BRYCE DOWNEY & LENKOV LLC

Labor & Employment Newsletter
November 2016

Does Title VII Prohibit Employment Discrimination Based On Sexual Orientation?

Title VII prohibits employment discrimination based on race, color, religion, sex or national origin. Does Title VII's prohibition on employment discrimination based on "sex" protect against discrimination based on sexual orientation? This is the precise issue addressed in *Hively v. Ivy Tech Cmty. Coll., S. Bend,* 830 F.3d 698 (7th Cir. 2016), *rehearing en Banc granted, opinion vacated.*

In *Hively*, Plaintiff alleged that her employer denied her contract renewal and opportunities for promotion because she was openly gay. The district court granted Defendant's motion to dismiss, finding that sexual orientation is not a protected class under Title VII. The Seventh Circuit Court of Appeals was sympathetic to the plaintiff, but held that it was bound by the Seventh Circuit's prior decisions on the issue and affirmed the district court's decision dismissing the case. However, the court recognized the conflict between the court's precedence addressing sexual orientation and gender identity; while the court found that Title VII does not protect against discrimination based on sexual orientation, most courts recognize that discrimination based on gender identity is sex discrimination prohibited by Title VII based on failure to conform to gender stereotypes.

On 10/11/16, the Seventh Circuit granted Plaintiff's petition for rehearing by the full Seventh Circuit panel and vacated its prior order.

Practice Tip:

Whether Title VII prohibits employment discrimination based on sexual orientation remains unclear; however, there is a strong likelihood that the Seventh Circuit or the United States Supreme Court will find that sexual orientation is a protected class under Title VII. Additionally, many states, including Illinois, prohibit discrimination based on sexual orientation. Employers should keep a close eye on the pending decision in the *Hively* case and be ready to amend their anti-discrimination policies accordingly.

New OSHA Reporting Requirements To Take Effect 12/1/16

Rich Lenkov and Maital Savin will be hosting a webinar, on new OSHA regulations on 12/13/16. Click here to register.

In our July 2016 newsletter, we advised you that Occupational Safety and Health Administration (OSHA) recently published a new rule regarding workplace injury reporting, the first phase of which was originally scheduled to take effect on 8/10/16. Shortly thereafter, a number of employers and employer groups filed suit challenging OSHA's new rule with the US District Court for the Northern District of Texas. The court requested that the rule be delayed to allow additional time to consider a pending motion challenging the rule. As a result, OSHA changed the effective date of the first phase of the rule to 12/1/16. Here is what employers need to know about the new rule:

Phase 1

Beginning on 12/1/16, the rule will require employers to have a reasonable procedure for reporting work accidents. Employers' reporting policies must:

1. *Expressly state* that employee have a right to report work injuries and illnesses;
2. Provide a reasonable procedure for employees to report workplace injuries and illnesses;
3. Not discourage employees from reporting injuries or illnesses;
4. Assure employees that the employer will not discriminate or retaliate against them for reporting a work injury or illness.

OSHA will consider unreasonable any rule requiring immediate reporting, especially if this may lead to discipline. OSHA will consider it to be reasonable to require employees to report injuries as soon as reasonably known or recognized by the employee.

OSHA also prohibits employers from providing incentives or disincentives for employees to report workplace injuries. *Notably, OSHA will consider automatic post-injury drug testing to be a disincentive*. Instead, employers who would like to conduct post-injury drug testing must make an individualized assessment of whether the potential use of drugs or alcohol caused the injury.

Phase 2

On 1/1/17, employers will be required to electronically submit injury and illness reports to OSHA. This means increased exposure for penalties and citations from OSHA. Moreover, OSHA announced it intends to post this information on its website. While some believe that this will incentivize employers to work to reduce injuries and provide public health researchers an opportunity to study injury causation and prevention, this will also make it easy for third-parties, such as Plaintiff's attorneys, to generate increased litigation.

