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EEOC IS ON THE CASE: ACTION AGAINST SEXUAL ORIENTATION DISCRIMINATION

By: Deborah H. Share

A district court in Pennsylvania recently denied an employer's motion to dismiss when it found that Title VII of the Civil Rights Act of 1964 prohibits discrimination based upon sexual orientation. *U.S. Equal Employment Opportunity Comm'n v. Scott Med. Health Ctr., P.C.*, 2016 WL 6569233 (W.D. Pa. Nov. 4, 2016). Discrimination "because of" one's sex and stereotyping based on one's sex includes harassment and creation of a hostile work environment based on actual or perceived sexual orientation.

THE BACKGROUND

Dale Baxley was employed as a telemarketer by Scott Medical Health Center ("Scott Medical") from July 2013 until he quit in August 2013. Baxley is a gay man. Baxley alleged that multiple times a week his manager made offensive and unwelcome comments to him about his sexual orientation, asked explicit questions, made explicit comments about sex, and repeatedly used slurs related to his sexual orientation.

He claimed that he was constructively discharged because of the severe and pervasive treatment that created a hostile work environment.

Separately, five of Baxley's female coworkers brought charges to the Equal Employment Opportunity Commission ("EEOC") against the same manager for sex discrimination under Title VII of the Civil Rights Act of 1964 ("Title VII"). They alleged that the manager had engaged in sexual harassment and unwelcome touching against them, thereby creating a hostile work environment. The EEOC investigated the claims, and determined that there was reasonable cause to find that Title VII had been violated with respect to the five female employees.

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During the course of its investigation into the female employees' complaint, the EEOC discovered Baxley's claims of constructive discharge against the manager. The EEOC found evidence that the manager had also harassed Baxley, based upon his gender and sexual orientation. It further noted that Baxley had reported the manager's conduct to Scott Medical's President, who "shrugged it off and took no action at all to stop the harassment, which continued." *Id.* at * 2. The EEOC gave Scott Medical the opportunity to remedy the situation; however, no conciliation agreement could be reached.

After this failure, the EEOC filed a lawsuit against Scott Medical on behalf of Baxley. Scott Medical moved to dismiss the complaint on grounds of jurisdiction and failure to state a claim.

THE DECISION

Scott Medical made both procedural and substantive arguments in support of its motion to dismiss. Both failed to persuade the court, and the motion to dismiss was denied on both grounds.

A. Procedural Analysis

First, Scott Medical argued that the EEOC had not followed proper procedure under Title VII, and that the lawsuit was untimely, both relieving the court of its jurisdiction over the matter.

In response, the court highlighted the steps that the EEOC must follow in order to bring a lawsuit itself:

First, the EEOC must receive a charge filed on behalf of an employee alleging workplace discrimination. Next, the EEOC must provide notice of the charge to the employer. Then, the EEOC must conduct an investigation into the charge. After its investigation, the EEOC must make a reasonable cause determination. And finally, if the EEOC determines reasonable cause exists, it must engage in conciliation efforts. Only once all of these preconditions have been met can the EEOC file suit.

Id. (internal citations omitted). The court found that the EEOC had followed each step here. Specifically, the court maintained that the EEOC could find evidence of Baxley's claims of discrimination, sufficient to support its lawsuit, during the course of its "reasonable investigation" into the claims of his coworkers.

The court also disagreed with Scott Medical's assertion that the EEOC was required to bring a new charge for Baxley, as it was a distinct claim. The court stated that Baxley's claim of sex discrimination was in fact the same as the sex discrimination claims made by his female coworkers. The discrimination claimed by Baxley and by the women was exactly the same: they were all "discriminated against and harassed 'because of sex.'" *Id.* at * 3.

Scott Medical further argued that the EEOC had failed to provide sufficient notice to it with respect to the EEOC's investigation into Baxley's claims. The court was unpersuaded by this argument, noting that the EEOC had noted Baxley's claims and the supporting evidence in its original determination letter, requested Baxley's personnel file, met with Scott Medical's

President to discuss Baxley's claims, and told Scott Medical's attorney that it had unearthed new discrimination complainants during its investigation.

B. Substantive Analysis

Scott Medical also argued that Title VII does not prohibit discrimination based upon sexual orientation.

The court boiled down the EEOC's arguments to this: "[W]hether, but for Mr. Baxley's sex, would he have been subjected to this discrimination or harassment." *Id.* at * 5. Its answer was no. The court found "no meaningful difference between sexual orientation discrimination and discrimination 'because of sex.'" *Id.* "Because of sex" has been broadly interpreted, and includes a prohibition of sex stereotyping. The present circumstances were likened to those of a female employee who is told to dress more femininely, act more femininely, and wear make-up and jewelry in order to obtain a promotion. Sex stereotyping includes assumptions about how a person's sexuality should conform to his or her sex.

The court further cited decisions from across the country where federal courts found that Title VII protects against discrimination on the basis of sexual orientation, as well as the Supreme Court's opinion legalizing same-sex marriage. Title VII, according to the court, was "designed to eradicate" this exact type of discrimination in the form of sex stereotyping. As such, Scott Medical's motion to dismiss was denied.

TAKEAWAYS FOR EMPLOYERS

Protections against discrimination continue to expand throughout the country. Employers need to continue to be prepared to receive a variety of complaints, and to be aware of different variants of complaints that may surface. Employers should update and maintain thorough policies and procedures for handling such complaints, and ensure that these policies and procedures are carried out to the letter. The need to shore up internal investigation procedures is more important now than ever.

Additionally, employers should understand the role that the EEOC (and local variants) plays in investigating discrimination complaints, and bringing lawsuits against employers. This will allow employers to understand what various EEOC actions and requests mean, and the resources necessary to reserve when confronted with one. EEOC investigations can be wide-ranging, and may lead to issues not covered by the initial complaints. Investigations launched by the EEOC cannot be taken casually -- employers should contact their attorneys if they are uncertain about what an EEOC notice means or how to respond.

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