

Alex Berg ([00:02](#)):

Hi, and welcome to Making the Case with Lambda Legal, a podcast from Lambda Legal highlighting impactful cases and policy work. I'm Alex Berg, a journalist and host, and I cover all things LGBTQ+, and the issues that impact us.

Alex Berg ([00:17](#)):

On this episode of Making the Case, we are going to talk employment discrimination, and how discrimination on the basis of sexual orientation violates Title VII of the Civil Rights Act of 1964. In 2015, we teamed up with math teacher, Kimberly Hively, who had sued her employer, Ivy Tech Community College, for sex discrimination. After her case was dismissed in March of 2015, Lambda Legal reached out to Hively to help.

Alex Berg ([00:41](#)):

Hively had lost her job after she was seen kissing her girlfriend in the school's parking lot. With us today, we have senior counsel, Greg Nevins, who argued Kim's case before a panel of the US Court of Appeals. First in 2015, and then again before the full or en banc court in 2016, we also have former chief strategy officer and legal director, Sharon McGowan with us who will speak to the broader implications of this win.

Alex Berg ([01:03](#)):

Let's get to it. I'm joined now by Sharon McGowan and Greg Nevins. Welcome.

Greg Nevins ([01:13](#)):

Well, it's great to be here with you this afternoon, talking about a subject that's near and dear to my heart.

Sharon McGowan ([01:17](#)):

Thanks for having us.

Alex Berg ([01:18](#)):

I'm so excited to be talking to you both. And with that, Greg, I want to start with you. This year we are celebrating the five year anniversary of one of Lambda Legal's landmark victories, Hively v. Ivy Tech, can you tell us briefly what this case was about?

Greg Nevins ([01:33](#)):

Kim Hively's case came about because she had tried repeatedly to get a full tenure track position. She kept being denied that, but she kept trying. And then one day she kissed her partner in the parking lot. And then after that, not only was she not getting a promotion, but she was actually terminated from her job. And so therefore when she put everything together and deduced that she'd been victim of sexual orientation discrimination, but that's when she went to the EOC and then filed her own lawsuit in federal court.

Greg Nevins ([02:00](#)):

So when I found out about that, I called up Kim Hively and said, "Were you planning on appealing?" She goes, "I am now." So we filed an appeal on her behalf, went up to the Seventh Circuit. They initially ruled

against us as they had to do. And then we asked the whole court, which is 11 judges to rehear the case. And when we did, they ruled in our favor and they became the first federal appellate court in the country in the 50 plus year history of Title VII to rule that it covered discrimination based on sexual orientation.

Alex Berg ([02:28](#)):

Now, it sounds very monumental and I certainly want to get into the implications of the case, but first I want to kind of hit on a couple of things that you mentioned. It's really outrageous to consider that Hively worked at this college for over a decade. This was her livelihood. You think about the kind of relationship we all have with our workplace. We're going in every day, the kind of relationships we form with our colleagues, and then they terminated her. What was your strategy when approaching the case?

Greg Nevins ([02:52](#)):

The strategy here is that Title VII prohibits discrimination because of sex. What that has been interpreted to mean is that if you treated differently because of your sex, then you were discriminated against. So it's not just, "I'm against all women or I'm against all men." It's discrimination is unlawful. If anything happens to you that wouldn't have happened if you had been of the other sex.

Greg Nevins ([03:13](#)):

So in other words, if you are a woman kissing a woman in the parking lot, and that would not have been a problem at all, if you'd been a man kissing woman in the parking lot, then that is sex discrimination. It's as simple as that.

Greg Nevins ([03:24](#)):

But courts had ruled the other way for years and years and years. And this was an opportunity to really set them straight on what the correct interpretation of the law was.

Alex Berg ([03:32](#)):

Now, Sharon, you were still at the Justice Department at the time this case was working its way through the courts, but it was on your radar. Why was this case so important?

Sharon McGowan ([03:40](#)):

Absolutely. Alex and this case was of particular importance to the Justice Department because Kim was a public employee. And so even though the EOC sort of has sort of a particular sort of lane of jurisdiction, the Civil Rights Division of the Justice Department, where I was working at the time, was monitoring this issue. And because it was so cleanly presented, we saw this as potentially one of these sort of breakthrough opportunities.

Sharon McGowan ([04:03](#)):

We knew that there were a number of cases from decades ago where courts had just in a very knee jerk way said, "of course the law doesn't cover this. Of course, Congress didn't mean to do this." But we had been seeing some traction in LGBT cases, particularly in the gender identity side of things, where the courts have been revisiting this question and saying, "Wait a minute, why doesn't this actually apply?"

Sharon McGowan ([04:22](#)):

And so as that case was working its way through the courts, I and my colleagues in the Justice Department, were very hopeful that this might actually be one of these opportunities for the court to give itself the opportunity to revisit this stale precedent that actually no longer, probably never, but actually certainly no longer reflected the best view of the law.

