Tales From an Employment Lawyer

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Employment Law Situations

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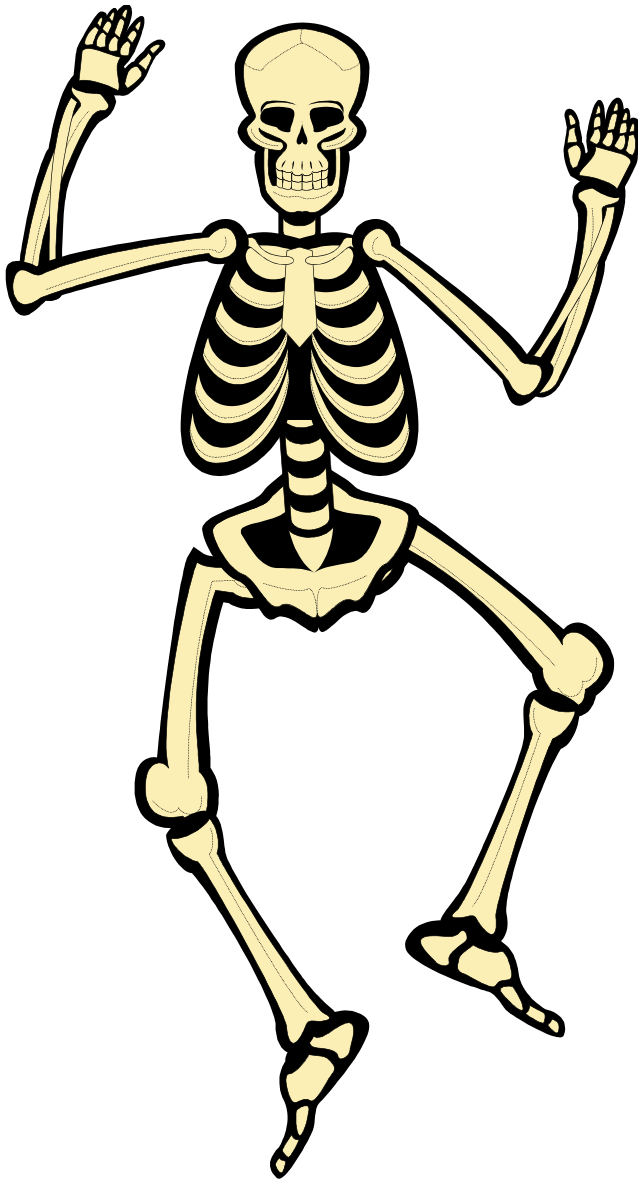
Agenda

- How COVID-19 has created an "open season" on employers.
- The biggest development in Title VII caselaw since 1989: *Ramifications of* ***Bostock*** *decision.*
- Discrimination cases that should scare HR—and management.



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It's a scary time to do business

- **7 months** since COVID shut down America.
- One website tracks COVID litigation during that time: https://www.huntonak.com/en/covid-19-tracker.html
- **809 lawsuits** filed as of October 28, 2020.
  - 99 for conditions of employment (lack of PPE, exposure to COVID-19 at work, personal injury, wrongful death).
  - 4 for disability disputes (state and Federal).
  - 46 for discrimination (age, sex, and pregnancy).
  - 54 for leaves of absence (FMLA, etc.)
  - 77 for payment issues
  - 465 for unlawful termination.
  - 1 for violation of WARN Act.
  - 44 for other.
  - **Only 5 total, so far, in Alabama**.
    - 73 in Florida, 52 in Texas, over 150 in California.

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Some examples

- Texas company sued for not allowing a man to keep teleworking after office reopened.
- Kentucky worker sued after being fired for complaining about a lack of face masks at work.
- New York employee sued since he was laid off because he was in a “vulnerable” age group.

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A COVID refresher

- March 13 was the "start" of the pandemic in Alabama – it hasn't even been 8 months.
- By end of March, Families First Coronavirus Response Act passed.
- CARES Act passed shortly thereafter.
- No new federal legislation since.
  - HEROES Act passed by the U.S. House of Representatives on May 15, 2020, but Senate has not addressed.
- On May 8, 2020, Governor Ivey issued a questionable executive order providing businesses with "liability protections" for COVID claims arising out of transmission of COVID absent "clear and convincing evidence" of wanton, reckless, willful or intentional conduct.
- Still no legislation, but on October 15, 2020, Governor Ivey hinted at a special session to address COVID liabilities.

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Families First Act has two relevant parts

1. Emergency Paid Sick Leave Act (Division E).
2. FMLA Expansion Act (Division C).

Both laws only apply to private businesses with **fewer than 500 employees**.

- Both laws apply to all state and local governments, regardless of number of employees.
- Limited application to federal government.
- Very limited exceptions for small businesses.

