Employment Law Update

Legal Issues Facing City & County Governments

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Agenda

- Handling harassment and discrimination during "#MeToo" era.
- Service dogs and emotional support animals in the workplace.
- Sexual orientation updates, one big Supreme Court case, and maybe a constitutional amendment.
- State, county, city employees & unions.

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The Difference a Year Makes

- The election of Donald Trump was anticipated to slow or perhaps reverse 8 years of rapid advancement in employee rights (and employer risks).
- President Trump has appointed new members to the EEOC to fill several vacancies, which will change the majority of the board from Democrat to Republican.
- Trump nominated Janet Dhillon as a more "business friendly" chairperson (no action since October 2017).

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The Difference (cont.)

- Trump froze Obama-era rule requiring large employers to disclose data on workers' wages broken down by gender and ethnicity.
- AG Jeff Sessions issued a directive requiring federal agencies to accommodate religious objections to requirements that contradict their faith.
- Justice Department changed position to now contend that Title VII does not bar transgender discrimination.
- Department of Labor dropped its appeal of a federal court order enjoining changes to the FLSA.

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October 2017: #MeToo

- On October 15, 2017, actress Alyssa Milano encouraged spreading the hashtag #MeToo, as part of an awareness campaign in order to reveal the ubiquity of sexual abuse and harassment. Milano tweeted:
  - **"If all the women who have been sexually harassed or assaulted wrote 'Me too.' as a status, we might give people a sense of the magnitude of the problem."**
  - The phrase "Me too" was tweeted by Milano around noon on October 15, 2017 and had been used more than 200,000 times by the end of the day.

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#MeToo and the "Weinstein Effect"

- Term used to describe a wave of sexual harassment allegations that began in the United States in October 2017, when media outlets reported on numerous sexual abuse allegations against film producer Harvey Weinstein.
- The allegations were described as a "tipping point" or "watershed moment" and precipitated a "national reckoning" against sexual harassment.

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High-Profile #MeToo Targets

- Patrick Meehan, U.S. Rep. (PA)
- Harvey Weinstein
- James Rosen, Fox News
- Alex Kozinski, 9th Circuit Court of Appeals
- Al Franken, Senator (MN)
- Garrison Keillor, NPR
- Charlie Rose, CBS/PBS
- John Conyers, Jr., U.S. Rep (MI)
- David Sweeny, NPR
- Louis C.K., comedian
- Kevin Spacey, actor
- Roy Moore, former Ala. Chief Justice
- Bill O'Reilly, Fox News
- Matt Laurer, NBC
- Tom Brokaw, NBC
- President Donald J. Trump
- Bill Cosby
- **Literally HUNDREDS more**

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#MeToo in the Courtroom

- In January and February, 2018, former USA Gymnastics national team "doctor" Larry Nasser was sentenced after pleading guilty to 10 counts of sexual assault of minors including several Olympic gold medalists.
- Michigan Circuit Court Judge Rosemarie Acquilina became famous for permitting over 150 women and girls to present personal testimony on their sexual abuse, all of which was televised live nationally.
- In April 2018, "America's Dad" Bill Cosby was found guilty of sexual assault after a much-watched trial in Pennsylvania.

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Real Impact

- Newsweek and the New York Times reported in in Feb. 2018 that "81 percent of women surveyed alleging they had experienced sexual harassment or assault and a stunning 43 percent of men said they had experienced sexual misconduct too."
- In the Stop Street Harassment study 38 percent of women and 13 percent of men reporting being harassed at work.
- The Washington Post/ABC News reported that more than half of American women had experienced "unwanted sexual advances."
- Employment Law Alliance poll in Feb. 2018 of private sector outside counsel: Nearly half thought companies not doing enough.

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Even in Alabama

- Most recently, Roy Moore taken down by numerous allegations of sexual predation.
- But the risks of harassment and discrimination have been there all along:
  - 2018: Woman gets $10 million judgment in sexual assault by Birmingham police officer.
  - 2017: $28 million award three individuals who were sexually abused by jail administrator in Clay County.
  - 2016: $374,000 awarded to breastfeeding Tuscaloosa Police Officer who was reassigned and demoted (verdict upheld by Eleventh Circuit in Sept. 2017).

