6-2021

5th Circuit Panel Affirms Dismissal of Title VII and ADA Claims by Transgender Plaintiff for Lack of Comparator Evidence

Arthur S. Leonard

5th Circuit Panel Affirms Dismissal of Title VII and ADA Claims by Transgender Plaintiff for Lack of Comparator Evidence

By Arthur S. Leonard

A panel of the U.S. Court of Appeals for the 5th Circuit ruled on May 12 that U.S. District Judge David Hittner (S.D. Texas) had correctly granted a motion by the defendant employer, to dismiss discrimination claims under Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act (ADA) brought by Elijah Anthony Olivarez, a transgender man, in connection with his discharge on April 27, 2018. On May 14, the court withdrew its opinion and substituted a new one reaching the same conclusion but correcting errors in the first opinion concerning the applicable Supreme Court standard for deciding dismissal motions in employment discrimination cases. Writing for the panel, Circuit Judge James Ho asserted that Olivarez failed to state a discrimination claim under either statute because he had not alleged that any similarly situated employee (a "comparator") had received any more favorable treatment than Olivarez.

Olivarez began working as a retail store associate for T-Mobile in December 2015. He alleges that during the first half of 2016, a supervisor made "demeaning and inappropriate comments" about his transgender status, about which he complained to Human Resources. He alleges that T-Mobile retaliated against him for filing the complaint by reducing his hours to part-time from September 2016 to November 2016. Anticipating surgical gender confirmation, Olivarez "stopped coming to work" in September 2017 "in order to undergo egg preservation and a hysterectomy," and the following month he "applied retroactively" to Broadspire Services, with which T-Mobile contracted for administration of its leave programs, for medical leave to extend to December 2017. A mixture of unpaid and paid leave was granted through December 31, and extended at Olivarez's request to February 18, 2018, but a further extension of leave was denied in March 2018 and Olivarez was discharged on April 27, 2018. He filed charges with the EEOC, received a right-to-sue letter on August 15, 2019, and filed suit against T-Mobile and Broadspire on November 12, 2019.

At the time Olivarez filed suit, gender identity discrimination claims under Title VII were not recognized as such by the 5th Circuit – indeed, Judge Ho authored a relevant decision to that effect – and artful pleading would be necessary to state a claim suing sex stereotyping or gender non-conformity theories. Transgender law specialist Jillian T. Weiss is Olivarez's counsel in the 5th Circuit, but the opinion does not note whether his original Complaint was file *pro se*; in any event, a First Amended Complaint was filed on November 22, 2019. Judge Hittner entered a scheduling order on February 13, 2020, setting a deadline of March 13 for any further amendment of pleadings. At the time, of course, the *Bostock* case had been argued but was not yet decided (and ultimately would not be decided until June 15, 2020). Defendants moved to dismiss for failure to state a claim. Their motion was denied *without prejudice* on March 27, 2020, and Judge Hittner permitted Olivarez to file another amended complaint, which he did on April 16, followed by defendants' renewed motion to dismiss on April 30, which was granted by Judge Hittner. At the time the dismissal motion was granted, the Supreme Court had not announced its decision in *Bostock*. After the *Bostock* ruling was announced, Olivarez moved to file a new amended complaint, but the court denied his motion.

Of course, *Bostock* took away one of the defendants' key arguments, and a point of contention on the appeal was whether the facts as alleged by Olivarez in his last amended complaint were sufficient to state a claim under Title VII (and the ADA) in light of *Bostock*. The 5th Circuit panel decided they were not. Olivarez was not appealing the district court's dismissal of his retaliation claim, which had been found to be time-barred.

In his original opinion, Judge Ho focused on *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), as setting the standard for pleading a disparate treatment claim under Title VII in the absence of direct evidence of discriminatory intent. In the substituted opinion, he acknowledged that the pleading standard is now governed by *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). It is not necessary for the plaintiff to meet the standard of alleging a *prima facie* case, as described in *McDonnell Douglas*, but rather to allege facts sufficient to state claim. However, Judge Ho wrote, the *McDonnell Douglas* pleading standards (which go to the question of a *prima facie* case sufficient to shift a burden of production to the defendant) remain relevant, pursuant to the 5th Circuit's decision in *Chhim v. Univ. of Texas at Austin*, 836 F.3d 467 (5th Cir. 2016), where the court said that the plaintiff must "plead sufficient facts on all of the ultimate elements of a disparate treatment claim to make his case plausible." And, according to Judge Ho, Olivarez "has failed to plead any facts indicating less favorable treatment than others 'similarly situated' outside of the asserted protected class."

