15-1720

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

KIMBERLY HIVELY,
Plaintiff-Appellant,

v.

IVY TECH COMMUNITY COLLEGE, South Bend,
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

REPLY BRIEF OF PLAINTIFF-APPELLANT KIMBERLY HIVELY

Gregory R. Nevins
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
730 Peachtree St. NE, Suite 1070
Atlanta, GA 30308
Phone: (404) 897-1880
Facsimile: (404) 897-1884

Attorney for Plaintiff-Appellant,
Kimberly Hively

TABLE OF CONTENTS

TABLE OF AUTHORITES

Cases

Statutes

Miscellaneous

I. INTRODUCTION

In her opening brief, Hively explained that an employer should not fire a woman for any trait that is acceptable in men, including attraction to women, and therefore this Court should overrule *Hamner v. St. Vincent Hosp. & Health Care Ctr.*, *Inc*., 224 F.3d 701 (7th Cir. 2000). Ivy Tech offers essentially four arguments in response: (1) *Hamner* is in line with this the decisions of other circuits and has been followed faithfully in this circuit, (2) Hively is asking for this court to change the interpretation of Title VII, instead of just applying it consistently across the board; (3) the federal circuit courts are absolutely correct in relying on Congressional failure to pass specific sexual orientation protections in ENDA; and (4) Title VII forbids, for example, the firing of any white woman if she marries a black man, but not if she marries a black woman. In light of Hively's explaining the error of contrary authority, the first of these is not even a real argument, but an invocation to a herd mentality. The second is simply semantic gamesmanship, in the same way that urging that *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998) is a judicial engrafting of "same-sex sexual harassment" onto the "Employer Practices" proscription of Title VII. The other two arguments ignore or misinterpret *Oncale* and its progeny and thirty years of law proscribing discrimination based on interracial relationships. Therefore, Hively respectfully requests that the panel to whom this case is assigned invoke Circuit Rule 40(e) and

overrule Hamner and provide an interpretation of Title VII consistent with its text and Supreme Court precedent.

II. ARGUMENT

A. THIS COURT SHOULD NOT APPLY WAIVER AGAINST HIVELY.

This Court has repeatedly refused to apply waiver when the appellant was raising pure questions of law, especially those of statutory interpretation. Moreover, it is widely recognized that waiver should not be applied to penalize a litigant for not making an argument that the tribunal below was powerless to accept, such as the overruling of a precedent of this Court. These important distinctions from the waiver cases cited by Ivy Tech warrant consideration by this Court of all of Appellant's arguments.[1]

1. This Court Repeatedly Has Entertained Arguments About Pure Issues of Law, Especially Statutory Interpretation, That Were Not Presented Below.

In multiple cases over more than thirty years, this court has refused to apply waiver when the question was a "matter of law," even when the plaintiff "fail[ed] to present anything to the district court" on the subject. *Charlton v. United States*,

[1] All of the cases cited by Ivy Tech (see Defendant-Appellee's Brf. at 8-9) involve one or more of the following distinguishing characteristics: they did not involve questions of statutory interpretation, or even other pure questions of law with no application to facts; they involved subsidiary issues and/or issues of no public importance; they involved issues raised after extensive proceedings in the district court, including full discovery and summary judgment or even a trial, and/or they involved parties represented by counsel.

743 F.2d 557, 561 n.5 (7th Cir. 1984) (not applying waiver "despite counsel's failure to respond to the motion to dismiss."). Recognizing that "[f]orfeiture is a sanction, and sanctions should be related to harm done or threatened," *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 749-750 (7th Cir. 1993), this Court has cited many circumstances – all present here – where the purposes of the waiver rule are not served: the presence of a pure question of law, *Republic Tobacco Co. v. N. Atl. Trading Co.*, 481 F.3d 442, 447 (7th Cir. 2007); *Niedert v. Rieger*, 200 F.3d 522, 528 (7th Cir. 1999); *Diersen v. Chicago Car Exch.*, 110 F.3d 481, 485 (7th Cir. 1997); *Amcast*, 2 F.3d at 749; and specifically a question of statutory interpretation, *Republic Tobacco*, 481 F.3d at 447; *Haroco, Inc. v. Am. Nat'l Bank & Trust Co*., 38 F.3d 1429, 1439 (7th Cir. 1994); *Amcast*, 2 F.3d at 750; the fact that the parties on appeal have briefed the issues extensively, *Julian v. Bartley*, 495 F.3d 487, 498 (7th Cir. 2007); *Republic Tobacco*, 481 F.3d at 447; *Niedert*, 200 F.3d at 528;*Diersen*, 110 F.3d at 485; *Haroco*, 38 F.3d at 1439; *Amcast*, 2 F.3d at 749; and in instances where the district judge's view of the purely legal issues involved, while perhaps interesting, would have no legal weight. *Julian*, 495 F.3d at 498; *Republic Tobacco*, 481 F.3d at 447; *Niedert*, 200 F.3d at 528; *Amcast*, 2 F.3d at 750. Thus, on more than one occasion, this Court has declared, "there is no reason to defer [the issue's] resolution to another case. There will be no better time to resolve the issue than now." *Diersen*, 110 F.3d at 485, quoting *Amcast*, 2 F.3d