Speaker 4 ([04:40](#)):

Last week, Hively prevailed. The Seventh Circuit Court of Appeals reversed its own prior rulings saying, "Civil rights laws prohibiting discrimination on the basis of sex, as in gender, also includes sexual orientation."

Speaker 5 ([04:54](#)):

I think it was one of the most significant appellate civil rights decisions in many, many years. What we're going to see is we're going to see the dominoes fall.

Alex Berg ([05:05](#)):

Greg, what did the Hively decision actually say?

Greg Nevins ([05:07](#)):

The Hively case agreed with us on all our different principles. The principle that I said before that if a man and a woman are doing the exact same thing and a woman is being penalized for it, where a man isn't, then that is by definition, sex discrimination.

Greg Nevins ([05:20](#)):

So therefore, if a woman being in a relationship with a woman was problematic to the employer, whereas a man being in a relationship with a woman wouldn't be, then that's sex discrimination. They also agreed with us that it was sex stereotyping to presume that a woman should have to only be feminine or only date men and the like. They agreed with that theory as well. They basically endorsed all of our rationales for why this is sex discrimination.

Greg Nevins ([05:45](#)):

One thing that's important to remember is that unlike some of our cases in the past where the argument was about how fundamentally unfair something was, like the denial of marriage and how it was irrational and didn't serve any legitimate purpose. In this case, the only question is it sex discrimination under a statute? So policy arguments about how bad sexual orientation discrimination is, were not the arguments we were making.

Greg Nevins ([06:08](#)):

We were just making a simple argument that this is sex discrimination, and it was a conservative argument. It was tied directly to the text of the statute. And that's what ended up winning over a majority of the Seventh Circuit. And I should hasten to say that court was made up of eight Republican appointed judges and three democratic appointed judges. And we won eight to three

Alex Berg ([06:28](#)):

Sharon, what did this one mean at a national level?

Sharon McGowan ([06:30](#)):

Well, just to pick up on what Greg was saying, and this was really a breakthrough moment, not only because of the fact that we had a Court of Appeals finally taking the opportunity to go back and look at this old law that had been on the books. And that had just been applied in a very wrote way for decades. It mattered, because as Greg said, the composition of the court was one that was bipartisan. This wasn't just sort of Democrats ruling one way or Republicans ruling another.

Sharon McGowan ([06:55](#)):

This really showed that the arguments actually were ones that anyone who was approaching the question with intellectual honesty should be able to reach the right conclusion. And it also meant that we were now actually seeing the sexual orientation set of cases under Title VII, catch up with the gender identity cases, as I mentioned previously.

Alex Berg ([07:13](#)):

Yeah. It's interesting to consider that the anniversary of this case was five years ago. It feels like it could be 50 years with the amount of things that have happened in the past half a decade. So Sharon, a couple of times you mentioned that this was a breakthrough moment. For those of us who aren't as familiar with the various legal processes involved really crystallize what made this so breakthrough?

Sharon McGowan ([07:34](#)):

I think it's important to recognize that for decades, starting in the 70s, we had people trying to bring claims of sex discrimination based on the fact that they were experiencing discrimination because they were gay, lesbian, or bisexual. And there were transgender cases as well, but I'm separating them out a little bit because they actually were on slightly different tracks with different levels of success with the transgender cases, actually really breaking through first and the sexual orientation cases catching up, which may be different than how people sort of think about the trajectory of LGBT history more broadly.

Sharon McGowan ([08:04](#)):

But one of the things that was so significant with the Hively decision is that after decades of all of the courts of appeals lining up and saying, "No, the law doesn't cover this. No, the law doesn't cover this. No, the law doesn't cover this." There's really no point in the Supreme Court getting involved if all of the lower courts are agreeing. So once you had a court like the Seventh Circuit sitting as a full court with all 11 judges saying, "Wait a minute, that actually is not right." Then you find yourself in a circumstance that we call a circuit split.

Sharon McGowan ([08:30](#)):

You have some circuits saying that the law doesn't cover this, and then you have the Seventh Circuit, and then soon we had other circuits joining as well saying, "No, I actually think the law does cover this." Those are the kinds of conditions that you need for the Supreme Court to say, "All right, we've now got this dispute. We're going to need to weigh in."

Sharon McGowan ([08:46](#)):

So without Hively we wouldn't actually have been in a position to have the Supreme Court take up the case a few years later.

Alex Berg ([08:51](#)):

Wow. So for both of you, this was obviously huge and Lambda Legal was really at the center of it all. Greg, what did you learn from this case that you've brought forward to your other work?

Greg Nevins ([09:02](#)):

I did learn that having a very simple, very straightforward, what I would call the elevator talk, where you can explain what your theory is by the time the two of you get to the floor you're getting off on is amazingly helpful in trying to win over people.

Greg Nevins ([09:17](#)):

I would say that was the number one lesson that I learned through that, but also no matter how numerous the cases are that have held against your position, if they're all stupid, if they're all poorly reasoned, then you should be fearless and you should go after them.

