SHAWE ROSENTHAL LLP

E-UPDATE

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RECENT DEVELOPMENTS

Maryland Federal Court Permits Sexual Orientation Discrimination Claim Under Title VII

Acknowledging that neither the Supreme Court nor the U.S. Court of Appeals for the Fourth Circuit have yet ruled on the question of whether Title VII's prohibition on discrimination based on sex includes sexual orientation, a Maryland federal court has found that it does.

Case Background: In *Squire v. FedEx Freight, Inc.*, a transgender employee alleged that he was subjected to discriminatory discipline and termination after his employer learned of his gender reassignment surgery. Following his termination, the employee filed a charge of discrimination with the Equal Employment Opportunity Commission (a prerequisite to bringing a lawsuit). On his charge, he marked the box for "Sex" when indicating the basis for the alleged discrimination and, in the written explanation, further stated "sex (Gender Identity/Transgender)." Following closure of the EEOC charge, the employee sued his employer.

The Court's Decision. Arguing that "sex" and "sexual orientation" are distinct, the employer asserted to the court that the employee did not allege sexual orientation discrimination in his charge, and had therefore failed to exhaust the administrative prerequisite for such claim. The court, however, rejected the employer's argument.

While noting that a sister court within the Fourth Circuit found the two to be different concepts, the court nonetheless approvingly quoted another court that "society's views of gender, gender identity, sex, and sexual orientation have significantly evolved in recent years" and "the legal landscape is transforming as it relates to gender identity, sexual orientation, and similar issues, especially in the context of providing expanded legal rights." The court cited *Hively v. Ivy Tech Cmty. Coll. Of Indiana*, in which the Seventh Circuit recently held that sexual orientation discrimination is a form of sex discrimination under Title VII. Thus, according to the court, it was reasonable for the employee to believe that "sex" on the EEOC charge necessarily encompassed "sexual orientation," particularly as there was no separate box for the latter.

Significance for Employers. While awaiting guidance from the Fourth Circuit (or the Supreme Court), employers in Maryland should be aware at least one federal judge in this district has found that Title VII's prohibitions on sex discrimination will be deemed to include sexual orientation discrimination.

Recent Court Rulings Highlight the Importance of Prompt and Proportionate Response to Harassment Complaints

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We often counsel our clients on the need to respond promptly and effectively to employee complaints of harassment, and two recent federal appellate court rulings confirm the importance of doing so.

Employer Conducted Immediate Investigation and Took Action to Stop Additional Harassment

In *Tucker v. United Parcel Service, Inc.*, a female UPS supervisor complained that a male subordinate engaged in sexually inappropriate behavior, including touching. Following an investigation, during which the employee was suspended, the employer could not determine if his behavior was intentional. The employee was permitted to return to work, but was counseled on workplace policies on professionalism and harassment, and was further prohibited from the supervisor's work area. Although he never interacted with the supervisor thereafter, she nonetheless complained that she felt unsafe because he stared at her. The employer provided her with an escort to her car and offered her a transfer to another facility nearby or a different shift, which she refused. She asked that the employee be transferred instead, but the employer explained that the union would not allow it. She subsequently demanded that the employee be removed from the facility. She then resigned and filed suit.

The U.S. Court of Appeals for the Fifth Circuit held that the employer was not liable under Title VII because it took immediate action once it received the supervisor's complaint. The employee was suspended during the investigation, and then subsequently counseled on workplace policies and instructed to stay away from the supervisor's work area, and the employer also provided an escort for the supervisor. This was sufficient to stop any future harassment, which is what is required by the law, and it was not necessary to terminate the employee, as the supervisor demanded.

Employer Implemented and Enforced Comprehensive Anti-Discrimination Policy

In *Wilcox v. Corrections Corp. of America*, a female corrections officer complained that a male co-worker inappropriately hugged and touched her, and made sexual comments. The employer immediately directed the co-worker to stay away from the employee, after which he never touched her or made inappropriate comments. It also hired an outside investigator, who determined that the co-worker had engaged in sexual harassment of the employee and others. The co-worker was then fired. The employee sued for sexual harassment and a jury awarded her over $100,000; however, the trial court overturned the jury verdict and found for the employer.

On appeal, the U.S. Court of Appeals for the Eleventh Circuit upheld the trial court's determination that the employer's prompt and effective response to the complaint barred liability under Title VII. The employer had implemented a comprehensive anti-discrimination policy and ensured that employees were aware of it. In addition, the court found that the employer had enforced the policy by counseling the co-worker, investigating him, and then terminating him. These actions prevented recurrence of the harassment once the employer became aware of it.

Lessons for Employers

Some helpful guidance can be drawn from these two cases. It is important for employers to implement a detailed anti-discrimination and anti-harassment policy. It is also important to ensure that employees are made aware of the policy. Then, if there are complaints, employers must respond

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promptly, with a thorough and unbiased investigation. At the conclusion of the investigation, it is necessary to take steps to ensure that any harassment will not continue to occur – which does not always require the termination of the alleged wrongdoer, even if that is what the alleged victim wants. The legal obligation is to stop the harassment. An employer who takes these steps will likely be able to avoid liability for co-worker harassment and will also encourage a harassment-free workplace.

