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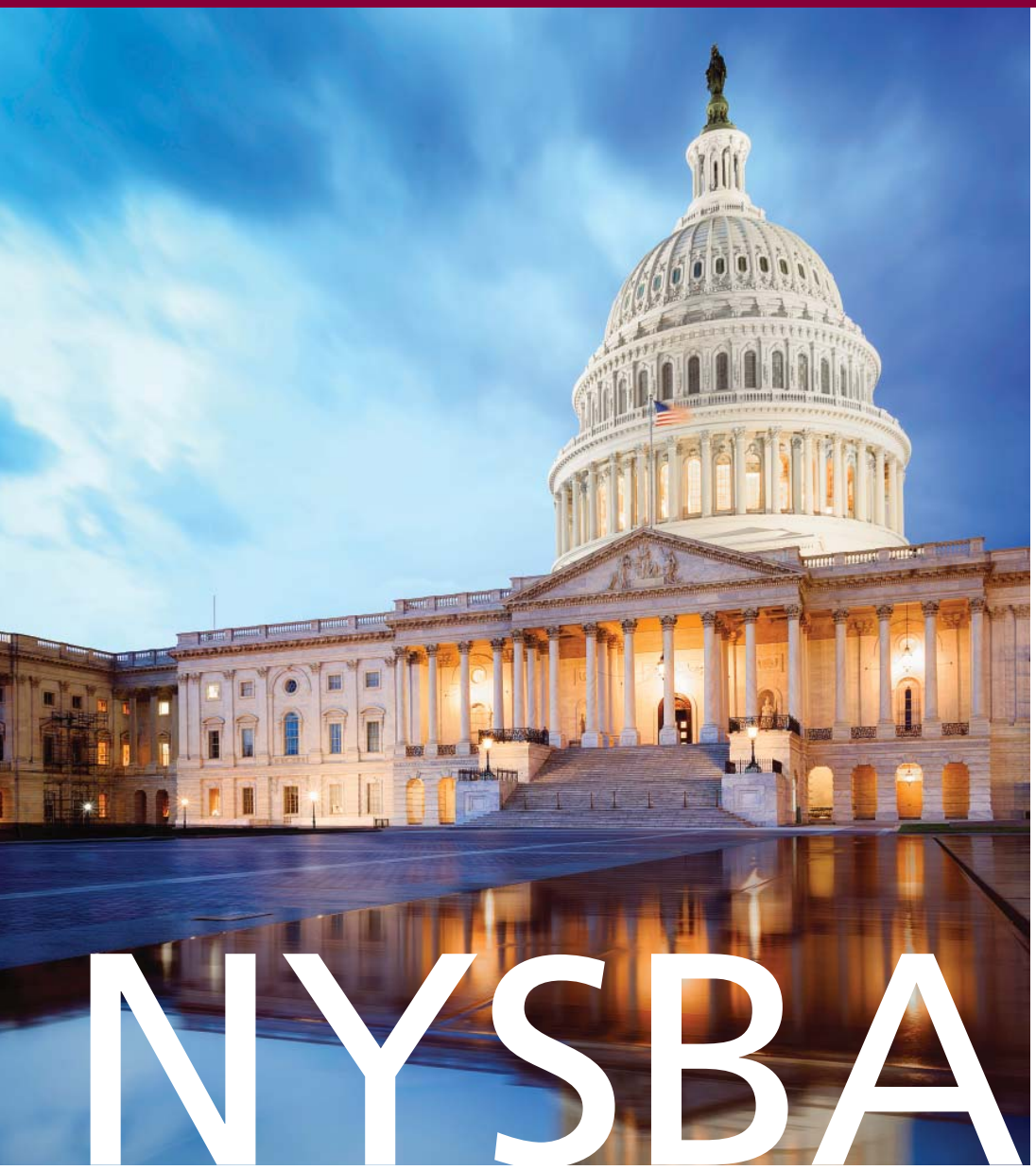

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Labor & Employment Law Section

Fall Meeting

The Washington Court Hotel
525 New Jersey Avenue, NW
Washington, DC

September 23–25, 2016

Attendance at this meeting offers up to 8.0 MCLE credit hours in Professional Practice for Experienced Attorneys only.

IMPORTANT INFORMATION

Under New York's MCLE rule, this program has been approved for a total of **up to 8.0 credit hours** in professional practice for experienced attorneys only. **This is not a transitional program and is NOT suitable for MCLE credit for newly-admitted attorneys because it is not a basic practical skills program.**

MCLE Credit Breakdown by Session:
Plenary I: 1.5 in Professional Practice
Plenary II: 1.5 in Professional Practice
Workshop A: 1.5 in Professional Practice
Workshop B: 1.5 in Professional Practice
Workshop C: 1.5 in Professional Practice
Plenary III: 1.5 in Professional Practice
Plenary IV: 1.0 in Professional Practice
Plenary V: 1.0 in Professional Practice

DISCOUNTS AND SCHOLARSHIPS: New York State Bar Association members and non-members may receive financial aid to attend this program. Under this policy, anyone who requires financial aid may apply in writing, **not later than seven working days prior to the program**, explaining the basis of his/her hardship, and if approved, may receive a discount or scholarship. Scholarships apply to the educational portion of the program only. For more details, please contact: cteeter@nysba.org or Catheryn Teeter, New York State Bar Association, One Elk Street, Albany, New York 12207. 518-487-5573

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Hotel Information:

Washington Court Hotel
525 New Jersey Avenue, NW
Washington, DC

The Hotel is a five minute walk from Union Station; close to Union Square, the National Mall, the US Capitol Building and DC's trend-setting shopping, dining and nightlife.

To Book Your Hotel Accommodations Online, click on this link, LABRFA16DC, to be directed to the Hotel webpage.

SCHEDULE OF EVENTS

Friday, September 23

11:00 am **Registration –** Ballroom Foyer

11:00 –12:00 pm **Lunch –** Box lunches are **provided for *registered attorneys only*** as part of their meeting fees.

12:00 pm **GENERAL SESSION –** Ballrooms 2 & 3

Wifi Sponsored by Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf, LLP

Welcome Remarks
Sharon P. Stiller, Esq., Section Chair

NYSBA Welcome
Claire P. Gutekunst, Esq., President

Introduction to the Program/Announcements
Alyson Mathews, Esq. and William D. Frumkin, Esq., Program Co-Chairs

12:15 – 1:30 pm **Plenary One: We Can Do It!...But When? From Entry Level to Boardroom, the Riveting Struggle for Equal Pay**

Rosie the Riveter symbolizes a nation coming together to support a foreign war, but she could easily represent something else. Rosie, like most women in the workforce at the time, was paid substantially less than her male counterparts who stayed behind, as well as those who went to fight, even though they were doing the same job. More than seventy years later, the struggle for pay equity and gender parity is ongoing, whether it's an entry level job, a position in the C- Suite, or somewhere in between. This distinguished panel will examine the legal, social and economic ramifications of the gender pay gap, with a focus on solutions including litigation.

Moderator: **Wendi S. Lazar, Esq.**, Outten & Golden LLP, New York City
Panelists: **Francis H. Byrd**, Byrd Governance Advisory, Brooklyn
Zachary Fasman, Esq., Proskauer R9ose, LLP, New York City
Pamela Coukos, Esq. & PhD, Working IDEAL, Washington, DC

1:30 – 1:45 pm **Coffee/Networking Break - *Sponsored by Greenberg Burzichelli Greenberg PC***

1:45 – 3:00 pm **Plenary Two: Newton's Laws of Motion and the LGBT Community…What's Next?**

2015 saw both an expansion and contraction of rights in the LGBT Community. Gay marriage is in, but bathroom access is out, and religious freedom laws are proliferating. What is an employer to do? This panel will examine the issue of LGBT Workplace Rights, focusing on the EEOC's effort to expand the meaning of "sex" under Title VII, and the complicated issue of a transgender employee in the workforce.

Moderator: **Chrisopher A. D'Angelo, Esq.**, Michelman & Robinson, LLP, New York City
Panelists: **David Lopez, Esq.**, General Counsel, EEOC, Washington, DC
Sarah Warbelow, Esq., Legal Director, Human Rights Campaign, Washington, DC
Phyllis Taylor, Esq., V.P., Legal Services, Consolidated Edison Co. of New York, Inc., New York City

3:00 – 3:15 pm **Coffee/Networking Break**

CONCURRENT WORKSHOPS (CHOOSE ONE)

3:15 – 4:30 pm **Workshop A: Labor Arbitration - An Overdue Look at Some Controversial Issues in Disciplinary Cases** - Sagamore Hill Rooms 1 & 2

While just cause hearings are often considered routine, some aspects of the disciplinary case still spark controversy. A panel of arbitrators and advocates will address some of these contested issues, including: the role of employer investigations; last chance agreements and leniency; when an employer may call the grievant as its witness; and counseling memos as predicates for subsequent discipline. The program will conclude with a look at the increasingly popular procedures for expediting disciplinary cases.

Moderator: **Jay M. Siegel, Esq.**, Arbitrator & Mediator, Cold Spring
Panelists: **James A. Brown, Esq.**, Arbitrator and Mediator, Brooklyn
Richard K. Zuckerman, Esq., Lamb & Barnosky LLP, Melville
Steven M. Klein, Esq., Associate Counsel, CSEA, Inc., Albany

Friday, September 23 *Continued*

3:15 – 4:30 pm **Workshop B: Labor Relations Round-Up** - Ashlawn Room

Not quite a year after breaking new ground in *Browning-Ferris Industries*, the NLRB issued its long-awaited decision in *Miller & Anderson*, allowing bargaining units composed of jointly and solely-employed employees of a single user employer. The workshop also will address recent NLRB rulings on workplace rules (*Whole Foods Markets*), the "perfectly clear" successor doctrine (*Adams & Associates*), withdrawal of recognition in guard units (*Loomis Armored*), the General Counsel's efforts to seek reconsideration of the *Levitz* doctrine, and an update on the status of litigation over US DOL's new rule on reporting of "persuader" activity.

Panelists:
Allyson L. Belovin, Esq., Levy Ratner, PC, New York City
Peter D. Conrad, Esq., Proskauer Rose LLP, New York City
Richard F. Griffin, Jr., Esq., General Counsel, National Labor Relations Board, Washington, DC

3:15 – 4:30 pm **Workshop C: Bullying in the Workplace** - Ballroom 2 & 3

Approximately 20 States, including New York, are considering legislation that would curb or ban workplace bullying. The workshop will focus on identifying workplace bullying; how workplace bullying varies from other types of bullying; the harm it can cause to employees' productivity and morale; how workplace bullying can poison the atmosphere or factory; and measures currently being used to address it.

Panelists:
Robert T. Szyba, Esq., Seyfarth Shaw LLP, New York City
Jose Luis Manjarrez, Esq., New Jersey State Parole, Newark, NJ
Dr. Loraleigh Keashly, Wayne State University, Detroit, MI
Fran Sepler, President, Sepler & Associates, Minneapolis, MN

5:00– 6:00 pm **MEET & GREET WITH JUSTICE RUTH BADER GINSBURG AT THE SUPREME COURT**
Open to Registered Attorneys Only. Very Limited availability. Sign up early online to ensure admittance. Tickets required. 15 minute walk from Hotel. Directions will be provided.

6:30 pm **Cocktail Hour –** Atrium Ballroom
Sponsored by Jones Day

7:30 pm **Dinner –** Atrium Ballroom
Guest Speaker: CATHY VENTRELL-MONSEES, ESQ., Sr. Counsel, EEOC, Washington, DC

Saturday, September 24

8:00 am **Registration & Continental Breakfast –** Ballroom Foyer
Continental Breakfast Sponsored by Proskauer Rose LLP

8:00 – 8:40 am **Committees Breakfast Meetings –** Ballroom 1

8:40 am -12 noon **GENERAL SESSION –** Ballroom 2 & 3
Wifi Sponsored by Lamb & Barnosky, LLP

8:40 am **Remarks & Program Announcements –** Ballroom 2 & 3
Sharon Stiller, Esq., Section Chair **Robert L. Boreanaz, Esq., Program Co-Chair**

8:45 – 10:00 am **Plenary III: Accommodating Mental Disabilities**

Not all disability cases are alike. When the individual has a mental health disability, that case will differ, in ways both practical and legal, from cases in which the disability is a bodily impairment. The Panel will examine how symptoms of a mental health disorder, or side effects of medications, can manifest as difficulties interacting with supervisors or co-workers; panic attacks when under deadlines; lateness and absenteeism because of sleep deprivation. The Panel will also discuss, from the employee, employer and neutral perspectives, challenges in the "interactive process" that are particular to a psychiatric disability, such as supervisor and peer discomfort about working with a mentally-ill individual.

Continued on Next Page

Saturday, September 24 *Continued*

8:45 – 10:00 am **Plenary III: Accommodating Mental Disabilities *Continued***

Panel Chair: **Rachel J. Minter, Esq.**, Law Office of Rachel J. Minter, New York City

Panelists: **John A. Beranbaum, Esq.**, Beranbaum Menken LLP, New York City
Laura M. Fant, Esq., Proskauer Rose LLP, New York City
Aaron Konopasky, J.D., Ph.D., ADA/GINA Policy Division, EEOC, Washington, DC

10:00 – 10:10 am **Coffee/Networking Break - *Sponsored by Seyfarth Shaw LLP***

10:10 – 11:00 am **Plenary IV: High Court Round Up**
This panel will highlight and explore the relevant Labor, Employment and Employee Benefit decisions from the U.S. Supreme Court 2015-2016 term.

Moderator: **Robert T. Simmelkjaer, Esq.,** New York City

Panelists: **Louis G. Santangelo, Esq.**, Citigroup Global Markets, Inc., New York City
Howard Schragin, Esq., Sapir Schragin LLP, White Plains
David Kahne, Esq., Stroock & Stroock & Lavan LLP, New York City

11:00 – 11:10 am **Coffee/Networking Break**

11:10 – 12:00 pm **Plenary V: Big Data Analytics – New Frontier or Veritable Minefield?**
"Big Data" analytics and the corresponding "data mining" may be the new frontiers in employment law. Data analytics and data mining gives employers sophisticated information about applicants and existing employees. Is this an effective new tool to assess predictive employee trends and attributes … or is it an area fertile for litigants to frame theories of liability? The panel will explore the new frontier as well as its benefits and pitfalls.

Panelists: **Michael T. Anderson**, Murphy Anderson PLLC, Boston, MA
Kate Bischoff, Esq., tHRive Law & Consulting LLC, Minneapolis, MN

1:35 pm *or* **1:55 pm** **Optional Event: U.S. CAPITOL TOUR**
Tours at 2:20 pm and 2:40 pm. Attendees must arrive at the Capitol Visitor Center entrance at First St. NE and East Capitol St. at least 45 minutes prior to the selected tour time to go through security. **Preregistration required. Please specify tour time preference when registering.**

2:00 pm **Optional Event: THE NEWSEUM, 555 Pennsylvania Avenue NW**
Dedicated to free expression and the five freedoms of the First Amendment: religion, speech, press, assembly and petition, the museum's seven levels of interactive exhibits include 15 galleries and 15 theaters. Exhibits include the 9/11 Gallery, the Berlin Wall Gallery, and the Pulitzer Prize Gallery featuring photographs from every Pulitzer Prize-winning entry dating back to 1942.
In 2015, TripAdvisor users rated the Newseum as a "Traveler's Choice Top 25 Museum in the U.S."
Attend Free as part of Smithsonian Museum Day. For free passes to paid museums participating, go to: www.smithsonianmag.com/museumday/museum-day-live-2016/?no-ist

7:00 - 8:00 pm **Cocktail Reception –** Montpelier Room

8:00 pm **Dinner on Your Own**

Sunday, September 25

8:00 – 10:00 am **Breakfast** – On Your Own

8:30 – 10:30 am **Labor & Employment Law Section Executive Committee Breakfast Meeting –** Ballroom 2 & 3

12:00 noon **Departure/Check-Out**

THINGS TO DO

Tour the National Monuments and Memorials
Our national monuments are truly spectacular. The best time to see them is at night when they are illuminated, less crowded and parking is easier. During daytime visits, take a tour bus. Listen to informative park ranger talks and you won't have to negotiate congested city traffic.

African American Civil War Memorial and Museum, 1200 U Street NW. A Wall of Honor lists the names of 209,145 United States Colored Troops (USCT) who served in the Civil War. The museum explores the African American struggle for freedom in the United States. Open Monday to Friday, 10 a.m. to 5 p.m., Saturdays, 10 a.m. to 2 p.m.

Arlington National Cemetery, across the Memorial Bridge from D.C. America's largest burial ground with the graves of President John F. Kennedy, Supreme Court Justice Thurgood Marshall, boxer Joe Louis and the Tomb of the Unknowns. Hours are 8 a.m. to 7 p.m. daily.

Franklin Delano Roosevelt Memorial, West Potomac Park near Lincoln Memorial on Ohio Drive SW. Four outdoor galleries, one for each of FDR's terms in office from 1933 to 1945. Hours are 8 a.m. to 11:45 p.m. daily.

Iwo Jima Memorial, Marshall Drive, next to Arlington National Cemetery in Arlington, Virginia. Also known as the United States Marine Corps War Memorial, dedicated to the marines who gave their lives during one of the most historic battles of World War II. Hours are 6 a.m. to midnight daily.

Jefferson Memorial,15th Street SW. This dome-shaped rotunda honors the nation's third president. The 19-foot bronze statue of Jefferson is located on the Tidal Basin, surrounded by a grove of trees. Hours are 8 a.m. to midnight daily.

Korean War Veterans Memorial, Daniel French Drive and Independence Avenue SW. Our nation honors those who were killed, captured, wounded or remain missing in action during the Korean War (1950 -1953). Nineteen figures represent every ethnic background. A Pool of Remembrance lists the names of the lost Allied Forces. Hours are 8 a.m. to 11:45 p.m.

Lincoln Memorial, 23rd Street between Constitution and Independence Avenues NW. Dedicated in 1922 to honor President Abraham Lincoln. Hours are 8 a.m. to midnight.

Martin Luther King Jr. National Memorial, Tidal Basin. Honors Dr. King's national and international contributions and vision for all to enjoy a life of freedom, opportunity, and justice. Open 24 hours. Guides onsite 9:30 a.m. - 10 p.m. daily.

Pentagon Memorial, I-395 at Boundary Channel Drive. Honors the 184 lives lost in the Pentagon and on American Airlines Flight 77 during the terrorist attacks on September 11, 2001. Open 24 hours a day.

U. S. Holocaust Memorial Museum, 100 Raoul Wallenberg Place SW. The museum serves as a memorial to the millions of people who were murdered during the Holocaust. Open 10 a.m. to 5:20 p.m. daily. Reserve same-day passes online (www.ushmm.org) or pick up onsite at Museum day of visit.

Vietnam Veterans Memorial, Constitution Ave. and Henry Bacon Drive NW. A V-shaped granite wall is inscribed with the names of the 58,209 Americans missing or killed in the Vietnam War. Hours are 8 a.m. to 11:45 p.m.

Washington Monument, Constitution Ave. and 15th St. NW. The memorial to George Washington, took 40 years to complete its original construction due to lack of funds, but was finally dedicated in 1885. Take the elevator to the top and see a wonderful view of the city. For free tickets, go to the kiosk on the Washington Monument grounds at 15th Street and Madison Drive. Hours are 9 a.m. to 4:45 p.m. daily. Advance tickets are available for a $1.50 service fee.

Additional Things to do not located on The Mall or surrounding the Tidal Basin

WalkingTownDC Tours 2016: September 17-25
Grab your walking shoes and get ready for Washington, DC's best FREE public tour program featuring more than 50 guided walking tours in neighborhoods throughout the District. This popular annual event introduces visitors to the art, culture, and history of Washington, DC through a series of "bite-size" lunchtime tours, after-work "happy hour" tours, and longer weekend tours. Tours are led by historians, licensed tour guides, community leaders and business owners, enthusiasts and docents, who all donate their time and expertise for this annual festival. **All tours require reservations and are free and open to the public.** For additional information, visit: www.culturaltourismdc.org/portal/walkingtown-dc1

The Phillips Collection, 1600 21st Street, NW. America's first Museum of Modern Art. Opened to the public in 1921 in the Dupont Circle neighborhood. Paintings by Renoir, Rothko, Bonnard, O'Keeffe, Van Gogh and Diebenkorn are among the many stunning impressionist and modern works that fill the museum. The collection continues to develop with selective new acquisitions, many by contemporary artists. Open Tuesday - Sunday; 10 am to 5 pm. www.phillipscollection.org

National Zoo, Rock Creek Park, Washington, D.C. Part of the Smithsonian Institution with more than 435 different species of animals. The Zoo's Conservation and Research Center, located in Front Royal, Virginia, is a breeding preserve for rare and endangered species.

THINGS TO DO

In Washington, D.C., you will enjoy access to fascinating, FREE attractions and historic sights. Touch a moon rock, marvel at the Hope Diamond, view Dorothy's Ruby Red slippers or explore Native American culture at the Smithsonian Institution's fifteen Washington, D.C. area facilities. Discover treasures like the Gutenberg Bible at the Library of Congress, the only da Vinci painting in North America at the National Gallery of Art and historic documents like the Declaration of Independence at the National Archives.

Library of Congress, Thomas Jefferson Building, 10 First Street SE. America's oldest national cultural institution, 216 years old, the library has become the largest repository of recorded knowledge in the world and a symbol of the vital connection between knowledge and democracy. Thomas Jefferson's personal library is the core of the library, and the vast range of his interest determined the universal and diverse nature of the Library's collections and activities. Open Monday - Saturday, 8:30 am – 5:00 pm.

Smithsonian Institution Building (The Castle)
1000 Jefferson Drive SW. This historic building is a good place to start your tour of the museums. The Smithsonian Info. Center is here and you can find a map and schedule of events.

Smithsonian National Air & Space Museum
7th and Independence Ave. SW. The largest collection of air and spacecraft in the world as well as smaller items like instruments, memorabilia, and clothing. There are IMAX films and planetarium shows several times a day.

Smithsonian Hirshhorn Museum and Sculpture Garden
Independence Ave. and 7th St. SW. The Smithsonian's museum of modern and contemporary art includes arts of traditional historical themes and collections addressing emotion, abstraction, politics, process, religion, and economics.

Smithsonian Freer Gallery
1050 Independence Ave. SW. World-renowned collection of art from China, Japan, Korea, South and Southeast Asia, and the Near East. Paintings, ceramics, manuscripts, and sculptures. The Eugene and Agnes E. Meyer Auditorium provides free programs relating to the collections of the Freer and Sackler galleries, including performances of Asian music and dance, films, lectures, chamber music, and dramatic presentations.

Smithsonian Sackler Gallery
1050 Independence Ave. SW. Connected underground to the Freer Gallery of Art. The Sackler collection includes Chinese bronzes, jades, paintings and lacquerware, ancient Near Eastern ceramics and metalware and sculpture from Asia.

Smithsonian National Museum of African Art
950 Independence Ave. SW. Ancient as well as contemporary works from Africa. Special events, storytelling, demonstrations and children's programs.

Smithsonian Institution National Museum of Natural History
10th St. and Constitution Ave. NW. Family favorite museum - 80-foot dinosaur skeleton, life size model of a blue whale, an enormous prehistoric white shark, and a 45-and-a-half carat jewel known as the Hope Diamond. The Discovery Room is a great hands-on display for young children.

Smithsonian American History Museum
12th to 14th Sts. NW. More than 3 million artifacts of American history and culture, from the War of Independence to the present day including the Star-Spangled Banner. New galleries such as the Jerome and Dorothy Lemelson Hall of Invention, presenting "Invention at Play," join old favorites including "The American Presidency: A Glorious Burden" and "America on the Move."

Smithsonian National Museum of the American Indian
4th St. and Independence Ave. SW. Showcases Native American objects from ancient pre-Columbian civilizations through the 21st century. Multimedia presentations, live performances and hands-on demonstrations bring the Native American people's history and culture to life.

The White House, 1600 Pennsylvania Avenue.Tour requests must be submitted through your Member of Congress. These self-guided tours are available 7:30 a.m. to 1:30 p.m. Fridays and Saturdays. Tour hours may be extended when possible based on the official White House schedule. Tours are on a first come, first served basis. Requests can be submitted up to three months in advance and no less than 21 days in advance. White House tours are free of charge. (Please note that White House tours may be subject to last minute cancellation.)

Additional free museums located in Washington, D.C., not on the National Mall:

Smithsonian Renwick Gallery
70 9th St. NW. The building was the original site of the Corcoran Gallery and is furnished with American crafts and contemporary arts from the 19th to 21st centuries. The museum features unique works of art in an impressive setting across the street from the White House.

National Portrait Gallery & Smithsonian American Art Museum
8th and F Streets NW. In the Penn Quarter neighborhood of downtown - The National Portrait Gallery presents six permanent exhibitions of paintings and sculpture to photographs and drawings. *The Smithsonian American Art Museum* houses the largest collection of American art in the world spanning more than three centuries.

Smithsonian National Museum of African American History & Culture - GRAND OPENING SEPTEMBER 24 at 1 PM. SEPTEMBER 25 OPEN 10 AM to 10 PM. 1400 Constitution Avenue, NW. Since 2003, the museum has been collecting items to tell the story of America through the African American lens on topics such as slavery, post-Civil War reconstruction, the Harlem Renaissance, and the civil rights movement. *Special festivities thoroughout the opening weekend.*

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THE GENDER PAY GAP WHERE ARE ALL THE WOMEN? PAY AND PROMOTION INEQUITY IN FINANCIAL SERVICES

Submitted By:

WENDI S. LAZAR, ESQ.
Outten & Golden, LLP
New York City

NYSBA Fall Conference, September 23, 2016, Washington, DC
Plenary: Moderator, Wendi S. Lazar, Outten & Golden
The Gender Pay Gap

Where Are All the Women?
Pay and Promotion Inequity in Financial Services

by Wendi S. Lazar and Jennifer L. Liu[1]

Introduction

On September 6, 2013, court papers announced that Bank of America had agreed to pay $39 million to settle *Calibuso v. Bank of America Corp.,* a nationwide gender discrimination class action on behalf of female stockbrokers. No. 10 Civ. 1413, Docket No. 1 (E.D.N.Y. filed Mar. 30, 2010). In the lawsuit, which was filed in 2010, the plaintiffs alleged that the bank paid them less than male stockbrokers and also gave them inferior accounts and business opportunities. While the settlement is a great "win" for the plaintiffs, it raises a more probing question: can lawsuits remove external barriers for women to get ahead on Wall Street?

Since Title VII of the Civil Rights Act was enacted in 1964, women have been struggling to find pay and promotion equity across every industry in the U.S. In no other industry is this struggle more palpable and obvious than in high finance. The lawsuits that women have filed against Wall Street firms over the past several decades, both individual and class action cases, paint a picture of how women's struggle on Wall Street has evolved. As more women have infiltrated the financial services industry, the kinds of legal claims filed have slowly shifted away from allegations of outright animus against women to more subtle forms of discrimination.

Despite the progress women and their counsel have achieved in pushing forward the state of the law on gender discrimination, men today still control Wall Street, and the "glass ceiling" has fossilized into cement. Women are seldom, if ever, promoted to C-suite positions or director-level appointments at large financial institutions. When they do reach these levels, many ultimately find it difficult to overcome the expectations that they will lead like their male counterparts. Women like Ina Drew, the former Chief Investment Office of JPMorgan Chase, and Zoe Cruz, the former Co-President of Morgan Stanley, exemplify these challenges: both were on track to reach the highest-level positions at their firms before they were each derailed.

---

[1] Wendi S. Lazar is a partner at Outten & Golden, LLP and the firm has been counsel of record for the plaintiffs in many of the cases cited in this paper, including *Quinby v. WestLB AG*, No. 04 Civ. 7406 (S.D.N.Y.); *EEOC v. Morgan Stanley & Co., Inc.*, No. 01 Civ. 8421 (S.D.N.Y.); *Amochaev v. Citigroup Global Markets, Inc.*, No. 05 Civ. 1298 (N.D. Cal.); *Jaffe v. Morgan Stanley & Co., Inc.*, No. 06 Civ. 3903 (N.D. Cal.); *Calibuso v. Bank of America Corp.*, No. 10 Civ. 1413, (E.D.N.Y.); *Chen-Oster v. Goldman, Sachs & Co.*, No. 10 Civ. 6950 (S.D.N.Y.). Jennifer Liu was an associate at Outten & Golden, LLP, when she co-wrote this paper and is now practicing law in San Francisco, California.

The personal and professional costs for women in financial services, who litigate or in other ways take on their institutions, are great. While many of them succeed in breaking down barriers, few are able to find new jobs in the sectors that they have shaken up. Those who leave the industry to be caregivers for any length of time rarely come back to the same positions they left, often suffer permanent devaluation in their compensation, and are inevitably derailed from managing director or partner tracks. As sophisticated as our case law has become in this area, gender inequity in pay and promotions in this demanding but lucrative industry continues to thrive, and the U.S. has little legislation to promote families, work-life balance, or affirmative opportunities for women to lead.

In addition to being problematic from an equality perspective, lack of gender equality on Wall Street has serious business repercussions. A multitude of studies have shown the clear benefits of diversity to company performance. For example, a McKinsey report found that if every country matched the progress toward gender parity of its fastest improving neighbor, global GDP could increase by up to $12 trillion by 2025.[2] Gender inequality is everyone's problem and everyone must be a part of the solution.

The Numbers Don't Lie

The Pay Gap

Across all industries, the gender pay gap and the dearth of female executives is the widest in financial services. Nationwide, across all industries, the ratio of women's to men's median weekly full-time earnings is 81.1 percent.[3] In one survey of thirteen major industry groupings, this pay gap was greatest in "Financial Activities" – women in this sector make 70.5 cents per dollar made by men, versus a high of 92.2 cents per dollar made by men in "Construction."[4] In another survey of dozens of industries, the six jobs with the biggest salary gap were all financial sector jobs.[5] Women in these six jobs made between 55 to 62 cents for every dollar made by men in the same jobs.[6]

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[2] McKinsey Global Institute, *The Power of Parity: How Advancing Women's Equality Could Add $12 Trillion to Global Growth, Mckinsey & Co.* (2015); *see also* Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents at 2, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516) (recognizing the benefits of "diverse people, ideas, perspective, and interactions." in American workplaces); Amicus Brief of National Women's Law Center, Gay & Lesbian Advocates & Defenders, and Lambda Legal Defense and Education Fund, Inc. et al. supporting respondents at 15-19, *Fisher v. Univ. Texas at Austin*, (No. 14-981), *available at* http://www.scotusblog.com/wp-content/uploads/2015/11/14-981_amicus_resp_BriefofNationalWomensLawCenter.authcheckdam.pdf.

[3] Institute for Women's Policy Research, *The Gender Wage Gap: 2015; Earnings Differences by Race and Ethinicity* (Mar 2016), *available at* http://www.iwpr.org/initiatives/pay-equity-and-discrimination.

[4] Bureau of Labor Statistics, U.S. Department of Labor, *The Economics Daily*, Women's earnings and employment by industry, 2009 on the Internet at http://www.bls.gov/opub/ted/2011/ted_20110216.htm (visited *March 10, 2016*).

[5] Frank Bass, Shining Shoes Best Way Wall Street Women Outearn Men, BLOOMBERG, Mar. 16, 2012, *available at* http://www.bloomberg.com/news/2012-03-16/shining-shoes-best-way-wall-street-women-outearn-men.html; (cited by Jezebel, *Good News Ladies Can Close the Wall Street Gap By Shining Shoes*, March 16, 2012, *available at* http://jezebel.com/5893868/good-news-ladies-can-close-the-wall-street-wage-gap-by-shining-shoes; ThinkProgress, *Gender Pay Gap is Largest On Wall Street*, Mar. 19, 2012, *available at* http://thinkprogress.org/economy/2012/03/19/447514/gender-pay-gap-is-largest-on-wall-street).

[6] *Id.*

The Glass Ceiling

The same gap emerges when looking at the number of women at the top of major financial services firms. As of 2015, 54.3% of the workforce of Fortune 500 companies in the finance industry is female.[7] Among these, 29.3% of executive officials and 18.7% of board directors are women.[8] Of the 38 female CEOs of Fortune 1000 companies, only one heads a financial company – Beth Mooney of KeyCorp.[9] No major Wall Street firm has ever had a female CEO.[10] Of the 127 members of the top 10 investment banks' executive committees, only 20 (15.7%) are women.[11]

Occupational Segregation

Underscoring the huge disparity in the representation of women and men at the helm of large financial services companies is the fact that the few women who do make it "to the top" overwhelmingly tend to hold roles such as Human Resources (HR), communications/PR, and legal affairs. The women in these roles typically do not wield much influence over compensation and promotion decisions – instead, it is their largely male counterparts on the business side who dictate pay and promotions.

Of the 20 women who serve on the executive committees of the top 10 investment banks (out of 127 members in total), only ten have true "line" roles in the sense that they manage revenue-generating business units.[12] The remainder occupy "staff" roles, such as Human

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[7] Catalyst. Catalyst. Pyramid: Women in S&P 500 Companies. New York: Catalyst, February 3, 2016.
[8] *Id.*
[9] Matt Egan, *Where are the Women on Wall Street? Cultural Obstacles Still Block CEO Posts*, FOX BUSINESS, Apr. 11, 2012, *available at* http://www.foxbusiness.com/business-leaders/2012/04/11/missing-women-in-wall-street-clubby-c-suites/.
[10] *Id.*
[11] *See* Goldman Sachs, *Executive Officers*, *available at* http://www.goldmansachs.com/who-we-are/leadership/executive-officers/index.html (last visited Mar. 13, 2016); Morgan Stanley, *Operating Committee,*, *available at* http://www.morganstanley.com/about/company/governance/operating_committee.html (last visited Mar. 13, 2016); JP Morgan Chase & Co., *Operating Committee*, *available at* http://www.jpmorganchase.com/corporate/About-JPMC/operating-committee.htm (last visited Mar. 13, 2016); Bank of America, *Executive Management Team*, *available at* http://investor.bankofamerica.com/phoenix.zhtml?c=71595&p=irol-govmanage#fbid=XmXXo1rGCTa (last visited Mar. 13, 2016); Deutsche Bank, *Group Executive Committee*, *available at* https://www.db.com/en/content/company/group_executive_committee.htm (last visited Mar. 13, 2016); Citigroup Inc., *Operating Committee*, *available at* http://www.citigroup.com/citi/about/our_leaders.html (last visited Mar. 13, 2016; Credit Suisse, *Executive Board*, *available at* https://www.credit-suisse.com/governance/en/executive_board_cs.jsp (last visited Mar. 13, 2016); Barclays Bank PLC, *Executive Committee Biographies*, *available at* https://www.home.barclays/about-barclays/leadership-team.html (last visited Mar. 13, 2016); UBS, *Meet our Management: A Unique Client Partnership Model*, *available at* http://www.ubs.com/global/en/investment-bank/meet-our-management/our-management-team.html (last visited Mar. 13, 2016); HSBC, *Leadership*, *available at* http://www.hsbc.com/about-hsbc/leadership (last visited Mar. 13, 2016).
[12] *Id.*

Resources, Public Relations, and Legal.[13] Women are less likely than men to occupy line roles and employees in line roles have a much greater probability of advancing to the CEO position than those in staff roles. [14]

Fewer Women Coming In, More Women Going (Or Getting Pushed) Out

The numbers show another disquieting pattern – in recent years, fewer women have chosen to enter the financial industry, and greater numbers of women have been leaving (either voluntarily or involuntarily). The number of young women interested in finance has dropped – although the number of women in U.S. business schools has continued to inch upwards, from 34.7% in 2004 to 39.3% in 2009[15], the number of those pursuing finance or accounting is down 6.6% from 2005 to 2009[16]. According to EEOC statistics, women have been exiting the securities industries in greater numbers than men – between 2002 and 2011, the number of women in these industries fell by 14% as compared to a 3% drop for men.[17] Over the same period, the number of women in "official" or "manager" positions at these firms has fallen by 2%, whereas the number of men has increased by 7%.[18] There is at least strong anecdotal evidence that during the most recent Wall Street recession, firms laid off disproportionately more women than men.[19] The numbers also show that women in finance were let go in greater numbers than their male counterparts – between 2008 and 2010, the number of women in the industry fell by 24%, whereas the number of men fell by 18%.[20] This disparate treatment of women is even starker when looking solely at "executive/senior level officials and managers" in finance – between 2008 and 2010, the number of women fell by 7%, whereas the number of men actually stayed flat.[21]

Without outside pressure to change this industry, which is predominantly in the hands of male executives, the industry likely will not change. In Europe, quotas for female representation on boards have had a powerful impact on boosting the number of women on European corporate

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[13] *Id.*
[14] Joanna Barsh & Lareina Yee, *McKinsey & Company: Unlocking the full potential of women at work*, at 6 (2012), *available at* http://www.mckinsey.com/client_service/organization/latest_thinking/unlocking_the_full_potential
[15] Geraldine Fabrikant, *Where are the Women on Wall Street?*, N.Y. TIMES, Jan. 27, 2010, at B3.
[16] *Id.*
[17] U.S. Equal Employment Opportunity Commission, "2002 EEO-1 National Aggregate Report by NAC-3 Code: 523 – Security, Commodity Contracts & Like Activity," Job Patterns for Minorities and Women in Private Industry, 2002 ("2002 NAC-3 523 Data"); U.S. Equal Employment Opportunity Commission, "2011 EEO-1 National Aggregate Report by NAICS-3 Code: 523 – Security, Commodity Contracts, and Other Financial Investments and Related Activities," Job Patterns for Minorities and Women in Private Industry, 2011 ("2011 NAICS-3 523 Data").
[18] 2002 NAC-3 523 Data; 2011 NAICS-3 523 Data.
[19] Anita Raghavan, *Terminated: Why the Women of Wall Street Are Disappearing*, FORBES, Mar. 16, 2009, *available at* http://www.forbes.com/part_forbes/2009/0316/072_terminated_women.html.
[20] U.S. Equal Employment Opportunity Commission, "2008 EEO-1 National Aggregate Report by NAICS-3 Code: 523 – Security, Commodity Contracts, and Other Financial Investments and Related Activities," Job Patterns for Minorities and Women in Private Industry, 2008 ("2008 NAICS-3 523 Data"); U.S. Equal Employment Opportunity Commission, "2010 EEO-1 National Aggregate Report by NAICS-3 Code: 523 – Security, Commodity Contracts, and Other Financial Investments and Related Activities," Job Patterns for Minorities and Women in Private Industry, 2010 ("2010 NAICS-3 523 Data").
[21] 2008 NAICS-3 523 Data; 2010 NAICS-3 523 Data.

boards.[22] Norway became the first European country to institute a board quota for women in 2003, when it set a requirement of 40% female participation on corporate boards.[23] Since then, fourteen other countries including Germany, Spain, Israel, Greece, the Netherlands, Finland, Austria, Belgium, France, Italy, Malaysia, India, UAE, and Denmark have instituted similar quotas and several more have quotas pending.[24] As Elin Myrmel-Johansen, Director of Communications for the Norwegian savings and insurance company, Storebrand, explained, the quotas were difficult to stomach at first but they are paying off – "Gender [parity] is about strengthening business, not about being nice."[25]

Board quotas, however, seem unlikely to be the answer to the dearth of women on boards in the United States. Legislation mandating board quotas would likely be unconstitutional based on U.S. Supreme Court jurisprudence on affirmative action in higher education admissions.[26] In particular, while U.S. colleges may consider race as one factor in admissions to further a compelling government interest (such as creating a diverse student body), colleges may not set specific quotas.[27] Even the United States' allowance of nonquota affirmative action programs has been highly controversial and the Supreme Court is currently considering a challenge to the University of Texas's affirmative action policy. *See Fisher v. Univ. of Texas at Austin*, 135 S. Ct. 2888 (2015). In lieu of quotas or even affirmative action policies, the U.S. needs to find meaningful solutions to its gender gap and female leadership crisis.

In the United Kingdom, a private effort to increase the number of women on boards has garnered some success. In particular, Great Britain does not have legislated boardroom quotas, but through a group called the 30% club,[28] Helena Morissey, a money manager, has persuaded major British companies to double the percentage of women on their boards, raising the percentage to 23 percent in 2015.[29] In 2014, the club launched a U.S. chapter with the goal of achieving 30% female membership on S&P 500 boards by 2020. The success of this effort remains to be seen.

Legal Responses to Gender Discrimination in Finance

[22] Alison Smale & Claire Cain Miller, *Germany Sets Gender Quota in Boardrooms*, New York Times (March 6, 2015), *available at* http://www.nytimes.com/2015/03/07/world/europe/german-law-requires-more-women-on-corporate-boards.html.
[23] Alina Dizik, *Do quotas for corporate boards help women advance?* Capital Ideas Magazine, Spring 2015, *available at* http://www.chicagobooth.edu/capideas/magazine/spring-2015/do-quotas-for-corporate-boards-help-women-advance.
[24] *Id.* (at the time of the writing of this article, Germany had not yet passed its board quota law, but it has since then); *Infra* at n.22.
[25] *Id.*
[26] *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Grutter v. Bollinger*, 539 U.S. 306, 338 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).
[27] *Gratz v. Bollinger*, 539 U.S. 244, 246 (2003) (holding that a 20 person quota for minority students violated the Fourteenth Amendment Equal Protection Clause because those students had been selected solely on the basis of race).
[28] *See* http://30percentclub.org/
[29] *Infra* at n.22.

In her recently published book Lean In, Sheryl Sandberg describes the problem of why women don't get ahead as a "chicken-and-egg" situation.[30] The chicken: Women will tear down external barriers once they are in power.[31] The egg: There are external barriers to get women into those roles in the first place.[32] Legal strategies address the "egg" or external half of the problem – how can the law, and lawsuits, help remove or lower external barriers to women getting ahead in the financial sector? Of course, by bringing lawsuits against their employers, women become blackballed and stigmatized in an already male-controlled industry. Class and collective actions can alleviate some of this pressure on women litigants to a degree, but the incestuous nature of the finance world still creates enormous risks for litigants.

Individual Litigation

Historically, litigation has played a major role in combating gender discrimination. During the 1970s, 1980s, and 1990s, significant legal cases made major headway in attacking the most blatant forms of sex discrimination – namely, sexual harassment and sex-stereotyping. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), affirmed that sexual harassment was indeed a form of illegal gender discrimination prohibited by Title VII. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), recognized that gender stereotyping is also illegal gender discrimination.

In more recent years, women filing individual lawsuits have continued to push back against barriers to advancement in the financial services industry.

In 2002, plaintiff Laura Zubulake filed a lawsuit against UBS Warburg, where she had worked as a director and senior salesperson in its equity sales division, alleging gender discrimination claims. No. 02 Civ. 1243, Docket No. 1 (S.D.N.Y. filed Feb. 15, 2002). She alleged that UBS passed her over for promotion in favor of a male, and that her male manager discriminated against her by ridiculing her, excluding her from outings with male co-workers and clients, making sexist remarks in her presence, and seating her apart from the other senior salespersons on her desk. Zubulake also alleged that UBS retaliated against her by firing her after she filed a charge of discrimination with the EEOC. Zubulake's case is most famous for the series of far-reaching rulings issued by the court on e-discovery issues, rather than for its impact on discrimination law. However, her case is also notable in that it was one of few cases to go to trial – after a jury trial in April 2005; Zubulake won a jury verdict awarding her more than $29 million – $9.1 million in compensatory damages, and $20.1 million in punitive damages.[33]

In another rare case of a gender discrimination case making it to trial, *Quinby v. WestLB AG*, plaintiff Claudia Quinby won a $2.54 million award and jury verdict on her retaliation claim. Quinby had alleged that WestLB discriminated against her by paying her less than it paid men in similar positions, and then retaliated against her by firing her after she complained about the discrimination. No. 04 Civ. 7406, Docket No. 1 (S.D.N.Y. filed Sept. 17, 2004). The jury,

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[30] SHERYL SANDBERG, LEAN IN: WOMEN, WORK, AND THE WILL TO LEAD 5 (2013).
[31] *Id.*
[32] *Id.*
[33] Eduardo Porter, *UBS Ordered to Pay $29 Million in Sex Bias Lawsuit*, N.Y. TIMES , Apr. 7, 2005; *available at* http://www.nytimes.com/2005/04/07/business/07bias.html.

however, did not find WestLB liable on her claim that the bank discriminated against her by paying her less than her male peers.

More often, however, the few lawsuits that are brought by women in financial services end up getting resolved in confidential settlements, in which the plaintiff's future silence is one of the key terms of the agreement. For example, in 2002, a former female managing director of Deutsche Bank sued the firm alleging that the bank had discriminated against her on the basis of her sex and had retaliated against her for complaining about it. *Gambale v. Deutsche Bank AG*, No. 02 Civ. 4791, Docket No. 1 (S.D.N.Y. filed Jun. 20, 2002). The following year, the parties reached a confidential settlement. The fact that the settlement was a "multi-million dollar settlement" only emerged when the judge who had presided over the case, on his own initiative, decided to unseal records in the case – a highly unusual move that earned him criticism by the appellate court. *Gambale v. Deutsche Bank AG*, 377 F.3d 133 (2d Cir. 2004).

In 2010, plaintiff Charlotte Hanna sued Goldman Sachs, claiming that the firm pushed her onto the "mommy-track" after she became pregnant, and then demoted and ultimately fired her after she chose to work part-time. *Hanna v. Goldman, Sachs & Co., Inc.*, No. 10 Civ. 2637, Docket No. 1 (S.D.N.Y. filed Mar. 24, 2010). In her complaint, she alleged gender and pregnancy discrimination claims under federal, state, and city law, as well as claims under the FMLA. The case initially made headlines when it was filed and helped stir public debate about discrimination against pregnant and working mothers. However, Hanna reached a confidential settlement with Goldman later that year, and the case has not attracted public attention since.[34]

Other notable cases settled against Wall Street firms include: *Bartoletti v. Citigroup Inc.*, in which a group of women laid-off from Citigroup's public finance division have alleged that Citi disproportionately targeted women for downsizing, No. 10 Civ. 7820, Docket No. (S.D.N.Y. filed Oct. 13, 2010) (settled as of December 9, 2013); *Hazan-Amir v. Citigroup Inc.*, in which an associate in Citigroup's asset finance division alleges that she received lower pay than male colleagues, endured sexist remarks by her male peers and superiors, and was demoted after returning from maternity leave, No. 11 Civ. 721, Docket No. 1 (S.D.N.Y. filed Feb. 1, 2011); and *Voelker v. Deutsche Bank AG*, in which a former vice president in the bank's securities lending division alleges that the bank "mommy-tracked" her into a reduced role after she returned from maternity leave, No. 11 Civ. 6362, Docket No. 1 (S.D.N.Y. filed Sept. 12, 2011).

An exception to the trend of most lawsuits being settled, in Cohen v. Bank of New York Mellon Corp., a veteran portfolio officer alleged that the bank paid her less than younger, male employees. However, the court held that no discrimination existed and ruled in favor of the bank stating that the employee was terminated based on merits and not gender. No. 11 Civ. 456, Docket No. 1 (S.D.N.Y. filed Jan. 21, 2011).

Risks of Filing an Individual Lawsuit

[34] Bob Van Voris, *Goldman Settles Lawsuit Over Pregnancy Bias With Former Vice President*, BLOOMBERG, Nov. 5, 2010, *available at* http://www.bloomberg.com/news/2010-11-05/goldman-settles-lawsuit-over-pregnancy-bias-with-former-vice-president.html.

While many women have obtained favorable confidential settlements, the risks of bringing a lawsuit are still great. If a case does not settle and proceeds to a public trial, Defendants can attempt to place a woman's character on trial as well. Even after a case concludes, industries sometimes punish plaintiffs for speaking out, denying them future professional opportunities. Ellen Pao recently suffered such an experience in a highly publicized trial against her former employer, Kleiner Perkins. Kleiner Perkins is one of Silicon Valley's oldest and most revered venture capital firms.[35] Although the notion that gender discrimination occurs in venture capital firms should not be surprising, the case generated significant buzz because it was the first to expose allegations of gender discrimination at a well-known venture firm. In her complaint, Pao alleged that she was the victim of sexual harassment, and that Kleiner also prevented her and other women from advancing to higher-paying positions, reserved for men.[36] Pao's trial focused public attention on sexism in Silicon Valley and beyond, but ultimately, after Kleiner Perkins successfully attacked her character, the jury found in its favor.[37] In the wake of her trial, Pao also lost her CEO position at Reddit, and chose not to appeal.[38]

Class Action Litigation

Class actions have been a powerful tool in forcing the financial services industry to change its treatment of women. Whereas individual gender discrimination lawsuits often fail to make significant headlines, class action lawsuits attract the public's attention and make gender equality a topic of everyday conversation – at least, for a time. Moreover, whereas individual discrimination lawsuits tend to culminate in confidential settlements, class action settlements must be reviewed and approved by a court and are therefore usually public. And unlike individual discrimination lawsuits, the core evidence in a class action generally focuses on challenging discrete policies and practices – not department-level manager decisions – and is supported by sophisticated multivariate regression analysis of company-wide compensation and promotion data. Finally, class actions can force change through broad-based injunctive relief, or through consent decrees in which companies agree to change their practices company-wide. Individual lawsuits rarely, if ever, prompt company-wide or industry-wide change.

For example, in one of the earliest gender discrimination class action lawsuits in the financial services industry, *Kraszewski v. State Farm General Insurance Co.*, the female plaintiffs alleged that they were rejected or deterred from applying for positions as insurance sales agents. Nos. 88 Civ. 15337, 88 Civ. 15399 (N.D. Cal.). At the time the case was filed, in

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[35] Romio Geron, Ellen Pao Says Kleiner Perkins Fired Her (Updated), *available at* http://www.forbes.com/sites/tomiogeron/2012/10/03/ellen-pao-says-kleiner-perkins-has-fired-her/ (last visited Feb. 22, 2013).

[36] Paul Elias, Ellen Pao Lawsuit: Sexual Harassment Case Roils Silicon Valley, *available at* http://www.huffingtonpost.com/2012/07/19/ellen-pao-lawsuit_n_1688208.html (last visited Feb. 22, 2013); CGC-12-520719 (Cal. Super. Ct. filed May 10, 2012).

[37] Davey Alba, *Kleiner Lawyer: Ellen Pao Made A Coworker Cry*, March 11, 2015, *available at* http://www.wired.com/2015/03/kleiner-lawyer-ellen-pao-made-co-worker-cry/.

[38] Mike Isaac & David Streitfeld, *It's Silicon Valley 2, Ellen Pao 0: Fighter of Sexism Is Out at Reddit*, The New York Times (July 10, 2015), *available at* http://www.nytimes.com/2015/07/11/technology/ellen-pao-reddit-chief-executive-resignation.html; Rachel Sklar, *Three Undeniable Ways Ellen Pao Was Pushed Off a Glass Cliff at Reddit*, Elle (July 14, 2015) *available at* http://www.elle.com/culture/tech/a29322/3-undeniable-ways-ellen-pao-was-pushed-off-a-glass-cliff-at-reddit/; Ellen Pao, *Ellen Pao Speaks: I Am Now Moving On* (Sept. 10, 2015), *available at* http://recode.net/2015/09/10/ellen-pao-speaks-i-am-now-moving-on/.

1979, insurance sales was still predominantly a man's world. The case ultimately settled in 1988 for $250 million, and part of the settlement involved a commitment by State Farm to set aside 50% of new agent jobs in California for women. The case resulted in a dramatic increase in the number of female State Farm agents.[39]

In the 1990s, three notable gender discrimination class actions against Wall Street firms made waves in the industry. In *Martens v. Smith Barney, Inc.*, female stockbrokers brought class action claims alleging that Smith Barney discriminated against them, paid them less than male stockbrokers, and propagated a hostile work environment. No. 96 Civ. 3779, Docket No. 1 (S.D.N.Y. May 20, 1996). The case unearthed a trove of embarrassing practices, such as men using foul and sex-laden language in the workplace, excluding women from male-oriented social outings like golf events and fishing trips, and hiring strippers to come to the workplace.[40] In *Cremin v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, female stockbrokers filed a similar case against Merrill Lynch, alleging widespread discrimination in business opportunities and pay, as well as sexual harassment. No. 96 Civ. 3773, Docket No. 1 (N.D. Ill. Jun. 21, 1996). Both Smith Barney and Merrill Lynch ultimately paid over $100 million each to settle the claims of class members.

In a third case, *EEOC v. Morgan Stanley & Co., Inc.*, a female professional, Allison Schieffelin, brought class action claims alleging that Morgan Stanley discriminated against her and other women in the firm's institutional division. No. 01 Civ. 8421, Docket No. 1 (S.D.N.Y. filed Sept. 10, 2001). While Schieffelin's claims focused on unfair treatment in pay, promotions, and business opportunities, her allegations also included scandalous details of company-sponsored trips to strip clubs that excluded women. The parties reached an agreement to settle the case on the eve of trial, for $54 million. The judge who had presided over the case called the settlement a "'watershed in safeguarding and promoting the rights of women on Wall Street."[41]

As part of the settlements in these cases, Smith Barney, Merrill Lynch, and Morgan Stanley agreed to adopt diversity initiatives and training, and improved complaint handling procedures. More significantly, the public outcry that erupted after these salacious details came to light forced the entire industry to change its practices. Now, most if not all Wall Street firms have policies forbidding employees from engaging in "exclusionary events" like outings to strip clubs. Whereas in the 1990s, the industry tolerated openly sexist, "locker room" behavior as the norm, by the 2000s, the industry recognized this behavior as not only improper, but illegal.

The major gender discrimination lawsuits of the 2000s focused on challenging subtler, but still systematic, forms of discrimination against women in finance. In *Kosen v. American Express Financial Advisors, Inc.*, No. 02 Civ. 82 (D.D.C. Feb. 19, 2002), female financial advisors alleged sex and age discrimination consisting of denial of equal pay and promotions. The case settled in 2002 for $31 million dollars. Similarly, in *Amochaev v. Citigroup Global*

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[39] Goldstein, Borgen, Dardarian & Ho, *Kraszewski v. State Farm Insurance Co.*, *available at* http://gbdhlegal.com/cases/kraszewski-v-state-farm-insurance/ (last visited Apr. 3, 2013).
[40] Jodi Kantor, *Stocks and Bondage: Tales from the Boom Boom Room: Women vs. Wall Street By Susan* Antilla, N.Y. TIMES, Dec. 22, 2002, *available at* http://www.nytimes.com/2002/12/22/books/stocks-and-bondage.html.
[41] Patrick McGeehan, *Morgan Stanley Settles Bias Suit with $54* Million, N.Y. TIMES, Jul. 13, 2004, *available at* http://www.nytimes.com/2004/07/13/business/morgan-stanley-settles-bias-suit-with-54-million.html?pagewanted=all&src=pm

Markets, Inc., female stockbrokers sued Smith Barney for gender discrimination again, alleging that discretionary account distribution practices allowed mostly male managers to give the best accounts to favored male brokers, and less desirable accounts to women. No. 05 Civ. 1298, Docket No. 1 (N.D. Cal. filed Mar. 31, 2005). The case resulted in a $33 million dollar settlement and an agreement to implement formal account distribution policies that aimed to remove discretion from the account distribution process. Two years later, two almost identical Title VII class cases against Morgan Stanley settled for a combined $69.5 million dollars. *Augst-Johnson v. Morgan Stanley & Co., Inc.*, No. 06 Civ. 1142 (D.D.C. Oct. 26, 2007), involved gender discrimination claims on behalf of female financial advisors, and *Jaffe v. Morgan Stanley & Co., Inc.*, No. 06 Civ. 3903 (N.D. Cal. Oct. 22, 2007), involved race discrimination claims on behalf of African American and Hispanics financial advisors. Both settlements included extensive injunctive relief that focused, in large part, on reducing observed pay disparities resulting from account distribution and other policies.

Although not a finance case, another noteworthy case from this period is *Velez v. Novartis Corp.*, in which female sales representatives brought class action claims against the pharmaceutical company alleging discrimination in pay and promotions and pregnancy discrimination. No. 04 Civ. 9194, Docket No. 1 (S.D.N.Y. filed Nov. 19, 2004). The plaintiffs won a huge jury verdict at trial — $3.36 million in compensatory damages for the 12 plaintiffs, and punitive damages of $250 million.[42] The parties ultimately settled the case for $152.5 million plus additional non-monetary relief, including the company's agreement to institute improved complaint procedures and regular audits and monitoring.[43]

In 2011, the U.S. Supreme Court's watershed decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), changed the landscape of gender discrimination lawsuits. In *Dukes*, female store employees brought nationwide class action claims on behalf of millions of women, alleging that Wal-Mart had discriminated against them in pay and promotions. At the heart of their allegations was the theory that allowing Wal-Mart store managers to exercise excessive subjectivity in setting pay and awarding promotions permitted managers to discriminate against female employees. The Supreme Court rejected this theory as a basis for class certification, holding that the plaintiffs could not show the required commonality for class certification when there was no "glue" holding together the way in which Wal-Mart managers exercised their discretion.

The main impact of *Dukes* on gender discrimination class action lawsuits in the finance sector has been to shift the focus from challenging disparate treatment – where plaintiffs must show an intent to discrimination – to challenging policies that have a disparate impact on women – policies that appear neutral on their face but in practice disproportionately hurt women. Since *Dukes*, at least one U.S. Circuit Court of Appeal has endorsed class action status in a disparate impact case. In the case, *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, African-American stockbrokers alleged that Merrill Lynch's "teaming" and "account distribution" policies permitted white brokers to discriminate against them and earn higher compensation than

[42] Sanford Heisler, LLP, *Novartis Pharmaceutical Gender Discrimination Class Action*, *available at* http://www.sanfordheisler.com/cases/novartis_gender_discrimination.html (last visited Apr. 3, 2013).
[43] *Id.*; Velez v. Novartis Pharma. Corp., No. 04 Civ. 9194, Docket No. 294-2 (S.D.N.Y. filed July 14, 2010) (Settlement Agreement and Release).

them, even though the policies were facially neutral. 672 F.3d 482 (7th Cir. 2012). After the district court denied the plaintiffs' motion for class certification, relying in large part on *Dukes*, the Seventh Circuit reversed. *Id.* Writing for the panel, Judge Richard Posner reasoned that, unlike the *Dukes* plaintiffs, who had challenged decisions made by thousands of different store managers across the country, the *McReynolds* plaintiffs brought a challenge to company-wide policies that could be efficiently determined on a class-wide basis. *Id.* Bank of America recently settled the *McReynolds* case for $160 million.

In the same vein as *McReynolds*, two recent high-profile gender discrimination class actions focus on attacking company-wide policies that have a negative disparate impact on women. In *Calibuso v. Bank of America Corp.*, which also recently settled as mentioned above, female stockbrokers who worked for Bank of America and Merrill Lynch alleged that the bank discriminated against them in the distribution of business opportunities and paid them less than their male peers. No. 10 Civ. 1413, Docket No. 1 (E.D.N.Y. filed Mar. 30, 2010). The complaint focused on account distribution, teaming, and compensation policies that are neutral on their face, but which have the effect of boosting men's performance and handicapping women's. Notably, the court ordered Bank of America to produce comprehensive compensation and account-level data for a multi-year period for all financial advisors working in the United States to the plaintiffs' lawyers – a rare instance of secretive information about pay (and pay gaps) being released to anyone outside a Wall Street firm. *Calibuso* recently settled, and the $39 million settlement is expected to be divided among as many as 4,800 current and former employees of the two brokerage operations.[44]

In *Chen-Oster v. Goldman, Sachs & Co.*, female professionals in Goldman's revenue-generating divisions sued the company, alleging that Goldman discriminated against them in pay, promotions, business opportunities, and other terms and conditions of employment. No. 10 Civ. 6950, Docket No. 1 (S.D.N.Y. filed Sept. 15, 2010). The *Chen-Oster* complaint similarly focuses on company-wide policies and practices that disadvantage women, such as Goldman's use of "360-degree performance reviews" and ranking systems to evaluate performance and set compensation, as well as the firm's promotion practices. As with the Bank of America case, the court ordered Goldman Sachs to produce comprehensive compensation, performance review, and promotion data for a ten-year period – across the five revenue-generating divisions of the company for U.S. employees. *Chen-Oster v. Goldman, Sachs & Co.*, 285 F.R.D. 294 (S.D.N.Y. 2012). The *Chen-Oster* case is ongoing.

Finally, the EEOC has made an initial foray into combating pregnancy discrimination on a class-wide basis. Unfortunately, these attempts have been unsuccessful so far. In *EEOC v. Bloomberg L.P.*, female plaintiffs brought class-wide pregnancy discrimination claims against the company, alleging that they suffered reduced pay and demotions when they returned from maternity leave. No. 07 Civ. 8383, Docket No. 1 (S.D.N.Y. filed Sept. 27, 2007). On a motion for summary judgment, the (female) judge found no discrimination. *Bloomberg*, 778 F. Supp. 2d 458 (S.D.N.Y. 2011). She agreed with Bloomberg that there was no evidence that Bloomberg

[44] Patrick McGeehan, *Bank of America to Pay $39 Million in Gender Bias Case*, N.Y. TIMES, Sept, 6, 2013, *available at* http://mobile.nytimes.com/blogs/dealbook/2013/09/06/bank-of-america-to-pay-39-million-in-gender-bias-case/?_r=0&.

treated women coming back from maternity leave any differently than other employees who came back from lengthy leaves, and dismissed the case.

Women Who Don't Sue

While litigation has been effective to a degree in changing working conditions, compensation, and social norms in financial services, the majority of women who are discriminated against in this industry do not sue their employers.[45] The reasons are obvious—it's expensive, and because a lawsuit is public, it could be career-ending. Even many of those who prevail never get another job in the industry. It is also emotionally and financially draining and time-consuming. Finally, bringing any action against the institution (including filing a charge with the EEOC against the institution, or formalizing a HR complaint) is highly likely to elicit retaliation.[46]

For female employees, the HR process of bringing a gender discrimination complaint against a male supervisor or other "bad actor" or multiple bad actors is treading into career jeopardy. HR will often begin an investigation of the bad actor and then proceed to interview a myriad of employees, supervisors and managers involved in the business unit. Ultimately, the senior business decision-makers will become involved and, as the statistics above reflect, are likely be male and supportive colleagues of the bad actor. The mere fact that the woman has complained will likely result in planting a scarlet letter on her back. Once she has been branded, she is likely to suffer poor performance reviews, no promotion, reduced business contacts, and/or a flat or reduced bonus.

There are few alternatives to bringing complaints or charges for women who experience unfair treatment, or those who are determined to change the status quo in a male-dominated industry. Unlike other industries, the traits that define success in finance are "macho" traits, such as working long hours and making the deal at any cost. Key business activities mix frequently with social ones in stereotypically male locales, such as bars and golf courses, where women often do not get invited. Even if women are included, they are often made to feel like outsiders. The end result of women not participating in these events is to reward "macho" behavior—male relationships grow stronger, and gender bias thrives.[47]

One alternative to internal or external complaints that companies have explored is coaching and mentoring. Many financial services companies have coaching programs which they are offering to more female executives. Whether these programs will help retain and promote women is still questionable. While coaching is becoming more acceptable in

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[45] *See* Susan Antilla, *After Boom-Boom Room, Fresh Tactics to Fight Bias*, N.Y. TIMES DEALBOOK, Apr. 1, 2013, *available at* http://dealbook.nytimes.com/2013/04/01/after-boom-boom-room-fresh-tactics-to-fight-bias//. *See also* Anita Raghavan, *Terminated: Why the Women of Wall Street Are Disappearing*, FORBES, Mar. 16, 2009, *available at* http://www.forbes.com/forbes/2009/0316/072_terminated_women.html.

[46] *See* U.S. Equal Employment Opportunity Commission, *Charge Statistics FY 1997 Through FY 2015*, *available at* http://www1.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Mar. 14, 2016).

[47] Lusita Lopez Torregrosa, *On Wall St., Gender Bias Runs Deep*, N.Y. TIMES, Jul. 24, 2012 *available at* http://www.nytimes.com/2012/07/25/us/25iht-letter25.html?_r=0. *See also* Gina L. Miller, Ph.D. and Faye A. Sisk, Ph.D., *Business Education and Gender Bias at the "C-Level"*, *available at* http://www.swosu.edu/aij/2012/v2i1/miller-sisk.pdf (last visited Apr. 6, 2013).

preparation for promotion, for some women it is a negative message and utilized to brand the coached executive as a woman needing to acclimate and fit in to the existing male culture in order to succeed. Or worse, sometimes it is just another step in the company's planned exit for the executive. Moreover, while these programs may be helpful for men in the industry, oftentimes the coaches are male insiders, and merely coach women on how to behave more like the men they work with.

Alternatively, mentoring and diversity programs can encourage a sense of female empowerment and forge deeper relationships amongst female employees, but with so few high-level opportunities comes a great deal of competition. With so few senior roles for women, many women are worried about how it will look for them to participate in a female network and are wary of the women who are their mentors. The statistics, for their part, do not seem to show any immediate improvement in the number of women getting to the top of the profession by virtue of these programs, nor do they seem to provide social networking alternatives to the "boom boom rooms," bars, or golf courses. In fact, the women that do succeed become so highly visible and isolated that it is almost predestined that at the top they will fail.[48]

A case in point is Zoe Cruz. In 2007, after a mercurial rise to President of Morgan Stanley, the firm ousted her from her President's seat—not quietly, like men in the profession who often fail upwards after a huge payout,[49] but loudly for the whole world to hear. After Zoe came Ina Drew, who the industry blamed in 2012 for J.P. Morgan $3 billion trading debacle. JPMorgan Chase's Heidi Miller and Bank of America's Sallie Krawcheck are other notable examples. This is not to insinuate that Ina or Zoe were entirely scapegoats. But, they were the obvious choices for future women business leaders in the industry, until they were isolated, ousted, and publicly shamed.[50]

Oftentimes, before these women at the top can break through the glass ceiling, rather than sue, they hire counsel to work behind the scenes to advise them. While the legal advice of experienced counsel is invaluable and badly needed, and often helps women leverage an exit from an untenable situation, it often does not help women get what they want and deserve: the sorely-earned promotion, the well-deserved bonus, or the choice client accounts. While an exit is better for most women than remaining in a hostile and inequitable work environment, it does not keep them on Wall Street, much less help them get ahead.

Family Responsibility Discrimination

Other barriers exist for women caregivers in the financial services industry. While banks and other institutions have recently installed nursing facilities for new mothers, the industry has

[48] Catalyst, *Myth of the Ideal Worker: Does Doing All the Right Things Really Get Women Ahead*?, *available at* http://www.catalyst.org/knowledge/myth-ideal-worker-does-doing-all-right-things-really-get-women-ahead (last visited Apr. 6, 2013).
[49] Susanne Craig, *Lessons on Being a Success on Wall St., and Being a Casualty*, N.Y. TIMES DEALBOOK, Apr. 1, 2013, *available at* http://dealbook.nytimes.com/2013/04/01/lessons-on-being-a-success-on-wall-st-and-being-a-casualty/.
[50] *Id.*

failed to support women who return to full-time jobs with added responsibilities at home.[51] In the 1980's and 1990's, most cases brought by women caregivers in financial services were brought under the Pregnancy Discrimination Act[52] and the Family Medical Leave Act (FMLA).[53] However, as more women in financial services became caregivers of children and the elderly in the last 10 years, an increasing number of lawsuits have been brought under Title VII, the Equal Pay Act, and the Americans with Disabilities Act as well, alleging sex discrimination, sex stereotyping, and sex role and impact bias, and disparate treatment—and the case law is quickly developing. In 2013, 70% of American children now live in households where every adult in the home is employed.[54] However, in the past 20 years the U.S. has not passed any major federal initiative to help workers accommodate their family and work demands.[55] While these protections have had some impact on protecting women caregivers, they don't guarantee part-time employment benefits for women returning to the workplace or provide paid leave for new mothers, or those needing to care for a child or parent beyond limited maternity rights and FMLA rights.

Given the amount of gender discrimination that still exists in finance, women in the industry need all the help they can get. While some banks have recently hired "specialists" to institute and develop family-friendly policies for women and other caregivers, these are few and far between. The alternative for women in the industry whose husbands earn more than they do, and work 50-60 hours a week, is to leave the workplace and stay home with their families.[56]

Conclusion

Litigation in the financial services industry, both class actions and individual cases, has provided shocking and undeniable evidence that women continue to encounter discrimination because of their gender and the realities that encompass their lives and careers as women leaders and caregivers.

The overwhelming evidence of their lack of promotion and pay equity can no longer be ignored. Women continue to leave finance in droves, at a time when the business sorely needs their proven effective governance and leadership. Given the state of the financial services industry, and the mismanagement, greed, and governance crises of the last five years, the recent exodus of women may be a greater loss for this industry than any other singular factor to affect it in years.

Financial firms should seek to create inclusive corporate cultures that consider the individual needs of their employees while working to connect them with the larger workplace. Firms need to create true mentorship initiatives that work tirelessly at retention and inclusion

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[51] Dalia Fahmy, *Mothers Accuse Goldman Sachs, Citigroup of Discrimination*, *available at* http://abcnews.go.com/Business/mothers-accuse-goldman-sachs-citigroup-discrimination/story?id=10210805#.UWDQBZMpySo (last visited Apr. 6, 2013).
[52] 42 U.S.C. § 2000e(k) (2006).
[53] 29 U.S.C. § 2601 (1999).
[54] Stephanie Coontz, *Why Gender Stalled*, N.Y. TIMES, Feb .16, 2013, *available at* http://www.nytimes.com/2013/02/17/opinion/sunday/why-gender-equality-stalled.html?pagewanted=all&_r=0.
[55] *Id.*
[56] *Id.*

with clear development and leadership paths that don't isolate their participants. Finally, state and federal lawmakers must work diligently to draft legislation to support changing family roles with family friendly policies and more flexibility in the workplace.

Ultimately, the high-level positions in financial services come with high compensation and power in an industry that controls world politics, policy, and business. Women who have achieved great success in the markets have often gone on to make major contributions to politics and policy – female financiers in the 1990s bankrolled women's issues like the pro-choice platform, as well as female political candidates such as former Texas Governor Ann Richards and Senators Barbara Boxer (D-Calif.) and Olympia Snowe (R-Maine).[57] Without addressing the underrepresentation and under compensation of women in finance, the reins of power in this country—and the direction of our future public policies—will likely continue to rest in the hands of men.

[57] Elizabeth Dwoskin, *Book Review: "Wall Street Women," by Melissa S. Fisher*, BLOOMBERG BUSINESSWEEK, Jul. 26, 2012, *available at* http://www.businessweek.com/articles/2012-07-26/book-review-wall-street-women-by-melissa-s-dot-fisher.

We Can Do It… But When?
The Riveting Struggle for Equal Pay

New York State Bar Association
Labor & Employment Law Section Fall Meeting
Washington, D.C. — September 23, 2016

Speakers

Moderator
Wendi S. Lazar
Outten & Golden LLP
New York, New York

Panelist
Zachary Fasman
Proskauer Rose LLP
New York, New York

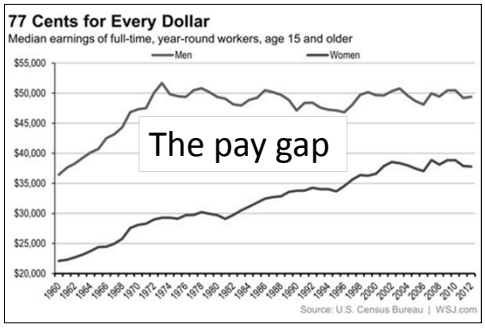
Panelist
Francis H. Byrd
Byrd Governance Advisory
Brooklyn, New York

Panelist
Pamela Coukos
Workplace Equality Law
Washington, D.C.

Overview

- What is the gender pay gap and where does it come from?
- Legal Framework
- Common Allegations and Defenses
- Recent Coverage of the Issue
- Solutions

Quantifying the Gender Pay Gap

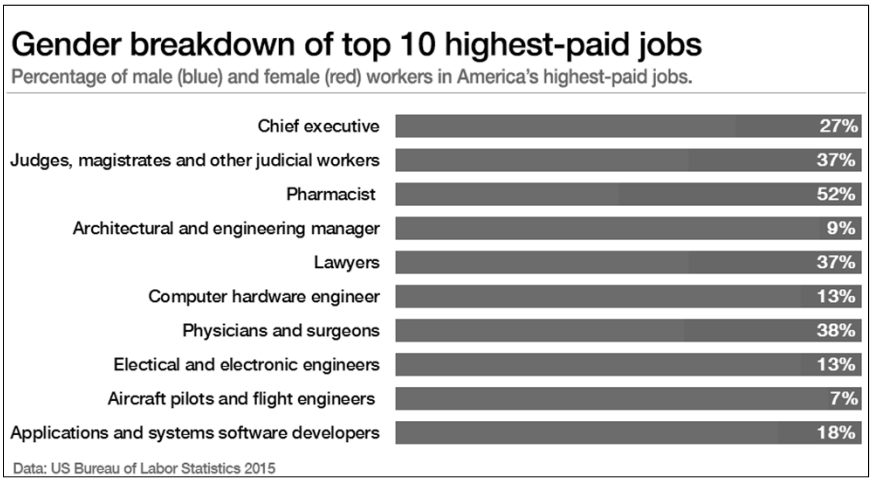


- Gradual improvement means that women will not receive true parity until 2060
- The gap is broader for minority women

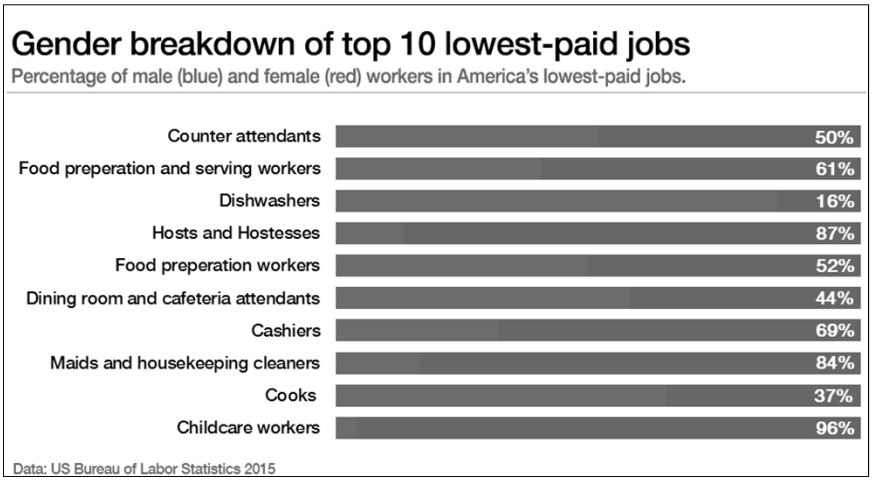
Roots of the Gender Pay Gap

- Individual pay disparity stems from:
  - Promotion and pay decisions
  - Hiring and retention choices
  - Workplace culture relating to work/life balance
- Differences in industry account for 51% of the gender pay gap.
  - The entry of women into male-dominated fields results in lower pay.
  - The reverse is true when jobs attract more men.

Roots of the Gender Pay Gap

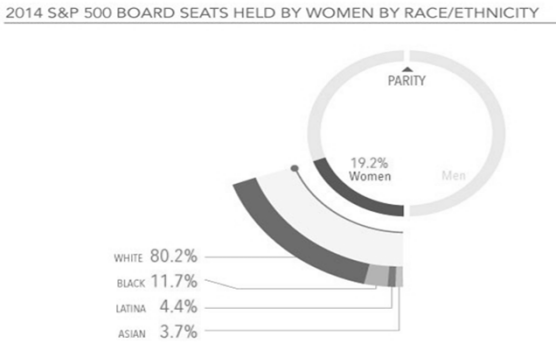


Roots of the Gender Pay Gap



The State of Corporate Diversity in 2016

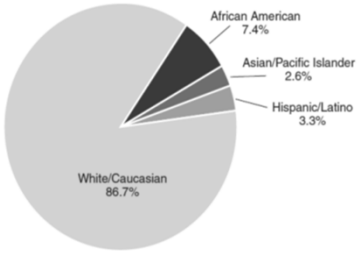
- Percentage of Women (by race/ethnicity) on S&P 500 boards



Catalyst. 2014 S&P 500 Board Seats Held by Women by Race/Ethnicity. New York: Catalyst, March 17, 2015.

The State of Corporate Diversity in 2016

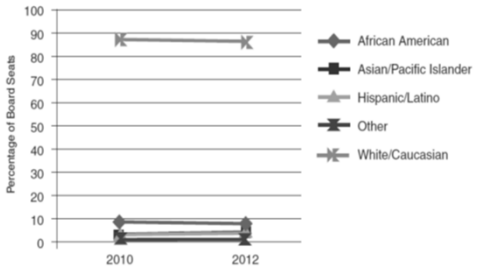
FIGURE 9
Fortune 500 Total Board Seats by Race/Ethnicity, 2012



Missing Pieces: Women and Minorities on *Fortune* 500 Boards—2012 Alliance for Board Diversity Census : "Reprinted with permission from Catalyst, The Prout Group, The Executive Leadership Council, the Hispanic Association on Corporate Responsibility, and Leadership Education for Asian Pacifics, Inc." Published on August 15, 2013.

The State of Corporate Diversity in 2016

FIGURE 10
Fortune 500 Percentage of Board Seats by Race/Ethnicity[7]



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The State of Corporate Diversity in 2016

- Do Pay Gaps between white men, women and directors of color persist even on corporate boards?
- ***Yes!?!*** According a research report released in July by Professors Matthew Souther and Adam Yore from the University of Missouri – "*Racial and Gender Inequality in the Boardroom*"
- Findings: (1) Women and racial minority directors are less likely to serve on key committees – especially audit and compensation; (2) Women and minority directors are less likely to serve in leadership positions on the board as lead directors, non-executive chairs or committee chairs; (3)Women and racial minority directors are more likely to be undercompensated compared to white male directors serving on the same board.

Legal Framework

(Federal)

- The Equal Pay Act of 1963
  - Gender-based difference in wages
  - Must show "equal work" as comparator
  - Comparator must be in the "same establishment"
  - No proof of intent required
  - Collective action mechanism ("opt-in")
- Title VII of the Civil Rights Act of 1964
  - Disparity based on any protected class
  - Discrimination in all terms and conditions of employment, including pay
  - No comparator required
  - Must either show discriminatory intent (disparate treatment) or discriminatory effect (disparate impact)
  - Class Action mechanism ("opt-out")

Legal Framework
(Federal continued)

- Bennet Amendment Affirmative Defenses
  - Seniority
  - Merit
  - Quantity or quality of production
  - Any factor other than sex

Legal Framework
(New York)

New York Equal Pay Act (amended in 2016)

- Originally, mirrored federal Equal Pay Act
- Expanded comparators in the "same establishment"
  - Formerly: Same establishment required same office
  - Now: Comparators can be anywhere within the county
- Narrowed definition of affirmative defense
  - Formerly: "Factor other than sex"
  - Now: Job-related
- Protects employees' right to discuss and disclose wages
- Allows for treble damages

Legal Framework
(New York)

- New York State Human Rights Law
  - Mirrors Title VII
- New York City Human Rights Law
  - Applies to all protected classes
  - Applies to all terms and conditions of employment
  - Requires a showing of discriminatory intent (disparate treatment) or discriminatory effect (disparate impact)
  - More liberal standards than Title VII

Legal Framework
(Other States)

- California Fair Pay Act
  - Gender-based disparity in wages
  - No "same establishment" requirement for comparators
  - Work must be "substantially similar" (not "equal")
  - Affirmative defense must be a bona fide factor other sex with "an overriding legitimate business purpose"
  - Cannot prohibit employees from discussing wages
- Massachusetts Act to Establish Pay Equity
  - Employers cannot inquire into applicants' previous compensation
  - No "factor other than sex" affirmative defense
  - Cannot prohibit employees from discussing wages

Executive Actions

- White House Equal Pay Task Force
- Policy: OFCCP and EEOC
  - OFCCP Directive 307
  - Pay Transparency Executive Order
  - OFCCP Sex Discrimination Regulations
  - Pay data collection under Presidential Memorandum, OFCCP rulemaking, & EEOC information collection (EEO-1)
- Public Engagement
  - Research, reports & analysis of pay gap
  - What House Equal Pay Pledge

Executive Actions

- Enforcement of Equal Pay for Equal Work
  - *EEOC v. Forrest City Grocery Co.* (N.D. Miss.)
  - *OFCCP v. AstraZeneca* (Dep't of Lab. ALJ)
- Enforcement of Equal Access to Equal Work
  - *OFCCP v. G&K Services, Inc.* (Dep't of Lab.)
  - *EEOC v. Market Burgers LLC d.b.a. Checkers* (E.D. Pa.)
  - *OFCCP v. Ft. Myers Construction Corp.* (Dep't of Lab.)
  - *EEOC v. Western Sugar Coop.* (D. Colo.)

Pressure for Change for Board Diversity

- Where is the pressure for corporate board diversity coming from?
  - U.S. Securities and Exchange Commission:
    - Speech by Chair, Mary Jo White in November 2015 - SEC.gov | Keynote Remarks at the Women's Forum of New York Breakfast of Corporate Champions: "The Pursuit of Gender Parity in the American Boardroom")
    - Push for new disclosure requirements
  - Congressional Democrats pressed for GAO report last December 2015
    http://www.gao.gov/products/GAO-16-30

Pressure for Change for Board Diversity

- Institutional Investors – Shareholder Proposals, Proxy Votes, Private Engagement and SEC disclosure petition:
  - Board Accountability Project NYC Pension Funds, CalPERS, CalSTRS, CT State Treasurer CtW Investment Group; Council of Institutional Investors (CII)
  - Mega cap mutual funds: BlackRock, Vanguard, seek answers during private engagements – some votes in favor of diversity proposals
- Advocacy groups Thirty Percent Club (in the U.S.), 20/20 Women on Boards use of “name and shame game” and push for legislation

Common Allegations

- Providing lower pay or fewer benefits to employees
- Steering or classifying employees or applicants into lower paid positions
- Denying networking, mentoring or training opportunities that facilitate promotion or assignment to higher paid positions
- Assigning fewer hours to non-exempt employees

Common Defenses

- Seniority, merit, and quantity/quality of production (Lawful)
- Basing compensation decisions on prior pay (Unlawful in Massachusetts)
- Providing higher compensation for lateral hires (Potentially unlawful *see Scott v. Family Dollar* (W.D.N.C. 2016))
- Subjective performance review systems (Potentially unlawful)
- Increase in pay only for those who negotiate (Lawful)
- Higher pay for head of household (Unlawful in NY and CA)

Recent Developments

- Recent Equal Pay Act Litigation:
  - *EEOC v. Port Auth. of N.Y. & N.J.*, 768 F.3d 247 (2d Cir. 2014)
  - *Jaburek v. Foxx*, 813 F.3d 626 (7th Cir. 2016)
  - *Steele v. Pelmor Labs., Inc.*, 642 F. App'x 129 (3d Cir. 2016)
  - *Carey v. Foley & Lardner LLP*, 577 F. App'x 573 (6th Cir. 2014)
  - *Blackman v. Fla. Dep't of Bus. & Prof'l Regulation*, 599 F. App'x 907 (11th Cir. 2015)
  - *Riser v. QEP Energy*, 776 F.3d 1191 (10th Cir. 2015)
- Equal Pay in the news:
  - U.S. Women's National Soccer Team
  - Inequities in Hollywood
  - Pope Francis's support of equal pay measures

Solutions

- Increasing transparency
  - New laws promoting and requiring transparency
  - Availability of compensation data from third party sources (e.g. SEC filings, Comparably, Glassdoor)
- Individual Efforts
  - "Leaning in"
  - Negotiating raises
  - Male colleagues working as allies
- Quotas

Best Practices

- Regular and robust internal assessments and affirmative action programs
- Reporting and transparency mechanisms
- Identifying failure points
  - Entry level pay and placement
  - Negotiation and discretion
  - Opportunity distribution
  - Pay secrecy
  - Performance measurement and rewards
  - Excessive complexity

What To Expect for Board Diversity in 2017 and Beyond

- More Shareholder Pressure (Proxy Access)
- More Research on Gender/Racial Diversity
- Post-election Fallout and a "new" SEC
- Is There Potential for Litigation by "*discriminated*" women or minority directors against companies?

U.S.CORPORATE BOARDS – GENDER/RACIAL PAY GAPS: THE BUMPY ROAD TO BOARD DIVERSITY WHAT TO WATCH FOR IN 2017 AND BEYOND

Submitted By:

FRANCIS H. BYRD
Byrd Governance Advisory
Brooklyn, NY

Agenda

- State of Corporate Board Diversity in U.S.
- Is There Discrimination At The Board Level In Pay and Committee Assignments? – *Yes!?!*
- Pressure for Change: SEC, Institutional Investors, Diversity Advocates
- The Outlook for 2017 and Beyond

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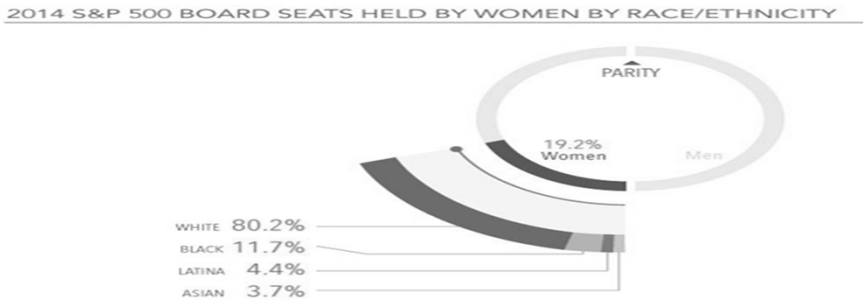
2

The State of Corporate Diversity in 2016

- Percentage of Women (by race/ethnicity) on S&P 500 boards



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The State of Corporate Diversity in 2016

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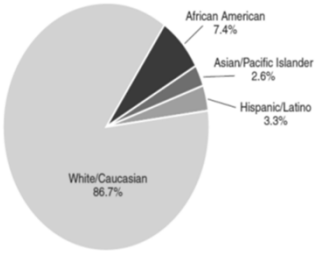

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4

The State of Corporate Diversity in 2016

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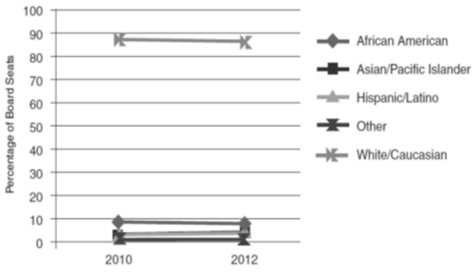

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5

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- Do Pay Gaps between white men, women and directors of color persist even on corporate boards?
- ***Yes!?!*** According a research report released in July by Professors Matthew Souther and Adam Yore from the University of Missouri – "*Racial and Gender Inequality in the Boardroom*"
- Findings: (1) Women and racial minority directors are less likely to serve on key committees – especially audit and compensation; (2) Women and minority directors are less likely to serve in leadership positions on the board as lead directors, non-executive chairs or committee chairs; (3)Women and racial minority directors are more likely to be undercompensated compared to white male directors serving on the same board.

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Pressure for Change

- Where is the pressure for corporate board diversity coming from?
  - U.S. Securities and Exchange Commission:
    - Speech by Chair, Mary Jo White in November 2015 - SEC.gov | Keynote Remarks at the Women's Forum of New York Breakfast of Corporate Champions: "The Pursuit of Gender Parity in the American Boardroom")
    - Push for new disclosure requirements
  - Congressional Democrats pressed for GAO report last December 2015 http://www.gao.gov/products/GAO-16-30
  - Institutional Investors – Shareholder Proposals, Proxy Votes, Private Engagement and SEC disclosure petition:
    - Board Accountability Project NYC Pension Funds, CalPERS, CalSTRS, CT State Treasurer CtW Investment Group; Council of Institutional Investors (CII)
    - Mega cap mutual funds: BlackRock, Vanguard, seek answers during private engagements – some votes in favor of diversity proposals
  - Advocacy groups Thirty Percent Club (in the U.S.), 20/20 Women on Boards use of "name and shame game" and push for legislation

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What To Expect in 2017 and Beyond

- More Shareholder Pressure (Proxy Access)
- More Research on Gender/Racial Diversity
- Post-election Fallout and a "new" SEC
- Is There Potential for Litigation by "*discriminated*" women or minority directors against companies?

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Research/Resources

- Missing Pieces: Women and Minorities on *Fortune* 500 Boards—2012 Alliance for Board Diversity Census "Reprinted with permission from Catalyst,The Prout Group, The Executive Leadership Council, the Hispanic Association on Corporate Responsibility, and Leadership Education for Asian Pacifics, Inc." Published on August 15, 2013.
- Racial and Gender Inequality in the Boardroom, Matthew E. Souther and Adam S. Yore. Published July 2016 Electronic copy available at: http://ssrn.com/abstract=2810543
- The SEC Wants New Rules For Board Diversity—Here's Why That Matters by Molly Petrilla, January 29, 2016 http://fortune.com/2016/01/29/sec-rules-board-diversity/
- United States Government Accountability Office, Corporate Boards, Strategies to Address Representation of Women Include Federal Disclosure Requirements, December 2015 http://www.gao.gov/assets/680/674008.pdf
- 20/20 Women on Boards https://www.2020wob.com/

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THE GENDER PAY GAP: RECENT DEVELOPMENTS

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The Gender Pay Gap: Recent Developments

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I. THE WAGE GAP AND THE LIMITATIONS OF LEGISLATION

Income inequality has become a staple of political and economic discussion, and the wage gap between women and men has been part of the legal and legislative agenda for many years. Recent federal and state efforts to legislate a closing of that gap must be understood by reference to the actual nature and extent of the wage gap itself.

According to data maintained by the Census Bureau, the gender wage gap has narrowed significantly during the past 50 years. In 1964, according to data from the Census Bureau, the typical woman working full time made about 59 cents on the dollar earned by a man. By 2004, that had risen to 77 cents. In 2014, the latest data available, women earned 79 cents for every dollar earned by men.

Yet this oft-cited "70-something cents on the dollar" statistic accounts only for women's median hourly earnings as a share of men's median hourly earnings for full-time workers. This statistic does not take into account a variety of non-gender based differences between the male and female workforces in America, including differences in experience, industry, and other factors. A closer look is in order.

The courts have established that in wage discrimination cases, arithmetic comparisons alone do not explain very much and are generally incapable of proving discrimination.[2] Experts analyzing the wage gap typically use multiple regression analyses that control for legitimate and non-discriminatory variables between men and women's wages, such as differences in education, skills, length and type of work experience, career choice, time out of the labor force, employer type, and other factors. While results vary from study to study, virtually all sophisticated studies based upon multiple regression analyses show a much narrower gap than pure mathematical computation would suggest.

- Some studies conclude that after accounting for non-discriminatory variables, women actually earn 96.7 cents for every dollar a man earns.[3]
- Other studies place the controlled statistic closer to women earning 92 cents for every dollar a man earns.[4]

2 *See Pollis v. New Sch. for Soc. Research,* 913 F.Supp. 771, 784 (S.D.N.Y.1996) ("[I]t is doubtful whether statistics tending to demonstrate a difference between the average salaries paid to male and female employees can satisfy plaintiff's *prima facie* burden."), *rev'd in part on other grounds,* 132 F.3d 115 (2d Cir.1997).

3 *See* June E. O'Neill and Dave M. O'Neill*, The Declining Importance of Race and Gender in the Labor Market: The Role of Federal Employment Policies* (Washington, D.C.: AEI Press, forthcoming August 2012), *available at* http://www.ncpa.org/pdfs/ba766.pdf.

These and other studies establish that while a wage gap continues, it is smaller than commonly reported and may be disappearing. Indeed, a 2013 Pew Research Center study estimated that among millennial workers, women earn 93% of the wages earned by comparable male workers, and that women in that group are in fact more educated than their male counterparts.[5] Significantly, while these studies show that the gap has narrowed, particularly when accounting for legitimate non-discriminatory factors, there remains a persistent unexplained gap between men and women's earnings. Indeed, some experts believe that the pay gap has not significantly narrowed since the 1980's.[6] The persistence of a wage differential may point to inadequacies in the current legislative landscape in effectively combatting discrimination in the workplace.

A. Federal Legislation

The basic federal statute guaranteeing equal pay for equal work, the Equal Pay Act of 1963 ("EPA"), is discussed in detail in subsequent portions of this paper. Critics of the EPA's effectiveness for eradicating the gender-based wage gap have identified a number of limitations.

- Weak Remedies
    - Critics maintain that the EPA's remedies – back pay, pay raises to the level of the opposite-sex counterpart, and attorney's fees – are inadequate compensation to make the victim whole and insufficient to deter future violations of the law by employers.
    - EPA claims are limited to situations within the same "establishment" which has been narrowly defined.
    - The EPA allows for gender based differentials based upon "any other factor other than sex", a broad exemption as discussed below.
- Limited Class Actions
    - The EPA is an amendment to the Fair Labor Standards Act (FLSA), which contains a different type of class action mechanism than

4 *See* Robert J. Samuelson, *What's the real gender pay gap?*, Washington Post, April 24, 2016 *available at* https://www.washingtonpost.com/opinions/whats-the-real-gender-pay-gap/2016/04/24/314a90ee-08a1-11e6-bdcb-0133da18418d_story.html?utm_term=.255b380779c2.

5 *See On Pay Gap: Millenial Women Near Parity – For Now*, Pew Research Center December, 2013 (finding that in 2012, women earned 93% as much as men based upon workers between ages 25 and 34).

6 *See* Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends, and Explanations*, IZA DP No. 9656, January 2016 *available at* http://ftp.iza.org/dp9656.pdf.

under other statutes. Critics claim that it is too difficult to bring EPA lawsuits as class actions because the EPA, adopted prior to the current federal class action rule (FRCP Rule 23), requires plaintiffs to opt in deliberately to participate in a class action suit.

- Retaliation and Pay Transparency
    - The EPA's prohibition against retaliation only covers employees who initiate a complaint or lawsuit. Conduct leading up to that point is not covered. Some critics believe this is a problem because some companies have restrictive policies that penalize employees from disclosing or discussing their salaries with co-workers, which often prevents or deters workers from discovering wage inequities.
    - Such prohibitions have generally been held unlawful under the National Labor Relations Act.
- Prior Salary
    - One of the many "factors other than sex" applicable under the EPA are market rates, which often are reflected in an employee's prior salary.
    - The Office of the New York City Public Advocate Letitia James recently released a policy report calling for New York City to prohibit an employer from asking for a women's prior salary.[7]
    - The report states that "the common practice of employers' use of prior salary history to determine employee pay perpetuates the existing wage inequities women face, and women who may have left the job market due to family responsibilities would have an unfair playing field even before being hired."[8]

Legislative efforts to revise the EPA have continued to stall in Congress. The much-debated Paycheck Fairness Act, seeking to amend the EPA to address some deficiencies critics of the EPA have highlighted, has been introduced in the House and Senate for the past several years and has never passed. The principal provisions of the Paycheck Fairness Act are:

7 The Public Advocate for The City of New York, *Policy Report: Advancing Pay Equity in New York City*, April 2016 *available at* http://pubadvocate.nyc.gov/sites/advocate.nyc.gov/files/opa_pay_equity_report_final.pdf.

8 *Id.* at 4.

- Same Establishment
    - The Paycheck Fairness Act would broaden the law's definition of "establishment" by stating that wage comparisons may be made between employees who perform substantially equal jobs at any of the employer's places of business that are located in the same county or political subdivision.
- Affirmative Defense
    - The Act would provide that a "factor other than sex" affirmative defense must be based on a "bona fide, job-related factor such as education, training, or experience that is consistent with business necessity."
    - Even if an employer could make out the affirmative defense satisfying "any factor other than sex," the employee could overcome such a defense by proving:
        - an existing alternative business practice that would serve the same business purpose without producing a pay differential; and
        - the employer refuses to adopt such a practice.
- Pay Transparency
    - The bill would prohibit retaliation for inquiring about the employer's wage practices or disclosing their own wages to coworkers.
- Class Actions
    - The bill would provide for class actions under Rule 23 of the Federal Rules of Civil Procedure as opposed to the current EPA opt-in system.
- Enforcement and Remedies
    - The bill would allow prevailing plaintiffs to recover compensatory and punitive damages.
    - The bill also would enhance the role the Department of Labor and Equal Employment Opportunity Commission in collecting data and increasing enforcement.

As discussed above, these federal efforts have been notably unsuccessful. State laws designed to narrow the pay gap have generally fared better in the legislative process. New York, California, Connecticut, Maryland, and Massachusetts have all

enacted legislation within the past year that attempts to address pay transparency, limit affirmative defenses, and give broader coverage to the terms "establishment" within each statute. California and Massachusetts have introduced legislation to prohibit the allegedly detrimental effects of requesting prior salary information as well. Because state courts have had little opportunity to interpret some of the murkier terms within these statutes, it is far too soon to judge the effectiveness of these changes.

On a more fundamental basis, however, one might logically ask whether more legislation is in fact the solution. Experts addressing that issue suggest that changes in the labor market are necessary before the wage gap can be eliminated. For example, one study notes that the proportion of Americans "overworking" (working longer than 50 hours per week) has increased substantially during the past 30 years. Overwork may signal commitment and productivity to employers, and workers who work more than 50 hours a week typically make disproportionately more than those who work 40 hours or less.

In a hypothetical world where men and women are equally likely to work long hours, the rise in overwork and its associated wages would increase levels of wage inequality but have no effect on the gender gap in wages. Various studies show, however, that a much lower proportion of women than men work such long hours: thus, women are less likely to enter jobs that require extremely long work hours and earn the highest compensation. This may be a contributing factor to the wage gap.[9]

Professor Claudia Goldin, a Harvard University economics professor and expert labor economist, has addressed flexible scheduling and non-linear compensation in her work, and has concluded that additional government intervention may not be the solution to the gender pay gap. Instead, Professor Goldin posits that to effect change in the gender pay gap, there must be changes in the labor market, in particular how jobs are structured and paid. According to her, the gender wage gap could be reduced and might even vanish altogether if firms did not have an incentive to reward individuals who labored long hours and worked particular hours.[10] This phenomenon is known as "non-linear compensation."

- Non-linear compensation often prevails in the corporate sector, finance, and law, where employees are incentivized to work double or triple a traditional full-time schedule.
    - A non-linear compensation structure makes it more lucrative for familial partners to have one person work 80 hours and the other

9 Youngjo Cha and Kim A. Weeden, *Overwork and the Slow Convergence in the Gender Gap in Wages*, American Sociological Review 2014, *available at* http://asr.sagepub.com/content/early/2014/04/02/0003122414528936.full.pdf+html.

10 Claudia Goldin, *A Grand Gender Convergence: Its Last Chapter*. American Economic Review. 2014 *available at* http://scholar.harvard.edu/files/goldin/files/goldin_aeapress_2014_1.pdf.

- work none, because if both partners opt for 40-hour weeks, they would have *less* overall earnings.[11]

- By contrast, linear compensation is prevalent in pharmacies, and pharmacists have seen a significant narrowing of the wage gap. Structural changes, such as centralized computer records and standardization of drugs, allow one pharmacist to take over easily for another without compromising the quality of work and easing part-time capability. Thus, women are less likely to leave their jobs to care for their families, a decision that can make it difficult to reenter the workforce later, or can significantly hamper women in achieving earnings as high as they would have should they have stayed in the work force.[12]

Changes in technology may alter the labor force significantly during the next 20 years, in ways that today can only be suggested by labor economists. Such changes, and new ways of workforce organization, may eliminate the wage gap more completely than legislation and litigation.

II. FEDERAL LAW: THE EQUAL PAY ACT OF 1963

A. Background

1. On June 10, 1963, Congress passed the Equal Pay Act, as an amendment to the Fair Labor Standards Act, to "prohibit discrimination on account of sex in the payment of wages by employers."

2. At the time, Congress cited statistics stating the average woman worker earned only 59 percent of the average wage for men.

B. Requirements to prove an EPA violation

1. The EPA provides:

   a) "No employer … shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of

11 Marina N. Bolotnikova, *Reassessing the Gender Wage Gap*, Harvard Magazine, May-June 2016, *available at* http://www.harvardmagazine.com/2016/05/reassessing-the-gender-wage-gap.

12 Claudia Goldin & L.F. Katz, *A Most Egalitarian Profession: Pharmacy and the Evolution of a Family Friendly Occupation*, Journal of Labor Economics (forthcoming) *available at* http://scholar.harvard.edu/files/goldin/files/w18410.pdf.

which requires equal skill, effort, and responsibility, and which are performed under similar working conditions…." 29 U.SC. § 206(d).

2. To prove discrimination under the Equal Pay Act, a plaintiff must show that:

   a) the employer pays different wages to employees of the opposite sex;

   b) the employees perform equal work on jobs requiring equal skill, effort, and responsibility; and

   c) the jobs are performed under similar working conditions.

   See e.g., Rogers v. Bank of New York Mellon, No. 09 CIV. 8551 (HBP), 2016 WL 4362204, at *8 (S.D.N.Y. Aug. 15, 2016) (citations omitted).

3. Unequal Compensation

   a) As an initial matter, a plaintiff must compare herself to an individual of the opposite sex who receives higher compensation (including fringe benefits) than she. *See e.g.*, *Ghirardo v. Univ. of S. Calif.*, 156 Fed. Appx. 914, 915 (9th Cir. 2005) (dismissing EPA claim when plaintiff failed to show that her total compensation was less than average total compensation earned by male comparators; it was insufficient to compare only disparate annual raises).

   b) When a plaintiff attempts to demonstrate that she receives a lower compensation than a comparator of the opposite sex, she may not arbitrarily select one comparator performing equal work who earns more than she does but exclude other comparators performing equal work who earn the same or less than she does. *See*, *Hein v. Oregon Coll. of Educ.*, 718 F.2d 910, 916 (9th Cir. 1983); *See also*, *Lavin-McEleney v. Marist Coll.*, 239 F.3d 476, 481 (2d Cir. 2001).

   c) The Second Circuit, dealing with a case in which plaintiff compared herself to only one other male employee noted that "[t]he problem with comparing plaintiff's pay only to that of a single male employee is that it may create the impression of an [EPA] violation where no widespread gender discrimination exists" and it may result in her receiving a windfall of damages (where the single male comparator is particularly well-paid) or may improperly limit

her recovery (where the single male comparator receives more than she does but less than other males performing equal work). *Lavin-McEleney v. Marist Coll.*, 239 F.3d 476, 481 (2d Cir. 2001).

d) In cases such as *Lavin-McEleney* where only one male comparator actually existed, a plaintiff may properly run a regression analysis that "use[d] the entire Marist faculty to establish a sufficiently large sample size, extrapolating from professors who did not compare to plaintiff across all five variables to predict what a male professor who would have so compared typically would have been paid." Id. at 482. The plaintiff could then compare her salary to this statistical composite (rather than her sole male comparator's actual salary) to establish liability and calculate damages. *Id*

e) In *Moccio v. Cornell University*, plaintiffs identified a number of comparators in the same title as plaintiff to prove that she was paid less than her male comparators, but left out a number of other male employees who also hold that title. 889 F. Supp. 2d 539, 571 (S.D.N.Y. 2012), aff'd, 526 F. App'x 124 (2d Cir. 2013). The court noted that the compensation records of the latter employees showed plaintiff earned more than those male employees and held plaintiff may not selectively choose male comparators to carry a *prima facie* case. *Id.*

4. "Equal Work"

a) "From the first, the EPA concerned equal pay for—emphatically—equal work. To that end, Congress rejected statutory language encompassing 'comparable work' to instead mandate equal pay for 'equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.'" *E.E.O.C. v. Port Auth. of New York & New Jersey*, 768 F.3d 247, 254 (2d Cir. 2014) citing 29 U.S.C. § 206(d)(1).

b) The standard to prove "equal work" is demanding. The test under the EPA is "whether the jobs in question are substantially related and substantially similar in skill, effort, responsibility, and working conditions." *Waterman v. N.Y. Tele. Co.*, No. 82 Civ. 1512 (CSH), 1984 WL 1482, at *2 (S.D.N.Y. Feb. 24, 1984); *see also Hein*, 718 F.2d at 913.

c) The focus in proving "equal work" is to show substantially equal job content by showing "equal skill, effort, and responsibility." *See Port Auth. of New York & New Jersey*, 768 F.3d 247, 254 (2d Cir. 2014).

(1) Equal skill is defined as including "such factors as experience, training, education, and ability," as measured "in terms of the performance requirements of the job" at issue. *Id.* citing 29 C.F.R. § 1620.15(a).

(2) Equal effort "looks to 'the measurement of the physical or mental exertion needed for the performance of a job.'" *Id.* citing 29 C.F.R. § 1620.16(a).

(3) Equal responsibility "turns on 'the degree of accountability required in the performance of the job, with emphasis on the importance of the job obligation.'" *Id.* citing 29 C.F.R. § 1620.17(a).

C. Affirmative Defenses

1. "Once the plaintiff establishes a prima facie case, the defendant must 'prove' that the wage differential is justified under one of the four affirmative defenses set forth under § 206(d)(1) of the Equal Pay Act:

a) a seniority system;

b) a merit system;

c) a system which measures earnings by quantity or quality of production; or

d) any other factor other than sex." *See e.g., Schleicher v. Preferred Sols., Inc.*, No. 15-1716, 2016 WL 4088741, at *5 (6th Cir. Aug. 2, 2016) (citations omitted).

2. Importantly, a defendant bears both the burden of persuasion and production on its affirmative defenses. *Id.*

3. Seniority System

a) A bona fide seniority or classification system is an affirmative defense under the EPA. *See West v. City of New York*, No. 78 Civ. 1981 (MJL), 1985 WL 202, at *14 (S.D.N.Y. Jan. 18, 1985); *EEOC v. Cleveland State Univ.*, No. C80-311, 1982 WL 320, at *14-15 (N.D.Ohio May 10, 1982) (finding

seniority system justified pay differential when years in academic rank was the basis for the seniority system and the university "applied the principles of seniority fairly"). Any such system, however, will not be considered bona fide if it "reflect[s] differences based on sex, whether as drafted or applied." *West*, 1985 WL 202 at *14.

b) Even a system that is valid as drafted cannot constitute an appropriate affirmative defense to a compensation differential when it is discriminatorily applied. *Id.* (rejecting defense when male predecessor, holding a managerial title, was replaced by a female plaintiff who performed same job duties but was hired into and remained at a non-managerial title).

4. Merit System

a) A bona fide merit system is an affirmative defense against EPA liability for a salary differential. To qualify, the merit system "must be a structured procedure in which employees are evaluated at regular intervals according to predetermined criteria…." EEOC Compliance Manual, Section 10: Compensation Discrimination, at 10-IV(F)(1).

5. Incentive System

a) An incentive system is any system or policy that is designed to encourage employees to increase productivity and/or work more efficiently. For example, an employer could validly pay word processors an increased amount of money for each document they produce. Similarly, a retail store could pay each sales associate by commission, which would be calculated according to the volume of their sales. EEOC Compliance Manual, Section 10: Compensation Discrimination, No. 915.003 (December 5, 2000). To be considered a bona fide incentive system, the compensation awards must be based on the quality or quantity of production. *Id.*

6. Any Other Factor Other Than Sex

a) Generally

(1) The EPA contains a catch-all defense for differentials based on any other factor other than sex. This defense is generally evaluated by courts on a factual

basis. *See, e.g.*, *Taylor v. White*, 321 F.3d 710, 718 (8th Cir. 2000).

(2) The employer must prove that it actually and consistently applies the asserted factor and that the factor is gender neutral. *See* 29 U.S.C. 206(d)(1).

b) There is a circuit split over whether this defense applies only to considerations adopted to serve a legitimate business purpose.

(1) The Second, Fourth, Sixth, Eight, Ninth, and Eleventh Circuits have held this justification must serve legitimate business purposes. *See*, *Aldrich v. Randolph cent. Sch. Dist.*, 963 F.2d 520 (2d Cir. 1992); *Brinkley v. Harbour Recreation Club*, 180 F.3d 598 (4th Cir. 1999); *Timmer v. Michigan Dep't of Commerce*, 104 F.3d 833 (6th Cir. 1997); *Ledbetter v. Alltel Corp. Servs., Inc.*, 437 F.3d 717 (8th Cir. 2006); *Kouba v. Allstate Ins. Co.*, 691 F.2d 873 (9th Cir. 1982); *Price v. Lockheed Space Operations Co.*, 856 F.2d 1503 (11th Cir. 1988).

(2) The Seventh Circuit disagrees. *See*, *Wernsing v. Department of Human Servs.*, 427 F.3d 466 (7th Cir. 2005).

D. <u>The Lily Ledbetter Fair Pay Act</u>

1. The Ledbetter Act reverses a May 2007 Supreme Court decision, *Ledbetter v. Goodyear Tire & Rubber*, 550 U.S. 618 (2007), holding that Ledbetter could not recover in a discrimination suit because her claim – alleging her employer paid her less than her male co-workers during most of her 19-year career – had not been filed in a timely manner, notwithstanding the continuing effects of alleged past discrimination. This was so, the Court reasoned, because Ledbetter did not timely complain of discrimination when Goodyear purportedly made its discriminatory decisions about Ledbetter's compensation, years prior to her Charge-filing date.

2. Adopts the "Paycheck Rule." The time period for filing a pay discrimination charge with the EEOC begins to run each time an employee receives a paycheck that manifests discrimination. The new rule effectively eliminates the statute of limitations for compensation-linked personnel actions because each new paycheck gives rise to a new charge-filing period. In Ledbetter, she claimed that the pay discrimination arose from performance

evaluations that reflected discriminatory animus resulting in smaller wage increases than to similarly situated male counterparts.

3. Two-year recovery cap remains. While employees and retirees may now reach back to their first day of employment for evidence of a discriminatory pay decision, they can only recover back-pay for up to the two years preceding the filing of their EEOC charge.

4. This rule applies to intentional discrimination and disparate impact claims.

5. Applies to retirees. The new law applies to retirement payments such that it will restart the time period for filing a charge to the first time a retiree receives an annuity check or other retirement benefit that s/he claims was based on wage decisions permeated with discrimination because his/her pension benefits are depressed. The Ledbetter Act is less clear as to whether the paycheck rule will apply to each new pension payment.

6. Any employment action affecting compensation could be considered timely. The new law extends the paycheck rule beyond pay raises to include any decision or "other practice" affecting compensation "in whole or in part" that may have influenced compensation received. Therefore, the paycheck rule could be applied to any employment action – including decisions on employee benefits, hiring, employment transfers and/or evaluations – that impacts compensation in any way.

E. Collective Actions for Equal Pay Claims

1. "Opt In" Requirement

   a) Because the EPA is an amendment to FLSA, Section 16(b) of FLSA is the mechanism by which employees may bring suit on behalf of themselves and other similarly situated employees who consent in writing to become a party to the lawsuit. 29 U.S.C. § 216(b).

   b) Unnamed members of an alleged class must "opt in" to participate and be bound by the adjudication. *Id.*; *See also*, *Beavers v. American Cast Iron Pipe Co.*, 975 F.2d 792 (11th Cir. 1992) (an individual is not deemed to be a party to an EPA action unless the individual consents in writing to be included and files the written consent with the court).

   c) The 216(b) scheme for the preliminary certification of "collective actions" under the FLSA (and, accordingly, under

the EPA) is materially differs from the procedure for certification of class actions under Fed. R. Civ. P. 23. *See, Jock v. Sterling Jewelers Inc.*, No. 08 CR. 2875, 2016 WL 2991174, at *1 (S.D.N.Y. May 22, 2016) citing *Myers v. Hertz Corp.*, 624 F.3d 537, 542 (2d Cir. 2010).

2. Proposed collective class must be "similarly situated"

   a) "[T]he courts have consistently held that EPA plaintiffs asserting that they and fellow employees were subjected to conduct by their common employer that violated their right to equal pay under the EPA may be granted conditional certification if they make the necessary provisional demonstration that non-party employees were similarly situated with respect to an asserted violation." *Barrett v. Forest Labs., Inc.*, No. 12 cv. 5224(RA)(MHD), 2015 WL 5155692, at *3 (S.D.N.Y. Sept. 2, 2015).

   b) In *Coates v. Farmers Grp., Inc.*, the court held that plaintiffs' allegations that "(1) [plaintiffs] all were subject to the same compensation policies and practices, which were implemented regardless of job title, salary grade, or geographic location by a small highly centralized group of decisionmakers; and (2) the compensation policies resulted in lower pay for female attorneys compared to male attorneys" was sufficient to show the proposed class members are similarly situated." No. 15-CV-01913-LHK, 2015 WL 8477918, at *12 (N.D. Cal. Dec. 9, 2015).

3. Certifying a Collective Action At The Notice Stage

   a) "[S]ince 'certification' in the FLSA collective action context refers only to 'the district court's exercise of the discretionary power ... to facilitate the sending of notice to potential class members,'" certification of a collective action is a preliminary determination that requires only a relatively modest showing. *See, Jock*, No. 08 CR. 2875, 2016 WL 2991174, at *1 (S.D.N.Y. May 22, 2016) citing *Myers v. Hertz Corp.*, 624 F.3d 537, 542 (2d Cir. 2010).

   b) Same "Establishment"

      (1) As noted above, in order to sustain an EPA violation, plaintiffs must show they were performing equal work for unequal compensation in the same establishment. Defendants have pointed out this hurdle when plaintiffs seek to certify collective actions for

employees that are nationwide or who don't all work in the same location. *See*, *Coates v. Farmers Grp., Inc.*, No. 15-CV-01913-LHK, 2015 WL 8477918, at *12 (N.D. Cal. Dec. 9, 2015).

(2) Some courts, however, have taken "[t]he general approach of . . . decline[ing] to determine at the conditional-certification stage whether the plaintiffs will be able to satisfy the 'establishment' requirement." *Coates*, No. 15-CV-01913-LHK, 2015 WL 8477918, at *12 (N.D. Cal. Dec. 9, 2015) citing *Barrett v. Forest Labs., Inc.*, No. 12 CV. 5224 RA MHD, 2015 WL 5155692, at *3 (S.D.N.Y. Sept. 2, 2015); *see also, e.g.*, *Kassman v. KPMG LLP*, No. 11 CIV. 03743 LGS, 2014 WL 3298884, at *1 (S.D.N.Y. July 8, 2014).

c) Making a Preliminary Showing of Unequal Pay for Equal Work

(1) Courts have been reluctant to evaluate the merits of the plaintiffs' EPA violation claims in a proposed collective action. *See*, *Coates*, No. 15-CV-01913-LHK, 2015 WL 8477918, at *12 (N.D. Cal. Dec. 9, 2015).

(2) In *Coates*, the court held that plaintiffs may make a preliminary showing of an EPA violation without expert statistical analysis. *Id.* The *Coates* court held that a putative class of plaintiffs' made a sufficient "model factual showing" of unequal pay for equal work where:

(a) the employer's compensation policies show "that the compensation and related performance evaluation policies are common across job titles, salary grades, and geographic area and

(b) the plaintiffs' have offered evidence that within job titles, and among certain job titles, attorneys are performing the same tasks and following the same standardized case management guidelines. *Id.* at *10.

(3) *Coates* did not address the merits of defendant's argument that the alleged comparators were

improper, stating "the notice-stage is not the appropriate time to evaluate the merits of Coates' EPA claim." *Id.* at *11.

(4) In *Barrett*, a putative class of plaintiffs claiming EPA violations presented evidence of:

(a) a retained economist relying on pre-motion production of pay records who concluded by a multiple regression analysis that there was a statistically significant difference in male and female pay when controlling for a series of relevant variables; and

(b) a list of comparators for each of the ten plaintiffs composed of male employees who "had less or equal seniority as compared to the plaintiff and who worked in equivalent or lower-paid COLA tiers, but who nonetheless were being paid more than the plaintiff." No. 12 CV. 5224 RA MHD, 2015 WL 5155692, at *3 (S.D.N.Y. Sept. 2, 2015).

(5) The court in *Barrett* held that the showing made by plaintiffs on its face justified certification of a collective action. *Id.*

4. Proving Class-wide EPA Violations

a) There is surprisingly little case law on the EPA in the class action context.

b) It is clear based upon the proffered evidence and the court's initial rulings on certifying a collective action in *Barrett* and *Coates* that a multiple regression analysis or a similarly advanced statistical analysis would be necessary to prove unequal pay for equal work on a collective-wide class basis. *See Barrett v. Forest Labs., Inc.*, No. 12 CV. 5224 RA MHD, 2015 WL 5155692, at *3 (S.D.N.Y. Sept. 2, 2015); *Coates*, No. 15-CV-01913-LHK, 2015 WL 8477918, at *12 (N.D. Cal. Dec. 9, 2015); *and see Pollis v. New Sch. for Soc. Research, 913 F.Supp. 771, 784 (S.D.N.Y.1996)* ("[I]t is doubtful whether statistics tending to demonstrate a difference between the average salaries paid to male and female employees can satisfy plaintiff's *prima facie* burden."), *rev'd in part on other grounds,* 132 F.3d 115 (2d Cir.1997).

F. Recent Equal Pay Act Litigation

1. Recent case law trends suggest that the "substantially equal work" prong of plaintiff's *prima facie* case is a particularly high burden and has been a pitfall for plaintiffs.

2. *E.E.O.C. v. Port Auth. of New York & New Jersey*, 768 F.3d 247, 247-249 (2d Cir. 2014).

    a) Following an extensive EEOC investigation, the EEOC brought EPA claims on behalf of 14 non-supervisory female attorney plaintiffs claiming that they were paid less than their male counterparts in the Port Authority's law department. The EEOC alleged that all attorneys had the same "job code," required the same training, education, and ability, and had similar years of experience based on bar passage year. *Id.* at 256-257.

    b) The Second Circuit affirmed the district court's dismissal of the EEOC's EPA claims, holding that the EEOC failed to plead *actual* job duties to make a sufficient pleading of "equal work" under the EPA because the EEOC failed to say anything about "whether the attorneys were required to perform 'substantially equal work . . . . [T]he EEOC's complaint provides no guidance as to whether attorney's handled complex commercial matters or minor slip-and-falls, negotiated sophisticated lease and financing arrangements or responded to employee complaints, conducted research for briefs or drafted multimillion-dollar contracts." *Id.* at 257.

    c) The Second Circuit also explicitly rejected the EEOC's theory that "an attorney is an attorney is an attorney" as such broad generalizations based on mere job classifications are not cognizable under the EPA. *Id.*

3. *Jaburek v. Foxx*, 813 F.3d 626 (7th Cir. 2016).

    a) The plaintiff, a female federal employee, failed to identify male comparators who were paid higher wages, as required to establish *prima facie* claim under the Equal Pay Act. The alleged comparators were male employees who worked in different office locations (plaintiff in Texas and the comparators in Seattle and Anchorage) and had different supervisors than plaintiff, and plaintiff failed to provide description of the male employees' duties, hours,

backgrounds, or qualifications sufficient to allow the court or a jury to conclude that the comparators performed equal work. *Id.*

4. *Steele v. Pelmor Labs. Inc.*, 642 F. App'x 129, 136 (3d Cir. 2016)

   a) The Third Circuit affirmed the district court's dismissal of plaintiff's claims on summary judgment because plaintiff failed to show equal work where plaintiff was the only person who performed the tasks, responsibilities, and common core functions.

5. *Carey v. Foley & Lardner LLP*, 577 F. App'x 573, 580 (6th Cir. 2014)

   a) The Sixth Circuit affirmed the district court's dismissal of plaintiff's EPA claim where plaintiff, a partner in a large law firm who claimed female partners were paid more than him for the same work, could not show that all partners performed "substantially equal work" merely because they hold the title "partner." Plaintiff failed to carry his burden to introduce evidence that a female colleague was paid at a higher rate than he was despite working in a position that requires similar qualifications, skills, and responsibilities. The court held that "whether two attorneys perform 'equal work' depends on the size and scope of the attorney's cases, the importance of his or her practice group to the firm's financial health, his or her responsibility for recruiting and mentoring associates, and his or her leadership role in the firm, among other factors."

6. *Blackman v. Florida Dep't of Bus. & Prof'l Regulation*, 599 F. App'x 907, 910–11 (11th Cir. 2015)

   a) The Eleventh Circuit affirmed a district court's dismissal of plaintiff's EPA claims for failure to prove a *prima facie* case because plaintiff failed to introduce evidence regarding the skills and qualifications needed to perform the jobs of her comparators. The court held that the other comparators routinely traveled more, performed inspections plaintiff did not, and addressed a variety of issues the plaintiff did not such as scheduling, personnel, and compliance issues. *Id.*

   b) The majority also rejected the argument that plaintiff identified proper comparators because those comparators indirectly supervised the same employees that the plaintiff also supervised. *Id.*

7. *Riser v. QEP Energy*, 776 F.3d 1191, 1196–98 (10th Cir. 2015) reaches a different result.

   a) The Tenth Circuit reversed the district court's dismissal of plaintiff's EPA claim on summary judgment and held that genuine disputes of material fact exist as to whether plaintiff's work was "substantially equal" to a male comparator where:

      (1) The comparator's duties were carved directly out of the plaintiff's duties because the plaintiff had performed all of the fleet administration duties before the comparator was hired.

      (2) The district court's finding that the male comparator performed two additional duties was subject to a material factual dispute because plaintiff's testimony was that she began implementing these duties prior to his taking over and further "the fact that a female employee performed additional duties beyond a male comparator does not defeat the employee's prima facie case under the EPA."

      (3) The court also found the employer's argument that plaintiff had no comparator as disingenuous because the employer essentially bifurcated plaintiff's position, assigning the tasks she was performing to the two positions of Fleet Administrator and Facilities Manager, which were then filled by male employees compensated at significantly higher rates.

G. Any Other Factor Other Than Sex Affirmative Defense

1. *Schleicher v. Preferred Sols., Inc.*, No. 15-1716, 2016 WL 4088741, at *3 (6th Cir. Aug. 2, 2016)

   a) Plaintiff, a male salesman, claimed that the reduction of his salary to match that of his female counterpart violated the EPA. *Preferred*, 2016 WL 4088741, at *3. Plaintiff and the female comparator became employees of the defendant at roughly the same time and they were offered either a purely commission based compensation package or a base salary and a smaller commission *at their choice*. *Id.* at *7. Plaintiff chose pure commission and the female comparator chose salary and a smaller commission. *Id.* Plaintiff out earned his female comparator by nearly $700,000 over the ensuing four years. *Id.* After performance issues, plaintiff's

compensation was then reduced to match his female comparator's. *Id.*

b) The Sixth Circuit affirmed the district court's summary judgment dismissal of plaintiff's claims *Id.* at *9.

c) The court held that the employer carried its burden to show that "any other factor other than sex" could explain the pay differentials because both the plaintiff and comparator had the ability to choose their own compensation models. *Id.* at *7-9.

H. Cases Finding an EPA Violation

1. *Siler-Khodr v. Univ. of Texas Health Sci. Ctr. San Antonio*, 261 F.3d 542 (5th Cir. 2001).

a) Female professor brought suit against university in state court, alleging that the university had discriminated against her on the basis of her gender in violation of Title VII and paid her unequally in violation of the Equal Pay Act (EPA). After trial, a jury verdict awarding plaintiff $91,000 in back pay and $20,000 in compensatory damages was entered.

b) Defendant appealed and the Fifth Circuit held that: (1) statistical studies indicating that gender significantly affected faculty salaries at university presented jury question whether plaintiff's unequal pay was due to gender; (2) whether university's affirmative defenses were pretexts were questions for jury; and (3) application of the EPA to state university did not violate the Eleventh Amendment.

c) The court held that the statistical analysis of plaintiff's expert was admissible and reliability was a question for the jury. Plaintiff offered an expert who conducted a multiple regression analysis examining male and female pay that controlled for a variety of factors. "The reports indicated that gender significantly affected faculty salaries at the University. After adjusting for confounding factors such as rank, degree, tenure, duration in the institution and age, women tended to earn lower salaries than men." *Id.* at 545.

d) The court examined the defendant's affirmative defenses claiming prior salary and market forces dictated the disparity and the grant-obtaining ability of the faculty also could account for the disparity. *Id.* at 548-549. The court found that plaintiff submitted sufficient evidence to rebut the

defendant's affirmative defenses as pretext for the pay disparity. *Id.* Plaintiff offered evidence that there was no basis for a compensation decisions based on campus-wide or department-wide policy stating that the importance of gaining grants. *Id.* at 548. The court further held "the University's market forces argument is not tenable and simply perpetuates the discrimination that Congress wanted to alleviate when it enacted the EPA" *Id.* at 549.

III. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

A. Compensation discrimination claims can also be brought under Title VII of the Civil Rights Act of 1964.

1. Plaintiffs may raise a Title VII violation for wage disparity even where an EPA violation may not be cognizable. For instance, the EPA requires "substantially equal work," thus it does not prohibit discrimination between employees performing comparable work. Title VII may allow for a cognizable claim in that circumstance if the plaintiff can also prove the wage disparity was the result of discriminatory intent.

2. Non-EPA wage discrimination cases are based on the conventional theories of Title VII discrimination.

B. Distinctions Between Title VII Framework and the EPA

1. *Prima Facie Case*

   a) Title VII utilizes the familiar burden-shifting analysis of *McDonnell Douglas Corp. v. Green* in disparate treatment cases. In such cases, a Title VII plaintiff need only show that (1) she was a member of a protected class; (2) she was qualified for the job in question; (3) she was paid less than a men for the same work; and (4) the employer's adverse employment decision occurred under circumstances that raise an inference of discrimination. *See Warren v. Solo Cup Co.*, 516 F.3d 627, 629 (7th Cir. 2008).

   b) In contrast to the EPA, the similarity of the work between the plaintiff and male comparator is somewhat relaxed as the male must be similarly situated under Title VII standards. However, an individual plaintiff in a disparate treatment case must prove discriminatory intent, which is not an element of an EPA violation. *See Birch v. Cuyahoga Cnt. Probate Ct.*, 392 F.3d 151, 165-65 (6th Cir. 2004); *See Belfi v. Prendergast*, 191 F.3d 129, 136 (2d Cir. 1999).

2. If the plaintiff makes a *prima facie* case, the burden shifts to the employer to articulate some legitimate, non-discriminatory reason for the adverse employment decision. *Mickelson v. N.Y. Life*, 460 F.3d 1304 (10th Cir. 2006). The plaintiff retains the ultimate burden of providing that the employer's articulated reason was pretextual. *Id.* at 1310.

