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Judge Made Protected Class Under Title VII Loosens Separation of Powers Doctrine

Introduction

The Seventh Circuit has stretched Title VII's protected classes beyond the bounds of the 88th Congress's words and intent. Undoubtedly, Title VII needs legislative updates due to societal progress and the current cultural norms. It is time for Congress to act to close the gap. However, in a recent *en banc* opinion, *Hively II*, the Seventh Circuit circumvented the legislature. In doing so, the Seventh Circuit artfully side-stepped the separation of powers doctrine. Despite slow legislative change, this overstep loosens the separation of powers doctrine. Over the long haul, this is harmful to that doctrine—despite the *Hively II* ruling's immediate popularity.

It is easily discernible why this sort of judge-made law develops in the place of the necessary legislative change. In United States common-law tradition, judicial improvisation used to be the norm. Statutes were a comparatively infrequent source of English law through the mid-19th century.[1] In the absence of statutes, the law was the product of judicial rulings, at least in those many areas where there was no accepted common law for the courts to "discover."[2] It is unsurprising that those same judges took some liberties when statutes began to supplant their handiwork—adopting the rule that statutes in derogation of the common law were to be narrowly construed and for the rule permitting judges to fill perceived statutory "gaps," which had less to do with perceived meaning than with the judges' notions of public policy.[3]

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As Justice John Marshall Harlan admonished, an invitation to judicial lawmaking results inevitably in "a lessening, on the one hand, of judicial independence and, on the other, of legislative responsibility, thus, polluting the bloodstream of the American system of government."[4] Justice Scalia and his co-author Bryan Garner (attorney and author) supply numerous reasons for sounding the alarm on judicial activism in their book on interpreting legislative texts. First, when judges fashion law rather than fairly interpret it from governing texts, they subject themselves to intensified political pressures—in the appointment process, in their retention, and in the arguments made to them.[5] Second, every time a court constitutionalizes a new sliver of law—as by finding a "new constitutional right" to do this, that, or the other—that sliver becomes untouchable by the political branches.[6]

Title VII failed to protect against sexual orientation discrimination—which is shameful. In the past, it was routinely accepted that Title VII encompassed certain protected categories as designated by Congress. None of those categories included sexual orientation discrimination. However, over time the courts developed narrow reasoning related to gender stereotyping that qualified as sex discrimination.

This article focuses on the recent *Hively v. Ivy Tech* (*Hively II*) opinion issued by the Seventh Circuit sitting *en banc*. There, the Seventh Circuit majority opinion (albeit a plurality opinion in some respects) artfully held that sexual orientation falls within Title VII's protected class based upon "sex." Tellingly, Judge Posner wrote in his concurrence that the court should recognize and accept this "judicial interpretative updating" of Title VII's prohibition of sex discrimination. The *Hively II* court appropriately recognized that the law protecting against discrimination on the basis of sexual orientation lags far behind social and cultural progress on this issue. However, this push forward was not the judiciary's move to make. Instead, the legislature is the proper branch of government to push our country forward to extend greater protection under an amended Title VII. The immediate gratification of *Hively II* is self-evident, yet it harms the very fabric of the separation of powers doctrine.

The dissent in *Hively II* admonishes of this potential unraveling of the distinct separation of powers. Justices Sykes, Bauer, and Kanne are adamant that the majority and concurring opinions circumvented the legislative process. The very nature of this type of violation of the separation of powers should give legal scholars pause. This unraveling of the separation of powers weakens the courts' role and lends credence to their critics at a time when critics abound. Although the *Hively II* decision appears welcome by a majority of folks, it comes at a great cost to representative self-government.

Unfortunately, judicial statutory updating, whether through reasoned or unreasoned means, is not aligned with constitutional underpinnings. The Constitution establishes two procedures for enacting and amending statutes: bicameralism and presentment.[7] Judicial statutory amendments override that process. The Constitution assigns the power to make and amend the statutes to the peoples' representatives.[8]

Sir Thomas More well knew the discomfort a judge could feel. Speaking of judicial duties, he declared: "[I]f the parties will at my hands call for justice, then, all were it my father stood on the one side, and the Devil on the other, his cause being good, the Devil should have right."[9] This demonstrates the difficult choices that judges make daily. In *Hively II*, the Seventh Circuit had a tough choice: conform to current social and cultural norms (and what Title VII should protect) or wait on the slow legislative process (what is core to our Constitution).

However, given the separation of powers doctrine, the choice required textualist discipline. From nontextualism derives purposivism. Where purpose is king, text is not—the purposivist goes around or behind the words of the controlling text to achieve what he believes to be the provision's purpose. This is destructive because of purposivism's

manipulability.[10] "A corps of judges allowed to play with the level of generality will move every which way, defeating the objective of justice (equal treatment) under law."[11]

As Justice Scalia and Brian Garner discuss in their book, the courts should return to the oldest and most commonsense interpretative principle: in their full context, words mean what they convey to reasonable people at the time they were written—with the understanding that general terms may embrace later technological innovations.[12] Textualism—the exclusive reliance on text for interpretation—develops both better drafting and better decision making.[13] However, in an unquestionably challenging matter, the Seventh Circuit failed to utilize textualism in deciding the *Hively II*.

History in the Federal Courts

A majority of western countries have long prohibited discrimination of their citizens in the workplace on the basis of their sexual orientation. However, the United States is behind the curve. In the fifty-four years since Congress passed Title VII, the Supreme Court has received no requests to hear any cases based on alleged discrimination for sexual orientation.

Notably, two recent circuits sitting *en banc* changed all that. The Seventh Circuit rendered the first opinion in *Hively II*, and the Second Circuit followed that newly paved path in *Zarda v. Altitude Express, Inc*. In both cases, the courts held that Title VII proscribes discrimination based on an individual's sexual orientation. In contrast to this recent trend, in *Evans v. Ga. Reg'l Hosp.*, the Eleventh Circuit affirmed the position held by the vast majority of the federal courts, that while Title VII does allow for sexual discrimination claims based on sexual stereotypes, its use of the term "sex" does not extend to claims of discrimination based on one's sexual orientation. Given the split in the circuits, this issue may very well finally come before the Supreme Court.

