IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

KIMBERLY A. HIVELY,

Plaintiff-Appellant,

v.

IVY TECH COMMUNITY COLLEGE,

Defendant-Appellee.

APPEAL NO.: 15-1720
Dist. Ct. No. Dist of Indiana
Case No. 3:14-cv-01791-RL-CAN

MOTION FOR INITIAL EN BANC CONSIDERATION OF APPEAL

STATEMENT PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 35[1]

Plaintiff-Appellant Kimberly Hively ("Appellant" or "Ms. Hively") hereby moves this Court, pursuant to Rule 35 of the Federal Rules of Appellate Procedure ("FRAP") and 28 U.S. Code § 46, for initial en banc consideration of the instant appeal. This appeal meets the criteria articulated in FRAP 35 and the Seventh Circuit's Practitioner's Handbook for Appeals for en banc review. The district court below concluded that it was bound by this Court's decision in *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 704 (7th Cir. 2000), to dismiss Appellant's complaint that she was discriminated against in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000(e) *et seq*., when she was denied full-time employment at Ivy Tech Community College and subsequently was denied renewal of her part-time contract solely because she is a lesbian woman. As demonstrated below, as well as in Appellant's Opening

[1] *Rule 35(b)(1)* requires a petition for hearing or rehearing en banc to begin with a statement that: "(A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or (B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue." Both criteria are met here.

Brief filed concurrently herewith, however, the panel decision in *Hamner* and, by turn, the dismissal of this lawsuit below conflict with U.S. Supreme Court precedent regarding how Title VII is to be interpreted and applied – in particular, *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998), and *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). *Hamner* and the dismissal below also conflict with numerous other decisions of this and other federal courts of appeal, district courts, and the Equal Employment Opportunity Commission (the "EEOC"), including this Court's decisions in *Rabé v. United Air Lines*, 636 F.3d 866 (7th Cir. 2011); *Shepherd v. Slater Steels Corp.*, 168 F.3d 998 (7th Cir. 1999); and *Drake v. 3M*, 134 F.3d 878 (7th Cir. 1998).

This appeal also presents an issue of exceptional importance: whether it will continue to be the law of this Circuit that an employer may take an adverse job action with impunity against a *woman* who is attracted to women that an employer would not take against a *man* who is attracted to women, notwithstanding Title VII's ban on sex discrimination in employment.

Because the district court was correct that the holding in *Hamner* is directly on point and because that was the *only* reason for dismissal of Appellant's Title VII claim, a panel considering this appeal would be limited to two options. It would have to affirm the decision below in order to avoid an intra-circuit conflict –

in which case Appellant would be back before this Court on a petition for rehearing en banc to challenge *Hamner*'s correctness – or it have to follow the procedure provided by Seventh Circuit Local Rule 40(e) for rehearing *sua sponte* before decision,[2] which again would place this appeal before this entire Court. Rather than inefficiently requiring a panel to consider this appeal when there is no basis for deciding this appeal that could avoid this Court needing to consider whether to hear it en banc at some point, Appellant respectfully requests that this Court grant her motion for initial en banc review at this time. Doing so not only will conserve judicial resources; it will allow this Court to correct the *Hamner* court's approach to statutory interpretation of Title VII's ban on sex discrimination that has been categorically repudiated by the Supreme Court. As discussed in more detail below, it additionally will bring this Circuit into alignment with decisions of this and other federal courts, as well as the EEOC, that Title VII protects employees against being subjected to adverse job actions because of: (a) attributes permitted among those of the other sex, (b) sex stereotypes, or (c) relational discrimination.

[2] Rule 40(e) of the Seventh Circuit Local Rules provides that, "A proposed opinion approved by a panel of this court adopting a position which would overrule a prior decision of this court … shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear en banc the issue of whether the position should be adopted."

I. *HAMNER* IS IN CONFLICT WITH THE SUPREME COURT'S DECISIONS IN *ONCALE* AND *PRICE WATERHOUSE* AND HAS BEEN UNDERMINED BY MANY OTHER CASES.