3. In disparate treatment cases, the plaintiff must prove that the challenged practice had a disparate impact upon members of a protected group. If this is shown, the burden shifts to the employer to demonstrate that the challenged practice is job-related and consistent with business necessity. If this is done, the plaintiff may still prevail by demonstrating that an alternative employment practice exists that equally well serves the employer's interest with a lesser disparate impact, and the employer refuses to adopt that practice. 42 U.S.C. § 2000e-2(k)(1)(A).

C. The Bennett Amendment and *Washington v. Gunther*

1. On June 12, 1964, Congress amended Title VII with what is commonly called the Bennett Amendment, which incorporated the four affirmative defenses of the EPA into the structure of sex discrimination wage claims brought under Title VII. 42 U.S.C. § 2000e-2(h).

2. In *County of Washington v. Gunther*, 452 U.S. 161 (1981), a group of four female county prison guards sued the County of Washington for unequal wages, alleging that female jail guards should be paid at least 95 percent of the wages female jail guards where the employer paid the female guards only 70 percent of the male guards' wages and the county set the pay scale for female guards, but not for male guards, at a level lower than that warranted by its own survey of outside markets and the worth of the jobs. *Id.*

   a) The Supreme Court held that the plaintiffs could establish a claim for wage discrimination under Title VII if they could prove that the wage disparity was intentional. *Id.* at 168. The Court also held that the Bennett Amendment to Title VII — permitting an employer to differentiate on the basis of sex in paying wages if authorized by the EPA — does not restrict Title VII's scope, but rather incorporates into Title VII the four affirmative defenses contained in the EPA. *Id.* at 168-69.

D. "Comparable Worth"

1. The concept of "comparable worth" is a theory under which plaintiffs might claim increased compensation on the basis of a

comparison of the intrinsic worth or difficulty of their job with that of other jobs in the same organization or community. *County of Washington v. Gunther*, 452 U.S. 161, 166 (1981).

2. The "comparable worth" theory, however, was never ruled on by the Court in *Gunther*.

   a) The Court stated that its narrow holding did not address the controversial concept of "comparable worth."

   b) Courts generally have rejected the theory of "comparable worth", and have generally held that reliance on market rates to establish the value of different positions, rather than upon the results of a job study, is not a form of sex-based wage discrimination absent proof of intentional discrimination. *See*, *e.g.*, *Randall v. Rolls-Royce Corp.*, 637 F.3d 818 (7th Cir. 2011); *Sims-Fingers v. City of Indianapolis*, 493 F.3d 768 (7th Cir. 2007); *AFSCME v. Washington*, 770 F.2d 1401, 1408 (9th Cir. 1985).

   c) In *Randall*, the Seventh Circuit addressed comparable worth and held: "A personnel officer might be as valuable to Rolls–Royce as an aeronautical engineer, but if the latter commands a higher wage in the market for aeronautical engineers, Rolls–Royce will have to pay him or her more; and if, as [defendants' expert] found, there were at the outset of the complaint period more male than female employees in jobs that command a higher market wage, the average compensation of male employees would exceed that of female employees in the same job category for a reason unrelated to sex discrimination. If cardiologists command a higher market wage than internists, they will be paid more even if the clinic that employs both types of physician regards them as equally valuable. Maybe workers in different jobs that are in some sense of comparable value, though the market thinks otherwise, should be paid the same as a moral matter; but 'comparable worth' is not recognized as a theory on which to base a federal discrimination suit." 637 F.3d 818, 822-23.

IV. REVISIONS TO EEO-1 REPORTING REQUIREMENTS

A. On January 21, 2016, the EEOC announced its proposal to revise EEO-1 reports[13] to include a requirement that employers disclose certain employee pay data.

1. Under the new proposal, the EEO-1 would consist of Component 1, which is the existing EEO-1, and Component 2, which will require disclosure of aggregate W-2 pay data.

2. Under the proposal, employers must report the data for each of the ten existing EEO-1 job categories and within those categories by 12 pay prescribed bands. Employers will be required to report the number of employees in each pay band and aggregate hours worked by the employees.

3. The EEOC intends to compute disparities within job categories, across job categories, and any overall variation for purposes of discerning potential discrimination.

4. The EEOC is still taking comment from interested parties.

5. As of July, 2016, the EEOC announced that beginning with work year 2017, the EEO-1 filing deadline will be March 31 to coincide with the issuance of W-2s for the prior year. As such, the first EEO-1 under the revised rule must be filed on March 31, 2018.[14]

B. Future Pay Equity Enforcement

1. Presently, EEOC statistics show that the agency has recovered more than $50 million in relief for employees in the past five years in connection with its enforcement of equal pay laws.[15]

2. The EEOC and the Office of Federal Contract Compliance Programs ("OFCCP") plan to develop a software tool that will allow their investigators to conduct analyses of W-2 pay distribution within a single firm or establishment, across an aggregate industry, or within a metropolitan-area.

[13] A sample of the proposed EEO-1 form can be found at http://www.eeoc.gov/employers/eeo1survey/2016_new_survey.cfm

[14] Proposed Revision of the EEO-1 can be found at https://www.gpo.gov/fdsys/pkg/FR-2016-07-14/pdf/2016-16692.pdf

[15] *See* EEOC Enforcement & Litigation Statistics available at http://www.eeoc.gov/eeoc/statistics/enforcement/epa.cfm

3. This software application would highlight statistics of interest and potential targets of investigation.

4. The EEOC and OFCCP anticipate that the process of reporting pay data will encourage employers to self-monitor and comply voluntarily if they uncover pay inequities in order to avoid investigation.

V. STATE AND LOCAL LAWS ON THE PAY GAP

A. New York Achieve Pay Equity Law.

1. On October 21, 2015, Governor Cuomo signed the Achieve Pay Equity law, which amends New York's current Equal Pay Act (NY Labor Law Section 194(a)), which prohibits pay differentials based on gender in jobs requiring "equal skill, effort and responsibility" which are "performed under similar working conditions." The amendments went into effect on January 19, 2016.

   a) Replacement of "any other factor other than sex" with "bona fide factor" exception: Under the pre-amendment law, an employer could defend against a claim of a gender-based wage differential by showing that the differential was based on or justified by (i) seniority system, (ii) merit system, (iii) system measuring earnings based on quantity or quality of work, or (iv) "any other factor other than sex."

   b) The amendments maintain the first three categories but modify the "any other factor …" language to instead require that employers show a "bona fide factor other than sex such as education, training or experience" that supports the difference in pay. In addition, the factor relied upon by the employer must be job-related and consistent with business necessity.

   c) The burden remains on the employer to prove the existence of this bona fide factor; it is not on the complaining employee to prove discriminatory motive.

   d) It is unclear what factors (that may have otherwise fallen under the "any other factor other than sex" catch-all) will still be viable under the amended language.

2. Even if the employer has met the burden of showing a "bona fide factor" under the new fourth prong, the amendments allow the employee to prevail if he or she can prove three things:

a) the employer's practice causes a disparate impact on the basis of sex;

b) a viable alternative practice exists that would both remove the wage differential and serve the same business purpose; and

c) the employer refused to adopt the alternative practice.

3. The pre-amendment law looked at wages of employees in the "same establishment" in order to determine whether employees who work for the same employer are being paid unequally based on their gender.

4. The amendment now broadens the definition of "same establishment" to include the same "geographical region," so long as the region is not larger than a county. This allows for comparison of employee wages across all stores in the same city or borough, as opposed to looking only at a single location.

5. Pay Transparency: The new law provides that employers may not prohibit employees from inquiring about, discussing, or disclosing wages.

   a) Employers may establish and distribute a written policy containing "reasonable workplace and workday limitations on the time, place and manner" for pay discussions consistent with other federal and state laws.

   b) The law provides that an example of a reasonable limitation would be a rule that an employee may not disclose a co-worker's pay without the co-worker's permission.

   c) An employer may also prohibit an employee who has access to other employees' pay information as part of his or her job from disseminating that information to others who do not have the same access unless it is "in response to a complaint or charge, or in furtherance of an investigation, proceeding, hearing, or action under this chapter, including an investigation conducted by the employer."

6. Increase in liquidated damages

   a) The new law increases the amount of liquidated damages for a willful violation of Section 194 to 300% of the unlawful difference in pay.

b) This is a dramatically higher penalty than under other provisions of the Labor Law, which provides for liquidated damages at a rate of 100%.

B. <u>California Fair Pay Act: The California Fair Pay Act took effect on January 1, 2016.</u>

1. Changes in the new California Fair Pay Act include:

a) "Substantially Similar Work"

(1) Under California's previous equal pay statute, the law required employers to pay employees of the opposite sex equally for "equal" work on jobs that require "equal" skill, effort and responsibility.

(2) The Act now requires employers pay employees of the opposite sex equally for "substantially similar work" when viewed as a composite of skill, effort and responsibility, and performed under similar working conditions.

b) In addition, the Act eliminated a requirement from the prior equal pay act that a discrimination claim be based on a comparison of the wages of employees in "the same establishment."

2. Burden on the Employer to Show Exceptions Where a Wage Differential Exists

a) Under the new law, employers now carry the burden to prove exceptions where wage differentials exist, that the exception was "applied reasonably," and the factors relied upon account for the "entire wage differential."

b) Further, the new law provides additional restrictions on the "bonafide factor other than sex" exception, as noted below.

c) Under the new law, the employer must affirmatively show that any wage differential is based upon one of the enumerated exceptions:

(1) A seniority system;

(2) A merit system;

(3) A system that measures earnings by quantity or quality of production; or

(4) A bona fide factor other than sex, such as education, training, or experience.

(a) This factor shall apply only if the employer demonstrates that the factor is not based on or derived from a sex-based differential in compensation, is job related with respect to the position in question, and is consistent with a business necessity.

(b) Further, this defense shall not apply if the employee demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential

3. Enhanced Anti-Retaliation Provisions

a) The Act now prohibits employers from retaliating against employees for:

(1) disclosing the employee's own wages,

(2) discussing others' wages,

(3) inquiring about another employee's wages,

(4) or aiding or encouraging another employee to exercise their rights under the Act.

4. Three Year Record-Keeping Requirements

a) The Act increases the period of time that the employer must maintain records relating to wages, job classifications, and other conditions of employment of the employees from two years to three years.

C. New Jersey Pay Equity Legislative Developments

1. On March 14, 2016, the New Jersey Assembly passed a bill (A.2750) seeking to supplement New Jersey's current equal pay law and amend the State's Law Against Discrimination.

2. The bill had previously passed the New Jersey Senate (S.992).

3. The bill would have, among other things:

a) Prohibited an employer from paying an employee at a lesser rate of compensation than another employee of the opposite sex for "substantially similar" work, when viewed as a composite of skill, effort, and responsibilities;

b) Required an employer to justify differences in pay rates by showing such pay decisions are based on a seniority system, a merit system, or otherwise based on a bona fide job-related reason other than sex;

c) Restarted the statute of limitations each time a discriminatory paycheck is issued to the employee—similar to the federal Lily Ledbetter Fair Pay Act—but would also allow back pay for the entire violation period;

d) Prohibited an employer from retaliating against an employee for disclosing information about any employee's title, occupational category, or rate of compensation to other employees, any government agency, or a lawyer from whom the employee seeks legal advice;

(1) An employer would have also be prohibited from requiring an employee to sign a waiver of such rights as a condition of employment;

e) Required contractors to provide information on gender, race, job title, occupational category and compensation, and significant changes during the course of the contract to the New Jersey Labor Commissioner and Division of Civil Rights.

f) Contractors would also have been required to disclose such information to employees and their authorized representatives upon request.

4. On May 2, 2016, Governor Chris Christie (R) conditionally vetoed the bill.

a) In his memo on the conditional veto the Governor objected to a number of provisions in the bill, including:

(1) The proposal to adopt an essentially unlimited statute of limitations that would in effect lift the two-year cap on the recovery of back pay by employees;

(2) Governor Christie expressed concern that the bill provided "absolutely no limitation on the amount of

back pay an employee can recover when claiming wage discrimination," and recommended that the bill mirror the Lilly Ledbetter Act in this regard, by limiting back pay to two years.

b) The demographic reporting requirements for contractors;

(1) The Governor described this requirement as "outrageous bureaucratic red tape creation."

c) The authorization under the bill to provide for treble damages awards for violations of the bill's wage discrimination and disclosure provisions;

(1) The Governor stated that such a provision is not authorized by State or federal law and therefore expressed concern that this provision would make New Jersey a "liberal outlier."

5. The bill was returned to the Senate with the Governor's amendment recommendations.

a) State legislators have pledged to continue pursuing the passage of this legislation, but no further next steps have been announced.

6. The New Jersey state assembly also recently passed a bill in April 2016 (A.883) that would require bidders on state contracts to submit a gender equity report to the Division of Purchase and Property in the State Department of Treasury as part of the bidding process.

7. According to the language of the bill, the report would be required to measure the extent to which male and female employees perform the same or comparable work at different rates of pay and the extent to which job titles may be predominantly held by members of the same gender.

8. The bill was received in the New Jersey Senate for consideration on April 18, 2016 and has been referred to the Senate State Government, Wagering, Tourism & Historic Preservation Committee for consideration.

D. **<u>Connecticut Pay Equity Legislative Developments</u>**: On July 2, 2015, Connecticut Governor Daniel P. Malloy (D) signed into law Public Act No. 15-196, "An Act Concerning Pay Equity and Fairness."

1. The Act encourages wage transparency by barring employers from:

a) Prohibiting employees from voluntarily discussing the amount of his or her wages or the wages of another employee that have been voluntarily disclosed by such other employee;

b) Prohibiting employees from inquiring about the wages of another employee;

c) Requiring an employee from signing a waiver or other document that denies the employee's right to disclose or discuss his or her wages or the wages of another employee (that have been voluntarily disclosed) or to inquire about the wages of another employee;

d) Discharge, discipline, discriminate against, retaliate against or otherwise penalize any employee who discloses or discusses the amount of his or her wages or the wages of another employee (that have been voluntarily disclosed) or inquires about the wages of another employee.

2. The Act applies to all Connecticut employers regardless of size and provides for a private right of action for violations of the Act, including the Act's anti-retaliation provisions.

a) Available damages include compensatory and punitive damages and attorney's fees and costs.

E. **Massachusetts Equal Pay Law Amendment**. On August 1, 2016, Massachusetts Governor Charlie Baker (R) signed into law Bill S.2119, a comprehensive pay equity bill entitled "The Act to Establish Pay Equity."

1. The Act will become effective in July, 2018

2. The Act aims to strengthening prohibitions on gender discrimination in the payment of wages for comparable work.

3. The Act defines "comparable work" as "substantially similar in that it requires substantially similar skill, effort and responsibility and is performed under similar working conditions." However, the bill further states that "a job title or job description alone shall not determine comparability."

4. Mitigating factors that may legitimately warrant a difference in wages, benefits and other compensation for comparable work include:

a) a bona fide seniority system, provided that leave for pregnancy-related conditions or protected parental, family or

medical leave is not taken into account for seniority purposes;

b) a bona fide merit system;

c) a bona fide system of measuring earnings based on quantity or quality of sales or production;

d) the geographic location in which a job is performed;

e) education, training or experience if such factors are "reasonably related" to the particular job and consistent with business necessity; or

f) travel, if a "regular and necessary condition" of the job.

5. Similar to the federal Equal Pay Act, the Act prohibits employers from reducing the wages of an employee for the sole purpose of complying with the law.

6. The first three mitigating factors mirror the federal law, while the latter three are new.

7. Beyond that, Massachusetts' courts will have to determine whether Massachusetts' new definition of "comparable work" is interpreted more expansively than in the federal statute.

8. Pay Transparency

a) Employers are prohibited from screening job applicants based on their wage histories by either:

(1) requiring that an applicant disclose prior salary, wages, or benefits during the application, interview, or hiring process; or

(2) requiring that an applicant's prior wages satisfy minimum or maximum criteria.

b) The Act also prohibits employers from inquiring into or seeking the salary history of a job applicant directly from any current or former employer unless authorized to do so in writing by the applicant after an offer of employment with compensation has already been extended.

c) Employers, however, are not prohibited from collecting salary information through other means.

9. Wage Discussions in the Workplace

   a) The bill prohibits employers from restricting employee inquiry into or discussion about their own wages or that of other employees.

   b) Employers may, however, prohibit human resources or other employees with access to compensation information from disclosing such information without the prior written consent of the employee whose information is being sought.

10. Employer's Affirmative Defense: The Act establishes an affirmative defense from liability for an employer who, within the three years prior to the commencement of an action for equal pay violations, can show:

    a) it completed a good faith self-evaluation of its pay practices; and

    b) that "reasonable progress" has been made towards eliminating wage differentials based on gender for comparable work.

F. **Maryland Equal Pay for Equal Work Act of 2016**. Governor Larry Hogan (R) signed the Equal Pay for Equal Work Act of 2016, which is set to take effect on October 1, 2016

1. Under the new Act, gender identity is added to sex as a protected class.

2. The Act now forbids discrimination pay for "work of a comparable character or work on the same operation, in the same business or of the same type."

3. The new law expands the "same establishment" language beyond a single facility to include all workplaces in the same county.

4. The new law limits the "bonafide factors other than sex" affirmative defense to those factors that:

   a) are not derived from a sex based differential in compensation;

   b) are "job related" and "consistent with business necessity"; and

   c) account for the entire differential.

5. Pay Transparency: The new law prohibits employers from retaliating against employees for wage inquiries. It contains an exception for employees with "access to the wage information of other employees," unless the disclosure is based on information that was "obtained outside the performance of the essential functions of the employee's job."

PAY TRANSPARENCY AND NEW DISCLOSURE AND REPORTING INITIATIVES

Submitted By:

PAMELA COUKOS
Working Ideal
Washington, DC

Pay Transparency and New Disclosure and Reporting Initiatives

Since President Obama began his tenure by signing the Lilly Ledbetter Fair Pay Act,[1] a broader legal, policy and cultural transformation has moved the gender pay gap from a niche issue to an increasingly prominent public concern. At the same time, changes in the workplace and increased government, stakeholder and business attention have taken approaches that once seemed radical and turned them into achievable interventions. Notably, reporting and transparency are becoming more accepted initiatives – and they are approaches that align with the best current thinking on effective workplace diversity practices. The movement toward greater pay transparency and increased disclosure and reporting ranges from legal restrictions on punitive pay secrecy policies to empowering workers to know their worth to voluntary disclosures by employers to new proposed reporting requirements. Taken together these initiatives promise to transform existing expectations about access to wage information.

Legal Limitations on Pay Secrecy Policies and Practices

Traditionally, many employers sought to limit the ability of workers to share information through formal pay secrecy policies or by enforcing informal norms or practices. One well-regarded survey found in 2010 that about half of all employees report they are formally barred or discouraged from discussing or disclosing information about their pay, with an even greater proportion of private sector employees indicating that pay information at their workplace Is secret.[2] In addition, cultural

[1] P.L. 111-2 (2009).
[2] Ariane Hegewisch, et al, *Pay Secrecy and Wage Discrimination,* Institute for Women's Policy Research (2011), http://www.iwpr.org/publications/pubs/pay-secrecy-and-wage-discrimination.

expectations can prevent individuals from asking about or disclosing their pay even where there is no explicit workplace restriction. Pay secrecy policies and practices not only make it harder for employees to identify or challenge unfair pay practices, they can have other negative impacts on workers and employers, such as harming performance, morale, and retention.[3]

Pay secrecy policies have flourished despite significant question as to their legality. Prior to 2015, California, Colorado, DC, Illinois, Louisiana, Maine, Michigan, Minnesota, New Hampshire, New Jersey, and Vermont had some form of pay secrecy restriction.[4] And just since 2015, new laws passed in Connecticut, Delaware, Massachusetts New York, and Oregon have significantly expanded state law protections. Generally, these laws provide certain exceptions or exclusions, for example, where employees have broad access to salary records as part of their work responsibilities. Federal law has also limited pay secrecy for some time. The National Labor Relations Board has established in a series of rulings that employer pay secrecy policies or practices can violate the National Labor Relations Act. The NLRB decisions protect the right of non-supervisory workers to share information about wages as a necessary instrument of collective action.[5] In light of these existing legal mandates, it should be very difficult to sustain formal policies against discussing wages. However, limited enforcement and knowledge has blunted their impact.[6]

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[3] OFCCP Pay Transparency Final Rule, *infra* note 7 (citing studies).
[4] State law information compiled from Department of Labor Women's Bureau resources at https://www.dol.gov/wb/media/WB_PaySecrecy_FactSheet_508.pdf and https://www.dol.gov/wb/equalpay/equalpaymap.htm and more recent news accounts.
[5] *See, e.g.,* National Labor Relations Board Decision and Order, *T-Mobile USA, Inc.*, Case No. 28-CA-106758 (2016), https://www.nlrb.gov/case/28-CA-106758; *National Labor Relations Board v. Main Street Terrace Care Center,* 216 F.3d 531 (6th Cir. 2000).
[6] Tom Driesbach, *Pay Secrecy Policies at Work: Often Illegal, and Misunderstood,* NPR (April 13, 2014), http://www.npr.org/2014/04/13/301989789/pay-secrecy-policies-at-work-often-illegal-and-misunderstood; *The Law That Is Supposed to Protect Your Right To Talk About Pay Doesn't Actually Work*, Think Progress (March 25, 2015), https://thinkprogress.org/the-law-that-is-supposed-to-protect-your-right-to-talk-about-pay-doesnt-actually-work-f3b20c90396d#.aznut44ra.

The recent uptick in new state laws and a new federal Executive Order have now focused greater attention on this issue and upended many assumptions about worker rights to ask about, discuss or disclose their pay information. In 2015, the U.S. Department of Labor's Office of Federal Contract Compliance Programs adopted new regulations for companies that do business with the federal government, to implement President Obama's Executive Order 13665 signed in 2014. These rules state that employees of and applicants to covered federal contractors are legally permitted to talk about their pay, and ask about the pay of others, without fear of reprisal, and subject to some limited defenses.[7]

Workers and Employers Taking Initiative on Pay Transparency

Regardless of the scope of legal protections, social, cultural and technological changes have made pay transparency an increasing reality on the ground. Workers are now using websites like Glassdoor or Payscale to share pay information. Those sites have produced new datasets and research that are expanding our understanding of the pay gap and its dynamics.[8] A few private employers have implemented full pay transparency, a framework public employers have already adapted to.[9]

At the same time, investor pressure,[10] union engagement[11] and high profile hacks and leaks[12] have begun to open the conversation about internal pay equity studies to the public. A few major

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[7] U.S. Department of Labor Office of Federal Contract Compliance Programs, *Government Contractors Prohibitions Against Pay Secrecy Policies and Actions, Final Rule*, 80 FR 54934 (Sept. 11, 2015), available at https://www.gpo.gov/fdsys/pkg/FR-2015-09-11/pdf/2015-22547.pdf;

[8] Andrew Chamberlain, *Demystifying the Gender Pay Gap, Evidence from Glassdoor Salary Data,* Glassdoor.com (March 23, 2016), https://www.glassdoor.com/research/studies/gender-pay-gap/.

[9] Erica Morphy, *Jet.com Is Making Its Employees' Salaries Transparent and Non-Negotiable,* Forbes (July 21, 2015); Alison Griswold, *Here's Why Whole Foods Lets Employees Look Up Each Others' Salaries*, Business Insider (March 3, 2014).

[10] Lisa Hayles, Boston Common Asset Management Comment to U.S. EEOC on Proposed Revision of the Employer Information (EEO-1) Report to Include Collection of Pay Data, available at https://www.regulations.gov/document?D=EEOC-2016-0002-0240; Susan Baker and Brianna Murphy, Trillium Asset Management Comment to U.S. EEOC on Proposed Revision of the Employer Information (EEO-1) Report to Include Collection of Pay Data, available at http://www.trilliuminvest.com/wp-content/uploads/2016/03/EEOC-Comment-Letter-3.9.16.pdf; Katie Johnson, *She's Pressing Top Companies on Pay Equity*, Boston Globe (May 21, 2016), available at

employers have taken the previously unprecedented step of publicly disclosing their pay equity audits – with Amazon, Microsoft, Salesforce and the Gap publishing their findings and plans on company websites or putting them in public press releases.[13] This follows other disclosures from tech employers such as Apple, Cisco and Google who voluntarily released their EEO-1 data, along with broader publication of their diversity data and measures.[14]

Even more companies have made new voluntary commitments to incorporate regular pay equity audits into their business practices. For example, over the last several years, at least 100 employers have joined the Boston Women's Compact. The Compact requires companies signing on to address the gender pay gap through self-assessment and other best practices.[15] In June of 2016 the White House asked major companies to sign a pledge that they would make pay equity studies standard operating procedure – and twenty-eight have now agreed to make that commitment. The "Equal Pay Pledge," states that signatories will conduct regular, companywide pay equity audits that include an assessment of pay differences across occupations and the potential impact of hiring, promotion and other practices on gender pay equity.[16]

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https://www.bostonglobe.com/business/2016/05/20/she-pressing-top-companies-pay-equity/tA0XUQep7QCRGj6NTG82pL/story.html.

[11] Alexander C. Kaufman and Emily Peck, *Wall Street Journal Vows to Fix Pay Gap for Women and Minorities,* Huffington Post (March 24, 2016), http://www.huffingtonpost.com/entry/wall-street-journal-pay-gap_us_56f44629e4b0143a9b47bc4d.

[12] Libby Copeland, *Sony Pictures Hack Reveals Stark Gender Pay Gap,* Slate (Dec. 5, 2014), http://www.slate.com/blogs/xx_factor/2014/12/05/sony_pictures_hack_reveals_gender_pay_gap_at_the_entertainment_company_and.html.

[13] Diversity at Amazon, https://www.amazon.com/b/ref=tb_surl_diversity/?node=10080092011); Salesforce, *Equality at Salesforce: The Equal Pay Assessment Update* (March 8. 2016), available at https://www.salesforce.com/blog/2016/03/equality-at-salesforce-equal-pay.html; Cora Lewis, *These Companies are Eliminating Their Gender Pay Gaps,* Buzzfeed (March 14, 2016), available at https://www.buzzfeed.com/coralewis/companies-are-eliminating-their-gender-pay-gaps?utm_term=.ek1l5WEXv#.nkGVy6reK.

[14] http://opendiversitydata.org/.

[15] City of Boston, Boston Women's Compact, http://www.cityofboston.gov/women/workforce/compact.asp.

[16] *White House Equal Pay Pledge,* available at https://www.whitehouse.gov/webform/white-house-equal-pay-pledge; *White House Fact Sheet: Government, Businesses and Organizations Announce $50 Million in Commitments to Support Women and*

New Proposed Reporting Requirements

Finally, over the last several years, federal agencies have been considering options to require employers to report summary pay data for enforcement purposes. OFCCP has been engaged in a rulemaking process that would require federal contractors to provide summary pay data -- beginning with a process for gathering input in 2011 and a proposed rule published in 2014.[17] That process has now merged with an EEOC proposal to expand the current EEO-1 form to collect pay as well as representation information.[18]

The EEOC's rulemaking is not yet complete, but the proposal would require employers with 100 or more employees to provide summary information based on W-2 wage data by gender and race/ethnicity using the 10 EEO-1 occupational categories. Rather than specific pay amounts, the EEOC proposes reporting the number of workers within pay bands, as well as total hours worked. The agency anticipates beginning pay data collection with 2017 data to be reported by March of 2018.

Benefits of Voluntary Self-Analysis, Disclosure and Reporting

Although existing laws and regulations either require companies to implement regular pay equity analysis, or create strong risk management incentives to do so, progress remains uneven.[19] This makes the recent increase in voluntary self-analysis and stakeholder engagement particularly significant. And a new federal data collection requirement should further increase the amount and

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Girls (June 13, 2016), available at https://www.whitehouse.gov/the-press-office/2016/06/13/fact-sheet-government-businesses-and-organizations-announce-50-million.

[17] *See* Office of Federal Contract Compliance Programs, *Notice of Proposed Rule Making, Government Contractors, Requirement to Report Summary Data on Employee Compensation*, 79 F.R. 46562 (2014).

[18] 81 F.R. 45479, Agency/Docket Number 3046-007, Document Number 2016-16692, https://www.federalregister.gov/articles/2016/07/14/2016-16692/agency-information-collection-activities-notice-of-submission-for-omb-review-final-comment-request.

[19] Covered federal contractors must include regular self-analysis of compensation by race and gender as part of their EEO programs, *see* 41 C.F.R. §60-2.17, and all employers are potentially subject to public or private enforcement actions under federal or state laws banning pay discrimination.

quality of internal pay equity audits, by ensuring employers will review their data annually when compiling the report.

Measurement, transparency and accountability appear to be more effective than other kinds of common approaches to improving diversity and EEO outcomes generally.[20] Measuring and reporting on progress can help interrupt common biases and in-group favoritism by making outcomes more visible.[21] Collecting data and reviewing results seems to be particularly salient.[22] Research on federal contractors has identified a relationship between affirmative action programs -- which require companies to establish written plans, review data, set goals and monitor progress -- and progress in the workplace for women and workers of color.[23] These findings suggest that the movement toward greater disclosure, increased reporting and more transparency is an important intervention in addressing the pay gap.

[20] Frank Dobbin, Alexandra Kalev and Erin Kelly, *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies,* American Sociological Review (2006); Iris Bohnet, *What Works: Gender Equality by* Design (2016); Michele E. A. Jayne and Robert L. Dipboye, *Leveraging Diversity to Improve Business Performance: Research Findings and Recommendations for Organizations*, Human Resource Management (Winter 2004); Frank Dobbin and Alexandra Kalev, *Why Diversity Programs Fail, And What Works Better*, Harvard Business Review (July-August 2016).
[21] Barbara Reskin, *The Proximate Cause of Employment Discrimination,* Contemporary Sociology (2000); Christine Jolls and Cass Sunstein, *Debiasing Through Law*, Journal of Legal Studies (2006); Joel Nadler, et al, *Aversive Discrimination in Employment Interviews: Reducing Effects of Sexual Orientation Bias with Accountability,* Psychology of Sexual Orientation and Gender Diversity (2014).
[22] Bohnet (2016); Dobbin & Kalev (2016), *supra* note 20.
[23] *See, e.g.,* Fidan Ana Kurtulus, *Affirmative Action and the Occupational Advancement of Women and Minorities 1973-2003*, Industrial Relations (2012); Jonathan S. Leonard, *The Impact of Affirmative Action on Employment*, Journal of Labor Economics (1984).

Unequal Payday

Pamela Coukos (April 12, 2016)

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https://workingtowardequality.wordpress.com/2016/04/12/unequal-payday/.

It's Equal Pay Day[1] — except that it's not. It's a funny idea in the first place, naming a special day to recognize the systematic shortchanging of the wages of more than half the population in the same way we might celebrate a famous person, place or event. More importantly, there is not really some specific point in the calendar when women "catch up" to what men have earned in the year before. When you look at the big picture, you can't pick a single day when women are at parity with men. It's always some kind of unequal payday.

If women on average earn somewhere around 79 percent of what men make in a year, at that rate it would take between 15 and 16 months for a typical women working full time to equal what a comparable man makes in just 12. If she's African-American or Latina, her months are more likely to stretch out well beyond 16[2]; but women of all races might need to work more days than the average, or a bit less. Because it also depends on where she lives[3], her age and her occupation.[4] On whether she's a mother,[5] whether she has a college degree, whether she works full time. There's an endless debate, often more myth than fact,[6] about exactly how many cents women lose on the dollar, and whether if you try really, really hard to narrow it down you can get it to single digits.[7] (At the end of the day, there's always a gap.)[8] And then what? To paraphrase one of my favorite quotes on this point, splitting the pennies into two piles — one stack called discrimination and the other called life choices — "just isn't very satisfying."[9]

Equal Pay Day is intended to smooth over these complications with simple and accessible symbolism. The calendar shows how much longer and harder she works for the money, in this case a year's worth of male earnings. Maybe it's not exactly 102 days into the next calendar year, but that really isn't the point. The point is we still have a problem and Equal Pay Day is a startling reminder that we are not equal, not yet.

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We need to get beyond only caring about — and only talking about — "equal pay for equal work." Paying women less for "substantially equal" work has been illegal under the Equal Pay Act for more than fifty years. And it's wrong, and it is still a problem.[10] But denying women equal **access** to equal work has also been illegal for more than fifty years under Title VII of the Civil Rights Act of 1964 and other state and federal laws. In other words, you can't limit women's access to higher paying jobs and then justify their wage gap as just an unfortunate accident of that difference in job duties. This is doubly true when ideas about what women "can" or "should" do skew who gets hired to do what.

Think that doesn't happen? Tell it to the women shunted into the bakery instead of a higher paying area of the grocery store,[11] the female laundry workers assigned to sort and fold clothes instead of loading the washers like the men for a higher hourly rate,[12] the women placed at the cashier station instead of valet parking the cars and getting tip money.[13] And if women just happen to get fewer work hours on the construction site, less valuable clients and fewer sales leads,[14] or fewer promotional opportunities then they get paid less too.[15] If we limit ourselves to the problem of equal pay for equal work we may miss a lot of unequal paydays.

That also means everything we think we know about whether differences in jobs, or in work hours, or experience "explains" enough of the pay gap comes with a giant asterisk. Overt discrimination as well as other barriers to equality of opportunity challenge the assumption that these are simply different "life choices" we can drop into the analysis without question. As I wrote several years back, "even the 'explained' differences between men and women might be more complicated. . . . If high school girls are discouraged from taking the math and science classes that lead to high-paying STEM jobs, shouldn't we in some way count that as a lost equal earnings opportunity?"[16]

Certainly it's impossible to sum up the big, sprawling social inequality of how gender (and race, and disability, and sexual orientation) distort fair earnings by just picking a single point in the calendar and calling it a draw. And yet sometimes we benefit from a useful and imprecise shorthand for

understanding a much more complex phenomenon. Happy Unequal Payday everyone; only 43 more years until we finally catch up.[17]

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[1] National Committee on Pay Equity, http://www.pay-equity.org/day.html.
[2] Bryce Covert and Dylan Petrohilos, *The Gender Wage Gap is a Chasm for Women of Color, In One Chart*, Think Progress (Sept. 18. 2014), http://thinkprogress.org/economy/2014/09/18/3569328/gender-wage-gap-race/.
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[5] Shelley J. Correll, et al, *Getting a Job: Is There a Motherhood Penalty?* American Journal of Sociology (March 2007), http://gender.stanford.edu/sites/default/files/motherhoodpenalty.pdf.
[6]Pamela Coukos, *50 Down, 50 to Go: Mythbusting the Pay Gap Revisited,* U.S. Department of Labor Blog (June 7, 2013), http://blog.dol.gov/2013/06/07/50-down-50-to-go-myth-busting-the-pay-gap-revisited/.
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[16] Coukos, *supra* note 8.
[17] Laura Bates, *Women Can't Wait Until 2059 for Equal Pay*, Time Magazine (April 11, 2016), http://time.com/4286884/women-cant-wait-for-equal-pay/.

NEWTON'S LAWS OF MOTION AND THE LGBT COMMUNITY... WHAT'S NEXT

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I. INTRODUCTION

It has been over 50 years since Title VII introduced employment anti-discrimination law to the United States, and yet, the concept of equal protection under the law still excludes the L.B.G.T. community at the federal level. Under Title VII, a person's race, color, religion, national origin and *sex* are all bases upon which workplace discrimination is federally prohibited. 42 U.S.C.A. § 2000e-2. Notably left unaccounted for by Congress are the classes "sexual orientation" and "gender identity." This lack of explicit nationwide protection has left countless lesbian, gay, bisexual and transgender employees exposed to adverse employment actions. Without clear and adequate legal recourse, L.B.G.T. individuals turn to their respective state's laws, only to find that more than half of U.S. states do not extend such protections, either.[1] According to the Human Rights Campaign, 28 out of 50 U.S. states do not include in their human rights laws "sexual orientation" or "gender identity" as protected categories for employees working in the private sector. *See* http://www.hrc.org/state_maps. In the absence of state and federal law, counties and county equivalents have the ability to enact local ordinances to protect the L.B.G.T. community, but there remains a dearth of protection at that level, as well.

Necessity, they say, is the mother of invention. Despite Title VII's narrow categorical protections, substantial ground has been made in extending protection on the basis of sexual orientation and transgender status, but the finish line has not yet been crossed. Leading the charge in many cases has been the Equal Employment Opportunity Commission, both internally, and in federal court. The result has been a profusion of case law interpreting the

[1] *See* Appendix 1.

meaning of "sex" as either inclusive or exclusive of sexual orientation and gender identity, categories pivotal in protecting the L.B.G.T. community. This submission is written to capture the evolution of the meaning of "sex" under Title VII, and will also explore state and local legislation regarding gender identity, and both the legal and cultural climate, and implications of such legislation.

II. THE ORIGINAL MEANING OF "SEX": A MAN OR A WOMAN, ONLY

There is an ongoing historical debate about whether the term "sex" was included in Title VII as a way to defeat it at its bill stage, or if its inclusion in the original 1964 statute was meant, in earnest, to inure to the benefit of women. *See Law and Inequality: A Journal of Theory and Practice*, Vol. 9, No. 2, March 1991, pp. 163-184 ("the popular interpretation of the addition of 'sex' to Title VII is that it was the result of a deliberate ploy of foes of the bill to scuttle it...[b]itter opponents of the job discrimination title...decided to load up the bill with objectionable features [such as gender equality] that might split the coalition supporting it."). One thing that is clear, however, is that Congress has been of no assistance in defining the term. Regardless of Congress' original intent, the fact the term "sex" has not been addressed by Congress since Title VII's enactment has left the interpretation of "sex" solely to the courts.

As with many of the first cases pertaining to civil rights issues, the first few decades of Title VII jurisprudence is beset with conservative rulings. Much of this is not only due in large part to Congress' silence on the interpretation of Title VII and the breadth of the term "sex," but also its inaction with respect to amending the statute. Indeed, many of the judges issuing these rulings felt constrained by the text of Title VII in the absence of Congressional guidance or action, using that fact as the basis for their decision. Many of the first cases also

used this position when analyzing "transsexualism" in the context of Title VII, and ultimately precluding it from Title VII's protections. *See, e.g., Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977) ("[i]n absence of any indication of congressional intent to expand the term 'sex' beyond its traditional meaning, for purposes of Title VII, the Court of Appeals would not enlarge Title VII's application to encompass employment discrimination against individuals who undergo sex changes"); *Powell v. Read's, Inc.*, 436 F. Supp. 369 (D. Md. 1977) ("[c]omplaint wherein male who was engaged in trial venture of living as a woman as prerequisite to having a sex change operation claimed that he had been unlawfully discriminated against on the basis of sex in that he was fired on the first day of his job when the supervisor discovered that he was male failed to state a cause of action under the Civil Rights Act of 1964…the Act did not reach discrimination against a transsexual").

Perhaps the court in *Voyles* best summarized the judicial climate at the outset of this endeavor:

> Section 2000e-2(a)(1) speaks of discrimination on the basis of one's "sex." No mention is made of change of sex or of sexual preference. The legislative history of as well as the case law interpreting Title VII nowhere indicate that "sex" discrimination was meant to embrace 'transsexual' discrimination, or any permutation or combination thereof. Indeed, neither party has cited, nor does research disclose, a single case which holds squarely that Title VII provides redress for claims of the sort raised here.
>
> Furthermore, even the most cursory examination of the legislative history surrounding passage of Title VII reveals that Congress' paramount, if not sole, purpose in banning employment practices predicated upon an individual's sex was to prohibit conduct which, had the victim been a member of the opposite sex, would not have otherwise occurred. Situations involving transsexuals, homosexuals or bi-sexuals were simply not considered, and from this void the Court is not permitted to fashion its own judicial interdictions.
>
> Recognizing this apparent oversight, various members of the House of Representatives have, on three separate occasions during this year alone, introduced

> as of yet unenacted legislation which would amend § 2000e-2(a) to include 'affectional or sexual preference' as additional basis upon which employers are precluded from discharging their employees. HR 166, 94th Cong., 1st Sess. (1975); HR 2667, 94th Cong., 1st Sess. (1975); HR 5452, 94th Cong., 1st Sess. (1975) (HR 5452 was referred to the House Committee on the Judiciary on March 25, 1975, and subsequently referred to the Subcommittee on Civil and Constitutional Rights on March 31, 1975, where its disposition is still pending). Thus, it becomes clear that in enacting Title VII, Congress had no intention of proscribing discrimination based on an individual's transsexualism, and only recently has it attempted to include conduct within the reach of Title VII which is even remotely applicable to the complained-of activity here.

Voyles v. Ralph K. Davies Med. Ctr., 403 F. Supp. 456, 457 (N.D. Cal. 1975), *aff'd*, 570 F.2d 354 (9th Cir. 1978); *see also, e.g., Smith v. Liberty Mut. Ins. Co.*, 395 F. Supp. 1098, 1100–01 (N.D. Ga. 1975), *aff'd*, 569 F.2d 325 (5th Cir. 1978) ("[w]hether or not the Congress should, by law, forbid discrimination based upon 'affectional or sexual preference' of an applicant, it is clear that the Congress has not done so"); *Gay Law Students Ass'n v. Pac. Tel. & Tel. Co.*, 65 Cal. App. 3d 608, 135 Cal. Rptr. 465, 470 (Ct. App. 1977), *vacated sub nom. Gay Law Students Assn. v. Pac. Tel. & Tel. Co.*, 24 Cal. 3d 458, 595 P.2d 592 (1979) (noting in its decision to exclude sexual orientation from Title VII's California counterpart that Title VII "has been interpreted by the United States Supreme Court and other federal courts to prohibit only those bases of employment discrimination enumerated in the Act.") *citing Espinoza v. Farah Mfg. Co.* (1973) 414 U.S. 86, 95, 94 S.Ct. 334, 38 L.Ed.2d 287; *Bradington v. International Business Machines Corp.* (D.Md.1973) 360 F.Supp. 845, 852, *aff'd*. (4th Cir. 1974) 492 F.2d 1240).

Later court decisions followed along the same path, adhering to a strict reading of the term "sex." *See, e.g., Ulane v. E. Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984). In denying protections against discrimination on the basis of one's sexual identity (and comparing it to the analysis used in denying sexual orientation the same protections as "sex"), the *Ulane* court

reasoned that "the phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men." *Ulane*, at 1085. Though the *Ulane* court still used the lack of legislative history as a basis for its opinion, it also demonstrated a willingness to apply the strictest of readings to a single term, an analysis that has been perpetuated each decade since, and still has major implications today. *See e.g., Griffith v. Keystone Steel & Wire, Div. of Keystone Consol. Indus., Inc.*, 887 F. Supp. 1133, 1136 (C.D. Ill. 1995); *Creed v. Family Express Corp.*, No. 306-CV-465RM, 2007 WL 2265630, at *2 (N.D. Ind. Aug. 3, 2007); *Hively v. Ivy Tech Cmty. Coll., S. Bend*, No. 15-1720, 2016 WL 4039703, at *1 (7th Cir. July 28, 2016).

It should be noted that many of the earlier internal EEOC decisions also found against allowing sexual orientation to stand on its own as a basis upon which a person cannot be discriminated under both Title VII and its own EEOC regulations. *See Robert Campbell*, EEOC DOC 01831816, 1983 WL 411831, at *1 (Dec. 13, 1983) ("[n]either the EEOC Regulations nor Title VII include sexual orientation as a proscribed basis of discrimination"); *Mark E. Smith, Appellant*, EEOC DOC 01851294, EEOC DOC 01851295 (June 11, 1986) ("Congress intended Title VII's ban on sexual discrimination in employment to prevent discrimination because of gender, not because of sexual orientation or preference.").

To overcome the prevailing view at the time, courts needed to look beyond the statutory language and the perceived intent of such language, and espouse an entirely different substantive position. In a landmark decision rendered in 1989, a far more progressive and expansive analysis was introduced on the country's biggest legal stage.

III. DOES "SEX" INCLUDE SEXUAL ORIENTATION *VIS-À-VIS* SEXUAL STEREOTYPES?

a. The *Price Waterhouse* Decision

Price Waterhouse is a Supreme Court decision that expanded the protective coverage provided to citizens under the term "sex" to include sex stereotypes. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989) (*superseded by statute on other grounds*). Though the case has nothing, specifically, to do with sexual orientation or gender identity, the analysis and reasoning proffered in the plurality opinion has since provided a path for asserting sex-based discrimination based upon sexual orientation and gender identity.

The Plaintiff in the original lower court filing, Hopkins, was a female senior manager in one of the offices of Defendant Price Waterhouse, a professional accounting partnership. *Id*. at 228, 1778. In 1982, Hopkins was nominated by a partner of Price Waterhouse to be considered for partnership. Integral to the partnership selection process was the comments of existing partners who review the application of each candidate. *Id*. at 251, 1971. Of the 662 partners at Price Waterhouse at the time of Hopkins' consideration, "7 were women." *Id*. at 233, 1781. "Of the 88 persons proposed for partnership that year, only 1—Hopkins—was a woman...Forty-seven of these candidates were admitted to the partnership, 21 were rejected, and 20…were 'held' for reconsideration the following year." *Id*. Of the 26 partners with an informed opinion of Hopkins who had submitted comments on Hopkins, only half supported her bid for partnership, with the others either recommending her candidacy be denied, or held in abeyance for a later cycle of partnership selection. *Id*. at 233, 1781. In comparison to the 88 other candidates for partnership, none had Hopkins' record for successfully securing contracts, a record which included securing a

$25,000,000 government contract bid during the same year as her partnership candidacy. *Id*. at 233-234, 1782.

Hopkins' candidacy was ultimately placed on hold, with the aim of reconsideration the following year. *Id*. at 228, 1778. When the Price Waterhouse partners refused to re-propose Hopkins as a partnership candidate in 1983, Hopkins filed suit, alleging sex discrimination in violation of Title VII. In overall support of their decision to not grant the partnership title to Hopkins, partners at Price Waterhouse, "[b]oth supporters and opponents of her candidacy," cited to their perception that Hopkins "was sometimes overly aggressive, unduly harsh, difficult to work with and impatient with staff." *Id*., at 235, 1782. Of more significant legal impact, the partners offered the following additional comments, which became the subject of scrutiny in this case: "[Hopkins is] macho"; "[she] overcompensated for being a woman"; "[she should] take a course in charm school"; "[she might have been seen by opposing partners as objectionable] because it's a lady using foul language"; "[she] matured from a tough-talking somewhat masculine hard-nosed manager to an authoritative, formidable, but much more appealing lady partner candidate"; and finally, "[she should] walk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id*.

The obvious hurdles Hopkins faced in her pursuit of recourse under Title VII were twofold. First, Hopkins had to overcome the overwhelming case law which narrowly interpreted "sex" as only being on the basis of either being a man or a woman. Second, Hopkins had to overcome the fact that most courts, to date, gave heavy credence to the position that Congress' abstinence from offering statutory interpretative guidance perpetuated the argument that sex is to be as narrowly construed as possible. Contributing to the difficulty of her chances at success

was the simple fact that not once did any of the partners ever explicitly say that their decision was made because Hopkins was a woman.

Delivering a forceful blow to employers off the bat, Justice Brennan, who penned the plurality opinion in *Price Waterhouse*, immediately dispelled the theory that Congress' inaction with respect to "sex" is an indicator of their position. In fact, Brennan wielded that detail as a weapon with which to carve out an opening for future litigants. In referring to Congress' limited inclusions of only "sex, race, religion, and national origin" in Title VII, Justice Brennan noted that "the statute does not purport to limit the other qualities and characteristics that employers *may* take into account in making their employment decisions." Essentially, Justice Brennan's take is that Congress' silence with respect to Title VII was an open invitation for courts to liberally interpret its meaning, which serves as the very foundation upon which the sex-based stereotypes argument is built.

Justice Brennan more explicitly develops his opinion by disavowing sex-based stereotype discrimination as legally permissible. The opinion does so by recognizing that decisions made because of stereotypes associated with one sex over the other are just as much based on sex as decisions made specifically because that person is a man or a woman. Brennan supports this notion with more than a few poignant statements, not the least of which is, "[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." *Id.* at 250, 1790-1791. Brennan continues with this line of reasoning by stating "if an employee's flawed 'interpersonal skills' can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism." *Id*. at 256, 1793.

b. Cases Interpreting *Price Waterhouse*

Price Waterhouse has had a profound effect on Title VII litigation since the opinion was rendered. To be sure, a number of courts since the 1989 decision have held that where the employer acts upon "stereotypes of sexual roles in making employment decisions, or allows the use of these stereotypes in the creation of a hostile or abusive work environment, then the employer opens itself to liability under Title VII's prohibition of discrimination on the basis of sex." *Tinory v. Autozoners*, No. CV 13-11477-DPW, 2016 WL 320108, at *5 (D. Mass. Jan. 26, 2016) *quoting Centola v. Potter*, 183 F. Supp. 2d 403, 409 (D. Mass. 2002). Specifically with respect to Plaintiffs seeking to protect against sexual orientation or gender identity-based discrimination under the federal law, *Price Waterhouse*'s introduction of this broader standard has been a boon. *Smith v. City of Salem, Ohio*, 378 F.3d 566, 573 (6th Cir. 2004) ("…the approach in *Holloway*, *Sommers*, and *Ulane*—and by the district court in this case—has been eviscerated by *Price Waterhouse*) *citing Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000) ("[t]he initial judicial approach taken in cases such as *Holloway* [and *Ulane*] has been overruled by the logic and language of *Price Waterhouse*.").

In *Glenn v. Brumby*, the court, relying on *Price Waterhouse* and the sex-based stereotype discrimination argument, held that the Defendant discriminated against the Plaintiff because she was transitioning from a male to a female. *Glenn v. Brumby*, 663 F.3d 1312, 1321 (11th Cir. 2011). Where this platform would have more likely than not failed pre-*Price Waterhouse*, the court in *Brumby* reasoned that "[T]he very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior." *Id*. at 1316. Though this was an Equal Protection Clause case, the court relied on

Title VII cases in determining that "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination…" *Id*. at 1317.

In *Terveer*, the employer-Defendant began treating the Plaintiff differently and adversely after learning of his homosexuality, which ultimately culminated in denying Plaintiff a promotion. *Terveer v. Billington*, 34 F. Supp. 3d 100, 105–08 (D.D.C. 2014). Traditional notions of Title VII would have precluded the Plaintiff from recovering under the statute. However, *Terver* was able to successfully advance the argument that Title VII extended coverage for protection against discrimination based on sex stereotypes. The court, sympathizing with this sentiment and citing *Price Waterhouse* and its progeny, accordingly found satisfactory the assertions that Plaintiff is:

> a homosexual male whose sexual orientation is not consistent with the Defendant's perception of acceptable gender roles, Am. Compl. ¶ 55, that his status as a homosexual male did not conform to the Defendant's gender stereotypes associated with men under Mech's supervision or at the LOC, *id.* ¶ 59, and that his orientation as homosexual had removed him from Mech's preconceived definition of male,…. *id.* ¶ 13.

Id. at 116. *citing Price Waterhouse*, 490 U.S. at 251, 1775 ("we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.").

Likewise, in *Heller*, the court also attempted to remove any distinction that may practically exist between sexual orientation and sex with respect to workplace discrimination under Title VII. The Plaintiff in this case was an openly gay woman. *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1216–20 (D. Or. 2002). Her employer would constantly berate Plaintiff with derogatory remarks in connection with her known relationship with another woman. *Id*. Almost immediately after informing her employer that she planned to

report these comments to her employer's board of directors, *Heller* was fired from her position. *Id*.

Like in *Terveer* and *Brumby*, the court determined that the Defendants' pre-conceived notions of gender, more specifically, that a man should date a woman and that a woman should date a man, are stereotypes, which, if they form the basis of an adverse employment action, constitute Title VII sex discrimination. *Id*. at 1224 ("[v]iewing the evidence in the light most favorable to plaintiff, a jury could find that [Defendant] repeatedly harassed (and ultimately discharged) Heller because Heller did not conform to [Defendant's]stereotype of how a woman ought to behave…Heller is attracted to and dates other women, whereas [Defendant] believes that a woman should be attracted to and date only men."). In support of this position, the court attempted to place practical realities on the situation by way of a comparison to heterosexual plaintiffs in such discrimination cases:

> If an employer subjected a heterosexual employee to the sort of abuse allegedly endured by Heller—including numerous unwanted offensive comments regarding her sex life—the evidence would be sufficient to state a claim for violation of Title VII. The result should not differ simply because the victim of the harassment is homosexual.

Id. at 1222–23. *Doe v. City of Belleville*, 119 F.3d 563, 575 (7th Cir. 1997) ("observing that if the plaintiff in that case had been a woman instead of a man, 'there would be no agonizing over whether the harassment ... described could be understood as sex discrimination'"), *vacated and remanded for reconsideration in light of Oncale*, 523 U.S. 1001, 118 S.Ct. 1183, 140 L.Ed.2d 313 (1998) (case settled on remand).

Finally, the court in *Videkis*, a very recent decision, has taken this notion even further, noting that, essentially, there is no line between discrimination on the basis of sexual

orientation and discrimination based on sex, stereotypes aside. There, the court wrote the following:

> the line between discrimination based on gender stereotyping and discrimination based on sexual orientation is blurry, at best. (Dkt. No. 25.) After further briefing and argument, the Court concludes that the distinction is illusory and artificial, and that sexual orientation discrimination is not a category distinct from sex or gender discrimination. Thus, claims of discrimination based on sexual orientation are covered by Title VII and IX, but not as a category of independent claims separate from sex and gender stereotype. Rather, claims of sexual orientation discrimination are gender stereotype or sex discrimination claims. Other courts have acknowledged the difficulty of distinguishing sexual orientation discrimination from discrimination based on sex or gender stereotypes. See, e.g., *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 291 (3d Cir.2009) (stating that "the line between sexual orientation discrimination and discrimination 'because of sex' can be difficult to draw"); Dawson v. Bumble & Bumble, 398 F.3d 211, 217 (2d Cir.2005) (acknowledging that it would be difficult to determine if an actionable Title VII claim was stated when a plaintiff stated she was discriminated against based on her sex, her failure to conform to gender norms, and her sexual orientation, because "the borders [between these classes] are so imprecise" (alteration in original)); *Centola v. Potter*, 183 F.Supp.2d 403, 408 (D.Mass.2002)(acknowledging that "the line between discrimination because of sexual orientation and discrimination because of sex is hardly clear"). Simply put, the line between sex discrimination and sexual orientation discrimination is "difficult to draw" because that line does not exist, save as a lingering and faulty judicial construct.

Videckis v. Pepperdine Univ., 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015). This position, in advancing even beyond the ambit of *Price Waterhouse*, is indicative of some of the recent internal EEOC decisions rendered in this area, and the other cases that cite to the authority espoused therein.

IV. DOES "SEX" INCLUDE SEXUAL ORIENTATION BY ITS VERY NATURE?

a. The EEOC's *Baldwin* Decision and Its Impact

In holding that Title VII facially prohibits discrimination on the basis of sexual orientation, the *Videckis* court was persuaded by the EEOC's decision in *Baldwin v. Dep't of Transportation*, EEOC Appeal No. 0120133080 (July 15, 2015). *Baldwin* involved an air traffic controller who alleged in a complaint to the EEOC that he was discriminated against on the basis of his sexual orientation when he was not selected for a permanent management position at a Miami facility. *Id*. at 3. Under EEOC precedent, in determining whether a Title VII claim for sex discrimination has been stated, the EEOC examines whether the challenged employment action was made in reliance on "sex-based considerations" or whether gender "was taken into account." *Baldwin* at 5. While *Baldwin* explicitly adopted the sex-stereotyping rationale for allowing sexual orientation discrimination claims to proceed under Title VII in EEOC proceedings, it additionally took the leap that could become the subject of Title VII litigation for the foreseeable future. *Id*. at 9.

In *Baldwin*, the EEOC held that, where an employer discriminates against an employee on the basis of his or her sexual orientation, sex-based considerations are necessarily at play, given that sexual orientation is a characteristic definitionally tied to one's sex. *Id*. at 6. The *Baldwin* decision signified the advent of the EEOC's current interpretation of Title VII, which diverges from previous Title VII jurisprudence by regarding sexual orientation discrimination as necessarily sex-based discrimination. In applying the EEOC's position that allegations of sexual orientation discrimination necessarily involves sex-based considerations, the *Videkis* court reasoned that plaintiffs who allege sexual orientation discrimination allege that the employer took the employee's sex into account by treating him or her differently for associating with a person of the same sex.

Videckis' approval of *Baldwin* is not inconsequential, by any means. It's extension of the *Baldwin* position represents a break from long-standing Title VII precedent roundly rejecting a cause of action for sexual orientation discrimination under Title VII. With that said, some district courts are currently at odds over whether to adopt the EEOC's *Baldwin* decision and recognize sexual orientation discrimination under Title VII. For instance, while *Isaacs v. Felder Services*, LLC, 143 F. Supp. 3d 1190, 1193-94 (M.D. Ala. 2015) relied on *Baldwin* in adopting the view that sexual orientation discrimination is cognizable under Title VI, *Hinton v. Va. Union Univ.*, 2016 WL 2621967 (E.D. Va. 2016) disagreed with *Isaacs* when it affirmed its belief that the EEOC's view is merely persuasive, thus failing to extend Title VII protection to claims of sexual orientation discrimination.

Still other courts have taken another approach in light of the Baldwin decision. Some have deferred their rulings on private lawsuits in anticipation of guidance on the question of whether sexual orientation discrimination is indeed "sex discrimination" by its very nature given the *Baldwin* interpretation. *See*, *e. g.*, *Matavka v. Board of Educ. Of J. Sterling Morton High School Dist.*, 201, 2016 WL 3063950 (N. D. Ill. 2016) (noting that "[s]hould [the circuit court] follow [*Isaacs* and *Videckis*] in finding *Baldwin* persuasive, [such a] finding plainly would affect the disposition of [the motion before it].").

b. EEOC's Involvement in Title VII Litigation in District Court

On March 1, 2016, the EEOC filed two landmark federal cases, arguing for the first time in the federal courts that Title VII protections extend to sexual orientation by virtue of one's sex. (*See* Appendices 2 and 3 for copies of the both complaints). *EEOC v. Scott Medical Health Center*, Case No. 2:16-CV-00225; *EEOC v. Pallet Companies d/b/a IFCO Systems NA,*

Inc., Case No. 1:16-CV-00595. With respect to both cases, the argument advanced by the EEOC, in essence, has two integral factors. First, borrowing from the *Baldwin* opinion issued in July of 2015, the EEOC more specifically contends that

> "Sexual orientation" as a concept cannot be defined or understood without reference to sex. A man is referred to as "gay" if he is physically and/or emotionally attracted to other men. A woman is referred to as "lesbian" if she is physically and/or emotionally attracted to other women. Someone is referred to as "heterosexual" or "straight" if he or she is physically and/or emotionally attracted to someone of the opposite-sex. See, e.g., American Psychological Ass'n, "Definition of Terms: Sex, Gender, Gender Identity, Sexual Orientation" (Feb. 2011), available at http://www.apa.org/pi/lgbt/resources/sexuality-definitions.pdf ("Sexual orientation refers to the sex of those to whom one is sexually and romantically attracted" (second emphasis added).

Baldwin v. Dep't of Transp., Appeal No. 0120133080 (July 15, 2015). At its core, the argument advanced by the EEOC in *Baldwin*, and now in the private sector in *Scott* and *Pallet Co.'s*, is that the two characteristics are inextricably linked, such that to discriminate on the basis of sexual orientation is to discriminate on the basis of sex, no matter how you slice it. This argument, as new as it is, has seen little critical legal analysis in the federal courts, and, accordingly, may not be the EEOC's strongest position.

But perhaps the second, more compelling argument advanced by the EEOC in these two cases is the *Price Waterhouse* argument grounded in sex-based stereotypes. In *Pallet Co.'s*, for example, it was alleged that an openly gay woman was terminated after complaining of anti-gay epithets meant to reinforce historical gender "norms," such as "I want to make you like men" and "you would look good in a dress." The EEOC has argued in its complaint that this "conduct…was motivated by sex (female)…in that [the Plaintiff], by virtue of her sexual orientation, did not conform to sex stereotypes and norms about females to which [the Defendants] subscribed." *Pallet Companies d/b/a IFCO Systems NA, Inc.*, Case No. 1:16-CV-

00595. This notion fundamentally proposes that, in such situations, but for an adversely affected employee's sex, he or she would not have been discriminated against for being insufficiently masculine or feminine." *Baldwin, v. Dep't of Transp.*, Appeal No. 0120133080 (July 15, 2015).

The parties recently settled this complaint. (*See* Appendix 4 for the Consent Decree associated with this case). Under the terms of the settlement, Pallet Co.'s, admitting no fault, as is customary in any settlement, will pay the plaintiff $182,200, and will pay an additional $20,000 over two years to the Human Rights Campaign Foundation.

Scott Medical involves a homosexual male working for a telemarketing company. The Plaintiff in this case was allegedly subjected to vile remarks from his direct supervisor, such as "fag," "faggot," "fucking faggot," "queer" and "fucking queer can't do your job." According to the complaint, the remarks were made on a regular basis, at least three to four times each week. The Defendant also invaded Plaintiff's personal life with other such derogatory remarks. Shortly after learning that the Plaintiff was in a relationship with another man, the Defendant said, "I always wondered how you fags have sex," "I don't understand how you fucking fags have sex," and "Who's the butch and who is the bitch?" In conjunction with these offensive statements, the Defendant allegedly mistreated Plaintiff by frequently screaming and yelling at him. Ultimately, when no action was taken to stop the harassment and discrimination, the Plaintiff resigned from his position.

The EEOC advanced the same argument in *Scott Medical* as it did in *Pallet Co.'s*. The Defendant in this action is challenging the EEOC's legal theories. Scott Medical Center moved the United States District Court and presiding judge Cathy Bissoon to dismiss the case, on the familiar premise that only Congress can extend employment protections to homosexual

people by amending Title VII. The EEOC responded by noting that a number of courts have adopted a broader view of Title VII's ban on sex discrimination, such as the *Price Waterhouse* sex stereotype argument.

The EEOC's general counsel, David Lopez, was clear with his agenda in saying, "[w]ith the filing of these two suits, the EEOC is continuing to solidify its commitment to ensuring that individuals are not discriminated against in workplaces because of their sexual orientation." Certainly, now that the EEOC is firmly entrenched in the fight for broader Title VII protections, employers, particularly those in jurisdictions without anti-discrimination laws, must exercise heightened discretion in their employment decisions in the event that these arguments are deemed successful by federal courts on a more national stage. The question remains, will *Baldwin*, advanced by *Scott Medical*, continue to gain acceptance in federal courts, specifically, in the circuit courts? Less than one month ago as this is being written, the question was answered in the negative.

c. The *Hively* Decision: Its Impact on EEOC Litigation and Other Federal Title VII Claims

Prior to July, 2016, no circuit had yet to formally adopt *Baldwin*. In what is already being discussed as a profound decision, the Seventh Circuit addressed *Baldwin* in *Hively*, when it squarely rejected its legal theory on sexual orientation discrimination. *Hively v. Ivy Tech Cmty. Coll., S. Bend*, No. 15-1720, 2016 WL 4039703 (7th Cir. July 28, 2016). In doing so, *Hively* effectively dealt a blow to the EEOC's preferred interpretation of Title VII. This long-awaited decision rejects *Baldwin*'s specific argument, and affirms the Seventh Circuit's overall position that Title VII does not provide a cause of action for sexual orientation discrimination.

The court offered a lengthy explanation for its decision, in part relying on prior Title VII jurisprudence and Congress's reticence to expand protections for gay and lesbian employees in the workplace. *Hively* also spends time discrediting the practical use of *Price Waterhouse*'s sex-stereotyping discrimination argument, and finally, contemplates the expansive interpretation of "sex discrimination" propagated by *Baldwin* and the few district courts that have had the chance to weigh in on and use *Baldwin* in support of their liberal decisions.

Hively involves a part-time adjunct professor who began teaching at Ivy Tech Community College in 2000. *Hively*, at 2. In December of 2013, Hively filed a *pro se* charge with the EEOC, alleging that she had been discriminated against based on her sexual orientation and blocked from full time employment without just cause, in violation of Title VII. *Id*. After "exhausting the procedural requirements" in the EEOC, Hively again filed a *pro se* complaint, this time in the district court, again claiming that Ivy Tech Community College refused to interview her for full time positions for which she was qualified, based on her sexual orientation in violation of Title VII. *Id.*

Ivy Tech offered the same defense in the district court that it did on appeal to the Seventh Circuit, pointing to pre-*Baldwin* precedent, both within and outside the Seventh Circuit. *Id.* at 3. These prior rulings, importantly, either reject, or do not address *Baldwin*'s central proposition that sexual orientation discrimination is both facially discriminatory under Title VII, as well under the *Price Waterhouse* sex-stereotyping theory. In relying on these prior rulings, the district court, accordingly, ruled in favor of Ivy Tech. *Hively* at 3.

The Seventh Circuit panel in *Hively* begins its legal analysis by devoting significant time to the legislative litany in which most courts that deny such Title VII claims are

well versed. *Hively* offers a detailed discussion of Congress' silence and repeated rejections of legislation aiming to extend Title VII to cover sexual orientation discrimination. Beyond simply iterating this well-established fact, *Hively* suggests that Congress' inaction in the face of a recognized "emerging [judicial and social] consensus that sexual orientation [discrimination] can no longer be tolerated," is not a result of negligence or a "want of knowledge" or opportunity. *Id.* at 6-7. Rather, the *Hively* court seems to take Congress' failure to amend Title VII as an expression of the affirmative intent not to include sexual orientation discrimination under the types of discrimination actionable under Title VII. *Id.* at 8-9.

The *Hively* court notes that its analysis could stop at the legislative-based argument. However, whether as lip service, because of "changing workplace norms," or an attempt to erase the notion that the Seventh Circuit simply cites to precedent with little legal analysis, as *Baldwin* suggests, the Seventh Circuit panel pressed forward. *Hively* continues with a lengthy exercise in sex discrimination history and the competing arguments advanced over the past few decades.

The *Hively* court next addresses the sex stereotyping argument. It recognizes that the chief issue in deciding such claims is that "it is exceptionally difficult to distinguish between [a gender non-conformity claim and a sexual orientation claim]," citing to multiple pro and anti-*Price Waterhouse* courts that echo the same sentiment. *Id at 5-6.* *Hively* claims there are two ways to deal with this: (1) "throw out the baby with the bathwater," which is to say, dismiss any claim in which the line is blurred; or (2) attempt to discern a difference between the two types of claims. *Id*. at 5-7. Of course, there is a third way to deal with the perceived lack of distinction that *Hively* does not address in this portion of the opinion, which is to treat gender non-

conformity discrimination and sexual orientation discrimination as one in the same, as more liberal courts have done. Though *Hively* seems to agree that dressing sexual orientation claims in the guise of sex stereotyping claims is a way to shoehorn what might be viewed as otherwise meritless Title VII actions into federal courts, it does not appear inclined to use that as an excuse for immediately rejecting claims that are difficult to differentiate. As the court puts it, "we cannot conclude that it is impossible [to recognize differences between the two claims]." *Id.* at 7.

Accordingly, the court then turns away from whether to dismiss bootstrapped claims, and turns to the manner in which sex stereotyping claims can be analyzed and distinguished from sexual orientation claims. *Hively* points out that harassment of gay and lesbian employees may stem from stereotypes about the gay "lifestyle" that are not connected to the sex of the employee (i.e. stereotypes regarding gay "promiscuity, religious beliefs, spending habits, child-rearing, sexual practices, or politics"). *Id.* Thus, the Seventh Circuit adopts the practice of attempting to "extricate the gender non-conformity claims from the sexual orientation claims," and ultimately, dismiss the claims that are unmistakably grounded in discrimination on the basis of sexual orientation. *Id*. In doing so, the court is essentially intimating that, unlike as asserted in *Baldwin*, sexual orientation discrimination is not always sex discrimination.

The *Hively* court makes some parting statements that leave the reader wondering what the future might bring for Title VII sex discrimination claims. *Hively* recognizes the paradox the decision creates, noting that most Americans would be surprised to learn that, at least under current federal law, anyone is guaranteed the right to marry someone of the same sex, yet a private employer would face no federal penalty for firing an employee who married their same-sex partner. *Id.* at 11. The Seventh Circuit effectively concedes that, though it does not

support sexual orientation discrimination, its hands are tied when faced with precedent and a lack of Congressional action to amend Title VII:

> Perhaps the writing is on the wall. It seems unlikely that our society can continue to condone a legal structure in which employees can be fired, harassed, demeaned, singled out for undesirable tasks, paid lower wages, demoted, passed over for promotions, and otherwise discriminated against solely based on who they date, love, or marry. The agency tasked with enforcing Title VII does not condone it, (*see Baldwin,* 2015 WL 4397641 at **5, 10); many of the federal courts to consider the matter have stated that they do not condone it (*see*, *e.g., Vickers*, 453 F.3d at 764–65; *Bibby*, 260 F.3d at 265; *Simonton,* 232 F.3d at 35; *Higgins*, 194 F.3d at 259; *Rene*, 243 F.3d at 1209, (Hug, J., *dissenting*); *Kay*, 142 Fed.Appx. at 51; *Silva*, 2000 WL 525573, at *1); and this court undoubtedly does not condone it (*see Ulane*, 742 F.2d at 1084). But writing on the wall is not enough. Until the writing comes in the form of a Supreme Court opinion or new legislation, we must adhere to the writing of our prior precedent, and therefore, the decision of the district court is AFFIRMED.

Id. at 15.

Proponents of the EEOC's *Baldwin* decision will undoubtedly be disappointed by the Seventh Circuit's ruling in *Hively* in that it squarely places the onus on Congress or the Supreme Court to afford Title VII's protection to employees discriminated against due to their sexual orientation. Certainly, the EEOC's position in *Scott Medical* has been placed in severe jeopardy, until such time as another circuit court rules in contrast to the ruling handed down by the Seventh Circuit court in *Hively*. In the meantime, those suffering sexual orientation discrimination must either plead sex-stereotyping discrimination and hope for the best (a pro-*Price Waterhouse* ruling), or be lucky enough to seek relief under an applicable state or local anti-discrimination statute, provided that there is such a statute in their state or locality.

d. Religious Freedom Laws and the Potential Impact on Gay Rights in the Workplace

When the Supreme Court handed down the *Hobby Lobby* decision in the summer of 2014, it immediately called into question the future of sexual orientation and gender identity

discrimination law in the United States. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014).

Hobby Lobby is a closely held, for-profit company that sells home goods, decorative items, and arts and crafts. As part of the Patient Protection and Affordable Care Act, the Department of Health and Human Services ("HHS") mandated that employers, such as Hobby Lobby, provide contraceptives to its employees. 42 U.S.C.A. § 300gg–13(a)(4). The owners of Hobby Lobby, and the owners of the two other closely held companies joining Hobby Lobby in the suit, "had sincere Christian beliefs that life begins at conception and that it would violate their religion to facilitate access to contraceptive drugs or devices that operate after that point." *Id.* at 2755. The storeowners challenged the HHS mandate as being violative of the Religious Freedom Restoration Act of 1993, and the Free Exercise Clause of the United States Constitution. 42 U.S.C.A. § 2000bb–1(b); U.S.C.A. Const.Amend. 1. The Supreme Court, in a five to four decision penned by Justice Alito, ruled in favor of Hobby Lobby, stating that:

> HHS has not shown that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion. The Government could, *e.g.,* assume the cost of providing the four contraceptives to women unable to obtain coverage due to their employers' religious objections. Or it could extend the accommodation that HHS has already established for religious nonprofit organizations to non-profit employers with religious objections to the contraceptive mandate. That accommodation does not impinge on the plaintiffs' religious beliefs that providing insurance coverage for the contraceptives at issue here violates their religion and it still serves HHS's stated interests. Pp. 2780 – 2783.

Id. at 2757–58.

In holding that religious beliefs trump a compelling government interest (where a viable alternative exists for the government), the court seemingly gave employers *carte blanche*

to make other employment related decisions based on their religious beliefs. Justice Alito did importantly note "that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction…" but that this decision "…provides no such shield." *Id*. at 2783. Presumably, that language would protect people from being discriminated against on the basis of sex where religious freedoms are espoused as the reason for otherwise discriminatory employment actions. But, how does it impact the L.B.G.T. community? If case law is still largely unsettled as to whether sexual orientation and gender identity are protected under the umbrella of "sex," can religious freedoms be asserted as an additional reason to deny employment to a homosexual person, or to terminate a person because he or she is transgender? These questions were answered in favor of employers and religious freedoms in a recently decided federal district court case. *See EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 14-cv-13710-SFC-DRG (E.D. MI filed 08/18/16) (holding that an employer can terminate a transgender employee using religious freedoms as a valid legal justification).[2] Some state legislatures are also attempting to use *Hobby Lobby* as a jumping-off point to enact religious freedom laws that might very well implicate the L.G.B.T. community in that way. *See* https://www.aclu.org/anti-L.G.B.T.-religious-exemption-legislation-across-country#rfra16. Certainly, this case, and these state laws cloud the future of L.G.B.T. rights even more.

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[2] *See* Appendices 5-9 for: (5) *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 8-18-16 Opinion & Order of Judge Sean F. Cox (6) *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, EEOC's Summary Judgement Motion Brief; (7) *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, ACLU's Unopposed Motion and Brief for Leave to File Amicus Curiae Brief in Support of EEOC's Summary Judgement Motion; and (8) *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, R.G. & G.R.'s Summary Judgment Motion Brief.

V. TRANSGENDER PROTECTIONS

a. State and Local Laws Regarding Workplace Discrimination on the Basis of Gender Identity

Transgender people often face a long and strenuous internal battle to act upon their gender identity and transition to the gender that allows them to live as their most authentic self. Whether it means facing the rejection of family and friends, becoming subject to physical violence or experiencing various forms of discrimination, transgender individuals continue to fight for global acceptance and equality.

Recently, the fight for equality received a major endorsement from New York State Governor Andrew Cuomo, who announced new regulations in October of 2015, which have since updated the state's human rights laws. After repeated but failed efforts to enact legislation, Governor Cuomo recently took executive action by introducing what the Governor's Office called the most sweeping regulations in the nation. The regulations, which cover employees throughout New York State, prohibit both private and public employers from discriminating against a person on the basis of transgender status. The regulations, according to Cuomo, "cover[] it all." *See* Mckinley, Jesse. *"Cuomo Planning Discrimination Protections for Transgender New Yorkers."* The New York Times. The New York Times, 22 Oct. 2015. Web. 17 Nov. 2015. More specifically, the regulations read:

> "(a) Statutory Authority. Pursuant to N.Y. Executive Law section 295.5, it is a power and a duty of the Division to adopt, promulgate, amend and rescind suitable rules and regulations to carry out the provisions of the N.Y. Executive Law, article 15 (Human Rights Law).
> (b) Definitions.
> (1) Gender identity means having or being perceived as having a gender identity, self-image, appearance, behavior or expression whether or not that gender

identity, self-image, appearance, behavior or expression is different from that traditionally associated with the sex assigned to that person at birth.
(2) A transgender person is an individual who has a gender identity different from the sex assigned to that individual at birth.
(3) Gender dysphoria is a recognized medical condition related to an individual having a gender identity different from the sex assigned at birth.
(c) Discrimination on the basis of gender identity is sex discrimination.
(1) The term ”;sex”; when used in the Human Rights Law includes gender identity and the status of being transgender.
(2) The prohibitions contained in the Human Rights Law against discrimination on the basis of sex, in all areas of jurisdiction where sex is a protected category, also prohibit discrimination on the basis of gender identity or the status of being transgender.
(3) Harassment on the basis of a person's gender identity or the status of being transgender is sexual harassment.
(d) Discrimination on the basis of gender dysphoria or other condition meeting the definition of disability in the Human Rights Law set out below is disability discrimination.
(1) The term ”;disability”; as defined in Human Rights Law section 292.21, means:(i) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques; or(ii) a record of such an impairment; or(iii) a condition regarded by others as such an impairment, provided, however, that in all provisions of this article dealing with employment, the term shall be limited to disabilities which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held.
(2) The term ”;disability”; when used in the Human Rights Law includes gender dysphoria or other condition meeting the definition of disability in the Human Rights Law set out above.
(3) The prohibitions contained in the Human Rights Law against discrimination on the basis of disability, in all areas of jurisdiction where disability is a protected category, also prohibit discrimination on the basis of gender dysphoria or other condition meeting the definition of disability in the Human Rights Law set out above.
(4) Refusal to provide reasonable accommodation for persons with gender dysphoria or other condition meeting the definition of disability in the Human Rights Law set out above, where requested and necessary, and in accordance with the Divisions regulations on reasonable accommodation found at section 466.11 of this Part, is disability discrimination.
(5) Harassment on the basis of a person's gender dysphoria or other condition meeting the definition of disability in the Human Rights Law set out above is harassment on the basis of disability.

N.Y. Comp. Codes R. & Regs. tit. 9, § 466.13.

Prior to enactment, the New York State Human Rights Law protected individuals from discrimination on the basis of only: race; creed; color; national origin; sexual orientation; military status; age; sex; marital status; disability; or familial status. When publically announcing the regulations, Cuomo stated, "[i]n 2015, it is clear that the fair legal interpretation and definition of a person's sex includes gender identity and gender expression." *See* Mckinley, Jesse. "Cuomo Planning Discrimination Protections for Transgender New Yorkers." The New York Times. The New York Times, 22 Oct. 2015. Web. 17 Nov. 2015. "The [New York Human Rights Law] left out the T, so to speak…[t]hat was not right, it was not fair, and it was not legal" Cuomo said, later adding, "[t]ransgender individuals deserve the same civil right that protects them from discrimination." *Id*.

According to the New York State Division of Human Rights, "[i]f the Division determines there is probable cause to believe harassment or discrimination has occurred, the Commissioner of Human Rights…may award job, housing or other benefits, back and front pay, [uncapped] compensatory damages for mental anguish, [and] civil fines and penalties,…up to $50,000 or up to $100,000 if the discrimination is found be 'willful, wanton or malicious…'". *Id*. This level of recovery is just as it would be under any other New York State Human Rights Law violation grounded in discrimination on the basis of one of the aforementioned protected categories.

New York's statute stands as the beacon for civil rights, as it was the "first state regulatory action in the nation to affirm that harassment and other forms of discrimination, by both public and private entities, on the basis of a person's gender identity, transgender status, or

gender dysphoria is considered unlawful discrimination." https://www.governor.ny.gov/news/governor-cuomo-introduces-regulations-protect-transgender-new-yorkers-unlawful-discrimination. On the state level as a whole, only 20 states offer some form of protections for transgender employees. *See* Appendix 1. Additionally, the governors of Indiana, Kentucky, Michigan, and Pennsylvania have also issued executive orders banning discrimination against transgender *public* employees. Per the American Civil Liberties Union, 200 cities and counties have banned gender identity discrimination, including localities such as Atlanta, Austin, Boise, Buffalo, Cincinnati, Dallas, El Paso, Indianapolis, Kansas City, Louisville, Milwaukee, New Orleans, New York City, Philadelphia, Phoenix, Pittsburgh, and San Antonio. *See* https://www.aclu.org/know-your-rights/transgender-people-and-law. As with discrimination on the basis of sexual orientation, if citizens are not lucky enough to live within a jurisdiction offering the kinds of protections New York has extended, they must rely on judicial interpretations of Title VII, a perilous and unclear path.

b. Title VII Litigation Regarding Gender Identity in the Absence of State or Local Protections

Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998) is a landmark Supreme Court case in the realm of L.G.B.T. rights. Surprisingly, *Oncale* had little to do with homosexuality or gender identity. In fact, the case involved male-on-male horseplay on an oilrig, which was ultimately deemed harassment. The case contemplated whether discrimination on the basis of sex can occur between a harasser and a victim of the same sex. The late Justice Scalia was forced to confront the well-known intention of Congress when it drafted Title VII; that sex discrimination protections were designed to

protect women from men, and to a smaller extent, men from women. In looking to side-step the policy behind Title VII legislation, Justice Scalia penned the following line which has become a rallying cry for many courts that take a liberal view of Title VII: "But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id*. at 79. It is unlikely Scalia, one of the most notoriously conservative justices in the past two decades, had gender identity in mind when he proffered that proposition. Nonetheless, many courts and EEOC decisions have begun to apply that same philosophy in order to denigrate the argument that Congress' silence equals a strict and narrow intent to which the judiciary must adhere.

Like with sexual orientation discrimination, the EEOC maintains a strong position on the issue of gender identity discrimination in the workplace, maintaining that such discrimination is prohibited discrimination "because of sex" in the eyes of Title VII. In recent years, the EEOC has brought and resolved a number of actions against employers alleged to have discriminated against their transgender employees.

The EEOC opinion *Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821 (2012), borrowing Justice Scalia's line from *Oncale*, exemplifies the EEOC's interpretation of Title VII with respect to gender identity discrimination. *Macy* involved a transgender police detective who alleged that she was denied a position for which she was otherwise qualified with the Bureau of Alcohol, Tobacco, Firearms and Explosives when she disclosed her transgender status. The EEOC took the opportunity to clarify its position that discrimination on the basis of gender identity is cognizable as sex discrimination under Title VII. Gender identity

discrimination is necessarily sex discrimination, according to *Macy*, because it involves non-conformance with gender norms and stereotypes and arises out of a plain reading of Title VII's "because of . . . sex" language. *Macy* and its offspring in turn look back to ***Price Waterhouse v. Hopkins***, 490 U. S. 228 (1989), which, again, held that sex-stereotyping discrimination is inherently discrimination on the basis of sex. The EEOC continues to file actions against employers that discriminate against transgender employees under the sex-stereotyping theory. A current pending case, ***EEOC v. Bojangles Restaurants, Inc.***, No. 5:16-cv-00654-BO (filed 2016), involves a North Carolina restaurant chain that has been accused of discriminating against a transgender employee. Specifically, the transgender employee allegedly was subjected to offensive comments made by managers demanding that the employee engage in behavior and grooming practices that are stereotypically male.

A number of federal courts have explicitly adopted EEOC's interpretation of Title VII, extending its protections to transgender plaintiffs. For example, in ***Fabian v. Hospital of Central Connecticut***, WL 1089178 (D. Conn. 2016), an orthopedic surgeon brought a Title VII action alleging that she was not hired because she disclosed her identity as a transgender woman who would begin work after she transitioned to presenting as a woman. The court held that transgender individuals discriminated against on the basis of their gender identity had cognizable sex discrimination claims under Title VII, citing *Macy* for support.

Private litigants have also found success in courts in arguing that gender identity discrimination constitutes prohibited sex-based discrimination. Most notably, the 4th, 6th, and 9th Circuits have expressly adopted the sex-stereotyping theory in holding that gender identity discrimination is prohibited by Title VII. ***See Schwenck v. Hartford***, 204 F. 3d 1187, 1201-02

(9th Cir. 2000); *see also Barnes v. City of Cincinnati*, 401 F. 3d 729 (6th Cir. 2005); *see also G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 2016 WL 1567467 (4th Cir. Apr. 19, 2016).

c. The Social State of Transgenderism in the United States and the Current Laws Either Perpetuating Discrimination or Protecting Against It

Transgender individuals continue to face struggles entirely separate and apart from the workplace discrimination to which they have been subject because of Title VII and various courts' interpretations of its drafters. To be sure, transgender individuals have endured disparate treatment in and been entangled in a constant fight for acceptance in their everyday social interactions.

Officer Budd is a man who transitioned from a woman in the same year he was finishing a course of study at the police academy to become a New York City police officer. *See* Rojas, Rick, *Transgender on the* Force. August 5, 2016. His whole life, he was burdened with the confusion of why he was born into a sex opposite from his gender identity. *Id*. An added layer of burden many in his position face is the prospect of disapproval from peers and society when the decision is ultimately made to be one's true self, publicly. Officer Budd recalls this feeling of insecurity with how he might be embraced, stating, "I didn't want to be judged before they got to know me as a person…I didn't want to be a science project." As New York Times writer Rick Rojas put it, "[t]hose who delay making the transition while on the force face the corrosive toll of living what feels like a fraudulent life; those who do make it risk being rejected from the tight-knit fellowship of law enforcement that was also central to their identity." Officer Budd was lucky enough to experience a "rebirth," after his transition, one that was received well

by an accepting group of officers in one of the nation's most accepting cities. Others are not quite as lucky.

Brad Roberts is an officer who worked for the Clark County School District in Nevada for more than two decades. Officer Roberts transitioned from a female to a male who, in accordance with his gender identity, has been using the men's bathroom since that time, just as any other man. In 2011, the Clark County School District banned Officer Roberts specifically from the men's bathroom, requiring that he submit evidence of genital surgery prior to being allowed re-entry. The ban was ultimately lifted because its of facially discriminatory aim, but not without Officer Roberts living through the public shame of being denied rights, and the humiliation of not having community acceptance for the person he knew himself to be for many years.

The State of North Carolina has enacted a similar statewide bathroom law, known as "HB2," that restricts transgender individuals from using public bathrooms that comport with their gender identity (e.g., a person originally born with the biological features of the male sex, but who identifies as a woman may not use a public restroom designed for women, regardless of whether that individual has undergone a sex change operation to either surgically remove such male biological features and/or add biological features of the female sex) N.C. Gen. Stat. Ann. § 143-760. The law specifically reads, in relevant part

> …(1) Biological sex.--The physical condition of being male or female, which is stated on a person's birth certificate…
> (3) Multiple occupancy bathroom or changing facility.--A facility designed or designated to be used by more than one person at a time where persons may be in various states of undress in the presence of other persons. A multiple occupancy bathroom or changing facility may include, but is not limited to, a restroom, locker room, changing room, or shower room….
> (4) Public agency.--Includes any of the following:

> a. Executive branch agencies.
> b. All agencies, boards, offices, and departments under the direction and control of a member of the Council of State.
> c. "Unit" as defined in G.S. 159-7(b)(15).
> d. "Public authority" as defined in G.S. 159-7(b)(10).
> e. A local board of education.
> f. The judicial branch.
> g. The legislative branch.
> h. Any other political subdivision of the State….
> (b) Single-Sex Multiple Occupancy Bathroom and Changing Facilities.--Public agencies *shall require every multiple occupancy bathroom or changing facility to be designated for and only used by persons based on their biological sex.*

Id. (emphasis added).

As a result of this law that has garnered severe public scrutiny, the State University of New York ("SUNY") system, which includes SUNY Albany, refused to compete in a collegiate basketball game at Duke University, a school residing in the now notorious State of North Carolina. Additionally, the company PayPal has abandoned its plan to move part of its operations to North Carolina in reaction to the new state law. *See* https://www.washingtonpost.com/news/post-nation/wp/2016/04/05/paypal-abandons-plans-to-open-facility-in-charlotte-due-to-lgbt-law/?utm_term=.067b8caf21b4. Joining in the boycott to operate in the state, the immortal Bruce Springsteen and famous pop-rock band Maroon 5 have canceled their shows in Greensboro and Raleigh, respectively, while more recently, the National Basketball Association moved its upcoming annual All-Star game from Charlotte to New Orleans. *See* http://brucespringsteen.net/news/2016/a-statement-from-bruce-springsteen-on-north-carolina; http://money.cnn.com/2016/05/20/media/maroon-5-cancel-north-carolina-concert-lgbt/; http://abcnews.go.com/US/nba-star-game-moved-orleans-controversial-nc-anti/story?id=41511843. These moves underscore the sentiment of many in the United States. But perhaps more impactful than eliciting major entities to publically reveal their clear social

stance is the negative impact HB2 has on transgender individuals. Laws such as HB2 demonstrate that transgender individuals are not just facing discrimination in the workplace, or simply enduring a struggle for community-wide acceptance, but they are subject to laws that restrict their public lifestyle specifically on the basis of their gender identity.

d. Bathroom Laws in the Workplace

On the issue of bathroom access in the workplace, the EEOC posits three primary points for employers to take heed of in order to avoid Title VII liability: 1) that denying an employee equal access to a common restroom corresponding to the employee's gender identity is sex discrimination; 2) that an employer cannot condition this right on the employee undergoing or providing proof of surgery or any other medical procedure; and 3) that an employer cannot avoid the requirement to provide equal access to a common restroom by restricting a transgender employee to a single-user restroom. "Fact Sheet: Bathroom Access Rights for Transgender Employees Under Title VII of the Civil Rights Act of 1964," https://www. eeoc. gov/eeoc/publications/fs-bathroom-access-transgender. cfm.

The EEOC summarized these positions powerfully in *Lusardi*, a case involving a transgender female employee of the United States Army who was constantly referred to by her former male name when attempting to use the women's bathroom at her employer's facilities. *Lusardi*, EEOC DOC 0120133395, 2015 WL 1607756, at *8 (Apr. 1, 2015). In their decision, which ultimately found the employer's conduct to be a violation of Title VII's prohibition against sex discrimination, the EEOC stated:

> This case represents well the peril of conditioning access to facilities on any medical procedure. Nothing in Title VII makes any medical procedure a prerequisite for equal opportunity (for transgender individuals, or anyone else).

> An agency may not condition access to facilities -- or to other terms, conditions, or privileges of employment -- on the completion of certain medical steps that the agency itself has unilaterally determined will somehow prove the bona fides of the individual's gender identity.
> On this record, there is no cause to question that Complainant -- who was assigned the sex of male at birth but identifies as female -- *is* female. And certainly where, as here, a transgender female has notified her employer that she has begun living and working full-time as a woman, the agency must allow her access to the women's restrooms.

Id.

Though not all states have passed employment discrimination laws that specifically pertain to transgender employees, many have passed laws that enable a person to choose the workplace bathroom that best suits their gender identity. *See* Appendix 5. While this represents a step in the right direction, it remains insufficient in light of Title VII's narrow categorical inclusions, of which sexual orientation and gender identity are not a part, despite today's clear social climate.

VI. CONCLUSION

When Maria Robinson, an author who writes about raising children, famously stated "Nobody can go back and start a new beginning, but anyone can start today and make a new ending," she might as well have been talking about the current debate as to whether the meaning of sex in Title VII is inclusive of the LGBT community. From a strict construction early on, to a broader definition granting more rights to females, to the movement now which supports interpreting the term to include sexual orientation and transgender status, one thing is certain; we cannot go back and change previous decisions, but future decisions can bring a new ending. Indeed, some already have. Whether that new ending is perpetuated, either through judicial interpretation or legislation, remains to be seen

APPENDIX 1

to

Newton's Laws of Motion and the LGBT Community…What's Next?

Submitted by: Christopher A. D'Angelo

State-by-State Survey
of
Sexual Orientation & Gender Identity Discrimination Laws

State-by-State Survey of Sexual Orientation & Gender Identity Discrimination Laws[1]				
State	**Prohibits Discrimination Based on Sexual Orientation**		**Prohibits Discrimination Based on Gender Identity**	
	Public Employer	*Private Employer*	*Public Employer*	*Private Employer*
Alabama				
Alaska	X			
Arizona	X			
Arkansas				
California	X	X	X	X
Colorado	X	X	X	X
Connecticut	X	X	X	X
Delaware	X	X	X	X
Florida				

[1] Statistics taken from the Human Rights Campaign: http://www.hrc.org/state_maps.

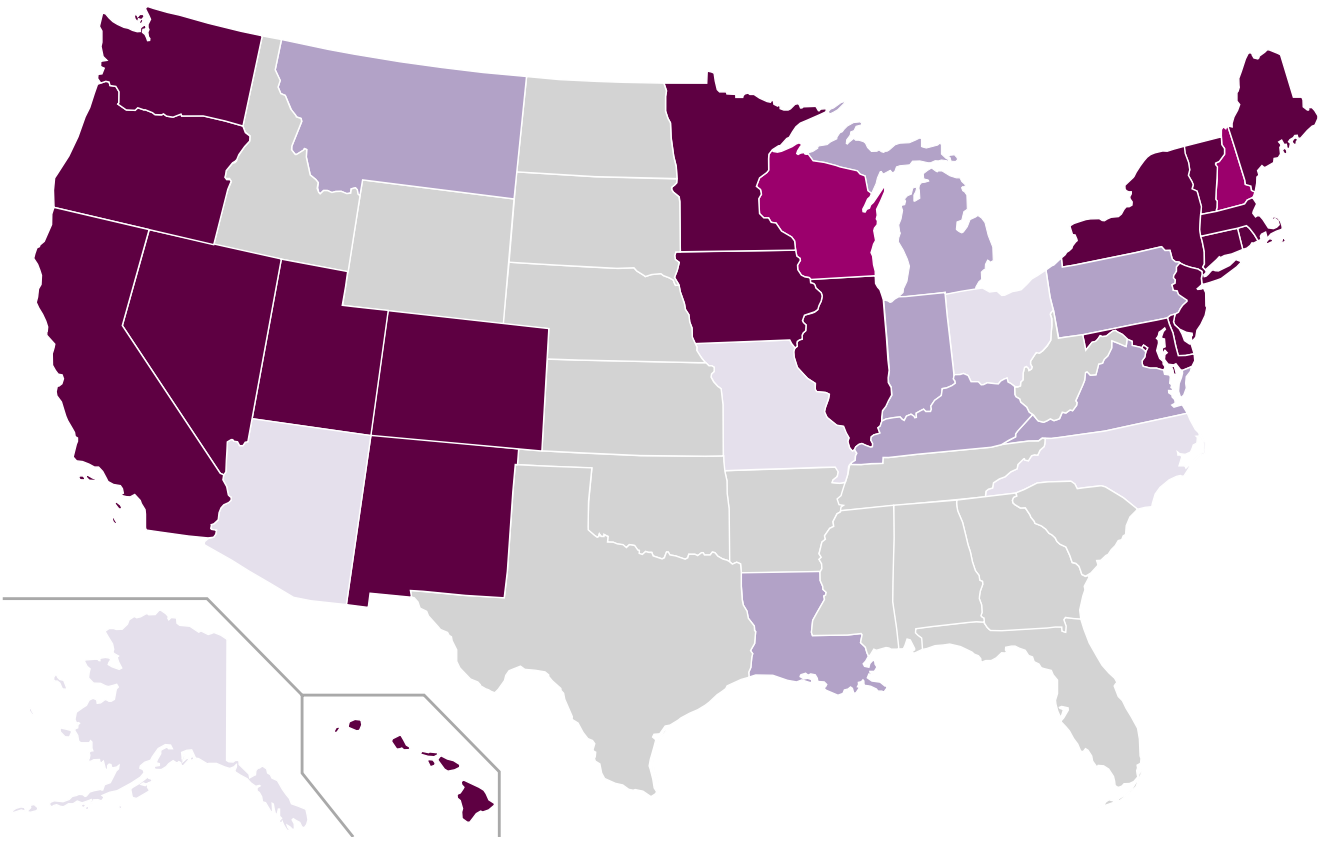
State-by-State Survey of Sexual Orientation & Gender Identity Discrimination Laws				
State	**Prohibits Discrimination Based on Sexual Orientation**		**Prohibits Discrimination Based on Gender Identity**	
	Public Employer	*Private Employer*	*Public Employer*	*Private Employer*
Georgia				
Hawaii	X	X	X	X
Idaho				
Illinois	X	X	X	X
Indiana	X		X	
Iowa	X	X	X	X
Kansas				
Kentucky	X		X	
Louisiana	X		X	
Maine	X	X	X	X
Maryland	X	X	X	X
Massachusetts	X	X	X	X
Michigan	X		X	
Minnesota	X	X	X	X

State-by-State Survey of Sexual Orientation & Gender Identity Discrimination Laws				
State	**Prohibits Discrimination Based on Sexual Orientation**		**Prohibits Discrimination Based on Gender Identity**	
	Public Employer	*Private Employer*	*Public Employer*	*Private Employer*
Mississippi				
Missouri	**X**			
Montana	**X**		**X**	
Nebraska				
Nevada	**X**	**X**	**X**	**X**
New Hampshire	**X**	**X**		
New Jersey	**X**	**X**	**X**	**X**
New Mexico	**X**	**X**	**X**	**X**
New York	**X**	**X**	**X**	**X**
North Carolina	**X**		**X***	
North Dakota				
Ohio	**X**			
Oklahoma				
Oregon	**X**	**X**	**X**	**X**

State-by-State Survey of Sexual Orientation & Gender Identity Discrimination Laws				
State	**Prohibits Discrimination Based on Sexual Orientation**		**Prohibits Discrimination Based on Gender Identity**	
	Public Employer	*Private Employer*	*Public Employer*	*Private Employer*
Pennsylvania	X		X	
Rhode Island	X	X	X	X
South Carolina				
South Dakota				
Tennessee				
Texas				
Utah	X	X	X	X
Vermont	X	X	X	X
Virginia	X		X	
Washington	X	X	X	X
West Virginia				
Wisconsin	X	X		
Wyoming				

STATEWIDE EMPLOYMENT LAWS & POLICIES

HUMAN RIGHTS CAMPAIGN



Updated April 20, 2016

The Federal Equal Employment Opportunity Commission is now accepting complaints of gender identity discrimination in employment based on Title VII's prohibition against sex discrimination.

States that prohibit discrimination based on sexual orientation and gender identity (20 states & D.C.): California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Utah, Vermont, Washington

States that prohibit discrimination based on sexual orientation only (2 states): New Hampshire, Wisconsin

States that prohibit discrimination against public employees based on sexual orientation and gender identity (7 states): Indiana, Kentucky, Louisiana, Michigan, Montana, Pennsylvania, Virginia

States that prohibit discrimination against public employees based on sexual orientation only (5 states): Alaska, Arizona, Missouri, North Carolina, Ohio

*State courts, commissions, agencies, or attorney general have interpreted the existing law to include some protection against discrimination against transgender individuals in Florida and New York.

*North Carolina's executive order enumerates sexual orientation and gender identity. However, this order has a bathroom carve out for transgender employees making the executive order not fully-inclusive.

APPENDIX 2

to

Newton's Laws of Motion and the LGBT Community…What's Next?

Submitted by: Christopher A. D'Angelo

***Scott Medical* Complaint**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Plaintiff,	)	**CIVIL ACTION NO.**
v.	)	
SCOTT MEDICAL HEALTH CENTER, P.C.,	)	
Defendant.	)	

NATURE OF THE ACTION

This is an action under Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), and Title I of the Civil Rights Act of 1991, to correct unlawful employment practices on the basis of sex (male) to provide appropriate relief to Dale Baxley. As alleged with greater particularity in paragraphs 11(a) through (h) below, the Commission alleges that Defendant subjected Baxley to a sexually hostile work environment perpetuated by Defendant's telemarketing manager, Robert McClendon. Defendant constructively discharged Baxley as a result of the intolerable working conditions and Defendant's failure to take prompt and effective action to prevent or alleviate it.

JURISDICTION AND VENUE

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 451, 1331, 1337, 1343 and 1345. This action is authorized and instituted pursuant to Section 706(f)(1) and (3) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(f)(1) and (3) ("Title VII") and Section 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981a.

2. The employment practices alleged to be unlawful were committed within the jurisdiction of the United States District Court for the Western District of Pennsylvania.

PARTIES

3. Plaintiff, the U.S. Equal Employment Opportunity Commission (the "Commission"), is the agency of the United States of America charged with the administration, interpretation and enforcement of Title VII, and is expressly authorized to bring this action by Section 706(f)(1) and (3) of Title VII, 42 U.S.C. § 2000e-5(f)(1) and (3).

4. At all relevant times Defendant Scott Medical Health Center, P.C. ("Defendant"), a Pennsylvania professional corporation, has continuously been doing business in the Commonwealth of Pennsylvania and the City of Pittsburgh, and has continuously had at least 15 employees.

5. At all relevant times, Defendant has continuously been an employer engaged in an industry affecting commerce within the meaning of Sections 701(b), (g) and (h) of Title VII, 42 U.S.C. §§ 2000e(b), (g) and (h).

STATEMENT OF CLAIMS

6. More than thirty days prior to the institution of this lawsuit, Charging Parties Libby Eber, Brittany Fullard, Allyssa Griffie, Donna Mackie and Kaitlyn Wieczorek filed charges of discrimination with the Commission alleging violations of Title VII by Defendant. During the course of its investigation of the aforementioned charges of discrimination, the Commission uncovered the violations of Dale Baxley's rights under Title VII that are reflected in paragraphs 11(a) through (h) of this Complaint.

7. On July 22, 2015, the Commission issued to Defendant a Letter of Determination finding reasonable cause to believe that Title VII was violated, including the violations of Dale Baxley's rights under Title VII that are reflected in paragraphs 11(a) through (h) of this Complaint, and inviting Defendant to join with the Commission in informal methods of conciliation to endeavor to eliminate the discriminatory practices and provide appropriate relief.

8. The Commission engaged in communications with Defendant to provide Defendant the opportunity to remedy the discriminatory practices described in the Letter of Determination.

9. The Commission was unable to secure from Defendant a conciliation agreement acceptable to the Commission.

10. On September 15, 2015, the Commission issued to Defendant a Notice of Failure of Conciliation.

11. Since at least May 2013, Defendant has engaged in unlawful employment practices at its Pittsburgh, Pennsylvania facility, in violation of Section 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a)(1). These unlawful practices include, but are not limited to, the following:

(a) Dale Baxley is a gay male. He was previously employed by Defendant in a telemarketing position.

(b) At all relevant times, Robert McClendon was the Telemarketing Manager for Defendant, a supervisor with authority to hire and fire employees who reported to him. Defendant is vicariously liable for his harassing conduct.

(c) Defendant has engaged in sex discrimination against Baxley by subjecting him to a continuing course of unwelcome and offensive harassment because of his sex (male). Such harassment was of sufficient severity and/or pervasiveness to create a hostile work environment because of his sex (male).

(d) From at least mid-July 2013 until on or about August 19, 2013, Robert McClendon routinely made unwelcome and offensive comments about Baxley, including but not limited to regularly calling him "fag," "faggot," "fucking faggot," and "queer," and making statements such as "fucking queer can't do your job." McClendon directed these harassing comments at Baxley at least three to

four times each week.

(e) From at least mid-July 2013 until on or about August 19, 2013, McClendon routinely made other unwelcome and offensive sexual comments to Baxley. For instance, upon learning that Baxley is gay and had a male partner (and to whom he is now married), McClendon made highly offensive statements to Baxley about Baxley's relationship with the partner such as saying, "I always wondered how you fags have sex," "I don't understand how you fucking fags have sex," and "Who's the butch and who is the bitch?"

(f) From at least mid-July 2013 until on or about August 19, 2013, McClendon frequently screamed and yelled at Baxley.

(g) On or about August 19, 2013, Defendant constructively discharged Baxley because of his sex (male). Baxley reported McClendon's sex discriminatory behavior to Defendant's president, Dr. Gary Hieronimus, but Hieronimus expressly refused to take any action to stop the harassment. Baxley resigned in response to Defendant's creation of, and refusal to discontinue, a sexually hostile work environment. Defendant knowingly created and permitted working conditions that Baxley reasonably viewed as intolerable and that caused him to resign.

(h) McClendon's aforementioned conduct directed at Baxley was motivated by Baxley's sex (male), in that sexual orientation discrimination necessarily entails treating an employee less favorably because of his sex; in that Baxley, by virtue of his sexual orientation, did not conform to sex stereotypes and norms about males to which McClendon subscribed; and in that McClendon objected generally to males having romantic and sexual association with other males, and objected

specifically to Baxley's close, loving association with his male partner.

12. The effect of the practices complained of in paragraphs 11(a) through (h) above has been to deprive Baxley of equal employment opportunities and otherwise adversely affect his status as an employee because of his sex.

13. The unlawful employment practices complained of in paragraphs 11(a) through (h) above were intentional.

14. The unlawful employment practices complained of in paragraphs 11(a) through (h) above were done with malice or with reckless indifference to Baxley's federally protected rights.

PRAYER FOR RELIEF

Wherefore, the Commission respectfully requests that this Court:

A. Grant a permanent injunction enjoining Defendant, its officers, agents, servants, employees, attorneys, and all persons in active concert or participation with them, from engaging in sex-based harassing conduct and other employment practices which discriminate on the basis of sex.

B. Order Defendant to institute and carry out training, policies, practices, and programs which provide equal employment opportunities based on sex, and which ensure that its operations are free from the existence of a sexually hostile work environment.

C. Order Defendant to make Baxley whole, by providing appropriate backpay with prejudgment interest, in amounts to be determined at trial, and other affirmative relief necessary to eradicate the effects of its unlawful employment practices, including but not limited to front pay.

D. Order Defendant to make Baxley whole by providing compensation for past and future pecuniary losses resulting from the unlawful employment practices described in

paragraphs 11(a) through (h) above, such as debt-related expenses, job search expenses, medical expenses and other expenses incurred by Baxley, which were reasonably incurred as a result of Defendant's conduct, in amounts to be determined at trial.

E. Order Defendant to make Baxley whole by providing compensation for past and future non-pecuniary losses resulting from the unlawful practices complained of in paragraphs 11(a) through (h) above, including emotional pain, suffering, inconvenience, loss of enjoyment of life, and humiliation, in amounts to be determined at trial.

F. Order Defendant to pay Baxley punitive damages for its malicious and reckless conduct described in paragraphs 11(a) through (h) above, in amounts to be determined at trial.

G. Grant such further relief as the Court deems necessary and proper in the public interest.

H. Award the Commission its costs of this action.

JURY TRIAL DEMAND

The Commission requests a jury trial on all questions of fact raised by its complaint.

Respectfully submitted,

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

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GWENDOLYN YOUNG REAMS
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APPENDIX 3

to

Newton's Laws of Motion and the LGBT Community…What's Next?

Submitted by: Christopher A. D'Angelo

***EEOC v. Pallet Co's.* Complaint**

JS 44 (Rev. 12/12)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS
Equal Employment Opportunity Commission, Baltimore Field Office
10 S. Howard Street, 3rd Fl.
Baltimore, MD 21201

(b) County of Residence of First Listed Plaintiff _____
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
Amber Trzinski Fox, Trial Attorney
Baltimore Field Office, 10 S. Howard St., 3d Fl., Baltimore, MD 21201
(410) 209-2763

DEFENDANTS
Pallet Companies d/b/a IFCO Systems NA, Inc.
3030 Waterview Avenue, Suite 200
Baltimore, MD 21230

County of Residence of First Listed Defendant _____
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*
Marc Antonetti
Baker Hostetler
1050 Connecticut Ave., N.W., Suite 1100, Washington, DC 20036

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☒ 1 U.S. Government Plaintiff
- ☐ 2 U.S. Government Defendant
- ☐ 3 Federal Question *(U.S. Government Not a Party)*
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 440 Other Civil Rights
- ☐ 441 Voting
- ☒ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 448 Education

PRISONER PETITIONS

Habeas Corpus:
- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☐ 535 Death Penalty

Other:
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Employee Retirement Income Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District *(specify)* ☐ 6 Multidistrict Litigation

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity)*:
Title VII of the Civil Rights Act of 1964, as amended, and Title I of the Civil Rights Act of 1991.
Brief description of cause:
Defendant discriminated against female employee because of her sex and subjected her to retaliatory discharge.

VII. REQUESTED IN COMPLAINT: ☐ CHECK IF THIS IS A **CLASS ACTION** UNDER RULE 23, F.R.Cv.P. **DEMAND $** CHECK YES only if demanded in complaint:
JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY *(See instructions):* JUDGE _____ DOCKET NUMBER _____

DATE 03/01/2016 SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
BALTIMORE DIVISION

U.S. Equal Employment Opportunity Commission, 10 S. Howard Street, 3rd Floor Baltimore, MD 21201, **Plaintiff,** **v.** **Pallet Companies d/b/a IFCO Systems NA, Inc.** 3030 Waterview Avenue, Suite 200 Baltimore, MD 21230, **Defendant.**	**Civil Action No.** **COMPLAINT** **JURY TRIAL DEMAND**

NATURE OF THE ACTION

This is an action under Title VII of the Civil Rights Act of 1964 and Title I of the Civil Rights Act of 1991 to correct unlawful employment practices on the bases of sex and retaliation, and to provide appropriate relief to Yolanda Boone, who was adversely affected by such practices. As alleged with greater particularity below, the United States Equal Employment Opportunity Commission (the "EEOC" or the "Commission") alleges that Defendant Pallet Companies d/b/a IFCO Systems NA, Inc. ("Defendant" or "IFCO") unlawfully discriminated against Boone on the basis of her sex (female) by subjecting her to harassment, which culminated in her discharge. The Commission further alleges that Defendant discharged Boone in retaliation for complaining about the harassment.

JURISDICTION AND VENUE

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 451, 1331, 1337, 1343, and 1345. This action is authorized and instituted pursuant to Section 706(f)(1) and (3) of

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(f)(1) and (3) ("Title VII"). This action is also authorized and instituted pursuant to Section 102 of Title I of the Civil Rights Act of 1991, 42 U.S.C. § 1981a.

2. The employment practices alleged to be unlawful were committed within the jurisdiction of the United States District Court for the District of Maryland.

PARTIES

3. Plaintiff, the United States Equal Employment Opportunity Commission, is an agency of the United States of America charged with the administration, interpretation, and enforcement of Title VII and is expressly authorized to bring this action by Sections 706(f)(1) and (3) of Title VII, 42 U.S.C. §§ 2000e-5(f)(1) and (3).

4. At all relevant times, Defendant has continuously been a corporation doing business and operating within the State of Maryland with at least fifteen (15) employees.

5. At all relevant times, Defendant has continuously been an employer engaged in an industry affecting commerce within the meaning of Sections 701(b), (g) and (h) of Title VII, 42 U.S.C. § 2000e(b), (g) and (h).

STATEMENT OF CLAIMS

6. More than thirty days prior to the institution of this lawsuit, Boone filed a charge with the Commission alleging violations of Title VII by IFCO.

7. On or around August 31, 2015, the Commission issued to Defendant a Letter of Determination finding reasonable cause to believe that Title VII was violated and inviting Defendant to join with the Commission in informal methods of conciliation to endeavor to eliminate the discriminatory practices and provide appropriate relief.

8. The Commission engaged in communications with Defendant to provide

Defendant the opportunity to remedy the discriminatory practices described in the Letter of Determination.

9. The Commission was unable to secure from Defendant a conciliation agreement acceptable to the Commission.

10. On or around October 23, 2015, the Commission issued to Defendant a Notice of Failure of Conciliation.

11. All conditions precedent to the institution of this lawsuit have been fulfilled.

12. Defendant hired Boone on September 14, 2013, as a forklift operator working the first shift. Boone was an excellent forklift operator.

13. Boone is a lesbian. Her sexual orientation was known to most, if not all, of her co-workers, including the night shift manager, Charles Lowry.

14. Approximately three months after Boone began working for IFCO, Lowry requested that Boone begin working some hours during the night shift, which she agreed to do to earn extra income.

15. Almost as soon as Boone began working the night shift, Lowry began harassing Boone on a weekly basis, making comments such as "I want to turn you back into a woman;" "I want you to like men again;" "You would look good in a dress;" "Are you a girl or a man?" and "You don't have any breasts." He also quoted biblical passages stating that a man should be with a woman and not a woman with a woman. On several occasions, he would grab his crotch while staring at Boone.

16. After weeks of enduring Lowry's comments and behavior, Boone complained to her supervisor Anthony Powell in February and March 2014, but no action was taken.

17. On April 18, 2014, Lowry blew a kiss and stuck out his tongue and circled it in a suggestive manner toward Boone.

18. Boone immediately complained to Powell, and then to Anthony "Tony" Flores, the General Manager.

19. Boone told Flores what happened that day and also complained about the perpetual harassment and comments to which Lowry subjected her. Flores said he would speak with Lowry.

20. After her meeting with Flores, Boone returned to the warehouse and contacted Human Resources through the employee hotline to file a complaint about Lowry's harassment.

21. Lowry later returned to the warehouse and continued to intimidate and harass her. Unable to endure the continuing harassment, she informed Flores that she would leave early that day, which she did.

22. Boone returned to work on her next scheduled work day, April 22, 2014. As soon as she arrived, Flores called Boone into a meeting with himself, Brian Schaffer, the Regional Director, and Randall Lucas, a Human Resources representative, and asked her to resign. Boone refused to resign.

23. Flores, Schaffer, and Lucas called Boone back into Flores's office later that day and handed her a typed letter stating she had resigned from her position. They again demanded her resignation and when she again refused to resign, Defendant discharged her and called the police to escort her off the property.

24. Since at least September 2013, Defendant engaged in unlawful employment practices in violation of Section 703(a) of Title VII, 42 U.S.C. § 2000e-2(a) by subjecting Boone to harassment which culminated in her discharge. Lowry's aforementioned conduct directed at

Boone was motivated by Boone's sex (female), in that sexual orientation discrimination necessarily entails treating an employee less favorably because of her sex; in that Boone, by virtue of her sexual orientation, did not conform to sex stereotypes and norms about females to which Lowry subscribed; and in that Lowry objected generally to females having romantic and sexual association with other females, and objected specifically to Boone's close, loving association with her female partner.

25. Since at least April 22, 2014, Defendant engaged in unlawful employment practices in violation of Section 704(a) of Title VII, 42 U.S.C. § 2000e-3(a) when it discharged Boone for complaining about the harassment.

26. The effect of the practices complained of in the above paragraphs has been to deprive Boone of equal employment opportunities and otherwise adversely affect her rights under Title VII, resulting in expenses incurred due to lost wages, emotional pain, suffering, inconvenience, mental anguish, embarrassment, frustration, humiliation, and loss of enjoyment of life.

27. The unlawful employment practices complained of above were intentional.

28. The unlawful employment practices complained of above were done with malice or with reckless indifference to Boone's federally protected rights.

PRAYER FOR RELIEF

Wherefore, the Commission respectfully requests that this Court:

A. Grant a permanent injunction enjoining Defendant, its officers, successors, assigns and all persons in active concert or participation with them, from engaging in any employment practice that discriminates on the basis of sex and from retaliating against persons who engage in protected activity;

B. Order Defendant to institute and carry out policies, practices, and programs that provide equal employment opportunities for women and that eradicate the effects of its past and present unlawful employment practices, and prevent sex discrimination and retaliation from occurring in the future;

C. Order Defendant to make Boone whole by providing appropriate backpay with prejudgment interest, in amounts to be determined at trial, and other affirmative relief necessary to eradicate the effects of its unlawful employment practices, including but not limited to reinstatement or front pay in lieu of reinstatement;

D. Order Defendant to make Boone whole by providing compensation for past and future pecuniary losses resulting from the unlawful employment practices described in the paragraphs above.

E. Order Defendant to make Boone whole by providing compensation for past and future non-pecuniary losses including emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, embarrassment, frustration, and humiliation, in an amount to be proven at trial;

F. Order Defendant to pay Boone punitive damages for its callous indifference to her federally protected right to be free from discrimination based on disability;

G. Order Defendant to sign and conspicuously post, for a designated period of time, a notice to all employees that sets forth the remedial action required by the Court and inform all employees that it will not discriminate against any employee because of sex, will not retaliate against any person for engaging in protected activity, and will comply with all aspects of Title VII;

H. Grant such further relief as the Court deems necessary and proper in the public interest; and

I. Award the Commission its costs in this action.

The Commission requests a jury trial on all questions of fact raised by its Complaint.

Respectfully submitted,

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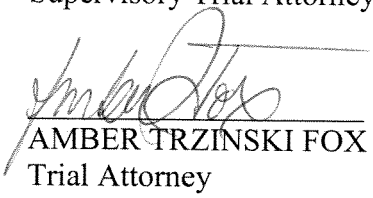
General Counsel

JAMES L. LEE
Deputy General Counsel

GWENDOLYN YOUNG REAMS
Associate General Counsel

DEBRA M. LAWRENCE
Regional Attorney

MARIA SALACUSE
Supervisory Trial Attorney



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APPENDIX 4

to
Newton's Laws of Motion and the LGBT Community…What's Next?
Submitted by: Christopher A. D'Angelo

***EEOC v. Pallet Co's.* Consent Decree**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
BALTIMORE DIVISION

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, v. PALLET COMPANIES d/b/a IFCO SYSTEMS NA, INC., Defendant.	Civil Action No. 1:16-cv-00595-CCB

CONSENT DECREE

This action was instituted by Plaintiff Equal Employment Opportunity Commission (the "EEOC" or the "Commission") against Defendant Pallet Companies d/b/a IFCO Systems NA, Inc. ("IFCO" or "Defendant"), under Title VII of the Civil Rights Act of 1964 ("Title VII") and Title I of the Civil Rights Act of 1991, alleging that Defendant unlawfully discriminated against Yolanda Boone ("Ms. Boone") on the basis of her sex (female) by subjecting her to harassment, which culminated in her discharge, and that Defendant discharged Ms. Boone in retaliation for complaining about the harassment. Defendant asserts that discrimination or harassment based on sexual orientation is against both its values and its written employment policies, which policies have been in place since 2007, and Defendant denies that it discriminated in any way against Ms. Boone. The parties desire to resolve amicably the Commission's action without the time and expense of continued litigation, and, as a result of having engaged in comprehensive settlement negotiations, the Parties have agreed that this action should be finally resolved by the entry of a Consent Decree. With these understandings, the Parties have jointly formulated a plan to be

embodied in a Decree which will promote and effectuate the purposes of Title VII.

The Court has examined this Decree and finds that it is reasonable and just and in accordance with the Federal Rules of Civil Procedure and Title VII. Therefore, upon due consideration of the record herein and being fully advised in the premises, it is ORDERED, ADJUDGED AND DECREED:

Scope of Decree

1. This Decree resolves all issues and claims in the Complaint filed by the EEOC in this Title VII action ("the Complaint"), which emanated from the Charge of Discrimination filed by Ms. Boone. This Decree in no way affects the EEOC's right to process any other pending or future charges that may be filed against Defendant and to commence civil actions on any such charges as the Commission sees fit.

2. This Decree shall be in effect for a period of two years from the date it is entered by the Court. During that time, this Court shall retain jurisdiction over this matter and the parties for purposes of enforcing compliance with the Decree, including issuing such orders as may be required to effectuate the purposes of the Decree. If the Court determines that Defendant has failed to meet the established terms at the end of two years, the duration of the Decree may be extended.

3. Unless otherwise specified in this Decree, the terms of this Decree apply to Defendant's seven plants in the North Region of IFCO's Third-Party Operations Division (the "Region") located in the following cities: Baltimore, MD, Barrington, NJ, Scarborough, ME, Martinsburg, VA, Wilmington, MA, and Suffolk, VA.

4. This Decree, being entered with the consent of the parties, shall not constitute an admission, adjudication, or finding on the merits of the case.

Monetary Relief

5. Within ten (10) business days of entry of this Decree, Defendant shall pay Yolanda Boone monetary relief in the total amount of $182,200, representing $7,200 in back pay with interest and $175,000 in nonpecuniary compensatory damages. Defendant will issue to Ms. Boone an IRS Form 1099 for the 2016 tax year for the non-pecuniary damages amount and an IRS W2 form for the 2016 tax year for the back pay amount. Defendant shall make all legally required withholdings from the back pay amount. The checks and IRS forms will be sent directly to Ms. Boone, and a photocopy of the checks and related correspondence will be mailed to the EEOC, Baltimore Field Office, 10 S. Howard Street, 3rd Floor, Baltimore, Maryland 21201 (Attention: Trial Attorney Amber Trzinski Fox).

6. Defendant shall provide Ms. Boone, within ten (10) days of the entry of this Decree, with a positive letter of reference, on IFCO letterhead, setting forth, at a minimum, the following: Ms. Boone's dates of employment, position, and work location. In response to any inquiry received by Defendant's automated employment and income verification provider, The Work Number, concerning Ms. Boone from a potential employer, headhunter, or other person inquiring about Ms. Boone's employment history, Defendant shall ensure that The Work Number provides a positive reference concerning Ms. Boone, indicating the following: Ms. Boone's dates of employment, position, and work location. Ms. Boone should direct all potential employers, headhunters or other persons inquiring about her employment history at Defendant to contact The Work Number by visiting its website at www.theworknumber.com or by dialing 1-800-367-5690 (1-800-424-0253 TTY). Defendant's Work Number employer name is IFCO Systems and its employer code is 16415.

7. Defendant will contribute, each year of this Decree, $10,000 to the Human Rights

Campaign Foundation to support, specifically, the Human Rights Campaign Workplace Equality Program.

Injunctive Relief

8. Defendant, its managers, officers, agents, successors, purchasers, assigns, U.S. subsidiaries, and any corporation or entity into which Defendant may merge or with which Defendant may consolidate are enjoined from engaging in sex discrimination by creating or maintaining a hostile work environment on the basis of sex. The prohibited hostile work environment includes the use of offensive or derogatory comments, or other verbal or physical conduct based on an individual's sex, which creates a severe and/or pervasive hostile working environment, or interferes with the individual's work performance that violates Title VII, which, in part, is set forth below:

> It shall be an unlawful employment practice for an employer – (1) . . . to discriminate against any individual with respect to [her] . . . terms, conditions, or privileges of employment, because of such individual's . . . sex . . . .

42 U.S.C. § 2000e-2(a)(1).

9. Defendant, its managers, officers, agents, successors, purchasers, assigns, U.S. subsidiaries, and any corporation or entity into which Defendant may merge or with which Defendant may consolidate, are further enjoined from retaliating against any individual for asserting her or his rights under Title VII or otherwise engaging in protected activity, such as by complaining of discrimination, opposing discrimination, filing a charge, or giving testimony or assistance with an investigation or litigation, including, but not limited to, participating in this matter in any way including by giving testimony, as set forth in the following provision of Title VII:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because [she] has opposed any practice made an unlawful

> employment practice by this subchapter, or because [she] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a).

Sexual Orientation and No Retaliation Policy

10. Within thirty (30) days of the entry of this Decree, Defendant shall distribute to all employees in the Region copies of its existing EEO and Speaking Up policies ("Policies") and wallet cards containing the Speaking Up hotline's toll-free number and web address ("Wallet Card"). In addition, Defendant will distribute the Policies and the Wallet Card in hard copy form to any new employees of the Region within seven (7) days of hire. Defendant must also immediately post the Policies in a manner easily visible to all employees in the Region and immediately forward a copy of any amended policy to the EEOC.

Training

11. Defendant shall retain, at its expense, a subject matter expert ("SME") on sexual orientation, gender identity, and transgender training to assist Defendant in development of a training program on LGBT workplace issues. The SME shall be identified to the EEOC within 30 days of the entry of this Decree and Defendant must obtain the EEOC's approval of the SME. The EEOC's approval of the SME will not be unreasonably withheld. Within 90 days of the entry of this Decree, Defendant and its SME will develop a specific training module on sexual orientation and sexual identity issues in the workplace ("LGBT Module") and provide the LGBT Module to the EEOC for its approval. The LGBT Module, which will take no less than thirty minutes and no more than forty-five minutes to complete, will address FAQs, acceptance of diversity of all individuals in the workplace, and how the Policies provide protection for all LGBT employees, together with other topics or issues determined appropriate by the SME,

subject to the EEOC's approval. The EEOC may edit and comment on the draft module. Defendant will finalize the LGBT Module after receiving input from the EEOC, and will provide a final copy of the LGBT Module to the EEOC for the EEOC's final approval. The EEOC's approval of the LGBT Module will not be unreasonably withheld. The EEOC may provide the LGBT Module (after deleting all references to Defendant) to other companies and agencies as it deems necessary. Defendant and the SME will not claim any copyright or other ownership interest in the LGBT Module.

12. Defendant will present two types of training programs incorporating the LGBT Module:

A. Nationwide Plant Management and Human Resources Training. The LGBT Module will be presented, either live or via webinar, as part of an hour-long EEO and Harassment training program, to Defendant's General Manager, Vice President of Operations, Regional Operations Directors, Plant Managers, Assistant Plant Managers, Human Resource Directors and Human Resources Regional Field Operations Managers in the United States. This training session will include Defendant's Policies, including its anti-retaliation policy, as well as the requirements of Title VII's prohibitions against sexual harassment and retaliation and the requirements and prohibitions of this Decree. A copy of the entire program will be provided to the EEOC. The training shall be conducted by the SME (or his/her designee) and Kevin W. Shaughnessy or another lawyer selected by Defendant and approved by the EEOC.

B. Region Training. The LGBT Module will be presented to all employees in the Region as part of a live, hour-long EEO and Harassment training program. This training session will include Defendant's Policies, including its anti-retaliation policy, as well as

the requirements of Title VII's prohibitions against sexual harassment and retaliation and the requirements and prohibitions of this Decree. A copy of the entire program will be provided to the EEOC. The training shall be conducted by the SME (or his/her designee) and Kevin W. Shaughnessy or another lawyer selected by Defendant and approved by the EEOC.

13. The training for both groups of employees set forth in Section 12A and Section 12B must be completed within one hundred eighty (180) days of the entry of this Decree, or 30 days after the EEOC's approval of the final LGBT Module is received by Defendant, whichever is later. During the effective dates of this Decree, Defendant will also provide the training program in Section 12A to all new Plant Managers, Assistant Plant Managers, Human Resource Directors and Human Resources Regional Field Operations Managers within thirty (30) days of their hire or promotion and the training program in Section 12B to all new Region employees within thirty (30) days of their hire. Training for new employees covered by this Section 13 may be pre-recorded.

14. In year two of the Decree, Defendant shall provide one hour of EEO and LGBT training, via an on-line module, to all of its Plant Managers, Assistant Plant Managers, Human Resource Directors and Human Resources Regional Field Operations Managers in the United States, including a quiz or a test to be passed by all participants. To pass the quiz or test, the participants must achieve a score of 80 percent or greater.

15. Within ten (10) business days of completing the training described in Paragraphs 12A and 12B above, Defendant will provide the EEOC with written documentation that the training occurred, including a list of participants and their job titles, the date the training was completed, and where the training was delivered through a live session, a signed (either manual

or electronic) attendance sheet. Defendant will provide written documentation of the training of all new employees in the Region, and those trained as described in Paragraph 14, has occurred with its next due semi-annual report.

Notice and Postings

16. Within ten (10) business days of entry of this Decree, Defendant will post, at all of Defendant's locations, the posters required to be displayed in the workplace by Commission Regulations, 29 C.F.R. § 1601.30.

17. Within fifteen (15) business days of entry of this Decree, Defendant will also post in all places where notices are customarily posted for employees at its Baltimore Plant at 3030 Waterview Avenue, Suite #200, Baltimore, MD 21230, the Notice attached as Attachment A. The Notice shall be posted and maintained for the duration of the Decree and shall be signed by Defendant's owner or corporate representative with the date of actual posting shown. Should the Notice become defaced, marred, or otherwise made unreadable, Defendant will ensure that new readable copies of the Notice are posted in the same manner as specified above. Within its first semi-annual report, Defendant shall provide to the EEOC a copy of the signed Notice, written confirmation that the Notice has been posted, and a description of the location and date of the posting.