Practice Tip:
Employers who do not have an injury reporting procedure should create one. Employers should carefully revise any policies they may have for automatic post-accident drug testing to provide for an individualized assessment. Additionally, employers should train their supervisors on reporting procedures, how to conduct an individualized assessment and avoiding retaliation.

Are You Ready For New Overtime Rules?

As we reported in our July 2016 newsletter, the U.S. Department of Labor (DOL) released regulations which would significantly impact employers' responsibility to pay overtime wages. The regulations were scheduled to take effect on 12/1/16. On 9/28/16, the House of Representative passed a bill to delay the effective date by 6 months. However, in response to the bill, President Obama stated he would veto the bill if it were presented to him. Accordingly, we encourage employers to become familiar with the new regulations which will likely take effect on 12/1/16.

For details about the DOL regulations which will likely take effect on 12/1/16, **click here.**

Transgender Employees: Which Bathroom?

In *Roberts v. Clark Cty. Sch. Dist.*, No. 215CV00388JADPAL, 2016 WL 5843046 (D. Nev. 2016), the U.S. District Court for the District of Nevada held that the defendant-employer engaged in unlawful sex discrimination when it prohibited Plaintiff, a transgender male, from using either the men's or women's restroom at work.

In 2011, Plaintiff advised his employer that he was transitioning from female to male. The employer prohibited Plaintiff from using the men's restroom until he presented proof that he had undergone gender reassignment surgery, and also prohibited Plaintiff from using the women's restroom because he presented as a male. However, Plaintiff was permitted to use gender-neutral restrooms.

The employer argued that Title VII only prohibits discrimination based on "sex" and not based on gender identity. However, the court held that the employer's bathroom ban was an adverse employment action that constituted sex discrimination in violation of Title VII. The court found persuasive the decisions from the U.S. Courts of Appeal in the Fourth, Sixth and Ninth Circuits, as well as the positions taken by the Equal Employment Opportunity Commission (EEOC) and the Occupational Safety and Health Administration (OSHA).

Notably, on 10/28/16, the U.S. Supreme Court agreed to hear *Gloucester County School Board v. G.G.*, which involves the issue of whether transgender public school students must be permitted to use restroom corresponding with their gender identity. This is the first time the Supreme Court will directly address issues involving transgender individuals. While the case involves students – and not employees – it will certainly provide guidance on how the courts may rule on this issue when it comes to employees.

Practice Tip:
While the Seventh Circuit held in *Ulane v. Eastern Airlines*, 742 F.2d 1081 (7th Cir. 1984), that Title VII does not prohibit discrimination against transsexuals, that decision is currently under severe scrutiny and also does not specifically address the bathroom usage question. In light of much more recent court rulings in other districts and the pending Supreme Court ruling, the safest practice for Illinois and Indiana employers to avoid or minimize transgender discrimination claims is to allow transgender employees to use the restroom corresponding with their gender identity.

What Is An Essential Job Function Under The ADA?

Critical to the determination of whether an employee is a "qualified individual" entitled to protection under the Americans with Disabilities Act (ADA) is whether he/she can perform the essential functions of his/her job with or without reasonable accommodations. 42 U.S.C. §12111(8).

In the recent Seventh Circuit court decision in *Brown v. Smith*, 2016 WL 3536619 (7th Cir. 2016), the court affirmed a jury verdict for an employee who argued that he was discriminated against and terminated because of his diabetic condition and not because he did not possess a commercial driver's license (CDL) to drive a city bus. The court found that it was a question of fact for the jury whether the possession of a CDL license was an essential function of the Plaintiff's street supervisor position.

The employer argued that possessing a CDL was an essential function as Plaintiff's job description stated that street supervisors must hold a CDL.

The Seventh Circuit replied that a written job description was only one of several functions to look at in determining whether a particular requirement or task is an essential function. Other factors include:

(1) "the employer's judgment as to which functions are essential; (2) the "amount of time spent on the job performing the function;" (3) the "work experience of past incumbents in the job; and (4) the "consequences of not requiring an incumbent to perform the function." 29 C.F.R. §1630.2(n)(i-iv).

