Northwest Ohio Human Resource Association

AFFILIATE OF SHRM SOCIETY FOR HUMAN RESOURCE MANAGEMENT

LEGISLATIVE UPDATE

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Seventh Circuit opens door to Title VII coverage for sexual orientation discrimination

Last month, the Seventh Circuit Court of Appeals, which hears federal appeals from Indiana, Illinois, and Wisconsin, was the first Circuit Court to hold that Title VII's prohibition against discrimination based upon "sex" included discrimination based upon sexual orientation. The EEOC has long-held that Title VII's definition of "sex" included sexual orientation and transgender protections. And while some lower courts have agreed, most have not, and no federal court of appeals had previously ruled in support of the EEOC's interpretation.

The case, *Hively v. Ivy Technical Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017), was brought by a part-time adjunct professor who alleged the community college where she worked discriminated against her based upon her sexual orientation. Hively had served in her role for 14 years, and between 2009 and 2014, applied to more than six full-time positions. She was never hired for any full time position, and in 2014 her part time contract was not renewed. After filing her claim alleging violation of Title VII for sexual orientation discrimination, the District Court dismissed based upon binding precedent from the 7th Circuit that sexual orientation was not a class protected under Title VII. Hively appealed the dismissal to the 7th Circuit. The initial appellate board was unable to overturn its own prior ruling; but a majority of the court decided to hear the matter *en banc*. The Court ruled 5-4 to overturn its prior ruling holding that sexual orientation was not a protected class under Title VII.

The court provided a few different bases for the court's reversal. First, he noted that the 7th Circuit and other courts erroneously held that the absence of the words "sexual orientation" from Title VII was decisive of the issue. However, the court noted that the EEOC's interpretation of the statute was due deference. It also held that Congress could just as easily have added language to specifically exclude sexual orientation from the statute, had it disagreed with the EEOC's interpretation. The court then noted it leaned heavily on the line of cases from the Supreme Court that weighed on the issues, including *Oncale v. Sundowner Oil* (finding same sex discrimination was barred by Title VII), *Loving v. Virginia*, and more recently the *Windsor* and *Obergefell* decisions.

The Court found that under two commonly used tests for discrimination, sexual orientation should be viewed as akin to sex discrimination, and protected under Title VII. The first test was the comparative method, in which two similarly situated persons are compared to determine if the protected classification was the reason for the different outcomes. The court here said other courts attempt to compare the treatment of lesbians, to gay men — leading to an implausible comparison. Instead, the Court found that these cases should be treated like gender non-conformity cases, where two individuals of *the same sex* are compared.

The Court also found sexual orientation to be a derivation of sex discrimination under the associational bias theory. Under this theory, which the Court ties closely to *Loving v. Virginia*, sex discrimination can be imputed to a sexual orientation discrimination claim because the claim would not exist but for the sexes of the complainant and the partner. This theory takes the rationale of *Loving*, and another associated case, *Holcomb v. Iona Coll.*, 521 F.3d 130 (2d Cir. 2008), which held: "where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's *own* race." Replacing race based language with sex based language, the 7th Circuit held the rationale was substantially the same to encompass sexual orientation discrimination under the umbrella of "sex."

Based on the foregoing the 7th Circuit reversed the lower court's entry of dismissal, and overturned its own precedent holding that sexual orientation was not a protected class under Title VII. The matter has been sent back to the trial court for further proceedings. While this ruling is not binding on the 6th Circuit, of which Ohio is a part, it is persuasive. Moreover, it illustrates a judicial willingness to break from prior definitions to include these newer groups.

Workers' Compensation Update

Disclosure of Medical Information

The Ninth District Court of Appeals recently affirmed prior caselaw about when an employer's disclosure of an employee's medical information may be actionable. In *Templeton v. Fred W. Albrecht Grocery Co.*, 2017-Ohio-282, the employee had an active worker's compensation claim. As part of that claim, the employer had in its file a psychological report. The employer's worker's compensation administrator intended to forward the report to the injured worker's attorney, but instead sent it to several co-employees. The injured worker brought claims of invasion of privacy, negligence, and unauthorized disclosure of medical information.

On the issue of invasion of privacy, the court held consistent with prior cases, that, among other things, the disclosure had to be intentional. In the instant case, the disclosure was not intentional (indeed, the sender attempted to recall the email messages), and was not actionable. The court was also asked to expand caselaw previously only applicable to hospitals and physicians, that articulates a claim for breach of medical confidence. The court refused to expand the reach of this claim to include employers.

Coming and Going Rule

The complexity of the "coming and going" rule has vexed Ohio courts for years. Generally, fixed situs employees are not entitled to participate in the Workers' Compensation Law when they are injured traveling to and from their place of employment. The coming and going rule applies only to fixed-situs employees. Some Ohio courts have found that home health aides and nurses are fixed-situs employees, and consequently, travel to and from clients' homes are covered by the coming and going rule, while others have not. As a general rule, the application of the coming and going rule is not static and there are several exceptions.

Recently, in *Franklin v. BHC Services*, 2017-Ohio-655, the 8th District Court of Appeals found the workers' compensation claim of a home health nurse injured in a car accident while traveling to a clients' home was not barred by the coming and going rule. The nurse was travelling from her first patient of the day to her second. Although the nurse was not compensated for travel time, the court of appeals found there was a genuine issue of material fact as to whether the claimant was a fixed situs employee. The court noted that travel was an essential feature of the claimant's job, and she received reimbursement for travel based on conditions imposed by the employer. The court also found there was a question of fact as to whether the injuries sustained by the claimant arose out of employment under the "totality of the circumstances" test, which examines, among other things, the proximity of the scene of the accident to work, the employer's control over the scene of the accident, the benefit to the employer received from the claimant's presence at the scene of the accident.

In *Molton v. The Kroger Company*, 2017-Ohio-565, another court reviewed a claim under the rule. In *Molton*, the claimant was fatally injured when she left work at the end of her shift and walked across a major street to the closest bus stop. The guardian of the client's minor child filed a claim for death benefits. The claim was disallowed administratively and the trial court granted summary judgment in favor of the employer, finding the coming and going rule applied to prohibit the claim. On further appeal to the 2d District Court of Appeals, the court affirmed the lower court's ruling, finding the coming and going rule applied to prohibit the claim because the company did not have control over the scene of the accident, the accident did not occur on the company's premises, and the company derived no benefit from the claimant's presence at the scene of the accident.

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