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DISABILITY DISCRIMINATION

Delray Beach gets a break on damages after jury finds discrimination

by Tom Harper
The Law and Mediation Offices of G. Thomas Harper, LLC

A jury in Palm Beach County awarded $762,000 to a former employee of the City of Delray Beach in a disability discrimination case. The jury found that the city had denied the Vietnam veteran a reasonable accommodation for his disability and constructively discharged him because of his handicap. The jury awarded $262,000 in lost wages (back pay) and $500,000 in compensatory damages for pain and suffering. An appeals court, however, recently reversed the jury's award of $500,000 to the employee. Here is what happened.

Facts

Robert DeSisto, a Vietnam veteran in his 60s, worked as an operator in the city of Delray Beach's water treatment plant for 29 years. During the Vietnam war, DeSisto served as a crew chief and door gunner on a Chinook helicopter with the 101st Airborne Division. He earned the Bronze Star and the Air Medal for completing 25 combat missions. Years after returning from Vietnam, he was diagnosed with post-traumatic stress disorder (PTSD).

In 2010, the water plant superintendent informed all operators that they would be required to obtain a commercial driver's license (CDL) within six months. DeSisto told his supervisor that his PTSD prevented him from taking the CDL exam, which would require him to drive a full-size dump truck containing 80,000 gallons of sludge on I-95 with a driver's license inspector at his side. He asked to be excused from the new requirement.

DeSisto explained that being exposed to loud noises and stressful situations such as driving on congested roads sometimes triggered "flashbacks" and "panic attacks" that made him "freeze up" and unable to function. He said he was terrified that he would hurt someone in an accident. In a television interview, he stated that he believed he would suffer a "panic attack" due to PTSD if he had to sit behind the wheel of a dump truck with an inspector at his side.

DeSisto provided his supervisor with medical documentation in which doctors from the U.S. Department of Veterans Affairs (VA) explained that his condition prevented him from driving large trucks on the highway. His supervisor sent his medical documentation to HR, but HR determined that DeSisto wasn't eligible for an exemption from the CDL requirement. He then asked to be moved to a different shift that didn't require a CDL, but that request was also denied.

DeSisto claimed that city officials strongly recommended that he retire.

His plant manager gave him a six-month notice and set a June 2010 deadline for having his CDL. When June arrived and he still hadn't been offered an accommodation, DeSisto decided to quit his job. He then filed suit, alleging the city discriminated against him based on his disability in violation of the Florida Civil Rights Act (FLCRA) and "constructively discharged" him.

DeSisto's disability claim was tried before a jury in state court in Palm Beach County. At trial, two of his friends and a fellow member of his PTSD support group testified that he was stressed and fearful of obtaining the CDL. After deliberating for only 45 minutes, the jury returned a verdict in his favor and awarded him $762,000 in damages—$262,000 in back pay and $500,000 in compensatory damages for pain and suffering. The jury found that the city had denied DeSisto a reasonable accommodation for his PTSD and constructively discharged him because of his disability.

Interviewed after the trial, DeSisto's lawyer, Sid Garcia, said that e-mails sent by city officials belied the city's claim that it couldn't offer DeSisto an accommodation. "They buried themselves with their own e[-]mails," the lawyer stated. In addition, Garcia claimed there was evidence that other water treatment workers—one with a back injury and another with knee problems—were exempted from the licensing requirement. Garcia asserted that DeSisto was denied an accommodation because his disability is mental rather than physical.

DeSisto's lawyer was awarded $41,000 in legal fees on top of the $762,000 in damages. The city appealed the verdict to the Florida 4th District Court of Appeals (DCA).

Court's decision

In July 2016, the 4th DCA upheld the jury's verdict that the city illegally forced DeSisto to leave his job because his panic attacks prevented him from complying with the new requirement that he be able to drive a 20-ton truck as part of his job. In a victory for the city, however, the appeals court reversed the jury's award of $500,000 for emotional distress. The court ruled that DeSisto "presented no proof of physical injury or psychological evidence of emotional pain and suffering as the result of the city's discrimination."

