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LEGISLATION

Hang up and drive: Florida amends, toughens texting-while-driving law

by Lisa Berg
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.

Studies show that texting, which simultaneously involves manual, visual, and cognitive functions, is among the worst of all distractions for drivers. According to the National Highway Traffic Safety Administration, sending or reading a text message takes a driver's eyes off the road for an average of five seconds, which at 55 miles an hour is the equivalent of driving the length of a football field with your eyes closed!

On May 17, 2019, Governor Ron DeSantis signed a bill that makes it a primary offense to text while driving, meaning violators can be pulled over and cited. Texting was already a secondary offense under the Florida Ban on Texting While Driving Law, but drivers could be cited only if they were pulled over for another violation. The new law takes effect July 1, but only warnings will be given until January 1, 2020, when police officers can begin writing citations that carry fines of about $30 plus court costs and fees as well as three points on your driving record for a first offense.

Existing law

According to the Florida Ban on Texting While Driving Law, a person many not operate a motor vehicle while manually typing or entering multiple letters, numbers, symbols, or other characters into a wireless communications device or while sending or reading data on a wireless communications device for the purpose of "nonvoice" interpersonal communication.

Nonvoice interpersonal communications include texting, e-mailing, and instant messaging. For purposes of the ban on texting while driving, the term "wireless communications device" means any handheld device used or capable of being used in a manner that is designed or intended to receive or transmit text or character-based messages, access or store data, or connect to the Internet or any communications service and allow text communications.

Effects of amendment

The new law amends the existing law to allow police officers to stop motorists simply for texting. It also requires law enforcement officers who stop a motor vehicle to inform the driver of her right to decline a search of her wireless communications device and prohibits officers from accessing the device without a warrant. Therefore, if a driver is pulled over and the officer asks to see the driver's cell phone, she can decline.

According to the amendment, a motor vehicle that is stationary is not

AGENCY ACTION

DOL launches effort to reduce improper UI payments. The U.S. Department of Labor (DOL) has launched a series of initiatives aimed at reducing improper payments in the unemployment insurance (UI) program. Part of the effort involves providing states the resources to recognize and combat improper UI payments. The DOL has also released a redesigned integrity webpage, "UI Payment Accuracy by State," which displays each state's improper payment rate. The webpage, found at www.dol.gov/general/maps, contains information on the root causes of each state's improper UI payments and provides links for reporting fraud. In addition, the DOL has created two new state recognition awards—one to recognize states that have demonstrated excellence in minimizing improper UI payment rates and the other to recognize states that have significantly reduced their improper payment rates.

EEOC issues new "Digest of EEO Law." The Equal Employment Opportunity Commission (EEOC) in April released the latest edition of its federal-sector "Digest of Equal Employment Opportunity Law," which is available on the agency's website at www.eeoc.gov/federal/digest/index.cfm. The director of the EEOC's Office of Federal Operations noted that harassment in the workplace remains a persistent problem, and the digest provides information to assist federal stakeholders in their efforts to fight it. The digest features a wide variety of recent EEOC decisions and federal court cases of interest. This edition contains summaries of noteworthy decisions, including cases involving attorneys' fees, class complaints, compensatory damages, complaint processing, dismissals, and findings on the merits. It also includes cases discussing remedies, sanctions, settlement agreements, establishing a claim, summary judgment (i.e., dismissal without a trial), and timeliness.