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Even in Alabama (cont.)

- But the risks of harassment and discrimination (cont.):
  - 2015: $1,065,383: Pharmacy manager terminated just after his 65th birthday. Boss had made several age-related remarks.
  - 2015: $188,620: Female city employee harassed by co-worker.
  - 2015: $166,000: Two black women who worked for municipal housing authority were discriminated against because of their color.
  - 2015: $20,000: White applicant for police-officer position not hired because city was filling open positions with black applicants.

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Ending Forced Arbitration of Sexual Harassment Act of 2017

- Senators Kirsten Gillibrand and Lindsey Graham have joined forces to sponsor bipartisan legislation seeking to outlaw taxpayer-funded settlements on issues of harassment, to allow victims to decide whether or not to publicly disclose allegations, and to end forced arbitration clauses in workplace agreements.
- S. 2203 introduced December 6, 2017.
- Would prohibit pre-dispute arbitration agreements from being valid or enforceable if it requires arbitration of a sex discrimination dispute.

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EEOC Funding Increases

- Even with the Trump administration generally decreasing EEOC enforcement, in March 2018, Congress added $16 million to the EEOC's budget to investigate and enforce sexual discrimination and harassment claims in the #Metoo era.
- In her budget justification to Congress, the EEOC's acting director cited sexual harassment as a key issue for the commission to tackle in the next several years.
- The EEOC is also in the process of releasing updated enforcement guidance on sexual harassment for employers to follow.

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Upcoming EEOC Guidance

- The proposed guidance will outline **five key measures**, which have generally proved effective in preventing and remedying harassment:
  1. Strong and committed leadership.
  2. Regular and proven accountability.
  3. Robust and comprehensive harassment policies.
  4. Reliable and accessible complaint procedures, which include prompt and thorough investigations of harassment.
  5. Routine, interactive (preferably live) training tailored to the specific workforce and workplace.

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What Are We to Do?

- One thing #MeToo has taught us is that many legitimate victims of sexual harassment do not speak out until there is a forum for doing so or a very significant incentive.
- Employers have had anti-harassment policies for decades, but have historically had little motivation in teasing out sexual harassment allegations.
- #MeToo has become its own outlet for sexual harassment allegations, wholly apart from the anti-harassment policies that most employers have.
- If employers do not more proactively address risks of harassment, there is an increasing risk that employees will go public immediately.
- It is reasonable to conclude that "going public" may result in increased risk of litigation.

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Provide Regular Training to Employees

- Annual training generally works best.
- Employees need to know how to report discrimination and harassment.
- Have several ways that complaints can be made.
- Live training is better than online training.
- Carefully select the trainer. Involve your own managers.

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Train Management Separately

- Management's needs are different.
- Need to know how to recognize discrimination and harassment.
- Need to know best practices for responding to complaints.

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Provide Bystander Training—to Both Employees and Management

- Bystander training provides suggestions to those who observe harassing behavior about ways they can "intervene."
- Bystander interventions are a more effective approach to eliminating sexual harassment.

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EEOC Risk Factors

- In 2016, the EEOC developed a list of "risk factors" that can be assessed and considered in ferreting out sexual harassment in workplaces.
- https://www.eeoc.gov/eeoc/task_force/harassment/risk-factors.cfm

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Risk Factor: Homogenous Workforce

- Where mostly male employees, females are more likely to harassed.
- Similar phenomenon associated with other areas of discrimination: race, national origin, etc.
- Minority individuals may feel isolated and therefore not report harassment.
- EEOC suggests paying careful attention to work groups with low diversity. Have managers reach out and check in, even documenting those efforts.

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Risk Factor: Nonconforming Workers

- Workers that don't match "societal norms" are more likely to be harassed:
  - Feminine male among mostly masculine men.
  - "Tough" female in male-dominated job.
- EEOC suggests proactively and intentionally creating a culture of civility and respect with the involvement of the highest levels of leadership. Training is the best way to do this.