FRAP 35(b)(1) provides for those seeking en banc review to specify whether "the panel decision conflicts with a decision of the United States Supreme Court or" this Court. While there is not yet a panel decision in this appeal, the District Court cited only one decision of this Court in dismissing Ms. Hively's sex discrimination claim: *Hamner*.[3] That decision conflicts with the mandate set forth in *Oncale* that courts entertain all cases falling within the language of Title VII, and that (with limited qualifications not relevant here) sex discrimination occurs whenever an employee is treated differently because of his or her gender,[4]

[3] Appellant focuses on *Hamner*, because it is the controlling precedent cited by the District Court and is this Court's definitive holding regarding Title VII coverage of discrimination against people with same-sex attractions. Appellant acknowledges similar rulings in *Spearman v. Ford Motor Co*., 231 F.3d 1080, 1084 (7th Cir. 2000), and *Hamm v. Weyauwega Milk Products, Inc*., 332 F.3d 1058 (7th Cir. 2003), but those courts relied on *Hamner*. Moreover, those decisions are less clear-cut, as they also emphasized work-related issues regarding the plaintiffs who brought those cases in upholding summary judgment against them. *See Spearman*, 231 F.3d at 1085-86 (citing "work-related" conflict, issues, and disputes); *Hamm*, 332 F.3d at 1062-63 (citing concerns "related to his job performance").

[4] Appellant recognizes that there is a very limited "bona fide occupational qualification" defense to adverse employment action claims and that a hostile work environment is actionable only when the offending conduct is sufficiently severe or pervasive, but neither of those limitations on sex discrimination claims is relevant to the present case.

irrespective of whether Congress intended coverage of the specific mistreatment at issue. *Hamner* also conflicts with the holding in *Price Waterhouse* that "gender must be irrelevant in all employment decisions" and that termination of an employee because of a trait that is counter to gender norms is sex discrimination. 490 U.S. at 240 (plurality opinion); *see also id*. at 275 (O'Connor, J., concurring) (to avoid liability, the employer must "avoid substantial reliance on forbidden criteria in making its employment decisions."). *Hamner* further is in great tension with many other Supreme Court decisions cited in the accompanying Opening Brief that command courts to entertain all claims that fall within the language of Title VII, and with many other decisions of this Court that proscribe differential treatment of men and women for almost any reason – with the glaring exception of how *Hamner* and its progeny address the reason of same-sex attraction.

Hamner narrowly viewed *Oncale*'s relevance, holding that the plaintiff would have a claim only if gay males, but not lesbians, were mistreated, or if there was a general antipathy to males in the workplace. 224 F.3d at 707 and n.5. The notion that *Oncale* requires a man to allege a general antipathy to men in the workplace is untenable. This Court has recognized that the workplace in *Oncale* was *exclusively* male, *Shepherd*, 168 F.3d at 1009; nevertheless, the Supreme Court allowed Joseph Oncale's claim to proceed if he could prove that he himself

would not have been subject to the intense sexual harassment he suffered but for his being male. 523 U.S. at 79-80. And *Hamner* is simply wrong that discrimination against gay men is legal if unaccompanied by mistreatment of lesbians. To paraphrase the recent statement of Chief Justice Roberts, see *infra* at p. 11, if an employer takes an adverse job action again Joe because he loves Tom, when the employer would not do so if Joe were Joanne, that is sex discrimination. And, because Title VII prohibits discrimination against an individual based on sex regardless of whether others also have been discriminated against on that basis, there is no basis for holding that such conduct is actionable only if the employer also fires Michelle, but not Michael, for dating Peggy.

Hamner's methodological mistake is twofold. First, it assumes that an expansive definition of the word "sex" is necessary in order to protect employees against mistreatment based on same-sex attraction. 224 F.3d at 704. This ignores the facts of that case that a male employee was mistreated because of an attraction to men, whereas female employees were not. Second, *Hamner* relied on *Ulane v. Eastern Airlines*, 742 F.2d 1081 (7th Cir. 1984), a decision that was premised on the notion that Title VII's interpretation should be controlled by what the 88th Congress intended to cover, as well as on the inaction of subsequent Congresses (*see Hamner*, 224 F.3d at 704) –approaches thoroughly and unanimously rebuked

in *Oncale*. 523 U.S. at 79-80. In the years since *Hamner* was decided, other circuits have widely acknowledged that the reasoning of *Ulane* – and similar cases on which *Ulane* relied – are incompatible with the Supreme Court's subsequent decisions in *Price Waterhouse* and *Oncale*. *See Glenn v. Brumby*, 663 F.3d 1312, 1318 n.5 (11th Cir. 2011) (collecting cases).

