

CLIENT ALERT

Sixth Circuit Court of Appeals Requires Close Analysis of Gender Discrimination Claims.

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The United States Court of Appeals for the Sixth Circuit found recently that a plaintiff could not establish a *prima facie* case of gender discrimination under Title VII of the Civil Rights Act (“Title VII”) because she was unable to identify any “similarly situated” employees who received more favorable treatment. This case is a good reminder that the Sixth Circuit requires plaintiffs to meet a more stringent standard than some other courts to establish a *prima facie* case.

In *Simpson v. Vanderbilt University*, a professor of anatomic pathology sued for gender discrimination after the University terminated her employment. The University terminated the plaintiff-professor’s employment after determining that she had started, ran, and solicited clients for her own private, side-business in violation of several University policies that prohibited conflicts of interest. After conducting an investigation, the University determined that the plaintiff-professor had solicited clients of a former University-run consulting service for her own side business. The investigation revealed that the plaintiff-professor neither sought permission to run this side business nor disclosed it on the University’s conflict of interest questionnaire. When the plaintiff-professor refused to cease her side-business activities, the University terminated her employment for cause.

Under Sixth Circuit law, a plaintiff may establish a *prima facie* case of gender discrimination by demonstrating that (1) she is a member of a protected group; (2) she was subjected to an adverse employment action; (3) she was qualified for the position; and (4) similarly situated males were treated more fairly. There is disagreement amongst other circuit courts as to whether a plaintiff must demonstrate the fourth element as part of a *prima facie* case. Unlike the Sixth Circuit, the First, Second, Third, Seventh, and Tenth Circuits do not require a showing of “similarly situated” employees as part of a *prima facie* case.

To support her claim, the plaintiff-professor in *Vanderbilt* alleged that other, male professors had also run side businesses without having their employment terminated. The plaintiff-professor relied primarily on how the University treated a male Neurologist who also provided consulting services on the side. The Court reviewed compared the University’s treatment of both individuals in detail and concluded that the two professors were not similarly situated. Specifically, the Court found that, unlike the plaintiff-professor, the Neurologist had disclosed his side business on the conflict-of-interest form, agreed to close his side business at the request of the University, paid back the money he had earned in the side business to the University, and did not use University resources to solicit clients.

After concluding that the plaintiff-professor had failed to identify any other employees who were similarly situated, the Court determined that plaintiff-professor could not establish a *prima facie* case of discrimination and affirmed the district court's decision granting the University summary judgment.

This case appears to expand the factors courts may examine to determine whether two employees are similarly situated. Typically, courts look at the employees' job responsibilities, their supervisors, and the conduct in which the employees engaged. Under that analysis, the Sixth Circuit could have concluded that both employees had engaged in the same conduct—running a side business. The Court went further in *Vanderbilt*, however, by examining how the employee responded to the employer once the employer informed the employee that it believed the employee was violating policy.

To minimize the risk of similar claims, employers should extensively document the circumstances regarding how they confront employees prior to taking action against those employees. How did the employer bring a potential rule violation to the employee's attention? How did the employee respond? Did the employee offer to take any steps to remedy the problem? How cooperative was the employee during the employer's investigation? Documenting these factors can help employers distinguish their treatment of certain employees and may lead to faster resolution of employment discrimination claims. And consistency in treatment of similarly situated employees is key.

Please contact your Hahn Loeser & Parks [Labor and Employment attorneys](#) for more information regarding how to protect your organization from similar claims of employment discrimination.



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