Title VII of the Civil Rights Ac Updates Feb. 2024

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Title VII of the Civil Rights Act

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Title VII Claims

Discrimination claims that rely on indirect or circumstantial evidence are governed by a burden-shifting framework.

Plaintiff must first establish a prima facie case of discrimination: the plaintiff must show that she

(1) is a member of a protected group;
(2) was qualified for her position;
(3) suffered an adverse employment action; and
(4) was treated less favorably than other similarly situated employees,
or
was replaced by a person who was not a member of her protected group.

Title VII Claims – Retaliation

The plaintiff must first establish a prima facie case of Title VII retaliation, which has three elements:

(1) the employee engaged in [an] activity protected by Title VII;

(2) an adverse employment action occurred; and

(3) a causal link exists between the protected activity and the adverse action.

Title VII Sexual Harassment- Hostile Work Environment

(1) the employee belongs to a protected group;
(2) the employee was subjected to unwelcome harassment;
(3) the harassment complained of was based on the protected characteristic;
(4) the harassment complained of affected a term, condition, or privilege of employment; and
(5) the employer knew or should have known of the harassment and failed to take prompt remedial action.

However, when “the alleged harassment is perpetrated by a supervisor with immediate or successively higher authority, the employee need only satisfy the first four elements set forth above.”

Title VII of the Civil Rights Act

- Applicants, employees and former employees are protected from employment discrimination based on:
  - race,
  - color,
  - religion,
  - sex (including pregnancy, gender identity),
  - national origin,
  - age (40 or older),
  - disability
  - genetic information (including family medical history).

Bostock v. Clayton County, June 15, 2020

- Three cases
  - Bostock - a child welfare services coordinator, was fired after his employer learned he had joined a gay softball league.
  - Donald Zarda - a skydiving instructor, was fired after his employer learned he was gay.
  - Aimee Stephens - a funeral director, was fired after her employer earned that she was going to transition from male to female.

- SCOTUS held that employment discrimination based on sexual orientation (Bostock and Zarda) or transgender status (Aimee Stephens) is discrimination "because of sex," and is therefore unlawful under Title VII.

- SCOTUS held that Title VII makes it unlawful for a covered employer to take an employee's sexual orientation or transgender status into account in making employment-related decisions.

Oct. 2023 - Proposed EEOC Guidance – Harassment Based on Sexual Orientation and Gender Identity

•epithets regarding sexual orientation or gender identity;

•physical assault;

•harassment because an individual does not present in a manner that would stereotypically be associated with that person's gender;

•intentional and repeated use of a name or pronoun inconsistent with the individual's gender identity (misgendering); or

•the denial of access to a bathroom or other sex-segregated facility consistent with the individual's gender identity.

Oct. 2023 - Proposed EEOC Guidance – Harassment Based on Sexual Orientation and Gender Identity

Guidance Hypothetical example of harassment based on gender identity

- fast-food employee who identifies as female is "frequently" referred to by supervisors and coworkers by the wrong name and pronouns and questioned about "her sexual orientation and anatomy and asserted that she was not female."

- harassment against the employee by "customers" who "intentionally misgendered" her may be considered as part of the harassment allegations against an employer where "her supervisors did not address the harassment and instead reassigned her to duties outside of the view of customers."

- sex-based "stereotyping," regardless of whether the stereotyping is positive or negative, may also constitute harassment or discrimination, including conduct based on assumptions about "the expression of sexual orientation or gender identity."

TX SB 45 and HB 21 effective 9.1.21
TX Sexual Harassment

Expanded definition of "employer" - "people who act directly or indirectly in the interests of an employer in relation to an employee."

Could include -

Supervisors? Co-workers? Human resources professionals? Independent contractors? Staffing agencies?

TX SB 45 and HB 21 effective 9.1.21
TX Sexual Harassment

New definition of "unlawful employment practice" An employer commits an "unlawful employment practice" if sexual harassment of an employee occurs and the employer or the employer's agents or supervisors:
(1) know or should have known that the conduct constituting sexual harassment was occurring; **and**
(2) fail to take **immediate and appropriate** corrective action. Section 21.142.(1) –(2).

Religious Discrimination

"To establish a prima facie case of religious discrimination under Title VII, the plaintiff must present evidence that
(1) [he] held a bona fide religious belief,
(2) [his] belief conflicted with a requirement of his employment,
(3) [his] employer was informed of [his] belief,
and
(4) [he] suffered an adverse employment action for failing to comply with the conflicting employment requirement.