Monitoring Provisions

18. The EEOC has the right to monitor and review compliance with this Decree.

19. On a semi-annual basis, for the duration of this Decree, and one month before the expiration of this Decree, Defendant must submit written proof via affidavit to the EEOC that it has complied with each of the requirements set forth above. Such proof must include, but need not be limited to, an affidavit by a person with knowledge establishing: (a) the completion of

training; (b) that the sexual orientation and retaliation policy has been distributed and remains posted in accordance with this Consent Decree; (c) that it has complied with the injunctive relief requested in this Decree; and (d) notifying the Commission of all reported complaints alleging sexual orientation discrimination in the Region. The notification required by section 19(d) will include, if the information is available to Defendant, each name of the individual lodging the complaint; home address; home telephone number; nature of the individual's complaint; the name of individual who received the complaint or report; the date the complaint or report was received; description of Defendant's actions taken in response to the complaint or report, including the name of each manager or supervisor involved in those actions. If no complaints of alleged sexual orientation discrimination or harassment were reported, Defendant will confirm in writing to the EEOC that no such complaints were made.

20. The EEOC may monitor compliance during the duration of this Decree by inspection of Defendant's Regional premises, records, and interviews with employees at reasonable times. Upon thirty (30) days' notice by the EEOC, Defendant will make available for inspection and copying any records requested by the EEOC from the Region.

21. For the duration of this Consent Decree, Defendant must create and maintain such records as are necessary to demonstrate its compliance with this Consent Decree and 29 C.F.R. §1602 *et seq.* and maintain an updated EEO poster in compliance with 42 U.S.C. § 2000e-10.

Miscellaneous Provisions

22. All materials required by this Decree to be provided to the EEOC shall be sent by e-mail to Amber Trzinski Fox, EEOC Trial Attorney, at amber.fox@eeoc.gov, and by certified mail to Amber Trzinski Fox, EEOC Trial Attorney Baltimore Field Office, 10 South Howard Street, 3rd Floor, Baltimore, MD 21201. Any notice to Defendant shall be sent by email to

Kevin W. Shaughnessy at kshaughnessy@bakerlaw.com, and by certified mail to Kevin W. Shaughnessy, Baker & Hostetler LLP, 200 South Orange Avenue, Suite 2300, Orlando, FL 32801,

23. This Consent Decree will operate as a full and final resolution of this action. The EEOC and Defendant shall bear their own costs and attorneys' fees.

24. The EEOC and Defendant shall have independent authority to seek the judicial enforcement of any aspect, term or provision of this Decree. In the event that either party to this Decree believes that the other party has failed to comply with any provision(s) of this Decree, the complaining party shall notify the alleged non-compliant party in writing of such non-compliance and afford the alleged non-compliant party thirty (30) business days to remedy the non-compliance or satisfy the complaining party that it has complied. If the dispute is not resolved within thirty (30) business days, the complaining party may apply to the Court for appropriate relief.

25. The undersigned counsel of record in the above-captioned action hereby consent, on behalf of their respective clients, to the entry of this Consent Decree.

FOR PLAINTIFF:

/s/ Debra M. Lawrence
Debra M. Lawrence
Regional Attorney

/s/ Maria Salacuse
Maria Salacuse
Supervisory Trial Attorney

/s/ Amber Trzinski Fox
Amber Trzinski Fox
Trial Attorney
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Baltimore Field Office

FOR DEFENDANT:

/s/ Kevin W. Shaughnessy
Kevin W. Shaughnessy
(with permission)
Baker & Hostetler LLP
200 South Orange Avenue
Suite 2300
Orlando, FL 32801
Phone: (407) 649-4014
Email: Kshaughnessy@bakerlaw.com

Counsel for Defendant Pallet Companies d/b/a/ IFCO Systems NA, Inc.

10 S. Howard Street, 3rd Floor
Baltimore, MD 21201
Phone: (410) 209-2763
Email: amber.fox@eeoc.gov

Counsel for Plaintiff Equal Employment Opportunity Commission

SO ORDERED.

Signed and entered this 28th day of June, 2016.

The Honorable Catherine C. Blake
United States District Court Judge

ATTACHMENT A

NOTICE TO EMPLOYEES POSTED PURSUANT TO A CONSENT DECREE BETWEEN THE EEOC AND PALLET COMPANIES d/b/a IFCO SYSTEMS NA, INC.

This Notice is being posted as part of the resolution of a lawsuit filed by the Equal Employment Opportunity Commission (EEOC) against Pallet Companies d/b/a IFCO Systems NA, Inc. ("IFCO") in the United States District Court for the District of Maryland, Baltimore Division (*EEOC v. Pallet Companies d/b/a IFCO Systems NA, Inc. ("IFCO")*), Civil Action No. 1:16-cv-00595-CCB). The EEOC brought this action to enforce provisions of Title VII of the Civil Rights Act of 1964, as amended, which prohibits discrimination on the basis of sex and retaliation.

IFCO will conduct its hiring and employment practices without regard to the sex or sexual orientation of an applicant or employee and ensure that no employees are retaliated against for complaining of any such discrimination.

IFCO will take all complaints of discrimination in the workplace seriously and address them appropriately.

IFCO will not engage in any acts or practices made unlawful under Title VII, including retaliation against one who exercises his or her rights under Title VII.

Employees or job applicants should feel free to report instances of discriminatory treatment to a supervisor or a manager, at any time. IFCO has established policies and procedures to promptly investigate any such reports and to protect the person making the reports from retaliation, including retaliation by the person allegedly guilty of the discrimination.

Individuals are also free to make complaints of employment discrimination directly to the Baltimore Field Office, 10 South Howard Street, 3rd Floor, Baltimore, Maryland 21201 or by calling 866-408-8075 / TTY 800-669-6820. General information may also be obtained on the Internet at www.eeoc.gov.

_____

Owner

Date Posted:

APPENDIX 5

to

Newton's Laws of Motion and the LGBT Community…What's Next?

Submitted by: Christopher A. D'Angelo

***EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 8-18-16 Opinion & Order**

of

Judge Sean F. Cox

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Equal Employment Opportunity Commission,

Plaintiff,

v. Case No. 14-13710

R.G. & G.R. Harris Funeral Homes, Inc., Sean F. Cox
United States District Court Judge

Defendant.
_____/

OPINION & ORDER

In enacting Title VII of the Civil Rights Act of 1964, Congress prohibited employers from discharging or otherwise discriminating against any individual with respect to compensation, terms, conditions, or privileges of employment "because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e–2(a)(1).

In filing this action against Defendant R.G. & G.R. Harris Funeral Homes, Inc. ("the Funeral Home"), the Equal Employment Opportunity Commission sought to expand Title VII to include transgender status or gender identity as protected classes. The EEOC asserted two Title VII claims. First, it asserted a wrongful termination claim on behalf of the Funeral Home's former funeral director Stephens, who is transgender and transitioning from male to female, claiming that it "fired Stephens because Stephens is transgender, because of Stephens's transition from male to female, and/or because Stephens did not conform to [the Funeral Home's] sex- or gender-based preferences, expectations, or stereotypes." Second, it alleges that the Funeral

Home engaged in an unlawful employment practice by providing work clothes to male but not female employees.

This Court previously rejected the EEOC's position that it stated a Title VII claim by virtue of alleging that Stephens's termination was due to transgender status or gender identity – because those are not protected classes. The Court recognized, however, that under Sixth Circuit precedent, a claim was stated under the *Price Waterhouse* sex/gender-stereotyping theory of sex discrimination because the EEOC alleges the termination was because Stephens did not conform to the Funeral Home's sex/gender based stereotypes as to work clothing.

The matter is now before the Court on cross-motions for summary judgment. Neither party believes there are any issues of fact for trial regarding liability and each party seeks summary judgment in its favor. The motions have been fully[1] briefed by the parties. The motions were heard by the Court on August 11, 2016.

The Court shall deny the EEOC's motion and shall grant summary judgment in favor of the Funeral Home as to the wrongful termination claim. The Funeral Home's owner admits that he fired Stephens because Stephens intended to "dress as a woman" while at work but asserts two defenses.

First, the Funeral Home asserts that its enforcement of its sex-specific dress code, which requires males to wear a pants-suit with a neck tie and requires females to wear a skirt-suit, cannot constitute impermissible sex stereotyping under Title VII. Although pre-*Price*

[1]This Court granted all requests by the parties to exceed the normal page limitations for briefs. The Court also granted the sole request for leave to file an amicus brief. Thus, the American Civil Liberties Union and the American Civil Liberties Union of Michigan filed an Amicus Curiae Brief.

Waterhouse decisions from other circuits upheld dress codes with slightly differing requirements for men and women, the Sixth Circuit has not provided any guidance on how to reconcile that previous line of authority with the more recent sex/gender-stereotyping theory of sex discrimination. Lacking such authority, and having considered the post-*Price Waterhouse* views that have been expressed by the Sixth Circuit, the Court rejects this defense.

Second, the Funeral Home asserts that it is entitled to an exemption under the federal Religious Freedom Restoration Act ("RFRA"). The Court finds that the Funeral Home has met its initial burden of showing that enforcement of Title VII, and the body of sex-stereotyping case law that has developed under it, would impose a substantial burden on its ability to conduct business in accordance with its sincerely-held religious beliefs. The burden then shifts to the EEOC to show that application of the burden "to the person:" 1) is in furtherance of a compelling governmental interest; and 2) is the least restrictive means of furthering that compelling governmental interest. The Court assumes without deciding that the EEOC has shown that protecting employees from gender stereotyping in the workplace is a compelling governmental interest.

Nevertheless, the EEOC has failed to show that application of the burden on the Funeral Home, under these facts, is the least restrictive means of protecting employees from gender stereotyping. If a least restrictive means is available to achieve the goal, the government must use it. This requires the government to show a degree of situational flexibility, creativity, and accommodation when putative interests clash with religious exercise. It has failed to do so here. The EEOC's briefs do not contain any indication that the EEOC has explored the possibility of any accommodations or less restrictive means that might work under these facts. Perhaps that is

because it has been proceeding as if gender identity or transgender status are protected classes under Title VII, taking the approach that the only acceptable solution would be for the Funeral Home to allow Stephens to wear a skirt-suit at work, in order to express Stephens's female gender identity.

In *Price Waterhouse*, the Supreme Court recognized that the intent behind Title VII's inclusion of sex as a protected class expressed "Congress' intent to forbid employers to take gender into account" in the employment context. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989). That is, the goal of the sex-stereotyping theory of sex discrimination is that "gender" "be *irrelevant*" with respect to the terms and conditions of employment and to employment decisions. *Id.* (emphasis added).

The EEOC claims the Funeral Home fired Stephens for failing to conform to the masculine gender stereotypes expected as to work clothing and that Stephens has a Title VII right *not to be subject to gender stereotypes* in the workplace. Yet the EEOC has not challenged the Funeral Home's sex-specific dress code, that requires female employees to wear a skirt-suit and requires males to wear a pants-suit with a neck tie. Rather, the EEOC takes the position that Stephens has a Title VII right to "dress as a woman" (*ie*., dress in a stereotypical feminine manner) while working at the Funeral Home, in order to express Stephens's gender identity. If the compelling interest is truly in eliminating gender stereotypes, the Court fails to see why the EEOC couldn't propose a gender-neutral dress code as a reasonable accommodation that would be a *less restrictive* means of furthering that goal under the facts presented here. But the EEOC has not even discussed such an option, maintaining that Stephens must be allowed to wear a skirt-suit in order to *express* Stephens's gender identity. If the compelling governmental interest

is truly in *removing or eliminating* gender stereotypes in the workplace in terms of clothing (*i.e.*, making gender "irrelevant"), the EEOC's chosen manner of enforcement in this action does not accomplish that goal.

This Court finds that the EEOC has not met its demanding burden. As a result, the Funeral Home is entitled to a RFRA exemption from Title VII, and the body of sex-stereotyping case law that has developed under it, under the facts and circumstances of this unique case.

As to the clothing allowance claim, the underlying EEOC administrative investigation uncovered possible unlawful discrimination of a kind not raised by the charging party and not affecting the charging party. As such, under the Sixth Circuit precedent, the proper procedure is for the filing of a charge by a member of the EEOC and for a full EEOC investigation of that new claim. Because the EEOC did not do that, it cannot proceed with that claim in this action. The clothing allowance claim shall be dismissed without prejudice.

BACKGROUND

The EEOC filed this action on September 25, 2014. The First Amended Complaint is the operative complaint. The EEOC asserts two different Title VII claims against the Funeral Home. First, it asserts that the Funeral Home violated Title VII by terminating Stephens because of sex. That is, the EEOC alleges that the Funeral Home's "decision to fire Stephens was motivated by sex-based considerations. Specifically, [the Funeral Home] fired Stephens because Stephens is transgender, because of Stephens's transition from male to female, and/or because Stephens did not conform to [the Funeral Home's] sex- or gender-based preferences, expectations, or stereotypes." (Am. Compl. at ¶ 15). Second, the EEOC alleges that the Funeral Home violated Title VII "by providing a clothing allowance / work clothes to male employees but failing to

provide such assistance to female employees because of sex." (*Id.* at ¶ 17).

Following the close of discovery, each party filed its own motion for summary judgment. This Court's practice guidelines, which are expressly included in the Scheduling Order issued in this case, provide, consistent with Fed. R. Civ. P. 56 (c) and (e), that:

> a. The moving party's papers shall include a separate document entitled Statement of Material Facts Not in Dispute. The statement shall list in separately numbered paragraphs concise statements of each undisputed material fact, supported by appropriate citations to the record. . .
>
> b. In response, the opposing party shall file a separate document entitled Counter-Statement of Disputed Facts. The Counter-Statement shall list in separately numbered paragraphs following the order or the movant's statement, whether each of the facts asserted by the moving party is admitted or denied and shall also be supported by appropriate citations to the record. The Counter-Statement shall also include, in a separate section, a list of each issue of material fact as to which it is contended there is a genuine issue for trial.
>
> c. All material facts as set forth in the Statement of Material Facts Not in Dispute shall be deemed admitted unless controverted in the Counter-Statement of Disputed Facts.

(D.E. No. 19 at 2-3).

In compliance with this Court's guidelines, in support of its motion, the EEOC filed a "Statement of Material Facts Not In Dispute" (D.E. No. 52) ("Pl.'s Stmt. A"). In response to that submission, the Funeral Home filed a "Counter-Statement of Disputed Facts" (D.E. No. 61) ("Def's Stmt. A"). In support of its motion, the Funeral Home filed a "Statement of Material Facts Not In Dispute" (D.E. No. 55) (Def.'s Stmt. B"). In response, the EEOC filed a Counter-Statement of Disputed Facts" (D.E. No. 64) ("Pl.'s Stmt. B").

Notably, neither party believes that there are any genuine issues of material fact for trial regarding liability. (*See* D.E. 64 at Pg ID 2087, "The Commission does not believe there are any

genuine issues of material fact regarding liability for trial;" D.E. No. 61 at Pg ID 1841, "[the Funeral Home] avers that none of the facts in dispute is material to the legal claims at issue.").

The following relevant facts are undisputed.

The Funeral Home and Its Ownership

The Funeral Home has been in business since 1910. The Funeral Home is a closely-held, for-profit corporation owned and operated by Thomas Rost ("Rost"). (Stmts. B at ¶ 1). Rost owns 94.5 % of the shares of the Funeral Home. (Stmts. A at ¶ 19). The remaining shares are owned by his children. (Stmts. B at ¶ 8). Rost's grandmother was a funeral director for the business up until 1950. (Rost Aff. at ¶ 52). Rost has been the owner of the Funeral Home for over thirty years. Rost has been the President of the Funeral Home for thirty-five years and is the sole officer of the corporation. (Stmts. B at ¶¶ 9-10). The Funeral Home has three locations in Michigan: Detroit, Livonia, and Garden City.

The Funeral Home is not affiliated with or part of any church and its articles of incorporation do not avow any religious purpose. (Stmts. A at ¶¶ 25-26). Its employees are not required to hold any religious views. (*Id*. at ¶ 27). The Funeral Home serves clients of every religion (various Christian denominations, Hindu, Muslim, Jewish, native Chinese religions) or none at all. (Stmts. A at ¶ 30). It employs people from different religious denominations, and of no religious beliefs at all. (*Id*. at ¶ 37).

The Funeral Home's Dress Code

Both parties attached the Funeral Home's written Employee Manual as an exhibit to the pending motions. It contains the following regarding dress code:

DRESS CODE

September 1998

For all Staff:

To create and maintain our reputation as "Detroit's Finest", it is fundamentally important and imperative that every member of our staff shall always be distinctively attired and impeccably groomed, whenever they are contacting the public as representatives of The Harris Funeral Home. Special attention should be given to the following consideration, on all funerals, all viewings, all calls, or on any other funeral work.

MEN

SUITS — BLACK GRAY, OR DARK BLUE ONLY (as selected) with conservative styling. Coats should be buttoned at all times. Fasten only the middle button on a three button coat.

If vests are worn, they should match the suit. Sweaters are not acceptable as a vest. NOTHING should be carried in the breast pocket except glasses which are not in a case.

SHIRTS — WHITE OR WHITE ON WHITE ONLY, with regular medium length collars. (Button-down style collars are NOT acceptable). Shirts should always be clean. Collars must be neat.

TIES — As selected by company, or very similar.

SOCKS — PLAIN BLACK OR DARK BLUE SOCKS.

SHOES — BLACK OR DARK BLUE ONLY. (Sport styles, high tops or suede shoes are not acceptable). Shoes should always be well polished.

. . . .

PART TIME MEN - Should wear conservative, dark, business suits, avoiding light brown, light blue, light gray, or large patterns. All part time personnel should follow all details of dress as specified, as near as possible.

FUNERAL DIRECTORS ON DUTY – Are responsible for the appearance of the staff assisting them on services and are responsible for personnel on evening duty.

WOMEN

> Because of the particular nature of our business, please dress conservatively. A suit or a plain conservative dress would be appropriate, or as furnished by funeral home. Avoid prints, bright colored materials and large flashy jewelry. A sleeve is necessary, a below elbow sleeve is preferred.
>
> Uniformity creates a good impression and good impressions are vitally important for both your own personal image and that of our Company. Our visitors should always associate us with clean, neat and immaculately attired men and women.

(D.E. No. 54-20 at Pg ID 1486-87) (underlining and capitalization in original).

In addition, it is understood at the Funeral Home that men who interact with the public are required to wear a business suit (pants and jacket) with a neck tie, and women who interact with the public are generally[2] required to wear a business suit that consists of a skirt and business jacket. (Stmts. B at 51; D.E. No. 54-11 at Pg ID 1423).

The Funeral Home administers its dress code based upon its employees' biological sex. (Stmts. B at ¶ 51). Employees at the Funeral Home have been disciplined in the past for failing to abide by the dress code. (Stmts. B at ¶ 60).

Stephens's Employment And Subsequent Termination

The Funeral Home hired Stephens in October of 2007. At that time, Stephens's legal name was Anthony Stephens. All of the Funeral Home's employment records pertaining to Stephens – including driver's license, tax records, and mortuary science license – identify Stephens as a male. (Stmts. B at ¶ 63).

Stephens served as a funeral director/embalmer for the Funeral Home for nearly six years

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[2]Rost testified that female employees at the Detroit location do not wear a skirt and jacket "all the time over there," and sometimes wear pants and a jacket. (Rost Dep., D.E. No. 54-11 at Pg ID 1423).

under the name Anthony Stephens. (Stmts. A at ¶¶ 1-2).

On July 31, 2013, Stephens provided the Funeral Home/Rost with a letter that stated, in pertinent part:

> Dear Friends and Co-Workers:
>
> I have known many of you for some time now, and I count you all as my friends. What I must tell you is very difficult for me and is taking all the courage I can muster. I am writing this both to inform you of a significant change in my life and to ask for your patience, understanding, and support, which I would treasure greatly.
>
> I have a gender identity disorder that I have struggled with my entire life. I have managed to hide it very well all these years . . .
>
> . . . It is a birth defect that needs to be fixed. I have been in therapy for nearly four years now and have been diagnosed as a transexual. I have felt imprisoned in my body that does not match my mind, and this has caused me great despair and loneliness. With the support of my loving wife, I have decided to become the person that my mind already is. I cannot begin to describe the shame and suffering that I have lived with. Toward that end, I intend to have sex reassignment surgery. *The first step I must take is to live and work full-time as a woman for one year. At the end of my vacation on August 26, 2013, I will return to work as my true self, Amiee Australia Stephens, in appropriate business attire*.
>
> I realize that some of you may have trouble understanding this . . . It is my wish that I can continue my work at R.G. & G. R. Harris Funeral Homes doing what I have always done, which is my best!

(D.E No. 53-22) (emphasis added).

It is undisputed that Stephens intended to abide by the Funeral Home's dress code for its female employees – which would be to wear a skirt-suit. (Stmts. A at ¶ 8; Stmts. B at ¶ 51; D.E. No. 54-11 at Pg ID 1423; *see also* D.E. No. 51 at Pg ID 605, and First Am. Compl. at 4).

Stephens hand-delivered a copy of the letter to Rost. (Rost Dep. at 110). Rost made the decision to fire Stephens by himself and did so on August 15, 2013. (Stmts. A at ¶¶ 10, 12-13;

Rost Dep. at 117-18). Rost privately fired Stephens in person. (Stmts. A at ¶ 11). Rost testified:

> Q. Okay. How did you fire Stephens: how did you let Ms. Stephens know that she was being released?
> A. Well, I said to him, just before he was – it was right before he was going to go on vacation and I just – I said – I just said "Anthony, this is not going to work out. And that your services would no longer be needed here."

(Rost Dep. at 126). Stephens also testified that Rost said it was not going to work out. (Stephens Dep. at 80). Stephens's understanding from that conversation was that "coming to work dressed as a woman was not going to be acceptable." (*Id.*). It was a brief conversation and Stephens left the facility. (Rost Dep. at 127).

After being terminated, Stephens met with an attorney and ultimately filed a charge of discrimination with the EEOC. (Stephens Dep. at 79-80; D.E. No. 54-22). The EEOC charge filed by Stephens checked the box for "sex" discrimination and indicated that the discrimination took place from July 31, 2013 to August 15, 2013. (D.E. No. 54-22 at Pg ID 1497). The charge stated "the particulars" of the claimed sex discrimination as follows:

> I began working for the above-named employer on 01 October 2007; I was last employed as a Funeral Director/Embalmer.
>
> On or about 31 July 2013, I notified management that I would be undergoing gender transitioning and that on 26 August 2013, I would return to work as my true self, a female. On 15 August 2013, my employment was terminated. The only explanation I was given was that management did not believe the public would be accepting of my transition. Moreover, during my entire employment I know there are no other female Funeral Directors/Embalmers.
>
> I can only conclude that I have been discharged due to my sex and gender identity, female, in violation of Title VII of the Civil Rights Act of 1964, as amended.

(*Id.*).

Administrative EEOC Proceedings

During the EEOC administrative proceedings, the Funeral Home filed a response to the Charge of Discrimination that stated, among other things, that it has a written dress code policy and that Stephens was terminated because Stephens refused to comply with that dress code. (D.E. No. 63-16).

During the administrative investigation, the EEOC discovered that male employees at the Funeral Home were provided with work clothing and that female employees were not. (D.E. No. 63-3, March 2014 Onsite Memo).

On June 5, 2014, the EEOC issued its "Determination." (D.E. No. 63-4). It stated, in pertinent part:

> The Charging Party alleged that she was discharged due to her sex and gender identity, female, in violation of Title VII of the Civil Rights Act of 1964, as amended.
>
> Evidence gathered during the course of the investigation reveals that there is reasonable cause to believe that the Charging Party's allegations are true.
>
> Like and related and growing out of this investigation, the Commission found probable cause to believe that the Respondent discriminated against its female employees by providing male employees with a clothing benefit which was denied to females, in violation of Title VII of the Civil Rights Act of 1964, as amended.

(D.E. No. 63-4).

Complaint, Amended Complaint, and Affirmative Defenses

The EEOC filed this civil action against the Funeral Home on September 25, 2014, asserting its two claims.

As its first responsive pleading, the Funeral Home filed a Motion to Dismiss seeking dismissal of the wrongful termination claim. This Court denied that motion, ruling that the

EEOC's complaint stated a claim on behalf of Stephens for sex-stereotyping sex-discrimination under binding Sixth Circuit authority. (*See* 4/23/15 Opinion, D.E. No. 13). This Court rejected, however, the EEOC's position that its complaint stated a Title VII claim on behalf of Stephens by virtue of alleging that the Funeral Home fired Stephens because of transgender status or gender identity. (*See* D.E. No. 13 at Pg ID 188) (noting that "like sexual orientation, transgender or transsexual status is currently not a protected class under Title VII.").

On April 29, 2015, the Funeral Home filed its Answer and Affirmative Defenses. (D.E. No. 14).

On May 15, 2015, the EEOC sought to file a First Amended Complaint, in order to correct the spelling of Stephens's first name. That First Amended Complaint, that contains the same two claims, was filed on June 1, 2015. (D.E. No. 21).[3]

On June 4, 2015, the Funeral Home filed its Answer and Affirmative Defenses to the EEOC's First Amended Complaint, (D.E. No. 22). In it, the Funeral Home included additional affirmative defenses, including: 1) "The EEOC's claims violate the Funeral Home's right to free exercise of religion under the First Amendment to the United States Constitution;" and 2) "The EEOC's claims violate the Funeral Home's rights under the federal Religious Freedom Restoration Act (RFRA)." (*Id*. at Pg ID 254).

[3]Although this Court rejected the EEOC's position that it could pursue a Title VII claim based on transgender status or gender identity, the EEOC kept those allegations in the First Amended Complaint because it wished to preserve its right to appeal this Court's ruling. (*See* D.E. No. 37 at Pg ID 462-63).

Relevant Discovery In This Action

a. Termination Decision

Again, Rost made the decision to terminate Stephens. (Stmts. A at ¶¶ 12-13). It is undisputed that job performance did not motivate Rost's decision to terminate Stephens. (Stmts. A at ¶ 16). During his deposition in this action, Rost testified:

Q. Okay. Why did you – *what was the specific reason that you terminated Stephens?*
A. *Well, because he – he was no longer going to represent himself as a man. He wanted to dress as a woman.*
Q. Okay. So he presented you this letter . . .
A. Number 7, yes.
Q. Yeah, Exhibit 7. So just for a little background and pursuant to the question of Mr. Price, you were presented that letter from Stephens?
A. Correct.
Q. Okay. And did anywhere in that letter indicate that Stephens would continue to dress under your dress code as a man in the workplace?
A. No.
Q. Did he ever tell you during your meeting when he handed you that letter that he would continue to dress as a man?
A. No.
Q. *Did he indicate that he would dress as a woman?*
A. *Yes. Yes.*
Q. Okay. *Is it – the reason you fired him*, was it because he claimed that he was really a woman; is that why you fired him or was it because he claimed – or that he would no longer dress as a man?
A. *That he would no longer dress as a man.*
Q. And why was that a problem?
A. Well, because we – *we have a dress code that is very specific that men will dress as men*; *in appropriate manner, in a suit and tie* that we provide and that women will conform to their dress code that we specify.
Q. So hypothetically speaking, if Stephens had told you that he believed that he was a woman, but would only present as a woman outside of work, would you have terminated him?
A. No.

(Rost Dep. at 135-37) (emphasis added).

b. Rost's Religious Beliefs

Rost also testified that the Funeral Home's dress code comports with his religious views. (Stmts. A at ¶ 18).

Rost has been a Christian for over sixty-five years. (Stmts. B at ¶ 17). He attends both Highland Park Baptist Church and Oak Pointe Church. For a time, Rost was on the deacon board of Highland Park Baptist Church. Rost is on the board of the Detroit Salvation Army, a Christian nonprofit ministry, and has been for 15 years; he was the former Chair of the advisory board. (Smts. B at ¶¶ 18-19).

The Funeral Home's mission statement is published on its website, which reads "R.G. & G.R. Harris Funeral Homes recognize that its highest priority is to honor God in all that we do as a company and as individuals. With respect, dignity, and personal attention, our team of caring professionals strive to exceed expectations, offering options and assistance designed to facilitate healing and wholeness in serving the personal needs of family and friends as they experience a loss of life." (Smts. B at ¶ 21). The website also contains a Scripture verse at the bottom of the mission statement page:

> "But seek first his kingdom and righteousness, and all these things shall be yours as well."
>
> Matthew 5:33

(Stmts. B at ¶ 22 ; D.E. No. 54-16).

In operating the business, Rost places, throughout the funeral homes, Christian devotional booklets called "Our Daily Bread" and small cards with Bible verses on them called "Jesus Cards." (Stmts. B at ¶ 23).

Rost sincerely believes that God has called him to serve grieving people. He sincerely believes that his "purpose in life is to minister to the grieving, and his religious faith compels him to do that important work." (Stmts. B. at ¶ 31). It is also undisputed that Rost sincerely believes that the "Bible teaches that a person's sex (whether male or female) is an immutable God-given gift and that it is wrong for a person to deny his or her God-given sex." (Stmt. B at ¶ 28).

In support of the Funeral Home's motion, Rost submitted an affidavit. (D.E. No. 54-2). Rost operates the Funeral Home "as a ministry to serve grieving families while they endure some of the most difficult and trying times in their lives." (*Id*. at ¶ 7).

At the Funeral Home, the funeral directors are the most "prominent public representatives" of the business and are "the face that [the Funeral Home] presents to the world." (*Id*. at ¶ 32). The Funeral Home "administers its dress code based on our employees' biological sex, not based on their subjective gender identity." (*Id*. at ¶ 35).

Rost believes "that the Bible teaches that God creates people male or female." (*Id*. at ¶ 41). He believes that "the Bible teaches that a person's sex is an immutable God-given gift and that people should not deny or attempt to change their sex." (*Id*. at ¶ 42). Rost believes that he "would be violating God's commands if [he] were to permit one of the [Funeral Home's] funeral directors to deny their sex while acting as a representative of [the Funeral Home]. This would violate God's commands because, among other reasons, [he] would be directly involved in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift." (*Id*. at ¶ 43). Rost believes that "the Bible teaches that it is wrong for a biological male to deny his sex by dressing as a woman." (*Id*. at ¶ 44). Rost believes that he "would be violating

God's commands" if he were to permit one of the Funeral Home's male funeral directors to wear the skirt-suit uniform for female directors while at work because Rost "would be directly involved in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift." (*Id*. at ¶ 45). If Rost "were forced as the owner of [the Funeral Home] to violate [his] sincerely held religious beliefs by paying for or otherwise permitting one of [his] employees to dress inconsistent with his or her biological sex, [Rost] would feel significant pressure to sell [the] business and give up [his] life's calling of ministering to grieving people as a funeral home director and owner." (*Id*. at ¶ 48).

Rost's Affidavit also states that he "would not have dismissed Stephens if Stephens had expressed [to Rost] a belief that he is a woman and an intent to dress or otherwise present as a woman outside of work, so long as he would have continued to conform to the dress code for male funeral directors while at work. It was Stephens's refusal to wear the prescribed uniform and intent to violate the dress code while at work that was the decisive consideration in [his] employment decision." (*Id*. at ¶ 50). Rost "would not discharge or otherwise discipline employees who dress as members of the opposite sex on their own time but comply with the dress code while on the job." (*Id*. at ¶ 51).

c. Clothing Benefits

The Funeral Home provides its male employees who interact with clients, including funeral directors, with suits and ties free of charge. (Stmts. A at ¶ 42). Upon hire, full-time male employees who interact with the public are provided two suits and two ties, while part-time male employees who interact with the public are provided one suit and tie. (Stmts. A at ¶ 47). After those initial suits are provided, the Funeral Home replaces them as needed. (*Id*. at ¶ 48). The

Funeral Home spends about $225 per suit and $10 per tie. (*Id*. at ¶ 52).

It is undisputed that benefits were not always provided to female employees. Starting in October of 2014, however, the Funeral Home began providing female employees who interact with the public with an annual clothing stipend that ranged from $75.00 for part-time employees to $150.00 for full-time employees. (*See* Stmts. A at ¶ 54; Rost Dep. at 15-16).

In addition, the Funeral Home affirmatively states that it will offer the same type of clothing allowance that it provides to male funeral directors to any female funeral directors in the future: the Funeral Home "will provide female funeral directors with skirt suits in the same manner that it provides pant suits to male funeral directors." (Rost Aff. at ¶ 54).

STANDARD OF DECISION

Summary judgment will be granted where there exists no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). No genuine issue of material fact exists where "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elect. Indus. Co., Ltd. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986).

ANALYSIS

Under Title VII, it is an "unlawful employment practice" for an employer 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. 42 U.S.C. § 2000e-2(a). "We take these words to mean that *gender must be irrelevant* to employment decisions." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989) (emphasis added).

Here, the EEOC asserts that the Funeral Home violated Title VII in two ways.

I. Title VII Wrongful Termination Claim On Behalf Of Stephens

The EEOC alleges that Stephens was terminated in violation of Title VII under a *Price Waterhouse* sex-stereotyping theory of sex discrimination. That is, the EEOC alleges that the Funeral Home violated Title VII by firing Stephens because Stephens did not conform to the Funeral Home's sex/gender based stereotypes as to work clothing.[4]

This Court previously denied a Motion to Dismiss filed by the Funeral Home and ruled that the EEOC's complaint stated a *Price Waterhouse* sex/gender-stereotyping claim under Title VII. (*See* D.E. No. 13). That ruling was based on several Sixth Circuit cases that establish that a transgender person – just like anyone else – can bring such a claim under Title VII. *See Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir. 2004) ("Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as 'transsexual,' is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity."); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Myers v. Cuyahoga County, Ohio*, 182 F. App'x 510, 2006 WL 1479081 (6th Cir. 2006).

The Court includes here some aspects of those decisions that bear on the positions advanced by the parties in the pending motions. First, the Sixth Circuit has gone a bit further than other courts in terms of the reach of a sex-stereotyping claim after *Price Waterhouse* and

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[4]Notably, the parties have confined their claims, defenses, and analysis to *clothing alone*. In addition, unlike many sex-stereotyping cases, this case does not involve any allegations that the Funeral Home discriminated against Stephens based upon any gender-nonconforming *behaviors*.

spoke of discrimination against men who wear dresses:

> After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex. It follows that employers who discriminate against men because they *do* wear dresses[5] and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex.

Smith, 378 F.3d at 574 (emphasis in original). Second, the cases indicate that Title VII sex-stereotyping claims follow the same analytical framework followed in other Title VII cases, including the *McDonnell Douglas* burden-shifting paradigm. *See e.g., Myers*, 182 F. App'x at 519.

It is well-established that, at the summary judgment stage, a plaintiff must adduce either direct or circumstantial evidence to proceed with a Title VII claim. *Upshaw v. Ford Motor Co.*, 576 F.3d 576, 584 (6th Cir. 2009); *DiCarlo v. Potter*, 358 F.3d 408, 414 (6th Cir. 2004).

The EEOC's Motion for Summary Judgment asserts that, based on Rost's testimony, it has direct evidence that the Funeral Home fired Stephens based on sex stereotypes and it is therefore entitled to summary judgment. That appears to be a solid argument, as the "ultimate question" as to the Title VII sex-stereotyping claim is whether the Funeral Home fired Stephens "because of [Stephens's] failure to conform to sex stereotypes," *Barnes*, 401 F.3d at 738, and Rost testified:

> Q. Okay. Why did you – *what was the specific reason that you terminated Stephens?*
> A. *Well, because he – he was no longer going to represent himself as a man.*

---

[5]Neither *Smith* nor *Barnes* appeared to involve a person who was born male wearing a dress in the workplace. *See, e.g., Barnes*, 401 F.3d at 738 (noting the plaintiff had a "practice of dressing as a woman outside of work.").

He wanted to dress as a woman.

. . . .

Q. *Did he indicate that he would dress as a woman?*
A. *Yes. Yes.*
Q. Okay. *Is it – the reason you fired him*, was it because he claimed that he was really a woman; is that why you fired him or was it because he claimed – or that he would no longer dress as a man?
A. *That he would no longer dress as a man.*
Q. And why was that a problem?
A. Well, because we – *we have a dress code that is very specific that men will dress as men*; *in appropriate manner*, in a suit and tie that we provide and that women will conform to their dress code that we specify.
Q. So hypothetically speaking, if Stephens had told you that he believed that he was a woman, but would only present as a woman outside of work, would you have terminated him?
A. No.

(Rost Dep. at 135-37) (emphasis added). Thus, while this Court does not often see cases where there is direct evidence to support a claim of employment discrimination, it appears to exist here.

The Funeral Home asserts that the EEOC's motion should be denied, and that summary judgment should be entered in its favor, based upon two defenses. First, it asserts that its enforcement of its sex-specific dress code does not constitute impermissible sex stereotyping under Title VII. Second, the Funeral Home asserts that RFRA prohibits the EEOC from applying Title VII to force the Funeral Home to violate its sincerely held religious beliefs.[6]

A. The Court Rejects The Funeral Home's Sex-Specific Dress-Code Defense.

The Funeral Home argues that its enforcement of its sex-specific dress code cannot constitute impermissible sex stereotyping under Title VII. It asserts that several courts have

[6]The EEOC's Motion, and the ACLU's brief, both address a First Amendment Free Exercise defense by the Funeral Home. (*See, e.g.*, EEOC's motion at 13). The Funeral Home, however, did not respond to the arguments concerning that defense because it believes that RFRA provides it more expansive protection. (*See* D.E. No. 60 at Pg ID 1797, n.4).

concluded that sex-specific dress codes and grooming policies that impose equal burdens on men and women do not violate Title VII. The Funeral Home essentially asks the Court to rule that its sex-specific dress code operates as a defense to the wrongful termination claim because the Funeral Home's dress code does not impose an unequal burden on male and female employees. The Funeral Home relies primarily on two cases to support its position: 1) *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir. 2006) (*en banc*); and 2) *Barker v. Taft Broadcasting Co.*, 549 F.2d 400 (6th Cir. 1977).

As explained below, the Court concludes that this defense must be rejected because: 1) the sex-specific dress code cases that the Funeral Home relies on involved claims that challenged an employer's dress code as violative of Title VII, and this case involves no such claim; 2) the Funeral Home's argument is based upon a non-binding decision of the Ninth Circuit; 3) the Ninth Circuit decision is divided and the dissent is more in line with the views expressed by the Sixth Circuit as to *post-Price Waterhouse* sex-stereotyping claims; and 4) the only Sixth Circuit case on dress codes cited by the Funeral Home is from 1977 – a decade before *Price Waterhouse* was decided.

Unlike the cases that the Funeral Home relies on, as the EEOC and ACLU both note, the EEOC has not asserted any claims in this action based upon the Funeral Home's dress code policy. That is, the Funeral Home's sex-specific dress code policy *has not* been challenged by the EEOC in this action. Rather, the dress code is only being injected because the Funeral Home is using its dress code as a *defense* to the Title VII sex-stereotyping claim asserted on behalf of Stephens. Indeed, the Funeral Home listed this as an affirmative defense:

The EEOC's claims are barred by virtue of the fact that the Funeral Home was

> legally justified in any and all acts of which the EEOC complains, including but not limited to the Funeral Home's right to impose sex-specific dress codes on its employees.

(D.E. No. 14 at Pg ID 202).

The primary case the Funeral Home relies on is *Jespersen.* In that case, the Ninth Circuit issued an *en banc* decision in order to clarify its "circuit law concerning appearance and grooming standards, and to clarify [its] evolving law of sex stereotyping claims." *Jespersen*, 444 F.3d at 1105. In that case, the plaintiff was a female bartender who was terminated from her position after she refused to follow the company's "Personal Best" policy, which required female employees to wear specified make-up[7] and prohibited male employees from wearing any makeup. The plaintiff alleged that the policy discriminated against women by: 1) subjecting them to terms and conditions of employment to which men are not similarly subjected; and 2) requiring that women conform to sex-based stereotypes as a term and condition of employment.

The majority affirmed the district court's dismissal of the plaintiff's claims. In doing so, the majority stated:

> We agree with the district court and the panel majority that on this record, Jespersen has failed to present evidence sufficient to survive summary judgment on her claim that the policy imposes an unequal burden on women. With respect to sex stereotyping, *we hold that appearance standards,* including makeup requirements*, may well be the subject of a Title VII claim for sexual stereotyping*, but that on this record Jespersen has failed to create any triable issue of fact that the challenged policy was part of a policy motivated by sex stereotyping. We therefore affirm.

Id. at 1106 (emphasis added). Even though the majority affirmed the district court, it emphasized that it was "not preclud[ing], as a matter of law, a claim of sex-stereotyping on the basis of dress

[7]Face powder, blush, mascara, and lip color.

or appearance codes. Others may well be filed, and any bases for such claims refined as law in this area evolves." *Id*. at 1113.

Moreover, the dissent lays out a cogent explanation as to why the plaintiff in that case had a sex-stereotyping claim under *Price Waterhouse*:

> I agree with the majority that appearance standards and grooming policies may be subject to Title VII claims. . . I part ways with the majority, however, inasmuch as I believe that the "Personal Best" program was part of a policy motivated by sex stereotyping and that Jespersen's termination for failing to comply with the program's requirements was "because of" her sex. Accordingly, I dissent from Part III of the majority opinion and from the judgment of the court.
>
> Jespersen's evidence showed that Harrah's fired her because she did not comply with a grooming policy that imposed a facial uniform (full makeup) on only female bartenders. Harrah's stringent "Personal Best" policy required female beverage servers to wear foundation, blush, mascara, and lip color, and to ensure that lip color was on at all times. Jespersen and her female colleagues were required to meet with professional image consultants who in turn created a facial template for each woman. Jespersen was required not simply to wear makeup; in addition, the consultants dictated where and how the makeup had to be applied. Quite simply, her termination for failing to comply with a grooming policy that imposed a facial uniform on only female bartenders is discrimination "because of" sex. Such discrimination is clearly and unambiguously impermissible under Title VII, which requires that "gender must be irrelevant to employment decisions." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (plurality opinion) (emphasis added).

Jespersen, 444 F.3d at 1113-14. The dissent noted that "*Price Waterhouse* recognizes that gender discrimination may manifest itself in stereotypical notions as to how women should dress and present themselves" and cited the Sixth Circuit's decision in *Smith*, wherein it had stated "[a]fter *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex." *Jespersen,* 444 F.3d at 1115 (quoting *Smith, supra*). The dissent further stated, "I believe that the fact that Harrah's designed and promoted a policy

that required women to conform to a sex stereotype by wearing full makeup is sufficient 'direct evidence' of discrimination." *Id*. The dissent concluded that the plaintiff presented a "classic case" of *Price Waterhouse* discrimination. *Id.* at 1116.

The Funeral Home has not directed the Court to any cases wherein the Sixth Circuit has endorsed the majority view in *Jespersen*. And the only Sixth Circuit dress-code case that it cites is from 1977 – a decade before *Price Waterhouse* was decided.

In pre-*Price Waterhouse* decisions, dating back to the 1970's, other circuits have held that employer personal appearance codes with differing requirements for men and women do not violate Title VII as long as there is "some justification in commonly accepted social norms and are reasonably related to the employer's business needs." *Carroll v. Talman Fed. Savings & Loan*, 604 F.2d 1028, 1032 (7th Cir. 1979); *see also Fountain v. Safeway Stores, Inc*., 555 F.2d 753, 755 (9th Cir. 1977) ("regulations promulgated by employers which require male employees to conform to different grooming and dress standards than female employees is not sex discrimination within the meaning of Title VII."). In *Barker v. Taft Broadcasting, Co.,* 549 F.2d 400 (6th Cir. 1977), a majority of a Sixth Circuit panel expressed a similar view, ruling that an employer's grooming code that required a shorter hair length for men than women did not violate Title VII, while the dissent concluded that a Title VII claim was stated.

But the Sixth Circuit has not provided any post-*Price Waterhouse* guidance as to whether sex-specific dress codes, that have slightly differing clothing requirements for men and women, either violate Title VII or provide a defense to a sex stereotyping claim. This evolving area of the law – how to reconcile this previous line of authority regarding sex-specific dress/grooming codes with the more recent sex/gender-stereotyping theory of sex discrimination under Title VII

– has not been addressed by the Sixth Circuit.

Lacking such guidance, this Court finds that the dissent in *Jespersen* appears more in line with the post-*Price Waterhouse* views that *have been* expressed by the Sixth Circuit. This is illustrated by a comparison of the majority's ruling in *Jespersen* to the portion of the Sixth Circuit's decision in *Smith* that was quoted by the dissent in *Jespersen:*

The majority in *Jespersen* upheld the dismissal of a sex discrimination claim where the female plaintiff was terminated for not complying with a policy that required women (but not men) to wear makeup.	"After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex." *Smith, supra*, at 1115.

It appears unlikely that the *Smith* court would allow an employer like the employer in *Jespersen* to avoid liability for a Title VII sex-stereotyping claim simply by virtue of having put its gender-based stereotypes into a formal policy.

Accordingly, for all of these reasons, the Court rejects the Funeral Home's sex-specific dress code defense to the Title VII sex-stereotyping claim asserted on behalf of Stephens in this case.

B. The Funeral Home Is Entitled To A RFRA Exemption Under The Unique Facts And Circumstances Presented Here.

The Funeral Home also argues that the Religious Freedom Restoration Act of 1993 ("RFRA") prohibits the EEOC from applying Title VII to force the Funeral Home to violate its sincerely held religious beliefs. It asserts this defense on the heels of the Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc*., 134 S.Ct. 2751 (2014).

"Congress enacted RFRA in 1993 in order to provide very broad protection for religious

liberty. RFRA's enactment came three years after" the Supreme Court's decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), "which largely repudiated the method of analyzing free-exercise claims that had been used" in cases such as *Sherbert v. Verner* and *Wisconsin v. Yoder*. *Hobby Lobby*, 134 S.Ct. 2760. In short, in *Smith*, the Supreme Court rejected the previous balancing test set forth in *Sherbert* and "held that, under the First Amendment, 'neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest.'" *Id.*

"Congress responded to *Smith* by enacting RFRA." *Hobby Lobby*, 134 S.Ct. at 2761. "RFRA prohibits the "Government [from] substantially burden[ing] a *person's* exercise of religion even if the burden results from a rule of general applicability" unless the Government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §§ 2000bb–1(a), (b) (emphasis added). The majority in *Hobby Lobby* further held:

> "[L]aws [that are] 'neutral' toward religion," Congress found, "may burden religious exercise as surely as laws intended to interfere with religious exercise." 42 U.S.C. § 2000bb(a)(2); *see also* § 2000bb(a)(4). In order to ensure broad protection for religious liberty, RFRA provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." § 2000bb–1(a). If the Government substantially burdens a person's exercise of religion, under the Act that person is entitled to an exemption from the rule unless the Government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." § 2000bb–1(b).

Id. at 2761.

One of the stated purposes of RFRA is to provide a "defense to persons whose religious

exercise is substantially burdened by the government." 42 U.S.C. § 2000bb(b)(2). RFRA provides that "[a] person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or *defense in a judicial proceeding*." 42 U.S.C. § 2000bb-1(c) (emphasis added).

By its terms, RFRA "applies to *all Federal law*, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993." 42 U.S.C. § 2000bb-3(a) (emphasis added).

1. The Funeral Home Is Entitled To Protection Under RFRA And RFRA Applies To The EEOC, A Federal Agency.

The majority in *Hobby Lobby* concluded that a for-profit corporation is considered a "person" for purposes of RFRA protection. *Hobby Lobby*, 134 S.Ct. at 2768-69. The Funeral Home, a for-profit, closely-held corporation, is therefore entitled to protection under RFRA.

RFRA applies to the "government," which is defined to include "a branch, department, *agency*, instrumentality, and official (or other person acting under color of law) of the United States." 42 U.S.C. § 2000bb–2(1) (emphasis added). On its face, the statute applies to the EEOC, a federal agency, and the EEOC has not argued otherwise.

2. The Funeral Home Has Met Its Initial Burden Of Establishing That Compliance With Title VII "Substantially Burdens" Its Exercise Of Religion.

If RFRA applies in this case, then the Court "must next ask" whether the law at issue "substantially burdens" the Funeral Home's exercise of religion. *Hobby Lobby*, 134 S.Ct. at 2775. "Whether a government action substantially burdens a plaintiff's religious exercise is a question of law for a court to decide." *Singh v. McHugh*, __ F. Supp.3d __, 2016 WL 2770874 at

*5 (D.C. Cir. 2016).

As the challenging party, the Funeral Home has the initial burden of showing a substantial burden on its exercise of religion. For purposes of RFRA, "exercise of religion" includes "any exercise of religion, whether or not compelled by, or central to, a system of religious beliefs." *Hobby Lobby*, 134 S.Ct. at 2762.

Moreover, the majority in *Hobby Lobby* explained that the "question that RFRA presents" is whether the law at issue "imposes a substantial burden on the *ability of the objecting parties to conduct business in accordance with their religious beliefs*."[8] *Hobby Lobby*, 134 S.Ct. at 2778 (emphasis in original). Thus, the question becomes whether the law at issue here, Title VII and the body of sex-stereotyping case law that has developed under it, imposes a substantial burden on the ability of the Funeral Home to conduct business in accordance with its religious beliefs. The Court concludes that the Funeral Home has shown that it does.

Rost has been a Christian for over sixty-five years. The Funeral Home's mission statement is published on its website, which reads "R.G. & G.R. Harris Funeral Homes recognize that its highest priority is to honor God in all that we do as a company and as individuals. With respect, dignity, and personal attention, our team of caring professionals strive to exceed expectations, offering options and assistance designed to facilitate healing and wholeness in serving the personal needs of family and friends as they experience a loss of life." (Smts. B at ¶ 21).

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[8]The EEOC's brief asserts that RFRA protects only specific religious activities, not beliefs, and that the Funeral Home is still able to engage in its limited religious activities, like the placing of devotional cards in the funeral homes. The EEOC's limited view is not supported by the majority opinion in *Hobby Lobby*.

Rost believes that God has called him to serve grieving people and that his purpose in life is to minister to the grieving, and his religious faith compels him to do that important work. (Stmts. B. at ¶ 31). Rost believes that the "Bible teaches that a person's sex (whether male or female) is an immutable God-given gift and that it is wrong for a person to deny his or her God-given sex." (Stmt. B at ¶ 28).

The EEOC attempts to cast the Funeral Home as asserting that it would only be substantially burdened if it were required to provide female work clothing to Stephens. (D.E. 63 at Pg ID 1935). The Funeral Home's position is not so limited.

Rost believes "that the Bible teaches that God creates people male or female." (*Id*. at ¶ 41). He believes that "the Bible teaches that a person's sex is an immutable God-given gift and that people should not deny or attempt to change their sex." (*Id*. at ¶ 42). Rost believes that he "would be violating God's commands" if he were to permit one of the Funeral Home's funeral directors "to deny their sex while acting as a representative of [the Funeral Home]. This would violate God's commands because, among other reasons, [Rost] would be directly involved in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift." (*Id*. at ¶ 43). Rost believes that "the Bible teaches that it is wrong for a biological male to deny his sex by dressing as a woman." (*Id*. at ¶ 44). Rost believes that he "would be violating God's commands" if he were to permit one of the Funeral Home's biologically-male-born funeral directors to wear the skirt-suit uniform for female directors while at work, because Rost "would be directly involved in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift." (*Id*. at ¶ 45).

Such beliefs implicate questions of religion and moral philosophy. *Hobby Lobby*, 134

S.Ct. at 2779. Rost sincerely believes that it would be violating God's commands if he were to permit an employee who was born a biological male to dress in a traditionally female skirt-suit at the funeral home because doing so would support the idea that sex is a changeable social construct rather than an immutable God-given gift. The Supreme Court has directed that it is not this Court's role to decide whether those "religious beliefs are mistaken or insubstantial." *Hobby Lobby*, 134 S.Ct. at 2779. Instead, this Court's "narrow function" is to determine if this is "an honest conviction" and, as in *Hobby Lobby*, there is no dispute that it is.

Notably, the EEOC concedes that the Funeral Home's religious beliefs are sincerely held. (*See* D.E. No. 51 at Pg ID 596 & 612, "The Commission does not contest Defendant's religious sincerity.").

The Court finds that the Funeral Home has shown that the burden is "substantial." Rost has a sincere religious belief that it would be violating God's commands if he were to permit an employee who was born a biological male to dress in a traditionally female skirt-suit at one of his funeral homes because doing so would support the idea that sex is a changeable social construct rather than an immutable God-given gift. Rost objects on religious grounds to: 1) being compelled to provide a skirt to an employee who was born a biological male; and 2) being compelled to allow an employee who was born a biological male to wear a skirt while working as a funeral director for his business. To enforce Title VII (and the sex stereotyping body of case law that has developed under it) by requiring the Funeral Home to provide a skirt to and/or allow an employee born a biological male to wear a skirt at work would impose a substantial burden on the ability of Rost to conduct his business in accordance with his sincerely-held religious beliefs.

If Rost and the Funeral Home do not yield to Title VII and the body of sex stereotyping

case law under it, the economic consequences for the Funeral Home could be severe – having to pay back and front pay to Stephens in connection with this case.

Moreover, Rost testified that if he "were forced as the owner of [the Funeral Home] to violate [his] sincerely held religious beliefs by paying for or otherwise permitting one of [his] employees to dress inconsistent with his or her biological sex, [Rost] would feel significant pressure to sell [the] business and give up [his] life's calling of ministering to grieving people as a funeral home director and owner." (Rost Aff. at ¶ 48).

The Court concludes that the Funeral Home has met its initial burden of showing that enforcement of Title VII, and the body of sex-stereotyping case law that has developed under it, would impose a substantial burden on the ability of the Funeral Home to conduct business in accordance with its sincerely-held religious beliefs.

3. The Funeral Home Is Entitled To An Exemption Unless The EEOC Meets Its Demanding Two-Part Burden.

Once a claimant demonstrates a substantial burden to his religious exercise, that person "is entitled to an exemption from" the law unless the Government can meet its burden of showing that application of the burden "to the person:" 1) is in furtherance of a compelling governmental interest; and 2) is the least restrictive means of furthering that compelling governmental interest. *Hobby Lobby,* 134 S.Ct. at 2761.

The Supreme Court has described the dual justificatory burdens imposed on the government by RFRA as "the most demanding test known to constitutional law." *City of Boerne v. P.F. Flores*, 117 S.Ct. 2157, 2171 (1997).

a. The Court Assumes, Without Deciding, That The EEOC Has Met Its Compelling Governmental Interest Burden.

The EEOC appears to take the position that RFRA can never succeed as a defense to a Title VII claim or that Title VII will always be presumed to serve a compelling governmental interest and be narrowly tailored for purposes of a RFRA analysis. (*See* D.E. No. 63 at Pg ID 1899, asserting that RFRA "does not protect employers from the mandates of Title VII" and D.E. No. 51 at Pg ID 628, asserting that the majority in *Hobby Lobby* "*suggested* in a colloquy" with the principal dissent "that Title VII serves a compelling governmental interest which cannot be overridden by RFRA.") (emphasis added).

The majority did reference employment discrimination, in discounting the dissent's concern that the majority's ruling may lead to widespread discrimination cloaked in religion, stating:

> The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. *See post*, at 2804 – 2805. Our decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.

Hobby Lobby, 134 S.Ct. at 2784. This Court does not read that paragraph as indicating that a RFRA defense can never prevail as a defense to Title VII or that Title VII is exempt from the focused analysis set forth by the majority. If that were the case, the majority would presumably have said so. It did not.

Moreover, the majority stated "[t]he dissent worries about forcing the federal courts to apply RFRA to a host of claims made by litigants seeking a religious exemption from generally

applicable laws, and the dissent expresses a desire to keep the courts out of this business" but noted that it was Congress that enacted RFRA and explained "[t]he wisdom of Congress's judgment on this matter is not our concern. Our responsibility is to enforce RFRA as written." *Id*. at 2784-85.[9]

And the dissent surely does not read the majority opinion as exempting Title VII (or other generally-applicable anti-discrimination laws) from a RFRA defense or the focused analysis set forth in the majority opinion:

> Why should decisions of this order be made by Congress or the regulatory authority, and not this Court? Hobby Lobby and Conestoga surely do not stand alone as commercial enterprises seeking exemptions from generally applicable laws on the basis of their religious beliefs. *See, e.g., Newman v. Piggie Park Enterprises, Inc*., 256 F.Supp. 941, 945 (D.S.C. 1966) (owner of restaurant chain refused to serve black patrons based on his religious beliefs opposing racial integration), *aff'd in relevant part and rev'd in part on other grounds*, 377 F.2d 433 (C.A.4 1967), *aff'd and modified on other grounds*, 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968); *In re Minnesota ex rel. McClure*, 370 N.W.2d 844, 847 (Minn.1985) (born-again Christians who owned closely held, for-profit health clubs believed that the Bible proscribed hiring or retaining an "individua[l] living with but not married to a person of the opposite sex," "a young, single woman working without her father's consent or a married woman working without her husband's consent," and any person "antagonistic to the Bible," including "fornicators and homosexuals" (internal quotation marks omitted)), *appeal dismissed*, 478 U.S. 1015, 106 S.Ct. 3315, 92 L.Ed.2d 730 (1986); *Elane Photography, LLC v. Willock*, 2013–NMSC–040, —— N.M. ——, 309 P.3d 53 (for-profit photography business owned by a husband and wife refused to photograph a lesbian couple's commitment ceremony based on the religious beliefs of the company's owners), *cert. denied*, 572 U.S. ——, 134 S.Ct. 1787, 188 L.Ed.2d 757 (2014). Would RFRA require exemptions in cases of this ilk? And if not, how does the Court divine which religious beliefs are worthy of accommodation, and which are not? Isn't the Court disarmed from making such a judgment given its recognition that "courts must not presume to determine ... the plausibility of a religious claim"? *Ante,* at 2778.

Id. at 2804-05.

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[9]The same is true of this Court.

Without any authority to indicate that Title VII is exempted from the analysis set forth in *Hobby Lobby*, this Court concludes that it must be applied here. *See also Holt v. Hobbs*, 135 S. Ct. 853, 858 (2015) (discussing, in a RLUIPA case, how the lower court believed it was somehow bound to defer to the Department of Correction's security policy as a compelling interest that is narrowly tailored and explaining that the statute "does not permit such *unquestioning deference*. RLUIPA, like RFRA, 'makes clear that it is the obligation of the courts to consider whether exceptions are required under the test set forth by Congress.'") (emphasis added).

The majority in *Hobby Lobby* instructed that when determining whether a challenged law serves a compelling interest, it is not sufficient to use "very broad terms," such as "promoting" "gender equality." *Hobby Lobby*, 134 S.Ct. at 2779. That is because "RFRA contemplates a '*more focused inquiry*: It 'requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person' – the particular claimant whose sincere exercise of religion is being substantially burdened." *Id*. (citations omitted) (emphasis added). This is critical because it means the Government's showing must focus on justification of the particular person burdened – here, the Funeral Home. In other words, even if the Government can show that the law is in furtherance of a generalized or broad compelling interest, it must still demonstrate the compelling interest is satisfied through application of the law *to the Funeral Home under the facts of this case*.

The majority in *Hobby Lobby* held that this requires this Court to scrutinize "the asserted harm of granting specific exemptions to [the] particular religious claimant" and "look to the marginal interest in enforcing" the challenged law in this particular context. *Hobby Lobby*, 134

S.Ct. at 2779. The majority in *Hobby Lobby*, however, assumed without deciding that the requisite "to the person" compelling interest existed. Thus, it did not provide any real guidance for how to go about doing that. As the principal dissent noted, the majority opinion provides "[n]ot much help" for "the lower courts bound by" it. *Id*. at 2804.

Here, in response to the Funeral Home's motion, the EEOC very broadly asserts that "Congress's mandate to eliminate workplace discrimination" is the compelling governmental interest that warrants burdening the Funeral Home's exercise of religion. (D.E. No. 63 at Pg ID 1934). In the section of its own motion that deals with the government's burden, the EEOC more specifically asserts that Title VII's prohibitions against sex discrimination establish that the government has a compelling interest in protecting employees from gender stereotyping in the workplace. (D.E. No. 51 at Pg ID 629).

The Court fails to see how the EEOC has met its requisite "to the person"-focused showing here. But this Court is also at a loss for how this Court is supposed to scrutinize "the asserted harm of granting specific exemptions to [the] particular religious claimant" and "look to the marginal interest in enforcing" the challenged law in this particular context. *Hobby Lobby*, 134 S.Ct. at 2779. This Court will therefore assume without deciding that the EEOC has met its first burden and proceed to the least restrictive means burden.

b. The EEOC Has Failed To Meet Its Burden Of Showing That Application Of The Burden On The Funeral Home, Under The Facts Presented Here, Is The Least Restrictive Means Of Furthering The Compelling Governmental Interest Of Protecting Employees From Gender Stereotyping In The Workplace.

If the EEOC meets its burden regarding showing a compelling interest, then the Court

must determine if the EEOC has met its additional, and separate, burden of showing that application of the burden "to the person" is the least restrictive means of furthering that compelling governmental interest. *Hobby Lobby,* 134 S.Ct. at 2761.

The "least-restrictive means standard is exceptionally demanding." *Hobby Lobby*, 134 S.Ct. at 2780. That standard requires the government to "sho[w] that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting part[y]." *Id*. at 2780.

If a less restrictive means is available for the government to achieve the goal, the government must use it. *Holt v. Hobbs*, 135 S.Ct. 853, 864 (2015). As another district court within the Sixth Circuit has explained, "[t]his 'exceptionally demanding' standard, *Burwell*, 134 S.Ct. at 2780, begs for the Government to show *a degree of situational flexibility, creativity, and accommodation* when putative interests clash with religious exercise." *United States v. Girod*, __ F. Supp.3d __, 2015 WL 10031958 at *8 (E.D. Ky. 2015) (emphasis added).

Again, it is the EEOC that has the burden of showing that enforcement of the religious burden on the Funeral Home is the least restrictive means of furthering its compelling interest of protecting employees from gender stereotyping in the workplace.

As to this burden, the EEOC's position is stated in: 1) a page and a half in its own motion (D.E. No. 51 at Pg ID 629-30); and 2) two paragraphs that respond to the Funeral Home's motion. (D.E. No. 63 at Pg ID 1939). Essentially, the EEOC asserts, in a conclusory fashion, that Title VII is narrowly tailored:

> Title VII's prohibitions against sex discrimination in the workplace demonstrate that the government has a compelling interest in protecting employees from losing their jobs on the basis of an employer's gender stereotyping, and they are precisely

tailored to ensure this.

(D.E. No. 51 at Pg ID 629).[10]

Thus, the EEOC has not provided a focused "to the person" analysis of how the burden on the Funeral Home's religious exercise is the least restrictive means of eliminating clothing[11] gender stereotypes at the Funeral Home under the facts and circumstances presented here.

The Funeral Home argues that "the EEOC does not even attempt to explain" how requiring the Funeral Home to allow a funeral director who was born a biological male to wear a skirt-suit to work could be found to satisfy RFRA's least-restrictive means requirement. (D.E. No. 60 at Pg ID 1797).[12]

Indeed, the EEOC's briefs do not contain *any discussion* to indicate that the EEOC has ever (in either the administrative proceedings or during the course of this litigation) explored the possibility of any solutions or potential accommodations that might work under the unique facts

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[10]The Sixth Circuit could conclude, on appeal, that the more focused analysis set forth in *Hobby Lobby* should not apply in a Title VII case. There is no existing authority to support such a position and it is not this Court's role to create such an exception.

[11]Again, because the parties have confined their claims, defenses, and analysis to work place clothing, and have not discussed hair styles or makeup, this Court also confines its analysis to clothing.

[12]Although it is not its burden, the Funeral Home asserts that "[a] number of available alternatives" could allow the government to achieve its stated goal without violating the Funeral Home's religious rights. In response to those least-restrictive-means arguments, the EEOC states that the Funeral Home never proposed that Stephens could continue to dress in "men's clothing" while at work, but could dress in "female clothing" outside of work, prior to Rost's deposition. (D.E. No. 63 at 1924). The EEOC further asserts that the Funeral Home was "free to offer counter-proposals" but failed to do so. (D.E. No. 69 at Pg ID 2131). Such arguments overlook that it is *the EEOC's burden* to establish that enforcement of the burden on the Funeral Home is the least restrictive means of furthering its compelling interest under the facts presented here.

and circumstances presented here. As a practical matter, the EEOC likely did not do so because it has been proceeding as if gender identity or transgender status is a protected class under Title VII,[13] taking the approach that the Funeral Home cannot prohibit Stephens from dressing as a female, in order to express her female gender identity. This is one of the first two cases that the EEOC has ever brought on behalf of a transgender person.[14] The EEOC appears to have taken the position that the only acceptable solution would be for the Funeral Home to allow Stephens to wear a skirt while working as a funeral director at the Funeral Home in order to express Stephens's female gender identity. (*See, e.g.*, D.E. No. 69 at Pg ID, arguing that the Funeral Home cannot require that "an employee dress inconsistently with his or her gender identity;" D.E. No. 63 at Pg ID 1923, arguing that "Defendant's insistence that Stephens wear men's clothing at work, despite knowledge that [Stephens] now identifies as female," violates Title VII; D.E. No. 63 at Pg ID 1927, stating that Stephens would present according to the dress code for females; D.E. No. 63 at Pg ID 1936-37, arguing that the Funeral Home having to provide "female clothing to Stephens" would not impose a substantial burden because doing so would not be unduly costly.).

Understanding the narrow context of the discrimination claim stated in this case is important. The wrongful discharge claim in this case is brought under a very specific theory of

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[13]*See, e.g.*, EEOC Determination, finding reasonable cause to believe that charging party was discharged due to sex and "gender identity" (D.E. No. 63-4); Amended Complaint (D.E. No. 21 at Pg ID 244-45), alleging that the Funeral Home discharged Stephens "because Stephens is transgender," and "because of Stephens's transition from male to female."

[14]*See, e.g.*, EEOC's 9/25/14 Press Release (stating that this "Lawsuit is One of Two the Agency Filed Today – the First Suits in its History – Challenging Transgender Discrimination Under 1964 Civil Rights Act.").

sex discrimination under Title VII. The EEOC's claim on behalf of Stephens is brought under a *Price Waterhouse* sex/gender stereotyping theory. *Price Waterhouse* recognized that sex discrimination may manifest itself in stereotypical notions as to how women and men should dress and present themselves in the workplace.

As the Supreme Court recognized in *Price Waterhouse*, the intent behind Title VII's inclusion of sex as a protected class expressed "Congress' intent to forbid employers to take gender into account" in the employment context. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989). The goal of the sex-stereotyping theory of sex discrimination is that "gender" "be *irrelevant*" with respect to the terms and conditions of employment and to employment decisions. *Id.* (emphasis added).

Significantly, neither transgender status nor gender identity are protected classes under Title VII. [15] The only reason that the EEOC can pursue a Title VII claim on behalf of Stephens in this case is under the theory that the Funeral Home discriminated against Stephens because Stephens failed to conform to the "masculine gender stereotypes that Rost expected" in terms of the clothing Stephens would wear at work. The EEOC asserts that Stephens has a "Title VII right *not to be subject to gender stereotypes* in the workplace." (D.E. No. 51 at Pg ID 607) (emphasis added).

Yet the EEOC has not challenged the Funeral Home's sex-specific dress code, that requires female employees to wear a skirt-suit and requires male employees to wear a suit with pants and a neck tie, in this action. If the EEOC were truly interested in eliminating gender

[15]Congress can change that by amending Title VII. It is not this Court's role to create new protected classes under Title VII.

stereotypes as to clothing in the workplace, it presumably would have attempted to do so.

Rather than challenge the sex-specific dress code, the EEOC takes the position that Stephens has the right, under Title VII, to "dress as a woman" or wear "female clothing"[16] while working at the Funeral Home. That is, the EEOC wants Stephens to be permitted to dress in a stereotypical feminine manner (wearing a skirt-suit), in order to express Stephens's gender identity.

If the EEOC truly has a compelling governmental interest in ensuring that Stephens is not subject to gender stereotypes in the workplace in terms of required clothing at the Funeral Home,[17] couldn't the EEOC propose a gender-neutral dress code (dark-colored suit, consisting of a matching business jacket and pants, but without a neck tie) as a reasonable accommodation that would be a less restrictive means of furthering that goal under the facts presented here?[18] Both women and men wear professional-looking pants and pants-suits in the workplace in this country, and do so across virtually all professions.

The following deposition testimony from Rost supports that such an accommodation could be a less restrictive means of furthering the goal of eliminating sex stereotypes as to the clothing worn at the Funeral Home:

Q. Now, do you currently have any female funeral directors?

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[16]This is the language used by the parties. (*See, e.g.*, D.E. No. 21 at Pg ID 244; D.E. No. 63 at 1935; D.E. No. 59 at Pg ID 1749).

[17]Rost's Affidavit states that he would not dismiss Stephens or other employees if they dressed as members of the opposite sex while *outside* of work. (Rost Affidavit at ¶¶ 50-51). Rost also so testified. (*See* Rost Dep., D.E. No. 54-5 at Pg ID 1372).

[18]Similar to the gender-neutral pants, business suit jackets, and white shirts that the male and female Court Security Officers in this building wear.

A. I do not.
Q. If you did have a female funeral director, what would describe what her uniform would be or what she would be required to wear?
MR. PRICE: Objection, speculation. But go ahead.
THE WITNESS: She would have a dark jacket and a dark skirt, matching. Matching.
BY MR. KIRKPATRICK:
Q. Okay. A skirt. So just like the male funeral director she would have a business suit, but a female business suit?
A. Yes.
Q. As a skirt?
A. Yes.
. . . .
Q. Okay. Why do you have a dress code?
A. Well, we have a dress code because it allows us to make sure that our staff – is dressed in a professional manner that's acceptable to the families that we serve, and that is understood by the community at-large what these individuals would look like.
Q. Is that based on the specific profession that you're in?
A. It is.
Q. And again, tell us why it fits into the specific profession that you're in that you have a dress code?
A. Well, it's just the funeral profession in general, if you went to all funeral homes, would have pretty much the same look. Men would be in a dark suit, white shirt and a tie and women would be appropriately attired in a professional manner.
. . . .
Q. Okay. Now, have you been to funeral homes where there have been women wearing businesslike pants before?
A. I believe I have.
Q. Okay. So, the fact that you require women to wear skirts is something that you prefer, it's not necessarily an industry requirement?
A. That's correct.
Q. Okay. But women could look businesslike and appropriate in pants, correct?
A. They could.

(D.E. No. 63-11 at Pg ID 1999-2000; *see also* Rost Dep., D.E. 54-11 at Pg ID 1423, wherein Rost testified that female employees at the Funeral Home's Detroit location sometimes wear pants with a jacket to work). In addition, Stephens testified:

Q. Okay. Did you have a uniform or a dress code that you had to follow while with R.G. & G.R. Funeral Home?
A. They bought suits.
Q. Okay.
A. I wore it.
Q. So they being the company, bought you a suit or suits?
A. Yes.
Q. Were they male suits?
A. I would assume they were.
Q. Okay.
A. I guess a female could have dressed in them.

(Stephens's Dep., D.E. No. 54-15 at Pg ID 1453).[19]

But the EEOC has not even discussed the possibility of any such accommodation or less restrictive means as applied to this case.[20] Rather, the EEOC takes the position that Stephens must be allowed to wear a skirt-suit in order to *express* Stephens's female gender identity. That is, the EEOC wants Stephens to be able to dress in a *stereotypical feminine* manner. If the compelling governmental interest is truly in *removing or eliminating* gender stereotypes in the workplace in terms of clothing (*i.e.*, making gender "irrelevant"), the EEOC's manner of enforcement in this action (insisting that Stephens be permitted to dress in a stereotypical feminine manner at work) does not accomplish that goal.

This Court concludes that the EEOC has not met its demanding burden. As a result, the

[19]The Court notes that Rost's affidavit appears to indicate that he would be opposed to allowing a funeral director who was born a biological female to wear a male funeral director uniform (which consists of a pant-suit with a neck tie) while at work. (Rost Aff. at ¶ 45). Notably, however, Rost has *already allowed* female employees to wear a pants-suit to work without a neck tie.

[20]This potential accommodation or least restrictive means of requiring a gender-neutral uniform may actually be consistent with what the EEOC proposed in the administrative proceedings. (*See* D.E. No. 74-1 at Pg ID 2171, proposing that the Funeral Home reinstate Stephens and agree to "implement a Dress Code policy that *affords equivalent consideration to all sexes with respect to uniform requirements* and allowance/benefits.") (emphasis added).

Funeral Home is entitled to a RFRA exemption from Title VII, and the body of sex-stereotyping case law that has developed under it, under the facts and circumstances of this unique case.

In its amicus brief, the ACLU asserts that the implications of allowing a RFRA exemption to the Funeral Home in this case "are staggering" and essentially restates the *Hobby-Lobby* principal dissenting opinion's fears about the impact of the majority's decision on employment discrimination and other laws. (*See* D.E. No. 59 at Pg ID 1767). This Court is bound by the majority opinion in *Hobby Lobby* and it makes clear that RFRA exemptions are considered on a case-by-case basis.

Moreover, in *General Conf. of Seventh-Day Adventists*, 617 F.3d 402 (6th Cir. 2010), the Sixth Circuit held, as a matter of first impression, that a RFRA defense does not apply in a suit between private parties.[21] The Seventh Circuit has also so ruled. *See Listecki v. Official Comm. of Unsecured Creditors*, 780 F.3d 731, 736-37 (7th Cir. 2015). In the vast majority of Title VII employment discrimination cases, the case is brought by the employee, not the EEOC. Accordingly, at least in the Sixth and Seventh Circuits, it appears that there cannot be a RFRA defense in a Title VII case brought by an employee against a private[22] employer because that would be a case between private parties. *See, e.g., Mathis v. Christian Heating and Air Conditioning, Inc.*, 2016 WL 304766 (E.D. PA 2016) (district court ruled, in Title VII case

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[21]The ACLU noted this ruling in a footnote in its brief. (D.E. No. 59 at Pg ID 1761). None of the parties addressed how that ruling by the Sixth Circuit, as a practical matter, appears to prohibit a RFRA defense in a Title VII case brought by an employee against a private employer.

[22]In Title VII cases brought by an employee against a governmental employer, such as the United States Postal Service, there could not be a RFRA defense because the United States federal government does not hold religious views.

brought by employee against private employer, that a RFRA defense is not available "because RFRA protects individuals only from the federal government's burden on the free exercise of religion.").[23]

II. Title VII Discriminatory Clothing Allowance Claim

As the second claim in this action, the EEOC alleges that the Funeral Home has violated Title VII by providing a clothing allowance/work clothes to male employees but failing to provide such assistance to female employees. (Am. Compl. at ¶¶ 15 & 17). The EEOC asserts that the effect of the Funeral Home's unlawful practice "has been to deprive a class of female employees of equal employment opportunities and otherwise adversely affect their status as employees because of their sex." (*Id*. at ¶ 18). The EEOC alleges that "[s]ince at least September 13, 2011," the Funeral Home has provided a clothing allowance to male employees but not female employees. (Am. Compl. at ¶ 12).

In the pending motions, each party contends that it is entitled to summary judgment as to this claim. Before reaching the merits of the second claim, however, the Court must address the Funeral Home's assertion that the EEOC lacks the authority to bring the second claim in this action.

A. Under *Bailey,* The EEOC Cannot Bring The Second Claim In This Action.

Relying on *EEOC v. Bailey*, 563 F.2d 439 (6th Cir. 1977), the Funeral Home notes that the EEOC may include in a Title VII suit only claims that fall within an "investigation reasonably

[23]This Court recognizes that this appears to produce an odd result. Under existing Sixth Circuit precedent, the Funeral Home could not assert a RFRA defense if Stephens had filed a Title VII suit on Stephens's own behalf because no federal agency would be a party to the case. But, because this is one of those rare instances where the EEOC (a federal agency) chose to bring suit on behalf of an individual, a RFRA defense can be asserted.

expected to grow out of the charge of discrimination." (D.E. No. 54 at Pg ID 1317). The Funeral Home asserts that, under *Bailey*, a claim falls outside that scope if: 1) the claim is unrelated to the charging party; and 2) it involves discrimination of a kind other than raised by the charging party. It asserts that those considerations show that the EEOC's clothing allowance claim does not result from an investigation reasonably expected to grow out of Stephens's EEOC charge. In making this argument, the Funeral Home states that the clothing allowance claim on behalf of a class of women is unrelated to Stephens – who *received and accepted* the clothing provided by the Funeral Home at all relevant times. The Funeral Home asserts that the clothing allowance claim alleges discrimination of a kind other than that raised by Stephens, wrongful discharge. In support of that proposition, it directs the Court to *Nelson v. Gen. Elect. Co.*, 2 F. App'x 425, 428 (6th Cir. 2001).

In response, the EEOC does not dispute that *Bailey* is good law. Rather, it attempts to distinguish this case from *Bailey*. (D.E. No. 63 at Pg ID 1942-43). It asserts that the situation here is more akin to *EEOC v. Cambridge Tile Mfg. Co.,* 590 F.2d 205 (6th Cir. 1979). That was a two-page per curiam decision that "involve[d] the scope of the investigatory and subpoena power of the EEOC." *Id.* at 205. It did not address the issue that the Court is presented with here. The EEOC does not direct the Court to any other Sixth Circuit authority regarding this challenge.

In *Bailey*, the underlying charge of discrimination that had triggered the investigation of the employer's employment practices was filed by a white female employee who alleged sex discrimination against women and race discrimination against black women. *Bailey,* 563 F.2d at 441 & 445. The EEOC later brought suit against the employer alleging racial and religious

discrimination. The district court held that the employee's charge of discrimination could not support the EEOC's lawsuit and dismissed it.

On appeal, the Sixth Circuit affirmed the dismissal of the religious discrimination charges but reversed as to the race discrimination charges. The opinion began by providing an overview of the process that leads to a civil action being filed by the EEOC:

> "In the Equal Employment Opportunity Act of 1972 Congress established an integrated, multistep enforcement procedure culminating in the EEOC's authority to bring a civil action in a federal court." *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355, 97 S.Ct. 2447, 2451, 53 L.Ed.2d 402 (1977). The procedure is triggered when "a person claiming to be aggrieved" or a member of the EEOC files with the EEOC a charge alleging that an employer has engaged in an unlawful employment practice. Such a charge is to be filed within 180 days after the occurrence of the allegedly unlawful practice, and the EEOC is to serve notice of the charge on the employer within ten days of filing and to investigate the charge. s 706(b) of Title VII, 42 U.S.C. s 2000e-5(b). Under s 709(a) of Title VII, 42 U.S.C. s 2000e-8(a), the EEOC may gain access to evidence that is relevant to the charge under investigation, *see Blue Bell Boots, Inc. v. EEOC*, 418 F.2d 355, 358 (6th Cir. 1969), and under s 710, 42 U.S.C. s 2000e-9, the EEOC may gain access to evidence that relates to any matter under investigation. The EEOC is then required to determine, "as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge, whether there is reasonable cause to believe the charge is true. s 706(b), 42 U.S.C. s 2000e-5(b). If there is no reasonable cause, the charge must be dismissed and the person claiming to be aggrieved shall be notified. If there is reasonable cause, the EEOC "shall endeavor to eliminate any such unlawful employment practice by informal methods of conference, conciliation, and persuasion." s 706(b), 42 U.S.C. s 2000e-5(b). When the EEOC is unable to secure a conciliation agreement acceptable to the EEOC, the EEOC may bring a civil action. s 706(f)(1), 42 U.S.C. s 2000e-5(f)(1). *See Occidental Life Insurance Co. v. EEOC, supra*, 432 U.S. at --, 97 S.Ct. at 2450-2452; Conference Committee Report, Section-by-Section Analysis of H.R. 1746, The Equal Employment Act of 1972, 118 Cong.Rec. 7168-69 (Mar. 6, 1972).

Id. at 445.

The Sixth Circuit agreed with the district court that it did not have jurisdiction over the allegations of religious discrimination in the EEOC's lawsuit because the "portion of the EEOC's

complaint incorporating allegations of religious discrimination exceeded the scope of the EEOC investigation [of the employer] reasonably expected to grow out of the charge of discrimination." *Id*. at 446.

The court noted that the "clearly stated rule in this Circuit is that the EEOC's complaint is 'limited to the scope of the EEOC' investigation reasonably expected to grow out of the charge of discrimination." *Id*. at 446 (citations omitted). The court explained that there are two reasons for that rule:

> There are two reasons for the rule that the EEOC complaint is limited to the scope of the EEOC investigation reasonably expected to grow out of the charge of discrimination. The first reason is that the rule permits an effective functioning of Title VII when the persons filing complaints are not trained legal technicians. "(T)his Court has recognized that Title VII of the Civil Rights Act of 1964 should not be construed narrowly," *Blue Bell Boots, Inc. v. EEOC, supra*, 418 F.2d at 358, and thus adopted the rule because "charges of discrimination filed before the EEOC will generally be filed by lay complainants who are unfamiliar with the niceties of pleading and are acting without the assistance of counsel." *Tipler v. E. I. duPont deNemours & Co., supra*, 443 F.2d at 131. Similarly, we stated in *McBride v. Delta Air Lines, Inc., supra*, 551 F.2d at 115:
>
> > Because administrative complaints are filed by completing a form designed to elicit specificity in charges, and because the forms are not legal pleadings and are rarely filed with the advice of legal counsel, any other standard would unreasonably limit subsequent judicial proceedings which Congress has determined are necessary for effective enforcement of the legal standards established by Title VII. See House Report No. 92-238, U.S.Code Cong. and Admin.News, pp. 2141, 2147-48 (1972).
>
> The second reason for limiting the scope of the EEOC complaint to the scope of the EEOC investigation that can be reasonably expected to grow out of the private party's charge is explained in *Sanchez v. Standard Brands, Inc., supra*, 431 F.2d at 466.
>
> > The logic of this rule is inherent in the statutory scheme of Title VII. A charge of discrimination is not filed as a preliminary to a lawsuit. On the contrary, the purpose of a charge of discrimination

> is to trigger the investigatory and conciliatory procedures of the EEOC. Once a charge has been filed, the Commission carries out its investigatory function and attempts to obtain voluntary compliance with the law. Only if the EEOC fails to achieve voluntary compliance will the matter ever become the subject of court action. Thus it is obvious that the civil action is much more intimately related to the EEOC investigation than to the words of the charge which originally triggered the investigation.

Bailey, 563 F.2d at 446-47.

The Sixth Circuit then explained that in light of those two reasons, the allegations of religious discrimination in the EEOC's complaint could not reasonably be expected to grow out of the plaintiff's charge.

First, the case simply did not involve the "situation in which a lay person has inadequately set forth in the complaint filed with the EEOC the discrimination affecting that person." *Id.* at 447. That is because the EEOC's allegations regarding religious discrimination did not involve practices affecting the plaintiff who filed the EEOC charge. *Id.*

Second, the court concluded that the present case does not involve a situation in which it would be proper, in view of the statutory scheme of Title VII, to permit the lawsuit to include the allegations of religious discrimination. The court explained that "to allow the EEOC, as it did in the present case, to issue a reasonable cause determination, to conciliate, and to sue on allegations of religious discrimination unrelated to the private party's charge of sex discrimination would result in undue violence to the legal process that Congress established to achieve equal employment opportunities in country." *Id*. at 447-448.

The Sixth Circuit then held that "[t]he procedure to be followed when instances of discrimination, of a kind other than that raised by a charge filed by an individual party and

unrelated to the individual party, come to the EEOC's attention during the course of an investigation of the private party's charge is for the filing of a charge by a member of the EEOC and for a full EEOC investigation of that charge." *Id*. at 448. It explained its rationale for requiring a new charge by the EEOC:

> Then the employer is afforded notice of the allegation, an opportunity to participate in a complete investigation of such allegation, and an opportunity to participate in meaningful conciliation discussions should reasonable cause be found following the EEOC investigation. Section 706(b) of Title VII, 42 U.S.C. s 2000e-5(b), provides for the filing of a charge by a member of the EEOC, and under such a filing, an employer will not be stripped of formal notice of the charge and of the opportunity to respond to the EEOC's inquiry into employment practices with respect to allegations of discrimination unrelated to the individual party's charge. In addition, the filing of a charge will permit settlement discussions to take place pursuant to 29 C.F.R. s 1601.19a5 after a preliminary investigation but before any finding of reasonable cause.
>
> Several reasons support this position. The filing of a charge by a member of the EEOC as urged by this Court should lead to a more focused investigation on the facts of possible discrimination by an employer when that possible discrimination is not related to the individual party's charge.

Id. Another reason for that position is "the importance of conciliation to Title VII." *Id*. at 449. The court noted that the EEOC's duty to attempt conciliation is among its "most essential functions" and explained:

> It is our belief that if conciliation is to work properly, charges of discrimination must be fully investigated after the employer receives notice in a charge alleging unlawful discriminatory employment practices. *See EEOC v. MacMillan Bloedel Containers, Inc., supra*, 503 F.2d at 1092. The requirement that a member of the EEOC file a charge when facts suggesting unlawful discrimination are discovered that are unrelated to the individual party's charge does serve the purposes of treating the employer fairly and forcing the employer and the EEOC to focus attention during investigation on the facts of such possible discrimination and thereby does serve the goal of obtaining voluntary compliance with Title VII.

Id. at 449. The court rejected the EEOC's position that "it would be a matter of placing form

over substance, resulting in the waste of administrative resources and the delay in the enforcement of rights," to require "a member of the EEOC to file a charge with respect to the allegations of discrimination uncovered in an EEOC investigation which were of a kind not raised by the individual party and which did not affect the individual party." *Id*. at 449.

Accordingly, "[i]f an EEOC investigation of an employer uncovers possible unlawful discrimination of a kind not raised by the charging party and not affecting that party, then the employer should be given notice if the EEOC intends to hold the employer accountable before the EEOC and in court." *Id*. at 450.

Finally, the court rejected the EEOC's position that it did not need to file a new charge because the employer received notice of the new alleged discrimination by virtue of having received a reasonable cause determination that included religious discrimination:

> We are unable to accept the EEOC's argument that it was immaterial that appellee received notice and opportunity to comment at the time the EEOC issued its reasonable cause determination and during conciliation rather than before the issuance of the reasonable cause determination. While a court might conclude that the Due Process Clause of the Fifth Amendment was not violated by the procedure followed by the EEOC in the present case, our concern is with the legislative judgment of due process incorporated into the specific statutory scheme of Title VII. Evidence of that legislative intent indicates a concern for fair treatment of employers.

Id. at 450.

As was the situation in *Bailey*, the EEOC investigation here uncovered possible unlawful discrimination: 1) of a kind not raised by the charging party (Stephens); and 2) not affecting Stephens. As such, under *Bailey*, the proper procedure is for the filing of a charge by a member of the EEOC and for a full EEOC investigation of that charge.

1. The Discrimination Is Of A Kind Not Raised By Stephens In The EEOC Charge.

The Court concludes that the second discrimination claim alleged in this action is "of a kind not raised by the charging party," Stephens.

Again, the rule in this Circuit is that the EEOC's complaint is limited to the scope of the EEOC's investigation reasonably expected to grow out of the charge of discrimination. "The relevant inquiry is the scope of the investigation that the *EEOC charge* would have reasonably prompted." *EEOC v. Wal-Mart Stores, Inc.,* 2010 WL 567316 at * 2 (6th Cir. 2010) (emphasis added). Thus, the court looks to the *EEOC charge itself*. *See, eg., Nelson v. General Elec. Co.*, 2 F. App'x 425, 428 (6th Cir. 2001).

In *Nelson*, the court looked to the EEOC charge, noting that the plaintiff's charge alleged just two discriminatory actions, that the plaintiff was given a bad performance evaluation and was laid off, because of her race and gender, and in retaliation for having complained about race discrimination. Moreover, that EEOC charge expressly confined the charged discrimination to the time period between March 30 and September 22 of 1995. After the EEOC administrative process concluded, the plaintiff filed a complaint that included that her employer failed to promote her because of her race and gender. The district court concluded that the scope of the investigation reasonably expected to grow out of her EEOC charge would not include failure to promote claims. The Sixth Circuit affirmed.

Here, the EEOC charge filed by Stephens checked the box for "sex" discrimination and indicated that the discrimination took place from July 31, 2013 to August 15, 2013 – a two week period in 2013. (D.E. No. 54-22 at Pg ID 1497). The charge stated "the particulars" of the

claimed sex discrimination Stephens experienced as follows:

> I began working for the above-named employer on 01 October 2007; I was last employed as a Funeral Director/Embalmer.
>
> On or about 31 July 2013, I notified management that I would be undergoing gender transitioning and that on 26 August 2013, I would return to work as my true self, a female. On 15 August 2013, my employment was terminated. The only explanation I was given was that management did not believe the public would be accepting of my transition. Moreover, during my entire employment I know there are no other female Funeral Directors/Embalmers.
>
> I can only conclude that I have been discharged due to my sex and gender identity, female, in violation of Title VII of the Civil Rights Act of 1964, as amended.

(*Id*.).

Thus, Stephens alleged just one discriminatory action – termination – that occurred during a two-week period in 2013. The charge alleged that Stephens alone, who was undergoing a gender transition, was fired due to Stephens's gender identity and the Funeral Home's beliefs as to the public's acceptance of Stephens's transition. Even though the Funeral Home later asserted, during the administrative proceeding, its dress code as a defense to the alleged discriminatory termination, the *EEOC charge itself* mentioned nothing about clothing, a clothing allowance, or a dress code. Thus, this Court fails to see how Stephens's EEOC charge would reasonably lead to an investigation of whether or not the Funeral Home has provided its male employees with clothing that was not provided to females since September of 2011.[24] *Nelson, supra*; *see also EEOC v. Wal-Mart Stores, Inc., supra*, at * 2 (noting "this is not a case where the

[24]The EEOC attempts to characterize the clothing allowance claim as the same type of discrimination in Stephens's EEOC charge because it is alleged sex/gender discrimination. By that logic, the plaintiff in *Nelson* would have been found to have alleged the same type of discrimination (race and gender) even though her EEOC charge did not allege any failure to promote claims. That was not the case.

civil complaint alleges different kinds of discriminatory acts than the initial EEOC complaint," as was the case in *Nelson*.)

2. The Alleged Clothing Discrimination Claim Does Not Involve Stephens.

In addition, this is not a case wherein Stephens has a claim for the alleged discriminatory clothing allowance, but inadequately set forth that claim in the EEOC charge by virtue of being a lay person. *Bailey,* 563 F.2d at 447.

Stephens is not included in the class of females who were allegedly discriminated against by the Funeral Home by virtue of not having received clothing that was provided to male employees. That is because, at all relevant times, Stephens was one of the employees who *was provided* the clothing that was not provided to female employees. Stephens was fired before Stephens ever attempted to "dress as a woman" at work. Thus, Stephens cannot claim a denial of this benefit.[25]

3. As A Result, Under *Bailey,* The EEOC Cannot Proceed With The Claim In This Action.

The Court concludes that the EEOC investigation here uncovered possible unlawful discrimination: 1) of a kind not raised by the charging party (Stephens); and 2) not affecting the

[25]It would not have been a problem if Stephens had asserted a clothing allowance claim on Stephen's own behalf in the EEOC charge and then the EEOC's complaint simply broadened that same claim to assert it on behalf of a class of women. *See EEOC v. Keco Indust. Inc*., 748 F.2d 1097, 1101 (6th Cir. 1984) (explaining that in *Bailey* the "additional and distinct claim of religious discrimination required a separate investigation, reasonable cause determination, and conciliation effort by the EEOC" and distinguishing it where the EEOC "merely broadened" the scope of the charging party's charge to assert the same claim on behalf of all female employees in the same division).

charging party (Stephens). As such, under *Bailey*, the proper procedure[26] is for the filing of a charge by a member of the EEOC and for a full EEOC investigation of that new claim of discrimination. Because the EEOC failed to do that, it cannot proceed with that claim in this civil action. Accordingly, the Court shall dismiss the clothing allowance claim without prejudice.

CONCLUSION & ORDER

For the reasons set forth above, the Court **ORDERS** that the EEOC's Motion for Summary Judgment is **DENIED.**

It is further **ORDERED** that the Funeral Home's Motion for Summary Judgment is **GRANTED IN PART AND DENIED IN PART**.

The Court **GRANTS** summary judgment in favor of the Funeral Home as to the wrongful termination claim. The Court rejects the Funeral Home's sex-specific dress code defense but concludes that, under the unique facts and circumstances of this case, the Funeral Home is entitled to a RFRA exemption from Title VII (and the sex-stereotyping body of case law under it).

As to the clothing allowance claim, the Court concludes that the EEOC administrative investigation uncovered possible unlawful discrimination of a kind not raised by the charging party and not affecting the charging party. Under *Bailey*, the proper procedure is for the filing of a charge by a member of the EEOC and for a full EEOC investigation of that new claim of

[26]The EEOC argues that it is not required to "ignore" discrimination that it inadvertently uncovers during an administrative proceeding. *Bailey* does not require the EEOC to "ignore" discriminatory acts that it uncovers during an administrative investigation that are of a kind not raised by the charging party and not affecting the charging party; it just requires the filing of a new charge by a member of the EEOC and a full investigation of the new claim.

discrimination. Because the EEOC did not do that, it cannot proceed with that claim in this civil action. The Court therefore **DISMISSES WITHOUT PREJUDICE** the clothing allowance claim.

IT IS SO ORDERED.

S/Sean F. Cox
Sean F. Cox
United States District Judge

Dated: August 18, 2016

I hereby certify that a copy of the foregoing document was served upon counsel of record on August 18, 2016, by electronic and/or ordinary mail.

S/Jennifer McCoy
Case Manager

APPENDIX 6

to

Newton's Laws of Motion and the LGBT Community…What's Next?

Submitted by: Christopher A. D'Angelo

EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.,
EEOC's Summary Judgement Motion Brief

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, v. R.G. & G.R. HARRIS FUNERAL HOMES, INC., Defendant.	)	CIVIL ACTION NO. 2:14-CV-13710 Hon. Sean F. Cox Magistrate Judge David R. Grand

Motion for Summary Judgment

Pursuant to Fed. R. Civ. P. 56, the Plaintiff Equal Employment Opportunity Commission moves for summary judgment on the grounds that there is no material factual dispute that the Defendant discharged Aimee Stephens because of sex.

The Commission further states neither the First Amendment to the Constitution nor the Religious Freedom Restoration Act authorizes the discharge of employees on the basis of sex, thus Defendant's affirmative defenses must fail as a matter of law.

Finally, the Commission states that there is no material factual dispute with respect to Defendant's clothing allowance, which provided

free clothing benefits to male employees and nothing to females until October 2014. Since that time, Defendant has provided stipends to women which are less than the value of the benefit provided to men. Both fringe-benefit policies constitute sex discrimination in violation of Title VII.

The Commission respectfully directs the Court to the attached memorandum for the arguments supporting this Motion.

The Commission sought concurrence in this motion from defense counsel on February 1, 2016 and said concurrence was denied.

Wherefore, the Commission respectfully moves for summary judgment in its favor.

Respectfully submitted,

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

s/ Miles Shultz
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Dated: April 7, 2016

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IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Plaintiff,	)	CIVIL ACTION NO. 2:14-CV-13710
v.	)	Hon. Sean F. Cox
	)	Magistrate Judge
R.G. & G.R. HARRIS FUNERAL HOMES, INC.,	)	David R. Grand
Defendant.	)	

Memorandum in Support of Plaintiff EEOC's Motion for Summary Judgment

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Statement of the Issues

1. Title VII is a neutral rule of general applicability which applies to businesses operated by non-religious and religious persons alike. Does the Commission's attempt to vindicate Aimee Stephens's Title VII rights violate Defendant's rights under the First Amendment Free Exercise Clause?

   The Commission answers "No."

2. The Religious Freedom Restoration Act prohibits the government from substantially burdening a sincere religious exercise unless such is done in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. Defendant admits that it would not have had to change any of its religious practices if it had continued to employ Stephens, and has only asserted that Rost's beliefs have been impinged upon. Protection of the Title VII rights of employees is a compelling governmental interest, and Title VII is precisely tailored to further that interest. Does RFRA trump this enforcement action under Title VII?

   The Commission answers "No."

3. The Defendant's owner and sole decisionmaker has admitted that his decision to fire Aimee Stephens was motivated by his beliefs and attitudes about how men and women are supposed to act and present themselves. Are these testimonial admissions sufficient to warrant summary judgment in favor of the Commission as to liability for Aimee Stephens's termination?

   The Commission answers "Yes."

4. Until October 2014, Defendant provided a fringe benefit by which male employees were granted a clothing allowance of suits and ties free of charge, including free replacements as they wore out,

whereas female employees were given nothing. The approximate value of a suit and tie is $235. Since October 2014, the female employees have been given annual stipends of either $75 or $150 depending upon whether they are part- or full-time, while the male employee benefit has remained the same. Do the pre- and post-October 2014 fringe benefit policies violate Title VII, warranting summary judgment in favor of the Commission?

The Commission answers "Yes."

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I. INTRODUCTION

A. Overview of the Case.

The Equal Employment Opportunity Commission brought this Title VII case alleging sex discrimination. The case stems from a Charge filed by Aimee Stephens, who is a transgender woman and served as a funeral director/embalmer for the Defendant for nearly six years under the name of Anthony Stephens. It is undisputed that Stephens was a capable, competent employee who was not fired for performance reasons.

The Commission's Complaint alleged, *inter alia*, that the Defendant discharged her because she did not conform to the Defendant's sex-based stereotypes. Despite being a good employee, she was fired after giving the Defendant's owner, Thomas Rost, a letter describing her life struggles with gender-identity issues and stating her intention to present at work as a woman in appropriate business attire. Ex. A, Stephens Letter.

Rost responded two weeks later by handing Stephens a severance agreement. Ex. B, Rost 30(b)(6) Dep. at 126:1-8. "[T]he specific reason" Rost fired Stephens was that Stephens was going to present as a female:

"he [Stephens] was no longer going to represent himself as a man. He wanted to dress as a woman." *Id.* at 135:24-136:1.

Given the testimonial admissions of Rost, there is no material dispute that Stephens was terminated because she did not conform to Rost's gender stereotypes, and summary judgment in favor of the Commission as to the termination claim is appropriate.

In addition, the Defendant has maintained a discriminatory clothing-allowance policy which until October 2014 provided suits and ties to male employees who interacted with the public and nothing to similarly situated females. Since October 2014, female employees have been given an annual stipend of either $75 or $150, but this is still inferior to that accorded to men, both in dollar value and in flexibility, as the men can replace suits as needed. Thus, summary judgment is also appropriate as to this issue.

B. The Affirmative Defenses

After eight months of litigation—including a Motion to Dismiss and an initial Answer to the Complaint—Defendant injected new defenses. Only after the Commission filed an Amended Complaint, which merely

corrected the spelling of the Charging Party's first name, Defendant first asserted that its termination of Stephens was protected by the Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb–1 ("RFRA"). *See* Dkt. 22, Answer to Amended Complaint, p. 5 (Affirmative Defenses 12-13).

Defendant admits it discharged Stephens because she did not conform to the masculine gender stereotypes that Rost expected of her. That is sex discrimination. Yet, Defendant asserts that its religious beliefs have been burdened by Aimee Stephens's Title VII right to not be subject to gender stereotypes in the workplace.

That argument misconstrues both the Free Exercise Clause and RFRA. Controlling Supreme Court precedent makes clear that the Free Exercise Clause does not excuse compliance with a neutral and generally applicable law such as Title VII. Moreover, Defendant has identified no religious *exercise* that is substantially burdened, as is required to invoke RFRA. Even if Defendant had done so, courts have consistently recognized that preventing employment discrimination is a compelling government interest, which also takes this matter outside of RFRA's

scope. Because there are no material facts in dispute, summary judgment in favor of the Commission is appropriate on Affirmative Defenses 12 and 13.

C. Thomas Rost Limits His Religious Exercise.

Thomas Rost owns 94.5% of the shares of Defendant and was the sole decision-maker who terminated Stephens's employment. Ex. B, Rost 30(b)(6) Dep. at 26:20-26:24; 117:23-118:6 . Rost testified as to Defendant's religion-based affirmative defenses. Ex. C, Notice of 30(b)(6) Deposition, and Ex. B at 6:14-10:3. Defendant's religious exercises are those of Rost. Ex. B at 29:1-7.

Rost is a Christian. *Id.* at 29:20-22. He attends two churches with some regularity. *Id.* at 29:25-30:1-6. However, the evidence shows that Rost's exercise of his religious beliefs at or through RGGR is limited to the placement of (1) "Daily Bread" devotional books and (2) cards bearing the name of Jesus with New Testament verses on the back.

Can you think of any ways in which you
express your faith through Harris, R.G. G.R.
Harris; you exercise your faith using your
business?
A The only thing in a direct way is little things
that we leave out, we give away Daily Breads

which is a little daily devotional; it's a pick up. We have a little card that people can pick up. That would be the only thing.
Q Okay. And this is just -- as they walk out they can grab something like that?
A Yes. It's a pick up item if they so desire.
Q What about, you say a little card, what's that?
A We call it a Jesus card.
Q Okay.
A I forgot what it says on the front. It's kind of to grab your attention and then on the back it just has references, verse references.
Q Scriptural references about Jesus?
A Yes, exactly. Yes.

Id. at 39:23-40:17; Ex. D (Daily Bread Devotional); and Ex. E (Jesus card). These publications were placed on a credenza or desk at the entry place for each location for visitors to take or leave as they desire. Ex. B, Ex. B at 39:14-40:17.

Rost admitted that continuing to employ Stephens would not have interfered with these religious practices at RGGR. *Id.* at 57:2-19.

D. RGGR does not operate as a religious enterprise.

Defendant is not affiliated with or part of any church. *Id.* at 31:15-31:19. Rost employs people from different denominations and of no religious beliefs at all. *Id.* at 40:18-41; Ex. F, Shaffer Dep. at 33:10-12. He admits that employing individuals with beliefs different from his own

does not constitute an endorsement of their beliefs or activities by RGGR. Ex. B at 41:20-42:18. He does not impose his own beliefs on employees, stating that he would not, for example, terminate an employee because he or she had sex outside of marriage, had an abortion, or committed adultery. *Id.* at 138:2-138:16.

The Defendant's articles of incorporation do not avow any religious purpose. Ex. R, Articles of Incorporation at p. 6. There are no religious views or values that employees are expected to uphold. Ex. B at 81:18-21. RGGR's website contains a "mission statement" which makes two references to God, the second of which is a passage in the Gospel of Matthew (Ex. G), which Rost chose because he liked it. Ex. B at 85:7-85:21. And the Defendant's employees do not regard RGGR as a Christian business enterprise. *See*, e.g., Ex. H, Nesmith Dep. at 19:18-20:4; Ex. I, Kish Dep. at 55:10-55:25.

Defendant is open 24 hours per day, 365 days per year, and Easter is not a paid holiday. Ex. B at 88:20-89:21. It serves clients of every religion (various Christian denominations, Hindu, Muslim, Jewish, native Chinese religions) or those of no religious affiliation. Ex. J, Cash

Dep. at 41:19-42:10; Ex. K, Crawford Dep. at 32:18-34:9; Ex. B at 33:19-36:23. Indeed, employees have been known to wear Jewish head coverings when holding a Jewish funeral service. Ex. K at 34:20-35:4; Ex. J at 42:7-12. The business keeps Catholic religious items (crucifixes, kneelers, candles) in storage until requested by Catholic (or occasionally non-Catholic) clients. Ex. L, Matthew Rost Dep. at 36:20-25; Ex. J at 42:19-25; Ex. H at 26:1-10; Ex. K at 34:20-35:11; Ex. F at 34:16-35:10; Ex. M, McKie Dep at 29:12-25; 31:11-14.

While the rooms where funerals are held on site are called "chapels," they are decorated to look like living rooms and are not decorated with visible religious fixtures. Ex. B at 84:2-85:6. This is done deliberately to avoid offending people of different religions. *Id*. Although some of the chapels have statues of Jesus Christ and the Virgin Mary, these are kept hidden behind curtains unless a Catholic service is being held. Ex. J at 53:7-16; Ex. M at 29:16-25.

As far as presenting itself to the outside world, Defendant has not advertised in Christian publications or church bulletins in more than twenty years, with one exception. Ex. B at 37:25-38:9. The one exception

is a small advertisement in a Catholic parish's festival publication that Rost regards as a "gift." *Id*. at 39:2-13.

RGGR does not sponsor publications which call people to join the Christian faith or celebrate Christian holidays. *Id*. at 31:20-32:2; 39:2-16. There are no prayer groups or Bible studies at RGGR. Ex. J at 47:8-16; Ex. N, Kowalewski Dep. at 30:11-12; Ex. H at 19:18-24; Ex. I, Kish Dep. at 55:10-20; Ex. M at 27:8-15. RGGR does not have any religion-based exclusions to employee medical coverage, such as refusing to pay for abortions. Ex. B at 92:17-93:20.

Significantly, Rost admitted that the business climate causes him to act against his religious ideals: the practice of cremation instead of holding a funeral. His Christian beliefs align him toward performing funerals. *Id*. at 51:22. However, the industry has changed, with a growing preference for cremations, and he needs to do them to stay in business. *Id*. at 52:14-53:10.

E. Rost's religious beliefs about men and women motivated him to fire Stephens.

Rost's religious *beliefs*—not a religious exercise—led him to terminate Stephens's employment after she presented her transition

letter. When asked what was objectionable to him about continuing to employ Aimee Stephens, Rost stated that transgender expression violated his beliefs regarding proper behavior by men and women:

> Q So, your personal faith as a follower of Jesus Christ tells you that it would be improper or -- to employ someone like the person you knew as Anthony Stephens?
> A Absolutely.
> Q Okay. You indicated as part of the healing process, but what about your religious beliefs specifically are violated by continuing to employ Stephens?
> A I believe it would violate my faith, yes, absolutely.
> Q Okay. What aspects of it?
> A Well, I believe that God created a man as a man and God created a woman as a woman. And to -- to not honor that, I would feel it's a violation of my faith, absolutely.
> Q So Stephens would be presenting in a way that offended your religious beliefs, essentially?
> A Yes. Yes.

Ex. B at 54:21-55:19. Later, under questioning by his own attorney, Rost re-affirmed that Stephens's non-conformance with his beliefs regarding the behavior of men and women prompted the firing decision. Compare the above with *Id*. at 135:24-136:3 ("[the specific reason Stephens was fired] was [that Stephens was] no longer going to represent himself as a

man. He wanted to dress as a woman").

Rost also testified that he objected to Stephens's use of "Aimee" in the charge of discrimination, saying that this made him "uncomfortable….because he's [Stephens] a man." Ex. O, Rost Dep. at 23:4-8.

F. Defendant's Clothing-Allowance Policy

Defendant provides a different clothing allowance to its male and female employees. *Id*. at 24:8-25; Ex. I, Kish Dep. at 16:13–19:5. This dress code requires female employees to wear a suit jacket, skirt, and blouse. Ex. O at 24:8-25; Ex. I at 16:15-17:7. Male employees, including funeral directors, must wear a suit jacket, suit pants, white dress shirt, and tie. Ex. O at 13:4-21; Ex. I at 17:8-24.

For male employees who have contact with customers, Defendant provides nearly all work attire free of charge. Approximately 10 years ago, Defendant made an arrangement with a local clothier—Sam Michael's—to pay for suit jackets, suit pants, and ties for the male employees. Immediately upon hire of a full-time male, Defendant pays for two suit jackets, two suit pants, and two ties from Sam Michael's. Ex.

O at 14:9-19. For part-time males, Defendant pays for one suit jacket, one suit pant, and one tie. *Id*. These clothing benefits also include tailoring of the suit jackets and pants (Ex. I at 19:20-24) and repairs to the suit as needed (Ex. O at 19:2-24). Moreover, replacement suit jackets, suit pants, and ties are provided on an as-needed basis, which, on average, is every year or sometimes more often. Ex. K at 19:1-3; Ex. J at 21:4-8; Ex. F at 44:3-15; Ex. N at 22:21-23:1.

No work-clothing benefits were provided to any female employees until late 2014. Ex. O at 15:16-16:12; Ex. I at 20:16–21:3; Ex. P, Clothing Allowance Checks; Ex. M at 42:1-4; Ex. H at 13:5–14:4. Beginning in October 2014, Defendant began to provide female employees who have customer contact an annual clothing stipend. Ex. I at 20:16–21:23; Ex. P. The amount depends on the employee's status: full-time females are given $150 per year and part-time women receive $75 per year. Ex. I at 20:16-21:23. Defendant acknowledges, however, that the attire it provides to its male employees costs Defendant approximately $235 (part-time) to $470 (full-time) per employee. Ex. O at 15:3-6. Defendant also acknowledges that it based the amount of clothing allowance for its

female employees on what it determined was "fair," rather than the amount it paid for its male employees' clothes. *Id*. at 45:12-20. Furthermore, unlike Defendant's male employees who receive their clothing benefits immediately upon hire, Defendant's female employees are required to wait until the next clothing allowance checks are issued for all female employees. Ex. I at 25:11-15, 38:15-25.

II. RELEVANT LAW

A. Rule 56 Standard

Summary judgment is only appropriate where the record reveals there are no issues of material fact in dispute. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The moving party bears the burden of "clearly and convincingly" demonstrating the absence of any genuine disputes of material fact. *Sims v. Memphis Processors, Inc.*, 926 F.2d 524 (6th Cir. 1991) (citing *Kochins v. Linden-Ailmak, Inc.*, 799 F.2d 1128, 1133 (6th Cir. 1986)). If Plaintiff meets this burden, the Defendant is required to present significant probative evidence showing that genuine, material disputes remain. *Sims*, 926 F.2d at 526.

B. First Amendment Free Exercise Standard

The standard for review of a free-exercise claim is well-established: a religious objector to legislative enactments must comply with neutral laws of general applicability. *Mt. Elliott Cemetery Ass'n. v City of Troy*, 171 F.3d 398, 403 (6th Cir. 1999) (quoting *Employment Division v. Smith*, 494 U.S. 872, 879 (1990)).

To determine whether a law is neutral and of general applicability, the Sixth Circuit asks if the object of the law is to target practices because of their religious motivation:

> A law is not neutral if the object of the law, whether overt or hidden, is to infringe upon or restrict practices because of their religious motivation. *See [Church of the] Lukumi Babalu [, Aye, Inc. v. City of Hialeah,]* 508 U.S. 520, 535 (1993).
>
> The requirement that the law be of general applicability protects against unequal treatment which results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation.

Mt. Elliott Cemetery Ass'n., 171 F.3d at 405.

Ultimately, if a religious person is being treated the same as a non-religious person under a valid and neutral law of general applicability, there is no free-exercise violation. *See Hansen v. Ann Arbor*

Pub. Schools, 293 F. Supp. 2d 780, 809 (E.D. Mich. 2003) (where no students were permitted to comment at a school panel on homosexuality, free-exercise rights of religious student were not violated).

C. RFRA Standard

The Religious Freedom Restoration Act ("RFRA") prohibits the government from substantially burdening the exercise of religion unless the government demonstrates that the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. 42 U.S.C. § 2000bb–1(a), (b).

The standard for analyzing a RFRA claim is a two-step process:

> First, the plaintiff must make out a prima facie case by establishing Article III standing and showing that the law in question would (1) substantially burden (2) a sincere (3) religious exercise. If the plaintiff makes out a prima facie case, it falls to the government to demonstrate[ ] that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest . The government carries the burdens of both production and persuasion when it seeks to justify a substantial burden on a sincere religious practice.

Michigan Catholic Conf. v. Burwell, 755 F.3d 372, 383 (6th Cir. 2014), vacated and remanded, 135 S. Ct. 1914; affirmed after remand, 807 F.3d 738 (6th Cir. 2015) (citations and internal quotation marks omitted).

Determining whether or not the government has substantially burdened an exercise of religion is a question of law. *Id*. at 385. Further, "[a] substantial burden exists when government action puts substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008) (quoting *Thomas v. Review Bd.*, 450 U.S. 717, 718 (1981)).

III. ARGUMENTS

A. The Commission Has Not Violated Defendant's Free-Exercise rights.

Defendant alleges in Affirmative Defense 12 that the EEOC's claims violate RGGR's free exercise rights, but that cannot be: the Defendant did not put the Commission on notice that religious exercise issues were involved until it filed its Answer to the Amended Complaint in June 2015. Rost admits that he did not raise such defenses during the EEOC's investigation of Stephens's charge of discrimination. Ex. B at 70:7-71:17; 141:2-142:15. Thus, the lawsuit could not have been formulated with any anti-religious motive in mind.

Even if the defense were construed to be an attack on Title VII, which it does not seem to be, Defendant's claim would be unsuccessful

under the Free Exercise Clause. Title VII is a neutral law of general applicability.[1] *See General Tel. Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 326 (1980) (there is a public interest in preventing employment discrimination). Title VII applies equally to all employers with 15 or more employees regardless of religious status—including Defendant. *See* Dkt. 22 at paragraphs 5-6 (admitting that Defendant is an employer for the purposes of Title VII).

A free-exercise claim cannot insulate an employer from liability under Title VII, and no court has so held. *See EEOC v. Townley Engineering & Mfg. Co.*, 859 F.2d 610, 620-21 (9th Cir. 1988) (elimination of mandatory attendance requirement for corporate prayer meetings to accommodate the Title VII rights of a non-religious employee did not violate Defendant's free exercise rights). In another religious claim involving Title VII enforcement, the court held that an investigation and subsequent lawsuit did not infringe upon a business owner's religious practices. *See EEOC v. Preferred Mgmt. Corp.*, 216 F. Supp. 2d 763, 810 (S.D. Ind. 2002) (even assuming the effect of EEOC's

[1] Far from being intended to infringe upon religion, Title VII protects the convictions of religious institutions by allowing them to restrict employment to those of their own faith. 42 U.S.C. § 2000e–1(a).

investigation and litigation were to force conformance to Title VII's strictures against using religious criteria to make employment decisions, such would not "substantially burden" owner's religious beliefs or practices).

Consequently, summary judgment in favor of the Commission is proper as to Defendant's free-exercise defense set forth in Affirmative Defense 12.

B. Defendant's RFRA defense should be rejected.

1. The Commission does not contest Defendant's religious sincerity.

Defendant's religious exercise is limited—much more than the religious practices of other plaintiffs in RFRA disputes. *See, e.g., Hobby Lobby v. Sebelius*, 723 F.3d 1114, 1122 (10th Cir. 2013), *aff'd sub nom Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (describing the evangelical activity, religious principles and actions demonstrated by the two plaintiff corporations). And the Defendant here gave no indication that its religious beliefs were being violated until litigation had been underway for nearly eight and a half months. Nevertheless, for the purposes of this motion, the Commission will not contest the

sincerity of Defendant's religious views.

2. Defendant's Religious Exercise at RGGR is Not Affected by Title VII Enforcement.

There is nothing about enforcement of Title VII that will interfere with Rost's religious exercises at Defendant. RFRA protects religious exercise, not simply beliefs. 42 U.S.C. § 2000bb(1)(a)) In particular, RFRA does not protect Mr. Rost from having his religious beliefs offended. The Commission is not requesting that Defendant endorse Stephens's transition or otherwise affirm something to which Rost objects.

In *Wilson v. James*, __ F. Supp .3d __, 2015 WL 5952109 (D.D.C. 2015), the plaintiff, a member of the Utah National Guard, was reprimanded after he sent an email using a military account objecting to a same-sex marriage ceremony held in the Cadet Chapel at West Point. The plaintiff sued under RFRA, claiming that he was being punished for his beliefs. However, the district court rejected the RFRA claim, noting that a burden on beliefs was different from a burden on the exercise of those beliefs:

A substantial burden on one's religious beliefs—as distinct from

> such a burden on one's *exercise* of religious beliefs—does not violate RFRA. [H]ere, Plaintiff has not identified any burdened action or practice of the LDS faith. The discipline imposed did not "force[him] to engage in conduct that [his] religion forbids" or "prevent[him] from engaging in conduct [his] religion requires," *Henderson v. Kennedy,* 253 F.3d 12, 16 (D.C.Cir.2001). Nor did it "condition[ ] receipt of an important benefit upon conduct proscribed by [his] religious faith, or ... den[y] such a benefit because of conduct mandated by [his] belief," *Thomas v. Review Bd. of Ind. Employment Sec. Div.,* 450 U.S. 707, 717–18, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981). Nothing prevented Plaintiff from continuing to maintain his beliefs about same-sex marriage and homosexuality, just as he had before the [reprimand], without repercussion.

Wilson, 2015 WL 5952109 at *8.

Similarly, in *McKnight v. MTC*, 2015 WL 7730995 (N.D. Tex. Nov. 9, 2015), a prisoner filed a claim under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc–1, et seq.,[2] alleging that his religious freedom rights had been violated by the placement of a homosexual cellmate in his cell. In the absence of any claim that the plaintiff's religious exercise had been changed, the court held that the claim was without merit:

> Here, Plaintiff has pled no facts tending to show that Defendants' refusal to accommodate his housing request "put a substantial pressure on him to modify his behavior and to violate his beliefs."

[2] RLUIPA claims are evaluated under the same standard as RFRA claims. *See Holt v. Hobbs*, 135 S. Ct. 853, 860 (2015).

> *Jehovah [v. Clarke],* 798 F.3d [169 (4th Cir. 2015)] at 180–181 (quotations and quoted case omitted). Plaintiff relies instead on conclusory statements that sharing a cell with a homosexual inmate is against his conscience and "religious obligation to honor God." … Thus, Plaintiff's allegations suggest that he takes issue only with the *exposure* to a homosexual cellmate, and not with any *effect* it has on his religious activities. Indeed, his filings do not identify any religious exercise apart from mentioning very general tenets of his religion to "honor God" and maintain his "human dignity."

McKnight, 2015 WL 7730995 at *4.

The facts are similar here: Rost avers that his obligation to honor God obliges him to fire Stephens, who does not act as Rost's beliefs dictate she should. In other words, the mere presence of and exposure to Stephens offends his beliefs. *See* Ex. T, Def's Answers to Plaintiff's First Set of Discovery Requests at p. 4 ("Stephens['s] intentions also violated Mr. Ros[t]'s sincerely held religious beliefs"). However, this is not sufficient to sustain a RFRA claim.

Significantly, Defendant is still able to engage in the religious activities identified by Rost—the placement of devotionals and cards for the public—regardless of whether or not one of its employees happens to violate Rost's religion-based gender stereotypes. Thus, Rost's religious exercises are not affected by the presence or employment of Stephens.

The mere fact that Rost thinks Stephens's continued employment violates his religious beliefs is legally insufficient under RFRA.

3. Enforcement of Title VII does not substantially burden Defendant.

Even if Defendant identifies a religious exercise that has been burdened, RFRA requires a "*substantial* burden" and such is a question of law for the Court. "RFRA is not a mechanism to advance a generalized objection to a governmental policy choice, even if it is one sincerely based upon religion." *Michigan Cath. Conf. v. Burwell*, 807 F.3d 738 (6th Cir. 2015) (*Burwell II*) (affirming *Burwell I*):

> But a government action does not constitute a substantial burden on the exercise of religion even if "the challenged Government action would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs" if the governmental action does not coerce the individuals to violate their religious beliefs or deny them the "rights, benefits, and privileges enjoyed by other citizens." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988).

Id., 755 F.3d at 384 (6th Cir. 2014).

Here, RGGR cannot establish a substantial burden. As stated before, there is no burdened exercise. Further, the Commission is not asking Rost to adopt a different belief about transgender people, and

Rost has already admitted that employing people with religious beliefs different from his own does not constitute an endorsement of the employee's religious views.

Likewise, continued employment of Aimee Stephens does not constitute an endorsement of any religious view. As Justice O'Connor stated in a concurring opinion:

> A statute outlawing employment discrimination based on race, color, religion, sex, or national origin has the valid secular purpose of assuring employment opportunity to all groups in our pluralistic society. Since Title VII calls for reasonable rather than absolute accommodation and extends that requirement to all religious beliefs and practices rather than protecting only the Sabbath observance, I believe an objective observer would perceive it as an anti-discrimination law rather than an endorsement of religion or a particular religious practice."

Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 711-712 (1985).

Instead, in this case, the EEOC has filed suit in an effort to create a workplace free of gender discrimination for a qualified funeral director and embalmer. Since no employer can discharge people for reasons grounded in sexual stereotypes, the Defendant is not being denied any right, benefit or privilege granted to an employer who does not share its views. Further, Commission investigations and lawsuits under Title VII

are not a substantial burden under RFRA. In *EEOC v. Preferred Mgmt. Corp.*, 216 F. Supp. 2d 763 (S.D. Ind. 2002), the Commission investigated and sued an employer under Title VII for alleged religious discrimination against employees and applicants who did not share the fundamentalist Christian views of the Defendant's management. Both the investigation and lawsuit involved extensive and searching examination of the religious viewpoints of the Defendant's decision-makers and employees. *See Preferred*, 216 F. Supp. 2d at 772-803. The defendant in *Preferred* objected to this process, claiming that it violated its rights under RFRA and the First Amendment. *Id.* at 804-805. The court held that neither the 2½-year investigation (which included 24 depositions) nor the litigation itself constituted a substantial burden on the religious rights of the employer. *Id.* at 807-809, 810.

Here, because the Defendant chose not to assert them, the Commission was entirely unaware of any potential religious issues during the investigation. Thus, there can be no claim of a substantial burden from the investigation. As to the litigation itself, Defendant injected religion into the matter, so the Commission properly probed the

religious claims at stake.

Therefore, as a matter of law, it should be held that Defendant's rights have not been substantially burdened by this action.

4. Enforcement of Title VII here furthers a compelling governmental interest in eradicating sex discrimination and is precisely tailored to further that interest.

To the Commission's knowledge, there is no case law holding that RFRA trumps Title VII. To the contrary, the Supreme Court suggested in a colloquy between the principal dissent and the majority opinion in *Hobby Lobby*, 134 S. Ct. 2751, that Title VII serves a compelling governmental interest which cannot be overridden by RFRA. While dealing with a matter far removed from the dispute here, the discussion is worth quoting in full.

In *Burwell*, the principal dissent expressed concerns about RFRA being used to trump laws regarding accommodation and hiring, especially in the context of sex-based hiring decisions informed by religion. *See Burwell* at 2804-2805 (Ginsberg, J., dissenting).

In response, the majority opinion emphasized that anti-discrimination laws with respect to hiring would not be trumped by

RFRA:

> The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. See *post,* at 2804 – 2805. Our decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.

Id. at 2783. Title VII's prohibitions against sex discrimination in the workplace demonstrate that the government has a compelling interest in protecting employees from losing their jobs on the basis of an employer's gender stereotyping, and they are precisely tailored to ensure this.

Ultimately, the concurring opinion stated the balance most clearly in the employment context:

> Among the reasons the United States is so open, so tolerant, and so free is that no person may be restricted or demeaned by government in exercising his or her religion. Yet neither may that same exercise unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling.

Id. at 2786-87 (Kennedy, J., concurring).

Even if Title VII burdens a religious practice, there "is a 'compelling government interest' in creating such a burden: the eradication of employment discrimination based on the criteria

identified in Title VII[.]" *Preferred Mgmt.*, 216 F. Supp. 2d at 810.

In the final analysis, Thomas Rost is free to exercise his Christian religious beliefs, but he is not free to take away Aimee Stephens's livelihood in the process. Nor is he able to excuse his actions under the cloak of religious freedom. Neither the Constitution nor RFRA authorize the firing of Stephens. To the contrary, Rost's admissions warrant entry of judgment in favor of the Commission.

C. Summary Judgment as to liability for Stephens's gender-motivated termination is warranted.

Title VII violations can be established through either circumstantial or direct evidence. "Direct evidence of discrimination is that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 570 (6th Cir. 2003). Rost admits that his sex-based stereotypes motivated Stephens's termination. Ex. B at 135:24-136:3. And this constitutes an admission of discrimination. Thus, the Commission respectfully requests that summary judgment as to liability for Stephens's termination be entered in favor of the Plaintiff.

As this Court discussed in its *Amended Opinion & Order Denying Defendant's Motion to Dismiss* (Dkt. 13), an employer discriminates on the basis of sex when it fires an employee for failing to conform to the employer's notions of the employee's sex. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989) (sexual stereotyping claim based on, among other things, instruction to plaintiff to wear jewelry and dress more femininely); *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998) ("statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils"). Here, there is no material dispute of fact regarding motivation. Rost has frankly and forthrightly stated his motivation for firing Stephens in no uncertain terms—that Stephens was a man and had to present as one. Ex. B at 135:24-136:3.

In *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004), the Sixth Circuit explained that an employer violates Title VII when it takes action against an employee based on "[s]ex stereotyping," that is, "based on a person's gender non-conforming behavior." This includes penalizing an employee for dress or mannerisms that, in the employer's mind, conform to the wrong sex stereotypes. *See also Myers v. Cuyahoga Cty.*,

182 Fed. Appx. 510, 519 (6th Cir. 2006) ("Title VII protects transsexual persons from discrimination for failing to act in accordance and/or identify with their perceived sex or gender") (citing *Smith* and *Barnes*); *Fabian v. Hospital of Central Connecticut*, No. 3:12-cv-1154, __F. Supp. 3d __, 2016 WL 1089178 at *10-13 (D. Conn. March 18, 2016) (following *inter alia*, Title VII's plain language, *Price Waterhouse* and *Smith* and discussing the development of the case law).

Thus, an employee who alleges that failure to conform to sex stereotypes concerning how a man or woman should look and behave was the "driving force" behind the employer's adverse employment actions "state[s] a claim for relief pursuant to Title VII's prohibition of sex discrimination." *Smith*, 378 F.3d at 575. In particular, an employer may not fire a transgender woman for failing to comport with the employer's gender expectations. Such an act is discrimination "because of … sex," which Title VII prohibits.

RGGR fired Stephens because she did not conform to its expectations of how someone assigned the male sex at birth should look and act:

Q [Defense Counsel] Okay. Why did you -- what was the specific reason that you terminated Stephens?
A Well, because he -- he was no longer going to represent himself as a man. He wanted to dress as a woman.

Ex. B at 135:24-136:1. Rost also admits that Stephens's termination was not motivated by any performance reasons. *Id.* at 108:25-109:9.

