

Pennsylvania's Equal Rights Amendment Provides No Private Right of Action for Gender-Based Discrimination Claims Against a Private Employer

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In a case of first impression, the Superior Court of Pennsylvania considered whether there is a private right of action against a private employer for gender-based discrimination under the Equal Rights Amendment to the Pennsylvania Constitution ("ERA"). *Dillon v. Homeowner's Select, Affinity Ins. Servs., Inc.*, No. 2969 EDA 2006, 2008 PA Super. 229 (Sept. 29, 2008). The case involved an employee's claim for money damages based on sexually offensive comments and conduct by her immediate supervisor. The employee claimed that, although she reported the behavior to another manager, the behavior continued until she voluntarily transferred to another department.

The court of common pleas dismissed the case because the plaintiff failed to exhaust administrative remedies by filing a complaint with the Pennsylvania Human Relations Commission. The issue raised on appeal was whether the court erred in dismissing her complaint and requiring that she exhaust administrative remedies for a claim under the ERA. The Superior Court affirmed the dismissal, but on different grounds. It concluded that there was no private right of action under the ERA and, therefore, did not reach the issue of exhausting administrative remedies.

The ERA provides that "[e]quality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual." PA. CONST. art. I, § 28.

Since the amendment was passed in 1971, the courts have applied it in a variety of contexts, including cases rejecting presumptions intended to protect women in the enforcement of prenuptial agreements; rejecting the presumption that a wife who committed a crime in the presence of her husband was coerced by the husband; holding that the Adoption Act violates the ERA by requiring parental consent only from an unwed mother; abolishing the presumption that a husband owns all household goods possessed by both spouses; holding that a statutory scheme providing for immediate parole of women, but not men, was unconstitutional; permitting both a husband and wife to recover damages for loss of consortium; and abolishing the rule that a husband, but not a wife, is primarily responsible for funeral expenses of a deceased spouse. In these cases, the discrimination at issue had its roots in statutes or case law of the Commonwealth.

In 1984, the Supreme Court of Pennsylvania considered the ERA in the context of gender-based automobile insurance rates in *Hartford Accident & Insurance Company v. Insurance Commissioner*, 482 A.2d 542 (Pa. 1984). In *Hartford*, a male driver filed a complaint with the Insurance Commissioner in which he challenged insurance rates that required him to pay more than a similarly-situated female driver. The Commissioner interpreted the prohibition against "unfairly discriminatory" rates in the Casualty and Surety Rate Regulation Act, 40 P.S. §1183(d), and held that the gender-based rates violated the Commonwealth's public policy against gender discrimination as set forth in the ERA. The Commonwealth Court and the Supreme Court both affirmed.

In evaluating the scope of the ERA in *Hartford*, the Supreme Court determined that the ERA applies to gender-based discrimination by state or local entities or officials, including discrimination through statutes, official policies, and rulings of courts and administrative agencies. Subsequent appellate court cases followed this analysis, finding that the Insurance Commissioner, a state official, must interpret the Commonwealth's insurance statutes in a manner that complies with the ERA.

The U.S. Court of Appeals for the Third Circuit cited insurance rate cases issued by Pennsylvania's appellate courts following *Hartford* and stated, in *dicta*, that there is a private right of action against an employer under the ERA for gender discrimination in the workplace. See *Pfeiffer v. Marion Center Area Sch. Dist.*, 917 F.2d 779 (3d Cir. 1990). Some federal district courts in Pennsylvania followed this *dicta* and found a private right of action under the ERA. Others rejected it and ruled that the ERA does not establish a private right of action for workplace gender discrimination.

In *Dillon*, the Superior Court of Pennsylvania disagreed with the federal courts that had found a private right of action under the ERA. Relying on the Supreme Court's instruction in *Hartford* that the scope of the Constitution is determined by its language, it concluded that the text of the ERA does not suggest it was intended to address private conduct. It also explained that *Hartford*, which it characterized as addressing the Casualty and Surety Rate Regulation Act and the Insurance Commissioner's authority under the Act, does not provide a basis for regulating private conduct. Ultimately, the Superior Court concluded that while the ERA prohibits state and local government officials from denying equality of rights based on gender, it does not circumscribe, prohibit or limit the conduct of private citizens or entities. The court focused on the fact that the defendant in this case was a private employer, which leaves open the question of whether employees would have a private right of action under the ERA against a public employer.

The Superior Court stated that it was disinclined to "fabricate" a new cause of action for gender discrimination. It noted that an intermediate appellate court is not best situated to analyze the diverse policy considerations involved in defining elements, defenses and immunities of a new cause of action for damages as a result of discrimination, implying that such is the job of the Pennsylvania Supreme Court. Since it appears that the employee has not sought an appeal in this case, Superior Court's decision will stand. It is possible, however, that a different Superior Court panel or Commonwealth Court might reach a different result before the issue is finally resolved by the Supreme Court.

Other related issues that were not addressed in *Dillon* and have not yet been addressed by the Supreme Court include whether money damages would be available under the ERA as a remedy for gender discrimination and whether Pennsylvania will recognize a common law cause of action for discriminatory termination in cases where the employee is precluded from pursuing a remedy under the Pennsylvania Human Relations Act. In *Weaver v. Harpster*, 885 A.2d 1073 (Pa. Super. 2005), the Superior Court acknowledged the Commonwealth's strong public policy against gender discrimination, as expressed in the ERA. Based on this public policy, it permitted a common law claim for wrongful discharge (as opposed to a direct claim for damages under the ERA) where the employer had fewer than four employees and was not covered by the Pennsylvania Human Relations Act. The Supreme Court accepted an appeal in *Weaver* to determine whether Pennsylvania will recognize common law claims in those limited situations, but the Court has not yet issued a decision.