Grants aim to help jobseekers exiting criminal justice system. The DOL has made available $82.5 million in Reentry Employment Opportunity grants and $5 million in Fidelity Bonding Demonstration grants to improve employment opportunities for young adults and adults exiting the criminal justice system. The Reentry Employment Opportunity grants are designed to develop or expand programs to improve employment opportunities for adults between 18 and 24 who have been incarcerated in the youth or adult criminal justice system and adults older than 25 who were released from prison or jail within two years of enrollment. The Fidelity Bonding Demonstration grants will enable states to expand their use of fidelity bonds to help people with criminal records, including ex-offenders recovering from opioid and other drug addictions, obtain employment. ✤

subject to the texting prohibition. Consequently, drivers can still text at a red light (although it isn't recommended). In addition, the prohibition on texting doesn't apply to a driver who is:

- Reporting an emergency or criminal or suspicious activity to law enforcement authorities;
- Receiving messages related to the operation or navigation of the vehicle or vehicle safety, including emergency, traffic, or weather alerts, receiving data used primarily by the motor vehicle, or listening to radio broadcasts;
- Using a device or system for navigation purposes (i.e., drivers can still use GPS programs such as Google Maps);
- Conducting wireless interpersonal communication that doesn't require the manual entry of multiple letters, numbers, or symbols, except to activate, deactivate, or initiate a feature or function;
- Conducting wireless interpersonal communications that don't require reading text messages, except to deactivate or initiate a feature or function; and
- Operating an autonomous vehicle.

The amendment specifies that a driver may not use a handheld wireless communication device in a designated school crossing, school zone, or work zone area where construction personnel are present or operating equipment on the road or immediately adjacent to the work zone area.

Employer takeaway

Employers have an obligation under the Occupational Safety and Health Act to create a safe and healthful workplace. You are well advised to adopt policies banning texting while driving if you haven't already. Moreover, you shouldn't create any incentives for employees that encourage or condone texting. Any employee training should include a discussion of your policy as well as the dangers of distracted driving.

You may contact Lisa Berg at lberg@stearnsweaver.com. ✤

ELECTRONIC WORKPLACE

Under the radar: Florida's cybersecurity and data breach law

by Jeffrey D. Slanker
Sniffen & Spellman, P.A.

In past issues of Florida Employment Law Letter, we've highlighted some less talked about and little publicized statutes that affect businesses in Florida. Press releases and news stories often address workplace safety and employment discrimination, but there are a host of Florida statutes that don't get much press. One of those laws, the Florida Information Protection Act of 2014 (FIPA), governs an important HR issue: cybersecurity and data breaches. This article highlights some pertinent aspects of FIPA, explores potential vulnerabilities in computer systems, and shows how important it is that HR professionals are the front lines in the war on data breaches.

FIPA sets the rules for collecting sensitive data

FIPA generally applies throughout Florida to any entity that collects individuals' personal data, including governmental entities. The law requires certain disclosures to be made when data containing personal information has been breached or accessed without authorization. Personal information includes an individual's first name (or initial) and last name in combination with any one of the following:

- Social Security number;
- Driver's license number;
- Passport number;
- Military identification number; or
- Any other number issued on a government document used to verify identity.

FIPA also protects an individual's medical information, information about an individual's health insurance coverage that could be used to identify her in conjunction with a policy or subscriber number, and information about an individual that could be used to gain access to her online accounts.

Obviously, the purpose of the law is to encourage covered entities to properly store records before they are breached, including minimizing the amount of personal information that is stored. After a breach has occurred, a covered entity must take steps to notify the affected individuals and inform them which information has been compromised.

Notice requirements

When a breach occurs, the entity must provide notice of it to the individuals whose information was compromised (or is reasonably believed to be compromised). The notice can be mailed or e-mailed, but it must be given without unnecessary delay as soon as the entity becomes aware of the breach (or potential breach). Notice must be provided within 30 days of when the entity first became aware of the breach. Civil penalties apply after 30 days. The notice must include the estimated date of the breach, a description of the personal information believed to have been taken, and the entity's contact information.

If a breach affects 500 or more individuals, FIPA requires the entity to provide notice to the Florida Attorney General's Department of Legal Affairs. The notice must include a synopsis of the breach and details of any steps or services being offered to mitigate its effects. If a system maintained by a third party was breached, the third party is required to notify the covered entity within 10 days of becoming aware of the breach.