As a matter of background, Title VII provides in relevant part as follows:

> It shall be an unlawful employment practice for an employer … to fail or refuse to hire or to discharge … or otherwise to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin …[14]

An examination of the common usage of the term "sex" is important. In both 1964 and today, the common, ordinary usage of the word "sex" means biologically male or female; it does not refer to sexual orientation.[15] Indeed, to a current English speaker, the word "sex" does not encompass the term "sexual orientation."

Despite this, the Supreme Court has long held that Title VII was intended to be interpreted broadly so as to cover the entire spectrum of disparate treatment based on protected characteristics regardless of whether the discrimination is directed against individuals falling within the majority or a minority group.[16] As a result, some federal courts held that "Title VII should be interpreted broadly to achieve equal employment opportunity."[17] Notwithstanding, prior to the recent shift brought into being by the Equal Employment Opportunity Commission's 2015 decision in *Baldwin v. Foxx*, and the Seventh Circuit's 2017 decision in *Hively II*, the overwhelming majority of federal courts readily dismissed sexual orientation claims brought under Title VII.

1964 Through 1989—Title VII Applies to Discrimination Based on Gender Only

From 1964 until 1989, not a single federal court interpreted Title VII's guaranteed protection against sex-based discrimination in the workplace to extend to disparate treatment based on sexual orientation. Notably, in each of the early sexual orientation cases, the federal courts decided to take a narrow view of the legislative intent behind Title VII and limit its use of the word "sex" to apply to the male and female gender only. In one of these early sexual orientation cases, the Fifth Circuit held that "the prohibition on sexual discrimination could not be 'extended … to situations of questionable application without some stronger Congressional mandate.'"[18] In *Smith v. Liberty Mut. Ins. Co.*, the plaintiff filed suit after he was denied employment based on his interviewer's impression that he was "effeminate" and presumption as to Smith's sexual preference. Relying on its decision in *Smith*, the Fifth Circuit then held in *Blum v. Gulf Oil Corp.* that "[d]ischarge for homosexuality is not prohibited by Title VII."[19] In *Blum*, plaintiff alleged that he was terminated from his position due, in part, to his homosexuality. While the court ultimately dismissed the case on the basis that the employer had a legitimate non-discriminatory basis for the plaintiff's termination, the court reinforced its position that Title VII did not afford protection for sexual discrimination based on one's sexual orientation.

1989 Through 2015—The "Curious Distinction"

In 1989, the Supreme Court expanded Title VII[20] when it held that gender stereotyping can constitute discrimination in violation of Title VII's prohibition against sex discrimination.[21] However, the Court limited its holding to disparate treatment premised on sexual stereotypes only, and not an employee's proclaimed sexual orientation. In *Price Waterhouse v. Hopkins*, the plaintiff was a successful senior manager and the only female in a class of eighty-eight candidates considered for a partnership. While she received some strong recommendations, she was also advised by some of the partners that if she wanted to be elevated, she needed drop her masculine appearance and be more feminine, including: changing her attire, putting on makeup, wearing jewelry and changing the way she walked. The Court held that this kind of stereotyping constituted sexual discrimination in violation of Title VII. The Court explained "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[22] As a result, following *Price Waterhouse*, courts were faced with the difficult task of distinguishing between non-actionable sexual orientation claims and actionable sexual stereotype claims.

From 1989 until 2015, in keeping with the Court's holding in *Price Waterhouse*, the following courts held that sexual orientation discrimination was not a recognized Title VII protected category: *Williamson v. A.G. Edwards & Sons, Inc.*,[23] ("Title VII does not prohibit discrimination against homosexuals."); *Higgins v. New Balance Athletic Shoe, Inc.*,[24] ("Title VII does not proscribe harassment simply because of sexual orientation."); *Simonton v. Runyon*,[25] ("Simonton has alleged that he was discriminated against not because he was a man, but because of his sexual orientation. Such a claim remains non-cognizable under Title VII."); *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*,[26] ("[H]arassment based solely

upon a person's sexual preference or orientation (and not on one's sex) is not an unlawful employment practice under Title VII."); *Bibby v. Phila. Coca Cola Bottling Co.*,[27] ("Title VII does not prohibit discrimination based on sexual orientation."); *Rene v. MGM Grand Hotel, Inc.*,[28] ("[A]n employee's sexual orientation is irrelevant for purposes of Title VII. It neither provides nor precludes a cause of action for sexual harassment. That the harasser is, or may be, motivated by hostility based on sexual orientation is similarly irrelevant, and neither provides nor precludes a cause of action."); *Medina v. Income Support Div., State of New Mexico*,[29] ("Title VII's protections, however, do not extend to harassment due to a person's sexuality … Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation.") (internal quotations omitted); *Vickers v. Fairfield Med. Ctr.*,[30] ("[S]exual orientation is not a prohibited basis for discriminatory acts under Title VII").

2015—EEOC Holds That Sexual Orientation is Sexual Discrimination

In 2015, the Equal Employment Opportunity Commission (EEOC) held for the first time in *Baldwin v. Foxx* that discrimination based on someone's sexual orientation violates Title VII.[31] In *Baldwin*, the complainant filed charges with the EEOC against the Federal Aviation Administration claiming that he was passed over for a permanent position due to his homosexuality. The EEOC held that this was a viable claim under Title VII—breaking with longstanding precedent—in that "sexual orientation is inherently a sex-based consideration, and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII."[32] The EEOC specifically rejected the notion raised in *Price Waterhouse* that discrimination based on sexual orientation is only actionable to the extent it constitutes a sexual stereotyping. Notwithstanding, at least two recent appellate courts rejected the EEOC's holding in *Baldwin* in dismissing a plaintiff's Title VII sexual orientation claims.[33]

Municipality, County, and State Laws on Sexual Orientation Discrimination

More specific than Title VII, many state and local antidiscrimination laws distinguish between sex discrimination and sexual orientation discrimination by listing them as separate forms of unlawful discrimination.[34] This makes the statutory analysis much easier because the plain text of the particular statute designates "sexual orientation" as a protected category. The state of Illinois is one of the more progressive states in the area of sexual orientation discrimination.

