Employment Law Update October/November 2009

PUBLISHED ON
November 1, 2009

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Title VII Coverage Extended to Homosexual Employee Alleging "Gender Stereotyping" Sexual Harassment

By: David J. Freedman

Societal norms regarding homosexuality seem to be slowly shifting, and the Third Circuit Court of Appeals, the federal appeals court covering Pennsylvania, New Jersey, Delaware, and the U.S. Virgin Islands, appears to be keeping pace.

Many states and localities -- including the states of Maryland and New Jersey and several Pennsylvania cities like Lancaster and York -- have laws prohibiting employment discrimination on the basis of sexual orientation. Employees working outside those select jurisdictions, however, have long been without protection on the basis of their sexual preference. Title VII of the Civil Rights Act, the prominent federal anti-discrimination statute, does not expressly prohibit employment discrimination on the basis of sexual orientation; rather, it prohibits discrimination "because of sex." In the past, courts interpreting that phrase have held that it does not protect homosexual employees from workplace harassment based on their homosexuality. Likewise, despite several opportunities, Congress has yet to pass a law or amend Title VII to prohibit sexual orientation discrimination throughout the United States.

In the recent case of *Prowel v. Wise Business Forms, Inc*., however, the United States Third Circuit Court of Appeals held that a homosexual employee could pursue a claim of "gender stereotyping" under Title VII. Plaintiff Matthew Prowel worked for Wise as a machine operator for 13 years. During the final two years of that employment, co-workers discovered that Prowel was homosexual and began harassing him. Prowel testified that co-workers referred to him as "Princess," "Rosebud," and other more odious derogatory terms. Someone left a "man-seeking-man" newspaper ad and a pink feather light-up tiara at Prowel's work station. Graffiti in the male bathroom accused Prowel of having AIDS and engaging in sex with male co-workers.

Most seriously, Prowel overheard a co-worker loudly state that he hated Prowel and that all homosexuals should be shot. Prowel complained to management, but Wise allegedly did nothing other than paint over the bathroom graffiti. A few months later, Wise terminated Prowel during a reduction in force. When Prowel sued for discrimination, the trial court threw the case out, reasoning that Title VII does not prohibit sexual orientation discrimination.

On appeal, the Third Circuit reversed that decision, finding that Prowel presented sufficient facts to require a jury trial regarding whether his co-workers harassed him because he failed to comply with traditional male stereotypes. Unlike other male employees, Prowel did not curse, was very well groomed, and discussed topics such as art, music and interior design. In Prowel's own words, he also "pushed buttons on his [machine] with pizzazz,'" which he claimed provoked his co-workers' ire. According to the court, Prowel's suit could go forward because Title VII protects employees from gender stereotyping discrimination based on the law's prohibition against employment discrimination "because of sex," even though gay and lesbian employees are not protected from sexual orientation discrimination. In an understatement, the Third Circuit admitted that "the line between sexual orientation discrimination and discrimination because of sex' can be difficult to draw."

Although the law in this area might not be entirely clear, employers can reasonably expect to find themselves increasingly defending lawsuits from homosexual employees claiming "gender stereotyping" discrimination. Additionally, unless employers take proactive steps to prevent and correct harassment against gay and lesbian employees, many of these lawsuits will make it to a jury.

As a result, employers would be wise to undertake a number of basic, preventive measures to limit their liability risks. Employers should consider adding "sexual orientation and gender stereotypes" as a protected group to their equal employment opportunity policies, and provide training emphasizing that harassment of gay and lesbian employees will not be tolerated. Those employers in states, cities and counties with laws prohibiting sexual orientation discrimination should have done so already. Employers should also investigate harassment complaints from homosexual employees in the same manner as similar complaints from employees in other protected classifications.

Moreover, employers that embrace diversity and the positive effects it has on employees and their competitive positions on the one hand would have difficulty justifying discrimination based on sexual orientation in today's business environment on the other. Promoting and embracing diversity in the workplace helps businesses to attract, hire and retain skilled, productive and highly motivated employees. Including all employees, regardless of sexual orientation, within that circle of diversity makes business sense as well. And according to the Third Circuit, failing to do so could result in legal liability.

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Public Comment Period on ADAAA Proposed Regulations

In our August 2009 Employment Update, Jennifer Craighead summarized the EEOC's proposed regulations under the Americans with Disabilities Act Amendments Act (ADAAA). On September 23, 2009, the EEOC published these proposed regulations in the Federal Register for comment. The regulations can be found under the ADAAA topic on the EEOC's website at www.eeoc.gov. Written comments may be submitted to the EEOC electronically at http://www.regulations.gov by November 22, 2009.