Greg Nevins ([09:33](#)):

People should never be deterred by how many times your position has been rejected. If it was rejected, for reasons that are not persuasive, and that aren't legitimate, you should fearlessly go after justice. You can be confident that if you are on the side of right, if you are the more intellectually, honest position, and the more thoughtful and reasonable and logical position you're going to prevail in the end.

Alex Berg ([09:53](#)):

Sharon, how about you? What lessons did you take from this case that you've brought into your other work?

Sharon McGowan ([09:57](#)):

Well, this is an example of where you have the right legal argument and you need the world to catch up with you sometimes for the right legal argument to actually land. And in some ways I see a really interesting parallel with the marriage equality cases.

Sharon McGowan ([10:11](#)):

In many ways, the arguments didn't change over time. It was the ability of people to have their mind open in a way that they could accept it. And so Greg is, I think, absolutely right that these in many ways are very straightforward and lower case C conservative arguments.

Sharon McGowan ([10:27](#)):

It's not about did Congress mean to do this? It's really, what does the statute say? And if Congress hasn't excluded an interpretation, then the law applies if the facts line up. And so that is sort of where we see ourselves in a situation where some people may have been surprised that the Bostock decision was ultimately written by Justice Gorsuch.

Sharon McGowan ([10:46](#)):

And I think Greg and I were in the camp of people who weren't that surprised because in many ways, this is a very straightforward apply the text of the statute argument.

Sharon McGowan ([10:53](#)):

In constitutional cases, you find yourself talking a little bit more about the values, is this consistent with Liberty and equality? And of course, all of that is in play in these employment discrimination cases, but when it came to Title VII we literally were talking about, does the statute have the right words to give us a way to get these clients into court? And you had to twist yourself up into knots and come up with all of these other extra reasons why that wasn't the case and courts used to do that. And then they realized those arguments just don't hold water anymore.

Sharon McGowan ([11:23](#)):

And so I think persistence is a lesson of keeping at it when your arguments are right. And also recognizing that we can have the best legal arguments in the world. And if we're not doing the work outside of the courtroom so that people can be receptive because as I always say, "Judges are people too." We need to create those conditions in which people can rethink things that they thought that they always knew to create the opportunity for us to have more freedom, more equality, better civil rights protections in ways that maybe we would've had in the past.

Greg Nevins ([11:52](#)):

Well, let me jump in on the persistence part. The effort here is really a great example of the way Lambda Legal has been doing impact litigation work since it's founding 50 years ago, which is to look at the toughest legal hurdles facing our community, whether it be employment protections, marriage equality, sodomy laws.

Greg Nevins ([12:11](#)):

Lambda Legal has always tried to come up with long term strategies where we would go to courts where we thought would be receptive and build momentum to change the law and make it work in our favor, do a 180 reverse law on the law so that it goes from being a force that oppresses us and works against us in our daily lives to being one that uplifts us and recognizes our full civil rights and our full humanity.

Alex Berg ([12:35](#)):

So if listeners want to learn more about this case, Sharon, where can they find out more?

Sharon McGowan ([12:39](#)):

So you can certainly go to our website, www.lambdalegal.org. And there is this whole section about our employment work. You can also search specifically for information about Kim Hively's case, but I would urge you not to limit yourself there because there are so many people, as Greg said, who were part of this story. Vandy Beth Glenn, a brave legislative editor in Georgia, who we litigated a case on her behalf in 2010. Jameka Evans, also from Georgia is part of this story.

Sharon McGowan ([13:05](#)):

There have just been so many brave plaintiffs and we can't do the work that we do without brave people willing to stand up and say, "What happened to me wasn't fair. Wasn't right." And often, as Greg says, "It'll be years before they see the relief that they deserve. But every single one of these plaintiffs have always been involved in this work to make sure that they are making the world better for the people who come after them."

Sharon McGowan ([13:23](#)):

And so let me just continue to add my gratitude for all of the plaintiffs over the years who have helped us lead this charge and get us to where we are today

Alex Berg ([13:31](#)):

Here, here. I think that is the perfect note to end this conversation on. I really appreciate you both just peeling back all of the layers of this case. Thank you so much for joining.

Sharon McGowan ([13:39](#)):

Thank you, Alex.

Greg Nevins ([13:40](#)):

Thank you, Alex.

Alex Berg ([13:43](#)):

Thank you for listening to this week's episode of Making the Case with Lambda Legal. Making the Case is hosted by me, Alex Berg, and written and produced by Erica Kramer for Lambda Legal. Our show is recorded and mixed by Erik Monical for Mouth Media Network. Original music was made for Making the Case by Meghan Rose.

Alex Berg ([14:02](#)):

If you are seeking information to assist with a legal matter involving sexual orientation, gender identity, or HIV, please reach out to our legal help desk at lambdalegal.org/helpdesk.

Alex Berg ([14:14](#)):

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