

Third Circuit Reinstates Homosexual Employee's Sexual Harassment Claim

On August 28, 2009, the United States Court of Appeals for the Third Circuit reinstated the sexual harassment claim of a homosexual employee claiming workplace "sexual stereotype" harassment. (The case is *Prowel v. Wise Business Forms*, and the opinion may be accessed at the following link: <http://www.ca3.uscourts.gov/opinarch/073997p.pdf>.) Title VII makes illegal "sexual stereotype" harassment, but not harassment based on sexual orientation.

The Third Circuit reversed the trial court's decision to grant summary judgment in favor of the employer, Wise Business Forms, and ruled that the "sexual stereotype" harassment claim must go to trial. The trial court had dismissed the claim on the ground that it was, at bottom, one for sexual *orientation* harassment. The Third Circuit agreed with the general proposition that sexual orientation harassment is not unlawful. It noted, however, that a distinction exists between sexual orientation harassment and "sexual stereotype" harassment. When a person is harassed because he/she does not conform to traditional notions of how a person of that sex should look, speak or act, the harassment constitutes sexual stereotype harassment. Under the law, this type of harassment is based on sex as opposed to sexual orientation.

The plaintiff in this case, Brian Prowel, alleged that he was harassed at work because he "had a high voice and did not curse; was very well-groomed; wore what others would consider dressy clothes; was neat, filed his nails. . . ; crossed his legs and had a tendency to shake his foot 'the way a woman would sit'; walked and carried himself in an effeminate manner; drove a clean car; had a rainbow decal on the trunk of his car; talked about things like art, music, interior design, and décor; and pushed the buttons on his [work machine] with 'pizzazz.'" He claimed that, among other things, coworkers called him names, wrote messages about him on the bathroom wall, and left messages at his workstation stating that his homosexual lifestyle was sinful.

The Third Circuit noted that the line between sexual orientation harassment and sexual stereotype harassment can be difficult to draw. The court acknowledged that there was evidence that Prowel had been harassed because of his sexual orientation. If that were the only evidence in the case, the court likely would have affirmed the grant of summary judgment. However, Prowel had also introduced evidence of his effeminate nature, and evidence that his coworkers commented on it. Given that evidence, the court found sufficient evidence of sex stereotyping harassment to require a jury trial. It remains to be seen whether a jury will find that the alleged harassment was because of Prowel's sexual orientation, his failure to conform to "sex stereotypes," or both.

Prowel reminds employers that sexual harassment does not occur exclusively between heterosexuals or individuals of the opposite sex. Employers must recognize that, despite the fact that sexual orientation is not a "protected characteristic" under Title VII, a homosexual man or woman may nevertheless seek redress for harassment or disparate treatment discrimination based on sexual stereotypes. Employers should educate and train employees on this and other types of illegal harassment, and should adopt and implement appropriate anti-harassment policies. And, as always, employers must remain vigilant, properly investigate complaints of harassment and take the necessary steps to put an end to any harassing behavior.

If you have any questions or comments about this E-Flash, please contact Post & Schell, P.C. Labor and Employment Attorney Robert Toy. Bob can be reached at rtoy@postschell.com or 215-587-1091.

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