Stephens intended to provide the same level of services to the Respondent as she had always provided. And she still intended to dress professionally, in a manner consistent with the Respondent's dress requirements for women. Ex. Q, Stephens Dep. at 133:6-133:9. In other words, she still intended to meet all of the Respondent's legitimate business expectations. Therefore, RGGR discriminated against Stephens based on its gender stereotypes, in contravention of *Smith*. Ex. B at 55:8-55:9 ("Well, I believe that God created a man as a man and God created a woman as a woman."). As the Sixth Circuit noted in *Smith*, *Price Waterhouse* states that Title VII forbids discrimination based on the employer's notions of how a male or female should look or act. *See* 378 F.3d at 572-73.

Because the Commission can establish direct evidence of

discrimination, the Court need not proceed to the second step of the traditional *McDonnell Douglas* burden-shifting analysis for cases proceeding under a circumstantial evidence theory. Even if the Court considers RGGR's dress code a possible defense, RGGR's argument fails for two reasons: RGGR's dress code is not a legitimate, non-discriminatory reason for terminating Stephens, and even if it were non-discriminatory, the dress code is a pretext, not the real reason RGGR fired Stephens.

RGGR is likely to cite a string of cases allegedly standing for the proposition that sex-specific dress codes do not violate Title VII. *See* Dkt. 7 at Pg ID 38-40. However, as this Court already recognized, this is not the Commission's allegation in the lawsuit. *See* Dkt. 13 at Pg ID 197 ("Here, however, the EEOC's complaint does not assert any claims based upon a dress code and it does not contain any allegations as to a dress code at the Funeral Home"). The Commission is not asserting that RGGR's dress code violates Title VII—rather the violation is RGGR's insistence that Stephens dress in accord with Rost's gender stereotypes. Stephens's gender identity is female, and she was prepared to abide by

RGGR's female dress code. Ex. Q, Stephens Dep. at 133:6-9. RGGR's desire to force her to present as a male at work evidences the exact sex-based consideration that establishes RGGR terminated Stephens because of her sex.

RGGR claims that if it cannot force Stephens to dress inconsistent with her gender identity, sex specific dress codes would be "effectively invalidate[d]." Dkt. 7 at Pg ID 40-42. RGGR's argument misses the mark because Stephens fully intended to abide by the female dress code—and to continue to dress in a professional manner at work.

RGGR claims that employers will not be "able to any longer control how its employees and agents appear to the public." Dkt. 7 at Pg ID 41. This is unworthy of credence. RGGR can require its employees to dress professionally and appropriately. What RGGR cannot require is that an employee dress inconsistently with his or her gender identity. It is RGGR's insistence that it could require Stephens to present inconsistently with her gender identity—but consistently with RGGR's stereotypes for how she should dress—that establishes that RGGR terminated Stephens for violating its gender-based expectations. Such

employer action violates Title VII.

D. Defendant's Clothing-Allowance Policy Constitutes Sex-Based Discrimination.

Title VII makes it unlawful for an employer to "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ." 42 U.S.C. § 2000e-2(a)(1). Defendant's policy of paying for the work clothing of male employees, while failing to provide a comparable benefit to female employees violates Title VII.

As clarified by the EEOC Guidelines on Discrimination Because of Sex, "fringe benefits" are encompassed by the language in § 2000e-2(a)(1). 29 C.F.R. §1604.9(a)–(b). Federal courts have also recognized various allowances, including work-clothing-related allowances, as being fringe benefits under Title VII. *See Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 443, 453–56 (D.C. Cir. 1976) (upholding lower court's finding that providing a uniform-cleaning allowance to only the male employees, but not female employees, constituted a violation under Title VII); *Long v. Ringling Brothers-Barnum & Bailey Combined Shows*, 9 F.3d 340, 343–44 (4th

Cir. 1993) (finding genuine issues of material fact in a Title VII case involving a claim of fringe benefits, which included allowances for meals, laundry and valet services, and life and health insurances).

Thus, Defendant's practice of providing fringe benefits only to men in the form of free work clothing violated Title VII.

Even now, although Defendant provides female employees with a yearly clothing allowance of $75 to $150, this is significantly less than the clothing benefits in excess of $200 provided to male employees, and is less flexible, since women can only obtain it on a pre-determined schedule and even part-time male employees can replace clothing at need as it wears out or is damaged.

Specifically, RGGR permits its male employees to receive their clothing benefits immediately upon hire and they can replace soiled or damaged clothes as needed, also at no cost. In contrast, Defendant's female employees are required to wait until the next clothing allowance checks are issued for *all* female employees before they receive their clothing allowance. As a consequence, Defendant has only lessened, but not eliminated, its discrimination against female employees. Hence, it

continues to violate Title VII and is liable for damages for discrimination on the basis of sex. Thus, summary judgment is appropriate as to the clothing-allowance claim as well.

IV. CONCLUSION

There is no factual dispute that Thomas Rost discharged Aimee Stephens because she refused to conform to his sex-based stereotypes and present as a man. Rost has forthrightly admitted this, and more than once. Moreover, his religious beliefs regarding transgender persons do not excuse him from his duty as an employer to respect Aimee Stephens's Title VII rights. No case has held that either the First Amendment or RFRA trumps or voids employee discrimination claims.

Further, Defendant has and continues to provide inferior clothing allowance benefits to female employees. This, too, is not a matter of dispute. Consequently, summary judgment in favor of the Commission is appropriate as to both of the claims at issue in this lawsuit, and the Commission respectfully requests that the Court grant its motion as to liability and the matter proceed as to the calculation of damages

Respectfully submitted,

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

s/ Miles Shultz
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Dated: April 7, 2016

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Certificate of Service

I hereby certify that on April 7, 2016, I electronically filed the forgoing with the clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all record attorneys.

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

dated: April 7, 2016

s/ Dale Price
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APPENDIX 7

to

Newton's Laws of Motion and the LGBT Community…What's Next?

Submitted by: Christopher A. D'Angelo

***EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, ACLU's Unopposed Motion and Brief for Leave to File Amicus Curiae Brief in Support of EEOC's Summary Judgement Motion**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v.

R.G. & G.R. HARRIS FUNERAL HOMES, INC.,

Defendant.

Case No. 14-cv-13710

Hon. Sean F. Cox
Mag. David R. Grand

UNOPPOSED MOTION BY THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The American Civil Liberties Union and the American Civil Liberties Union of Michigan (collectively, the "ACLU") file this unopposed motion for leave to file an *amicus curiae* brief for the reasons that follow and those set forth in the attached brief:

1. The American Civil Liberties Union is a nonprofit, nonpartisan organization with over 500,000 members dedicated to protecting the fundamental liberties and basic civil rights guaranteed by the U.S. Constitution. The American Civil Liberties Union of Michigan is the Michigan affiliate of the American Civil Liberties Union.

2. The ACLU is well-positioned to submit an *amicus* brief in this case. The ACLU has a long history of defending religious liberty, including defending the right of individuals to freely practice their religion or no religion. *See, e.g.*, *Hanas v. Inner City Christian Outreach, Inc.*, 542 F. Supp. 2d 683 (E.D. Mich. 2008) (holding that a Catholic man's rights were violated when he was sent to jail for asking a drug court judge to remove him from a drug rehabilitation program that coerced him into practicing the Pentecostal faith).[1] At the same time, the ACLU is committed to fighting discrimination and inequality, including discrimination against transgender people. *See, e.g.*, Complaint, *Love v. Johnson*, 2:15-cv-11834-NGE-EAS (E.D. Mich. filed May 21, 2015) (challenging the State of Michigan's policy of refusing to correct the gender on a transgender person's driver's license or state identification card unless the person requesting the correction produces an amended birth certificate showing the correct gender).[2]

3. Most relevant to this case, the ACLU filed an *amicus* brief in a pregnancy discrimination case where the employer raised religious exercise defenses to enforcement of Title VII and the Americans with Disabilities Act. These defenses were rejected. *See Herx v. Diocese of Fort Want–South Bend Inc.*,

[1] For a full history of the ACLU's free exercise work, see https://www.aclu.org/aclu-defense-religious-practice-and-expression.

[2] More information about the ACLU's LGBT rights work can be found at https://www.aclu.org/issues/lgbt-rights.

48 F. Supp. 3d 1168 (N.D. Ind. 2014), *appeal dismissed*, 772 F.3d 1085 (7th Cir. 2014).

4. The proposed brief would aid this Court by providing a historical context for this case, including the long line of cases that have rejected the use of religion to discriminate against others in employment, and by highlighting the government's compelling interest in preventing such discrimination.

5. The proposed brief would also aid this Court by demonstrating why a sex specific dress code provides no defense to Title VII liability where an employer terminates a transgender employee for dressing in accordance with her gender identity.

6. Pursuant to Local Rule 7.1(a), the ACLU has contacted the parties' counsel to seek concurrence. Both parties concur in the ACLU's request to file an *amicus curiae* brief.

7. If the motion is granted, the ACLU will file the brief attached as Exhibit A.

WHEREFORE, the ACLU respectfully requests that this Court grant this motion to allow the ACLU to file the attached *amicus curiae* brief.

Respectfully submitted,

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Dated: April 15, 2016

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v.

R.G. & G.R. HARRIS FUNERAL HOMES, INC.,

Defendant.

Case No. 14-cv-13710

Hon. Sean F. Cox
Mag. David R. Grand

BRIEF IN SUPPORT OF ACLU'S UNOPPOSED MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Local Rule 7.1(d), the ACLU submits this brief in support of its unopposed motion for leave to file an *amicus curiae* brief. Whether to grant a motion for leave to file an *amicus* brief is in the sound discretion of the Court. *See, e.g.*, *Northland Family Planning Clinic v. Cox*, 394 F. Supp. 2d 978, 990 (E.D. Mich. 2005) (granting leave to anti-abortion organization and individuals to file *amici* briefs in a constitutional challenge to an abortion restrictions); *Bay Cnty. Democratic Party v. Land*, 347 F. Supp. 2d 404, 438 (E.D. Mich. 2004) (allowing *amicus* brief with no discussion). The ACLU has frequently been granted leave to file *amicus curiae* briefs in this Court. *See, e.g.*, *Freedom from Religion Found. v. City of Warren*, 873 F. Supp. 2d 850 (E.D. Mich. 2012); *Doe v. Sturdivant*, No. 05-

70869, 2005 WL 2769000, at *3 (E.D. Mich. Oct. 25, 2005); *Everson v. Mich. Dep't of Corrections*, 222 F. Supp. 2d 864 (E.D. Mich. 2002); *Thomason v. Jernigan*, 770 F. Supp. 1195, 1196 (E.D. Mich. 1991).

In one case, this Court engaged in some analysis when granting leave to the Detroit Free Press to file an *amicus curiae* brief. This Court granted leave in that case in part because the *amicus* brief "offers a unique perspective and analysis of the" underlying statute at issue in the case. *Flagg v. City of Detroit*, 252 F.R.D. 346, 360 n.28 (E.D. Mich. 2008). The same is true here. As discussed in the accompanying motion, the ACLU does not repeat the identical arguments of any party but rather provides an extensive discussion of courts' refusal to countenance religious exemptions from anti-discrimination laws, as well as an explanation of why a sex specific dress code provides no defense to Title VII liability where an employer terminates a transgender employee for dressing in accordance with her gender identity.

Furthermore, this Court in *Flagg* also allowed the Free Press to file an *amicus* brief because of its interest in the case. *Id.* The ACLU likewise has a significant interest in the outcome of this case and in making sure that religious exercise protections are not used to license discrimination. The intersection of these and other civil rights and liberties uniquely position the ACLU to offer an *amicus* brief here. Indeed, the ACLU has been granted *amicus* status in other

religious exercise challenges to enforcement of Title VII. *See Herx v. Diocese of Fort Want–South Bend Inc.*, 48 F. Supp. 3d 1168 (N.D. Ind. 2014). Moreover, as a membership organization, the ACLU has an interest in ensuring that Title VII's protections are enforced, which will benefit our members.

Accordingly, the ACLU respectfully requests that this Court grant leave to allow the ACLU to file the attached *amicus curiae* brief.

Respectfully submitted,

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Dated: April 15, 2016

CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2016, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to all counsel of record.

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Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v.

R.G. & G.R. HARRIS FUNERAL HOMES, INC.,

Defendant.

Case No. 14-cv-13710

Hon. Sean F. Cox
Mag. David R. Grand

ACLU'S *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFF EEOC'S MOTION FOR SUMMARY JUDGMENT

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INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union and the American Civil Liberties Union of Michigan (collectively, "ACLU") submit this *amicus* brief in support of Plaintiff's motion for summary judgment. The right to practice one's religion, or no religion, is a core component of our civil liberties and is of vital importance to the ACLU. For this reason, the ACLU regularly brings cases aimed at protecting the right to religious exercise and expression. At the same time, the ACLU is committed to fighting discrimination and inequality, including discrimination against transgender people by, for example, denying transgender employees the ability to dress consistently with their gender identity.

Amici support the motion for summary judgment filed by Plaintiff Equal Employment Opportunity Commission ("EEOC"). *Amici* submit this brief to explain why an employer may not use a sex-specific dress code as a license to subject a transgender employee to an adverse employment action, such as firing, because she intends to dress consistently with her gender identity, and to explain why Title VII is essential to furthering the government's compelling interest in preventing invidious discrimination. *Amici* take no position on the other issues presented by the parties' cross-motions for summary judgment.

INTRODUCTION

Amici agree with the EEOC that terminating a transgender employee because she intends to dress consistently with her gender identity constitutes illegal sex discrimination even if couched as the enforcement of a so-called "biological" sex-specific dress code. To hold otherwise would allow employers through the adoption and application of such a dress code to reinforce the sex-stereotypes that Title VII was intended to eradicate. To be clear, this case is not a challenge to gendered dress codes, as Defendant R.G. & G.R. Harris Funeral Homes, Inc. ("Funeral Home") would have this Court believe. The EEOC's case is only about whether firing a transgender female employee because of her plan to start dressing as a woman constitutes sex stereotyping in violation of Title VII. It plainly does.

Amici further agree with the EEOC that neither the Free Exercise Clause nor the Religious Freedom Restoration Act ("RFRA") exempts the Funeral Home from liability under Title VII. The religious defenses raised by the Funeral Home—that it has the right to discriminate based on sex in violation of federal civil rights laws because of its owner's religious beliefs—are, unfortunately, not new. For decades, private employers have attempted to use their religious beliefs to evade compliance with anti-discrimination laws, including Title VII. For example, employers claimed that the right to religious freedom entitled them to pay men more than women, because of their religious belief that men should be the primary breadwinners;

businesses claimed that the right to religious liberty entitled them to discriminate against people of color in public accommodations, because of their religious belief that the races should be kept separate; and universities claimed a religious liberty right to prohibit interracial dating among their students, because of their religious belief against interracial relationships. In each of these cases, courts squarely rejected the notion that religious liberty provides employers, schools, and businesses open to the public with a license to discriminate. This Court should come to the same conclusion here. The exemption the Funeral Home seeks, if granted, would not only contravene clear and consistent precedent, it would threaten decades of progress achieved by important civil rights statutes and would make employees throughout the country vulnerable to discrimination.

FACTUAL AND PROCEDURAL BACKGROUND

Aimee Stephens is a transgender woman who served as a funeral director and embalmer at the Funeral Home. Mem. in Supp. of Pl.'s Mot. for Summ. J. ("Pl. Mem.") at 1. On July 31, 2013, Ms. Stephens wrote her coworkers a letter informing them about her transition from male to female, and explaining that she intended to dress in appropriate business attire as a woman. *See id.* Ex. A, Stephens Letter. The Funeral Home's owner, Thomas Rost, responded two weeks later by handing Ms. Stephens a severance agreement. Mr. Rost has said that the "specific

reason" he terminated Ms. Stephens was because she "wanted to dress as a woman." Pl. Mem. at 1–2.

The EEOC brought a sex discrimination lawsuit against the Funeral Home, alleging that its termination of Ms. Stephens violated Title VII's prohibition on sex discrimination. The Funeral Home moved to dismiss the case on the ground that gender identity is not protected by Title VII; however, this Court concluded that the EEOC had properly alleged a sex discrimination claim by asserting that Ms. Stephens was fired for failing to conform to Mr. Rost's sex- or gender-based stereotypes. Op. & Order Denying Mot. to Dismiss at 14. After its motion to dismiss was denied, the Funeral Home amended its Answer to raise defenses under the Free Exercise Clause and RFRA. Answer to Am. Compl. at 5. The parties have filed cross-motions for summary judgment.

ARGUMENT

I. The Funeral Home's dress code is not a defense to its discriminatory firing of Aimee Stephens.

The Funeral Home relies on its alleged "biological" sex-specific dress code to justify its termination of Ms. Stephens. Its argument, however, misconstrues the EEOC's argument as a challenge to its dress code, which it is not, and ignores the ample legal precedent establishing that an employer's adverse response to an employee's manner of dress may constitute illegal sex discrimination. Since *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), numerous courts have recognized

that disparate treatment of an employee because her clothing fails to comport with the employer's sex-based stereotypes qualifies as illegal sex discrimination. The Sixth Circuit in *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004), extended *Price Waterhouse*'s reasoning to a transgender firefighter who had been suspended after she began to express a more feminine appearance at work. The court reasoned that, under *Price Waterhouse*, "employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex." *Id.* at 574.

Consistent with *Price Waterhouse* and *Smith*, courts have repeatedly held that an employer's adverse response to a transgender person's intention to begin dressing consistently with his or her gender identity—such as occurred in the present case—constitutes unlawful sex stereotyping. In *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008), for example, the court found that a transgender woman was subject to sex stereotyping in violation of Title VII, based on evidence that her offer to work at the Library of Congress was retracted because she was perceived as "a man in women's clothing," or would be perceived as such by Members of Congress and their staffs. *Id.* at 305. The Eleventh Circuit reached a similar conclusion in *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011), finding that the reason for a transgender woman's termination—because she was perceived

"as 'a man dressed as a woman and made up as a woman,'"—provided "ample direct evidence to support the district court's conclusion" that she was fired due to sex stereotyping in violation of the Fourteenth Amendment. *Id*. at 1320–21; *see also Chavez v. Credit Nation Auto Sales, LLC*, No. 14-14596, 2016 WL 158820, at *7 (11th Cir. Jan. 14, 2016) (testimony that transgender woman was told not to wear a dress to and from work evidence of sex discrimination); *Dawson v. H&H Elec., Inc.*, No. 4:14CV00583 SWW, 2015 WL 5437101, at *4 (E.D. Ark. Sept. 15, 2015) (finding that there was "ample evidence from which a reasonable juror could find that [a transgender employee] was terminated because of her sex," where employer "repeatedly forbade" her to "wear feminine clothes at work" and terminated her employment "soon after she disobeyed [her employer's] orders and began wearing makeup and feminine attire at work"); *Lie v. Sky Pub. Corp.*, No. 013117J, 2002 WL 31492397, at *5 (Mass. Super. Oct. 7, 2002) (firing of transgender woman for refusing to "wear traditionally male attire" made out case of sex stereotyping).

The Funeral Home suggests that its termination of Ms. Stephens did not violate Title VII because it fired her for failing to comply with its dress code "based on the biological sex of its employees." Mem. of Law in Supp. of Def.'s Mot. for Summ. J. ("Def. Mem.") at 8. But the Funeral Home's assertion that it may require Ms. Stephens to wear men's attire because it perceives her to be

"biologically" male is simply another way of describing its illegal sex stereotyping—its refusal to allow a person it perceives as male to dress as a female.[1] As such, this case is no different than *Smith* and the other cases cited *supra*. And while the Funeral Home claims that the EEOC is challenging its ability to maintain a sex-specific dress code, the lawfulness of sex-specific dress codes is not at issue in this case. What is at issue is the Funeral Home's discriminatory application of its dress code to Ms. Stephens. None of the cases cited by the Funeral Home involve transgender employees, nor do they permit an employer to treat transgender men and women differently from other men and women. Rather, the cases cited by the Funeral Home involve employees who did not comply with the dress code applicable to them. Here, by contrast, there is no dispute that Ms. Stephens intended to comply with the dress code consistent with her gender identity.

Nor is there any basis for the Funeral Home's argument that accepting the EEOC's position in this case would require employers "to allow an employee to dress in a female uniform one day, switch to a male uniform the next day, and return to the female uniform whenever that employee chooses." Def. Mem. at 15.

[1] While it is unnecessary for this Court to resolve this question, it bears pointing out that the Funeral Home's assertion that Ms. Stephens is "biologically" male is inaccurate—research indicates that gender identity itself has a biological component. *See* M. Dru Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science Is Key to Transgender Rights*, 39 Vt. L. Rev. 943, 944 (2015) (summarizing research).

A transgender person's decision to live consistent with her gender identity is not one that is made lightly, nor is going to be reversed on a whim. *See, e.g.*, *Schroer v. Billington*, 577 F. Supp. 2d 293, 296 (D.D.C. 2008) (transgender job applicant explaining "that she did not see being transgender as a choice and that it was something she had lived with her entire life"). The Funeral Home's argument that its "business needs and the interests of the grieving people [it] serves" allows it to refuse Ms. Stephens the ability to dress as a woman is similarly devoid of merit Def. Mem. at 14. The record shows that Ms. Stephens intended to dress professionally as a woman. Moreover, "Title VII prohibits discrimination based on sex whether motivated by hostility, by a desire to protect people of a certain gender, by gender stereotypes, or by the desire to accommodate other people's prejudices or discomfort." *Lusardi v. McHugh*, EEOC DOC 0120133395, 2015 WL 1607756, at *9 (Apr. 1, 2015) (collecting cases).

II. The Free Exercise Clause and RFRA do not provide religious exemptions from Title VII and other civil rights laws.

A central question presented in this case is whether a for-profit business can rely on the religious beliefs of its owners to discriminate against a lay employee on the basis of her sex, where other employers would face liability under Title VII or another civil rights statute for engaging in such discrimination. The answer is no. Neither the Constitution's Free Exercise Clause nor RFRA gives for-profit businesses the right to discriminate against lay employees on the basis of sex, race,

or other federally protected characteristics, even if the discrimination is motivated by the sincerely held religious beliefs of the business's owners. To the contrary, courts have consistently refused to grant employers religious exemptions from civil rights laws in circumstances such as these. This Court should apply the same principle here.

A. Enforcement of Title VII against the Funeral Home does not violate the Free Exercise Clause.

In *Employment Division v. Smith*, 494 U.S. 872 (1990), the Supreme Court held that "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest." *City of Boerne v. Flores*, 521 U.S. 507, 514 (1997) (citing *Smith*). Since *Smith*, courts—including the Sixth Circuit—have consistently held that neutral laws of general applicability do not violate the Free Exercise Clause. *See, e.g.*, *Mount Elliott Cemetery Ass'n v. City of Troy*, 171 F.3d 398, 405 (6th Cir. 1999) ("[T]he City of Troy's ordinances governing residential and community facilities districts are neutral laws of general applicability. As a result, we find that judgment was properly entered in favor of the City with respect to the free exercise claim.").

Here, Title VII is a neutral law of general applicability, and it is well-settled that the law does not target any specific religion for discriminatory treatment. *See, e.g.*, *Vigars v. Valley Christian Ctr. of Dublin, Cal.*, 805 F. Supp. 802, 809 (N.D. Cal. 1992) ("Title VII neither regulates religious beliefs, nor burdens religious acts,

because of their religious motivation. On the contrary, it is clear that Title VII is a secular, neutral statute . . . ."). Even if particular religious beliefs are disproportionately burdened by Title VII, this burden is insufficient to show the statute is *intended* to discriminate against that religion, such that heightened judicial scrutiny of the statute is required. *See, e.g.*, *Bloch v. Frischholz*, 587 F.3d 771, 785 (7th Cir. 2009) ("*Smith* requires more than just evidence of an adverse impact on [religious believers] . . . . Under *Smith*, the denial of a religious exception is not intentional discrimination."); *Prater v. City of Burnside*, 289 F.3d 417, 428–29 (6th Cir. 2002) ("Discrimination may not be inferred . . . simply because a public program is incompatible with a religious organization's spiritual priorities . . . . The Church, therefore, must show more than disparate impact in order to prove discriminatory animus on the part of the City."). The Free Exercise Clause accordingly does not exempt lay employees from Title VII's protections.

Even under the more rigorous pre-*Smith* analysis, courts repeatedly found that antidiscrimination laws such as Title VII meet strict scrutiny and therefore survive Free Exercise Clause challenges.[2] These courts held that any burdens on

[2] Before *Smith*, courts analyzed religious exemption claims by determining whether: (1) the denial of an exemption substantially burdened the claimant's religious exercise; and (2) if so, whether the denial of an exemption was nevertheless justified by the need to further a compelling government interest. *See Wisconsin v. Yoder*, 406 U.S. 205, 210–11 (1972); *Sherbert v. Verner*, 374 U.S. 398, 406–09 (1963). Because RFRA was meant "to restore the compelling interest

the free exercise of religion imposed by antidiscrimination statutes are outweighed by the compelling state interest in eradicating discrimination and promoting equality. In *Bob Jones University v. United States*, 461 U.S. 574 (1983), for example, the Supreme Court held that the IRS's denial of tax exempt status to Bob Jones University and Goldsboro Christian Schools—on the ground that the schools engaged in racial segregation because of its religious belief against interracial relationships—did not violate the Free Exercise Clause, because "the Government has a fundamental, overriding interest in eradicating racial discrimination in education . . . [which] outweighs whatever burden denial of tax benefits places on [the schools'] exercise of their religious beliefs." *Id.* at 604; *see also, e.g.*, *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 945 (D.S.C. 1966) ("refus[ing] to lend credence or support to [a restaurant owner's position] that he has a constitutional right to refuse to serve members of the Negro race in his business establishments upon the ground that to do so would violate his sacred religious beliefs"), *aff'd in relevant part and rev'd in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds*, 390 U.S. 400 (1968).

In the employment context, courts consistently rejected pre-*Smith* Free Exercise Clause challenges to Title VII and other nondiscrimination statutes. For instance, in *EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980), the Fifth

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test as set forth" in *Sherbert* and *Yoder*, 42 U.S.C. § 2000bb(b)(1), the pre-*Smith* case law is informative with respect to the Funeral Home's RFRA defense.

Circuit held that application of Title VII to a sectarian university's employment practices did not violate the Free Exercise Clause. *Id.* at 489. Although the College argued that it should be allowed to discriminate on the basis of sex because of its religious belief that only men should teach certain courses, the court concluded that the College was not exempt from Title VII's prohibition against discrimination because of sex and that any claimed burden on religious exercise in complying with the law were justified by the government's "compelling interest in eradicating discrimination in all forms." *Id* at 488. To take another example, in *EEOC v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986), the Ninth Circuit held that a sectarian school's policy of providing health insurance benefits only to persons it considered to be "head of household"—i.e., single persons and married men, but not married women—violated Title VII and the Fair Labor Standards Act (FLSA). *Id.* at 1364. The school challenged the statutes on Free Exercise Clause grounds, arguing that its practice of providing health insurance benefits to single employees and married men, but not married women, was motivated by the sincere religious belief that men should be the head of the household. *Id.* at 1367. The court, however, held that the school's policy discriminated on the basis of sex and that enforcement of the anti-discrimination statutes was the least restrictive means for furthering Congress's compelling interest in eliminating discrimination. *Id.* at 1368–69 (citing *EEOC v. Pac. Press Publ'g Ass'n*, 676 F.2d 1272, 1279 (9th Cir.

1982)); *accord Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1398 (4th Cir. 1990) (holding that enforcement of the FLSA's minimum wage and equal pay provisions against a sectarian school that paid female teachers less than male teachers did not violate the school's free exercise rights, because enforcement of these provisions was the least restrictive means for furthering the government's compelling interest in preventing discrimination and ensuring fair wages).

B. Enforcement of Title VII against the Funeral Home does not violate RFRA.

Just as courts refused to grant religious exemptions from Title VII and other civil rights laws under the pre-*Smith* Free Exercise Clause, so too they have refused to grant such exemptions under RFRA. *See Redhead v. Conference of Seventh-Day Adventists*, 440 F. Supp. 2d 211, 221–22 (E.D.N.Y. 2006) (rejecting sectarian school's RFRA defense to Title VII sex discrimination claim by teacher who was fired after becoming pregnant outside of marriage); *EEOC v. Preferred Mgmt. Corp.*, 216 F. Supp. 2d 763, 810–13 (S.D. Ind. 2002) (rejecting for-profit company's RFRA defense to Title VII religious discrimination claims); *see also Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2783 (2014) (stating that "[t]he Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race").

Under RFRA, which was meant to restore the pre-*Smith* approach to religious exemption claims, employers must comply with federal laws, including

Title VII—even where the requirements of those laws impose a substantial burden on its owner's religious beliefs—so long as the government "demonstrates that application of the burden to the person . . . (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb–1(b). Here, Title VII is the least restrictive means for furthering the government's interest in preventing invidious employment discrimination on the basis of sex. "It is beyond question that discrimination in employment on the basis of sex, race, or any of the other classifications protected by Title VII is . . . an invidious practice that causes grave harm to its victims." *United States v. Burke*, 504 U.S. 229, 238 (1992). Such discrimination "both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984). To prevent these evils, Title VII and other civil rights laws ensure equal access to the "transactions and endeavors that constitute ordinary civic life in a free society." *Romer v. Evans*, 517 U.S. 620, 631 (1996).[3]

[3] To be sure, there are many cases where a court may dispose of RFRA claims on alternative grounds. For example, the Sixth Circuit has held that RFRA does not apply in a suit between private parties. *Gen. Conf. Corp. of Seventh-Day Adventists v. McGill*, 617 F.3d 402, 410 (6th Cir. 2010). Or, as the EEOC argues here, a court may conclude that the challenged government action does not impose a substantial burden on the RFRA claimant's religious exercise. Pl. Mem. at 18–24.

Courts have acknowledged the government's compelling interest in eradicating *all* forms of invidious discrimination proscribed by Title VII. In *EEOC v. Pacific Press Publishing Association*, for example, the Ninth Circuit rejected an employer's pre-*Smith* free exercise challenge to an EEOC retaliation case, because of the government's compelling interest in preventing employment discrimination. 676 F.2d 1272, 1280 (9th Cir. 1982), *abrogation on other grounds recognized by Am. Friends Serv. Comm. Corp. v. Thornburgh*, 951 F.2d 957, 960 (9th Cir. 1991).[4] It held that "Congress clearly targeted the elimination of *all forms* of discrimination as a 'highest priority.' Congress' purpose to end discrimination is equally if not more compelling than other interests that have been held to justify legislation that burdened the exercise of religious convictions." *Pac. Press*, 676 F.2d at 1280 (emphasis added) (citations omitted). Courts have similarly rejected RFRA challenges to Title VII liability, explaining that Title VII furthers the government's compelling interest in "the eradication of employment discrimination based on the criteria identified in Title VII." *Preferred Mgmt. Corp.*, 216 F. Supp. 2d at 811; *see also Redhead*, 440 F. Supp. 2d at 221–22 (stating that the government has a compelling interest in making sure that "Title VII remains enforceable as to [non-ministerial] employment relationships").

[4] The employer in *Pacific Press* was a Seventh-Day Adventist non-profit publishing house, and maintained that the charging party's participation in EEOC proceedings violated church doctrines prohibiting lawsuits by members against the church. 676 F.2d at 1280.

Although it is unnecessary to consider separately the interest in protecting equal employment opportunity based on each of the protected characteristics under Title VII, it is well established that the government has a compelling interest in eradicating discrimination based on sex. As the Supreme Court stated in *Roberts*, the "stigmatizing injury" of discrimination, "and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race." 468 U.S. at 625; *see also Bd. of Directors of Rotary Club Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (acknowledging the State's "compelling interest in assuring equal access to women extends to the acquisition of leadership skills and business contacts as well as tangible goods and services"). In the employment context, in particular, courts have consistently recognized that the government interest in preventing gender discrimination is "of the highest order." *Dole*, 899 F.2d at 1392 (internal quotation marks omitted); *accord Fremont Christian School*, 781 F.2d at 1368.

The government's interest in preventing invidious sex discrimination is no less compelling when the discrimination is directed at transgender persons. Our nation has a long and painful history of sex discrimination against transgender people. *See Smith*, 378 F.3d at 575 (holding that employer engaged in impermissible sex discrimination when it suspended transgender firefighter after

she began to exhibit a more feminine appearance at work); *cf. Glenn*, 663 F.3d at 1319–20 (holding in a case involving employment discrimination against a transgender employee that "governmental acts based upon gender stereotypes—which presume that men and women's appearance and behavior will be determined by their sex—must be subjected to heightened scrutiny [under the Fourteenth Amendment] because they embody 'the very stereotype the law condemns'" (quoting *J.E.B. v. Alabama*, 511 U.S. 127, 138 (1994)); *Adkins v. City of New York*, No. 14-CV-7519 JSR, 2015 WL 7076956, at *4 (S.D.N.Y. Nov. 15, 2015) (holding that transgender people are a quasi-suspect class for purposes of the Fourteenth Amendment, in part because they "have suffered a history of persecution and discrimination").

Numerous studies have shown that transgender people face a serious risk of bodily harm, violence, and discrimination because of their transgender status. One systematic review of violence against transgender people in the United States up to 2009 found that between 25 and 50% of respondents had been victims of physical attacks because of their transgender status, roughly 15% had reported being victims of sexual assault, and over 80% had reported being victims of verbal abuse because of their transgender status. Rebecca Stotzer, *Violence Against Transgender People: A Review of United States Data*, 14 Aggression and Violent Behavior 170 (2009). With respect to employment discrimination in particular, one national

study found that 37% of transgender people reported experiencing some form of adverse employment action because of their transgender status. E.L. Lombardi, et al., *Gender Violence: Transgender Experiences With Violence and Discrimination*, 42 Journal of Homosexuality 89 (2001). More recently, the National Transgender Discrimination Survey ("Survey") found that nearly half of respondents had experienced some form of adverse employment action, and 26% had lost a job, because of their transgender status. Jaime Grant, et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* at 50 (2011), *available at* http://www.thetaskforce.org /static_html/downloads/reports/reports/ntds_full .pdf. The Survey found that transgender people report twice the unemployment rate of the general population, and that 44% of transgender people report being underemployed. *Id.* There can be no doubt that the government has a compelling interest in addressing such rampant discrimination.

Finally, uniform enforcement of anti-discrimination laws, such as Title VII, is the least restrictive means of achieving the government's interest in preventing the social harms of discrimination. *Hobby Lobby*, 134 S. Ct. at 2783 (recognizing that prohibitions against discrimination are "precisely tailored" to achieve the goal of equal opportunity). There is simply no way to prohibit discrimination except to prohibit discrimination, and any RFRA exemption from Title VII risks imposing concrete harms on employees subjected to invidious discrimination. *See N. Coast*

Women's Care Med. Grp., Inc. v. Superior Court, 189 P.3d 959, 967 (Cal. 2008) (holding that a state law prohibiting discrimination in public accommodations "furthers California's compelling interest in ensuring full and equal access to medical treatment irrespective of sexual orientation, and there are no less restrictive means for the state to achieve that goal" other than enforcement of the statute).

Every single instance of discrimination "causes grave harm to its victims," *Burke*, 504 U.S. at 238, and denies society the benefit of their "participation in political, economic, and cultural life," *Jaycees*, 408 U.S. at 625. Because of the individual harms associated with each instance of invidious discrimination, there is simply no "numerical cutoff below which the harm is insignificant." *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 282 (Alaska 1994) (per curiam) (rejecting state Free Exercise Clause challenge to municipal ordinance prohibiting housing discrimination based on marital status, on the ground that any exemption to the ordinance would directly impede the government's interest in preventing such discrimination). For the same reasons, enforcement of Title VII against some employers cannot alleviate the harms imposed by allowing other employers to engage in invidious discrimination. *See* Def. Mem. at 20–21.[5]

[5] Indeed, the Constitution requires the government and courts to account for the harms a religious exemption to Title VII would impose on employees. As the Supreme Court cautioned in *Cutter v. Wilkinson*, 544 U.S. 709 (2005), the

The implications of allowing a RFRA exemption in this context are staggering. People hold sincere religious beliefs about a wide variety of things, including racial and religious segregation and the role of women in society. Our country's tradition of respect for religious freedom, in all its diversity, requires that we not subject an individual's assertions about his or her religious beliefs to unduly invasive scrutiny. As a result, if religious motivation exempted businesses from anti-discrimination laws, our government would be powerless to enforce those laws to protect all Americans against the harms of invidious discrimination. To name just a few examples: Business owners could refuse service to people of color, on the ground that their religious beliefs forbid racial integration. *See Piggie Park*, 256 F. Supp. at 945. Employers could refuse to hire women or pay them less than men, because their religious beliefs require women to remain at home. *See Fremont Christian School*, 781 F.2d at 1367–69; *Dole*, 899 F.2d at 1398. And

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Establishment Clause requires courts analyzing religious exemption claims under RFRA and the Religious Land Use and Institutionalized Persons Act to "take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Id.* at 720; *see also Estate of Thornton v. Caldor*, 472 U.S. 703, 709–10 (1985) (holding that the Establishment Clause prohibited a Connecticut law that "arm[ed] Sabbath observers with an absolute and unqualified right not to work on whatever day they designate[d] as their Sabbath," because the statute took "no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath"). Otherwise, "[a]t some point, accommodation may devolve into 'an unlawful fostering of religion.'" *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334–35 (1987) (quoting *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144–45 (1987)).

educational institutions receiving federal benefits could impose religiously motivated racial segregation policies on their students. *See Bob Jones Univ.*, 461 U.S. at 604. All civil rights laws would be vulnerable to such claims where the discrimination was motivated by religion. Such challenges have no foundation in the law, and should not be countenanced by this Court.

CONCLUSION

For the foregoing reasons, the EEOC's motion for summary judgment as to the Funeral Home's liability for Ms. Stephens's gender-motivated termination should be granted.

Respectfully submitted,

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Dated: April 15, 2016

CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2016, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to all counsel of record.

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APPENDIX 8

to

Newton's Laws of Motion and the LGBT Community…What's Next?

Submitted by: Christopher A. D'Angelo

***EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*,**
R.G. & G.R.'s Summary Judgment Motion Brief

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Equal Employment Opportunity Commission, Plaintiff, v. R.G. & G.R. Harris Funeral Homes, Inc., Defendant.	Civil Action No. 2:14-cv-13710 Hon. Sean F. Cox

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT R.G. & G.R. HARRIS FUNERAL HOMES, INC.'S MOTION FOR SUMMARY JUDGMENT

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Statement of the Issues Presented

1. Whether the Court should grant summary judgment to Defendant R.G. & G.R. Funeral Homes, Inc. ("R.G.") on Plaintiff Equal Opportunity Employment Commission's (the "EEOC") Title VII claim on behalf of Charging Party Stephens, when the undisputed evidence demonstrates that R.G. dismissed Stephens because of Stephens's stated intent to violate a sex-specific dress code that imposes equal burdens on the sexes.

2. Whether the Religious Freedom Restoration Act ("RFRA") requires the Court to grant summary judgment to R.G. on the EEOC's Title VII claim on behalf of Stephens, when the undisputed evidence shows that the EEOC seeks to compel R.G. (a closely held corporation) to violate its owner's sincerely held religious beliefs.

3. Whether the Court should grant summary judgment to R.G. on the EEOC's Title VII claim (on behalf of an unidentified group of women) that challenges R.G.'s manner of providing work clothes and clothing allowances to its employees, when the EEOC lacks authority to bring a claim of discrimination that is unrelated to Stephens (a biological male when employed by R.G.) and that involves a kind of discrimination (discrimination in the terms and conditions of employment) different than that alleged by Stephens (discriminatory discharge), and when the undisputed evidence demonstrates that R.G. provides work clothes and clothing allowances that are equivalent for comparable male and female employees.

Authority for the Relief Sought

Issue No. 1

Barker v. Taft Broadcasting Co., 549 F.2d 400 (6th Cir. 1977)

Jespersen v. Harrah's Operating Co., 444 F.3d 1104 (9th Cir. 2006) (en banc)

Issue No. 2

Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1, *et seq.*

Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014)

Issue No. 3

EEOC v. Bailey Co., 563 F.2d 439 (6th Cir. 1977)

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Introduction

Defendant R.G. & G.R. Harris Funeral Homes, Inc. ("R.G.") and its owner Thomas Rost ("Rost") walk alongside grieving family members and friends when their loved ones pass away. Rost is a devout Christian who believes that God has called him to minister to these grieving families, and his faith informs the way he operates his business and how he presents his business to the public.

Charging Party Stephens was employed by R.G. as a funeral director embalmer. In Stephens's work as a funeral director, Stephens regularly interacted with the public, including grieving family members and friends. When Stephens, a biological male, informed Rost of an intention to begin wearing the female uniform for funeral directors, R.G. dismissed Stephens for refusing to comply with R.G.'s dress code.

Plaintiff Equal Employment Opportunity Commission (the "EEOC") claims that R.G. violated Title VII's prohibition on sex discrimination when R.G. dismissed Stephens. This Court's previous rulings have established that the EEOC is confined to arguing that R.G. engaged in unlawful sex stereotyping when it dismissed Stephens. Yet the undisputed evidence demonstrates that R.G. dismissed Stephens because Stephens stated an intent to violate a sex-specific dress code that imposes equal burdens on men and women. That decision had nothing to do with pernicious or illegitimate sex-based stereotypes. Consequently, as a matter of law, Stephens's termination does not violate Title VII.

In addition, R.G. is entitled to summary judgment because the Religious

Freedom Restoration Act ("RFRA") forbids the EEOC from applying Title VII to punish R.G. under the facts of this case. RFRA applies here because R.G. is a closely held corporation entirely controlled and majority-owned by Rost and because Rost operates R.G. consistent with his Christian faith. Rost sincerely believes that a person's sex (whether male or female) is an immutable God-given gift, and that he would be violating his faith if he were to pay for and otherwise permit his funeral directors to dress as members of the opposite sex while at work. Compelling R.G. to allow its male funeral directors to wear the uniform prescribed for females would thus substantially burden R.G.'s exercise of religion. Because the government cannot satisfy strict scrutiny here, RFRA bars Title VII's application in this case.

Finally, the Court should reject the EEOC's claim that R.G. violates Title VII by allegedly failing to provide female employees work clothes or clothing allowances equivalent to those given to males. This is because the EEOC lacks authority to raise that claim and because the work clothes and clothing allowances that R.G. provides to its employees do not discriminate between comparable male and female employees.

Standard of Review

Summary judgment must be granted when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Once the moving party carries its initial burden, the non-moving party may avoid summary judgment by "point[ing] to evidence in the record upon which a reasonable jury could find for it." *Martin v. Ohio Turnpike Comm'n*,

968 F.2d 606, 608-09 (6th Cir. 1992) (citations omitted).

Argument

I. Stephens Was Not Unlawfully Dismissed Because of Sex in Violation of Title VII.

Title VII prohibits an employer from dismissing or otherwise taking adverse action against an employee "because of" the employee's sex. 42 U.S.C. § 2000e-2(a)(1). Plaintiffs generally rely on the indirect method of proof for Title VII cases in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under that method, a plaintiff must establish the prima facie case by showing that "(1) he is a member of a protected class; (2) he was qualified for his job; (3) he suffered an adverse employment decision; and (4) he was replaced by a person outside the protected class or treated differently than similarly situated non-protected employees." *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 391 (6th Cir. 2008); *accord Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006). If the plaintiff establishes these elements, the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for its action. *Humenny v. Genex Corp.*, 390 F.3d 901, 906 (6th Cir. 2004). If the employer provides such a reason, the plaintiff's claim fails unless the plaintiff produces evidence that the proffered reason is a pretext for discrimination. *Id.*

In Title VII sex-discrimination litigation, "[t]he critical issue . . . is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Oncale v. Sundowner*

Offshore Servs., Inc., 523 U.S. 75, 80 (1998). Even though Stephens stated an intent to begin wearing the female uniform for funeral directors, Stephens was at all relevant times—from the time of Stephens's hiring through discharge—a biological male. Consequently, to establish a prima facie case for sex discrimination, Stephens must show that R.G. treated Stephens less favorably than a similarly situated female employee or that Stephens was replaced with a female employee. The EEOC cannot make this showing because R.G. was simply enforcing its legitimate dress code for funeral directors when it dismissed Stephens. Accordingly, the EEOC cannot prove intent to discriminate against Stephens based on sex.

A. Stephens Must Be Considered a Male for Purposes of Title VII.

Ruling on R.G.'s Motion to Dismiss, this Court held that "transgender status is not a protected class under Title VII." *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 100 F. Supp. 3d 594, 595 (E.D. Mich. 2015). This Court also "rejected the EEOC's claim that R.G. violated Title VII by firing Stephens . . . because of Stephens's transition from male to female." Order Granting in Part and Denying in Part EEOC's Motion for Protective Order at *2 (ECF No. 34). The EEOC is thus confined to arguing that R.G. discriminated against Stephens under the sex-stereotyping theory set forth in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Legal analysis under that theory must begin by identifying the plaintiff's sex, which forms the basis of the alleged stereotyping. Because transgender status is not a protected class, the baseline for a sex-stereotyping claim must be a person's biological sex.

In this case, there is no dispute that during Stephens's employment at R.G., Stephens was a biological male. Indeed, this fact is conclusively established in this proceeding. In its response to R.G.'s Requests for Admissions, the EEOC *denied* that Stephens is "female *and not a male* for purposes of determining whether discrimination on the basis of 'sex' has occurred under Title VII." Pl.'s Resp. to Def.'s First Set of Discovery at Request for Admission No. 6 (Ex. 25) (emphasis added).

Thus, Stephens must be treated as a male for purposes of Stephens's Title VII claim. This conclusion has two consequences. First, any claim that Stephens was subjected to unlawful discrimination because Stephens is female must fail. Second, Stephens was subject to R.G.'s dress code for male funeral directors.

B. R.G.'s Enforcement of its Sex-Specific Dress Code Does Not Violate Title VII.

1. Sex-Specific Dress Codes That Impose Equal Burdens on Men and Women Do Not Violate Title VII.

Courts generally uphold sex-specific dress and grooming policies against Title VII challenges. *See, e.g.*, *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1110 (9th Cir. 2006) (en banc) (stating that the Ninth Circuit has "long recognized that companies may differentiate between men and women in appearance and grooming policies, and so have other circuits"); *Fagan v. Nat'l Cash Register Co.*, 481 F.2d 1115, 1117 n.3 (D.C. Cir. 1973) ("[R]easonable regulations prescribing good grooming standards are not at all uncommon in the business world, indeed, taking account of basic differences in male and female physiques and common differences in customary dress of male and

female employees, it is not usually thought that there is unlawful discrimination 'because of sex.'"). This is particularly true when even though the challenged policy treats men and women differently, it does so without placing an unequal burden on one sex.

In *Barker v. Taft Broadcasting Co.*, 549 F.2d 400, 401 (6th Cir. 1977), for example, the Sixth Circuit held that a male employee who was discharged for failing to keep his hair short as required by his employer's sex-specific grooming policy did not state a cause of action under Title VII for discrimination based on sex. The employer's grooming policy "limited the manner in which the hair of the men could be cut and limited the manner in which the hair of women could be styled." *Id.* In holding that the male plaintiff failed to make out a prima facie case of sex discrimination, the court observed that there was "no allegation that women employees who failed to comply with the code provisions relating to hair style were not discharged"; nor was there "any allegation that the employer refused to hire men who did not comply with the code, but did hire women who were not in compliance." *Id.* In other words, the plaintiff did not state a claim for sex discrimination because he failed to allege that the employer's grooming policy imposed an unequal burden on men.

Courts in other circuits have reached the same conclusion. In 2006, an en banc panel of the Ninth Circuit confronted a similar set of facts in *Jespersen*. There, the court considered whether Harrah's Casino violated Title VII by requiring its bartenders to conform to a dress and grooming policy that required female bartenders

to wear makeup and nail polish and to tease, curl, or style their hair, while prohibiting male bartenders from wearing makeup or nail polish and requiring them to keep their hair cut above the collar. *Jespersen*, 444 F.3d at 1107. The court noted that it has "long recognized that companies may differentiate between men and women in appearance and grooming policies." *Id.* at 1110. "The material issue under our settled law is not whether the policies [for men and women] are different, but whether the policy imposed on the plaintiff creates an unequal burden for the plaintiff's gender." *Id.* (citation and quotation marks omitted). Because the female plaintiff failed to show that requiring women to wear makeup (and prohibiting men from doing so) imposed an unequal burden on women, the Ninth Circuit held that she could not establish her claim of sex discrimination. *Id.* at 1112; s*ee also Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1387 (11th Cir. 1998) (upholding sex-specific grooming policy); EEOC Compliance Manual § 619.4(d) (June 2006) (stating that sex-specific dress codes that "are suitable and are equally enforced and . . . are equivalent for men and women with respect to the standard or burden that they impose" do not violate Title VII).

2. R.G.'s Sex-Specific Dress Code Does Not Impose Unequal Burdens on Males and Females.

Because R.G.'s dress code for funeral directors imposes equivalent burdens on men and women, the enforcement of the dress code against Stephens was not unlawful discrimination, and R.G. is entitled to judgment as a matter of law.

R.G.'s basic dress code is outlined in the company's employee handbook. *See*

R.G. Employee Manual, EEOC002717-19 (Ex. 19). It is a sex-specific dress code that R.G. applies based on the biological sex of its employees. T. Rost Aff. ¶ 35 (Ex. 1). The dress code requires men who interact with the public to wear dark suits with nothing in the jacket pockets, white shirts, ties, dark socks, dark polished shoes, dark gloves, and only small pins. R.G. Employee Manual, EEOC002717-19 (Ex. 19). Women who interact with the public must wear "a suit or a plain conservative dress" in muted colors. *Id.* The employees of R.G. understand that this requires those male employees to wear suits and ties and those female employees to wear skirts and business jackets. *See* Peterson Dep. 30:24-31:25, 32:3-8 (Ex. 11); Kish Dep. 17:8-16, 58:5-11 (Ex. 5); Shaffer Dep. 52:12-22 (Ex. 12); Cash Dep. 23:1-4 (Ex. 8); Kowalewski Dep. 22:10-15 (Ex. 9); McKie Dep. 22:22-25 (Ex. 13); M. Rost Dep. 14:9-19 (Ex. 10).

When analyzing the EEOC's claim on behalf of Stephens, the relevant requirements of the dress code are those that apply to R.G.'s funeral directors because that is the position held by Stephens. *See Jespersen*, 444 F.3d at 1106-07 (focusing only on the dress code for the plaintiff's position). R.G. employees understand that the dress code requires funeral directors to wear company-provided suits. *See* Kish Dep. 17:8-22 (Ex. 5); Crawford Dep. 18:3-11 (Ex. 6). Although R.G. has not had an opportunity to employ a female funeral director since Rost's grandmother stopped working for R.G. around 1950, *see* Stephens Dep. 102:4-14 (Ex. 14); T. Rost Aff. ¶ 52-53 (Ex. 1), there is no dispute that R.G. would provide female funeral directors with skirt suits in the same manner that it provides pant suits to male funeral directors, and

that those female employees would be required to wear those suits while on the job. *Id.* at ¶ 54. The burden on male funeral directors that must wear a company-issued suit is identical to the burden on female funeral directors that must wear company-issued suits for women.

Moreover, R.G. does not discriminate in its enforcement of the dress code. R.G. has in fact disciplined employees for failing to comply with the dress code, *see* Kish Dep. 54:1-16, 68:22-69:8 (Ex. 5); M. Rost Dep. 37:22-39:6 (Ex. 10), and no evidence indicates that R.G. has enforced it unevenly. Indeed, it is undisputed that if a female funeral director were to say that she planned to wear a men's suit at work, that employee would be discharged just like Stephens was. T. Rost Aff. ¶ 55 (Ex. 1). In addition, neither R.G.'s dress code nor any other R.G. policy requires any employee to act in a masculine or feminine manner. Nor has R.G. ever disciplined an employee for failing to act in a stereotypically masculine or feminine way.

The undisputed evidence thus demonstrates that R.G.'s dress code imposes equivalent burdens on male and female funeral directors. Consequently, the EEOC has failed to present an issue of triable fact, and R.G. is entitled to summary judgment.

3. Neither *Price Waterhouse* nor *Smith* Invalidate R.G.'s Sex-Specific Dress Code.

The Supreme Court's decision in *Price Waterhouse* and the Sixth Circuit's holding in *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004), do not alter the widely accepted rule acknowledged in *Barker* and *Jespersen* that sex-specific dress and grooming codes

are lawful under Title VII when they impose equivalent burdens on men and women. In *Smith*, the Sixth Circuit held that a male firefighter's Title VII complaint, which alleged that his employer took an adverse action against him because he "express[ed] less masculine, and more feminine mannerisms and appearance," stated a claim upon which relief could be granted. 378 F.3d at 572. In *Price Waterhouse*, the Supreme Court held that the plaintiff's employer violated Title VII by denying her a promotion because she was too "macho" and "aggressive" for a woman. 490 U.S. at 235-237, 250-51, 256. In neither case did the plaintiffs refuse to comply with (or challenge) a sex-specific dress code or grooming policy that imposed equal burdens on the sexes.

The absence of such a policy is critical. An important question when resolving sex-discrimination claims is whether the employer treats employees of one sex better than employees of the other sex. *White*, 533 F.3d at 391. And "the ultimate question" is whether the employee "has proven that the defendant intentionally discriminated against him because of his [sex]." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993) (quotation marks and alterations omitted). An employer's comments that a female employee is too "aggressive" or "macho" (as in *Price Waterhouse*, 490 U.S. at 235, 256) or that a male employee is engaging in "non-masculine behavior" (as in *Smith*, 378 F.3d at 570) show an intent to single out and discriminate against that employee because of his or her sex. But when an employer is simply enforcing a dress code that places equal burdens on the sexes and that applies to all employees in the same position, that does not demonstrate an intent to treat women worse than men

(or vice versa). *See Jesperson*, 444 F.3d at 1111-12 ("The [sex-specific dress and grooming] policy does not single out Jespersen. It applies to all of the [employees in her position], male and female."). Indeed, unlike the employers in *Price Waterhouse* or *Smith*, R.G. never indicated that Stephens's behavior was too feminine or not masculine enough. R.G. simply maintained that Stephens, like all other employees, whether male or female, must comply with the dress code. Thus, the EEOC (on behalf of Stephens) cannot show what the plaintiff in *Price Waterhouse* could (and what the plaintiff in *Smith* alleged)—that R.G. treated Stephens differently from other employees because of Stephens's sex.

As the Ninth Circuit has noted, the plaintiff in *Price Waterhouse* established impermissible sex-based discrimination because "the very traits that [the female plaintiff] was asked to hide"—primarily her aggressiveness—"were the same traits *considered praiseworthy* in men." *Jespersen*, 444 F.3d at 1111 (emphasis added). Indeed, the Court in *Price Waterhouse* explained that "[a]n employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not." 490 U.S. at 251 In other words, by insisting that female employees conduct themselves in a stereotypically feminine fashion, Price Waterhouse impeded those employees' ability to perform their jobs and advance their careers. That is why the sex stereotyping in *Price Waterhouse* established unlawful discrimination.

But this case is very different. It is instead like *Jesperson*, where the plaintiff tried

to use *Price Waterhouse* to invalidate a sex-specific dress and grooming policy that imposed equal burdens on the sexes. But the Ninth Circuit rejected the plaintiff's argument, concluding that "Jespersen's claim . . . materially differs from [the plaintiff's] claim in *Price Waterhouse* because Harrah's grooming standards do not require Jespersen to conform to a stereotypical image that would objectively impede her ability to perform her job requirements as a bartender." 444 F.3d at 1113.

Similarly here, "[t]he record contains nothing to suggest [that R.G.'s dress] standards would objectively inhibit" one sex's "ability to do the job." *Id.* at 1112. R.G.'s dress code does not require Stephens to conform to a sex stereotype that would impede Stephens's ability to perform the duties of a funeral director. On the contrary, as discussed below, R.G. implemented its dress code to further its unique work as a funeral business catering to the needs of its customers. Thus, far from impeding Stephens's ability to perform the requirements of the job, R.G.'s dress code *enabled* Stephens to do the job well.

4. R.G.'s Dress Code Furthers Particular Business Needs in the Funeral Industry.

R.G.'s dress code is driven by the unique nature of the funeral industry, which requires utmost sensitivity to the needs of grieving families—including the need for an environment free from distraction. *See* T. Rost Aff. ¶ 34 (Ex. 1) ("Maintaining a professional dress code that is not distracting to grieving families is an essential industry requirement that furthers their healing process."); T. Rost 30(b)(6) Dep.

59:13-60:5 (Ex. 4) (explaining that R.G. instituted its dress code because grieving families and friends that come to R.G. deserve "an environment where they can begin the grieving process and the healing process," and noting that clients "don't need some type of a distraction . . . for them and their family"); Stephens Dep. 91:22-92:9 (Ex. 14) (testifying that professional attire is particularly important in the funeral industry given that "the funeral business is a somber one . . . because somebody has died, and people are . . . mourning the loss"). The dress code ensures that R.G.'s "staff is . . . dressed in a professional manner that's acceptable to the families that [R.G.] serve[s]." T. Rost Dep. 49:22-50:15 (Ex. 3); *see also* T. Rost 30(b)(6) Dep. 57:20-58:6 (Ex. 4) (testifying that the "dress code conforms to what is acceptable attire in a professional manner for the services that [R.G.] provide[s]").

The sex-specific nature of the dress code is also rooted in the business need for professionalism and the absence of distraction. The dress code forbids male funeral directors from wearing the female uniform because allowing them to do that would attract undue attention to themselves and disrupt the grieving process for the clients. T. Rost Aff. ¶ 37 (Ex. 1). Indeed, Stephens himself, while owner of a funeral business, required male employees to wear a coat and tie and required the only female employee to wear a ladies' "business-type dress," described as "[a] ladies' blue jacket." Stephens Dep. 36:1-23 (Ex. 14).

Professional dress takes on heightened significance for funeral directors like Stephens because they often deal directly with grieving family members. For example,

funeral directors regularly interact with families throughout the funeral process. Cash Dep. 27:13-28:9 (Ex. 8); Crawford Dep. 14:8-18 (Ex. 6); T. Rost Aff. ¶¶ 16-31 (Ex. 1). Funeral directors also perform sensitive duties like removing the body of the deceased from the family—a particularly distressing experience for family members. T. Rost Aff. ¶¶ 14-15 (Ex. 1). Rost believes that allowing a male funeral director to dress as a female would distract R.G.'s clients mourning the loss of their loved ones, disrupt their healing process, and harm R.G.'s clients and business. *Id.* at ¶¶ 36-40.

These uncontested facts demonstrate that R.G.'s dress code and its decision to dismiss Stephens were motivated by legitimate business needs and the interests of the grieving people that R.G. serves. Thus, neither R.G.'s dress code nor Stephens's discharge violates Title VII's prohibition on sex discrimination.

R.G. must emphasize one concluding point about the EEOC's sex-stereotyping argument: accepting that argument would make it impossible for a company to enforce sex-specific dress or grooming requirements, even if they impose equal burdens on the sexes. Not only would this contravene the well-established Title VII case law that affirms those sorts of sex-specific policies, it would also override employers' freedom to determine how their businesses will present themselves to the public and would jeopardize their success in the marketplace. As Judge Posner has observed, sex-stereotyping case law does not create "a federally protected right for male workers to wear nail polish and dresses . . . , or for female ditchdiggers to strip to the waist in hot weather." *Hamm v. Weyauwega Milk Products, Inc.*, 332 F.3d 1058, 1067

(7th Cir. 2003) (Posner, J., concurring). If it did, Title VII would require employers with legitimate sex-specific dress and grooming policies to allow an employee to dress in a female uniform one day, switch to a male uniform the next day, and return to the female uniform whenever that employee chooses. Congress surely did not have this in mind when it added sex as a protected classification in Title VII.

II. RFRA Prohibits the EEOC from Compelling R.G. to Violate its Sincerely Held Religious Beliefs.

RFRA provides that the government "shall not substantially burden a person's exercise of religion." 42 U.S.C. § 2000bb-1(a). The only exception to this rule is if the government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). The EEOC's attempt to apply Title VII under these circumstances would substantially burden R.G.'s exercise of religion by, among other things, forcing R.G. to violate Rost's religious belief that a person's sex (whether male or female) is an immutable God-given gift and that R.G. cannot pay for or otherwise permit one of its male funeral directors to wear the female uniform at work. Because the EEOC cannot demonstrate that forcing R.G. to violate its faith in this way would satisfy strict scrutiny, RFRA prohibits the EEOC's attempt to apply Title VII here.

A. RFRA Protects R.G.'s Exercise of Religion.

RFRA applies to "a person's" exercise of religion. 42 U.S.C. §§ 2000bb-1(a), (b).

This includes closely held for-profit corporations like R.G., 94.5 percent of which is owned by Rost, its sole officer and chief executive, with the remaining 5.5 percent split between Rost's two children. *See* T. Rost 30(b)(6) Dep. 26:20-28:25, 78:2-9 (Ex. 4); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768-69 (2014) (concluding that "persons" protected by RFRA include closely held for-profit corporations).

Moreover, R.G. exercises religion through the work that it performs. As the Supreme Court explained in *Hobby Lobby*: "[T]he exercise of religion involves not only belief and profession but the performance of (or abstention from) physical acts that are engaged in for religious reasons. Business practices that are compelled or limited by the tenets of a religious doctrine fall comfortably within that definition." *Id.* at 2770 (quotation marks and citation omitted).

Rost has been a Christian for over sixty-five years. T. Rost 30(b)(6) Dep. 30:13-22 (Ex. 4). His faith informs the way he operates his business, *id.* at 86:20-22, 87:3-24, which includes hosting funeral services of deep spiritual significance to many, *see id.* at 32:3-13; T. Rost Aff. ¶¶ 10, 20, 26, 30 (Ex. 1). R.G.'s mission statement, which is posted on its website with a Scripture verse, reflects the business's religious purposes:

> R.G. & G.R. Harris Funeral Homes recognize that its highest priority is to honor God in all that we do as a company and as individuals. With respect, dignity, and personal attention, our team of caring professionals strive to exceed expectations, offering options and assistance designed to facilitate healing and wholeness in serving the personal needs of family and friends as they experience a loss of life.

R.G. Webpage (Ex. 15). Long-time employees and managers agree that R.G. is

operated according to Rost's religious convictions. Cash Dep. 8:25-9:25, 46:5-18 (Ex. 8) (testifying that he considers R.G. to be a Christian business); Kowalewski Dep. 29:8-10 (Ex. 9) (testifying that he considers R.G. to be a Christian business).

R.G. is a tangible expression of Rost's deeply felt religious calling to care for and minister to the grieving. *See* T. Rost 30(b)(6) Dep. 86:2-19 (Ex. 4) (testifying that he considers his business to be a ministry to grieving families); T. Rost Aff. ¶ 10 (Ex. 1). Rost describes the ministry of R.G. as one of healing and giving comfort—to help families on the "worst day of their lives" and "meet their emotional, relational and spiritual needs . . . in a religious way." T. Rost 30(b)(6) Dep. 86:2-19 (Ex. 4). In addition to the spiritual and emotional care involved in his ministry, Rost ensures that all customers have access to spiritual guidance by placing throughout his funeral homes Christian devotional booklets entitled "Our Daily Bread" and small cards with Bible verses on them called "Jesus Cards," and by making a Bible available to visitors at all his funeral homes. *Id.* at 39:23-40:17; Nemeth Dep. 27:13-28:2 (Ex. 7); Cash Dep. 47:17-24 (Ex. 8); Kowalewski Dep. 31:17-32:21, 33:5-22 (Ex. 9); M. Rost Dep. 28:20-29:19 (Ex. 10); Peterson Dep. 28:18-30:12 (Ex. 11).

Viewing all this evidence of R.G.'s religious exercise in the light of *Hobby Lobby*, this Court should conclude that RFRA's protections apply here. Indeed, just as the businesses in *Hobby Lobby* exercised religion by operating "in [a] manner that reflects [their] Christian heritage," *Hobby Lobby*, 134 S. Ct. at 2770 n.23, R.G. exercises religion by, as its mission statement says, upholding as "its highest priority" the need "to

honor God in all that we do as a company." R.G. Webpage (Ex. 15).

B. Applying Title VII in this Case Would Substantially Burden R.G.'s Exercise of Religion.

The EEOC's attempt to apply Title VII here would substantially burden Rost's exercise of religion. A substantial burden exists where the government requires a person "to engage in conduct that seriously violates [his] religious beliefs," *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015) (quotation marks omitted), or where it "put[s] substantial pressure on an adherent . . . to violate his beliefs," *Thomas v. Rev. Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981). Rost sincerely believes that a person's sex (whether male or female) is an immutable God-given gift and that it is wrong for a person to deny his or her God-given sex. T. Rost Aff. ¶¶ 41-42 (Ex. 1). He also sincerely believes that he would violate his faith if he were to pay for or otherwise allow one of his funeral directors to wear the uniform for members of the opposite sex while at work. T. Rost Aff. ¶¶ 43-46 (Ex. 1). Thus, compelling R.G. to allow Stephens to wear the uniform for female funeral directors at work would impose a substantial burden on R.G.'s free exercise of religion by compelling Rost to engage in conduct that "seriously violates [his] religious beliefs." *Holt*, 135 S. Ct. at 862.

Moreover, requiring R.G. to permit a male funeral director to wear the uniform for female funeral directors would interfere with R.G.'s ability to carry out Rost's religious mission to care for the grieving. *See* T. Rost 30(b)(6) Dep. 59:8-12, 69:25-70:6 (Ex. 4). This is because allowing a funeral director to wear the uniform for members

of the opposite sex would often create distractions for the deceased's loved ones and thereby hinder their healing process. *Id.* at 54:8-17, 59:13-60:9; T. Rost Aff. ¶¶ 36-38 (Ex. 1). And by forcing R.G. to violate Rost's faith, this application of Title VII would significantly pressure Rost to leave the funeral industry and end his ministry. T. Rost Aff. ¶ 48 (Ex. 1). Thus, applying Title VII in this case would substantially burden R.G.'s and Rost's religious exercise of caring for the grieving.

C. The EEOC Cannot Demonstrate That Applying Title VII in this Case Would Satisfy Strict Scrutiny.

Having established a substantial burden on religious exercise, the burden shifts to the government to satisfy strict scrutiny. 42 U.S.C. § 2000bb-1(b). RFRA requires that the EEOC "demonstrat[e] that application of [a substantial] burden to the person . . . is the least restrictive means of furthering" a compelling government interest. *Id.* This is an "exceptionally demanding" standard, requiring the government to "show[] that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties." *Hobby Lobby*, 134 S. Ct. at 2780. The EEOC cannot make the required showing.

To begin with, the EEOC cannot demonstrate a compelling interest here. RFRA's strict-scrutiny test "look[s] beyond broadly formulated interests justifying the general applicability of government mandates," and instead scrutinizes the specific interest in applying the law to the party before the court and "the asserted harm of granting specific exemptions to [that party]." *Gonzales v. O Centro Espirita Beneficente*

Uniao do Vegetal, 546 U.S. 418, 430-31 (2006); *see also Hobby Lobby*, 134 S. Ct. at 2779. Thus, the relevant government interest is not a generic interest in opposing discrimination, but the specific interest in forcing R.G. to allow its male funeral directors to wear the uniform for female funeral directors while on the job. Yet the EEOC has no compelling interest in mandating that.

Notably, this case does not involve discriminatory animus against any person or class of persons. R.G. dismissed Stephens because Stephens would no longer comply with the dress code. R.G. was not motivated by animus against people who dress as members of the opposite sex. Indeed, it is undisputed that R.G. would not discharge or otherwise discipline employees who dress as members of the opposite sex on their own time but comply with the dress code while on the job. T. Rost Aff. ¶¶ 50-51 (Ex. 1); T. Rost 30(b)(6) Dep. 137:11-15 (Ex. 4). Moreover, the uncontested evidence demonstrates that R.G.'s dress code and its enforcement of the dress code against Stephens are based on R.G.'s legitimate interest in ensuring that mourners have a space free of disruptions to begin the healing process after the loss of a loved one. T. Rost 30(b)(6) Dep. 139:5-23 (Ex. 4); T. Rost Aff. ¶¶ 36-39 (Ex. 1). Consequently, applying Title VII here would not further a compelling government interest.

Nor can the EEOC satisfy RFRA's least-restrictive-means requirement. A number of available alternatives would allow the government to achieve its goals without violating R.G.'s free-exercise rights. For example, the government could continue to enforce Title VII in most situations, but permit businesses in industries

that serve distressed people in emotionally difficult situations to require that its public representatives comply with the dress code at work. Alternatively, the government could prohibit employers from discharging employees simply because they dress inconsistently with their biological sex outside of work, while allowing employers to dismiss employees who refuse to wear sex-specific uniforms on the job. Because these alternatives (and others) are available, the EEOC cannot meet RFRA's least-restrictive means requirement and thus cannot satisfy strict scrutiny.

III. The EEOC Cannot Prevail on its Clothing Allowance Claim on Behalf of a Class of Female Employees.

The EEOC's complaint seeks relief on behalf of "a class of female employees" that were supposedly deprived of work clothes or clothing allowances that R.G. allegedly provides to male employees. Am. Compl. ¶¶ 17-18 (ECF No. 21). R.G. is also entitled to summary judgment on this "clothing allowance" claim.

A. The EEOC Lacks Authority to Raise its Clothing Allowance Claim.

The EEOC may include in a Title VII suit only claims that fall within an "investigation reasonably expected to grow out of the [complainant's] charge of discrimination." *EEOC v. Bailey Co.*, 563 F.2d 439, 446 (6th Cir. 1977), *disapproved of on other grounds by Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). The Sixth Circuit has held that a claim falls outside that scope if (1) the claim is "unrelated to [the charging] party" and (2) it involves discrimination "of a kind other than that raised by [the charging party]." *Id.* at 448. These two considerations show that the

EEOC's clothing allowance claim does not result from an investigation reasonably expected to grow out of Stephens's charge of discrimination, which alleged unlawful "discharge[] due to [Stephens's] sex and gender identity." Charge of Discrimination, EEOC002748 (Ex. 21).

First, the EEOC's clothing allowance claim on behalf of a class of women is unrelated to Stephens. As previously discussed, Stephens was a biological male while employed at R.G. *See* T. Rost Dep. 21:1-25 (Ex. 3); Def.'s Resp. to Charge at 4-5, EEOC002744-45 (Ex. 22); Kish Dep. 67:9-68:21 (Ex. 5). And there is no dispute that Stephens received, accepted, and wore the men's clothing provided by R.G. *See* Stephens Dep. 59:14-60:1 (Ex. 14); Pl.'s Resp. to Def.'s First Set of Discovery at Request for Admission No. 2 (Ex. 25). Thus, an allegation concerning work clothes or an allowance not provided to a class of females is simply not related to Stephens.

Second, the clothing allowance claim alleges discrimination of a kind other than that raised by Stephens. In the EEOC charge, Stephens alleged a discriminatory "discharge[]." Charge of Discrimination, EEOC002748 (Ex. 21). Stephens did not mention anything about inequality in the clothing or clothing allowance provided by R.G. *Id.* A claim that asserts "discriminat[ion] . . . with respect to . . . compensation, terms, conditions, or privileges of employment" (as the clothing allowance claim does) is of a different kind than a claim that alleges discriminatory "discharge." 42 U.S.C. § 2000e-2(a)(1); *see Bailey Co.*, 563 F.2d at 451 (rejecting "the belief that all forms of unlawful employment discrimination . . . whether involving hiring, discharge,

promotion, or compensation are like or related"); *Nelson v. Gen. Elec. Co.*, 2 F. App'x 425, 428 (6th Cir. 2001) (unpublished) (finding that "the scope of the investigation reasonably expected to grow out of [an] EEOC charge" that alleged unlawful discharge did not include failure to promote). Moreover, a claim of discrimination against a class of women (which the clothing allowance claim is) is separate and distinct from a claim of discrimination against a biological man (which is all Stephens could validly raise in an EEOC charge).

Nor could Stephens have included the clothing allowance claim in an EEOC charge because, as a biological male, Stephens was not "aggrieved" by a clothing policy that supposedly disfavors women. *See* 42 U.S.C. § 2000e-5(b) (noting that EEOC charges are filed by "person[s] claiming to be aggrieved"). While older case law called for a broad reading of what it means to be an "aggrieved" person under other federal statutes, *see Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972), the Supreme Court has mandated a narrower reading of that language in Title VII, *see Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 176-77 (2011) (rejecting *Trafficante* in the Title VII context). Therefore, just as Article III standing principles generally forbid a person from raising the "rights or interests of third parties," *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2663 (2013), so does Title VII's aggrieved person standard, *see Thompson*, 562 U.S. at 177 (concluding that "the term 'aggrieved' [in Title VII] must be construed more narrowly than the outer boundaries of Article III"). Consequently, a

biological male could not raise the legal interests of a class of female employees at R.G.

B. The EEOC's Clothing Allowance Claim Lacks Merit Because R.G. Does Not Discriminate Between Comparable Male and Female Employees.

The EEOC's claim that work clothes or clothing allowances were provided to male employees but not to a class of female employees also fails on its merits. To the extent that the class of employees the EEOC references is R.G.'s funeral directors—the position that Stephens held—the EEOC has failed to show disparate treatment. Indeed, R.G. provides suits for all funeral directors. *See* T. Rost Dep. 13:4-14, 47:23-48:11 (Ex. 3); Kish Dep. 64:12-24 (Ex. 5); McKie Dep. 38:19-23 (Ex. 13); Def.'s Resp. to Pl.'s Second Set of Discovery at Interrogatory No. 14 (Ex. 28). Although R.G. has not employed a female funeral director since Rost became the owner (notably, a qualified woman has not applied for an open funeral-director position during that time, *see* T. Rost Aff ¶¶ 52-53 (Ex. 1)), it is undisputed that R.G. would provide female funeral directors with a women's suit of equal quality and value to the men's suit provided to male funeral directors. *Id.* at ¶ 54.

Nor can the EEOC establish sex discrimination with respect to the clothes and clothing allowances that R.G. provides to employees in positions other than funeral director. Male employees who interact with the public in positions other than funeral director (all of whom are part-time) receive one suit from R.G. that is replaced by R.G. when it is no longer serviceable. *See* T. Rost Aff. ¶ 57 (Ex. 1) And female employees

who interact with the public in positions other than funeral director receive an annual clothing allowance of $150 for full-time employees and $75 for part-time employees. T. Rost Dep. 15:16-16:4 (Ex. 3); Nemeth Dep. 13:5-23 (Ex. 7); Kish Dep. 20:16-25 (Ex. 5). This allowance is sufficient to purchase an outfit that conforms to R.G.'s dress code for those positions and to cover the cost of replacing those outfits when they wear out. *See* Kish Aff. ¶¶ 5-7 (Ex. 2). Accordingly, regardless of the sex of the employees in those positions, R.G. provides them with clothing or resources to purchase dress code-complying clothing. Finally, no clothes or clothing allowance is provided for employees, whether male or female, in positions that do not interact with the public. *See* Kish Dep. 56:14-58:4, 65:17-66:18 (Ex. 5). The EEOC thus cannot prevail on its clothing allowance claim because it is unable to show that R.G. discriminates between comparable male and female employees.

Conclusion

For the foregoing reasons, R.G. respectfully requests that the Court grant summary judgment in its favor.

Dated: April 7, 2016

Respectfully submitted,

/s/ James A. Campbell
James A. Campbell

APPENDIX 9

to

Newton's Laws of Motion and the LGBT Community…What's Next?

Submitted by: Christopher A. D'Angelo

State and Local Bathroom Laws

- **Colorado**: Rule 81. 9 of the Colorado regulations mandates that employers permit their employees to use restrooms appropriate to their gender identity without being harassed or questioned. 3 CCR 708-1-81. 9 (revised December 15, 2014).
- **Delaware:** State of Delaware Guidelines on Equal Employment Opportunity and Affirmative Action Gender Identity, available at **http://www. delawarepersonnel. com/policies/documents/sod-eeoc-guide. pdf**, issued pursuant to the state's gender identity nondiscrimination law, provides Delaware state employees with access to restrooms that correspond with their gender identity.
- **District of Columbia:** employees in the District of Columbia have the right to use facilities consistent with their gender identity. D. C. Municipal Regulations 4-802, "Restrooms and Other Gender Specific Facilities," available at **http://www. dcregs. dc. gov/Gateway/RuleHome. aspx?RuleNumber=4-802**.
- **Iowa**: the Iowa Civil Rights Commission requires that employers allow employees access to restrooms in accordance with their gender identity rather than their assigned sex at birth. *See* **https://icrc. iowa. gov/sites/files/civil_rights/publications/2012/SOGIEmpl. pdf**.
- **New York City:** This Executive Order requires "city agencies to ensure that employees and members of the public are given access to City single-sex facilities consistent with their gender identity, without being required to show identification, medical documentation, or any other form of proof or verification of gender." *See* http://www1.nyc.gov/office-of-the-mayor/news/223-

16/mayor-de-blasio-mandates-city-facilities-provide-bathroom-access-people-consistent-gender#/0.

> The term "gender" shall include actual or perceived sex and shall also include a person's gender identity, self-image, appearance, behavior or expression, whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the legal sex assigned to that person at birth.

New York City, N.Y., Code § 8-102(23). The Executive Order also requires City agencies to:

- Post the new single-sex facility policy in conspicuous locations for employees and members of the public to see within three months;
- Train managers on the policy within one year and frontline staff within two years;
- Update agency Equal Employment Opportunity (EEO) plans to incorporate training requirements within three months, and
- Report steps taken to comply with today's Executive Order to the Department of Citywide Administrative Services (DCAS) pursuant to EEO reporting requirements. *See* http://www1.nyc.gov/office-of-the-mayor/news/223-16/mayor-de-blasio-mandates-city-facilities-provide-bathroom-access-people-consistent-gender#/0

• **Vermont:** Vermont requires that employers permit employees to access bathrooms in accordance with their gender identity. *See* "Sex, Sexual Orientation, and Gender Identity: A Guide to Vermont's Anti-Discrimination Law for Employers and Employees," Vermont Human Rights Commission, available at: http://hrc. vermont. gov/sites/hrc/files/pdfs/other%20reports/trans%20employment%20brochure%207-13 -12. pdf.

• **Washington:** employers must permit transgender employees to use the restroom consistent with their gender identity. "Guide to Sexual Orientation and Gender Identity and the Washington State Law Against Discrimination," available at: **http://www. hum. wa. gov/Documents/Guidance/GuideSO20140703. pdf**.

WORKSHOP A

DOUBLE JEOPARDY

Submitted By:

STEVEN KLEIN, ESQ.
CSEA, Inc.
Albany, NY

DOUBLE JEOPARDY

We all think we know what double jeopardy is and, more relevant to our labor arbitration practice, when it may or may not be utilized as a defense in such an arbitration. However, there are times when an employer action that is not technically disciplinary in nature may still serve as a predicate to a double jeopardy defense.

The right not to be subject to double jeopardy is one of the most basic constitutional due process protections, enshrined in the Federal Constitution. The Fifth Amendment reads, in pertinent part, that "No person shall … be subject for the same offence to be twice put in jeopardy of life or limb; …" Although there is no express double jeopardy protection in this State's constitution, the United States Supreme Court declared in 1969 that "the double jeopardy prohibition ... represents a fundamental ideal in our constitutional heritage. ... Once it is decided that a particular Bill of Rights guarantee is 'fundamental to the American scheme of justice,' ... the same constitutional standards apply against both the State and Federal Governments." *Benton v. Maryland*, 395 U.S. 784, 794–95 (1969).

What do we mean when we say one has the right to be free from double jeopardy? "The Double Jeopardy Clause … protects against multiple punishments for the same offense." *People v. Biggs*, 1 N.Y.3d 225, 771 N.Y.S.2d 49 (2003) (internal quote marks and citations omitted). Double jeopardy in the labor arbitration context has been similarly characterized by labor arbitrators. For example, in *Gulf States Paper Corp.*, 97 LA 61 (Welch, 1991), the arbitrator stated that double jeopardy "simply means that a person should not be penalized twice for the same offense." *Id*. at 62.

Elkouri and Elkouri, *How Arbitration Works* (7th Ed. 2012), provides a more comprehensive definition, stating:

> Once discipline for a given offense is imposed and accepted, it cannot thereafter be increased, nor may another punishment be imposed, lest the employee be subjected to 'double jeopardy'. … The double jeopardy doctrine also prohibits employers from attempting to impose multiple punishments for what is essentially a single act. … Likewise, an employer cannot issue a disciplinary 'warning' and later, after deciding more serious punishment would have been preferable, … impose a harsher punishment. [*Id*. at 15-61 – 15-63; footnotes omitted.]

Just a short tour through several well-known labor arbitration treatises reveals that the concept of raising a double jeopardy defense against disciplinary charges is not new. For example, Schoonhoven's *Fairweather's Practice and Procedure in Labor Arbitration* (4th Ed. 2015) cites to a successful double jeopardy defense raised in *Misco Precision Casting Company*, 40 LA 87 (Dworkin, 1962). *Id*. at 418. There, the Arbitrator discussed the difference between when an employer imposes a definite penalty, which was then accepted by several employees, only to have the employer impose an additional penalty on them days later. This, according to the Arbitrator, was double jeopardy because the employees were clearly disciplined twice for the same infraction. The Arbitrator contrasted this with a situation where an employer suspends an employee pending an investigation of the facts and any final penalty is "deferred for legitimate reasons." *Misco*, *supra* at 90; *see also*, *Zayas v. Bacardi Corp*., 524 F.3d 65 (1st Cir. 2008). In addition, Elkouri and Elkouri reference an even older award, *Harvester Co*., 16 LA 616 (McCoy, 1951).

What these cases show is that this is not a new concept in private sector labor arbitration. Nor, as Elkouri and Elkouri explain, is it a concept necessarily rooted in the Constitution.

Rather, at least in the private sector, arbitrators rely on "fundamental fairness" based on a contractual requirement of "just cause" for discipline. *Id*. at 15-61 (citations omitted).

The prohibition against double jeopardy has been carried over into the public employment realm in New York, although its application outside of arbitration appears to be rare. A lengthy case law search, for example, revealed only one case where the defense was raised in a Civil Service Law §75 disciplinary hearing. *Yerry v. Ulster County*, 128 A.D.2d 941, 512 N.Y.S.2d 592 (3d Dep't 1987). There, the Appellate Division dismissed a substantial evidence appeal of a Section 75 determination terminating a public employee. In doing so, the Court found that although the employee, a county nurse's aide, had already been orally counseled for a number of instances of alleged misconduct, such counseling could not be considered discipline because the Court of Appeals had previously held that the placement of a written reprimand in an employee's personnel file was not a discipline under Section 75. *Id*., *citing Tomaka v. Evans-Brant C.S.D.*, 65 N.Y.2d 1048, 494 N.Y.S.2d 697 (1985). The Appellate Division concluded that the employer was not precluded on double jeopardy grounds from subsequently terminating the nurse's aide for the same acts of misconduct. *Id*.

It is not rare, however, for the double jeopardy defense to be raised, successfully, in public sector labor arbitration. Very recently, for example, an Arbitrator agreed with an employee and her union that her employer was trying to discipline her a second time for the same misconduct, and he dismissed those disciplinary charges as a result. *County of Onondaga*, PERB Case No. A2014-227 (Zonderman, 2016). A copy of this Opinion and Award follows this section for your reference and use.

The facts in the *County of Onondaga* matter are instructive on how arbitrators generally view the issue of double jeopardy. The grievant, a County employee, had previously been served with an "Inter Office Letter" containing five allegations of misconduct, and the employer imposed a three-day suspension without pay as the penalty. When the employee complained to her union, however, it was discovered that the employer had failed to properly follow the disciplinary procedures in the parties' collective bargaining agreement. Ultimately, the employer made the employee whole for her suspension, but it did not remove the "Inter Office Letter" from her personnel file. *Id*. at 13. In fact, it later placed another memorandum in the employee's personnel file that stated "the findings and conclusion with regard to the allegations against [the employee] will stand." *Id*. at 14.

Several months later, the employer served a formal Notice of Discipline on the employee that contained eight charges of alleged misconduct and sought the employee's termination. Five of those eight charges, the union claimed, alleged the same misconduct as had been previously raised in the "Inter Office Letter." Arbitrator Zonderman was assigned to hear the matter. After numerous days of hearing, he issued an award finding that double jeopardy applied and that the employee had been previously disciplined for the same five offenses, despite the County's argument that she had already been made whole for her three-day suspension and, thus, had not been previously disciplined. Arbitrator Zonderman noted that the accusatory instrument, the "Inter Office Letter," remained in the employee's personnel file and, thus, on her permanent record. Moreover, he found that the written accusations underlying the previous "Inter Office Letter" and subsequent memorandum amounted to a written reprimand which, under the parties' collective bargaining agreement, was contractually permissible discipline. *Id*. at 15.

The issue of whether the prior counseling, as opposed to discipline, of a public employee would trigger a successful double jeopardy defense has been raised in a State employee disciplinary arbitration. The State, like all other employers not otherwise limited by a collective bargaining agreement, has the managerial right to counsel its represented employees. The State and most of its employees' unions have negotiated over this issue, and the collective bargaining agreements covering those employees generally contain a provision identical or similar to the following:

> … Counseling represents a conversation or a discussion between an employee and supervisor, usually focusing on a particular component of employee behavior, a specific incident, or in some cases, overall performance or behavior. **Counseling is non-punitive, and is intended to be a positive and constructive device aimed at modifying employee behavior.** Its purposes include teaching, clarifying, assisting in employee development and setting future expectations and objectives. Counseling involves face to face contact. Out of respect to the employee and the process, it should be private and conducted out of the mainstream of fellow employee activity. Counseling is but another means of communication in the workplace. … [2011-2015 Agreement Between PEF and State, p. 131; emphasis added.]

Let us presume that a State employee covered by the language above is alleged by a co-worker to have made an inappropriate statement to the co-worker. Rather than avail itself of the contractual disciplinary procedure, the State instead elects to counsel the employee, giving him notice that the statement was highly inappropriate and warning him to never make such a statement again. The employee complies with this directive and refrains from making such statements in the future. The employee does, however, then engage in several unrelated acts of misconduct. In response, the State serves the employee with charges seeking termination based not only on the subsequent, unrelated acts of misconduct, but also based on the statement for which the employee was already counseled. Is a double jeopardy defense warranted? After all,

counseling is clearly not discipline, so the employee cannot be said to have been twice punished for the same offense.

Nonetheless, according to at least one arbitrator, this was still double jeopardy. In *State of New York (Department Of Correctional Services) & PEF*, (Pohl, 2001), the Arbitrator dismissed the disciplinary charge based on the inappropriate comment, explaining his reasoning as follows:

> Grievant conceded he made the disgusting and highly inappropriate statement attributed to him in this charge. He also admitted so in his statement on April 30, 2001, taken by Mr. Montenegro (St. 16). However, Mr. Powers testified, as did grievant, that grievant was called in to discuss the comment incident with Mr. Powers, Ms. Bennis and Mr. Larry Weingartner, grievant's supervisor. At that time, grievant was informally counseled that the statement he made to Ms. Bennis was totally inappropriate and that he should never make such a comment again. Mr. Powers admitted he has never again received a complaint that grievant continued making such comments after his meeting. I agree with the Union's assertion that including this allegation in the N.O.D. is akin to double jeopardy. Management could have handled the incident through the N.O.D. process. Instead, it opted to informally counsel JR against making such a comment in the future to Ms. Bennis. The counseling appears to have worked. Since the inclusion of this allegation in the N.O.D. was inappropriate, grievant cannot be found guilty of Charge A. 5. [*Id*. at 8-9; a copy of the Opinion and Award follows this section for your reference and use.]

Somewhat ironically, the same argument, that counseling followed by discipline for the same act of misconduct constituted double jeopardy, was also raised before Arbitrator Zonderman in the *Onondaga County* case discussed above. Unlike Arbitrator Pohl, however, he did not find that it was double jeopardy for the County to counsel and then discipline the grievant for the same acts of misconduct. *Id*. at 20.

From a union's prospective, therefore, an argument may be raised that if the employer has already warned an employee not to do something, and the employee has heeded that warning, it is unfair to then turn around and try to discipline the employee for the same act of

misconduct. In fashioning such an argument, union counsel should remember that one of the basic tenets of just cause is the notion that an employee may not be disciplined absent notice that the employee's actions are wrong. As was noted by Koven and Smith in *Just Cause: The Seven Tests*, (2nd Ed. 1992), "[a] fundamental component of the just cause standard is that employees must be told what kind of conduct will lead to discipline…." *Id*. at 28. It follows that if a counseling is intended to provide an employee with that notice that the employer is dissatisfied with some aspect of the employee's performance and wants the employee to correct that performance or face discipline, the incident giving rise to the counseling must be separate and apart from any subsequent discipline in order to not violate this just cause standard.

It would seem that the employer's counsel, on the other hand, has to remind the arbitrator that counseling is not discipline and that absent two attempts at discipline for the same offense, there is simply no double jeopardy violation. Another argument, which has been raised by the employer in a CPLR Section 7511 application seeking to vacate Arbitrator Zonderman's Award in *County of Onondaga*, *supra*, is that by entertaining and ruling on a motion to dismiss based on double jeopardy grounds, the disciplinary arbitrator has exceeded his or her contractual authority. As this paper goes to print, a decision from Supreme Court on the employer's application has not been issued.

STATE OF NEW YORK

PUBLIC EMPLOYMENT RELATIONS BOARD

In the matter of the Arbitration between:

CSEA Local 834

Union,

and

County of Onondaga, Employer

Grievant: GP

OPINION AND AWARD

Case no. A2014-227

Before: PAUL S. ZONDERMAN, ARBITRATOR

Appearances:

Union:

Steven Klein, Esq,

CSEA Legal Department

143 Washington Avenue

Albany, New York 12210

Employer:

Thomas Kutzer, Esq.

Deputy County Attorney

Onondaga County Law Dept.

421 Montgomery St., 10th floor

Syracuse, New York 13202

Hearing dates: March 4, 11, May 27, 28, June 18, July 20, August 13, October 7, 2015

PROCEDURAL BACKGROUND

In accordance with Article 26 of the collective bargaining agreement (J-1), the parties met at either 6595 Kirkville Rd. or 5815 Heritage Dr., Syracuse, NY, to consider the discipline of GP, the Grievant, pursuant to the following stipulated issue:

> "Is Grievant guilty of the conduct as alleged in the NOD dated 7-15-14? If so, is termination the appropriate penalty? If not, what is the appropriate penalty, if any? Was the suspension appropriate under the agreement?"

There was no objection raised to the request for arbitration, or the reference to this Arbitrator for hearing, and I conclude that the matter was properly before me for a determination. Both parties were afforded full opportunity to adduce evidence, cross-examine witnesses, and make argument in support of their respective positions. The hearings took place on eight (8) days , March 4, 11, May 27, 28, June 18, July 20, August 13, October 7, 2015. At the end of the evidentiary hearing, the parties were given until November 13th, to postmark or email their closing briefs to the Arbitrator, extended by agreement to December 22, 2015. Briefs having been received by email on December 22, 2015, the hearing was closed, and the Arbitrator's decision is due by January 22, 2016.

THE NOTICE OF DISCIPLINE (C-1, July 15, 2014)

CHARGES That you violated the following Onondaga Work Rules:

3 Unauthorized absence which includes:
a) Absence which has not been approved in advance by the Supervisor;
b) Absence which has not been excused for emergency or medical reasons;
c) Absence for other than that specified in the authorization.

12 Neglect of job duties or responsibilities.

15 Discourteous treatment of the public or any other conduct which does not merit the public trust.

21 Stopping work and leaving work area before specified quitting time without authorization.
25 Failure to follow job instructions, directions or departmental procedures and policies.
41 Falsification of County forms or records including employment application, daily work sheets and attendance records; willful misrepresentation of facts; forging another's signature.
42 Conviction of a crime or engaging in unlawful or improper conduct which:
a) affects the employee's ability to perform the job or report to work;
b) results in the reluctance or refusal of other employees to work with him or her;
c) harms the County's reputation or the public trust.
44 Inability to get along with fellow employees which adversely affects operational efficiently.

SPECIFICATION 1[1] On or about October 11, 2013, you accessed and viewed report DR# 02/13-4811882 multiple times and printed a copy. This report related to a matter with a neighbor of yours and was not related in any way to your official duties at the District Attorney's Office. On April 24, 2013, you signed the CNYLEADS Information Sharing Policy and the Use and Dissemination Agreement and were instructed when given access to this resource on April 24, 2013 by Investigator Timothy McCarthy that all queries within CYNLEADS shall be for an official function. Queries must be related to an official investigation. Curiosity inquiries are forbidden. This instruction also appears on the home page every time CYNLEADS is accessed.

When confronted on November 18, 2013, you stated that District Attorney Investigator and TAC (Technical Agency Coordinator) officer Timothy McCarthy instructed you that accessing CNYLEADS report DR #02/13-481182 was not a violation and was appropriate. Investigator McCarthy stated in a written inter-office memorandum on October 31, 2013 that he never gave you permission to improperly access this information.

Further, you stated to Sgt. Clisson of the Onondaga County Sheriff's Department during questioning on October 21, 2013 that you were given authority to look at CNY LEADS report DR #02/13-481182 by Onondaga County District Attorney First Chief Rick Trunfio. On October 22, 2013 Mr. Trunfio sent an email to Chief Dean Decker stating that at no time did he give you the authority or permission to view this report or any reports outside your duties as Victim Assistance Coordinator.

SPECIFICATION 2[2] On September 13, 2013, you directed Attorney David Zukher to call District Attorney Fitzpatrick's Secretary Michelle Robbins to address a complaint about a witness issue in a pending trial and did not address the complaint to the appropriate District Attorney handling the case.

Assistant District Attorney Andrew Tarkowski and Senior Assistant District Attorney Jeremy Cali inquired of you on September 13, 2013 as to why you would have sent this victim directly to the District Attorney without reporting it to the appropriate assistant district attorney. In response, you denied having the conversation with Mr. Zukher or directing his complaint to the District Attorney's secretary. Mr. Zukher was then called in your presence on speaker phone and asked why he called Michelle Robbins, to which he stated "I just spoke with GiGi (GP) and she told me to call Michelle Robbins."

On March 7, 2013, you were directed in written form by Chief Assistant District Attorney, Alison Fienberg, as a reminder of Departmental policy that it was essential that you document in a file and communicate with an Assistant District Attorney immediately when confronted with an issue, complaint or concern by a witness or victim. Ms. Fienberg

[1] Subject to motion to dismiss based on prior discipline on Nov. 14, 2013 (see G-1 and G 16).
[2] Subject to motion to dismiss based on prior discipline on Nov. 14, 2013 (see G-1 and G-16).

further reminded you that Assistant District Attorney's need to be notified immediately about any witness contact, dissatisfied or concerned victims.

SPECIFICATION 3[3] On October 25, 2013 after Katie Taylor had seen four DWI files on your desk prior to October 25, 2013, you brought these files to first Katie Taylor and then Janet Crangle, one of them pending and undocumented in violation of directives given to you in the March 7, 2013 email from Chief Assistant District Attorney Alison Fineberg. You stated to Katie Taylor on October 25, 2013 that they had been on your desk and you were not sure what to do with them. Three of these files were closed and one of them was a pending 2010 felony DWI file DR# 10-333274 that was later found to contain no information or documentation by you in the file. As such, you had no business reason to be in possession of the file.

Chief Assistant District Attorney Chris Bednarski approached you on or about October 25, 2013 about the 2010 file DR# 10-333274 and asked you why you possessed the file, and what information you needed or were adding to it. You had no answer for Mr. Bednarski. When later confronted on October 31, 2013 by Barry Weiss, Chris Bednarski and Jeremy Cali as to why this file was on your desk and how long it had been there, you denied the files ever being on your desk or turning them over to Janet Crangle, who had just stated on October 25, 2013 after you spoke with Katie Taylor she received them from you.

SPECIFICATION 4[4] On April 7, 2014, you met with a complainant of a possible criminal offense. She was a concerned mother whose daughter was being threatened on Facebook with violence and gun violence in her school. You did not immediately contact an Assistant District Attorney about the complaint as required by the March 7, 2013 directive from Chief Assistant District Attorney Alison Fineberg.

You met with this woman again on April 30, 2014 and only on that date, **three weeks** after the initial complaint of the threats, did you bring it to the attention of an Assistant District Attorney.

SPECIFICATION 5[5] On October 11, 2013 you signed in to work at 9:00 a.m. and out at 4:00 p.m., but actually left work at 3:00 p.m. You neither had permission from your supervisor to adjust your regular schedule (9:00 a.m. – 5:00 p.m. with a one hour lunch) nor to leave early.

SPECIFICATION 6[6] On November 1, 2013 you signed in to work at 9:00 a.m. and out at 4:00 p.m., but actually left work at 3:00 p.m. You neither had permission from your supervisor to adjust your regular schedule (9:00 a.m. – 5:00 p.m. with a one hour lunch) nor to leave early.

On November 6, 2013 Senior Assistant District Attorney, Jeremy Cali reinforced County and Departmental rules regarding time and attendance, schedule adjustments, and leave requests with you. Mr. Cali instructed that you must turn in the appropriate request slip to request time off and that it must be approved, and you must sign in and out on the sheet accurately. You stated that you understood. This direction was also provided to you in writing on November 14, 2013.

[3] Subject to motion to dismiss based on prior discipline on Nov. 14, 2013 (see G-1 and G-16).

[4] Subject to motion to dismiss based on prior Counselling letter dated May 8, 2014 (C-28).
[5] Subject to motion to dismiss based on prior discipline on Nov. 14, 2013 (see G-1 and G-16).
[6] Subject to motion to dismiss based on prior discipline on Nov. 14, 2013 (see G-1 and G-16).

SPECIFICATION 7[7] On May 21, 2014, at approximately 9:00 a.m., Assistant District Attorney Anthony Germano was speaking with a victim of a crime who was in crisis and possibly suicidal. Mr. Germano attempted to locate you so that you could provide service to the victim in accordance with your job duties. However, he was unable to locate you at 9:20 a.m. he enlisted the services of an advocate from another agency. You were not in the office during this time period to perform your duties since records indicate that you signed in at 10:00 a.m. and signed out at 12:00 p.m. without requesting or receiving authorization from your supervisor, Mr. Cali.

SPECIFICATION 8 On May 30, 2014, you signed in at 9:00 a.m. and signed out at 5:00 p.m. However, you actually entered the office at 9:45 and left before 4:08 p.m., which was the time that Mr. Weiss date stamped and reviewed your time sheet. When questioned about this in a June 2, 2014 meeting with Administrative Officer Barry Weiss and Senior Assistant District Attorney Jeremy Cali, you stated that the fact that you signed in for 9:00 when you actually entered the office at 9:45 was because you were speaking with a family member of a homicide victim on the third floor between 9:00 a.m. and 9:45 a.m., before coming to your work station in the District Attorney's Office. Review of video surveillance demonstrated this to be false.

PROCEDURAL BACKGROUND

On day 1 of the arbitration, March 4, 2015, the County made a brief Opening Statement alleging that it wished to terminate the Grievant, a short term employee, who had been placed on notice of misconduct several times, yet still performed her job contrary to directions; and that when confronted, Grievant misrepresented facts to cover up her misconduct. The County presented sixteen (16) witnesses, resting its case on day 5, June 18, 2015. The Union had reserved the right to make an opening statement; and on the fifth day of hearing, after the County rested, the Union then made several motions to dismiss charges based upon the concept of 'double jeopardy'. These motions were taken under advisement by the Arbitrator. The Union then began its case on day 5, and presented four (4) witnesses, including Grievant, and rested its defense on day 7, August 13, 2015. The County then requested the right to present Rebuttal witnesses. The gap between day 7 and day 8 was due to the mutual unavailability of counsel. The County presented its 5 Rebuttal witnesses on day 8, October 7, 2015 [3 of whom had previously testified]. The parties were then given until November 13th, to postmark or email their closing briefs to the Arbitrator, extended by agreement of counsel to December 22, 2015.

FACTUAL BACKGROUND

GP ("the Grievant") was employed on March 14, 2011, and at the times in question was a Victim Assistance Coordinator ("VAC"), working in the office of Onondaga County District Attorney, William J. Fitzpatrick . The Distinguishing Features of the VAC classification (C-4) are summarized in its first paragraph.

> "The work involves responsibility for assisting families, victims, and witnesses of crimes as well as the administration, management and planning for the Victim Assistance Program (VAP), which is sponsored

[7] Subject to motion to dismiss based on prior Counselling email dated May 22, 2014 (C-29).

> through the Onondaga County District Attorney's Office. The incumbent in this classification assists the victims by furnishing information on the Rights of Crime Victims in New York State, explaining the availability of compensation through the NY State Crime Victims Board and servicing emergency needs such as shelter, transportation and financial assistance. An employee in the class will keep abreast of each felony and misdemeanor case and stay in contact with victims as they go through the various procedures of the justice system. This could include assisting with the filing of forms and statements as well as acting as the liaison between law enforcement and prosecutors. Does related work as required."

The position requires a Baccalaureate Degree in Social Work, Criminal Justice, Psychology, Counseling or a closely related field, and four years of experience in the field.

Grievant was allowed access to the confidential "CNYLEADS[8]" and "CHAIRS[9]" computer data bases. Grievant was given a user ID and password (C-24). On the login page (C-25), there is a prominent warning (in red) as follows: " Warning! Authorized access only. Unauthorized use of this portal is punishable by applicable NY State and federal laws!". Prior to accessing the program, a new user must read and acknowledge consent to the "CNY USE AND DISSEMINATION AGREEMENT" (C-26) (by checking a box). Grievant did so consent to the terms of confidentiality (C-27) [testimony of Debbie Kroll, County IT employee]. This agreement (C-26) notes the State and federal criminal penalties available to prosecute confidentiality violations, both misdemeanors and felonies. A short quote from the CNYLEADS Use and Dissemination Agreement is noted.

> "…All queries within these information sources shall be for an official function. Queries must be related to an official investigation. Curiosity inquiries are forbidden. The information contained in CNYLEADS is confidential. …Users will not use nor allow the use of CNYLEADS without the proper authorization. Users will not confirm the existence or non-existence of criminal history record information to any person or agency not eligible to receive such information. Users will make no attempt to gain access to any database or computer file that they are not specifically authorized access to."

On Thursday, November 14, 2013, Grievant was given an "Inter Office Letter" (G-1) signed by Sr. ADA Jeremy Cali and Administrative Officer, Barry Weiss, listing several items of misconduct, and concluding with the words "Given the above reasons you will be suspended for three days without pay. You will no longer have access to CNYLEADS, the remainder of your computer access will be restored as of Monday, November 18, 2013".

[8] CNYLEADS = "Central New York Law Enforcement Analysis and Database Systems".
[9] CHAIRS = "Criminal History, Arrest, and Incident Reporting System".

On November 18, 2013, Grievant was suspended without pay for three (3) days.

On February 11, 2014, Barry Weiss and Terese Smith signed a Memorandum to "File" re GP "to serve as documentation to reinstate the 3 days of pay that were taken away from GP on November 18, 2013" (G-16). The letter concluded with the words "The findings and conclusion with regard to the allegations against her will stand"

Grievant was terminated on July 15, 2014, with the filing of a Notice of Charges (C-1). On the following day, July 16, 2014, the Union filed a step 2 grievance (C-2). On July 21, 2014, the parties mutually agreed to bypass the Step 2 hearing and move this grievance to the next step in the grievance process (C-3). On July 28, 2014, the Union filed a "Demand for Arbitration" with the NYS Public Relations Board.

CONTRACTUAL PROVISIONS

Article 26

Discipline and Discharge Procedure

The following procedures shall be the exclusive procedure utilized for disciplinary and discharge matters for all permanent employees covered by this Agreement and who have satisfactorily completed the initial probationary period with the County as provided by local Civil Service rules and regulations. It is also the intent of this Article to provide for a swift and judicious alternative for handling discipline and discharge matters in lieu of Section 75 and 76 of the New York State Civil Service Law.

Disciplinary action shall include, but is not limited to, oral and written reprimands, suspension, demotion, discharge, fines or any combination thereof or other such penalties as may be deemed appropriate by the Employer. An employee shall be entitled to representation by the CSEA at each step of the discipline and discharge procedure. An employee shall be entitled upon request to have an Association Representative present if, as a result of an investigation, an employee is asked by the Employer to sign a statement for purposes of attesting to or admitting incompetency or misconduct.

Service of the notice of discipline shall be made by personal service to the employee with the Unit President or his/her designee receiving a copy, if present at the time. If service cannot be effectuated by personal service, it shall be made by registered or certified mail, return receipt requested to the employee with a copy sent to the Unit President or his/her designee.

The notice of discipline shall contain a detailed description of the specific acts and conduct for which discipline is being sought including references to date, times and places and shall state any proposed penalty being sought. The notice of discipline shall also state that the employee has the right to appeal the disciplinary action by filing a written grievance through the Union within five (5) work days after receipt of notice of discipline if he/she disagrees with it. No disciplinary proceeding shall be commenced under this Article more than 15 months after the occurrence of the alleged acts and/or conduct complained of and described in the charges provided, however, that such limitation shall not apply

where the acts and/or conduct complained of and described in the charges would, if proved in a court of appropriate jurisdiction, constitute a crime.

Employees will be presumed innocent until proven guilty and the burden of proof shall be the Employer's. Employees shall be given the opportunity to resolve the proposed discipline by settlement and to be represented by a Civil Service Employees Association representative, and waive their rights to the procedure as outlined herein. Any settlement agreed upon between the parties shall be reduced to writing with the exception of oral reprimands, which shall be the form set forth in Appendix D and shall be final and binding upon all parties subject to the approval of the Division of Employee Relations with a copy of same to the President of the Civil Service Employees Association, Local 834

* * *

In instances when disciplinary action is to be preferred against a bargaining unit employee, the employee shall not be suspended from employment prior to the completion of the second step of the discipline and discharge procedures contained in Article 27 of the current agreement unless, in the opinion of the department head and the Director of Employee Relations or their authorized designee, the employee presents a danger to the health and/or safety of one's self or another or disrupts the operation of the department where the employee is situated.

Disciplinary action against an employee, except oral reprimands, which shall be issued in accordance with the form attached hereto as Appendix D, may be appealed by filing a written grievance through the Union within five (5) work days after the receipt of such notification by the employee if he/she disagrees with the disciplinary action taken. Said grievance shall be processed by the Union as a Step Two grievance and, if necessary, through the arbitration step. In instances where an employee is suspended or terminated from employment prior to the completion of the third step of the discipline and discharge procedure contained in Article 27, a Step Three Grievance meeting shall be convened by the Employer within five (5) working days after receipt of a Step Two grievance as provided above. The Director of Employee Relations shall render a decision in writing to resolve the matter within seven (7) calendar days after conclusion of the Step Two meeting. Failure to file a grievance within the time frame herein above specified will constitute acceptance of the penalty as proposed by the Employer, by the employee and settle the matter in its entirety.

In instances where an employee has been suspended in excess of 20 working days or discharged as a result of a Step Two decision, the Union may, on behalf of the discharged employee, proceed to arbitration using the following expedited procedure.

i. The Union shall notify the Director of Employee Relations of its intent to proceed to arbitration within five (5) working days after its receipt of the Step Two Decision.

ii. The Union and the Employer shall appoint an arbitrator on a rotation basis from a mutually agreed upon list of five (5) arbitrators. The

arbitrator shall be responsible for conducting a hearing within thirty (30) days of appointment.

iii. The arbitrator shall render a written decision within ten (10) working days after the conclusion of the hearing.

This expedited procedure differs only in method of determining an arbitrator and in the time limits for conducting a hearing and rendering a decision. All other procedures and/or obligations of this Article have the same force and effect for this expedited procedure.

Subject to a mutual written agreement between the Civil Service Employees Association, Local 834 and the Division of Employee Relations, the time limits herein above specified may be waived.

The disciplinary arbitrator shall not have jurisdiction of authority to add to, modify, detract from or alter in any way the provisions of this agreement, or any amendments or supplement thereto or to add new provisions to this agreement or any amendment or supplement thereto.

Rather, the disciplinary arbitrator shall be limited to determining guilt or innocence and the appropriateness of the proposed penalty.

If, in any case where an employee has been suspended or discharged pending the outcome of an arbitration proceeding, an arbitrator finds that such suspension or discharge was unwarranted or that the penalty was too severe then the employee shall be reinstated and compensated for all time lost, and all other rights and conditions of employment as may be determined by the arbitrator, less the amount of compensation which he/she may have received on other employment or in the form of any type of State or Federal benefits since his/her suspension or discharge from the public service.

The decision of the Arbitrator shall be final and binding upon all parties

Article 28

Employee Leave Benefits

All regular full-time employees and regular part-time employees on a pro rated basis covered by this agreement shall be entitled to the following leave benefits set forth in this Article.

HOURS OF WORK

The basic work week for employees in County departments and agencies and those covered under special regulations is a 35 hour work week from 8:30 a.m. to 4:30 p.m. each business day Monday through Friday. Some departments and institutions work a 40 hour work week. Some departments also participate in a flex-time project (see Appendix H) where starting times may be 8:00, 8:30 or 9:00 a.m.

In departments where a deviation from the stated work hours is required schedules are determined at the discretion of the department head.

Daily time records showing actual hours worked by each employee shall be maintained. In the absence of mechanized time recording equipment, each department will use designated daily sign-in sheets.

ARGUMENTS OF THE PARTIES

The Employer argues that there was no double jeopardy; that Grievant did not agree with either the document given her (G-1) or the 3-day suspension penalty; that the discipline was revoked and the money paid to Grievant; that a penalty has to be imposed, increased, and accepted for double jeopardy to attach; that CNYLEADS searches without a legitimate business purpose are prohibited (C-25, 26); that Grievant admitted going into the CNYLEADS System; that both Inv. Tim McCarthy and ADA Trunfio denied giving Grievant permission to do so; that Grievant's actions violated the Use and Dissemination Agreement (C-14) and several County Work Rules (C-5); **that Grievant is guilty of the misconduct alleged in Specification 1**; that Grievant told Atty. David Zukher on the phone to call the DA's Executive Secretary (Michelle Robbins) in violation of an order of Chief ADA Alison Fineberg (C-15) that such calls be referred to the ADA assigned to the case; that such action was a neglect of duty (Rule 12), failure to follow instructions (Rule 25) and misrepresentation of facts (Rule 41); **that Grievant is guilty of the misconduct alleged in Specification 2;** that Grievant had an open yellow felony DWI file on her desk without making any notation of work on the file; that the ADA who originally was assigned the file had left the office months before; that Grievant had no satisfactory explanation and gave conflicting reasons for having the file; that such conduct was a neglect of duties (Rule 12), violation of an instruction of Chief ADA Alison Fineberg (Rule 25), misrepresentation of facts (Rule 41), and improper conduct (Rule 42); **that Grievant is guilty of the misconduct alleged in Specification 3;** that Grievant acknowledges telling no ADA or Investigator about a cyber-bullying complaint by a mother and daughter made to Grievant on April 7, 2014, until April 30, 2014, in violation of Chief ADA Alison Finberg's direction given Grievant (C-15); that Grievant is guilty of neglect of duties (Rule 12) and failure to follow instructions (Rule 25); that Grievant's delay in bringing this to the attention of an ADA delayed help to the daughter; **that Grievant is guilty of the misconduct alleged in Specification 4**; that Grievant falsified her time sheet for October 11, 2013 (C-19), by signing in at 9:00am and out at 4:00pm, when she was actually at home at 2:40pm when she interposed in a Sheriff's police matter at a neighbor's home, and failed to later correct her time sheet, all without supervisory approval; that Grievant was thus guilty of unauthorized absence (Rule 3), neglect of duties (Rule 12), leaving work early without authorization (Rule 21), failure to follow instructions (Rule 25), and falsification of records (Rule 41); **that Grievant is guilty of the misconduct alleged in Specification 5**; that on November 1, 2013, Grievant signed in at 9:00am and out at 4:00pm (C-20); that she was not at work at 3:00pm; that Grievant did not have permission to leave early; that such conduct violated several work rules including falsification of time records (Rule 41); **that Grievant is guilty of the misconduct alleged in Specification 6**; that on May 21, 2014, Grievant signed in at 10:00am and out at 12:00pm (C-21); that no time off slip had been submitted to her supervisor; that at 9:20am, Grievant could not be located

when needed in an urgent situation; that Grievant's supervisor, ADA Jeremy Cali had previously told her to sign in and out accurately and advise him any time she left the office; that such conduct constituted unauthorized absence (Rule 3), neglect of duty (Rule 12), and failure to follow instructions (Rule 25; **that Grievant is guilty of the misconduct alleged in Specification 7**; that on Friday, May 30, 2014, Grievant signed in for a 9:00-5:00 workday with a 12:00-1:00 lunch break (C-22); that she was seen coming in with her coat at 9:45 am, and leaving with her coat at 4:00 pm; that on Monday, June 2, 2014, Grievant's Supervisor (Cali) asked her why she was late, and Grievant responded that she was down on the third floor of the building with a homicide victim's mother outside the courtroom of County Court Judge Miller; that DA's Chief Investigator Dean Decker obtained and reviewed the video from the third floor of the criminal courthouse from 9:00am-10:00am, and testified that the video did not show Grievant on the 3rd floor with the victim's mother (Abigail Ortiz); ADA Cali reviewed the video with the same result; that Grievant was guilty of several acts of misconduct including unauthorized absence (Rule 3), falsification of attendance records (Rule 41), and willful misrepresentation of facts (Rule 41); **that Grievant is guilty of the misconduct alleged in Specification 8**; that credibility of witnesses in this case is of the utmost importance; that on numerous occasions Grievant has fabricated her stories to avoid being held responsible for her own misconduct; that in specification 8, the mother was in plain view but Grievant was nowhere in sight; that in specification 1, Grievant stated she had permission to use CNYLEADS, but both supervisors denied giving permission; that in the specification 3 DWI file, both Ms. Taylor and Ms. Crangle said the file came from Grievant, but Grievant said she never saw it before; that Grievants claims of working other hours or returning to the office are not reflected on any of the time sheets; that Article 28 of the contract (J-1) provides that "Daily time records showing actual hours worked by each employee shall be maintained"; that any overtime hours would have to be with permission of her supervisor; that Grievant's telephone recording and baiting of Inv. Tim McCarthy was reprehensible; that Grievant's lack of character is reflected in her conduct; that there is no merit to Grievant's claim of a grand conspiracy against her; that by virtue of Grievant's conduct and demonstrated lack of credibility, District Attorney Fitzpatrick has lost trust in her; that Grievant's termination should be upheld based upon Grievant's wanton disregard for her duties and responsibilities and the truth.

The Union argues that the only three specifications (4, 7, and 8) took place after the misconduct previously raised in the November 14, 2013 memorandum (G-1); that specifications 1, 2, 3, 5, and 6 were raised in the November 14, 2013 memo (G-1), which was never removed from Grievant's personnel file; that Grievant never denied accessing/printing the CNY LEADS report on October 11, 2013; that she did so to identify the Deputy Sheriff (Quigley) who intimidated her, and upon the advice of DA Investigator Tim McCarthy, whom she called from the scene; that Tim McCarthy denied both the call and the advice, but her cell phone records (G-2) affirm the call and demonstrate DA Investigator Tim McCarthy was lying under oath; that the transcribed phone conversations between McCarthy and Grievant on Nov. 18, 2013 (G-9, 10) also contradicts McCarthy's testimony and credibility; that Grievant was later able to

purchase a redacted copy of the document in question for fifty cents at the Sheriff's office (G-3, 4); **that specification 1 has not been proven**; that Grievant admits talking on the phone to Atty. Zukher on both September 12 and 13, 2013, but denies referring his call to the DA's Executive Secretary, Michele Robbins, which would have been inappropriate; that Atty. Zukher was told he might want to call Michele Saltis, the victims advocate at Vera House in Syracuse; that Grievant immediately sent a text to ADA Tarkowski on both days, since it was his case, and confirming the Vera House reference (G-12, 13); that in a memo from Atty. Zukher to ADA Trunfio (C-18) dated October 31, 2013, Zukher only stated that "gigi told him to call Michelle"; that eight months later in the NOD, Michele becomes Michele Robbins; **that specification 2 has not been proven**; that Grievant admits she had four files on her desk that she thought were closed and that another staff person must have left them there by mistake; that Grievant denied having "an open file" on her desk because she didn't know one of the files was open because she had no reason to look at them; **that specification 3 has not been proven**; that Darlene Widger's daughter was allegedly threatened and harassed on the internet, her school authorities had taken no action and she went to the Syracuse Police in March of 2013; that the Police were not helpful, but gave Widger the card of ADA Geoff Ciereck; that when her calls to Ciereck had not been returned, Widger and her distraught daughter came to the DA's office, but the receptionist told Widger that Ciereck was not in the office; that Grievant was coming up the stairs and stopped to see what was wrong; that Widger did not give Grievant her name , but said that ADA Ciereck was the one she was trying to see; that Grievant gave Widger her card and told her to call or email if she could help; that on April 30, 2013, Widger brought in a drive containing the harassing messages, which Grievant immediately downloaded and emailed to ADA Ciereck; Grievant had no further contact with the matter; that it was mid-September of 2014, after Grievant's discharge, that it was determined that the Widger daughter had fabricated the threats; **that specification 4 has not been proven**; that on October 11, 2013, and November 1, 2013, Grievant admits that she left the office early; the first day was to get her sick son at school, followed by the Deputy Quigley "run in"; that Grievant had told co-worker Maria Galvin and the Secretary that she was leaving; that Grievant came back to work about 4:00 pm to finish work and retrieve the report to identify Deputy Quigley, and went home about 6:30 pm; that her new supervisor, Jeremy Cali, did not discuss his reporting requirements with her until November 6, 2013; that on November 1, 2013, she left early to go to the Sheriff's Personnel Department to file a harassment claim against Chief Investigator Decker arriving back about 5:00 pm; that the November 6, 2013 meeting was a counselling session, making inappropriate the later attempts to discipline her in specifications 5 and 6**; that the County has not met its burden of proof in specifications 5 and 6**; that on May 21, 2014, when ADA Germano was looking for Grievant, she was not in the office since she admittedly arrived an hour late for work without permission from ADA Cali; that Grievant's daughter was sick and she called in; that neither ADA Cali nor Maria Galvin were at their desks, so she left a message that she'd be late with office Secretary, Sara; that this was not rebutted; that when she arrived at work, Grievant recorded her actual time of arrival (C-21); that Ms. Galvin had signed in at 9:00 am and could not be found, but Grievant is the person blamed for the early incident; that Grievant left work at noon because her child was sick and she was

needed at home; that she signed out with the actual time (12:00) and took 5 hours for family sick leave ("5 FSL") which she noted on the sheet; **that specification 7 should be dismissed**; that after having given rides to Ms. Ortiz all week, Grievant went to pick her up on May 30, 2014, but Ms. Ortiz had arranged a ride with someone else; that when Grievant was interrogated about this on June 2, 2014, she did not state she was on the third floor with Ms. Ortiz; that she stated that she may have been with the family or may have been on the way to pick her up - - - she was not sure; that what she said at that June 2nd meeting was not recorded; that she was not given the opportunity to have a Union representative present; **that the County has not sustained its burden to prove specification 8**; that the County has already determined that the appropriate penalty for specifications 1, 2, 3, 5, and 6 is a 3-day suspension; that the three newer specifications of misconduct (4, 7, and 8) are minor performance and time and attendance violations and do not support Grievant's termination by their addition; that Grievant has always gone above and beyond to help victims of violent crime in Onondaga County; that during the Unemployment hearing, ADA Cali had to admit that the DA's office never received any complaints from victims or families about Grievant; that Grievant has worked hard to achieve her "dream job" and she is good at it; that the County has not demonstrated that she in incorrigible; that if Grievant is guilty of misconduct, the principles of progressive discipline require a penalty far short of termination; and that Grievant should be reinstated with full back pay and benefits retroactive to her initial suspension without pay; and that if there is a penalty, it should be minor in nature.

DISCUSSION

●The Union argues that there is double jeopardy involved in several of the charges (1, 2, 3, 5, and 6) that originally resulted in a three (3) day suspension without pay on November 18, 2013, which pay was later restored, but which multiple accusations of misconduct remained in the Grievant's file. That issue will be discussed at length in specification 1, and not repeated in the other specifications to which it may also apply.

The issue of double jeopardy first requires a comparison between the "Inter Office Letter" dated Nov. 14, 2013 (G-1) and the Notice and Charges in the present case dated July 15, 2014 (C-1) to determine if the same offenses were repeated.

The charges are not worded precisely, but are needlessly expanded to include background circumstances, witnesses, proof, explanations, almost to the extent of what one would expect in an opening statement. In determining whether there is double

jeopardy, one must focus on what is the essence of the charge, rather than on how the County intends to prove it.

Item 1 of the "Inter Office letter dated November 14, 2013, the alleged prior disciple, concerns a CNY LEADS Policy violation when Grievant improperly accessed and printed report DR# 02/13-481182 on October 11, 2013. That is the essence of the charge. Specification 1 of the present charges, although using more words and details, deals with the very same offense: that being Grievant's allegedly unauthorized access to a confidential LEADS System report DR# 02/12-481182. I thus find that the current specification 1 was a duplicate allegation of a write-up which had occurred eight (8) months earlier.

The question then becomes whether the "Inter Office Letter" dated Nov. 14, 2013 (G-1), was, in and of itself, a prior disciplinary action for the same offense. The last paragraph of the "Inter Office Letter", signed by Sr. Asst. District Attorney Jeremy Cali and County Administrative Officer, Barry Weiss, recited the following:

> "Given the above reasons you will be suspended for three days without pay. You will no longer have access to CNY LEADS, the remainder of your computer access will be restored as of Monday November 18, 2013."

This certainly sounds like a discipline. For procedural reasons not relevant to the present hearing, "the three 3 days of pay that were taken away from GP on November 18, 2013" were "reinstated", as noted in a Memo dated February 11, 2014 (G-16).

There is a clear distinction between the merit of the charges made, and the appropriateness of the penalty imposed. Charges can stand, and the penalty can be reduced in a grievance settlement. The grievance was settled and the suspension was eliminated, but the accusations remained in written form and were not expunged from Grievant's record. There was no further grievance of this latter action, the matter was "accepted" by the Union, and Grievant's personnel record continued to show Grievant's multiple misconduct. Management vehemently believed the charges were true, that Grievant was culpable, and that there was no explanation or valid defense for her misconduct. They still believe it. Grievant's actions were not excused or justified, and CNY LEADS violations are major violations. The County made it a point to say so three

months later in G-16: "The findings and conclusion with regard to the allegations against her will stand".

A three (3) day suspension penalty might be corrected and written off with the lost pay returned; however, in the present case, the multiple written accusations of the "Inter Office Letter" dated November 14, 2003 (G-1) remained in Grievant's permanent record. Not only was there failure to expunge this critical record (G-1), but there was no documentation or testimony that it was not intended to be formal discipline. In fact, to the contrary, the County particularly noted in a Memorandum three months later, on February 11, 2014 (G-16), that "The findings and conclusion with regard to the allegations against her will stand". That was fatal in this case. Those allegations ("that will stand") were three typed pages long. I find that such written accusations of guilt, even without the suspension, are equivalent to and constitute a "written reprimand".

Should there be any doubt that this accusatory document (G-1) constitutes discipline, the parties' contract (J-1), in Article 26 (p. 26, paragraph 2), specifies

> "disciplinary action shall include …oral and written reprimands".

I thus find that the suspension had been reduced to a Reprimand.
In the *How Arbitration Works* treatise, by Elkouri & Elkouri, 6th Edition[10], it is noted, in part:

> Once discipline for a given offense is imposed and **accepted**[11], it cannot thereafter be increased, nor may another punishment be imposed, lest the employee be subjected to 'double jeopardy'. …The double jeopardy doctrine also prohibits employers from attempting to impose multiple punishments for what is essentially a single act. … Likewise, an employer cannot issue a disciplinary 'warning' and later, after deciding more serious

[10] Alan Miles Ruben, Editor-in-Chief, ABA Section of Labor and Employment Law, BNA, Washington D.C., 2003, at pages 980-981.
[11] There is no requirement in Article 26 that a Grievant must formally "accept" a punishment (Reprimand) in order for it to be effective later as the basis for a double jeopardy claim. . The only reference to "accepting" a penalty in Article 26 is "Failure to file a grievance within the time frame herein above specified will constitute **acceptance** of the penalty … by the employee and settle the matter in its entirety." I find the 1980 federal arbitration case (75 LA 1158; FMCS case 80K/12524) cited by the County to be inapplicable on the facts since it dealt with procedural technicalities in the Penalty Guide of the GSA Disciplinary Regulations.

> punishment would have been preferable, …impose a harsher punishment." (emphasis added)

The County argues that no "acceptance" ever occurred, and that double jeopardy did not attach.

I find that the basis for using the term "accepted" in the above quote means no longer grievable, or non-appealable, or final. Most every labor contract has a limitation period after which the action is deemed "accepted" or unchallenged in the grievance procedure. The present contract is no exception (Article 26):

> "Failure to file a grievance within the time frame herein above specified will constitute **acceptance** of the penalty as proposed by the Employer, by the employee and settle the matter in its entirety." (emphasis added)

Certain cases cited by the County also support this view[12]:

> "Stated another way, the application of the double jeopardy concept has held that once discipline for a given act has been applied and accepted it cannot thereafter be increased. On the other hand, the double jeopardy concept has been found inapplicable where the preliminary action taken against the employee **may not be considered final**." (emphasis added)

The *City of Orlando Case*, cited above, contains several citations which support the view that "accepted" is synonymous with procedurally final. One such early case is by distinguished Arbitrator Whitley P. McCoy[13]:

> "Arbitrator may invoke principle of double jeopardy to set aside second penalty imposed for same offense, despite employer's contention that prohibition against double jeopardy is applicable to only criminal proceedings. When a long established principal, such as protection from double jeopardy, is applicable, arbitrator should apply it even though he is not a criminal court judge. To hold otherwise would be contrary to fundamental concepts of justice, and would diminish confidence in arbitration as a process for obtaining justice.
>
> Employee who was reprimanded and subsequently discharged on basis of same offense for which he had been reprimanded must be reinstated with

[12] *City of Orlando and Central Florida PBA*, 88 LA 572 (1986), Charles H. Frost, FMCS.
[13] International Harvester & UAW Local 1106, 16 LA 616, (1951).

> full back pay, since discharge constituted double jeopardy. Contention that reprimand was not intended as penalty and that employee had merely been allowed to go back to work pending decision as to what penalty to impose is rejected, since evidence shows that supervisor who administered reprimand considered it final penalty for offense."