Some of Illinois' most progressive legislation was enacted in the last 20 years, but its history of passing legislation to protect individual rights goes back even further. In 1961, Illinois was the first state to decriminalize sodomy by consenting adults in private.[35] In 2011, Illinois adopted civil unions, making it one of only six states to adopt civil unions for both same sex and opposite sex couples.[36] Illinois also legalized gay marriage in 2014, prior to the U.S. Supreme Court decision of *Obergefell v. Hodges*, which made gay marriage legal nationwide.[37] Illinois is also one of nine states that has banned conversion therapy on minors, under the Youth Mental Health Protection Act, which bans mental health providers, including social workers, from attempting to change a minor's sexual orientation.[38] It is also a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act to violate the Youth Mental Health Protection Act.[39] The Youth Mental Health Protection Act has been challenged by pastors as violating their First

Amendment rights, but the U.S. District Court for the Northern District of Illinois held that the Act does not apply to non-licensed religious counselors.[40]

In 2005, the Illinois Human Rights Act (IHRA) was amended to prohibit discrimination based on sexual orientation in employment, financial credit transactions, public accommodations, and housing.[41] The IHRA has a broad definition of sexual orientation, covering, "actual and perceived heterosexuality, homosexuality, bisexuality, [and] gender-related identity, whether or not traditionally associated with the person's designated sex at birth."[42] Employers employing 15 or more employees at least 20 weeks a year are subject to the IHRA, as well as parties to a public contract, joint apprenticeship, training committee, employment agency, and labor organization.[43] Religious corporations and institutions are exempt from the IHRA.[44]

Individuals who believe they have been discriminated against based on their sexual orientation by their employers in violation of the IHRA may file a charge of discrimination with the Illinois Human Rights Commission within 180 days of the alleged discriminatory act.[45] The Commission may provide several remedies for successful complainants, including: injunctive relief, lost wages, compensatory damages, damages for emotional distress, interest on actual damages, attorney's fees, and costs.[46] Punitive damages are not available for employment discrimination under the IHRA.[47] Notably, they are available for Title VII plaintiffs, subject to the Title VII caps on damages. Under the IHRA, public contractors also face special damages, including termination of a contract and debarment from public contracts for three years.[48] The attorney general can also bring a civil action against an employer engaged in a pattern and practice of sexual orientation discrimination; remedies include equitable relief and a fine of up to $50,000.[49]

States with laws that prohibit "sexual orientation" discrimination include: California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Utah, Vermont, Washington, and Wisconsin.[50] Some states even have protection against "sexual orientation" discrimination for government employees: Alaska, Arizona, Indiana, Kentucky, Louisiana, Michigan, Missouri, Montana, North Carolina, Ohio, Pennsylvania, and Virginia.[51] Notably, Indiana, the jurisdiction where Hively lived, has not enacted any state law protecting employees from sexual orientation discrimination.

Illinois employers and the entire Seventh Circuit (at least on some levels) were always aware (or should have been) of this protected category. However, since *Hively II*, all employers in the jurisdictions of the Seventh Circuit should be aware of the potential of sexual orientation discrimination—not just those within states, cities, or counties with local laws in this area.

SCOTUS's Prior Decisions Relevant to Sexual Orientation Discrimination Analysis

The Seventh Circuit's majority opinion in *Hively II* was guided in part by several prior decisions by the Supreme Court of the United States. The first decision discussed by the *Hively II* court was *Price Waterhouse v. Hopkins*.[52] *Price Waterhouse* held that the practice of gender stereotyping falls within Title VII's prohibition against sex discrimination. The majority went on to debate *Oncale*, and its discussion on the sex of the harasser and the harassed. That case clarified that it makes no difference if the sex of the harasser is the same as the sex of the victim.

The majority also looked to *Obergefell v. Hodges*.[53] The *Obergefell* decision recognized that the Due Process and Equal Protection Clauses of the Constitution protect the right of same-sex couples to marry. In reaching its decision in *Hively II*, the Seventh Circuit noted that Title VII's plain language creates "a paradoxical legal landscape in which a person can be married on Saturday and then fired on Monday for just that act."[54]

The Supreme Court's recent decisions have addressed sexual orientation discrimination in the employment context and more broadly. The Supreme Court's wide-ranging rulings include: *Romer v. Evans*,[55] in which the Court held that a provision of the Colorado Constitution forbidding any organ of government in the state from taking action designed to protect "homosexual, lesbian, or bisexual" persons[56] violated the federal Equal Protection Clause. *Romer* was followed by *Lawrence v. Texas*,[57] in which the Court found that a Texas statute criminalizing homosexual intimacy between consenting adults violated the liberty provision of the Due Process Clause. Next came *United States v. Windsor*,[58] which addressed the constitutionality of the part of the Defense of Marriage Act (DOMA) that excluded a same-sex partner from the definition of "spouse" in other federal statutes. The Court held that this part of DOMA "violate[d] basic due process and equal protection principles applicable to the Federal Government."[59] Finally, the Court in *Obergefell* held that the right to marry is a fundamental right, protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[60] The Court wrote that "[i]t is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality."[61] Then came *Hively I*.

