



Employment Law Note

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Ninth Circuit Says “Paramour Preference” is Not Sex Discrimination



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This past month, the Ninth Circuit held that workplace favoritism toward a supervisor’s romantic partner is not unlawful sex discrimination under Title VII. The decision, *Maner v. Dignity Health*, brought the Ninth Circuit into alignment with all other circuits that have considered Title VII claims brought under the “paramour preference” theory.

Background

William “Bo” Maner worked as a biomedical design engineer in the lab of Dr. Robert Garfield for several decades. From 1999 to 2008, Garfield’s lab operated out of the University of Texas in Galveston. In addition to Maner, Garfield employed two researchers: Yuan Dong (male) and Leili Shi (female). Early on in his employment with Garfield, Maner learned that Garfield and Shi were engaged in a long-term romantic relationship that had begun as a workplace affair.

In 2008, Garfield moved his lab from Galveston to Phoenix, Arizona. Around the same time, Maner was arrested and pled guilty to the aggravated sexual assault of his daughter. Maner was sentenced to eight years of probation, the terms of which prohibited him from leaving the state of Texas. Rather than terminate Maner, Garfield approved a remote work plan to allow him to continue working from Texas. However, Maner’s performance immediately declined under the remote arrangement. When cuts to lab funding required Garfield to eliminate an employee position, Garfield selected Maner to be discharged.

Paramour Preference

Maner brought a Title VII sex discrimination claim in Arizona District Court alleging that Garfield protected Shi, his romantic partner, from the effects of the budget cuts by firing Maner. Maner claimed that this favoritism violated Title VII under the “paramour preference” theory, which suggests that an employer engages in sex discrimination when a supervisor’s romantic or sexual relationship with one employee results in an adverse employment action against another employee.

Title VII makes it unlawful for an employer to fire or otherwise discriminate against an individual “because of such individual’s race, color, religion, sex, or national origin.” The paramour preference theory requires Title VII to prohibit discrimination based on sexual *activity* as well as sex *characteristics*.

The Bostock Test

In its decision, the Ninth Circuit stated that the analysis of Maner’s paramour preference claim “begins, and pretty much ends, with the Supreme Court’s decision in *Bostock*.” In June of 2020, the United States Supreme Court issued a landmark decision, *Bostick v. Clayton County*. There, the Court created a simple, all-purpose test to determine whether employers violate the law by discharging employees on account of their sexual orientation or gender identity. The test: If changing the employee’s sex would have yielded a different choice by the employer, a statutory violation has occurred. Applying this test, the Supreme Court found that firing an employee due to their sexual orientation or gender

identity is sex discrimination under Title VII. The Court reasoned that, if a man is fired solely because he is attracted to men, the employer discriminates against him for actions it would tolerate if he were a woman.

According to the Ninth Circuit in *Maner*, the paramour preference theory fails the *Bostock* test. When the employer discriminates in favor of the supervisor's romantic partner, it discriminates against all other employees because they are not the romantic partner, not because of their sex. Changing the sex of the complaining employee would not result in a different choice by the employer because the identity of the favored employee would remain the same. That

is, if Maner had not been a man, Garfield would still have made the same decision to favor his romantic partner, Shi.

Takeaways

As the Ninth Circuit pointed out, workplace favoritism toward a supervisor's sexual or romantic partner is clearly unfair to other employees and harmful to morale. But such favoritism is not prohibited by Title VII as long as the relationship is consensual. Still, employers may choose to enforce workplace policies that discourage romantic relationships between supervisors and subordinates to avoid the issue altogether.

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