

John R. Malcy
(317) 432-5509
john.malcy@btlaw.com

11 South Meridian Street
Indianapolis, IN 46204-3535 U.S.A.
(317) 236-1313
Fax (317) 231-7433

www.btlaw.com

December 21, 2015

Via CM/ECF Filing and FedEx Overnight

Clerk, United States Court of Appeals
for the Seventh Circuit
Room 2722
219 South Dearborn Street
Chicago, IL 60604

Re: *Kimberly Hively v. Ivy Tech Community College of Indiana*
No. 15-1720

Dear Clerk,

Pursuant to Fed.R.App.P. 28(j) and Circuit Rule 28(e), Appellee responds to Appellant's Supplemental Authority [ECF 31], and provides other recent supplemental authority not cited by Appellant.¹

First, the decisions cited by Appellant are lower court decisions, are not within the Seventh Circuit, and one is not even a Title VII case. *Videckis v. Pepperdine Univ.*, 2015 U.S. Dist. LEXIS 167672 (C.D. Cal. Dec. 16, 2015) (Title IX case); *Isaacs v. Felder Servs., Inc.*, 2015 U.S. Dist. LEXIS 146663 (M.D. Ala. Oct. 29, 2015). Remarkably, the trial judge in *Pepperdine* cited but refused to follow binding (as to that judge) Ninth Circuit precedent, *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1063 (9th Cir. 2002) (en banc), which states, "We would hold that an employee's sexual orientation is irrelevant for purposes of Title VII. It neither provides nor precludes a cause of action for sexual harassment."

As for the *Isaacs* decision, the Magistrate Judge had correctly concluded that "sexual orientation discrimination is neither included nor contemplated by Title VII." *Isaacs v. Felder Services, LLC*, 2015 U.S. Dist. LEXIS 146715 *8 (M.D. Ala. Oct. 8, 2015). The Magistrate Judge wrote, "Sexual orientation is neither included in nor contemplated by Title VII. 'Although the Eleventh Circuit has not addressed this issue, every court that has done so has found that Title VII ... was not intended to cover discrimination against homosexuals.'" The Magistrate Judge further noted that new EEOC decision "is not controlling." *Id.*

The district judge disagreed, siding with the EEOC's recent shift in its 3-2 federal employee ruling, and ignoring and not even citing any of the federal appellate authority throughout the country. And, the district judge's interpretation was of no effect as the claim failed as Plaintiff "has

¹ Rather than one response to Appellant's letter, then a second new letter with other new authority, Appellee respectfully submits this in one letter the body of which is less than 700 words (as the body of single letters are limited to 350 words).

December 21, 2015

Page 2 of 2

offered no direct or circumstantial evidence to suggest that the decision of Felder Services to fire him was based on his sexual orientation.” *Isaacs*, at *3. Summary judgment was entered accordingly.

Meanwhile, and not noted by Appellant, are other decisions consistent with this Court’s holdings that sexual orientation is not protected under Title VII. For instance, in *Dingle v. Bimbo Bakeries*, 2015 U.S. App. LEXIS 21787 (2nd Cir. Dec. 16, 2015), the Second Circuit affirmed the district court’s dismissal of a Title VII sexual orientation claim, while reversing the dismissal of New York state-law sexual orientation claims.² Unlike Title VII, the New York laws “expressly protect against discrimination based on both *perceived* as well as *actual* sexual orientation.” *Id.* at *2 (emphasis in original).

Similarly, in *Moore v. Greyhound Bus Lines*, 2015 U.S. Dist. LEXIS 141055 (E.D. N.Y. Oct.16, 2015), the court dismissed a Title VII claim but allowed amendment of the complaint. The court wrote, “[Plaintiff] is reminded that Title VII does not apply to allegations of discrimination on the basis of sexual orientation, *see Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000).” *Moore*, at *3.

Finally, in *Pittman v. Cook Paper Recycling Corp.*, 2015 Mo. App. 1090 (Oct. 27, 2015), the Missouri Court of Appeals held that Missouri’s anti-discrimination statute – which like Title VII prohibits discrimination on the basis of “sex” – does not cover sexual orientation. The court explained, “If the Missouri legislature had desired to include sexual orientation in the Missouri Human Rights Act’s protections, it could have done so. No matter how compelling Pittman’s argument may be and no matter how sympathetic this court or the trial court may be to Pittman’s situation, we are bound by the state of the law as it currently exists. Without the legislative addition of “sexual orientation” to the statutory list of protected statuses, the Missouri Human Rights Act does not prohibit discrimination based upon a person’s sexual orientation.”

Respectfully submitted,

/s/ John R. Maley

Proof of Service

I certify that on December 21, 2015, a copy of this letter was served via the Court’s CM/ECF system upon Gregory Nevins, Esq., LAMBDA LEGAL DEFENSE AND EDUCATION FUND, Inc., 730 Peachtree St., NE, Suite 1070, Atlanta, GA 30308.

/s/ John R. Maley

DMS 3357373

² A review of the appellate briefs confirms that a Title VII sexual orientation was among the other claims raised that were dismissed and affirmed.