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Risk Factor: Cultural & Language Differences

- Converse of homogenous workforce.
- Likely to occur when there is a significant number of one group that is different from most of the group.
- EEOC suggests paying close attention to relations among and within groups of workers and make efforts to increase diversity in culturally segregated workforces.

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Risk Factor: Many Young Workers

- Workplaces with many teenagers and young adults are more likely to have harassment.
- Workers in first or second jobs may unaware of workplace norms.
- EEOC suggests employers:
  - Provide orientation to all new employees with emphasis on the employer's desire to hear about all complaints of unwelcome conduct.
  - Provide training on how to be a good supervisor when youth are promoted to supervisory positions.

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Risk Factor: "High value" Employees

- Perception is that upper management is likely to turn a blind eye.
- High-value employees may also be able to hide their behavior.
- EEOC suggests that if a high-value employee is discharged for misconduct, consider publicizing that fact (unless there is a good reason not to).

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Risk Factor: Customers & Citizens

- Typically applies to sales representatives.
  - Sales representative is reluctant to report harassment because of losing commission.
- May also involve service-industry employees: server in restaurant.
  - Server is reluctant to report harassment because of losing tip.
- EEOC suggests that employers should be wary of a "customer is always right" mentality in terms of application to unwelcome conduct.

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Risk Factor: Monotonous Jobs

- Workplaces were the work is monotonous or low intensity are more likely to have harassment.
- Because workers have “time on their hands,” they avoid boredom through inappropriate conduct.
- EEOC suggests that employers consider varying or restructuring job duties or workload to reduce monotony or boredom.

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Risk Factor: Isolated Workspaces

- Situations where there are only a few employees, such as water department or road work crews, building inspectors, etc.
- EEOC suggests employers:
  - Consider restructuring work environments and schedules to eliminate isolated conditions.
  - Ensure that workers in isolated work environments understand complaint procedures.
  - Create opportunities for isolated workers to connect with each other (*e.g.*, in person, on line) to share concerns.

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Risk Factor: Decentralized Workplaces

- Characterized by limited communication between upper-level management and workers (and their first-line supervisors).
- EEOC suggests increased training for first-level supervisors.
- EEOC also suggests employers:
  - Ensure that compliance training reaches all levels of the organization, regardless of how geographically dispersed workplaces may be.
  - Ensure that compliance training for area managers includes their responsibility for sites under their jurisdiction.
  - Develop systems for employees in geographically diverse locations to connect and communicate.

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2017: ERA Ratified in Nevada

- **Section 1.** Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
- **Section 2.** The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
- **Section 3.** This amendment shall take effect two years after the date of ratification.

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ERA: A Refresher

- ***Congress*** imposed a deadline for ratification set as March 22, 1979.
- Insufficient states had ratified by that date.
- Congress then extended ratification deadline by 4 more years, but not enough states acted.
- Nevada became the 36th state to ratify the amendment.
- Article V of the Constitution provides no deadlines for amendments.
- Assuming that ratification is even possible, only two more states must act.

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2018: Illinois to Consider the ERA

- On April 11, 2018, the Illinois State Senate voted 43-12 to approve a bill to ratify the ERA.
- Ratification initiative now goes to the State House of Representatives and **a vote may happen this month.**
- If Illinois passes thee ERA, ratification by just **ONE more state** would bring the ERA to the constitutionally mandated three-quarters threshold.
- Florida, Virginia, Utah all possibilities.

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Service Dogs and Emotional Support Animals in the Workplace

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The Legal Framework: Americans with Disabilities Act

Title II of the ADA

- Applies to public entities in their capacities as public venues.
- Federal regulations specifically state that disabled citizens have a right to bring service animals (including dogs and even miniature horses) into public venues, but do not permit emotional support or "comfort" animals.
- Regulations severely limit questions that can be asked by officials.

Title I of the ADA

- Applies to public entities in their capacity as "employers."
- The ADA imposes upon employers the duty to provide reasonable accommodations for known disabilities unless doing so would result in undue hardship to the employer.
- Does not explicitly address "service dog" vs. "comfort dog" distinction, but does posit that a dog **could be** a reasonable accommodation (29 C.F.R. § 1630 App.).
- EEOC guidance suggests employee may need ADA leave to train a service animal.
- EEOC has taken position that even emotional support animals might be a reasonable accommodation in a proper scenario.