In *Brown,* trial testimony established that driving a bus was not a key responsibility for supervisors, Plaintiff never had to drive a bus during his four years as a supervisor and other supervisors only rarely had to do so. Further, replacement drivers could generally be secured quickly for this task, making it unnecessary for the supervisors to drive a bus.

The court concluded there was sufficient evidence for the jury to conclude that possessing a CDL (or for that matter driving a bus) was not an essential job function for a city street supervisor.

Practice Tip:

We recommend that employers prepare written job description for all positions. In evaluating whether a particular job function is "essential," employers should closely examine each of the aforementioned factors when deciding whether to terminate an employee who could not perform that task with or without a reasonable accommodation.

Well-Documented Support For Termination May Overcome Discrimination Claim

While it is not the only factor a court looks at, where an employer has a written history of ongoing disciplinary reports on an employee, this can be quite helpful in potentially defeating a claim of discrimination.

In *Simpson v. Franciscan Alliance, Inc.*, 2016 WL 3536669 (7th Cir. 2016), the Seventh Circuit affirmed the lower court's grant of summary judgment to the defendant nursing home, dismissing Plaintiff employee's age and race discrimination claims.

Plaintiff was reprimanded four times between October 2010 and September 2011. The employer used a form called an "Employee Corrective Action Report" to document each incident. The disciplinary incidents included a failure to follow a doctor's orders associated with changing a patient's dressings and stopping a controlled pain medication, improperly directing a patient-care technician to step in for her on two procedures despite a nurse being required for same, three patient complaints all in one month about various issues and finally, prematurely removing a patient's morphine pump after the patient complained about not getting ice as requested from Plaintiff.

Plaintiff alleged she was held to a higher standard than non-African American employees and employees under the age of 40. However, she could not provide sufficient evidence that such employees were treated more favorably.

The court concluded that Plaintiff had not established a *prima facia* case of age or race discrimination, nor did she present evidence from which a jury could reasonably conclude that the basis for her termination was pretextual.

Practice Tip:

Although written disciplinary reports used in support of terminating an employee will not always be sufficient to overcome a claim of discrimination, they can make it much stronger to adequately defend such a case than when such discipline is only oral in nature.

Equal Pay Data Rule Finalized

In September 2016, the Equal Employment Opportunity Commission (EEOC) announced that it finalized its equal pay data rule, which will go into effect on 3/31/18. While this seems very far away, the new rule will scrutinize pay data for 2017, which is just around the corner.

The rule will require employers with 100 or more employees to submit pay data by gender, race and ethnicity on their EEO-1 forms. This significantly expands the EEO-1 reporting requirements, which previously only required that employers report the number of employees by gender, race and ethnicity.

The rule is intended to help identify pay discrimination for enforcement action. However, opponents of the rule argue that the rule is too burdensome and too broad to help the EEOC fight pay discrimination. In particular, critics are skeptical of the job "categories" by which pay data must be broken down, which they argue are too broad to analyze meaningful pay distinctions. Additionally, the rule does not account for certain compensation data such as relocation expenses or severance pay.

Practice Tip:

In anticipation of having to disclose 2017 pay data, employers should begin evaluating their pay practices now. We encourage employers to conduct an internal audit to identify and address any areas of pay disparity now, before the data must be reported. Employers would also be wise to think about what internal data collection steps they must take in order to be able to accurately report pay data on their EEO-1 forms in the future.

EEOC's Strategic Enforcement Plan: A Preview For 2017-2021

On 10/17/16, the Equal Employment Opportunity Commission (EEOC) announced its strategic enforcement plan for 2017 – 2021.

The EEOC reaffirmed its prior commitment to six priorities:

1. Eliminating Barriers in Recruitment and Hiring.
2. Protecting Vulnerable Workers, Including Immigrant and Migrant Workers, and Underserved Communities from Discrimination.
3. Addressing Selected Emerging and Developing Issues.
4. Ensuring Equal Pay Protections for All Workers.
5. Preserving Access to the Legal System.
6. Preventing Systemic Harassment.

