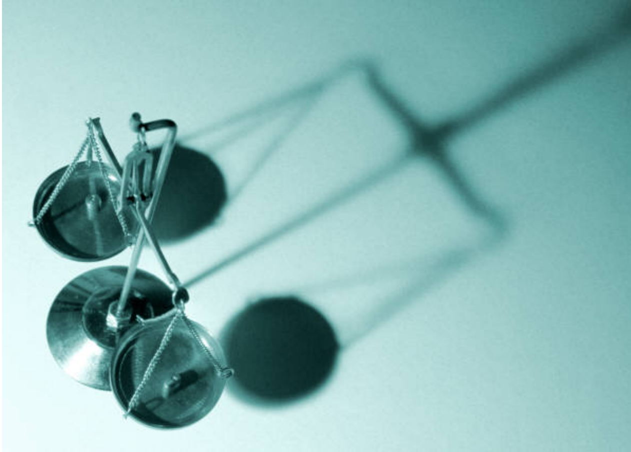
LABOR AND EMPLOYMENT LAW UPDATE



SEXUAL ORIENTATION IN THE PRIVATE WORKPLACE

Despite fierce political opposition, legal protection against sexual orientation discrimination in the private workplace is growing in the U.S. On January 31, 2006, Washington Governor Christine Gregoire signed a law outlawing such discrimination in her state. A similar law became effective in Illinois on January 1, 2006. On February 6, 2006, Governor Ted Kulongoski established a taskforce to study the need for legislation in Oregon. Private employers with a multi-state presence should therefore audit their employment policies to make sure they are in compliance with applicable laws.

WHAT IS SEXUAL ORIENTATION DISCRIMINATION? This type of employment discrimination generally involves an applicant's or employee's actual or *perceived* heterosexuality, homosexuality or bisexuality.

FEDERAL LAW: There is no federal law expressly prohibiting sexual orientation discrimination by private employers. Title VII only bars discrimination based upon sex.

In *Oncale v. Sundowner Offshore Services, Inc.*, a unanimous Supreme Court held that unlawful sex discrimination may exist even where the alleged victim and perpetrator are of the same sex. The Court identified three types of claims which are available to a plaintiff alleging same-sex harassment:

1. The harasser makes "explicit or implicit proposals of sexual activity" and there is "credible evidence that the harasser was homosexual."

2. The harasser "is motivated by general hostility to the presence of" members of the same sex in the workplace.

3. The harasser treats his or her own gender more harshly in a mixed-sex workplace.

STATE LAW: Eighteen jurisdictions now have statutes which expressly address sexual orientation discrimination in private employment:

California	Connecticut
District of Columbia	Hawaii
Illinois	Maine
Maryland	Massachusetts
Minnesota	Nevada
New Jersey	New Hampshire
New Mexico	New York
Rhode Island	Vermont
Washington	Wisconsin

MUNICIPAL LAW: Municipalities across the nation also have ordinances criminalizing sexual orientation discrimination by private employers. The following is only a sampling:

Atlanta	Austin
Cincinnati	Cleveland
Columbus	Denver
Detroit	Kansas City
Louisville	Miami-Dade
New Orleans	Philadelphia
Phoenix	Pittsburgh
Portland	St. Louis
Tampa	Tucson

STATE TORT LAW: Even in jurisdictions which do not expressly prohibit discrimination based upon sexual orientation, creative claimants may resort to torts of general application. These torts include defamation, invasion of privacy, intentional infliction of emotional distress, breach of covenant of good faith and fair dealing and wrongful termination.

SUPREME COURT AGAIN ADDRESSES EVIDENTIARY BURDENS IN BIAS CASES

For more than 30 years, the U.S. Supreme Court has been attempting to define the evidentiary burdens borne by claimants in proving discrimination in employment. The latest effort is the February 21, 2006 opinion in *Ash v. Tyson Foods, Inc.*

FACTUAL BACKGROUND: Two African American employees of Tyson Foods alleged that they were denied promotions to supervisory positions because of their race in violation of Title VII of the Civil Rights Act of 1864 and the Civil Rights Act of 1866. To support their claims, the employees identified two common pieces of evidence: (1) discriminatory remarks by the person who made the promotion decisions; and (2) evidence showing that the qualifications of the unsuccessful applicants were superior to the successful applicants.

DISCRIMINATORY REMARKS: The Eleventh Circuit had determined that referring to each of the claimants as "boy" was insufficient as a matter of law to be evidence of discriminatory animus. The Supreme Court disagreed and reversed:

> Although it is true that the disputed word will not always be evidence of racial animus, it does not follow that the term, standing alone, is always benign. The speaker's meaning may depend upon various factors including context, inflection, tone of voice, local custom, and historical usage.

COMPARATIVE QUALIFICATIONS: The Eleventh Circuit determined that the disparity in qualifications alleged by the claimants was not significant. The following language was used to justify the judgment, as a matter of law, in favor of the employer:

> Pretext can be established through comparing qualifications only when the "disparity in qualification is so apparent as virtually to jump off the page and slap you in the face."

The Supreme Court effectively reprimanded the Eleventh Circuit for its use of hyperbole and described the language as "unhelpful and imprecise." The Eleventh Circuit was instructed to formulate a better test on remand.

THE UPSHOT: Since they address the motive behind employment practices, discrimination cases are necessarily complex. Simple evidentiary tests may be easy to apply and enable courts to dispose of weak cases on summary judgment, but they have not fared well with the Supreme Court. *Tyson Foods* sends the message that each case must be analyzed on its own merits rather than on the basis of "one size fits all" tests. If the message is heeded, it may become harder to win summary judgments.

DISCLAIMER

This paper is not intended to provide legal advice in general or with respect to any particular factual scenario. Any such advice should be obtained directly from retained legal counsel.

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