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Essential Knowledge for Employees Interacting with the Public

- Because your organizations provide public services, your employees need to be aware of limitations about service animals that may accompany citizens that visit or use your facilities.
- Service animals are typically dogs, but can also be miniature horses.
- 28 C.F.R. § 35.136.

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28 C.F.R. § 35.136: General Rule Under Title II

(a) **General**. Generally, a public entity shall modify its policies, practices, or procedures to permit the use of a service animal by an individual with a disability.

(b) **Exceptions**. A public entity may ask an individual with a disability to remove a service animal from the premises if—

(1) The animal is out of control and the animal's handler does not take effective action to control it; or

(2) The animal is not housebroken.

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28 C.F.R. § 35.136: Inquiries Under Title II

(f) **Inquiries**. A public entity shall not ask about the nature or extent of a person's disability, but may make two inquiries to determine whether an animal qualifies as a service animal.

A public entity may ask if the animal is required because of a disability and what work or task the animal has been trained to perform. A public entity shall not require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal. Generally, a public entity may not make these inquiries about a service animal when it is readily apparent that an animal is trained to do work or perform tasks for an individual with a disability (e.g., the dog is observed guiding an individual who is blind or has low vision, pulling a person's wheelchair, or providing assistance with stability or balance to an individual with an observable mobility disability).

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Service Animal vs. Comfort Animal

- For purposes of Title II of the ADA, a service animal is a "dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability." 28 C.F.R. §§ 35.104, 36.104.
- The regulations list multiple examples of appropriate work or tasks, including "helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors." *Id.*
- By contrast, "**the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition.**" *Id.* (emphasis supplied).
- On its face, this regulation DOES NOT APPLY TO TITLE I. The only decision to consider the question has held that the Title II or Title III definition of "service animal" is "not pertinent" under a Title I analysis. See *Clark v. Sch. Dist. Five,* 2017 WL 1284871, at *3 (D.S.C. Jan. 6, 2017) (Gossett, M.J. report and recommendation), *overruled on other grounds,* 2017 WL 1160419 (D.S.C. Mar. 29, 2017).

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Your Employees Can Ask Citizens Only Two Things:

1. Is the animal is required because of a disability?
2. What work or tasks has the animal has been trained to perform?

CANNOT ask for documentation.
CANNOT require service dog vest.

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What About Dogs for Workers?

- The EEOC takes the position that the ADA requires employers to permit otherwise qualified workers to bring their service animals and **even their emotional support animals** into their workplaces.
- EEOC has sued CRST International, Inc., alleging violations of Title I of the ADA arising out of CRST allegedly "failing to hire [the plaintiff] on the basis of disabilities and his request for accommodation," including specifically his requested "reasonable accommodation of being allowed to drive with his service animal."
- See *EEOC v. CRST International, Inc.,* 1:17-CV-00129-LRR (N.D. Iowa Filed 3/2/17 pending).

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Other Title I Service Dog Cases

- *Arndt v. Ford Motor Company,* 247 F. Supp. 3d 832 (E.D. Mich. 2017).
- *Baker v. Dupnik,* 2011 WL 13183250 (D. Ariz. Mar. 3, 2011).
- *Schultz v. Alticor/Amway Corp.,* 177 F. Supp. 2d 674 (W.D. Mich. 2001), *aff'd,* 43 F. App'x 797 (6th Cir. 2002).
- *EEOC v. AutoZone, Inc.,* 2008 WL 4418160 (D. Ariz. 2008).
- *Clark v. Sch. Dist. Five,* 2017 WL 1284871, at *3 (D.S.C. Jan. 6, 2017) (Gossett, M.J. report and recommendation), *overruled on other grounds,* 2017 WL 1160419 (D.S.C. Mar. 29, 2017).
- ***Fowler v. City of Huntsville, Ala.*** (N.D. Ala. 2018) (voluntarily dismissed).

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Common Reasons for Service Animals

- Guides blind or low-vision employees.
- Provides signals for deaf or hearing-impaired employees.
- Detects or responds to employee's seizures.
- Soothes anxiety or post-traumatic distress disorder (PTSD).