at 750; *see also Julian*, 495 F.3d at 498 ("efficiency dictates that we resolve the question here.").

2. Waiver Should Not Apply Against a Pro Se Litigant Who Did Not Present Arguments to a District Court Powerless to Entertain Them.

Waiver also is inappropriate here because the District Court could not overrule *Hamner*. This Court has held that, if current precedent precludes the argument, a party should be allowed to take advantage of a change in the law "even if he had not reserved the point decided, if the decision could not reasonably have been anticipated. A contrary rule would induce parties to drown the trial judge with reservations." *McKnight v. GMC*, 908 F.2d 104, 108 (7th Cir. 1990). Similarly, ample authority rejects waiver when the tribunal below was either powerless or highly unlikely to accept the argument being made on appeal. *United States v. Williams*, 504 U.S. 36, 43-44 (1992) (excusing failure to ask Tenth Circuit to overrule recent precedent; it "seems to us unreasonable" to require "that a party demand overruling of a squarely applicable, recent circuit precedent" in order to secure review in a higher court); *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 143-144 (1967) (excusing failure to argue First Amendment defense to libel to lower courts prior to issuance of *New York Times v. Sullivan*); *O'Connor v. Ohio*, 385 U.S. 92, 91-93 (1966) (petitioner's "failure to object to a practice which Ohio had long allowed cannot strip him of his right to attack the practice following its

invalidation by this Court"); *Emerick v. Commonwealth, Dep't of Public Welfare*, 407 A.2d 1378, 1380 n.6 (Pa. Commw. 1979) (where lower tribunal stated it was "powerless" to consider an argument, waiver's "purpose would not have been served here even had the issue been raised, we will consider it on appeal"); Brent E. Newton, *An Argument for Reviving the Actual Futility Exception to the Supreme Court's Procedural Default Doctrine*, 4 J. App. Prac. & Process 521, 560 n.139 (2002) (rules requiring presentation of claims "typically will not have any relevance when an inferior court was utterly powerless in light of extant appellate precedent to grant relief");[2] Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 Yale L.J. 922, 959-60 (2006) (noting that neither the interest in avoiding error or preventing sandbagging is served by requiring a party to make an argument to a trial court that is "foreclosed by then-existing law").

B. IVY TECH BRAZENLY IGNORES THE VAST MAJORITY OF CASES CITED BY HIVELY AND THEN FALSELY CLAIMS REPEATEDLY THAT THERE IS NO AUTHORITY SUPPORTING HIVELY'S POSITION.

Hively was quite candid with this Court in her opening brief, citing not just this Court's precedent against her position but numerous adverse decisions of other

[2] It should be noted that, while in some procedural contexts (not present here) presentation of arguments may be statutorily mandated, the Supreme Court has made clear that "[t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. We announce no general rule." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976).

courts and explaining their analytical errors. Ivy Tech cites almost all of those cases, as well as *Oncale* and *Price Waterhouse*, but altogether ignores Hively's analysis of them as well as every single other case cited by Hively. Because of Ivy Tech's silence, there is no response to the following lines of authority cited by Hively:

First, Ivy Tech ignores the many U.S Supreme Court cases, post-*Oncale*, demanding that courts entertain all Title VII claims falling within the words of the statute, irrespective of any perceived Congressional intent to the contrary. *See Staub v. Proctor Hosp.*, 131 S. Ct. 1186 (2011); *Thompson v. North American Stainless, L.P.*, 562 U.S. 170, 174-75 (2011); *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 (2003); *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506 (2002); *Reeves v. Sanderson Plumbing Products, Inc*., 530 U.S. 133, 148 (2000).