Moreover, because the employer in this case is a municipality, DeSisto could recover a maximum of $100,000 in damages under the Florida law in effect at the time of the discrimination. The state law limiting liability for all state agencies and subdivisions of the state, counties, local municipalities, and corporations that act as instruments of the state, counties, or municipalities provided in pertinent part:

> Neither the state nor its agencies or subdivisions shall be liable to pay a claim or a judgment by any one person which exceeds the sum of $100,000. . . . However, a judgment or judgments may be claimed and rendered in excess of these amounts and may be settled and paid pursuant to this act up to $100,000 . . . and that portion of the judgment that exceeds these amounts may be reported to the Legislature, but may be paid in part or in whole only by further act of the Legislature.

Since DeSisto left his job in 2010, the Florida Legislature has increased the damages cap to $250,000. However, to get more money from the city of Delray Beach, DeSisto will have to persuade the legislature to pass a claims bill.

After the appeals court reduced the jury verdict, Garcia stated that DeSisto hoped to reach a settlement with the city or ask for a new trial on the issue of damages. For what it's worth, Garcia also won an $880,000 verdict in a case in which a veteran on the West Palm Beach police force claimed he was terminated because the city suspected he had symptoms of "battle fatigue." *City of Delray Beach v. Robert DeSisto*, Case No. 4D13-4207 (Fla. 4th DCA, July 20, 2016).

Takeaway

After the favorable jury verdict on his FLCRA claim, DeSisto filed federal Rehabilitation Act claims against the city based on the same facts. On appeal, the federal court of appeals in Atlanta dismissed the federal claims, noting that because DeSisto won a jury verdict in the first lawsuit, he couldn't file a second lawsuit based on the same facts.

Employers should be aware that mental conditions can constitute a disability, just like physical injuries and illnesses. Cases like DeSisto's can go on for years and cost you thousands of dollars in legal expenses. And even if you're represented by a staff lawyer (like the city was), you can be held responsible for the employee's attorneys'

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ASK ANDY

Time to revisit your standard separation agreement?

by Andy Rodman
Stearns Weaver Miller Weissler
Alhadeff & Sitterson, P.A.

Q *I'm the HR director for a company with 750 workers. We have a severance policy under which employees who are terminated "without cause" (e.g., through a reduction in force) receive severance of one week's pay per every year of service if they sign a general release. I was recently informed that even if a departing employee signs the release and accepts the severance, he can still file a charge with the Equal Employment Opportunity Commission (EEOC). Is that correct? If so, that doesn't seem fair.*

A Sorry to break the bad news, but, as I've told my teenage daughters, life isn't always fair. An employee can file a charge of discrimination with the EEOC even if he signs a release and accepts severance pay, and there's little (or nothing) you can do about it. How can that be?

The EEOC takes the position that filing a charge of discrimination with the agency is an unwaivable right. It's akin to the right to be paid minimum wage and overtime: Just like nonexempt employees can't agree to work for less than the minimum wage or forgo overtime compensation, employees can't agree to waive their right to file an EEOC charge. The EEOC's rationale is that when it investigates allegations asserted in a charge of discrimination, it's protecting the *public at large*, not merely the interests of the charging party.

It's important to review the language in your standard separation and release agreements. It's not enough to refrain from expressly conditioning severance on an agreement to forgo filing an EEOC charge. The agreement shouldn't be written in a way that could even be reasonably read to prohibit the filing of a charge.

For example, "Employee releases and waives all claims arising under federal, state, and local law" could be read as prohibiting the filing of a charge even though it doesn't expressly state that. However, that language could be salvaged by including a "carveout" provision stating, "Nothing in this agreement prohibits Employee from filing a charge of discrimination with the EEOC or from participating in any investigation or proceeding pending before the EEOC." While you may not want to tell a departing employee that he can take your severance payment and stroll over to the EEOC to file a charge against your company, you risk having your release invalidated if you don't include a carveout.

