15-1720

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

KIMBERLY HIVELY,
Plaintiff-Appellant,

v.

IVY TECH COMMUNITY COLLEGE OF INDIANA,
Defendant-Appellee.

Appeal from the United States District Court
For the Northern District of Indiana
Case No. 34-cv-01791-RL-CAN
The Honorable Judge Rudy Lozano

DEFENDANT-APPELLEE IVY TECH COMMUNITY COLLEGE OF INDIANA'S ANSWER TO THE PETITION FOR REHEARING AND REHEARING EN BANC

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Appellate Court No: 15-1720

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I. Summary of the Argument

At the outset of this appeal, Appellant Kimberly Hively petitioned the Court for en banc consideration. That petition – subject to largely the same high standard as the instant petition – was summarily denied without a single judge requesting a vote. (Dkt. 12). The assigned panel then considered Hively's appeal and upheld the district court's decision in a thorough and unanimous opinion. (Dkt. 34). Undeterred, Hively now attempts to obtain the disfavored remedy of rehearing or rehearing en banc, by contending there is some conflict in the precedent interpreting Title VII, 42 U.S.C. §§ 2000e *et seq.*

Despite Hively's arguments, no lack of uniformity or conflict in authority exists here. In fact, Hively's petition is the antithesis of what is required by Appellate Rule 35. Hively advocates for "this Court's creation of a circuit split" by discarding decades of uniform appellate decisions and an unbroken line of cases from this Court. (Hively Petition, p. 11, n.5). As for Hively's invitation to judicially craft a new claim to simplify the longstanding analytical framework, doing so would be "wholly inappropriate" and "a clear violation of the separation of powers." *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 951 (7th Cir. 2002), *reh'g denied, reh'g en banc denied* (May 17, 2002), *cert. denied* 537 U.S. 974 (2002).

The panel hardly "dodged" the issue as Hively complains. The disfavored relief being sought by Hively – en banc consideration – should again be declined as she cannot satisfy the applicable legal standard. Likewise, aside from possibly correcting a single, inconsequential citation, there is no legal basis for the panel to revisit its decision.

II. Argument

A. Creating a Circuit Conflict and Disrupting the Court's Own Jurisprudential Uniformity is Directly Contrary to the Purpose of En Banc Consideration.

"It should go without saying that mere disagreement with a decision by a panel of the court is not a sufficient ground for rehearing en banc." *Mitchell v. JCG Indus.*, 753 F.3d 695, 699 (7th Cir. 2014) (Posner, J., concurring in denial of rehearing en banc). "An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a). The applicable rule then goes on to offer a single 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." Fed. R. App. P. 35(b). Thus, en banc consideration is appropriate only in rare circumstances, and is almost always reserved for situations in which a panel decision creates a jurisprudential conflict or lack of uniformity. *See Easley v. Reuss*, 532 F.3d 592, 594 (7th Cir. 2008) ("in the last calendar year, out of the thousands of cases resolved by this court, only one en banc opinion has been issued"); *Lear v. Cowan*, 220 F.3d 825 (7th Cir. 2000) (en banc rehearing denied in death penalty case).

Although Hively clearly disagrees with the panel decision, she offers little to meet the standard required for en banc consideration as there is neither "an intracircuit or an intercircuit conflict, [and] a reversal of the panel decision would

create a circuit split . . . ." *Mitchell*, 753 F.3d at 699 (7th Cir. 2014) (Posner, J., concurring). In fact, Seventh Circuit "precedent has been unequivocal in holding that Title VII does not redress sexual orientation discrimination" and "[t]hat holding is in line with all other circuit courts to have decided or opined about the matter." *Hively,* No. 15-1720, slip op. at 6, 2016 U.S. App. LEXIS 13746 (7th Cir. July 28, 2016) (Dkt. 34). Hively's peculiar response is to ask this Court to "promptly create[]" a "circuit split." (Hively Petition, p. 10). This should be declined.