The County also argues that the discipline was withdrawn for procedural reasons. I find that the suspension was withdrawn, but the "findings and conclusion" (Reprimand) were affirmed (see G-16).

The added wording in the current charges providing details of who said what to whom, does not add to the essence of the charge that the CNY LEADS security policy was violated by Grievant's access and use of report DR# 02/13-481182. I thus find that there is double jeopardy between the first item of the "Written Reprimand" and Specification 1 of the current charges. Grievant's motion to dismiss specification 1 is granted[14].

[14] Grievant testified that on October 11, 2013, she was called by the school to take her son Zack (age 17) home since he had a migraine headache; that Zack was long time friends with the older Murdock boy, Jack, who lived across the street; that there were two Sheriff's cars in front of the Murdock house; that her son was concerned because nobody answered the Murdocks' door and yet his friend's car was in the driveway; that she walked over to see what was going on; that she was wearing a black jacket with a "DA's" emblem on it; that she asked the male deputy if they were there concerning Jack Murdock, and the deputy said "no", that they were there regarding a custody issue of two young children; that the deputy asked if she knew the family; that she replied "not very well" and began to return to her house; that the deputy said "You need to help me find these people"; that she told the deputy she could not help him and was backing away from him; that the deputy continued toward her and tried to grab her ID; that the deputy would not give her his name and turned so she could not see his name tag; that she took out her cell phone and called DA Sr. Investigator Tim McCarthy; that she was trained to call him if she had a problem; that her phone records (G-2) show she called Tim McCarthy at 2:16pm on 10-11-13; that she told McCarthy that a deputy was yelling at her and wouldn't give her his name; that she described the deputy and McCarthy said it sounds like Mike Quigley; that she asked the deputy if he was Mike Quigley and if he wanted to talk to her investigator at work; the deputy then walked away; that Tim McCarthy then told her to "Look it up; it should be in LEADS by then; and let me know if it's Quigley"; that she got back to work about 4:00 pm and looked up the report in LEADS; that Grievant knows she can't use leads for curiosity, but this wasn't personal; that Quigley was rude and that Tim McCarthy told her to look it up; that this was the only time she looked it up; that later, when she went to the Sheriff's office, she paid fifty cents to the Secretary (G-4) [10-31-13 at 2:35pm] and got a redacted copy of the report (G-3).
Investigator McCarthy doesn't appear to remember the phone call and asserts that he tells all employees the 'boilerplate' rule that "You may access CNYleads in performance of your official duties.You can't utilize CNYleads to gain information on friends or relatives for no legitimate purpose" (see G-5). There is a serious credibility issue in this case involving DA Chief Investigator Dean Decker, Sr. Investigator Tim McCarthy, and Grievant, which need not be explored since specification 1 is dismissed.

● Specification 2 of the current charges dated July 15, 2014 (C-1), deals with a September 13, 2013, phone call from Attorney Zukher about an issue in a pending trial, where Grievant allegedly advised the attorney to call the District Attorney's Executive Secretary (Michelle Robbins), despite Grievant's being well aware and previously directed that such calls must be referred to the Asst. D.A. handling the particular case.

Item 4 of the "Inter Office Letter" dated November 14, 2013 (G-1), mentioned above, clearly originates this accusation[15]. I thus find that specification 2 of the current charges was a duplicate allegation of a prior discipline. For the reasons stated above, I find that there is double jeopardy between the fourth item of the "Written Reprimand" and Specification 2 of the current charges. Grievant's motion to dismiss specification 2 is granted.

If specification 2 were to be considered on the merits, the charge would nevertheless fail. Grievant's testimony, supported by her text messages to ADA Tarkowski on September 12 (G-12) and September 13 (G-13) make it clear that Grievant promptly and appropriately notified ADA Tarkowski, the ADA handling the case involved, after each of *Atty. Zukher's calls.*

> 9-12-13, 12:32pm: Hi, Andrew, Cherron Patterson lost her return flight information. Can Dave Brubaker give it to me so I can give it to her? Thanks! [Response: "Sure"]. (G-12)
>
> 9-13-13, 9:27am: Good morning Andrew, I wanted to let you know that Cherron missed her flight yesterday. I just told her that you were in trial and I couldn't get the information and to just go to the airport with her ID and get her ticket. Vera House is not happy. She's going to go to the airport this morning with her ID and see if they'll let her standby. Just wanted to give you a heads up because Lauren or Randy may be calling the office. [Response: "Ok"]. (G-13)

[15] "On September 13, 2013 Attorney David Zuhker called the desk of Michelle Robbins to address an issue with his client Cherron Patterson trying to obtain flight information. You met with Jeremy Cali and Andrew Tarkowski and they inquired as to why David would have called Michele Robbins. You stated you did not speak to David that day had spoken to him maybe a couple days prior. You stated you never told him to call Michele Robbins. Jeremy Cali called David Zuhker on speakerphone with yourself and Andrew Tarkowski present and asked him why he called Michele Robbins desk. David Zuhker "I just talked to Gigi and she told me to call Michele."

Specification 2 only refers to the September 13, 2013 call by ADA Andrew Tarkowski. As to the allegation that Grievant told Atty. Zukher to call the DA's Executive Secretary (Michele Robbins), Grievant credibly denied she did so; and she testified that a suggested referral was made that Atty. Zukher call "Michele Saltis, a Victims Advocate at Vera House, or to her Secretary (Jamie Spindler) who might be able to reach her. The involvement of Vera House in the second text is confirmatory to the Vera House mention. The hearsay of Atty. Zukher as to who he was told to call suggests he was confused about the names.

● Specification 3 of the current charges dated July 15, 2014 (C-1), deals with four (4) case folders which were allegedly on Grievant's desk for "a few days" on or about October 25, 2013, and which Grievant had no business reason to possess. Three of the files were closed and one was an open felony DWI file DR# 10-333274. Grievant did not know who dropped the files on her desk; she had no reason to have such files; she did not know one file was still open; she was never seen to be looking at the files; and she brought them to Ms. Taylor (DWI Legal Secretary), who told her to bring them to Ms. Crangle (Personnel). There was no evidence connecting Grievant with the files, other than Grievant having told Ms. Crangle that she "inherited" them. Crangle testified that three of the files were so old, they should have been sent to storage. The evidence is weak on this specification. If somebody leaves files on your desk unsolicited, it is reasonable to let them sit for a few days before wanting to get rid of them. I see no culpability here.

Nevertheless, item 4 of the "Inter Office Letter" dated November 14, 2013 (G-1), mentioned above, substantially originates this accusation[16]. I thus find that specification 3 of the current charges was a duplicate allegation of a prior discipline. For all the reasons stated above, I find that there is double jeopardy between the fourth item of the

[16] "On October 31, 2013 you met with Barry Weiss, Jeremy Cali, and Chris Bednarsky related to a file from the DWI unit. When asked if the file was on your desk and how long, you said that you had never seen that file, until Chris Bednarski had given it to you just recently to make victim contact. Kate Taylor has given a memorandum at the request of Chris Bednarski, stating that on October 25, 2013, you brought that file to her desk with two other files stating that these files had been on your desk and you inquired of Kate what to do with them. She stated she had seen the files on your desk and assumed they were closed files. She told you to take them to Janet Crangle. Janet confirms that you did. Janet recognized the file in question as still being opened and brought it back to Kate. Kate then brought that file to Chris Bednarski, which prompted his first conversation with you about this file."

"Written Reprimand" and Specification 3 of the current charges. Grievant's motion to dismiss specification 3 is granted.

● Specification 4 of the current charges dated July 15, 2014 (C-1), deals with Grievant's meeting on April 7, 2014, with a mother (Darlene Widger) whose daughter was allegedly being threatened with violence on Facebook and in her school; and not contacting an Assistant DA (as required by the March 7, 2013 directive of Chief Assistant DA, Alison Fineberg) until three weeks later, **April 30, 2014**, when they met again. This charge is the first of three charges (spec. 4, 7, and 8) that are current and not subject to the double jeopardy defense.

On March 6, 2013, Grievant did have a conversation with Alison Fineberg, Chief Assistant District Attorney, brought about in two other cases where several victim messages allegedly went unreturned by Grievant. The conversation was summarized in a memo dated March 7, 2013, from Ms. Fineberg to Grievant., excerpted as follows (C-15):

> "In the future, it is essential that victim contact be clearly documented in the respective file and communicated to the assigned ADA. It is the ADA's job to make an informed case decision and without this information, that is impossible.
>
> Furthermore, all information should be available (via a documented case file) to any ADA that needs to address any complaints/questions that are raised by the victim or anyone else.
>
> ADA's need to be made immediately aware of dissatisfied or concerned victims. If you don't feel you are getting the appropriate response or sense of urgency from an ADA when you have a problem victim or witness, please see me immediately.
>
> Please see me if you have any questions about this.
>
> Thanks, Alison."

This meeting and memo (C-15) was both a directive and friendly advice from Chief Assistant District Attorney Fineberg. It was analogous to a "counseling memo". I find that it was not intended to nor did it constitute disciplinary action. Similarly, the letter

from ADA Jeremy Cali dated May 8, 2014 (C-28) was a counseling memo and not considered discipline. The motion to dismiss this charge is denied.

I find the relevant facts to be that Ms. Darlene Widger felt that neither her daughter's school nor the Syracuse Police were taking her daughter's bullying complaints seriously, and the Syracuse Police had given Ms. Widger the business card of ADA Geoff Ciereck as the appropriate ADA contact. Ms. Widger left several messages with ADA Ciereck's voicemail and secretary, had no response, and angrily came to the DA's office on April 7, 2014, with her distraught daughter. The receptionist told her ADA Ciereck was not in the office and to leave her name. As Grievant came into the office, she observed the mother and daughter were very upset, and Grievant asked if she could be of help. Ms. Widger told her that she had been unable to reach ADA Ciereck, but she did not give Grievant her name or her daughter's name, and she did not ask Grievant for any help. Grievant gave Ms. Widger her card. Widger never heard from ADA Ciereck. Ms. Widger was unsuccessful in emailing Grievant the material allegedly being sent to her daughter, so she brought the thumb-drive containing the material to Grievant's office on April 30, 2014. Grievant immediately downloaded the messages and emailed them to ADA Ciereck. It was not until mid-September of 2014, after Grievant's termination in July, that ADA Jeremy Cali, Sr. Asst. D.A. and Bureau Chief, Special Victims Unit, informed Ms. Widger that the investigation had concluded that her daughter had fabricated the cyber-threats.

I fail to see any culpability on Grievant's part under these facts. Grievant didn't even have the victim's names. Ms. Widger already had the name of the proper ADA to contact and was trying to do so. Grievant had volunteered to help, and as soon as she received the communications complained of, she passed them along to ADA Ciereck. Following instructions, the only thing Grievant might have done was to report to Alison Fineberg that Ms. Widger was not "getting the appropriate response or sense of urgency" from ADA Ciereck. Grievant however, was not necessarily aware of Ciereck's subsequent non-action. The facts suggest that others in the office were aware of the ongoing police investigation, and weren't sharing that with Grievant. It is unknown when the police investigation began to suspect that the daughter's claim was fraudulent. Based upon all of the above, I find that there is not a preponderance of evidence that Grievant was guilty of misconduct as alleged in specification 4.

● Specifications 5 and 6 of the current charges dated July 15, 2014 (C-1), accuse Grievant of mid-day absences on October 11, 2013 (C-19), and on November 1, 2013 (C-20), contrary to the respective sign-in sheets (9-4:00), and without permission from, or prior notification to her Supervisor. Grievant testified that she told Maria Galvin and Secretary Sara that she would be out of the office. Grievant admits that she left the office early on both days, and attempts to explain these absences[17]. Much testimony related to these charges, both of which dates preceded ADA Cali's attempts to get control of his newly assigned unit. Such discussion however, is pre-empted by the discussion below.

Item 3 of the "Inter Office Letter" dated November 14, 2013 (G-1), mentioned above, clearly originates these accusations[18]. I have found above that this letter constituted discipline, and remained in Grievant's file as a "written reprimand". I thus find that specifications 5 and 6 of the current charges were duplicate allegations of such a prior discipline. For the reasons stated above, I find that there is double jeopardy between the third item of the "Written Reprimand" (G-1) and Specifications 5 and 6 of the current charges. Grievant's motion to dismiss specifications 5 and 6 is hereby granted.

[17] Grievant testified that on October 11, 2013, she had taken her ill son home from school; and that on November 1, 2013, she was not at her desk at 3:00 pm because she was at the County Personnel Office to file a complaint against Dean Decker for harassment, and stayed there about 2.5 hours. [Investigator Decker had accused her of stealing ADA Pelosi's "Kindle" on a Saturday. Decker threatened to investigate and have her fired. Decker wanted Grievant to take a lie detector test, which she refused. Decker called her a thief and told her that DA Fitzpatrick did not want a thief working for him. Videos of the particular office absolved Grievant. Ultimately, it was discovered that the Kindle was never left in the office, and the case was closed. Captain Brogen told Decker of that, but Decker never told her of that.

Both Grievant and her Special Victims Bureau co-worker, Maria Galvin, testified that they could modify their 9-4:00 workday to end at 5:00 pm if they chose to take a lunch break from 12-1:00pm; that the time sheet for May 30, 2014 (C-22) illustrates this; that Grievant is frequently out of the office in the line of duty assisting, meeting, and or transporting crime victims and witnesses; that the Victim Advocates had no formal supervision as their unit was funded by grant, and their hours are favorably verified by the grant Auditor; that they filled in the sign in-out sheet in the morning; and that if they left the office or took lunch, they would adjust the time sheet when they returned; and that in the fall of 2013, Jeremy Cali, the ADA Chief of the Special Victims Unit, became their Supervisor. It wasn't until November 6, 2013, that ADA Cali first spoke to the two Victim Assistance Coordinators (Grievant and Maria Galvin) and the office Secretary (Sara) about the need for accurate time sheets, and began tighter control of their whereabouts.

[18] "You were home at the time of the incident in report DR#02/13-4811822 on October 11, 2013 at 3 pm. The signin/out sheet on that day, signed by you, reflects that you worked from 9am-4pm. On November 1, 2013 Chief Dean Decker had requested that you meet to give an account for your CNYLEADS inquiries by the end of that day. When Chief Decker checked your office at 3:00pm on November 1, 2013, Maria Galvin stated you had left for the day. The sign in/out sheet, you signed, reflects that you worked from 9am-4pm that day."

● Specification 7 alleges that on May 21, 2014, between 9-9:20am, Grievant was urgently needed by ADA Anthony Germano to assist a crime victim in crisis (possibly suicidal) and could not be located. An outside agency had to be utilized. The time sheet showed that Grievant had signed in at 10:00 am and signed out at 12:00 pm (C-21). Grievant had not requested or received permission from Supervisor Jeremy Cali to be out of the office.

I find that the email to Grievant dated May 22, 2014 (C-29) from Jeremy was a Counseling memo and did not constitute a prior discipline. The motion to dismiss this charge is denied.

On the merits, Grievant testified that her daughter was sick and she called in to Maria and ADA Cally, and they were not in. She then advised Sara at the front desk that she would be late. Grievant testified that she brought her sick daughter into the office with her, and that the sign-in sheet (C-21) shows her actual times (10-12). It also notes "5 FSL" which stands for "five hours family sick leave". Grievant testified that she was not docked pay for May 21, 2014, which fact was not rebutted[19]. Grievant further testified that the urgent situation dealt with a City case which is Maria Galvin's responsibility. There was no discussion about Ms. Galvin's whereabouts at the time. Grievant's job does not require her to be in the office from 9:00-5:00, and Ms. Galvin testified that she was not out of the office much. I find that there is not a preponderance of evidence that Grievant was guilty of misconduct as alleged in specification 7.

● Specification 8 charges that May 30, 2014, was a 9-5:00 day with an hour for lunch from 12-1:00 pm noted on the time sheet (C-22), but Grievant entered the office at 9:45 am and left before 4:08 pm. Grievant testified that she was not in court at 9-9:45am because she was outside Abigail Ortiz' home waiting to give her a ride to court. That it was a "cross communication". Grievant had allegedly told ADA Cali on June 2nd that

[19] C-29: "…Yesterday (5/21/14) Tony Germano was looking for you or Maria at 9:20 am because he had a suicidal victim in the office. I see you needed some FSL and came in at 10am and left at 12pm. It was addressed with me that you were not here and I had no answer as I did not know you were taking time yesterday. As we discussed in my office previously, you have to let me know when you are going to be off so I can account for where you are when asked. I also need to sign off on leave with the triplicate slips. Please see me today when you have a chance and we can discuss this, and any questions you have."

she was with Abigail Ortiz on the third floor of the County Court Building from 9-9:45am. Grievant says she told her interrogators at a meeting on June 2nd that she may have been with the family or on the way to pick up Ms. Ortiz. The video footage retrieved by Inv. Dean Decker shows that Grievant was not on the third floor at the time. But the trial had been going on all week, and Grievant was undisputedly with Abigail Ortiz, the murder victim's mother. Ms. Ortiz testified "…she sat with the family; she took me home; she picked me up". This was Friday, and Grievant had been with Ms. Ortiz and supporting the family all week either on the third floor or outside. It is understandable that she went to pick up Ms. Ortiz at her home Friday morning by habit. Did she lie to her interrogators on June 2nd? If the meeting was recorded, and if she had Union representation so as not to preclude testimony to the contrary, then perhaps an argument could be made that she was on a personal errand between 9-9:45 am. That would just make no sense. Ms. Ortiz testified, "The end of May, she went to pick me up, but somebody else did. I had gotten another ride". That is sufficient corroboration of Grievant's testimony. Further, as to the end of the day, Grievant would have been with the Ortiz family, or taking her home. The fact that Grievant was not in her office at 4:00 pm, during the week of a murder trial, is, without further proof, a technicality of little significance. I find that there is not a preponderance of evidence that Grievant was guilty of misconduct as alleged in specification 8.

Grievant shall be reinstated, made whole, and compensated for all time and wages lost, and all other rights, seniority, benefits, accruals, and conditions of employment which may have been lost, from the date of termination (July 15, 2014), less the amount of compensation which she may have received on other employment or in the form of any type of State or Federal benefits since her discharge from the public service.

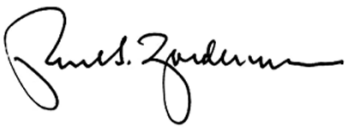
AWARD

By reason of the foregoing, I issue the following

AWARD

1. Grievant's motion to dismiss specification 1 is granted.
2. Grievant's motion to dismiss specification 2 is granted.
3. Grievant's motion to dismiss specification 3 is granted
4. I find Grievant not guilty of specification 4.
5. Grievant's motion to dismiss specification 5 is granted
6. Grievant's motion to dismiss specification 6 is granted.
7. I find Grievant not guilty of specification 7.
8. I find Grievant not guilty of specification 8.
9. I find that termination is not the appropriate penalty.

10. The appropriate remedy is that Grievant shall be reinstated, made whole, and compensated for all time and wages lost, and all other rights, seniority, benefits, accruals, and conditions of employment which may have been lost, from the date of termination (July 15, 2014), less the amount of compensation which she may have received on other employment or in the form of any type of State or Federal benefits since her discharge from the public service.



Dated: January 20, 2016

PAUL S. ZONDERMAN
Arbitrator

AFFIRMATION

State of New York
County of Schenectady} ss:

I, PAUL S. ZONDERMAN, do hereby affirm upon my oath as arbitrator that I am the individual described in and who executed this instrument, which is my Award.

Dated: January 20, 2016

PAUL S. ZONDERMAN

WITNESS LIST (8 days, 22 witnesses, 3 recalled*)

Day 1, March 4, 2015
Scott Clisson, Sergeant, Investigator; County Sheriffs Department
Paula Pellizari, Captain, Internal Affairs Commander; County Sheriffs Department
Timothy McCarthy, Sr. Investigator; Sheriff's Department, Onondaga County
Alison Fineberg, Chief Assistant District Attorney, Onondaga County

Day 2, March 11, 2015
Michelle Robbins, Executive Secretary to Onondaga County D.A. Wm. Fitzpatrick
Andrew Tarkowski, former Asst. D.A., Special Victims Bureau, Onondaga County
Katherine Taylor, Legal Secretary, DWI Unit, D.A.'s office, Onondaga County
Chris Bednarski, Chief Assistant District Attorney, Onondaga County
Anthony Germano, Special Victims Bureau, D.A.'s office, Onondaga County
Barry Weiss, Administrative Officer, D.A.'s office, Onondaga County

Day 3, May 27, 2015
Dean Decker, Chief Investigator, D.A.'s office, Onondaga County
Rick Trunfio, 1st Chief Assistant D.A., Onondaga County
Michael Lefebvre, IT Division, Sheriff's Dept., Onondaga County

Day 4, May 28, 2015
Deborah Krol, IT Specialist, Onondaga County
Jeremy Cali, Sr. Asst. D.A., Bureau Chief, Special Victims Unit

Day 5, June 18, 2015
William Fitzpatrick, District Attorney, Onondaga County

- - - - - - County Rests; Grievant's Motions; taken under advisement - - - - - -

Darlene Widger, parent of allegedly bullied teenager
Maria Galvin, Special Victims Advocate, D.A.'s office, Onondaga County
Abigail Ortiz, mother of murder victim

Day 6, July 20, 2015
GP, Grievant, Victim Assistance Coordinator, Onondaga D.A.'s office

Day 7, August 13, 2015
GP (cross-examination)

- - - - - - -***Union Rests***

Day 8, October 7, 2015
County Rebuttal
*Timothy McCarthy, Sr. Investigator; Sheriff's Department, Onondaga County
*Katherine Taylor, Legal Secretary, DWI Unit, D.A.'s office, Onondaga County
Janet Crangle, Personnel, Employee Relations
Robyn Stark, Deputy Sheriff, Onondaga County
*Jeremy Cali, Sr. Asst. D.A., Bureau Chief, Special Victims Unit

*previously testified

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration Between

STATE OF NEW YORK (DOCS)

-and- **OPINION AND AWARD**

PUBLIC EMPOYEES FEDERATION

AAA#15 672 0588 01

(JR - NOD: May 8, 2001)

BEFORE: Stuart M. Pohl, Arbitrator

Appearances:

For State

Mary Annne Klein	-Labor Relations Representative II
George Montenegro	-Affirmative Action Administrator 2
Leni Pearl	-Mail & Supply Clerk - Attica CF
Kelly McDonald	-Agency Service Representative - Albion CF
David Wiater	-Correctional Counselor - Orleans CF
William M. Powers	-Deputy Superintendent - Program Services
Lisa M. Bennis	-Correction Counsel
Roslee A. Sidari	-Calculations Clerk

For PEF

Steve Klein	-Associate Attorney - PEF
JR	-Grievant
Robert Beckwith	-Field Representative - PEF
Tim Crowley	-Correction Counselor

On December 13, 2000, Case Administrator, Linda R. Cimino, of the Syracuse, NY office of the American Arbitration Association (hereinafter, "AAA"), wrote to the parties

advising that I had been designated from the Rotating Panel to serve as the arbitrator in the above matter. Hearings in this matter were held on October 5, 2001 and March 19, 2002, at the Holiday Inn, Rochester, New York. At that time, the STATE OF NEW YORK, Department of Correctional Services (hereinafter, referred to as the "STATE" or "DOCS") was represented by Mary Anne Klein, Labor Relations Representative II, and the Public Employees Federation was represented by Steve Klein, Esq., of counsel, William P. Seamon, Esq.

The hearing was scheduled to resolve charges raised in a Notice of Discipline ("N.O.D.") served upon the Grievant, JR, dated May 7, 2001 (St. 1[20]). During the course of the hearing, both the State and PEF were given full opportunity to call witnesses and to present documentary evidence in support of their respective positions. Each was also afforded the opportunity to cross examine witnesses called by the other. By agreement of the parties, the State and PEF filed post- hearing briefs with AAA. AAA mailed the briefs to me by letter dated April23, 2002. The hearing was declared closed as of that date. This Award is due on or before May 28, 2002.

ISSUES

The parties stipulated to submit the following issues to me for decision and award:

1. Is there just cause for the imposition of discipline based on the May 7, 2001 Notice of Discipline?
2. If so, is the proposed penalty of termination appropriate?
3. If not, what shall the appropriate penalty be?

[20] All references to State Exhibits received into evidence at the hearing in this matter are cited, herein, as "St. __." All references to Joint Exhibits received into evidence at the hearing in this matter are cited, herein, as "Jt. _ _." All references to Grievant Exhibits received into evidence at the hearing in this matter are cited, herein, as "Gr. __."

BACKGROUND

Many of the facts in this proceeding are not in dispute. Those that are will be reconciled under the Opinion heading which follows.

The grievant, JR, has worked for DOCS for approximately thirteen years as a Correction Counselor (Grade 19) at the Orleans C.F.[21] His responsibilities have included conducting sex offender programs for inmates at the facility.

On or about May 7, 2001[22], JR was served with a Non-Suspension Notice of Discipline seeking "Dismissal from service and loss of any accrued leave." (St. 1). The N.O.D. contained two (2) Charges which alleged misconduct in violation of Sections 2.1, 2.2, 2.6, 2.12 and 6.11 of the Employee's Manual (St. 3) and Executive Order #19, the New York State Policy Against Sexual Harassment in the Workplace (St. 4). The Charges alleged as follows:

A. On several occasions while on duty at Orleans Correctional Facility, you made inappropriate and unwelcome sexual advances to other employees.

1) On or around February 8, 2001, at approximately 10:00 a.m., while on duty at Orleans Correctional Facility, you harassed Leni Pearl in the Business Office by curling your finger in a beckoning motion for 2-3 minutes. When Ms. Pearl came over to you, you stated, "I just wanted to see if I could make you come with this finger" or words to that effect.

2) On several occasions during the period from June 1, 2000 through January 30, 2001, you harassed Leni Pearl by asking her to go out with you or to go away on vacation with you even though she repeatedly replied no.

3) Sometime during the Fall of 2000, while at work, you told Leni Pearl that you wanted to experience your pierced tongue and you also touched her on her shoulders in an attempt to rub them even though she told you not to.

[21] Grievant has one additional year of State service with the former Division of Youth.
[22] AAA and the Union reference a May 14, 2001 date for the N.O.D., which appears to be incorrect (See St. 1).

4) Sometime in February, 2001, while in the Guidance Unit, you made a curling motion with your finger to employee, Kelly McDonald. When she came to your desk, you stated, "Just wanted to see if I could make you come with my finger."

5) On or around May 1 9, 2000, while on duty at Orleans Correctional Facility, you approached Lisa Bennis and said, "Your husband is really good looking. I would like to fuck him up the ass" or words to that effect.

6) During the period of June 1, 2000 through May 1, 2000, you regularly spoke in vulgar language, specifically using the words such as "fuck" and "mother-fucker" in your interaction with co-workers.[23]

B. During the period of June, 2000 through May 1, 2001, while on duty at Orleans Correctional Facility, you made threatening statements to co-worker David Waiter, three or four times. Specifically, you stated, "when you 're not home on Monday nights, I'm going to go to your home and fuck your wife" and "I am going to have my nephew fuck your daughter" or words to that effect.

A grievance was filed challenging the charges and seeking their dismissal (Jt. 2). The matter then proceeded to arbitration.

CONTENTIONS OF THE PARTIES

A. The State.

The State's contentions in support of its attempt to terminate grievant's employment are as follows:

1. The State's evidence established that grievant is guilty of all remaining charges contained in the N.O.D.

2. The grievant's defenses are without merit and should be rejected.

3. Grievant's testimony was self-serving at best. Further, it demonstrated that he "just doesn't get it." He continues to engage in inappropriate and crude behavior even after he is told to stop it. He often apologizes, but erroneously believes that is sufficient to avoid any further consequences. He is mistaken.

[23] Charge A. 6. was dismissed at the first day of the hearing.

4. Whatever definition the arbitrator chooses to apply to the term, "just cause," the State has met its burden of proving it had just cause to issue the N.O.D.

5. The penalty of dismissal from the service and loss of all accruals is appropriate since (a) grievant's conduct was egregious; (b) grievant was trained in sexual harassment and was aware of the State's policy against sexual harassment in the workplace; (c) grievant is not truly remorseful and admitted he likes to "push the envelope" of acceptable behavior; and (d) he is incorrigible.

6. The grievance should be denied.

B. <u>The Union</u>.

The Union contends as follows:

1. The grievant admitted he engaged in the conduct and/or spoke the words attributed to him in Charge A. 1., A. 2. (on one occasion); A. 4; A. 5; and Charge B.

2. As for the allegations in Charge A. 3, he could not recall making the statement alleged, and could not recall ever touching Ms. Pearl. As for Charge A. 5., grievant already was counseled for such behavior approximately one week after the incident. Resurrecting it as a charge constitutes double jeopardy. As for the statements alleged in Charge B., they were disgusting and completely inappropriate, but were part of the general "busting of chops" that went on among grievant and Mr. Wiater and Mr. Crowley.

3. The State failed to prove that the conduct alleged in Charge B. amounted to a "threat" since it did not prove grievant "intended," through use of his "stupid, inappropriate" statements, to harm Mr. Wiater or his family.

4. The penalty sought by the DOCS is inappropriate in that it is too severe under all the circumstances. Grievant should be disciplined in a progressive manner for his misconduct. In

doing so, the arbitrator should take into consideration (a) that this is grievant's first disciplinary matter in his fourteen year career with the State; (b) except for his most recent annual performance evaluation, he has always been rated as highly effective, effective or satisfactory (St. 7); (c) he received commendations in 1990, 1994 and 1996. He is not incorrigible and deserves another chance to be a valued member of the DOCS staff.

3. The grievance should be sustained.

OPINION

I have carefully considered the contentions of the parties, along with the testimony and documentary evidence submitted in support of their respective positions. Having completed my deliberations, I find that the grievance must be sustained, in part, and denied, in part, for the reasons I will now discuss.

I found the State's case to be compelling in most respects. Indeed, grievant admitted he made most of the statements attributed to him and engaged in much of the inappropriate conduct alleged in the N.O.D. Although there are a few areas in dispute which I will deal with momentarily, the case really boils down to one essential question: What is the appropriate penalty? That question will be answered under a separate subheading, below. I will proceed first with a brief discussion of the pending charges found in the N.O.D.

I. The Remaining Charges:

A. Charges A. 1 and A. 4.

Grievant admitted that he made the fingering gesture, followed by the lewd and disgusting sexual comment to Leni Pearl on or about February 8, 2001. The comment disgusted

Ms. Pearl who testified she slapped JR on his head for making the comment. She reported it to her supervisor, Judy Seever and filed a report (St. 10). There is no evidence that grievant engaged in this prank prior to trying it out on Ms. Pearl. However, he should have understood that his words and actions were inappropriate. Certainly his prank cannot be viewed as being "professional" or "courteous" (St. 3, Employees' Manual, Section 2.6). And his words and gesture to Ms. Pearl, while susceptible of several interpretations, clearly were intended by grievant to be sexual. As such, they were also implicitly indecent and profane (St. 3, Employees' Manual, Section 2.12). In light of the fact that Ms. Pearl found the antic to be offensive and that it was sex-based, his conduct did violate the spirit, if not the letter of Executive Order No. 19, Policy Statement on Sexual Harassment in the Workplace, as well as Sections 2.6 and 2.6 of the Employees' Manual.[24] **I find he is guilty of Charges A. 1.**

After the incident with Ms. Pearl, grievant repeated his crude prank, this time with another co-worker, Kelly McDonald. She responded by calling him an "asshole." While his conduct was no more crude or unprofessional than it had been with Ms. Pearl, his offensive escapade against Ms. McDonald is all the more unacceptable and inappropriate, because he knew from Ms. Pearl's earlier reaction to it, that it would likely be as demeaning to Ms. McDonald. Grievant has undergone sexual harassment training, albeit far back in 1990. He has apparently forgotten much of what he learned. He also received a copy of the State's anti-sexual harassment directive. He should have known better than to attempt such a childish and coarse prank. **I find he is guilty of Charges A. 4.**

[24] Section 6.11 of the Employees' Manual does not appear to be applicable since none of grievant's words or actions occurred in the presence of any inmates of the facility.

B. Charges A. 2.

Grievant admitted there was one occasion he recalled on which he asked Ms. Pearl to go out. He claims he was being facetious and that he was responding to Ms. Pearl's question as to where he got his dark tan. I believe this exchange occurred. However, I also believe the State's witnesses, Ms. Pearl and Roslee Sidari, each of whom recalled numerous occasions when JR asked Ms. Pearl to go out with him. On each such occasion Ms. Pearl told JR "no," or that she didn't want to go out with him. Her rejection of each offer did not stop JR, continuing attempts to ask her out. Ms. Pearl did not testify that she found the invitations offensive or that they otherwise made her feel intimidated or fearful. She simply said she wasn't interested in going out with JR. There is, therefore, insufficient evidence to prove that grievant's attempts to ask Ms. Pearl for a date constituted sexual harassment or a violation of the sections of the Employees' Manual cited in the N.O.D. Therefore, grievant is not guilty of making "inappropriate or unwelcomed sexual advances" in the manner alleged in Charge A. 2. **Grievant is not guilty of Charge A. 2.**

C. Charges A. 3.

In comparing the testimony of JR, who had much to gain by distorting the truth, or lying about what he actually said regarding Ms. Pearl's pierced tongue, with that of Ms. Pearl, I believe Ms. Pearl 's version of what occurred is closer to the truth. Given JR proclivity to engage female employee's in sexual humor and banter, it is more likely than not that he did tell her he wanted to experience her pierced tongue. Even, if Ms. Pearl did voluntarily show grievant her pierced tongue on occasion, a conclusion I am not able to make given Ms. Pearl 's testimony that she only did so one occasion to "get him off my case," that does not excuse the grievant's sexually implicit statement. I also credit her testimony, and that is Ms. Sidari that grievant

attempted to rub Ms. Pearl's shoulders several times, over Ms. Pearl's objections. Indeed, as pointed out by the State's representative, and notwithstanding JR claim that he could not recall rubbing Ms. Pearl's shoulders, grievant did admit during his interview by George Montenegro, that he had given back rubs to some of the ladies when requested to do so (St 16). While I don't believe Ms. Pearl ever asked grievant to rub her shoulders, I do credit her testimony that he attempted to do so serval times. **I find that the grievant is guilty of Charge A. 3.**

D. Charges A. 5.

Grievant conceded he made the disgusting and highly inappropriate statement attributed to him in this charge. He also admitted so in his statement on April 30, 2001, taken by Mr. Montenegro (St. 16). However, Mr. Powers testified, as did grievant, that grievant was called in to discuss the comment incident with Mr. Powers, Ms. Bennis and Mr. Larry Weingartner, grievant's supervisor. At that time, grievant was informally counseled that the statement he made to Ms. Bennis was totally inappropriate and that he should never make such a comment again. Mr. Powers admitted he has never again received a complaint that grievant continued making such comments after his meeting. I agree with the Union's assertion that including this allegation in the N.O.D. is akin to double jeopardy. Management could have handled the incident through the N.O.D. process. Instead, it opted to informally counsel JR against making such a comment in the future to Ms. Bennis. The counseling appears to have worked. Since the inclusion of this allegation in the N.O.D. was inappropriate, **grievant cannot be found guilty of Charge A. 5.**

E. Charge B.

Grievant acknowledged making an outrageous and extremely offensive and disgusting sex-based statement at least once. Mr. Wiater testified grievant made the statements to

him on six (6) or seven (7) occasions. It appears this is somewhat of an embellishment, since at his interview with Mr. Montenegro, he told him grievant made the statements three or four times (St. 14). Only on the most recent occasion did grievant apparently also make the statement about grievant's nephew and Mr. Wiater's daughter. In any event, I do believe grievant made the statements on more than one occasion, and that Mr. Wiater objected to them and told him to stop after each occasion. I find no evidence, however, to conclude that grievant ever intended to carry out the threats. More to the point, since this really boils down to an issue of perception, Mr. Wiater did not testify that he felt threatened by the remarks, although he thought grievant was "nuts" to make them. Clearly he was offended enough to report them, although he did not do so at the time they were made, suggesting to me he thought the statements were simply grievant's sick attempt at being funny. Grievant claimed he and Mr. Wiater often "busted each others chops," and that Mr. Wiater once called him a "Spic." Although it appears, as discussed under the next subheading, that there is considerable horseplay and "busting chops" in the office and the facility, among many of the staff members, grievant now claims that much of his problem behavior is caused by his "sense of humor" being different than that of others. He is always trying to "push the envelope," although it is clear he has considerable difficulty knowing where to draw the line. I find grievant is guilty of so much of Charge B. as alleges that he made the statements about Mr. Wiater's wife and daughter. While they were not intended or perceived as threatening," they were nonetheless "totally inconsistent with [his] duties and responsibilities as a Correction Counselor." (St. 1, p. 2).

II. <u>The Appropriate Penalty</u>.

The State argues that the grievant is incorrigible and that, therefore, the only appropriate penalty is termination. The grievant's counsel contends that dismissal is far too severe in light of

the fact that grievant is a long-term employee of the State, with a good work record and no prior discipline. Several factors have led me to conclude that grievant's career can be salvaged if discipline short of dismissal is imposed.

First, grievant has been a long-term employee of the State and has, until the year prior to the N.O.D., performed satisfactorily as an employee (St. 7). He has no prior discipline, and the counselings which are a part of his file speak to conduct unrelated to the misconduct I have found him guilty of in this proceeding. Grievant does have a considerable behavioral problem which must be addressed. Grievant thinks he is a comedian and that the workplace is his audience. He is wrong in both respects. Grievant's words and actions are crude, insulting, demeaning and unacceptable. Grievant claims he now understands that he cannot "push the envelope," as he calls his obnoxious and disgusting words and actions. Time will tell. However, in considering the just cause issue, I have some concern for the work environment which may have contributed to grievant's highly inappropriate words and actions. According to State and Union witnesses alike, the facility and the office in which Ms. Pearl and others work, is often filled with cursing and sexual innuendos. And Ms. Pearl sometimes did little to discourage unwanted attention. She even admitted she has tattoos on her upper and lower back and that she has shown them to JR and others in the office. But, JR job involves providing sex offender counseling, with Mr. Crowley, to inmates at the facility. His inappropriate conduct, characterized by crude comments and actions, followed by apologies, cannot continue if grievant wants to save his job. He says he has behaved over the six month period prior to the arbitration. But, Mr. Crowley testified he had seen JR flirt with female employees three or four times during that period. The appropriate penalty is one which will give grievant a last chance to correct his errant ways. I will direct that he be suspended without pay for ninety (90) working days. He will

then be reinstated, on a last-chance basis, after first attending and successfully completing a State-provided sexual harassment training program which shall be a condition precedent to reinstatement. Any further proven incident of the types of which he has been found guilty herein will form the basis for his dismissal from the service.

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration Between

STATE OF NEW YORK (DOCS)

-and-

PUBLIC EMPOYEES FEDERATION

AAA#15 672 0588 01

(-NOD: May 8, 2001)

AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration provision of the collective bargaining agreement entered into by the above-named parties, and dated 1999-2003, and having been duly sworn and having duly heard the proofs and allegations of the parties, AWARD as follows:

The grievance is sustained in part, and denied in part.

The Employer had just cause for the imposition of discipline based on the May 7, 2001 Notice of Discipline.

The proposed penalty of dismissal from the service and loss of all accruals is not appropriate.

The appropriate penalty is a ninety (90) days suspension without pay. During that time, grievant will attend and complete a comprehensive State-provided sexual harassment training program, as a condition precedent to his reinstatement. At the conclusion of his suspension period, grievant will be reinstated on a last-chance basis. Any further proven misconduct of the types of which he has been found guilty herein, will form the basis for his dismissal from the service.

_____
Stuart M. Pohl, Arbitrator

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
TOWN OF AMHERST)

I, Stuart M. Pohl, do hereby affirm, upon my oath as arbitrator, that I am the individual described in and who executed this instrument, which is my Award.

May 25, 2002 — **(Date)**

Stuart M. Pohl, Arbitrator — **(Signature of Arbitrator)**

WORKSHOP A

PROGRESSIVE DISCIPLINE

Submitted By:

STEVEN KLEIN, ESQ.
CSEA, Inc.
Albany, NY

PROGRESSIVE DISCIPLINE

How do we define progressive discipline? One way is to look at principles such as those set forth in Holloway and Leech, *Employment Termination-Rights and Remedies*, (1985). There, the authors state:

> In reviewing sanctions, arbitrators have established the principle that discipline should be corrective and not punitive, that it should look toward saving and improving the future usefulness of the employee rather than wreaking vengeance or deterring others. The employee's past record becomes crucial, for it helps indicate whether he is incorrigible or is a potentially useful employee. Except for the most serious offenses, penalties must be progressive: reprimands and disciplinary layoffs must be used first to give the employee incentive and an opportunity to change his ways, and discharge may be used only as a last resort when corrective measures hold no promise of reform. [*Id*. at 118.]

An even simpler definition of the concept comes out of the theory of just cause. One of the seven tests of just cause asks "was the degree of discipline administered by the Employer in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the Employer?" Koven and Smith, *Just Cause: The Seven Tests*, (2nd Ed., 1992), at 377. From these tests, two factors emerge: the seriousness of the offense and the employee's work record.

In examining these factors, one arbitrator has explained:

> Progressive and corrective discipline is a well established concept in labor relations and labor arbitration. It consists of verbal warnings, written warnings, and suspensions, before removal is justified, in all but the most serious disciplinary offenses. The process is designed to provide an employee with ever increasing levels of discipline in order that the employee understand that if he does not improve his behavior or job performance he will eventually be subject to removal. [*State (Department of Labor) and PEF*, (Levin, 1989), at 10-11.]

Thus, the purpose behind progressive or corrective discipline is to provide the employee with the notice envisioned by the just cause standard; the employee has a right to be told what the employer's work rules or expectations are and to be given a fair opportunity to follow those rules and meet those expectations. Arbitrator Levin also answers the first question posed above: when is progressive discipline necessary? The answer is whenever the employee has engaged in all but the "most serious" of disciplinary offenses.

Traditionally, arbitrators have distinguished between "extremely serious offenses such as stealing, striking a foreman, persistent refusal to obey a legitimate order, etc.," and "those less serious infractions of plant rules or of proper conduct such as tardiness, absence without permission, careless workmanship, insolence, etc., …" Elkouri and Elkouri, *How Arbitration Works*, (7th Ed. 2012), at 15-40 (*quoting Huntington Chair Corp.*, 24 LA 490, 491 (McCoy, 1955).).

It is safe to say, therefore, that more than a *de minimis* theft of time is an offense undeserving of progressive discipline. *Metropolitan Atlanta Transit Auth.*, 132 LA 836 (Bain, 2013) (just cause existed to discharge bus operator for padding overtime by making dishonest time report). Similarly undeserving of progressive discipline is the offense of threatening violence. *City of Ada*, 134 LA 702 (Lumbley, 2014) (firefighter discharged for, among other things, threats of violence posted on social media). So too is gross insubordination. *United States Army*, (Frockt, 2016) (just cause existed to discharge employee who refused to perform her assigned duties, made up a conflict with her supervisor, and then filed false claims about the conflict).

Theft of time, threats of violence, insubordination - these are broad categories, however, and different arbitrators have differing standards as to what each may consider a serious offense and why. Sometimes, it can even be difficult to distinguish between two awards issued by the same arbitrator involving similar misconduct.

We can all probably agree, for example, that a medical professional who is treating patients with drug abuse issues should not be altering a personal prescription for a medicine containing a controlled substance. Is such misconduct an extremely serious offense warranting termination? This was the issue faced by an arbitrator who was asked to terminate a Registered Nurse working at one of the State's SUNY Medical Centers after the Nurse was caught having twice altered and presented for filling at a pharmacy a prescription she had been provided for cough syrup with codeine. *State (State University of New York) and PEF*, (Denenberg, 2006). The Nurse, who had worked for the State for over twenty years at the time with no prior discipline, did not deny her misconduct, but explained that she had been ill and had gone through the cough medicine faster than the prescriptions permitted. When her misconduct was discovered, moreover, the Nurse both immediately entered a strict drug treatment program and temporarily surrendered her nursing license under a program run by the State Education Department that allowed Nurses with drug abuse or dependency issues time to seek recovery without permanent license revocation. Ultimately, it was the Nurse's lengthy and clean work record and her participation in the State-run program that led to the Arbitrator's finding that recovery from drug abuse was the State's public policy and, therefore, that termination was not the appropriate penalty as it would serve to frustrate the Nurse's recovery in this case. Instead, the Arbitrator ordered a twelve-week suspension without pay.

In another PEF case, however, the same arbitrator was presented with an Educational Supervisor who worked in a State prison and who had been observed by a State Trooper using cocaine. Although the employee was not arrested, the Trooper reported what he saw to the State, which then sought to terminate the employee. The union argued that the employee's previously unblemished fourteen year career, coupled with his immediate and sincere expressions of remorse, militated against a finding that termination was the appropriate penalty. Here, however, Arbitrator Denenberg disagreed, finding that because the employee worked in a State prison filled with drug offenders and because the State had a purported zero tolerance policy for illegal drug use by its prison workers, the offense was serious enough that progressive discipline was inapplicable. *State (Department of Correctional Services) and PEF*, (Denenberg, 2005).

What distinguishes these two cases from each other? In both, the employee had a lengthy, previously unblemished career. In both, the employee admitted the misconduct, which was similar in both cases. What Arbitrator Denenberg focused on was how the State employer looked at drug use within each employee's profession. For the Nurse, the State had expressed a clear public policy of recovery and forgiveness through the State Education Department's policy allowing licensed professionals to temporarily surrender their licenses while engaged in a treatment program. On the other hand, the Education Supervisor worked in a prison, where the State had a zero tolerance policy that stressed discipline up to and including termination, not recovery and forgiveness.

So when is progressive discipline necessary and how should it be applied? These are issues that come up in nearly all disciplinary arbitrations. For those of us on the union side, progressive discipline is something we rarely concede is inapplicable to our members. For those of you on the other side, your clients are often telling you that because it is their business or

agency, they know best whether they should have to get stuck with an employee once that employee's misconduct has been proven.

Of course, the parties may always agree in their stipulated submission of issues to the arbitrator that one of the issues is whether the employer's proposed penalty is appropriate and, if not, what should be the appropriate penalty. In the absence of such a stipulated issue, the parties may still have negotiated a disciplinary provision in their collective bargaining agreement that requires the arbitrator to apply or at least consider progressive discipline.

For example, the current collective bargaining agreement between the State of New York and the Public Employees Federation ("PEF"), which represents the Professional, Scientific and Technical Unit of State employees, provides in pertinent part:

> Both parties to this Agreement recognize the … principle of corrective discipline. [*Id*. at 65.]
>
> * * *
>
> Disciplinary arbitrators shall render determinations of guilt or innocence and the appropriateness of proposed penalties. [*Id*. at 70.]
>
> * * *
>
> Upon a finding of guilt the disciplinary arbitrator has full authority, if he/she finds the penalty or penalties proposed by the State to be inappropriate, to devise an appropriate penalty including, but not limited to, ordering reinstatement and back pay for all or part of any period of suspension. [*Id*. at 71.]

Even absent either a stipulated progressive discipline issue or mandatory contract language, however, from a union's perspective the application of progressive discipline should always be a relevant issue for a disciplinary arbitrator. How can a union argue that progressive discipline should be applied, however, if the employer is unwilling to agree to submit it and the

contract is silent on the issue? Often, the employer's own policies will provide another route to the issue.

In a recent private sector case in the retail sector, for example, Arbitrator Staudohar reduced a supermarket clerk's termination to time served, or a nine-month suspension. The clerk had twice in one week left her checkout station to pursue suspected shoplifters leaving the store. The store had a shoplifting policy that prohibited employees from assisting in detaining or pursuing suspected shoplifters without prior written authorization but, significantly, the policy also stated that a violation "will result in disciplinary action, possibly including termination." The union argued, and the Arbitrator agreed, that this language implied progressive discipline, rather than a zero tolerance policy. *Safeway, Inc*., 136 LA 545 (Staudohar, 2016).

In conclusion, determining whether progressive discipline is necessary and how it should be applied, like many other issues in labor arbitration, depends on who is asking. Each side should, however, be prepared to look both in and beyond the disciplinary provisions in the collective bargaining agreement to support their respective positions. As was noted above, Arbitrator Denenberg essentially did this when she was faced with two similar drug offense cases involving State employees – she looked beyond the relevant contract language and the parties' submitted issues, not to mention the employees' similar work record histories, and instead examined the external State policies addressing illegal drug use by employees in the two affected professions. In so doing, she came to different conclusions in each case on whether progressive discipline should apply.

WORKSHOP A

LAST CHANCE AGREEMENT: IS YET ANOTHER CHANCE AN OPTION?

Submitted By:

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2016 Fall Meeting, Washington, D.C.

Last Chance Agreements: Is Yet Another Chance an Option?

By: James A. Brown, Esq., Arbitrator and Mediator

I. The Elements of an Enforceable Last Chance Agreement:

A. Knowing and Voluntary Waiver.

B. No Coercion or Duress.

C. Consideration.

D. Union Involvement.

II. Last Chance Agreements at Arbitration:

A. The Arbitrator's Role.

B. The "Superseded" Just Cause Standard.

III. Issues Particular to Public Employees:

A. Constitutional Due Process Rights May Be Waived.

B. CPLR Article 78 Standard of Judicial Review for Public Employees Serving a Disciplinary Probation ("Bad Faith").

C. Various Findings of No "Bad Faith" under CPLR Article 78.

I. The Elements of an Enforceable Last Chance Agreement:

A. Knowing and Voluntary Waiver.

- *Matter of Dominguez v. O'Flynn*, 99 A.D.3d 1250 (4th Dept. 2012).

Employee's execution of Last Chance Agreement was "voluntary" even where dismissal was his only alternative.

- *Whitehead v. State Dept. of Mental Hygiene*, 71 A.D.2d 653 (2d Dept. 1979), *aff'd*, 51 N.Y.2d 781 (1980); and
- *Sepulveda v. Long Island State Park & Recreation Com.,* 123 A.D.2d 703 (2d Dept. 1986).

Employee's execution of Last Chance Agreement was "knowing" despite his claim that he did not understand Agreement's probation period. Court noted that employee had served as a probationary employee prior to attaining permanent status.

- *Stresing v. Agostinoni*, 2014 U.S. Dist. LEXIS 75511 (W.D.N.Y. 2014).

Employee's execution of Last Chance Agreement was "knowing" despite purported ambiguity of Agreement's reference to "same or similar conduct" where his Union representatives had advised "that if he got into a fight during the Disciplinary Evaluation Period he would be terminated."

B. No Coercion or Duress.

- *Matter of Dominguez v. O'Flynn,* 99 A.D.3d 1250 (4th Dept. 2012).

Employee, whose choice was either to sign Last Chance Agreement or face termination, was not placed in an "untenable position." Court found no coercion or duress where employee was allowed "to continue his employment with the understanding that he would be terminated if he engaged in any future misconduct – rather than proceeding with the scheduled disciplinary hearing."

- *Wolfe v. Jurczynski*, 241 A.D.2d 88 (3d Dept. 1998).

Court rejected employee's argument that "he was offered the unpalatable choice of resigning or being discharged" where employer had the right to terminate his employment.

C. Consideration.

- *Whitehead v. State Department of Mental Hygiene,* 71 A.D.2d 653 (2d Dept. 1979), *aff'd*, 51 N.Y.2d 781 (1980); and
- *Matter of Dominguez v. O'Flynn*, 99 A.D.3d 1250 (4th Dept. 2012).

Curtailment of employee's pending disciplinary proceedings was adequate consideration for waiver of contractual and statutory rights to a future pre-termination hearing.

- *Faillace v. Port Authority of New York & New Jersey*, 130 A.D.2d 34 (1st Dept. 1987); and
- *Kelly v. NYC Department of Environmental Protection*, 2014 U.S. Dist. LEXIS 27039 (N.D.N.Y. 2014).

Settlement of disciplinary proceeding was adequate consideration for public employee's waiver of constitutional due process rights.

D. Union Involvement.

- *Whitehead v. State Dept. of Mental Hygiene*, 71 A.D.2d 653 (2d Dept. 1979), *aff'd*, 51 N.Y.2d 781 (1980).

Employee's waiver of pre-termination hearing rights was "knowing" when she received assistance from her Union representative before signing settlement agreement imposing disciplinary probation.

- *Sepulveda v. Long Island State Park & Recreation Com.,* 123 A.D.2d 703 (2d Dept. 1986).

Execution of Last Chance Agreement was "voluntary" where employee received assistance from her Union representative whose signature appeared on the Agreement.

- *Associated Electric Cooperative, Inc. v. IBEW, Local 53*, 751 F.3d 898 (8th Cir. 2014).

Where Union never agreed to Last Chance Agreement, arbitrator properly considered whether employee was terminated for just cause. In the absence of an agreed-to Last Chance Agreement, the parties' "relevant agreement" was the collective bargaining agreement which provided that "discharge of employees shall be for just cause."

- *Unite Here Local 100 v. Westchester Hills Golf Club, Inc.*, 2016 U.S. Dist. LEXIS 16356 (S.D.N.Y. 2016).

Arbitrator properly ruled that Last Chance Agreement was invalid where: (a) Union representative was not involved in the negotiation of the Agreement; and (b) collective bargaining agreement required the "involvement of a Union representative during the resolution of complaints and grievances."

II. Last Chance Agreements at Arbitration:

A. The Arbitrator's Role.

- *Von Roll Isola USA, Inc. v. Int'l Union of Elec., Elec., Salaried, Mach., and Furniture Workers, AFL-CIO, Local 301*, 304 A.D.2d 934 (3d Dept. 2003).

Arbitrator may decide if employee violated Code of Conduct where Last Chance Agreement did not specify who would determine misconduct but rather provided: "any future violations of Code of Conduct… will result in immediate dismissal without any right to grieve the action." However, arbitrator could not impose a penalty which differed from that which was pre-determined by the parties.

- *Hay Adams Hotel LLC v. Hotel & Restaurant Employees, Local 25*, 2007 U.S. Dist. LEXIS 34129 (D.D.C. 2007).

Arbitrator may decide if misconduct was committed where Last Chance Agreement did not specify who would determine if future misconduct was "similar in nature." However, arbitrator could not determine penalty (unless he found that the alleged misconduct was not "similar").

- *Mele v. NYS Office of General Services*, 46 A.D.3d 1159 (3d Dept. 2007).

Despite settlement agreement's failure to specify who would decide future misconduct, employee's dismissal was not arbitrable where employee waived his rights to appeal *and* was placed on probation (which distinguished case from *Von Roll Isola USA, supra*).

- *Harrison Baking Company v. Bakery and Confectionery Workers, Local No. 3*, 1991 U.S. Dist. LEXIS 2480 (S.D.N.Y. 1991).

Arbitrator may apply collective bargaining agreement's "just cause" standard despite employee's agreement to "subject myself to termination" based on future latenesses and absences. Court noted that the issue framed at arbitration was not limited to the Last Chance Agreement, but more broadly provided: "Was the severance of [employee] from the payroll proper?" Ultimately, court found no meaningful distinction between "proper" and "just cause."

B. The "Superseded" Just Cause Standard.

- *Von Roll Isola USA, Inc. v. Int'l Union of Elec., Elec., Salaried, Mach., and Furniture Workers, AFL-CIO, Local 301,* 304 A.D.2d 934 (3d Dept. 2003).

Collective bargaining agreement's disciplinary provisions, including its just cause standard, "can be supplemented or superseded by specific language in a last chance agreement."

- *Coca-Cola Bottling Co. v. Teamsters Local Union No. 688,* 959 F.2d 1438 (8th Cir. 1992), *cert. denied*, 506 U.S. 1013 (1992).

Last Chance Agreement "superseded" collective bargaining agreement's just cause provision; arbitrator could not disregard plain meaning of the Agreement's mandatory termination provision.

- *Tootsie Roll Industries Inc. v. Local Union No. 1*, 832 F.2d 81 (7th Cir. 1987).

Last Chance Agreement, which provides that Union "waives any right to file or pursue a grievance or other claim" to challenge discipline for poor attendance, was "a deliberate modification of the general absenteeism policy" and superseded the collective bargaining agreement.

- *International Union of Operating Engineers, Local 351 v. Cooper Natural Resources*, 163 F.3d 916 (5th Cir. 1999), *cert. denied*, 528 U.S. 812 (1999).

Because Last Chance Agreements "follow collective bargaining agreements in time, they should be construed as superseding a CBA in certain circumstances because an LCA reflects the parties' own construction of the CBA."

- *Hay Adams Hotel LLC v. Hotel Res. Employees, Local 25*, 2007 U.S. Dist. LEXIS 34129 (D.D.C. 2007).

Where Union agreed in Last Chance Agreement to waive "its right to grieve" in the event of similar misconduct in the future, the Agreement "modified the just cause provision of the CBA."

III. Issues Particular to Public Employees:

A. Constitutional Due Process Rights May Be Waived.

- *Matter of Abramovich v. Board of Education Central School District No. 1 Town of Brookhaven et al.,* 46 N.Y. 2d 450 (1979), *cert. denied,* 444 U.S. 845 (1979).

Employee may waive constitutional due process rights provided waiver is "freely, knowingly and openly arrived at, without taint of coercion or duress."

- *Stresing v. Agostinoni*, 2014 U.S. Dist. LEXIS 75511 (W.D.N.Y. 2014).

Public employee does not enjoy constitutional due process right to a pre-termination hearing where he "expressly waived his state-created property interest in such a hearing."

B. CPLR Article 78 Standard of Judicial Review for Public Employees Serving a Disciplinary Probation ("Bad Faith").

- *Miller v. NYS Dept. of Correctional Services,* 69 N.Y.2d 970 (1987).

Employee who agreed to a disciplinary probation waived "any right he may have had" to judicial review of his termination "at least in the absence of actual bad faith."

- *Wilson v. Bratton,* 266 A.D.2d 140 (1st Dept. 1999).

The termination of a tenured public employee placed on a disciplinary probation is subject to same judicial standard of review as the termination of a probationary employee: "Absent bad faith, a municipal agency may summarily terminate a probationary employee for any reason."

- *Swinton v. Safir*, 93 N.Y.2d 758 (1999); and
- *Matter of York v. McGuire*, 63 N.Y.2d 760 (1984).

Probationary employees can be terminated without a pre-termination hearing provided termination is not in bad faith, a consequence of constitutionally impermissible reasons, or prohibited by statute or case law.

C. Various Findings of No "Bad Faith" under CPLR Article 78.

- *Johnson v. Katz*, 68 N.Y.2d 649 (1986).

No "bad faith" found based on affidavits showing employee's continuing problems with co-workers and employee's own correspondence reflecting interpersonal problems at work.

- *Wilson v. Bratton*, 266 A.D.2d 140 (1st Dept. 1999).

No "bad faith' found based on employee's latenesses.

- *McGough v. State*, 243 A.D.2d 983 (3d Dept. 1997).

No "bad faith" found based on counseling memoranda noting unsatisfactory work performance.

- *Matter of Schmitt v. NYS Dept. of Correctional Services*, 47 A.D.3d 1098 (3d Dept. 2008).

No "bad faith" found based on evidence that employee was AWOL.

- *Engoren v. County of Nassau*, 163 A.D.2d 520 (2d Dept. 1990).

No "bad faith" found based on employee's own letter attesting to her unsatisfactory work performance.

WORKSHOP A

LABOR ARBITRATION: AN OVERDUE LOOK AT SOME CONTROVERSIAL ISSUES IN DISCIPLINARY CASES

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September 23, 2016

NEW YORK STATE BAR ASSOCIATION
LABOR & EMPLOYMENT SECTION FALL MEETING

LABOR ARBITRATION: AN OVERDUE LOOK AT SOME CONTROVERSIAL ISSUES IN DISCIPLINARY CASES

By: Richard K. Zuckerman, Esq.

I. THE EMPLOYER'S INVESTIGATION: When is the Investigation an Essential Part of the Employer's Burden of Proof?

a. Employment as a Property Interest

i. When an employee has a reasonable expectation of continued employment, the employee is deemed to have a "property interest" in that employment.

1. Property interests in employment are not created by the U.S. Constitution, but can be created by, among other things:

i. A collective bargaining agreement;

ii. A State or local statute, rule or ordinance;

iii. Other employer documents, such as employment agreements or personnel policies, requiring "just cause" for discipline.

ii. Public sector employers must provide at least minimal due process before disciplining or discharging employees because employees have a property interest in their continued employment. *See generally*, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985) (a public employee with a property interest in his/her continued employment is entitled to "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story" before any disciplinary action is taken).

1. In New York, statutes such as, but not limited to, the Civil Service Law, the Education Law, Village Law, Town Law, the Westchester County Police Act and the Rockland County Police Act, among others, create protected property interests in continued employment for non-probationary/tenured public sector employees.

iii. Other public sector employees, such as probationary/non-tenured public sector employees, do not have a statutory right to a pre-termination/pre-disciplinary hearing.

iv. Likewise, at-will employees generally do not have a protected property interest in their employment. *See Bishop v. Wood*, 426 U.S. 341 (1976).

b. Burden of Proof

i. For disciplinary hearings involving public sector employees with pre-discipline/pre-termination hearing rights, the burden of proof is on the employer to show that the employee engaged in/is guilty of the alleged misconduct. *See State of Iowa, Dept. of Gen. Servs.*, 79 LA 852, 855 (Mikrut, 1982); *Rohr Indus.*, 78 LA 978, 982 (Sabo, 1982); *Dobbs Houses*, 78 LA 749, 752 (Tucker, 1982).

ii. The employer also has the burden of convincing the arbitrator/hearing officer that the requested penalty is the appropriate one for the alleged misconduct.

1. Note: certain statutes/rules limit the available penalties for particular types of disciplinary hearings. *See*, *e.g.*, Civil Service Law § 75 (a reprimand, fine, suspension without pay, demotion or dismissal).

iii. The employee has the burden of proving any defenses or justifications provided for his/her at-issue conduct. *See Mississippi Lime Co.*, 29 LA 559, 561 (Updegraff, 1957); *Cleveland Cliffs Iron Co.*, 51 LA 174, 177 (Dunne, 1967); *George D. Ellis & Sons*, 27 LA 562, 564-65 (Jaffee, 1956).

c. Standard/Quantum of Proof

i. Four primary standards of proof:

1. Substantial evidence: "[e]vidence which a reasonable mind would accept as sufficient to support a particular conclusion and consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance." *Marker v. Finch*, D.C.Del., 322 F.Supp. 905, 910; *see also* BLACK'S LAW DICTIONARY 1428 (6th ed. 1990); *People ex rel. Vega*

v Smith, 66 N.Y.2d 130, 139, 485 N.E.2d 997 (1985), *quoting 300 Gramatan Ave. Assocs. v State Div. of Human Rights*, 45 N.Y.2d 176, 180, 379 N.E.2d 1183 (1978) ("such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact").

2. Preponderance of the evidence: "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Braud v. Kinchen*, La.App., 310 So.2d 657, 659; *see also* BLACK'S LAW DICTIONARY 1182 (6th ed. 1990); *Ausch v. St. Paul Fire & Marine Insurance Co.*, 125 A.D.2d 43, 511 N.Y.S.2d 919 (2d Dep't 1987) ("[a] party who must prove his case... only need satisfy [the hearing officer] that the evidence supporting his case more nearly represents what actually happened than the evidence which is opposed to it").
3. Clear and convincing evidence: "[t]hat proof which results in reasonable certainty of the truth of the ultimate fact in controversy" (*see Lepre v. Caputo*, 131 N.J. Super. 118, 328 A.2d 650, 652); "[p]roof which requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt." BLACK'S LAW DICTIONARY 251 (6th ed. 1990).
4. Beyond a reasonable doubt: "the facts proven must, by virtue of their probative force, establish guilt." *Id*.

ii. The standard of proof varies depending on whether a particular statute applies to the disciplinary case (*e.g.*, Civil Service Law § 75, Education Law § 3020-a, *etc*.) and whether the parties' collective bargaining agreement provides for a particular standard to be used. *See*, *e.g.*, *State University of New York*, 74 LA 299, 300 (Babiskin, 1980) (collective bargaining agreement specifically provided that the "… burden of proof, even in serious matters which might constitute a crime shall be preponderance of the evidence on the record and shall in no case be proof beyond a reasonable doubt").

1. The standards that are most frequently applied in disciplinary hearings are "substantial evidence," "a preponderance of the evidence" or "clear and convincing evidence" depending on the severity of the alleged misconduct or the applicable statute. *See*, *e.g.*, Civil Service Law § 75 (requiring the "substantial evidence" standard); *Wholesale Product Supply Co*., 101 LA 1101 (Bognanno, 1993) (preponderance of the evidence standard applied for a discharge case); *Professional Med Team*, 111 LA 457 (Daniel, 1998) (noting that the "clear and convincing evidence" standard is generally used for discharge cases).
2. Sometimes, however, arbitrators will apply the "beyond a reasonable doubt" standard; especially in cases involving issues of moral turpitude. *See Clean Harbors Deer Park L.P.*, 131 LA 1523, 1524 (Shieber, 2013) (rejecting the "beyond a reasonable doubt" standard in favor of the "clear

and convincing evidence" standard and noting that the former standard may be more appropriate for cases involving acts of moral turpitude, not instances of alleged assault on a supervisor as was at-issue in the instant case).

d. The Employer's Investigation

i. How does an investigation help the employer before and/or during the hearing stage?

1. An employer's pre-disciplinary investigation is essential for obtaining evidence sufficient to meet the applicable standards of proof.
2. Conducting an investigation demonstrates to the Arbitrator/Hearing Officer that necessary steps were taken to determine the facts surrounding the alleged misconduct and that sufficient reason(s) exist to take disciplinary action against the employee.
    i. Doing so also helps to eliminate the potential of the employer becoming aware of certain facts for the first time during the hearing when they are presented by the employee, Union or a witness.
3. The results of an investigation might bring to the employer's attention reasons for performance/conduct deficiencies that require an accommodation(s) (*e.g.*, if an employee's performance problems are due to the employee having disability requiring accommodation pursuant to

the Americans with Disabilities Act) or some other pre-disciplinary action (*e.g.*, training/retraining on the proper use of equipment or technology).

   i. Discovering the need for an accommodation or other pre-disciplinary action *before* disciplinary charges are filed and/or a disciplinary hearing occurs can save an employer thousands of dollars in potentially unnecessary and litigation expenses.

4. The investigation might bring to the employer's attention other/additional employees who should be subject to discipline for the at-issue incident.
5. Many arbitrators assign significantly greater probative value to the evidence and information in the employer's possession at the time the decision to discipline had been made (as opposed to after-acquired evidence).

   i. Therefore, a best practice is to suspend an employee or reassign the employee to a different location (*e.g.*, home) pending an investigation into the incident(s) at-issue. Whether the suspension/reassignment can be without pay will depend on a number of factors, including, but not limited to, whether the employee has due process rights pursuant to a statute (*e.g.*, Civil Service Law § 75, Education Law § 3020-a), the disciplinary provision(s) in a collective bargaining agreement, the employer's discipline policy, *etc*.

e. Just Cause for Discipline

i. The principles of "just cause" for discipline, also known as "The Seven Tests," are widely applied by arbitrators when determining whether an employer properly disciplined/terminated an employee.

ii. The principles are:

1. Notice

- "Did the employer give the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?"

2. Rule reasonably related to operations

- "Was the employer's rule or managerial order reasonably related to the orderly, efficient, and safe operation of the company's business?"

3. Investigation prior to discipline

- "Did the employer, before administering discipline to an employee, make an effort to discover whether the employee violated or disobeyed a rule or order of management?"

4. Fairness of investigation

- "Was the employer's investigation conducted fairly and objectively?"

5. Sufficiency of proof
    - "At the investigation, did the 'judge' obtain substantial evidence or proof that the employee was guilty as charged?"
6. Non-discrimination
    - "Has the employer applied its rules, orders and penalties evenhandedly and without discrimination to all employees?"
7. Appropriateness of penalty
    - "Was the degree of discipline administered by the employer reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee's service?"

See DISCIPLINE AND DISCHARGE IN ARBITRATION, Chapter 2.I.A (Brand and Biren, ed., 3rd ed. 2015).

iii. As evidenced by the tests above, the employer's investigation and the results thereof comprise a substantial part of establishing "just cause" for discipline/termination. Therefore, the employer's investigation is a crucial component of the pre-disciplinary process.

f. Due Process as an Element of Just Cause

i. Due process is an essential element of proving just cause for disciplinary action.

1. Just cause, however, does not require that the investigation exhaust every possible lead and interview every potential witness, though doing so is, of course, a best practice.
    i. *See* DISCIPLINE AND DISCHARGE IN ARBITRATION, Chapter 2.II.A.2 (Brand and Biren, ed., 3rd ed. 2015) ("…just cause does not require 'the employer to do more than to conduct a reasonable investigation and to afford the grievant the opportunity to give his side of the case… [the employer is not] required to search for possible corroboration or contradiction of witnesses against grievant, at least where such avenues have not been suggested by grievant himself to the employer. Nor is the investigation deficient merely because the company fails to ask every question that can be suggested retrospectively.' [*internal citations omitted*]").
2. Providing sufficient due process to an employee mitigates/prevents allegations by the employee that an employer's disciplinary action was arbitrary, capricious, discriminatory, unfair or otherwise improper.
    i. Many arbitrators believe that the "basic notions of fairness and due process" include the opportunity to be heard prior to the imposition of discipline.
        a. *See* DISCIPLINE AND DISCHARGE IN ARBITRATION, Chapter 2.II.A.4 (Brand and Biren, ed., 3rd ed. 2015)

("Finding no just cause for discharge, one arbitrator opined that '[d]ischarge and disciplinary actions must include basic notions of fairness and due process which includes the right of an employee to have an opportunity to be heard… before 'sentence is carried out'' [*internal citations omitted*]").

ii. Conducting an inadequate investigation may be considered a violation of due process and may potentially result in the overturning of a dismissal or other imposed discipline.

a. For example, an arbitrator overturned an employee's termination, even though the employee admitted to the alleged misconduct, because the employer's investigation consisted of telephone conversations with the complaining "outsider" individual, which the arbitrator determined to be procedurally insufficient. *See Niagara Frontier Transit Sys., Inc.*, 32 LA 901 (Thompson, 1959).

iii. Where the nature of the alleged misconduct is more severe (*e.g.*, violence or the threat of violence), a less extensive/lengthy pre-discipline investigation may be a warranted and appropriate safety measure. *See, e.g., Cutrale Citrus Juices*, 117 LA 1149 (Duda, 2002) (termination of employee for use of threatening language

without pre-termination interview did not violate employee's due process rights because the employer wanted to ensure that the employee was removed from the workplace so that he did not come into contact with the supervisor whom he had threatened and because the employer informed the union of the incident shortly after the termination).

3. Many collective bargaining agreements require an investigation or some other similar formal or informal due process procedure prior to the implementation of employee discipline. An employer's failure to adhere to the collective bargaining agreement will likely result in a lesser penalty (if any) imposed on the employee by the Arbitrator/Hearing Officer, depending on the seriousness of the misconduct.

II. THE GRIEVANT AS WITNESS: When May an Employer Call the Grievant as its Witness (and When Should the Union Decline to Call the Grievant)?

a. Calling the Grievant/Employee as a Witness

i. Although arbitrators are split on this issue, some arbitrators believe that when it is not otherwise prohibited by statute or a collective bargaining agreement, the employer may be permitted to call the grievant/employee as a witness during its direct case or rebuttal.

1. When deciding whether to permit the employer to call the grievant/employee as a witness, arbitrators consider, among other things,

whether the grievant/employee is the only individual with knowledge of the at-issue incident(s) or the Union's decision not to call the grievant/employee as a witness. *See*, ***e.g.***, DISCIPLINE AND DISCHARGE IN ARBITRATION, Chapter 2.II.A.4 (Brand and Biren, ed., 3rd ed. 2015) ("In a discharge or discipline case where no supervisor is a party or witness to the underlying circumstances, the employer often calls the grievant as its first witness."); 2009 LA Supp. 151592 (Pecklers 2009) ("Employer was permitted to initially call Mr. Grievant as an adverse witness, based upon the fact that he possessed the only first-hand knowledge of the events"); *Chicago Transit Authority*, 135 LA 1485 (Wolff 2015) ("…it is permissible for an employer to call the grievant as a witness later if the union has not done so").

ii. Certain statutes specifically prohibit the employer from calling the grievant/employee to testify as a witness.

1. For example, pursuant to the general hearing procedures for N.Y. Education Law § 3020-a proceedings, the Respondent cannot be required to testify during the hearing. 8 N.Y.C.R.R. § 82-3.8(e) ("[t]he employee shall: […] (2) not be required to testify at the hearing; […]").

iii. Even where a specific statute does not preclude the employer from calling the grievant/employee as a witness, the Fifth Amendment protects an individual from answering questions in an informal or formal civil proceeding where the answers

may incriminate him/her in future criminal proceedings. *Baxter v. Palmigiano*, 425 U.S. 308, 316, 96 S.Ct. 1552, 1557 (1976).

1. The Fifth Amendment does, however, permit "adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them." *Id*.

a. "Silence in the face of accusation is a relevant fact not barred from evidence by the Due Process clause [and] is often evidence of the most persuasive character." *Steiner v. De Buono*, 239 A.D.2d 708, 657 N.Y.S.2d 485 (3d Dep't 1997), quoting *Baxter*, 425 U.S. at 153-154, S.Ct. at 1558.

iv. Public sector employees also have "Garrity rights," which consist of a warning by the employer advising the employee, in sum and substance, that he/she may be the subject of an internal investigation and may be liable for any statements made, but he/she has a right to remain silent on any issues that may tend to implicate him/her in a crime. *Garrity v. New Jersey*, 385 U.S. 493 (1967).

1. In other words, an employee cannot be disciplined for remaining silent or refusing to answer the employer's questions if the answers to those questions may result in the employee's self-incrimination.

b. <u>When is the Grievant/Employee Considered an "Adverse" or "Hostile" Witness?</u>

i. An adverse witness is one that is hostile, biased or unwilling to answer questions. *See generally*, *People v. Davis*, 163 A.D.2d 826, 558 N.Y.S.2d 358 (4th Dep't

1990), *l've den*. 76 N.Y.2d 939 (1990) ("When the witness continued to respond in an evasive manner to the prosecutor's questions, it was in the court's discretion to designate her a hostile witness" (*citing People v. Marshall*, 144 A.D. 1005, 534 N.Y.S.2d 623 (4th Dep't 1988), *l've den*. 73 N.Y.2d 893, 538 N.Y.S.2d 805 (1989)).

ii. The grievant/employee will likely be considered to be an "adverse witness" when called by the employer. Thus, leading questions may be used during the employer's direct examination of the grievant, but the employer is bound by the grievant/employee's answers unless his/she previously made a contradictory statement(s) under oath or in writing.

1. *See* Federal Rule of Evidence, Rule 611(c)(2); CPLR 4514; *see also Jordan v. Parrinello*, 144 A.D.2d 540, 534 N.Y.S.2d 686 (2d Dep't 1988) (*citing Becker v. Koch*, 104 N.Y. 394, 10 N.E. 701 (1887) ("It is well established that when an adverse party is called as a witness, it may be assumed that such adverse party is a hostile witness, and, in the discretion of the court, direct examination may assume the nature of cross examination by the use of leading questions. However, a party may not impeach the credibility of the a witness whom he calls unless the witness made a contradictory statement either under oath or in writing").

c. When Should the Union Decline to Call the Grievant/Employee as a Witness?

i. Whether the Union should decline to call the grievant/employee as a witness is a decision that should be made on a case-by-case basis.

1. Some things to consider when making this determination are:

a. Failing to call the grievant/employee as a witness may leave the employer's case unrebutted if there are no other witnesses on behalf of the Union/grievant/employee.

i. In that case, the employer and arbitrator may rely on the theory that the Union/grievant/employee did not prove its case.

b. The arbitrator will not get to hear the grievant's/employee's side of the story if not called to testify.

i. On the other hand, if the grievant/employee does not come across as a credible witness, the Union may not want him/her to testify.

c. A negative inference may be drawn as a result of the grievant's/employee's failure to testify.

i. *See Baxter v. Palmigiano*, 425 U.S. 308, 316, 96 S.Ct. 1552, 1557 (1976); *see also Schwartz v. New York City Dep't of Educ.*, 22 A.D.3d 672, 802 N.Y.S.2d 726 (2d Dep't 2005) (arbitrator in an Education Law § 3020-a

proceeding did not exceed authority by noting that the absence of the petitioner's testimony left unrebutted certain evidence).

d. The grievant/employee will not be subject to cross-examination if he/she is not required to testify.

e. Any testimony provided by the grievant/employee at a disciplinary proceeding may be (and will likely be) used in a simultaneous criminal proceeding. This may inadvertently infringe upon the grievant's/employee's Fifth Amendment privilege against self-incrimination in the criminal proceeding.

THIS OUTLINE IS MEANT TO ASSIST IN GENERAL UNDERSTANDING OF THE CURRENT LAW. IT IS NOT TO BE REGARDED AS LEGAL ADVICE. INDIVIDUALS WITH PARTICULAR QUESTIONS SHOULD SEEK ADVICE OF COUNSEL.

WORKSHOP B

LABOR RELATIONS ROUND-UP

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I. Withdrawal of Recognition: NLRB General Counsel Seeks Reversal of *Levitz* Doctrine

On May 9, 2016, NLRB General Counsel Richard Griffin issued a memorandum (GC 16-03) instructing all Regional Directors, Officers-in-Charge and Resident Officers to argue for reversal of the *Levitz* doctrine in any unfair labor practice case alleging unlawful withdrawal of recognition from an incumbent bargaining representative without objective evidence that the union actually has lost majority support. (Copy of the GC Memo is attached.)

In *Levitz Furniture of the Pacific*, 333 NLRB 717 (2001), the NLRB adopted a framework that heightened the showing required of employers to unilaterally withdraw recognition, moving from a test based on an employer's "good faith doubt" as to a union's majority status, to one that turns on "objective evidence" that the union actually has lost its standing with the bargaining unit. The Board rejected the then-General Counsel's position in *Levitz* that employers should be required to continue recognition unless and until the union has failed to receive a majority of the votes cast in a secret-ballot election. However, the Board left open the possibility that the *Levitz* doctrine would be revisited in the event that subsequent developments showed that it did not effectuate the purposes of the Act.

In Memorandum GC 16-03, General Counsel Griffin expressed the Agency's view *Levitz* has resulted in frequent litigation over difficult issues, and has failed to serve two important federal labor policies: promotion of stable collective bargaining relationships and employee free choice in the selection of representatives. Accordingly, in all cases where a determination has been made to issue an unfair labor practice complaint alleging that an employer has violated Section 8(a)(5) by withdrawing recognition in the absence of objective evidence that the union has actually lost majority support, the General Counsel has directed all offices to (i) plead in the alternative that the employer unlawfully refused to bargain by withdrawing recognition absent the results of a Board-conducted election, and (ii) seek adoption of a rule that recognition may be withdrawn -- unless the parties have agreed otherwise -- only after the Board has issued a Certification of Results finding that the union is no longer the majority representative.

Attached to GC Memo 16-03 is a model argument that has been developed by the Office of the General Counsel for inclusion in all briefs to administrative law judges and the Board in withdrawal of recognition cases, urging that the Agency require employers to utilize the NLRA's election procedures rather than act unilaterally when there is reason to believe that the union has lost majority support. The principal points made in the model argument are that experience under *Levitz* has demonstrated that employers are not withdrawing recognition only when the evidence "clearly indicates" a loss of majority support, causing protracted litigation; that a rule prohibiting withdrawal of recognition absent issuance of a Certification of Results following an RM or RD election best effectuates the policies of the Act and better accomplishes what the Board set out to do in *Levitz*; and, that the proposed rule is even more appropriate today than when *Levitz* was decided, given the Board's revised representation case rules streamlining the election process.

II. *Miller & Anderson, Inc.*, 364 NLRB No. 39 (2016) – NLRB Issues Long-Awaited Ruling on Bargaining Units Combining User and User/Supplier Employees

On July 11, 2016 The Board overturned *Oakwood Care Center*, 343 NLRB 659 (2004), and returned to its standard under *M.B. Sturgis, Inc.*, 331 NLRB 1298 (2000), holding that employer consent is not required for bargaining units consisting of jointly employed and solely employed employees of a single user employer. Such units will be deemed appropriate, even absent employer consent, if the traditional community of interest standard is met. Chairman Pearce and Members Hirozawa and McFerran, for the majority, determined that a return to the *Sturgis* standard was both consistent with the language of the NLRA and better serves the purposes of the Act.

An Overview of NLRB Precedent

The Early Years of the Act

The majority began their analysis of the issue by examining Board precedent dating back to the early years of the Act. As the majority noted, for the first four decades of the Act's administration, the Board routinely found units consisting of the employees of a single employer appropriate, regardless of whether some of those employees were jointly employed by other employers.[1] When faced with petitions to include both groups of employees in a single bargaining unit, the Board used its traditional community of interest test to decide whether such units were appropriate. Significantly, during this time, the Board identified no statutory impediment to such units and the issue of employer consent was not raised. The courts of appeal similarly accepted bargaining units consisting of jointly employed employees and employees solely employed by a user employer.[2] Thus, the majority noted that as of the end of the 1960's -- and continuing for the two decades that followed -- no Board or court decision had barred, absent employer consent, units combining solely employed employees and jointly employed employees. Rather, as these decisions demonstrate, neither the Board nor the courts perceived any statutory impediments to units combining solely employed employees and jointly employed employees; such units were subject only to the traditional community of interest standards.[3]

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1 *See Louis Pizitz Dry Goods Co.*, 71 NLRB 579 (1946); *Taylor's Oak Ridge corp.*, 74 NLRB 930 (1947); *Denver Dry Goods Co.*, 74 NLRB 1167 (1947); *JM High Co.*, 78 NLRB 876 (1948); *Block & Kuhl Department Store*, 83 NLRB 418 (1949); *Stack & Co.*, 97 NLRB 1492 (1952); *Frostco Super Save Stores, Inc.*, 138 NLRB 125 (1962); *Spartan Department Stores*, 140 NLRB 608 (1963).

2 *See S.S. Kresge Co. v. NLRB*, 416 F.2d 1225 (6th Cir. 1969); *Gallenkamp Stores Co.* v. NLRB, 402 F.2d 525, 531 (9th Cir. 1968)' *NLRB v. Zayre Corp.*, 424 F.2d 1159 (5th Cir. 1970)

3 See, e.g., Globe Discount City, 209 NLRB 213 (1974); NLRB v. Western Temporary Services, Inc., 821 F.2d 1258 (7th Cir. 1987).

Lee Hospital

In *Lee Hospital*, decided in 1990, altered its treatment of units combining jointly employed and solely employed user employees. 300 NLRB 947 (1990). In that case, the Board announced a "general rule" that it does not include employees in the same unit if they do not have the same employer, absent employer consent, and held that if employees are jointly employed by two employers, they can be included in a unit with employees of the user employer only with the employer's consent. *Id.* at 948. The majority points out that the *Lee Hospital* decision ignored the Board's routine practice of finding appropriate units that combined employees solely employed by a user employer with employees jointly employed by that user employer and a supplier employer, offered no rationale in support of the general rule it asserts exists, and relied only on a single case (cited in a footnote) that in fact is inapposite to the issue at hand.[4] Notwithstanding these shortcomings in the *Lee Hospital* analysis, the Board began applying the "rule" of *Lee Hospital* to prohibit any unit that would combine jointly employed employees with solely employed employees of one of the joint employers absent consent of both employers.[5]

Sturgis

In *Sturgis*, the Board reexamined *Lee Hospital* and concluded that it had improperly extended the multi-employer analysis to situations where a single user employer obtains employees from a supplier employer and a union is seeking to represent both those jointly employed employees and the user's solely employed employees in a single unit. 331 NLRB 1298. The *Sturgis* Board rejected the "faulty logic" of *Lee Hospital* that a user employer and a supplier employer who employ employees that perform work on behalf of the same user are equivalent to the completely independent user employers in multi-employer bargaining units. *Id.* at 1298. The Board found that employer consent is not required for a unit combining the employees solely employed by a user employer and those jointly employed by that same user employer and a supplier employer because such a unit is an "employer unit" under Section 9(b) of the Act given that all the employees perform work for the user employer and all are employed by the user employer.[6] Thus, the Board in *Sturgis* held that it would apply traditional community of interest factors to decide if such units are appropriate.

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[4] The *Lee Hospital* Board cited *Greenhoot, Inc.*, 204 NLRB 250 (1973), which stands for the much different proposition that where two or more otherwise separate user employers obtain employees from the same supplier employer, and a union is seeking to represent those employees in a single unit, that unit sought is a multi-employer unit requiring employer consent. *Greenhoot* left undisturbed the Board's long-standing practice of finding appropriate units that combined employees solely employed by a user employer and employees jointly employed by that user employer and a supplier employer absent employer consent.

[5] *See e.g.*, *International Transfer of Florida, Inc.*, 305 NLRB 140 (1991); *Hexacomb Corp.*, 313 NLRB 983 (1994).

[6] Section 9(b) of the Act provides that "[t]he Board shall decide in each case whether . . . the unit appropriate for the purposes of collective bargaining shall be the *employer unit*, craft unit, plaint unit, or subdivision thereof[.]" 29 U.S.C. §159(b) (emphasis added).

Oakwood

Four years later, the Board changed course again and concluded that *Sturgis* was misguided both as a matter of statutory interpretation and sound national labor policy. Specifically, the Board determined that Congress had not authorized it to direct elections in units encompassing the employees from more than one employer, and that the bargaining structure contemplated by *Sturgis* gives rise to significant conflicts among the various employers and groups of employees participating in the process.

The Board's Decision

The majority noted that the central purpose of the Act is to protect and facilitate employees' opportunity to organize unions to represent them in collective bargaining negotiations. Moreover, because the Act does not explicitly address the issue at hand, the majority concluded that it does not compel *Oakwood's* holding that employer consent is required. As such, the majority deemed itself free to consider whether another rule is not only a permissible interpretation of the statute, but also that it better serves the purposes of the Act. The majority determined that a return to the *Sturgis* rule met both of those criteria.

Sturgis is Consistent With the Act

The majority determined that the *Sturgis* rule is within the ambit of a Section 9(b) employer unit because all the employees in such a unit are performing work for the user employer and are employed, within the meaning of the common law, by the user employer. The *Oakwood* rule, by contrast, was deemed too restrictive. Additionally, the majority concluded that *Oakwood* was based on the erroneous conception that bargaining in a *Sturgis* unit constitutes multi-employer bargaining. The majority distinguished between a *Sturgis* unit and true multi-employer bargaining units, which are created without regard for any pre-existing community of interest among the employees and involve employers who are physically and economically separate from each other. It is the latter situation that the rule requiring employer consent was designed to address. The majority further reasoned that, given the broad definition of "employer" and "employee" under the Act, and the statutory charge to afford employees the fullest freedom in exercising their right to bargain collectively, a combined *Sturgis* unit does not fall outside the ambit of a Section 9(b) "employer unit" but rather is responsive to Section 9(b)'s statutory command.

Sturgis Effectuates Fundamental Policies of the Act that *Oakwood* Frustrates

Noting that a key aspect of the right to self-organization under the Act is the right to draw the boundaries of that organization, *i.e.*, to choose whom to include and whom to exclude, the Board majority determined that the *Sturgis* approach best effectuates the fundamental policies of the Act. That is, the *Sturgis* rule honors the principle of self-organization because it does not require employees to obtain employer permission before they may organize in their desired unit; it leaves employees free to choose the

unit they wish to organize, provided it is appropriate under the Board's community of interest test. *Oakwood*, on the other hand, denies employees in an otherwise appropriate unit full freedom of association because it requires employees to obtain employer permission to organize. The majority reasoned that *Oakwood* upended the Section 9(b) mandate and allowed employers to shape their ideal bargaining unit, which is precisely the opposite of what Congress intended.

Member Miscimarra dissented, arguing that the majority holding requires two or more businesses to engage in multi-employer and/or non-employer bargaining without their consent. In his view, the majority's ruling in *Miller & Anderson*, coupled with the recent expansion of the Board's joint employer standard in *Browning-Ferris Industries*, 362 NLRB No. 186 (2015), creates a new legal regime that will result in confusion and instability.

III. NLRB Reverses 1984 Ruling in *Wells Fargo,* Prohibiting Withdrawal of Recognition from a Mixed-Guard Union Without Evidence of Actual Loss of Majority Status

Section 9(b)(3) of the National Labor Relations Act prohibits the NLRB from certifying a union as the representative of a unit of "guards" -- defined as individuals employed to "enforce against employees and other persons rules to protect property of the employer or to protect persons on the employer's premises" -- any labor organization that "admits to membership or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards." The purpose of this prohibition is to protect against the divided loyalty of an employer's security personnel. However, nothing in the Act prohibits an employer from voluntarily recognizing and bargaining with such a "mixed-guard union".

Although Section 9(b)(3) places no limitation on the NLRB's authority to enforce existing collective bargaining relationships between an employer and a union disqualified from certification as the representative of guards, for over 30 years the Board has interpreted that provision of the Act to prohibit it from ordering an employer to continue such a relationship following contract expiration. The Board's reasoning had been that when an employer has withdrawn recognition from a mixed-guard union, it cannot direct the employer to resume recognizing and bargaining with the union because such an order "would give[ ] the [u]nion indirectly -- by a bargaining order -- what it could not obtain directly -- by certification -- *i.e*., it compels the [employer] to bargain with the [union]." *Wells Fargo Corp.*, 270 NLRB 787 (1984), rev. denied sub. nom. *Truck Drivers Local 807* v. *NLRB*, 755 F.2d 5 (2d Cir. 1985), cert. denied, 474 U.S. 901 (1985). As a result, the NLRB has permitted employers to withdraw recognition from a mixed-guard union upon contract expiration, without any need to demonstrate that there has been a loss of the union's majority support.

On June 9, 2016, in *Loomis Armored US, Inc.*, 364 NLRB No. 23 (2016), the NLRB revisited the issue and overruled *Wells Fargo*. In that case, the company had long-term relationships -- anywhere from 10 - 47 years -- with several IBT locals covering multiple units of security guards working throughout California. The Teamsters had been voluntarily recognized by Loomis at each of these locations. Recognition was withdrawn solely on the basis of the *Wells Fargo* Board's interpretation of Section 9(b)(3). In none of these units did the company assert that the union had lost majority support.

Noting criticism of *Wells Fargo* over the years both by certain members of the Board and in the courts, and emphasizing that Section 9(b)(3) does not speak to the termination of voluntarily created collective-bargaining relationships between employers and mixed-guard unions, the Board abandoned the rule adopted in *Wells Fargo* and held that a Section 9(a) relationship with a mixed-guard union in a bargaining unit of guards is subject to the same rules on withdrawal of recognition as apply to any other collective bargaining relationship. The NLRB found that "*Wells Fargo* created an unwarranted exception to the general rule that an employer, having voluntarily recognized a majority supported union, must continue to recognize and bargain with the union unless and until the union is shown to have actually lost majority support." 364 NLRB No. 23, slip op at 2.

The Board held that "[t]his narrower reading of Section 9(b)(3) . . . is more consistent with the relevant legislative history," adding that "[t]he fundamental purpose of the 9(b)(3) prohibition of Board certification of mixed-guard unions in guard units . . . is to permit employers to decide for themselves whether to recognize and bargain with such unions" and that "[t]he Board's issuance of a remedial order to bargain does no more than restore the status quo that the employer, not the Board, created." 364 NLRB No. 23, slip op. at 5-6.

However, recognizing that application of the new rule would be "manifestly unfair" to the company given its reliance on decades-old precedent, the Board declined to give its ruling retroactive effect in this or any other pending cases involving unilateral withdrawal of recognition from a mixed-guard union in a guards unit. Accordingly, the complaint was dismissed.

Member Miscimarra, dissenting, would adhere to the *Wells Fargo* rule as in his judgment Section 9(b)(3) is open to "several reasonable interpretations;" that the rule established by the Board more than 30 years ago reflects a "reasonable middle position between less persuasive interpretations, and is most consistent with the compromise that Congress struck when it restricted the representation of guards by mixed guard/non-guard unions;" and, lastly, that "no compelling reasons warrant reconsideration of *Wells Fargo*." 364 NLRB No. 23, slip op. at 8.

IV. *Adams & Associates, Inc.*, 363 NLRB No. 193 (2016) – Making the "Perfectly Clear" Successor Standard a Little Bit Clearer

On May 17, 2016, a unanimous panel consisting of Chairman Pearce and Members Hirozawa and McFerran, clarified the Board's "perfectly clear" successor standard, holding that when a successor employer expresses an intent to retain a sufficient number of the predecessor's employees to continue the union's majority status without making it clear that employment will be conditioned on acceptance of new terms, the employer is a "perfectly clear" successor that may not unilaterally set initial terms.

Adams & Associates ("A&A") successfully bid on a contract to operate a youth training center that was previously operated by Horizons Youth Services. Horizons had a collective bargaining relationship with the AFT; the CBA was set to expire in March 2014.

On February 13, 2014, an executive of A&A met with the training center's employees to discuss the transition and the hiring process. Among other things, the executive told the employees that they were "doing a really good job;" that the new employer "didn't want to rock the boat;" that he "wanted a smooth transition;" and that "aside from disciplinary issues, he was 99 percent sure that [they] would all have a job."

Between February 28 and March 10, 2014, A&A extended offers of employment and presented employment agreements specifying terms and conditions of employment that differed from the CBA. Ultimately, a majority of the staff hired by A&A were former Horizons employees who had been represented by AFT. Consistent with the A&A offer letters and employment agreements, the employees were hired under changed terms.

As in nearly all successorship cases, the Board's analysis began with *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). The Supreme Court in *Burns* held that a successor employer generally is not bound by the substantive terms of a collective bargaining agreement between the predecessor and a union but is, instead, free to set initial terms and conditions of employment unilaterally. The Court reasoned that the duty to bargain generally does not attach before the successor sets initial terms because it is not usually evident whether the union will retain majority status until after the successor has hired a full complement of employees. But, the Court also recognized that "there will be instances in which it is *perfectly clear* that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." *Id.* at 294-95 (emphasis added).

Several years later, in *Spruce Up Corp.*, 209 NLRB 194 (1974), enfd. per curiuam 529 F.2d 516 (4th Cir. 1975), the Board interpreted the "perfectly clear" caveat in *Burns* to be limited to circumstances where the successor employer has either "actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer . . . has failed to clearly announce its intent to establish a new set of

conditions prior to inviting former employees to accept employment." *Id*. at 195 (footnote omitted).

Twenty years after *Spruce Up,* in *Canteen Co.*, 317 NLRB 1052 (1995), enfd. 103 F.3d 1355 (7th Cir. 1997), the Board clarified that the "perfectly clear" exception applies, and a bargaining obligation attaches, when a successor expresses an intent to retain the predecessor's employees without making it clear that employment will be conditioned on acceptance of new terms. A subsequent announcement of new terms (or an intent to set new terms) will not erase the bargaining obligation that is triggered when a successor expresses an intent to retain the predecessor's employees but does not make clear that their employment is conditioned upon the acceptance of new terms. *See, e.g.*, *DuPont Dow Elastomers LLC*, 332 NLRB 1071 (2000). Thus, the Board clarified that to avoid "perfectly clear" status, a successor employer must clearly announce its intent to establish a new set of conditions *prior to* or *simultaneously with*, its expression of intent to retain the predecessor's employees.
Applying that standard to the facts in *Adams & Associates*, the Board concluded that A&A became a "perfectly clear" successor on February 13, 2014, when it announced to the Horizons' employees that they had "been doing a really good job;" that the successor "didn't want to rock the boat" but rather "wanted a smooth transition;" and, that "aside from disciplinary issues, he was 99 percent sure that [they] would all have a job." The Board found that given these statements, A&A expressed an intent to hire the employees and that in order to preserve its right to set initial terms, A&A was required to clearly announce its intent to establish new conditions of employment on or before February 13, 2014. Because it did not do so, "perfectly clear" successor status attached and A&A's unilateral implementation of new terms and conditions violated Section 8(a)(5).

V. *Whole Foods Market, Inc.*, 363 NLRB No. 87 (2015) - NLRB Holds that "No-Recording" Rule Is Unlawful

Whole Foods Market, Inc. 363 NLRB No. 87 (2015), the NLRB recently held that WFM's rules prohibiting recording in the workplace, without prior management approval, violated Section 8(a)(1) of the NLRA.

The rules at issue were contained in WFM's General Information Guide (GIG), which is applicable to all employees and is distributed company-wide. The first rule appeared in a section entitled "Team Meetings" and states:

> In order to encourage open communication, free exchange of ideas, spontaneous and honest dialogue and an atmosphere of trust, Whole Foods Market has adopted the following policy concerning the audio and/or video recording of company meetings:

> It is a violation of Whole Foods Market policy to record conversations, phone calls, images or company meetings with any recording device (including but not limited to a cellular telephone, PDA, digital recording device, digital camera, etc.) unless prior approval is received from your Store/Facility Team Leader, Regional President, Global Vice President or a member of the Executive Team, or unless all parties to the conversation give their consent. Violation of this policy will result in corrective action, up to and including discharge.
>
> Please note that while many Whole Foods Market locations may have security or surveillance cameras operating in areas where company meetings or conversations are taking place, their purposes are to protect our customers and Team Members and to discourage theft and robbery. 363 NLRB No. 87, slip op. at 1.

The second rule was in a section of the GIG headed "Team Member Recordings:"

> It is a violation of Whole Foods Market policy to record conversations with a tape recorder or other recording device (including a cell phone or any electronic device) unless prior approval is received from your store or facility leadership. The purpose of this policy is to eliminate a chilling effect on the expression of views that may exist when one person is concerned that his or her conversation with another is being secretly recorded. This concern can inhibit spontaneous and honest dialogue especially when sensitive or confidential matters are being discussed. *Id.*

WFM defended the rules on the ground that to permit recording at its town hall and store meetings would "chill the dynamic," *i.e.*, it would make employees reluctant to voice their opinions about store management, which would conflict with WFM's "speak up and speak out" culture and be disruptive to "team harmony." WFM also argued that recording would compromise its internal appeal procedure for employment termination decisions. 363 NLRB No. 87, slip op. at 2.

An administrative law judge agreed with WFM and found that the no-recording rules challenged by the General Counsel "cannot reasonably be read as encompassing Section 7 activity," relying in part on WFM's explanation of their purpose, *i.e.*, "the elimination of a chilling effect on the expression of views." Accordingly, he concluded that maintenance of the rules was not an unfair labor practice and recommended that the complaint be dismissed. 363 NLRB No. 87, slip op. at 2.

Contrary to the ALJ, the Board found that the rules in question would chill protected activity, noting that "[p]hotography and audio or video recording in the workplace, as well as on the posting of photographs and recordings on social media, are protected by Section 7 if employees are acting in concert for their mutual aid and protection and no overriding employer interest is present." 363 NLRB No. 87, slip op. at 3. Elaborating, the Board said: "Such protected conduct may include, for example, recording images of protected picketing, documenting unsafe workplace equipment or hazardous working conditions, documenting and publicizing discussions about terms and conditions of employment, documenting inconsistent application of employer rules, or recording evidence to preserve it for later use in administrative or judicial forums in employment-related actions." *Id.*

In finding an unfair labor practice, the Board observed that "[t]he rules at issue here unqualifiedly prohibit all workplace recording," pointing to the testimony by a WFM witness that the no-recording rules apply "regardless of the activity that the employee is engaged in, whether protected concerted activity or not." 363 NLRB No. 87, slip op. at 4. The Board distinguished *Flagstaff Medical Center*, 357 NLRB No. 65 (2011), *enf'd in relevant part*, 715 F.3d 928 (D.C. Cir. 2013), relied on by WFM. In that case, the NLRB had held that a policy prohibiting use of cameras in a hospital setting did not violate the Act, explaining that "in light of the weighty patient privacy interests and the employer's well-understood HIPAA obligation to prevent the wrongful disclosure of individually identifiable health information, employees would reasonably interpret the rule as a legitimate means of protecting those interests, not as a prohibition of protected activity." 363 NLRB No. 87, slip op. at 4. Turning next to WFM's business justification, the Board found that it was "not without merit," but noted that "it is based on relatively narrow circumstances, such as annual town hall meetings and termination-appeal peer panels, and is not nearly as persuasive or compelling as the patient privacy interest in *Flagstaff*; it thus fails to justify the rules' unqualified restrictions on Section 7 activity." 363 NLRB No. 87, slip op. at 5.

Member Miscimarra dissented. Agreeing with the ALJ's reasoning as well as WFM's argument that the no-recording rules were intended to encourage employee communications, including those protected by Section 7, he would have dismissed the complaint. In his opinion, "employees would reasonably read the rules to *safeguard* their right to engage in union-related and other protected conversations," pointing to their statement of purpose, *i.e.*, "to encourage open communication, free exchange of ideas, spontaneous and honest dialogue and an atmosphere of trust." 363 NLRB No. 87, slip op. at 7.

A petition for review of the Board's order is pending in the Court of Appeals for the Second Circuit.

VI. *Columbia University*, 364 NLRB No. 90 (August 23, 2016) – Once Again, NLRB Holds That Graduate Student Assistants Are Employees . . . *and* Students

A Board majority consisting of Chairman Pearce and Members Hirozawa and McFerran held that graduate student assistants who have a common law employment relationship with their university are statutory employees under the National Labor Relations Act. The Board overruled *Brown University*, 342 NLRB 483 (2004), and returned to its holding in *New York University*, 332 NLRB 1205 (2000). The Board majority determined that the *Brown University* Board erred as a matter of statutory interpretation and, in doing so, deprived an entire category of workers the protections of the Act without sufficient justification in either the language of the statute or its underlying purposes. The majority found that employee status is not precluded by the existence of an academic relationship as well.

Overview of Precedent

The Board first addressed the status of graduate assistants in 2000, when it decided *NYU*. In that case, the Board found that "ample evidence exists . . . that graduate assistants plainly and literally fall within the meaning of 'employee' as defined in Section 2(3)." 332 NLRB at 1206. The *NYU* Board based its holding on the breadth of the statutory definition of "employee," the lack of any explicit statutory exclusion for graduate assistants, and the facts of that case establishing that the assistants were compensated by the university for services they performed under the university's direction and control. The *NYU* Board relied on its recent decision in *Boston Medical Center*, 330 NLRB 152 (1999), holding that house staff at a teaching hospital are statutory employees entitled to engage in collective bargaining. Specifically, the Board found that *Boston Medical Center* supported its policy determination that collective bargaining is feasible in the university context.

Four years later, in a sharply-divided decision, the Board overruled *NYU* in *Brown University*. The *Brown University* majority rejected *NYU*'s reliance on the existence of a common-law employment relationship and found that even if such a relationship existed, statutory coverage should attach only if the relationship between the graduate student and the university is *primarily* economic in character. Finding that graduate assistants were primarily students, the *Brown University* Board determined they were excluded from statutory coverage. Additionally, the *Brown University* majority cited, as policy reasons for its holding, its belief that collective bargaining is not well suited to educational decision making and that a change in emphasis from educational to economic concerns would be "detrimental to both labor and educational policies." 342 NLRB at 489 (citations omitted).

Analysis

The Board majority in *Columbia University* considered both the statutory language and the Act's underlying policies in reaching its conclusion that when student assistants have an employment relationship with their university under the common law test, this relationship is sufficient to establish that the student assistant is a Section 2(3) employee for all statutory purposes.

The Statutory Language

The majority opinion notes that Section 2(3) of the Act defines "employee" to "include any employee" and that the Supreme Court has observed that the "breadth" of that provision is "striking." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984). Further, while Section 2(3) lists certain exceptions to its definition of "employee," none is applicable to students generally or student assistants in particular. Because the Act does not offer a definition of the term "employee" itself, the Board and the courts must infer that Congress intended to incorporate the common-law meaning. The Board majority determined that the "fundamental error" of the *Brown University* decision was to look not only at whether an employment relationship exists, but also whether some other relationship between the employee and employer is the primary one. This standard, according to the majority, is not derived from the text of Section 2(3) and is not supported by the fundamental policies of the act. Rather, the majority asserts, where an employment relationship exists, there should be compelling reasons before the Board excludes a category of workers from the Act's coverage.

The Policy Considerations

The Act makes clear that federal labor policy is to "encourage[e] the practice and procedure of collective bargaining," and to protect workers "full freedom" to choose collective bargaining representation. 29 U.S.C. 151. The Board majority concluded that "*[p]ermitting* student assistants to choose whether they wish to engage in collective bargaining – not prohibiting it – would further the Act's policies." 364 NLRB No. 90, p. 7 (emphasis in original). The majority further asserted that the *Brown University* Board "failed to demonstrate that collective bargaining between a university and its employed graduate students cannot coexist successfully with student-teacher relationships, with the educational process, and with the traditional goals of higher education." *Id.* Rather, the majority points to both the analogous experiences of public universities with collective bargaining by students and private universities with faculty bargaining as evidence that unions and universities can successfully navigate collective bargaining without harming the goals of higher education.

In applying its holding to the facts of the case, the Board majority concluded that all petitioned-for student assistants are statutory employees and that the unit sought is appropriate for collective bargaining. The case was remanded to the Regional Director for determination of unresolved issues of voter eligibility.

Member Miscimarra dissented, arguing that Congress did not intend for collective bargaining to be the means by which students attempt to exercise control over the expenses associated with higher education. In his opinion, students' service as teaching or research assistants is "an incidental aspect of their education." Accordingly, he is also of the view that the intrusion of collective bargaining into the academic setting -- including the potential for the use of economic weapons -- fundamentally changes the relationship between students and their academic institutions, and will have a negative impact on the "far more important" goal of completing degree requirements on time.

VII. DOL "Persuader Rule" – Update on Status of Pending Litigation

Brief Summary of the Persuader Rule

In March 2016, the U.S. Department of Labor ("DOL") published its final rule addressing the "advice exemption" to the so-called "Persuader Rule" (the "Rule") under the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"). The Rule, which was to have gone into effect on July 1, 2016, narrows the advice exemption by changing the definitions of reportable "persuader activity" and non-reportable "advice," and by modifying the reporting requirements in connection with "persuader activity," revising the forms filed by employers (Form LM-10) and labor-relations consultants (Form LM-20).

The effect of these changes is that, for the first time, the Rule imposes upon employers and labor relations consultants, including attorneys, the obligation to file public reports with DOL disclosing any advice that even "indirectly persuades" employees regarding their exercise of rights to engage in organizational activity and/or collective bargaining. The existing Rule only requires such reports when a consultant makes *direct* contact with employees. As reformulated by the DOL, the Rule would apply not only to persuader communications during organizing and bargaining, but also to certain routine employment-related counseling, *e.g.*, drafting of employer policies if their purpose is to directly or indirectly persuade regarding the exercise of rights under Section 7 of the NLRA.

Status of Legal Challenges to the Rule

Shortly after the Rule's publication, several employer associations and other entities filed three lawsuits against DOL, seeking to enjoin implementation of the Rule. These actions were filed in the District of Minnesota, the Northern District of Texas, and the Eastern District of Arkansas. Each lawsuit challenges the Rule in similar ways, arguing that it (1) exceeds the scope of DOL's authority under the LMRDA; (2) is arbitrary and capricious; (3) conflicts with existing state rules governing attorneys' professional responsibility; (4) violates free speech and association rights protected by the First Amendment; (5) is void for vagueness; and, (6) violates the Regulatory Flexibility Act. The cases have proceeded on separate tracks and are at various stages of litigation. Notably, a nationwide preliminary injunction was issued in the Texas case enjoining implementation and enforcement of the new Rule.

In the Minnesota case, on June 22, 2106, the court found that plaintiffs had shown a likelihood of success on the merits, specifically that the new Rule requires the reporting of certain activities that are exempt from disclosure under the LMRDA, but nevertheless refused to issue a preliminary injunction enjoining implementation of the Rule because the court did not believe plaintiffs had established they were likely to suffer irreparable harm in the absence of injunctive relief. In refusing to grant an injunction, the court stated its preference to allow the Rule to take effect and leave parties who wish to challenge the Rule to raise their arguments in opposition to an actual enforcement action brought by DOL. Thus, the case has proceeded on the merits, with summary judgment motions due beginning on September 16, 2016.

In the Texas case, the court issued a nationwide preliminary injunction on June 27, 2016, halting implementation of the new Rule just prior to its effective date. The court found that plaintiffs had demonstrated a likelihood of success on the merits, noting, among other things, that the Rule exceeded DOL's authority under the LMRDA by effectively eliminating the advice exemption. The court also found the Rule to be arbitrary, capricious and an abuse of discretion, inasmuch as it reversed DOL's longstanding position of over 50 years, without conducting any studies or independent analyses supporting such action. Moreover, the court found that the Rule would cause irreparable harm by, among other things, reducing employer access to full, complete, un-conflicted legal advice, and burdening First Amendment rights.

The injunction prevented DOL from implementing and enforcing the new Rule and relieved employers and consultants who engage only in indirect persuader activity from the reporting obligations that the revised advice exemption would have required. In light of the nationwide preliminary injunction, DOL has indicated that the new Forms LM-10 and LM-20 will not go into effect until further notice from DOL and that employers and consultants should continue to complete the preexisting versions of those forms. While the case was scheduled to proceed on the merits, with the court recently revising its scheduling order and requiring that amended pleadings be filed by November 15, 2016 and summary judgment motions be filed in July 2017, DOL filed a notice of interlocutory appeal on August 25, 2016, seeking review in the Fifth Circuit of the court's decision granting the nationwide injunction.

In the Arkansas case, the court has yet to rule on plaintiffs' motion for a preliminary injunction and probably will not do so given the nationwide preliminary injunction issued in the Texas case. Summary judgment motions and *amicus* briefs in support of such motions were filed at the end of August 2016. Accordingly, the first final ruling on the validity of the new Rule may be issued in the Arkansas case, despite the fact that the court has not ruled on the motion for an injunction.

WORKSHOP B

LABOR RELATIONS ROUND-UP

Submited By :

RICHARD F. GRIFFIN, JR., ESQ.
National Labor Relations Board
Washington, DC

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 16-03 May 09, 2016

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Richard F. Griffin, Jr., General Counsel /s/

SUBJECT: Seeking Board Reconsideration of the *Levitz* Framework

This memorandum sets forth the new procedure that Regions should follow after making a determination to issue complaint alleging that an employer has violated Section 8(a)(5) by unlawfully withdrawing recognition from an incumbent union absent objective evidence that the union actually had lost majority support. This procedure includes pleading an alternative theory of violation in the complaint and incorporating the attached model argument into the briefs submitted to administrative law judges and the Board.

Extant Board law permits employers to unilaterally withdraw recognition from an incumbent union based on objective evidence that the union has actually lost majority support. *See Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 717 (2001). In *Levitz*, the Board rejected the General Counsel's position that employers should not be permitted to withdraw recognition absent the results of Board elections. Rather, it adopted a framework that increased the showing required of employers to unilaterally withdraw recognition and decreased the showing required for obtaining RM elections, anticipating that employers would be likely to withdraw recognition only if the evidence before them "clearly indicate[d]" that a union had "lost majority support." *Id.* at 726. However, the Board noted that it would revisit this framework if experience showed that it did not effectuate the purposes of the Act. *Id*. at 726.

Experience has shown that the option left available under the *Levitz* framework for employers to unilaterally withdraw recognition has proven problematic. It has created peril for employers in determining whether there has been an actual loss of majority support for the incumbent union, has resulted in years of litigation over difficult evidentiary issues, and in a number of cases has delayed employees' ability to effectuate their choice as to representation. As a result, *Levitz* has failed to serve two important functions of federal labor policy noted in that decision, specifically, promoting stable bargaining relationships and employee free choice. *Id.* at 723-26.

In order to best effectuate these central policies of the Act, Regions should request that the Board adopt a rule that, absent an agreement between the parties, an employer may lawfully withdraw recognition from a Section 9(a) representative based only on the results of an RM or RD election. This proposed rule will benefit employers, employees, and unions alike by fairly

and efficiently determining whether a majority representative has lost majority support. Moreover, the proposed rule is even more appropriate now because the Board's revised representation case rules have streamlined the election process.

Thus, in order to place this issue before the Board, in cases where a Region has made a determination to issue complaint alleging that an employer has violated Section 8(a)(5) by unilaterally withdrawing recognition under extant law, it should also plead, in the alternative, that the employer violated Section 8(a)(5) by unilaterally withdrawing recognition absent the results of a Board election. Regions should also include in their briefs to administrative law judges and to the Board the model brief section attached below.

If a Region has any questions or concerns regarding this new policy, it should contact the Division of Advice.

Attachment

Release to the Public

MEMORANDUM GC 16-03

[I.] The Board Should Require that Employers Utilize Board Representation Procedures to Fairly and Efficiently Determine Whether their Employees' Exclusive Bargaining Representative Has Lost Majority Support.

In *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 725-26 (2001), the Board stated that it would revisit the framework it established for when employers may unilaterally withdraw recognition from their employees' exclusive bargaining representative if experience showed that it did not effectuate the purposes of the Act. Experience has shown that the *Levitz* framework has created peril for employers in determining whether there has been an actual loss of majority, has resulted in years of litigation over difficult evidentiary issues, and in a number of cases has delayed employees' ability to effectuate their choice as to representation.

Thus, the General Counsel urges the Board to hold that, absent an agreement between the parties, an employer may lawfully withdraw recognition from its employees' Section 9(a) representative based only on the results of an RM or RD election.[1] Such a rule would benefit employers, employees, and unions alike by fairly and efficiently determining whether a majority representative has lost majority support. It will also better effectuate the Act's goals of protecting employee choice and fostering industrial stability, and is even more appropriate now because the Board's revised representation case rules have streamlined the election process.

A. The Board in *Levitz* sought to create a framework to encourage employer use of RM elections and left open future consideration of the General Counsel's proposal to require exclusive use of RM elections to resolve questions of majority support.

In *Levitz,* the then-General Counsel proposed that employers should be prohibited from unilaterally withdrawing recognition. *Id.* at 719, 725. The Board acknowledged that its early case law supported the General Counsel's view. *Id.* at 721 & n.25. Specifically, it noted that in

[1] The General Counsel does not seek any change to the holding in *Levitz* that employers can obtain RM elections by demonstrating a good-faith reasonable uncertainty as to a representative's continuing majority status. *Levitz*, 333 NLRB at 717.

United States Gypsum Co., 90 NLRB 964, 966 (1950), decided shortly after Congress amended the Act to provide for employer-filed petitions, the Board held that it was bad faith for an employer to unilaterally withdraw recognition rather than file a RM petition, which it described as "the method whereby an employer who, in good faith, doubts the continuing status of his employees' bargaining representative may resolve such doubt." *Levitz*, 333 NLRB at 721. The *Levitz* Board also acknowledged that the General Counsel's proposed rule might minimize litigation and be more protective of employee choice. *Id.* at 725. In this context, the Board noted that elections are the preferred means of testing employee support, and that the proposed rule would be more consistent with *Linden Lumber Division v. NLRB*, 419 U.S. 301, 309-10 (1974), which allows an employer to insist that a union claiming majority support prove it through an election. *Levitz*, 333 NLRB at 725.

However, the Board rejected the General Counsel's proposed rule and instead adopted a rule that it believed would effectively encourage employer use of RM petitions by elevating the evidentiary requirement for an employer's unilateral withdrawal, while lowering the standard for an employer's filing of an RM petition. *Id.* at 717. The Board then concluded that under its new framework, employers would be likely to unilaterally withdraw recognition only if the evidence before them "clearly indicate[d]" that a union had "lost majority support." *Id.* at 725. It stated that if future experience proved otherwise, it could revisit the issue. *Id.* at 726.

B. Experience under *Levitz* has failed to result in employers acting only where the evidence before them "clearly indicates" a loss of majority support and has caused protracted litigation undermining the core purposes of the Act.

In the 15 years since *Levitz*, the option left available under the *Levitz* framework for employers to unilaterally withdraw recognition has proven problematic. In a number of cases involving unilateral withdrawal, employers have acted based on evidence that did not "clearly

indicate[]" a loss of majority, causing protracted litigation over the reliability of that evidence. This unnecessary litigation has resulted in significant liability for employers and substantial interference with employee free choice. It also encourages the disclosure and litigation of individual employees' representational preferences, which can interfere with employees' Section 7 rights.

A fundamental flaw with the *Levitz* framework is that it fails to account for the difficulty of ascertaining whether evidence relied on by an employer actually indicates a loss of majority support, creating significant liability even for employers acting in good faith. For example, employers have unlawfully withdrawn recognition based on ambiguously worded disaffection petitions that did not clearly indicate that the signatory employees no longer desired union representation. *See, e.g., Anderson Lumber Co.,* 360 NLRB No. 67, slip op. at 1 n.1, 6-7 (2014) (written statements submitted by four employees that they did not want to be union members did not show they no longer desired union representation), *enforced sub nom., Pacific Coast Supply, LLC v. NLRB*, 801 F.3d 321 (D.C. Cir. 2015). Employers have also unlawfully withdrawn recognition where they relied on untimely disaffection petitions. *Latino Express,* 360 NLRB No. 112, slip op. at 1 n.3, 13-15 (2014) (rejecting petition signed by employees during the certification year, when the union has an irrebutable presumption of majority status). In other cases, employers mistakenly relied on disaffection petitions that were invalid because they contained signatures that employees had revoked. *See, e.g., Scoma's of Sausalito, LLC,* 362 NLRB No. 174, slip op. at 3 (Aug. 21, 2015) (employees revoked signatures on disaffection petition before employer withdrew recognition). Additionally, questions have arisen regarding unit composition, creating confusion as to how many, and which employees would actually constitute a majority. *See, e.g., Vanguard Fire & Security Systems*, 345 NLRB 1016, 1018

(2005) (finding employer unlawfully withdrew recognition where signatures on disaffection petition were of non-unit employees), *enforced*, 458 F.3d 952 (6th Cir. 2006). Moreover, employers have unlawfully withdrawn recognition based on facially valid disaffection petitions that did not actually constitute objective evidence of a loss of majority support because they were tainted by unfair labor practices. *See, e.g., Mesker Door, Inc.*, 357 NLRB 591, 596-98 (2011) (concluding that unlawful threats by employer's attorney and plant manager had a causal relationship with employees' disaffection petition and thus the employer's withdrawal of recognition based on it was unlawful).

Protracted litigation over these evidentiary issues also has interfered with the right of employees to choose a bargaining representative. It may take years of litigation before employees deprived of their chosen union obtain a Board order restoring the union's representational role, which completely undermines their Section 7 rights in the interim. *See, e.g., id.* (ordering employer to bargain with union five years after employer's unlawful withdrawal of recognition). Because a restorative bargaining order that operates prospectively fails to compensate employees for their lost representation, employees are irreparably deprived of what benefits their union could have obtained for them during the course of the employer's unlawful conduct. *See Frankl v. HTH Corp.*, 650 F.3d 1334, 1363 (9th Cir. 2011) (affirming Section 10(j) bargaining order in part because the Board's inability to order retroactive relief for a failure to bargain, partly due to an unlawful withdrawal of recognition, means employees will never be compensated for "the loss of economic benefits that might have been obtained had the employer bargained in good faith").

At the same time, such litigation under *Levitz* can also delay the process for employees who want to reject representation. For example, an unfair labor practice charge filed by an

incumbent union can create the "collateral effect of precluding employees from filing a decertification election petition with the Board." *Scoma's of Sausalito, LLC,* 362 NLRB No. 174, slip op at 1 n.2 (Member Johnson, concurring). *See also Wurtland Nursing & Rehabilitation Center,* 351 NLRB 817, 820-21 (2007) (Member Walsh, dissenting) (noting that if the employer had not unlawfully withdrawn recognition, the Board could have held an RM or RD election to determine the unit employees' true sentiments).

Finally, evidentiary disputes about the reliability of employee petitions have resulted in the disclosure of individual employees' union sympathies and litigation of their subjective motivations for signing a petition. *See, e.g., Scoma's of Sausalito,* 362 NLRB No. 174, slip op. at 4-5 (reviewing multiple petitions and employee testimony to determine whether employees' representative had majority support at the time of the withdrawal of recognition); *Johnson Controls, Inc.*, Case 10-CA-151843, JD-14-16 (NLRB Div. of Judges Feb. 16, 2016) (same). Such open questioning of employees regarding their union support can chill the future exercise of Section 7 rights. *See National Telephone Directory Corp.,* 319 NLRB 420, 421 (1995) (confidentiality interests of employees have long been a concern to the Board and "it is entirely plausible that employees would be 'chilled' when asked to sign a union card if they knew the employer could see who signed") (internal citations omitted). The courts have also noted that such inquiries are unreliable because of the pressure that employers may exert over their employees to give favorable testimony. *See Pacific Coast Supply,* 801 F.3d at 332 n.8; *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 608 (1969).

In short, the experience under *Levitz* has not yielded the results that the Board anticipated and intended. Consistent with the General Counsel's original recommendation in *Levitz,* the Board should hold that, absent an agreement between the parties, an employer may lawfully

withdraw recognition from its employees' Section 9(a) representative based only on the results of an RM or RD election.

C. A rule precluding employers from withdrawing recognition absent the results of an RM or RD election will best effectuate the policies of the Act and better accomplish what the Board set out to do in *Levitz*.

It is within the Board's expertise and discretion to determine how a withdrawal of recognition can be accomplished. *See Linden Lumber,* 419 U.S at 309-10 (relying on Board's expertise in affirming rule that union must petition for an election after an employer has refused to recognize it based on a card majority); *Brooks v. NLRB,* 348 U.S. 96, 104 (1954) (noting that matters "appropriately determined" by the Board include when employers can ask for an election or the grounds upon which they can refuse to bargain). The Board should exercise its discretion and adopt the rule proposed above to best effectuate the policies of the Act.

The proposed rule is more consistent with the principle that "Board elections are the preferred means of testing employees' support." *Levitz,* 333 NLRB at 725. It is also more consistent with the Act's statutory framework and the Board's early interpretation of the Act's provision providing for employer-filed petitions. As the Board held in *United States Gypsum Co.* and referenced in *Levitz,* RM petitions are "the method" provided in the Act by which employers may test a representative's majority support. *Levitz,* 333 NLRB. at 721. Moreover, the interests of both employers and employees would be best served by processing this issue through representation cases, which are resolved more quickly than unfair labor practice cases.[2] Indeed, the Board's new representation case rules, which have revised the Board's blocking charge procedures, have made elections an even more efficient manner of resolving

[2] In FY 2015, 87.1% of representation cases were resolved within 100 days while 80.4% of unfair labor practices were resolved within 365 days. *See* National Labor Relations Board Performance and Accountability Report (2015) at 25-26.

representation questions. In light of these considerations, requiring an RM or RD election before a withdrawal of recognition will best serve the purposes of protecting employee free choice and industrial stability, which are the statutory policies the Board sought to protect in *Levitz*.

In the past, the Board's blocking charge procedure had been the major concern regarding the use of RM elections as a prerequisite for withdrawing recognition because of the potential delay in proceeding to an election. *See, e.g., Levitz*, 333 NLRB at 732 (Member Hurtgen, concurring) ("Faced with an RM petition, unions can file charges to forestall or delay the election."); *B.A. Mullican Lumber & Mfg. Co.*, 350 NLRB 493, 495 (2007) (Chairman Battista, concurring) (stating that "an RM petition leading to an election is superior to an employer's unilateral withdrawal of recognition," but expressing concern about the potential delay caused by union-filed blocking charges), *enforcement denied*, 535 F.3d 271 (4th Cir. 2008). However, the Board's new election rules should allay this concern. For instance, the rules impose heightened evidentiary requirements; a party must now affirmatively request that its charge block an election petition, file a written offer of proof in support of its charge, include the names and anticipated testimony of its witnesses, and promptly make its witnesses available. *See* NLRB Rules and Regulations Sec. 103.20 (effective April 14, 2015). If the Region determines that the proffered evidence is insufficient to establish conduct interfering with employee free choice, it will continue to process the petition and conduct the election. *Id.*

Indeed, initial data shows that this change has significantly reduced the number of blocking charges. Between April 2014 and April 2015, in the year before the new election rules went into effect, unfair labor practice charges blocked 194 of 2,792 election petitions.[3] Between

[3] *See* NLRB News & Outreach, Fact Sheets, Annual Review of Revised R-Case Rules (Apr. 20, 2016), https://www.nlrb.gov/sites/default/files/attachments/news-story/node-4680/R-Case%20Annual%20Review.pdf.

April 2015 and April 2016, in the year after the new election rules went into effect, charges blocked only 107 of 2,674 petitions, a decrease of just over 40%.[4] This data shows that the more efficient election procedures have largely resolved prior concerns regarding blocking charges.

Beyond the foregoing substantive and procedural reasons justifying the proposed rule, its adoption will not interfere with other methods of dissolving an existing bargaining relationship that do not involve unilateral action by an employer. Employees will still be able to exercise their choice to not be represented by their current union by filing an RD petition, and they will be able to do so without the threat of an employer's unlawful withdrawal blocking an RD election. In addition, the proposed rule will permit a voluntary agreement between the employees' bargaining representative and their employer for withdrawal, whether this involves a union's disclaimer of interest or a private agreement between the parties to resolve the question. Finally, if a bargaining representative, through its own egregious unfair labor practices creates an atmosphere of employee coercion that renders a fair RM election improbable, the Board could permit a unilateral withdrawal if an employer provided objective evidence of an actual loss of majority support.[5]

[4] *Id.* In addition, since the implementation of the Board's new election rules, RM petitions have increased from 49 in each of FY 2013 and FY 2014 to 61 in FY 2015, demonstrating increased employer confidence in the RM process. *See Employer-Filed Petitions-RM*, NLRB, https://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections/employer-filed-petitions-rm (last visited May 3, 2016).

[5] *Cf. Union Nacional de Trabajadores (Carborundum Co.)*, 219 NLRB 862, 863-64 (1975) (revoking union's certification based on its violent and threatening conduct and extensive record of similar aggravated misconduct in other recent cases), *enforced on other grounds*, 540 F.2d 1, 12-13 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977); *Laura Modes Co.*, 144 NLRB 1592, 1596 (1963) (refusing to grant union bargaining order remedy based on card majority where union created atmosphere of coercion based on its agents physically assaulting employer officials who displayed unwillingness to recognize their employees' rights under the Act).

For the above reasons, the Board should exercise its discretion to modify its standard to hold that, absent an agreement between the parties, an employer may lawfully withdraw recognition from its employees' Section 9(a) representative based only on the results of an RM or RD election.

