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Discrimination

Perceived-As Bias Claims Likely to Increase Under Title VII, but Coverage Varies by Court

That U.S. workers are protected against discrimination when they're "regarded as" disabled is well-established, but whether similar protections exist against perceived-as bias based on national origin, religion and the other Title VII-protected traits is an open question, a law professor and a management lawyer told Bloomberg BNA.

The ways in which workers identify themselves along national origin, religion, race and similar lines has become more and more fluid in the modern workplace. This increases the risk of employees' exposure to—and employers' liability for—discrimination, even when based on a misperception of protected-class status, Professor D. Wendy Greene said.

Agreeing, Garrett Wozniak of management-side law firm Kollman & Saucier P.A. in Timonium, Md., told Bloomberg BNA Feb. 25 "I think we'll see more perceived-as bias claims" under Title VII as time goes along, "and not just in the national origin and religious bias contexts." Those are the two protected traits on which the bulk of such claims have been based to date when brought under Title VII of the 1964 Civil Rights Act, he said.

The argument is that even if an employer perceives someone as being a member of a particular national origin or religious group and they're not, it's still illegal to discriminate against them on that basis, Wozniak said.

It's an argument that the Equal Employment Opportunity Commission has backed for some time, according to Greene.

And the EEOC has renewed its emphasis on that view since the events of Sept. 11, 2001, plaintiffs' attorney Todd M. Johnson of Baty, Holm, Numrich & Otto P.C. in Kansas City, Mo., told Bloomberg BNA Feb. 29.

The federal courts, Wozniak noted, are sharply divided about whether Title VII protects from discrimination an employee subjected to bias based on an incorrect perception of his or her protected traits.

"If you're an employer in one of the federal circuits where these types of claims have been recognized as viable, you better train your employees," he said.

Changes in Diversity, Classifications Cited. Greene told Bloomberg BNA Feb. 23 that a rise in cultural diversity, mixed-race classifications and similar societal developments are driving the increased risk of workers experiencing bias based on a Title VII-protected class to which they don't belong.

The societal developments also include increases in transracial adoptions and interracial marriages and shifting gender norms and gender identifications, according to Greene. She teaches employment discrimination law at the Cumberland School of Law at Samford University in Birmingham, Ala.

As workers' Title VII classifications become more fluid, the possibility of bias based on misperceptions of an employee's protected class under the statute correspondingly is becoming more likely, she said.

Wozniak cited what he called a snowball effect as one major reason for an anticipated increase in perceived-as bias claims under Title VII. As more plaintiffs' lawyers learn that such claims are being recognized in their jurisdiction, the number of claim filings is sure to rise, he said.

Further, in addition to changes in how people are identifying themselves along racial, sexual and religious lines in and out of the workplace, there also are more aspects of on-the-job behavior than ever being covered by anti-bias laws, including at the state and local levels, he added.

Where the Law Stands. Unlike the Americans with Disabilities Act, Title VII doesn't contain language expressly addressing perceived-as bias.

However, the EEOC's compliance manual states that national origin discrimination includes bias "against an individual based on the employer's belief that he is a member of a particular national origin group." It provides as an example discrimination directed at someone perceived as being Arab based on his appearance, speech and mannerisms regardless of whether he is in fact of Arab ethnicity.

In addition, the section of the compliance manual defining race discrimination contains similar language, and the agency renewed its favorable view of Title VII perceived-as bias claims post-Sept. 11 in a fact sheet addressing "Employment Discrimination Based on Religion, Ethnicity, or Country of Origin."

The federal courts, however, have been far less uniform in their treatment of perceived-as bias claims under Title VII. The U.S. Supreme Court has not ruled on the issue.

At the federal appeals court level, the U.S. Court of Appeals for the Fifth Circuit—in *EEOC v. WC&M Enterprises, Inc.*, 496 F.3d 393, 101 FEP Cases 332 (5th Cir. 2007) (159 DLR A-6, 8/17/07)—is the only federal circuit to have expressly recognized such a claim as viable.