If the cost of notice exceeds $250,000, more than 500,000 individuals' data was breach, or the entity doesn't have access to the affected individuals' e-mail or mailing addresses, it may provide notice on its website or via print or broadcast media.

While there's no individual legal claim under FIPA, violations are treated as an unfair or deceptive trade practice, and claims can be filed by the AG's Department of Legal Affairs. An entity can be subject to civil penalties of $1,000 per day for the first 30 days of the violation and $50,000 for each 30-day period after that up to 180 days, with a maximum penalty of $500,000 for violations that last longer than 180 days. Additional remedies apply under Florida's Deceptive and Unfair Trade Practices Act.

Managing the risk of human error

Take care to ensure your computer system is fully updated and you've installed the latest security technology, including antivirus software and firewalls. Be aware that many cyberattacks can be traced back to human error. For example, phishing scams rely on unsuspecting individuals to open an infected document or go to a strange website and offer their login information or other personal data. As people become savvier, cybercriminals devise more sophisticated scams. You can manage the risk of human error, however.

Because the success of many cyberattacks relies on human actions, HR professionals are critical to your defense. HR should train employees how to recognize the signs of a cyberattack and avoid falling victim to data breaches. Involving IT personnel in the training can help employees understand your system's vulnerabilities, how any flaws or weaknesses can be exploited, and how they can avoid being duped by hackers and other cybercriminals.

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REPORTING REQUIREMENTS

September 30 deadline looms for newly required EEO-1 data

Employers required to submit EEO-1 reports to the Equal Employment Opportunity Commission (EEOC) are venturing into uncharted territory as they work to collect newly required information due by September 30. While they may be accustomed to submitting traditional EEO-1 information—data on employees' race/ethnicity and gender, or what's being called Component 1 data—this year they also must compile data on compensation and hours worked, or what's being called Component 2 data.

Complicating the issue is the on-again, off-again nature of the new Component 2 requirements. The requirement for two years of pay and hours-worked data was initiated during the Obama administration, but before it could take effect, the Trump administration issued a stay, calling the requirements too burdensome on employers. Then, a federal judge ordered the stay lifted but left open the question of which two years of data employers would need to submit. Just days after the EEOC informed employers which two years of data they need to submit, the administration announced it was appealing the judge's ruling. The appeal doesn't affect the deadline employers face, however.

What employers must do

Businesses required to submit EEO-1 reports—employers with at least 100 employees as well as federal contractors and subcontractors with at least 50 employees—must submit Component 2 data by September 30. Since this is the first year the agency has needed to collect the data, it is using an outside contractor for much of the work because time and resources are limited. Deciding on a scope of work and finalizing the contract are time-consuming. Therefore, the EEOC has announced it won't be able to accept Component 2 submissions until mid-July, meaning employers have just 2½ months to compile and submit the data after the Component 2 portal becomes available.

Information from both Components 1 and 2 helps the EEOC and the Office of Federal Contract Compliance Programs (OFCCP) gauge compliance with federal equal opportunity laws. The Obama administration added Component 2 to help identify pay disparities across industries and occupations not detectable by examining just the traditional race/ethnicity and gender information required for Component 1.

Component 1 data was due March 31, but the upcoming September 30 Component 2 deadline is expected to present challenges for employers. Some surveys have shown that about 75 percent of employers are skeptical that they will be able to comply by the deadline since many questions need answers before they can collect and submit accurate information. Employers also are concerned about the logistics of gathering the data and confirming its accuracy in time to meet the deadline. Moreover, employers worry that the new Component 2 data requirement may expose them to risk since the EEOC and the OFCCP share EEO-1 data and the OFCCP uses the data to initiate audits.

Employers need to monitor developments in the government's appeal of the decision to require Component 2 data, but the EEOC has posted a notice on its website stating employers should begin preparing to submit 2017 and 2018 Component 2 data by September 30 in light of the U.S. District Court for the District of Columbia's decision in *National Women's Law Center, et al. v. Office of Management and Budget, et al.* The notice further informs employers that on May 3, the U.S. Department of Justice (DOJ) appealed the *National Women's Law Center* ruling, but the appeal "does not stay the district court orders or alter EEO-1 filers' obligations to submit Component 2 data."

