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SECOND CIRCUIT REVIEW

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Sex Stereotyping Based on Sexual Orientation Discrimination

In this month's column, we report on a recent decision by the U.S. Court of Appeals for the Second Circuit in which the court affirmed a grant of summary judgment, dismissing a plaintiff's claims for employment discrimination based on sex stereotyping.

In *Dawson v. Bumble & Bumble*,[1] the Second Circuit ruled that the plaintiff failed to establish that adverse employment actions taken against her were the result of unlawful discrimination. In so ruling, the court expounded on the requirements for making out Title VII sex stereotyping claims.

Background

Plaintiff Dawn Dawson, a gender nonconforming lesbian female, sued Bumble & Bumble for employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII) and state and municipal civil rights laws.[2] Ms. Dawson alleged that Bumble & Bumble discriminated against her on the basis of sex, sex stereotyping and sexual orientation and asserted claims under Title VII, New York State Human Rights Law (NYSHRL) and New York City Human Rights Law (NYCHRL) for improper termination, failure to promote and hostile environment sexual harassment.

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Ms. Dawson was employed by defendant Bumble & Bumble ("Bumble" or the salon), an upscale hair salon, as a "hair assistant" from February 1999 to July 2000. Her primary responsibility as a hair assistant was to aid a hair stylist by performing tasks such as greeting clients, shampooing and blow-drying clients' hair, and cleaning the stylist's workstation. In addition to her duties as a hair assistant, Ms. Dawson was enrolled in Bumble's training program, which assistants must complete for promotion to the position of stylist. Bumble evaluated assistants in the training program based on their execution of four haircuts. Satisfactory execution of the haircuts as well as a positive evaluation of general work ethic and attitude were required for progression to advanced training, and eventually to the stylist position. After 17 months in the program, Ms. Dawson did not progress to the advanced training seminars and was terminated.

Bumble argued to the district court that Ms. Dawson did not satisfactorily complete the training program and did not display appropriate work ethic and attitude. Bumble introduced testimony from, among others, the salon's manager, Connie Voines, and educational coordinator, Elizabeth Santiago, characterizing Ms. Dawson's work as "erratic" and "inadequate." Ms. Voines and Ms. Santiago testified that stylists and clients complained about Ms. Dawson's demeanor and Ms. Voines described her overall performance as "below average."[3]

Ms. Dawson countered that she was qualified to be a hair stylist and was regularly praised for her work by the salon's manager, educational coordinator, and clients. Ms. Dawson introduced the deposition testimony of a stylist and a former head assistant, both of whom testified that she had performed exceptionally and that staff and clients had praised her. Ms. Dawson argued that the salon's adverse employment actions against her were the result of unlawful discrimination based on sex, sex stereotyping and sexual orientation.

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She also argued that she was subjected to hostile work environment sexual harassment.

Ms. Dawson pointed to two instances of conduct supporting her sex stereotyping claim: (1) a comment made by Ms. Voines to Ms. Dawson during her termination that her short haircut would scare customers, and (2) a comment made by a stylist to Ms. Dawson stating that other stylists referred to Ms. Dawson as a "dyke" and threatened to fire her. Ms. Dawson's sex discrimination claims were based on a comment from Ms. Voines stating that few women do editorial styling. Ms. Dawson's hostile environment claims were based on various offensive remarks made to her by other stylists at the salon.

District Court Analysis

The district court began its analysis of Ms. Dawson's improper termination claims by discussing the three-part burden shifting test for Title VII claims established in *McDonnell Douglas Corp. v. Green*[4] (also applicable to NYSHRL and NYCHRL claims). In *McDonnell Douglas*, the Supreme Court held that to make a prima facie case of discrimination, a plaintiff must demonstrate that: (1) she is a member of a protected class; (2) she is competent to perform the job or is performing her duties satisfactorily; (3) she suffered an adverse employment decision or action; and (4) the decision or action occurred under circumstances giving rise to an inference of discrimination based on her membership in the protected class. Once the plaintiff establishes these elements, the burden then shifts to the defendant to offer a legitimate, nondiscriminatory reason for the adverse employment decision. If the defendant is able to offer such a reason, she will be entitled to summary judgment unless the plaintiff can then prove by a preponderance of the evidence that the legitimate reason offered was a mere pretext for discrimination.

The district court noted the contradictory versions of the facts surrounding Ms. Dawson's employment and termination and found an assessment of her claims to be "uniquely difficult" given the diverse work environment at the salon. For example, the district court observed that Ms. Voines, the manager of the salon, was a pre-surgery male-to-female transsexual and that there were several openly gay men and women among the staff.

Ms. Dawson's claims were said to be fused; it was unclear if she thought she was discriminated against based on one or more of: sex, appearance or sexual orientation.

Sex Stereotyping Claims

Ms. Dawson maintained that despite the admitted diversity of sexual orientation among the staff at the salon, she was a victim of discrimination because she was a lesbian who failed to conform to gender norms. Bumble countered that Ms. Dawson's stereotyping claim amounted to an impermissible sexual orientation discrimination claim and that sexual orientation is not a protected class under Title VII. The district court described Ms. Dawson's claim as "a novel stereotyping theory that tests the elasticity of the law to encompass [Ms. Dawson's] grievances."