Hively I

The Seventh Circuit panel deciding *Hively I* followed the prior federal stare decisis, requiring it to affirm the district court's dismissal of Hively's case.[62] In reaching its decision, the Seventh Circuit embarked on an extensive analysis of the current state of the federal precedent on the application of Title VII to claims of sexual orientation discrimination. It also analyzed the EEOC's recent opinion in *Baldwin v. Foxx*,[63] which identifies sexual orientation as a protected category under Title VII. In declining to expand the interpretation of Title VII to include protections for discrimination based on sexual orientation, Justice Rovner explicitly invited either the Supreme Court to rule on this issue or the federal legislature to amend Title VII employment laws.[64]

In *Hively*, the plaintiff, Kimberly Hively, an open lesbian adjunct professor, sued Ivy Tech Community College of Indiana for sex discrimination under Title VII after Ivy Tech repeatedly denied her applications for full-time positions and refused to renew her contract for part-time employment. Ivy Tech moved to dismiss the case, arguing that sexual orientation was not a protected class under Title VII. The district court granted Ivy Tech's motion, and Hively appealed.[65]

The Seventh Circuit identified a myriad of precedential opinions from other jurisdictions in an effort to invite the Supreme Court to say "yes" or "no" to sexual orientation discrimination cases. Justice Rovner also identified multiple opportunities when the legislature passed on amending Title VII to reflect a protected category for sexual orientation.[66]

The dicta in *Hivley I* is interesting, in part, for its detailed discussion as to how differing federal circuit and district courts have reasoned out their respective opinions related to sexual orientation. Some courts have completely dismissed any case where there is an entanglement of sexual identity and sexual orientation allegations. However, the Seventh Circuit cautioned against this reasoning, identifying the risk of "throw[ing] out the baby with the bath water."[67] In

contrast, other courts took on the difficult task of drawing distinctions between sexual identity discrimination and sexual orientation discrimination. The Seventh Circuit cautioned against this reasoning too, because it often turns on a distinction without a difference. This is because sexual identity discrimination falls under Title VII's protections as discrimination based on "sex," whereas sexual orientation discrimination is based on with whom the individual shares an intimate relationship.

Justice Rovner also discussed the difficult task of drawing a distinction due to its effect on the flamboyancy of a gay man or the masculinity of a lesbian.[68] In his assessment, if the distinction were more drawn between the two, then the more extreme the individual's flamboyancy or masculinity, the more likely the discrimination will fall under sexual identification analysis, and thus, would be protected under Title VII.[69] Justice Rovner predicted this analysis as leaving the more gender conforming homosexuals unprotected.[70]

The court considered *Baldwin* as well as *Price Waterhouse*.[71] In *Price Waterhouse*, the plaintiff, Ann Hopkins, contended that she was turned down for partnership because of her sex.[72] When her candidacy was placed on hold, she was advised to "'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.'"[73] The Supreme Court found that Title VII forbids this type of sex stereotyping.[74] The Seventh Circuit panel explained in *Hively I* that, following this ruling, "a line of cases emerged in which courts began to recognize claims from gay, lesbian, bisexual, and transgender employees who framed their Title VII sex discrimination claims in terms of discrimination based on gender non-conformity … and not sexual orientation."[75] But, the distinction proved to be elusive.[76]

While lower federal courts have considered the scope of Title VII's protections with respect to claims of sexual orientation discrimination, the Supreme Court has otherwise "expound[ed] upon the rights of lesbian, gay, and bisexual persons in a constitutional context," contributing to the changing legal landscape considered by the Seventh Circuit in *Hively I*.[77] For example and also discussed above, in *Romer v. Evans*, the Supreme Court concluded that the Equal Protection Clause prohibited an amendment to the Colorado Constitution that proscribed any legislative, executive, or judicial protections for homosexuals, lesbians, or bisexual persons.[78] In 2003, the Supreme Court overturned prior precedent and held, in *Lawrence v. Texas*, that a statute that criminalized same-sex sexual intercourse violated due process.[79] More recently, the Supreme Court dealt with gay marriage in *United States v. Windsor* (finding a federal statute which limited the definition of marriage to a union between a man and woman unconstitutional) and *Obergefell v. Hodges* (determining that same-sex couples could not be deprived of the right to marry).[80] The Seventh Circuit found these Supreme Court cases to be relevant to the extent that they "create a paradoxical legal landscape in which a person can be married on Saturday and then fired on Monday for just that act."[81]

Ultimately, the *Hively I* court deferred to the legislature or the Supreme Court for an answer. However, the Seventh Circuit decided to sit *en banc* to reconsider *Hively I*.[82] Indeed, they did this to reconsider the Seventh Circuit's binding precedent.

Hively II

Hively I was short lived. The change came on April 4, 2017. On that day, the Seventh Circuit sitting *en banc* became the first circuit to hold that "discrimination on the basis of sexual orientation is a form of sex discrimination" under Title VII.[83]

Although *Hively II* is a momentous decision, the Seventh Circuit's ruling is not particularly surprising in light of the 2015 decision by the EEOC in *Baldwin v. Foxx*, which, as the court recognized in *Hively I*, "applies only to federal government employees.[84]" The EEOC held that an allegation of sexual orientation discrimination is an allegation of sex discrimination under Title VII.[85] It explained that sexual orientation discrimination is inherently sex-based (as it necessarily references sex and is premised on sex-based preferences, expectations, etc.), constitutes associational discrimination, and is a form of sex stereotyping.[86]

The EEOC criticized the Seventh Circuit (and other courts) for failing to follow this "straightforward" approach.[87] According to the EEOC, the Seventh Circuit "simply cite[d] earlier and dated decisions without any additional analysis" or consideration of subsequent cases, such as *Price Waterhouse v. Hopkins*, discussed below.[88] *Hively II* represents the Seventh Circuit's response to *Baldwin*.[89] Indeed, *Hively II* represents result oriented purposovism.