Why so soon?

Judge Tanya S. Chutkan of the D.C. district court ordered the Trump administration's stay on collection of Component 2 data lifted on March 4, 2019. Then, in April, the judge held a hearing during which the EEOC and other parties presented their views on the collection of Component 2 data. The EEOC's chief data officer reported that the agency wouldn't be able to collect Component 2 data by the May 31 deadline for Component 1.

On April 25, Chutkan set the September 30 deadline and allowed the EEOC to decide which two years of Component 2 data it would collect—2018 and 2017 or 2018 and 2019. If the EEOC had chosen 2018 and 2019, the 2018 data would have been due on September 30 and the 2019 data would have been due March 31, 2020. Since the

EEOC decided on 2018 and 2017 data, both years are due September 30. ✤

EMPLOYER RETALIATION

Arbitrator awards fired DISH employee $189K for workers' comp retaliation

by Tom Harper
The Law and Mediation Offices of G. Thomas Harper, LLC

On April 12, 2019, Sheila Cesarano, an arbitrator with the American Arbitration Association (AAA), found that DISH Network terminated one of its installers in retaliation for filing a workers' compensation claim after he suffered a job-related injury. The award shows that having arbitration agreements with employees doesn't always mean an employer will win an employment dispute.

Trying to satisfy an unhappy customer

Colin Morrison was hired in 2015 to work as a DISH technician in the Miami area. He had a good work record, but he hurt his shoulder in an on-the-job accident in June 2017. His doctor restricted him from pulling or lifting more than 20 pounds, which meant he couldn't perform field installation work. He filed a workers' comp claim and returned to light duty labeling products in the office while his shoulder recovered.

In August 2017, Morrison's supervisor, Maddison Holm, asked him to accompany her into the field to assist other technicians. They stopped to check on a new employee, Daniel Diaz, who was installing an international satellite dish. Diaz had installed the dish on the customer's patio, but she was unhappy with the location and wanted it on her roof. He got a ladder and went up to the roof to install the equipment while Morrison and his supervisor watched.

When Diaz needed help, Holm told Morrison to climb the ladder and assist him with the roof installation. She could clearly see that he and Diaz weren't using any fall protection or safety gear as they worked on the roof. Morrison said he was aware of company policy requiring technicians to don fall protection gear when they climbed onto roofs, but he was also mindful of the cardinal rule of following his supervisor's instructions.

While he and Diaz were working on the roof, Morrison saw Holm talking on her phone. She had called her supervisor, who informed her that employees weren't supposed to be on roofs without safety gear. After she ended the call, Holm mentioned safety equipment for the first time and instructed both men to come down off the roof because they weren't wearing safety gear. Holm and Diaz didn't have any safety gear in their vehicles, so Holm returned to the office and brought back the only safety harness she could find. The technicians took turns using it to complete the roof installation.

When the installation was done, Holm told Morrison that he was being placed on administrative leave for being on the

WORKPLACE TRENDS

Research finds lack of mentorship and coaching. New data from media agency network Mindshare U.S. found that 42% of U.S. employees said their companies either don't offer mentorship programs or don't offer enough of them. Men were more likely than women to say they either got enough or more than enough mentorship programs at work, at 57% versus 42%. The research also found that 66% of U.S. employees rank ongoing feedback or coaching on their work as an important or very important benefit in the workplace. Yet 28% of people surveyed said that they either don't get enough ongoing coaching or feedback or that their companies don't even offer it. The data showed that women were more likely than men to feel that way, at 31% versus 25%.