Notably, the EEOC indicated that it intends to emphasize issues related to "complex employment relationships and structures in the 21st century workplace, focusing specifically on temporary workers, staffing agencies, independent contractor relationships, and the on-demand economy." This signals that the EEOC intends to pay closer attention to businesses that may be considered employers in the "gig economy," such as Uber.

Additionally, the EEOC noted that it intends to focus on backlash discrimination against employees who are or are perceived to be Muslim, Sikh, Arab, Middle Eastern and Southeast Asian.

Further, the EEOC indicated it intends to focus on claims under the Americans with Disabilities Act (ADA), including inflexible leave policies.

Finally, the EEOC made note of its continued effort to preserve employee access to the legal system and intention to target overly-broad waivers included in settlement provisions that prohibit filing charges.

Practice Tip:

Being familiar with the EEOC's strategic enforcement plan is a good way for employers to understand the areas the EEOC plans to target in the coming years. Employers would be wise to be aware of the EEOC's priorities as potential issues develop in their workplaces.

BDL Wins Summary Judgment In Federal Employment Case

Storrs Downey and Maital Savin were successful in having the U.S. District Court for the Northern District of Illinois grant their Motion for Summary Judgment, dismissing the entirety of a federal case brought against one of our clients. The case involved various claims of employment discrimination, including ADA failure to accommodate, discrimination, retaliation and common law retaliatory discharge. The court concluded that the plaintiff failed to establish that he was disabled as defined by the ADA or that there was a causal connection between his OSHA complaint and his discharge.

Storrs Downey & Maital Savin Published In DRI In-House Defense Quarterly Magazine

Storrs Downey and **Maital Savin's** article "Religious Accomodations In The Workplace" was published in the Summer 2016 issue of DRI 's *In House Defense Quarterly*. Click here to view the full article.


Practical Lessons

By Storrs Downey and Maital Savin

Religious Accommodations in the Workplace

EMPLOYMENT AND LABOR LAW

Human Resources

Imagine that you are general counsel for a popular international food company that delivers fresh meal kits directly to consumers. The company is known for its wide variety of easy-to-make meals. This morning, one of your truck drivers stated that he is unwilling to deliver meals that contain pork products due to his religious beliefs. Must you accommodate his religious beliefs?

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on religion, among other protected classes. 42 U.S.C. §2000e-2(a). Title VII also requires employers to accommodate an applicant's or employee's "sincerely held" religious belief or practice, unless doing so would pose an "undue hardship." *Id.* To establish a *prima facie* case of religious discrimination based on a failure to accommodate, a plaintiff must show that (1) a bona fide religious practice conflicts with an employment requirement; and (2) the religious practice was a motivating factor in the employer's decision to take adverse employment action. *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2032 (2015). Once a plaintiff establishes a *prima facie* case, the burden shifts to the employer to show that it made a reasonable accommodation of the religious practice or to show that any accommodation would result in undue hardship. *E.E.O.C. v. Unión Independiente de la Autoridad de Acueductos y Alcantarillados*

Storrs Downey is a founding partner and capital member, and Maital Savin is an associate, of the law firm of Bryce Downey & Lenkov LLC in Chicago. Mr. Downey represents employers, businesses, and insurance carriers on labor and employment matters and on all forms of complex civil litigation ranging from construction to product liability matters in Illinois and Indiana. He is a member of DRI and IRMS. Ms. Savin counsels employers on a wide range of employment and workers' compensation issues and defends employers and insurance carriers in related litigation.

