says that "[n]othing is to be added to what the text states or reasonably implies…That is, a matter not covered is to be treated as not covered."[31] The authors asserted that the principle is "so obvious that it seems absurd to recite it."[32] Yet they noted that some claim that it is "a matter not of choice but of necessity that courts must act creatively when interpreting and applying statutes."[33]

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[24] *Id.* at 42.
[25]The Violence Against Women Act, 42 U.S.C. § 13925(b)(13)(A); The Hate Crimes Act, 18 U.S.C. § 249(a)(2)(A); *et al.* (*see Hively* at 49-51).
[26] *Hively* at 48.
[27] *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008), quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989).
[28] *Sandifer v. U.S. Steel Corp*, 134 S.Ct. 870, 876 (2014), quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979).
[29] Henry M. Hart Jr. and Albert M. Sacks, *The Legal Process* 1169 (William N. Eskridge and Phillip P. Frickey, eds., 1994).
[30] Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (Thomson/West 2012).
[31] *Id.* at 93.
[32] *Id.*
[33] Kent Greenawalt, *Statutory Interpretation 20 Questions* at 221 (1999).

The second is *stare decisis*. The authors of *Reading Law* concluded that the principle of *stare decisis* has "special force in statutory cases. The legislature, naturally, can change a law whose meaning the prior judicial interpretation has established. But once its meaning has been established, that meaning cannot be changed [by judicial interpretation] 'in light of' a later statute with which a different meaning would be more compatible."[34] For example, in a previous Seventh Circuit case, the court had said that "[p]rinciples *of stare decisis* require that we give considerable weight to prior decisions of this court unless and until they have been overruled or undermined by the decisions of a higher court, or other supervening developments, such as a statutory overruling."[35]

Consequently, despite efforts by the *Hively* majority to suggest otherwise, Judge Posner's concurrence highlights the adoption by the Seventh Circuit of a new canon of statutory interpretation: where changes in the broader society warrant it, courts are free to revisit long-standing interpretations of statutory meaning.

What will future interpretations of Title VII bring?

In *Obergefell*, the US Supreme Court declared that "laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter."[36] Even though "the Court was presented with the opportunity to consider the question as one of sex discrimination," it "declined to do so and thus far has declined to take any opportunity to weigh in on the question of sexual orientation discrimination under Title VII."[37]

Perhaps a majority on the Seventh Circuit was merely trying to nudge the US Supreme Court into doing so with the *Hively* decision. Yet, in the absence of a US Supreme Court decision overturning *Hively*, this new approach to statutory interpretation in the Seventh Circuit, similar to "dynamic statutory interpretation,"[38] creates many new questions.

1. **How old must a precedent be to warrant a fresh look?** Neither the majority opinion nor Judge Posner's concurrence suggest how much time must pass before a statute "invites an interpretation that will update it to the present."[39]
2. **Is legislative inaction dead as a tool of statutory interpretation?** The majority in *Hively* supported the rejection of legislative inaction as grounds to uphold past precedents based, in part, on a decision of the Equal Employment Opportunity Commission that sexual orientation discrimination is sex discrimination under Title VI.[40] The *Hively* court said that this decision might have influenced Congress <u>not</u> to act to amend Title VII to

[34] *Reading Law* at 255.
[35] *Santos v. United States*, 461 F.3d 886, 891 (7th Cir. 2006).
[36] *Obergefell,* 135 S.Ct. at 2602.
[37] *Hively v. Ivy Tech Community College of Indiana,* 830 F.3d at 714 (7th Cir. 2016) (three-judge panel).
[38] William N. Eskridge, Jr., *Dynamic Statutory Interpretation* at 50 (quoting Arthur Phelps, *Factors Influencing Judges Interpreting Statutes*, 3 Vand. L. Rev. 456, 469 (1950).
[39] *Hively* at 25.
[40] *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641 (July 15, 2015).

include discrimination on the basis of sexual orientation. Consequently, "we have no idea what inference to draw from congressional inaction or later enactments…"[41] The question then becomes: How can a legislature effectively communicate that it concurs with existing judicial precedent, or does what a legislature currently think not matter at all unless it affirmatively acts to change back what the courts have interpreted existing statutes to mean? And does it end there?

3. **How reliably does *stare decisis* matter in the Seventh Circuit going forward?** The Seventh Circuit has effectively rejected not only the Seventh Circuit precedents under Title VII but also the *stare decisis* principle set out in its decision in *Santos.* Can litigants safely rely on *stare decisis* in advocating a particular statutory construction before the Seventh Circuit? For example, the majority relied in part on *Loving v. Virginia*. Yet all of the Seventh Circuit precedents on sexual orientation discrimination under Title VII were decided after *Loving*, and *stare decisis* would have normally have prevented *Loving* from serving as a reason to reject those precedents.

While the issue of sexual orientation discrimination under Title VII will only be definitively resolved in the future, the approach to statutory construction may also be undergoing a substantial transformation, at least within the Seventh Circuit. Litigants seeking to have the Seventh Circuit interpret statutes should be prepared for wide-ranging arguments and unexpected results.

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[41] *Hively v. Ivy Tech Community College of Indiana*, No. 15-1720 (7th Cir. Apr. 4, 2017) (*en banc*) at 9.