

Employment Decision

Title VII Prohibits Harassment Based On Effeminacy, Illinois Court Finds

Every employer knows it is illegal to harass an employee because of his or her sex. But does Title VII prohibit harassment based on a failure to conform to sexual stereotypes? According to at least one federal judge in Illinois, the answer is yes.

Terrence Jones worked for Pacific Rail Services. According to his complaint, he was harassed by a male co-worker, Fred, who repeatedly commented on his effeminate appearance. For example, Fred stated "your hands are so soft – what are you doing after work?" and "why don't you come strip for me?" Jones complained to Pacific Rail for over a year, but the company allegedly took no action to end the harassment. Finally, Jones filed a lawsuit alleging that Fred's actions: (1) created a hostile work environment based on his sex; and (2) constituted harassment based on his non-conformance to sexual stereotypes. Pacific Rail filed a motion to dismiss the second claim.

Judge Mathew Kennelly, relying on a 1998 decision by the Seventh Circuit, *Doe v. City of Belleville*, held that Title VII does not permit an employee to be treated adversely because his or her appearance or conduct does not conform to stereotypical gender roles. *Jones v. Pacific Rail Services*, Case No. 00 C 5776. Citing *Doe*, Judge Kennelly noted that:

A man who is harassed because his voice is soft, his physique is slight, his hair long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers' idea of how men are to appear and behave, is harassed "because of" his sex.

This is a good example of how the definition of harassment "because of" sex continues expanding. It is yet another reminder of the importance of having a comprehensive non-harassment policy and of training employees how to abide by such a policy.

First Appeals Courts Say Employees with Disabilities Can Sue for Hostile Work Environment

On March 30, 2001, the Fifth Circuit became the first federal court of appeals to explicitly allow an employee to sue for disability-based harassment under the Americans with Disabilities Act ("ADA"). *Flowers v. Southern Regional Physician Services, Inc.*, No. 99-31354. Two weeks later, the Fourth Circuit Court of Appeals came to the same conclusion. *Fox v. General Motors Corp.*, Case No. 00-1589.

The plaintiff in the Fifth Circuit case, Sandra Flowers, worked as a medical assistant. In March, 1995, Flowers' supervisor discovered that Flowers was HIV-positive. Flowers alleged that after the supervisor learned of her HIV status, her work environment dramatically changed. Among other things, Flowers claimed that: the supervisor began intercepting her telephone calls, eavesdropping on her conversations, and hovering around her desk; Southern's president refused to shake her hand and would purposely avoid coming near her; and she was forced to submit to more frequent drug testing. She also claimed that she was subjected to a number of unfair and unwarranted disciplinary actions. In November, 1995, Flowers was terminated.

Although a jury found that Flowers' disability was not a motivating factor in the

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termination decision, it still found that Flowers endured a hostile work environment based on her disability. The jury awarded Flowers \$350,000 in damages, which was reduced to \$100,000 based on the applicable damage caps under the ADA. Southern appealed, arguing that disability harassment is not a valid cause of action under the ADA.

The Fifth Circuit rejected Southern's arguments that an employee can't sue for "disability harassment". It found that, since the ADA's language is similar to Title VII's and sex harassment is really just another form of sex discrimination, disability harassment should likewise be considered just another form of disability discrimination. While Flowers could state a disability harassment claim, however, the court found that she did not prove that she suffered any real damages. Consequently, the court reduced the jury's damage award to \$1!

The plaintiff in the Fourth Circuit case, Robert Fox, worked for GM for 12 years before suffering a non-work related injury to his back. After an 11-year absence due to this injury, Fox returned to work. But he re-injured his back less than a year later. Over the next few years, he went on and off disability leave.

Starting in October 1994, Fox claimed that his supervisors and co-workers subjected him to a barrage of harassment. For example, although workers with medical restrictions always worked together at one large group table, Fox was assigned to a small individual table directly in front of the general foreman's office. The table was located in a hazardous area and the chair was too low for Fox, which aggravated his back injury. Also, the general foreman refused to let Fox take the required physical examination for a job change, and referred to the disabled workers as "hospital people," "handicapped MFs" and "911 hospital people." Fox went back on disability leave because the harassment was causing Fox to suffer depression and anxiety, which in turn caused his physical condition to worsen. A jury awarded Fox \$203,000 in compensatory damages and medical expenses.

On appeal, the Fourth Circuit held that the ADA generally protects employees from a hostile work environment based on their disability. The court also found that there was sufficient evidence for the jury to conclude that Fox was subjected to a hostile work environment because of his disability. Therefore, the damage award was upheld.

