NDIRF

For North Dakota. For Local Government. For You.

PARTICIPATOR

DECEMBER 2019

ANTI-DISCRIMINATION LAW IS A MOVING TARGET, DON'T MISS IT

Anti-discrimination law has been the subject of substantial disagreement amongst the courts over the past decade. This creates a moving target that political subdivisions cannot afford to miss. For example, Title VII of the federal Civil Rights Act prohibits discrimination against employees because of their "sex." Courts have traditionally interpreted the term "sex" to mean that you cannot discriminate against an employee because he or she is male or female. But does the term "sex" also extend to prohibit discrimination based on an individual's sexual orientation or transgender status? This question is making its way through the court system with varying results and is presently before the United States Supreme Court.

On February 6, 2019, the 5th Circuit Court of Appeals noted in Wittmer v. Phillips 66 that some courts across the country have recently construed Title VII to "prohibit employers from discriminating on the basis of either sexual orientation or transgender status." This is also the position of the EEOC (the federal agency that investigates discrimination complaints). However, the federal district court of Minnesota recently recognized the 8th Circuit (which is binding upon federal courts in North Dakota) maintains that discrimination based on sexual orientation is not actionable. Further, on May 10, 2018, the 11th Circuit in Bostock v. Clayton County determined that Title VII does not prohibit discrimination against individuals based on their sexual orientation. Bostock is presently on appeal to the Supreme Court.

There is also judicial disagreement with respect to whether transgender individuals are protected under Title VII. On September 30, 2019, in Cunningham v. Burlington Coat Factory Warehouse Corp., the federal district court of New Jersey noted the 7th, 8th, and 10th Circuits recognize that transgender individuals are not protected under Title VII. However, the EEOC, 6th, and 11th Circuits, recognize that transgender individuals are protected under Title VII. Given this split in authority, the Cunningham court admitted it does not know the answer and will not make a decision until the Supreme Court provides guidance in R.G. & G.R. Harris Funeral Homes Inc. v. EEOC which is presently on appeal.

While it is anticipated the Supreme Court will answer the question of whether Title VII applies to sexual orientation and transgender status in the next year, be aware that there is judicial disagreement over the applicability of federal law to other employment issues as well. Put simply, federal courts sometimes disagree as to how federal law should be applied and this creates a moving target for employers. You need to be sure that your employment decisions comply with the current legal environment to avoid potential liability. This is not always an easy task. **It is vital to consult with legal counsel before making significant employment decisions. A ten-minute phone call may save you from years of unnecessary litigation and expense.** *Provided by Brian D. Schmidt, Attorney at Law and partner at Smith Porsborg Schweigert Armstrong, Moldenhauer & Smith.*

In This Issue:

HOLD HARMLESS AGREEMENTS: A RISK MANAGEMENT STALWART REVISITED

By Joe Jarret:

Joe Jarret is an attorney, former risk manager and past-president of the Southwest Florida Chapter of PRIMA and PRIMA's 2016 Author of the Year.

HOLD HARMLESS AGREEMENTS UNDER FIRE

During my public sector career, I have been afforded the opportunity to serve as both a risk manager and attorney. Recently, I was attending a continuing legal education conference when I overheard a group of plaintiffs' attorneys discussing the demise of hold harmless agreements. They predicted the demise of this stalwart risk transfer device on a 2019 ruling of the Supreme Court of Kentucky (Miller v. House of Boom Kentucky, LLC), which held that liability waivers signed by parents on behalf of their minor children are unenforceable when the party seeking the waiver is a for-profit business. I believe that my learned colleagues were a bit optimistic where public entity liability is concerned. The facts of the case in question are these:

In August 2015, Kathy Miller took her minor daughter, and her daughter's friends to play at House of Boom, a for-profit trampoline park located in Louisville, Kentucky, that offers a collection of trampoline and acrobatic stunt attractions. Prior to the children being allowed to participate, Miller was required to agree to an extensive release and waiver of any claims providing that she, her spouse, her minor children, or wards may have or that may arise as a result of participating in any of the activities offered by House of Boom. While playing at House of Boom, Miller's daughter sustained a fractured ankle when another child jumped off a three-foot ledge and landed on her ankle. Miller filed suit on behalf of her daughter against House of Boom for damages related to her injury. Based on the release and waiver of claims, House of Boom asked the United States District Court for the Western District of Kentucky for judgment in its favor. Due to the novelty of this issue in Kentucky law, the federal court sought guidance from the Supreme Court of Kentucky, and requested the Supreme Court answer the following question:

Is a pre-liability waiver signed by a parent on behalf of a minor child enforceable under Kentucky law?

The court's brief response to the above question was, "no." However, the court did go on to rule that, although parents have the right "to raise their child, choose the child's educational path, and make healthcare decisions on the child's behalf," these rights have "never abrogated the traditional common law view that parents have no authority to enter into contracts on behalf of their child when dealing with a child's property rights, prior to being appointed guardian by a district court." Despite this ruling, however, it is crucial to note that the Supreme Court held that pre-injury liability waivers signed by a parent on behalf of a minor are unenforceable when the waiver is signed in favor of a commercial, for-profit entity. The Court was cautious to expressly narrow its holding to waivers executed in favor of for-profit commercial entities, and in so doing, drew a marked distinction between waivers in the commercial context and public/not-for-profit context. The court specifically opined that, "the question of whether public policy exists to require enforcement of parent-signed, pre-injury waivers in a non-commercial context is not before this Court today, and thus we make no determination on the issue."

HOLD HARMLESS AGREEMENTS: THE BASICS

For the newer members of our profession, a hold harmless agreement is a risk management staple designed to transfer risk to a third party. The hold harmless clause in a legal contract absolves one or both parties to the contract of legal liability for any injuries or damages suffered by the parties to the contract. Risk managers generally insist upon adding a hold harmless agreement to a contract when the service being retained involves risks that the government does not or legally cannot, be held responsible for legally or financially. It is important to note that hold harmless agreements come in three broad categories:

1. Broad form hold harmless agreements will cover every activity referenced in the agreement and requires the indemnitor to assume all liability of the indemnitee, even if the indemnitee is negligent;

2. Intermediate form indemnity, where your entity can be held harmless for everything related to the activity or project except for problems or injuries that your entity alone caused; and

3. Limited hold harmless, where the Indemnitor only assumes responsibility for its own negligence.

Continued on Page 3

Continued from Page 2

HOLD HARMLESS AND THE COURTS

As a result of the House of Boom decision, hold harmless agreements are facing renewed scrutiny by the courts. There have traditionally been two conflicting views when it comes to the legality and viability of hold harmless agreements. One aspect is that hold harmless agreements are looked upon with suspicion by the courts, and as such, are not worth the paper they are written on. The other view is that hold harmless agreements offer public entities complete protection from all liability regardless of the circumstances. As any savvy risk manager will tell you, both schools of thought lack merit. In today's litigious society, courts are more closely scrutinizing the exculpatory language contained in the hold harmless agreements. As such, they are increasingly requiring that the agreement be strictly construed against the party relying on it, while insisting that the exculpatory clause be drafted in such a way that it particularly and clearly describes the liability to be limited.

That is not to say, however, that courts are not willing to void, as a matter of public policy, hold harmless agreements that are vague, overly broad, or inartfully drafted. Further, most states have either passed legislation or have had court decisions handed down rendering hold harmless agreements unenforceable in cases of gross negligence or official misconduct on the part of a public entity. Finally, many states preclude governmental entities from defending or paying settlements or judgments on behalf of any parties other than public entities and employees. Such states prohibit public entities from entering into agreements that serve to indemnify a private third party or pay any settlement or judgment on behalf of a third party.