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Common reasons (cont.)

- Aids employee's **mobility** by—
  - Providing source of balance and stability.
  - Providing a brace for getting in and out of wheelchair.
  - Helping to recover from a fall.
  - Pulling a wheelchair.
  - Opening doors.
  - Retrieving dropped items.

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What Should You Do?

- Service dog lawsuits are dangerous because of three known facts: (1) everyone likes dogs; (2) everyone knows employers don't want dogs in the workplace; and (3) everyone knows employees want their dogs in the workplace.
- If an employee makes a request, it must be treated like any other request for accommodation. Cannot have a general rule against service animals.
- Start with the interactive process.
- Important questions:
  - What are essential job functions employee can't perform because of disability?
  - How will animal assist employee in performing those functions?
  - What other accommodations are available? ***Is there another way to solve this problem?***
  - What does the medical provider have to say?

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Generally Don't Have to Allow Animal When Employee—

- Can't perform essential functions regardless of animal (but be careful because employee can claim absence of animal is WHY they can't perform the job).
- Can't demonstrate how animal will help employee perform job functions.
- Can't maintain control of the animal.
- Animal bites.
- Animal not housebroken.
- Animal presents a direct threat to employee or others (construction?).
- Accommodating animal would completely undermine employer's work?
- Allergies of other workers? Courts have been skeptical.

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How to Do Interactive Process Right

Arndt v. Ford Motor Co., 247 F.Supp.3d 832 (E.D. Michigan)

- Assembled team of employees to address request.
- Worked on request for 3 months until employee resigned.
- Researched what other manufacturing facilities had done.
- Had regional head of safety and health to tour facility to obtain suggestions and address concerns.

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How to Do It Right (cont.)

- Sought information from employee's psychologist.
- Gave employee leave with full pay while it investigated request.

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How to Do It Right (cont.)

- *Fowler v. City of Huntsville, Ala.*
  - Listened to employee's request.
  - Met service animal in person (in dog?).
  - Requested doctor's note.
  - Requested clarification of doctor's note.
  - Granted several of doctor's suggested accommodations, but not service dog.
  - Moved employee to more conducive environment.
  - Documented employee performance and decline in disciplinary problems after alternative accommodations.
  - Avoided stereotypical characterizations and impermissible justifications.

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How to Do Interactive Process Wrong

Baker v. Dupnik, 2011 WL 13183250 (D. Ariz. 2011)

- Did little or no research on how dog would help employee.
- Viewed request as relating to falling instead of mobility (which was employee's concern).
- Refused to permit service dog to attend meetings.
- Refused to permit service dog's trainer to attend meetings.

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How to Do It Wrong (cont.)

- Didn't investigate claimed problems with dog:
  - Cleaning schedule.
  - Distraction to or fear by other employees.
  - Tripping hazard.
- Didn't talk to employee with allergies to see whether the dog would actually affect him.
  - Allergic coworker later testified that dog presented no problem if he avoided dog.
- Didn't explore possibility of staggering worker's schedule and allergic coworker's schedule to avoid exposure to dog.

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Status of Sexual Orientation Discrimination

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Status of the Law Is Confusing

- You can't discriminate against someone because he or she doesn't conform to sexual stereotypes.
  - *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989).
    - Female accountant wasn't promoted to partner because she was too masculine: She would have made partner if she had walked, talked, and dressed more femininely and if she had worn makeup, had her hair styled, and had worn jewelry.
- However, in the Eleventh Circuit, you can discriminate on the basis of sexual orientation.
  - *Evans v. Georgia Reg'l Hosp.* 850 F.3d 1248 (11th Cir.), cert. denied, 138 S. Ct. 557, 199 L. Ed. 2d 446 (2017).

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Status of the Law (cont.)

- **Issue:** Sexual orientation discrimination v. sexual stereotype discrimination.
- Until last year, all U.S. Circuit Courts of Appeal had ruled that sexual orientation discrimination was not covered by Title VII of 1964 Civil Rights Act.
- So you could fire someone for being gay, but not for "acting" or "appearing" gay.