Another Month, Another Slew of NLRB Advice Memos

The National Labor Relations Board's Office of the General Counsel (OGC) has continued to release Advice Memoranda, following up on what we reported in our February 2018, March 2018 and May 2018 E-Updates. Six more memos were issued on June 14, 2018. One of the memos was originally prepared several years ago, with the others in more recent months, but they were not released to the public until now. Of particular interest are the following:

- *RoHoHo, Inc. dba Papa John's Pizza* (September 8, 2017). The OGC found that an employee's termination for failing to give sufficient notice of her absence to attend a two-day "Fight for $15" convention held by the labor union SWOC, violated her rights under the National Labor Relations Act to engage in concerted activity regarding the terms and conditions of employment. While activity solely by and on behalf of a single employee does not constitute protected concerted activity, the OGC deemed the employee's absence to be a "solo strike" intended to assist a labor union in furtherance of the union's organizing efforts, which is protected.
- *Comprehensive Healthcare Management Servs.,LLC dba Brighton Rehabilitation and Wellness Servs.* (May 3, 2018). A certified nursing assistant did not report a co-worker's failure to change a resident's wet clothing but posted it on Facebook. She was terminated for violating the employer's Resident Abuse policy and the Social Media policy. Although the union challenged the Social Media policy as unlawful under the NLRA, the OGC found that, regardless of whether the employee had engaged in protected concerted activity in her Facebook post, she was lawfully terminated for violation of the Resident Abuse policy.

TAKE NOTE

Supreme Court Disapproves ALJ Appointments. In a surprising decision, *Lucia v. SEC*, the Supreme Court held that the system used to appoint administrative law judges (ALJs) throughout the federal government violates the U.S. Constitution.

Many federal agencies, including the National Labor Relations Board and the Department of Labor, use ALJs to decide contested cases. The civil service system used to appoint them was designed to maintain their neutrality. However, in a case involving the Securities and Exchange Commission, the Supreme Court held that ALJs must be appointed by the President, a court of law, or the head of a government department. As the remedy, the Supreme Court ordered that the case be retried, before a different and properly appointed ALJ.

Going forward, agencies can cure this problem by developing a new appointment system. It appears, however, that pending cases heard by ALJs who were not validly appointed may have to start over, before a different ALJ. Whether having cases decided by ALJs who are beholden to agency heads for their appointments is ultimately good for employers remains to be seen.

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D.C. Voters Approve Minimum Wage Increase to $15. On June 19, 2018, D.C. voters approved Initiative 77, by which the minimum wage, currently $12.50, will increase to $15 per hour by 2020, and thereafter will increase in proportion to the Consumer Price Index. The ballot measure also eliminates the separate minimum wage rate for tipped employees, currently $3.33, by gradually increasing the wage rate until it reaches the non-tipped minimum wage rate by 2026.

There is some uncertainty as to whether this measure will take effect. It must undergo a 30-day review period by Congress, which could block implementation, although this has rarely happened. However, the D.C. mayor and several councilmembers are reportedly opposed to the measure, and could pass blocking legislation. We will continue to monitor further developments.

Under FMLA, Employee Must Respond to Request for Additional Information. The U.S. Court of Appeals for the Tenth Circuit reiterated the need for employees to provide information required by the employer under the Family and Medical Leave Act.

In *Dulany v. Brennan*, an employee told her employer that she would be missing work because of an "acute stress response," but did not request FMLA leave or respond to her employer's request for a medical certification. After her eventual resignation, she sued, claiming that the employer had failed to designate her leave as FMLA. The court, however, noted that the employer was entitled to obtain additional information in support of a FMLA leave request, and that FMLA leave may be denied if the employee fails to respond, as happened here.

Employee May Not Dictate ADA Accommodation to Be Provided. An employee cannot insist on a specific accommodation, particularly when other reasonable accommodations have been offered as part of the interactive discussion required under the American with Disabilities Act. In so finding, the U.S. Court of Appeals for the Third Circuit offered guidance to employers on what constitutes an employer's good faith participation in the accommodations process.

As the court stated in *Sessoms v. The Trustees of the Univ. of Penn.*, "An employer may demonstrate good faith in various ways, including meeting with the employee, requesting information about the employee's condition and limitations, asking what the employee wants, showing signs of having considered the employee's request, and offering and discussing available alternatives when the request is too burdensome." In the present case, the employer engaged in these actions. The plaintiff, however, was unwilling to consider any accommodation that did not involve a change in supervisor. However, as the court noted, "Reasonable accommodation does not entitle an employee to a supervisor ideally suited to her needs." Moreover, to the extent that the employee wants a transfer as an accommodation, it is necessary for the employee to show that there are appropriate and available positions, which the plaintiff did not do.