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Families First Act

- Provides 10 days of paid leave in most qualifying situations, and sometimes up to 12 weeks (child care needs due to school closures).
- Money fronted by employer and later reimbursed through payroll tax credits.
- No length of service requirement for employees. Brand new hires entitled to the leave immediately.
- Suits for damages permitted, plus attorneys' fees, for violations.

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Families First regulatory updates

- Initial DOL regulations were attacked in Court in S.D.N.Y. and federal court invalidated certain regulations.
- DOL amended regulations effective September 16.
  - DOL **did away with important worker exclusion**
  - DOL doubled down on intermittent leave ban, but we **still don't know** if it's valid.

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FF regulatory updates (cont.)

- When the Families First Act was first passed, the DOL Governor of each state to **designate certain categories of employers** who would be regarded as "**health care providers**" who were "essential to the state's response" to COVID-19.
  - Kay Ivey did so, as did governors in other states.
  - Includes group homes for mentally disabled, and many others.
  - Workers for these types of businesses were **categorically ineligible** for FF leave.
- DOL's revised rule eliminates this blanket exemption.
  - DOL's revised regulations change definition of "health care provider" exclusion to focus solely on **employees** rather than employer – thus many employers who thought they were categorically exempt are not.
- Revised rule also limits who is a health care provider.
  - *"*Employees who do not provide health care services as described above are not health care providers **even if** their services could affect the provision of health care services, such as IT professionals, building maintenance staff, human resources personnel, cooks, food services workers, records managers, consultants, and billers*."*
  - *So what if you already did it wrong?* Scary situation.

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FF regulatory updates (cont.)

- DOL regulations initially provided that intermittent use of FF leave was acceptable for certain reasons **only if** the employer consented.
- S.D.N.Y. struck this down.
- DOL rolled out new regulations, continuing to provide a requirement of employer consent for intermittent leave, but no one knows if this is valid.
- DOL also modified intermittent rules, so now, "the employer-approval condition would not apply to employees who take FFCRA leave in full-day increments to care for their children whose schools are operating on an alternate day (or other hybrid-attendance) basis because such leave would not be intermittent."

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FF small business exemption?

- **Even now**, all we know about the small business exemption is that:
  - It only applies to businesses with less than 50 workers.
  - It only applies to child-care related leave.
  - It only applies where leave would jeopardize the viability of the business as a going concern.
  - DOL won't tell us in advance if a particular business qualifies.

Good luck. It's a scary situation.

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Families First may stick around

- Currently, Families First Act leave expires on December 31, 2020.
- HEROES Act (passed by the U.S. House on May 15, 2020) proposes extension of paid leave provisions of Families First Act through December 31, **2021**.
- No action yet on this by the Senate.
- Expect something after the election. . .

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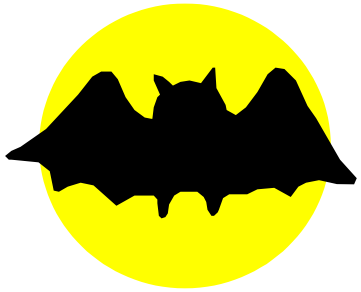

Trick or Treat?

Bostock v. Clayton County

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Bostock v. Clayton County

- Title VII prohibits discrimination on the basis of sex.
- In 1989, the U.S. Supreme Court declared that Title VII protects employees from failing to comply with typical gender stereotypes. *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989).
- Until 2017, all U.S. Circuit Courts of Appeal had ruled that sexual orientation discrimination was not covered by Title VII of 1964 Civil Rights Act because discrimination on the basis of "homosexuality" is not the same as discrimination on the basis of "sex."
- States had created a patchwork of protections.

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State laws

- 21 states and D.C. prohibit discrimination based on sexual orientation and gender identity.★
- Wisconsin prohibits discrimination based on sexual orientation only. ★
- 7 states prohibit discrimination against public employees based on sexual orientation and gender identity. ★
- 4 states prohibit discrimination against public employees based on sexual orientation only. ★