The Seventh Circuit's opinion in *Hively II* was also guided by *Oncale v. Sundowner Offshore Services, Inc.*, a case in which the Supreme Court considered whether sexual harassment by a harasser who is of the same sex as the harassed employee is covered by Title VII.[90] In addressing sexual harassment, the *Oncale* Court explained that "statutory prohibitions often go beyond the principal evil to cover reasonably comparative evils, and it is ultimatelythe provisions of our laws rather than the principal concerns of our legislators by which we are governed."[91] Accordingly, the *Hively II* court reasoned that Title VII may be applied in contexts that Congress would not have anticipated.[92]

The Seventh Circuit also considered concepts raised in *Baldwin*. For example, like the EEOC, the Seventh Circuit found the theory of associational discrimination persuasive.[93] Associational discrimination is premised upon *Loving v. Virginia*, where the Supreme Court ruled that a statute that prohibited interracial marriage violated the Equal Protection and Due Process Clauses.[94] From *Loving* it follows that individuals may not be discriminated against on the basis of a protected characteristic of a person with whom they associate. The Seventh Circuit court cited to *Parr v. Woodmen of the World Life Insurance Co.* and *Holcomb v. Iona College* for the application of associational discrimination in the Title VII context.[95]

Additionally, the *Hively II* court relied heavily on the comparative method and the concept of gender stereotyping. The comparative method examines whether a plaintiff has "described a situation in which, holding all other things constant and changing only her sex, she would have been treated the same way."[96] In the court's view, Hively's claim "describe[d] paradigmatic sex discrimination," because Hively claimed that she would not have been fired if she had been a man married to a woman and everything else had stayed the same.[97]

The comparative method is linked to gender stereotyping, a concept also relied upon by the EEOC.[98] Hively's claim was no different than Hopkins' stereotyping claim in *Price Waterhouse*, since she alleged that she would not have been treated the same way for the same conduct (marriage to a woman) if she had been a man.[99] Hively represented "the ultimate case of failure to conform to the female stereotype."[100]

Like the panel before it, five judges[101] of the Seventh Circuit discussed *Romer*, *Lawrence*, *Windsor*, and *Obergefell*.[102] After reviewing the aforementioned cases, the court concluded: "[t]he logic of the Supreme Court's decisions, as well as the common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex, persuade us that the time has come to overrule our previous cases that have endeavored to find and observe that line."[103] Accordingly, the court held that it was "wrong to dismiss Hively's complaint for failure to state a claim" and reversed and remanded the case.[104]

Following suit, on February 26, 2018, the Second Circuit joined the Seventh Circuit by abandoning its prior precedent in *Zarda v. Altitude Express, Inc.*, and held that discrimination on the basis of sexual orientation constitutes sex discrimination under Title VII.[105] Like the Seventh Circuit, the Second Circuit decided to convene *en banc* to reevaluate Title VII's treatment of sexual orientation discrimination in light of evolving legal doctrine, citing to *Baldwin* as well as *Hively II*.[106] The Second Circuit similarly discussed *Price Waterhouse* and *Oncale* in reaching its holding.[107] It also relied upon associational discrimination, citing to *Loving* and *Holcomb*.[108] However, unlike *Hively II*, a majority of the *Zarda* court did not agree with relying upon the comparative method.[109] Instead, the Second Circuit accorded weight to the principle that sexual orientation is a function of sex, a concept discussed by Circuit Judge Flaum in his concurrence in *Hively II*.[110] Likewise, a majority in *Zarda* did not rely on *Romer*, *Obergefell*, or *Windsor* in reaching its decision. In fact, the *Zarda* Court did not cite to *Romer* at all, and Chief Judge Katzmann only mentioned *Obergefell* and *Windsor* in a footnote.[111]

As recognized by both the Seventh and Second Circuits, federal appellate courts throughout the country have routinely declined to include discrimination on the basis of sexual orientation in Title VII's prohibition against sex discrimination.[112] Thus, on the one hand, *Hively II* represents a departure from well-established law; yet, on the other hand, the decision can be viewed as an endorsement of a previously recognized need for change.[113] With the Second Circuit joining in, *Hively II* may even prove to be the stimulus to start a trend. It remains to be seen if, when, or how the Supreme Court will handle this issue. In December 2017, it denied *certiorari* to an Eleventh Circuit case that declined to overturn precedent and instead held that sexual orientation discrimination did not constitutes sex discrimination under Title VII.

Perhaps *Zarda* may influence the Supreme Court to take this issue up in the future.

Legislative Solutions

The Seventh Circuit's decision in *Hively II* is timely given the current state of the legislature. At present, it appears highly unlikely that the legislature will pass an amendment to Title VII that would clarify that sexual orientation is a protected class. Rather than patiently allowing the legislature to correct or amend Title VII to make sexual orientation a protected class, the Seventh Circuit took matters into its own hands in deciding *Hively II*, and further unraveled the separation of powers doctrine. In doing so, the Seventh Circuit (and shortly thereafter, the Second Circuit) circumvented the Constitution.

Sometimes, the best, broadest, and most comprehensive path takes patience. However, had the Seventh Circuit not issued its expansive opinion in *Hively II*, people of differing sexual orientations would likely suffer harm in their

respective employments until such time as Congress sees fit to act. Because the current Congress will likely not amend Title VII to add sexual orientation as a protected class, such harms could be long endured on the patient path towards legislative change.

Practical Considerations

Given the Seventh Circuit's ruling, a whole new class of potential plaintiffs are on the courthouse doorsteps. However, given that most of the state and local jurisdictions in the Seventh Circuit had some form of protection against sexual orientation discrimination within the respective statutes, employers in those jurisdictions already faced a similar type of claim. Although in Indiana—where Hively worked—no such statute existed.

Nonetheless, employers should have historically considered and dealt with sexual orientation discrimination in the same way they dealt with other types of workplace issues—under a progressive disciplinary policy. Such a policy would prevent liability, and also allows for a good workplace culture that respects everyone.