Moreover, *Hamner* did not even acknowledge *Price Waterhouse*, and its superficial treatment of *Oncale* reflects that it did not consider – and may not even have been presented with – the simple argument that Hamner suffered discrimination as a man for sexual attraction to men that was welcomed in women. This Court has recognized that "as a practical matter an opinion that contains no discussion of a powerful ground later advanced against it is more vulnerable to being overruled than an opinion which demonstrates that the court considered the ground now urged as a basis for overruling." *United States v. Hill*, 48 F.3d 228, 232 (7th Cir. 1995) citing *Schiffels v. Kemper Fin. Servs.*, 978 F.2d 344, 351 (7th Cir. 1992); *see also Hayden v. Greensburg Cmty. School Corp.*, 743 F.3d 569, 578 (7th Cir. 2014) (expressing dismay that *Price Waterhouse* and its progeny have "been ignored entirely in this appeal" concerning a gender-based restriction on hair length).

The Supreme Court, in several decisions after *Hamner*, has made clear that it meant what it held in *Oncale* – that courts should entertain every claim that comes within Title VII's language and should not erect judicial exceptions or rules that would screen out those claims. *Thompson v. North American Stainless, L.P.*, 562 U.S. 170, 174-75 (2011) (rejecting "a categorical rule that third-party reprisals do not violate Title VII."); *Lewis v. City of Chicago*, 560 U.S. 205, 215 (2010); *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456-458 (2006) (per curiam); *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 95 (2003); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002); *see also Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148 (2000). Because the Supreme Court has since reaffirmed its articulation of proper statutory interpretation of Title VII in *Oncale*, this Court has added reason to revisit *Hamner*. *See Minn-Chem, Inc. v. Agrium Inc.*, 683 F.3d 845, 851-852 (7th Cir. 2012) (revisiting 2003 en banc decision that had relied on "legislative history" in its interpretation, because subsequent Supreme Court decisions had "now become a firmly established principle of statutory construction" contrary to the interpretive approach employed in this Court's earlier decision).

In addition, *Hamner* is in tension with decisions of this Court reflecting that lesbians and gay men enjoy protection against sex discrimination under Title VII. In *Rabé*, 636 F.3d at 868, the plaintiff claimed United had discriminated against

her on the basis of, *inter alia*, "sexual orientation in violation of Title VII." This Court held that "plaintiff has asserted a colorable claim for coverage directly under the terms of the federal statutes." *Id*. at 872. *See also Johnson v. Hondo, Inc.*, 125 F.3d 408, 413-414 (7th Cir. 1997) (recognizing that "*Price Waterhouse v. Hopkins* [] tells us" that subjecting an employee to harassment based on hostility to how he "exhibited his sexuality … is discrimination 'because of' sex.") (citations omitted). Indeed, just this last fall, the panel in *Muhammad v. Caterpillar, Inc.*, 767 F.3d 694 (7th Cir. 2014), agreed to excise from its initial decision gratuitous language casting doubt on Title VII's coverage of sexual orientation discrimination, suggesting that some judges on this Court may be open to reconsidering *Hamner*.

Hamner also is at odds with other rulings of this Court holding that Title VII is violated whenever someone is mistreated because of his or her gender. *See Shepherd*, 168 F.3d at 1009 ("So long as the plaintiff demonstrates in some manner that he would not have been treated in the same way had he been a woman, he has proven sex discrimination."); *see also Orton-Bell v. Indiana*, 759 F.3d 768, 774-75 (7th Cir. 2014); *Venezia v. Gottlieb Mem'l Hosp., Inc.*, 421 F.3d 468 (7th Cir. 2005); *Holman v. Indiana*, 211 F.3d 399 (7th Cir. 2000); *Bellaver v. Quanex Corp./Nichols-Homeshield*, 200 F.3d 485, 492-493 (7th Cir. 2000).

