Hot Topics in Sex Harassment and Discrimination

I. Introduction

Title VII of the Civil Rights Act of 1964 and other state statutes such as Ohio Revised Code § 4112.01 *et seq.* and Kentucky Revised Statutes § 344.010 *et seq.* prohibit discrimination based on sex.

II. Sexual Harassment

A. What is Sexual Harassment?

1. Harassment is a form of employment discrimination prohibited by federal and state civil rights laws. Harassment imposes an unwanted condition on a person's employment because of that person's legally protected characteristic.

2. Sexual harassment usually involves one or more of the following behaviors:

a) Unwelcome sexual advances;

b) Acts of gender-based animosity (i.e. hostile conduct based on the victim's gender); or

c) Sexually-charged or gender offensive workplace behavior, regardless of whether any one person is a "target" of the conduct.

B. Two Types of Sexual Harassment Claims

1. Quid Pro Quo Harassment

a) "This for that"

For example, "if you sleep with me, I'll give you the promotion you've been wanting."

Where supervisor told employee that she could "leave" at anytime if she did not like his behavior, the court found that the plaintiff had a prima facie case of quid pro quo harassment. *Velez Cortes v. Nieves Valle*, 253 F. Supp. 2d 206 (D.P.R. 2003).

b) Requires a tangible employment action

(1) Examples of a tangible employment action include:

- Hiring

- Firing
- Failing to promote
- Reassignment with significantly different responsibilities
- Decision causing a significant change in benefits

2. Hostile Work Environment Harassment

a) Hostile work environment harassment is unwelcome sexual conduct that unreasonably interferes with an individual's job performance or creates an intimidating, hostile or offensive work environment.

b) Who can create?

- Supervisors
- Co-workers
- Third parties

c) No tangible employment action is required: Employee must show that the harassment was so severe or pervasive as to alter employment conditions or unreasonably interfere with job performance.

C. Employer's Duties

1. Employer Liability for Supervisor Harassment

In 1998, the Supreme Court decided two cases that redefined the standard for employer liability for harassment by supervisors. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

a) Quid Pro Quo: Employer is automatically liable if the supervisor commits a tangible employment action.

b) Hostile Environment: Employer is liable for hostile work environment, unless the employer can prove the two-prong affirmative defense:

(1) **The employer must show that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior**

E.g., generally, the employer must have an anti-harassment policy and a procedure by which the employee can by-pass the harassing supervisor; **and**

(2) The employer must show that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.

2. Legal Risks to Employer

a) Personal liability for supervisors in Ohio. *Genaro v. Central Transp., Inc.*, 84 Ohio St. 3d 293 (1999).

b) Judgments in harassment cases routinely exceed $1 million.

c) Legal fees

d) Harm to reputation

D. Preventing Sexual Harassment

1. In *Kolstad v. American Dental Association*, 119 S. Ct. 2118 (1999), the United States Supreme Court determined that in the punitive damages context, an employer may not be liable for the discriminatory employment decisions of its managers where those decisions are contrary to the employer's *good-faith efforts to comply with Title VII.* As examples of such efforts that will protect the employer from punitive damage exposure, the Court listed:

- The institution of written anti-harassment and antidiscrimination policies;
- Effective grievance mechanisms for employees with discrimination concerns; and
- Education of personnel about federal prohibitions against discrimination.

2. Anti-harassment policies

All employers, regardless of size, should adopt and distribute to all employees a written policy expressing absolute disapproval of sexual harassment and retaliation for making such claims.

- Communicate to all employees the employer has a zero tolerance toward sexual harassment, and that the company has done everything possible to prevent sexual harassment in the workplace.

- Be comprehensive and inclusive, clearly defining the prohibited conduct.
- Be communicated and well known to the employees.
- Provide multiple avenues for complaint and relief—an employee should be able to complain to a number of people including someone outside his direct chain of command.
- Be vigorously enforced.
- Assure employees that they will not be retaliated against for reporting harassment.
- Should an employee file a sexual harassment claim, the written policy can serve as some evidence of the employer's good-faith attempt to prohibit sexual harassment in the workplace.