Employer May Require Medical Information or Examination Based on Safety Concerns. The U.S. Court of Appeals for the Sixth Circuit held that an employer was entitled to require an employee to submit information from his doctor based upon legitimate safety concerns.

In *Mitchell v. U.S. Postal Service*, the employee suffered from depression, which required him to take a number of medical leaves. Upon his return from his most recent leave, he submitted a note from his doctor that cleared him to return. However, at the same time, the employer received a letter from the employee's wife that questioned his mental stability and suggesting that he would suffer a breakdown if he returned to work. The employer placed the employee on leave and asked him to

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provide medical documentation to confirm that he posed no threat of harm to himself or others. He refused, and was eventually terminated. He then sued for violation of the Rehabilitation Act (the corollary to the Americans with Disabilities Act applicable to government employees).

The court held that the employer's concern about workplace safety was a legitimate, nondiscriminatory reason for requesting a medical examination. In so finding, the Sixth Circuit joined at least three other circuits – the Second, Seventh and Eleventh.

Forcing Workers to Pay Full Union Dues Violated the NLRA. The U.S. Court of Appeals for the D.C. Circuit held that a union's demand for payment of full union dues from employees who had chosen a more limited union membership violated those employees' rights under the National Labor Relations Act.

Section 7 of the NLRA protects workers' rights to choose whether or not to participate in union activity. However, an exception to this right provides that a collective bargaining agreement can require union membership as a condition of employment in certain circumstances, but that employees may choose between full and "core" membership, with decreased fees for the latter. In *Tamosiunas v. NLRB*, the union sent letters to the core members, demanding payment of the full union membership fees. The union also asked the employer to garnish the full fees from the core members' paychecks.

The employees filed unfair labor practice charges with the NLRB, which found that the union's demand for full fees and garnishment did not restrain their Section 7 rights. The court, however, found the NLRB's ruling "legally unsupportable," because the union's actions would reasonably tend to "coerce or restrain" the employee's rights to not pay full union membership dues.

NEWS AND EVENTS

The Maryland Chamber of Commerce featured Liz Torphy-Donzella in their ongoing series, Reply All. Reply All is a video series in which the Chamber talks with leaders of industry across the state, to gain insights that can help businesses in Maryland succeed.

Lindsey A. White was reelected Secretary of the Alumni Board for the University of Maryland Francis King Carey School of Law.

TOP TIP: Employers Should Ensure They Are a Party to the Arbitration Agreement They Want to Enforce (Of Course)

Several recent cases highlight the need for employers to take some basic steps to make sure they are actually a party to any arbitration agreement with an employee, and that the agreement is actually finalized.

In *Wekesser v. Knight Enterprises S.E., LLC*, the U.S. Court of Appeals for the Fourth Circuit held that an employer could not force arbitration of an employee's Fair Labor Standards Act claims based on an agreement that was executed between the employee and the parent company. The court found that the employer was not a party to the agreement, nor could it be considered a third-party beneficiary of the agreement because the agreement did not clearly evidence an intent to benefit a third party.

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Similarly, in *Goplin v. WeConnect, Inc.*, the U.S. Court of Appeals for the Seventh Circuit refused to enforce an arbitration agreement where the employer was not identified by name in the agreement. The agreement named another company, and the employer argued that the two were not separate entities but were different names for the same entity. However, language on the employer's website indicated that the two were distinct companies that had merged to form a single new company. Thus, the court found that the employer was not a party to the agreement.

Finally, in *Huckaba v. Ref-Chem, L.P.*, the U.S. Court of Appeals for the Fifth Circuit found that the employer's failure to sign an arbitration agreement rendered it invalid. Although Texas courts have found that the presence of a signature block alone does not establish the parties' intent to require signatures, the agreement contained additional language that expressly required it to be signed by both parties. Specifically, it stated that, by signing the agreement, the parties were giving up any right they had to sue each other and that any changes would need to be made in writing and signed.

These cases hammer home the point that employers should ensure that they are specifically named in the arbitration agreement. If there is a change to the corporate entity, it may be necessary to execute new agreements utilizing the name of the new entity. And, of course, employers should actually sign the agreement – a step that is sometimes overlooked, even if it seems obvious.

RECENT BLOG POSTS

Please take a moment to enjoy our recent blog posts at laboremploymentreport.com:

- The EEOC Compares Harassment Prevention to Crime Prevention by Fiona W. Ong, June 20, 2018 (Selected as a "noteworthy" blog post by the Employment Law Daily)
- What Is the EEOC's Position on Post-Offer/Pre-Employment Medical Exams? by Fiona W. Ong, June 14, 2018 (Featured by the Employment Law Daily)
- NLRB Issues New (and More Balanced) Guidance on Handbook Rules by Fiona W. Ong, June 8, 2018 (Featured on hrsimple.com)
- Is Equal Pay Becoming the New #MeToo? by Lindsey A. White, June 7, 2018
- Lessons Learned from Those "Special" Treats in the Breakroom or at the Office Party by Shelby Skeabeck, May 31, 2018 (Featured on hrsimple.com)

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