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Is Your Non-Compete Valid Under Pennsylvania Law?

By: Jill Sebest Welch

Employers engaged in enterprises that involve trade secrets and confidential or proprietary business information are increasingly entering into agreements with employees that include confidentiality provisions, covenants not to compete, and covenants not to solicit. But in these difficult economic times, when employees are involuntarily separated from their employers in a reduction in force or downsizing, is that non-competition agreement enforceable?

As a general matter, restrictive covenants are considered a restraint of trade and are looked upon unfavorably. In Pennsylvania, there is no statute that specifically addresses restrictive covenants; rather, courts look to the reasonableness of the restrictions and traditional contract law principles in deciding whether a non-compete and non-solicit agreement is valid and enforceable. Increasingly, the circumstances surrounding the employee's separation or termination from employment are also a factor that must be considered to determine if the non-compete restriction should be enforced.

Take for example the Pennsylvania Superior Court's decision in *Insulation Corporation of America v. Brobston*. Brobston, a ten year salesperson, was privy to certain confidential corporate information such as overhead costs, profit margin, dealer discounts, customer pricing, marketing strategy and customer contract terms of his employer. Information of this nature was a protectible business interest under the "non-disclosure" covenant of the employment contract. Brobston was terminated because he failed to increase the company's sales. Among the reasons cited, Brobston was terminated for failing to take overnight sales trips to develop business and for failing to report sales calls and expenses. In short, he was fired for "failing to promote his employer's interests." Despite his poor sales performance, the company still sought to enforce a two-year, 300 mile non-compete agreement to keep him from working for a competitor. The Superior Court reversed the trial court's injunction against Brobston's competing with the company, stating that the "salesman, discharged for poor sales performance, cannot reasonably be perceived to pose the same competitive threat to his employer's business interests as the salesman whose performance is not questioned, but who voluntarily resigns to join another business in direct competition with the employer."

Since *Brobston*, Pennsylvania courts have suggested that employees who leave their employers through no fault of their own may also escape the restrictions of their non-compete agreements. In *All-Pak, Inc. v. Johnston*, the Superior Court was sympathetic to employees terminated for reasons beyond their control, perhaps opening the door for employees affected by downsizing or layoffs to claim that their non-compete agreements should not be enforced. However, there is an equally compelling argument that in these challenging economic times, employers' legitimate business interests are even more in need of protection from competition than ever.

Although this issue is far from clear, two trends emerge from these cases. First, companies that terminate an employee's employment for poor performance relative to the company's legitimate business interests cannot turn around and prevent that former employee from competing with them. Second, an employee terminated for misconduct or disloyalty will not be able to avoid his obligations under a non-compete. Despite these recent trends, the following are still valid guiding principles when drafting restrictive covenants in Pennsylvania.

1. Covenants not to compete are enforced to the extent reasonably necessary to protect the legitimate business interests of the employer -- the employer's relationship with its customers, confidential information, good will, and trade secrets. The information must belong to the employer and be developed through the efforts of the employer -- information that is common knowledge or can be derived from a phone book or directory is not a protectable interest.

2. Pennsylvania courts will permit the equitable enforcement of post-employment restraints only where they are incident to an employment relation between the parties, the restrictions are reasonably necessary for the protection of the employer, and the restrictions are reasonably limited in duration and geographic scope.

3. The signing of a covenant at the inception, or within a few days after the inception, of the employment relationship is sufficient consideration to support the covenant. Note that a non-compete or non-solicit entered into mid-stream -- in the course of an employment relationship -- must be accompanied by sufficient additional consideration to be valid and enforceable. Generally, a "beneficial change in an employee's status" is sufficient consideration. Continued employment, however, will not provide sufficient consideration.

4. The length of time and geographic area should be no greater than is reasonably necessary to protect the employer's legitimate business interests. As a general matter, Pennsylvania courts and federal courts have consistently affirmed covenants with temporal restrictions of one to three years and, depending on the nature of the business, a nationwide geographic scope may be appropriate. The more reasoned approach, however, is to limit the geographic scope to the territory where the particular employee engaged in business for the company.

5. If the restrictions of the covenant are overbroad, the courts are permitted to "blue-pencil" the covenant to make the restrictions more narrow and to make the covenant enforceable.