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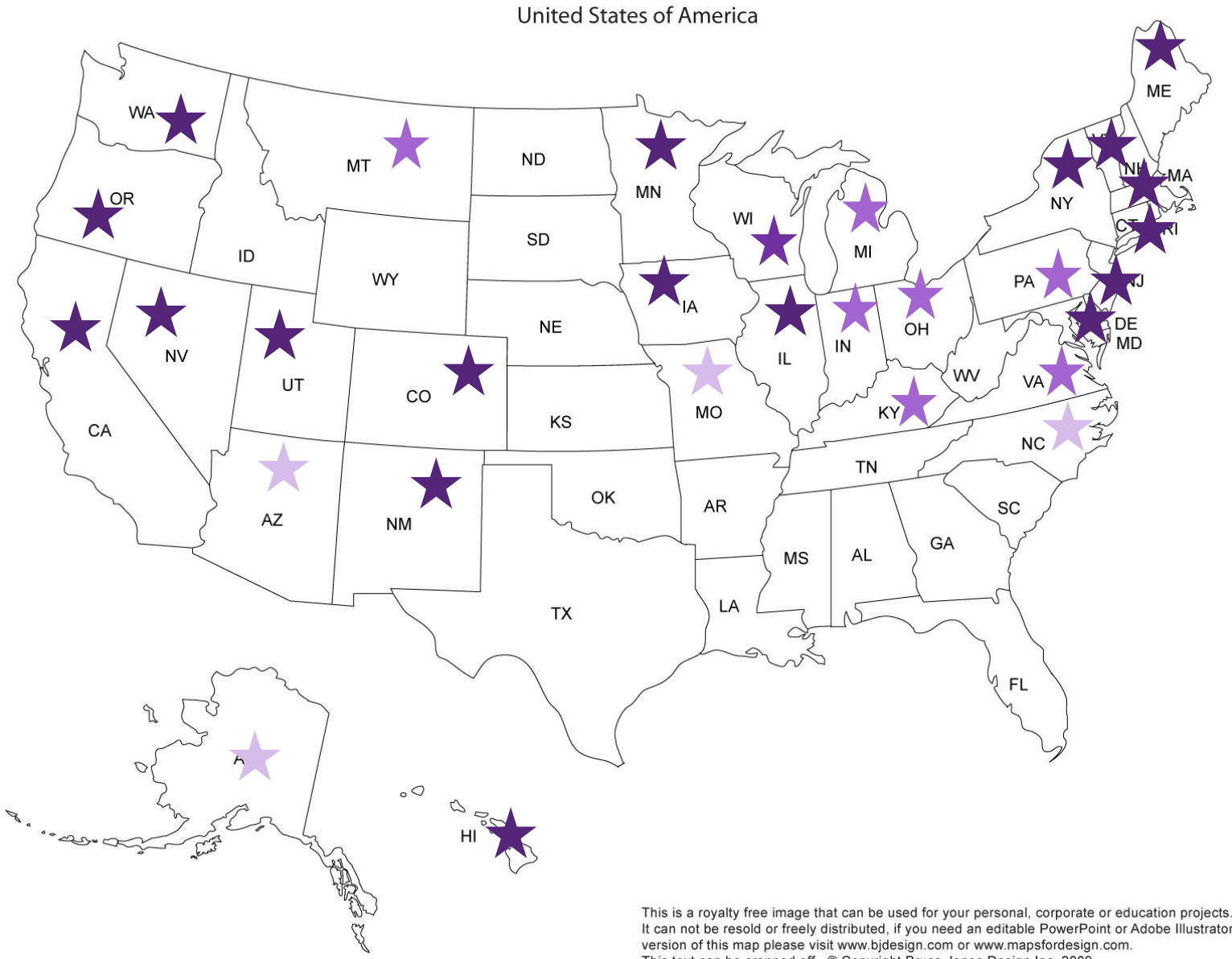

CT, DC, DE, MA, MD, NH, NJ, RI, VT

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State of Federal law as of June 14, 2020

- In the Eleventh Circuit, which decided *Bostock v. Clayton County* prior to the Supreme Court's decision:
  - 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.
  - In other words, Title VII, so construed, protects "butch" lesbians and effeminate males, but NOT closeted homosexuals who dress and act like heterosexuals.

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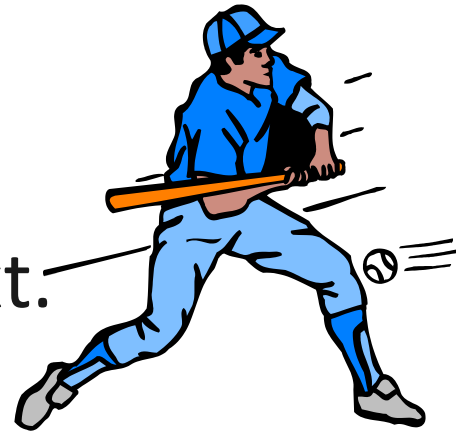
Bostock (cont.)

- Gerald Bostock was an employee of Clayton County, GA, as an official for its juvenile court system since 2003, with good performance records through the years.
- In early 2013, he joined a gay softball league and promoted it at work.
- Shortly thereafter, he was terminated.
- He believed his termination was pretext.



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Bostock (cont.)

