

Sexual Orientation Protection to be Added to Illinois Human Rights Act

The Illinois Legislature has passed — and Governor Rod Blagojevich has indicated he will sign into law — legislation that amends the Illinois Human Rights Act to prohibit discrimination in employment and housing on the basis of "sexual orientation."

The legislation makes it unlawful to discriminate against a person because of his or her sexual orientation, as well as on the basis of the existing categories of race, color, religion, national origin, ancestry, age, sex, marital status, familial status or handicap. "Sexual orientation" is defined as "actual or perceived heterosexuality, homosexuality, bisexuality, or gender-related identity, whether or not traditionally associated with the person's designated sex at birth." Sexual orientation does not include a physical or sexual attraction to a minor by an adult. The Amendment also contains provisions relevant to owners of real estate or individuals engaging in real estate transactions.

To address concerns of opponents who argued that the legislation to make sexual orientation a protected class was not necessary and would in essence be conferring "special rights," the Act provides that it shall not be construed as requiring any employer, employment agency, or labor organization to give preferential treatment or special rights based on sexual orientation or to implement affirmative action policies or programs based on sexual orientation.

The amendment to the Illinois Human Rights Act to include "sexual orientation" as a protected category statewide follows the lead of a number of Illinois municipalities, including the City of Chicago, which already have prohibited discrimination on the basis of sexual orientation. According to published reports, Illinois will be one of 15 states in the country that include sexual orientation in anti-discrimination laws.

The Illinois Human Rights Act, which generally applies to employers who have 15 or more employees (with certain exceptions), prohibits employers from refusing to hire, segregating, or acting with respect to recruitment, hiring, promotion, renewal of employment, selection for

EEOC Update

The EEOC has announced that its public Web site will now be available in a Spanish-language version. The new site is available at www.eeoc.gov/es/.

IL Developments

In addition to the Illinois Sexual Orientation Protection (see lead article) there are two other developments of particular interest to Illinois employers.

Amendment Would Allow Unemployment Benefits for Locked Out Workers

In other Illinois legislative action, a bill awaiting action by Governor Blagojevich would ease eligibility for unemployment benefits for workers who are locked out by their employers during a labor dispute. The legislation, Senate Bill 1994, amends the

training or apprenticeship, discharge, discipline, tenure or terms, privileges or conditions of employment on the basis of unlawful discrimination. The Illinois Department of Human Rights and the Illinois Human Rights Commission are the public bodies charged with enforcement of the Act. 📌

NLRB Clarifies Status of Jointly-Employed Temporary Workers for Representation Elections

In yet another departure from existing precedent, the current National Labor Relations Board has issued an important decision involving temporary workers supplied by staffing firms to user employers. In *H.S. Healthcare L.L.C. d/b/a Oakwood Care Center*, 343 NLRB No. 76 dated November 19, 2004, the Board reverted to its pre-2000 position that a representation election seeking a unit comprised of both jointly employed temporary workers and the regular employees of the user employer can proceed only if the staffing firm and the user employer consent to the election.

From a practical standpoint, the *Oakwood* decision will make union organizing efforts more difficult in combined units of temporary workers and regular employees, since it is unlikely (except in rare cases) that the user employer or the staffing agency will consent to such an election.

In the *Oakwood* case, Local 1199 of the Service Employees International Union filed a petition seeking to represent a unit of employees comprised of regular employees and temporary employees provided by a staffing agency. Neither the staffing agency nor the user employer consented to an election in this combined unit. In dismissing the election petition, the Board majority consisting of Chairman Battista and Members Schaumber and Meisburg explicitly overruled the Board's 2000 decision in *M.B. Sturgis*, 331 NLRB 1298 which had held that an election could be held in such a combined unit even without employer consent. In determining that *Sturgis* was wrongly decided, the Board majority held that a combined unit of temporary employees provided by a staffing company and the regular employees of actually constituted a multiemployer unit which requires the consent of both employers under the Board's historical interpretation of the Act. The Board majority held that the language of the Act did not authorize the Board to "...direct elections in units encompassing the employees of more than one employer."

"labor disputes" provision in the Illinois Unemployment Insurance Act, at 820 ILCS 405/604, to remove provisions that made locked-out workers ineligible for unemployment benefits unless their contract prohibits lock outs or the employees could demonstrate that their employer acted in bad faith during collective bargaining negotiations.

Under the new measure, unionized workers would not be disqualified from unemployment benefits unless their collective bargaining representatives refuse to meet under reasonable conditions with the employer or refuses to bargain in good faith with the employer.

