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Does Title VII Protect Sexuality?

A recent decision by the Sixth Circuit Court of Appeals may have opened a door for gays and lesbians to seek protection under Title VII against employment discrimination. The Sixth Circuit covers the states of Michigan, Ohio, Kentucky, and Tennessee. To reduce the risk of a discrimination charge, and to bolster a defense against such a charge, employers should adopt policies prohibiting harassment or discrimination against any employee based upon the employee's sexuality.

In *Barrett v. Whirlpool Corp.*, three Caucasian employees alleged that their employer discriminated against them on account of their association with and advocacy for certain African-American co-workers. The employees claimed that the associational discrimination against them created a hostile work environment.

The Court noted that Title VII protects employees who are victims of discriminatory animus towards third persons who are members of a protected class and with whom the employee associates. *Barrett* cited to a prior case in which the Sixth Circuit had held that a Caucasian employee could state a claim under Title VII if an employer took adverse actions upon learning that the employee's child was bi-racial. In the prior case, the Sixth Circuit had noted that the employee was discriminated against because his race was different than his child's race. Therefore, according to the Court in the prior case, the employer discriminated against the employee based upon his race.

Barrett clarified that the degree of association between the employee and the third person is not relevant. According to *Barrett*, an employee does not need to be a close family member to the third person, or even a close friend, to state a Title VII claim.

Of the three plaintiffs, *Barrett* found that only one stated a claim under Title VII. The successful plaintiff alleged that she was physically threatened because of her association with African-American employees and that the employer took no corrective action after she complained. The successful plaintiff also alleged that her supervisor attempted to prevent her from applying for a promotion because

of the supervisor's disapproval of the employee's friendship with an African-American co-worker. She alleged that these actions were taken against her because she was a Caucasian associating with an African-American. *Barrett's* language suggests that its holding is not limited to an employee's association with another co-worker but would also apply to an employee's association with a non-employee.

The Court released *Barrett* on February 23, 2009, so it is too soon to see how courts apply its holdings to other types of Title VII claims. (Any one of the parties may appeal *Barrett* to the United States Supreme Court. The deadline for such an appeal is May 26, 2009.) But a credible argument could be made that *Barrett* should apply to gays and lesbians.

All employees are members of a protected class based upon their gender. This means that employers may not discriminate against men or women. Because *Barrett* recognizes Title VII claims for associational discrimination without regard to the degree of association, one could argue that *Barrett* would recognize a Title VII claim for associational discrimination for a male employee who has a close association with another male - a much closer association than the successful Caucasian *Barrett* plaintiff had with the African-American co-worker. If this male employee was subjected to insults for being gay - or even terminated for being gay, this employee could argue that he was harassed and discriminated against because of his gender. The male employee could argue that a female employee who has a close association with a male would not be subject to the same harassment and discrimination.

A court could apply *Barrett* to the harassment and discrimination against this hypothetical male employee and find that Title VII protects employees from this kind of associational discrimination. Even though Title VII and the Ohio Civil Rights Act do not expressly include sexuality as a protected status, these laws do not exclude sexuality as a protected status either. (The Americans with Disabilities Act and the Ohio Civil Rights Act both expressly exclude homo sexuality and lesbianism from their definitions of a disability.) Therefore, *Barrett* could be interpreted to protect employees who are closely associated with members of their same sex.

In response to *Barrett*, an employer should adopt policies against harassment or discrimination based upon sexuality. If an employer adopts such policies and enforces them, the employer might avoid being found liable for associational discrimination.