3. Employee and management education

- Supervisors should know what conduct is inappropriate and watch out for it in themselves as well as in their subordinates and peers. *For example*, employees should abstain from conduct such as physical contact with other employees, sexual or derogatory comments and jokes, propositioning, horseplay, and display of sexually explicit materials.

4. Reference checking

E. Correcting Sexual Harassment

1. Things To Remember When Conducting Sexual Harassment Investigations

- Take the complaint seriously
- Act quickly
- Document everything
- Maintain confidentiality
- Remember that there does not have to be a formal complaint for an employer to be held liable for sexual harassment
- Supervisors must immediately notify management and Human Resources of any potential problems. Supervisors must also be sensitive to inconspicuous

potential complaints. An employer that *should have known* of unlawful conduct can be liable even if the employee does not complain.

- Communicate the outcome to complainant

F. Other Developments in Sexual Harassment Law

1. Same-sex sexual harassment

a) Demonstrating that the harassment occurred because of sex

(1) In *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), the Supreme Court recognized same-sex sexual harassment, but only if the plaintiff can "prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted discrimination because of sex."

(a) Because Of Sex

(i) The Supreme Court outlined three ways in which a plaintiff can show that an incident of same-sex harassment constitutes sex discrimination.

(a) The plaintiff can show that the alleged harasser made "explicit or implicit proposals of sexual activity" and provide "credible evidence that the harasser was homosexual."

(b) The plaintiff can demonstrate that the harasser was motivated by general hostility to the presence of members of the same sex in the workplace.

(c) The plaintiff may "offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace."

(b) Court permitted plaintiff's Title VII claim to proceed where plaintiff presented evidence that the harasser indicated a sexual interest in him and had made similar advances to other male employees. *LaDay v. Catalyst Technology, Inc.*, 302 F.3d 474 (5th Cir. 2002).

2. Continuing Violation Doctrine

a) The Supreme Court has held that a plaintiff bringing a hostile work environment claim can recover for acts outside the limitations period so long as the acts are part of the same hostile environment and at least one act occurred during the limitations period. The Supreme Court emphasized that hostile environment claims involve repeated conduct and are based on the cumulative effect of individual acts.

b) For example, under federal law, a charge of sexual harassment must be filed with the EEOC within 180 days after the harassment occurred. A plaintiff may base her sexual harassment claim on and possibly recover for harassment occurring months and even years prior to the 180 day cut-off if that harassment is part of the same hostile environment.

III. Pregnancy, Maternity and Parenting Issues

A. Pregnancy Discrimination Act

1. The Pregnancy Discrimination Act of 1978 ("PDA") is an amendment to Title VII of the Civil Rights Act that requires equal treatment of women "affected by pregnancy, childbirth, or related medical conditions" in all aspects of employment, including fringe benefits.

B. Coverage Under Employee Health Insurance Plans

1. Prescription Contraceptive Coverage

a) Prescription contraceptives must be covered if other preventative drugs or services are covered.

b) Although an employer's policy may be facially neutral by denying prescription contraceptives for all employees, prescription contraceptives were only available to female; thus, the policy only burdened females and the exclusion treated medication needed for sex-specific conditions less favorably than medication necessary for other medical conditions. *Cooley v. Daimler Chrysler Corp.*, 281 F. Supp. 2d 979 (E.D. Mo. 2003).

2. Coverage for infertility treatments

a) Infertility treatments are not required to be covered.

b) The United States Court of Appeals for the Second Circuit ruled that an employer's exclusion of coverage for infertility treatments violates neither

the PDA nor Title VII. *Saks v. Franklin Covey Co.*, 316 F.3d 337 (2d Cir. 2003).

(1) The court concluded that for a condition to fall within the PDA's inclusion of "pregnancy . . . and related medical conditions" as sex-based characteristics, that condition must be unique to women. Because infertility is a medical condition afflicting both men and women, infertility does not fall within the meaning of "related medical condition" under the PDA.

(2) The court further found that because the health plan's exclusion applied to procedures to treat both male and female infertility, the exclusion did not violate Title VII.