In addition, the Eleventh Circuit—in *Jones v. UPS Ground Freight*, 683 F.3d 1283, 115 FEP Cases 278 (11th Cir. 2012) (113 DLR A-1, 6/12/12)—has indicated that a harasser's use of epithets associated with a different racial or ethnic minority than the one to which an

employee belongs won't necessarily shield an employer from liability for hostile environment harassment.

The Fourth Circuit is the only federal appeals court to signal its potential rejection of perceived-as bias claims under Title VII. In *El v. Max Daetwyler Corp.*, 451 F. App'x 257 (4th Cir. 2011), it affirmed a lower court's dismissal of a member of the Universalist religion's claim that he was subjected to discrimination based on "a misapprehension that he was Muslim."

The lower court had ruled that Title VII doesn't recognize such a claim. The Fourth Circuit, in a three-sentence, unpublished opinion, upheld that decision "for the reasons stated by the district court."

'Stark Divide' Among Federal District Courts. At the federal district court level, "there is a stark divide" as to whether perceived-as bias claims under Title VII are viable, Wozniak said.

The courts that have rejected such claims include federal trial courts in Georgia, Illinois, Kansas, New York, North Carolina, Ohio and Tennessee.

On the other hand, a dozen or so other federal district courts have recognized perceived-as bias claims to be viable under Title VII, Greene noted.

For example, the U.S. District Court for the Eastern District of Michigan in June ordered a trial in *Kallabat v. Michigan Bell Telephone Co.*, 2015 FEP Cases 184862 (E.D. Mich. 2015), a Title VII case brought by a customer service specialist who alleges he was subjected to disparate treatment because he was "perceived as being Muslim." Noting a lack of Sixth Circuit precedent precluding "perceived as" religion claims, the court cited in support of its ruling a U.S. District Court for the Western District of Pennsylvania decision permitting a perceived bias claim by a Catholic worker (118 DLR A-2, 6/19/15).

Similarly, in *Arsham v. Mayor & City Council of Baltimore*, 85 F. Supp. 3d 841, 126 FEP Cases 369 (D. Md. 2015), the U.S. District Court for the District of Maryland in February 2015 denied dismissal of an Iranian engineer's claim that her supervisor discriminated against her because he mistakenly believed she was from India. The court there cited the EEOC's compliance manual in support of its decision (30 DLR A-2, 2/13/15).

Johnson, who was on the losing side in *Yousif v. Landers McClarty Olathe KS, LLC*, 120 FEP Cases 830 (D. Kan. 2013) (211 DLR A-1, 10/30/13), when the U.S. District Court for the District of Kansas in October 2013 rejected perceived-as race, color, national origin and religious discrimination claims by an automobile dealership car washer allegedly called a "Middle Eastern hitman" and similar names, noted that the court there didn't follow the EEOC's view on the issue.

But the court in *Yousif* did follow well-settled law, he added.

"It feels like the better authority is on the side of recognizing such claims," Greene told Bloomberg BNA.

Legal Arguments. To that point, Greene said the courts that have rejected such claims have imposed what she refers to as an "actuality requirement" on Title VII perceived-as bias claims.

In other words, Greene said, these courts require the plaintiffs to show that the protected class at which the discrimination was directed is a protected class to which they actually belong, rather than another protected class. That results from what she termed a "too

rigid" interpretation of the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 5 FEP Cases 965 (1973), burden-shifting test for proving Title VII discrimination, which has as its first prong proof of protected-class membership, according to Greene.

Wozniak said the chief argument he's seen courts adopt for not allowing such claims is that Title VII, unlike the ADA, doesn't expressly allow for such claims. Such statutory construction is the standard way in which the viability of legal claims is determined, he said.

But Greene said the courts that have rejected Title VII perceived-as bias claims on that basis haven't really examined the statute's intent and legislative purpose. Plus, relying on a facial difference between Title VII and the ADA doesn't focus on the substance of the issue, which is whether employment discrimination in fact occurred, she said.

According to Johnson, the legislative histories of Title VII and the ADA, when read together, likewise support recognition of perceived-as bias claims under Title VII.