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So—

- In the Eleventh Circuit:
  - If your male employee dresses like a drag queen, you can't fire him because of how he dresses (sexual stereotyping).
  - But if an otherwise masculine male employee returns from a long weekend and announces to that he married his boyfriend over the weekend, you can fire him for being a homosexual.

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Hively v. Ivy Tech Community College

830 F.3d 698 and 853 F.3d 339 (7th Cir. 2017)

- Plaintiff maintained that she had been denied tenure at community college because of her sexual orientation.
- District court dismissed action.
- Seventh Circuit affirmed dismissal because of circuit precedent.
- *En banc* hearing **reversed** circuit precedent.

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Zarda v. Altitude Express

855 F.3d 76 and 883 F.3d 100 (2d Cir. 2018)

- Plaintiff skydiver asserted he was fired because of his sexual orientation.
- District court dismissed.
- Second Circuit affirmed dismissal because of circuit precedent.
- *En banc* hearing **reversed** circuit precedent, ruling that Title VII prohibits discrimination against gay employees.

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EEOC v. Harris Funeral Home

884 F.3d 560, (6th Cir., decided March 7, 2018)

- Employee announced plans to transition from male to female. Funeral home fired because of religious reasons.
- Sixth Circuit held that transgender individuals are protected by Title VII, and that religious belief does not give employers the right to discriminate against them.
- The decision reverses the lower court's decision, which held that religious belief was sufficient to exempt the employer from anti-discrimination laws.

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Supreme Court to Weigh in or Nah?

- December 12, 2017.
- Supreme Court turns away sexual-orientation bias suit out of Eleventh Circuit (*Evans v. Georgia Regional Hospital*).
- Justice Kennedy is the key vote:
  - Wrote majority opinion in *Lawrence v. Texas* (sodomy).
  - Wrote *United States v. Windsor* (invalidating DOMA).
  - Wrote majority opinion in *Obergerfell v. Hodges* (gay marriage).
  - Wrote in *Obergerfell* that "the Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity."
  - The question now, then, is whether that "lawful realm" includes workplaces covered by Title VII of the Civil Rights Act of 1964.

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Janus v. American Federation of State, County & Municipal Employees

- Supreme Court will decide whether it is a violation of the First Amendment for a government to force its employees to pay agency fees to an exclusive representative for speaking and contracting with the government over policies that affect their profession.
- Stated differently, should *Abood v. Detroit Board of Education,* which permitted such arrangements, be overruled?

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Alabama Is a Right-to-Work State

- Alabama is a right-to-work state in which an employee cannot be compelled as a term or condition of employment to join a union. Ala. Code § 25-7-32.
- Neither can an employee be required to refrain from joining a union. Ala. Code § 25-7-33.
- No employer may require that employees, as a condition of employment, pay any dues, fees, or any other charges to a labor union. Ala. Code § 25-7-34.
- Alabama law provides for a direct suit against an employer for discharge resulting from the employee's failure to join or refrain from joining a union or his failure to pay dues. Ala. Code § 25-7-35.

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The Resolution of *Janus* Should Not Impact the State of Alabama

- This issue is already decided for Alabama. No organization can enter into an agreement that requires a non-union-member to pay a fee (a.k.a. an agency fee paid in lieu of union membership fee).
- *See Prof'l Helicopter Pilots Ass'n., Office & Prof'l Employees Int'l Union, Local 102 v. Lear Siegler Servs., Inc.,* 326 F. Supp. 2d 1305, 1308 (M.D. Ala. 2004), aff'd sub nom. *Prof'l Helicopter Pilots Ass'n. v. Lear Siegler Servs., Inc.,* 153 F. App'x 630 (11th Cir. 2005).
- Similarly, State, county, and city employees can't be forced to give money to political action committee. See Ala. Code § 17-17-5; *White v. John*, 164 So. 3d 1106 (Ala. 2014).

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Watch the Blawg for More

- Lanier Ford maintains an employment blog tracking new developments:

www.ThirdShiftBlog.com

- You can sign up for email blasts by emailing DJC@LanierFord.com.

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Questions?

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