However, the problematic area of sexual orientation discrimination (like all other types of discrimination against protected categories) is the indirect or circumstantial methods of proof. Proving those types of claims usually involve comparator employees, which can be problematic for both plaintiffs and defendants. An extension of protected classes requires employers to consider additional categories when making hiring, firing, or other tangible employment decisions. It also makes it difficult for plaintiffs to prove their cases—usually there are no smoking guns in discrimination cases. The most difficult part of the indirect or circumstantial areas of proof are detailed in the Seventh Circuit's historical analysis. However, recently, the Seventh Circuit decided to flip the script for analyzing the factors in an employment discrimination case.[114] Now the Seventh Circuit and its lower courts should consider all facts and indirect evidence holistically to determine whether the plaintiff has a valid claim that can overcome the summary judgment stage of a case. This seems more practical, but will likely require significant expense in defending employment law claims.

One way to avoid discrimination or the perception of discrimination based upon sexual orientation is to not ask employees about their sexual orientation. This lack of knowledge can aid in the employer's interest in protecting against supervisors and similar employees making tangible employment decisions for subordinates in violation of the law. Overall, employers should have considered protecting against sexual orientation discrimination in the past. Most Illinois employers already protected against sexual orientation discrimination due to Illinois' progressive laws.

Conclusion

Hively II is uncharted territory in both the Seventh Circuit and a majority of the Federal Appellate Courts. It is uncharted because a majority of the federal courts stuck by the plain language of Title VII in deciding cases prior to *Hively II* and *Zarda*. Title VII's plain language used the word "sex" as one of its protected categories and not the words "sexual orientation." Despite the obvious initial likability of opinions incorporating "sexual orientation" into a Title VII protected

category, those opinions are covert judicial purposivism. Although those opinions serve a legitimate purpose, that purpose unravels the strands of rope that hold the separation of powers doctrine together. Judge Posner even conceded that the majority should admit its covert actions and accept its actions for what they are: judicial interpretative updating, which in essence is overstepping into the legislatures constitutional duties. Understandably, the legislature would be difficult to wait on for a grant of this protection. However, patience is a virtue, and the Constitution required it under the plain language of Title VII.

Endnotes

[1] ANTONIN SCALIA AND BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 406 (2012).

[2] *Id.*

[3] *Id.* at 406-7.

[4] JOHN M. HARLAN, THE EVOLUTION OF A JUDICIAL PHILOSOPHY: SELECTED OPINIONS AND PAPERS OF JUSTICE JOHN M. HARLAN 291 (1969). *Cf.* William Van Alstyne, *Clashing Visions of a "Living" Constitution: Of Opportunists and Obligationists*, CATO SUP. CT. REV. 2010-11, at 13, 20 (2011) ("the more courts transform constitutional clauses without needing actual amendments to do so—*that is*, the more they do not require new text—the less necessary new text seems to be. But then exactly to the extent that courts do not require new text, neither may it be safe to provide it, for to the extent such text is provided to record a *definite* change, one may rightly be wary—merely reacting in tutored fear of the administration of the new text, given what the Court has previously presumed *already* to do.").

[5] SCALIA AND GARNER, *supra* note 1, 426-7.

[6] *Id.*

[7] *See* U.S. CONST. art. 1, § 7.

[8] *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 341 (7th Cir. 2017) (*en banc*) (hereinafter *Hively II*).

[9] RAYMOND WILSON CHAMBERS, THOMAS MORE 268 (1962).

[10] SCALIA AND GARNER, *supra* note 1, 615.

[11] Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441, 449 (1990). *Cf.* Larry A. Alexander, *Painting Without the Numbers: Noninterpretive Judicial Review*, 8 U. DAYTON L. REV. 447, 452 (1983) ("At some point as we ascend the ladder of generality of description and then descend again to apply the general norm to a specific, modern practice, we cross over the line from what they [the Framers] banned to what we would ban.").

[12] SCALIA AND GARNER, *supra* note 1, 406.

[13] *Id.*

[14] 42 U.S.C. § 2000e-2(a)(1).

[15] *See, e.g., Sex*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1969) (defining "sex" as "[t]he property or quality by which organisms are classified according to their reproductive functions[;] [e]ither of two divisions, designated male and female, of this classification"); *Sex*, NEW OXFORD AMERICAN DICTIONARY (3d ed. 2010) (defining "sex" as "either of the two main categories (male and female) into which humans and many other living things are divided on the basis of their reproductive functions"); *Sex*, THE AMERICAN HERITAGE DESK DICTIONARY (5th ed. 2013) (defining "sex" as "[e]ither of the two divisions, female and male, by which most organisms are classified on the basis of their reproductive organs and functions[;] [t]he condition or character of being female or male").

[16] *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

[17] *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926, 935 (2d Cir. 1988) (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-36 (1971).

[18] *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 327 (5th Cir. 1978) (quoting *Willingham v. Macon Telegraph Publishing Co.*, 507 F.2d 1084, 1090 (5th Cir. 1975) (*en banc*)).

[19] *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979).

[20] 42 U.S.C. § 2000e *et seq.*

[21] *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

[22] *Price Waterhouse*, 490 U.S. at 251 (citing *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707, n. 13 (1978), quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)).

[23] *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989).

[24] *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999).

[25] This case was expressly overruled by *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (petition for cert pending), which found that sexual orientation discrimination is motivated, at least in part, by sex and is thus a subset of sex discrimination for purposes of Title VII, overruling *Simonton v. Runyon*, 232 F.3d 33 (2nd Cir. 2000).

[26] *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 704 (7th Cir. 2000).

[27] *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001).

[28] *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1063-64 (9th Cir. 2002).

[29] *Medina v. Income Support Div., State of New Mexico*, 413 F.3d 1131, 1135 (10th Cir. 2005).

[30] *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006).

[31] *Baldwin v. Foxx*, No. 2012-24738-FAA-03, 2015 *EEOPUB LEXIS* 1905 (E.E.O.C. July 16, 2015).

[32] *Id*. at *13.

[33] *Bailey v. Grocery Haulers, Inc.*, No. 3:15cv1835 (JBA), 2017 U.S. Dist. LEXIS 38460 (D. Conn. Mar. 16, 2017); *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248 (11th Cir. 2017) (only discrimination based on gender non-conformity actionable under Title VII).