Barley Snyder's Employment Law attorneys can assist companies of all sizes across a variety of industries in preparing non-compete agreements that protect their business interests. On November 17, 2009, Jill Welch will provide tips to employers to help protect their competitive edge through the enforcement of non-compete and non-solicit agreements at Barley Snyder's fall seminar "Managing Your Business In Challenging Times." The seminar will be held at the Berkshire Country Club in Reading from 7:30 a.m. to 12:00 noon. Information on additional seminars in your area can be found in this newsletter or on Barley Snyder's website at www.barley.com/seminars.

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Coming Home: Reemployment Rights of Service Members Returning From Military Leave

By: Jill Sebest Welch

The Uniformed Services Employment and Reemployment Rights Act (USERRA) and its implementing regulations protect employees who have served in the military from discrimination in employment and, in many cases, grant them up to five years of job protected leave. As troops withdraw from their assignments and start returning to the workforce, it is important that employers are aware of their obligations to these servicemen and women.

The Escalator Principle

Under USERRA, a person returning to employment is entitled to the seniority and other rights and benefits determined by the seniority that the person had on the first date of service plus the additional seniority and rights and

benefits that s/he would have attained if s/he had remained continuously employed. Generally dubbed the "Escalator Principle," this is broader than simply holding the employee's position until his or her return. It requires placing the returning employee in the position that he or she would have attained with reasonable certainty but for service in the military -- either up or down on the escalator.

Seniority is defined as longevity in employment together with any benefits of employment that accrue with, or are determined by, longevity in employment. This definition has two requirements: first, the benefit must be provided as a reward for length of service (rather than a form of short-term compensation for services rendered); second, the service member's receipt of the benefit must have been reasonably certain but for his/her absence due to service.

The following examples illustrate how the Escalator Principle applies to these seniority-based rights and benefits.

• Opportunity for promotion -- if an employee missed an opportunity for a seniority-based promotion, and the opportunity required a skills test or exam, the employer should give the returning employee a reasonable amount of time to adjust to the position and then give the skills test or exam. If the reemployed employee is successful, and there is a reasonable certainty that the employee would have been promoted during the time s/he was in military service, then the reemployed employee's promotion must be made effective as of the date it would have occurred had the employment not been interrupted by military service.

• Similarly, the employer must provide reasonable efforts to train/re-train the returning servicemember to qualify for the escalator position, absent undue hardship.

• Time spent on military leave counts toward the returning servicemember's eligibility for Family Medical Leave Act leave (i.e. 1,250 hours in the previous 12 months).

• An employee who is laid off with recall rights who then serves in the military while on layoff may be entitled to reemployment upon return if the employer would have recalled the employee but for the military service.

• If an employee left employment for military service in the midst of a bona-fide apprenticeship program or probationary period that required actual training and/or observation in the position (rather than merely time served) the employee should be allowed upon return to complete the apprenticeship or probationary period. Once the employee completes the apprenticeship or probationary period, the employee's pay and seniority should reflect both the pre- and post-service time in the apprenticeship/probationary period plus the time served in the military.

The Escalator Position Also Depends On Time Away In Military Leave

The particular position to which the returning employee is entitled depends on how long the employee was in military service:

• If service was for 90 days or less, the employee is entitled to reinstatement in the escalator position, and the employer must make reasonable efforts to assist the employee in becoming qualified for that position. If the employee cannot become qualified, the employee is entitled to the position that s/he held when military service started.

• After service of more than 90 days, the employee is entitled to reinstatement in the escalator position, but the employer may choose to reinstate the employee to any position of the same seniority, status and pay as the escalator position for which the employee is qualified. The employer must make reasonable efforts to assist the employee in becoming qualified. If the employee cannot become qualified, the employee is entitled to be placed in any other

position that is the closest approximation to the escalator position. If there is no such position for which the employee is qualified, then the employee must be placed in any other position that is the closest approximation to the pre-service position.

• If the employer's circumstances have changed so much that reemployment is impossible or unreasonable, the employer is not required to reemploy a returning servicemember. For example, an employer is not required to reinstate an employee after a reduction in force that with reasonable certainty would have included the servicemember. However, employers cannot refuse to rehire a returning servicemember simply because a temporary employee was hired in his or her place.

USERRA's requirements are complex and fairly extensive, and reemployment rights may be different or more stringent under state law, so employers are well-advised to consult with an attorney if they have any questions on their obligations to those going on military leave or returning from service. Barley Snyder's Employment Law attorneys work with employers to assist them in crafting military leave policies and to ensure that they are compliant with the requirements under USERRA and state law. Jill Welch can be reached at 717.399.1521 or jwelch@barley.com.

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