Finally, in an effort to meet the strict requirements of Rule 35, Hively half-heartedly points to several Supreme Court decisions and asserts a purported conflict with the panel ruling here. This is a remarkable position given that Hively is relying upon Supreme Court decisions from as long ago as 1971 and no more recently than 1998, yet the panel decision is in accord with *numerous* decisions from this and other circuit courts after that time. Hively would have this Court conclude that the holdings of this Court and every circuit court that has addressed the issue – approximately half of which have done so since 1998 – have all ignored controlling, longstanding Supreme Court precedent.[1] And, as the panel noted, "[i]f

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[1] Hively also mentions *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) in support of her request for panel rehearing. The *Obergefell* decision addressed the issue of same sex marriage and, as Hively notes, was decided the day after the briefing in this matter closed. What Hively does not mention, however, is that she twice provided the panel with supplemental authority after briefing closed, yet never mentioned *Obergefell*. Hively also fails to mention that the panel did, in fact, analyze *Obergefell* and concluded it "did not address the issue of gender nor of workplace discrimination" and had no direct impact on the statutory interpretation of Title VII. *Hively*, slip op. at 33, 2016 U.S. App. LEXIS 13746).

we, and every other circuit to have considered it are wrong about the interpretation of the boundaries of gender discrimination under the 'sex' prong of Title VII, perhaps it is time for the Supreme Court to step in and tell us so." *Hively,* slip op. at 11, 2016 U.S. App. LEXIS 13746.[2]

B. Hively's Proposal to Judicially Amend Title VII is "Wholly Inappropriate," Not Exceptionally Important.

For over thirty years, this Court has held that "Title VII does not . . . provide for a private right of action based on sexual orientation discrimination." *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 951 (7th Cir. 2002), *reh'g denied, reh'g en banc denied, cert. denied* 537 U.S. 974 (2002); *Ulane v. Eastern Airlines*, 742 F.2d 1081 (7th Cir. 1984). In doing so, the Court has rejected requests to "judicially amend Title VII to provide for such a cause of action" finding that it "is wholly inappropriate, as well as constituting *a clear violation of the separation of powers*, for this court, or any other federal court, to fashion causes of action out of whole cloth, regardless of any perceived public policy benefit." *Schroeder*, 282 F.3d at 951 (emphasis added). This is precisely what Hively is asking this Court to do now, based on the premise that purported challenges in applying the statutory language make the issue exceptionally important. *See generally, Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998) ("the Constitution's central mechanism of

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[2] As the panel noted, the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth and Tenth Circuits have all held that Title VII simply does not cover sexual orientation. *See Hively*, slip op. at 6 (listing case citations). No Circuit has held otherwise.

separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts.") (citation omitted).

Preliminarily, Hively's characterization of an unworkable analytical framework overstates the panel's conclusions. In fact, the panel determined that "although disentangling gender discrimination from sexual orientation discrimination may be difficult, *we cannot conclude that it is impossible*." *Hively,* slip op. at 22, 2016 U.S. App. LEXIS 13746 (emphasis added). Moreover, the panel decision noted that any statutory paradox is "not [the Court's] concern" as its task "is to interpret Title VII as drafted by Congress, and . . . Title VII prohibits discrimination only on the basis of gender." *Id.*, slip op. at 34.

Moreover, judicially amending the statute is not a proper solution to the perceived problem. As the panel noted, "despite multiple efforts, Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation" and "Congress' failure to act to amend Title VII to include sexual orientation is not from want of knowledge of the problem." *Id.,* slip op. at 6, 8. Although a few lawmakers have filed an amicus brief offering their view that – despite currently and repeatedly seeking to pass legislation to bar sexual orientation discrimination – such discrimination is already prohibited by existing law, this illogical position merely reveals the shortcomings of Hively's argument.

