THE NINTH CIRCUIT PROMOTES WORKPLACE TOLERANCE BY A PLURALITY: OFFENSIVE SEXUAL CONDUCT AND GENDER STEREOTYPING IN THE WORKPLACE

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Published in the December 2002 King County Bar Bulletin

As any employment attorney will tell you, there is no state or federal law prohibiting discrimination based on sexual orientation. However, both the state courts (see the October Bar Bulletin article on sexual orientation and equal protection) and, more recently, the Ninth Circuit Court of Appeals, have made inroads towards increasing tolerance in this area of the law.

The Ninth Circuit's recent decision on this issue is *Renee v. MGM Grand Hotel, Inc.*, No. 98-16924 (9th Cir. 9/24/02). Following the lead set by Price Waterhouse v. Hopkins, 490 U.S. 228, 250-251 (1989) (female employee had claim for discrimination where she was treated differently due to her perceived failure to act femininely), and *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 82 (1998) (male employee had claim for discrimination where he was treated differently for perceived feminine traits), the plurality in Rene focuses not on sexual orientation but on gender stereotyping and offensive sexual touching. This makes the decision somewhat awkward because the facts lay out a clear case of discrimination based on sexual orientation, but, since so far the courts have not been willing to extend Title VII of the Civil Rights Act to cover sexual orientation, the plurality shoehorns the facts into the line of precedent set by Price Waterhouse v. Hopkins and Oncale.

Intolerant Treatment of Openly Gay Employee

Rene, an openly gay man, was a butler who worked with an all male staff of butlers and a male supervisor at the MGM Grand Hotel in Las Vegas, Nevada. He alleged that his coworkers subjected him to a hostile work environment by whistling and blowing kisses at him, calling him "sweetheart," telling crude jokes, giving him sexually orientated "joke" gifts, forcing him to look at photos of men engaged in sexual acts and touching him in an offensive and sexual way, including caressing him, hugging him, grabbing him in the crotch and poking their fingers in his anus through this clothing. Renee's lawsuit was dismissed on summary judgment in District Court based on the grounds that Renee did not state a cause of action under Title VII.

Behavior Illegal as "Offensive Sexual Touching"

In a plurality opinion authored by Judge Fletcher, the Ninth Circuit Court of Appeals explained that the kind of harassment suffered by Renee clearly created a hostile work environment. The fact that it was sexual in nature made it "because of…sex." The plurality opinion relies on Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998), indicating that the plurality took two basic tenets from that case: "First, Title VII forbids severe or pervasive same-sex sexual touching . . . Second, offensive sexual touching is actionable discrimination even in a same-sex workforce."

A key difference between the Rene case and the Supreme Court opinions in Price Waterhouse and Oncale is that Rene testified that he believed that the harassing behavior occurred because he was gay. The court, however, focused instead on the sexual nature of the physical assaults on Rene to establish that the conduct was "of a sexual nature." As the plurality opinion succinctly put it, "Rene's tormentors did not grab his elbow or poke their fingers in his eye. They grabbed his crotch and poked their fingers in his anus." The court set forth a sampling of cases where sexual assault had been found to be sexual harassment under Title VII and placed the Rene case within the context of the sexual assault cases. In doing so, the court distanced itself from ruling on the issue of sexual orientation, stating: "We have surveyed the many cases finding a violation of Title VII based on the offensive touching of the genitalia, buttocks, or breasts of women. In none of those cases has a court denied relief because the victim was, or might have been, a lesbian. The sexual orientation of the victim was simply irrelevant. If sexual orientation is irrelevant for a female victim, we se no reason why it is not also irrelevant for a male victim." In other words, Rene's otherwise viable claim would not be defeated just because he believed he was targeted because he is gay.

Gender Stereotyping

A concurring opinion authored by Judge Pregerson focuses on gender stereotyping. The concurring opinion notes that last year, the Ninth Circuit Court of Appeals held that "gender stereotyping of a male employee by his male co-workers -'constituted actionable harassment under . . . Title VII'" in Nichols v. Azteca Restaurant Enterprises, Inc., 256 F.3d 864, 874-75 (9th Cir. 2001). Specifically, this kind of behavior constitutes "discriminat[ion]…because of…sex." Judge Pregerson's concurrence focused on the gender stereotyping portions of Rene's testimony: "The repeated testimony that his co-workers treated Rene, in a variety of ways, 'like a woman' constitutes ample evidence of gender stereotyping." In a footnote, the Pregerson concurrence states, "At issue is not what Rene perceived himself to be, but rather what his co-workers perceived him to be, and how they acted upon that perception." Id. at n.2.

Two other brief concurring opinions were also filed by Judge Graber (following Oncale and noting that sexual orientation is not protected by Title VII and that Rene did not claim "sexual stereotyping") and Judge Fisher (following Oncale and other sexual touching cases and agreeing with Judge Pregerson that Rene's allegations constitute ample evidence from which a jury could find gender stereotyping.)

What the Future May Hold

Of course, the Rene case is not likely to be the last word on the issue, especially since the Ninth Circuit's decision was a plurality opinion. Four judges dissented and indicated that gender stereotyping and harassment based on sexual orientation are not protected by Title VII. Therefore, we can expect that this issue will be addressed in future cases (or on appeal in this case), and it may take a Supreme Court decision to provide more assurance as to the status of the law for future cases. While it is not certain where the law is going on this issue, it appears that there is a trend in Washington and the Ninth Circuit towards interpreting the law in a way that is neutral to sexual orientation, thereby in effect expanding the rights of homosexuals. (*See also Vasquez v. Hawthorne*, 33 P.3d 735 (Wash. 2001), in which the Washington Supreme Court held

that the surviving same sex partner of a deceased person may be eligible for equitable distribution of the estate of the deceased who died intestate on the basis of meretricious relationship theory.) Employers should bear this new direction of the law in mind in connection with drafting policies and enforcing those policies. Employees should be aware of this when determining what the basis is for a hostile work environment.