WORKSHOP C

WORKPLACE BULLYING: WHAT IT IS AND WHAT TO DO ABOUT IT

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WORKPLACE BULLYING: WHAT IT IS AND WHAT TO DO ABOUT IT

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Introduction

They aren't someone else's problem; the senior partner who goes through six assistants per year; the corporate executive who snarls at her subordinate in front of a client; the manager whose employees seem to always be in tears; the physician known for terrorizing nurses and staff members. You know these people, and if you are an employment attorney or a human resources professional, you know the toll they can take on an organization and its people. You also know that it is very difficult to effectively address some of these problem employees and leaders. Most workplace bullies are smart, successful and worthy adversaries; their contributions and talents are unmistakable, and they have a way of creating an enduring impression that without them, the firm, company or clinic would fall to pieces. For years, European, British, Australian and Canadian employers have been bound by statute to prevent workplace bullying in the same manner Title VII has prohibited harassment and discrimination in the US. The problem of non-discriminatory bullying, or bullying insufficient to meet the standards of Title VII however, has only been on the American agenda for a decade, despite the fact that by some estimates 35-50 percent of American workers have experienced bullying behavior in the workplace[1]. This article will summarize the problem, its effects, emerging legal approaches and effective employer strategies for dealing with the problem.

What is Workplace Bullying?

Workplace bullying is defined in many ways, depending upon the context. While the legal definition for purposes of pending legislation is being crafted to parallel Title VII descriptions of protected class harassment (see later section on legal issues), the most oft-cited working definition is:

"'…the repeated malicious, health-endangering mistreatment of one employee (the target) by one or more employees (the bully, bullies). The mistreatment is psychological violence, a mix of verbal and strategic assaults to prevent the target from performing well. It is illegitimate conduct in that it prevents work getting done. Thus an employer's legitimate business interests are not met.[2]" Recently, to provide greater guidance in separating true bullying from one-off or isolated bad behavior, Britain adopted definitional criterion stating that bullying occurs when the conduct is persistent and frequent, lasting more than six months and occurring at least once a week.[3] Persistence is the most damaging part of bullying, because it is corrosive, and wears down support systems, resistance, attempts to use positive

[11] Lutgen-Sandvik, P., Tracy, S. J., & Alberts, J. K. (in-press). Burned by bullying in the American workplace: Prevalence, perception, degree, and impact. *Journal of Management Studies*.

[2] Namie, Gary;The Bully at Work: What You Can Do to Stop the Hurt and Reclaim Your Dignity on the Job; Sourcebooks, Naperville, IL, 2003

[3] Montalbán, F. Manuel and Durán, Maria Auxiliadora, Mobbing: A Cultural Approach of Conflict in Work Organizations (June 1, 2005). IACM 18th Annual Conference. Available at SSRN: http://ssrn.com/abstract=735105

conflict management skills, and coping mechanisms. The hallmarks of bullying are persistence, targeting and abuse.

The Manifestation of Workplace Bullying:

Workplace bullying occurs in a wide variety of settings. It is particularly prevalent in the professions, where focusing on individual contributions and competitiveness are so integrated into the culture that individuals may become inured to conduct that would be considered unacceptable or abusive in other, more team-based or collaborative professional settings. The lawyer, physician, shareholder, financial advisor and highly compensated sales professional's stereotype of the brilliant-but-volatile producer is just a shade away from a bully who does harm to organizations and employees. Academia, too is a typical incubator of bullying, with the protective shields of academic freedom and tenure often creating a sense of entitlement, even when contrary to ethical or institutional codes. It must be emphasized, however that no workplace is immune from bullying and bullies can be found at every pay grade.

Bullies are effective because they tend to bully along power lines, and sustain productive relationships with superiors and clients. Because often their bullying behavior is subtle, hidden, or both, the extent of their abusiveness is only seen by those targeted, or tremulous witnesses who do what is necessary to avoid becoming a target. When the bullying is brought to the attention of superiors or human resources, it is not unusual for the complainant to be told the bully's "bark is worse than his/her bite" or "You just need to stand up to him/her," amplifying the helplessness of the complainant. Most targets believe that upper level leaders are aware of the bullying and don't intend to address it.

Gender: Bullies are both women and men. Women comprise 58 percent of those found to be bullying, while men represent 42 percent. Research also shows that when the targeted person is a woman, she is bullied by a woman in 63 percent of cases; when the target is male, he is bullied by a man in 62 percent of incidents. Overall, women comprise the majority of bullied people (80 percent)[4]. Female bullies[5] tend to use covert techniques, such as spreading rumors, providing conflicting instructions, making negative statements to others and being emotionally intrusive, while male bullies tend to use more overt strategies, such as yelling, public criticism, mocking and direct disparagement. As with any gender difference, however, these tendencies are just that. Bullying strategies vary from individual to individual, and there are certainly manipulative masculine bullies and feminine "screamers."

The Lone Bully: A solo bully is an individual who targets other individuals, usually subordinates. He or she is likely a serial bully with a history of treating others badly until they depart the organization, change jobs, or stand up to the bully effectively (a rarity). Covert bullies(more likely to be female) may create a tense, fearful or abusive environment for others by spreading misinformation, triangulating information, using nonverbal intimidation, making veiled threats and sharing information about the target inappropriately. More extroverted bullies may yell, publicly criticize, find fault constantly, publicly

[4] Namie, Gary; Workplace Bullying, Escalated Incivility; Ivey Business Journal Nov-Dec, 2003

[5] Given the increasing sensitivity to treating gender as a binary, it is appropriate here to note that these tendencies are attached to those who identify with more feminine or masculine gender roles, rather than being a strict construct.

humiliate and physically threaten targets. While the extroverted bully is easily spotted by observers (and may bring others around to group bullying, see below,) the introverted bully operates below the radar, causing the target to seem to be overreacting or overstating the problem.

Group Bullying, or "Mobbing:" Mob bullying happens when an individual is targeted by one or more people, and other people are enjoined or compelled to engage in similar conduct. Mob bullying often happens when an individual is identified as "expendable" by leaders, has been made a scapegoat for a problem in the workplace, or is in some manner different from those bullying him or her. The differences inciting the bully need not be related to a protected class[6]. Non protected class differences include size, social skills, socioeconomic status, political beliefs, personal style or attire, or general physical appearance. The group engaged in bullying may include those who feel their own social status and "insider" position is strengthened by joining in the dominant group's behavior, as well as those who recognize they must join the activity lest they be targeted next. The bullying behavior becomes virtually habitual, and may involve individuals from every level of the organization. At times, HR becomes an agent of the bullying, supporting those engaged in "hyper-supervision" of an employee, not questioning unsupported reprimands, or failing to question Performance Improvement Plans that are objectively unreasonable or disproportionate.

It should be noted that during periods of organizational instability or intentional change, bullying is often a tool used by emerging leadership to devalue previous leaders or to rid the organization of those representing the pre-change regime. Often the pretext for the bullying is prior failures or lack of adequate performance; however *the difference between managing performance and bullying is that the bullied employee will not be coached, counseled or even fired, but belittled, badgered, blamed and ostracized*, usually ending in their resignation.

Bullying Culture: A bullying culture (an organizational culture that is conducive to bullying) can be characterized by certain basic factors, such as internal competitiveness, strong hierarchy, a high level of dissatisfaction with work (i.e. low engagement), unearned privilege and low behavioral accountability. When this culture is made unstable by organizational change, restructuring, or changes in leadership, the propensity for bullying becomes even higher. If such instability causes layoffs, cutbacks or a reallocation of resources, the environment becomes even riper for bullying.[7] In bullying cultures, bullying flourishes over long periods of time and is subtly or overtly rewarded. The bullying becomes "invisible," in that the pattern of conduct is so much a part of the fabric of the organization that it does not raise any concerns, and those who cannot "handle it" are viewed as a poor "fit," rather than a target.

[6] This characterization takes note of the fact that bullying may include protected-class motives or targets for bullying that does not meet the standards of "tangible harm," or the pervasiveness or severity of "hostile work environment," yet still results in psychological and/or emotional damage.

[7] Salin, D. (2003). Ways of explaining workplace bullying: A review of enabling, motivating and precipitating structures and processes in the work environment. *Human Relations, 56* (10), 12131232.

What do Bullies Do?

Bullying can be identified as involving one or more of the following;

- Verbal Abuse
- Physical Intimidation
- Psychological or Emotional Abuse
- Work Sabotage or Performance Sabotage

A comprehensive list of bullying behaviors is impossible. It can include everything from "death by a thousand cuts" to reorganizing someone's department without their input, to sharing confidential information to standing over someone with fists clenched. While some behaviors, such as screaming, yelling, throwing objects, teasing and harassment are obvious, some are quite insidious, and can include:

- Constant criticism, both public and private and direct and through others - explanations and proof of achievement are ridiculed, overruled, dismissed or ignored
- Undermining, especially in front of others – raising doubts or concerns about someone's credibility, expertise or knowledge, causing others to doubt their competence.
- Omission from essential conversations, resulting in incomplete work or work that fails to incorporate group decisions.
- Isolation and exclusion from social interaction.
- Discipline for behavior others are not disciplined for.
- Subjection to unrealistic goals and deadlines which are unachievable or which are changed without notice or reason.
- Abandonment by one's own management, unable to have conversations or speak with their supervisors.
- Denial of resources, even when others have plentiful or an oversupply of same.
- Overwork or denial of meaningful work, sometimes given menial assignments instead.
- Being given direction only in terse, written form.
- Being the subject of complaints by others at the suggestion of management.
- Failure to provide a clear job description, or provide one that is exceedingly long or vague; the bully often deliberately makes the person's role unclear
- Invitations to "informal" meetings which turn out to be harangues or administration of discipline.
- Setting the target up for discipline by making false reports.

Bullying can make any employee look like a bad employee. For those attempting to unravel bullying situations, it can be difficult to determine whether or not the behavior being complained of is merely an overstated part of a legitimate attempt to manage performance. The key is that the workplace bully treats his or her targets as incompetent, lazy, ineffective or weak, but *offers no legitimate manner for the employee to ever be viewed as a "good" employee.* Bullies will often suggest that they have done everything they can to help the struggling employee; however this pretense will often crumble if they

are pressed to provide specifics details about the manner of such help, such as coaching, training, and mentoring or other positive interventions. Targets will report only criticism, humiliating comments to others, condescension and being further set up to fail.

The Loud and Quiet Bullies

While most people will agree that yelling, screaming and name-calling are problematic, and finding witnesses to such conduct is not hard, we often stereotype bullies as being "loud." Perhaps more pernicious, and definitely more difficult to investigate is the "quiet" bully. Usually a serial bully, quiet bullies target one person at a time for intensive psychological abuse. This might include falsifying information to make the target look bad, encouraging others to complain about the target, or undermining the target by "damning with faint praise." Generally, quiet bullies are quite adept at "managing up," or impressing their own superiors, rendering the complainant to be dismissed as a poor employee. These bullies are difficult to "catch" without speaking to their prior targets, usually former employees. Most importantly, it is critical to recognize that the destabilizing effect of quiet bullying often renders the target to be viewed as mentally or socially disordered, creating the impression that the bully him/herself is the victim.

The Effects of Workplace Bullying

The Individual: Recent research on bullying suggests that the psychiatric diagnosis of Post-Traumatic Stress Disorder (PTSD), the complex of psychological injury resulting from a traumatic event, will hold with many targets of bullying. PTSD focuses on major traumas, rather than the cumulative trauma of workplace bullying. To distinguish the injury resulting from many small events that are not in themselves life threatening, practitioners may refer to this as "Complex Post Traumatic Stress Disorder," or Complex PTSD. Interestingly, some newer research suggests that the most traumatic part of workplace bullying may not be the conduct itself, but the sense of being in "captivity," or unable to escape the situation over a prolonged period of time. [8] It is not surprising, then, that coworkers of bullies may demonstrate the same syndrome, albeit a milder version.

PTSD symptoms include hyper vigilance, fatigue, persistent anger, fearfulness, fragility, numbness, forgetfulness, hypersensitivity and somatic symptoms such as loss of sleep and heart palpitations. British research suggests targets of bullying use far more sick leave than average workers and are more likely to engage in dysfunctional use of licit or illicit chemicals[9].

The most pernicious effect, however, is that it takes very little time for a bullied employee to begin to engage in conduct that escalates and appears to give legitimacy to the bullying; they engage in avoidance behaviors such as absenteeism, defensive behaviors such as aggression or hostility or self-preservation behaviors such as withdrawal. Increasingly, they may become emotionally volatile or demonstrate trait anger, and as such, alienate any peers or superiors who might be otherwise

[8] Teherani, Noreen;Workplace Trauma: Concepts, Assessments and Interventions, Brunner Routledge, NY 2004.
[9] Hoel, H.,Sparks, K and Cooper, C; *The Cost of Violence/Stress at Work and the Benefits of a Violence/Stress Free Work Environment* Geneva, International Labor Organization, 2001

sympathetic. This spiral of self-sabotage quickly causes the target to face skepticism about their claims and shield the bullier from adequate scrutiny. Further, it renders the target a "bad" employee, frequently resulting in job loss. The despair over job loss and the challenges of finding a new job in traumatized state can lead to self- destructive behaviors and suicide.

The Organization: Bullying behavior in the workplace may be isolated or widespread, and as such, the impact on the workplace varies. Certainly, given the emotional and psychological injury to the target, declining productivity, loss of morale and increased absenteeism are logical consequences of bullying. Interestingly, it appears that witnesses to bullying may, in the short term, increase productivity in order to evade being bullied themselves. Nevertheless, the more widespread the bullying, the greater the cost to the organization based on direct harm to individuals.

On a more functional level, bullying by managers or leaders in the corporation creates a climate of fearfulness and distrust which stifles creativity, innovation, risk taking and teamwork. The autocratic bully in a leadership role will find his or her subordinates compliant but short on initiative and highly risk averse. To the extent this is precisely what the bullying leader wishes, this may seem to be a perfect match of the hearty and the timid, but bullying leaders often set up their bullying opportunities by railing against those subordinates who cannot "thinking for themselves." As such, business can be paralyzed by individuals walking on eggshells and waiting for the next outburst.

Bullying that has been permitted to flourish in organizations can also "leak," resulting in clients or customers becoming unhappy with the business. As a steady stream of employees departs the bullying environment, organizations get a reputation as a "tough place to work, "affecting recruitment and hiring.

Preventing Workplace Bullying

Anti-Bullying Policies: Policies for the workplace can take the form of a specific anti-bullying policy or the promulgation of a general non-harassment or "Respectful Workplace Policy." Proponents of a specific anti-bullying policy argue the approach supports a specific discussion of workplace bullying with employees and prompts subject-specific training and education on the subject, rather than simply encouraging people to be civil.

The importance of a policy protecting people from hostility and intimidation that is NOT protected class based is important not only for employees, but for those who might make a distinction between behavior that violates policy and behavior that is simply unpleasant.

A template for an anti bullying policy is on the following page.

Anti-bullying Policy Section 1: Purpose, Statement, & Examples

Purpose of policy. The purpose of the policy should clearly reflect the values of the organization. Standard language would be: It is the policy of (EMPLOYER) that all employees should enjoy a work environment free from abusive behavior or bullying.

Statement. Describe the definition of workplace bullying. Also include the organization's position and how the behavior hinders company goals and negatively affects employee health: (EMPLOYER) defines abusive behavior and bullying as persistent, targeted and malicious conduct that is severe and pervasive.

Examples. Indicate examples such as (humiliation, character attacks, isolating an employee, name calling, etc.), but be sure to acknowledge that this type of workplace abuse is not limited to the behaviors listed.

Anti-bullying Policy Section 2: Complaint and Resolution Process

State that the employer encourages reporting of any behavior they believe to be appropriate. Identify appropriate contact people. Identify the people to contact if there is a problem. The contact list should be across all levels of the organization. It should also include confidential resources if such resources exist (i.e. EAP). A statement of non-retaliation should be included. Encourage but do not require self-help.

Also note that prompt reporting and intervention is most effective in eliminating bullying or abusive behavior.

Informal resolution. This should be an option as long as all parties involved agree to it. It can be an open dialogue between parties to work through the problem. This option would require the person charged to be receptive to information about the effects of their abusive behavior.

Anti-bullying Policy Section 3: Action

Formal process. Clarify the procedures on how workplace abuse complaints are handled by the organization from beginning to end.

Privacy. Ensure that complaints will be handled in a manner respectful of individual privacy, but that confidentiality cannot be guaranteed.

Timing. Indicate that the investigation will be conducted in the shortest time possible and will be neutral.

Anti-bullying Policy Section 4: Consequences

Accountability. Discuss the personal and organizational consequences when an investigation has confirmed workplace abuse.

Respectful Workplace Policies

A more comprehensive approach involves the establishment of a policy that affirmatively supports respectful conduct or expands workplace anti-harassment policies to include abusive treatment not based on protected class status. Formatted in a manner similar to the bullying specific policy, above, "Respectful Workplace Policies" incorporate a statement of positive expectations and culture, a prohibition against harassing, abusive and violent conduct, both unlawful (i.e. protected class harassment, assault) and unacceptable (workplace bullying, abusive language), and the means to address such conduct. In essence, if a company states that no one will be harassed or treated abusively for ***any reason or for no reason***, the company has promulgated an anti-bullying policy without specifically naming it such. Prohibitions against reprisal or retaliation should apply to all prohibited conduct in the policy.

Enforcement and Definitions

One objection to prohibitions against workplace bullying policy is that appropriate management practices can be reported to be bullying. Correcting poor behavior, reprimanding or disciplining for violation of policies or correcting work performance are amongst behaviors that might be viewed by an unhappy employee as bullying. For this reason, employers benefit by not only defining what bullying is, but what it is not. The following two pages are examples of analytics that can form the basis of anti-bullying education for managers, supervisors and employees as well as for investigators and decision makers attempting to assess the conduct in quiest. The first allows a fact finder or decision maker to apply standards such as frequency, intensity, harm and duration to their analysis of facts. The second removes those behaviors that are either legitimate management behavior, poor management that is not abusive, and protected class harassment from the bullying rubric:

Bullying Analytic

What has the effect on the complainant been?

- ☐ Performance effect
- ☐ Emotional effect
- ☐ Psychological effect
- ☐ Physical Effect
- ☐ No major effect

What behavior has occurred?

- ☐ Physical assault or intimidation
- ☐ Verbal Abuse
- ☐ Emotional Abuse
- ☐ Work Sabotage or Destabilization

This behavior was characterized by

- ☐ Frequency (persistence over time)
- ☐ Intensity (multiple events on any given day)
- ☐ Severity (offensive to a reasonable person)
- ☐ Targeting (complainant treated badly compared to others similarly situated)
- ☐ A power imbalance

The respondent was

- ☐ Intentionally abusive
- ☐ Habitually abusive
- ☐ Inadvertently abusive
- ☐ Not abusive

The situation was

- ☐ One way
- ☐ Two way
- ☐ Part of the work culture for a long time
- ☐ Previously reported and not addressed
- ☐ Previously reported and found not to violate policy
- ☐ An ongoing dispute between two or more people

Factors to Consider

- ☐ Attended Anti-Bullying Training

Distinguishing Bullying from Non-Bullying Behavior

In order to help organizations attempting to clarify bullying behavior for purposes of appropriate personnel responses, the following bullying analytic can be helpful to distinguish bullying behavior from poor management, performance issues, mere rude behavior or interpersonal conflict.

Threshold Analysis for Bullying: **PRELIMINARY DETERMINATION CHECKLIST**

Alleged behavior is

- ☐ Repeated and/or Persistent or Severe
- ☐ Targeted towards one or more people, but not targeted towards others (i.e. not a "bad manager)
- ☐ Involves one or more of the following
    - Verbal abuse (yelling, belittling, name calling)
    - Physical threats or intimidation (standing very close, balling fists, pushing or shoving)
    - Work sabotage (destroying work product, "bombarding" with impossible assignments, withdrawing resources to do work, interfering with work activity)
    - Humiliation or emotional abuse (mocking, intentionally embarrassing, sharing information inappropriately, public harsh criticism, badgering or shunning)
- ☐ Has had a demonstrable impact on the ability of the complainant to do his or her job

The alleged behavior is not **apparently**

- ☐ Legitimate efforts to manage, discipline or correct the respondent's own conduct
- ☐ A mutual conflict between peers
- ☐ Directed at or perceived to be directed at the complainant due to protected class status.
- ☐ Outside of the context of the parties' employment

The complaint involves

- ☐ Individuals who by necessity have contact in the workplace

Leadership Behaviors and Competencies:

As with any workplace conduct, the most powerful form of shaping or extinguishing behavior is through the establishment of clear expectations, modeling appropriate behavior and aligning recognition and reward with the standards set. As such, leaders set the tone for the workplace by declaring an expectation of civility and respect, but can quickly undermine their own moral authority if bullies are ignored or explained away.

In particular, professional firms which rely on individual production are at risk for bullying when there is a tradition or practice of allowing highly productive individuals to behave in an uncivil manner on a regular basis, or turning a blind eye when incivility turns into tantrums or abusive conduct. The individual talent or unique value to the firm or group is used to excuse or override any attempt to address the behavior. This "toxic rainmaker" often is managed by carefully screening his or her direct reports for thick skinnedness, but rarely does this completely insulate the organization from the negative effects of the individual's behavior and reputation. Excusing the conduct because the individual is a "perfectionist" or "demanding" serves to demonstrate to those bullied by this individual sends a clear message that bullying will, at least in this case, be tolerated.

Leaders must be visible and vocal about a climate of respect or civility, acknowledge and address visible lapses in such policies, and promote the seeking and giving of feedback through implementation of 360 evaluation process, listening sessions and/or open door policies. Promotion of emotional intelligence, including self-awareness and empathy build the competencies which will have the effect of extinguishing disrespectful conduct before it escalates to bullying.

Training

Training about bullying behavior in the workplace can be worked into regular training on preventing workplace harassment, or dealt with separately. Most important is that the training give examples of bullying behavior that are not so outrageous as to suggest the conduct is always outlandish, nor so subtle that it confuses people. As with harassment training, it is often best to begin with the impact of bullying behavior and elicit from employees conduct they have seen or heard about in the workplace that can elicit those results. Training should also provide strategies for direct and indirect self-help as well as seeking assistance from others.

Training about bullying, like training about harassment, can give employees and supervisors a working understanding of organizational expectations and processes, but training does not change behavior. Even the most powerful and memorable training is a small step towards what is necessary. Essential skills and training that should be part of a comprehensive bullying and harassment prevention strategy include coaching and training on how to have difficult conversations, assertiveness, giving and getting feedback, and listening skills.

A typical anti-bullying training should last 60 to 90 minutes, include case examples, an opportunity for interaction, discussion of both individual bullying and group bullying, include some background on why bullies exist in organizations and instructions about what to do if one experiences or observes bullying.

A separate session for managers and supervisors should focus on prevention of bullying and what to do and say when an employee reports they are experiencing bullying.

Effective Interventions

Prompt Response to Early Warnings: It is far better to issue a verbal warning to or coach someone who is being overly stern or vulgar than to have to conduct a full blown investigation into behavior alleged to recur frequently and have a significant duration. Supervisors and managers must address minor infractions in a progressive manner and document all incidents, counseling and coaching, reprimand and further discipline. As with any early and informal interventions, supervisors should document their discussions and retain that documentation to consider during performance appraisal and to discern pattern conduct.

Coaching Some bullies are coachable. Even those who are coachable are unlikely to make significant changes in their behavior without a credible employment threat, such as demotion, loss of income, loss of eligibility for bonus or even termination in the case of additional incidents. Employers should carefully explore the experience of professional coaches, selecting someone who has had success with bullies, and particularly bullies in the professions. The coaching should be conducted in accordance with a written coaching plan based on the employer's investigative findings and the coach's assessment of the bullying individual. It is an essential prerequisite that the individual whose behavior has been a problem acknowledges a need to change. The plan should include the coach seeking feedback from the superiors, colleagues, and subordinates of the bullying person. The challenge of coaching a bullying individual is to find ways to understand how the bullying occurs and how the individual behaves in the context of the bullying, not in a controlled, one on one setting. While bullies may agree that they occasionally lose their temper or can be difficult to deal with, they often are largely unaware of many of their nonverbal behaviors, the impact of their vocal tone, and their inappropriate use of power, status and authority. Since those things are unlikely to be on display in the coaching context, feedback and detailed descriptions from targets are very valuable. Activities such as journaling, identifying triggers and role playing are helpful in bringing about changes in those who have bullied.

Accountability: Evidence demonstrates that bullies will pay attention to directives about conduct when they truly believe there will be a consequence for their inappropriate conduct. Consequences can include reduction or denial of bonus, reduction of salary, requiring the bully to reimburse the firm or company for legal fees necessary to address the conduct, or status change, such as demotion or removal of a title. Evidence also demonstrates that absent such consequences, the bullying behavior may go underground or be extinguished for a short while, but is highly likely to recur. Employers must therefore carefully consider whether their hesitancy to anger a productive contributor is likely to result in ongoing, potentially significant costs to the organization, and whether those costs might cumulatively exceed the value of the bullying employee's contribution. Incorporated into those costs are the increased awareness of "spectators" to the bullying that the organization will not protect them should they be the next target. This will reduce a willingness to raise issues and the likelihood of another "crisis" down the road.

Investigations: Because bullies are notoriously effective at "managing up," and are often held in great esteem by their leaders and advisors, complaints of bullying may be brushed aside or minimized. This is particularly important because **bullying managers and supervisors make any employee look like a 'bad' employee.** Bullying is, in essence, about undermining confidence, finding fault, sabotage and creating failures. Thus, an employee who has been badly bullied may appear paranoid, may have demonstrated excessive absenteeism, poor work performance or erratic behavior.

Because, as discussed earlier, bullies are often producing effective results and are shrewd about presenting themselves in the best light, executives overseeing the bully or outside boards may believe the complainants to be 'outliers,' or the motivation for the complaint to be politically motivated or even intransigence. It is essential the organization conduct a **neutral and impartial** investigation into the concerns of the employee without prejudging based on the comparative credibility of the complainant and subject of the complaint. The organization must also be prepared to accept the results of that investigation despite the preconceptions of high level leaders who might resist negative findings. Conversely, investigators must avoid getting caught up in the emotional state of a complainant to focus on the specific behavior they are alleging and the evidence that supports or refutes their claims. The following is a tool that can be useful to investigators in designing their questions for investigating bullying matters.

Conclusion

As the understanding of workplace bullying and its effect on organizational and individual performance increases , and as tolerance for such behavior declines, employers need to be mindful of both cultural norm setting and policy development as important tools to prevent and address workplace bullying. The likelihood of workplace bullying claims leading to litigation seems to be increasing, even in the absence of specific legislative prohibitions. The problem is preventable, and the behavior can be addressed by focusing on the importance of human dignity and respect in all aspects of employment.

WORKSHOP C

WORKSHOP BULLYING AN OVERVIEW AND ASSESSMENT

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I. Introduction

Individual employment rights scored a major victory with the passing of the Civil Rights Act of 1964 (42 U.S.C. §2000e), which outlawed differential treatment of workers because of their race, religion, color, sex, or national origin. Later on, the Age Discrimination in Employment Act (29 U.S.C. §621) and the American with Disabilities Act (42 U.S.C. §12101) and many other similar state laws were added to the list of protections that were afforded to individual employees. But despite the extent of these protections, individual employment laws left a major gap, which exposed employees to the very same invidious treatment that the laws were supposed to address. As it stands, generally, an employee is subject to workplace mistreatment and abusive conduct by an employer, so long as that employer's actions are not motivated by one of the protected categories. This raises a number of concerns because of the impact that an abusive work environment can have. Bullying, for example, can have an effect on an employee's psychological well-being, including stress, depression, mood swings, loss of sleep, and low self-esteem. From a business standpoint, employers suffer from a lack of productivity, turnover, the use of sick time, and potential legal costs. According to the Workplace Bullying Institute (WBI), status-blind harassment is a legitimate issue affecting a great deal of Americans on several different levels. Studies have also shown that far too many people in the workplace find themselves in abusive work environments when they are simply trying to carry out their tasks in the workplace.

Part of the American response has been a recent national movement called the Healthy Workplace Bill (HWB), which has spear-headed a number of statutory proposals throughout the country. The HWB has been the driving force behind a number of state bills, which have sought to address status-blind harassment by providing among other things, a private cause of action and internal procedures for dealing with workplace mistreatment.

II. Statutory proposals and current laws

The Healthy Workplace Bill has been introduced by a number of states and in a variety of forms. Recently, New York introduced Bill A03250 (Assemb. Reg. Sess. 2015-2016 (N.Y. 2015)), which proposes a civil cause of action for employees who are subjected to an abusive work environment. The bill defines abusive conduct, in part, as "means acts, omissions, or both, that a reasonable person would find abusive, based on the severity, nature, and frequency of the conduct, including, but not limited to: repeated verbal abuse such as the use of derogatory remarks, insult, and epithets." The goal of the New York bill is to provide legal redress to employees who have been harmed physically, psychologically, or financially by workplace bullying. Its parallel goal is to also provide legal incentives for employers who implement preventive measures and respond to abusive mistreatment in the workplace.

The driving force behind the bill were legislative findings, which discovered that one third of the workforce experiences workplace mistreatment and that it often results in serious harm including feelings of shame, humiliation, anxiety, depression, suicidal tendencies, and symptoms of post-traumatic stress disorder. In referencing class status protections, the proponents of the bill declared that legal protections for abusive work environments should not be limited to those claims that are grounded on some form of protected category. According to the language of the bill, the interest of a potential claimant isn't the only concern. Instead, it takes the overall good of the public into account by recognizing that social and economic well-being of the state is dependent on healthy and productive employees. Similarly, the bill recognizes the employers as potential stake holders in that an abusive environment can lead to turnover; sabotage; low moral; and low productivity. The statutory proposal will amend the New York labor law by including the full text of the HWB; and it's through this statutory proposal, therefore, that the language and content of the HWB will be explored.

In summary of its text, the bill states that: (1) No employee shall be subjected to an abusive work environment; (2) face retaliation for participating, testifying, or opposing an abusive practice; (3) that employers are vicariously liable unless they can show that they have implemented preventive measures to avoid mistreatment and that the claimant failed to take advantage of those measures; and, (4) that employees are individually liable unless they can establish that they were following the orders of the employer under threat of an adverse employment action. The bill includes other affirmative defenses including a showing that the complaint is based on an adverse employment action that was made for poor performance, misconduct, or financial necessity; or that the complaint is based on a reasonable performance evaluation or an employer's reasonable investigation about potentially illegal or unethical activity. Where an individual defendant has been found liable, the bill provides a host of remedies that include but are not limited to reinstatement; removal of the offending party from the plaintiff's work environment; reimbursement for lost wages; front pay; medical expenses; compensation for pain and suffering; compensation for emotional distress; punitive damages; and attorney fees. In terms of employer liability, where the alleged behavior did not result in an adverse employment action, a plaintiff can recover damages for emotional distress but only if the conduct was extreme and outrageous.

Four states, including Tennessee; California; Utah; and North Dakota have passed laws that are related to the HWB. These four laws do not offer a private cause of action that would allow an individual claimant to sue in court, and they also vary in the extent of their coverage.

Tennessee

Tennessee was the 26th state to introduce the HWB but in June 2014, it became first to pass a state law related to abusive conduct. Named the Healthy Workplace Act (Tenn. Code Ann. § 50-1-503), the law obligates government agencies within the state to adopt internal policies to prevent abusive

conduct in the workplace. Under the law, abusive conduct is defined as "repeated verbal abuse, threats, intimidation, humiliation or work sabotage." Public sector agencies are given incentives for adopting the model policy but they are also given the option of creating their own policy as long as it: (1) assists employers in recognizing and responding to abusive conduct and (2) prevents retaliation against any reporting employee. Although the law does not feature a private cause of action, the law shields employers from vicarious liability for negligent or intentional infliction of mental anguish if the policies are in place.

California

Conversely, California was the first state to introduce the HWB but the 2nd state to pass a state law related to abusive conduct in the workplace. By amending the Government Code relating to employment (Code Cal. Gov't Code § 12950), California passed a law that is policy-driven in the sense that it obligates employers with 50 or more employees to provide two-hours of training to supervisors on a recurring basis. California took an existing law requiring supervisors to undergo sexual harassment training, and incorporated an "abusive conduct" component to the text. Abusive conduct is defined as "conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interest and includes repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person's work performance." This law does not resemble the text of the Healthy Workplace Bill, and it has been criticized for not going far enough, and for not designing the law in a way that would incentivize employers to create internal policies that prevent and respond to abusive conduct.

Utah

In July of 2015, Utah amended the Utah State Personnel Management Act (Utah State Personnel Management Act, 67-19-§43), which now requires that state agencies provide biannual training for supervisors and employees on how to prevent abusive conduct. The law defines abusive conduct as: "verbal, nonverbal, or physical conduct of an employee to another employee that, based on its severity, nature, and frequency of occurrence, a reasonable person would determine: (1) is intended to cause intimidation, humiliation, or unwarranted distress; (2) results in substantial physical or psychological harm as a result of intimidation, humiliation, or unwarranted distress, or (3) exploits an employee's known physical or psychological disability." In addition, the law states that a single act does not constitute abusive conduct unless it's especially severe and egregious. A key feature of the Utah law is that it establishes a grievance procedure for victims of abusive treatment. Under the "grievance procedure" section of the law, a victim of abusive treatment can file a written grievance to the department head. That department head in turn will have 10 days to respond with a decision and an explanation of that decision. If no response is received within that timeframe, or if an employee is dissatisfied with that decision, the grievant may submit a complaint to the Division of Antidiscrimination and Labor.

North Dakota

Similarly, North Dakota amended its existing North Dakota Century Code (N.D.C.C § 54-06-38), which expanded the definition of harassment to include workplace bullying. The law obligates all state agencies to adopt and enforce a policy that defines harassment and explains the responsibilities of employees, management, and supervisors. If an agency fails to adopt such a policy, that organization will be subject to the model policy adopted by the North Dakota Human Resources Management Services Division. The law does not define abusive conduct or workplace bullying, nor

does it mention these terms at any place in the law. The amendment to this provision was minor, as it simply removed the term "unlawful" in front of harassment.

III. International response

Status blind harassment for workers is a relatively new concept in the United States, but other countries have either enacted harassment laws that are specific to the workplace, or amended their employment laws to address workplace bullying. In contrast to American employment laws, the idea anti-bullying statutes appear to have found a home in the national legal system of a number of European countries. Scholars point to the historical social roots that separate both continents. While American employment laws are grounded on its history of slavery and racial discrimination, European laws are rooted in its history of inequality and class-based mistreatment. Sweden; the United Kingdom; France; and Canada are four nations that have joined the campaign against workplace mistreatment by enacting or amending laws that address workplace mistreatment.

Sweden

Sweden was the first country in the world to enact specific anti-bullying statutes. Under its Occupational Safety and Health laws, Sweden enacted the Victimization at Work law (Swedish National Board of Occupational Safety and Health, Victimization at Work, Ordinance ([AFS] 1993-17 (Swed.)), which does not give the right of a private cause of action, but instead imposes obligations on companies to adopt internal systems that address bullying. Under the law, bullying is defined as "recurrent reprehensible or distinctively negative actions which are directed against individual employees in an offensive manner and which can result in those employees being placed outside the workplace community."

The United Kingdom

The United Kingdom does not have a specific law for workplace bullying but British courts have relied upon the Protection from Harassment Act (Protection from Harassment Act, 1997, c. 40 § 1 (Eng.)), as a form of remedy for status-blind mistreatment. Under the PHA, employees are prohibited from pursuing a course of conduct that "they know, or should know, amounts to harassment." Courts have interpreted the definition of harassment as conduct: (1) occurring on at least two occasions; (2) targeted at the claimant; (3) calculated in an objective sense to cause distress, (4) that is objectively judged to be oppressive and unreasonable. In contrast to the Swedish law, the PHA provides for a private cause of action and the possibility of vicarious liability if it's "just and reasonable under the circumstances."

France

In 2002, France amended the provisions of its labor code and adopted the Social Modernization Law (C. TRAV. Art. L. 122-49), which provides for civil and criminal penalties for moral harassment. In order to fall under its purview, an individual's conduct must have the purpose or effect of degrading the employee's right to dignity, affecting the employee's mental or physical health or compromising the employee's career. The SML is both friendly and challenging for potential claimants. While the law provides for a private cause of action, strict liability, and certain obligations on employers, the standard for establishing a claim is high and a single act will not be covered no matter the severity of the conduct.

Canada

Canada also amended the Occupational Health and Safety Regulations provisions of its labor code to include the Violence Prevention in the Workplace law (Canada Labour Code R.S, C.L-2, § 125), but it only applies to employers that are federally regulated. The aim of the law is to provide for a

safe, health and violence-free workplace by, among other things, fostering an environment that is free from bullying and abusive behavior. The law further provides for internal controls and measures that strive to prevent, detect, and address prohibited behavior. Other similar laws have been enacted within the Canadian provinces of British Columbia; Manitoba; Saskatchewan; Ontario; and Quebec. Ontario also amended its Occupational Health and Safety Act to prohibit workplace harassment, which is defined as "engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or out reasonably to be known to be unwelcome." The law is status-blind and it requires employers to adopt internal policies and procedures for reporting, investigating, responding and informing.

International Labor Organization

The International Labor Organization ("ILO") has also taken a position on workplace bullying. Referring to the topic as "Worker well-being," the ILO's stance is that every worker should be entitled to productive work in conditions of freedom, equity, security and human dignity. It also links the health and safety of workers to higher production, satisfaction, and engagement in the workplace. This, according to the ILO, benefits not only the employee but the employer as well. The ILO believes that an employee's well-being is a natural and integral part of the core values found in its Occupational Safety and Health ("OSH") provisions, which state, in part, that conditions of work should be consistent with worker's well-being and human dignity.

The aim of the worker well-being framework is to complement OSH in pursuit of safeguarding workers, which the ILO regards as the most important resource. Considering the ILO's role in developing international labor standards and guidance, the ILO will presumably become one of the leading proponents of status-blind protection laws by seeking ratification of related international labor standards. In order to do this, the ILO will rely on: The ILO Convention on Occupational

Safety and Health (No.155); The Occupational Health Services Convention (No. 161); and the Promotional Framework for Occupational Safety and Health Convention (No. 187); which the ILO has deemed as three conventions that are on point with workplace well-being.

IV. Trends which may aggravate workplace bullying

Researchers point to a number of trends that create a fertile ground for workplace aggression-among them-the fall in union membership and the proliferation of temporary employees. To understand the direction that union membership has taken, it's important to compare the extent of union membership in the middle of the 20th century to union membership today. Fifty years ago, for example, one third of U.S. workers were union members, but it has since fallen to one in every ten. According to the Bureau of Labor Statistics, union membership was as high as 20 % in 1983 compared to 11.1% in 2015. The overwhelming majority of union members are in the public sector, at five times the number of private sector union membership, which currently sits at 6.7 %.

In terms of its association to workplace bullying, unions play a fundamental role in conflict resolution and negotiations when a problems arises in the workplace. Management's exercise of authoritative and disciplinary functions make the workplace inherently adversarial, transforming conflict resolution into a fundamental tool for preserving labor relations. Conflict resolution serves a number of purposes that provide a collective benefit to employers; employees; and the public. When it comes to the interplay between management and workers, resolution of internal problems can prevent work stoppages, foster working relationships; and improve the overall outlook towards the organization. The public interest is also served when conflict resolution functions as an alternative to legal disputes and a source of relief for employers and employees. A union representative or shop steward can also play a fundamental role in addressing workplace bullying

before the conduct progresses by stepping in as an advocate or mediator between the employee and the source of the mistreatment.

Under this framework, incorporating workplace bullying provisions into collective bargaining agreements ("CBA") appear to be a natural fit, as it can complement and bolster the union's inherent role of conflict resolution. A prime example can be found in a CBA negotiated by the Massachusetts public employees' locals 509 and 888 of the Service Employees International Union (SEIU) and the National Association of Government Employees (NAGE). Termed the "mutual respect" provision, the CBA prohibits—among other acts—"behaviors that contribute to a hostile, humiliating or intimidating work environment, including abusive language or behavior. Another example of a "mutual respect" clause can be found in the collective bargaining agreement that was negotiated between the Government Accountability Office Employees Organization and the International Federation of Professional and Technical Engineers (IFPTE). The mutual respect clause states that "the parties will not tolerate bullying behavior, either direct or indirect, whether verbal, physical, or otherwise, by one or more persons against another or others, at the place of work and, or in the course of employment." What makes this clause unique and forward-thinking, is that aside from using the term "bullying," it also provides examples of conduct that constitute bullying including: "slandering; ridiculing or maligning a person or his or her family; persistent name calling which is hurtful; insulting; humiliating; using a person as a butt of jokes; abusive and offensive remarks." With the decline in union membership, therefore, comes a reduction in services and benefits that unions provide to their members, including protection from unfair treatment and arbitrary decisions.

Workplace bullying is also manifested in temporary employment settings, where managers have been blamed for mistreating temporary workers and exposing them to onerous working conditions. The

role of temporary agencies in the American labor scene has grown twofold. Between the years of 1990-2008, for example, the temporary help industry grew from 1.1 million to 2.3 million and it expanded from clerical and industrial work to include skilled occupations. For employers, using temporary agencies provides them with the flexibility to meet their staffing demands instead of employing a full workforce when the level of work isn't always present. Others believe that employers have a number of nefarious incentives for using temporary workers such as circumventing sick and vacation time and other benefits normally found in conventional employment relationships. Researchers signal the nature and structure of the temporary employment relationship as a source for workplace bullying. It's the ability of companies to maneuver the workforce that places them at the same level as any other resource which is needed for production. This kind of framework depersonalizes workers; inhibits the creation of long-term working relationships; and cultivates an unhealthy work environment that leads to abusive behavior.

Vertical organizational structures with power disparities can also be a hotbed for workplace harassment. Indeed, many companies and agencies have this kind of organizational arrangement, but workplaces that feature executive and administrative support-staff, factories where there are plant managers and assembly line workers, and militaristic structures are especially susceptible to workplace harassment. The same kind of results can be found, where there is a mixture of low and high-status workers. This can be explained by the high-status worker acting on a feeling of dominance over the low status worker, who is also unlikely to understand his or her rights, or much less report incidents of mistreatment. Other risk factors that make workplaces prone to abusive treatment are organizations where a small percentage of the workers do not conform to social and workplace stereotypes. Examples of this can be found where workers challenge gender and racial norms, or other non-discriminatory stereotypes such as behavioral characteristics within a particular industry.

V. Vulnerability and impact in policing

The manner in which labor relations are administered affects the attitudes and behavior of workers. Workplaces that provide fair treatment for their employees are likely to benefit from employee motivation and engagement. On the other hand, a workplace filled with conflict and unfair treatment is likely to experience low motivation and a fall in productivity. For certain industries, and more than others, this can lead to disastrous results for persons holding an interest in the work outcome. And although there are a number of hazardous professions that can be used to describe the dangers of workplace bullying, policing provides one of the better examples for two reasons. First, policing—to some degree—is distinguishable in that it carries a propensity for workplace mistreatment, and it also demonstrates the manner in which the inherent dangers in policing can augment the consequences of an abusive workplace. Second, and because the public safety and public service aspect of policing affects many people, the topic of workplace bullying and its consequences are more likely to resonate with the reader.

Researchers point to a number of aspects of police work that may make law enforcement susceptible to mistreatment—among them—(1) the behavior of the public; (2) hierarchical workplace environments; (3) an environment dominated by procedures; (4) internal investigations; and (5) long working hours. The inherent risks associated with policing, and the need for officers to maintain a healthy mind is obvious. In 2014, for instance, there were 1, 165, 383 violent crimes in the United States; 96 officers killed in the line of duty; and 48, 315 officers assaulted. The combination of psychological trauma from workplace bullying and the natural risks that officers' face in their respective communities is, therefore, an onerous work-related condition for police officers and police organizations.

A major concern for policing are the findings that bullying targets aren't necessarily problem employees, but instead the brightest; the highly skilled; and the boldest. Applying these findings to context of policing can have dire consequences, as it implies that law enforcement officers who are in a position to make the strongest impact in the myriad of police related tasks are going to be the ones most affected. Victims of workplace mistreatment in the context of policing may be especially vulnerable and unlikely to confront the source of the abuse. Katz, Kochan, and Colvin believe that employees are likely to respond to conflictive workplaces according to the exit-voice-loyalty-neglect framework. Under this model, employers may quit their jobs or voice their concerns to their employer. Other responses are to say and do nothing, or develop low motivation, reduced commitment and organizational performance. It's precisely the response of neglect that is closest to the kind of response that is likely to be found in policing, in part, because law enforcements officers are generally vested and concerned with long-term career benefits associated with policing, and thereby less likely to move on to another profession or agency.

Police Chief Darryl Forte from the Kansas City Police Department brought the issue to real life when he wrote about the prevalence of workplace bullying in policing. Chief Forte described how he had been the victim of bullying himself and that he had also witnessed other people within the department falling victim to the same mistreatment. He spoke of incidents where the perpetrators of the mistreatment cursed, yelled, and threatened people. The victims in some of those incidents had little that they could do because of willful blindness; because some people dismissed the conduct as non-consequential; or because in some cases it was the victim that was blamed. Perhaps more compelling was the manner in which Chief Forte has implemented preventive measures in his department. Some of the measures include providing workplace bullying literature to his staff; reminding upper management to remain vigilant; and asking them to intervene when they witness mistreatment. And finally, he stresses the importance of speaking up for those that cannot speak up

for themselves, recognizing that workplace bullying is often carried out by persons who outrank their targets.

VI. Conclusion

Individual and collective employment laws were a major step for labor relations in the United States. By some accounts, however, these laws left a major gap that exposes workers to the very same conduct that the laws sought to protect against. A number of states have introduced legislative bills to enact laws that provide status-blind protections for victims of workplace bullying. Part of the driving force behind this movement, is that existing common law and statutory protections are inadequate at providing the proper legal redress for victims of abusive workplaces. The international community has also responded by enacting status-blind protections or by amending and interpreting laws that already exist. There are also a number of trends that may contribute to the presence of workplace bullying including the fall in union membership and the proliferation of temporary agencies. Supporters of this view cite unions as a fundamental tool for conflict resolution and temporary agencies as source of impersonal relationships that lead to a breakdown in labor relations. And finally, the potential harm of workplace bullying is aggravated in certain industries more than others. Policing is both prone to workplace bullying and especially vulnerable to the consequences that an abusive work environment can produce because of the dangers associated with the profession.

WORKSHOP C

SOME THINGS YOU NEED TO KNOW BUT MAY HAVE BEEN AFRAID TO ASK: A RESEARCHER SPEAKS TO OMBUDSMEN ABOUT WORKPLACE BULLYING

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Some Things You Need to Know but may have been Afraid to Ask:

A Researcher Speaks to Ombudsmen about Workplace Bullying

LORALEIGH KEASHLY

ABSTRACT

Workplace bullying is repeated and prolonged hostile mistreatment of one or more people at work. It has tremendous potential to escalate, drawing in others beyond the initial actor-target relationship. Its effects can be devastating and widespread individually, organizationally and beyond. It is fundamentally a systemic phenomenon grounded in the organization's culture. In this article, I identify from my perspective as a researcher and professional in this area current thinking and research findings that may be useful for ombudsmen in their deliberations and investigations as well as in their intervention and management of these hostile behaviors and relationships.

KEYWORDS

Ombudsmen, workplace bullying, workplace aggression

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In the early 1990's, I became interested in understanding persistent and enduring hostility at work. That interest was spurred by a colleague's experience at the hands of her director. He yelled and screamed at her (and others), accusing her of not completing assignments, which she actually had. He lied about her and other subordinates. He would deliberately avoid when staff needed his input and then berate them for not consulting with him. At other times, he was thoughtful, apologetic, and even constructive. My colleague felt like she was walking on eggshells, never sure how he would be. Her coworkers had similar experiences and the group developed ways of coping and handling it. For example, his secretary would warn staff when it was not a good idea to speak with him. And yet his behavior took its toll on all of them. She called asking for my advice as a dispute resolution person. I gave her some ideas, all things it turned out she had tried already. So like any good academic, I went to the literature to find out what was there. At that time, there was very little about what I had come to view as emotionally abusive behavior as described in the domestic violence literature. I undertook some research to see if emotional abuse was a workplace phenomenon (Keashly, Trott & MacLean, 1994; Keashly, Harvey & Hunter, 1997). Unfortunately, I discovered that it was. As I broadened my search in terms of disciplines and countries, I came across other constructs like bullying (Adams, 1992; Einarsen, 1999; Rayner & Hoel, 1997), mobbing (Leymann, 1996; Zapf & Einarsen, 2003), harassment (Brodsky, 1976) and abusive treatment (Bassman, 1992) that in essence described the same phenomenon: systematic and prolonged mistreatment of others at work (Keashly, 1998).

Since that time, there has been a virtual explosion of research in these areas and the addition of related constructs and terms such as workplace harassment (Bowling & Beehr, 2006), abusive supervision, (Tepper, 2000), social undermining (Duffy et al, 2002), incivility (Andersson & Pearson, 1999; Gill & Sypher, 2009;), interpersonal mistreatment (Lim & Cortina, 2005; Price-Spratlen, 1995), ostracism (Ferris, Brown, Berry, & Lian, 2008), emotional tyranny (Waldron, 2009), workplace victimization (Aquino & Thau, 2009), and disruptive practitioner behavior (Joint Commission, 2008) . As exciting as this is, I believe it has become confusing because it is hard to wrap one's arms around this area when the terms and their associated definitions multiply. Thus, it is hard to understand this phenomenon and therefore how to address it. Fortunately, several very good reviews of the literature that have come out that can be helpful in summarizing research on these constructs (e.g., Aquino & Thau, 2009; Einarsen, Hoel, & Zapf, 2010; Griffin & Lopez, 2005; Hershcovis & Barling, 2007; Kelloway, Barling, & Hurrell, 2006; Martinko, Douglas & Harvey, 2006; Tepper, 2007) The challenge is there are so many of those reviews that the construct proliferation and its accompanying confusion continues. For professionals who are faced with addressing these persistently hostile behaviors and relationships, it is often difficult to know where to begin and what to include. Also, the professionals' timeframe is often such that there is little time to distill the essence of what is known and not known from the empirical research literature. In this article, I will identify from my perspective as a researcher and professional in this area, the current thinking and findings that may be useful for ombudsmen in their deliberations and investigations as well as their management of these hostile behaviors and relationships with appropriate and timely interventions. To accomplish this, using the term workplace bullying, I will discuss what is known about the nature, prevalence and effects of these hostile relationships as well as current thinking on antecedents and processes of development. Throughout this discussion, I will note the implications of different findings for the work of ombudsmen as they investigate and address workplace bullying. I will end this paper with a brief discussion of the value of taking a contingency perspective on the development and implementation of interventions for the prevention and management of bullying.

WORKPLACE BULLYiNG: THE NATURE OF THE BEAST

Workplace bullying is a special case of workplace aggression. Workplace aggression refers to efforts by individuals to harm others with whom they work (Neuman & Baron, 1997). Before addressing workplace bullying's unique features, it is important to discuss aggressive behaviors more generally. I never cease to be amazed at the range and type of behaviors that fall within this domain. To more completely map out this behavioral space, Neuman and Baron (1997) utilized Buss's (1961) approach of three dimensions to define the space. The dimensions are:

1) physical (deeds) — verbal (words, tone);

2) active (doing a behavior) — passive (withholding or "failures to do"); and

3) direct (at the target) — indirect (at something or someone the target values).

This approach describes the "methods of attack". While much research (e.g. VandenBos & Bulatao, 1996; Kelloway, Barling & Hurrell, 2006) and public attention has been paid to physical, active and direct behaviors such as shootings and assaults, i.e., physical violence, Neuman and Baron's (1997) work and that of others (e.g., Cortina, Magley, Williams & Langhout, 2001; Keashly & Neuman, 2004; Rayner, Hoel & Cooper; 2002; Richman, Rospenda, Nawyn, Flaherty, Fendrich, Drum & Johnson, 1999; Schat, Frone & Kelloway, 2006) have demonstrated that the more frequent kinds of behaviors in workplaces, particularly among organizational insiders, are often passive, indirect and nonphysical. These types of behaviors have been labeled as psychological aggression. For example, in their representative survey of American workers, Schat, Frone and Kelloway (2006) found the 41% of workers report experiencing psychologically aggressive behavior at work while 6% experienced physical aggression. Workplace bullying actions are predominantly psychologically aggressive (Keashly, 1998). Rayner and Hoel's (1997) categorization of bullying behaviors provides a concise illustration of specific behaviors. This is not a comprehensive listing of all possible behaviors but it will give an idea of ways in which bullying can be conducted.

1. Threat to Professional Status: Questioning competence, belittling opinion, professional humiliation in front of colleagues, negative comments about intelligence, questioning a person's ability to supervisors; spreading rumors or gossip. These are primarily active behaviors.

2. Threat to Personal Standing. Name-calling, insults, verbal abuse, tantrums, intimidating behaviors, devaluing with reference to age, gender, race/ethnicity or appearance, hostile gestures. These are predominantly active behaviors

3. isolation. Exclusion from work-related gatherings, silent treatment, withholding information, ignoring contributions, not taking concerns seriously, preventing access to opportunities or promotion, poisoning others against the target. These behaviors tend to be passive in nature.

4. Overwork / Unreal Expectations. Undue pressure, impossible deadlines, unnecessary disruptions, setting up to fail, unreal or ambiguous expectations; more so than for others in the same environment.

5. Destabilization. Others take credit for work; assigning meaningless tasks, removing responsibility, denied raise or promotion without reason; excessive monitoring.

I have several observations regarding these behaviors. First, what is particularly unique about workplace bullying is that it is often about what people **do not do** rather than what they do, i.e., "lack of action" such as withholding information, excluding from meetings, the silent treatment (Rayner & Keashly, 2005). This poses particular challenges for the target, bystanders, managers, and third parties to whom these concerns are brought. Thus, it is important for ombudsmen to note that most aggressive behavior at work is psychological in nature and often passive or "failures to do" behaviors.

Second, the nature of the relationship between the target and actor will influence the specific expressions of hostility (Aquino & Lamertz, 2004; Neuman & Keashly, 2010; Hershcovis & Barling, 2007). This has to do with the means and opportunity available to the actor (Neuman & Keashly, 2010). For example, a supervisor due to his/her control over rewards and job assignments has the opportunity and the means to bully through overwork and destabilization types of behaviors. Opportunities available to peers may have more to do with information sharing and other working relationships. Thus, behaviors falling under threats to personal and professional standing as well as isolation are more likely under their control. Subordinates, due to their less powerful organizational position, may engage in more indirect kinds of behaviors such as rumors or gossip or withholding of information. These examples of actor means and opportunity illustrate that bullying is not limited to one type of relationship. Indeed, bullying can be top-down (boss-subordinate), horizontal (peer-peer) or bottom-up (subordinate-boss) (Rayner & Keashly, 2005). Thus, workplace bullying is considered to be **relational** in nature — harming others through purposeful manipulation and damage of relationships. This is important for ombudsmen to know as it requires that the relational context of the experience be assessed. Thus, investigations will need to involve at the very least assessment of target and actor and consideration of the nature of their relationship organizationally, e.g., the kind of contact that is typically required for this type of relationships.

Third, identifying the behaviors, while necessary, is insufficient for understanding workplace bullying (Leymann, 1996). Indeed, in isolation, each of these behaviors may be seen as minor and people may wonder what all the fuss is about (So he glared at you? So what?). What makes these behaviors more than they appear is their **frequency** and the **duration of exposure**. Workplace bullying and its related constructs are **repeated** and **enduring** forms of workplace aggression. **Persistency** is the core feature that distinguishes workplace bullying from more occasional aggressive treatment (Leymann, 1996; Einarsen et al, 2003). The defining characteristics are as follows:

1. Negative actions that are repeated and patterned. This element captures both frequency of occurrence (daily, weekly, monthly) and variety (more than one type of behavior). Regardless of the construct, it is the frequency of exposure to hostile behaviors that has been directly linked to a variety of negative individual (health, job attitudes and behaviors) and organizational (productivity, turnover) outcomes, i.e., the greater the exposure, greater the impact (Keashly & Neuman, 2002). Being exposed to a number of different hostile behaviors contributes to this sense of frequency. We found that the number of different events uniquely contributed to negative individual outcomes beyond the mean frequency of exposure (Keashly, Trott, & MacLean, 1994). But

the number of behaviors and the frequency of occurrence do not adequately capture the nature of exposure. Frequency of exposure must also be considered in terms of the overall frequency of contacts with the actor. For example, perhaps the boss only yells at an employee once a month but if the employee only sees him/her once a month that is 100% of the time. The implications of that for a target are very different than for a target whose actor behaves this way once a month but they see him/her daily, i.e., they are exposed to other behaviors, hopefully positive, that will influence their overall experience. Further, the frequency of exposure can be created (or enhanced) by the target reliving the experience, i.e., rumination (Harvey & Keashly, 2003). Finally the repeated nature of exposure may be linked to the involvement of more than one actor, i.e., mobbing (Zapf & Einarsen, 2005). The repeated and patterned nature of these behaviors highlights the importance of investigating a pattern of behavior rather than each incident as a separate item (Rayner & Keashly, 2005). Further the frequency of contact that would be required organizationally "normally" for the relationship is also important to consider in any assessment.

2. Prolonged exposure over time (duration). It is duration that is particularly distinctive about workplace bullying. Researchers have used timeframes for assessing these actions ranging from six months (which is typical in the European literature, e.g. Einarsen et al 2003) to a year (e.g., Keashly & Neuman, 2004; Schat, Frone, & Kelloway, 2006) to 5 years (e.g. Cortina et al, 2001). These timeframes pale in comparison to the reports of those who self-identify as targets of workplace bullying. They report exposure ranging up to 10 years (Burnazi, Keashly & Neuman, 2005; Zapf, Einarsen, Hoel & Vartia, 2003). Zapf and Gross (2001) report that average duration of those who were bullied by one person was 28 months, for those who were bullied by two to four people or more than 4 people (i.e., mobbing), it was 36 months and 55 months, respectively. Thus, the question of "how long is too long" is important to consider in this discussion of workplace bullying. While researchers often specify at least one event weekly for a minimum period of 6 or 12 months, this timeframe does not necessarily appeal to those for example, in Human Resources or indeed, ombudsmen who will want to be able to address a developing hostile situation as quickly as possible, before irreversible damage sets in. Thus, codifying a specific minimum duration in policy may hamper reporting of problems and ultimately effective management. It is sufficient to note that bullying tends to occur over an extended period of time.

Fourth, while persistence or chronicity is the important marker of workplace bullying, it is also important to recognize that the nature and intensity of behaviors directed at the target do not stay the same throughout. Long-standing bullying situations will often show a progression or escalation of aggression from covert and indirect behaviors to increasingly overt, direct and in some situations physical (Einarsen, 1999; Glomb, 2002). Research suggests that such escalation will have the effect of rendering target attempts to constructively and actively respond ineffective (Richman, Rospenda, Flaherty & Freels, 2001; Zapf & Gross, 2001). This puts the target at increased risk for injury psychologically, emotionally, and physically (see further discussion below). The failure of constructive methods also may promote target resistance and retaliation behaviors (Liefooghe & Davey, 2010; Lutgen-Sandvik, 2006) that may further an escalatory spiral. Such spirals can result in drawing others into the situation, often as actors (Zapf & Gross, 2001) and may even result in secondary spirals or cascades of aggression elsewhere in the unit or organization (Anderson & Pearson, 1999) i.e., the development of a hostile work environment.

Given the above description, a question is often raised as to how workplace bullying, particularly at advanced stages is different from an escalated conflict between employees. What appears to distinguish bullying from "normal" workplace conflict is the existence of a power imbalance (Einarsen et al, 2003). This imbalance can be pre-existing in the structure of the workplace (boss-subordinate) or it can develop as a conflict escalates and one party becomes disadvantaged relative to the other. The importance of the imbalance is the potential impact on the target's resources and ability to defend him/herself as well as the actor's ability to continue their actions (Keashly & Jagatic, 2010). This has implications for the nature and

intensity of negative effects and highlights the importance of prevention and early intervention, as well as the necessity of strategies for remediation of effects.

Taken together, the prolonged exposure to repeated hostile actions with an inability to defend creates a situation in which the target becomes increasingly disabled (Keashly, 1998). Further such a relationship, if allowed to continue, has the potential to not only spread its impact beyond the immediate dyad to others in the organization (e.g., witnesses) but it also has the possibility of creating hostile work environments where many workers are now "behaving badly". The bullying process with its progression and its span of impact illustrates the **communal** nature of workplace bullying (Namie & Lutgen-Sandvik, 2010). That is, a variety of different parties are involved in or impacted by workplace bullying. This communal nature requires that ombudsmen will need to engage a number of people in the investigation and ultimately the management of the bullying.

Cyberspace: The next (and current) frontier. Before leaving this section on bullying's nature, It is important to acknowledge modern technological devices as the new medium for bullying, e.g., bullying through the internet, email, text messaging, video/picture clips and social networking sites. Lois Price Spratlen (1995) ombudsman for the University of Washington at the time was among the first to identify how email was being used to bully and harass others. Known as cyberbullying or cyberaggression (e.g., Slonje & Smith, 2008; Weatherbee & Kelloway, 2006), several unique features of the medium conspire to make it a particularly virulent and destructive forum for and form of bullying. Some of these features are:

a) the ability of the actor(s) to be anonymous making it more difficult for both targets and those investigating to identify the source. By reducing detection, actors may become emboldened to engage in more extreme and destructive attacks on the person's reputation (Bjorkqvist, Osterman, & Hjelt-Back, 1994);

b) span of impact from a few organizational members to millions of new media users globally; and

c) once these messages or images are released, they are difficult to expunge from cyberspace, creating a situation in which exposure can be continually renewed and thus relived, increasing damage to the target and others.

It is critical that researchers and professionals focus their efforts on understanding the nature and impact of cyberbullying and to seek ways to manage its use and impact.

THE FACES OF HARM

The consequences of workplace bullying have been demonstrated at individual, group and organizational levels. At the individual level, direct targets show disruption of psychological, emotional and physical well-being as well as decrements in cognitive functioning (e.g., distraction, rumination), poor job attitudes, problematic job behaviors, and decreased performance (see Einarsen et al, 2003). Of particular note is the evidence of genuine trauma associated with prolonged mistreatment. Some targets manifest symptoms characteristic of Post-traumatic Stress Disorder (PTSD) such as hypervigilance, nightmares, and rumination (Glomb & Cortina, 2006; Hauge, Skogstad, & Einarsen, 2010; Janson & Hazler, 2004). Witnesses/bystanders to workplace bullying manifest similar symptoms and outcomes (e.g., Hoel, Faragher, & Cooper, 2004; Vartia, 2001). At the work group or unit level, there is evidence of destructive political behavior, lack of cooperation, and increasing incidence of interpersonal aggression (e.g., Glomb & Liao, 2003; Lim, Cortina, & Magley, 2008). At the organizational level, bullying's impact is manifested in organizational withdrawal behaviors of targets and other employees such as increased sick leave and presenteeism, lowered organizational commitment, increased turnover and loss of talent, retaliation behaviors such as theft, sabotage and violence, and reputational damage in the broader community (Lutgen-Sandvik, 2006; Rayner & McIvor, 2008; Tepper, Carr, Breaux, Gelder, Hu, & Hua, 2009). Recent research has begun to expand the victim net beyond organizational boundaries to include friends and family members who experience distress and strain as support for the targeted loved one (Barling, 1996; Hoobler & Brass, 2006). Clearly, workplace bullying left unchecked can have profound implications both inside and outside the organization.

HOW BiG iS THE PROBLEM?

So workplace bullying is hurtful and its effects are expansive. Just how big a problem is this? The prevalence depends on how workplace bullying is assessed, the nature of the sample (convenience, organizational or representative of the nationwide workforce), and the country. Regarding measurement, there are two methods by which researchers assess exposure to bullying: operational (objective) or self-labeling (subjective). The objective approach identifies someone as bullied based on whether they have experienced at least one hostile behavior weekly or more often for a period of six months (characteristic of European research) or 12 months (typical in American studies). This method measures **exposure** to workplace bullying by means of a behavioral checklist. For example, a person will indicate whether they have experienced someone at work withholding critical information from them. The self-labeling method provides people with a definition of bullying and asks if they have had such an experience in the past six months, year or longer. This method measures experience of victimization. It is the **experience of victimization** that targets will provide to an ombudsman, not simply exposure to specific behaviors (Keashly, 2001). Thus, ombudsmen need to prepare to probe for the fullness of the target's experience as well as help the target provide specifics of incidents.

Typically, rates of exposure are generally higher for the operational method than for the self-labeling method that requires a person to acknowledge s/he has been a victim, which sometimes people are reluctant to do. So the self-labeling method can be considered a conservative estimate while the operational is a more liberal estimate. European literatures show rates ranging from 2-5% (in Scandinavian countries to 55% in Turkey (see Nielsen, Skogstad, Matthiesen, Glaso, Aasland, Notelaers & Einarsen, 2009 for fuller details) while US literature reports from 10-14% (labeling) to 63% (operational; see Keashly & Jagatic, 2010 for fuller details.) These rates apply to direct targets. If we extend the victim net to include witnesses, the rates of exposure to workplace bullying jump dramatically. For example, in a representative sample of over 7000 US workers (Lutgen-Sandvik, Namie, & Namie, 2009) 12.3% of respondents indicated they had witnessed others being bullied at work in the previous 12 months. Adding to this the 12.6% who said they had been bullied during this same period, almost 25% of the American working adults are exposed to and affected by workplace bullying in a 12-month period. These rates refer to general working populations. Exposure may be higher or lower in different organizations and occupations. In short, workplace bullying is part of many adults' working lives.

WHY BULLYiNG? ANTECEDENTS AND PROCESSES.

Discussion of the causes or contributions to workplace bullying requires the recognition of the multi-causal nature of this phenomenon (Zapf, 1999). Characteristics of the target, the actor, the work environment, and the organizational context all play a role to varying degrees and often in interaction in the manifestation of (and on the flipside, the prevention and management of) workplace bullying (Einarsen, Hoel, Zapf & Cooper, 2003 for review). A useful framework for considering what some of these antecedents are and how they may combine with one another comes from Baillien, Neyens, De Witte, and De Cuyper (2009) who propose three interrelated processes that may contribute to the development of bullying: intrapersonal, interpersonal, and intragroup/organizational. Individual and work-related antecedents are implicated in either being the source of these processes or influencing how employees cope with the challenges created by these processes. I will briefly describe these processes and how different factors are linked to them.

The intrapersonal pathway is one in which workplace bullying is a result of stressors and frustration and how employees cope with them. Research in this area focuses on individual characteristics that may enhance vulnerability to be a target or propensity to be an actor. Relevant target characteristics are those that may affect what the individual **perceives** as occurring (i.e., interpreting ambiguous behavior or situations as hostile) or may provoke affective and behavioral reactions that are provocative to others or make them seem as "easy" targets for displaced aggression (De Cuyper, Baillien & De Witte, 2009). Individuals with a propensity to experience negative affect such as anger, fear, worry, anxiety, sadness and depression and associated traits of neuroticism reported higher levels of hostile treatment (Aquino & Thau, 2009; Bowling & Beehr, 2006; Coyne, Seigne, & Randall, 2000; Milam, Spitzmueller & Penney, 2009). Similarly, relevant actor characteristics are ones associated with anxiety or anger and hostility such as negative affectivity, trait

anger, poor self-control, emotional susceptibility and irritability, dispositional aggressiveness, (hostile) attributional bias and unstable self-esteem (Martinko et al, 2006; Neuman and Baron, 1998; Zapf & Einarsen, 2003), all of which have been associated with increased aggressiveness. An actor's lack of self-reflection and poor perspective taking ability has been linked to engaging in bullying behaviors (Parkins, Fishbein, & Ritchey, 2006; Zapf & Einarsen, 2003).

What is interesting is that characteristics broadly characterized as negative affect and anxiety appear relevant to both targets and actors. So the question becomes what may explain an employee becoming either target or actor? Baillien et al (2009) suggest that it is ineffective coping behavior in response to frustrations (which can come from both interpersonal and group level circumstances) that may provide the key. Specifically, in their analysis of 87 workplace bullying cases, they found that an employee might become vulnerable to victimization by others when they cope with frustrations in a passive-inefficient way (e.g., by withdrawing, becoming helpless, or reducing productivity). Such behavior may be perceived as violating existing norms (not carrying one's load) and result in other workers responding negatively towards them. When an employee copes with an experienced frustration in an active-ineffective way, they may displace their frustration onto an "innocent"coworker, resulting in bullying (e.g. Tepper, Duffy, Henle & Lambert, 2006). Bullying grounded in these dynamics can be viewed as a form of "predatory bullying"(Einarsen, 1999). To the extent this process is operational, strategies for prevention and management would focus on developing more effective stress and emotional management strategies on the part of workers.

The interpersonal pathway is one where workplace bullying may result from interpersonal conflict that is ineffectively managed and escalates, i.e., dispute-related bullying (Keashly & Nowell, 2003; Zapf & Gross, 2001). In escalated conflicts, everyone engages in increasingly hostile and damaging actions. These conflicts become bullying situations when one party becomes notably unable to defend themselves yet the other continues on an increasingly punitive path. Indeed attempts by the target to actively address the issues are often unsuccessful and such failure is often tied to increasingly negative impact on the target (Richman, Rospenda, Flaherty & Freels, 2001). In this process, the more powerful employee becomes the actor and the less powerful employee becomes the target. These can be challenging situations to assess as their genesis may have been mutually determined but the balance has swung. To the extent these processes were predominant, prevention efforts would focus on the development of constructive conflict management strategies and conflict intervention strategies for third parties (e.g., managers, bystanders).

intragroup/organizational pathway is one in which workplace bullying is viewed as a result of unit or organizational features that enable or directly stimulate bullying. These can be particularly challenging to deal with as they are grounded in the way of doing work. Salin's (2003) model of enabling, motivating, and precipitating organizational features helps clarify how these factors may influence bullying development. Briefly, **enabling** features are structures and processes whose existence or nonexistence affect whether bullying is even possible. These include ***power imbalance*** which, as noted earlier, affects both the ability of the target to respond and defend and the means and opportunities available to an actor to mistreat; ***low perceived costs and risks*** to engaging in bullying behaviors as reflected in organizational cultures in which harassment is equated with way to do business styles of leadership linked to controlling (authoritarian) and uninvolved (laissez-fair) leadership. Also, lack of a clear and enforceable policy suggesting these behaviors are not problematic; and the ***qualities of the working environment*** that create stress and frustration for employees such as unfair or inequitable treatment (perceived injustice), lack of autonomy and decision control, poor communication, role overload, conflict and ambiguity and uncomfortable physical environments (e.g., Neuman & Baron, 2010). . As noted above, bullying may be the result of inefficient coping with these stressors. **Motivating** features are structures and processes that"make it rewarding to harass others"(Salin, 2003; pg. 1222). These are conditions that promote the functionality of bullying, i.e., as a rational response to those perceived as"threats" or"burdens"(Hoel & Salin, 2003; Felson, 2006). This includes internally competitive environments, where employees are promoted or rewarded for outperforming other coworkers so it could be construed to be in an employee's interest to undermine or sabotage another, i.e., micropolitical behavior (Zapf & Einarsen, 2003). Bullying can also be a response to perceived norm violation on the part of a coworker such as a "rate buster"in an effort to bring them "back into line"

with production norms. Bullying behavior can also be a way of establishing social dominance. Bullying can be used as constructive dismissal where the work environment is made so uncomfortable for someone that they leave. Westhues (2002) talks about mobbing by professors against another as just such a strategy. Finally, **precipitating factors** are structures and processes that may actually trigger an episode of bullying assuming other factors as noted above are in place. These factors are typically associated with some organizational changes such as changes in management or work group, restructuring, downsizing, and increasing diversity (Baillien & De Witte, 2009; Neuman & Baron, 2010). The argument is that these changes create stress, anxiety and frustration, which can lead to aggressive responding as discussed above. Salin (2003) argues that bullying is a result of an interaction among at least two of these factors if not all three. This set of processes are perhaps the most challenging to address as we are in essence talking about re-designing a work environment and changing its culture and resultant climate.

THE CHALLENGE OF ADDRESSiNG WORKPLACE BULLYiNG.

As can be seen from this admittedly brief and selective presentation of research on workplace bullying, this is a phenomenon that is dynamic, relational, and communal in nature. Its dynamics can spiral to encompass and impact other organizational members and extend its reach outside the organization. While played out by individuals, it is the organization's structure and processes that play pivotal roles in whether and how bullying is manifested, i.e., bullying is fundamentally a systemic problem (Keashly, 2001; Namie & Lutgen-Sandvik, 2009). It is this belief of the systemic nature of bullying that has researchers and professionals calling for organizational leaders and managers to take responsibility for leading the efforts in prevention and management of workplace bullying. Recent scholarship has begun to identify and assess what organizational and management efforts are important for developing a culture and climate that are antithetical to bullying (for detailed discussion see; Einarsen & Hoel 2008; Fox & Stallworth, 2009; & Giga, 2006; Keashly & Neuman, 2009; Osatuke, K., Moore, S.C., Ward, C., Dyrenforth, S. R. & Belton, L., 2009; Rayner & McIvor, 2008; Salin, 2006).

Organizational culture change, however, is a long-term process. In the meantime there will be workplace bullying and the question is how to intervene to effectively manage and mitigate its impact. As is hopefully clear from the research, there are different points in the process at which action could notably change its course. There are also a variety of actions that could be undertaken at each of these points. What I have found useful as a way of thinking about how to ameliorate workplace bullying is applying the contingency approach of conflict intervention. While full exposition of this approach is beyond the scope of this article (See Keashly & Nowell, 2010 for more detail), I would like to briefly describe its fundamental principles and what it highlights about addressing bullying.

The contingency approach is grounded in the idea that effective intervention in a conflict depends upon matching the action(s) to the phase of conflict development (discussion, polarization, segregation and destruction) and different issues that are prominent in each stage. For example, in the early phase of a conflict, parties while disagreeing are still openly communicating and see value in maintaining their relationship. Thus, a useful action might be helping parties have constructive discussions through negotiation or if somewhat heated, through mediation. At a much later stage, where parties are polarized, communication distorted and behavior is becoming destructive, initial action involves stopping the destructive behavior and if successful, then perhaps utilizing a version of shuttle diplomacy to focus on more substantive issues. The other aspect of a contingency approach is the recognition that de-escalation cannot be accomplished by a single action but requires coordinating a sequence of activities over time to move parties back down the spiral. Applying this perspective to workplace bullying, highlights a number of important considerations:

1. The need to thoroughly and critically assess the history and current status of the bullying situation. This knowledge makes it possible to select methods of intervening that increase the chances of at least minimizing damage and at most (re) building the parties, particularly the target, the working relationship as well as the working environment for others.

2.Individuals observing the actor and target interactions can play critical roles in helping to manage the situation. As revealed by research documenting span of impact, other people have a stake in this situation being resolved constructively. Bystanders represent a critical yet untapped group that could have profound influence in bullying situations, particularly in the not-yet-bullied phase (Ashburn-Nardo, Morris, & Goodwin, 2008; Keashly and Neuman, 2007; Scully & Rowe, 2009)

3.The need to view dealing with bullying as a comprehensive and coordinated effort of a number of different activities and a number of different parties. It highlights the importance of coordinating short-term crisis management interventions such as separation of the parties with longer-term methods directed at fundamentally altering the parties' relationship specifically and the system generally. Such coordinated and comprehensive efforts require organizational awareness of bullying and a commitment to dealing with it directly. Ombudsmen's location in the organizational system positions them well for developing and facilitating these types of efforts.

4.It provides an explanation for why some actions may fail, i.e., they were inappropriate for the circumstances. For example, mediation has been recommended as an approach for addressing workplace bullying (e.g., Hoel, Rayner, & Cooper, 1999; Schmidt, 2010). Critics argue that in cases of severe bullying, the target is not able to participate fully as an equal party. Further, mediation's focus on the future can be a way for the actor to avoid having to take responsibility for their actions. Thus, mediation may be more appropriate early on but less effective and even detrimental in later stages.

5.Recognition that damage inherent in severe bullying limits the means of handling such situations. As discussed under harm, long term exposure to bullying effectively disables and damages the target and often others so that a "return to normal" is highly unlikely. This highlights the importance of preventive measures addressing harmful interactions early (not-yet-bullied; Rayner, 1999) before more damage occurs and when there is a chance for (re)building productive relationships. Individual skill development on the part of all parties such as communication, anger management, stress management, perspective taking and conflict management skills) may be relevant in these relationships preventing bullying from becoming entrenched. While enhancing individual skills is important, the organizational context can either support or undermine them (Salin, 2003). So any efforts must acknowledge organizational culpability and focus change at this level as well.

CONCLUSiON

Workplace bullying is persistent relational aggression. It has tremendous potential to escalate, drawing in others beyond the initial actor-target relationship. Its effects can be devastating and widespread individually, organizationally and beyond. It is fundamentally a systemic phenomenon, grounded in the organization's culture. Ombudsmen are in a unique position organizationally to become aware of these types of relationships and to provide leadership in assessing and responding effectively and constructively to the benefit of all organizational members. It is my hope that the research discussed in this article has provided information and insight that will help ombudsmen in their efforts to address this devastating phenomenon and to develop a culture of respect and dignity for all employees where bullying has no place.

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WORKSHOP C

BULLYING IN THE WORKPLACE

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Combating Bullying in the Workplace: A Comparison of Global Approaches

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Bullying is a problem facing companies and their employees throughout the world. More than a quarter of respondents in a 2014 survey in the United States reported experiencing workplace bullying.[1]

Companies must address bullying, not only to show solidarity with their employees, but also because engendering a healthy workplace is a critical business issue. When it comes to bullying, companies suffer when their employees suffer. Studies have shown that workplace bullying leads to increased absenteeism, decreased productivity, higher health care costs, higher rates of employee turnover, and myriad other difficulties for employers.[2]

Jurisdictions vary widely in their legislative approaches to combat bullying. For example, while the United States has had status-based harassment and discrimination laws in place for decades and well in advance of most other countries, these laws generally protect those who are harassed in the workplace based on specified "protected categories."[3] There is no legislation at the federal level to assist those who are bullied or harassed in the workplace but do not have such a protected status on which to base a claim. As discussed below, however, there has been a state-level movement in recent years to address this gap in coverage. Other countries also have been proactive in combating workplace bullying. For example, new legislation has been introduced, or existing legislation interpreted, to address bullying in, among others, Sweden, the United Kingdom, France, Japan and parts of Canada and Australia.

This article provides an overview of anti-bullying legislation in the United States, Sweden, the United Kingdom, France, and Canada. It also provides suggestions for employers to address bullying in the workplace.

United States

Although the first piece of state-level anti-bullying legislation was introduced in 2003, it was more than a decade before any state enacted legislation specifically aimed at workplace harassment unrelated to a protected characteristic. Today, two states (California and Tennessee) have enacted laws related to workplace bullying, although neither provides a civil cause of action for bullying victims or otherwise expands an employee's ability to hold an employer accountable for bullying in the workplace. Bills also have been introduced in 25 other states, including New York, as well as in Puerto Rico and the U.S. Virgin Islands. Many of the introduced bills are based on the draft Healthy Workplace Bill prepared by the Workplace Bullying Institute ("WBI").

California

The introduction of the Healthy Workplace Bill in 2003 made California the first state in the U.S. to begin formally considering anti-bullying legislation. Although that legislation has not been adopted, California did adopt a law in 2014 requiring that prevention of abusive conduct be included as a component of the sexual harassment training for supervisory employees already required under California law for employers with 50 or more employees.[4] Abusive conduct is defined as "conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests" and includes "repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person's work performance."[5]

Tennessee

Earlier in 2014, Tennessee became the first state to pass a bullying-related law. The Tennessee Healthy Workplace Act encourages public-sector employers to adopt a policy that "assist[s] [the employer] in recognizing and responding to abusive conduct in the workplace" and "prevent[s] retaliation against any employee who has reported abusive conduct in the workplace."[6] If a public-sector employer adopts such a policy, the employer shall have immunity from tort suits resulting from abusive conduct by the employer's employees that results in negligent or intentional infliction of mental anguish.[7] The law that passed was significantly scaled back from that initially introduced which was based on the WBI's Healthy Workplace Bill and contained, among other points, a private right of action for bullied employees.

New York

The New York State Legislature introduced an anti-bullying bill in 2010, which passed in the Senate[8] but was put on hold in the Assembly. Since that time, similar bills have been introduced periodically in the New York State Assembly and Senate. As of the time of writing, a bill has been introduced in the Assembly for the 2015-16 legislative session with 80 sponsors.[9]

The bill would amend the New York Labor Law to provide legal redress for employees subjected to an "abu-

sive work environment," which exists when an employee is "subjected to abusive conduct that causes physical harm, psychological harm or both."[10] Abusive conduct is defined as "acts, omissions, or both, that a reasonable person would find abusive, based on the severity, nature, and frequency of the conduct."[11] A single act usually will not constitute abusive conduct unless it is "especially severe and egregious,"[12] similar to the standard for hostile work environment claims under Title VII of the Civil Rights Act.[13] Under the bill employers are vicariously liable for the abusive conduct of their employees,[14] and employers may not retaliate against individuals who participated in the complaint process.[15]

The bill does provide employers with several alternative affirmative defenses. First, an employer may have an affirmative defense against a claim if it can demonstrate that it exercised reasonable care to prevent and promptly correct the abusive conduct, and that the employee unreasonably failed to take advantage of the appropriate preventative or corrective opportunities that it provided.[16] This defense is not available if the abusive conduct culminated in an adverse employment decision with respect to the complaining employee (e.g., termination or demotion). However, the employer can assert alternative defenses that the complaint is based on "adverse employment action reasonably made for poor performance, misconduct or economic necessity," "a reasonable performance evaluation," or "an employer's reasonable investigation about potentially illegal or unethical activity."[17]

The remedies available under the bill include reinstatement, removal of the offending party from the complainant's work environment, reimbursement for lost wages, front pay, medical expenses, compensation for pain and suffering and/or emotional distress, punitive damages, and attorney's fees.[18] But in cases where there was no adverse employment decision, an employer may be held liable for emotional distress damages and punitive damages only when the actionable conduct was extreme and outrageous.[19] This is a notable departure from earlier versions of the bill which provided that, in cases where there was no adverse employment decision, emotional distress damages are capped at $25,000 and punitive damages are not available.[20] Finally, the bill also precludes employees who have collected Workers' Compensation benefits for conditions arising out of an abusive work environment from bringing a claim pursuant to the law for the same conditions.[21]

Elsewhere in the U.S.

At the time of writing, four other jurisdictions (Connecticut, North Dakota, Utah and the U.S. Virgin Islands) in addition to New York have workplace bullying bills currently under active consideration in the state legislature.

Sweden

In 1993, Sweden became the first country in the world to enact specific anti-bullying legislation. The Ordinance on *Victimization at Work*,[22] enacted as part of Sweden's occupational safety and health laws, offers protection against "victimization," which it defines as "recurrent reprehensible or distinctly negative actions which are directed against individual employees in an offensive manner and can result in those employees being placed outside the workplace community."[23]

Unlike New York's proposed law, the ordinance does not provide a private cause of action for aggrieved employees. Instead, it imposes administrative obligations upon employers to prevent victimization, to immediately intervene when such misconduct becomes apparent, and to attempt to engage in a collaborative process to resolve conflicts.[24] Employers who fail to comply with these obligations may be fined and/or imprisoned for up to one year.[25]

United Kingdom

Although the United Kingdom has not enacted legislation specifically to combat workplace bullying, British courts have interpreted the *Protection from Harassment Act*, 1997[26] (PHA), as providing redress for victims of workplace bullying.[27] The PHA prohibits individuals from pursuing a course of conduct that they know, or should know, amounts to harassment.[28]

Courts have interpreted the statute's vague definition of "harassment" as conduct: (i) occurring on at least two occasions, (ii) targeted at the claimant, (iii) calculated in an objective sense to cause distress, and (iv) that is objectively judged to be oppressive and unreasonable.[29] When harassment has occurred, vicarious liability for the conduct is not automatic. Instead, employer liability must be "just and reasonable in the circumstances."[30] Whether an employer has implemented a harassment policy and procedures is one factor courts may consider in determining whether the imposition of vicarious liability is reasonable.[31]

The PHA provides for remedies similar to those available under the New York bill, including injunctive relief and compensatory and emotional distress damages.[32] There is no cap on the damages that courts may award aggrieved employees. Significantly, a court in 2006 awarded a victim of workplace bullying GBP 800,000 (approx. $1.2 million) in damages.[33] This can be contrasted with general unfair dismissal law in the UK for which damages are capped at GBP 88,210 (approx. $135,750).

France

In 2002, France enacted the *Social Modernization Law*, which introduced provisions to the French Labor Code that provide civil and criminal penalties for "moral"

harassment.[34] The law sets a fairly high standard for actionable conduct in that it expressly provides that a single act, regardless of its severity, is not enough to constitute moral harassment.[35] In addition, the conduct must have the purpose or effect of degrading the employee's right to dignity, affecting the employee's mental or physical health, or compromising the employee's career.[36] The law places an affirmative obligation on employers to take all necessary actions to prevent moral harassment,[37] and prohibits them from retaliating against employees who report moral harassment or who refuse to be victims of moral harassment.[38]

Labor tribunals have interpreted the Social Modernization Law as holding employers strictly liable for actionable conduct, even if they implemented measures to prevent moral harassment.[39] The law also provides for the automatic nullification of any employment contract termination resulting from moral harassment.[40] Additionally, labor tribunals have ordered employers to pay damages for breach or "disloyal non-performance" of an employment contract based upon a failure to prevent moral harassment.[41]

Canada

Legislation aimed at combating workplace bullying also has been enacted in the Canadian provinces of British Columbia, Manitoba, Saskatchewan, Ontario, and Quebec. In Ontario, for example, the Occupational Health and Safety Act was amended in 2010 to strengthen protections from workplace harassment and violence. "Workplace harassment" is defined as "engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome."[42] Accordingly, harassment under the law is not limited to abusive conduct based on any particular protected characteristic. The law requires that employers develop policies and programs that include procedures for reporting, investigating, and responding to harassment, and provide employees with sufficient information and instruction on such policies and programs.[43]

Recommendations for Employers

The existence of workplace bullying—and the global trend aimed at combating it—should be of interest to both U.S. and multinational employers. To safeguard the company against the tangible and intangible costs of workplace bullying (as well as to mitigate the risk of litigation and liability as more jurisdictions adopt laws protecting bullied employees), prudent employers will consider taking the following steps:

- Broaden workplace policies to prohibit abusive conduct and retaliation against any employee raising a complaint.
- Require employees to report abusive conduct, and provide a specific and clear procedure that offers employees multiple avenues to complain about abuse.
- Train all managers on how to handle reports of abusive conduct and on the consequences of retaliation.
- Take immediate and effective action to rectify all retaliation complaints.
- Continually review and, if necessary, revise employment policies to ensure compliance with applicable workplace bullying laws and regulations.

Endnotes

1. Results of the 2014 WBI U.S. Workplace Bullying Survey, WORKPLACE BULLYING INSTITUTE, http://www.workplacebullying.org/wbiresearch/wbi-2014-us-survey/ (last visited February 20, 2015).
2. *See, e.g.,* Cunniff, L., & Mostert, K. (2012). *Prevalence of workplace bullying of South African employees*. SA Journal of Human Resource Management/SA Tydskrif vir Menslikehulpbronbestuur, 10(1), Art. #450, 15 pages. http://dx.doi.org/10.4102/sajhrm.v10i1.450 (last visited February 20, 2015).
3. Under Title VII of the Civil Rights Act of 1964, race, color, religion, sex, and national origin are protected categories. The Age Discrimination in Employment Act protects workers who are 40 and older from discrimination, and the American with Disabilities Act protects disabled workers. Under the Genetic Information Predisposition Act of 2008, employers are prohibited from using information regarding someone's genetic predisposition to disease in making employment decisions. Veteran status is also a protected category under the Vietnam Era Veterans Readjustment Assistance Act. Finally, many states also include sexual orientation as a protected category.
4. Cal. Gov't Code §12950.1
5. *Id.*
6. Tenn. Code Ann. §50-1-503.
7. *Id.* §50-1-504.
8. Sen. 1823 B, 2010 Sess. (N.Y. 2010).
9. Assemb. 3250, 2015 Sess. (N.Y. 2015)
10. Assemb. 3250 §761.
11. *Id.* (providing the following examples of abusive conduct: "repeated verbal abuse, such as the use of derogatory remarks, insults and epithets; verbal, non-verbal, or physical conduct of a threatening, intimidating or humiliating nature; or the sabotage or undermining of an employee's work performance").
12. *Id.*
13. *See* David C. Yamada, *Workplace Bullying and American Employment Law: A Ten-Year Progress Report and Assessment*, 32 COMP. Lab. L. & Pol'y J. 251, 262 (2010) (describing the domestic interdisciplinary coverage of and responses to workplace bullying and discussing decision of the Healthy Workplace Bill author to base the standard on that of hostile work environment claims).
14. Assemb. 3250 §763.
15. *Id.* §762.
16. *Id.* §763. This affirmative defense is similar to the Title VII affirmative defense created by the Supreme Court in *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742 (2008) and *Faragher v. Boca Raton*, 524 U.S. 775 (1998).
17. *Id.* §765.

18. *Id.* §766.
19. *Id.*
20. *See, e.g.*, Sen. 4289 §769, 2011 Sess. (N.Y. 2011). *See also* Yamada, *supra* note 13, at 265 (stating that this safeguard "has the effect of discouraging extensive litigation and promoting quick resolution").
21. Assemb. 3250 §769.
22. Swedish National Board of Occupational Safety and Health, Victimization at Work, Ordinance (Arbetsmiljoverket [AFS] 1993-17) (Swed.).
23. *Id.* §1.
24. *Id.* §§4-6. The accompanying guidelines suggest that management set standards for good behavior by example and clearly communicate to employees that victimization in the workplace is unacceptable.
25. *See* Frank Lorho & Ulrich Hilp, Bullying at Work 15-23 (European Parliament Directorate-Gen. for Research, Working Paper SOCI 108 EN, 2001), available at http://www.europarl.europa.eu/workingpapers/soci/pdf/108 en.pdf; Helge Hoel & Stale Einarsen, *The Swedish Ordinance Against Victimization at Work: A Critical Assessment*, 32 Comp. Lab. L. & Pol'y J. 225, 240 (2011).
26. Protection from Harassment Act, 1997, c. 40, §1 (Eng.).
27. *See Majrowski v. Guy's & St. Thomas's NHS Trust*, [2005] EWCA (Civ) 251, ¶56 (Court of Appeal); *Green v. DB Group Servs.* (U.K.) Ltd., [2006] EWHC 1898 (Q.B.).
28. Protection from Harassment Act, 1997, c. 40, §1 (Eng.).
29. *See* Susan Harthill, *Bullying in the Workplace: Lessons From the United Kingdom*, 17 Minn. J. Intl L. 247, 285 (2008) (citing Green, [2006] EWHC 1898, ¶152).
30. Majrowski, [2005] EWCA (Civ) 251, ¶57.
31. *Id.* ¶59.
32. Protection from Harassment Act §3(2).
33. Green, [2006] EWHC 1898 (Q.B.).
34. C. TRAV. art. L. 122-49.
35. *Id.*
36. *Id.*
37. *Id.* art. L. 122-51. One measure that employers must take is preparing a written document displaying workplace rules, which includes a provision prohibiting moral harassment. Id. art. L. 122-34.
38. *Id.* art. L. 122-49.
39. *See* Loic Lerouge, *Moral Harassment in the Workplace: French Law and the European Perspectives*, 32 Comp. Lab. L. & Pol'y J. 109, 122-27 (2010) (analyzing moral harassment cases before French Labor Tribunals).
40. C. TRAV. art. L. 122-49.
41. Lerouge, *supra* note 39, at 123.
42. Ontario Occupational Health and Safety Act, RSO 1990, ch O.1, s 1.
43. *Id.* at ss 32.0.1, 32.0.6-7.

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Michelle A. Gyves is an associate at Proskauer and a member of the International Labor and Employment Practice Group.

S06438 Summary:

BILL NO	S06438
SAME AS	SAME AS
SPONSOR	SANDERS
COSPNSR	ADDABBO, BRESLIN, CARLUCCI, COMRIE, ESPAILLAT, HAMILTON, HOYLMAN, KRUEGER, LATIMER, PARKER, PERKINS, SAVINO, SERRANO, STAVISKY
MLTSPNSR	

Add Art 20-D §§760 - 769, Lab L

Establishes a civil cause of action for employees who are subjected to an abusive work environment.

S06438 Text:

STATE OF NEW YORK

6438

IN SENATE

January 13, 2016

Introduced by Sen. SANDERS -- read twice and ordered printed, and when printed to be committed to the Committee on Labor

AN ACT to amend the labor law, in relation to establishing healthy workplaces

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The labor law is amended by adding a new article 20-D to read as follows:

ARTICLE 20-D
HEALTHY WORKPLACES

Section 760. Legislative findings and intent.
761. Definitions.
762. Abusive work environment.
763. Employer liability.
764. Employee liability.
765. Affirmative defenses.
766. Remedies.
767. Enforcement.
768. Effect on collective bargaining agreements.
769. Effect of other laws.

§ 760. Legislative findings and intent. The legislature hereby finds that the social and economic well-being of the state is dependent upon healthy and productive employees. At least one-third of all employees directly experience health endangering workplace bullying, abuse and harassment during their working lives. Such form of mistreatment is four times more prevalent than sexual harassment alone. Workplace bullying, mobbing and harassment can inflict serious harm upon targeted employees, including feelings of shame and humiliation, severe anxiety, depression, suicidal tendencies, impaired immune systems, hypertension, increased risk of cardiovascular disease, and symptoms consistent with post-traumatic stress disorder.

Furthermore, the legislature finds that abusive work environments can have serious consequences for employers, including reduced employee

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD07296-01-5

productivity and morale, higher turnover and absenteeism rates, and significant increases in medical and workers' compensation claims.

The legislature hereby finds that if mistreated employees who have been subjected to abusive treatment in the workplace cannot establish that the behavior was motivated by race, color, sex, sexual orientation, national origin or age, such employees are unlikely to be protected by the law against such mistreatment.

The legislature hereby declares that legal protection from abusive work environments should not be limited to behavior grounded in a protected class status as required by employment discrimination statutes. Existing workers' compensation provisions and common law tort law are inadequate to discourage such mistreatment or to provide adequate redress to employees who have been harmed by abusive work environments.

The purpose of this article shall be to provide legal redress for employees who have been harmed psychologically, physically or economically by deliberate exposure to abusive work environments; and to provide legal incentives for employers to prevent and respond to abusive mistreatment of employees at work.

§ 761. Definitions. As used in this article, the following terms shall have the following meanings:

1. "Abusive conduct" means acts, omissions, or both, that a reasonable person would find abusive, based on the severity, nature, and frequency of the conduct, including, but not limited to: repeated verbal abuse such as the use of derogatory remarks, insults, and epithets; verbal, non-verbal, or physical conduct of a threatening, intimidating, or humiliating nature; or the sabotage or undermining of an employee's work performance. It shall be considered an aggravating factor if the conduct exploited an employee's known psychological or physical illness or disability. A single act normally shall not constitute abusive conduct, but an especially severe and egregious act may meet this standard.

2. "Abusive work environment" means an employment condition when an employer or one or more of its employees, acting with intent to cause pain or distress to an employee, subjects that employee to abusive conduct that causes physical harm, psychological harm or both.

3. "Adverse employment action" means an outcome which negatively impacts an employee, including, but not limited to, a termination, demotion, unfavorable reassignment, failure to promote, disciplinary action or reduction in compensation.

4. "Constructive discharge" means an adverse employment action where:

(a) the employee reasonably believed he or she was subjected to an abusive work environment;

(b) the employee resigned because of that conduct; and

(c) the employer was aware of the abusive conduct prior to the resignation and failed to stop it.

5. "Physical harm" means the impairment of a person's physical health or bodily integrity, as established by competent evidence.

6. "Psychological harm" means the impairment of a person's mental health, as established by competent evidence.

§ 762. Abusive work environment. 1. No employee shall be subjected to an abusive work environment.

2. No employer or employee shall retaliate in any manner against an employee who has opposed any unlawful employment practice under this article, or who has made a charge, testified, assisted, or participated in any manner in an investigation or proceeding under this article, including, but not limited to, internal complaints and proceedings, arbitration and mediation proceedings and legal actions.

§ 763. Employer liability. 1. An employer shall be vicariously liable for a violation of section seven hundred sixty-two of this article committed by its employee.

2. Where the alleged violation of such section does not include an adverse employment action, it shall be an affirmative defense for an employer only that:

(a) the employer exercised reasonable care to prevent and correct promptly any actionable behavior; and

(b) the complainant employee unreasonably failed to take advantage of appropriate preventive or corrective opportunities provided by the employer.

§ 764. Employee liability. 1. An employee may be individually liable for a violation of section seven hundred sixty-two of this article.

2. It shall be an affirmative defense for an employee only that the employee committed a violation of such section at the direction of the employer, under actual or implied threat of an adverse employment action.

§ 765. Affirmative defenses. It shall be an affirmative defense that:

1. the complaint is based on an adverse employment action reasonably made for poor performance, misconduct or economic necessity;

2. the complaint is based on a reasonable performance evaluation; or

3. the complaint is based on an employer's reasonable investigation about potentially illegal or unethical activity.

§ 766. Remedies. 1. Where a defendant has been found liable for a violation of section seven hundred sixty-two of this article, the court may enjoin such defendant from engaging in the unlawful employment practice and may order any other relief that is deemed appropriate including, but not limited to, reinstatement, removal of the offending party from the plaintiff's work environment, reimbursement for lost wages, front pay, medical expenses, compensation for pain and suffering, compensation for emotional distress, punitive damages and attorney fees.

2. Where an employer is liable for a violation of section seven hundred sixty-two of this article that did not include an adverse employment action, emotional distress damages and punitive damages may be awarded only when the actionable conduct was extreme and outrageous. This limitation does not apply to individually named employee defendants.

§ 767. Enforcement. 1. The provisions of this article are enforceable solely by means of a civil cause of action commenced by an injured employee.

2. An action to enforce the provisions of this article shall be commenced within one year of the last act that constitutes the alleged violation of section seven hundred sixty-two of this article.

§ 768. Effect on collective bargaining agreements. This article shall not prevent, interfere, exempt or supersede any current provisions of an employee's existing collective bargaining agreement which provides greater rights and protections than prescribed in this article nor shall this article prevent any new provisions of the collective bargaining agreement which provide greater rights and protections from being implemented and applicable to such employee within such collective bargaining agreement. Where the collective bargaining agreement provides greater rights and protections than prescribed in this article, the recognized collective bargaining agent may opt to accept or reject to be covered by the provisions of this article.

§ 769. Effect of other laws. 1. No provision of this article shall be deemed to exempt any person or entity from any liability, duty or penalty provided by any other state law, rule or regulation.

2. The remedies provided in this article shall be in addition to any remedies provided under any other provision of law, and nothing in this article shall relieve any person from any liability, duty, penalty or punishment provided by any other provision of law, except that if an employee receives workers' compensation for medical costs for the same injury or illness pursuant to both this article and the workers' compensation law, or compensation under both this article and such law in cash payments for the same period of time not working as a result of the compensable injury or illness or the unlawful employment practice, the payments of workers' compensation shall be reimbursed from damages paid under this article.

§ 2. This act shall take effect immediately, and shall apply to abusive conduct occurring on or after such date.

A03250 Summary:

BILL NO	A03250
SAME AS	SAME AS
SPONSOR	Englebright
COSPNSR	Colton, Gunther, Lavine, Jaffee, Schimel, Rosenthal, Rivera, Robinson, Pretlow, Weprin, Lupardo, Moya, Abbate, Benedetto, Titone, Miller, Ortiz, Dinowitz, Hevesi, Russell, Goldfeder, Wright, Mosley, Skoufis, Peoples-Stokes, Steck, Mayer, Aubry, Bichotte, Walker, Barron, Richardson, Stirpe, Blake
MLTSPNSR	Arroyo, Brennan, Brindisi, Ceretto, Cook, Crespo, Curran, Cusick, Cymbrowitz, Davila, Duprey, Fahy, Galef, Garbarino, Giglio, Goodell, Gottfried, Hooper, Johns, Lentol, Lifton, Lupinacci, Magee, Malliotakis, Markey, McDonald, McDonough, McKevitt, McLaughlin, Montesano, Nojay, O'Donnell, Paulin, Perry, Ra, Raia, Ramos, Rodriguez, Saladino, Sepulveda, Skartados, Solages, Stec, Tedisco, Thiele, Titus

Add Art 20-D SS760 - 769, Lab L

Establishes a civil cause of action for employees who are subjected to an abusive work environment.

A03250 Text:

STATE OF NEW YORK

3250

2015-2016 Regular Sessions

IN ASSEMBLY

January 22, 2015

Introduced by M. of A. ENGLEBRIGHT, COLTON, GUNTHER, LAVINE, JAFFEE, SCHIMEL, ROSENTHAL, RIVERA, ROBINSON, PRETLOW, WEPRIN, LUPARDO, MOYA, ABBATE, ROBERTS, BENEDETTO, TITONE, MILLER, ORTIZ, DINOWITZ, HEVESI, RUSSELL, GOLDFEDER, WRIGHT, MOSLEY, BORELLI, SKOUFIS, PEOPLES-STOKES, STECK, MAYER, AUBRY -- Multi-Sponsored by -- M. of A. ARROYO, BRENNAN, BRINDISI, CAMARA, CERETTO, CLARK, COOK, CRESPO, CURRAN, CUSICK, CYMBROWITZ, DAVILA, DUPREY, FAHY, GALEF, GIGLIO, GOODELL, GOTTFRIED, HOOPER, JOHNS, KATZ, LENTOL, LIFTON, LUPINACCI, MAGEE, MALLIOTAKIS, MARKEY, McDONALD, McDONOUGH, McKEVITT, McLAUGHLIN, MONTESANO, NOJAY, O'DONNELL, PAULIN, PERRY, RA, RAIA, RAMOS, RODRIGUEZ, SALADINO, SCARBOROUGH, SEPULVEDA, SKARTADOS, SOLAGES, STEC, TEDISCO, THIELE, TITUS -- read once and referred to the Committee on Labor

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HEALTHY WORKPLACES

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763. Employer liability.
764. Employee liability.
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766. Remedies.
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768. Effect on collective bargaining agreements.
769. Effect of other laws.

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD07296-01-5

§ 760. Legislative findings and intent. The legislature hereby finds that the social and economic well-being of the state is dependent upon healthy and productive employees. At least one-third of all employees directly experience health endangering workplace bullying, abuse and harassment during their working lives. Such form of mistreatment is four times more prevalent than sexual harassment alone. Workplace bullying, mobbing and harassment can inflict serious harm upon targeted employees, including feelings of shame and humiliation, severe anxiety, depression, suicidal tendencies, impaired immune systems, hypertension, increased risk of cardiovascular disease, and symptoms consistent with post-traumatic stress disorder.

Furthermore, the legislature finds that abusive work environments can have serious consequences for employers, including reduced employee productivity and morale, higher turnover and absenteeism rates, and significant increases in medical and workers' compensation claims.

The legislature hereby finds that if mistreated employees who have been subjected to abusive treatment in the workplace cannot establish that the behavior was motivated by race, color, sex, sexual orientation, national origin or age, such employees are unlikely to be protected by the law against such mistreatment.

The legislature hereby declares that legal protection from abusive work environments should not be limited to behavior grounded in a protected class status as required by employment discrimination statutes. Existing workers' compensation provisions and common law tort law are inadequate to discourage such mistreatment or to provide adequate redress to employees who have been harmed by abusive work environments.

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4. "Constructive discharge" means an adverse employment action where:

(a) the employee reasonably believed he or she was subjected to an abusive work environment;

(b) the employee resigned because of that conduct; and

(c) the employer was aware of the abusive conduct prior to the resignation and failed to stop it.

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6. "Psychological harm" means the impairment of a person's mental health, as established by competent evidence.

§ 762. Abusive work environment. 1. No employee shall be subjected to an abusive work environment.

2. No employer or employee shall retaliate in any manner against an employee who has opposed any unlawful employment practice under this article, or who has made a charge, testified, assisted, or participated in any manner in an investigation or proceeding under this article, including, but not limited to, internal complaints and proceedings, arbitration and mediation proceedings and legal actions.

§ 763. Employer liability. 1. An employer shall be vicariously liable for a violation of section seven hundred sixty-two of this article committed by its employee.

2. Where the alleged violation of such section does not include an adverse employment action, it shall be an affirmative defense for an employer only that:

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1. the complaint is based on an adverse employment action reasonably made for poor performance, misconduct or economic necessity;

2. the complaint is based on a reasonable performance evaluation; or

3. the complaint is based on an employer's reasonable investigation about potentially illegal or unethical activity.

§ 766. Remedies. 1. Where a defendant has been found liable for a violation of section seven hundred sixty-two of this article, the court may enjoin such defendant from engaging in the unlawful employment practice and may order any other relief that is deemed appropriate including, but not limited to, reinstatement, removal of the offending party from the plaintiff's work environment, reimbursement for lost wages, front pay, medical expenses, compensation for pain and suffering, compensation for emotional distress, punitive damages and attorney fees.

2. Where an employer is liable for a violation of section seven hundred sixty-two of this article that did not include an adverse employment action, emotional distress damages and punitive damages may be awarded only when the actionable conduct was extreme and outrageous. This limitation does not apply to individually named employee defendants.

§ 767. Enforcement. 1. The provisions of this article are enforceable solely by means of a civil cause of action commenced by an injured employee.

2. An action to enforce the provisions of this article shall be commenced within one year of the last act that constitutes the alleged violation of section seven hundred sixty-two of this article.

§ 768. Effect on collective bargaining agreements. This article shall not prevent, interfere, exempt or supersede any current provisions of an employee's existing collective bargaining agreement which provides greater rights and protections than prescribed in this article nor shall this article prevent any new provisions of the collective bargaining agreement which provide greater rights and protections from being implemented and applicable to such employee within such collective bargaining agreement. Where the collective bargaining agreement provides greater rights and protections than prescribed in this article, the recognized collective bargaining agent may opt to accept or reject to be covered by the provisions of this article.

§ 769. Effect of other laws. 1. No provision of this article shall be deemed to exempt any person or entity from any liability, duty or penalty provided by any other state law, rule or regulation.

2. The remedies provided in this article shall be in addition to any remedies provided under any other provision of law, and nothing in this article shall relieve any person from any liability, duty, penalty or punishment provided by any other provision of law, except that if an employee receives workers' compensation for medical costs for the same injury or illness pursuant to both this article and the workers' compensation law, or compensation under both this article and such law in cash payments for the same period of time not working as a result of the compensable injury or illness or the unlawful employment practice, the payments of workers' compensation shall be reimbursed from damages paid under this article.

§ 2. This act shall take effect immediately, and shall apply to abusive conduct occurring on or after such date.

ACOMMODATING EMPLOYEES WITH MENTAL DISABILITIES

Submitted By:

JOHN A. BERANBAUM, ESQ.
Beranbaum Menken LLP
New York, NY

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I. The Prevalence of Mental Illness Within and Outside the Workforce

A. As of 2012, there were an estimated 43.7 million adults 18 or older in the United States with a mental illness, or 18.6% of the population, and an estimated 9.6 million adults with a serious mental illness (defined as a mental, behavioral or emotional disorder resulting in a serious functional impairment that substantially limits one of more major life activity).[1] It is predicted that by 2020, depression will be one of most prevalent disabilities globally, second only to heart disease.[2]

B. Among the working population, it is estimated that 10% of employees have at least one mental disability,[3] and that in any given year, 5% of employees may suffer from an episode of clinical depression.[4]

II. Unemployment and Underemployment of People with Mental Health Disabilities

A. Unemployment among people with mental disabilities is as high as 25%. Of those people in the workforce, a 2002 survey showed that 38% of workers with mental disabilities had jobs paying at or near the minimum wage compared with 20% of non-disabled employees. A survey from 1994-1995 revealed that people with mental health disabilities earned a median hourly wage almost a third-less than that earned by people without mental health disabilities.[5] Among people with serious mental illness, the unemployment rate is between 70-90%, and those that do hold jobs are generally paid low wages and have little potential for career advancement.[6]

B. Public income support programs are overrepresented by people with mental health disabilities, who make up more than 25% of Social Security Disability Insurance

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[1] National Institutes of Health, National Institute of Mental Health, Statistics: Any Disorder among Adults. Retrieved April 29, 2015, from http://www.nimh.nih.gov/health/statistics/prevalence/any-mental-illness-ami-among adults.shtml; http://www.nimh.nih.gov/health/statistics/prevalence/serious-mental-illness-smi-among-us-adults.shtml.

[2] C.S. Dewa and D. McDaid, "Investing in the Mental Health of the Labor Force: Epidemiological and Economic Impact of Mental Health Disabilities in the Workforce," available online at http://www.springer.com/cda/content/document/cda_downloaddocument/9781441904270-c1.pdf. This paper (and others cited herein) is reprinted in I.Z. Schultz and E.S. Rogers (eds.), *Work Accommodation and Retention in Mental Health* (Springer 2011) (hereafter "*Work Accommodation and Retention*"), at 33.

[3] *Id.* at 37.

[4] J.I. Wang, "Mental Health Literacy and Stigma Associated with Depression in the Working Population," reprinted in *Work Accommodation and Retention*, *supra*, at 347.

[5] J.A. Cook, *Employment Barriers for Persons with Psychiatric Disabilities: Update of a Report for the President's Commission*, 57 Psychiatric Serv. 1391, 1392 (Oct. 2006), available online at http://ps.psychiatryonline.org/doi/pdf/10.1176/ps.2006.57.10.1391.

[6] T. Krupa, "Employment and Serious Mental Health Disabilities," reprinted in *Work Accommodation and Retention*, *supra*, at 91, 92.

recipients,[7] and are 38% more likely to receive welfare benefits than those without such disabilities.[8]

C. As reflected by its statutory findings, one goal of the ADA is to enable people with disabilities to free themselves of their reliance upon social welfare programs by removing barriers to work through equal employment opportunities:

> [T]he continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and non-productivity.
> 42 U.S.C. § 12101(a)(8).

III. The Economic Cost of Mental Illness

A. In North America, the estimated annual economic cost of mental disability is $83.1 billion. This figure includes the cost of public welfare outlays as well as lost productivity throughout the workforce.[9] The cost of depression alone is estimated to be $8 billion as a result of premature death of potentially productive employees, and $23 billion through absences or loss of productivity.[10]

B. "By any metric, depression has an adverse impact on employment and work productivity."[11] The presence of a mental health disability has been found to reduce productivity in employment by 11%, which translates into an average of 1 day of work absence and 3 days of reduction in work per month for an individual.[12]

IV. Economic Costs and Benefits of Accommodation for People with Disabilities

A. The cost of job accommodations for employees with disabilities (mental and physical) is low. In a study of workplace accommodations at Sears, Roebuck and Co. from 1993 to 1997, the average direct cost of an accommodation was $45. This compared to the $1,800 to $2,400 average administrative cost of replacing an

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[7] C.S. Dewa and D. McDaid, cited *supra* note 3, at 41.
[8] Sullivan, cited *supra* note 1, at 338, *citing* R. Jayakody and H. Pollack, *Barriers to Self-Sufficiency among Low-Income, Single Mothers: Substance Use, Mental Health Problems, and Welfare Reform* (paper presented at Assn. for Public Policy Analysis and Management in Washington, DC, Nov. 1997).
[9] C.S. Dewa and D. McDaid, cited *supra* note 3, at 39.
[10] Sullivan, cited *supra* note 1, at 338, *citing* R. Hirschfeld et al, *The National Depressive and Manic-Depressive Assn. Consensus Statement on the Under Treatment of Depression*, JAMA, 277, no. 4 (1997): 335.
[11] D. Lerner et al, "Depression and Work Performance: The Work and Health Initiative Study," reprinted in *Work Accommodation and Retention*, at 104.
[12] I. Schultz et al, "Employer Attitudes Towards Accommodations in Mental Health Disability," reprinted in *Work Accommodation and Retention*, at 325.

employee.[13] A 1992 through 1999 survey conducted by the Job Accommodation Network (JAN) (an organization helping disabled employees become more employable and facilitating their integration into the workforce by working with employers), showed that the cost of accommodations incurred by employers using JAN's services was $250, while the median reported benefit of providing accommodations was $10,000.[14]

B. A study found that a majority of employers reported that disability accommodations helped them to retain a qualified employee (91%), increase the employee's productivity (71%), or eliminate the cost of training a new employee (56%). A substantial number of employers also reported improved employee attendance (46%), interactions with co-workers (40%), overall company morale (35%), and overall company productivity (30%).[15]

C. In another study, both employers and disabled employees reported that functional limitations in the workplace due to disability could be mitigated significantly by accommodations. Without workplace accommodation, employers indicated the mean functional limitation level for disabled employees on a scale of 1 (not limited) to 5 (substantially limited) was 3.66, while with accommodations the mean limitation level dropped to 2.18. Employees' perception of the benefits of accommodations was even greater. Employees with disabilities reported their mean limitation level as 3.88 without an accommodation, and 1.89 with accommodations.[16]

V. The Non-Economic Costs and Benefits of Unemployment and Underemployment for People with Mental Health Disabilities

A. Working can be vital for recovery: "Existing qualitative evidence suggests that people with psychiatric disabilities view work as central to their recovery … and experience or anticipate many benefits from working, including increased self-esteem, decreased social isolation, and improved quality of life…, as well as financial gains, personal growth, and improved mental health."[17]

1. From a review of social science literature it was concluded that "work is an important source or role identity, social interaction and structured time that

[13] *The Economics of the Employment Provisions of the Americans with Disabilities Act: Part I - Workplace Accommodations*, 46 DePaul L. Rev. 877–914 (1997).
[14] "Accommodation Benefit/Cost Data" (JAN 1999), cited in D.J. Hendricks et al, *Cost and Effectiveness of Accommodations in the Workplace: Preliminary Results of a Nationwide Study*, Disabilities Studies Quarterly, Vol. 24, No. 4 (2005). JAN has been updating its cost surveys, and the most recent one is available is online at http://askjan.org/media/lowcosthighimpact.html.
[15] T. Solovieva et al, *Employer Benefits From Making Workplace Accommodations*, Disability and Health Journal, 4(1), 39-45 (2011).
[16] D.J. Hendricks et al, cited *supra* in note 15.
[17] E.C. Dunn et al, *The Meaning and Importance of Employment to People in Recovery from Serious Mental Illness: Results of a Qualitative Study*, Psychiatric Rehabilitation, Vol. 32, No. 1 at 69 (2008).

is associated with improved quality of life and recovery for persons with serious mental disorders," while being denied access to the labor market or segregated into poorly paid second tier jobs can add to the sense of failure and stigma already associated with mental disorders.[18]

VI. The Stigma Attached to Mental Illness

A. The stigma against mental illness generally

1. Studies ranking health conditions by degrees of stigma show that mental health disorders generate some of the strongest negative attitudes, with little change over the last three decades, and to a degree comparable to persons with AIDS or ex-convicts.[19]

2. In a study of people's perceptions of mental illness, 33% of the participants thought that people with major depression were violent, a stereotype that actually became more prevalent between 1950 and 1996. Another survey measuring people's comfort level with people with mental illness showed that 47% of the participants were unwilling to work closely or spend an evening socializing with someone with a major depressive disorder; 29% reported being unwilling to engage in social interactions with a troubled person (defined as having mild worrying, sadness, nervousness, sleeplessness with no functional impairment).[20]

3. Inherent to the stigma against mental illness is a moral judgment. Mental disorders are viewed as more controllable than physical impairments, leading to responses that often punish, rather than help, those with such disorders. Other common perceived attributes of mental illness are dangerousness, incompetence, and instability.[21]

B. Prejudices held by employers towards people with mental disabilities

1. Stigma is a more significant barrier to the employment of people with mental illness, especially serious mental illness, than is the individual's actual disabling condition. Ninety percent of employers would hire a person with a physical disability while only 10% would hire a person with a mental disability. Employers commonly believe that people with mental health disabilities are of limited employability and do not consider accommodations to be effective options for retaining them on the job.[22]

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[18] M.L. Baldwin and S.C. Marcus, "Stigma, Discrimination, and Employment Outcomes Among Persons with Mental Health Disabilities," reprinted in *Work Accommodation and Retention*, at 53–54.
[19] *Id.*
[20] B.G. Link et al, *Public Conceptions of Mental Illness: Labels, Causes, Dangerousness, and Social Distance*, Am. J. Public Health Vol. 89, No. 9 (1999) at 1331–32.
[21] Baldwin, cited *supra* note 15, at 56, 57.
[22] Schultze, cited *supra* note 13, at 326, 335.

2. Compared to hearing or mobility impairments, psychiatric disabilities are the least preferred disabilities by employers when considering job applications; once aware of their disability, employers rate people with mental illness as less employable than those with physical disabilities.[23]

3. In a survey of businesses, it was found that 68% of them made special efforts to hire minorities; 41% to hire people with general medical disorders; and 31% to hire people with mental disorders.[24]

4. Common prejudices found in the workplace against people with mental disabilities include:

5. The mentally ill are not competent to fulfill the task and social demands of employment;

a They are prone to violence and dangerous behavior at work;

b. Mental illnesses are not legitimate illnesses and, therefore, are not entitled to accommodations;

c. Employment will make people with mental illness more ill; and

d. Employing people with mental health disabilities will weaken workplace productivity.[25]

C. Self-Stigma

1. "[D]evaluation that is at the core of stigma and discrimination becomes internalized by people with mental illness, and compromises their sense of entitlement to valued social resources such as employment."[26]

2. Both direct and indirect stigma has a long-term psychological effect on people with mental health disorders, including feelings of anger, isolation, discouragement and sadness.[27]

VII. The Disclosure Dilemma

A. As discussed below, an employer is not obligated to make a reasonable accommodation to an employee's mental disability unless the individual discloses

[23] K. L. McDonald-Wilson, "Disclosure of Mental Health Disabilities in the Workplace," reprinted in *Work Accommodation and Retention*, at 199.
[24] Baldwin, cited *supra* note 15, at 58.
[25] Krupa, cited *supra* note 7, at 97; *see also* Schultze, cited *supra* note 13, at 326, 335.
[26] P.W. Corrigan and J.R. O'Shaughnessy, *Changing Mental Illness Stigma as it Exists in the Real World*, Rehabil. Psycho. 52(4):451-57 (2007).
[27] S. G. Goldberg and M.B. Killeen, *The Disclosure Conundrum: How People with Psychiatric Disabilities Navigate Employment*, , Psychology, Public Policy, and Law, Vol. 11, No. 3, 2005, 463–500 at 491, *citing* O.F. Wahl, *Mental Health Consumers' Experience of Stigma*, Schizophrenia Bulletin, 25, 467-78 (1991); O.F. Wahl, *Telling is Risky Business: Mental Health Consumers Confront Stigma*, NJ: Rutgers Univ. Press (1991).

the nature of the disability and need for the accommodation. *Hunt-Golliday v. Metropolitan Water Reclamation Dist. of Greater Chicago*, 104 F.3d 1004, 1013 (7th Cir. 1997) (plaintiff had "failed to present anything at all regarding whether she informed [the defendant] of her alleged … disability and her need for accommodation, let alone what should have or could have been done for her"); *Beck v. University of Wis. Bd. of Regents*, 75 F.3d 1130, 1134 (7th Cir. 1996) ("[a]n employee has the initial duty to inform the employer of a disability before ADA liability may be triggered for failure to provide accommodations -- a duty dictated by common sense lest a disabled employee keep his disability a secret and sue later for failure to accommodate"); *Mole v. Buckhorn Rubber Products, Inc.*, 165 F.3d 1212, 1218 (8th Cir.), *cert. denied*, 528 U.S. 821 (1999) ("Only [the employee] could accurately identify the need for accommodations specific to her job and workplace."); *Crandall v. Paralyzed Veterans of Am.*, 146 F.3d 894 (D.C. Cir. 1998) (employee with bipolar disorder could not state a claim under the Rehabilitation Act when he never told his employer of his mental illness and never requested accommodations.). *See also James v. Hyatt Regency Chicago*, 707 F.3d 775, 782 (7th Cir. 2013); *Wilbourn v. Chicago Transit Auth.*, No. 14 CV 6327, 2015 WL 1002879, at *3 (N.D. Ill. Mar. 2, 2015).

B. But revealing a mental disability can be perilous, or seemingly so, putting the employee at risk of ostracism, a hostile work environment, and other forms of discrimination, including termination.

1. Fear of stigma is the main reason for employees' non-disclosure of mental illness.[28] Employees interviewed for a study described the stigma coming from disclosure of one's mental illness as follows:

> "Once you're labeled mentally ill, they automatically assume there's a big difference…To a certain extent, I've noticed that normal people, even though they might not work as well, they're tolerated more on a regular job than mentally ill people are…I've also noticed that if you don't watch, the boss will put more on a mentally ill person to do, especially if that mentally ill person doesn't complain."
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> ***
>
> "…the downside of disclosure is that I can't be invisible…I'm thinking that I'm in this pretty bad situation where I want to blend in anonymously…I'll be angry that I had to reveal the most intimate part of myself to people who I would not want to do that with."
>
> ***
>
> "If people know you have a psychiatric disability, they treat you worse… They treat you different… They look at you different, they talk to you

[28] McDonald-Wilson, cited *supra* note 20, at 14, 197.

different, and they act different towards you because they think something's wrong with you."[29]

2. Myths, fears, and stereotypes about psychological or psychiatric disabilities still abound. Employer bias against people with mental disabilities, along with *perceived* fears about safety, potential liability, and insurance rates, create a serious barrier to continued employment once information about a person's disability is divulged.[30] *See, e.g., Quiles-Quiles v. Henderson*, 439 F.3d 1, 3–4 (1st Cir. 2006) (upon receipt of medical documentation, supervisor called plaintiff "crazy" on a daily basis and publicly joked about how he saw a psychiatrist and took medication for his condition); *Doe v. Salvation Army,* 443 F.3d 1050, 1051 (6th Cir. 2008) (employer stopped job interview upon learning that client took psychotropic medication due to its fears of liability); *Josephs v. Pacific Bell,* 432 F.3d 1006, 1011, 1016 (9th Cir. 2005), *amended and superseding*, 443 F.3d 1050 (9th Cir. 2006) (employer thought employee could not perform any job within the company based on his having been found not guilty in a criminal case many years earlier and having spent three years in a psychiatric facility; employer was "not going to bring someone like that back"); *Lizotte v. Dacotah Bank*, 677 F. Supp. 2d 1155, 1165 (D.N.D. 2010) (employer "blown away" that a person who attempted suicide is not in jail); *Stokes v. City of Montgomery,* No. 2:07-cv-686-WHA, 2008 WL 4369247, at *2–3 (M.D. Ala. Sept. 25, 2008) (perception that police officer was unfit after she attempted suicide and revealed that she continued to receive treatment for depression); *Burris v. Safeway, Inc.,* No. CV-04-0477, PCT-PGR, 2006 WL 2731113, at *4 (D. Ariz. Sept. 25, 2006) (employer made sarcastic comments about plaintiff's need to take psychiatric medications and feeling stressed, referred to her department as the "mental ward." and expressed concern that she has a potential for violent retaliation).[31]

3. Some courts have recognized the dilemma people with psychiatric disabilities face when seeking workplace accommodations: "We realize, of

[29] Goldberg, cited *supra* note 24, at 477, 485.

[30] With regard to perceived impairments, many "are not in fact disabling but are believed to be so, and the people having them may be denied employment or otherwise shunned as a consequence. Such people, objectively capable of performing as well as the unimpaired, are analogous to capable workers discriminated against because of their skin color or some other vocationally irrelevant characteristic." *Van Zande v. Wisconsin State Department of Administration*, 44 F.3d 538, 541 (8th Cir. 1995).

[31] The myths, fears and stereotypes that the ADA seeks to combat may even exist in the judiciary, making it difficult to enforce the law on behalf of plaintiffs with mental illness. Comments such as these are illustrative: "Paranoid schizophrenia often entails the sort of violent outbursts (or threats of violence) that an employer need not accommodate." *Wilson v. Chrysler Corp*., 172 F.3d 500, 513 (7th Cir. 1999) (Easterbrook, J., concurring), *rehearing with suggestion for rehearing en banc denied*, 236 F.3d 827 (7th Cir. 2001). Judge Posner begins the recitation of facts in one case by noting that the plaintiff "had a manic fit." *Miller v. Runyon*, 77 F.3d 189, 190 (7th Cir. 1996). *See* S. Stefan, *Hollow Promises: Employment Discrimination against People with Mental Disabilities*, (American Psychological Assn. 2002), at 272 n.12.

course, that someone with a disability may be reluctant to discuss it with anyone, particularly his/her employer." *Conneen v. MBNA America Bank, N.A.*, 334 F.3d 318, 331–32 (3d Cir. 2003). This is especially true where the underlying problem implicates one's mental or emotional stability. *Id., citing Taylor v. Phoenixville School District*, 184 F.3d 296, 315 (3d Cir. 1999) (noting that "[d]isabled employees, especially those with psychiatric disabilities, may have good reasons for not wanting to reveal unnecessarily every detail of their medical records ... the information may be irrelevant ... and ... could be embarrassing, and might actually exacerbate workplace prejudice.").

4. Additionally, people with mental disabilities may actually be incapable of clearly articulating an accommodation request. *See, e.g., Bultemeyer v. Fort Wayne Comm. Schools*, 100 F.3d 1281, 1286 (7th Cir. 1996) ("bearing in mind the seriousness of his mental illness, it is evident that Bultemeyer's actions were a product not of a cold, calculating intellect, but of an irrational fear. … These were not the deliberate actions of a mentally sound man who just didn't want to go to work, they were the product of mental illness. We understand that the irrationality of these fears may be frustrating to FWCS, but as Bultemeyer's employer, FWCS had a duty to engage in the interactive process and find a reasonable way for him to work despite his fears"); *see also Walsted v. Woodbury Co.*, 113 F. Supp. 2d 1318, 1335 (N.D. Iowa 2000) (observing that it should have been obvious that the plaintiff, who had an intellectual disability, might need an accommodation).