New Minimum Wage In Effect

Remember, on January 1, 2005 the minimum wage in Illinois increased to \$6.50 per hour for employees eighteen years or older. Employers with employees who are under the age of 18 are allowed to pay such

In overturning the *Sturgis* decision, the Board has actually reverted back to its decades old position as expressed in *Greenhoot, Inc.*, 205 NLRB 250 (1973) and *Lee Hospital*, 300 NLRB 947 (1990), both of which required the consent of both employers before an election could be directed in a combined unit.

The problem with the *Sturgis* decision, according to the Board, was that it approved a bargaining unit in which some workers were employed by one company, and other workers (*i.e.*, the temporary employees) were jointly employed by two companies (the staffing agency and the user employer). Thus, the "entity that the two groups of employees look to as their employer is not the same." The Board said that this result can cause problems in the bargaining process, since it "gives rise to significant conflicts among the various employers and the groups of employees participating in the process." The Board sought a better approach, noting that "...in order for employees to enjoy the full prospect of effective representation, the Act contemplates that employees be grouped together by common interests and by a common employer. The nonconsensual mixing of employees of different employers vitiates that basic principle."

younger workers up to 50 cents less per hour, which as of January 1, 2005 means the minimum is \$6 per hour for those under age 18. Please contact one of the attorneys in Schiff Hardin's Labor and Employment group if you have any questions about Illinois' Minimum Wage Law.

Although not specifically addressed in the *Oakwood* decision, it would appear that some of the progeny of *Sturgis* would be reconsidered by the current Board. For example, in *Tree of Life d/b/a Gourmet Award Foods*, 336 NLRB No. 77 (2001), a divided Board used the *Sturgis* analysis to find the user company committed an unfair labor practice by refusing to apply the terms of a collective bargaining agreement covering its regular employees to temporary employees it jointly employed along with a staffing agency. With the underpinnings of *Sturgis* removed, it is not likely that the current Board would have decided this case in the same way. 📌

Follow-Through is Key After Reaching Settlement Agreement

A recent federal appellate court ruling serves to emphasize the importance of managerial follow-through after a settlement has been reached to resolve pending employment matters such as an EEOC charge or a lawsuit.

In *Pardi v. Kaiser Permanente*, No. 02-16447 (November 15, 2004), the Ninth Circuit Court of Appeals held that a former employee who worked as a licensed respiratory therapist could proceed with his claims for breach of contract and breach of the implied covenant of good faith based upon his former employer's alleged failure to comply with the terms of a settlement agreement. The case focused on the employer's alleged failure to promptly revise its personnel records to reflect that the employee resigned rather than that he had been terminated.

The settlement agreement was reached in order to resolve a number of pending claims that the employee had against the employer. For its part, the employer agreed, among other things, to change its personnel records to reflect a voluntary separation from the company rather than a termination of the employee. The agreement also called for the company to make a substantial monetary payment to the employee. In

exchange, the employee agreed to withdraw all pending EEOC complaints and to release the company from claims occurring on or before the date of the settlement agreement.

However, during the course of the employee's employment, the employer had investigated allegations of misconduct that included improper medical record keeping that the employer apparently determined it was required to report to a state regulatory agency. After the employee had been terminated, the employer had reported the termination to California's Respiratory Care Board.

Approximately two weeks after the date of the settlement agreement, the state agency sought access to the employee's records, including the personnel file. Unfortunately, when the employer made the file available for the agency's review, it had not yet been updated to reflect the resignation rather than termination as agreed upon under the settlement. The employee claimed that he was adversely affected by the employer's failure to amend its records as had been agreed upon.

At the district court level, a judge granted the employer's motion for summary judgment on the employee's claims related to the failure to correct the personnel file, holding that the settlement agreement and release, as well as a state litigation privilege, would not allow the claims to go forward.

The appellate court disagreed in part, stating that because a reasonable jury could find that the settlement agreement imposed a duty on the employer to amend its personnel file in a timely manner, summary judgment was improper on a breach of contract theory. The appellate court also stated that the employee could proceed with an ADA retaliation claim to the extent that such a claim was based upon conduct alleged to have occurred after the date the settlement agreement was signed.

The unfortunate outcome for the employer in this case provides an important lesson for employers. Given how much time and financial resources go into the negotiation and execution of settlement agreements to resolve litigation, managerial follow through is vitally important to ensure that all provisions of such agreements are complied with in a prompt and accurate manner. While the negotiations themselves often go forward at high levels, the message must get through to the appropriate front-line forces to ensure that the company complies with all that it has agreed to do. 🗨️

EEOC Provides Guidance on ADA in Food Service Industry

The U.S. Equal Employment Opportunity Commission, together with the federal Food and Drug Administration, is providing information for employers in the restaurant and food service industries to help navigate applicable laws with respect to restrictions on employees with illnesses.

