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News & Types: Employment, Labor & Benefits Update

# Employment, Labor & Benefits Update - August 2016

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Practices: Employment, Labor & Benefits

**THE SEVENTH CIRCUIT AFFIRMS: NO FEDERAL PROTECTION FROM SEXUAL ORIENTATION DISCRIMINATION WITHOUT ACTION BY THE U.S. SUPREME COURT OR CONGRESS**

By Nancy Sasamoto

On July 28, 2016, the United States Court of Appeals for the Seventh Circuit, unequivocally reaffirmed that Title VII of the Civil Rights Act of 1964 does not prohibit discrimination based on sexual orientation. In *Hively v. Ivy Tech Community College*, the Court made clear that, while it does not condone employment discrimination based solely on who an employee dates, loves or marries, Title VII nevertheless provides no protection for sexual orientation discrimination.

In *Hively*, Plaintiff Kimberly Hively filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"), claiming that she had been blocked from full-time employment without just cause on the basis of her sexual orientation. Hively had begun teaching as a part-time adjunct professor at Ivy Tech Community College in 2002. According to Hively, she had the necessary qualifications for a full-time employment and had never received a negative evaluation, but the college refused even to interview her for any of the 6 full-time positions for which she applied between 2009 and 2014. Moreover, the college did not renew her part-time employment contract in July 2014. Hively alleged that the college's actions constituted discrimination on the basis of sexual orientation. After exhausting her administrative remedies at the EEOC, Hively filed her Title VII claim in the U.S. District Court. The college's defense was that Title VII does not apply to claims of sexual orientation discrimination. The District Court agreed with the college and dismissed Hively's case.

Rather than make short shrift in affirming the dismissal of Hively's case, the Court felt that an in-depth analysis was warranted in light of the EEOC's 2015 decision in *Baldwin v. Foxx*, where it concluded sexual orientation is inherently a "sex-based consideration." The EEOC came to the conclusion for three primary reasons. First, it found that sexual orientation discrimination necessarily entails treating an employee less favorably because of the employee's sex. Second, it constitutes a form of associational discrimination on the basis of sex as an employer orientation discrimination necessarily entails treating an employee less favorably because of the employee's sex. Second, it constitutes a form of associational discrimination on the basis of sex as an employer discriminates against lesbian, gay or bisexual employees based on who they date or marry. Third, sexual orientation discrimination is a form of discrimination based on gender stereotypes in which employees

are harassed or punished for failing to live up to societal norms about appropriate masculine and feminine behaviors, mannerisms, and appearances.

The Seventh Circuit began its analysis by reviewing the U.S. Supreme Court's rationale in the 1989 case of *Price Waterhouse v. Hopkins*, where the Supreme Court declared that Title VII protects employees who fail to comply with typical gender stereotypes. In *Price Waterhouse*, when Plaintiff Ann Hopkins failed to make partner in the accounting firm, the partners advised her that her chances would be improved the next time if she would "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." The Supreme Court stated that this type of gender stereotyping constituted discrimination on the basis of sex in violation of Title VII.

Following *Price Waterhouse*, gay, lesbian, bisexual and transgender employees began to frame their Title VII sex discrimination claims in terms of discrimination based on gender non-conformity and not sexual orientation. For the last 25 years, courts have struggled to distinguish between gender norm discrimination, which is prohibited, and sexual orientation discrimination, which is not cognizable under Title VII. In short, the Seventh Circuit recognized that the distinction between gender non-conformity claims and sexual orientation claims had "created an odd state of affairs in the law in which Title VII protects gay, lesbian and bisexual people," but only to the extent that they meet society's stereotypical norms about how gay men or lesbians look or act (i.e. not in conformance with usual gender stereotypes or norms). On the other hand, gay or bisexual people who do conform to gender stereotyped norms in dress and mannerisms usually lose their claims for sex discrimination.

However, the Seventh Circuit, recounting the various opportunities that the Supreme Court has had to interpret Title VII as prohibiting sexual orientation discrimination and the many chances that Congress has had to amend Title VII to expressly prohibit such discrimination, noted that neither the Supreme Court nor Congress had taken any action to expand the interpretation of or amend Title VII to cover discrimination on the basis of sexual orientation. Reluctantly, the Court concluded that, while the writing may be on the wall for change in that our society cannot condone a legal structure where employees can be harassed, demeaned, fired or otherwise discriminated against solely based on who they date, love or marry, writing on a wall is not enough, and Title VII does not apply to claims of sexual orientation discrimination like those alleged by Hively.