Family-friendly benefits gaining popularity. A report from the International Foundation of Employee Benefit Plans found more U.S. employers offering family-friendly benefits such as fertility services, paid leave, and flexible scheduling to accommodate employees in the competitive labor market. The research found that 31% of employers with 500 or more employees offer some sort of fertility benefit, up from 24% in 2016. More employers of all sizes were found to offer paid maternity leave. The research found that 41% offer paid maternity leave (up from 37% in 2016) and 32% offer paid paternity leave (up from 24% in 2016). Also, employers are providing additional types of paid leave, including paid family/caregiving leave, offered by 17% of workplaces, and paid leave to attend a child's activities, offered by 8%. Just over half of employers (51%) offer flexible work hours or compressed workweeks.

Research finds security risk in lax attitude about workplace communications. A new survey examining the growth of new workplace collaboration tools and platforms reveals a casual attitude about workplace communications that poses a threat to business. The survey of more than 1,500 workers in the United States and the United Kingdom by Symphony Communication Services, LLC, a secure team collaboration platform, found that workers are comfortable sharing personal, sensitive, and confidential information over chat platforms, practice risky digital habits, and don't care if their communications are leaked. The survey found that 27% knowingly connected to an unsecured network, 25% used a personal e-mail account to conduct business, 36% used personal computers or phones to perform work, and 29% shared work materials with a personal e-mail or messaging application. Employees also reported using messaging and collaboration platforms to share confidential company information, talk negatively about their bosses, send memes and photos, and discuss their personal lives. ✤

UNION ACTIVITY

AFL-CIO report details causes of worker deaths. The AFL-CIO in April released a report on worker deaths in 2017 showing that 5,147 workers were killed on the job and an estimated 95,000 died from occupational diseases. The report says that every day, on average, 275 U.S. workers die because of hazardous working conditions. The report calls workplace violence the third leading cause of workplace death, accounting for 807 deaths in 2017, including 458 homicides. There was a small decrease in the overall rate of fatal injuries from the previous year—3.5 per 100,000 in 2017, down from 3.6 per 100,000 workers in 2016. In recent years, however, there has been little overall change in the job fatality rate. The report also says recent studies show the toll of occupational diseases is greater than previous estimates.

Union urging legislation to protect call center jobs. The Communications Workers of America (CWA) is touting progress in its efforts to pass legislation to prevent the loss of U.S. call center jobs to offshoring. In April, the CWA highlighted its efforts in Alabama, Colorado, Nevada, and Texas, where bills that would protect call center jobs in those states were making progress in the state legislatures.

UAW leader applauds additions to GM plant. United Auto Workers (UAW) vice president Terry Dittes spoke out in favor of new investment and added jobs at the General Motors (GM) plant in Bowling Green, Kentucky. "UAW members in Bowling Green fully support the investment by GM at the Bowling Green Assembly," Dittes said in April. "Members from UAW Local 2164 are proud to build the iconic Chevrolet Corvette and will be adding a full shift of production and over 400 new bargaining unit jobs through this investment. We hope to see more of this in the future from GM, which is good for our members, their families, the community, and all of America."

CWA speaks out against outsourcing newspaper jobs. In April, the CWA held a hearing in Akron, where outsourced workers from Ohio newspapers spoke of job losses resulting from newspaper work being outsourced. Witnesses included several members of the Northeast Ohio Newspaper Guild/TNG-CWA Local 34001 who were affected by recent layoffs at the *Plain Dealer* in Cleveland, along with UAW members from the recently idled GM assembly plant in Lordstown. The *Plain Dealer* recently cut a third of its union-represented reporting staff, according to the CWA, and the newspaper planned to outsource editing, design, and layout jobs in May. In addition, a CWA member spoke about the loss of call center jobs in Ohio. ✤

roof without safety gear. She claimed it wasn't her decision to place him on leave, and she was merely following the instructions of her supervisor. While Morrison was on administrative leave, the HR manager conducted an investigation.