Second, Ivy Tech further ignores the many decisions of this Court that undermine the logic and holding of *Ulane v. Eastern Airlines*, 742 F.2d 1081 (7th Cir. 1984) and *Hamner*. *See Orton-Bell v. Indiana*, 759 F.3d 768, 774-75 (7th Cir. 2014) (any differential treatment based on gender, even idiosyncratic, inexplicable discrimination is actionable under Title VII); *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); *Rabé v. United Air Lines, Inc.*, 636 F.3d 866, 868, 870 (7th Cir. 2011) (ignoring *Hamner* in upholding statutory coverage of a lesbian's claim for discrimination on the basis of, *inter alia*, "sexual orientation in violation of Title VII" and holding that she alleged "substantial (*i.e.*, non-frivolous or colorable) claims for coverage directly under Title VII . . ."); *Bellaver v. Quanex Corp./Nichols-Homeshield*, 200 F.3d 485, 492-493 (7th Cir. 2000) (sex discrimination occurs when an employee is fired based on "unequal ideas of how man and women should behave"); *Drake v. 3M*, 134 F.3d 878 (7th Cir. 1998) (endorsing the validity of holdings that discrimination against those in interracial marriages is "because of the employee's race, as § 2000e-2(a) requires" and specifically holding that the "degree of association" between the employee and those of another race with whom the employee is associating is not "relevant to this inquiry"); *Johnson v. Hondo, Inc.*, 125 F.3d 408, 413-14 (7th Cir. 1997) ("the harassers in *Doe* expressed and exhibited hostility to the way in which plaintiff H. exhibited his sexuality, which *Price Waterhouse v. Hopkins* [] tells us is discrimination 'because of' sex") (citations omitted); *Doe by Doe v. City of Belleville, Ill.*, 119 F.3d 563, 572 (7th Cir. 1997), *vacated on other grounds*, 523 U.S. 1001 (1998). Perhaps most notably, although Hively repeatedly referred to the test articulated in *Shepherd v. Slater Steels Corp*., 168 F.3d 998 (7th Cir. 1999),

as the definitive test for whether actionable sex discrimination is present,[3] (see Opening Brf. at 10, 20, 21), Ivy Tech never acknowledges *Shepherd* either.

Third, Ivy Tech ignores the many decisions of the EEOC and federal district courts across the country specifically holding that allegations of sexual orientation discrimination, with nothing more, *may* be brought under Title VII. *Castello v. Postmaster General*, Request No. 0520110649, 2011 EEOPUB LEXIS 3966, December 20, 2011; *Veretto v. Postmaster General*, Request No. 0120110873, 2011 EEOPUB LEXIS 1973, July 1, 2011; *Hall v. BNSF Ry. Co*., 2014 U.S. Dist. LEXIS 132878, 124 Fair Empl. Prac. Cas. (BNA) 1419, 9 (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."); *Koren v. Ohio Bell Tel. Co.*, 894 F. Supp. 2d 1032, 1038(N.D. Ohio 2012) (Title VII claim stated when supervisor "harbored ill-will" because Koren changed his premarital surname but "would not have done so if a female employee had changed her name"); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1223 (D. Or. 2002) (if supervisor would have acted differently "if Plaintiff were a man dating a woman, instead of a woman dating a woman. . . . then Plaintiff was

3 *See ibid.* 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.")

discriminated against because of her gender.") (footnote omitted); *see also TerVeer v. Billington*, 34 F. Supp. 3d 100, 116 (D.D.C. 2014) (plaintiff stated a claim under Title VII by alleging that "his orientation as homosexual had removed him from [the alleged discriminator's] preconceived definition of male."); *Centola v. Potter*, 183 F. Supp. 2d 403, 409 (D. Mass. 2002); *Foray v. Bell Atlantic*, 56 F. Supp. 2d 327, 329 (S.D.N.Y. 1999).[4]

Worse yet, Ivy Tech repeatedly claims that there is no authority supporting Hively's position[5] – which would be problematic in and of itself as an overly broad assertion – but becomes completely indefensible when Hively extensively