Finally, *Hamner* further cannot be reconciled with the view of this Court, and for "the past thirty years, every case to consider a relational discrimination claim in the context of race," which have all "held that Title VII applies to such claims." Victoria Schwartz, *Title VII: A Shift From Sex to Relationships*, 35 Harv. J.L. & Gender 209, 246 (Jan. 2012); *see Drake*, 134 F.3d at 884; *Moffett v. Gene B. Glick Co.*, 621 F. Supp. 244, 269 (N.D. Ind. 1985). Simply put, if Pat's relationship with Sarah, a white woman, is a disqualification for an employer either because Pat is a nonwhite man, or because Pat is a woman, Title VII is violated. See Opening Brf. at p.7.

II. THIS ISSUE IS OF EXCEPTIONAL IMPORTANCE.

This case is of exceptional importance not only to Ms. Hively, but to all workers in Indiana – lesbian, gay, bisexual, or heterosexual– who might experience discrimination because of their sex in comparison to whom they love. The case is important not only to Indiana's 6.6 million residents who lack explicit "sexual orientation" protections under state law, but to the roughly 175 million Americans who reside in states that also have not passed explicit "sexual orientation" employment nondiscrimination statutes and instead must rely on an interpretation of Title VII that is faithful to its language.

The issue presented by this appeal is not only important but also timely and likely to recur. In the marriage equality oral arguments just two weeks ago, Chief Justice Roberts ignited a national public debate about whether differential treatment of those with same-sex attractions should be regarded as sex discrimination[5]: "I mean, if Sue loves Joe and Tom loves Joe, Sue can marry him and Tom can't. And the difference is based upon their different sex. Why isn't that a straightforward question of sexual discrimination?" *Obergefell v. Hodges*, 4/28/15 Transcript at 62:1-5, available at

[5] *See Gender Bias Issue Could Tip Chief Justice Roberts Into Ruling for Gay Marriage*, N.Y. Times, Apr. 29, 2015, available at http://www.nytimes.com/2015/04/30/us/gender-bias-could-tip-chief-justice-roberts-into-ruling-for-gay-marriage.html?_r=0; *The Sex Discrimination Rationale for a Right to Same-Sex Marriage Makes an Appearance in Today's Oral Argument*, Wash. Post, Apr. 28, 2015, available at http://www.washingtonpost.com/news/volokh-conspiracy/ wp/2015/04/28/the-sex-discrimination-rationale-for-a-right-to-same-sex-marriage-makes-an-appearance-in-todays-oral-argument/; *A 9-0 Supreme Court Ruling for Gay Marriage? 10-4*,Chicago Trib., May 1, 2015, available at http://www.chicagotribune.com/ news/opinion/zorn/ct-gay-marriage-supreme-court-same-sex-perspec-0503-jm-20150501-column.html. The rapt attention to the Chief Justice's question strongly suggests that the courts will soon see the issue of whether discrimination based on same-sex attraction constitutes sex discrimination raised in numerous Title VII even if there is a ruling for marriage equality on a basis other the sex discrimination. *See EEOC v. Indiana Bell Tel. Co.*, 256 F.3d 516, 529 (7th Cir. 2001) (en banc) (Posner, J., concurring) (the court "take[s] cases en banc to answer questions of general importance likely to recur, or to resolve intracircuit conflicts, or to address issues of transcendent public significance. . . .").

http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-556q1_7l48.pdf.[6]

Other developments underscore the importance and timeliness of this issue. The EEOC has unequivocally stated its willingness to accept Title VII charges alleging sexual orientation discrimination and has made clear its view that such mistreatment of employees and job applicants can constitute sex discrimination proscribed by Title VII. *See* "Gender Stereotyping: Preventing Employment Discrimination of Lesbian, Gay, Bisexual or Transgender Workers," ("it is illegal for an employer to deny employment opportunities . . . because: . . . a female employee dates women instead of men. [or because] a male employee plans to marry a man.") available at http://www.eeoc.gov/eeoc/publications/brochure-

