



Weekly Wright Report (12/18/17)

EMPLOYMENT LAW

\$1.16 Million Jury Award in Transgender Employment Discrimination Case

An Oklahoma federal jury recently returned a verdict in favor of professor Dr. Rachel Tudor in her lawsuit claiming that Southeastern Oklahoma State University discriminated against her based on her gender and gender identity. In particular, the jury found that the school denied Dr. Tudor tenure because of her gender identity and also retaliated against her. As a result, the jury awarded Dr. Tudor \$1.16 million in damages.

According to the complaint, Dr. Tudor is a male-to-female transgender English professor who worked as a tenure track Assistant Professor with the school from 2004 until her termination in 2011. When she was hired, Dr. Tudor presented as a man and went by a traditionally male name. Starting in 2007, Dr. Tudor began to present as a woman by wearing women's clothing, styling her hair in a feminine manner, and going by the name Rachel. Shortly later, Dr. Tudor was told to "take safety precautions because some people were openly hostile towards transgender people."

In 2009, Dr. Tudor applied for tenure and the review committee recommended that she receive tenure. In early 2010, however, a dean and Vice President of the school rejected the committee's recommendation and denied tenure to Dr. Tudor with no explanation for the decision. Dr. Tudor appeal the tenure denial, but the school failed to follow its appeal procedures. Ultimately, the President of the school denied Dr. Tudor's request for tenure, eventually explaining that Dr. Tudor did not receive tenure because she was supposedly deficient in the areas of "research/scholarship" and "university service." The school refused to allow Dr. Tudor to re-apply for promotion and tenure because doing so was not in the "best interests of the university."

In November 2017, Dr. Tudor and Southeastern Oklahoma State University tried the case before a jury, which found in favor of Dr. Tudor awarding her \$1.6 million on the discrimination and retaliation claims related to the tenure denial.

A prominent issue in the case was sex-stereotyping, which is an alternative vehicle for Title VII protection for those who have suffered gender-identity discrimination. Discriminatory conduct against LGBT individuals can constitute prohibited sex discrimination under Title VII and other federal statutes that prohibit sex discrimination where the conduct is based on those individuals' nonconformance to gender norms. This concept developed in a 1989 Supreme Court decision, *Price Waterhouse v. Hopkins*, where a woman was denied partnership at Price Waterhouse because she did not conform to traditional female stereotypes. In explaining the legal relevance of sex-stereotyping, the Court stated that "we are beyond the day when an employer



could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”

In 2004, the Sixth Circuit later summed up the impact of the Supreme Court’s decision by stating, “[a]fter *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim’s sex.” The court continued, “[i]t follows that employers who discriminate against men because they do wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim’s sex.”

More recently, the courts of appeals for the First, Sixth, Ninth, and Eleventh Circuits, district courts in the Second, Third, Fourth, Fifth, Sixth, Tenth, Eleventh, and D.C. Circuits, and the EEOC have recognized that transgender individuals’ sex-stereotyping claims constitute claims of sex-based discrimination. Maryland falls under the Fourth Circuit. For questions, ask Laura LRubenstein@wcslaw.com

The Importance of EEOC Position Statements

When an employee (a.k.a. “charging party”) files an administrative charge with the federal Equal Employment Opportunity Commission (“EEOC”) alleging harassment, discrimination or other legal violations, the EEOC requests that the employer respond to allegations in what is called a position statement. Position statements are not to be taken lightly.

For the last few years, the EEOC permits the release of position statements to charging parties, and their attorneys upon request during the investigation of the charge. Which means that great care should be taken in drafting the statements and marking information as confidential. Misstatements in the facts or failing to recognize sensitive areas can turn a defensible claim into a problematic one.

The temptation to take the process lightly, not obtain good advice or not devote the time necessary to presenting the employer’s best arguments may have significant impact on how the charge is handled by the EEOC. Even little things like later changing/supplementing the employer’s explanation as to why it took certain actions against the charging party can lead to a finding that the employer’s position is not credible.

Most insurance companies that provide coverage for harassment and discrimination claims will insist that employment attorneys draft, or at least review, the position statement prior to submission to ensure that an appropriately thorough response is submitted. For guidance on what your position statements and communications to the EEOC should include, ask Don DWalsh@wcslaw.com