But even though a departing employee may sign a release, take your money, and run to the EEOC, that doesn't mean the release is worthless. A general release of claims has significant value. Although the EEOC likely won't care about the executed release (and probably will require you to respond to the charge allegations), you may assert the release as a defense to any lawsuit a former employee files in court after he receives a "right-to-sue" notice from the EEOC. So the release may save you from spending tens of thousands of dollars defending allegations of discrimination or retaliation in court.

Also, there's some authority for the proposition that if it's drafted correctly, a separation and release agreement may prohibit an employee from collecting any money in connection with an EEOC proceeding. In other words, an employee may file a charge of discrimination with the EEOC, but he may not be able to collect any money in connection with that charge.

Lately, the EEOC has taken an aggressive position on separation and release agreements. In addition to scrutinizing language that expressly or implicitly purports to waive an employee's right to file a charge or participate in an EEOC proceeding, the agency has scrutinized overly broad confidentiality agreements and nondisparagement provisions. And it isn't just the EEOC. In August 2016, the Securities and Exchange Commission (SEC) settled with BlueLinx Holdings over severance agreements containing provisions that, according to the SEC, undermined its whistleblower program and protections.

If you haven't done so lately, now is the time to have your employment counsel review your standard separation and release agreement. You don't want to learn the hard way that your agreement may contain invalid provisions.

Andy Rodman is a shareholder and director at the Miami office of Stearns Weaver Miller. If you have a question or issue that you would like Andy to address, e-mail arodman@stearnsweaver.com or call him at 305-789-3255. Your identity will not be disclosed in any response. This column isn't intended to provide legal advice. Answers to personnel-related inquiries are highly fact-dependent and often vary state by state, so you should consult with employment law counsel before making personnel decisions. ✤

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fees and court costs if you lose. To head off expensive court fights, make sure you have a process in place for thoroughly reviewing accommodation requests and documenting your legal basis for any adverse decisions.

You may contact the author at tom@employmentlawflorida.com. ✤

LITIGATION

Florida appellate court decision highlights open issue in defamation cases

by Jeff Slanker
Sniffen and Spellman, P.A.

Labor and employment news tends to focus on discrimination and wage and hour claims, but the threat of employment-related tort (wrongful act) claims should also concern Florida business owners and managers. Tort claims can come in the form of defamation claims or allegations of tortious interference with business relationships. An appellate court in Florida recently highlighted a split of opinion in Florida courts regarding the fundamental nature of tort claims and asked the Florida Supreme Court to wade into the battle. The decision of the appellate court is important for Florida employers because it highlights some of the less publicized claims they must face or account for every day.

Facts

Dr. Sualeh Kamal Ashraf began working as a physician in the cardiology department at Florida Hospital Apopka in 2006. His clinical privileges were suspended in 2007, and a hospital committee conducted a formal investigation that led to a recommendation that his clinical privileges be revoked permanently. Ashraf had the opportunity to dispute the findings and did so. The findings were ultimately upheld and approved by the hospital's board of directors, and the hospital permanently revoked his clinical privileges.

As required by federal law, the hospital reported the revocation to the National Practitioner Data Bank (NPDB), a repository containing information regarding healthcare practitioners and providers. The NPDB generates a confidential report to be disseminated to certain authorized entities upon request.

Ashraf filed a lawsuit against the hospital alleging it had defamed him. Specifically, he alleged that the hospital committee's report contained false and defamatory information that directly resulted in the loss of employment opportunities. The trial court dismissed the claim as time-barred under a legal theory called the "single publication rule," and the doctor appealed.

Appellate court's decision

The appellate court affirmed the decision of the trial court to dismiss the lawsuit and held that a two-year statute of limitations barred Ashraf's claims. The decision hinged on the "single publication rule."

The statute of limitations for defamation claims (libel or slander) is two years, and it begins to run at the time the defamatory material is published or disseminated, not when the individual discovers the defamatory material. The "multiple publication rule" means that each communication or dissemination of defamatory material amounts to a separate claim.