[6] The response made by the attorney defending the Michigan marriage ban to the Chief Justice's question was categorically wrong. He argued that "All of this Court's landmark precedents in this area in sexual discrimination law have always involved treating classes of men and women differently. And that's not what we have here." *Id*. at 62:6-10. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 142 n.13 (1994) shows that is not true. *See also Hayden*, 743 F.3d at 579 ("The equal protection clause protects the individual rather than the group") (emphasis omitted). Even more relevant here, Title VII makes it unlawful "to discriminate against any *individual* . . ." based on particular characteristics. *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 708 (1978), quoting 42 U. S. C. § 2000e-2(a)(1) (emphasis in original). And it is irrelevant that both men and women may be affected; even if a sex-based restriction were applied to exclude an equal number of men and women based on their gender, sex discrimination still occurs as to each of them. *See J.E.B.*, 511 U.S. at 142 n. 13; *see also Connecticut v. Teal*, 457 U.S. 440 (1982) (rejecting equal application defense under Title VII).

gender_stereotyping.cfm. A webpage on the EEOC site describes several recent rulings in favor of lesbian and gay workers' right to bring sex discrimination claims, including "*Culp v. Dep't of Homeland Security*, EEOC Appeal No. 0720130012, 2013 WL 2146756 (E.E.O.C.) (May 7, 2013) (allegation of sexual orientation discrimination was a claim of sex discrimination because supervisor was motivated by his attitudes about sex stereotypes that women should only have relationships with men)." *See* http://www.eeoc.gov/federal/directives/lgbt_complaint_processing.cfm And *Culp* is but one of many recent EEOC decisions to this effect. See, *e.g.*, *Castello v. Postmaster General*, Request No. 0520110649, 2011 EEOPUB LEXIS 3966, Dec. 20, 2011; *Veretto v. Postmaster General*, Request No. 0120110873, 2011 EEOPUB LEXIS 1973, July 1, 2011.

Additionally, five different federal courts have now ruled that sexual orientation discrimination is actionable under Title VII, four of which did so using a sex-stereotyping approach, and three of which endorsed a relational discrimination framework. These courts recognize that a woman should not be punished for a trait acceptable in a man, or alternatively framed, that expecting different-sex attraction is a sex stereotype, in the same way that expecting a woman to have a demure persona and a man not to is, and employers cannot

punish noncompliance with those norms. *See Price Waterhouse*, 490 U.S. at 251 ("we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group"); *Hall v. BNSF Ry. Co.*, No. 2014 WL 4719007, 2014 WL 4719007, at *3 (W.D. Wash. Sept. 22, 2014) ("Plaintiff alleges disparate treatment based on his sex, not his sexual orientation, specifically that he (as a male who married a male) was treated differently in comparison to his female coworkers who also married males."); *TerVeer v. Billington*, 34 F. Supp. 3d 100, 116 (D.D.C. 2014) (upholding Title VII claim because "Plaintiff has alleged that he is 'a homosexual male whose sexual orientation is not consistent with the Defendant's perception of acceptable gender roles,'") (record citation omitted); *Koren v. Ohio Bell Tel. Co.*, 894 F. Supp. 2d 1032, 1038 (N.D. Ohio 2012) ("Koren chose to take his spouse's surname—a "traditionally" feminine practice"); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1223 (D. Or. 2002) (Title VII's "because of . . . .sex" requirement is satisfied if "Cagle would not have acted as she (allegedly) did if Plaintiff were a man dating a woman, instead of a woman dating a woman"); *Centola v. Potter*, 183 F. Supp. 2d 403, 409 (D. Mass. 2002) (Title VII's ban on sex stereotyping discrimination applies when "an employer acts upon stereotypes about sexual roles in making employment decisions.").

Appellant is **not** asking this Court to give her rights the legislative branch has withheld. The right not to have your employer treat you differently because of your sex was provided to Hively and all Americans more than a half-century ago, when Title VII became law. *Hamner* demands reconsideration because its improper attempts to narrow Title VII's plain language cannot be reconciled with Supreme Court precedent and because of the critical importance of properly resolving the question of Title VII's coverage in cases such as the instant appeal.

CONCLUSION

For the reasons set forth above, Appellant respectfully requests that this Court hear this appeal initially en banc.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 12, 2015, I utilized this court's ECF system to file a copy, resulting in the automatic service of counsel of record.

So certified this 12th day of May, 2015.

/s/ Gregory R. Nevins
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