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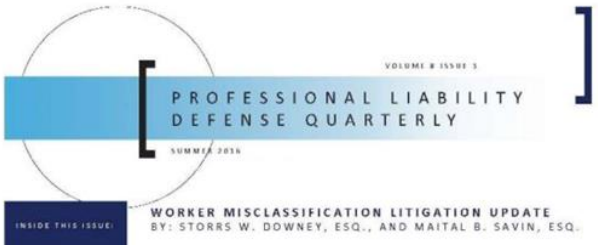
Storrs Downey And Maital Savin Published In Professional Liability Defense Federation's Defense Quarterly

Storrs Downey & Maital Savin's article "Increased Misclassification Litigation Stresses Importance Of Proper Worker Classification" was published in *Professional Liability Defense Quarterly's* Summer 2016 issue. Click Here to read the full article.



BDL Is Growing!

BDL welcomes Roslyn Lampkin-Smiley. Roslyn concentrates her practices in Workers' Compensation defense. Prior to practicing law, Roslyn was a critical care and occupational health nurse with some background in FMLA and workers' compensation issues. Roslyn also worked as a legal nurse consultant for insurance companies and defense law firms preparing medical record reviews. After Graduating from Northern Illinois University School of Law, she was an active member of Amnesty International and worked with the Illinois Innocence Project. In her free time, Roslyn enjoys playing golf, spending time at the Shakespeare Theater and spoiling her dog and grandchildren.

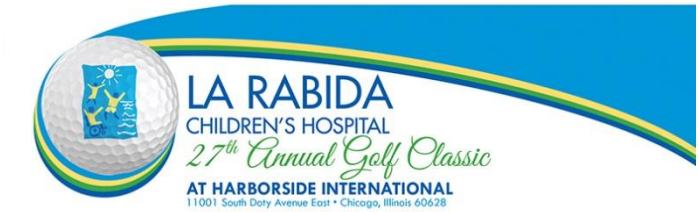
Annual Trip: Stanford vs Notre Dame Football Game

Geoff Bryce, Terry Kiwala, Kirsten Kus, and Bob Bramlette made their annual trip to Notre Dame to see the Irish take on the Stanford Cardinal. They were joined by executives from Willis Insurance, Trout Glass and Mirror and Her Closet Boutique. Unfortunately, the Cardinal came from behind to upset the Irish; however, a good time was had by all!

Giving Back

La Rabida Golf Outing

On 8/1/16, Tina Paries, Alec Miller, Terry Kiwala and Bob Bramlette participated in La Rabida Children's Hospital's 27th Annual Golf Classic at Harborside International. The outing supported La Rabida's mission to provide care to children with lifelong medical conditions, regardless of their family's ability to pay. La Rabida currently serves approximately 7,500 children annually who require primary and specialty care for chronic illnesses such as asthma, diabetes and sickle cell disease along with developmental disabilities.



Race Judicata 2016

BDL is proud to have sponsored Race Judicata's wine tent again this year! Each year, Bryce Downey & Lenkov sponsors Chicago Volunteer Legal Services' Race Judicata 5K Race. CVLS is the first and pre-eminent pro bono civil legal aid provider in Chicago. This year, the race took place on 9/15/16.

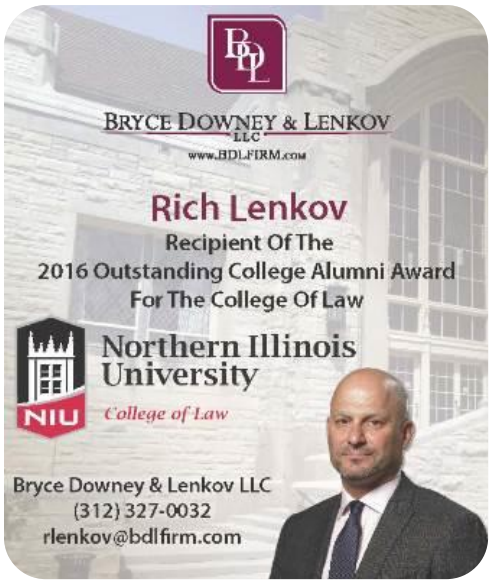
Justin Nestor Recognized In The 2017 Edition Of Best Lawyers In America©

Justin Nestor was selected by his peers for inclusion in the 2017 Edition of *The Best Lawyers in America* in the practice area of Workers' Compensation Law - Employers. Justin has been recognized by *Best Lawyers*® since 2015.