Greene also noted that it's been argued that workers subjected to bias based on a mistaken perception of their national origin, religion, race or gender don't really experience the harm—or same degree of harm—as individuals discriminated against based on their actual protected class. In other words, the harm they experience is viewed as too ancillary, she said.

However, bias harms in and of itself, Greene said. For perceived-as bias plaintiffs, the harm is based on the discriminatory words or actions, not the misperception, she said.

Policy Arguments. As for the policy arguments favoring or disfavoring the recognition of perceived-as bias claims under Title VII, Johnson said the overriding goal of the law is to eliminate discrimination in the U.S. workplace. If a manager or supervisor intends to discriminate against someone, "it really shouldn't matter that they were wrong about the person's protected class," he said.

Agreeing, Greene noted that such bias will otherwise go unremedied if perceived-as discrimination claims can't be brought under Title VII. Moreover, without coverage against perceived-as discrimination, retaliation against workers for complaining of perceived-as bias may also rise, she warned. In order to state a viable Title VII retaliation claim on that basis, she explained, complaining about perceived-as bias must first be considered a protected activity under the statute.

Those arguments "are difficult to overcome," Wozniak acknowledged. However, he said one policy argument against recognizing Title VII perceived-as bias would be that, given the breadth of existing employment discrimination laws, any time a claim is added to the scope of those laws, "you not only open the door to legitimate claims," you also open it to ill-founded claims as well. All claims are expensive for employers to defend against, whether legitimate or not, he said.

Employers also may have trouble recognizing an employee's shifting or changing protected class self-identification, Wozniak said.

Regarding fairness to employers, however, Greene said they ought not discriminate in the first place. And a plaintiff still needs "sufficient and persuasive evidence" of differential treatment in order to recover under Title VII, she added.

Although recognizing claims based on employees' sometimes changing racial, religious and gender self-identifications can put employers in a difficult spot and lead to some ill-founded claims, Greene asked "what percentage of the time is that likely to be the case?"

She acknowledged that complications may arise in certain situations, such as where an employer doesn't hire or promote a job candidate because it's trying to advance a workplace diversity policy and it misperceives the candidate as not being in the goal group. "It's hard," and an employer may find itself in a Catch-22 situation, Greene said.

But she noted the contrasting nature of diversity policies—positive policies that try to advance workplace equality and opportunity—and anti-discrimination laws—prohibitive policies that try to root out negative, harmful behavior. The question of where the focus ought to properly go may come down to "who are the intended beneficiaries of diversity policies," she said.

What to Look for and Do Going Forward. To date, the cases recognizing perceived-as bias claims under Title VII have mostly been limited to situations of alleged discrimination based on national origin, religion or race, Wozniak told Bloomberg BNA.

"It's an open question" whether courts will extend the scope of Title VII perceived-as claims to the other protected traits covered by the statute, he said. Such an extension "probably follows logically from the intent and purpose of Title VII," he said, noting that he's seen the argument extended into the retaliation context.

In *Fogleman v. Mercy Hospital, Inc.*, 283 F.3d 56, 112 AD Cases 1505, 88 FEP Cases 513 (3d Cir. 2002), the U.S. Court of Appeals for the Third Circuit in 2002 allowed an employee to pursue a "perceived" retaliation claim under the ADA. The EEOC supported the plaintiff in that case as an amicus.

Cases in which an employee is mistreated because she's misperceived to be pregnant and situations where an employer is mistaken about a worker's sexual orientation or gender identity might also be areas where the perceived-as argument may come up in the future, Wozniak said.

"If I'm an advocate for an employee in such a situation, you can bet I'm making that argument," he said.

But the outlook on Title VII perceived-as claims isn't all bad for employers, he added.

"If an employer's training its workforce and doing other things the right way, then it's really just another type of discrimination claim that you're trying to cut off at the pass," Wozniak said. He doesn't think it's necessary for employers to "dig into the minutiae" of the perceived-as theory in their anti-discrimination policies and training.

"I would say stick to the established categories, which should address possible perceived-as bias as well," he said.

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