Northwest Ohio Human Resource Association

AFFILIATE OF SHRM SOCIETY FOR HUMAN RESOURCE MANAGEMENT

LEGISLATIVE UPDATE

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Sexual Orientation Discrimination Illegal According To The Second Circuit Court Of Appeals

On February 26, 2018, in *Zarda v. Altitude Express, Inc.,* the United States Second Circuit Court of Appeals found that employees may bring discrimination claims on the basis of sexual orientation under Title VII of the Civil Rights Act of 1964. The Second Circuit joins the Seventh Circuit as the only courts of appeals to hold sexual orientation discrimination is a viable claim under the law. The Eleventh Circuit has rejected such claims, and thus, there is a clear conflict in the federal courts.

In recent years, the EEOC has advanced the position that Title VII should be interpreted to protect against sexual orientation discrimination. Several months ago, the Seventh Circuit issued a landmark decision in *Hively v. Ivy Tech Community College,* in which an adjunct professor alleged she was denied promotions because she is a lesbian. The Seventh Circuit reasoned that discrimination on the basis of sex inherently encompasses discrimination on the basis of sexual orientation. The *Zarda* court agreed.

Interestingly, before the court heard argument in the *Zarda* case, the Justice Department filed an amicus brief arguing against the position taken by the EEOC. In other words, the Justice Department argued that sexual orientation discrimination is not protected by Title VII. The Justice Department's decision to enter the *Zarda* case in opposition of another federal agency was controversial, as it is a rare for the government to be at odds with itself.

In light of *Zarda* and *Hively,* the big question on most people's minds is whether the United Sates Supreme Court will settle the issue. The Supreme Court already has a basis to consider the efficacy of sexual orientation discrimination because of the conflict between the circuit courts. More importantly, the *Zarda* and *Hively* courts based their reasoning on the Supreme Court's prior rulings in Constitutional cases involving race discrimination and same sex marriage. Nevertheless, the Supreme Court may wait until more circuit courts have addressed the issue, as it did before ultimately deciding the question of same sex marriage in the landmark 2015 *Obergefell* case.

State Attorneys General Support Legislation To End Forced Arbitration of Sexual Harassment Claims

Under the Federal Arbitration Act, employers may enter into arbitration agreements with employees which would bar such employees from pursing work-related claims outside of the arbitration process. These types of arbitration agreements invariably would encompass claims for sexual harassment. In light of the **#MeToo** movement, Illinois congresswoman Cherie Bustos introduced a bill in the House of Representatives on December 26, 2017 to amend the arbitration law. The Bill, titled Ending Forced Arbitration of Sexual Harassment Act of 2017, would allow sexual harassment/discrimination claimants who are subject to forced arbitration clauses to opt out of arbitration clauses, giving them the ability to file their claims in court.

Recently, all 56 Attorneys General of the United States, its territories, and the District of Columbia signed a letter of support for the passage of the legislation. The letter applauded Microsoft Corporation for voluntarily discontinuing its arbitration clauses to ensure that victims of sexual harassment may invoke their rights under the judicial system. The letter passionately states: "Congress today has both opportunity and cause to champion the rights of victims of sexual harassment in the workplace by enacting legislation to free them from injustice of forced arbitration and secrecy when it comes to seeking redress for egregious misconduct condemned by all concerned Americans."

The NLRB Reverts Back to the Browning-Ferris Joint Employer Test

Since August 27, 2015, employers have been grappling with the new NLRB standard regarding joint employment. The *Browning-Ferris v. NLRB* decision established that a joint-employer relationship will be found if the alleged joint-employers possess, exercise or simply retain the right, directly or indirectly, to control essential terms and conditions of employment, even if that control is not exercised. The *Browning-Ferris* decision was appealed and the U.S. Court of Appeals for the D.C. Circuit heard arguments in the Spring of 2017.

While *Browning-Ferris* was pending, the *Hy-Brand Industrial Contractors Ltd. & Brandt Construction Co.* case came before the NLRB for a decision on the joint employer question. On December 14, 2017, the NLRB voted 3-2 to overturn the joint employer test set forth in *Browning-Ferris*, reverting back to the previous standard which had been in effect for 30+ years. The board decided *Hy-Brand* along party lines, with President Trump's recent appointee, Bill Emmanuel casting the deciding vote. Upon issuing this decision, the NLRB asked the D.C. Circuit to remand the *Browning-Ferris* case back to the board, which the court agreed to do.

However, on February 26, 2018, the NLRB unanimously vacated the *Hy-Brand* decision because it deemed there was a potential conflict of interest tainting the decision. Shortly after the *Hy-Brand* decision, a motion for reconsideration was filed requesting Mr. Emmanuel recuse himself because his former law firm, Littler Mendelson, represented a party in the *Browning-Ferris* case. The NLRB inspector general, David Berry, issued a report finding that Bill Emmanuel should not have voted in the *Hy-Brand* case because it was linked to the *Browning-Ferris* case. On February 26, 2018, a three-member panel of the board granted reconsideration and vacated the *Hy-Brand* decision for further proceedings before the board. The NLRB has since requested the D.C. Circuit to recall the *Browning-Ferris* case in light of this latest development.

U.S. Supreme Court narrows the definition of Whistleblower

Endeavoring to root out corporate fraud, Congress passed the Sarbanes-Oxley Act of 2002 and the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010. The Dodd-Frank Act defines a "whistleblower" as "any individual who provides… information relating to a violation of the securities laws to the Commission, in a manner established by rule or regulation by the Commission." Historically, most whistleblower complaints have been reported internally first, affording companies the benefit of addressing complaints before becoming embroiled in expensive litigation. The SEC stated in a report to Congress that 83 percent of whistleblowers who received SEC awards under Dodd-Frank since 2012, first reported allegations internally to their employer, and only later turned to the SEC.

On February 21, 2018, in *Digital Realty Trust, Inc. v. Somers*, the U.S. Supreme Court decided unanimously that a whistleblower is afforded protection against retaliation by the employer under Dodd-Frank only if the complaint is presented first to the SEC. In other words, Dodd-Frank's anti-retaliation provision does not extend to an individual, who reports the allegations internally to his employer and not to the SEC.

In *Digital Realty Trust,* the plaintiff, a vice president, was terminated after internally reporting potential securities violations to senior management. The plaintiff did not report the allegations to the SEC. Shortly after his termination, the plaintiff filed a lawsuit in federal court claiming protection as a whistleblower under Dodd-Frank. Digital Realty, relying on the explicit statutory definition of "whistleblower," moved to dismiss the case, arguing the plaintiff failed to report his claim to the SEC, and therefore, he was not afforded whistleblower protection. The federal district court and the Ninth Circuit Court of Appeals denied Digital Realty's motion to dismiss.

On February 21, 2018, the U.S. Supreme Court unanimously reversed the decision of the Ninth Circuit citing the wording of Dodd-Frank, which defined whistleblowers as employees who provide "information relating to a violation of the securities laws to the Commission." By narrowing the definition of whistleblowers to those who take their allegations to the "Commission," the Court invalidated whistleblower claims first reported internally.

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