Gender Stereotyping Claims

EXCEL 2010

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Statutory Bases

- Title VII of 1964 Civil Rights Act
  - Race;
  - Color;
  - National Origin;
  - Religion; and
  - Sex (Gender).
- 42 USC §2000e-16.

Sexual Orientation

- Maybe coming soon to a theater near you:
  - Employment Nondiscrimination Act of 2009;
  - Would prohibit employment discrimination on the basis of sexual orientation and gender identification;
  - EEOC would have enforcement authority;
  - S. 1584; H.R. 3017.

What Title VII Prohibits

- 42 USC § 2000e-2:
- "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's . . . sex. . ."

Gender Stereotyping as Discrimination

- *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).
  - Ann Hopkins was a senior manager at PW, who was proposed for partnership.
  - Her candidacy for partner was deferred and PW did not propose her for partnership the following year.

Gender Stereotyping as Discrimination

- *Price Waterhouse (cont.):*
  - Supporting her candidacy:
    - A two-year effort that resulted in a $25 million State Department contract;
    - She was described as "an outstanding professional" with a "deft touch" and "strong character [with] independence and integrity."
    - Praised for decisiveness, broadmindedness and "intellectual clarity."
    - Work long hours to meet deadlines.

Gender Stereotyping as Discrimination

- *Price Waterhouse (cont.):*
  - Against her candidacy:
    - Agressiveness spilled over into abrasiveness;
    - Counseled to improve relations with staff members;
    - One partner described her as "macho;"
    - Another said she "overcompensated for being a woman;"
    - Another advised her to "take a course at charm school;"
    - Criticized for using profanity.

Gender Stereotyping as Discrimination

- *Price Waterhouse (cont.):*
  - Partner who explained PW's decision to her to improve chances:
    - Walk and talk more femininely;
    - Dress more femininely;
    - Wear make-up;
    - Have her hair styled; and
    - Wear jewelry.

Gender Stereotyping as Discrimination

- *Price Waterhouse (cont.):*
  - "As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that the matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'"

Gender Stereotyping as Discrimination

- *Price Waterhouse (cont.):*
  - "An employer who objects to aggressiveness in women but who positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind."

Gender Stereotyping as Discrimination

- Gender stereotyping is not a one-way street.
- *Caldwell v. Postmaster General*, EEOC Appeal No. 01880601 (1988).
  - Commission found gender stereotyping discrimination where male complainant was found "reserved," but two female applicants were "cheerful."

Gender Stereotyping as Discrimination

- *Caldwell (cont.):*
  - "Considering someone better suited for a job because that job requires someone "cheerful," "chipper," or "spunky" can mean that the employer considers the job better suited to a woman, as those descriptions are used approvingly for women. A "reserved" and "thoughtful" man, though a good communicator and skilled in human relations, may belong in a more traditionally "male" role in the employer's mind."

Gender Stereotyping as Discrimination

- *Harrell v. Secretary of Army*, EEOC Appeal No. 05940652 (1995).
  - Supervisor reassigned female complainant because she was emotional.
  - Supervisor cited three instances where complainant cried.
  - Reassigned her to less prestigious, less visible, nonmangerial position.

Gender Stereotyping as Discrimination

- *Harrell (cont.):*
  - No evidence that crying interfered with performance.
  - Male coworkers allowed to express emotions by shouting, yelling or pounding the desk.
  - Supervisor expected females to do secretarial chores like making coffee and typing letters.

Hostile Environment Discrimination

- Separate from gender stereotyping as a type of discrimination, another theory of discrimination was developing—hostile environment harassment.
- *Rogers v. EEOC,* 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972) (violation of Title VII found when employer created hostile environment through discriminatory service to Hispanic clientele).

Hostile Environment Discrimination

- *Rogers (cont.):*
  - "[T]he phrase 'terms, conditions or privileges of employment' in [Title VII] is an expansive concept that sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination. . . One can readily imagine working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers. . ."

Hostile Environment Discrimination

- Courts applied the same principle to find:
  - Hostile environment based on race. *Firefighters Institute for Racial Equality v. St. Louis*, 549 F.2d 506 (8th Cir.), *cert. denied sub nom. Banta v. United States*, 434 U.S. 819 (1977).
  - Hostile environment based on religion. *Compston v. Borden, Inc.*, 424 F.Supp. 157 (SD Ohio 1976).