The district court began its analysis of her sex stereotyping claim by discussing the Supreme Court's watershed decision in *Price Waterhouse v. Hopkins*.[5] In *Price Waterhouse*, the plaintiff was not promoted based on her failure to conform to sex stereotypes: her employer advised her to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" in order to increase her chances for partnership.[6] A plurality of the Supreme Court found that this behavior formed the basis of a Title VII employment discrimination claim for sex stereotyping.

The district court declined to address whether a sex stereotyping claim would be cognizable in the Second Circuit. The court instead stated that even if such a claim were permissible, Ms. Dawson failed to adduce evidence that Bumble relied upon sex stereotypes when it terminated her. The court concluded that Ms. Voines' comment that Ms. Dawson's haircut would scare customers was a gender-neutral comment, and that none of the evidence relied upon by Ms. Dawson reflected animus based on sex. Additionally, the court emphasized that she did not allege that she is a gender nonconforming woman, but rather, a nonconforming lesbian. The court characterized Ms. Dawson's claim as an attempt to bootstrap a claim for sexual orientation discrimination into one for sex stereotyping.[7]

Other Discrimination Claims

The district court also found that Ms. Dawson did not put forth substantial evidence to create a gender discrimination claim under Title VII or a discrimination claim based on sexual orientation under NYSHRL or NYCHRL. Regarding her hostile environment sexual harassment

claims, the court found that the offensive comments that she was subjected to were isolated and did not affect her work performance, and thus were not "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment."[8]

Reviewing the district court's decision de novo, the Second Circuit, in a decision written by Judge Rosemary S. Pooler and joined by Judges Chester J. Straub and Barrington D. Parker, affirmed the court's grant of summary judgment in favor of Bumble & Bumble. The majority of the court's opinion focused on Ms. Dawson's sex stereotyping claim.

The Second Circuit noted at the outset that the *McDonnell Douglas* three-part burden shifting test governed the analysis of Ms. Dawson's claims.[9] The court explained that Ms. Dawson's claims were often conflated—it was unclear at times whether Dawson believed she was discriminated against based upon her sex, her appearance, her sexual orientation, or some combination. The Second Circuit stated that to the extent that Ms. Dawson alleged discrimination based on sexual orientation, that claim must fail because sexual orientation is not a protected class under Title VII.[10]

The Second Circuit then suggested that Ms. Dawson had presented a sex stereotyping claim because a claim for discrimination based on sexual orientation was unavailable to her under Title VII. The court indicated that a sex stereotyping claim, when brought by a homosexual plaintiff, can "present problems" for an adjudicator because the claim may be used improperly to bootstrap discrimination claims based on sexual orientation into Title VII.[11] In fact, the Second Circuit has never reached the merits of such a claim, and district courts in the Second Circuit have routinely rejected sex stereotyping claims based upon allegations involving sexual orientation discrimination.[12]

The Second Circuit explained that sex stereotyping claims are generally cognizable, referring to the Supreme Court's decision in *Price Waterhouse* and the Second Circuit's decision in *Back v. Hastings on Hudson Union Free School District*.[13] In *Back*, the Second Circuit held that a plaintiff school psychologist raised a triable issue of fact as to sex stereotyping when she introduced evidence that she was denied tenure because her employer assumed that she would not maintain devotion to her job as a young mother.[14] The Second Circuit held that Ms. Dawson's claim of sex stereotyping differed from those in *Price Waterhouse* and *Back* because Ms. Dawson failed to present substantial evidence that her failure to conform to feminine stereotypes resulted in the adverse employment actions taken against her.[15]

The Second Circuit affirmed the district court's decision granting summary judgment on the remainder of Ms. Dawson's claims. The court ruled that she did not produce credible evidence showing that adverse employment decisions were taken against her as a result of sex discrimination or sexual orientation discrimination under NYSHRL and NYCHRL. The Second Circuit also affirmed the district court's finding that the offensive comments to which she was exposed were not severe or pervasive enough to create a hostile work environment.[16]

Conclusion

The Second Circuit's decision leaves open questions regarding the requirements for stating sex stereotyping claims based on underlying allegations of sexual orientation discrimination. The Second Circuit in *Dawson* noted that such claims have routinely been rejected by courts in the Second Circuit, and that they present "problems" because they may represent an impermissible attempt to create a Title VII protected class for sexual orientation. Accordingly, homosexual plaintiffs may face a double bind: they are unable to bring sexual orientation discrimination claims under Title VII and sex stereotyping claims may be viewed by the courts as veiled sexual orientation discrimination claims.

1. 398 F.3d 211 (2d. Cir. 2005).
2. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq.; New York State Human Rights Law, N.Y. Exec. Law §290 et. seq.; New York City Human Rights Law, N.Y.C. Admin. Code, Title 8.
3. *Dawson v. Bumble & Bumble*, 246 F. Supp. 2d 301, 305-06 (S.D.N.Y. 2003).
4. 411 U.S. 792 (1973).
5. 490 U.S. 228 (1989).
6. Id. at 235.
7. *Dawson*, 246 F. Supp. 2d at 315-20.
8. Id. at 325 (quoting the standard articulated in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986)).
9. See 411 U.S. 792 (1973).
10. *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217-18 (2d Cir. 2005).
11. Id. at 218.
12. Id. at 218-19.
13. 365 F.3d 107 (2d Cir. 2004).
14. *Dawson*, 398 F.3d at 219-20 (citing *Back v. Hastings on Hudson Union Free School District*, 365 F.3d 107, 122 (2d Cir. 2004)).
15. Id. at 222-23.
16. Id. at 223-25.