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Eleventh Circuit Affirms Sex Discrimination in Transgender Termination Case

Executive Summary: The Eleventh Circuit recently held that a governmental entity's termination of a transgender employee based on her non-conformity with gender stereotypes constituted sex discrimination in violation of the 14th Amendment's Equal Protection Clause. See *Glenn v. Brumby*. Although the facts were limited to a government employee, this decision impacts both public and private employers because it clarifies that while the 14th Amendment and Title VII do not specifically recognize transgender or transsexual individuals as members of their own protected class, the law still affords them workplace protections based on sex and gender if their employers subject them to adverse employment action because their appearance and/or behaviors do not align with gender stereotypes.

Vandy Beth Glenn (formerly Glenn Morrison) was born as a biological male, identified as a female, and was diagnosed in 2005 with the medically recognized mental disorder, Gender Identity Disorder ("GID"). Shortly thereafter, Glenn decided to transition from male to female under medical supervision. Part of this transition required Glenn to live as a female prior to undergoing sex-reassignment surgery.

During this process, Glenn worked as an editor in the Georgia General Assembly's Office of Legislative Counsel ("OLC") drafting and revising proposed legislation and resolutions. Glenn continued to present as a male at work, informed her immediate supervisor of the transitioning process, and provided the supervisor with informational material about GID. On Halloween in 2006, however, when other employees dressed in costume, Glenn reported to work dressed and groomed as a woman. Defendant Sewell Brumby, who headed the OLC, sent Glenn home deeming her appearance inappropriate. Brumby then terminated Glenn after confirming Glenn's intent to transition from male to female. Brumby's stated reasons for termination included that: transitioning was inappropriate, disruptive, immoral, ultraliberal, and could make coworkers uncomfortable; certain legislators would find it immoral and lose confidence in the OLC; Glenn's decision to transition demonstrated instability that could compromise Glenn's ability to maintain confidentiality; and Glenn's potential use of women's restrooms could lead to lawsuits.

Glenn subsequently filed a lawsuit under 42 U.S.C. § 1983 alleging constitutional violations based on sex discrimination and discrimination due to the medical condition, GID. Glenn sought reinstatement, injunctive relief, and attorneys' fees and costs but notably did not seek monetary damages. The trial court ruled in favor of Glenn and ordered her full reinstatement, including seniority. The Eleventh Circuit affirmed this decision, holding that the termination of a transgender or transsexual government employee violates the 14th Amendment's prohibition of sex-based discrimination if the basis for termination is due to gender stereotyping and is not substantially related to a significant government interest. Notably, the Eleventh Circuit clarified in dicta that a similar rationale could apply in the private-employment context because Title VII also prohibits discrimination against individuals who fail to conform to socially prescribed gender roles.

Employers' Bottom Line: Public and private employers should take note that while the Constitution and Title VII do not designate transsexual and transgender individuals as members of their own protected class, such individuals might still be protected from discrimination if an employer takes adverse action against them because their appearance and/or behaviors do not fit gender stereotypes. If you have any questions regarding this decision, please contact the author of this article, Aisha Sanchez, an attorney in our Tampa office at asanchez@fordharrison.com or the Ford & Harrison attorney with whom you usually work.

Communication of FMLA Policy is Key in Defending FMLA Interference Lawsuit

Executive Summary: A recent Sixth Circuit decision emphasizes the importance of informing employees how the employer will compute leave covered under the Family and Medical Leave Act (FMLA). In *Thom v. American Standard, Inc.*, the court affirmed a partial summary judgment for an employee on his FMLA interference claim, finding the employer failed to inform the employee how it was computing his FMLA leave. The Sixth Circuit also held that the employer acted in bad faith when it terminated him, entitling the employee to double compensatory damages under the statute.

Computation of FMLA Leave

Thom requested FMLA leave from April 27, 2005 until June 27, 2005 for a non-work related shoulder injury. The company approved the leave request and provided Thom with paperwork showing a return to work date of June 27. Thom's doctor later cleared him to return to work on June 13.

The employer was informed of the doctor's change in return date and expected Thom to return on June 13. But the employer sent nothing to Thom to alert him that his return-to-work date had been modified. When Thom failed to return on June 13, his employer called and was informed that Thom was still having problems with his shoulder and would return to work on June 27.