- The Eleventh Circuit rejected his claim of sex discrimination under Title VII of the Civil Rights Act, finding that the prohibition on "sex discrimination" does not apply to discrimination on the basis of "sexual orientation." In other words, the Court held that even if his allegations were true, he had no claim.
- Supreme Court took the case, and consolidated it with two other, similar cases.
- Decision was issued on June 15, 2020.
- Justice Gorsuch wrote the majority opinion, joined by 5 other justices, for a total 6-3 vote.

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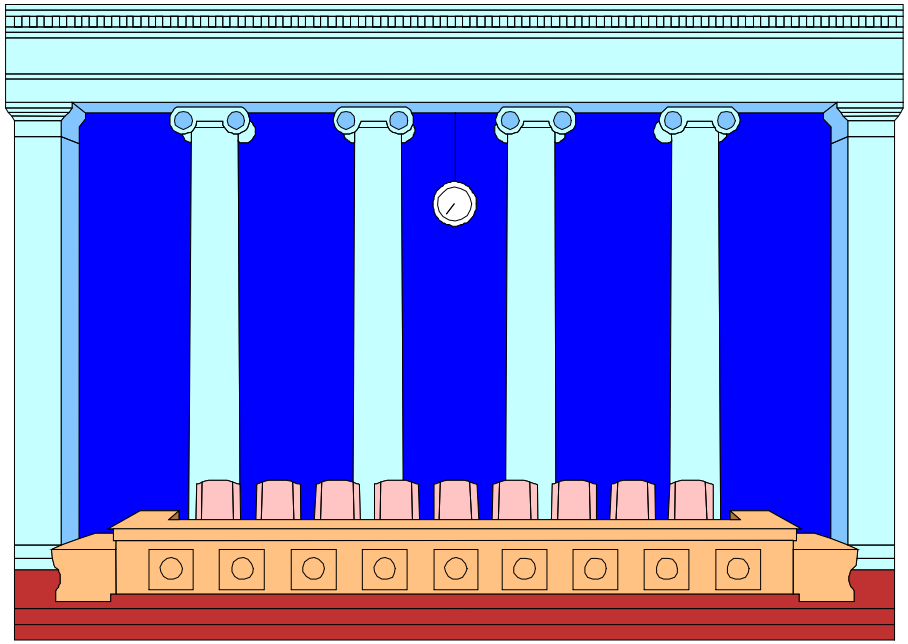
Bostock (cont.)

- Decision for all three is reported under *Bostock v. Clayton County,* 140 S.Ct. 1731, June 15, 2020.



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Bostock (cont.)

- The certiorari petition in Bostock presented a single question:

  Whether discrimination against an employee because of sexual orientation constitutes prohibited employment discrimination "because of . . . sex" within the meaning of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2.

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Title VII text

It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . **sex** . . . .

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Bostock (cont.)

- The argument put forward by Bostock was pretty simple: "it is impossible to consider a person's sexual orientation without also considering that person's sex."
- Bostock also noted that *Price Waterhouse* already prohibits sexual stereotyping.
- Bostock further noted that courts also recognize the idea that "Title VII prohibits discrimination against an employee not only because of his or her own protected class status, but also because of his or her **association** with someone who is a member of a particular protected class."
- Clayton County argued that Congress could never have imagined in 1964 that it was prohibiting sexual orientation discrimination when it used the term "sex" in Title VII.

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Bostock (cont.)

- The Court held, by a 6-3 vote, with Justice Gorsuch writing the opinion, that Title VII makes it unlawful to discriminate against an individual "because of" their sex, and thus, firing an individual for being either homosexual or transgender is illegal.
- In other words, the Court bit on the very first argument made by Bostock in his cert petition: "**It is impossible to consider a person's sexual orientation without also considering that person's sex.**"

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Bostock (cont.)

"The statute's message for our cases is equally simple and momentous: **An individual's homosexuality or transgender status is not relevant to employment decisions**. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.

Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge. Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision."

Bostock v. Clayton Cty., Georgia, 140 S. Ct. 1731, 1741–42 (2020)

Bostock (cont.)

- The Court was quick to point out that it would be no answer for an employer to say, ”OK fine, we will fire all males AND all females who are gay; that way, we are treating all sexes alike.”
- As the Court noted, “Title VII liability is not limited to employers who, through the sum of all of their employment actions, treat the class of men differently than the class of women. Instead, the law makes each instance of discriminating against an **individual** employee because of that **individual's** sex an independent violation of Title VII.”

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Bostock (cont.)

- Also, the Court noted that an employer violates Title VII when it intentionally fires an individual employee based ***in part*** on sex.
- "[A] defendant cannot avoid liability just by citing some other factor that contributed to its challenged employment decision."
- In other words, the motivating factor principle applicable to Title VII generally also applies to sexual orientation discrimination.