Neither Hively nor the lawmakers can avoid the fact that they are pursuing new legislation to address a matter that is *not* currently addressed by the statute.[3] Any addition to the list of characteristics protected by Title VII is a matter properly left to Congress.[4]

C. Hively's Associational Gender Discrimination Theory Does Not Support En Banc Consideration or Warrant a Different Outcome.

Hively also suggests that the panel's discussion of a theoretical associational gender discrimination claim requires the Court to universally recognize a new statutory prohibition on sexual orientation discrimination. This has little to do with the criteria applicable to en banc consideration and, instead, is simply a

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[3] For its part, the EEOC has also submitted an amicus brief touting its recent flip-flop in a 3-2 decision of its Commissioners under an analogous statutory provision applicable to federal employees. Specifically, the EEOC's decision flew into the face of its longstanding statutory interpretation of the meaning of a three letter word -- "sex." *See e.g., Morrison v. Dep't of Navy*, Appeal No. 01930778, 1994 EEOPUB LEXIS 329 (1994) ("statutes and case law . . . mandate" Title VII does not prohibit sexual orientation discrimination); *Allen v. Dep't of Homeland Sec.*, No. 0120091819, 2010 EEOPUB LEXIS 3830 (2010) (same). With that said, Rule 35 makes no mention of en banc consideration on such a basis, a conclusion that seems especially proper where the matter involves plain statutory interpretation and the agency's shifting view is universally contradicted by the courts of appeals. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987); *Gen. Dynamics v. Cline*, 540 U.S. 581, 600 (2004) (rejecting EEOC's definition of "age"); *EEOC v. Thrivent Fin.*, 700 F.3d 1044, 1049-50 (7th Cir. 2012) (rejecting EEOC's definition of "inquiries"). And, to be clear, Hively did call the *Baldwin* decision to the panel's attention and the case was analyzed by the panel.

[4] The panel also concluded that "perhaps the writing is on the wall," but "writing on the wall is not enough" and "[u]ntil the writing comes in the form of a Supreme Court opinion or new legislation, we must adhere to the writing of our prior precedent." *Hively*, slip op. at 42, 2016 U.S. App. LEXIS 13746, *55-56). Notably, the panel did not include rehearing en banc in this list of theoretical avenues to overturning precedent from circuit courts throughout the country.

disagreement with the panel's analysis. In any event, there are ample reasons Hively's associational theory does not support rehearing or rehearing en banc.

Factually, there is nothing in the District Court record suggesting that Hively associated with anyone. Historically, preventing racial discrimination was the core purpose of Title VII, while preventing sexual orientation discrimination was not a Congressional consideration at the statute's inception, nor has Congress acted to extend the statute. Thus, Hively's analogy is infirm from the outset.[5]

And legally, Hively's analogy – which she contends creates an "impermissible conflict in Title VII jurisprudence" – does not hold water. First, it is telling that Hively has offered no actual authority for the proposition she advances, and the few cases that have addressed this argument have rejected it. *See e.g., Partners Healthcare Sys. v. Sullivan*, 497 F. Supp. 2d 29, 39 (D. Mass. 2007) (if parties "propound the even more novel theory that all associational sex discrimination is barred as the analogue of interracial relationship discrimination, this argument proves too much and must be rejected" as "[a]dopting such a theory would serve to protect sexual orientation in any context where sex discrimination is protected").

Second, even if an associational sex discrimination claim existed, it would not extend to a claim of sexual orientation discrimination. Hively hypothesizes that an

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[5] In this vein, it is noteworthy that recently proposed versions of legislation to prohibit sexual orientation discrimination have included explicit associational provisions, essentially recognizing that an associational claim does not necessarily flow from the general protection of a particular classification. *See e.g.*, H.R. 1755, § 4(e), 113th Cong. (2013).

employee who associates with someone of a sexual orientation disfavored by an employer and then suffers an adverse action has been discriminated against "because of . . . sex" under Title VII. The following example is illustrative of the flaw in Hively's theory – a Caucasian, heterosexual employee who is fired for having drinks with a group of his African-American coworkers may state a cause of action under Title VII, but if that same employee is fired for having drinks with lesbian coworkers, he has no cause of action under Title VII. In the former situation, the employee is fired for associating with individuals possessing characteristics within the ambit of the statute's protections; in the latter, there is simply no protected characteristic at issue. This is one example of how "disentangling gender discrimination from sexual orientation discrimination may be difficult," but not impossible. *Hively,* slip op. at 22, 2016 U.S. App. LEXIS 13746.

