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DISCRIMINATION: CHICAGO APPELLATE COURT RULES THAT SEXUAL ORIENTATION IS SEX DISCRIMINATION

By Alan M. Kaplan

After the United States Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), a person could get married to a same-sex partner on Saturday and fired by his or her employer on Monday. Although gay and lesbian employees in Illinois, Wisconsin and a number of counties and cities in Indiana are protected from discrimination based upon sexual orientation, the question is whether a person's sexual orientation is protected from discrimination by the federal law known as Title VII of the Civil Rights Act of 1964. The situation has now changed in the Seventh Circuit, covering the states of Illinois, Indiana and Wisconsin. On April 4, 2017, the Seventh Circuit Court of Appeals ruled that discrimination on the basis of sexual orientation is a form of sex discrimination. In *Hively v. Ivy Tech Community College of Indiana*, Case No. 15-1720 (7th Cir. 2017), Kimberly Hively alleges that her employer blocked her applications for full-time positions and then did not renew her part-time contract. The federal district court granted the College's motion to dismiss the case and a three-judge panel of the Seventh Circuit agreed. On appeal, the entire Seventh Circuit Appellate Court reversed.

By taking this action, the Appellate Court rejected the distinction between discrimination on the basis of sex and discrimination on the basis of sexual orientation. By analyzing a long line of cases issued by the United States Supreme Court, the Appellate Court ruled that sexual orientation is a form of sex discrimination. For example, the Supreme Court ruled that the Constitution "protects the right of same-sex couples to marry." The Supreme court earlier ruled that "gender stereotyping falls within the prohibition against sex discrimination" and, in sexual harassment cases, it "makes no difference if the sex of the harasser is (or is not) the same as the sex of the victim." Rather than amending Title VII, which Congress has refused repeatedly to do, the Appellate Court examined the "broader context of the statue that…the legislature …passed," noting the actions of the Supreme Court in looking at the broader context in other cases, such as cases involving the anti-trust laws.

Therefore, the Appellate Court ruled that "any discomfort, disapproval, or job decision based on the fact that the [employee] dresses differently, speaks differently, or dates or marries a same-sex partner is a reaction purely and simply based on sex." Such action violates Title VII. Therefore, when employers make decisions

about employees, they need to consider whether their actions are based upon all of the employee's protected classifications, including sexual orientation.

BENEFITS - BACK TO BASICS - PLAN LOANS AND RETIREMENT LEAKAGE

By Mary W. Shellenberg

Like many practitioners, we continue to monitor developments under the new Administration on various aspects of employment and benefit law matters, including the future of health care reform and the Department of Labor's fiduciary rule. While the new Administration develops its policies, we thought that we would revisit some familiar topics in this month's newsletter.

With the decline in defined benefit pension plans, the responsibility for saving for retirement and "building a retirement nest egg" has been placed squarely on individual employees. Despite this fact, most employers are concerned about the adequacy of retirement savings – whether it be paternalistic (which is often true based on our experience) or business reasons (i.e. ensuring that "older workers have enough and can afford to retire to make room for younger, less expensive workers" as suggested by the Wall Street Journal). Whatever the motivation, saving for retirement is important and studies show that "leakage" (the term for using retirement savings early for purposes other than retirement) is significantly affecting the amount of savings available at retirement. There are typically three channels for leakage: in-service withdrawals (hardship or at age 59 ½), cash-outs at job separation and plan loans. This article will focus on 401(k) plan loans.

Loan features are common in 401(k) plans. The Center for Retirement Research at Boston College reports that about 90% of 401(k) plan participants have access to a loan feature and the Employee Benefits Research Institute estimates that 20% of participants have outstanding loans. Typically, loans are available for any purpose (that is, they are not limited to hardship). The right to borrow from the plan, on the other hand, is not unlimited. By law, plan loans are limited to 50% of a participant's account balance (unless the account balance is less than $10,000, in which case a participant can borrow 100% of his or her account balance) up to a maximum of $50,000 and plan loans must be repaid in five years, except if the loan is for a down payment on a home.

Because plan loans are easy to obtain, have no up-front costs and payments are made through payroll deductions, they are an attractive option to participants. However, there are also downsides. If the participant leaves his or her employment or is terminated, the loan is accelerated and must be repaid. If the participant does not have sufficient financial resources and the loan is not repaid, it will be considered a "distribution" and taxed at ordinary income rates, plus 10% penalty for early withdrawal, if the participant has not attained age 59 ½. Unlike a home equity loan, the interest on a plan loan is not tax-deductible, which effectively increases the cost of borrowing. Also, the interest paid on a plan loan is effectively taxed twice – once, at the time the participant earns the money to pay the interest on the loan, which is deposited into the participant's account and again, at the time of withdrawal. Finally, studies have shown that plan loans, even if repaid on a timely basis, reduce the amount of savings available at retirement.

The decision to borrow from a plan is solely that of the participant. In some cases, it may be the best or only course of action available. Whatever the case may be, if you want to encourage participants to maximize their

retirement security through retirement savings, or if you believe that the loan feature is being over-utilized, there are steps you can take as an employer and plan sponsor.

The first and the most important step is education. We recommend that employers work with their 401(k) vendors to develop programs to educate participants on the pros and cons of plan loans and their impact on retirement savings. Traditional education and other tools may be available to put the participant in the best position to evaluate whether to borrow from the plan or not. Second, as a plan sponsor, you are in control of the plan design and loan feature. Although we do not recommend eliminating the loan feature altogether, as a plan sponsor you can consider, among other things, limiting the number of loans and the frequency of borrowing, as well as re-borrowing (for example by imposing a minimum time period between loan payoff and the issuance of a new loan). Another option is limiting the sources from which a participant may borrow.

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.