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So, we have a new protected class! Err, *three* new protected classes?

- Sexual orientation.
- Gender identification (transgender status).
- Gender expression.

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So again—trick or treat?

- No doubt this decision is controversial, but perhaps it is better understood in the light framed by Justice Kennedy in *Obergerfell v. Hodges:*
- *Rights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era.*
- In other words, Congress may well have not understood the breadth of its proclamation in 1964, but it used language malleable enough to allow for "a better informed understanding" of the prohibition it created on sex discrimination.
- Like it or not, there appears to be no major initiative in Congress to amend Title VII following *Bostock*.

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Next steps for employers

- An organization's equal employment opportunity statement should be revised to include these new forms of discrimination.
- Managers, supervisors, team leaders, and HR personnel need to be aware of this new understanding of the definition of "sex."
- Someone in the HR department should probably be assigned the responsibilities of transition resource coordinator (TRC) for transgender employees.
  - The TRC may even need a fair amount of education or training to become familiar with this complex subject area.

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Next steps (cont.)

- Policies for transgender employees should probably be drafted.
  - Access to facilities (such as restrooms, locker rooms, and so forth) must be considered.
    - Justice Gorsuch remarked in the majority opinion: "*They say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today but none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today*."
  - Dress and grooming standards?
  - Use of pronouns and preferred names of the transitioning employee.
    - Perhaps a part of the anti-harassment policy?

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Next steps (cont.)

- Other training programs need to address discrimination against people in these classes, especially anti-harassment training programs.
- If a business contracts with the Federal Government, a flowdown requirement for subcontractors will have to be implemented.
- Affirmative action programs may need to be modified.

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Discrimination cases that should scare HR—and management

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David, what are the scariest cases?

- Not confusing FMLA matters.
- Not confounding Families First questions.
- Not controversial sexual orientation cases.
- Not class actions of all shapes and sizes.

Nope. It's the good, old-fashioned quid pro quo.

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Quid pro quo

- Distinguish hostile work environment (HWE) lawsuits from quid pro quo.
  - HWE claims have very high standard of liability.
  - HWE claims come with the Ellerth-Faragher defense: If an employer exercises reasonable care to prevent harassment, and employee unreasonably fails to take advantage of reporting opportunities, employer has solid defense.
  - If plaintiff in HWE suit is participating in banter, that's a strike against the claim.

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Quid pro quo (cont.)

- So what about a quid pro quo?
  - Usually involves threat of, or actual, adverse employment action.
  - Provision or or denial of some type of benefit—such as overtime hours, vacation time, bonus, "free ride," "job security," etc.
  - Mostly between males and females.
  - Typically the threat comes from a supervisor, who actually has the ability to carry out the threat.
  - Usually, something goes wrong.
- If the explicit or implicit threat is carried out, *i.e.*, if a "**tangible employment action**" is taken by a supervisor, generally an employer is **strictly liable**.
  - This means there are generally no defenses, other than arguing that the employee's story is not true.