However, there is an exception to the single publication rule. The single publication rule provides that a "cause of action for damages founded upon a single publication or exhibition or utterance . . . shall be deemed to have accrued at the time of the first publication or exhibition or utterance thereof in this state." Essentially, the rule is meant to confine trials to one type or instance of defamatory material and not engender separate trials for each publication of the material.

The appellate court held that the single publication rule applied to Ashraf's claims and that the statute of limitations was two years, running from the date the information in the committee's report was first disseminated or published, not from the date of each republication by the NPDB as Ashraf alleged. Stated differently, the provision of the report to entities to which it was legally required to be disseminated did not result in a new statute of limitations period. The court reasoned that the doctor had the opportunity to rebut the report and had knowledge of the report's contents when it was first published. The court also noted the danger in allowing plaintiffs to cause a new claim to accrue merely by, for example, applying for a job, which would trigger the dissemination of the report. *Ashraf v. Adventist Health System/Sunbelt, Inc.*

Takeaway for employers

The news headlines may highlight other aspects of labor and employment law, such as the impact of the U.S. Department of Labor's (DOL) new overtime rules, expanded protections for transgender individuals under civil rights laws, and the specter of whistleblower claims and provisions in an increasing number of statutes, but classic employment torts such as defamation should still be part of business owners' and managers' risk-management calculus. This case is important because it speaks to a primary defense to defamation claims—the single publication rule.

The Florida Supreme Court may weigh in on the defamation debate soon enough since the appellate court actually asked the supreme court to essentially resolve the question of whether the single publication rule bars defamation claims based on information that is more than two years old. The resolution of the question will

play a role in the exposure of employers to defamation claims and may lead to more defamation claims that can move forward rather than being dismissed as time-barred.

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WAGE AND HOUR LAW

New DOL exemption rules: What if you need to reclassify employees?

Employees must meet both the duties test and the salary-basis test to qualify for an exemption under the Fair Labor Standards Act (FLSA). The duties test, which looks at what the employee actually does in her job, determines whether she fits into one of the three categories of the white-collar exemption: executive, administrative, or professional. Under the new overtime rules, the salary threshold has been raised from $23,600 to $47,476, effective December 1, 2016, with automatic increases every three years. In response, employers will need to consider whether their exempt employees' wages will meet the new requirements or whether they should reclassify certain jobs to meet the requirements.

Perform a time study

One way to address this issue and create documentation that would be useful in a DOL audit is to perform a time study. To do that, you must create a list of employees' job duties and assess—or, in some instances, guesstimate—how much time employees spend regularly performing each of those duties. In general, if an employee spends 50 percent or more of his time performing nonexempt duties, he won't be considered exempt, even if he performs other exempt duties. When you're evaluating employees' job duties, get their input about what they believe their duties are and the amount of time each task takes.

You should be aware that a number of problems can affect the duties test, causing your managers to lose their exemption. For example, if a hospital has a critical shortage of nurses on the floor, the director of nursing may have to spend much of her time providing direct patient care, a task that's traditionally hourly nonexempt work. Or the software you just bought isn't performing as promised and many functions you believed would be automated must still be performed manually, requiring much more routine labor by employees you would otherwise consider exempt managers.

Professional exemption

As noted in DOL Fact Sheet 17D, the professional exemption is generally deemed the "learned professional category," and the primary duty must be "work requiring advanced knowledge . . . which is predominantly intellectual in character . . . and requires exercise of discretion and judgment." This exemption has generally been applied to people like doctors, lawyers, and architects who have significant education and advanced degrees, and their jobs often require licensure by a third party.

AGENCY ACTION

NLRB loosens standard for unionizing temp workers. The National Labor Relations Board (NLRB) has made it easier for unions to organize temporary workers. In July 2016, the NLRB decided 3-1 in the *Miller & Anderson* case that it would return to the standard established in a Clinton-era decision (*M.B. Sturgis, Inc.*). The ruling overturned the *Oakwood Care* case decided during the George W. Bush administration. Under the *Oakwood* standard, unions couldn't petition the NLRB to allow permanent and jointly employed temporary workers in a single bargaining unit unless the employer consented. The new *Miller & Anderson* ruling removes the requirement to obtain employer consent.