According to the arbitrator's later findings, the HR investigation was inadequate and amounted to a rubber-stamping of DISH's decision to discipline (and later fire) Morrison. The only evidence DISH had from the investigation was the HR manager's brief handwritten notes. Morrison wasn't given an opportunity to provide a written statement or verify the accuracy of HR's version of the incident. The arbitrator noted, "Significantly, the HR interview notes [were] silent as to the pivotal fact in this case: whether Holm had instructed [Morrison] to go on the roof to complete the dish installation."

After the inadequate investigation, HR recommended that both Morrison and Diaz be terminated. Morrison was fired in September 2017, and Diaz was terminated several weeks before Morrison. Holm received no discipline even though she had watched both employees climb up onto the roof and work without safety gear and said nothing until her supervisor reminded her of the safety rules. Morrison challenged his termination.

Arbitrator questions fairness of discipline

In reaching her decision, the arbitrator followed an analysis similar to the *McDonnell Douglas* burden-shifting formula used in court cases. She noted that to prove a workers' comp retaliation claim, an employee must show (1) he engaged in statutorily protected activity, (2) he was subjected to an adverse employment action, and (3) there was a causal relationship between the protected activity and the adverse action. Hinting at the direction of her decision, she quoted from a court decision involving a retaliatory discharge:

> Generally speaking, an employer does not announce or state in writing that it is discharging an employee because he or she has filed a workers' compensation claim. It is not difficult for an employer wishing to discharge an employee for engaging in protected activity to find another plausible reason or reasons to justify its decision. Thus, a determination of whether an adverse employment action was causally related to the employee's protected activity will frequently depend on a consideration of all the pertinent facts, a searching assessment of the actions, statements, and credibility of the participants, and the drawing of appropriate inferences informed by one's life experience and understanding of human nature.

Morrison had his accident in late June and was placed on administrative leave on August 13. The arbitrator found that the temporal proximity between his protected activity of filing a workers' comp claim and his being placed on administrative leave and then being fired was sufficient to create a causal connection. As a result, he satisfied his burden of presenting a *prima facie,* or minimally sufficient, case of retaliation. DISH was then required to provide a legitimate nonretaliatory reason for its actions.

DISH pointed to its safety rule requiring technicians to wear harnesses when they work on roofs as a legitimate reason

for firing Morrison. After considering all the testimony, however, the arbitrator concluded that reason was a "pretext," or excuse for retaliation. The arbitrator just couldn't overlook the fact that Morrison's immediate supervisor ordered him to climb onto the roof and then watched him work without safety gear. In her 15-page decision, she noted Holm's failure to know and follow the safety rule, HR's inadequate investigation, and DISH's failure to discipline Holm. Finally, the arbitrator noted that Holm's manager, who directed her to place Morrison on leave and then recommended his discharge, didn't testify at the arbitration hearing.

Finding that Morrison was able to show DISH's reasons for firing him were pretextual, the arbitrator awarded him $52,516.80 in back pay, $36,826.40 in front pay, and $100,000 in compensatory/emotional distress damages. *Colin Morrison v. DISH Network, LLC*, AAA Case No. 01-18-0001-3630 (Sheila Cesarano, Impartial Arbitrator, April 12, 2019).

Takeaway

In this case, HR let the employer down by simply approving management's adverse decision against an employee who had engaged in protected activity without objectively reviewing the facts. HR should serve as an objective advocate for fairness toward employees. All too often, HR attempts to protect managers' actions instead of examining the situation fairly and standing up to management when necessary. That can mean an HR manager puts her job in jeopardy because she's perceived as not being a team player. When necessary, stand up for fairness and due process for your employees. Be their advocate!

You can reach Tom Harper at tom@employmentlawflorida.com. ✤

SEX DISCRIMINATION

Supreme Court will decide whether LGBT discrimination is unlawful

The U.S. Supreme Court has agreed to decide the long-unresolved question of whether Title VII of the Civil Rights Act of 1964 protects employees from discrimination based on their sexual orientation or gender identity. The issue has been percolating in the lower courts for quite a while. As it frequently does, the Court declined to consider the question until there was a conflict between several appellate courts. Let's take a look at the history of the Court's decisions, the arguments on both sides of the issue, and what we can expect next.