Judge Ho asserted that this pleading requirement was not altered by *Bostock*. "Olivarez contends that, after the district court granted the motions to dismiss, *Bostock* changed the law and created a lower standard for those alleging discrimination based on gender identity. T-Mobile and Broadspire argue that *Bostock* did no such thing. We agree with T-Mobile and Broadspire. *Bostock* defined sex discrimination to encompass

sexual orientation and gender identity discrimination. But it did not alter the meaning of discrimination itself." And, he concluded, "[at] the summary judgment stage, when the claim relies on circumstantial evidence, a Title VII plaintiff must identify a more favorably treated comparator in order to establish discrimination. *Bostock* does not alter either of those standards."

Actually, the assertion that failure to allege a more favorably treated comparator is necessarily fatal to a disparate treatment claim is controversial, a point that Ho appears to acknowledge in passing earlier in the opinion when he writes, "And comparator allegations aside, the complaint presents no other facts sufficient to 'nudge the claims across the line from conceivable to plausible.'" This seems to recognize that evidence other than comparator evidence might satisfy the pleading requirement at the motion to dismiss stage in order to state a plausible discrimination claim. In this case, Olivarez's previous experience with the supervisor who made "demeaning and inappropriate comments" about his gender identity and the subsequent alleged retaliation against him when he complained to Human Resources might be cited to support a claim of discriminatory motivation, but the court doesn't mention that, probably due to the lack of temporal proximity of those incidents to the discharge. Also, there is no mention in the opinion whether the supervisor who allegedly made those remarks had anything to do with the discharge decision.

Judge Ho insists that *Bostock* actually requires comparator evidence, focusing on Justice Neil Gorsuch's reasoning for finding that gender identity claims are covered under Title VII, which was based on hypothetical fact patterns involving comparators.

As to the ADA claim, the court found that Olivarez's complaint fell short by failing to allege facts that would support an inference that he was fired *because of* a disability. (There is disagreement among the federal courts about whether gender dysphoria is a disability within the meaning of the ADA, because of the Helms Amendment that added a provision stating that "homosexuality" and "transsexualism" are not disabilities for purposes of the statute. Some courts have opined that gender dysphoria, which is a condition distinct from "transsexualism," is not excluded from coverage by this language.) "At most," wrote Judge Ho, "Olivarez made a conclusory allegation that T-Mobile and Broadspire 'discriminated against [Olivarez] based on [a] disability.' But the Rule 8 pleading standard demands more than conclusory statements."

The court rejected Olivarez's argument that Judge Hittner should have allowed the filing of a new amended complaint after the *Bostock* decision was announced, but as the court rejected the argument that *Bostock* had changed the pleading standard to dispense with the necessity to allege comparator facts, it found that "there is no intervening change of law that warrants reconsideration" of the trial court's decision to dismiss the case. The judge also pointed out that Olivarez had several chances to amend his complaint if he could come up with comparator evidence, but he never did so.

Judge Ho's view of the case can be summed up by his brief characterization of it in the introduction of his opinion: "An employer discharged a sales employee who happens to be transgender – but who took six months of leave, and then sought further leave for the indefinite future. That is not discrimination – that is ordinary business practice."

Olivarez's next step could be a petition for rehearing *en banc*, but the odds against succeeding in the 5th Circuit are fairly long, as twelve of the seventeen active judges were appointed by Republican presidents, including two venerable folks appointed by Ronald Reagan in the 1980s who have not taken senior status despite their age. Donald Trump appointed six of the active judges. ■

Arthur S. Leonard is the Robert F. Wagner Prof. of Labor and Employment Law at New York Law School.

Fourth Circuit Rules Prisoners Have No Privacy Interest in Their HIV Information

By William J. Rold

Inmate Christopher N. Payne was in a medical dorm in a Virginia prison farm when the attending physician remarked that he had not been taking his HIV medication, within the hearing of other inmates, staff, and civilians – thereby revealing Payne's HIV status to others. Payne's claim for violation of privacy was dismissed by Senior U.S. District Judge Liam O'Grady (E.D. Va.) prior to service, on the ground that neither the Supreme Court nor the Fourth Circuit recognized a right to privacy in inmate medical information. Payne appealed *pro se*.

The Fourth Circuit assigned counsel, and it requested adversary briefing from defendants. The case was argued, and the decision took nine months. While the court pretends otherwise, the opinion in *Payne v. Taslimi*, 2021 U.S. App. LEXIS 15972 (4th Cir., May 27, 2021), is sweeping in scope: "We limit our decision today to the question before us: Did Payne have a 'reasonable expectation of privacy' in his HIV status while in a prison medical unit? We hold that he did not. When Dr. Taslimi disclosed his HIV status, Payne was in prison, a place where individuals have a curtailed expectation of privacy. Whatever expectations remain fail to include the diagnosis of or medication for HIV, a communicable disease. The judgment below is therefore AFFIRMED."

Circuit Judge Julius N. Richardson (appointed by President Donald J. Trump) wrote the opinion. He was joined by Circuit Judges Stephanie D. Thacken (appointed by President Barack Obama) and A. Marvin Quattlebaum (appointet by Trump). While the judges reject claims under the Health Insurance Portability and