EEOC proposes delaying deadline on new EEO-1 report. The Equal Employment Opportunity Commission (EEOC) announced in July that its proposal to collect pay data through the EEO-1 survey includes a change in the due date. The revised proposal moves the deadline for employers to submit the EEO-1 survey from September 30, 2017, to March 31, 2018. The EEOC said the change is to simplify reporting by allowing employers to use existing W-2 pay reports, which are calculated based on the calendar year. In January, the EEOC proposed using the EEO-1 survey to collect summary pay data from employers with 100 or more employees, including federal contractors. The EEOC and the U.S. Department of Labor's (DOL) Office of Federal Contract Compliance Programs (OFCCP) have said they want to collect pay data to help identify possible pay discrimination.

OSHA delays enforcement provisions of new rule. The Occupational Safety and Health Administration (OSHA) announced in June that it has delayed enforcement of the antiretaliation provisions in its new injury and illness tracking rule. Originally scheduled to begin August 10, enforcement now will begin November 1. Under the rule, employers are required to inform workers of their right to report work-related injuries and illnesses without fear of retaliation, implement procedures for reporting injuries and illnesses that are reasonable and do not deter workers from reporting, and incorporate the existing statutory prohibition on retaliating against workers for reporting injuries and illnesses.

EEOC touts systemic program. The EEOC has issued a review of its systemic program over the past 10 years that reports success in tackling systemic discrimination. The review reports a 94 percent success rate in systemic lawsuits. It also says the EEOC tripled the amount of monetary relief recovered for victims in the past five fiscal years from 2011 through 2015, compared to the monetary relief recovered in the first five years after the Systemic Task Force Report of 2006. ✤

Creative professional exemption. The creative professional exemption, a subcategory of the professional exemption, primarily involves issues of "invention, imagination and originality." It's a difficult exemption to assess because it's very hard to determine the degree of creativity necessary to qualify. In an opinion letter, the DOL indicated that graphic artists who create vinyl wraps for buses and cars aren't "artists" but are "skilled employees who perform manual physical work . . . to reproduce and install an artistic product."

Another opinion letter addressed an employee whose primary duty was "marketing and promotional work" to bring business to a city. The DOL determined the creative professional exemption didn't apply but the employee did qualify for a combination of the executive and administrative exemptions based on the entire scope of his duties, including supervising others and exercising "discretion and independent judgment" on matters that had "significant economic impact on the city."

HCE exemption. On December 1, 2016, the minimum salary requirement for highly compensated employees (HCEs) rises from $100,000 to $134,004, which reflects the 90th percentile of earnings by full-time salaried workers nationally. Total annual compensation for HCEs (or any employees) doesn't include alternative benefits, such as health insurance costs, life insurance premiums, and retirement plan contributions, which can be effective recruiting tools for HCEs and are usually expected by such employees. HCEs are required to pass a duties test that may incorporate factors found in both the professional and the administrative exemptions. Typically, an HCE tends to fall within either the professional or the executive exemption and is represented by employees who are doctors, nurse practitioners, architects, CEOs, CIOs, CFOs, or employees who are in similar professions.

Executive exemption

To qualify for the executive exemption, an employee must supervise at least two full-time employees or the equivalent number of part-time, contract, or seasonal employees. The more people the employee supervises, the more likely the executive exemption will apply. If the work the executive performs is identical to the work performed by the people she supervises, it's less likely the exemption will apply. An executive employee also must have the authority to hire and fire or, at a minimum, have serious input into hiring, firing, and disciplinary decisions.

Business owner exemption

Some start-ups think that instead of paying minimum wage, they can give employees some stock, making them part owners, and call it even. However, under the FLSA, the exemption for business owners applies only if the owner has a bona fide 20 percent or more equity interest in the organization and is actively engaged in the management of the company. So a software designer whose salary doesn't meet the standard salary-basis test for exempt computer professionals isn't going to be rendered exempt because you give him a one percent stock option for future stock.