Hostile Environment Discrimination

- *Henson v. Dundee*, 682 F.2d 897 (11th Cir. 1982).
  - Female police dispatcher alleged she was repeatedly subjected to demeaning sexual inquiries and vulgarities by police chief over two year period.
  - Police chief repeatedly requested she have sexual relations with him.
  - Denied training at police academy because of refusals to have sexual intercourse.

Hostile Environment Discrimination

- *Henson (cont.):*
  - "Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or women run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be demeaning and disconcerting as the harshest of racial epithets."

Hostile Environment Discrimination

- *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57 (1986).
  - Michelle Vinson started as teller-trainee and over fours years advanced to assistant branch manager.
  - Discharged for excessive absence after taking sick leave for an indefinite period.
  - Brought Title VII action alleging she was constantly subjected by sexual harassment by Sidney Taylor, a bank vice president.

Hostile Environment Discrimination

- *Meritor (cont.):*
  - Unlike previous cases involving race, national origin and religion, *Meritor* raised a question over the "voluntariness" of the Vinson's conduct.
  - *Meritor* raised defense that plaintiff's conduct was "voluntary" because she had participated in sexual relations with Taylor.

Hostile Environment Discrimination

- *Meritor (cont.):*
  - "[T]he fact that sex-related conduct was 'voluntary,' in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'"

Hostile Environment Discrimination

- *Meritor (cont.):*
  - "The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary."

Hostile Environment Discrimination

- Courts and the EEOC have universally rejected the notion that the "sex" as used in Title VII includes sexual orientation and sexual preference.
  - Title VII applies to "traditional gender distinctions." *Machinik v. Secretary of Veterans Administration*, EEOC Appeal No. 01882988 (1988).
  - *Ulane v. Eastern Airlines*, 742 F.2d 1081 (7th Cir. 1984).

Hostile Environment Discrimination

- There is, however, no legal proposition that one member of a group cannot discriminate against another member of the same group.
  - "Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of that group." *Castaneda v. Partida*, 430 U.S. 482 (1977).

Hostile Environment Discrimination

- *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998).
  - Oncale was a roustabout on an oil rig.
  - Forcibly subjected to "sex-related, humiliating actions" in the presence of the crew.
  - Male supervisors also assaulted Oncale in a "sexual manner" and one threatened to rape him.
  - Left job because "I would be raped or forced to have sex."

Hostile Environment Discrimination

- *Oncale (cont.):*
  - "Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity, it is reasonable to assume those proposals would not have been made to someone of the same sex. . .

Hostile Environment Discrimination

- *Oncale (cont.):*
  - "The same chain of inference would be available to a plaintiff alleging same-sex harassment, if there were credible evidence that the harasser was homosexual. But harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex. A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms as to make it clear that the harasser is motivated by a general hostility to the presence of women in the workplace. . .

Hostile Environment Discrimination

- *Oncale (cont.):*
  - "A same-sex harassment plaintiff may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace. Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted discrimina[tion] . . . 'because of . . . sex."

Sexual Orientation vs. Gender Stereotyping

- The growing trend in the courts and at EEOC is to draw a distinction between discrimination based on sexual orientation or preference and cased based on gender stereotyping.
- The fact that both types of discrimination may be present does not preclude a violation of Title VII.

Sexual Orientation vs. Gender Stereotyping

- *Hitchcock v. Secretary of Homeland Security*, EEOC Appeal No. 0120051461 (2007).
  - Male supervisory screener was terminated for allegedly groping a male airline employee.
  - Complainant alleged both a hostile environment and discriminatory termination based on his sexual orientation and his "lack of masculinity."
  - EEOC upheld AJ to the extent he found that discrimination on the basis of sexual orientation did not state a claim for relief.

Sexual Orientation vs. Gender Stereotyping

- *Hitchcock (cont.):*
  - AJ erred in dismissing claim insofar as it was based on "gender stereotyping."
  - Relying on *Price Waterhouse*, EEOC noted that gender stereotyping is a form of discrimination based on sex.