D. The Panel Did Not Address a Threshold Argument that Also Supports Its Ultimate Decision.

While Hively presented the panel with various arguments, there is a common thread among them – not one of them was raised in the District Court. Ivy Tech called this issue to the panel's attention in the original briefing as "[a]rguments not raised in the district court are waived on appeal," and this Court could reject Hively's petition on this alternate ground. *Pond v. Michelin N. Am., Inc.*, 183 F.3d 592, 597 (7th Cir. 1999); *Kmart Corp. v. Footstar, Inc.*, 777 F.3d 923, 930 (7th Cir. 2015) ("A party waive[s] the ability to make a specific argument for the first time on appeal when the party fail[s] to present that specific argument to the district court, even though the issue may have been before the district court in more general

terms.") (internal quotations and citation omitted). Hively "changed [her] theory after losing below and that prevents [this Court] from considering it." *United States v. Ritz*, 721 F.3d 825, 828 (7th Cir. 2013).

E. Panel Rehearing is Unnecessary to Correct an Error in a String Citation that Changes Nothing About the Holding (or Even the Preceding Sentence).

Hively's petition is correct in one respect. The panel's parenthetical regarding the citation to *Muhammad v. Caterpillar, Inc.*, 767 F.3d 694, 697 (7th Cir. 2014) was slightly misstated, in that the *Muhammad* decision did not directly "cit[e] the holding in *Spearman*, 231 F.3d at 1085." *Hively*, slip op. at 4, 2016 U.S. App. LEXIS 13746. The final version of the *Muhammad* opinion, while doing nothing to contradict *Spearman*, did not include that citation. Thus, the substance of the panel decision was correct when it provided that, "[s]ince *Hamner* and *Spearman*, our circuit has, without exception, relied on those precedents to hold that the Title VII prohibition on discrimination based on 'sex' extends only to discrimination based on a person's gender, and not that aimed at a person's sexual orientation." *Hively,* slip op. at 4, 2016 U.S. App. LEXIS 13746. To the extent the panel believes it necessary, Ivy Tech does not oppose an amendment to the panel decision to remove the single erroneous parenthetical. *See e.g., Regen Capital I, Inc. v. UAL Corp. (In re UAL Corp.)*, 2011 U.S. App. LEXIS 26341 (7th Cir. Apr. 13, 2011) (denying panel rehearing, but making modest amendments to opinion).

Beyond this single amendment, there is no basis for panel rehearing. As noted above, the panel appropriately addressed the Supreme Court's *Obergefell* decision – a decision having nothing to do with gender or workplace discrimination

– and Hively's call to revisit the panel's opinion to "excise misleading and unnecessary language" that is not "germane" is simply not proper fodder for panel rehearing.

III. Conclusion

As was true at the outset of this appeal, Hively does not meet the heavy burden for en banc consideration; she again falls short of the applicable legal standard. Complete uniformity exists among this Court's decisions and there is no conflict with any Supreme Court decision or the legions of relevant cases from other circuits spanning decades. In fact, Hively is now asking this Court to *create a conflict* and disrupt uniformity for the first time since the statute went into place in 1964. Similarly, that application of the text of Title VII might not always be easy in practice does not warrant the Court jettisoning the law itself; such an approach would violate basic separation of powers principles. Finally, Hively waived the arguments in her petition by failing to raise any of them in the District Court.

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s/ Jason T. Clagg
Jason T. Clagg, Esq.

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