SEXUAL ORIENTATION DISCRIMINATION: WHAT TEXAS EMPLOYERS NEED TO KNOW

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Discrimination Based on Sex Includes Sexual Orientation:

Texas has recently recognized sexual orientation as a protected class of individuals under federal and state law. These individuals will now enjoy protection from discrimination and harassment in the workplace based on sexual orientation under both Title VII of the Civil Rights Act of 1964 ("Title VII") and the Texas Commission on Human Rights Act ("TCHRA"). In *Tarrant County College v. Sims*, No. 05-20-00351-CV, 2021 WL 911928 (Tex. App. – Dallas March 10, 2021), for the first time, a Texas Court concluded that the TCHRA precludes discrimination based on "sexual orientation." In reaching that conclusion, the court relied on recent federal court interpretation of the same issue under Title VII. Just a few months prior, in *Bostock v. Clayton County, Georgia*, ___ U.S. ___, 140 S. Ct. 1731 (2020), the United States Supreme Court held that Title VII's prohibition against discrimination "because of sex" encompasses "sexual orientation" and prohibits an employer from refusing to hire or from firing an individual for being gay or being transgender. *Id*. at 1738-43. The United States Supreme Court had made clear that an employer who discriminates against an individual for being gay or transgender violates Title VII. *Id.* at 1754.

Briefly, Amanda Sims ("Sims") alleged that she was terminated from employment after she revealed to her supervisor that she was homosexual. *Id*. at *1. Sims' supervisor expressed religious views that cast homosexual individuals in a negative light and Sims eventually complained that she was being discriminated against based on her sexual orientation. *Id*. Believing that Texas law did not support sex discrimination claims based on "sexual orientation," Sims brought her complaint as a whistleblower claim. *Id*. at **1, 4. The Dallas Court of Appeals on its own initiative, concluded that Sims had a claim under the TCHRA and gave her additional time to re-plead the allegations contained in her complaint. *Id*. at *4.

The *Sims* court explained that it felt compelled to follow the guidance of the *Bostock* decision and read the prohibition against discrimination "because of sex" to include a person's status as homosexual or transgender. 2021 WL 911928 at *4. This reversal of Texas and Fifth Circuit law indicates a shift in not only legal doctrine, but in attitudes toward gay and transgender individuals. This will require employers to create a more sensitive workplace that protects individuals of various races, national origins, religions and other protected characteristics.

Federal and State Prohibitions against Discrimination:

Title VII makes it unlawful for employers to "discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000e(a)(1). One of the protections of Title VII is to provide a workplace that is not "permeated with discriminatory intimidation, ridicule and insult" such that it creates an abusive work environment for someone within one of the enumerated protected categories. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21

(1993). The creation of a hostile work environment through harassment is one form of unlawful discrimination, commonly referred to as a hostile work environment. *Vance v. Ball State Univ.*, 570 U.S. 421, 427 (2013).

Similarly, the TCHRA, which is the Texas anti-discrimination statute, is designed to carry out the intent of Title VII. Section 21.051 of the TCHRA states that an employer commits an unlawful employment practice if it fails or refuses "to hire or to discharge any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, disability, religion, sex or national origin or age." Section 21.051 states:

An employer commits an unlawful employment practice if because of race, color, disability, sex, national origin, or age the employer:

(1) Fails or refuses to hire an individual, discharges an individual, or discriminates in any other manner against an individual in connection with compensation or the terms, conditions, or privileges of employment; or

(2) Limits, segregates, or classifies an employee or applicant for employment in a manner that would deprive or tend to deprive an individual of any employment opportunity or adversely affect in any other manner the status of an employee.

TEX. LAB. CODE § 21.051.