[34] *See, e.g.*, Illinois Human Rights Act, 775 ILCS 5/1-103(Q) (defining "unlawful discrimination" as "discrimination against a person because of his or her race, color, religion, national origin, ancestry, age, *sex*, marital status, order of protection status, disability, military status, *sexual orientation*, pregnancy, or unfavorable discharge from military service") (emphases added); Iowa Civil Rights Act, Iowa Code § 216.7(1)(a) (prohibiting discrimination in public accommodations "because of race, creed, color, *sex*, *sexual orientation*, gender identity, national origin, religion, or disability") (emphases added); Wis. Stat. § 106.52(3) (using similar language to prohibit discrimination in public accommodations); Minnesota Human Rights Act, Minn. Stat. § 363A.11(1)(a)(1) (same); Or. Rev. Stat. § 659A.403(1) (same); Washington Civil Rights Act, Wash. Rev. Code § 49.60.030(1) (declaring as a civil right the "right to be free from discrimination because of race, creed, color, national origin, *sex*, honorably discharged veteran or military status, *sexual orientation*, or the presence of any ... disability") (emphases added); D.C. Code § 2-1402.31(a) (forbidding certain forms of discrimination "based on the actual or perceived: race, color, religion, national origin, *sex*, age, ... [or] *sexual orientation* ... of any individual) ("emphases added); Bloomington, Ind., Code) (10)2.21.030 § defining a "discriminatory practice "as "the exclusion of a person by another person from equal opportunities because of race, religion, color, *sex*, national origin, ancestry, *sexual orientation*, gender identity, disability, housing status or status as a veteran") (emphases added); Indianapolis, Ind., Code § 581-101 (defining prohibited "discriminatory practices" to include denying employment and educational opportunity, access to public accommodations, and acquisition of real estate "based on race, color, religion, ancestry, age, national origin, disability, *sex*, *sexual orientation*, gender identity, or United States military service veteran status") (emphases added).

[35] ACLU. *History of sodomy laws and the strategy that led up to today's decision*. http://www.aclu.org/other/history-sodomy-laws-and-strategy-led-todays-decision (last visited March 16, 2018).

[36] Richard A. Wilson, *A Guide to the New Illinois Civil Union Law*, 99 ILL. BAR J. 232 (May 2011) available at https://www.isba.org/ibj/2011/05/aguidetothenewillinoiscivilunionlaw.

[37] Painter, George. *The Sensibilities of Our Forefathers: The History of Sodomy Laws in the United States*. http://www.glapn.org/sodomylaws/sensibilities/illinois.htm#fn78 (last visited March 16, 2018).

[38] 405 ILCS 48/1; Movement Advancement Project, *Conversion Therapy Laws*, http://www.lgbtmap.org/equality-maps/conversion_therapy (last visited March 16, 2018).]

[39] 405 ILCS 48/25.

[40] *Pastors Protecting Youth v. Madigan*, 237 F.Supp.3d 746 (N.D. Ill. 2017).

[41] 2004 Ill. Legis. Serv. P.A. 93-1078 (S.B. 3186).

[42] 775 ILCS 5/1-103(O-1).

[43] 775 ILCS 5/2-101(B)(1).

[44] 775 ILCS 5/2-101(B)(2).

[45] 775 ILCS 5/7A-102(A)(1).

[46] 775 ILCS 5/8A-104.

[47] Illinois Department of Human Rights, *Filing a Charge of Discrimination*, p. 9, https://www.illinois.gov/dhr/publications/documents/charge_discrimination_english_brochure.pdf (last visited March 16, 2018).

[48] 775 ILCS 5/8-109(A).

[49] 775 ILCS 5/10-104(A)(1).

[50] California: CAL. GOV'T. CODE ;12949 & 12926 ,12940 ,12920 §§ Colorado: COLO. REV. STAT. § 24-34-401; Connecticut: CONN. GEN. STAT. sec. 46a-814c(1); Delaware: 19 Del. C. § 711; Hawaii: HAW. REV. STAT. ANN. ;2-378 ,1-368 §§ Illinois: 775 ILCS 5/1-103 & 775 ILCS 5/1-102; Iowa: IOWA CODE ANN. 216.2(14), 216.6; Maine: ME. REV. STAT. tit. 5 § 4571, § 4572, § 4553 9-C; Maryland: MD. STATE GOV'T CODE ANN., ;606-20 §Massachusetts: MASS. GEN. LAWS ch. 151B, § 3(6), § 4; Minnesota: MINN. STAT. ANN. § 363A.02, § 363A.08; Nevada: NEV. REV. STAT. ANN. ;338.125 & ,613.405 ,613.340 ,610.185 ,613.330 §§ New Hampshire: N.H. REV. STAT. ANN.-354 §§ A:6, 354-A:7; New Jersey: N.J. STAT. ANN. ;12-10:5 ,4-10:5 ,3-5:10 §§ New Mexico: N.M. STAT. § 28-1-7; New York: N.Y. EXEC. LAW § 296; Oregon: OR. REV. STAT. ANN. § 659A.030; Rhode Island: R.I. GEN. LAWS-28 ,5-5-28 §§ ;7-5Utah: UTAH CODE ANN. § 34A-5-106; Vermont: VT. STAT. ANN. tit. 21, § 495; Washington: WASH. REV. CODE ANN. §§ ;49.60.040 ,49.60.010 49.60.030Wisconsin: WIS. STAT. ANN..111.325 ,111.36 ,111.31 §§

[51] Alaska: Alaska Admin. Order 195; Arizona: Executive Order 2003-22; Indiana: Indiana Governor Mitch Daniel's Policy statement of 4-26-05; Kentucky: Kentucky Executive Order 2003-533; Louisiana: Executive Order No. JBE 2016-11, Governor of Louisiana, 13 April 2016; Michigan: Michigan Executive Directive, No. 2003-24; Missouri: Executive Order 10-24; Montana: Montana Executive Order No. 41-2008; North Carolina: Executive Order 93 (2016); Ohio: Executive Order 2011-05K; Pennsylvania: Executive Order No. 2003-10; Virginia: Executive Order 1 (2014).