Click Here to learn more about Justin and the 2017 Edition of *The Best Lawyers in America*©.

Rich Lenkov Receives Northern Illinois University's 2016 Outstanding College Alumni Award

Rich Lenkov was honored with the 2016 College Of Law Outstanding Alumni Award from the NIU Alumni Association. Click Here to read more.



Recent Seminars

On **9/28/16**, Storrs Downey presented "The Ever Expanding Scope of the ADA: Accommodations, Remote Work, Transgender Issues, Defining Disability in Light of the ADAAA, Intersection of ADA and FMLA and the Interactive Process" at the 12th Annual National Employment Practices Liability Insurance ExecuSummit. Click Here for more info.

Upcoming Seminars

On **1/26/17**, **Storrs Downey** will present "Approaching LGBT Issues in Today's Workplace: Heightened Focus on Sexual Orientation, Gender Identity and Gender Expression Discrimination Claims" at the American Conference Institute's 25th National Conference on Employment Practices Liability Insurance in New York, NY. Click Here for more info and to register

Free Webinars

Bryce Downey & Lenkov hosts regular webinars on pressing issues and hot topics:

What you said about our 3/8/16 webinar, "Top 10 Employer Mistakes"

"Good practical advice, real-life examples."
"Good content for litigation avoidance."
"It was objective and straightforward."
"Good advice about growing list of protected rights under NLRB."

Recent

Hiring Do's And Don'ts (With Video Examples)
Is Your Independent Contractor Actually An Employee?
10 Tricky Employment Termination Questions Answered
Risky Business: Drugs, Sexual Orientation And Guns In The Illinois Workplace

If you would like a copy of any of our prior webinars, please email Marketing Coordinator Jason Klika at jklika@bdlfirm.com.

Contributors to the November 2016 Labor & Employment Newsletter

The Bryce Downey & Lenkov attorneys who contributed to this newsletter were **Storrs Downey** and **Maital Savin**

Cutting Edge Legal Education

If You Would Like Us To Come In For A Free Seminar, Click Here Now Or Email Storrs Downey At sdowney@bdlfirm.com

Our attorneys regularly provide free seminars on a wide range of labor and employment law topics. We speak to a few people or dozens, to companies of all sizes and large national organizations. Some of the topics we presented are:

- Hiring Do's And Don'ts (With Video Examples)
- Is your Independent Contractor Actually An Employee?
- 10 Tricky Employment Termination Questions Answered.
- Risky Business: Drugs, Sexual Orientation And Guns In The Illinois Workplace.
- Employment Law Issues Every Workers' Compensation Professional Needs To Know About.

Who We Are

Bryce Downey & Lenkov is a firm of experienced business counselors and accomplished trial lawyers committed to delivering services, success and satisfaction. We exceed clients' expectations everyday while providing the highest caliber of service in a wide range of practice areas. With offices in Chicago, Schererville, IN, Memphis and Atlanta, and attorneys licensed in multiple states, we are able to serve our clients' needs with a regional concentration while maintaining a national practice.

Our attorneys represent small, mid-sized and Fortune 500 companies in all types of disputes. Many of our attorneys are trial bar certified by the federal court and have been named Leading Lawyers, AV Preeminent and were selected to Super Lawyers and Risings Stars lists. Our clients enjoy a handpicked team of attorneys supported by a world-class staff.

Our Practice Areas Include:

- Business Litigation
- Business Transactions & Counseling
- Corporate/LLC/Partnership Organization and Governance
- Construction
- Employment and Labor
- Counseling & Litigation
- Entertainment Law
- Insurance Coverage
- Insurance Litigation
- Intellectual Property
- Medical Malpractice
- Professional Liability
- Real Estate
- Transportation
- Workers' Compensation

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