For employers who have not included "disability" in their non-harassment policy, these cases highlight the need to do so. More importantly, they highlight the need to train all supervisors to be sensitive to the disabilities of their employees and that castigating them because they can't do certain tasks is an invitation to a lawsuit.

Firing for Failure to Sign Non-Compete Was Not Discriminatory

Mary O'Regan worked for Arbitration Forums, Inc ("AF"). After AF was involved in a dispute with Resolute Systems, a competitor, it decided to require its existing employees

to sign employment agreements with covenants not to compete. O'Regan (who was 47 years old) consulted a lawyer, who told her the agreement was "overly broad, draconian in scope and lacked adequate consideration." O'Regan then told her employer that she would not sign the agreement, but would be willing to negotiate a new agreement. Her employer said no, fired her and replaced her with a 32-year-old man.

O'Regan sued for sex and age discrimination, because only she and three older female employees were discharged for refusing to sign the agreement. All of the younger male employees signed the agreement, so none of them were terminated. The United States District Court concluded that the decision to fire employees who would not sign the agreement was not discriminatory. The Seventh Circuit Court of Appeals agreed, noting:

There is no indication that [the president] used the employment agreement that [the company] drafted for any reason other than to protect AF's business interests. Nothing points to any use of the Agreement or the signing requirement as a way to eliminate AF's older female employees. The employment agreement may have been unnecessary, ineffective and unenforceable, but Title VII and the [Age Discrimination in Employment Act] do not prohibit AF from foolishly requiring it.

The Court, quoting from one of its prior cases, noted that "no matter how medieval a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firm's managers," the age discrimination laws do not interfere with a company's business decision.

Ironically, if O'Regan and her lawyer were correct about the fact that the covenant not to compete was unenforceable, it would have made more sense for O'Regan to sign the agreement and take her chances. It also makes good sense for an employer to get legal counsel when they decide to require employees to sign non-compete clauses, to avoid unfortunate situations like the one that led to this case and to make sure that the agreements are worth the paper they are printed on. *O'Regan v. Arbitration Forums, Inc.*, 99-4044 and 00-1306.

LABOR-MANAGEMENT RELATIONS

DOL Issues Beck Rights Notification

In 1988, the Supreme Court held, in the case of *Communication Workers v. Beck*, that union members can not be required to pay for union political expenditures. Upon request, employees can get a rebate for that portion of union dues spent for political purposes. But most employees are unaware of these rights. In an effort to "remedy" this lack of knowledge, on February 22, 2001,

President Bush signed Executive Order 13201 requiring that all government contractors and subcontractors notify employees of their *Beck* rights – as well as notifying them that they cannot be forced to join a union in order to retain their jobs (although employees can be required to pay union dues and initiation fees).

Pursuant to Executive Order 13201, the Department of Labor recently issued an "interim procedural notice" to assist employers in compliance. Until final rules are published, employers can satisfy the requirements of this Executive Order by posting a notice which includes specific language notifying employees of their *Beck* rights, how to exercise those rights, and how to contact the National Labor Relations Board ("NLRB") to get more information. Copies of the required language can be obtained from the NLRB or you can contact Steve Adelman (312.443.0405), or one of the other members of the LB&B Labor and Employment Law Department.

Not surprisingly, various unions have threatened to challenge the Executive Order. At the moment, however, the required notice should be posted by government contractors and subcontractors in "all places where notices to employees are customarily posted."

NLRB Changes Rules on Withdrawing Recognition from Union

For the last 50 years, the National Labor Relations Board ("NLRB") has held that an employer may withdraw recognition of a union by showing that it has a "good-faith doubt," based on objective considerations, as to whether the union still has majority status. An employer could also test a union's majority status by petitioning for an NLRB-conducted election if it has objective evidence of a "good-faith doubt." But the NLRB has decided to make it harder for an employer to simply withdraw recognition, while making it easier to file for an election. Overruling 50-year-old case law insofar as it permits withdrawal of recognition on the basis of "good-faith doubt," the NLRB will now require an employer to prove the union had lost majority support. *Levitz Furniture Company of the Pacific, Inc.*, Case 20-CA-26596.

In the *Levitz* case, a majority of the employees signed a petition stating that they no longer desired to be represented by the union for purposes of collective bargaining. The company responded by informing the union that it had objective evidence that the union no longer represented a majority of the employees in the bargaining unit. In conformance with the law (as it existed at that time), the employer further said that it would no longer recognize the union. The union sent back a letter stating that it was prepared to present objective evidence that it still represented a majority of the bargaining unit employees. The employer did not ask to see the union's alleged evidence of majority status.

