

OHIO APPELLATE COURT REAFFIRMS THAT SEXUAL ORIENTATION IS NOT A PROTECTED STATUS UNDER OHIO LAW -- BUT CHANGE IS COMING

The Ohio Court of Appeals for the Seventh District recently upheld a trial court's judgment on the pleadings dismissing a plaintiff's complaint of harassment because of his sexual orientation, on the basis that sexual orientation is not a protected status under Ohio law. *Inskeep v. Western Reserve Transit Authority*, 7th Dist. Case No. 12-MA-72, 2013-Ohio-897 (March 8, 2013).

Background Facts

Plaintiff Inskeep was employed as a bus driver by Western Reserve Transit Authority (WRTA). He sued his employer for sexual harassment because of his sexual orientation and for negligent infliction of emotional distress. WRTA filed an answer that included an affirmative defense that the complaint failed to state a claim upon which relief can be granted.

Thereafter, WRTA filed a motion for judgment on the pleading on the grounds that: (1) a claim of discrimination based on sexual orientation is not recognized under Ohio law; and (2) Plaintiff's claim for negligent infliction of emotional distress failed because plaintiff failed to allege he was a bystander to an accident or that he feared physical consequences, as required by Ohio law.

Inskeep responded that the prohibition of R.C. 4112.02(A) against employer discrimination "because of" sex includes discrimination because of sexual orientation. Inskeep also submitted an affidavit asserting that his negligent infliction of emotional distress claim was sufficient because he had been in fear of physical consequences from the harassment -- he was a bystander to what he thought was an explosion (another employee set off fireworks), causing him great panic, alarm, fear, and distress.

In reply, WRTA reiterated that sexual orientation is not protected by R.C. 4112.02(A) and moved to strike Inskeep's affidavit -- a court cannot consider anything outside the pleadings on a motion for judgment on the pleadings.

The trial court granted WRTA's motion to strike Inskeep's affidavit and dismissed Inskeep's complaint for failing to state a claim upon which relief can be granted. Inskeep appealed.

Discrimination Because of Sexual Orientation

Neither R.C. 4112.02(A) nor Title VII of the Civil Rights Act of 1964 prohibits discrimination based on sexual orientation.

R.C. 4112.02(A) prohibits discrimination "because of the race, color, religion, sex, military status, national origin, disability,¹ age, or ancestry of any person. . . ." The *Inskeep* court noted that Ohio courts of appeals uniformly have held that sexual orientation is not protected under R.C. 4112.02(A), citing decisions from the First, Ninth, and Eleventh Districts. See *Greenwood v. Taft, Stettinius & Hollister*, 105 Ohio App.3d 295 (1st Dist. 1995); *Gianinni-Baur v. Schwab Retirement Plan Servs.*, 9th

¹ The *Inskeep* court pointed out that the definition of "disability" under R.C. 4112.01(A)(13) and the definition of "physical or mental impairment" under R.C. 4112.01(A)(16) do not include homosexuality or bisexuality.

Dist. No. 25172, 2010-Ohio-6453 (Dec. 29, 2010); *Tenney v. General Electric Co.*, 11th Dist. No. 2001-T-0035, 2002-Ohio-2975 (June 14, 2002).

The court also noted that numerous federal courts of appeals have confirmed that discrimination based on sexual orientation is not prohibited by Title VII. See, e.g., *Vickers v. Fairfield Med. Ctr.*, 454 F.3d 757 (6th Cir. 2006); *Gilbert v. Country Music Assn., Inc.*, 432 Fed. Appx. 516 (6th Cir. 2011); *Bibby v. Philadelphia Coca-Cola Bottling, Co.*, 260 F.3d 257 (3rd Cir. 2001).

Although R.C. 4112.02(A) does not prohibit discrimination based on sexual preference, it does prohibit same-sex sexual harassment. In *Hampel v. Food Ingredients Specialties, Inc.*, 89 Ohio St.3d 169 (2000), the Ohio Supreme Court concluded that one man can illegally harass another man if the offending actions are committed “because of the sex” of the victim or would not have been done “but for the sex” of the victim.

Similarly, the United States Supreme Court has determined that same-sex harassment can be actionable under Title VII, but has yet to determine that discrimination based on sexual orientation violates federal law. See *Oncale v. Sandowner Offshore Serv., Inc.*, 523 U.S. 75, 78 (1997) (“ . . . nothing in Title VII necessarily bars a claim of discrimination ‘because of sex’ merely because the plaintiff and the defendant . . . are of the same sex.”).

Plaintiff Inskeep’s complaint failed to assert that the discrimination directed at him was because of his sex, rather than his sexual orientation. His harassment claim under R.C. 4112.02(A) was insufficient as a matter of law.

Negligent Infliction of Emotional Distress

Pursuant to Civ.R. 12(C), a court may only review the legal sufficiency of pleadings before it on a motion for judgment on the pleadings. No other documents may be considered. The contents of a memorandum in opposition to a motion, and any attachments to the memorandum, are not part of the pleadings. See Civ.R. 7(A); Civ.R. 10(C). Thus, the trial court properly struck Inskeep’s affidavit.

Under Ohio law, negligent infliction of emotional distress is actionable only if the plaintiff has either witnessed or experienced a dangerous accident or was subjected to an action involving physical peril. While Inskeep’s affidavit may have been sufficient to meet one of these elements, his complaint clearly did not contain any such allegations. Moreover, Inskeep failed to request leave to amend his complaint to make such required allegations. For these reasons, his negligent infliction of emotional distress claim failed as a matter of law.

Lessons To Be Learned

While current Ohio and federal law do not prohibit discrimination based on sexual orientation, nonetheless, employers should not tolerate such conduct. It is simply wrong. Employers should require that all employees are treated with respect and basic human decency. There is no place at the work site for harassment or discrimination against an employee because of his/her sexual orientation.

Moreover, discrimination based on sexual orientation is very likely to be made illegal in the near future -- either by statute or by case law. Indeed, this week, the United States Supreme Court is hearing arguments in two highly-publicized challenges to laws banning same-sex marriage. In the first case, *Hollingsworth v. Perry*, the Court is hearing a challenge to California’s same-sex marriage ban, Proposition 8. Both the federal district court and the Ninth Circuit Court of Appeals have ruled that the state law is unconstitutional. The second case, *United States v. Windsor*, is a challenge to the federal Defense of Marriage Act (DOMA). Two federal courts of appeal (the First and Second

Circuits) have ruled that aspects of DOMA are unconstitutional. Clearly, discrimination based on sexual orientation soon will become illegal under both state and federal law.

The *Inskeep* case can be found at:

<http://www.sconet.state.oh.us/rod/docs/pdf/7/2013/2013-ohio-897.pdf>