Administrative exemption

The administrative exemption is probably the most misused exemption of all. An exempt administrative employee must directly assist in running the company. A key element for the exemption is the discretion and independent judgment exercised by the employee. The DOL has consistently found that employees who work within algorithms or parameters, perform routine jobs, or are strongly guided by the supervision of others don't fall within any of the exempt categories. As a result, paralegals who work with attorneys have been found nonexempt, as have lending officers and mortgage brokers.

Being important doesn't necessarily make you exempt. For example, if an accounting manager simply performs the same tasks as a bookkeeper, the exemption is unlikely to apply. However, if the accounting manager is in fact the CFO with managerial and budgeting authority and other significant responsibilities, she is probably exempt.

Outside sales exemption

The outside sales exemption is a very specific exemption that requires the employee to be "customarily and regularly engaged away from the employer's place or places of business." It doesn't include sales made by mail, telephone, or the Internet or from an alternate "fixed site" of business, including the employee's home office. Basically, it requires that the employee consistently move or travel from place to place and actually visit customers.

Bottom line

The new rules will require some thought and planning on the part of most employers. To be effective, any planning has to take into consideration the actual

current and prospective job classifications of the affected employees. ✤

TITLE VII

From LBJ to LGBT: the evolution of Title VII

In the landmark sexual harassment case Meritor Savings Bank v. Vinson, U.S. Supreme Court Justice William Rehnquist wrote about Title VII of the Civil Rights Act of 1964, "The prohibition against discrimination based on sex was added to Title VII at the last minute . . . and we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex.'" Since then, the interpretation of Title VII's prohibition of discrimination based on sex has expanded far past barring the exclusion of women. Here's a look at that evolution and the possible next expansion of Title VII.

In the beginning

The first time Lyndon B. Johnson addressed a joint session of Congress as president, he said, "No memorial oration or eulogy could more eloquently honor President Kennedy's memory than the earliest possible passage of the civil rights bill for which he fought so long." Six months later and after much contentious debate, the Civil Rights Act of 1964 was passed by both houses of Congress and signed into law, prohibiting discrimination based on race, color, religion, sex, and national origin. Title VII of the Act covers all private employers, state and local governments, and educational institutions with 15 or more employees.

At the time, women were often relegated to less prestigious and lucrative positions than their male counterparts. According to Northwestern University law professor and author of *Gender Nonconformity and the Law* Kimberly A. Yuracko, "Title VII sought to and did end this kind of categorical group-based discrimination." What came next may have surprised some of the original backers of the law.

Sexual stereotypes

"In the decades that followed, discrimination became more subtle and complex," says Yuracko. While women weren't excluded from the workplace, they often were expected to fit a certain mold that involved gender stereotypes of behavior and dress. In *Price Waterhouse v. Hopkins*, the U.S. Supreme Court held that the prohibition against sex discrimination under Title VII bars discrimination based on sex stereotypes.

In that case, a female senior manager at Price Waterhouse was denied partnership partly because she was considered "macho." To improve her chances of becoming a partner, she was told to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." The Supreme Court found that those comments indicated gender discrimination and that Title VII bars not only discrimination because an employee is a woman but also sex stereotyping because she fails to "act like" a woman.

WORKPLACE TRENDS

Research shows culture gap between employers, employees. A new study claims that employees and employers have differing views on company culture, with employees viewing culture more negatively than management. The study from leadership training company VitalSmarts shows that leaders say they want innovation, initiative, candor, and teamwork, but employees feel management instead wants obedience, predictability, deference to authority, and competition with peers. The study, which surveyed more than 1,200 employees, managers, and executives, found that the more senior a person is in the organization, the more positive that person's perception of company culture. The researchers said that when employees believed that what was really valued was obedience, predictability, deference to authority, and competition with peers, they were 32% less likely to be engaged, motivated, and committed to their organization.