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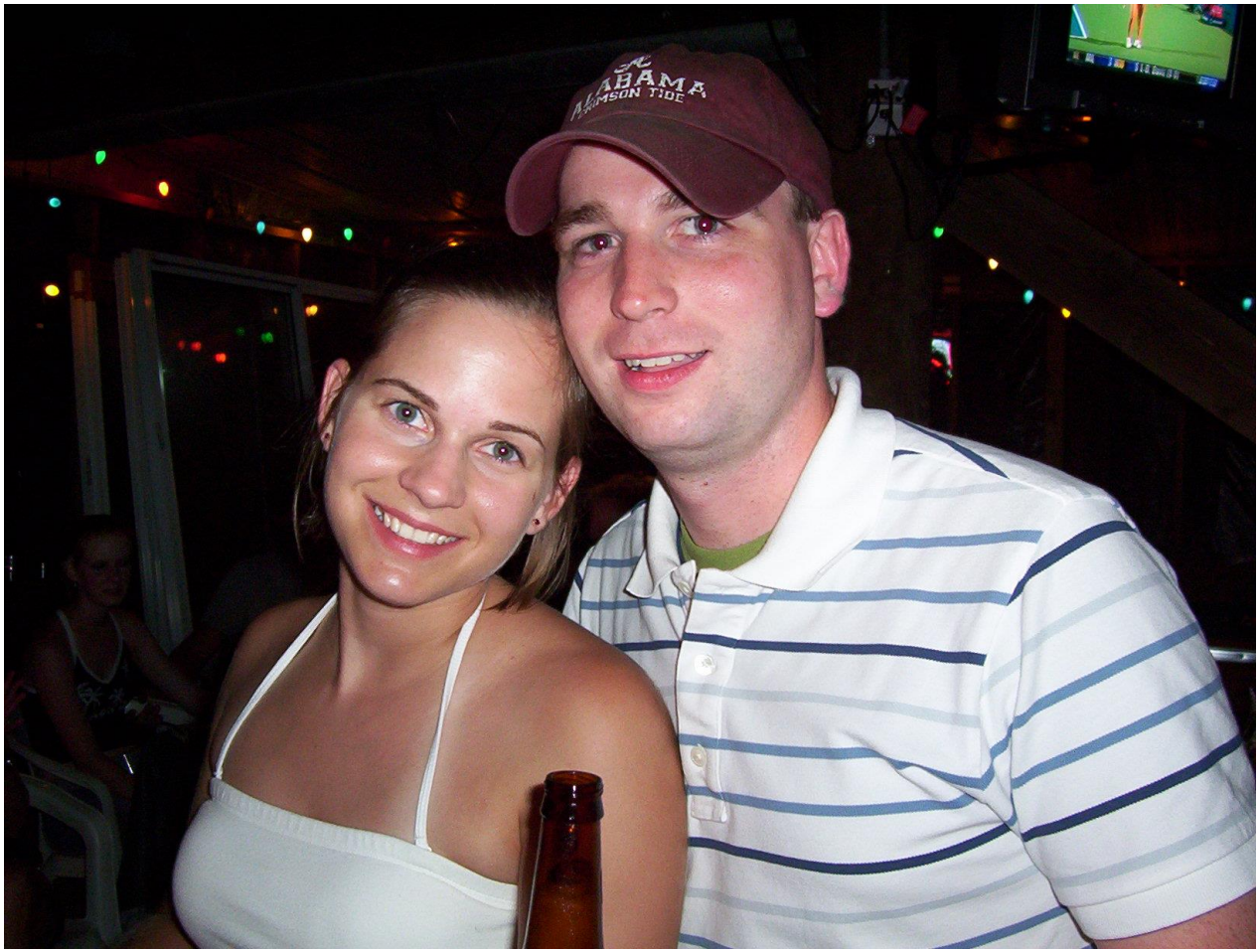
“But it was consensual.”



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Consent only matters if you can prove it was real

- “I had to smile.”
- ”I had no choice.”
- “Of course I had sex with him.”
- “Of course I told him I loved him.”

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Quid pro quo example

- *Hulsey v. Pride Restaurants, LLC,* 367 F.3d 1238 (11th Cir. 2004).
- Belinda Hulsey hired to work at the Burger King in Jasper, Alabama, when she was 17 years old.
  - Her younger sister Krystal already worked night shift at the same Burger King.
- Tim Garrison interviewed and hired Belinda.
  - Tim was 20 or 21 years old.
  - Tim was Assistant manager who managed the night shift.

QPQ example (cont.)

- About 2 weeks after Belinda started working, Tim expressed an interest in dating Belinda.
- Tim did so by telling her sister Krystal that he would arrange for Krystal to date Tim's brother Adam if she arranged for him to date Belinda.
- Belinda rejected the offer and had Krystal tell Tim that she wasn't interested and already had a boyfriend.
- Tim didn't give up.

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QPQ example (cont.)

- Five or six times, Tim tried to convince Belinda to break up with her boyfriend and date him.
- Tim promised to show Belinda what a man really was.
- Tim cut Krystal's hours so that Belinda was the only girl working the night shift.

QPQ example (cont.)

- Belinda was left to work with Tim, Adam, and Rusty.
  - Adam was Tim's brother.
  - Rusty was Tim's cousin.
- Three overtures from Tim:
  - Let's go to the back for a quickie before my brother gets back from taking out the trash.
  - Let me drive you home and we'll "do it."
  - Come on, let's go the bathroom and I'll show you what a man I am.

QPQ example (cont.)

Tim's physical touching:

- Tried to touch her breasts.
- Wrapped his arms around her and pulled at the front of her pants.
- Tried to pull her pants down. Two times, Tim tried to fondle her between her legs.
  - Belinda elbowed him in the chest one time.
  - Kneed him in the groin.

QPQ example (cont.)

- Belinda asked Tim to allow her to take her break when family members came by restaurant to eat.
- Tim agreed, but reneged when family members arrived.
- Time told her “The only way you can go on break is if I get into your pants after work.”
- When Belinda refused, **Tim fired her**—while her family members were present.

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QPQ example (cont.)

- Before she was terminated, Belinda never told higher-level restaurant management about Tim's conduct.
- Restaurant management only learned about Tim's behavior when Belinda reported it to BK manager in Hoover, Alabama.
- Eleventh Circuit: It doesn't matter. Tim took tangible employment action against Belinda. If it's true, Burger King is **on the hook**.