DRAFTING THE HOLD HARMLESS AGREEMENT

Public risk managers can continue to rely upon hold harmless agreements by ensuring they are drafted in such a way as not to be overly broad, generic, all-inclusive, or vague. Courts today distinguish between the terms "indemnify" and "hold harmless." Whereas a hold harmless agreement is generally understood to be designed to protect the public entity against the risk of loss as well as actual loss, the term indemnify is often interpreted to mean that the beneficiary of the agreement can only be expected to be reimbursed for any damage it suffers. The distinction between indemnity clauses and hold harmless clauses varies from state to state, although it is a generally accepted business practice that hold harmless clauses contain indemnity language designed to "defend, and hold harmless" a party "from any and all claims, damages, losses, and expenses, including, but not limited to, attorney's fees, arising out of or resulting from negligence or misconduct in relation to the work defined in this contract."

In most states, a well-drafted, properly administered waiver, voluntarily and knowingly signed by an authorized representative of the entity with which the government is doing business, can protect the government from liability for injuries resulting from ordinary negligence. Conversely, rare is the court that will uphold a poorly written, vague agreement, or one that seeks to protect the government against liability for gross negligence, reckless conduct, willful/wanton conduct, or intentional acts.

THE FUTURE OF HOLD HARMLESS AGREEMENTS

When it comes to the future viability of hold harmless agreements, the devil is in the details. Risk managers should keep abreast of legislation and court decisions that address these valuable risk transfer devices, and likewise avoid using "one size fits all" agreements that a court could construe as vague, overboard, or voidable by operation of law.

NDFT AGENT SELECTION IS OPEN

All political subdivision ND Fire and Tornado Fund (NDFT) members have been asked to select a local agent to handle their NDFT policy matters for the 2020-2021 coverage period. If you have not already done so, please designate the agent your entity wishes to work with by providing a notice to the NDIRF indicating the agent your entity has selected. We encourage a selection be made as soon as possible to ensure the transition is smooth for both you and your agent. The NDIRF will accept the agent selection notice via email at NDFT@NDIRF.com or U.S. Mail at PO Box 2258, Bismarck, ND 58502, submitted either by the political subdivision or the designated agent.

Once we receive the AOR letter, we will provide as much assistance to the agent as needed, including current property schedules and other property coverage information. The agent will be expected to review the coverage information with the NDFT member they are working with and submit changes to the NDIRF directly for any changes taking effect on or after 7/1/2020. For any changes or other service matters effective prior to 7/1/2020, NDFT members must contact the NDIRF directly.

NDIRF
NORTH DAKOTA
INSURANCE
RESERVE FUND
PO BOX 2258
BISMARCK ND 58502

PRESORTED
STANDARD
US POSTAGE PAID
BISMARCK, ND
PERMIT NO 419

NDIRF BOARD OF DIRECTORS ELECTION

Annually, at least two seats on the nine-member NDIRF Board of Directors are up for election. The election is held by member voting through solicitation of proxies by mail or voting in person at the NDIRF Annual Meeting. In 2020, directorships representing the member categories of "Others" and "Schools" are up for election. The incumbent board members are Burdell Johnson, Atwood Township, ("Others"), and Ty DeWitz, Kidder County School Board, ("Schools"). Elected officers or employees of NDIRF members, from among the respective categories electing a director in a given year (for example, "Others" and "Schools" in 2020), are eligible to serve as directors.

Upcoming Events:

February 20, 2020
1:30 p.m.
NDIRF Board of Directors Meeting
NDIRF offices, Bismarck

The NDIRF office will be closed Wednesday, December 25th and Wednesday, January 1st, 2020.

Happy Holidays!

Any eligible person wishing to be considered by the NDIRF Nominating Committee as a director candidate must complete and submit a Candidate Application Form by January 31, 2020. To obtain a copy of the form, please contact the NDIRF office by phone at 1-800-421-1988; by mail at P.O. Box 2258, Bismarck, ND 58502; or via e-mail at Brennan.Quintus@ndirf.com; and direct your request to the attention of the CEO.