VIII. Disclosure Is a Pre-Requisite for Accommodation Unless the Employer Has Independent Knowledge

A. Because an employer is only required to accommodate "known" disabilities, people with psychiatric disabilities have no choice but to disclose their conditions if they need an accommodation. *See, e.g., Richio v. Miami-Dade Cnty*., 163 F. Supp. 2d 1352, 1363 (S.D. Fla. 2001) (employer had no obligation under the ADA to accommodate employee with depression by extending her FMLA leave where employee had not advised employer that she suffered from depression, but had only stated that she was suffering from unspecified "emotional problems"); *Reed v. LePage Bakeries, Inc*., 244 F.3d 254, 261 (1st Cir. 2001) (plaintiff, who suffered from bipolar disorder, failed to provide adequate notice when she stated only that she needed an accommodation as to conflicts at work by referencing the fact that she was seeing a therapist, not that she had "depression."

B. Medical documentation that is not specific enough to establish a need for accommodation due to psychiatric impairment may result in no accommodation and no legal recourse. *See, e.g., Goos v. Shell Oil Co.*, 451 F. App'x 700, 702–03 (9th Cir. 2011) (Goos did not participate in good faith in the interactive process because Goos neglected to inform the employer that she and her psychiatrist believed she could not return to work as a machinist due to perceived

discrimination in the machine shop; by withholding this information, Goos prevented Shell from learning that it should consider reassigning hers).

C. Cases and authorities finding that either the employer had notice of disability and, therefore, was obliged to provide the accommodation, or finding the employee's accommodation request was sufficient to trigger the interactive process: *Taylor v. Phoenixville Sch. Dist*., 184 F.3d 296, 313–15 (3d Cir. 1999) (plaintiff's son informed employer that his mother had been diagnosed with bipolar disorder and would need accommodations when she returned to work; if employer needed more information, it was required to ask for it); *Bultemeyer v. Fort Wayne Cmty. Schools,* 100 F.3d at 1286 (letter requesting a position that was "less stressful" was sufficient in light of the employer's knowledge of plaintiff's mental disability).

D. Cases where plaintiff's notice to employer was insufficient: *Hoppe v. Lewis Univ*., 692 F.3d 833, 840 (7th Cir. 2012) (plaintiff made no attempt to tell defendant what the nature of her disability was and there was no reason to believe that defendant knew that she suffered from depression, anxiety, dizziness, or any other disability); *Kobus v. The College of St. Scholastica, Inc.*, 608 F.3d 1034, 1039 (8th Cir. 2010) (plaintiff revealed only that he needed time off for stress and depression, which was insufficient notice that he had a disability and required accommodation); *Boyle v. Lynch*, 5 F. Supp. 3d 425, 434 (W.D.N.Y. 2014) (notice of disability must be contemporaneous with request for accommodation).

IX. The Practicalities of Providing Legal Advice regarding Disclosure[32]

A. Does the employee need an accommodation? If so, disclosure will probably not be optional. The issue will be how to disclose and how much to disclose.

B. Other Reasons for Disclosure besides the Need for Accommodation

1. In applying for a job, explaining gaps in employment;

2. To explain symptoms, hospitalizations, crisis issues at work;

3. To gain the understanding of supervisors and coworkers;

4. To relieve the stress of keeping secrets and cover stories; and

5. To reduce isolation by sharing personal information with others.

C. Reasons Militating Against Disclosure

1. Client does not need an accommodation and privacy concerns outweigh any practical benefits of disclosure or could create problems the client does not already have.

[32] These considerations come from MacDonald-Wilson et al, cited *supra* note 20, at 201, Table 10.1, "Reasons for choosing to disclose or not disclose." *See also* Goldberg et al, cited *supra* note 24.

2. To prevent being treated negatively or differently by supervisors and coworkers;

3. To prevent having one's behavior being attributed to mental illness;

4. To prevent being perceived as less competent;

5. To prevent the mental disability influencing employment decisions;

6. To prevent needing to work harder to prove one's worth;

7. To blend in.

D. Considerations in deciding how, when and what to disclose[33]

1. What difficulties is the client having performing the job?

2. What difficulties is the client having with supervisors or coworkers?

3. Has the client been criticized or received poor evaluations because of problems with his or her work that may be attributable to a mental disability?

4. What accommodation(s) does the client need and how urgent is the need for accommodation? If the client does not request an accommodation, is he or she in danger of being disciplined or fired? Would it be possible to wait until the employer appreciates the client's work, or until he/she is well liked and respected by coworkers and supervisors or does the client need immediate action to preserve his or job?

5. Is there a close connection between the disability and the perceived inadequacies in the client's performance that can be explained through disclosure?

6. Evaluate to whom the disclosure should be made: the supervisor? Human Resources? a trusted co-worker?

7. If disclosure is made, consider what and how to disclose

a. Identify the specific medical condition, or give enough information to place employer on notice that the client requires accommodation due to a medical condition;

b. Identify the specific job functions affected by the client's medical condition and for which assistance is needed;

c. Emphasize the job functions the client *can* perform, accomplishments on the job, etc. Use positive language to describe

[33] These questions are derived from MacDonald-Wilson et al, cited *supra* note 20, Appendices A and B at 209–15, and Goldberg et al, cited *supra* note 24.

the impairment: "in recovery," "successfully treated," "biochemical imbalance," "a mental health condition," an "illness that is managed."

d. Specify what accommodation is being requested or request assistance in identifying the right assistance so that the client can continue to perform the essential functions of the job.

X. Interactive Process

A. General Principles

1. Once an employee asks for a reasonable accommodation, or the employer recognizes that the employee needs an accommodation but is unable to request one, the employer is obligated to initiate an interactive process aimed at determining the employee's limitations and possible ways of accommodating them. *See Barnett v. U.S. Air, Inc*., 228 F.3d 1105, 1112 (9th Cir.) (*en banc*), *vacated on other grounds*, 535 U.S. 391 (2002) *Zivkovic v. Southern California Edison Co.*, 302 F.3d 1080, 1089 (9th Cir. 2002), *appeal after remand*, 105 F. App'x 892 (9th Cir. 2004); *Mengine v. Runyon,* 114 F.3d 415, 420 (3d Cir. 1997); *Taylor,* 184 at 314–17; *Bultemeyer*, 100 F.3d at 1284. Additionally, the employer is required to initiate an interactive process when the disability is obvious or known to the company, and appears to be interfering with job performance.[34]

2. The interactive process is mandatory and requires both parties to participate in good faith. The legislative history makes clear that employers are required to engage in an interactive process with employees in order to identify and implement appropriate reasonable accommodations. The Senate Report to the ADA explained that: "[a] problem-solving approach should be used to identify the particular tasks or aspects of the work environment that limit performance and to identify possible accommodations … employers first will consult with and involve the individual with a disability in deciding on the appropriate accommodation." S.Rep. No. 101-116, at 34 (1989); *see also* H.R.Rep. No. 101-485, pt. 2, at 65 (1990), U.S. Code. Cong. & Admin. News 1990, at 303, 348.

[34] "Application of this general rule [that a request for accommodation is a prerequisite to liability for failure to accommodate] is not warranted, however, where the disability is obvious or otherwise known to the employer without notice from the employee. The notice requirement is rooted in common sense. Obviously, an employer who acts or fails to act without knowledge of a disability cannot be said to have discriminated based on that disability. Moreover, the notice requirement prevents an employee from keeping her disability a secret and suing later for failure to accommodate. These concerns are not relevant when an employer has independent knowledge of an employee's disability. The rule requiring a request for accommodation [does not apply] in such circumstances." *Brady v. Wal-Mart Stores, Inc.,* 531 F.3d 127, 135 (2d Cir. 2008), *quoting Felix v. N.Y. Transit Authority*, 154 F. Supp. 2d 640, 657 (S.D.N.Y. 2001).

3. All that is needed to trigger the interactive process is a request by an employee or someone on her behalf for assistance in the workplace due to a disability. She does not have to specifically use the word "accommodate" or any other "magic words." *See Conneen,* 334 F.3d at 332 (3d Cir. 2003)*; Taylor,* 184 F.3d at 312; *Zivkovic*, 302 F.3d at 1089 ("An employee is not required to use any particular language when requesting an accommodation but need only inform the employer of the need for an adjustment due to a medical condition.") (internal quotation and citation deleted).

4. Where psychological conditions are at issue, the ADA may impose a higher standard of care on the employer and require less of the employee to trigger the interactive process. *Bultemeyer*, 100 F.3d at 1285; *Taylor*, 184 F.3d at 313.[35] The information that must be included in the employee's initial notice depends on what the employer knows. *Taylor,* 184 F.3d at 313. Once the employer knows of the disability and the employee's desire for accommodations, it makes sense to place the burden on the employer to request additional information that the employer believes it needs. *Id.* at 315.

5. The interactive process requires that the employer accurately assess both the disability and its limitations and the range of potential accommodations that can be utilized to accommodate the disability. 29 C.F.R. § 1630.2(o)(3) provides in relevant part: "To determine the appropriate reasonable accommodation it may be necessary for [an employer] to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."

6. The phrase "may be necessary" is merely recognition that in some circumstances the employer and employee can easily identify an appropriate reasonable accommodation. "Any doubt that the EEOC views the interactive process as a mandatory obligation is resolved by the EEOC's interpretive guidance, which states that 'the employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the [employee] with a disability.'" *Barnett,* 228 F.3d at 1112, *quoting* 29 C.F.R. Pt. 1630, App. § 1630.9. *See also* EEOC Enforcement Guidance:

[35] *Bultemeyer*, 100 F.3d at 1285 ("In a case involving an employee with mental illness, the communication process becomes more difficult. It is crucial that the employer be aware of the difficulties, and help the other party determine what specific accommodations are necessary.… [P]roperly participating in the interactive process means that an employer cannot expect an employee to read its mind and know that he or she must specifically say "I want a reasonable accommodation,' particularly when the employee has a mental illness. The employer has to meet the employee half-way, and if it appears that the employee may need an accommodation but doesn't know how to ask for it, the employer should do what it can to help." (internal quotation and citation omitted).

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7. Both parties bear responsibility for determining what accommodation is necessary. *Mengine*, 114 F.3d at 420; *Beck*, 75 F.3d at 1135. Neither party should be able to cause a breakdown in the process for the purpose of either avoiding or inflicting liability. "A party that obstructs or delays the interactive process is not acting in good faith. A party that fails to communicate, by way of initiation or response, may also be acting in bad faith. In essence, courts should attempt to isolate the cause of the breakdown and then assign responsibility." *Id.*

8. An employer that obstructs or delays the interactive process, or fails to communicate by way of initiation or response, and thereby depletes the range of possible accommodations, is not fulfilling its duty to engage in the process in good faith. *Colwell v. Rite Aid,* 602 F.3d 495, 504 (3d Cir. 2010); *Taylor,* 184 F.3d at 311. The process would be an exercise in futility if employers could constrict

9. If the employee could have been reasonably accommodated but for the employer's lack of good faith, the employee will prevail on her failure to accommodate claim. *See Armstrong v. Burdette Tomlin Memorial Hosp.,* 438 F.3d 240, 246 (3d Cir. 2006); *see also Colwell,* 602 F.3d at 504–05; *Donahue v. Conrail,* 224 F.3d 226, 235 (3d Cir. 2000); *Taylor,* 184 F.3d at 317, 319.

10. However, an employer who fails to engage in the interactive process will not be held liable if the employee cannot identify a reasonable accommodation that would have been possible. *See Barber ex rel. Barber v. Colorado Dep't of Revenue*, 562 F.3d 1222, 1231 (10th Cir. 2009) ("Prior cases establish that a disabled plaintiff alleging that an employer failed to properly engage in the interactive process must also establish that the interactive process would have likely produced a reasonable accommodation.").

11. Cases where courts found the employer responsible for the breakdown of the interactive process: *Humphrey v. Memorial Hospitals Assoc*., 239 F.3d 1128, 1139 (9th Cir. 2002), *cert. denied,* 535 U.S. 1011 (2002) (employer failed to engage in the interactive process as a matter of law where it rejected the employee's proposed accommodations by letter and offered no practical alternatives); *Deane*, 142 F.3d at 149 ("the single telephone conversation ... hardly satisfies our standard that the employer make reasonable efforts to assist [the employee], to communicate with him in good faith, and to not impede his investigation [for employment]").

12. Cases where courts found the employee responsible for the breakdown of the interactive process: *Conneen*, 334 F.3d at 331 (affirming summary judgment because plaintiff failed to advise the employer that she needed a

previous accommodation reinstated); *Beck,* 75 F.3d at 1135 (doctor's note only requested accommodation for depression including reduced workload, which employer provided; plaintiff failed to specify that she needed anything the employer did not try to provide). *See also Taylor*, 184 F.3d at 313–15; *Goos*, 451 F. App'x at 702–03.

XI. Conduct-Based Accommodations

Cases revolving around mental health impairments often involve an adverse employment action that is pending or already happened. Many of the cases where the employee has already been subjected to an adverse action involve disability-related misconduct.

A. General Rule: An employer may discipline an employee—whether he or she has a disability or not—if the employee violates a workplace conduct standard, so long as the workplace conduct standard is (1) "job-related for the position in question and is consistent with business necessity," and (2) other employees are held to the same standard. 42 U.S.C. § 12112(b)(6); *see also* The Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities, §§ 8–9 (EEOC Jan. 20, 2011); EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, ¶¶ 35, 36 (October 17, 2002) (same) and EEOC Enforcement Guidance on Americans with Disabilities Act and Psychiatric Disabilities, ¶ 30.

B. Employers may use the same evaluation criteria for employees with disabilities as they do for people without such disabilities. The ADA does not require an employer to "accommodate" mentally disabled employees by accepting behavior that the employer would normally punish if committed by a non-disabled employee. In other words, the ADA does not require an employer to ignore violations of workplace rules and conduct requirements, even if the person has a disability and even if the conduct was caused by the disability. *See* Applying Performance and Conduct Standards, *supra,* ¶ 9.

C. Accommodations are prospective. Although there is no hard and fast rule as to when an employee should request an accommodation, they should do so before performance problems arise or before they become too serious. Employers are not required to rescind discipline, even terminations, based on disability-related conduct which occurred before the employer was placed on notice that the employee had a disability and might require accommodation. EEOC Enforcement Guidance on Americans with Disabilities Act and Psychiatric Disabilities, ¶ 31; Applying Performance and Conduct Standards, *supra,* ¶ ¶ 5– 6; 10.

D. If the employee waits too long to request an accommodation, there may be nothing a lawyer can do to preserve their employment, even if the conduct is caused by the disability. Applying Performance and Conduct Standards, *supra,* ¶ 9. *See, e.g., Little v. FBI*, 1 F.3d 255, 259 (4th Cir.1993); *see also Flynn v. Raytheon Co.*, 868 F. Supp. 383, 387 (D. Mass. 1994) ("While the ADA ... protects an individual's status as an alcoholic, it is clear that a company need not tolerate misconduct such as intoxication on the job"); *Neilsen v. Moroni Feed Co.,* 162 F.3d 604, 609 (10th

Cir. 1998); *Mararri v. WCI Steel, Inc.*, 130 F.3d 1180, 1182 (6th Cir. 1997) (ADA protects individual's status as an alcoholic but does not insulate him from the consequences of his actions).

E. However, the employer cannot fire an employee for misconduct or performance problems that flow from a failure to provide a reasonable accommodation when the employer knew about the disability before the misconduct took place and after the duty to engage in the interactive process and/or provide accommodations has been triggered. *See, e.g., Humphrey v. Memorial Hospitals Ass'n,* 239 F. 3d 1128 (9th Cir. 2001) *(*conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for discipline, particularly where it is the employer's failure to reasonably accommodate a known disability that leads to the performance inadequacies*); Borkowski v. Valley Cent. School Dist.,* 63 F.3d 131, 143 (2nd Cir. 1995). On the other hand, employees cannot assume that notice of their disability will forever trigger the employer's duty, so providing notice from time to time may be necessary to preserve the right to accommodation and to protect against adverse job actions based on manifestations of disability. *See Conneen,* 335 F.3d at 333.

F. If the discipline is something less than termination, the employer may ask the employee about the disability, or otherwise respond to the employee's disclosure in order to prevent future misconduct. EEOC, Applying Performance Conduct Standards at ¶10.

G. Specific Conduct Issues

1. ***Attendance***: Federal courts generally affirm that an employer can lawfully terminate an employee for excessive absenteeism even when the absences are due to a disability covered by the ADA if regular attendance is an essential function of the position, such as when an employee must perform a job on-site. *Conneen*, 334 F.3d at 329 (regular starting time is an essential function); *see also Samper v. Providence St. Vincent Med. Ctr*., 675 F.3d 1233**,** 1238 (9th Cir. 2012); *Vandenbroek v. PSEG Power CT LLC*, 356 F. App'x 457, 460 (2d Cir. 2009); *Nowak v. St. Rita High School*, 142 F.3d 999, 1003 (7th Cir.1998) (noting that a teacher "who does not come to work cannot perform the essential functions of his job").

2. ***Getting along with coworkers***: *See McKane v. UBS Financial Services., Inc*., 363 F. App'x 679, 682 (11th Cir. 2010) (employer did not violate the ADA by refusing to move the employee's office away from other employees so that he would not have to interact with them. Maintaining peaceful relations with coworkers was an essential function of the job); *Theilig v. United Tech Corp.*, 415 F. App'x 331, 333 (2d Cir. 2011) (employee's request to have no contact with any coworkers or with his two supervisors, based on a psychiatric evaluation that the employee's return to the workplace posed a risk of workplace violence or suicide, was unreasonable as a matter of law).

3. ***Getting along with supervisors***: An employee is not entitled to a change in supervisor as an accommodation for stress, depression, or anxiety. *See, e.g., Flynt v. Biogen Idec, Inc*., No. 3:11-cv-22, 2012 WL 4588570, at * 4 (S.D. Miss. Sept. 30, 2012); *Larson v. Commonwealth of Virginia, Department of Transp*., No. 5:10-cv-00136, 2011 WL 1296510, at *2 (W.D. Va., Apr. 5, 2011). However, altering management tactics, including adjusting the level of supervision, is one form of reasonable accommodation for mental disabilities. *See* Enforcement Guidance: The Americans With Disabilities Act and Psychiatric Disabilities, Question 26; *Battle v. United Parcel Service*, 438 F.3d 856 (8th Cir. 2006), *cert. denied*, 550 U.S. 598 (2007) (requiring supervisor to provide agenda to curtail abusive managerial tactics).

4. ***Disruptive or anti-social behavior***: *Sever v. Henderson*, 381 F. Supp. 2d 405 (M.D. Pa. 2005), *aff'g,* 220 F. App'x 159 (3d Cir. 2007) (employee, with post-traumatic stress disorder and obsessive compulsive disorder, was fired for making statements and gestures of violence against his co-workers). If an employer knew about an employee's disability before the employee engaged in disruptive or anti-social behavior related to his or disability, and the disability-related misconduct played a role in the decision to discipline, the employee may have a cause of action for discrimination, analyzed through the *McDonnell-Douglas* framework. *See e.g., Wills v. Superior Court*, 195 Cal. App. 4th 143, 166 (Cal. Ct. App. 2011*), as modified on denial of rehearing* (May 12, 2011), *review denied* (Jul 20, 2011) (interpreting FEHA as authorizing an employer to distinguish between disability-related misconduct and the disability itself in the narrow context of threats or violence against coworkers); *Gambini v. Total Renal Care, Inc.*, 486 F.3d 1087, 1094 (9th Cir. 2007) (holding that an employer violated the ADA by discharging an employee whose misconduct was caused by bipolar disorder).

5. ***Substance abuse***: Employers may hold an employee who is alcoholic or who engages in the illegal use of drugs to the same standards of performance and behavior as other employees. 42 U.S.C. § 12114(c)(4); EEOC, Applying Performance and Conduct Standards, ¶ 24; *Daft v. Sierra Pacific Power Co.*, 251 F. App'x 480, 482–83 (9th Cir. 2007).

XII. Types of reasonable accommodations: flexible or modified schedule

A. Late arrival time

1. *McMillan v. City of New York*, 711 F.3d 120, 123 (2d Cir. 2013) (social services case manager, suffering from schizophrenia, consistently came in late due to side-effect of his medication; in reversing summary judgment, the court found that arriving at work at a specific time was not an essential

function of plaintiff's job and that he could make up his tardiness by using time banked from when he worked more than the regular work week).

2. *Conneen*, 334 F.3d at 328–29, 331–32 (where bank manager was frequently tardy due to the sedative effect of medication, the court held that showing up at work at 8:00 A.M. to set a good example for other employees was not an essential job function; however, plaintiff's failure to accommodate claim failed because the plaintiff did not make the employer aware that she needed the schedule modification on a permanent, not temporary, basis).

3. *But see Guice-Mills v. Derwinski*, 967 F.2d 794, 797 (2d Cir. 1992) (a later start time was not a reasonable accommodation for a head nurse whose supervisory duties required her to be present during an early morning change in shifts).

B. Flexible hours/work schedule

1. *Solomon v. Vislack*, 763 F.3d 1, 9–11 (D.C. Cir. 2014) (in reversing summary judgment under the Rehabilitation Act, finding that flexible work hours may be a reasonable accommodation for a budget analyst who never missed a deadline despite frequently arriving late to work as a result of his intensifying depression)

2. *Breen v. DOT*, 282 F.3d 839, 843 (D.C. Cir. 2002) (modifying schedule to give clerical worker an extra hour of work a day in order to allow him uninterrupted time to do filing, followed by one day off every other week, was a reasonable accommodation to his obsessive compulsive disorder).

C. Part-time work

1. *Ralph v. Lucent Technologies, Inc.,* 135 F.3d 166, 171–72 (1st Cir. 1998) (affirming preliminary injunction requiring employer to provide four weeks of part-time work at the completion of paid leave for a carpenter who suffered a mental breakdown as a result of years-long sexual harassment; upholding finding of irreparable harm where medical evidence suggested that returning to work was essential to plaintiff's recovery and that his disability would worsen the longer he was out of work).

2. *Lowe v. Hamilton Cnty. Dep't of Job & Family Servs.,* No. 1:05-CV-117, 2012 WL 1931667, at *6 (S.D. Ohio May 29, 2012) (denying summary judgment regarding plaintiff's claim that employer failed to provide her 30 days of part-time work in preparation for her return to working full-time as an accommodation to her depression, ADHD and severe anxiety disorder).

3. *Reilly v. Revlon, Inc.*, 620 F. Supp. 2d 524, 542–43 (S.D.N.Y. 2009) (finding that Revlon failed to reasonably accommodate a depressed employee who, upon returning from an extended leave of absence, sought

to work part-time for a few weeks in order to transition to full-time status; "Revlon argues that it provided sufficient accommodation to plaintiff's disability by permitting Reilly to take her 12-week FMLA leave and then giving her ten additional weeks of paid disability leave for her depression. Providing legally-required FMLA leave is not any sort of accommodation; it is a requirement of law. Providing paid disability leave above and beyond the FMLA requirements is commendable, but providing benefits to a person who cannot work is not the same thing as making an accommodation in the workplace so the person can work.")

4. *But see Treanor v. MCI Telecommunications Corp.*, 200 F.3d 570, 575 (8th Cir. 2000) (request by plaintiff for a part-time position upon returning from leave for her depression was not a reasonable accommodation where no part-time positions existed, and employer was not obligated to create such a position).

D. Shortened work week or workday

1. Shortened work week or workday is a reasonable accommodation

a. *Klaes v. Jamestown Bd. of Pub. Utilities*, No. 11-CV-606, 2013 WL 1337188, at *9 (W.D.N.Y. Mar. 29, 2013) (plaintiff, an engineer, adequately pled a failure to accommodate claim where he requested to be removed from his on-call schedule in order to help with his sleep apnea and depression was reasonable).

b. *Cf. Menes v. CUNY Univ. of New York*, 92 F. Supp. 2d 294, 304 (S.D.N.Y. 2000) (holding that the employer reasonably accommodated plaintiff's depression by giving him a three-day work week, but that even with reduced schedule, the employee was unable to perform the essential functions).

c. *See also* S. Stefan, *Hollow Promises*, cited *supra* note 32, at 175: "Requirements that are related to minimizing labor costs and maximizing employer profits (often at the expense of employee health) should not be considered essential functions. Otherwise, any employer could determine that working 50, 60, 70, or more hours a week is an essential function of each position."

2. Shortened work week or workday is not a reasonable accommodation

a. *Pagonakis v. Express, LLC*, 534 F. Supp. 2d 453, 461 (D. Del. 2008), *aff'd in part, rev'd in part and remanded*, 315 F. App'x 425 (3d Cir. 2009) (the district and appellate courts accepted defendant's assertion that working at least 40 hours a week was an essential function of a store co-manager job, and consequently determined that plaintiff's requests for flexible hours to accommodate her head injury, cognitive disorder, depression and

adjustment disorder were unreasonable. *Note: The court so rules despite the fact that over a six-year period, in three different jobs with defendant, plaintiff had worked a flexible schedule*).

b. *Simmerman v. Hardee's Food Systems, Inc.,* No. 94–6906, 1996 WL 131948, at *5 (E.D. Pa. Mar. 22, 1996), *aff'd,* 118 F.3d 1578 (3d Cir. 1997) (Table) (granting summary judgment against restaurant manager who sought to work 40 hours a week because of her depression where employer insisted that a 50-hour work week, including night shifts, was an essential function of the job).

E. Shift changes: working during the day or on a fixed schedule

1. A 1989 Senate Report on the ADA states: "Some people with disabilities are denied employment opportunities because they cannot work a standard schedule. For example, persons who need medical treatment may benefit from flexible or adjusted work schedules. A person with epilepsy may require constant shifts rather than rotation from day to night shifts…. Allowing constant shifts or modified work schedules are examples of means to accommodate the individual with a disability to allow him or her to do the same job as a non-disabled person."[36]

2. Cases holding shift change/fixed schedule is a reasonable accommodation

a. *Gile v. United Airlines, Inc*., 213 F.3d 365, 374 (7th Cir. 2000) (upholding jury verdict for data entry operator whose employer refused to transfer her to the day shift in accommodation to her depression; the fact that the plaintiff had not fulfilled defendant's technical bidding process was deemed no defense).

b. *E.E.O.C. v. Union Carbide Chemicals & Plastics Co.,* No. CIV.A. 94–103, 1995 WL 495910, at *2 (E.D. La. Aug. 18, 1995) (finding triable issue as to whether the employer was obliged to accommodate lab technician's bipolar disorder by relieving him of working 12-hour rotating shifts and allowing him to work an eight hour shift, or a permanent day or night schedule).

c. *Cf. Krocka v. Bransfield*, 969 F. Supp. 1073, 1088–89 (N.D. Ill. 1997), *aff'd sub nom. Krocka v. City of Chicago*, 203 F.3d 507 (7th Cir. 2000) (dismissing depressed police officer's failure to accommodate claim because the Police Department had already granted plaintiff's accommodation request by removing him from the grave yard shift, although it had not yet made an official announcement).

[36] S. Rep. No. 101-116, at 31 (1989), quoted in S. Stefan, Hollow Promises at 184.

3. Cases holding shift change/fixed schedule is not a reasonable accommodation

a. *Shepheard v. New York City Corr. Dep't*, 360 F. App'x 249, 251 (2d Cir. 2010) (affirming summary judgment because police captain with major depression and anxiety disorder was unable to do her job even if assigned a regular midnight shift as an accommodation, regardless of her psychiatrist's note to the contrary).

F. Working from home/telecommuting

1. EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship, Question 34: "Working at home is a reasonable accommodation when the essential functions of the position can be performed at home and a work-at-home arrangement would not cause undue hardship for the employer. Certain considerations may be critical in determining whether a job can be effectively performed at home, including (but not limited to) the employer's ability to adequately supervise the employee and the employee's need to work with certain equipment or tools that cannot be replicated at home. In contrast, employees may be able to perform the essential functions of certain types of jobs at home (e.g., telemarketer, proofreader). For these types of jobs, an employer may deny a request to work at home if it can show that another accommodation would be effective or if working at home will cause undue hardship."

2. Cases where working from home is a reasonable accommodation

a. *Humphrey,* 239 F.3d at 1136–37 (reversing summary judgment where a triable issue existed as to whether a medical transcriptionist with obsessive compulsive disorder could have performed her essential job duties working at home, given that other medical transcriptionists worked from home. The court rejected the employer's argument that Humphrey's record of tardiness and absenteeism justified the denial of the accommodation: "It would be inconsistent with the purposes of the ADA to permit an employer to deny an otherwise reasonable accommodation because of past disciplinary action taken due to the disability sought to be accommodated.")

b. *Goonan v. Fed. Reserve Bank of New York*, 916 F. Supp. 2d 470, 482–83 (S.D.N.Y. 2013), *reconsideration denied*, No. 12 CIV. 3859 JPO, 2013 WL 1386933 (S.D.N.Y. Apr. 5, 2013) (denying motion to dismiss where employee whose PTSD was triggered by working at his office building located near the site of the World Trade Center bombing, sought transfer to another building or to telecommute; the employee's proposed accommodation was reasonable while the Bank's alternatives, including moving him

away from the window, a white noise machine, multi-spectrum lights, were not).

c. *Jacques v. DiMarzio, Inc*., 200 F. Supp. 2d 151, 161 (E.D.N.Y. 2002), *as supplemented* (May 6, 2002), *aff'd*, 386 F.3d 192 (2d Cir. 2004) (*see* below at p. 29, re changing supervisory methods).

3. Cases where working from home is not a reasonable accommodation

a. *E.E.O.C. v. Ford Motor Co.*, 782 F.3d 753 (6th Cir. 2015) (*en banc*) (holding that working from home on an as-needed basis was not a reasonable accommodation for a re-sale buyer in a highly interactive job who had irritable bowel syndrome, and previous attempts to telecommute with a flexible schedule had proven unsuccessful).

b. *Mason v. Avaya Commc'ns, Inc.,* 357 F.3d 1114, 1123–24 (10th Cir. 2004) (affirming summary judgment against employee with PTSD who wanted to work at home because she feared a potentially violent co-worker; an at-home accommodation was held unreasonable on its face because it sought to eliminate an essential function of plaintiff's service coordinator position).

c. *Vande Zande v. State of Wis. Dept. of Admin*., 44 F.3d 538, 544–45 (7th Cir. 1995) (Posner, J.) (paraplegic/ulcers) (holding that working from home, where "productivity would be greatly reduced" is not a reasonable accommodation; but "[t]his will no doubt change as communications technology advances, but is the situation today.")

d. *Fierce v. Burwell*, No. CIV. RWT 13-3549, 2015 WL 1505651, at *5 (D. Md. Mar. 31, 2015) (plaintiff, coping with depression and learning difficulties, experienced increasing tensions with her supervisor, that led her to request an accommodation that included working from home one-day a week; the court dismissed plaintiff's failure to accommodate claim because while working from home would presumably have alleviated her depression, she failed to show that telework was necessary to perform the essential functions of the job).

XIII. Types of reasonable accommodations: time off/ leaves of absence

A. 29 C.F.R. pt. 1630, App. § 1630.2(o) (EEOC Interpretive Guidance on Title I of the Americans with Disabilities Act): a reasonable accommodation "could include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment."

1. 29 C.F.R. pt. 32, App. A(b) (Department of Labor regulations to Rehabilitation Act: a reasonable accommodation may require an employer "to grant liberal time off or leave without pay when paid sick leave is exhausted and when the disability is of a nature that it is likely to respond to treatment of hospitalization").

B. Time off/ leave of absences is a reasonable accommodation

1. *Humphrey v. Memorial Hosp. Assn.*, 239 F.3d at 1135 ("[T]he ADA does not require an employee to show that a leave of absence is certain or even likely to be successful to prove that it is a reasonable accommodation." All that is required is a showing that the leave of absence "could plausibly have enabled [the plaintiff] adequately to perform her job.")

2. *Criado v. IBM Corp,* 145 F.3d 437 (1st Cir. 1988) (affirming jury verdict where plaintiff took disability leave because of his anxiety disorder and depression but and her psychiatrist, at its completion, requested additional leave without a specific return date to allow her condition to improve; the court held that the additional leave was reasonable, noting that plaintiff's doctor believed that, with the leave, he could ameliorate plaintiff's condition to the point that she could return to work as a productive employee. There was no real burden on IBM since it had a policy giving all its employees 52 weeks of paid disability leave).

3. *Rascon v. U.S. West Communications, Inc.,* 143 F.3d 1324, 1334–35 (10th Cir. 1998) (affirming bench trial judgment for plaintiff and holding that a leave of absence to enable plaintiff to receive nearly five months of intensive treatment for his PTSD was a reasonable accommodation given that his doctors expected the treatment to "improve" plaintiff's work, and defendant would not suffer an undue burden since its leave policy allowed for longer leaves than plaintiff sought).

4. *Baucom v. Potter*, 225 F. Supp. 2d 585, 592 (D. Md. 2002) (granting summary judgment for *plaintiff* under Rehabilitation Act on his claim that a Postal Service failed to reasonably accommodate his alcoholism and depression when it refused to permit him to use his accumulated leave time to receive in-patient treatment where, according to his doctor, it was reasonably likely that following the treatment he would be able to safely return to his duties).

5. *Shannon v. City of Philadelphia*, No. CIV.A. 98-5277, 1999 WL 1065210, at *6 (E.D. Pa. Nov. 23, 1999) (finding a jury question existed as to whether plaintiff's request for an additional three months of unpaid leave for treatment of his major depression following 12 weeks of FMLA leave was reasonable, where plaintiff's physician had opined that plaintiff would be "fully fit" to return to work in three to six months and was "hopeful" that her symptoms would "resolve nearly entirely" within a year).

6. *Powers v. Polygram Holding, Inc.*, 40 F. Supp. 2d 195, 199–202 (S.D.N.Y. 1999) (holding that a reasonable jury could find that plaintiff's request for a fourth consecutive leave request, or, in all, 17 weeks of leave, was reasonable even though the predicted return date for plaintiff, who suffered from manic depression, was uncertain; stating, "no person recovering from clinically diagnosed mental illness, especially while suffering symptoms of this illness, can give an absolute date as to when his symptoms will ameliorate to the point that he will be able to return to work. To require such certainty … would be to eviscerate much of the protection afforded under the ADA.")

C. Cases where time off/leave of absence is not a reasonable accommodation

1. *Hill v. Walker*, 737 F.3d 1209, 1217 (8th Cir. 2013)*, aff'g*, 918 F. Supp. 2d 819 (E.D. Ark. 2013) (holding that a three-week leave was not a reasonable accommodation because upon returning to work, plaintiff, a social services caseworker diagnosed with depression and anxiety, would continue refusing to handle a stressful client, which was an essential function of the job).

2. *Byrne v. Avon Products, Inc*., 328 F.3d 379, 380–81 (7th Cir. 2003) (Easterbrook, J.) (while reversing summary judgment on plaintiff's FMLA claim, the court upheld the dismissal of the ADA claim, finding that extended time off was not a reasonable accommodation because plaintiff's depression and sleep disturbance were so severe that he was unable to stay awake at work and was extremely suspicious of co-workers, rendering him incapable of working. The court declared categorically: "Inability to work for a multi-month period removes a person from the class protected by the ADA," adding that time off, however, may be an apt accommodation for intermittent illnesses, such as arthritis and lupus. *This is a troubling decision. Byrne's depression was, indeed, episodic. The opinion notes that he had "four years of highly regarded service" before his difficulty staying awake surfaced; it was for less than three weeks when he exhibited the most severe symptoms, at which point he was fired; and, as it turned out, with treatment, he "surmounted his mental difficulties" within two months of his discharge*)

3. *Cisneros v. Wilson*, 226 F.3d 1113, 1130 (10th Cir. 2000) (three-month leave request was unreasonable where plaintiff, suffering from severe depression and anxiety disorder, failed to state when she could reasonably be expected to return to work).

4. *Barfield v. Donahoe*, No. 13 C 1518, 2014 WL 4638635, at *4–5 (N.D. Ill. Sept. 17, 2014) (holding that neither the ADA nor the Rehabilitation Act requires multi-month medical leaves) (collecting cases).

5. *Carrson v. Fedex Ground Package Sys., Inc.,* No. CIV 05-1951-AA, 2006 WL 3751266, at *5 (D. Or. Dec. 15, 2006) (defendant's denial of the request for an extended leave of absence was justified where the plaintiff's physician did not indicate the nature of his symptoms, whether they were treatable, and whether the leave would enable him to return to work).

XIV. Types of reasonable accommodation: job restructuring

A. Removing stressful responsibilities

1. *Hill v. Walker*, 737 F.3d 1209, 1217 (8th Cir. 2013) (see above at p. 27).

2. *Beair v. Summit Polymers*, No. CIV.A. 5:11-420-KKC, 2013 WL 4099196, at *8 (E.D. Ky. Aug. 13, 2013) ("transferring an employee solely so she will be subjected to less supervision is not a reasonable accommodation.")

3. *Bolstein v. Reich*, Civ. A. No. 93-1092, 1995 WL 46387 (D.D.C. Jan. 19, 1995) (accommodation request by an attorney with chronic depression and severe personality disturbance for more supervision, less complex assignments and elimination of appellate work was not reasonable because it would eliminate the very duties justifying his GS-14 grade, and, moreover, he refused reassignment to a lower grade job where he could have performed essential functions).

B. Aggravation-free work environment

1. *Gonzagowski v. Widnall*, 115 F.3d 744, 747–48 (10th Cir. 1997) (affirming summary judgment where Air Force computer specialist was unable to do his job because of an anxiety disorder which was exacerbated by his supervisor and the introduction of a new program language. The court observed that the employer had temporarily assigned the plaintiff a new supervisor as an accommodation, yet the plaintiff nonetheless suffered anxiety when he learned that the original supervisor was still reviewing his work. The court rejected the recommendation of the plaintiff's psychologist that plaintiff be given a work environment with less stress and criticism because "it is unreasonable to require an employer to create a work environment free of stress and criticism.")

2. *Jacques v. DiMarzio, Inc*., 200 F. Supp. 2d 151, 161 (E.D.N.Y. 2002), *as supplemented* (May 6, 2002) (denying summary judgment as to whether it was a reasonable accommodation for a packager and assembler of electric guitars who had bipolar disorder, to continue to work at home or in a more isolated space in the factory, where the employer did not claim that such working arrangements would pose an undue hardship), *aff'd*, 386 F.3d 192 (2d Cir. 2004).

3. *Pimentel v. Citibank, N.A.*, 29 A.D.3d 141, 149, 811 N.Y.S.2d 381, 388 (1st Dept. 2006) (holding that plaintiff, a client financial analyst with depression and anxiety disorder, upon returning from disability leave, made an accommodation request unreasonable as a matter of law in asking for an alternative position with "no customer or people contact," and, in any event, no such position existed)

C. Job sharing

1. *Katz v. Metro. Life Ins. Co.*, No. 95 CIV. 10075 (RPP), 1998 WL 132945, at *5 (S.D.N.Y. Mar. 20, 1998) (dismissing failure to accommodate claim where the employer had offered a sales representative with depression and anxiety disorder a job sharing arrangement and the sales representative refused, instead seeking an alternative position or part-time work. Because the defendant offered plaintiff a reasonable accommodation, it was not obligated to offer him other accommodations.)

D. Eliminating mandatory OT

1. *Johnson v. City of Blaine*, 970 F. Supp. 2d 893, 912 (D. Minn. 2013) (dismissing failure to accommodate claim where patrol officer sought to be relieved of mandatory overtime so she could go to group therapy and treatment. The court found that mandatory overtime was an essential part of the patrol officer job, referred to in the job description and collective bargaining agreement).

XV. Types of reasonable accommodation: transfer

A. Transfer is found to be a reasonable accommodation

1. *McAlindin v. Cnty. of San Diego*, 192 F.3d 1226, 1237–38 (9th Cir. 1999), *opinion amended on denial of reh'g*, 201 F.3d 1211 (9th Cir. 2000), *cert. denied*, 530 U.S. 1243 (2000) (reversing summary judgment and finding that defendant had failed to produce evidence that plaintiff's request for a transfer would create an undue hardship for the County. On the contrary, transferring plaintiff due to his anxiety disorder would not interfere with other employees' expectations because the County's transfer list is unranked and transfers are distributed in an ad hoc manner at the discretion of the hiring department).

2. *Mustafa v. Clark Cnty. Sch. Dist.*, 157 F.3d 1169, 1176 (9th Cir. 1998) (holding that a reasonable jury could find that it was reasonable to transfer to a non-classroom setting a teacher who had developed severe depression, panic disorder and PTSD from sexual misconduct charges brought against him. Plaintiff's doctors had recommended the transfer and the school district failed to present evidence that it was not feasible).

3. *Cf. Duda v. Board of Education of Franklin Park Public School District No. 84,* 133 F.3d 1054, 1059–60 (7th Cir. 1998) (school janitor stated an ADA claim when the school district, after learning of his mental illness, transferred him to a location in which he was forced to work alone and instructed him not to speak to anyone).

B. Transfer is found not required as a reasonable accommodation

1. *Burchett v. Target Corp*., 340 F.3d 510, 518 (8th Cir. 2003) (holding that the employer was not required to transfer plaintiff as a reasonable accommodation where it had already restructured her work load and reduced her work hours in accordance with her doctor's orders, and she was able to perform her current job).

2. *Corder v. Lucent Technologies Inc*., 162 F.3d 924, 928 (7th Cir. 1998) (holding that "Lucent went the extra mile and then some for Corder," a 23-year employee suffering from severe depression and anxiety, by accommodating her unpredictable need for time off; that Lucent required her to work in a larger office, further from her home, so that other employees would be available to cover for her when she was absent did not represent a failure to accommodate).

3. *Diaz v. City of Philadelphia*, No. CIV.A. 11-671, 2012 WL 1657866, at *11-12 (E.D. Pa. May 10, 2012), *aff'd*, 565 F. App'x 102 (3d Cir. 2014) (where police officer developed irritable bowel syndrome, depressive disorder and anxiety as a result of sustained sexual harassment, the court held that the police department had adequately accommodated plaintiff by, among other things, granting her a leave of absence, and that it was not required to re-assign her to an inside, non-patrol positon. The Court deferred to police department's judgment that plaintiff's mental state made her incapable of handling any police work, and while acknowledging that the reasonableness of an accommodation is ordinarily a jury question, here, "we are satisfied that when dealing with the unique situation of police officers and issues related to their mental health it would be ill-advised to second-guess the personnel decisions of a police department.")

4. *Martinsky v. City of Bridgeport***,** 814 F. Supp. 2d 130, 149-–0 (D. Conn. 2011), *aff'd*, 504 F. App'x 43 (2d Cir. 2012) (finding that the police department was not required to accommodate a police officer with a panic disorder by keeping him off patrol duty and assigning him permanently to booking or the canine unit since such permanent assignments would violate either departmental policy or the collective bargaining agreement).

XVI. Types of reasonable accommodations: changing supervisors

A. A supportive supervisor facilitates the work tenure of people with mental health disabilities.[37]

B. EEOC Enforcement Guidance *Reasonable Accommodation and Undue Hardship* at question 33 ("[a]n employer does not have to provide an employee with a new supervisor as a reasonable accommodation.")

C. The great majority of cases hold that changing supervisors is not a reasonable accommodation

1. *Ozlek v. Potter*, 259 F. App'x 417, 420 (3d Cir. 2007) (holding that transferring plaintiff away from his management team to accommodate his depression, anxiety disorder and obsessive compulsive disorder, was unreasonable as a matter of law under the Rehabilitation Act).

2. *Cardenas-Meade v. Pfizer, Inc.,* 510 F. App'x 367, 372 (6th Cir. 2013) (while not precluding the reasonable accommodation of changing supervisors, holding that the administrative costs of transferring plaintiff, who alleged that her supervisors' abusive and discriminatory treatment caused her mental illness, outweighed the benefits, pointing out that the plaintiff was in a probationary trial period and had already failed her required final examination).

3. *Kennedy v. Dresser Rand Co.,* 193 F.3d 120, 122–23 (2d Cir.1999) (declining to adopt a per se rule that a request for transfer to a new supervisor is unreasonable as a matter of law, but ruling that there is a rebuttable presumption that such a transfer is unreasonable; in this case, it was deemed unreasonable because plaintiff requested not only that she change supervisors but also that she have no contact with her old supervisor – a virtual impossibility if she were to fulfill her job duties).

4. *Weiler v. Household Fin. Corp.,* 101 F.3d 519, 526 (7th Cir. 1996) ("Weiler's solution is that she return to work under a different supervisor. But that decision remains with the employer. In essence, Weiler asks us to allow her to establish the conditions of her employment, most notably, who will supervise her. Nothing in the ADA allows this shift in responsibility.")

5. *Alsup v. U.S. Bancorp*, No. 2:14-CV-01515-KJM, 2015 WL 224748, at *6-7 (E.D. Cal. Jan. 15, 2015) (dismissing complaint because transfer to another supervisor is a *per se* unreasonable accommodation under either California law or the ADA) (collecting cases).

[37] M. Cobiere et al, Work Accommodation and Natural Supports for Maintaining Employment, Psychiatric Rehabilitation Journal (2014), No. 2, 90-98, at 95-96.

D. Cases finding changing supervisors is a reasonable accommodation

1. *Lucas v. City of Philadelphia*, No. CIV.A. 11-4376, 2012 WL 1555430, at *5 (E.D. Pa. May 2, 2012) (motion to dismiss), 2013 WL 2156007, at *27–28 (E.D. Pa. May 17, 2013) (motion for summary judgment) (plaintiff made out a claim of failure to accommodate where he alleged that his supervisors' racial harassment caused him clinical stress and anxiety that would be exacerbated if he returned to the same location under the same supervisors, and, therefore, he required a transfer to another office location as a reasonable accommodation; plaintiff, however, lost on summary judgment because he had not informed defendant of his anxiety disorder before requesting the transfer).

2. *Johnson v. Billington*, 404 F. Supp. 2d 157, 167 (D.D.C. 2005) (denying motion for summary judgment as to failure to accommodate claim where plaintiff, with known bipolar disorder, requested a transfer away from his supervisor who was harassing him because of his disability, thereby preventing him from doing his job; the court called the situation more than a mere "personality conflict," and distinguished it from cases where the plaintiff did not allege disability-based supervisory harassment, but simply that supervisor was causing him or her stress).

3. *Diaz v. Fed. Express Corp.*, 373 F. Supp. 2d 1034, 1061 (C.D. Cal. 2005) (holding that there was a question of fact whether attendance deficiencies would be ameliorated if plaintiff, who, according to his psychiatrist, suffered depression stemming from the abusive treatment of his supervisors, worked in the same position under different supervisors).

4. *Kamali v. Calif. Dept. of Transportation*, B247756 and B250408, 2015 WL 1254469 (Ct. App. 2d Dept. Mar. 17, 2015) (under California Fair Employment and Housing Act, upholding jury verdict that defendant failed to reasonably accommodate plaintiff's depression and anxiety when it refused to transfer him away from his supervisor who triggered stress for plaintiff).

5. *Tynan v. Vicinage 13 of Superior Court*, 351 N.J. Super. 385, 402-06, 798 A.2d 648, 658–60 (App. Div. 2002) (under the New Jersey Law Against Discrimination, reversing summary dismissal of plaintiff's claim that defendant Superior Court violated its duty of reasonable accommodation when it failed to transfer plaintiff away from a supervisor whose management style exacerbated her stress-related physical and mental conditions; distinguishing *Gaul* on grounds that plaintiff's medical

condition preceded her working for the supervisor and she was not demanding a transfer, as allegedly Gaul did, from any prolonged stress).[38]

6. *Cf. Whalen v. City of Syracuse*, No. 5:11-CV-0794 LEK/TWD, 2014 WL 3529976, at *8 (N.D.N.Y. July 15, 2014) (assuming that separating the plaintiff from the supervisor who triggered his depression and anxiety by putting them on separate work crews could be a reasonable assumption, but finding that the employer had separated them and the harassment continued, and, moreover, the plaintiff preferred his original work crew).

E. Cases finding that in lieu of changing supervisors, modifying supervisory methods can be a reasonable accommodation

1. EEOC Guidance on Psychiatric Disabilities at question 26 (a reasonable accommodation may necessitate changes in supervisory methods, including alternative ways of communicating assignments, providing instructions or training by the medium most effective for the individual, e.g., in writing, conversation, email; providing the employee additional training; modifying training materials; and adjusting the level of supervision or structure, e.g. offering more detailed day-to-day guidance, feedback or structure).

2. *Battle v. United Parcel Serv., Inc.*, 438 F.3d 856, 864 (8th Cir. 2006), *cert. denied*, 550 U.S. 598 (2007) (*see* below at p. 35).

3. *American Federation of Gov't Employees v. Baker*, 677 F. Supp. 636, 638–39 (N.D. Cal. 1987) (pursuant to regulations under § 501 of the Rehabilitation Act requiring the federal government to become a model employer, holding that the U.S. Mint violated its duty of reasonable accommodation when it made five disabled employees working as coin checkers responsible for meeting a daily quota; the change was "traumatic" to the plaintiffs and the U.S. Mint had no supervisory or other employees with specialized training in employment of the disabled and did not seek outside help; the court ordered the employer to hire a rehabilitation specialist to determine and implement individual accommodations for each plaintiff).

4. *Cf. Pavone v. Brown*, 1997 WL 441312, at *8 (N.D. Ill. July 29, 1997), *aff'd*, 165 F.3d 32 (7th Cir. 1998) (affirming judgment for defendant on failure to accommodate claim where Veterans Administration already had twice transferred the plaintiff, a veteran with PTSD, at his request; suggesting that plaintiff might have raised an accommodation claim about bullying supervision, but failed to do so).

[38] *Tynan* was distinguished by *Fronczkiewicz v. Magellan Health Servs., Inc.,* No. 11-CV-7542 JEI/AMD, 2014 WL 3729185, at *6–7 (D.N.J. July 25, 2014), and *Boyce v. Lucent Technologies*, No. A-5929-05T2, 2007 WL 1774267, at *6–7 (N.J. Super. Ct. App. Div. June 21, 2007), on the grounds that, unlike in *Tynan*, the plaintiffs in those cases had failed to present evidence of a vacant position to which they could re-assigned.

5. *But see Connor v. Quest Diagnostics, Inc.*, 298 F. App'x 564, 565 (9th Cir. 2008) (affirming summary judgment regarding plaintiff's claim that Quest refused to accommodate his disability by adjusting its supervisory methods because he did not identify the existing supervisory methods incompatible with his disability or indicate how Quest should have changed them).

XVII. Types of reasonable accommodation: transferring from stressful coworkers as a reasonable accommodation

A. *Theilig v. United Tech Corp.,* 415 F. App'x 331, 333 (2d Cir. 2011) (affirming decision that plaintiff's request to work from home for two months with no direct contact with co-workers and supervisors was unreasonable as a matter of law even where his psychiatrist feared that he posed a risk of workplace violence or suicide).

B. *Gaul v. Lucent Technologies Inc*. 134 F.3d 576, 581 (3d Cir. 1997) (holding that a "transfer to a position where [the plaintiff] would not be subjected to prolonged and inordinate stress by coworkers" was unreasonable as a matter of law in that it was impractical since employer would have to transfer plaintiff whenever he was "stressed out by a coworker or supervisor"; the administrative costs would be excessive, and such an order would represent unwarranted judicial interference with an employer's organizational matters).

C. *Tyler v. Ispat Inland Inc.,* 245 F.3d 969, 974 (7th Cir. 2001) (affirming summary judgment, finding that an employee's request to be transferred back to a work site from which the employer had already removed him at his request was not a reasonable accommodation, especially where the plaintiff, diagnosed with Atypical Depression, had feared the very coworkers he would be working with if transferred back).

XVIII. Types of reasonable accommodation: communication facilitation/assistance

A. Notice of agenda items

1. *Battle v. United Parcel Serv., Inc.*, 438 F.3d 856, 864 (8th Cir. 2006), *cert. denied*, 550 U.S. 598 (2007) (upholding jury verdict that UPS failed to accommodate a manager with depression, anxiety, and obsessive-compulsive disorder; a new supervisor made the plaintiff memorize useless information from daily operations reports which he quizzed him on, and then berated him in front of other employees if answered incorrectly; finding that jury could reasonably conclude that plaintiff's request for an agenda, and more specifically, advance notice of the categories of information from the daily operations report that he and his supervisor would discuss, was reasonable. *Note: the supervisor's conduct seems so bizarre as to raise the question whether he was aware of plaintiff's disability and deliberately picked on him because of it.*)

B. Close supervision

1. *Stopka v. Med. Univ. of SC*, No. CIV.A. 2:05-1728-CWH, 2007 WL 2022188, at *1 (D.S.C. July 11, 2007) (holding that a medical resident with acquired dyslexia from brain injury causing difficulty with reading, short-term memory and synthesizing complex information, was reasonably accommodated with the provision of close supervision and a reduced patient load, yet he still could not perform the essential duties of the job).

2. *Golez v. Kerry, Inc*., No. C 07-05984 SI, 2008 WL 5411493, at *1 (N.D. Cal. Dec. 29, 2008) (finding triable issues of fact as to the reasonableness of an accommodation of limited hours and close supervision for a maintenance mechanic who had a brain tumor/brain surgery upon his return to work).

3. *Walsted v. Woodbury Cnty*., IA, 113 F. Supp. 2d 1318, 1329 (N.D. Iowa 2000) (plaintiff, in the borderline mentally retarded range and having a kindergarten education, worked satisfactorily as a custodian for eight years, but after twice being found guilty of stealing (one time as a prank on a co-worker, the other taking worthless validation stickers), she was fired. The court denied summary judgment as to plaintiff's failure to accommodate and terminations claims, finding that defendant was aware of her mental disability and need to accommodate it, but failed to engage in the interactive process and accommodate her with extra guidance, supervision, close watching, and assistance in the form of detailed explanations of instructions).

C. Helper/mentor

1. *Lane v. Clark Cnty*., No. 2:11-CV-485 JCM NJK, 2013 WL 592912, at *1 (D. Nev. Feb. 13, 2013) (a senior storekeeper at a juvenile correctional center, on leave for almost a year because of severe anxiety, major depression, and panic attacks, proposed through his doctor that he be accommodated with a life coach and mentor and be given permission to stop working for indefinite periods of time if he suffered panic attack. The court ruled that even with the requested job modifications, plaintiff would be unable to work sustained periods of time and not fulfill the job's essential functions).

D. Additional Training

1. Reasonable accommodations might include, inter alia, special training. 42 U.S.C. § 12111(9)(B).

2. *Luera v. Convergys Customer Mgmt. Grp., Inc.,* No. 7:12-CV-316, 2013 WL 6047563, at *10 (S.D. Tex. Nov. 14, 2013) (in a case brought under

the Texas Commission on Human Rights Act, a plaintiff with major depression who worked as a trainer for an on-call center, requested upon return from FMLA leave: 1) six weeks of training on new software system; 2) two days' notice before a shift change to adjust his medication; and 3) transition time before having to train a "full-time" class. Without stating that any of the requests were facially unreasonable, the court held that the employer had fulfilled its accommodation commitment in giving plaintiff significantly less training and transition time than requested due to extenuating circumstances, i.e., the termination of two other trainers).

3. *Kennelly v. Pennsylvania Tpk. Comm'n*, 208 F. Supp. 2d 504, 514 (E.D. Pa. 2002) (Rehabilitation Act) (a recently hired emergency response worker developed a panic disorder when defendant ignored his requests for additional training responding to medical emergencies; although the employer claimed that it was unaware of plaintiff's disability when he requested the training, the court held: "Given the temporal proximity of [plaintiff's] requests for additional training and the fact that his perceived lack of training caused his breakdown, there is an factual issue as to whether his request for training constituted a request for a reasonable accommodation.")

E. Help with application form

1. *Kemer v. Johnson*, 900 F. Supp. 677, 685-86 (S.D.N.Y. 1995), *aff'd*, 101 F.3d 683 (2d Cir. 1996), *cert. denied,* 519 U.S. 985 (1996) (ADA and Rehabilitation Act) (dismissing claim by GSA applicant with depressive neurosis and a schizotypal personality disorder that defendant failed to accommodate him by assisting with the employment application because 1) he failed to show that his disability interfered with his ability to fill out the application; and 2) defendant, in fact, provided a reasonable accommodation in the form of an oral explanation of the deficiencies in the submitted application, transmitting the submitted application along with a blank application, and inviting him to complete properly the blank application and resubmit it).

F. Assistance from coworkers

1. *Karlik v. Colvin*, 14 F. Supp. 3d 700, 709 (E.D. Mich. 2014) (the plaintiff, a Social Security claims representative, with dyslexia and ADHD, had good people skills but alleged he could not remember instructions from one day to the next, required a lot of assistance from his coworkers, frequently made errors in his work, and could not complete his assignments on time. In response, the employer restricted him from asking for assistance from coworkers, and when his performance did not improve, put him on performance improvement plans and then terminated him. The court held that there were questions of material fact as to whether plaintiff had proposed reasonable accommodations – none of which the employer

implemented – including providing audio text books, helping to ensure an environment with minimal distractions, removal of the prohibition against communicating with coworkers for assistance, restructuring the job to highlight his good interviewing skills or transferring him to a service representative position).

2. *Flowers v. City of Tuscaloosa*, No. 7:11-CV-01375-JEO, 2013 WL 625324, at *12 (N.D. Ala. Feb. 14, 2013) (where a custodian, diagnosed with anxiety and depression that, according to the City's examining psychologist, rendered it "doubtful that [she] will be able to maintain proper composure with sustained contact with individuals she perceives as trying to harm or mistreat her," requested to work as a team with another employee to allay her fears, the court held this was not a reasonable accommodation since there was no evidence that actual or perceived safety concerns prevented plaintiff from performing her job).

XIX. Types of reasonable accommodation: physical space accommodations

A. EEOC Guidance on Psychiatric Disabilities at question 24: reasonable accommodations may include physical changes to workplace, such as room dividers, partitions, soundproofing or visual barriers to accommodate limitations in concentration. Other accommodations include moving individual away from noisy machinery, reducing workplace noise that is adjustable, such as lowering volume or pitch of telephones; permitting individual to wear headphones or block out distractions.

B. *Ekstrand v. Sch. Dist. of Somerset*, 583 F.3d 972, 977 (7th Cir. 2009) (in reversing summary judgment, finding that transferring teacher to a classroom with natural light was reasonable accommodation to her seasonal affective disorder).

XX. Types of reasonable accommodation: job coach

A. 29 C.F.R. pt. 1630 app. § 1630.9 ("an employer, under certain circumstances, may be required to provide modified training materials or a temporary 'job coach' to assist in the training of an individual with a disability as a reasonable accommodation.")

B. EEOC Guidance on Psychiatric Disabilities at question 27: "An employer may be required to provide a temporary job coach to assist in training, and may be required to allow a job coach paid by public or private social service agency to accompany the employee at the job as a reasonable accommodation."

1. Provision of job coach held a reasonable accommodation

a. *Menchaca v. Maricopa Cmty. Coll. Dist.,* 595 F. Supp. 2d 1063, 1072 (D. Ariz. 2009) (finding that it was a reasonable accommodation to provide a job coach to a student counselor suffering from mental impairments of traumatic brain injury and PTSD with whom she could meet almost weekly for about an hour

to discuss plaintiff's activities and assist her with goal-setting, decision-making, and communication skills).

b. *E.E.O.C. v. Dollar Gen. Corp*., 252 F. Supp.2d 277, 291 (M.D.N.C. 2003) (denying summary judgment where the parties disputed whether the employee, who had moderate mental retardation, could perform the job independently; ruling that the assistance of a job coach was reasonable for so long as necessary to train the employee to perform her job independently, but noting that providing a full-time coach to do more than training is not reasonable).

2. Provision of a job coach held not a reasonable accommodation

a. *Davis v. Wal-Mart Stores, Inc.*, No. CV-09-1488-HU, 2011 WL 2729238, at *19 (D. Or. 2011), *report and recommendation adopted*, 2011 WL 2212992 (D. Or. July 12, 2010) (appointing a job coach for a store employee with borderline intellectual functioning and expecting the job coach to accompany the employee on a permanent basis or to be contacted whenever a problem arose was "likely unreasonable.")

b. *Kleiber v. Honda of Am. Mfg., Inc*., 420 F. Supp. 2d 809, 822 (S.D. Ohio 2006) *aff'd*, 485 F.3d 862 (6th Cir. 2007) (holding that "although the use of a temporary job coach to assist in the training of a qualified disabled individual can be a reasonable accommodation, a full-time job coach providing more than training is not a reasonable accommodation," in a case where plaintiff was brain damaged and required "intensive coaching initially and ongoing to handle activities of low to moderate demands.")

XXI. Types of reasonable accommodation: Reinstatement after employee's disability-influenced resignation

A. *Wooten v. Acme Steel Co.,* 986 F. Supp. 524, 529 (N.D. Ill. 1997), (granting summary judgment regarding plaintiff's claim that defendant failed to accommodate him when it refused to reinstate him after he had resigned during a severe depressive episode, holding, categorically, that reinstatement is not a reasonable accommodation. The court stated, "The only accommodation that the complaint can fairly be read to request consistent with Wooten's allegations about his uncontrollable depression is reinstating him whenever he resigns during a depressive episode. We cannot conclude that the ADA requires such extreme measures." *In fact, as reflected by the opinion, Wooten worked for defendant for nine years, received a promotion and performed his job well; his depression was episodic and not "uncontrollable"; he asked for a one-time accommodation of reinstatement while the court presumed that his illness would cause him to do so continually*).

B. *Smith v. State*, 759 N.W.2d 812 (Iowa Ct. App. 2008) (Table) (plaintiff, disabled by depression, resigned in an emotional state due to a family crisis, and within days requested that the resignation be withdrawn and she be reinstated. The court ruled that whether or not she was a former employee, plaintiff was an "applicant" for reinstatement, entitled to a reasonable accommodation under 42 U.S.C. § 12112(b)(5)(A) (discrimination construed as failing to provide reasonable accommodation to a qualified individual with a disability "who is an applicant or employee"). Smith, therefore, made out a claim, when the employer failed to engage in the interactive process upon her request for reinstatement).

C. *Cf. Bultemeyer v. Fort Wayne Cmty. Sch.,* 100 F.3d 1281, 1286 (7th Cir. 1996) (the court observed that only a few hours after its decision to terminate plaintiff, the school district received a letter from his psychiatrist recommending a transfer to a less stressful school; at that point, the defendant should have reconsidered its termination decision and engaged in the interactive process).

XXII. Types of reasonable accommodation: Service Dog

A. 29 CFR Pt. 1630, App. §1630.2(o): "it would be a reasonable accommodation for an employer to permit an individual who is blind to use a guide dog at work, even though the employer would not be required to provide a guide dog for the employee."

B. *McDonald v. Dep't of Envtl. Quality,* 351 Mont. 243, 259, 214 P.3d 749, 760 (2009) (holding that under Montana law the duty of reasonable accommodation encompasses not only providing a service dog to a disabled employee but also installing mats in the hallways of the workplace to prevent the service dog from slipping and falling while assisting the disabled employee. "[W]ithout [the service dog, the employee] had to perform her job duties under limitations to which similarly situated employees were not subjected, such as recurring dissociative episodes, difficulty walking, and the risk of falling…. The notion that she was required to endure these conditions to the absolute breaking point before she could be deemed to 'need' an accommodation is contrary to the purposes of the MHRA and the ADA, and we accordingly reject it.")

C. *Branson v. W.*, No. 97 C 3538, 1999 WL 1186420 (N.D. Ill. Dec. 10, 1999) (granting an injunction requiring the employer to allow a paraplegic to be accompanied by her service dog at work, after the jury found that the defendant had failed to identify and make a reasonable accommodation for the plaintiff).

XXIII. Personal needs/monitoring medication is not a reasonable accommodation

A. 29 C.F.R. Pt. 1630, App. § 1630.9: the reasonable accommodation "obligation does not extend to the provision of adjustments or modifications that are primarily for the personal benefit of the individual with a disability. Thus, if an adjustment or modification is job-related, e.g., specifically assists the individual in performing the duties of a particular job, it will be considered a type of reasonable

accommodation. On the other hand, if an adjustment or modification assists the individual throughout his or her daily activities, on and off the job, it will be considered a personal item that the employer is not required to provide."

B. EEOC, *Enforcement Guidance: The Americans With Disabilities Act and Psychiatric Disabilities*, question number 28 ("Medication monitoring is not a reasonable accommodation. Employers have no obligation to monitor medication because doing so does not remove a barrier that is unique to the workplace. When people do not take medication as prescribed, it affects them on and off the job.") *See also* EEOC, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship*, question 36.

C. *Robertson v. Neuromedical Ctr.,* 161 F.3d 292, 296 (5th Cir. 1998), *cert. denied*, 526 U.S. 1098 (1999) ("[Plaintiff] mischaracterizes the decision to take or not to take medication for his condition as an accommodation option available to [employer]. Because this personal decision rests solely with [plaintiff], [employer] was not in a position to 'accommodate' him in this way. Thus, we find this argument wholly without merit.")

D. *Brookins v. Indianapolis Power & Light Co*., 90 F. Supp. 2d 993, 1004–05 (S.D. Ind. 2000) (employer is not obligated as a reasonable accommodation to schedule an appointment for plaintiff with a psychiatrist who would prescribe medications).

XXIV. Rehabilitation treatment

A. *Office of Senate Sergeant at Arms v. Office of Senate Fair Employment Practices*, 95 F.3d 1102, 1109 (Fed. Cir. 1996) (holding that under Government Employee Rights Act, 2 U.S.C. §§ 1201 *et seq.*, the federal government was required to give an employee with alcoholism restricted-duty status and the opportunity for in-patient treatment, but there was no requirement that the employer make a retroactive accommodation, wiping clean disciplinary actions caused by disability and before the disability was disclosed).

ACCOMMODATING MENTAL DISABILITIES

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ACCOMMODATING MENTAL DISABILITIES

(September 24, 2016)

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I. Overview of the Law Governing Employees with Disabilities

A. The Americans with Disabilities Act – An Overview

1. The Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.* ("ADA") prohibits discrimination on the basis of disability in the areas of employment (under Title I), government and public entities (Title II), public accommodations (Title III), and telecommunications (Title VI).

2. With respect to employment under Title I, the ADA prohibits an employer from "discriminat[ing] against qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a).

   i. The ADA defines an **"employer"** as "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person." 42 U.S.C. § 12111(5).

   ii. A **"qualified individual"** is one who can perform the essential functions of a given position with or without reasonable accommodation. 42 U.S.C. § 12111(8).

      a. According to the Equal Employment Opportunities Commission ("EEOC"): "A qualified individual with a disability is a person who meets legitimate skill, experience, education, or other requirements of an employment position that he or she holds or seeks, and who can perform the 'essential functions' of the position with or without reasonable accommodation. Requiring the ability to perform 'essential' functions assures that an individual will not be considered unqualified simply because of inability to perform marginal or incidental job functions. If the individual is qualified to perform essential job functions except for limitations caused by a disability, the employer must consider whether the individual could perform these functions with a reasonable accommodation. If a written job description has been prepared in advance of advertising or interviewing applicants for a job, this will be considered as evidence, although not necessarily conclusive evidence, of the essential functions of the job." *See*

EEOC: The ADA: Questions and Answers (last modified Jan. 15, 1997) available at http://www.eeoc.gov/facts/adaqa1.html.

iii. The ADA defines "discriminate" to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." 42 U.S.C. § 12112(b)(5)(A).

3. Employers are also prohibited from retaliating against an applicant or an employee for filing a charge of disability-based discrimination or assisting or participating in an investigation of same, and from coercing, intimidating, threatening, or interfering with an individual "in the exercise or enjoyment of" or "on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of" any right protected under the law. 42 U.S.C. § 12203.

B. How "Disability" Is Defined Under the ADA

1. On September 25, 2008, the ADA Amendments Act of 2008 ("ADAAA") was signed into law. Among other changes, the ADAAA expanded the definition of "disability" in cases arising on or after its effective date of January 1, 2009.

i. In enacting the ADAAA, Congress explicitly stated that the definition of disability "shall be construed broadly" (ADAAA S.3406 Sect. 4(a) (2008)), and thus made it easier for an individual seeking protection under the ADA to establish that he or she has a disability under the statute.

ii. The ADAAA aims to shift the focus away from a strict interpretation of the definition of "disability" and instead focus upon whether discrimination in fact occurred. However, courts continue to require individuals bringing claims under the ADA to demonstrate that he or she has a covered disability in order to establish a *prima facie* claim.

2. An individual has a covered **"disability"** and is afforded protection under the ADA if he or she:

(1) Has a physical or mental impairment that substantially limits one or more major life activities; or

(2) Has a record of such an impairment; or

(3) Is regarded as having such an impairment.

42 U.S.C. § 12101(1).

i. This analysis must be conducted on a case-by-case basis, individually assessing each individual based on the facts of his or her specific circumstances.

ii. However, in enacting revised regulations under the ADAAA, the EEOC has recognized that "the individualized assessment of some types of impairments will, in virtually all cases, result in a determination of coverage" and that "it should be easily concluded" that certain impairments are disabilities. 29 C.F.R. 1630.2(j)(3). These include, but are not limited to, deafness, blindness, mobility impairments requiring a wheelchair, epilepsy, cancer, and diabetes, as well as a number of intellectual, psychological, or mental disabilities, including autism, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia. ***Id.***

3. **"Major life activities"** are defined broadly under the law, and "include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." 42 U.S.C. § 12101(2)(A).

i. Major life activities also include "the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." ***Id.*** at 12101(2)(B).

4. Because of the very broad definition of "major life activities," whether or not an individual has a disability under the ADA often focuses on whether an impairment in fact **"substantially limits"** such a major life activity or activities.

i. In enacting the ADAAA, Congress specifically rejected prior interpretations of the "substantially limits" prong, including the U.S. Supreme Court's narrow interpretation of the term in ***Toyota Motor Manufacturing, Kentucky, Inc. v. Williams,* 534 U.S. 184 (2002)**, which it found "require[d] a greater degree of limitation than was intended by Congress." *See* 42 U.S.C. 12101 note: Findings and Purposes of ADA Amendments Act of 2008, Pub. L. 110-325, § 2, Sept. 25, 2008, 122 Stat. 3553.

a. In *Toyota Motor Manufacturing*, the Supreme Court held that, to be substantially limited in a major life activity, "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives." ***Id.*** at 198.

ii. However, in enacting revised regulations under the ADAAA, the EEOC did not provide a standard for defining when an impairment "substantially

limits" a major life activity. As a result, the substantially limits prong has been shaped via case law. Section II will address when a mental health condition may be considered a covered disability under the ADA, including when it may be "substantially limiting" to a major life activity.

5. The EEOC has further recognized that "the individualized assessment of some types of impairments will, in virtually all cases, result in a determination of coverage . . . [and t]herefore, with respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward." 29 C.F.R. § 1630.2(j)(3)(ii).

    i. This include such impairments as: "deafness substantially limits hearing; blindness substantially limits seeing; an intellectual disability (formerly termed mental retardation) substantially limits brain function; partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function; autism substantially limits brain function; cancer substantially limits normal cell growth; cerebral palsy substantially limits brain function; diabetes substantially limits endocrine function; epilepsy substantially limits neurological function; Human Immunodeficiency Virus (HIV) infection substantially limits immune function; multiple sclerosis substantially limits neurological function; muscular dystrophy substantially limits neurological function; and major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia substantially limit brain function." *Id.* at 1630.2(j)(3)(iii).

C. A Note on the "Regarded As" Prong of the Definition of Disability

1. Under the ADAAA, an individual is "regarded as" disabled if he or she "has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." 42 U.S.C. § 12102(3)(A).

    i. However, the ADAAA specifically excludes from the "regarded as" definition "impairments that are transitory or minor," defining a transitory impairment as one "with an actual or expected duration of 6 months or less." *Id.* at 12102(3)(B).

2. Several circuit courts have held that requiring an employee to undergo a medical or psychiatric evaluation, standing alone, is not sufficient to demonstrate that an employer "regarded" an employee as disabled for purposes of the ADA.

    i. In ***Coursey v. Univ. of Md. E. Shore,* 577 Fed. App'x 167 (4th Cir. 2014)**, a professor brought suit under the ADA claiming that he was "regarded as" disabled and discriminated against after being ordered to undergo a "medical evaluation and/or mental health evaluation to ascertain

fitness for duty" following a number of reported instances of "erratic and unprofessional behavior" and being "verbally abusive" toward students.

a. The Fourth Circuit first noted that while it had "not [previously] decided whether an employer's request for an evaluation of its employee is, in and of itself, sufficient to show that the employer regarded the employee as disabled for purposes of the ADA . . . [o]f the courts of appeals to address this issue . . . all have concluded that it is not," citing decisions from the Second, Third and Sixth Circuits. *Id.* at 174.

b. The court then went on to find that "As the Third Circuit explained in *Tice* [*v. Ctr. Area Transp. Auth.*, 247 F.3d 506 (3d Circ. 2001)], an ADA plaintiff must point to other evidence showing that his employer regarded him as disabled—that is, substantially limited in a major life activity—and not just that it harbored concerns about his ability to perform his job." *Id.* Therefore, concluded the court, "[t]his record does not reveal that UMES regarded Dr. Coursey as disabled, nor has Coursey pointed to evidence suggesting that there is a genuine issue of material fact on that issue." *Id.* at 175.

ii. Similarly, in ***Sullivan v. River Valley School District,* 197 F.3d 804, 808 (6th Cir. 1999)**, the Sixth Circuit rejected a teacher's claim that the school district regarded him as disabled and suspended him for refusing to submit to a mental and physical fitness for duty examination after he began exhibiting "odd behavior," including disclosing confidential information about a student, engaging in disruptive and abusive verbal outbursts at a school board meeting, and failing to report to meetings.

a. The court concluded that "[a] request that an employee obtain a medical exam may signal that an employee's job performance is suffering, but that cannot itself prove perception of a disability because it does not prove that the employer perceives the employee to have an impairment that substantially limits one or more of the employee's major life activities. Deteriorating performance may be linked to motivation or other reasons unrelated to disability, and even poor performance may not constitute a disability under the ADA." *Id.* at 811. The court therefore concluded that "a defendant employer's perception that health problems are adversely affecting an employee's job performance is not tantamount to regarding that employee as disabled." *Id.* at 810.

D. New York State Law Definition of Disability

1. The New York State Human Rights Law ("NYSHRL") utilizes a broader definition of "disability" than under the ADA, thus providing coverage for a larger number of employees.

2. Under the NYSHRL, "disability" is defined as "a physical, mental, or medical impairment resulting from anatomical, physiological, genetic, or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques," or having a record of or being regarding as having such an impairment. N.Y. Exec. Law § 292(21).

i. No requirement that the impairment "substantially limit" a major bodily function, as under the ADA.

ii. The definition of "disability" under the NYSHRL also includes gender dysphoria or related medical or psychological conditions otherwise meeting the definition of disability under the law. 9 NYCCR § 466.13(d). As discussed further in Section II(E)(2) below, the ADA specifically exempts from coverage gender identity disorders not resulting from physical impairments.

II. When Is a Mental Health Condition a Covered Disability?

A. The federal regulations interpreting the ADA broadly define impairments to include mental or psychological disorders, to include "[a]ny mental or psychological disorder, such as an intellectual disability (formerly termed 'mental retardation'), organic brain syndrome, emotional or mental illness, and specific learning disabilities." 29 C.F.R. § 1630.2(h).

B. The EEOC has specifically recognized that traits or behaviors such as stress, irritability, chronic lateness, and poor judgment are not, in themselves mental impairments. *See* EEOC Enforcement Guidance on the ADA and Psychiatric Disabilities at Question 2, available at http://www.eeoc.gov/policy/docs/psych.html; *see also* 29 C.F.R. § Pt. 1630, App'x ("The definition of an impairment . . . does not include common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder.").

1. Courts have also recognized that such traits, standing alone, do not constitute covered impairments. *See also* ***Daley v. Koch*, 892 F.2d 212, 215 (2d Cir. 1989)** (noting that "poor judgment, irresponsible behavior and poor impulse control do not amount to a mental condition that Congress intended to be considered an impairment which substantially limits a major life activity"); ***Greenberg v. New York State*, 919 F. Supp. 637, 643 (E.D.N.Y. 1996)** (individual applying to be a correction officer with state department of correctional services could be rejected without violating anti-discrimination laws where psychologist concluded he had exercised poor judgment in some non-dispositive situations as "such personality

character traits do not amount to a disability"). However, such traits or behaviors may be linked or related to mental or physical impairments.

C. Courts have closely analyzed plaintiffs' attempts to claim difficulty interacting with others as a substantially limited major life activity and drawn a distinction between being limited from interacting with others and simply not being able to get along.

1. In ***Weaving v. City of Hillsboro*, 763 F.3d 1106 (9th Cir. 2014)**, the Ninth Circuit considered whether an employer properly terminated a police detective who had recurring interpersonal problems with his colleagues that the employee attributed to ADHD. The employee contended that he was disabled because his ADHD substantially limited his ability to engage in two major life activities – working and interacting with others. *Id.* at 1107. The appellate court reversed the district court's denial of the employer's motion for judgment as a matter of law and for a new trial, finding that the jury could not have found that ADHD substantially limited Weaving's ability to work or to interact with others within the meaning of the ADA. *Id.*

   i. More specifically, the court found that, as to working, "there is evidence showing that [the employee] was in many respects a skilled police officer," and that his "supervisors recognized his knowledge and technical competence and selected him for high-level assignments." *Id.* at 1112.

   ii. As to interacting with others, the court found that, while it has specifically recognized interacting with others as a major life activity in prior decisions, here, "[plaintiff]'s ADHD may well have limited his ability to *get along* with others," however "that is not the same as a substantial limitation on the ability to interact with others." *Id.* at 1113. Further, the court noted that plaintiff's "interpersonal problems existed almost exclusively in his interactions with his peers and subordinates," and that he "had little, if any, difficulty comporting himself appropriately with his supervisors." *Id.* Thus, the court concluded that "[o]ne who is able to communicate with others, though his communications may at times be offensive, inappropriate, ineffective, or unsuccessful, is not substantially limited in his ability to interact with others within the meaning of the ADA." *Id.* at 1114 (internal quotations and citation omitted).

2. In ***Jacobs v. North Carolina Admin. Office of the Courts*, 780 F.3d 562 (4th Cir. 2015)**, the Fourth Circuit considered a situation where an employee who was hired as an office assistant was then promoted to deputy clerk, in which position she was asked to work at the front counter to provide customer service. *Id.* at 566.

   i. Shortly following her promotion, the plaintiff started experiencing extreme stress, nervousness, and panic attacks, which she attributed to her social anxiety disorder. *Id.* at 566. As an accommodation, the employee asked to be reassigned to a position with less direct interpersonal

interaction. *Id.* at 567. This request was denied and the employee was subsequently terminated. *Id.*

ii. The Fourth Circuit reversed the district court's grant of summary judgment in favor of the employer, finding that the lower court disregarded evidence that the employee's social anxiety disorder was a disability as defined by the ADA based on a substantial limitation in interacting with others. *Id.* at 570.

iii. The circuit court further rejected the employer's argument on appeal that the employee could not have been substantially limited in interacting with others because she "interact[ed] with others on a daily basis," "routinely answered inquiries from the public at the front counter," "socialized with her coworkers outside of work," and interacted socially on Facebook. *Id.* at 573. Stating that a person does not have to "live as a hermit in order to be 'substantially limited' in interacting with others," the court held that the employer's argument misunderstood "both the meaning of 'substantially limits' and the nature of social anxiety disorder." *Id.* at 573-74.

3. In ***Glaser v. Gap Inc.*, 994 F. Supp. 2d 569 (S.D.N.Y. 2014)**, the plaintiff, a merchandise handler at a distribution center with autism, alleged that the employee violated the ADA and the New York State Human Rights Law by subjecting him to a hostile work environment, failing to accommodate him, and terminating him for alleged misconduct. *Id.* at 570-72.

i. The court rejected the employer's contention that the employee's autism did not substantially limit his ability to "interact with others," holding that, under the ADAAA, the term "substantially limits" is not meant to be a demanding standard. *Id.* at 575. Noting that the employee frequently had been "coached" not to distract his coworkers, not to put his arm around his supervisor or touch her when speaking to her, and to stand further apart from others when talking, the court held that the employer could not "seriously argue" that the plaintiff's ability to interact with others was not impaired and that a genuine issue of material fact existed as to whether the impairment was substantial such that summary judgment was not appropriate. *Id.* at 575-76.

D. At least one court has held that "merely submit[ting] evidence of a medical diagnosis of an impairment" is "insufficient for individuals attempting to prove disability." ***Sellers v. Deere & Co.*, 23 F. Supp. 3d 968, 985-86 (N.D. Iowa 2014)**. In *Sellers*, the plaintiff, a supply management specialist, alleged that he was subjected to adverse action because of his post-traumatic stress disorder (PTSD), obsessive/compulsive disorder, depression, and anxiety. The district court held that "not all persons who suffer from depression, anxiety or post-traumatic stress disorder are 'disabled' within the meaning of the ADA" and that more than a mere diagnosis is necessary to show that a condition substantially limits any major life activity. *Id.*

E. Specific Psychological and Mental Health-Related Conditions

1. The ADA specifically exempts from coverage certain psychological or mental health-related conditions, despite the fact that they may indeed be substantially limiting impairments for a given individual. These include exhibitionism, voyeurism, pedophilia, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from current illegal drug use. *See* 42 U.S.C. § 12211(b).

2. Gender Identity Disorders

   i. The ADA also specifically exempts from coverage "transvestism, transsexualism . . . [and] gender identity disorders not resulting from physical impairments." 42 U.S.C. § 12211(b)(1).

   ii. Recently, this exemption has been challenged in a suit out of the Eastern District of Pennsylvania, ***Blatt v. Cabela's Retail, Inc.*, No. 14-cv-4822 (E.D. Pa. filed Jan. 20, 2015)**, in which a transgender woman who was allegedly harassed by co-workers and then fired brought discrimination claims under both Title VII of the Civil Rights Act of 1964 and the ADA. Defendant moved to dismiss, and the parties engaged in a protracted series of briefing on whether the exclusion of gender identity disorder from the ADA violates the United States Constitution on equal protection grounds. As of the date of submission of this paper, the decision on the motion to dismiss is currently pending.

   iii. Many states and municipalities designate gender identity and expression as a protected characteristic in and of itself for purposes of discrimination law. Further, some states and cities have recognized gender identity disorder (sometimes also referred to as gender dysphoria) as a covered disability under human rights or similar laws.

      a. For example, recently amended regulations governing gender identity discrimination under the NYSHRL specifically state that, in addition to constituting sex discrimination, "[d]iscrimination on the basis of gender dysphoria or other condition meeting the definition of disability in the Human Rights Law . . . is disability discrimination." 9 NYCRR § 466.13(d).

3. Passive Aggressive Disorder

   i. In ***Gliha v. Butte-Glenn Cmty. College Dist.*, No. 12-cv-02781, 2013 U.S. Dist. LEXIS 84266 (E.D. Cal. June 14, 2013)**, involving claims under California's Fair Employment and Housing Act, Cal. Gov't Code § 12940 *et seq.* ("FEHA"), the state disability discrimination statute, the court held that "passive aggressive disorder" is not a qualified disability under FEHA.

a. Plaintiff, who served as Executive Director of Development for the Butte-Glenn Community College District, claimed that he was falsely accused of "bullying" employees, acting unprofessionally, and creating a hostile work environment, and that he was ordered by his superior to undergo counseling for "passive aggressive" behavior. *Id.* at *3. Plaintiff brought suit under FEHA, claiming that he was "perceived as" disabled and wrongly terminated.

b. The court first acknowledged that "the legislature has determined that the definitions of 'physical disability' and 'mental disability' under the law of this state require a 'limitation' upon a major life activity, but do not require, as does the Americans with Disabilities Act of 1990, a 'substantial limitation,'" thus "intend[ing] to result in broader coverage under the law of this state than under the federal act." *Id.* at *13.

c. Nevertheless, the court concluded that it "has not located, and plaintiff has not provided, any reason to include 'passive aggressive' disorder, standing alone, within the meaning of 'disability' as explained in the FEHA," noting further that "Plaintiff also denies being diagnosed with this disorder." *Id.* at *14. The court went on to note that "an inability to get along with one's supervisor does not give rise to a disability within the meaning of either the FEHA or the ADA." *Id.* Thus, concluded the court, "passive aggressive disorder is not contemplated by the FEHA as a disability" and plaintiff's claim in that regard was dismissed. *Id.* at *16.

III. Employer Obligations Regarding Accommodations

A. As noted above, the ADA (as well as state and local laws prohibiting disability discrimination) requires employers to provide "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." 42 U.S.C. § 12112(b)(5)(A).

B. A request for a reasonable accommodation is the first step in what has been termed the "interactive process" between the individual and the employer.

1. Generally, it is the obligation of the employee (or an employee's family member, friend, health professional, or other representative) to ask for an accommodation. However, an employer may be obligated to initiate the interactive process where an employee's disability may render him or her unable to ask for an accommodation.

i. In ***Wilbourn v. Chicago Transit Authority*, No. 14-cv-6327, 2015 U.S. Dist. LEXIS 24543 (N.D. Ill. Mar. 2, 2015)**, the court considered employees' obligations under the interactive process for individuals with mental disabilities when ruling on a motion to dismiss. The court noted that "[i]n order to trigger the employer's liability under the ADA, an employee must request an accommodation from his employer unless he has mental disabilities that would make him unable to ask for an accommodation. *Id.* at *3. To that end, the court stated that "[t]he inquiry is whether the nature of plaintiff's disability is such that he is unable to ask or does not know how to ask for accommodation." *Id*. Turning then to the facts of the specific case, the court found that plaintiff failed to plead sufficient facts to establish that he was unable to ask for an accommodation due to his disability and "[w]ithout additional factual detail about his diagnosis, it is not plausible that short-term memory impairment and depression would have disabled Plaintiff to the extent that he did not know how, or was unable, to ask [his employer] for an accommodation." *Id*.

ii. However, in ***Bultemayer v. Fort Wayne Community Schools*, 100 F.3d 1281 (7th Cir. 1996)**, where an employee, a school custodian, suffered from bipolar disorder, anxiety attacks, and paranoid schizophrenia, the court held that the employer had a duty to initiate the interactive process to determine whether or not a reasonable accommodation may exist even when the employee did not specifically request it, finding that the employee's failure to request was not "the deliberate actions of a mentally sound man" but "the product of mental illness."

2. The EEOC has made clear that requests for reasonable accommodation do not need to be made in writing or using any specific language (that is, an employee need not mention the ADA or use the phrase "reasonable accommodation"). *See* EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the ADA, Requesting Reasonable Accommodation Questions 1 and 3, available at http://www.eeoc.gov/policy/docs/accommodation.html. Further, while an employer may ask an individual to fill out a form or submit a request in written form, the employer cannot ignore the initial request. *Id.*

3. Requests for reasonable accommodation can be made at any time during the application process or during the period of employment, and an individual is not precluded from requesting an accommodation simply because he or she did not ask for one while applying for the job or after receiving an offer. *Id.* at Question 4.

C. An employer is not obligated to provide the specific accommodation that an employee wants, so long as the chosen accommodation is effective. *See* 29 C.F.R. § 1630.9 Appendix; *see also* EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the ADA, at Question 9. Thus, if there are two or more possible

reasonable accommodations, an employer may choose the least burdensome or expensive accommodation, so long as it is effective. *Id.*

1. "If more than one . . . accommodation[] will enable the individual to perform the essential functions or if the individual would prefer to provide his or her own accommodation, the preference of the individual with a disability should be given primary consideration. However, the employer providing the accommodation has the ultimate discretion to choose between effective accommodations[.]" 29 C.F.R. § 1630.9 Appendix.

2. In ***Meyer v. Sec'y, Health and Human Services,* 592 Fed. App'x 786 (11th Cir. 2014)**, the employer accommodated an employee's attendance issues stemming from social phobia, avoidant personality disorder, and dependent personality disorder by first allowing her to work an "Any 80" schedule (working from 10am to 2pm every weekday and at least 80 hours every two week), and later changing it to a "First 40" schedule (working from 10am to 2pm every weekend and at least 40 hours per week). The employee brought suit under the Rehabilitation Act arguing, in part, that the employer failed to provide her with reasonable accommodation when it switched her schedule to "First 40." *Id.* at 791. The circuit court affirmed summary judgment in favor of the employer, finding that the employee "has not argued that the First 40 schedule is itself not a reasonable accommodation, just that the Any 80 schedule would be better," and that the employer "had no obligation to provide her the maximum accommodation possible, nor was she "entitled to the accommodation of her choice, but only a reasonable accommodation." *Id.* (internal quotations and citation omitted).

3. In ***D'Eredita v. ITT Corp.,* No. 07-cv-6185, 2009 U.S. Dist. LEXIS 36496 (W.D.N.Y. Apr. 27, 2009), *aff'd* 370 Fed. App'x 139 (2d Cir. 2010)**, an employee with dyslexia argued that he was denied reasonable accommodation when the employer refused to transfer some of the duties of his position—which the employer deemed to be essential functions of the job—to another employee. The district court granted summary judgment to the employer, finding that it was not required to obviate an essential function as an accommodation and also that doing so would have reduced production standards. 2009 U.S. Dist. LEXIS 36496 at *34-35. On appeal, the Second Circuit affirmed the grant of summary judgment, agreeing that the accommodation requested by the employee was not reasonable, but also emphasizing that the employer extended an alternate reasonable accommodation of allowing the employee to bid on alternate jobs while continuing his medical benefits in the interim. 370 Fed. App'x at 141. To that end, the court noted that "[a] reasonable accommodation does not require the employer to provide every accommodation the disabled employee may request, so long as the accommodation provided is reasonable." *Id.* (internal quotations and citation omitted).

D. As a general matter, the ADA sets forth a number of examples of potential reasonable accommodations, including:

- Making existing facilities used by employees readily accessible to and usable by individuals with disabilities;
- Job restructuring;
- Part-time or modified work schedules;
- Reassignment to a vacant position;
- Acquisition or modification of equipment or devices; and
- Appropriate adjustment or modification of examinations, training materials, or policies.

42 U.S.C. § 12111(9).

E. "[T]he law requires an employer to rethink its preferred practices or established methods of operation. Employers must, at a minimum, consider possible modifications of jobs, processes, or tasks so as to allow an employee with a disability to work, even where established practices or methods seem to be the most efficient or serve otherwise legitimate purposes in the workplace." ***Miller v. Illinois Department of Transportation,* 643 F.3d 190, 199 (7th Cir. 2011)**.

F. Examples of Specific Accommodations for Individuals with Psychiatric or Mental Disabilities

1. In a fact sheet addressing employees with psychiatric disabilities, the U.S. Department of Labor (USDOL) Office of Disability Employment Policy has provided a list of examples of different types of accommodations that may be appropriate, depending on the nature of the mental or psychiatric disability in question. *See* Maximizing Productivity: Accommodations for Employees with Psychiatric Disabilities, available at http://www.dol.gov/odep/pubs/fact/psychiatric.htm.

2. Additionally, the Job Accommodation Network (JAN), a free service of the USDOL Office of Disability Employment Policy, provides an accommodation resource database that allows users to search for potential accommodations based on the specific needs or limitations of the individual at issue. *See* JAN Searchable Online Accommodation Resource (SOAR), available at http://askjan.org/soar/index.htm.

3. Examples of accommodations provided by the USDOL and JAN for individuals with mental and psychiatric disabilities include:

i. Modifications and equipment/technology for individuals with disabilities affecting focus, concentration, memory, or organization:

a. Addition of room dividers, partitions or other soundproofing or visual barriers between workspaces to reduce noise or visual distractions;

b. Providing private offices or private "quiet space" as needed;

c. Locating the individual's work space away from noisy equipment or machinery;

d. Reducing workplace noise that may be adjusted (*e.g.*, lowering telephone volume);

e. Increasing natural or full spectrum lighting;

f. Allowing the individual to listen to music or wear noise-cancelling headphones to help block out distractions;

g. Providing "white noise" or environmental sound machines;

h. Installing software that minimizes computerized distractions, such as pop-up or ad blockers;

i. Avoiding re-organization of the employee's workspace without permission;

j. Providing a recording device for recording and later review of meetings, training sessions, etc.;

k. Using a color-coding or similar scheme to prioritize tasks;

l. Providing daily/weekly/monthly written work assignments or task lists;

m. Providing handheld electronic organizers or calendar/organizer software or applications;

n. Utilizing watches or timers with prompts to remind individuals of tasks or keep them on pace to complete required tasks.

ii. Accommodations involving the manner and method of performance of job duties:

a. Division of large assignments into smaller tasks and goals;

b. Providing additional assistance and/or time for orientation activities, training, and learning new job tasks and responsibilities;

c. Providing additional training or modified training materials;

d. Providing equipment to allow for remote access and telecommuting where appropriate;

e. Restructuring of position to include only essential job functions.

iii. Accommodations involving management, supervision and interaction with others:

a. Implementing methods for assisting the individual in prioritizing tasks, including for example, regularly scheduled meetings to discuss assignments or providing "to-do" lists;

b. Utilizing new or additional forms of communication that are tailored to the individual's preferred learning and comprehension style (written, verbal, visual, etc.);

c. Providing written work agreements that include any agreed upon accommodations, long-term and short-term goals, expectations of responsibilities and consequences of not meeting performance standards;

d. Providing a temporary job coach to help develop appropriate workplace social skills;

e. Allowing individuals flexibility in attending work-related social functions (*i.e.*, not requiring attendance unless necessary to the essential functions of the position);

f. Educating all employees about their right to accommodations and providing relevant training to all employees, including both supervisory staff and co-workers.

iv. Generalized accommodations:

a. Providing longer or more frequent break periods, including the ability to go to a private "quiet" space as needed;

b. Offering flexible scheduling and/or a self-paced work load;

c. Allowing telephone calls during work hours to speak with healthcare providers or others providing support services to the individual;

d. Allowing the presence of a support animal;

e. Providing leave for medical or therapy appointments and treatment;

f. Providing referrals to counseling and Employee Assistance Programs, as appropriate.

4. While some (or many) of the accommodations listed above may not be reasonable or possible depending upon the nature of the individual's position, the structure of the individual's workplace, etc., the list highlights the wide-range of potential accommodations that should be considered when engaging in the individualized interactive process with an employee.

G. Courts Approaches to Specific Accommodation Requests

1. Changing Supervisors or Reassignment from Co-Workers

i. The EEOC has generally held that an employer is not required to change an employee's supervisor as a reasonable accommodation, though it has acknowledged that supervisory methods may need to be altered as a form of reasonable accommodation. *See* EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA, Question 33, available at http://www.eeoc.gov/policy/docs/accommodation.html.

a. In ***Belton v. Department of Veterans Affairs*, 2013 EEOPUB LEXIS 893 (EEOC 2013)**, the EEOC held that an employer "was not obligated to provide [the employee] with a reassignment away from his supervisor," despite the employee's claims that his depression and anxiety symptoms were exacerbated by the supervisor.

ii. Courts have generally taken the same approach as the EEOC with regarding to the question of changing supervisors.

a. In ***Kennedy v. Dresser Rand Co.*, 193 F.3d 120 (2d Cir. 1999)**, the Second Circuit analyzed the issue of providing reasonable accommodation for an employee who was suffering from depression and who had identified her supervisor as the "trigger and stressor [of] her depression." *Id.* at 121. Among other accommodations, the employee sought to have no contact whatsoever with the supervisor. *Id.* at 121-22. The Second Circuit held that because "the question of whether a requested accommodation is a reasonable one must be evaluated on a case-by-case basis . . . [a] per se rule stating that the replacement of a supervisor can never be a reasonable accommodation is . . . inconsistent with our ADA case law. There is a presumption, however, that a request to change supervisors is unreasonable, and the burden of overcoming that presumption…therefore lies with

the plaintiff." *Id.* at 123-24. The court went on to find that plaintiff's request was unreasonable because she did not present any facts "that would suggest that a change of supervisors could be accomplished without excessive organization costs." *Id.* at 123. Further, the court found that, because the plaintiff's request "was not simply for reassignment to a different supervisor but also for protection from any interaction with" the current supervisor, "[i]n the context of the particular workplace described in the record before us, it would be virtually impossible for [plaintiff] to perform her job of coordinating workers' compensation claims without at least some contact with [the supervisor], who supervises all health care personnel and who is the plant 'expert' on workers' compensation." *Id.* Therefore, the court concluded that plaintiff "has not met her burden of identifying a reasonable accommodation, [and] the district court did not err in granting [defendant]'s motion for summary judgment." *Id.*

b. In ***Pack v. Illinois Dep't of Healthcare and Family Services*, No. 13-cv-8930, 2014 U.S. Dist. LEXIS 101552 (N.D. Ill. July 25, 2014)**, plaintiff alleged that "she ha[d] a disability under the ADA because she ha[d] a conflict with one of her supervisors [] and that the disability cause[d] her to suffer from anxiety, panic disorder, and [PTSD]." *Id* at *7-8. Plaintiff's proposed accommodation was that she be allowed to work under a different supervisor. The district court held "that decision remains with the employer. In essence, Plaintiff seeks to establish the conditions of her employment, most notably, who will supervise her. Nothing in the ADA allows, much less requires, this shift in responsibility." *Id* at *11. In granting the employer's motion to dismiss on the failure to accommodate claim, the court further noted that "Plaintiff has pleaded herself out of court because her allegations indicate that she only requested, and would only accept, one accommodation—to work under a new supervisor—which courts have repeatedly held is not a reasonable request." *Id.* at *12.

c. In ***Cardenas-Meade v. Pfizer, Inc.*, No. 12-5043, 2013 U.S. App. LEXIS 307 (6th Cir. Jan. 3, 2013)**, the court rejected the employee's claim that the employer failed to engage in a good faith interactive process when it denied her request to be assigned to another supervisor on the basis that her interactions with her supervisor exacerbated her anxiety and depression. Specifically, the court noted that "while a reasonable accommodation under the ADA does include 'reassignment to a vacant position,' . . . requests for re-assignment to a new supervisor are disfavored." *Id.* at *13. The court went on to state that "[w]hile it is appropriate to consider the reasonableness of such a request on a 'case-by-case' basis, there is a 'presumption . . . that a request to change supervisors is

unreasonable, and the burden of overcoming that presumption (*i.e.*, of demonstrating that, within the particular context of plaintiff's workplace, the request was reasonable) therefore lies with the plaintiff.'" *Id.* (quoting *Kennedy v. Dresser Rand Co.*, 193 F.3d 120, 122-23 (2d Cir. 1999).

d. In ***Ozlek v. Potter*, 259 Fed. App'x 417 (3d Cir. 2007)**, the court held that an employee with depression, anxiety disorder, and obsessive-compulsive disorder was not entitled to be transferred to a new management team as an accommodation, citing *Gaul v. Lucent Technologies, Inc.*, 134 F.3d 576 (3d Cir. 1998) for the proposition that such an accommodation is "unreasonable as a matter of law." *Id.* at 420-21.

iii. Courts have also largely rejected requests for employees to be reassigned away from colleagues.

a. In ***Coulson v. Goodyear Tire & Rubber Co.*, 31 Fed. App'x 851 (6th Cir. 2002)**, an employee with "major depression with psychotic features" and "paranoid, obsessive, [and] avoidance traits" sought to be reassigned away from his co-workers as an accommodation. The court held that although reassignment "is within the realm of possible reasonable (and therefore required) accommodation," an employer is not required to transfer an employee to prevent that employee from having to work with certain employees, since courts "are not meant to act as a super-bureau of Human Resources." *Id.* at 858.

b. In ***Bradford v. City of Chicago*, 121 Fed. App'x 137 (7th Cir. 2005)**, the court held that an employee whose bipolar disorder was allegedly aggravated by working with certain co-workers (whom he believed were afraid of him) was not entitled to be reassigned as an accommodation.

2. Modifying Supervisory Style

i. Employers may be required to adjust supervisory methods for employees suffering impairments impacting interpersonal skills.

a. In ***Bennett v. Unisys Corp.*, No. 99-cv-4466, 2000 U.S. Dist. LEXIS 18143, at *32-33 (E.D. Pa. Dec. 11, 2000)**, involving a marketing employee with major depression, the court found that requiring a supervisor to regularly communicate with the employee and exempting the employee from participating in a performance review plan and instead receiving criticism face-to-face, supplemented by positive feedback, may be reasonable accommodations.

ii. In addition, courts have found that adopting a "soft approach" to discipline and supervision can be an effective and reasonable method of accommodating even severe mental disabilities.

a. In ***Kent v. Derwinski*, 790 F. Supp. 1032 (E.D. Wash. 1991)**, an employee diagnosed with mental retardation, clinical depression and schizophrenia exhibited difficulties with interpersonal relationships and sensitivity to criticism at work. The court found that providing a "soft approach" to discipline and supervision and suppressing coworkers' taunting was "consistent with good management techniques and are not an undue hardship on the defendants" and therefore constituted a reasonable accommodation. *Id.* at 1040.

iii. However, modifications to supervisory style as reasonable accommodation do not require lowering standards or removing essential functions of the job.

a. In ***Bolstein v. Reich*, No. 93-cv-1092, 1995 U.S. Dist. LEXIS 731 (D.D.C. Jan. 19, 1995), *aff'd*, 1995 U.S. App. LEXIS 32536 (D.C. Cir. Oct. 4, 1995)**, the court rejected plaintiff's claim of disability discrimination, finding that an employer was not required to grant requested accommodations to an attorney with chronic depression and severe personality disturbance because the requested accommodations of more supervision, less complex assignments, and the exclusion of appellate work would have eliminated the duties that justified his pay grade. *Id.* at *11-12.

iv. Courts have also been more likely to find that no reasonable accommodation involving supervisory style exists that would allow an employee to perform the essential functions of their position where employers have already attempted to adopt a more flexible management approach that has failed to alleviate an employee's psychological or mental disability-related issues.

a. In ***Boldini v. Postmaster Gen. U.S. Postal Serv.*, 928 F. Supp. 125, 132 (D.N.H. 1995)**, the court found that, because a "kinder and gentler" management approach had "proved futile" when adopted previously, no reasonable accommodation through flexible supervision style could be made.

3. Modifying the Employee's Work Schedule

i. An employer may, in certain circumstances, have an obligation to modify an employee's work schedule as a reasonable accommodation. *See* 42 U.S.C. § 12111.

a. In ***Breen v. Department of Transportation*, 282 F.3d 839, 841-43 (D.C. Cir. 2002)**, the court reversed the district court's grant of summary judgment to the employer on the issue of reasonable accommodation, finding that it may be a reasonable accommodation for an employee with obsessive compulsive disorder who was unable to complete her tasks with the normal workplace disruptions to be granted a modified schedule where she would work one extra hour at the end of each day, without disruptions, and then take one day off every other week.

4. Leave for Unpredictable Absences

i. Courts have generally held that reliable attendance is required to perform most jobs and, therefore, an employer does not have to provide leave for an employee who will be unable to maintain predictable attendance.

a. In ***Earl v. Mervyns, Inc.*, 207 F.3d 1361 (11th Cir. 2000)**, the court held that the employer, a department store, was not required to permit the plaintiff, a store area coordinator who suffered from obsessive compulsive disorder causing her to frequently be late, to "arrive at work at any time without reprimand" and allow her to make up missed time at the end of her shift, given that the nature of her job made punctual attendance an essential function of the job. *Id.* at 1367. Specifically, the court pointed to the fact that, if she worked the first shift and was late, the store would not be ready in time for the influx of customers, and if she worked the second shift, her tardiness would require the coordinator from the previously shift to have to work overtime. *Id.* at 1366.

ii. The EEOC has also provided that employers "need not . . . grant open-ended schedules (*e.g.*, the ability to arrive or leave whenever the employee's disability necessitates)." *See* The ADA: Applying Performance and Conduct Standards to Employees with Disabilities, Question 20, available at http://www.eeoc.gov/facts/performance-conduct.html. However, the EEOC has also recognized that it may be a reasonable accommodation to allow an employee to take unscheduled leave without providing a doctor's note when it is not excessive or overly frequent.

a. In ***Underwood v. Social Security Administration*, 2013 EEOPUB LEXIS 118 (EEOC 2013)**, the EEOC considered the case of an employee with bipolar disorder and post-traumatic stress disorder who requested a flexible attendance schedule as an accommodation, and found that while "allowing Complainant to take unscheduled leave in an unfettered manner . . . would have interfered in the Agency's ability to plan for the number of employees coming to work and for distribution of workload," the

employer should have given further consideration to the employee's assertion that "she would have benefited from an accommodation where she could take one day of unscheduled leave every other month without having to provide medical documentation." *Id.* at *18-19. The EEOC found that allowing those six or so days per year would not have been an undue hardship on the employer because "it would have allowed the Agency to maintain control over Complainant's leave, while allowing Complainant six days a year where she would not have had to undergo the stress of getting medical documentation on days where her disability resulted in her heaving a hard time just getting out of bed." *Id.* at *19.

iii. However, in ***Solomon v. Vilsack*, 763 F.3d 1 (D.C. Cir. 2014)**, the circuit court reversed the lower court's grant of summary judgment in favor of the employer, holding that an employee's request for a "maxiflex" schedule—that is, the ability to come to work late or leave early as a disability requires—was not unreasonable as a matter of law.

a. In *Solomon*, a budget analyst for the U.S. Department of Agriculture had difficulty maintaining her normal work schedule due to her depression. *Id.* at 5. As a result, she began frequently either coming in late or leaving early. *Id.* at 5-6. However, she continued to largely perform her duties in a timely manner by informally working additional unscheduled hours without pay. *Id.* Her supervisor was aware about the modified schedule and never questioned it. *Id.* at 6. After a few months, the employee submitted a letter from her doctor requesting the maxiflex schedule she had been working the past several months as a formal accommodation. *Id.* The agency denied her request and asserted that a maxiflex schedule could never be required as a reasonable accommodation. *Id.* at 6-7.

b. The court disagreed, noting that the ADA, along with the Rehabilitation Act (covering federal employees and federal contractors) recognizes part-time or modified work schedules as forms of reasonable accommodation, and therefore found that a genuine issue of material fact existed concerning whether the employee could have performed the essential functions of her position with a maxiflex schedule. *Id.* at 9-11.

c. The court found that whether a particular accommodation is reasonable depends on the context and a fact-specific inquiry, making it rare that an accommodation can be deemed unreasonable as a matter of law. *Id.* at 9. The court also found relevant to a finding of "reasonableness" the fact that the U.S. Office of Personnel Management, which governs federal employee

schedules, identifies a maxiflex schedule as an option for certain positions, and that one of the employee's colleagues worked a maxiflex schedule. *Id.* at 11-12.

5. Telecommuting

i. Courts and the EEOC have taken varying approaches to whether telecommuting or working from home may be a reasonable accommodation. Certainly, if an employee's duties can only be performed in a certain location (for example, a maintenance worker), telecommuting will not be considered reasonable. However, the question arises more frequently where an employer bases its argument that telecommuting is not a reasonable accommodation on the need for the employee to interact with colleagues, clients, or the public.

a. According to the EEOC, "[c]hanging the location where work is performed may fall under the ADA's reasonable accommodation requirement of modifying workplace policies, even if the employer does not allow other employees to telework." *See* EEOC: Work at Home/Telework as a Reasonable Accommodation, Question 2, available at, http://www.eeoc.gov/facts/telework.html. However, "[t]he ADA does not require an employer to offer a telework program to all employees," though if an employer does offer telework, it must allow employees with disabilities an equal opportunity to participate in such a program." *Id.* at Question 1.

b. In ***Blocher v. Department of Veterans Affairs*, 2013 EEOPUB LEXIS 1126 (EEOC 2013)**, the EEOC found that the employer "failed to meet its burden of proving that providing Complainant with at least some telework on a temporary basis as an accommodation during her recuperation from surgery would have posed an undue hardship," and that "[the employee's supervisor]'s opinion on the matter, without more, is not sufficient to establish undue burden." *Id.* at *10-11.

c. However, in ***EEOC v. Ford Motor Co.*, 782 F.3d 753 (6th Cir. Apr. 10, 2015)**, the court sided with the employer in ruling it did not need to allow a resale buyer with irritable bowel syndrome to work from home considering the fact that her position involved high degrees of interaction with colleagues and the public. Of note, the court pointed out how "the required teamwork, meetings with suppliers and stampers, and on-site [availability] all necessitate a resale buyer's regular and predictable attendance." *Id*. at 763. In determining that a jury could not return a verdict for the EEOC, the court acknowledged that "regular and predictable on-site job attendance" was an "essential function (and a

prerequisite to perform other essential functions) of [the employee's] resale-buyer job." *Id*. at 762-63.

d. But in ***Humphrey v. Memorial Hospitals Association*, 239 F.3d 1128 (9th Cir 2001)**, the court found that working at home might be a reasonable accommodation for a medical transcriptionist with obsessive compulsive disorder whose work was individually performed and did not involve direct client contact, stating that "[w]orking at home is a reasonable accommodation when the essential functions of the position can be performed at home and a work-at-home arrangement would not cause undue hardship for the employer." *Id*. at 1136.

IV. Direct Threat

A. The ADA provides employers with an affirmative defense where an otherwise qualified individual with a disability poses a "direct threat" to health or safety. 42 U.S.C. § 12113; 29 C.F.R. § 1630.15.

1. Courts have generally found that the employer bears the burden of showing that an individual poses a direct threat. *See, e.g.*, ***EEOC. V. Wal-Mart Stores, Inc.*, 477 F.3d 561, 571 (8th Cir. 2007)** (holding that "the employer bears the burden of proof, as the direct threat defense is an affirmative defense"); ***Echazabal v. Chevron USA*, 336 F.3d 1023, 1027 (9th Cir. 2003)** (same); *see also* ***Branham v. Snow*, 392 F.3d 896, 907 n.5 (7th Cir. 2004)** (finding that the employer "is certainly in the best position to furnish the court with a complete factual assessment of both the physical qualifications of the candidate and of the demands of the position" in asserting a direct threat defense).

2. However, other courts have placed the burden of proof on the employee, at least in some circumstances. *See* ***McKenzie v. Benton*, 388 F.3d 1342, 1355 (10th Cir. 2004)** (finding that plaintiff bears burden of proof on question of direct threat where the "job qualifications . . . properly included the essential function of performing [plaintiff's] duties without endangering her co-workers or members of the public with whom she came in contact"); ***Waddell v. Valley Forge Dental Associates, Inc.*, 276 F.3d 1275, 1280 (11th Cir. 2001)** (holding that the plaintiff had "the burden of establishing that he was not a direct threat or that reasonable accommodations were available"); ***EEOC v. Amego, Inc.*, 110 F.3d 135, 144 (1st Cir. 1997)** ("It is the plaintiff's burden to show that he or she can perform the essential functions . . . and is therefore 'qualified.' Where those essential job functions necessarily implicate the safety of others, plaintiff must demonstrate that she can perform those functions in a way that does not endanger others.").

B. To constitute a direct threat, the individual must pose a "significant risk" of "substantial harm" to themselves or others. 29 C.F.R. § 1630.2(r).

1. An employer seeking to establish that an individual poses a direct threat must also show that the risk "cannot be eliminated by reasonable accommodation." 42 U.S.C. § 12113(3).

2. Employers seeking to establish a direct threat defense face a high standard of proof and must make an individualized assessment of whether and to what extent the individual in question poses an actual threat to the health or safety of the individual or others.

C. In determining whether an individual pose a direct threat, the factors to be considered include:

(i) The duration of the risk;

(ii) The nature and severity of the potential harm that will occur;

(iii) The likelihood that the potential harm will occur; and

(iv) The imminence of the potential harm.

29 C.F.R. § 1630.2(r).

D. Speculative or purely subjective concerns are not sufficient to support a showing of direct threat. Rather, an employer must rely on a rigorous objective inquiry based on medical or other objective evidence.

i. "Because few, if any, activities in life are risk free … the ADA [does] not ask whether a risk exists, but whether it is significant … and the risk assessment must be based on medical or other objective evidence." ***Bragdon v. Abbott,* 524 U.S. 624, 649, 118 S. Ct. 2196 (1998) (citing *Sch. Bd. of Nassau Cty. v. Arline,* 480 U.S. 273, 287, 107 S. Ct. 1123 (1987))**.

ii. "A subjective belief that a direct threat exists, even if maintained in good faith, will not shield an employer from liability unless it is objectively reasonable." ***EEOC v. Burlington Northern & Sante Fe Ry. Co.*, 621 F. Supp. 2d 587, 601 W.D. Tenn. (2009)**.

E. Courts addressing the direct threat defense in the context of mental or psychological disabilities have placed significant emphasis on the need for employers to avoid "knee jerk" reactions and to consider all available objective evidence in making an employment decision.

1. In ***Hoback v. City of Chattanooga,* No. 10-cv-74, 2012 U.S. Dist. LEXIS 123794 (E.D. Tenn. Sept. 4, 2012)**, the district court upheld a jury verdict rejecting a police's department's direct threat defense involving an officer who suffered from post-traumatic stress disorder following his deployment in Iraq.

i. The police department received conflicting doctor's reports concerning plaintiff's mental state but determined that the individual was not fit for duty.

ii. Despite evidence that the employee had made comments about engaging in violence toward co-workers and others, the court rejected the employer's challenge to the jury verdict. In upholding the verdict, the court concluded that "[t]here was sufficient evidence for a reasonable jury to conclude the City's evaluation of Plaintiff was not based on the best objective medical evidence," noting the department's awareness of a determination by one of the physicians that the individual was fit for duty. *Id.* at *24.

F. Courts have found the direct threat defense to apply where an employee demonstrates violent or erratic behavior in the workplace and there is no evidence that a reasonable accommodation would successfully eliminate the risk.

1. In ***Jarvis v. Potter,* 500 F.3d 1113 (10th Cir. 2007)**, the Tenth Circuit held that the employer was able to demonstrate that an employee with post-traumatic stress disorder (PTSD) posed a direct threat in the workplace and that termination was proper where the employee had struck co-workers or raised his fists as if to strike them on several occasions after being startled and had told the employer that his PTSD was worsening, that he "could no longer stop the first blow," and that "if he hit someone in the right place, he could kill him." *Id.* at 1116-19.

i. In that case, the court held that the employer "relied on the best available objective evidence" in determining that the employee in fact posed a direct threat, and that the employer was not required to seek further medical advice or conduct a fitness-for-duty examination. *Id.* at 1124. The court further rejected the employee's claim that his PTSD could have been reasonably accommodated by instructing coworkers "not to startle him or approach him from behind," finding that the employer "was not required to ignore the risk of inadvertent startling." *Id.*

2. Courts have also held that off-duty violent or erratic conduct may be relevant in analyzing whether an individual poses a direct threat. *See* ***Johnson v. The New York Hospital,* 96 F.3d 33 (2d Cir. 1996)** (finding that an employee's off-duty conduct, in which he became intoxicated and aggressive toward hospital security guards, was relevant to the question of whether he posed a direct threat in his position as a registered nurse despite the employee's claim that his termination was discriminatory based on his alcoholism).

3. However, where a reasonable accommodation may exist, the direct threat defense is not available.

i. In ***McKenzie v. Dovala,* 242 F.3d 967 (10th Cir. 2001)**, the court held that even if a police officer currently posed a significant risk of harm to herself

or others in her current position because of PTSD stemming from family sexual abuse (the employee had fired six rounds from her service revolver into the ground at her father's grave and engaged in self-harm and several drug overdoses), the direct threat defense was not available to the employer because the evidence demonstrated that, following rehabilitation, the employee would not pose a risk of harm if employed "in a position that does not require the use of force." *Id.* at 968, 974-75. Thus the court concluded defendant failed to demonstrate that the risk "could not be eliminated by reasonable accommodation. *Id.* at 974.

G. Courts have also found the defense to apply where an individual is found to pose a direct threat because of the safety sensitive nature of the actual job duties.

1. In ***Emerson v. Northern States Power Co.*, 256 F.3d 506 (7th Cir. 2001)**, the court considered whether a customer service consultant for a power company posed a direct threat where her anxiety disorder caused unpredictable anxiety attacks that resulted in the employee needing to leave work unexpectedly with indeterminate recovery time.

   i. The court noted that, while the employee mainly handled routine customer calls, roughly 5-10% of her job involved processing customer calls about gas and electrical emergencies, which equated to about 4-10 such emergencies per week. *Id.* at 508. The court thus rejected the employee's argument that she never had trouble dealing with a safety-sensitive call or had an anxiety attack while on any call and therefore did not pose a direct threat, finding that the position "required prompt, accurate handling of emergencies such as gas leaks and downed power lines that could pose significant danger to the public." *Id.* at 513-15.

   ii. The court further found that the employer could not reduce the risk by reasonably accommodating the employee, noting that the employer had considered allowing the employee brief, five minute breaks to allow her to recover from her panic attacks, but that "the indeterminate time" the employee requested as an accommodation "simply introduced too much uncertainty into [the employer's] handling of emergency calls." *Id.* at 514. The court also noted that the employer "appropriately declined [the employee's] suggestion to route safety-sensitive calls away from her" as an accommodation, as "[a]n employer is not obligated to change the essential functions of a job to accommodate an employee." *Id.*

2. In ***Borgialli v. Thunder Basin Coal Co.*, 235 F.3d 1284 (10th Cir. 2000)**, the court found the direct threat defense to apply where an employee working as an explosive detonator in a mine "harbored a grudge against his supervisor" and "threatened suicide and perhaps injury to others." *Id.* at 1294. The court held that the employee posed a direct threat, stating that the ADA "does not require employers to take unnecessary risks when dealing with a mentally or physically impaired employee in an inherently dangerous job." *Id.* at 1295.

H. Other courts have sidestepped the need for a direct threat analysis by focusing on the behavior underlying the employment decision in question as a conduct/disciplinary issue.

1. In ***Felix v. Wisconsin Dept. of Transportation*, No. 15-2047, 2016 U.S. App. LEXIS 12462 (7th Cir. 2016)**, the circuit court considered whether a direct threat existed in the case of a DMV Field Agent Examiner suffering from a number of mental health disabilities—including post-traumatic stress disorder, major depressive disorder, anxiety, obsessive compulsive disorder and a medical phobia—who experienced panic attacks in the workplace and, in one incident, exhibited behavior suggesting risk of self-harm.

    i. In the incident, the employee was found lying on the floor behind her work counter repeating statements such as: "you all hate me ... they all hate you ... everybody hates you" and, when asked about cuts and scratches on her arm: "They're too dull ... the knives were too dull" and "God let me die ... I just want to die." *Id.* at *5-7.

    ii. Following the incident, the employer ("WisDOT") required the employee to undergo an independent medical examination ("IME") to determine her fitness to return to work, citing concern about the employee suffering a panic attack or incident similar to the one noted above while alone in an automobile with a student during a driving test. The IME report stated that the employee "remains at increased risk for potentially violent behavior toward self and others within the workplace," and that, based on the evaluation, the examiner "would predict" future similar episodes. *Id.* at *11-12.

        a. In response, the employee provided information from her physician stating that she was fit to return to work, though the physician declined to review the report from the IME. *Id.* at *12-15. However, WisDOT decided to terminate the employee's employment, finding that the information provided by the employee's physician "did not contribute new information about [her] ability to perform [her] duties in a safe, efficient and effective manner." *Id.* at *15.

    iii. The district court granted summary judgment to WisDOT, finding that the undisputed facts demonstrated that the termination was based not solely on the employee's disability, but rather on her behavior, the disruption it caused in the workplace and the danger it posed to the employee and others. *Id.* at *17. The court rejected the employee's contention that WisDOT was necessarily making a "direct threat" defense because it had not pleaded such as an affirmative defense and, instead, the court understood WisDOT to be arguing that the employee's behavior demonstrated that she was not qualified to continue in employment, irrespective of the fact that the behavior was caused by her disabilities. *Id.*

iv. The Seventh Circuit concurred, stating that "when an employee's disability has actually resulted in conduct that is intolerable in the workplace, the direct-threat defense does not apply: the case is no longer about potential but rather actual dangers that an employee's disability poses to herself and others." *Id.* at *28. The circuit court went on: "Put another way, what is at issue once an employee has engaged in threatening behavior is not the employer's qualification standards and selection criteria and whether they tend to screen out people with disabilities ... but whether the employer must tolerate threatening (and unacceptable) behavior because it results from the employee's disability. [Precedent] answers no: the employee is no longer 'otherwise qualified' to perform the job." *Id.*

a. The circuit court also noted that "WisDOT's actions following the April 18th incident are consistent with a genuine concern about the danger that [the employee]'s conduct presented to herself and others," and that, "[p]rior to that episode, WisDOT had accommodated [the employee]'s anxiety disorder by allowing her the time to compose herself in the restroom when she felt an anxiety attack coming on, for example." *Id.* at *32.

2. In ***Bodenstab v. County of Cook*, 569 F.3d 651 (7th Cir. 2009)**, the circuit court considered a case in which an anesthesiologist made comments alluding to the fact that, if he received a feared cancer diagnosis, he would kill his supervisor and several co-workers. The individual was placed on leave and required to undergo a psychiatric evaluation.

i. The evaluation determined that the individual suffered from a psychotic disorder rendering him unable to safely practice medicine, but also concluded that there was a low probability that the individual was an active danger to himself or others. Nevertheless, the employer proceeded with termination on the basis of the threats.

ii. The district court granted summary judgment for the employer, emphasizing that employers need not take risks with employees who threaten others.

iii. The Seventh Circuit affirmed, but analyzed the matter instead from a disciplinary/misconduct perspective, stating: "We need not decide … whether the undisputed evidence supports Cook County's conclusion that [the plaintiff] presented a direct threat to others. Even if Cook County could not satisfy its burden of establishing that [he] presented a direct threat to the health and safety of others in the workplace, summary judgment was nevertheless appropriate because the County presented undisputed evidence that it fired [the plaintiff] for threatening his co-workers." *Id.* at 658-59.

3. Courts have also differentiated between a direct threat of present or future violence and the ability to discipline an employee for past violent or threatening behavior.

   i. In ***Curley v. City of N. Las Vegas*, 772 F.3d 629 (9th Cir. 2014)**, the circuit court considered the case of a sewer cleaner who was investigated after he had numerous verbal altercations with coworkers. An investigation revealed that he had repeatedly threatened coworkers, for example by threatening to put a bomb in a coworker's car, to throw a blanket over a coworker's head and beat him, to kick in a coworker's teeth, and to shoot his supervisor's children in the kneecaps. *Id.* at 630-31. As a result the employee was required to undergo a fitness-for-duty examination. *Id.* at 631. The examination deemed the employee to be fit for duty and not a danger to himself or others. *Id.* Nevertheless, the employee was terminated on the basis of the threats. *Id.*

      a. Affirming summary judgment for the employer, the court held that the fitness-for-duty determination did not create a genuine issue of material fact as to whether the employer's proffered reason for termination was pretext for discrimination, because the determination was that he was unlikely to commit future violence, not that his past misconduct should be excused. *Id.* at 633.

I. When an employer "has a reasonable relief, based on objective evidence, that: (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition," the employer may require a medical examination. EEOC Enforcement Guidance on the ADA and Psychiatric Disabilities, Notice 915.002 (3/25/1997), available at http://www.eeoc.gov/policy/docs/psych.html.

   1. However, the EEOC has more recently affirmed that "[a]n employer must have objective evidence suggesting that a medical reason is a likely cause of the problem to justify seeking medical information or ordering a medical examination," and that "[a]n employer cannot require a medical examination solely because an employee's behavior is annoying, inefficient, or otherwise unacceptable." EEOC Fact Sheet, "Applying Performance and Conduct Standards to Employees with Disabilities," Question 16 (Oct. 2008), available at http://www.eeoc.gov/facts/performance-conduct.html.

J. Courts have acknowledged that the direct threat analysis may sometimes mirror or flow into the question of whether an employee is a "qualified individual" under the ADA, but the concepts remain distinct and can, and indeed should, be analyzed separately.

   1. In ***EEOC v. Amego, Inc.*, 110 F.3d 135 (1st Cir. 1997)**, the First Circuit considered whether termination of an employee at a facility for individual with mental and behavioral disabilities was appropriate where the former employee had twice attempted to commit suicide within a six week period by overdosing on

medications and the individual's duties included the dispensing of medications to employees. *Id.* at 137.

i. The EEOC argued that whenever an issue of threats to the safety or health of others is involved in an ADA Title I case, it must be analyzed under the "direct threat" provision as an affirmative defense. *Id.* at 142. The defendant facility, however, argued that the risks posed to others may be considered as part of the qualified individual analysis, and that the direct threat defense does not preclude the consideration of safety risks in other prongs of the ADA analysis. *Id.* at 142-43.

ii. The circuit court affirmed the district court's holding that the EEOC failed to meet its burden under the ADA of showing that the former employee was qualified for the position in question. First, the circuit court held that it could "discern no congressional intent to preclude the consideration of essential job functions that implicate the safety of others as part of the 'qualifications' analysis, particularly where the essential functions of a job involve the care of others unable to care for themselves." *Id.* at 143. The court then went on to hold that "[t]he precise issue here concerns the employer's judgment that [the former employee's] could not be trusted to handle the medication-related functions of her job" and "[i]n this case, a failure to perform an essential function—overseeing and administering medication—would necessarily create a risk to others." *Id.* at 144. Thus, the court concluded, "[t]hat a failure to perform a job function correctly creates a risk to others does not preclude the ability to perform that function from being a job qualification." *Id.*

2. In ***Bruzzese v. Lynch*, No. 13-cv-5733, 2016 U.S. Dist. LEXIS 75364 (E.D.N.Y. June 8, 2016)**, the court considered the case of a special agent with the U.S. Bureau of Alcohol, Tobacco and Firearms who was reassigned to non-field duty and told to surrender his firearm following several instances of inappropriate behavior on the job, including making questionable statements regarding the fatal shooting of a suspect during an undercover operation, acting "hyper" during preparations for another undercover operation, and allegedly making suicidal comments. *Id.* at *4-5.

i. The defendant agency argued that the plaintiff was not a qualified individual under the ADA because he could not be trusted to carry a firearm or engage in dangerous law enforcement activities, which are essential functions of the special agent field duty position. *Id.* at *18-19. The plaintiff in turn argued that he could only be found to be unqualified under the ADA if it is determined, through the required analysis, that he poses a "direct threat" and that the agency could not show that he posed a direct threat because he "never threatened anyone and was not terminated or disciplined" and a fitness for duty evaluation "found no evidence that [he] bore suicidal or homicidal ideation or was otherwise violent or dangerous." *Id.* at *20.

ii. The court rejected the plaintiff's argument, finding that "[w]hile it is true that the question of qualification is often blended with the question of whether an individual poses a 'direct threat,' because an individual does not constitute a 'direct threat' does not render that individual qualified." *Id.* The court went on to find that "[a]s a matter of law, [the] permanent reassignment of plaintiff did not constitute illegal discrimination because plaintiff has reasonably been determined to be not 'qualified' to be a special agent carrying a gun," given the fact that, "in addition to the carrying of a firearm, the job of a special agent requires vital exercise of great discretion — a mistake under stressful circumstances may mean sudden death" and "[t]he personality traits plaintiff demonstrated to his supervisors, and those reported in the [fitness for duty report], indicate that a supervisor could find it probable that plaintiff lacks the personality to react responsibly to sudden psychological stress or emotional trauma." *Id.* at *20-21.