The 2020 Supreme Court decision in *Bostock* arguably reversed the prior Fifth Circuit decision in *Wittmer v. Phillips 66 Co.*, 915 F.3d 328 (5th Cir. 2019), which perpetuated the view held for decades, that Title VII's prohibition against discrimination based on sex did not include "sexual orientation or transgender discrimination." *Id*. at 333-335 (J. James C. Ho, Concurring) (explaining that the word "sex" does not include "sexual orientation" or "transgender.") While some Texas employers have already added "sexual orientation" to their list of protected classifications in their policies against discrimination and harassment, many others have simply declined to address the issue of sexual orientation in their policies or employee handbooks. On the heels of the *Sims* case, that practice will no longer be sufficient to protect employers from discrimination and harassment claims based on sexual orientation or transgender status. Instead, company policies must be revised to specifically educate employees of the prohibition against "sexual orientation" and "transgender" discrimination and harassment in the workplace. Training for employees and supervisors will be an essential element of any new policy because not all employees understand the nature of sexual orientation discrimination. As explained below, there were several steps beginning in approximately 1989 that paved the way for recognition of sexual orientation and transgender discrimination today.

Gender Stereotyping and Same Sex Harassment:

Prior to *Bostock*, Title VII and the TCHRA both recognized the concept of "gender stereotyping" as one form of discrimination based on sex. This theory was originally recognized in the seminal case of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), in which a female candidate was not hired because she was too "macho," tough-talking" and "masculine" and who

"overcompensated for being a woman." *Id.* at 235. In *Price Waterhouse*, "sex stereotyping" was recognized as one form of disparate treatment of men versus women, and constituted discrimination based on sex. *Id.* at 251. *See also E.E.O.C. v. Boh Bros*., 731 F.3d 444, 454 (5th Cir. 2013) (gender-based bias was discrimination based on sex where plaintiff was continuously harassed on a construction site because he did not conform to how a "man should act."). Nevertheless, this gender discrimination theory was rarely extended to protect sexual orientation or transgender status. *See, e.g., Etsitty v. Utah. Transit Auth*., 502 F.3d 1215, 1222 (10th Cir. 2007) (discrimination against transsexuals is not "discrimination because of sex," therefore, transsexuals are not a protected class under Title VII). However, a different result was reached in *Smith v. City of Salem*, 378 F.3d 566, 574-75 (6th Cir. 2004) (discrimination based on transsexual status is no different than discrimination directed against the female applicant in *Price Waterhouse* case based on gender non-conformity). Sexual orientation, however, remained an unprotected status under this theory as well.

Same sex discrimination was first recognized in *Oncale v. Sundowner Offshore Servs, Inc*., 523 U.S. 75, 78 (1998) (creation of a hostile work environment by individuals of the same sex as the victim, was recognized as unlawful discrimination and harassment under Title VII). Moreover, sexual harassment, including same-sex harassment, does not need to be motivated by sexual desire, but may be motivated by contempt or hatred of members of that group. *EEOC v. BOH Brothers Construction Co*., LLC, 731 F.3d 444, 465-467 (5th Circuit 2013) (harassers testified they did not know conduct not based on sexual desire could constitute discrimination or harassment).

Sexual Harassment Based on Hostile Work Environment:

To establish Title VII sexual harassment based on a hostile work environment, an employee must show: (1) that he or she belongs to a protected class (which now includes sexual orientation); (2) that he or she was subject to unwelcome sexual harassment; (3) that the harassment was based on sex; (4) that the harassment affected a term, condition or privilege of employment; and (5) that the employer knew or should have known of the harassment and failed to take prompt remedial action to correct it. 42 U.S.C. § 2000e-2(a)(1); *Holmes v. North Texas Health Care Laundry Cooperative*, 304 F. Supp.3d 525, 542 (N.D. Tex. 2018); *Hernandez v. Yellow Transp., Inc*., 670 F.3d 644, 651 (5th Cir.), *cert. denied,* 568 U.S. 817 (2012). If the alleged harasser is a supervisor with immediate or higher authority over the harassed employee, the employee need not be required to show that the employer knew or should have known about the conduct. When the alleged harasser is a coworker, the plaintiff must prove that the employer knew or should have known of the harassment in question. *Holmes,* 304 F. Supp.3d at 542.