[52] *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

[53] *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

[54] *Hively v. Ivy Tech Community College, South Bend*, 830 F.3d 698, 714 (7th Cir. 2016) (vacated) (*Hively I*).

[55] *Romer v. Evans*, 517 U.S. 620 (1996).

[56] *Id*. at 624.

[57] *Lawrence v. Texas*, 539 U.S. 558 (2003).

[58] *U.S. v. Windsor*, 570 U.S. 744 (2013).

[59] *Windsor,* 570 U.S. at 769.

[60] *Obergefell*, 135 S.Ct. at 2604.

[61] *Id.*

[62] *Hively v. Ivy Tech Cmty. Coll.,* 830 F.3d 698, 709 (7th Cir. 2016), *as amended* (Aug. 3, 2016), *reh'g en banc granted, opinion vacated,* No. 15-1720, 2016 WL 6768628 (7th Cir. Oct. 11, 2016), and *on reh'g en banc sub nom. Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339 (7th Cir. 2017).

[63] *Baldwin,* 2015 EEOPUB LEXIS 1905.

[64] *Hively I*, 830 F.3d at 709.

[65] *Hively II*, 853 F.3d at 341.

[66] *Hively I*, 830 F.3d at 701.

[67] *Id.* at 706.

[68] *Id.* at 715.

[69] *Id.*

[70] *Id.*

[71] *Id.* at 702-704.

[72] *Price Waterhouse v. Hopkins*, 490 U.S. 228, 231-32 (1989).

[73] *Price Waterhouse*, 490 U.S. at 235.

[74] *Id.* at 251 (internal citations omitted).

[75] *Hively I*, 830 F.3d at 704.

[76] *Id.* at 705.

[77] *Id.* at 713.

[78] *Id.*; *Romer v. Evans*, 517 U.S. 620 (1996).

[79] *Hively I*, 830 F.3d at 713; *Lawrence*, 539 U.S. at 558.

[80] *Hively I*, 830 F.3d at 713; *Windsor*, 570 U.S. at 744; *Obergefell*, 135 S. Ct. at 2584.

[81] *Hively I*, 830 F.3d at 714.

[82] *Hively v. Ivy Tech Community College of South Bend*, 2016 WL 6768628 (7th Cir. 2016) (granting rehearing en banc and vacating opinion).

[83] *Hively II*, 853 F.3d at 341 (7th Cir. 2017).

[84] *Baldwin*, 2015 WL 4397641; *Hively I*, 830 F.3d at 703.

[85] *Baldwin*, 2015 WL 4397641 at *4.

[86] *Id.* at *5-7.

[87] *Id.* at *8.

[88] *Id.* at *8 n. 11.

[89] *Hively I*, 830 F.3d at 699, 703-04.

[90] *Hively II*, 853 F.3d at 344-45; *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79-80 (1998).

[91] *Hively II*, 853 F.3d at 344 (quoting *Oncale*, 523 U.S. at 79).

[92] *Hively II*, 853 F.3d at 345.

[93] *Id.* at 347-49; *Baldwin*, 2015 WL 4397641, at *6-7.

[94] *Hively II*, 853 F.3d at 347; *Loving v. Virginia*, 388 U.S. 1 (1967).

[95] *Hively II*, 853 F.3d at 347-48 (citing *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888 (11th Cir. 1986); *Holcomb v. Iona Coll.*, 521 F.3d 130 (2d Cir. 2008)).

[96] *Hively II*, 853 U.S. at 345.

[97] *Id.*

[98] *Id.* at 345-47; *Baldwin*, 2015 WL 4397641 at *7-8.

[99] *Hively II*, 853 F.3d at 346-47.

[100] *Id.* at 346.

[101] Chief Judge Wood issued the opinion of the court in which Circuit Judges Posner, Flaum, and Ripple concurred. Judge Posner concurred in the reversal of the dismissal of Hively's claim but wrote separately to explore an "alternative," and perhaps more "straightforward," approach to reaching that holding: "judicial interpretive updating." *Id.* at 352-53, 356. Circuit Judges Flaum and

Ripple concurred in the court's holding that sexual orientation discrimination constitutes sex discrimination under Title VII and joined Parts I and II of Chief Judge Wood's opinion, which included the court's discussion of *Oncale*, associational discrimination, the comparative method, and gender stereotyping. *Id.* at 341-49, 357. Those portions of the opinion, therefore, constitute a majority opinion. However, the court's discussion of *Romer*, *Lawrence*, *Windsor*, and *Obergefell* only constitutes a plurality opinion. In writing separately, Circuit Judges Flaum and Ripple added an explanation concerning the manner in which sexual orientation is inherently sex-based. *Id.* at 358-59. Meanwhile, Circuit Judges Sykes, Bauer, and Kanne dissented.

[102] *Id.* at 349-50.

[103] *Id.* at 350-51.

[104] *Id.* at 352.

[105] *Zarda v. Altitude Express, Inc.*, 993 F.3d 100, 108 (2d Cir. 2018) (*en banc*).

[106] *Zarda*, 883 F.3d at 107-08.

[107] *Id.* at 123.

[108] *Id.* at 126-28.

[109] *Id.* at 07-08.

[110] *Id.* at 113 (citing *Hively II*, 853 F.3d at 358 (Flaum, J., concurring)).

[111] *Id.* at 131 n. 33.

[112] *Id.* at 107; *Hively I*, 830 F.3d at 699-701; *Hively II*, 853 F.3d at 340.

[113] *Hively II*, 853 F.3d at 341.

[114] *Ortiz v. Werner Enterprises, Inc.*, 834 F.3d 760 (7th Cir. 2016).

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