Thom stated he would work on getting a doctor's note confirming the need for the leave. Thom came to work on June 17 (before his original return-to-work date) with a note extending his leave until July 18, but the employer informed him that it had already terminated him for exceeding the number of absences allowed under the company's policy. The company counted the days after June 13 as unexcused absences.

As discussed below, employers may choose among four methods for computing FMLA leave. The company in *Thom* argued that under the "rolling" method, Thom's leave would have expired on June 13. Under the "calendar" method, however, Thom's leave theoretically would have extended through July 14. Thom argued that the employer erred in not letting him know, in writing or otherwise, that company policy was to use a "rolling" method of leave calculation. The Sixth Circuit agreed. While the company had modified its leave policy, effective March 1, 2005, to utilize the "rolling" method, it failed to tell Thom about the change or otherwise alert him that his official leave date would expire earlier than June 27, the day the company previously approved. The Court thus held that Thom was entitled to rely on the "calendar" method and the return-to-work date (June 27) that the company approved in writing.

Damages

The FMLA mandates double damages as liquidated damages unless the defendant can show it acted in good faith. Noting the strong presumption in favor of awarding liquidated damages, the Sixth Circuit remanded the case to the trial court for doubling of compensatory damages. In doing so, the court specifically criticized the company's after-the-fact reliance on the "rolling" method of calculation in light of its refusal to reinstate Thom when he brought the medical certification justifying his continued leave and in light of the fact it approved his leave through June 27.

The Four Methods For Computing FMLA Leave

The FMLA entitles an employee to a total of 12 work weeks of leave during any 12-month period because of a serious health condition that makes the employee unable to perform the functions of his or her position. For their part, employers are permitted to choose any one of four methods for determining the 12-month period in which the 12 weeks of leave entitlement occurs:

1. The calendar year;
2. Any fixed 12-month "leave year," such as a fiscal year, a year required by state law, or a year starting on an employee's "anniversary" date;
3. The 12-month period measured forward from the date an employee's first FMLA leave begins; or,
4. A "rolling" 12-month period measured backward from the date an employee uses any FMLA leave.

Here's a key point: **Under the regulations, if a company does not specifically state to an employee requesting FMLA leave which option it will use to measure the 12-month period, the employee may use whatever option provides the most beneficial outcome to him or her.**

Choices 1 and 2 above, while easier to administer, allow employees potentially to stack their FMLA leave, *i.e.* to take 12 weeks at the end of one calendar year and then immediately take 12 more at the start of the next year.

Choice 3 allows some measure of stacking as well. Example: Employee X takes 4 weeks of FMLA leave beginning February 1 of Year One, another 4 weeks beginning June 1 of Year One, and another four weeks beginning January 1 of Year Two. The employee would not be entitled to any additional FMLA leave until February 1 of Year Two. When the employee's new 12-month period begins on February 1 of Year Two, employee X would become entitled to 12 more weeks of leave. Thus, some stacking could occur because the employee could take 4 weeks of FMLA leave in January of Year Two and be entitled to an additional 12 weeks of leave beginning February 1 of Year Two.

While Choice 4 is harder to administer, it is the one most likely to prevent the stacking of leave. Example: Employee X takes 4 weeks of FMLA leave beginning February 1 of Year One, another 4 weeks beginning June 1 of Year One, and another 4 weeks beginning December 1 of Year One. The employee would not be entitled to any additional FMLA leave until February 1 of Year Two. However, on February 1 of Year Two, employee X would become entitled to four more weeks of leave (as he or she had taken 8 weeks of FMLA leave within the preceding 12 months).

No matter which choice the company picks, the company must give employees 60 days' notice before implementing the choice. This allows the employee to retain the full benefit of his or her 12 weeks of leave under whichever method affords the employee the greatest benefit.

The Bottom Line:

A company should determine what method it will utilize in computing FMLA leave, put it in writing, and alert all affected employees of the change. It would be a good idea to distribute the policy and have each employee sign an acknowledgment of receipt. A company must also look at each employee already out on FMLA leave or who has requested FMLA leave within the 60-day notice period and determine how that employee will be affected if changed, *i.e.*, would the employee receive more leave if the employee had applied under a different choice? If so, the company must allow the employee the more liberal way to determine the 12-month period for FMLA leave but state how the period will be calculated for any subsequent requests, and then apply it consistently.

If you have any questions regarding this decision, please contact the author of this article, Michelle Tatum, mtatum@fordharrison.com, who is an attorney in our Jacksonville office, or the Ford & Harrison attorney with whom you usually work.