---

[4] At the time Hively was submitting her Opening Brief, yet another court fell in line with Hively's position. The District of Colorado held that a male plaintiff stated a claim under Title VII for discrimination "based on Deneffe's failure to conform to male stereotypes" in light of the following allegations: "(1) he did not take part in male braggodicio about sexual exploits with women as the other male pilots did; (2) he did not joke about gays as other male pilots did, (3) he submitted paperwork to SkyWest designating his male domestic partner for flight privileges, a benefit offered only for family members and domestic partners; and (4) he traveled on SkyWest flights with his domestic partner." *Deneffe v. SkyWest, Inc*., No. 14-cv-00348-MEH, 127 Fair Empl. Prac. Cas. (BNA) 54, 2015 U.S. Dist. LEXIS 62019 **15-16 (D. Colo. May 11, 2015) (citations omitted).

[5] See Defendant-Appellee's Brf. at 4 ("such a claim does not exist pursuant to *every* case that has ever considered the matter") (emphasis added); *id*. at 6 ("Moreover, in the almost two decades since Oncale, *every* court to consider the matter has concluded that an action taken "because of sexual orientation" is not equivalent to an action taken 'because of sex.'") (emphasis added; citation omitted); id. at 20 ("Hively has offered *no* authority for the proposition she is asking this Court to adopt and the few cases that have addressed this proposition have rejected it.") (emphasis added).

discussed the authorities supporting her, and Ivy Tech simply has ignored those citations. But the real takeaway is not that Ivy Tech should be taken to the woodshed for its dishonesty with this Court,[6] but that even a party so zealous that it is willing to shade the truth can offer nothing to counter Hively's logic that Title VII precludes an employer from firing women for a trait that it deems acceptable in men. Certainly, if there were a logical argument against this premise, Ivy Tech would have called it to this Court's attention.

C. *ONCALE*'S EXPLICIT HOLDING IS THAT TITLE VII IS VIOLATED WHEN AN EMPLOYEE ENDURES MISTREATMENT THAT WOULD NOT HAVE OCCURRED HAD HE OR SHE NOT BEEN HIS OR HER GENDER – IRRESPECTIVE OF WHETHER CONGRESS INTENDED THAT PARTICULAR APPLICATION OF THE STATUTE.

In her opening brief, Hively explained that *Oncale* requires that *all* claims of discrimination occurring because of one's gender be entertained by courts, and that they should not screen any such claims based on the perceived intent of Congress in 1964 or on what subsequent Congresses have not done.

Ivy Tech argues that *Oncale* does not end all reliance on congressional intent (Defendant-Appellee's Brf. at 16), but that is not Hively's argument. Instead,

[6] Typical of the disrespect that Ivy Tech shows this Court is its attempt to pass off the *Higgins*, *Wrightson*, *Blum* and *Williamson* cases as authoritative precedent from the First, Fourth, Fifth and Eighth Circuits, respectively, when Hively already explained why this is not so. See Hively Open. Brf. at 38-41 and n.20; Defendant-Appellee's Brf. at 11. If Ivy Tech has a counter-argument for why Hively is wrong, it did not deign to share that with the Court.

Hively's point is merely that *Oncale*'s central holding that all cases that "meet the requirements of Title VII" must be entertained even if the particular manifestation "was assuredly not the principal evil Congress was concerned with when it enacted Title VII." *Oncale*, 523 U.S. at 79. Thus, it is improper to interpret Title VII by guessing at the mindset of the 88th Congress, because "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id*. Contrary to Ivy Tech's assertion that *Oncale* contemplates continued speculation about what Congress intended in passing Title VII, the consistent interpretation of *Oncale* is to the contrary. "It is not for us to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended." *Lewis*, 560 U.S. at 215 (citing *Oncale*). Courts recognizing this key holding of *Oncale* have at least attempted to interpret Title VII as written and not attempt to divine the intent of the Congress that passed it. "The pre-*Price Waterhouse* cases' reliance on the presumed intent of Title VII's drafters is also inconsistent with *Oncale v. Sundowner Offshore Services, Inc.*, where the Supreme Court held that original legislative intent must not be given controlling weight in interpreting Title VII." *Glenn v. Brumby*, 663 F.3d 1312, 1318 n.5 (11th Cir. 2011); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221-1222 (10th Cir. 2007) ("this court recognizes it is the plain language of the statute and not the primary intent of Congress that guides our interpretation of Title VII. See