In recognition of the fact that what the employer did was perfectly lawful under established law, the NLRB decided not to apply its change in the law retroactively. By applying the old rule to this case, the NLRB decided that the

employer had objective evidence of a good faith doubt as to the union majority support. Its failure to inspect the union's alleged evidence to the contrary was lawful. In the future, however, an employer will be at great risk if he does not consider a union's claim that a majority of the bargaining unit employees still support the union.

With respect to the issue of elections, the NLRB held that an employer can now file for a decertification election by demonstrating "good-faith reasonable uncertainty (rather than disbelief) as to unions' continuing majority status." According to the NLRB, they are making it easier to test a union's majority status through use of the NLRB's election procedures because they consider an election to be "the most reliable measure of union support."

Whether this change in the law will hold up remains to be seen. A court confronted with the issue may decide not to enforce the NLRB's policy switch. More likely, however, this overruling of longstanding precedent may itself get overruled after President Bush fills the current vacancy on the Board and the two other NLRB positions expected to become vacant this year.

OTHER Supreme Court Rules that Federal Arbitration Act Can Apply In Most Employment Situations

By a 5-4 margin, the Supreme Court has definitively ruled that the 1925 Federal Arbitration Act ("FAA") can be used to enforce pre-dispute arbitration agreements in the employment arena (except for contracts with transportation workers). *Circuit City Stores, Inc. v. Adams*, No. 99-1379. The ruling settles an ongoing debate and a split between federal appellate courts over the interpretation of an exclusionary clause in the FAA.

The FAA is the statute that gives federal courts the power to enforce arbitration agreements between private parties. The FAA, however, contains an explicit exemption—it does not apply to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." In the *Adams* case, the Ninth Circuit Court of Appeals interpreted this FAA exemption broadly, holding that it expressly precluded the enforcement of arbitration agreements in all employment contexts. Consequently, the Ninth Circuit refused to enforce Circuit City's arbitration agreement with its employee Adams.

Most other federal appeals courts had concluded at one time or another that the FAA exemption only prohibited the enforcement of arbitration agreements against those workers specifically identified in the exemption—seamen, railroad employees and other employees actually engaged in the transport of interstate or foreign commerce. A slim majority of the Supreme Court has now agreed with those appeals courts.

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Ironically, even though the Supreme Court remanded the case with an instruction that the lower court should take jurisdiction, this case may still go to a jury rather than an arbitrator. According to the attorney for the plaintiff, Circuit City's arbitration agreement included restrictions which are "unconscionable" under California law, and it is therefore unenforceable in that state.

For information concerning mandatory arbitration programs, please see the insert included with this newsletter.

Tips and Holiday Pay Are Damages Under WARN Act

The Worker Adjustment and Retraining Notification Act ("WARN") requires employers to give 60 days notice of a plant closing or mass lay-off. If the employer fails to give the required notice, employees are entitled to backpay for every working day that they did not get the required notice. A Las Vegas Hotel recently learned that it doesn't pay to gamble with how this statute will be interpreted. *Local Joint Executive Board of Culinary/Bartender Trust Fund v. Las Vegas Sands Inc.*, Case No. 98-17065.

On May 15, 1996, the Sands Hotel in Las Vegas told its employees that the hotel casino would close in 45 days. The Sands offered its non-union workers more than 15 days' severance pay, but they had to stay at work until the hotel closed to receive this money. A similar agreement was reached with the union for the employees they represented. After the hotel closed, Sands paid the workers in accordance with these agreements – but the severance pay did not include the tips that employees would have earned, or double-time pay for those employees who would have worked on July 4 if they had been given the full 60-days' notice. The union and two non-union employee representatives filed a class action lawsuit seeking their tips for the additional 15 days, plus holiday pay for July 4.

The hotel argued that WARN Act damages are intended to deter future violations, rather than to compensate employees for lost wages. But the

Ninth Circuit Court of Appeals disagreed. The court said that the intent of the law was to give terminated workers the chance to "read-just" without immediately having to search for a job, so they should get everything that they would have received but for the premature closing in violation of the WARN Act. The hotel therefore had to pay the tips that would have been earned during the additional 15 day period and the holiday pay for July 4. The additional amounts paid as "severance pay" were not allowed to offset WARN damages, because they were part of a legally enforceable deal made with the union and the employees. The court also rejected the hotel's argument that vacation pay should be an offset, because the hotel was legally obligated to pay employees for all accrued vacation time.

Employers should expect the WARN Act to be applied in a way that gives employees as much protection as possible. If an employer cannot give the full 60 days notice, it must fit within one of the very limited exceptions under the Act (e.g., "unforeseen circumstances," attempting to sell the business, etc.) or it should pay the difference between the notice actually given and the full 60-day period without asking employees to sign any type of release.