Changes to NLRB Deferral Procedure

Executive Summary: On January 20, 2012, the NLRB's Office of the General Counsel released GC Memo 12-01, which dramatically changes the NLRB's procedures on the pre-arbitral deferral of unfair labor practice charges. Effective immediately, as a standard practice, the Regional offices will begin to fully investigate all 8(a)(1) and 8(a)(3) unfair labor practice charges that the Regions determine will not likely be resolved within a year through the parties' collective bargaining processes. Notably, the memo also states that Regions may revoke deferral and fully investigate any currently pending 8(a)(1) and 8(a)(3) unfair labor practice charges that were filed more than one year ago.

Former Pre-Deferral Procedure

Upon the filing of any 8(a)(1), (3), and (5) unfair labor practice charge where the allegation is covered by a collective bargaining agreement, Regions conducted a cursory investigation to determine whether the charge had "arguable merit." The initial investigation typically consisted of the collection of evidence from the Charging Party and a request from the Employer to provide assurances that the parties: 1) have a long and productive bargaining relationship; 2) there is no claim of employer enmity towards employees' exercise of protected rights; 3) the arbitration clause covers the dispute at issue; 4) the employer manifests a willingness to arbitrate the dispute; and 5) the alleged unfair labor practice lies at the center of the dispute. Once the employer provided such assurances, the Regions would defer the charge to the parties' grievance and arbitration process. As a practice, the Regions would follow up with the parties every 90 days requesting an update as to the status of the pending grievance. Should the parties fail to provide an update to the Region regarding the status of the grievance, the Region would dismiss the charge due to lack of cooperation.

New Procedure

Under the new GC Memo, the Regions are now instructed to treat 8(a)(1) and 8(a)(3) charges differently than 8(a)(5) charges. For the most part, the former pre-arbitral deferral policy for 8(a)(5) charges will remain unchanged. However, the Region's treatment of 8(a)(1) and 8(a)(3) charges will be changed in the following ways:

Upon the filing of any 8(a)(1) or 8(a)(3) charge that is subject to deferral, the Regions are instructed to begin the cursory investigation as was done previously. However, the Region is also instructed to determine whether the underlying grievance arbitration is "likely" to be completed in less than a year. If the Region makes a finding that the grievance arbitration is likely to be completed within a year, the Region is permitted to defer the charge. If, however, the Region makes a determination that the underlying grievance arbitration is not likely to be completed within a year, the Regional Director "should determine whether deferral is appropriate." Should the Regional Director believe that the deferral of such a charge "would unduly disadvantage the Charging Party or otherwise frustrate the Board's ability to enforce the Act, then the Region should proceed with a full investigation and reach a merit determination." If the Regional Director finds the charge meritorious, the Region will submit the case to Advice. If the Regional Director finds the charge is unmeritorious, the Region will dismiss the charge. Should the Regional Director find there is "a good reason to defer the charge despite the significant delay" (for example, all parties would prefer arbitration), the Region should contact Advice before deferring the charge.

Consistent with its prior practice, the Region will continue to conduct quarterly reviews of deferred 8(a)(1) and 8(a)(3) cases. However, after the charge has been deferred for a year, the Region will now send a "show cause" letter to all parties seeking an explanation as to why the Region should not revoke deferral and complete a full investigation. Unless the Regional Director is satisfied that there is "good reason" to keep the charge in deferral status, the Region will revoke deferral, conduct a full investigation, and make a determination of the case on its merits. If the charge is deemed meritorious, the charge will be submitted to Advice. If the charge is found to be non-meritorious, the Region will dismiss the charge, absent withdrawal.

Employers' Bottom Line:

The NLRB's new pre-arbitral deferral policy could significantly impact employers operating under a collective bargaining agreement since fewer unfair labor practice charges are likely to be deferred to the grievance and arbitration process. The procedural shift will require employers to respond to more unfair labor practice charges and in a more significant way. The policy change could contribute to an increase in the number of unfair labor practice complaints issued against employers and the types of remedies available to unions. We will keep you informed as to any changes in the Board's deferral policies and/or practices.

If you have any questions regarding the new policy, please contact the author of this article, Erica Berencsi, eberencsi@fordharrison.com, an attorney in our Los Angeles office, or the Ford & Harrison attorney with whom you usually work.