Poll finds willingness to learn top attribute for success. A survey from staffing firm Accountemps shows that 30% of CFOs polled said motivation to learn new skills is necessary to get ahead. That attribute was followed by interpersonal skills (27%) and ability to adapt easily to change (24%). Just 7% of the CFOs surveyed cited working long hours as a success strategy. "Putting in extra time at work doesn't necessarily lead to positive outcomes," Bill Driscoll, a district president for Accountemps, said. "Managers can help reinforce reasonable work hours by prioritizing projects, assigning realistic deadlines, bringing in temporary support, and setting a good example themselves."

9-to-5 workday a thing of the past? Nearly three in five workers (59%) believe the traditional 9-to-5 workday is no longer so common after all, according to a survey from CareerBuilder. Forty-five percent of the workers polled said they complete work outside of office hours, and 49% said they check or answer e-mails after they leave work. "While smartphones and other technology allow us to remain connected to the office outside of normal business hours, it may not always be a good thing as workers are having trouble disconnecting from their jobs," Rosemary Haefner, chief HR officer for CareerBuilder, said.

Emojis, emoticons OK in work communications? Staffing firm OfficeTeam polled senior managers about using emojis and emoticons in work communications and found that 39% think it's unprofessional, but 61% think it's OK at least in certain situations. When office workers were asked for their thoughts, 59% said they never or only sparingly use the symbols, and 41% send them at least sometimes. ✤

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10-12 Drugs and Alcohol in the Workplace: Key Policies and Legal Issues You Must Consider

10-12 Equal Pay for Equal Work: Practical Strategies for Evaluating Your Gender-Based Pay Practices

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10-13 Leave as ADA Accommodation: Legal Tips on Navigating ADA Leave Issues

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10-19 New Overtime Rule's Impact on Payroll: Strategies for Ensuring Proper Calculation of Wages Ahead of December 1, 2016 Effective Date

10-20 Background Checks: Do's, Don'ts, and Legal Limits on Screening Employees ✤

Men get on board the Title VII train

The next step in the evolution of Title VII came when men who were being harassed because of their perceived effeminacy and, often, perceived homosexuality began seeking protection using the *Price Waterhouse* sex stereotyping prohibition. Yuracko explains, "Rather than arguing that discrimination based on sexual orientation violated Title VII, an argument that had consistently lost, these plaintiffs argued that they were being penalized for violating gender stereotypes in violation of Title VII's prohibition on sex stereotyping." Those cases began making their way through the courts in the mid- to late 1990s, and by the early 2000s, the argument had been recognized in virtually every federal circuit.

LGBT and beyond

"Even more dramatic than the expansion of Title VII to protect men harassed because of their perceived effeminacy," asserts Yuracko, "has been courts' use of the sex stereotyping prohibition to protect transsexuals from discrimination." Here again, the courts have decided that while being a transsexual isn't a protected category, employers could be liable under Title VII if an applicant or employee can prove that she wasn't hired because her transsexual appearance and conduct didn't conform to traditional male stereotypes.

In 2012, the Equal Employment Opportunity Commission (EEOC) ruled that claims of "gender identity, change of sex, and/or transgender status" were covered by Title VII. Last year, another EEOC ruling declared that discrimination based on sexual orientation is also illegal and covered by Title VII. Under the direction of President Barack Obama, federal agencies are pushing ahead of legislation and the courts—often disagreeing with or even going against what courts have said. And the federal courts haven't shied away from not agreeing with the EEOC and other federal agencies, so this area of the law is far from settled.

Bottom line

While the recent EEOC determinations that transgender status and sexual orientation are protected aren't binding on federal courts and may ultimately be overturned if a federal court determines the interpretations are beyond Congress' intent in Title VII, you should be aware of this new basis on which an employee or applicant may claim sex discrimination. Until a federal court rejects the interpretations, the EEOC will treat claims of transgender or gender identity discrimination as prohibited sex discrimination under Title VII. ✤

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