SCOTUS Religious Accommodation Requests – *Groff v. DeJoy*, June 29, 2023

- Gerald Groff, USPS worker - required to deliver packages on Sundays
- Requested religious accommodation - Christian - Sundays must be devoted to worship and rest. Denied - undue hardship.
- Groff sued under Title VII, asserting not an undue hardship.
- Lower courts dismissed his case because under old "de minimis" undue hardship standard – the defense was easily met because granting the requested accommodation
    - imposed a burden on his coworkers,
    - disrupted the workplace and workflow, and
    - diminished employee morale.

SCOTUS Clarified Undue Hardship Standard for Religious Accommodation– *Groff v. DeJoy*, June 29, 2023

"would result in substantial increased costs in relation to the conduct of its particular business."

- fact-specific inquiry – consider all factors at hand, such as the particular accommodations at issue and their practical impact in light of the nature, size, and operating costs of an employer.
- Some additional costs would not be sufficient; rather, the requisite burden or adversity must rise to an "excessive" or "unjustifiable" level.
- accommodation's impact on co-workers may be relevant to the analysis, but only insofar as it impacts the conduct of the employer's business. Animosity to a particular religion or to the notion of accommodating religious practice is not "undue."
- Title VII requires an employer to reasonably accommodate an employee's practice of religion – not merely address the reasonableness of a particular accommodation. This includes consideration of other possible accommodations, such as voluntary shift swapping in the case of *Groff*.

Hamilton v. *Dallas County*, 5th Cir. Aug. 18, 2023.

- Nine female correctional officers alleged Dallas County implemented a new work schedule policy in which male officers could elect to take their weekly two days off on both Saturday and Sunday, whereas female officers could only elect to take one weekend day off, in addition to one weekday.

- Lower court dismissed the case because work scheduling disparities were not an "ultimate employment decision" under the previous court case.

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PREGNANT WORKERS FAIRNESS ACT

- Employers with 15 or more employees - reasonable accommodation to qualified employees for the known limitations related to pregnancy, childbirth or related medical conditions, unless undue hardship.

“Qualified” – means - inability to perform the essential functions even if it is for a temporary period, can be performed in the near future and the inability to perform the essential function can be reasonably accommodated.

Prohibitions include:

- Failing at interactive process;
- Denying employment opportunities
- Requiring leave instead of reasonable accommodation
- Taking adverse action in terms, conditions, or privileges of employment

EEOC PWFA Proposed Regulations

- Limitations – not the the level of "disability" under the ADA.
  - Limitations can be "modest, minor, and/or episodic impediment or problem."
  - Limitations includes a need or problem related to maintaining the pregnant employee's health or the health of their pregnancy. It further includes circumstances in which the employee is merely seeking health care related to her pregnancy.
- "Pregnancy" - is also defined broadly to include past pregnancies and potential or intended pregnancy. Examples of "related medical conditions:
  - termination of pregnancy;
  - infertility and fertility treatment;
  - anxiety, depression, psychosis, or postpartum depression;
  - menstrual cycles; use of birth control; and
  - lactation and conditions related to lactation.

EEOC PWFA Proposed Regulations

- Like the ADA, the PWFA protects "qualified" employees or applicants who, with or without reasonable accommodation, **can** perform the essential job functions of their job.

- In addition, the PWFA expands "qualified" employees to also include those who **cannot** perform one or more essential job function if:
- (1) the inability is for a "temporary period,"
- (2) the essential job function can be resumed "in the near future," and
- (3) the inability to perform the job function can be reasonably accommodated.

- The proposed regulations define "in the near future" as 40 weeks, but they recognize that it does not mean that the essential function must always be suspended for 40 weeks and depends on what the employee needs.

EEOC PWFA Proposed Regulations

- The proposed regulations provide examples of possible reasonable accommodations under the PWFA, including, among other things:
  - frequent breaks,
  - sitting/standing,
  - schedule changes and part-time work,
  - telework,
  - job restructuring, and
  - temporarily suspending one or more essential job functions. (Temporarily suspending an essential job function is not generally considered "reasonable" under the ADA).

- The proposed regulations prohibit employers from requiring a qualified employee to take a leave of absence, paid or unpaid, if another reasonable accommodation can be provided that would allow the employee keep working.

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