Oncale, 523 U.S. at 79."); *Jordan v. Sec'y of Educ. of the United States*, 194 F.3d 169, 172 (D.C. Cir. 1999) ("the Secretary confuses the subjective intentions of the members of Congress with the statute that Congress actually enacted. *Cf. Oncale* . . ."); *Doe v. United Consumer Fin. Servs*., No. 1:01 CV 1112, 2001 U.S. Dist. LEXIS 25509 *11 n7 (N.D. Ohio Nov. 9, 2001) ("*Ulane*'s reliance on Congressional intent is at odds with *Oncale* . . .").[7]

Hively also explained at length both the extensive precedent warning against giving undue credence to Congressional inaction, as well as the reasons therefor, and the especially acute application of that principle when Congress is silent in the face of precedent from courts other than the Supreme Court. Opening Brf. at 15-17. Ivy Tech's argument to the contrary cannot withstand scrutiny.

The first problem with Ivy Tech's position is, of course, *Oncale*. Whatever else legislative history may allow, after *Oncale*, it is mandatory that courts entertain *all* Title VII claims that "meet the statutory requirements" of Title VII. 523 U.S. at 80. Thus, a claim is stated when women are fired for any trait that is

[7] Ivy Tech curiously argues that, in 1964, there was "a last minute addition of gender based protections. The drafters had no intention of addressing sexual orientation and there is no legislative history suggesting otherwise." But if, in fact, "there is literally no legislative history to assist courts in their interpretation of the word 'sex,' one cannot condone a court purporting to 'interpret' Title VII by looking to congressional intent." Kevin Schwin, *Toward a Plain Meaning Approach to Analyzing Title VII: Employment Discrimination Protection of Transsexuals*, 57 Clev. St. L. Rev. 645, 661 (2009). Indeed, what such a court would be "doing is making assumptions about what Congress intended, with absolutely no factual or evidentiary basis." *Id*.

acceptable in men; Congressional action is not needed, only faithful application of Title VII's words.[8]

As to the general folly of relying on Congressional inaction, the analysis in Frank Easterbrook, *Stability & Reliability in Judicial Decisions*, 73 Cornell L. Rev. 422 (1988), is insightful. That article lays out many of the problems associated with statutory stare decisis, including giving a later Congress, years after the one that passed the statute, definitive control over the meaning of what the previous Congress passed; ignoring the fact that legislation to remedy an incorrect interpretation is easily blocked; and the constitutional problem associated with giving either house a "legislative veto" over an attempt to cure a judicial misinterpretation. *Id*. at 426-28. These concerns are far from academic. In November 2013, the Senate passed, 64-32, an ENDA that the President was willing to sign. House Speaker John Boehner refused to take up the legislation, stating publicly that ENDA is "unnecessary" because "People are already protected in the

[8] Ivy Tech thus has it backwards in its citation to *EEOC v. Abercrombie & Fitch*, 2015 U.S. LEXIS 3718 *9-10 (U.S. June 1, 2015), for the position that courts will not "add words to the law to produce what is thought to be a desired result." See Defendant-Appellee's Brf. at 13-14. Hively needs only a consistent application of sex discrimination principles to prevail, while Ivy Tech would need an amendment to the proscription against discrimination "because of such individual's . . . sex" (42 U.S.C. 2000e-2) to the effect of "however, discrimination against a man because he is a man attracted to men rather than a woman attracted to men or against a woman because she is a woman attracted to women rather than a man attracted to women is not a violation of this section."

workplace." http://www.mediaite.com/tv/boehner-calls-lgbt-employment-non-discrimination-act-unnecessary/

As to the specific folly of deferring to Congressional inaction in the face of interpretations from courts other than the Supreme Court, a devastating critique of that practice can be found at Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 Geo. Wash. L. Rev. 317 (2005). Each of the questionable rationales for acceding to Congressional quiescence is that much more indefensible when there are only statutory interpretations from lower courts. *Id*. at 327-41. As pointed out by Hively, and agin ignored by Ivy Tech, this principle has particular resonance in Title VII interpretation. See Opening Brf. at 16-17 and n.9.[9]

[9] Ivy Tech calls Hively's position inconsistent because she attaches significance to the fact that Congress, in the Civil Rights Act of 1991 (the "1991 Act"), did not pass a statutory exclusion for sexual orientation discrimination. See Defendant-Appellee's Brf. at 15 n.6. But the 1991 Act was one year after Congress *did* pass such an exclusion in the Americans with Disabilities Act. The 1991 act was two years after *Price Waterhouse v. Hopkins*, a decision which the 1991 Act deliberately set out to overrule in part, while leaving intact its holding condemning discrimination based on nonconformity with gender stereotypes. Moreover, there was very scant precedent in 1991 holding that sexual orientation discrimination was not covered by Title VII. As such, it is wrong to ignore Congress's failure to pass an explicit ADA-like exclusion for sexual orientation discrimination in passing the 1991 Act, while placing heavy reliance on Congressional silence generally in the face of circuit court precedent.