Employers should bear in mind, as the Seventh Circuit noted, that, although Title VII may not provide protection against discrimination on the basis of sexual orientation, employees may have protection under various state and local antidiscrimination laws. In Illinois, the Illinois Human Rights Act prevents sexual orientation discrimination. Both the Cook County Human Rights and City of Chicago Human Rights Ordinances prohibit discrimination based on sexual orientation and gender identity. However, the Seventh Circuit noted that more than half of the states in the U.S. do not have such state protections.

**DISABILITIES – THE DIRECT THREAT DEFENSE: A TOOL IN THE EMPLOYER'S TOOL BOX**
By Alan M. Kaplan

The Problem:

> Jack is a crane operator who works for Top 10 Construction, hoisting concrete panels that weigh several tons. A rigger on the ground helps him load the panels, and several other workers help him

> position them. During a break, Jack appears to have become light-headed, has to sit down abruptly, and seems to have some difficulty catching his breath. In response to a question from his supervisor about whether he is feeling all right, Jack says that this has happened to him a few times during the past several months, but he does not know why.

Could Top 10 ask Jack about his medical condition? Can Jack perform the essential functions of the job? Should Top 10 terminate Jack? If Top 10 terminates Jack, and Jack sues Top 10, claiming he was terminated because of a disability or a perceived disability, does Top 10 have a defense?

This scenario is taken from the EEOC's Enforcement Guidance on Disability-Related Inquiries, published in 2000 and available on the EEOC's website. In the Guidance, the EEOC states that employers may make disability-related inquiries, including requiring employees to participate in medical examinations. These inquiries must be job related and consistent with business necessity. An employer may make the inquiry when the employer "has a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition."

Additionally, as recently explained by the Seventh Circuit Court of Appeals in *Felix v. Wis. DOT*, 2016 U.S. App. LEXIS 12462 (7th Cir. July 6, 2016), an employer may be protected against a former employee's wrongful termination suit where the employee poses a "direct threat" to workplace safety. In *Felix*, the Court explained that there may be instances in which an employee may pose a "direct threat" to the health or safety of himself or other individuals in the workplace. A "direct threat" occurs when there is a "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." To determine whether an employee is a direct threat to himself and/or others, an employer must undertake an "an individualized assessment, based on reasonable medical judgment, of an employee's present ability to safely perform the essential functions of his job. Some of the factors include (1) the duration of the risk posed by the employee's condition; (2) the nature and severity of the potential harm that might result; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm."

The Solution:

The EEOC states that an employer may require its employee to have a medical examination to determine if he can perform the essential functions of his job. The examination, however, must be job related and consistent with business necessity.

Here, Top 10 has objective evidence that creates a reasonable belief that Jack may pose a "direct threat" to himself or others while operating the crane. The evidence is his behaviors and his statement to the supervisor. Accordingly, Top 10 may require Jack to obtain a medical examination from Jack's doctor or medical provider. To ensure that the medical examination is job related, Top 10 should give Jack his job description to show to his doctor or other medical provider. In addition, Top 10 may require documentation from Jack's doctor and then determine whether Jack can perform the essential functions of his job with or without a reasonable accommodation. If Top 10 chooses to terminate Jack because it believes that Jack poses a "direct threat" to himself or others at work, Top 10 may be protected by the "direct threat" defense as explained in *Felix v. Wisconsin*.

However, Top 10 may not have a job description, or, even if Top 10 had a job description, the job description may not list the essential functions and the physical requirements of the job. A job description that lists the essential functions and requirements of the job is important because, as explained previously, any medical inquiry examination of an employee needs to be job-related and consistent with business necessity. Therefore, Top 10, like all employers, needs to draft and implement an American With Disabilities Program. The program should include policies adopting the American With Disabilities Act and implementing the employer's obligation to provide reasonable accommodations to those qualified individuals with a disability. The program should also include the proper documentation, including job descriptions which list the essential functions and physical requirements of the job. The proper documentation should also include a document the employee should give to his or her doctor. That document could list the physical requirements and ask the doctor whether the employee is able to perform those duties or if the employee needs an accommodation. A "Functional Capacity Examination ("FCE") form" fulfills this part of the program. Finally, the program needs to set forth the procedures for analyzing the information in the FCE form and determining first, whether the employee is able to perform the essential functions of his job with or without a reasonable accommodation and, second, the nature of the employee's continued status as an employee.

For more information about this or any other employment law topic, please contact Frank Del Barto, Chair of the Employment, Labor & Benefits Group, at 847.734.8811 or via email at fdelbarto@masudafunai.com.