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The Wage Gap

- "The gender pay gap is a myth debunked by Harvard researchers and thousands of other mainstream publications. Stop brainwashing students. Moron."

  - *An anonymous student*

Wage Gap (cont.)

- But what if a manager doesn't believe in the wage gap?
- Some things, we just can't ignore.
- In *Aileen Rizo v. Jim Yovino, Fresno County Superintendent of Schools,* the Ninth Circuit held that employers should not rely upon **wage history data** when setting salaries, because doing so perpetuates gender discrimination, in part, due to the "wage gap."

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Wage Gap (cont.)

- In 2019, the Alabama Legislature adopted the **Alabama Equal Pay Act**.
- That law makes it unlawful to retaliate against or refuse to interview, hire, promote, or employ an applicant who *refuses to divulge his or her wage history*.
- No similar provision in federal law.
- Doesn't *necessarily* prohibit asking about wage history, but provides strong disincentive.
- Clearly intended to attack the "wage gap."

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Wal-Mart v. Dukes

- One of the biggest class action lawsuits of all time (1.5 million female Wal-Mart workers—too many, the Supreme Court said, for class litigation).
  - *Actually kind of scary, if you think about it.*
- All about the gender pay gap. Indeed, the women presented statistics showing that female workers made less and were less likely to be promoted than male counter-parts.

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Wal-Mart (cont.): Quotes from the case

- A manager told one employee, “Men are here to make a career and women aren’t. Retail is for housewives who just need to earn extra money.”
- A manager told one woman she could not take an overnight supervisor position because she had children.
- A senior vice president told a woman employee that she would not advance because she did not “hunt, fish, or do other typically-male activities” and was not “a part of the boys’ club.”
- Women made 5% to 15% less than comparable men, but on average had higher performance ratings.

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Wage-gap takeaways

- It doesn't really matter what you think about "the wage gap" in America – whether it's 79 cents on the dollar, 88 cents on the dollar, or "debunked by Harvard researchers."
- Just don't let it infect **your** hiring, promotion, and pay practices.
- And don't let your managers and employees "mommy track" your female employees.

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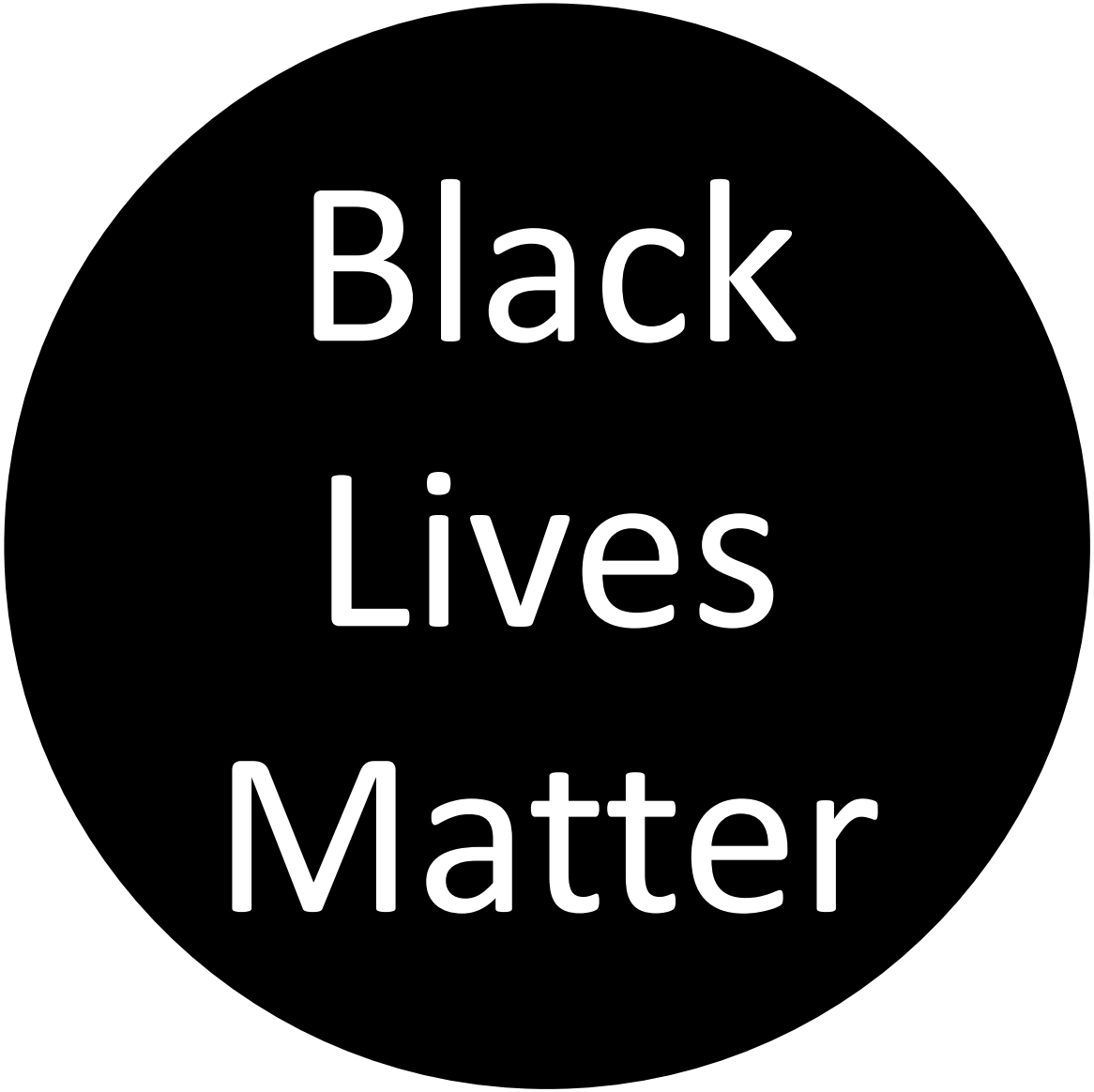