D. THERE IS NO STATUTORY JUSTIFICATION FOR TREATING PRESUMED ATTRACTION TO MEN DIFFERENTLY FROM EVERY OTHER SEX STEREOTYPE ABOUT WOMEN.

Hively pointed out that different-sex sexual attraction is a gender stereotype, but that, for some inexplicable reason, courts have exonerated discrimination based on same-sex attraction, despite the fact that there is nothing in Title VII or the *Price Waterhouse* decision supporting this anomalous approach. In response, Ivy Tech offers nothing but citations to cases that have repeated that error. Most telling is its citation to *Howell*, which correctly observed that "the Seventh Circuit has taken pains to differentiate between discrimination motivated by gender stereotyping" from discrimination "motivated by sexual orientation." Defendant-Appellee's Brf. at 17-18, quoting *Howell v. N. Central College*, 320 F. Supp. 2d 717, 722 (N.D. Ill. 2004). Hively agrees with *Howell*'s observation, especially its trenchant characterization of the "pains" that this Court has gone to to single out same-sex attraction from all other gender stereotypes.[10] The question Hively asks is "why?" That courts have had to engage in suchcontortions as they have to reject the argument should be a clue that the attempted delineation between same-sex attraction and all other gender-nonconforming traits is not one the courts should continue to indulge.

[10] As Hively noted previously, others courts have done the same, despite acknowledging the analytical challenges in such line-drawing. See Opening Brf. at 49-50.

Ivy Tech goes on to extol the *Vickers* decision as "perhaps most directly" holding that the sex stereotyping theory does not apply to sexual orientation discrimination. Defendant-Appellee's Brf. at 18. But there are three ways in which *Vickers* does not avail Ivy Tech. First, the decision lays to waste the canard that same-sex attraction is not gender non-conforming behavior, readily admitting that "by definition" it is. *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006); *see also Gilbert v. Country Music Ass'n*, 432 F. Appx. 516, 520 (6th Cir. 2011) ("[f]or all we know, Gilbert fits every male 'stereotype' save one—sexual orientation . . ."). Second, what *Vickers* actually held was that the plaintiff could not invoke Title VII's protections because the discrimination against him was based on gender-nonconforming traits that did not manifest themselves "in any observable way at work." *Vickers*, 453 F.3d at 764. To say that that distinction is utterly unsupported in Title VII law is an understatement, as it would immunize discrimination against religious adherents and those in interracial marriages who scrupulously hid the facts about their worship or nuptials from coworkers. Nevertheless, even if such an unprincipled distinction were adopted by this Court, Hively should be allowed to amend her complaint to allege that her same-sex attraction did manifest itself in the workplace, just as a court within the Sixth Circuit dutifully applied *Vickers* and allowed the Title VII claim of a gay man to proceed to trial because "his co-workers and superiors observed that gender non-

conformance when Koren requested to be called by his married name." *Koren*, 894 F. Supp. 2d at 1038.[11]

E. IVY TECH OFFERS NO PRINCIPLED BASIS TO IGNORE THE OBVIOUS PARALLEL BETWEEN DISCRIMINATON AGAINST THOSE IN SAME-SEX RELATIONSHIPS AND DISCRIMINATION AGAINST THOSE IN INTERRACIAL RELATIONSHIPS.