Sexual Orientation vs. Gender Stereotyping

- *Hitchcock (cont.):*
  - The record clearly reflects that complainant believed that he was being discriminated against because of his failure to conform to gender stereotypes. In his formal complaint, complainant specified that the reason he believed that he was discriminated against was because of his sex. Additionally, complainant stated that he had "several witnesses that can corroborate the workplace hostility toward me as well as the rumors and allegations concerning *my lack of masculinity." Formal Complaint (emphasis added).*

Sexual Orientation vs. Gender Stereotyping

- *Hitchcock (cont.)"*
  - Furthermore, we find that the record is incomplete with regard to the ASFD's perception or bias against complainant with regard to his "lack of masculinity." The mediator, in his affidavit stated that the ASFD referred to complainant as "faggot" and a "queer." Merely because these derogatory terms refer to sexual orientation does not automatically require that the ASFD was motivated by complainant's alleged sexual orientation. *See e.g. Capos, et al v. Department of Justice, EEOC Appeal Nos. 01943337, 01943338, 01943339, 01943340 (July 8, 1996).*

Sexual Orientation vs. Gender Stereotyping

- *Rosa v. Secretary of Veterans Affairs*, EEOC Appeal No. 0120091318 (2009).
  - Complainant alleged coworkers harassed him with "'homophobic gestures,' 'homosexual mannerisms,' and verbal mocking using 'very feminine voices.'"
  - Agency dismissed for failure to state a claim based on complainant's sexual orientation.

Sexual Orientation vs. Gender Stereotyping

- *Rosa (cont.):*
  - The Commission found that a "fair reading of the complaint" was that the complainant was "alleging that he was harassed because he was male, not because of sexual orientation."

Sexual Orientation vs. Gender Stereotyping

- *Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285 (10th Cir. 2009).
  - Plaintiff worked for 13 years in a small company the produces and distributes business forms,
  - He was, by his own admission, "an effeminate man" who did not "fit in" with the stereotypical man at the plant.

Sexual Orientation vs. Gender Stereotyping

- *Prowel (cont.):*
  - Plaintiff described coworkers as "[B]lue jeans, t-shirt, blue collar worker, very rough around the edges. Most of the guys there hunted. Most of the guys there fished. If they drank, they drank beer, they didn't drink gin and tonic. Just you know, all into football, sports, all that kind of stuff, everything I wasn't."

Sexual Orientation vs. Gender Stereotyping

- *Prowel (cont.):*
  - Plaintiff described himself as having a "high voice, did not curse, was well-groomed, filed his nails instead of ripping them off with a utility knife, crossed his legs, carried himself in an effeminate manner, had a rainbow decal on his car, and liked art, music, interior design, and décor."

Sexual Orientation vs. Gender Stereotyping

- *Prowel (cont.):*
  - Coworkers called him "Princess" and "Rosebud" and made comments on what he wore, how he walked, and his grooming habits.
  - He was also "outed" with regard to his sexual orientation when a coworker placed an ad for a "man-seeking-man" at his work station with a note that read: "Why don't you give him a call, big boy?"
  - He was called a "faggot" and a "pink, light-up, feather tiara with a package of lubricant jelly" was left at his work station.

Sexual Orientation vs. Gender Stereotyping

- *Prowel (cont.):*
  - "[T]he line between sexual orientation discrimination and discrimination "because of sex" can be difficult to draw. . . The District Court found that Prowel's claim fell clearly on one side of the line, holding that Prowel's sex discrimination claim was an artfully-pleaded claim of sexual orientation discrimination. However, our analysis — viewing the facts and inferences in favor of Prowel — leads us to conclude that the record is ambiguous on this dispositive question. Accordingly, Prowel's gender stereotyping claim must be submitted to a jury."

Sexual Orientation vs. Gender Stereotyping

- *Prowel (cont.):*
  - The Court specifically found that Title VII requires that sex be a motivating factor in an employment action, but not the sole factor and Prowel could bring a claim of sex discrimination even if the comments were also partially motivated by Prowel's sexual orientation.

Sexual Orientation vs. Gender Stereotyping

- Is there a difference between discrimination based on sexual orientation and gender stereotyping?
- What is the difference?
- How much longer will it matter?

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