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What to do with controversial topics at work?

- First Amendment inapplicable to private employers.
- However, private employers must be very careful to monitor for racial discussions among employees and take action where needed.
- Even efforts to prevent controversial topics in workplace may get you sued.

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Whole Foods

- A group of employees have sued Whole Foods for discriminatorily applying the company dress code. The lawsuit is filed as a class action.
- Employees claim that Whole Foods is targeting employees who are protesting “racism and police violence against Blacks and show[ing] support for Black employees” while **allowing** “commonly worn Pride flags in support of their LGBTQ+ coworkers.”

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Whole Foods (cont.)

- Whole Foods has moved to dismiss because Title VII ”does not provide a platform for socially conscious speech,” which is very true.
- However, plaintiffs counter that they “have not alleged that Whole Foods’ dress code on its face violates Title VII; rather, [they] have alleged that Whole Foods has selectively enforced the dress code to target and suppress BLM messaging in the workplace, thereby discriminating against its Black employees and employees of other races who associate with them and advocate for them, [which, they say] is in violation of Title VII.”

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What to do about masks?

- Employers have a right to enforce dress codes, and no obligation to allow socially conscious speech at work.
- However, employers **must be equitable and strict in fair enforcement.**
- Prohibit **all** messages, not just **some** messages. (Go with the solid color masks!)

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What if workplace politics goes to the extreme? *EEOC v. Air Systems, Inc.* (2019)

- Race discrimination and harassment.
- Plaintiff: EEOC on behalf of several African-American employees.
- ASI was installing heating, ventilation, and air conditioning (HVAC) in new Apple headquarters building (under construction).

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ASI (cont.)

- Racist graffiti in portable toilets: N-word, drawings of nooses, and swastikas.
- Complained to management.
- Graffiti was never removed.
- Coworker used the N-word in taunting plaintiffs.
- Complained to management.

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ASI (cont.)

- Racist threat written on sprinkler pipe with a rope tied into a noose.
- Management never did anything else to stop any of these practices.
- Let me remind you—this was **last year…in California.**

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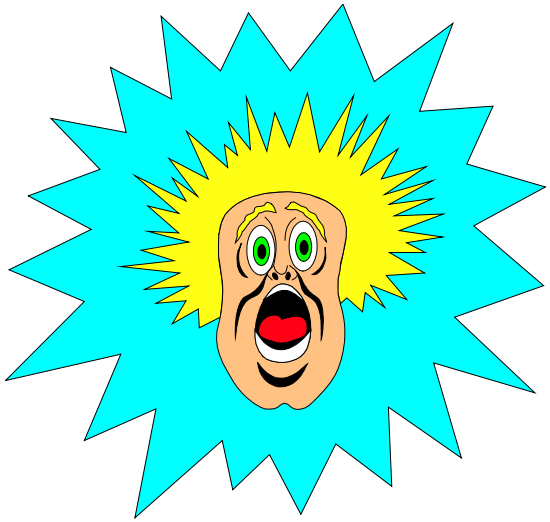
Settlement

$1.25 million



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Be proactive

- You've got to listen to employees.
- Don't close that office door all day.
- Don't sweep it under the rug.
- Don't assume it will get better.
- Don't doubt that employees will sue.
- Quick, effective, neutral investigations will save you money.

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Questions?

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For COVID-19 resources:

www.LanierFord.com

For employment law issues:

www.ThirdShiftBlog.com

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