Ivy Tech offers no serious argument to avoid the obvious comparison between discrimination based on an employee's interracial relationship and discrimination based on an employee's same-sex relationship. Ivy Tech argues that racial discrimination was a special concern of the 88th Congress, but it offers no authority for treating sex discrimination differently than race discrimination under Title VII and absolutely nothing to counter Hively's many citations from this Court and the Supreme Court to the contrary. Opening Brf. at 32-33. Ivy Tech misrepresents Hively's argument as about mere association with lesbians or gay

[11] Ivy Tech cites the *Partners* litigation in the District of Massachusetts, but it is important to note that that court was sympathetic to arguments Hively makes, but felt itself bound by what it viewed as an absolute exclusion of sexual orientation discrimination from Title VII coverage announced in *Higgins v. New Balance Ath. Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999). Indeed, the Partners court readily admitted that it reached the result it did as "necessary to resolve the tension created between *Price Waterhouse*" and *Higgins*. *Partners Healthcare Sys. v. Sullivan*, 497 F. Supp. 2d 42, 45 n.3 (D. Mass 2007). That should be a red flag to this court, which is not bound to follow *Higgins*, that it should not do so.

men,[12] but the argument is that Hively's relationship with a woman was a problem for Ivy Tech because of Hively's sex, the same way that Gresham's marriage to a black man was objectionable to her employer because of Gresham's race. *See Gresham v. Waffle House, Inc.*, 586 F. Supp. 1442 (N.D. Ga. 1984).

Ivy Tech's desperate argument that Hively did not allege that she was in a same-sex relationship (Defendant-Appellee's Brf. at 19) need not detain this Court long, especially given that its decision in *Drake v. 3M* remains the leading case holding that the "degree of association" between the employee and those of another race with whom the employee is associating is not "relevant to [the Title VII] inquiry." 134 F.3d at 884. Moreover, even if it were required that Hively allege that she has been in a same-sex relationship that was known to her co-workers, she should be allowed to do that on remand, even though doing so previously would have been futile under *Hamner*.

[12] At a couple of junctures in its brief, Ivy Tech suggests that Hively's argument would not always lead to protection for bisexuals, asexuals, or those who merely associate with lesbians or gay men. See Defendant-Appellee's Brf. at 17 n.7 and 20. Whether this is so or not (and it ignores the fact that bisexuals also defy the gender stereotype that men should *only* be attracted to women and women should *only* be attracted to men), the Court need not reach the issue. And the fact that the Employment Nondiscrimination Act passed by the Senate in 2013 might provide broader protections than Title VII does only undermines Ivy Tech's argument that this Court should attach significance, in interpreting Title VII, to the fact that Congress has not passed what Ivy Tech argues are the broader protections in ENDA.

F. IVY TECH'S SOVEREIGN IMMUNITY HAS BEEN ABROGATED VALIDLY WITH RESPECT TO ALL TITLE VII SEX DISCRIMINATION CLAIMS, NO MATTER WHAT FORM THOSE TAKE.

In arguing that its sovereign immunity has not been abrogated, Ivy Tech ignores the fact that Hively is seeking a ruling that she has stated a claim for intentional *sex* discrimination. It is hornbook law, including in the case cited by Ivy Tech, that Eleventh Amendment immunity has been abrogated for all claims of intentional discrimination under Title VII, especially its sex discrimination provision. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 447-48 (1976); *Nanda v. Bd. of Trustees of the Univ. of Ill.*, 303 F.3d 817, 831 (7th Cir. 2002). Courts manifestly have not insisted that there be a history of the exact type of discrimination against the particular type of plaintiff in order for there to be an abrogation of sovereign immunity, as evidenced by the rejection of states' arguments that their immunity remains intact for Title VII claims brought by men. *Fitzpatrick*, 427 U.S. at 456-57; *Maitland v. University of Minnesota*, 260 F.3d 959, 965 n.5 (8th Cir. 2001) (observing that acceptance of the state's argument would immunize states against claims of intentional race discrimination unless there were "findings specific to that employee's minority group" of a history of state-level discrimination). That ends the inquiry concerning whether Hively's claim of sex discrimination is cognizable against a state entity. *See Crumpacker v. Kan. Dep't of Human Res.*, 338 F.3d 1163, 1170 (10th Cir. 2003) ("To properly enact legislation under its § 5

authority, Congress need not identify a pattern of *each form of gender discrimination* in the workplace by the states.") (emphasis supplied).