Some background

Title VII was passed in 1964 and hasn't been substantially amended by Congress since then. However, its meaning and reach have been repeatedly expanded by the courts in the 55 years since it was enacted.

For example, although the law doesn't specifically prohibit sexual harassment, the U.S. Supreme Court first recognized harassment as a prohibited form of sex discrimination in 1986. And in the 1989 case *Price Waterhouse v. Hopkins,* the Court unanimously ruled that Title VII prohibits discrimination based on stereotypes about how men and women should look and behave. In other words, an employer can't discriminate against women who dress or act "masculine" or men who dress or act "feminine." The Court didn't base its decision on sexual orientation, but the *Price Waterhouse* case has been relied on many times over the years by LGBT employees pursuing claims that they were discriminated against or harassed at work.

While the federal appeals courts that have considered the issue disagree over whether Title VII protects employees from discrimination because of their sexual orientation or gender identity, the Equal Employment Opportunity Commission (EEOC) has taken the position that it does. In fact, in one of the cases pending before the Supreme Court, the EEOC argued in favor of LGBT protections in opposition to attorneys from the U.S. Department of Justice (DOJ).

What are the arguments for and against?

The Court's decision will likely turn on what it means for an adverse employment action to be "based on sex." Title VII defines that phrase to mean the employee's sex was a motivating factor in the decision. Similar standards that have been applied include whether the employment action occurred because the employer "took the employee's sex into account" or whether the action would have been taken against an employee of the opposite sex for the same reason.

The arguments for and against the position that Title VII prohibits discrimination on the basis of sexual orientation and gender identity can be summarized as follows.

Argument 1. Both sexual orientation and gender identity discrimination are "based on sex" if the same action wouldn't have been taken for the same reason against someone of the opposite sex. Under this rationale, it would be discriminatory for a female employee who marries a woman to be treated less favorably than a male employee who marries a woman.

The counterargument is that adverse employment actions against LGBT employees are based on the sex they are attracted to, not on their sex, which isn't prohibited by Title VII. Similarly, adverse actions taken against transgender individuals are not based on their sex, but on the fact that they present themselves as the *other* sex.

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Argument 2. Both forms of discrimination are based on stereotypes about the sex of the person to whom an employee should be attracted. This argument attempts to expand on the *Price Waterhouse* decision by saying that expecting men to be attracted only to women (and vice versa) is a gender stereotype that's no different from the expectation that men and women conform to traditionally male or female appearances and behaviors.

The counterargument is that although there may be some overlap between discrimination based on sexual orientation and gender stereotyping, they are not the same thing. With sexual orientation discrimination, adverse actions are taken not because of the way a person dresses or behaves but because the employer disapproves of same-sex relationships—which, again, is not prohibited by Title VII.

Argument 3. Sexual orientation discrimination is a form of "associational discrimination"—in which an employee is discriminated against because of the sex of a person with whom he chooses to associate. This argument attempts to draw an analogy to case law that has long prohibited discrimination against employees who associate with members of a different race, religion, and so on.

The counterargument is that with associational discrimination, the person with whom the employee associates is the member of the protected class and the employee is not. Being LGBT isn't a protected class and therefore isn't protected by Title VII.

Final thoughts

Underlying all the arguments and counterarguments lies the overarching issue of how far the Supreme Court should go in interpreting Title VII to apply in situations that clearly weren't anticipated when the law was passed in 1964. While the Court has expanded the reach of the law in previous cases, its current conservative majority may be less likely to do that with LGBT issues.

It's also possible that the Court could configure some sort of middle-ground approach in which discrimination is prohibited unless the employer can establish a legitimate business reason or a sincerely held religious belief.

A decision from the Court is due by June 2020, so stay tuned for updates. ✤

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