Affirmative Defenses to Claims:

An employer may avoid vicarious liability for workplace harassment based on sex (or another protected characteristic) if it can show: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise." *Watts v. Kroger Co*., 170 F.3d 505, 509-510 (5th Cir. 1999) (*quoting Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998)). *See also Burlington Industry v. Ellerth*, 524 U.S. 742, 765 (1998) (same standard for employer defense

articulated). Together, these two United States Supreme Court cases are known as the *Faragher/Ellerth* defense to workplace harassment claims.

In the years that followed the *Faragher/Ellerth* cases, courts have accepted this defense to workplace harassment claims if the employer had a policy against discrimination and harassment that was communicated to employees, and the employer took "prompt remedial action" to protect the claimant and end harassment reported by its employees. *Williams-Boldware v. Denton Cty*., 741 F.3d 635, 640 (5th Cir. 2014). Under what has come to be known as the *Faragher/Ellerth* defense, a defendant employer is entitled to summary judgment in its favor on a Title VII hostile workplace claim if the employer can show that it: (1) exercised reasonable care to prevent and correct promptly any harassing behavior, and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer to avoid the harm. *McDaniel v. Shell Oil Co*., 350 F. App'x924, 926 (5th Cir. 2009) (per curiam).

Generally, employers are successful in defending harassment claims when the company has a sexual harassment policy, usually contained in an employee handbook, clearly communicates those policies to employees (usually through training), promptly investigates complaints, and takes prompt remedial action when necessary to stop the harassment. *See e.g., Holmes v. North Texas Health Care Laundry Cooperative*, 304 F. Supp.3d 525 (N.D. Tex. 2018) (employer was able to show a defense to harassment claim because it had a policy against discrimination and harassment contained in an employee handbook, and promptly investigated the complaint at issue). Generally, an employer takes prompt remedial action when it takes allegations seriously, conducts a prompt and thorough investigation of the conduct alleged, and immediately implements remedial and disciplinary measures when needed, based on the results of the investigation. *Carmon v. Lubrizol Corp*, 17 F.3d 791, 795 (5th Cir. 1994).

Conversely, in *BOH Brothers*, the court determined that harassment training that lasted just a few minutes per year was insufficient to constitute a policy against sexual harassment. In fact, the supervisors testified that they did not understand that sexual harassment could be motivated by something other than sexual desire. 731 F.3d at 464-465. In determining whether an employer's remedial measures were sufficient, courts also consider whether the employer took prompt remedial action to stop the behavior and whether the offending behavior in fact ceased. *Hockman v. Westward Commc'ns, LLC*, 407 F.3d 317, 329 (5th Cir. 2004).

Training and Handbooks:

Now that "sexual orientation" and "transgender" status are clearly protected classifications under both Title VII and the TCHRA, what additional steps should employers take?

- Make sure that company policies and employee handbooks are updated to specifically reflect those classifications. Although the word "sex" now includes those groups, this will likely not be apparent to many employees and even to supervisors.

- Make it a priority to conduct training to remind employees of the company's anti-discrimination and anti-harassment policies and procedures. Explain that discrimination

or harassment based on "sexual orientation" or "transgender" status will not be tolerated.

- Establish a clear and easy to follow complaint procedure for employees. Make sure that all complaints, no matter how incidental they may appear, are investigated, and that prompt remedial steps are taken to stop any unlawful or unacceptable behavior identified.

- Make sure to articulate the policy that those who report discrimination or harassment to management, or who participate in an investigation of a discrimination or harassment complaint, will not be retaliated against.

The information contained in this article is not designed to address specific situations. If you have questions concerning this topic, you should consult with legal counsel for advice on fact specific matters.

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