While it would be improper to inquire separately whether state immunity would be validly abrogated for claims of sexual orientation discrimination, that inquiry would be readily answered in the affirmative. Ivy Tech makes the point that sexual orientation historically has been afforded less exacting constitutional scrutiny than race or sex, more akin to age and disability. And it accurately cites *Kimel* and *Garrett* for the propositions that the ADEA and Title I of the ADA proscribe conduct that does not violate Equal Protection principles. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 367-368 (2001) ("If special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause."); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 86 (2000) ("The Act, through its broad restriction on the use of age as a discriminating factor, prohibits substantially more state employment decisions and practices than would likely be held unconstitutional . . ."). But therein lies the difference; to Hively's knowledge, every court to consider whether the termination of an employee, based on antigay bias, outside the special contexts of the military and government intelligence violates the Equal Protection Clause has held that it does;[13] some courts considering the principle so well-established

[13] *Scarbrough v. Morgan County Board of Education*, 470 F.3d 250 (6th Cir.

after *Romer v. Evans* to divest offending public officials of their qualified immunity.[14] Thus, even if this Court were to engage in the highly dubious proposition of "parsing" whether Hively's particular allegation of sex discrimination also alleged a violation of Equal Protection principles, Hively satisfies that standard. *See Crumpacker*, 338 F.3d at 1170.[15]

2006); *Beall v. London City Sch. Dist. Bd of. Educ.*, No. 2:04-cv-290, 2006 U.S. Dist. LEXIS 37657 (S.D. Ohio June 8, 2006); *Lovell v. Comsewogue Sch. Dist.*, 214 F. Supp. 2d 319, 323 (E.D.N.Y. 2002); *Quinn v. Nassau County Police Dep't*, 53 F. Supp. 2d 347, 356-57 (E.D.N.Y. 1999); *Glover v. Williamsburg Local Sch. Dist. Bd. of Educ.*, 20 F. Supp. 2d 1160, 1174 (S.D. Ohio 1998); *Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279, 1288-89 (D. Utah 1998); *Miguel v. Guess*, 51 P.3d 89, 97 (Wash. Ct. App. 2002); *see also Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 957 (7th Cir. 2002) (Posner, J., concurring) ("Discrimination against homosexuals by public entitles violates the equal protection clause . . . [if] motivated by baseless hostility to homosexuals ... or if, though devoid of animus, the discrimination simply bore no rational relation to any permissible state policy.").

[14] *See, e.g.*, *Beall*, 2006 U.S. Dist. LEXIS 37657 **44-45; *Lovell*, 214 F. Supp. 2d at 325; *Miguel*, 51 P.3d at 99.

[15] While a sex discrimination claim sounding in sexual orientation bias should not have to qualify separately for Eleventh Amendment abrogation purposes, there is a well-documented history of state discrimination against their lesbians and gay employees. *See* Brad Sears, Christy Mallory & Nan D. Hunter, *Congressional Record of Employment Discrimination Against LGBT Public Employees, 1994-2007*, The Williams Institute (Sept. 23, 2009); https://escholarship.org/uc/item/8vv8v8gk; Brad Sears, Christy Mallory & Nan D. Hunter, *Findings of Widespread Discrimination Against LGBT People by State and Local Legislative Bodies, Commissions, and Elected Officials*, The Williams Institute (Sept. 23, 2009), https://escholarship.org/uc/item/9v35p0s0;

III. CONCLUSION

Ms. Hively respectfully requests that the panel that hears this case determine than *Hamner* should be overruled and invoke this Court's procedure under Circuit Rule 40(e) for the purpose of effecting that result and adopting an interpretation of Title VII that is logical and faithful to the text of the statute and Supreme Court precedent.

Dated: June 25, 2015

/s/ Gregory R. Nevins
Gregory R. Nevins
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
730 Peachtree St. NE, Suite 1070
Atlanta, GA 30308
Phone: (404) 897-1880
Facsimile: (404) 897-1884
gnevins@lambdalegal.org

Brad Sears, Christy Mallory & Nan D. Hunter, *Specific Examples of Employment Discrimination by State and Local Governments, 1980-Present*, The Williams Institute (Sept. 23, 2009), https://escholarship.org/uc/item/87g999g0.

CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared using 14-point Times New Roman font and contains 5825 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)**.**

So certified this 25th day of June, 2015.

/s/ Gregory R. Nevins
Gregory R. Nevins

CERTIFICATE OF SERVICE

I certify that on June 25, 2015, I utilized this court's ECF system to file a copy, resulting in the automatic service of counsel of record.

So certified this 25th day of June, 2015.

/s/ Gregory R. Nevins
Gregory R. Nevins