IV. Discrimination Based on Sexual Orientation

A. Discrimination based on sexual orientation is not prohibited under Title VII.

B. State Statutes and City Ordinances

1. Ohio

a) The following Ohio cities have enacted ordinances prohibiting discrimination in employment based on sexual orientation: Athens, Cincinnati, Cleveland, Columbus, Toledo, and Yellow Springs.

2. Kentucky

a) Kentucky Executive Order for state employees:

In 2003, Patton signed an executive order that prohibits discrimination against state employees based on sexual orientation or gender identity, among other factors. Kentucky is now the 10th state to use an executive order to prohibit discrimination based on sexual orientation against its public work force, and the only state to do so covering gender identity.

b) The following Kentucky cities/governmental entities have enacted ordinances prohibiting discrimination in employment based on sexual orientation: Covington, Lexington Fayette Urban County Government, and Louisville Jefferson County Metro Government.

3. Recent cases

a) Male former employee brought action against employer, claiming that he suffered sexual harassment from several of his male co-workers which eventually forced him to resign. The court found that any discrimination

suffered by male employee was on the basis of either actual or perceived homosexuality, rather than on the basis of gender, barring employee's sexual harassment action. *King v. Super Services, Inc.*, 68 Fed. Appx. 659 (6th Cir. 2003).

b) Where testimony of plaintiff's co-workers clearly demonstrated that plaintiff's harassers were motivated by their suspicion of plaintiff's sexual orientation and his perceived desire for some sort of physical intimacy with them, plaintiff's hostile work environment claim failed. *Spearman v. Ford Motor Co*., 231 F.3d 1080 (7th Cir. 2001), *cert. denied*, 532 U.S. 995 (2001).

V. Sex-Stereotyping

A. In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the United States Supreme Court held that employment decisions based on "sexual stereotyping" are prohibited under Title VII as sex discrimination. In that case, a female manager who was denied a partnership because her male colleagues considered her too aggressive and blunt, could present direct evidence of sex discrimination.

B. Even though Title VII does not prohibit discrimination based on sexual orientation, some courts have been willing to hear claims in which homosexual plaintiffs allege that their harassment was based on their failure to meet prevailing gender stereotypes.

1. Recent court cases

a) A federal appeals court recently concluded that stereotyping about mothers can qualify as gender discrimination as it ruled in a case in which a school employee says she was told that her job and her "little ones" were incompatible. *Back v. Hastings*, 2004 U.S. App. Lexis 6684 (2d Cir. April 7, 2004).

b) Court rejected plaintiff's claim alleging that his co-workers did not believe he fit the sexual stereotype of a man, and that their sexual stereotyping was evidence of discrimination "because of" sex and held that evidence presented related to speculation by co-workers about his sexual orientation. Male employee who was referred to as "girl scout" and whose close friendship with a co-worker was perceived by other co-workers as romantic in nature could not establish that he was discriminated against "because of" sex. *Hamm v. Weyauwega Milk Products, Inc.*, 332 F.3d 1058 (7th Cir. 2003).

c) Male truck driver who was fired after disclosing to his supervisor that he sometimes dressed and acted like a woman had no claim under Title VII because he was not fired for failure to conform to a gender stereotype,

rather he was fired because of his off-duty cross-dressing. *Oiler v. Winn Dixie Stores, Inc.*, 2002 U.S. Dist. Lexis 17417 (E.D. La. 2002).

d) The Ninth Circuit Court of Appeals held that a male employee who was referred to as "she" and "female whore" because of his effeminate characteristics was harassed "because of sex." *Nichols v. Axteca Restaurant Enterprises, Inc.*, 256 F.3d 864 (9th Cir. 2001).

e) The Ninth Circuit held that a homosexual plaintiff, who claimed co-workers harassed him on a daily basis by making sexually-oriented comments and touching his private parts, could proceed to trial. Five judges believed the plaintiff could proceed because he presented evidence that he was subjected to physical conduct of a sexual nature. Three of the judges believed the plaintiff had shown that he was subjected to actionable gender stereotyping. *Rene v. MGM Grand*, 305 F.3d 1061 (9th Cir. 2002) (*en banc*).