The EEOC, which oversees compliance with the Americans with Disabilities Act, has published a 17-page question-and-answer guide for employers to troubleshoot situations in which public health and safety concerns may also impact an employee or job applicant who has a disability.

The guidance covers at length the requirements of the ADA and the FDA Food Code, which is a model code for health issues in restaurants and other food service establishments. The EEOC takes the position that employers must take into account the ADA at the same time as they make decisions based upon the FDA Food Code provisions.

While recognizing that there are the "big four" pathogens listed in the Food Code as transmissible through food (salmonella, shigella, shiga toxin-producing Escherichia coli, and hepatitis A), the EEOC guidance directs employers to also consider whether an employee who has one of the "big four" diseases might fit the definition of a person with a disability under the ADA. If an employee is disabled by a disease that is transmissible through food, the employer may be able, under the ADA, to refuse to assign the employee to food-handling positions if the risk of transmitting the disease cannot be eliminated by a reasonable accommodation.

The EEOC's guidance also includes a number of resource listings in appendices, including internet links to food safety and health issues and a link to the FDA Food Code, which is expected to be updated in 2005.

The EEOC guidance is available at http://www.eeoc.gov/facts/restaurant_guide.html. 

Schiff Hardin's Labor and Employment Group Welcomes Marc L. Silverman

We are pleased to announce that [Marc L. Silverman](#) has joined Schiff Hardin as a partner in the Labor and Employment Group. He will be based in our New York office.

For more than twenty-five years, Mr. Silverman has represented domestic and foreign corporations on behalf of management in all areas of labor relations and employment law. His clients include construction and financial services companies, e-commerce companies, manufacturers in heavy and light industry, banks, real estate managers and developers, and media companies.

Mr. Silverman has broad experience defending age, sex, sexual harassment, race, disability and national origin discrimination cases before the Equal Employment Opportunity Commission, the Office of Federal Contract Compliance, various federal, state and local agencies and arbitration tribunals responsible for enforcing equal employment opportunity laws, and state and federal courts.

Mr. Silverman routinely advises employers in connection with wage and hour matters, workforce restructuring, plant closings, restrictive covenants and protection of trade secrets, workplace surveillance and privacy issues, and employee discipline and discharge. He has had extensive training in alternative dispute resolution and has served as a court appointed mediator for the U.S. District Court for the Southern District of New York in several high profile race and sex discrimination cases.

Mr. Silverman has experience representing management in union organizing campaigns, counseling clients on maintaining non-union status and representing employers in connection with decertification elections. He has tried more than 100 arbitrations and unfair labor practice cases before the NLRB and acted as chief spokesman for management in hundreds of collective bargaining sessions.

He is a frequent writer and lecturer in the field of labor and employment law and has written or lectured, most recently on the following topics: "Navigating the Office Romance Minefield," (Corporate Counsel Insert) *New York Law Journal*, February 14, 2000; "The Violence Against Women Act: How Potent A Weapon?" *NYSB Labor & Employment Newsletter*, September 1999; and "Mediation of Employment Disputes," sponsored by the Nassau Academy of Law and Cornell University, New York State School of Industrial and Labor Relations, May 14, 1999.

Mr. Silverman is a founding member of the New York State Bar Association's Labor and Employment Law Section and has served for many years on its Executive Board. He is also the former chair of its Equal Employment Opportunity Law Committee and served as labor counsel to the New York State Emergency Financial Control Board during New York City's financial crisis in 1975/1976. Mr. Silverman's memberships also include the New York State Management Attorneys Conference and the American Bar Association (Dispute Resolution Section of the Labor and Employment Law Section).

Active in community service, Mr. Silverman serves as a member of the Advisory Board of the Humane Society of New York and the Board of Directors of Project Renewal, which provides services to the homeless in New York City, for which he performs *pro bono* work.

Mr. Silverman received his undergraduate degree (B.S., 1968) from Cornell University and his law degree (J.D., 1972) from Cornell University Law School. Prior to attending law school, he served in the U.S. Army Reserve as a member of a combat engineer training unit.

He is admitted to practice in New York, as well as before the U.S. District Courts for the Eastern and Southern Districts of New York and the District of Connecticut, the U.S. District Court of Appeals for the Second Circuit, and the U.S. Supreme Court. 🗣️

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