V. Performance Management and Fitness for Duty Examinations

A. Performance Management and Enforcing Conduct Rules

1. Courts have made clear that an employer may enforce its conduct rules and policies even where an employee's disability is the basis for the bad behavior.

i. In ***Yarberry v. Gregg Appliances, Inc.*, 625 Fed. App'x 729, 740 (6th Cir. 2015)**, the Sixth Circuit held that a retail employer who terminated a bipolar employee following an incident where the individual entered a store after work hours, opened a safe, roamed the store using store equipment, then left without setting the alarm was justified regardless of whether the individual's bipolar disorder caused the behavior. The court stated that while the "the manic episode apparently associated with his bipolar disorder that caused him to enter [the] store after hours was non-violent and occurred only once" and the employer's "decision to terminate a previously successful employee so quickly after such an isolated event is concerning," nevertheless the employee's behavior "all gave [the employer] grounds for terminating him for his conduct alone, which violated company policies regarding safety and security as well as general behavior standards for management." *Id.* Thus, concluded the court, "[i]n light of these specific facts, [the employer] had legitimate, nondiscriminatory reasons for the termination." *Id.*

ii. In ***Krasner v. City of New York*, No. 13-cv-3998, 2014 U.S. App. LEXIS 16600 (2d Cir. Aug. 28, 2014)**, the court held that an employer could enforce its conduct rules even where the employee's "insubordination, use of profane language, and threats to co-workers of serious physical harm" were the result of his Asperger's syndrome, noting that the "fact that such aberrant behavior may be a result of [plaintiff]'s Asperger's is immaterial, inasmuch as 'workplace misconduct is a legitimate and nondiscriminatory

reason for terminating employment, even when such misconduct is related to a disability." *Id.* at *3.

iii. In ***Tate v. Addus Healthcare, Inc.*, No. 11-3252 & 12-2694, 2014 U.S. App. LEXIS 963 (7th Cir. Jan. 17, 2014)**, the court affirmed that "an employee's disability will not preclude an employer from imposing discipline, up to and including discharge, for the employee's violation of a workplace rule, even where there is a connection between the disability and the violation." In *Tate*, the court rejected the plaintiff's claim that the employer violated the ADA for terminating him for sleeping on the job, despite the condition being caused by his sleep apnea condition.

iv. *See also* ***Hamilton v, Southwestern Bell Tel. Co.*, 136 F.3d 1047, 1052 (5th Cir. 1998)** (holding that "the ADA does not insulate emotional or violent outbursts blamed on an impairment" and "[a]n employee who is fired because of outbursts at work directed at fellow employees has no ADA claim"); ***Palmer v. Circuit Court of Cook County, Ill.*, 117 F.3d 351, 352 (7th Cir. 1997)** ("[I]if an employer fires an employee because of the employee's unacceptable behavior, the fact that that behavior was precipitated by a mental illness does not present an issue under the [ADA]"); ***Valentine v. Standard & Poor's*, 50 F. Supp. 2d 262, 289 (S.D.N.Y. 1999)** ("[T]he ADA does not immunize disabled employees from discipline or discharge for incidents of misconduct in the workplace."); ***Francis v. Runyon*, 928 F. Supp. 195, 205 (E.D.N.Y. 1996)** ("A disabled individual cannot be 'otherwise qualified' for a position if he commits misconduct which would disqualify an individual who did not fall under the protection of the statute.").

2. However, the EEOC has suggested that if misconduct resulted from a disability, the employer must be prepared to demonstrate that the conduct rule is job-related and consistent with business necessity. *See* EEOC Enforcement Guidance on the ADA and Psychiatric Disabilities, Question 30, available at http://www.eeoc.gov/policy/docs/psych.html (Q. May an employer discipline an individual with a disability for violating a workplace conduct standard if the misconduct resulted from a disability? A. Yes, provided that the workplace conduct standard is job-related for the position in question and is consistent with business necessity.).

B. Performance Standards and Requests for Reasonable Accommodation

1. The EEOC has stated that an employee may ask for reasonable accommodation before or after being told of performance problems, noting that "[s]ometimes, an employee may not know or be willing to acknowledge that there is a problem requiring accommodation until the employer points out deficiencies in performance." EEOC Guidance on the ADA and Applying Performance and Conduct Standards to Employees with Disabilities, Question 5, available at http://www.eeoc.gov/facts/performance-conduct.html.

2. However, the EEOC has further made clear that an employer need not rescind or withhold discipline or tolerate or excuse poor performance going forward where an employee raises a request for an accommodation for the first time in response to counseling, discipline, or a low performance rating. *See id.* at Question 6.

3. Nevertheless, "when an employee requests a reasonable accommodation in response to the employer's discussion or evaluation of the person's performance, the employer may proceed with the discussion or evaluation but also should begin the interactive by discussing with the employee how the disability may be affecting performance and what accommodation the employee believes may help to improve it." *Id.*

    i. For example, if an employee does not disclose his disability even following counseling for performance issues but later raises it when being presented with a written warning and asks for an accommodation that he believes will alleviate the issues, the employer need not rescind the written warning or the prior oral counseling. However, the employer should discuss the request and how the proposed accommodation will help improve the employee's performance. The employer also may request medical documentation from the employee to confirm whether the individual has a disability and/or whether and how the proposed accommodation(s) may alleviate the restrictions caused by the disability. *See id.* at Question 5.

4. The EEOC has also recognized an "exception" to the interactive process requirement where an employee waits until a performance or conduct situation has escalated to the point of termination to request a reasonable accommodation. In such an instance, assuming that the employer has followed its policies or practices in reaching the decision to terminate (whether it be for poor performance or disciplinary or conduct issues), an employer is not obligated to forego termination simply because the employee raised a request for accommodation at that time. As noted by the EEOC, in such a scenario, "[t]he employer may refuse the request for reasonable accommodation and proceed with the termination because an employer is not required to excuse performance problems that occurred prior to the accommodation request" and "[t]his employee waited too long to request reasonable accommodation." *Id.* at Question 5, Example 9.

C. Fitness for Duty Examinations

1. If a fitness-for-duty examination is medical (which most are), it must be job-related and consistent with business necessity. *See* 42 U.S.C. §12112(d)(4)(A); 29 C.F.R. § 1630.14(c).

    i. In ***Coursey v. University of Maryland Eastern Shore*, 577 Fed. App'x 167 (4th Cir. 2014)**, the court held that it was job-related and consistent with business necessity for the University to require a professor to submit to a fitness-for-duty exam where there had been complaints about his

"violent outbursts, erratic and inappropriate behavior," "verbal abus[e]," and disregard of University policies from colleagues and students alike.

ii. In ***Owusu-Ansah v. Coca-Cola,* 715 F.3d 1306 (11th Cir. 2013)**, the court found it was job-related and consistent with business necessity to require a fitness-for-duty exam where an employee banged his fist on a table during a meeting in which he alleged discrimination and harassment by his managers and co-workers and loudly stated that someone was "going to pay for this." *Id.* at 1311. The court concluded that the employer "had a reasonable, objective concern" about the employee's mental state, which "affected job performance and potentially threatened the safety of its other employees." *Id.* at 1312.

iii. In ***Meeker v. Potter (USPS),* 2002 EEOPUB LEXIS 5795 (EEOC 2002)**, the EEOC found that it was job-related and consistent with business necessity to require an employee undergo a fitness-for-duty examination where the employee expressed "bizarre and paranoid-type feelings" relating to "life and death issues in the work place," and the employee had expressed suicidal tendencies in the past.

iv. Similarly, in ***Muzny v. Potter (USPS),* 2005 EEOPUB LEXIS 1774 (EEOC 2005)**, the EEOC found that the employer could require an employee to submit to a fitness-for-duty exam where "there was substantial evidence" that the employee "had paranoid tendencies based on the agency's psychiatric and psychological reports." Further, the employee had alleged that his supervisor had threatened to shoot him, that his premises had been wiretapped. *Id.* at *4.

2. However, in ***Kroll v. White Lake Ambulance Authority,* 763 F.3d 619 (6th Cir. 2014)**, the Sixth Circuit reversed summary judgment for the employer, finding that there was a genuine issue of material fact whether the defendant's order that an emergency medical technician (EMT) get psychological counseling was job-related and consistent with business necessity.

i. The EMT began having behavioral issues while having an affair with a married coworker, including instances of crying and arguing with the coworker while in the workplace. *Id.* at 610-21. The employee's director met with the employee and told her she could continue working only if she agreed to undergo counseling to address her mental health issues. *Id.* at 621. When the plaintiff refused, she was fired. *Id.*

ii. The circuit court found that the evidence demonstrated that the director knew of only two workplace incidents involving the employee when he required her to obtain counseling, one of which involved her using a cell phone while driving an ambulance, which was against regulation, and the other of which involved a paramedic claiming that the employee ignored a request to help administer oxygen to a patient. *Id.* at 623-24. While the

court found that these two isolated incidents could be the basis for disciplinary action or ordering additional training, they were insufficient to support a reasonable belief that the employee was having an emotional or psychological problem rendering her unable to perform the essential functions of her job. *Id.* at 624. Therefore, there was no business necessity that justified an order to seek psychological counseling. *Id.* The court noted that while a pattern of behavior showing that the employee's emotional problems were interfering with her ability to drive an ambulance safely or to provide appropriate patient care might support requiring her to obtain counseling, the court found that the director did not have sufficient information in this circumstance to establish such a pattern. *Id.* at 624-25.

iii. The court further rejected the application of the direct threat defense, finding that while "'special circumstances' may exist in workplaces where employees respond to stressful situations and shoulder responsibility for public safety" that may warrant a psychological exam or other action based on a direct threat concern, the two incidents in question did not rise to the level of evidence that the employee presented "a significant risk to the health or safety of others" such that direct threat would apply. *Id.* at 626.

PSYCHOLOGICAL ISSUES IN EMPLOYMENT LAW

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PSYCHOLOGICAL ISSUES IN EMPLOYMENT LAW

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The following is a non-exhaustive list of significant cases decided under the Americans with Disabilities Act involving individuals with psychiatric disabilities. However, many of the legal issues the cases present – such as what constitutes an "essential function," what is required to request a reasonable accommodation and the obligations of both the employer and employee as part of the reasonable accommodation process, specific types of reasonable accommodations that may be required, and the circumstances under which employers may make disability-related inquiries or require medical examinations of employees – are resolved in the same or similar ways regardless of the particular disability an employee has.

A. Definition of "Disability"

1. Actual Disability

Jacobs v. N.C. Administrative Office of the Courts, __ F.3d ___ (4th Cir. Mar. 12, 2015). Plaintiff, an office assistant who was promoted to deputy clerk, had duties that included microfilming and filing. Four or five of the 30 deputy clerks were assigned to provide back-up customer assistance at the front counter. When plaintiff began training on the front counter, she experienced extreme stress, nervousness, and panic attacks. She explained to management that she had social anxiety disorder with a past history of medical treatment including medication. She requested as an accommodation to handle a different task or only work at the counter once per week, and was subsequently terminated. In the ensuing ADA action, the district court granted summary judgment for the employer on the ground that plaintiff did not have a disability. Reversing, the Fourth Circuit ruled that a jury could conclude plaintiff's social anxiety disorder substantially limited her in interacting with others. Rejecting the employer's assertion that plaintiff could not be substantially limited in the major life activity of "interacting with others" because she "interact[ed] with others on a daily basis," "routinely answered inquiries from the public at the front counter," "socialized with her co-workers outside of work," and engaged in social interaction on Facebook, the Fourth Circuit held "[a] person need not live as a hermit to be 'substantially limited' in interacting with others." The court cited the American Psychiatric Association's definition of social anxiety disorder as including not just those who must avoid situations due to the condition, but also those who endure them with intense anxiety. "At a minimum, [plaintiff's] testimony that working at the front counter caused her extreme stress and panic attacks creates a disputed issue of material fact on this issue."

Weaving v. City of Hillsboro, 763 F.3d 1106 (9th Cir. 2014). Plaintiff was terminated from his job as a sergeant with the city's police department because of interpersonal problems he experienced when interacting with peers and subordinates. Plaintiff claimed that his ADHD substantially limited his ability to work and to interact with others. A jury agreed, concluded that plaintiff had been terminated because of his disability, and awarded plaintiff damages and attorney's fees. The Court of Appeals reversed, finding that evidence of plaintiff's competence as a police officer undermined his contention that he was substantially limited in working, and citing to two pre-ADAAA decisions in the Ninth Circuit – McAlindin v. City of San Diego and Head v. Glacier Northwest --to conclude that plaintiff was not substantially limited in interacting with others. By contrast to the plaintiffs in McAlindin and Head, who the court described as "so severely impaired that they were essentially housebound," plaintiff was able to engage in normal social interactions, and his interpersonal difficulties existed almost exclusively in his relationships with peers and subordinates. The court distinguished between the ability to "get along with others" and "interacting with others," and noted that the ADA does not protect a cantankerous person" who has "mere trouble getting along with coworkers."

Klute v. Shinseki, 840 F. Supp. 2d 209 (D.D.C. 2012). The plaintiff, a federal government attorney, alleged that he was denied a reasonable accommodation for his disability ("adjustment disorder" with mixed anxiety and depression) during a period that spanned both before and after the effective date of the ADAAA. Granting summary judgment for the agency, the court determined that, even assuming the ADAAA standards apply, the plaintiff was alleging a substantial limitation in working, which could not be demonstrated because the evidence showed he was merely unable to work for a particular supervisor or in a particular workplace.

Naber v. Dover Healthcare Assocs., Inc., 765 F. Supp. 2d 622 (D. Del. 2011), aff'd, 2012 WL 1072311 (3d Cir. Apr. 2, 2012) (unpublished). A recreation assistant alleged that she was discriminated against based on her major depression when she was terminated. The plaintiff testified that although she did not starve herself, her appetite was poor, and she "didn't want to eat." She also was unable to sleep "once or twice a week," had difficulty concentrating because of sleeplessness, and "was always thinking about what happened" with her employment. Viewing the facts and drawing all reasonable inferences in favor of the plaintiff, the court found that there was a question of fact as to whether the plaintiff's depression (rather than her strained relationship with her former supervisor) was the cause of her inability to sleep one or two nights a week and as to whether her sleeplessness was substantially limiting "as compared to the average person in the general population." Concluding, however, that the plaintiff could not establish that the employer's reason for her termination was pretextual, the court granted summary judgment to the employer on the plaintiff's ADA claim. On appeal, the Third Circuit affirmed the lower court's conclusion that the plaintiff could not establish a causal connection between her disability and her termination; the appeals court did not address whether the plaintiff had established coverage.

Wright v. Stark Truss Co., 2012 WL 3029638 (D.S.C. May 10, 2012), adopted by 2012 WL 3039092 (D.S.C. July 24, 2012). After several months of periodically visiting doctors to diagnose a variety of physical symptoms including nausea, vomiting, and weight loss, a shipping supervisor/dispatcher began to experience depression and anxiety. During this time, he allegedly threatened his wife, threatened suicide, and was involuntarily committed to a behavioral health

clinic for a 72-hour observation, following which he was released without restrictions. When he returned to work one week later, he was terminated. Denying the employer's motion for summary judgment, the court rejected the employer's argument that the plaintiff's impairment was "temporary" and therefore not "substantially limiting," holding that under the ADAAA's "episodic or in remission" rule, the evidence was sufficient to show that, when active, the plaintiff's depression and anxiety substantially limited him in sleeping, eating, thinking, and concentrating.

Dentice v. Farmers Ins. Exch., 2012 WL 2504046 (E.D. Wis. June 28, 2012). A litigation attorney at an insurance company sought and obtained a medical leave of absence for what was later diagnosed as depression, general anxiety disorder, and panic disorder. After nine months, he returned to work and sought accommodations for these conditions, as well as carpal tunnel syndrome, and was subsequently terminated. The plaintiff alleged disability discrimination and denial of accommodation, contending that his impairments substantially limit him in major life activities "including, but not limited to, thinking, concentrating, learning, interacting and communicating with others, caring for oneself, eating, sleeping, performing manual tasks, and marital relations." Denying the employer's motion for summary judgment on the issue of coverage, the court cited the fact that the plaintiff's impairments required a nine-month absence from work, as well as continued medical treatment even after he returned, and evidence that the impairments "affected many facets of his life, including both his work and personal life."

2. "Regarded as" Coverage

Stahly v. South Bend Transp. Corp., 2013 WL 55830 (N.D. Ind. Jan. 3, 2013). The plaintiff, a bus driver, challenged her termination on various grounds, including perceived disability. Denying the employer's motion for summary judgment on coverage, the court rejected the employer's reliance on pre-ADAAA case law, ruling that it could be concluded that the termination was "because of" a perceived impairment, given that management knew that the plaintiff was taking medication and suffered an anxiety attack for which she was admitted to an emergency room, that she took FMLA leave, and that she was referred by the employee assistance program to a stress recovery center.

Jenkins v. Medical Labs. of E. Iowa, 880 F. Supp. 2d 946 (N.D. Iowa 2012), aff'd, 2013 WL 1799851 (8th Cir. Apr. 30, 2013) (summary affirmance). The plaintiff could not show she was "regarded as" an individual with a disability when she was terminated for refusal to attend the EAP program as directed by her employer. Granting summary judgment for the employer, the court ruled that employer-required EAP counseling was not an "action prohibited by" the ADA, nor was there evidence to support the plaintiff's contention that she was sent to EAP because of a perceived mental impairment.

Risco v. McHugh, 868 F. Supp. 2d 75 (S.D.N.Y. 2012). The plaintiff, a probationary guidance counselor intern for the Department of the Army, alleged that she was unlawfully terminated based on disability. Noting that the plaintiff's immediate supervisor testified during the agency EEO investigation that he did not perceive the plaintiff as having an actual mental illness, the court concluded that she was not "regarded as" an individual with a disability. "Even under the expanded definition of disability set forth in the ADA Amendments Act . . . , Risco's assertions

that [her supervisor] referred to her inability to do a task as a 'mental thing' and described her inappropriate behavior as 'erratic' . . . do not demonstrate that [the supervisor] regarded Risco as having a mental impairment within the meaning of the statute."

Becker v. Elmwood, 2012 WL 13569 (N.D. Ohio Jan. 4, 2012), aff'd, 2013 WL 1859153 (6th Cir. May 3, 2013). The court granted the defendant school district's motion for summary judgment on a disability discrimination claim brought by a teacher with obsessive compulsive disorder, finding that the plaintiff did not suffer an adverse employment action because the circumstances of his resignation did not constitute a constructive discharge. However, in its analysis, the court rejected the defendant's reliance on pre-ADAAA cases requiring that, for "regarded as" coverage, the employer have perceived the employee to have had an impairment that substantially limits a major life activity, and ruled instead that "[t]he ADA now includes perceived disabilities 'whether or not the impairment limits or is perceived to limit a major life activity.'"

Hoback v. City of Chattanooga, 2012 WL 3834828 (E.D. Tenn. Sept. 4, 2012). After the plaintiff's National Guard unit was activated and he was deployed to Iraq, he resumed his duties as a police officer. Several years later, the city terminated him after concluding based on a fitness-for-duty psychological evaluation that he could not perform his job safely due to this PTSD. After the plaintiff prevailed at trial on his ADA discriminatory termination claim, the employer moved to set aside the verdict, arguing that the plaintiff was not "regarded as" an individual with a disability, and even if he was, his termination was justified. The court held that, as to the first step in the analysis, terminating someone because of his medical condition constitutes "regarding" the employee as an individual with a disability. The court rejected the employer's argument that it only regarded the plaintiff as incapable of performing the functions of a police officer, not as substantially limited in any major life activity. "This argument would have been convincing, and perhaps determinative, if the relevant events in the case occurred before January 1, 2009. However, because the events occurred after January 1, 2009, the ADAAA applies to the city's conduct. . . . A plaintiff must only show that he was 'subjected to an action prohibited under [the ADA] because of an actual or perceived physical or mental impairment whether or not the impairment limits a major life activity.'" Since a reasonable jury could conclude, and the city even conceded, that the plaintiff was terminated because evaluations indicated he was unfit due to his PTSD, he was "regarded as" an individual with a disability. Turning then to the merits of whether the termination was nevertheless justified due to direct threat to safety, the court upheld the jury's verdict in the plaintiff's favor based on testimony by the decisionmaker that he did not consider a second evaluation and on other evidence supporting the conclusion that the plaintiff was fit for duty.

B. Definition of "Qualified Individual with a Disability"

Jacobs v. N.C. Admin. Office of the Courts, 780 F.3d 562 (4th Cir. 2015). Reversing summary judgment for the employer, the court held there was "ample" evidence for a reasonable jury to conclude that providing customer service at the front counter was not an essential function of a deputy clerk with social anxiety disorder, particularly since there were 29 other deputy clerks potentially available to perform this job duty. All deputy clerks had the same title and job description but only four or five of them routinely worked at the front counter; the others

performed filing and record-keeping duties, many of which did not require face-to-face interaction with the public. Generally, the most junior clerks are assigned to the front desk because they can gain knowledge about the office, but some new clerks had been permitted to start their jobs filing. Upon getting the job, Jacobs was assigned to work at the counter four days a week, but she soon began experiencing extreme stress and panic attacks while working at the counter. The job description did not state that all deputy clerks must work at the front counter; fewer than 15% of the deputy clerks performed this function and some never performed it. Many employees were available to work at the front counter given that most deputy clerks received training to perform this duty. Finally, the employer failed to produce evidence that "mastery" of the front counter was essential to successful performance of the job or that excusing Jacobs from this task would negatively impact the operations.

Johnson v. Board of Trs., 666 F.3d 561 (9th Cir. 2011). Affirming summary judgment for the employer, the court held that the plaintiff was not a "qualified" individual under 29 C.F.R. §1630.2(m) because she failed to meet the "job-related requirement" that she have a valid state teaching certificate. The plaintiff, who had depression and bipolar disorder, failed to complete the educational requirements needed to renew her teaching certificate before the start of the school year. A few months before the expiration of her certificate, the plaintiff experienced a major depressive episode that prevented her from taking the necessary classes. The local school board rejected her request that, as a reasonable accommodation, it apply to the state board of education for a one-year provisional authorization to permit her to continue teaching while she completed her educational credits. Instead, the board terminated the plaintiff, noting that she had had five years to take the necessary classes and had sought an extension just as the school year was beginning. Such extensions were granted only when another qualified teacher was unavailable for hire, which was not the situation here. The court rejected the plaintiff's contention that she would have been qualified if the board had granted her request for reasonable accommodation. While the regulations specifically note that the ability to perform essential functions must be considered with or without the aid of a reasonable accommodation, the regulations do not state that the ability to meet job-related requirements also must be considered with or without the use of a reasonable accommodation. Therefore, the plaintiff must meet this part of the definition of "qualified" without any reasonable accommodation. The court rejected the argument that the appendix to §1630.10 requires consideration of reasonable accommodation in connection with meeting qualification standards, because that section applies only when a plaintiff is challenging a specific standard as discriminatory. In this case, the plaintiff did not challenge the board's right to determine whether to apply for a one-year authorization, so § 1630.10 and its appendix were irrelevant.

Kurzweg v. SCP Distribs., L.L.C., 2011 WL 1519105 (11th Cir. Apr. 21, 2011) (unpublished). About nine months after returning from discretionary leave for bladder surgery, the plaintiff, a delivery truck driver whose conditions included lymphoma, cervical degenerative disc disease, bipolar disorder, and ADD, was again placed on discretionary leave so that he could have neck surgery. Seven days after the expiration of the leave, which by then had already been extended by a month, the plaintiff was cleared to work without restriction. Nevertheless, he was subsequently terminated, and he became severely depressed. Approximately one year later, largely because of his worsening depression, the plaintiff applied for SSDI, stating that he "became unable to work because of [his] disabling condition." The SSA awarded the benefits,

with an onset date of June 9, 2008, the date of his termination. The plaintiff argued that he could nevertheless allege that he was able to perform the essential functions of the job at the time of his termination for purposes of his ADA case, because the SSA had erroneously chosen June 9, 2008, as the onset date merely because it was the last day he had worked. The court noted, however, that the plaintiff had apparently never attempted to correct the onset date. Moreover, the plaintiff's explanation did not fall within any of the exceptions discussed in Cleveland. Therefore, the plaintiff was estopped from asserting in his ADA claim that he was able to perform the essential functions of his position when he was terminated by the defendant.

Solomon v. Vilsack, 628 F.3d 555 (D.C. Cir. 2010). The plaintiff, whose psychiatric disabilities included a long history of depression, applied for Federal Employees Retirement System (FERS) disability retirement benefits after her accommodation requests were denied. Rejecting the view that the lower court's decision to bar the plaintiff's claim was "grounded . . . on the equitable doctrine of judicial estoppel," and therefore that the abuse-of-discretion standard applied, the appeals court held that Cleveland v. Policy Management Systems Corp. required it to answer two questions over which it had plenary review: (1) whether the disability benefits and disability discrimination claims "so inherently conflict" that the court should presumptively bar recipients of the benefits from asserting discrimination claims, and (2) even if no inherent conflict exists, whether the plaintiff failed to reconcile statements she made in her benefits application with her claim that she was qualified for the job. Vacating the lower court's decision, the appeals court held that claims of FERS disability benefits and claims of disability discrimination under the Rehabilitation Act do not "so inherently conflict" that courts should presumptively bar recipients of FERS benefits from asserting Rehabilitation Act claims. Although OPM regulations state that individuals who are able to fulfill the duties of their positions with reasonable accommodation are ineligible for benefits, the FERS system, as actually implemented, does not render such individuals ineligible. A reasonable jury could conclude that statements made by the plaintiff and her doctor in support of the plaintiff's FERS claim were consistent with the claim that the plaintiff was qualified for the job, because the form she signed did not warn her that employees who are able to work with reasonable accommodations are ineligible; there was no evidence that she was otherwise told of the ineligibility; her statements that she "became disabled for [her] position" and that she had "been unable to work" because her medical condition was "in crisis . . . [despite] continued treatment" were consistent with the claim that she could perform her job with reasonable accommodations; and her psychiatrist's supporting statement that "it has become clear that disability retirement is the only viable option" did not take reasonable accommodations into account.

C. Reasonable Accommodation

1. Notice of the Need for Reasonable Accommodation

Walz v. Ameriprise Fin., Inc., 779 F.3d 842 (8th Cir. 2015). Affirming summary judgment for the employer on claims for wrongful termination and failure-to-accommodate, the court held that the employee failed to inform her employer about her non-obvious disability or request an accommodation. As a result of bipolar affective disorder, Walz began engaging in highly disruptive and erratic behavior. After several attempts by her supervisor to discuss her behavior and offer help, Walz requested and was granted FMLA leave by the defendant's third-party

vendor that handles all such requests. She never told her supervisor or anyone else at Ameriprise the reason for her FMLA leave. Upon returning from leave, she gave her supervisor a note from her doctor at Allina Mental Health Services that cleared her to return to work and noted she had been stabilized with medication. But, the note did not specify Walz's condition nor did it request any accommodations. The court rejected Walz's argument that her disruptive behavior and use of FMLA leave, as well as the doctor's note put Ameriprise on notice that she had a mental illness. Nor did the court think sufficient notice of disability was provided based on the supervisor's testimony that after reading the doctor's note he "surmised" that Walz had been treated for her mental health. Even if the court were to agree with Walz that all of this evidence constituted notice of a disability, it did not specify any resulting limitations that would require accommodation. As a result, she was not entitled to reasonable accommodation and without reasonable accommodation she could not show she was qualified.

Kobus v. College of St. Scholastica, Inc., 608 F.3d 1034 (8th Cir. 2010). Because the plaintiff never mentioned that he had depression or that he was taking an antidepressant, he failed to put his employer on notice that he needed leave as a reasonable accommodation. On one occasion, the employer asked the plaintiff if he wanted medical leave under the FMLA after he had stated that he was dealing with "stress and anxiety," but he declined to apply for leave because he did not have a doctor who could fill out the certification form. In affirming summary judgment for the employer, the court rejected the plaintiff's argument that Question 17, Example A, in the EEOC's Enforcement Guidance on the ADA and Psychiatric Disabilities required the defendant to recognize that his statements about leave – including mentioning headaches and neck pain and a need for mental health leave – constituted a request for reasonable accommodation. The court emphasized that the plaintiff repeatedly declined to identify his diagnosis and failed to request FMLA leave when offered the opportunity. Furthermore, the court did not necessarily agree that the Enforcement Guidance was controlling, but even if it was, the guidance was clear that an employer had a right to obtain documentation confirming the existence of a disability and the need for accommodation. The plaintiff's repeated statements that he did not have a doctor, and therefore had no way to verify his condition or need for leave, meant he would not have been able to meet this requirement.

Stewart v. St. Elizabeths Hosp., 589 F.3d 1305 (D.C. Cir. 2010). The D.C. Circuit affirmed the lower court's determinations that the plaintiff was not unlawfully denied a reasonable accommodation under section 504 of the Rehabilitation Act. The plaintiff was a housekeeping aide with a mental disability who sought a transfer from a facility where individuals with mental illness were housed while awaiting trial. She admitted that she did not disclose her disability before October 2002, nine months after she was assigned to the facility. Prior to that time, although the plaintiff was seen crying, shaking, and talking to herself after a patient exposed himself, that reaction was not sufficient standing alone to indicate that she had a mental illness. Moreover, other signs of the plaintiff's work behavior, including her satisfactory job performance, her excellent attendance record, and the lack of any leave taken for a disability, would have led the plaintiff's supervisors to conclude that she did not have a disability. Therefore, the court affirmed summary judgment for the employer as to the alleged failure to provide a reasonable accommodation prior to October 2002. The court also affirmed judgment as a matter of law as to the plaintiff's October 2002 request for a reasonable accommodation. In response to the plaintiff's request for a transfer because she did not "feel that well," the hospital

administrator made an appointment for October 15 to discuss the request and asked the plaintiff to provide medical documentation of any disability. At the meeting, the plaintiff failed to provide the requested medical documentation and was told by the administrator that he would try to assist her as soon as she submitted the necessary paperwork. She left work early that day and never returned. The court concluded that the administrator did everything legally required in promptly scheduling a meeting and promising to help once medical documentation was provided.

Russell v. TG Mo. Corp., 340 F.3d 735 (8th Cir. 2003). An employee who told her supervisor that she needed to leave work immediately because she was "not feeling well" – without specifying either that she was experiencing an anxiety attack or her medical problem was related to her disability – did not request reasonable accommodation and thus the employer could treat her departure as an unexcused absence. The fact that Russell's supervisor knew she had bipolar disorder was irrelevant because nothing in Russell's request indicated that the leave was related to the disability.

Taylor v. Phoenixville Sch. Dist., 184 F.3d 296 (3d Cir. 1999). A request for reasonable accommodation must make clear that the employee needs accommodation because of a disability. A request does not have to be in writing, does not need to use the term "reasonable accommodation," and may come from a third party, such as a family member. The precise information contained in the request will depend on what the employer already knows. Here, the employer knew that: (1) Taylor had a psychotic episode at work, (2) she was immediately hospitalized for three weeks, (3) the hospital had contacted the school district and offered to provide information on Taylor's condition, and (4) Taylor had to take lithium for her condition. The school district's knowledge that Taylor might have a disability and Taylor's son's request for accommodation one week before his mother was due to return to work satisfied the requirements for a valid request for reasonable accommodation. A request for reasonable accommodation does not need to identify a specific accommodation. While such information would be helpful, an employer can request it during the interactive process. Similarly, there is a valid request for reasonable accommodation even if the specific accommodation requested is not feasible because the interactive process requires that the employer help to identify an appropriate accommodation. A request for reasonable accommodation does not have to go to an employee's immediate supervisor; the interactive process is triggered if the request is received by an appropriate agent of the employer, such as the school district's administrative assistant for personnel. Finally, the court rejected the school district's argument that Taylor's request was invalid because it did not know the specific name of her condition. The court found that the school district was aware she might have a disability because of the serious psychiatric problems Taylor exhibited in the workplace and that those problems required a three-week hospitalization. The school district was entitled to know the precise name and nature of Taylor's medical condition, but it was responsible for requesting such information through the interactive process.

Bultemeyer v. Fort Wayne Cmty. Sch., 100 F.3d 1281 (7th Cir. 1996). An employee with psychiatric disabilities had provided sufficient notice to his employer about his need for a reasonable accommodation by stating that he could not return to his position after disability leave because it was too stressful. Furthermore, the employee provided a psychiatrist's letter in a timely manner asking for a reassignment. The individual need not use the term "reasonable

accommodation" in making the request for a change. If the employer found the precise meaning of the employee's request unclear, it should have engaged in an interactive process to identify an appropriate accommodation by speaking to the employee or his doctor.

2. Interactive Process

Jacobs v. N.C. Admin. Office of the Courts, 780 F.3d 562 (4th Cir. 2015). Summary judgment for the employer was inappropriate given that evidence showed a reasonable accommodation was possible and a reasonable jury could conclude that the defendant acted in bad faith by failing to engage in the interactive process after a deputy clerk requested accommodation. Jacobs, who had social anxiety disorder, began experiencing extreme stress and panic attacks a few weeks after being assigned to provide customer service at the front counter. She told her supervisor about her disability and the problems she was experiencing, and that she had previously received treatment for the condition, including medication. The supervisor suggested Jacobs resume treatment and reported this conversation to the clerk of the court. Jacobs did seek medical treatment, but about four months later she sent an e-mail to her three immediate supervisors in which she requested, due to her disability, that she be trained to fill a different role in the office and work at the front counter only one day a week rather than the current four days. The next day, Jacobs contacted one of the supervisors in person who told her that only the clerk of the court had authority to grant her request, but the clerk was on a three-week vacation. Jacobs forwarded the e-mail to the clerk and asked the supervisor if she could take accrued leave. The supervisor questioned the need for leave and then denied it, even though previous requests for leave had always been granted without asking the reason it was being taken. When the clerk returned to the office, she promptly fired Jacobs without ever discussing the request for accommodation which was clearly sitting on her desk. Undisputed evidence showed that all three supervisors refused to discuss Jacobs' request for reasonable accommodation, even though the clerk testified that they had authority to reassign her to different job duties.

Hoppe v. Lewis Univ., 692 F.3d 833 (7th Cir. 2012). Affirming summary judgment for the employer, the court held that the employer engaged in a good faith interactive process and attempted to provide a reasonable accommodation for the plaintiff where she failed to provide the employer with information it needed to evaluate potential accommodations. The plaintiff, a university professor, had an adjustment disorder and her doctor sent the university a letter requesting that she be moved to a different office. Because the letter failed to identify a more suitable location for the plaintiff's office, the university asked the doctor to clarify the request and explain the factors that were likely to aggravate the plaintiff's condition. Although the doctor's second letter failed to answer the university's questions, the university offered the plaintiff three different offices within her current building. She declined all three. The plaintiff allegedly told a dean that she needed a new office in a different building away from a fellow professor, but there was no evidence that the defendant was aware that the recommendation had come from the plaintiff's doctor. Several months later the plaintiff's doctor sent another letter requesting that her office be moved and again failed to answer the university's questions. Nonetheless, the university offered the plaintiff a new office in a different building, which she accepted. Under the circumstances, no rational trier of fact could find that the university failed to participate in good faith in the interactive process or that it failed to offer the plaintiff a reasonable accommodation.

Kinneary v. New York, 601 F.3d 151 (2d Cir. 2010). Reversing a jury verdict for the plaintiff, the court ruled that the defendant provided a reasonable accommodation to a sludge boat captain who failed to take a random drug test mandated by federal law as part of Coast Guard licensing requirements. Due to "shy bladder syndrome," the plaintiff sometimes had difficulty producing sufficient urine for a drug test. After he was required to take a random drug test in December 2001 and was unable to provide a urine sample, he asked if he could take a blood test instead. In response, he was given written instructions for his doctor to follow. The plaintiff's doctor did not provide the information requested in the instructions, which was required under federal regulations, and instead sent a note confirming that the plaintiff had shy bladder syndrome, that he had been prescribed medication for the condition, and that the plaintiff was not a substance abuser. The plaintiff was told the note was unacceptable and cited for misconduct in failing to take the required drug test. Although subsequent blood and hair tests that the plaintiff took on his own initiative and two saliva tests administered by the city were all negative, the plaintiff never successfully took another urine test and refused to acknowledge that he had engaged in misconduct by not taking the urine test in December 2001. Following a proceeding related to the December 2001 test, the Coast Guard suspended the plaintiff's license for one year, and the city discharged him for not having a license. The court found that the city had accommodated the plaintiff by providing him the opportunity to have his December 2001 drug test cancelled based on a physician's evaluation. Because the plaintiff's doctor failed to provide the appropriate information, the plaintiff lost his license despite the accommodation, and he was therefore not otherwise qualified under the ADA.

Jakubowski v. Christ Hosp., Inc., 627 F.3d 195 (6th Cir. 2010), cert. denied, 131 S. Ct. 3071 (2011). Affirming summary judgment for the employer, the court held that the defendant hospital sufficiently engaged in the interactive process and that the plaintiff, a medical resident, failed to identify an effective reasonable accommodation to address his serious problems communicating with professional colleagues and patients. The plaintiff had exhibited serious, persistent problems with communication, prompting the director of the residency program to suspect that the plaintiff might have Asperger's Disorder. He referred the plaintiff for an examination, which ultimately confirmed this diagnosis. In the meantime the plaintiff's performance continued to be below acceptable levels, and he was informed he was to be terminated. Immediately after the termination, the plaintiff requested that the hospital provide him with "knowledge and understanding" as a reasonable accommodation. The plaintiff asked that his colleagues be informed about his disability and stated that he alone would improve his communication with patients. After discussing the plaintiff's proposal, the director rejected it because the hospital lacked sufficient resources to implement it, but he offered instead to help the plaintiff find a residency in pathology, which would require little or no patient interaction. The court found that the hospital had engaged in a good faith effort in the interactive process, listening to the plaintiff's proposal, explaining why it was unreasonable, and offering to find another residency suited to his limitations. The court rejected the plaintiff's proposal that the hospital establish a remediation program for him as a reasonable accommodation, because he proposed this accommodation only in litigation, not during the interactive process.

Ekstrand v. School Dist., 583 F.3d 972 (7th Cir. 2009). Reversing summary judgment for the employer as to the plaintiff's reasonable accommodation claim, the court concluded that once a

teacher with seasonal affective disorder provided medical documentation that she needed to be moved to a classroom with natural light, the employer would have had little problem accommodating the request. Prior to receiving medical documentation from the plaintiff, the employer was not liable for failing to provide the plaintiff with a classroom change as a reasonable accommodation based on her own conclusory remarks that natural light was necessary to accommodate her. During this time period, the plaintiff had identified various classroom conditions that exacerbated her seasonal depression, including lighting, noise, and air circulation, and the employer took accommodating steps to resolve each of these issues to avoid the costs of switching rooms. Once the plaintiff provided documentation of her need for natural light, the employer was obligated to provide the medically necessary accommodation absent undue hardship. Because there was evidence that the plaintiff remained a qualified individual with a disability on the date that she finally provided the documentation concerning the need for natural light, summary judgment on the plaintiff's failure to accommodate claim was improper.

Battle v. United Parcel Serv., Inc., 438 F.3d 856 (8th Cir. 2006). The court upheld a jury's finding that UPS failed to engage in good faith in an interactive process after receiving a letter from the plaintiff's doctor stating that the plaintiff was able to return to work following treatment for depression, anxiety, and obsessive compulsive disorder if he was given an agenda before his meetings with the district manager. The letter explained that the plaintiff, who monitored the work of 600 employees at 11 UPS package centers through the use of daily operations reports, needed an agenda because his disability prevented him from memorizing detailed information from the reports. As a division manager, the plaintiff was "required to focus on the worst performers and determine why goals [were] not met, why problems occurred, and how best to correct them," and then during his meetings with the district manager, the plaintiff would report on proposed solutions. Despite the plaintiff's specific request for an agenda, UPS required the plaintiff either to return to work immediately without accommodation or delay his return and continue the interactive process. The plaintiff was reinstated two months later after his doctor concluded he no longer needed an accommodation. Under the circumstances, the jury could have concluded that while the employer did participate in the interactive process, it acted in bad faith by delaying his return to work. The court also concluded that while an employer cannot be held liable for failure to engage in an interactive process if no reasonable accommodation is available, the jury found that providing an agenda would have been a reasonable accommodation. Alternatively, since the plaintiff's supervisor testified that the plaintiff never had to memorize information the jury could have concluded that this was a marginal function that easily could have been eliminated, thus enabling the plaintiff to return to work.

Conneen v. MBNA Am. Bank N.A., 334 F.3d 318 (3d Cir. 2003). A bank manager who had been provided with a temporary accommodation of a later starting time as a result of morning sedation due to medication taken for depression failed to make clear to her employer that she needed the accommodation extended. The employer, having talked to Conneen's psychiatrist, believed that she needed the later arrival time for a limited period and thus had required her to again report at the normal starting time. Conneen agreed to resume the earlier schedule, but soon she was arriving late. Company personnel discussed with Conneen her tardiness on several occasions and asked for explanations, including whether her late arrivals were related to her disability. Conneen denied any connection to her disability and instead blamed traffic, her dog, and family commitments. Conneen was counseled and later warned that she could face

termination if the tardiness continued, but still she did not ask to resume the later schedule as a reasonable accommodation. Conneen also knew the accommodation had been provided on a temporary basis, and thus it was her responsibility to ask that it be restored.

Humphrey v. Memorial Hosp. Ass'n, 239 F.3d 1128 (9th Cir. 2001). Summary judgment was inappropriate because there were factual issues as to whether the employer's failure to continue engaging in the interactive process resulted in denial of an effective accommodation. MHA had responded to Humphrey's requests for accommodation by allowing her a flexible work schedule, but it soon became clear to both parties that the accommodation was not working. Humphrey requested another accommodation, but MHA rejected that proposal and made clear that it was not going to consider further accommodations. The court stated that the employer's obligation to engage in the interactive process extends beyond one attempt at accommodation because the ADA's reasonable accommodation process envisions a cooperative approach to problem-solving that would be undermined if the employer's obligation were limited to trying one possible accommodation. Moreover, such a limitation would encourage employees to seek the most drastic and burdensome accommodation out of fear that if a lesser accommodation proved ineffective, the employer would not have to try anything else. Since MHA knew about two plausible alternatives (a leave of absence and working at home), and other possibilities might have come up through the interactive process, there was a genuine issue of fact as to whether Humphrey would have been qualified with an effective accommodation.

3. Part-Time Work and Modified Work Schedules

McMillan v. New York, 711 F.3d 120 (2d Cir. 2013). Reversing summary judgment for the employer, the court held that the plaintiff had suggested two plausible reasonable accommodations to address his disability-related tardiness, thereby raising a material factual issue as to whether he could perform the essential functions of a case manager. The employer's flex-time policy permitted employees to arrive between 9 and 10:15 a.m. A supervisor could approve or disapprove a late arrival, and if approved, the employee could apply accumulated leave or "banked time," i.e., to cover the time missed. Employees were required to work 35 hours per week, and they had a mandatory one-hour lunch period in which they were prohibited from working without prior approval. Due to medication taken for his schizophrenia, the plaintiff was drowsy and sluggish in the morning, often resulting in arrival after 11 a.m. For a period of at least 10 years, the plaintiff's tardy arrivals were explicitly or implicitly approved, allowing him to use banked time to make up for his late arrival. But, in 2008, management decided to stop approving the plaintiff's late arrivals, prompting him to request repeatedly that he be given a later start time because of the side effects of his medication. The employer refused, stating that he could not work past 6 p.m. without a supervisor present. The plaintiff noted that he often worked past 7 p.m. and that the office was open until 10 p.m., so that his request to work later would permit him to arrive after 10:15 yet meet his 35-hour requirement and bank extra hours to use when he was tardy. Alternatively, the plaintiff proposed that he be allowed to work through lunch to bank time.

Breen v. Department of Transp., 282 F.3d 839 (D.C. Cir. 2002). The court reversed summary judgment in this Rehabilitation Act case on the issue of whether an alternative work schedule was a reasonable accommodation. The plaintiff requested to work one extra hour for eight days

in exchange for one day off every two weeks, because her obsessive-compulsive disorder made it difficult to handle interruptions and prevented her from completing her filing duties. She believed the new schedule would resolve those problems by allowing uninterrupted work time after business hours. The agency disagreed, stating that the new schedule did not increase the number of hours she would work; uninterrupted time had been set aside for her without improvement in her job performance; and she was needed in the office every day. The court found a factual dispute because the plaintiff presented evidence that she needed uninterrupted time to complete her duties, not necessarily additional time; the employer had not provided uninterrupted time as promised; and the agency allowed many other employees, with similar jobs, to work alternative schedules.

Earl v. Mervyns, Inc., 207 F.3d 1361 (11th Cir. 2000). The plaintiff failed to identify an effective reasonable accommodation that would enable her to perform an essential function of her position. The court determined that punctuality was essential for a store area coordinator and that plaintiff, because of her disability, was regularly late for work. The plaintiff admitted that she could not arrive on time, and her psychiatrist testified that there was nothing the store could have done to help her arrive on time. Furthermore, given the time sensitivity of her essential functions, the court rejected plaintiff's requested accommodation that she be allowed to arrive whenever she could, without reprimand, and that she make up the time at the end of the shift.

4. Job Restructuring

Jacobs v. N.C. Admin. Office of the Courts, 780 F.3d 562 (4th Cir. 2015). Summary judgment for the employer was inappropriate given that a factual issue existed whether a deputy clerk's request for job restructuring to deal with her social anxiety disorder would have enabled her to perform the essential functions of her position. The disability was causing Jacobs to experience extreme stress and panic attacks as a result of being assigned to provide customer service at the front counter four days a week. Jacobs asked to work only one day a week at the front counter and spend more days performing other deputy clerk duties that did not entail working with the public. The requested accommodations did not require the defendant to increase the workload of Jacobs's coworkers; all 30 deputy clerks had the same job description so Jacobs was merely asking for a change in one assignment. Although the request would have required a departure from the defendant's informal practice to assign the most junior deputy clerks to front counter duty, changing an informal seniority policy does not make an accommodation unreasonable. Finally, there was no evidence that the disability generally interfered with the ability to perform all other job duties, suggesting that with the reasonable accommodation requested Jacobs would have been able to perform the essential functions of her position.

Solomon v. Vilsack, 763 F.3d 1 (D.C. Cir. 2014). A senior budget analyst for the Department of Agriculture requested a "maxiflex" schedule as a reasonable accommodation for her depression. The schedule would have enabled her to arrive at work later or leave early on days when her condition required her to do so, as long as she could complete her work promptly and securely. The Court of Appeals reversed summary judgment in favor of the agency on the plaintiff's claim under Section 501 of the Rehabilitation Act, rejecting the agency's categorical position that regular and predictable attendance is an essential element of any job. The court relied on cases in its own circuit and in sister circuits that have held that physical presence by or at a certain time

is not an essential function of all jobs. The court also observed that the Office of Personnel Management considers a maxiflex schedule as appropriate for some jobs, and the director of human resources for plaintiff's division testified that some agencies offer maxiflex. Turning to whether there were factual issues to be resolved by a jury, the court pointed out that although the agency argued that plaintiff's job involves tight and sometimes unpredictable deadlines, there was also evidence that plaintiff had never missed a deadline during the time that she had informally worked what amounted to a maxiflex schedule. Additionally, the agency had provided a flexible schedule for another budget analyst. The court also joined other circuits in holding that an employee who requests a reasonable accommodation in good faith engages in protected activity for purposes of the ADA's anti-retaliation provision, and that there was evidence in the record from which a jury could conclude that the agency's denial of a maxiflex schedule was in retaliation for plaintiff's having requested one.

Miller v. Illinois Dep't of Transp., 643 F.3d 190 (7th Cir. 2011). Reversing summary judgment for the employer, the court held that factual issues existed as to whether it was a reasonable accommodation for a bridge maintainer with acrophobia (fear of heights) to have other team members perform tasks that required working above 25 feet in an exposed or extreme position. The court noted that the ADA does not give employers "unfettered discretion" to determine what is "reasonable" and instead requires employers to rethink their preferred practices or established methods of operation. Evidence showed that for several years team members routinely swapped job responsibilities based on individual abilities, preferences, and limitations, and that on only one occasion had the plaintiff ever been required to work outside of his restrictions. The court concluded that a jury should be able to consider both the plaintiff's actual work environment and the employer's past flexibility in assigning tasks, in determining whether the plaintiff's request was "reasonable."

Tobin v. Liberty Mut. Ins. Co., 553 F.3d 121 (1st Cir. 2009). Affirming a jury verdict for the plaintiff, the court held that the employer failed to provide a reasonable accommodation to an insurance sales agent with bipolar disorder when it refused to assign him "mass marketing" accounts. These accounts were highly sought after because they involved access to a large volume of potential clients rather than requiring an agent to seek new business. The court found that this accommodation would have addressed the plaintiff's difficulties meeting his sales quota. The court rejected the employer's argument that assigning these accounts to the plaintiff would have been a change in his essential functions. Nor was the court persuaded that these accounts were assigned only as a perk to the highest performing agents. Even if that was true, reasonable accommodation could not be denied simply because the plaintiff's disability prevented him from satisfying standard eligibility requirements for the benefit. The plaintiff requested these accounts specifically because his disability prevented him from meeting his sales quotas without access to a large volume of potential clients. The court also rejected the employer's argument that U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002), did not require it to make an exception to its established policy of assigning mass marketing accounts. Even if Barnett applied, "special circumstances" indicated that giving these accounts to the plaintiff would not have upset any employee's expectations since the accounts had previously been assigned to new sales representatives as a means of jump-starting their business and to low-producing sales agents. Furthermore, two managers testified that they had discretion to give these accounts to the plaintiff but chose not to do so. Finally, while the plaintiff may have had some difficulty

handling these accounts due to his disability, other evidence showed that these accounts would have relied on his demonstrated strength in "closing the sale." Regardless, the employer denied him these accounts because it thought him undeserving and not because of a lack of competence.

5. Modification of Policies

Battle v. United Parcel Serv., Inc., 438 F.3d 856 (8th Cir. 2006). The court rejected UPS's contention that a division manager's request to be given an agenda before meeting with his supervisor was not a reasonable accommodation. The company argued that providing an agenda would delay its operations, yet within four months of the plaintiff's request, UPS provided all district managers who reported to the same division manager as the plaintiff with a computer-based search mechanism that allows them access to all information needed for their meetings.

6. Leave

Criado v. IBM, 145 F.3d 437 (1st Cir. 1998). The court upheld a jury verdict that the employee's leave constituted a reasonable accommodation. Furthermore, having granted her request for leave and then terminated her for absenteeism, IBM had failed in its duty to provide a reasonable accommodation. The employee's absence was caused by her disability and necessitated the reasonable accommodation of leave that she requested.

7. Reassignment

Adams v. Anne Arundel County Public Schools, 789 F.3d 422 (4th Cir. 2015). Plaintiff was an assistant principal at a large middle school where he had an altercation with a student that resulted in controversy and, eventually, a formal reprimand from the School Board for the way he handled the situation. During the Board's investigation, Plaintiff suffered from stress, anxiety, high blood pressure and panic attacks. His FMLA paperwork was later updated to reflect his diagnosis of PTSD. In early June, the Board informed the plaintiff that it intended to transfer him to J. Albert Adams Academy (JAA), a smaller, specialized middle school for children with behavioral issues. Both of the plaintiff's psychologists had recommended his transfer to a "supportive, lower-stress school environment." Indeed, one of plaintiff's doctors stated that the plaintiff was "not averse to the possibility of being assigned to a specialized program such as the [JAA], which has been mentioned as a possibility." After his transfer, the plaintiff reportedly did well at JAA and did not request a transfer. Nonetheless, the plaintiff filed suit against the Board for, among other things, alleged violations of FMLA and the ADA. The district court dismissed some of his claims for failure to state a claim and graned summary judgment on the other claims. The Fourth Circuit affirmed the district court's rulings. As to the discrimination and retaliation claims, the court found that the principal's verbal "attacks," the Board's reprimands and poor performance evaluations were insufficient to constitute "adverse employment action. As to the failure-to-accommodate claim, the court found that the Board's decision to transfer him to JAA, notwithstanding a reduction in pay, was "plainly reasonable" because 1) it was consistent with the doctors' recommendations, 2) the Board acted in a timely manner, 3) in light of plaintiff's disability, "the Board sensibly sought a 'less stressful environment' for him," 4) Plaintiff did not object to his reassignment or request a transfer, and 5) "the eventual decrease in [the plaintiff's] salary stemmed from a systemwide collective-bargaining agreement."

McFadden v. Ballard Spahr Andrews & Ingersoll, L.L.P., 611 F.3d 1 (D.C. Cir. 2010). A legal secretary who could no longer perform her job due to Graves' disease, fibromyalgia, depression, and a number of other ailments could not be reassigned to a receptionist position because it was not vacant or soon to become vacant. At the time that the plaintiff requested she be given the receptionist position, the long-time permanent receptionist was in the second month of a three-month period of medical leave. The employer had a temporary employee filling in, but it expected the permanent receptionist to return. There was no evidence that, at the time the plaintiff requested reassignment, the employer was taking any steps to seek a permanent replacement, such as posting a job listing. The employer hired a permanent replacement only after it became clear that the permanent receptionist would not be returning, which was approximately five months after she had begun her leave and two months after the plaintiff had requested reassignment.

McBride v. BIC Consumer Prods. Mfg. Co., 583 F.3d 92 (2d Cir. 2009). Affirming summary judgment for the employer, the court held that an employer's failure to engage in the interactive process is immaterial where there is no evidence of any reasonable accommodation that would permit the plaintiff to be reassigned to a vacant position. After a one-year leave of absence to deal with respiratory ailments and anxiety attacks brought on by exposure to chemical fumes in a manufacturing plant, the plaintiff was cleared by her doctor to return to work if she was not exposed to the fumes. The plaintiff failed to provide evidence beyond her own conclusory statements that she would have been qualified for any of the vacant positions available at the time she was cleared to return to work. Some of the positions would have required exposure to fumes (the plaintiff declined the company's offer of a respirator) while others would have been promotions. Furthermore, most of the vacancies required extensive professional experience, a college degree, or other qualifications that the plaintiff lacked. Finally, the plaintiff did not provide evidence challenging the job descriptions' depiction of the essential functions or the qualifications necessary to perform these jobs.

Skerski v. Time Warner Cable Co., 257 F.3d 273 (3d Cir. 2001). An employer's statement that restructuring a job would have been "inconvenient" is insufficient to excuse the employer from providing that accommodation. An employee with a panic disorder had been excused from climbing for three years when a new supervisor arrived who told him he had to resume climbing or possibly face termination. The employer rejected the employee's request to use a bucket truck so he could work at heights without climbing. At the employer's insistence and under duress, the employee agreed to a reassignment. The employer argued that the reassignment fulfilled its reasonable accommodation obligation, but the court disagreed, noting that the ADA requires accommodation in an employee's current job and that reassignment should be used only as a last resort. Moreover, the ADA requires employers to "look deeper and more creatively" into possibilities for providing accommodation, and the only defense for failure to provide an accommodation is to show "undue hardship." Noting there was conflicting evidence on the viability of the bucket truck as a reasonable accommodation, the court concluded that it was best left for a jury to decide if this would have been an effective accommodation.

Gile v. United Airlines, Inc., 213 F.3d 365 (7th Cir. 2000). Affirming an award of compensatory damages, the court found sufficient evidence for a jury to conclude that the plaintiff could have

performed the essential functions of her job if she had been given a reassignment. The court noted that the plaintiff presented "an endless stream of documentation" from her licensed clinical social worker about her psychological symptoms and the need for a transfer to a daytime shift. The social worker testified about how working the night shift was exacerbating the plaintiff's symptoms and preventing her from performing her job, and how a day shift would remedy that situation. The court also rejected United's claim that Gile obstructed the interactive process because she failed to use her seniority to get a day shift. The ADA requires an employer to do more than rely on its bidding process as part of providing a reasonable accommodation. United had simply refused Gile's repeated requests for a transfer and failed to engage in any type of interactive process with her. Finally, the court rejected United's argument that providing Gile with a reassignment, when she could have used the bidding process to get another job, amounted to "affirmative action." See also Gile v. United Airlines, Inc., 95 F.3d 492 (7th Cir. 1996) (holding that an employer has an obligation to provide reassignment to a vacant position to an individual who no longer can perform the essential functions of her current position because of a disability, and that an employer must look beyond the employee's particular department to locate an appropriate vacant position).

Duda v. Board of Educ., 133 F.3d 1054 (7th Cir. 1998). Citing the EEOC's appendix to the ADA regulations, the court found that an employer could not use reassignment to segregate an employee with a mental disability.

6. Other

Ekstrand v. School Dist., 683 F.3d 826 (7th Cir. 2012). Affirming a jury's verdict in favor of the plaintiff, the court found sufficient evidence for a reasonable jury to have concluded that the plaintiff was qualified to perform the essential functions of her teaching position with the reasonable accommodation of being provided with a classroom with natural light for her seasonal affective disorder. There was sufficient evidence for the jury to have found that the defendant had received medical documentation supporting the requested accommodation, but that it failed to provide a new classroom.

D. Defenses

1. Direct Threat

Bodenstab v. County of Cook, 569 F.3d 651 (7th Cir. 2009). An anesthesiologist diagnosed with paranoia and narcissistic personality traits told his friend that if his cancer metastasized, he would kill his supervisor and certain coworkers. After the friend notified the employer about these remarks, the employer suspended the plaintiff and ultimately terminated him. Affirming summary judgment for the employer, the court found it unnecessary to reach the question of whether the plaintiff posed a direct threat to the health and safety of others in the workplace, ruling that the plaintiff's threats alone were a legitimate, nondiscriminatory reason to terminate him and that he had failed to offer any evidence of pretext.

Jakubowski v. Christ Hosp., 627 F.3d 195 (6th Cir. 2010), cert. denied, 131 S. Ct. 3071 (2011). A doctor with Asperger's Syndrome was removed from the employer's Family Medical

Residency Program for communicating poorly with nurses, having difficulty communicating on the phone, getting "stuck" on a single diagnosis, and giving dangerous orders, among other reasons. Granting summary judgment to the employer, the court ruled that the employee was not "otherwise qualified" because his communication problems posed a direct threat "in the context of the medical work he [sought] to perform. The very nature of the medical profession requires solid communication skills with patients; fundamental problems with such communication make likely the potential of harm to the health or safety of others."

Jarvis v. Potter, 500 F.3d 1113 (10th Cir. 2007). The plaintiff, a former custodian for the Postal Service with post-traumatic stress disorder (PTSD), was terminated when he struck two employees. The employer claimed that the plaintiff was not qualified because he posed a direct threat. While the Tenth Circuit has recognized that the burden may be on the plaintiff to establish that he can perform a job safely when the essential functions of the job necessarily implicate the safety of others, the court said that this was not such a case; consequently, the employer bore the burden to establish the existence of a direct threat. The court found that the defendant met its burden. The plaintiff himself indicated during an internal investigation that his PTSD was getting worse, that he could kill someone if he hit the person in the right place, that if he struck someone, he could no longer "stop the first blow," and that he could not safely return to the workplace. In addition, the plaintiff's health care practitioner indicated that it was unlikely that the plaintiff's PTSD symptoms would go away; that several health care providers had noted the severity of the plaintiff's symptoms; that the "unpredictable nature of PTSD symptoms may pose some threat in the work place"; and that medical retirement might be the best course of action.

McKenzie v. Benton, 388 F.3d 1342 (10th Cir. 2004). Although the case did not involve the safety of others as an essential function of the job, the court nevertheless ruled that the plaintiff, a police officer with a history of severe depression, had the burden of proof to establish that she did not pose a direct threat, because "here there is a special risk to others, co-workers and the public, who are exposed to the danger of a firearm in the control of" plaintiff. The court placed the burden of proof on the plaintiff to prove she was not a direct threat, rather than on the employer to show that she was a direct threat, because "[t]he job qualifications here properly included the essential function of performing [plaintiff's] duties without endangering her co-workers or members of the public with whom she came in contact."

Williams v. Philadelphia Hous. Auth. Police Dep't, 380 F.3d 751 (3d Cir. 2004). A triable issue of fact was presented regarding whether a former police officer with depression who was deemed unable to carry a gun would pose a direct threat to safety if assigned to work around others with firearms. The employer's refusal to allow him to work around others with firearms was contrary to the conclusion of its own clinician.

Lizotte v. Dacotah Bank, 677 F. Supp. 2d 1155 (D.N.D. 2010). The plaintiff, a loan officer with a mood disorder, was involuntarily hospitalized for four days following a suicide attempt. He was released to work without restrictions, but the employer terminated him without further investigation, citing concerns about "safety," "reputation," "liability," "customer acceptance," and the employer's image. The court denied summary judgment for the employer, citing among other things, the employer's concern about image and the market president's statement that he

was "blown away" that someone who had attempted suicide had been released so quickly and was not in jail. Such evidence raised a question of fact as to whether the employer's concerns were based on "myth[s], fear[s] or stereotype[s]" regarding depression, and therefore whether the employer's reasons were legitimate and non-pretextual. The court also stated that there seemed to be "little question" that the plaintiff was qualified to perform the essential functions of the job.

2. Undue Hardship

McMillan v. New York, 711 F.3d 120 (2d Cir. 2013). Reversing summary judgment for the employer, the court held that the record did not support a finding of undue hardship as a matter of law regarding two possible accommodations to address the plaintiff's disability-related tardiness. The plaintiff, a city case manager, proposed being allowed to work past the normal 6 p.m. quitting time or being given approval to work through his lunch hour in order to "bank" time to use when he was late arriving at the office due to the side effects of medication taken for his schizophrenia. The defendant denied the plaintiff's request to work past 6 p.m., stating that he could not work without a supervisor present. The defendant contended that requiring a supervisor to work past 6 p.m. would be an undue hardship, but the court noted that the record did not address times when it appeared that the defendant had permitted the plaintiff to work unsupervised. The plaintiff claimed that he often worked past 7 p.m., and it seemed that the plaintiff worked unsupervised when he made home visits to clients. Regarding the plaintiff's proposal to work through lunch, the appeals court disagreed with the district court's conclusion, without any analysis, that this would have caused an undue hardship. The court noted the city's policy of permitting supervisors to approve an employee's request to work through lunch and concluded that such pre-approval did not seem to require significant difficulty or expense.

Tobin v. Liberty Mut. Ins. Co., 553 F.3d 121 (1st Cir. 2009). Affirming a jury verdict for the plaintiff, the court held that the employer failed to show that assigning an insurance sales agent "mass marketing" accounts would cause an undue hardship. The court found that this accommodation would have addressed the plaintiff's difficulties in meeting his sales quota due to his bipolar disorder. The court rejected the employer's argument that assigning these accounts to the plaintiff could jeopardize its relationship with an important client. Although there was testimony that assigning the plaintiff to one particular mass marketing account may have imposed an undue risk, other accounts were relatively easy to handle, and poor matches between a sales agent and a client could be addressed by reassigning personnel.

3. Employee Misconduct

Yarberry v. Gregg Appliances, Inc., No. 14–3960, 2015 WL 5155553 (6th Cir. Sept. 3, 2015). In this case, the plaintiff had not yet been diagnosed with bipolar disorder when he experienced a manic episode that resulted in conduct that violated company policies regarding safety and security. The plaintiff entered the defendant's store after hours, opened a safe, roamed around the store and used store equipment, and left the store without setting the alarm. Soon after the defendant was hospitalized, the employer fired him for his conduct. Although the plaintiff's conduct resulted from his disability, bipolar disorder, the court held that his conduct was a "legitimate, nondiscriminatory reason for [his] termination." Though the court found that this was a "close case" and that the employer's "decision to terminate a previously successful

employee so quickly after such an isolated event [was] concerning," it concluded that the plaintiff's conduct was sufficiently egregious to fall under EEOC 2008 Guidance and Sixth Circuit case law that suggests that "where there has been employee misconduct – including nonviolent disruptive misconduct – the employer may terminate the employee for that behavior even if it is related to his disability."

Gambini v. Total Renal Care, Inc., 486 F.3d 1087 (9th Cir. 2007). The plaintiff, who had bi-polar disorder, was terminated following what the employer referred to as a "violent outburst" at a meeting concerning her job performance. When she was notified that she was being placed on a performance improvement plan, the plaintiff yelled and cursed at her supervisor, slammed the door as she abruptly left the meeting, and kicked and threw objects when she returned to her cubicle. The plaintiff sued under Washington state law, claiming that her termination was based on her disability. The district court refused to give one of the plaintiff's proposed jury instructions, which said that "conduct resulting from a disability is part of the disability and not a separate basis for termination." On appeal, the Ninth Circuit remanded the disability claim for a new trial, holding that the proposed jury instruction was consistent with Washington law as interpreted by the state Supreme Court and with its own interpretation of the ADA, and that failure to give the instruction was not harmless error. The court noted that the employer was aware of the plaintiff's bipolar disorder, knew that the condition caused irritability and mood swings that the plaintiff was trying to control with medication, and was aware, through requests that the plaintiff had made, of accommodations that might reduce the chance of an outburst at work. Noting that at the time of the meeting at which the plaintiff's temper erupted she was in the throes of a medication change that heightened the volatility of her outbursts, the court concluded that a properly instructed jury could have found that the plaintiff's personality, and not her work product, was the reason she was terminated and that the plaintiff's violent outburst was a consequence of her bi-polar disorder, "which the law protects as part and parcel of her disability." The court added, however, that employees are not entitled to "absolute protection from adverse employment actions based on disability-related conduct." The plaintiff must be able to establish that she is "qualified," and even if she does so, the employer would still be entitled to raise a "business necessity" or "direct threat" defense against the discrimination claim.

Jarvis v. Potter, 500 F.3d 1113 (10th Cir. 2007). The Postal Service did not violate the ADA by terminating a Vietnam veteran whose post-traumatic stress disorder caused him to strike and kick coworkers. Even though the employee requested that coworkers announce themselves when approaching, so as not to startle him, the court found that this accommodation was unreasonable because it would not eliminate the possibility that he might be startled accidentally. The proposed accommodation also shifted to coworkers the burden of preventing him from engaging in violence.

Jones v. American Postal Workers Union, 192 F.3d 417 (4th Cir. 1999). An employer properly discharged an employee with schizophreniform disorder and post traumatic stress syndrome who had threatened the life of his supervisor. The ADA does not require an employer to ignore such egregious misconduct, even if it is caused by a disability.

E. Exams and Inquiries

Coursey v. Univ. of Md. Eastern Shore, 577 Fed. Appx. 167 (4th Cir. July 1, 2014). Defendant was justified in requiring a professor to undergo a mental health evaluation following numerous student complaints in 2009 that he was "erratic and verbally abusive," "unstable," "had lost it," and "went berserk" on students in class. These complaints followed student complaints in 2004 that plaintiff had made inappropriate sexual comments in class, belittled students, graded arbitrarily, and favored certain students over others, and complaints from other faculty members in 2007 about plaintiff's "erratic and unprofessional behavior" that included disparaging colleagues in the presence of students. "Given the plethora of complaints about Coursey's violent outbursts, erratic and inappropriate behavior, as well as his disregard for UMES policies, UMES has shown that it had valid concerns about Coursey's ability to perform his duties."

Kroll v. White Lake Ambulance Auth., 763 F.3d 619 (6th Cir. 2014). Reversing summary judgment in favor of the employer, the Court of Appeals held that a reasonable jury could have found that defendant's requirement that plaintiff undergo psychological counseling (which constituted a medical examination within the meaning of the ADA) after she became involved in a tumultuous relationship with a married co-worker was not job-related and consistent with business necessity. The defendant's director (Binns), who had ordered the counseling, was aware of only two occasions on which plaintiff's job performance may have been compromised: once when she reportedly was using a cell phone while driving an ambulance, and when she reportedly refused to assistant another EMT by providing oxygen to a patient. "Kroll's isolated moments of unprofessional conduct might reasonably have prompted Binns to begin internal disciplinary procedures or to provide Kroll with additional training, but they could not support the conclusion that Kroll was experiencing an emotional or psychological problem that interfered with her ability to perform her job functions." Binns' deposition testimony also indicates that he was prompted to require the counseling because of personal concerns about Kroll's sexual behavior rather than by concerns with her job performance. Finally, a reasonable jury could find that Kroll's emotional outbursts while off duty and outside the presence of patients did not impair her ability to perform her essential functions. See also Kroll v. White Lake Ambulance Auth., 691 F.3d 809 (6th Cir. 2012) (finding that a reasonable jury could conclude that "psychological counseling" constituted a medical examination within the meaning of the ADA).

Wetherbee v. The Southern Co., 754 F.3d 901 (11th Cir. 2014). Plaintiff was conditionally offered a job as a systems engineer with one of defendant's nuclear power plants. The employer learned post-offer that plaintiff had bipolar disorder, had experienced no episodes in the last six or seven years, had only experienced episodes when doctors attempted to take him off his medication, had recently attempted to alter his medication regimen, and, contrary to the recommendation of his health care professional, was not under the care of a psychiatrist. Defendant determined plaintiff could only be employed if he met several specific conditions, including compliance with his medication regimen and a restriction from working on any "safety sensitive systems and equipment" for a year while compliance with his medication regimen could be assessed. Because the systems engineer position required working with safety-sensitive systems and equipment, defendant withdrew the offer. Upholding the district Court's grant of summary judgment in defendant's favor, the court held, as a matter of first impression in the circuit, that an individual claiming a violation of 42 U.S.C. § 12112(d)(3)(C), which prohibits use of medical information obtained after a conditional offer of employment has been made in violation of the ADA, must establish that he or she has a disability. The court distinguished §

12112(3)(C) from those sections of the ADA that limit the gathering of medical information and its disclosure, which apply to applicants and employees with and without disabilities. Whether the results of an examination are "used" in a way that violates the ADA turns on whether there is discrimination on the basis of disability within the meaning of § 12112(a), which cannot occur unless an applicant has a disability. In this case, plaintiff conceded that he could not establish that he has a disability within the meaning of the ADA, making summary judgment for the employer appropriate.

Owusu-Ansah v. The Coca-Cola Co., 715 F.3d 1306 (11th Cir. 2013). Plaintiff, who oversaw the work of customer service representatives, challenged defendant's requirement that he take a psychiatric/psychological fitness-for-duty examination. Affirming summary judgment for the defendant, the court first held that a plaintiff need not be an individual with a disability to challenge a medical examination under the provision of the ADA that prohibits medical examinations of employees unless they are job-related and consistent with business necessity. However, the court found that the required medical examination was job-related and consistent with business necessity based on (1) a report from plaintiff's supervisor that plaintiff became agitated, banged his fist on the table, and said, "someone is going to pay for this" during a meeting at which he claimed he had been subject to harassing behavior by managers and co-workers because he is from Ghana; (2) plaintiff's refusal to discuss his work-related problems with a human resources employee; (3) concerns of defendant's consulting psychologist about plaintiff's mental and emotional stability; and (4) plaintiff's refusal to answer certain questions asked of him by a psychiatrist to whom he had been referred by defendant for evaluation. The court said that the ability to handle "reasonably necessary stress at work reasonably well with others" is an essential part of any job, and there was evidence that plaintiff may have been unstable and a danger to others.

Wisbey v. City of Lincoln, Neb., 612 F.3d 667 (8th Cir. 2010). The plaintiff, an emergency dispatcher who had taken frequent intermittent leave under the FMLA for depression and anxiety, alleged that the city violated the ADA by requiring her to submit to a fitness-for-duty medical examination and terminating her based on the doctor's report that she was not qualified to work. The court concluded that because the plaintiff stated in her application for FMLA leave that she "suffered from conditions affecting her concentration and motivation," the city had reason to believe that she could not perform the essential functions of her position and therefore did not violate the ADA by requiring a fitness-for-duty exam.

Brownfield v. City of Yakima, 612 F.3d 1140 (9th Cir. 2010). The plaintiff, a former police officer for the City of Yakima Police Department (YPD), injured his head in an automobile accident and returned to full duty after recovering from symptoms that included "reduced self-awareness." Years later, following several incidents (e.g., confrontations with other officers, a traffic stop during which the plaintiff reported that he felt "himself losing control," and an argument with his estranged wife who called the police), YPD referred the plaintiff for a fitness-for-duty examination (FFDE). The doctor who conducted the FFDE concluded that the plaintiff had a mood disorder, which manifested itself in "poor judgment, emotional volatility, and irritability" and could be related to his 2000 head injury. Based on the doctor's report that the plaintiff had a permanent disability and was unfit for police duty, YPD transferred him from administrative to FMLA leave. In 2006, based on a report from the plaintiff's primary care

physician (who concluded that the officer could perform his physical duties but would not comment on his psychological issues), YPD ordered the plaintiff to undergo another FFDE with a different doctor to determine whether he was fit for duty. The plaintiff went to the initial exam but refused to return to for a follow-up visit and was terminated. Relying on Yin v. California, 95 F.3d 864 (9th Cir. 1996), the plaintiff argued that the defendant could not require him to undergo an FFDE unless it could show that health problems had caused his job performance to decline. Agreeing with the conclusions reached by several district courts, the Ninth Circuit held that "prophylactic psychological examinations can sometimes satisfy the business necessity standard, particularly when the employer is engaged in dangerous work." While the business necessity standard is "quite high, and is not to be confused with mere expediency," the standard "may be met even before an employee's work performance declines if the employer is faced with significant evidence that could cause a reasonable person to inquire as to whether the employee is still capable of performing his job." An employee's behavior cannot, however, be "merely annoying or inefficient to justify an examination; rather, there must be genuine reason to doubt whether the employee can perform job-related functions."

Coffman v. Indianapolis Fire Dep't, 578 F.3d 559 (7th Cir. 2009). The plaintiff was subjected to fitness-for-duty psychological evaluations after coworkers noticed that, after two fellow firefighters committed suicide in the preceding months, she became withdrawn, defensive, and unable "to make decisions or even perform routine tasks on the scene of an incident without being told or prompted." The plaintiff alleged that the evaluations were not job related and consistent with business necessity, because there was no objective evidence that she was unable to perform an essential function of the job, or that she posed a direct threat to safety, because of a medical condition. After acknowledging that "withdrawn" and "defensive" behaviors might not justify a psychological evaluation in many workplaces, the court stated that it would not second-guess the propriety of such an evaluation for firefighters, who perform mentally and physically demanding work affecting the safety of coworkers and the "public at large."

The Mental Health Provider's Role in a Client's Request for a Reasonable Accommodation at Work

Many people with common mental health conditions have a right to a reasonable accommodation at work under the Americans with Disabilities Act (ADA). When requesting accommodations, clients may sometimes need supporting documentation from their mental health providers. This Fact Sheet briefly explains the law of reasonable accommodation and the mental health provider's role in the accommodation process.

1. What Is the ADA?

The ADA is a federal law that prohibits employers with 15 or more employees from discriminating on the basis of disability, and gives employees and job applicants with disabilities a right to a reasonable accommodation at work. It also provides rights outside the employment context, not discussed here.

2. What Is a Reasonable Accommodation?

A reasonable accommodation is a change in the way things are normally done at work that enables an individual to do a job, apply for a job, or enjoy equal access to a job's benefits and privileges. Common reasonable accommodations include **altered break and work schedules** (e.g., scheduling work around medical appointments), **time off for treatment**, **changes in supervisory methods** (e.g., providing written instructions, or breaking tasks into smaller parts), **eliminating a non-essential (or marginal) job function that someone cannot perform because of a disability**, and **telework**. Where an employee has been working successfully in a job but can no longer do so because of a disability, the ADA also may require **reassignment to a vacant position** that the employee can perform. These are just examples; employees are free to request, and employers are free to suggest, other modifications or changes.

3. Does My Client Need to Have a Particular Condition to Get a Reasonable Accommodation?

A reasonable accommodation may be obtained for any condition that would, if left untreated, "substantially limit" one or more major life activities, which include brain/neurological functions and activities such as communicating, concentrating, eating, sleeping, regulating thoughts or emotions, caring for oneself, and interacting with others. (The client does not actually have to stop treatment. The client's symptoms in the absence of treatment are merely considered in order to determine whether the person has a "disability" under the ADA.)

A condition does not have to result in a high degree of functional limitation to be "substantially limiting." It may qualify by, for example, making activities more difficult, uncomfortable, or time-consuming to perform compared to the way that most people perform them. Further, if the client's symptoms come and go, what matters is how limiting they would be when present. Federal regulations say that some disorders should *easily* be found to be disabilities, including major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia. Other conditions may also qualify depending on the individual's symptoms. Additionally, an individual may qualify for a reasonable accommodation if he or she has had a substantially limiting impairment in the past.

The ADA, however, does not protect individuals currently engaging in the illegal use of drugs, where an employer takes an action based on such use. Someone with alcoholism or who was addicted to drugs in the past may be entitled to a reasonable accommodation, such as time off for treatment. However, the ADA specifically says that employers are not required to tolerate employees using or being under the influence of alcohol or illegal drugs on the job, or unsatisfactory performance or conduct relating to the use of alcohol or illegal drugs.

4. What Kind of Reasonable Accommodation Could My Client Get?

If your client has a disability, the employer is legally required to provide a reasonable accommodation that would help your client do the job. If more than one accommodation would work, the employer may choose which one to provide. However, an employer cannot be required to provide an accommodation that is simply unreasonable on its face (that is, not plausible or feasible), or that would cause significant financial or operational difficulty. It also never has to excuse a failure to meet production standards or rules of conduct that are both necessary for the operation of the business and applied equally to all employees, or to retain an individual who cannot do the job even with a reasonable accommodation.

5. When Is It Important for My Client to Request a Reasonable Accommodation?

Because an employer does not have to excuse failure to meet production standards that are consistently applied, even if the difficulty was caused by a health condition or the side effects of medication, it could be in your client's interest to request an accommodation *before* any problems at work occur or become worse. An accommodation may help to prevent discipline or even termination by enabling your client to perform the job successfully.

6. How Can I Help My Client Get a Reasonable Accommodation?

Your client may ask you to document his or her condition and its associated functional limitations, and to explain how a requested accommodation would help. The employer, perhaps in consultation with a health care professional, will use this information to evaluate whether to provide a reasonable accommodation, and if so which one. The person evaluating the accommodation request also may contact you to ask for clarification of what you have written, or to provide you with additional information to consider. For example, you may be told about a particular job function and asked whether the requested accommodation would help your client to perform it, or you may be asked whether a different accommodation would be effective where, for example, the requested accommodation would be too difficult or costly for the employer to provide.

Employers are required to keep all information related to reasonable accommodation requests confidential.

7. Am I Permitted to Disclose My Client's Medical Information?

The ADA does not alter a health provider's ethical or legal obligations. You should request a reasonable accommodation on behalf of a client or provide an employer with medical information about the client only if he or she asks you to do so and signs a release.

8. Could an Employer Discriminate Against My Client Because of the Information I Provide?

The ADA prohibits employers from harassing your client because of a mental health condition, and from terminating or taking other adverse actions against your client because of a mental health condition. Therefore, unless the information you provide shows that your client is unable to perform the essential duties of the job even with a reasonable accommodation, the employer legally cannot take adverse action based on the information.

However, employers sometimes discriminate illegally. You therefore may wish to discuss with your client the risks associated with disclosing the condition (such as potential illegal discrimination), and with not disclosing it (such as not having a reasonable accommodation that may be necessary to do the job).

9. What Kind of Documentation Would Be Helpful?

Employers may require documentation that establishes how your client's condition limits job performance, and how an accommodation would help to overcome the limitations. However, you should not simply provide your client's medical records, because they will likely contain unnecessary

information. Documentation is most likely to help your client obtain a reasonable accommodation if it explains, using plain language, the following:

- Your professional qualifications and the nature and length of your relationship with the client. A brief statement is sufficient.
- The nature of the client's condition. Based on your professional judgment, state the nature of your client's mental health condition, even if the client is currently not experiencing symptoms (e.g., because of the use of medication or because the condition is in remission). If your client asks you not to disclose the specific diagnosis, it may be sufficient to state the general type of disorder (e.g., "an anxiety disorder"), or to describe how the condition substantially limits a brain/neurological function or some other major life activity.
- The client's functional limitations in the absence of treatment. Describe the extent to which the condition *would* limit a brain or neurological function, or another major life activity (e.g., concentrating, interacting with others, eating, sleeping, learning, reading, communicating, or thinking), in the absence of therapy, medication, and any other treatment. If the symptoms of the condition come and go or are in remission, describe the limitations during an active episode. It is sufficient to establish substantial limitation of *one* major life activity.
- The need for a reasonable accommodation. Explain how the client's condition makes changes at work necessary. For example, if your client needs an accommodation to perform a particular job function, you should explain how the client's symptoms – *as they actually are, with treatment* – make performing the function more difficult. If necessary, ask your client for a description of his or her job duties. *Limit your discussion to the specific problems that may be helped by a reasonable accommodation*. Also explain to the employer why your client may need an accommodation such as a schedule change (e.g., to attend a therapy appointment during the workday) or time off (e.g., to adjust to a new medication, receive treatment, or recover).
- Suggested Accommodation(s). If you are aware of an effective accommodation, you may suggest it. Do not overstate the need for a particular accommodation, in case an alternative is necessary.

Further Information

For more information about reasonable accommodations and disability discrimination, visit the Equal Employment Opportunity's (EEOC's) website (https://www.eeoc.gov), or call the EEOC at 800-669-4000 (voice) or 800-669-6820 (TTY).

HIGH COURT ROUND UP

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Plenary IV: High Court Round-Up
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Public Sector Employee Rights: Friedrichs and Heffernan

I. ***Friedrichs v. California Teachers Association***, 136 S. Ct. 1083 (March 29, 2016)

Facts: A group of individual public school teachers brought suit in federal district court challenging the constitutionality of California's agency-fee provisions and the opt-out process for obtaining a reduction in the fair-share fee for non-chargeable expenses. The teachers alleged disagreement with many of the California Teachers' Associations positions, including positions taken in collective bargaining.

Like New York, California has exclusive representation. Upon proof of a majority support, a teachers' union becomes certified as the exclusive representative for bargaining and the State permits the public-school employer to bargain solely with that union. California requires that in exchange for the exclusivity, the union must "fairly represent each and every employee," members and non-members alike. *Cal. Gov't Code § 3544.9.*

Individual California public school teachers can decline union membership. Upon notice from the union, public school employers must deduct from each non-union employee's wages and salary an amount equal to that employee's "fair share" of the cost of "negotiation, contract administration, and other activities of the employee organization that are germane to its functions as the exclusive bargaining representative." These costs are called "chargeable" expenses.

After filing their complaint, petitioner moved immediately and unusually for a judgment on the merits against themselves, arguing that their sole objective as a "test" case was to overturn the Supreme Court's precedent in *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

Arguments: The Union, the State of California and its amici supporters argued that "fair share" arrangements are designed to address the "free-rider" problem by preventing non-union members from reaping the benefits of the union's collective bargaining without paying for the benefits. They argued that *Abood* should be reaffirmed because it correctly balanced a public employers' prerogative to manage its workforce to ensure the efficient provision of public services. And, they argued, in the balancing between the States' strong interest in the orderly negotiation of terms and conditions of employment and labor peace and the minimal intrusion (if any) upon employees' First Amendment rights (employees are still free to express their political views), the State interest should prevail. California and the union also argued that they should win because the teachers had not met the high bar that is normally required to justify overruling a long-

standing precedent (and, in this case, one that governs tens of thousands of contracts and millions of union members nationwide).

The teachers and its amici supporters argued that when dealing with public employees, even something such as collective bargaining is inherently political because the salaries and benefits that the union is negotiating come out of the public fisc. They contended that being required to pay the "fair-share" fee, even if separated from other political expenditures, is coerced political speech.

Decision: In a one sentence *per curium* decision, the Court split 4-4 preserving the Ninth Circuit's decision upholding *Abood.* The result set no precedent. Analysts and commentators viewing the argument believed that the decision was headed to a 5-4 decision overturning *Abood* prior to Justice Scalia's death.

Significance: While the Court declined to rehear *Friedrichs,* there are currently several cases similar to *Friedrichs* that are working their way through the courts. There is no questioning the impact of a future precedential ruling on agency fees. California, New York, Illinois and eighteen other states currently have laws that allow unions to collect fair share fees from public employees who opt out of union membership. The invalidation of "fair share" fees would impact the way labor unions are funded and able to represent its members. It could potentially alter labor relations and how they are structured in municipalities throughout the country. There is also the issue of the opt-out methods employed by California and other similarly designed state system (the issue was given little attention at oral argument in *Friedrichs*).

The question remains whether the Court will agree to hear another "agency-fee" case, and doing so likely depends on the future composition of the Court. Should another conservative justice be confirmed to fill Justice Scalia's seat, another challenge to the *Abood* precedent may very well be heard in the near future.

II. ***Heffernan v. City of Patterson***, 136 S. Ct. 1412 (April 26, 2016)

Facts: Detective Jeffrey Heffernan, a veteran police officer in Paterson, New Jersey, was supervised by an individual appointed by the mayor as well as the chief of police, also appointed by the mayor. During the mayoral campaign, Heffernan's bedridden mother asked him to pick up and deliver to her a campaign yard sale supporting the mayor's opponent. Heffernan was spotted holding the sign and speaking to staff at a distribution point for the opposing candidate and word spread that he was campaigning against the mayor (though he was not doing so). He was demoted the next day for "overt involvement" in the opponent's campaign and brought suit alleging a violation of the First Amendment under 42 U.S.C. § 1983.

Decision: The key issue in the case was whether Heffernan, a public employee could maintain an action for constitutionally-protected political activity when he did not actually engage in that activity. Writing for a six-person majority, Justice Breyer concluded that the City's unconstitutionally motive to retaliate was what really mattered. Even if he had not actually engaged in the political activity, the demotion served to deter other employees from engaging in

such protected behavior. Improper motive can violate the First Amendment, even with a factual mistake.

The dissent (by Justice Thomas and joined by J. Alito) noted the anomalous result of the Court's attempting to protect political speech, when none actually occurred. The demotion may have been "misguided or wrong" but was not unconstitutional.

Significance: It remains to be seen whether *Heffernan* is a factual anomaly or whether it represents a significant case in the *Garcetti* line of First Amendment public employee cases. The facts are rather unique. Indeed, the facts of the case itself are not completely resolved. The Court assumed that Heffernan was demoted specifically because his supervisors believe he was speaking in support of the challenger in the election. But there was some evidence that he was demoted pursuant to a neutral office policy prohibiting all police officers from any overt involvement in any campaign. The Court expressed no view on whether there was such a policy, whether the City followed it in demoting Heffernan or whether it would be constitutionally valid. It remanded to answer those questions.

Equal Employment Opportunity: Green and CRST Van Expedited

I. ***Green v. Brennan***, 136 S. Ct. 1769 (May 23, 2016)

Facts: Marvin Green, an African-American postmaster with the United States Postal Service ("USPS") was denied a promotion and filed a formal internal complaint alleging that the denial was based on his race. Green alleged that his supervisors retaliated against him, including accusing him of intentionally delaying mail delivery, which is a federal crime. Green was given the choice of either retiring or accepting a transfer to a different office at a lower salary. Green signed a settlement agreement on December 16, 2009 agreeing to retire, but he did not officially resign until February 9, 2010. On March 22, 2010, Green contacted the USPS Equal Employment Opportunity counselor claiming that he was forced into the settlement, and his resignation was a constructive discharge. However, Title VII requires government employees to contact an EEOC counselor within 45 days of the "matter alleged to be discriminatory." The USPS successfully argued before the district court and the Tenth Circuit Court of Appeals that the last "matter alleged to be discriminatory" was the entry of the settlement agreement on December 16, which was beyond the 45-day limitations period. Green appealed.

Decision: By a 7-1 vote, the Court vacated the Tenth Circuit's ruling and held that when an employee alleges constructive discharge, the statute of limitations period starts when an employee officially resigns and gives "definite notice" of the decision to leave. The Court reaffirmed that the standard rule for determining the statute of limitations period is that the period starts when the plaintiff has a "complete and present cause of action." Since an employee must prove that he or she actually resigned in order to establish constructive discharge, the Court explained that the limitations period for a constructive discharge claim cannot begin to run before the resignation, which is an essential element of that claim, has occurred. Justice Sotomayor, writing for the majority, explained that a contrary rule might cause employees unnecessary procedural confusion. If the limitations period started to run before resignation, the employee might have to file a charge of discrimination, and then add a constructive discharge

claim after the resignation. The Court stated in a footnote that the reasoning of the decision would apply to claims filed against private sector and state and local government employees, which have different limitations periods.

Significance: The decision is plaintiff-friendly, expanding the timeframe for bringing a legal claim by establishing a later date – the resignation date – to start the clock ticking on the statute of limitations.

II. ***CRST Van Expedited v. EEOC***, 136 S. Ct. 1642 (May 19, 2016)

Facts: A truck driver for CRST filed an EEOC charge alleging sexual harassment. The EEOC filed suit on behalf of the driver and other similarly-situated employees. During discovery, the EEOC claimed that over 250 women had been subjected to unlawful harassment. The Court ultimately dismissed all of the claims and found that the EEOC had failed to investigate many of them prior to filing suit, which was unreasonable. The Court awarded CSRT more than $4 million in attorney's fees as the prevailing party. The attorney's fee award was appealed to the 8th Circuit, reversed, awarded again following final disposition of the district court case, and reversed again by the 8th Circuit. The 8th Circuit reasoned that Title VII only allows the recovery of fees if a defendant prevails on the merits of the underlying lawsuit, and that the district court's dismissal based on the EEOC's failure to satisfy its pre-suit investigation was not a victory "on the merits. CRST appealed.

Decision: In a unanimous opinion, the Supreme Court reversed the decision of the 8th Circuit and held that a defendant need not win "on the merits" to recover fees under Title VII.

Significance: The decision is a victory for employers because the Court made clear that a defendant may be entitled to recover attorneys' fees even absent a victory on the merits if the EEOC does not adequately investigate or conciliate before filing suit.

Fair Labor Standards Act: Tyson Foods and Encino MotorCars

I. ***Tyson Foods, Inc. v. Bouaphakeo***, 136 S. Ct. 1036 (March 22, 2106)

Facts: Plaintiffs, employees of Tyson Foods worked in the kill, cut, and retrim departments of a pork processing plant in Iowa. Plaintiffs work required them to wear protective gear, but the exact composition of the gear depended on the tasks the worker performed on a given day. Tyson Foods compensated some, but not all, employees for this donning and doffing, and did not record the time each employee spent on those activities. The named Plaintiffs, on behalf of themselves and more than 3,000 other workers, filed suit, alleging that the donning and doffing was integral and indispensable to their hazardous work and that Tyson Foods' policy not to pay for those activities denied them overtime compensation required by the Fair Labor Standards Act ("FLSA"). The District Court certified a class under Rule 23 and a FLSA collective action.

The case proceeded to trial. Because Tyson Foods had failed to keep records of each employee's donning and doffing time, the employees relied on what was described as "representative evidence" in the form of two studies conducted by an industrial relations expert and a statistics

expert. In the first study, Dr. Kenneth Mericle conducted videotaped observations analyzing how long various donning and doffing activities took, and then averaged the time taken to produce an estimate of 18 minutes a day for the cut and retrim departments and 21.25 minutes for the kill department. In the second study, Dr. Liesl Fox used each employee's time records -- combined with the time estimates from Dr. Mericle -- to ascertain which class members worked more than 40 hours a week and the value of classwide recovery. The study found that 212 class members were not entitled to recover, and that the remaining class members were entitled to an aggregate award of $6.7 million. Following trial, the jury returned a special verdict finding that donning and doffing time at the beginning and end of the work day was compensable. It awarded $2.9 million. The Eighth Circuit affirmed the judgment and the award.

Arguments: There was no dispute that there existed questions common to all class members, notably whether donning and doffing was compensable work under the FLSA. To be entitled to recovery under the FLSA, however, each employee must still prove that the amount of time spent donning and doffing, when added to his or her regular hours, amounted to more than 40 hours in a given week. Tyson Foods argued that these person-specific inquiries into individual work time predominate over the common questions raised by respondents' claims, making class certification improper. Plaintiffs countered that these individual inquiries are unnecessary because it can be assumed each employee donned and doffed for the same average time observed in Dr. Mericle's sample. This eliminated the need for individual inquires.

Tyson Foods, along with a number of *amici*, argued that reliance on this evidence was unfair and asked the Court to announce a broad rule against the use of representative evidence in class actions. It argued that Dr. Mericle's study manufactures predominance by assuming away the very differences that make the case inappropriate for classwide resolution. According to Tyson Foods, reliance on a representative sample absolved each employee of the responsibility to prove personal injury and thus deprived it of any ability to litigate its defenses to individual claims.

Decision: The Court held that the District Court properly certified the class of employees even though the plaintiffs relied on "representative evidence" to determine the number of additional hours each employee worked when Tyson Foods failed to keep proper time records. The Court refused to issue a blanket prohibition on the use of representative evidence in a class. According to the Court, "a representative or statistical sample, like all evidence, is a means to establish or defend against liability." "It follows that the Court would reach too far were it to establish general rules governing the use of statistical evidence, or so-called representative evidence, in all class-action cases." The Court, however, limited its holding and emphasized that "whether and when statistical evidence can be used to establish class-wide liability will depend on the purpose for which the evidence is being introduced and on the elements of the underlying cause of action." As noted by the Court, "[i]n many cases, a representative sample is 'the only practicable means to collect and present relevant data' establishing a defendant's liability" and "[i]n a case where representative evidence is relevant in proving a plaintiff's individual claim, that evidence cannot be deemed improper merely because the claim is brought on behalf of a class." The Court provided some guidance on when this "representative evidence" could be used in a class action: "If the sample could have sustained a reasonable jury finding as to hours worked in each

employee's individual action, that sample is a permissible means of establishing the employees' hours worked in a class action." If, on the other hand, the "representative evidence" could not be used to establish individual liability, as in the *Wal-Mart v. Dukes* case, according to the Court its use in a class action is improper.

Significance: This was somewhat of a split decision. On one hand, the plaintiff's bar can claim a modest victory in the Court's affirmance of the use of statistical evidence using average time estimates from a sample set to determine damages for the overall class. While not as broad as originally hoped, it still paves the way for class plaintiffs to prove damages with the use of expert statistical analysis in appropriate FLSA cases in which employer records are lacking and individual calculations are difficult, if not impossible. On the management side, the decision confirms that statistical evidence is only to be used in limited circumstances (i.e., where there is a common question of law or fact but there is an evidentiary gap created by the lack of employer records) and affirms the broader holding in *Walmart v. Dukes* that statistical evidence cannot be used as common proof of liability in the absence of a common question of law or fact unifying the class.

II. ***Encino MotorCars, LLC. V. Navarro***, 136 S. Ct. 2117 (June 20, 2016)

Facts: The FLSA requires employers to pay overtime compensation to covered employees who work more than 40 hours in a given week. However, "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles" at a covered dealership is exempt from the overtime provisions of the FLSA. While this provision clearly exempts employees who sell cars and mechanics who fix them, it is unclear whether employees who sell repair and maintenance services to customers are also exempt. In 1970, the Department of Labor issued a regulation that defined "salesman" to mean "an employee who is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts for sale of the vehicles . . . which the establishment is primarily engaged in selling." The regulation excluded service advisors from the exemption. In response to a number of court opinions disagreeing with this regulation, in 1978, the Department of Labor issued an opinion letter stating that service advisors could be exempt under the FLSA. In 1987, the Department confirmed its new interpretation by amending its Field Operations Handbook to clarify that service advisors should be treated as exempt under the statute. In 2008, the Department issued a notice of proposed rulemaking proposing to revise its regulations in accord with existing practice by interpreting this exemption to include service advisors. In 2011, however, the Department issued a final rule that followed the original 1970 regulation and interpreted the statutory term "salesman" to mean only an employee who sells vehicles.

Plaintiffs, all current or former service advisors for Encino Motorcars, filed suit alleging that Encino Motorcars violated the FLSA by failing to pay them overtime compensation when they worked more than 40 hours in a week. Encino Motorcars moved to dismiss, arguing that the FLSA overtime provisions do not apply to respondents because service advisors are covered by the §213(b)(10)(A) exemption. The District Court granted the motion, but the Ninth Circuit reversed, in relevant part, deferring under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to the new interpretation set forth in the 2011 regulation, and holding that service advisors are not exempt under the FLSA.

Decision: The Court held that the 2011 regulation that reversed the DOL's longstanding informal position that service advisors were exempt from overtime rules was arbitrary and capricious and not entitled to *Chevron* deference because it was issued without "the reasoned explanation that was required in light of the Department's change in position and the significant reliance interests involved." According to the Court, the Department "gave little explanation for its decision to abandon its decades-old practice of treating service advisors as exempt under §213(b)(10)(A)." The case was remanded back to the Ninth Circuit to interpret the statute in the first instance without deference to the 2011 regulation.

Significance: The decision did not answer the underlying question of whether service advisors are exempt under the FLSA. The other Circuit Courts who have addressed this issue (the Fourth and Fifth Circuits, plus numerous District Courts) concluded that service advisors are exempt under the FLSA. With the Court's reversal, there is no longer a circuit split and the current legal landscape favors exempt status for service advisors. Beyond that, it appears to be a victory for employers because the Court curbed the Department's aggressive policy changes to expand coverage of the FLSA and limit the available exemptions. Employers can take some solace in knowing that the Court will apparently hold the Department's feet to the fire to make well-reasoned and informed changes to its interpretive regulations.

SPOTTING ISSUES WITH DATA ANALYTICS IN HUMAN RESOURCES

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Spotting Issues with Data Analytics in Human Resources

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Big data makes some big promises. It will find the best candidates, identify which employees are about to leave you, measure key performance indicators in real time, improve employee wellness, and protect your vital trade secrets. But if using the wrong data, biased data, or even data you're not allowed to use, it can capitalize on correlations that result in discrimination or breach privacy laws. These materials just scratch the surface of the legal issues inherent with data analytics as applied to people decisions.

In the simplest terms, big data and data analytics use large amounts of data to find correlations that can be useful in making predictions. The analytics can either search for correlations on their own or be sent on particular searches to find correlations that can assist in business decision-making. One of the hallmarks of big data and analytics is that they use math – in the form of algorithms – to help the decision-making process. For employers, predictions can be made about whom to hire, which employees might be planning to resign, employee engagement levels, and much more.

Here are two examples:

- Using historical performance and personnel data, an employer can analyze what characteristics make employees good customer service representatives. Analytics software can determine that a particular major in college, a pattern of word choice, or type of work experience are optimal characteristics for those who hold such a position. The algorithm can then compare that historical data to available public information (from social media, candidate profiles, other internet usage) to source, recruit, and ultimately hire the best applicants for the position.

- Using an analytic program that analyzes the language in email and instant message, an employer could review email communications throughout a company looking for patterns that could be indicative of employee dissatisfaction. With this information, an employer could deploy resources into the particular teams or work groups with high dissatisfaction levels to determine if issues need to be addressed or allow seemingly dissatisfied employees to "self-select" out of their employment where a particular employee is not as beloved.

Each of these examples is addressed below in the context of current law. While unaware of current litigation alleging a violation of law due to the use of big data or analytics, I believe such litigation is a real possibility and is contemplated by academics.

Certainly, the Equal Employment Opportunity Commission is interested in these issues and has solicited testimony on the subject.[1]

I. DISCRIMINATION ISSUES

A. Neutral Policies, Neutral Data?

Data analytic vendors and data scientists like to point out that because their products use algorithms applied by machines, they are error-free and free of any human tendency to discriminate. Nevertheless, data analytics can run head on into anti-discrimination laws if the correlations and predictions created result in a disparate impact on members of a protected class.[2] In the hiring example above, a correlation between word choice and high performance in a customer service representative position is made based the analysis of the employer's historical data, including performance reviews, application data, current employee data, and performance standards. If a preference for candidates who make certain word choices is applied in choosing among applicants, the result could be a disparate impact on recent immigrants or individuals of a particular ethnic background. Anti-discrimination laws require, among other things, that employers maintain a system of employment free from discrimination based on protected class status. In defending its use of data analytics to

[1] The EEOC has made the use of big data a subject of the agency's research. Equal Employment Opportunity Commission Research and Data Plan, *available at* https://www.eeoc.gov/eeoc/plan/research_data_plan.cfm (last accessed at August 29, 2016).

[2] When correlations are based on data that can serve as a "proxy" for discrimination – like zip codes – the proxy can bake in discrimination. *See* Solon Baraocas & Andrew D. Selbst, *Big Data's Disparate Impact*, 104 CALIF. L. REV. 671 (2016). Note, Barocas and Selbst argue that Title VII appears to "bless" the use of data analytics in employment decisions without an effective regime to prove discrimination. *Id.* at 672, note 5.

choose customer service representatives, will the employer be able to rely on the neutrality and mechanical nature of algorithms?

1. Current status of disparate impact

In *Griggs v. Duke Power*, the U.S. Supreme Court held that when a seemingly neutral policy operates to discriminate against a protected class, an employer can be held liable under Title VII of the Civil Rights Act of 1964. 401 U.S. 424 (1971). In *Griggs*, the employer used generalized intelligence tests to determine who should be transferred into desirable departments. While the tests themselves appeared to be race-neutral, the impact of the tests disadvantaged African American employees by limiting their ability to be transferred or promoted. In finding the employer liable for discrimination, the Court held that an employer must demonstrate that the apparently neutral policy or test is job related and not designed to discriminate against a protected class.

The process by which an employer can show that a neutral policy or test is, in fact, job related is called validation. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (holding that where a neutral policy was validated as job-related, an employer is not liable for discrimination). In 1978, the EEOC adopted the Uniform Guidelines on Employee Selection Procedures (known as UGESP) that outline how validation works and describe the process by which an employer can determine whether a test or policy is in fact job-related.

Validation is a defense to a disparate impact case. *See Gulino v. Board of Education of the City School District of the City of New York*, 907 F. Supp. 2d 492

(S.D.N.Y. 2012) (holding that when the Board of Education failed to validate a standardized test for teachers, it was subject to liability when the test resulted in a disparate impact on minority teacher candidates). If an employer can establish that seemingly neutral policies, tests, or hiring criteria are job related, it can it shield itself from liability if a protected class is negatively impacted. Long-established case law seems to clearly indicate that employers' use of big data and analytics (whether direct or through a third party) must be validated if it is used to make employment decisions.

That said, big data and analytics present an intriguing conundrum that courts and anti-discrimination agencies (like the EEOC) will almost certainly wrestle with. Some data scientists argue that simply because correlations (like the correlation between word choice and success as a customer service representative) exist their job-relatedness is a given and the process of finding such correlations is self-validating.[3] This is based almost solely on statistics. But what if the correlation found is between successful performance and graduation from a particular university, residence in a particular neighborhood, or number of children? What if there is a clear correlation between successful performance and age, gender, or race? Courts and anti-discrimination agencies will deal with this and similar scenarios in the near future.

2. What Discrimination Doctrine Will Apply?

[3] See e.g. Bennett B. Borden & Jason R. Baron, *Finding the Signal in the Noise: Information Governance, Analytics, and the Future of Legal Practice*, 20 RICH. J.L. & TECH. 7 (2014).

In a forthcoming paper[4] to be published in the *William & Mary Law Review*, Washington University of St. Louis Law Professor Pauline Kim posited that the current discrimination doctrine is not well-suited to properly addressing discrimination that results from data analytics.

To describe analytics, Professor Kim articulates the unknowns that create a possibly insurmountable hurdle to attacking a potentially discriminatory algorithm. By putting together different data sets, applying an algorithm that may be unknown to the employer (and a vendor's trade secret), there are a great deal of unknowns to how the analytics reach a "prediction." How the algorithm weighs certain factors change frequently based on the ever changing nature of data sets and are intentionally "opaque," so at a specific point, the weight can change. Plus, employers cannot know if a particular candidate is better than another because no mechanism exists to see each candidate in a role. Because of these unknowns, Professor Kim argues two points: (1) "a strong liability regime intended to discourage the use of biased algorithms may also discourage employers from trying to understand whether the tools they are using have disparate effects;" and (2) the "nature of labor markets are such that employers will not reliably receive signals if their employment practices produce bias against minority groups" because there is no way to determine if a prediction is better than the alternative. So if the "bright shiny toy" of analytics does not tell employers there is a problem and employers do not want to see if there is a problem, the only groups left to

[4] Pauline Kim, *Data-Driven Discrimination at Work*, WASH. UNI. IN ST. LOUIS LEGAL STUDIES RESEARCH PAPER NO. 16-06-03, June 27, 2016, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2801251 (last accessed Aug. 29, 2016).

determine if discrimination exists when using these tools are the EEOC and plaintiffs' lawyers with vast resources to devote to finding discrimination.

Professor Kim argues that a traditional disparate treatment that requires intent to discriminate does not apply well to data analytics because the disparate treatment doctrine requires the employer knowingly use a tool to intentionally discriminate. To illustrate the lack of intention that can exist in analytics, she sets out the following scenario:

> Once bias enters the system, feedback loops may reinforce that bias. Recall the example of Google's algorithm suggesting criminal background checks more often when searches are conducted for African-American associated names than for Caucasian-associated names. Those results likely reflect patterns in past search behavior, rather than any discriminatory bias on the result of the programmers who created the algorithm. However, even the non-prejudiced employer, who otherwise would not treat applicants differently because of race, might be nudged by the ads to scrutinize the criminal record history of African-American applicants more closely than white applicants. If, as a result of the nudge, the employer conducts criminal background checks more often for African American applicants than white applicants, it will find more instances of criminal history in that population, further reinforcing a cycle of basis against that population.

This lack of intention makes the disparate treatment theory under Title VII difficult to use to attack an analytic tool.

Professor Kim next alleges that the current status of disparate impact cannot adequately address the issues data analytics raise. Professor Kim argues that the disparate impact doctrine is based largely on psychological and ability testing that use theory that particular candidate or employee attribute is attractive. Yet, analytics don't use theory – analytics use correlations that are found regardless of whether they "cause" a particular outcome. For example, it's possible an analytic could find that the best

customer service representatives wear purple socks regularly, so a tool would look for customer service representative candidates who wear purple socks. Psychological testing likely would not draw the same correlation. The correlations are drawn by analytics use statistics, so at least theoretically the correlations can provide the statistical basis necessary to show job-relatedness and business necessity to undermine liability under the disparate impact theory. Yet, questions linger whether purple sock wearing has any real relation to the job, especially if Asian women do not wear purple socks.

Because Professor Kim believes that both disparate treatment and disparate impact do not provide an adequate mechanism to uncover discrimination, Professor Kim argues that Title VII's language may provide yet another doctrine – classification bias. While similar to disparate impact, Professor Kim's classification bias differs in the burdens placed:

> First, sensitive information like race and sex should not be required to be purged from datasets: instead, preserving such data is important to avoid bias. Second, the method of identifying the relevant labor market for statistical comparison should look quite different. Third, an employer's defense of an algorithm should depend, not on a claim of job relatedness, but on the employer proving that the underlying model is statistically valid and substantively meaningful.

It's this "substantively meaningful" piece of Professor Kim's theory that is the most attractive. Purple socks wearing may be statistically valid, but it does not carry any meaning in the context of a customer service job. Thus, if the algorithm yielded discriminatory results – Asian women are not selected given their distaste for purple socks – the law could assist an Asian woman in rectifying the discrimination resulting from the purple sock wearing factor.

Time will tell whether Professor Kim's argument will hold water, but for the time being, it is an attractive basis for plaintiffs' attorneys and the EEOC alike.

B. Knew or Should Have Known Standards

In the second scenario above, an employer monitors employee email to determine if morale problems exist. The employer can accomplish this through the use of big data tools like "sentiment analysis" and other context analysis, applied to its emails or messaging system(s). If an employer uses these tools to evaluate morale or employee engagement and regularly reviews the information obtained to determine if attention is needed, has the employer created a situation in which it either knows or has reason to know of unlawful conditions (like harassment) in the workplace? If the employer uses data analytics to promote its business interests, must it also use data analytics to determine whether or not unlawful activity is occurring in its workplace?

This is a reminder that data analytics, which can provide both a sword and a shield for employers, can do the same for employees who seek to assert claims of unlawful practices. Data analytics tools should be selected with care and thoughtfully implemented.

C. Investigations

Despite the concerns outlined above, data analytics can be very useful in workplace investigations. Here are two examples:

- Imagine being an HR Director. The Chief Executive Officer of your company approaches you and asks you to conduct an investigation into whether the Chief

Financial Officer is misappropriating company funds. Being experienced, you know that an investigation involving multiple interviews of the CFO's entire staff will spark numerous rumors that will be difficult to control. Using data analytics, you can quickly and confidentially obtain copies of the CFO's email, smartphone, and desktop records and apply analytic software to this information, which allows you to find patterns around concepts related to sexual harassment (i.e. popular terms), identify individuals with knowledge quickly and efficiently, and swiftly narrow the scope of your investigation and limit the rumor mill. With a limited rumor mill, an investigation may be more effective and efficient.

- As the IT Director, you notice an unusual amount of activity on a particular server that stores the secret recipe for the company's most profitable food product. You see that only authorized employees have been accessing the recipe, and become concerned that these authorized users are copying the recipe or emailing it outside of your employer's system. Analytics can help determine if there is a problem and if so, who or what is responsible. By searching domain names, access times, and email traffic, analytic software can quickly reveal correlations that identify the source, nature, and frequency of unauthorized use of the company's recipe. The analytics can even determine if the recipe has been sent or otherwise transmitted to others who do not have authorization to have the recipe.

Carefully applied, today's technology can focus and shorten internal investigations. It can also be of use in the preparation of affirmative action plan and reports to

government agencies. Should employment disputes result in litigation, technology can assist in the assembly, review, preparation, and preparation of essential evidence.

WHEN YOU GAZE INTO THE ABYSS, THE ABYSS GAZES INTO YOU THE UNINTENDED CONSEQUENCES OF DATA ANALYTICS

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When You Gaze into the Abyss, the Abyss Gazes into You

the Unintended Consequences of Data Analytics

Michael Anderson
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Boston, MA

- Makes employer decisionmaking transparent
- Search criteria become discoverable
- Analytics borrowed from marketing are unsafe

Revival of Disparate-Impact Theories

Griggs v. Duke Power Co., 401 U.S. 424 (1971)
high-school education or intelligence test requirement violates Title VII for power company laborers;

Dothard v. Rawlinson, 433 U.S. 321 (1977)
height and weight restrictions (5'2" and 120 lb. minimum) for prison guards

"job related for the position in question and consistent with business necessity"

42 U.S.C. §2000e-2(k)(1)(A)

Pre-Big Data:

Requirements are overt, commonsense

developed by managers and counsel, not data analysts

Big Data analytics are hidden, multiplied by many orders of magnitude and not always intuitive

Do analysts run the show, or do counsel and managers HR officers micromanage?

How much foreknowledge is there about disparate outcomes?

No business justification defense for intentional discrimination

Blurred line between identity and behavior

Aztech Electric Co., 335 NLRB 260 (2001)

policy of not considering any applicant whose recent wage history differs by 30 percent from employer's starting wages – anti-union discrimination

Common-law assumptions conflict with anti-discrimination law

Employer rules held illegal:

- Must leave premises after shift
- Ban on talking to the press about your workplace
- Confidentiality
- Don't talk about wages
- Don't talk about discipline
- Don't talk about disability/medical
- Keep work issues within chain of command
- Don't tape-record
- "Negative conversations about associates or managers"
- "Derogatory behavior"
- Must cooperate in investigations

Opposition and anti-retaliation clauses will expand under pressure

Title VII, 42 U.S.C. §2000e-3(a),
Fair Labor Standards Act, 29 U.S.C. §215(a)(3)
Sarbanes-Oxley Act, 18 U.S.C. §1514A

Minority Report problem:
If analytics weed out employees for traits correlated with e.g., opposition to authority, or likelihood of marriage or pregnancy, law will have to expand to include prospective protected activity

BIOGRAPHIES

MICHAEL ANDERSON, ESQ.
BIOGRAPHY

Michael Anderson is a partner in Murphy Anderson's Boston office.

He graduated from Harvard University B.A. *magna cum laude* in philosophy in 1984 and Harvard Law School, J.D. *cum laude* in 1987. He clerked for Judge Richard S. Arnold on the U.S. Court of Appeals for the Eighth Circuit from 1987 to 1989.

Michael specializes in appellate litigation in defense of workers and their unions. He has litigated First Amendment access cases like *Sheet Metal Workers Local 15 v. NLRB (Brandon Regional Hospital)*, 491 F.3d 429 (D.C. Cir. 2007) (same First Amendment protections applicable to all other social protest apply to secondary boycott speech) and*Venetian Casino Resort v. Local Joint Executive Board*, 257 F.3d 937 (9th Cir. 2001) *cert. denied* , 535 U.S. 905 (2002) (sidewalk along Las Vegas Strip is public forum open to labor picketing, despite resort's claim that the sidewalk was its private property).

Michael is a Primary Chapter Editor of the Bureau of National Affairs' Developing Labor Law, and Chapter Editor of BNA's How to Take a Case Before the NLRB.

In his real life, Michael delivers funny political monologues in theater venues in New England and London. He is the winner of the Bad Ad Hoc Hypothesis Competition at MIT in 2014. He is a Shakespearean actor, appearing as Capulet in Boston Center for the Arts' *Romeo and Juliet* in 2012. His influences include George Orwell, Thomas Paine, and the first two Clash albums. He is an obsessive chess player.

ALLYSON L. BELOVIN, ESQ.
BIOGRAPHY

Allyson L. Belovin (Cornell University School of Industrial and Labor Relations, B.S., 1993; Georgetown Law School, J.D., 1996) joined Levy Ratner in 2000, after several years representing unions, workers and benefit funds in the building and construction industry and became member of the firm in 2006.

Belovin represents labor unions and individual employees in a variety of industries including health care, utilities, brewery, postal service, cultural organizations, typography, hotel and restaurant, maritime and academia. She practices before the NLRB and other administrative agencies, and has substantial experience in arbitrations and collective bargaining negotiations. Belovin also litigates individual and class action cases in federal and state court under various employment statutes, including Title VII and FLSA. Additionally, she represents unions and candidates in union elections and other internal union matters.

Belovin is a chapter editor to the seminal labor law publication, *The Developing Labor Law*, and has been on the Board of Editors of the well-known treatise *How to Take A Case Before the NLRB*. Belovin is on the Board of Directors of the AFL-CIO Lawyer's Coordinating Committee and is the co-chair of the Labor Relations Committee of the New York State Bar Association's Labor & Employment Section. She is an active member of the American Bar Association's Committee on the Development of the Law Under the NLRA and the AFL-CIO's Lawyer's Coordinating Committee. Belovin has authored and presented workshops for the ABA, the NYSBA, the AFL-CIO LCC and the Cornell School of Industrial and Labor Relations on various subjects, including employer handbook rules, arbitration of employee discipline cases, deposition techniques in labor cases, successorship and the labor law implications of corporate restructuring. Belovin also conducts training sessions for union organizers and rank-and-file activists on a variety of issues including grievance handling, arbitrations, and sexual harassment.

JOHN A. BERANBAUM, ESQ.
BIOGRAPHY

John A. Beranbaum is a founding partner of Beranbaum Menken LLP, which practices plaintiff-side employment law. For more than two decades he has represented plaintiffs in employment discrimination, sexual harassment, whistleblower and wrongful discharge cases. He has won seven-figure jury verdicts on behalf of the firm's clients, has numerous published court decisions and has written widely about employment law. He also serves as a mediator for the United States District Court for the Eastern District of New York. Earlier in his career, Mr. Beranbaum practiced as a disability rights advocate with a protection and advocacy organization and a legal services lawyer. He graduated from Yale University (magna cum laude) and N.Y.U. School of Law.

KATE BISCHOFF, ESQ.
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An enthusiastic management-side attorney and SHRM-SCP/SPHR-certified human resources professional, Kate Bischoff advises organizations in a wide range of industries on employment law and human resources issues, from recruitment and workplace culture to terminations. Her strengths include ensuring human resources policies and practices are compliant with federal and state laws, training employees and managers on equal employment opportunity and other supervisory topics, and handling investigations into employee grievances and complaints. Ms. Bischoff's passionate about improving company culture and using technology (social media and big data) in the workplace. Follow her on Twitter at @k8bischHRLaw. Ms. Bischoff also litigates employment cases, including discrimination, harassment, wage and hour, and contract matters. After several employment law trials, she speaks from experience when advising clients when administrative and court matters commence. Prior to founding tHRive Law & Consulting, Ms. Bischoff worked as an attorney at Zelle LLP and served as a human resources officer for the United States Department of State at the U.S. Embassy Lusaka, Zambia and for the U.S. Consulate General Jerusalem.

JAMES A. BROWN, ESQ.

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BIOGRAPHY

James A. Brown has been involved in labor-management issues for over thirty years, and has served as a full-time labor arbitrator and mediator since 2011.

Labor Panels: American Arbitration Association (Labor Arbitration); Federal Mediation and Conciliation Service; National Mediation Board; New York Public Employment Relations Board; New Jersey Public Employment Relations Commission; NJ PERC Special Disciplinary Arbitration Panel; New Jersey State Board of Mediation; Pennsylvania Bureau of Mediation; New York State 3020-a; New York City Office of Collective Bargaining; New York City Department of Education–United Federation of Teachers 3020-a Panel; and CUNY Blue Collar Panel.

Employment Law Panels: American Arbitration Association (Employment Law); FINRA (Securities Industry).

Fact-Finding and Interest Arbitration: Pennsylvania Department of Labor.

Recent Speaking Engagements: New York City Bar Association "New Labor Arbitrator Panel" program (June 2013), and New York State Bar Association "Labor Arbitrator Roundtable: Best & Worst Practices for Labor Arbitration" (October 2013).

Publications: "Friedrichs: The End of Public Labor Relations as We Know It?" NYSBA Labor and Employment Law Journal, Fall 2015, Vol. 40, No. 1; "Long Beach: Re-enforcing Limits on Provisional Work, New York Law Journal," October 18, 2007; "Post-Garcetti: N.Y.'s Public Employee Whistleblower Law," New York Law Journal, October 24, 2006; "The 1 in 3 Rule and Remedial Power," New York Law Journal, December 13, 2005; "Fixing a Broken Disciplinary System," New York Law Journal, April 21, 2004; "Civil Service Law; Merit and Property Interests," New York Law Journal, January 16, 2003; "Reviewing Leave Time for the Pregnant Employee," New York Law Journal, July 5, 2001; and Contributor to Public Sector Labor and Employment Law (2nd ed. 1998).

FRANCIS BYRD
BIOGRAPHY

Francis Byrd, Founder and CEO of Byrd Governance Advisory, has over 20 years of experience in the corporate governance field possessing a thorough understanding of governance from the perspective of investors and corporate issuers. Francis has held responsible positions with top institutional investors (TIAACREF, the Connecticut Retirement Plans & Trust Funds and the NYC Pension Funds); assessed governance quality at North Americas largest companies on behalf of bondholders and creditors (at Moody's Investors' Service) and advised corporate public issuers on how to respond to and engage with activist investors, ESG advocates, shareholder proponents and proxy advisor firms (at proxy solicitation/shareholder communications' firms, The Altman Group and Laurel Hill Advisory).

In 2014 and 2010, NACD Directorship identified Francis as a D-100 governance professional and one of a group of 30 "People To Watch", respectively. Francis provides strategic advice on governance risk and shareholder engagement and ESG integration.

PETER D. CONRAD, ESQ.
BIOGRAPHY

Peter Conrad began his legal career as a trial attorney and hearing officer at the National Labor Relations Board.

Peter joined Proskauer's Labor & Employment Law Department in 1980 and became a partner in 1986. He has represented employers in numerous industries (including health care, higher education, financial services, trucking, pharmaceutical, petrochemical, telecommunications, legal services, publishing, retail, broadcasting, entertainment, hotel and professional sports) in the full range of unfair labor practice and election proceedings before the NLRB. In the nearly 30 years that Peter has handled matters at the NLRB, he has confronted virtually every issue that a labor lawyer practicing in this area could expect to see, from the straightforward discharge for union activity, to the most complex secondary boycott, successorship and refusal-to-bargain situations, representing some of the firm's most prestigious clients.

The remainder of Peter's time is devoted to the related areas of union avoidance and corporate campaigns (defending employers against organizational activity in its many forms), as well as arbitration, negotiation, and litigation under collective bargaining agreements. Although primarily engaged in a more traditional labor relations practice, Peter also represents companies in employment discrimination cases (before state and federal administrative agencies and in the courts), workers' compensation and unemployment insurance proceedings, and general client counseling in all areas of labor relations and employment law.

The clients that Peter represents on a regular basis include T-Mobile USA, United Parcel Service, Consolidated Edison Company of New York, Barneys New York, Delaware North Companies, Castle Oil Corporation, and Otis Elevator Company, to name a few.

As a member of the interdepartmental Sports Law Group, Peter also has done work over the years for the National Basketball Association, the National Hockey League, Major League Baseball and the Major Indoor Soccer League, primarily in matters pending at the NLRB, including the 1995 attempted decertification of the National Basketball Players' Association and the much more recent season-long lockout by the NHL in 2004/2005.

Peter has been a member of the faculty of the Practising Law Institute since 1987, speaking on the labor and employment law aspects of "Acquiring or Selling the Privately Held Company."

PAMELA COUKOS, JD, PhD
BIOGRAPHY

Pamela Coukos, JD, PhD, is an advisor and expert with more than 20 years of experience in equality law, policy and research, and a founding Principal of Working IDEAL. Pam recently completed five years as a Senior Advisor at the U.S. Department of Labor's Office of Federal Contract Compliance Programs, where she provided strategic guidance on the agency's enforcement and outreach programs, and led the development of new investigative guidelines to assess federal contractor pay systems and practices for potential sex and race discrimination. Her career spans civil rights litigation, research, policy analysis, teaching and training, and advocacy – and the government, private and nonprofit sectors. She holds a law degree and a social science doctorate and has a particular expertise on the use of data and statistical analysis in Title VII cases.

Pam is currently advising companies and organizations on gender equity, pay equity, diversity and inclusion, and affirmative action. Her services include high quality audits of data and workplace practices. She has extensive background as a teacher and trainer and can provide innovative diversity training for employees and managers based on research-driven best practices for building inclusive workplaces and addressing unconscious bias.

At the Department of Labor's Office of Federal Contract Compliance Programs, Pam provided strategic guidance on the agency's enforcement and outreach programs, and led the development of new investigative guidelines to assess federal contractor pay systems and practices for potential sex and race discrimination. She also served as a technical subject matter expert for the agency's recent proposed rule to collect contractor pay data and authored a report for the Department's policy office on paid leave costs and benefits. Prior to joining DOL, Pam was Of Counsel to the law firm of Mehri & Skalet PLLC, where she represented plaintiffs in employment discrimination class actions. She served as a key member of the litigation and settlement team in *Abdullah v. The Coca-Cola Company,* a landmark case providing record financial and innovative programmatic relief to thousands of African-American class members for pay and promotion claims.

Pam began her legal career two decades ago working on federal legislation and impact litigation as a staff attorney for the NOW Legal Defense and Education Fund (known today as Legal Momentum) and as the Public Policy Director of the National Coalition Against Domestic Violence. In 2009-2010 she served as the California State Training Director for Organizing for America, training volunteer leaders working to support the passage of the Affordable Care Act.

In 2011 Pam completed her PhD in Jurisprudence and Social Policy at the University of California, Berkeley. Her dissertation applied quantitative and qualitative analysis to assess the effects of politics, law, and social movements on the development of sexual harassment law in the United States. Pam received her JD from Harvard Law School in 1994 and is a graduate of Brown University. A native of Indianapolis, Indiana, she presently lives in Takoma Park, Maryland, with her family.

ABOUT WORKING IDEAL

Working IDEAL provides trusted, effective and innovative advice on inclusive workplaces, diverse talent and fair pay to large and small companies, universities, non-profits, unions and other organizations across the nation. We specialize in evidence-based diversity assessments and pay equity audits for clients with serious commitments to equal employment opportunity and affirmative action. Our expertise includes leadership development, employee engagement, and strategic human capital – and how to deploy those tools to support stronger workplace inclusion, diversity, equity and access.

LAURA M. FANT, ESQ.
BIOGRAPHY

Laura Fant is an associate in the Labor & Employment Law Department at Proskauer Rose LLP.

Laura frequently counsels on matters involving the Americans with Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA), including disability accommodation in the workplace and public accommodations. She is experienced in conducting accessibility audits and providing FMLA, ADA and accessibility training, as well as training on numerous other subjects including discrimination and harassment, for clients in a variety of sectors that include retail, hospitality, financial services, sports and not-for-profit. She also regularly provides general employment counseling and has experience in developing, updating and implementing employee handbooks and company policies under federal, state and local law.

Laura serves as Secretary of the New York City Bar Association Disability Law Committee and is a frequent contributor to Proskauer's *Law and the Workplace Blog*.

Before joining Proskauer, Laura was Assistant General Counsel to the City of New York's Office of Labor Relations. There, she represented the Mayor and City agencies in labor and bargaining disputes at arbitration and before the Board of Collective Bargaining.

Prior to that, Laura was law clerk to Judge Jose L. Fuentes of the New Jersey Superior Court, Appellate Division and a judicial intern to Judge Laura Taylor Swain of the U.S. District Court for the Southern District of New York.

Laura is a member of the Board of Directors of Jersey City Ties, a not-for-profit organization based in Jersey City, NJ that provides young professionals with networking and volunteer opportunities within the local community.

ZACHARY D. FASMAN, ESQ.
BIOGRAPHY

Zachary D. Fasman is a Partner in the Labor & Employment Law Department of Proskauer Rose LLP, resident in the New York office. Zach focuses his practice on representing employers in all aspects of labor and employment law, including labor-management relations, employment litigation and counseling.

Zach has extensive trial and appellate experience in employment litigation, having handled hundreds of employment law cases ranging from nationwide class actions to jury trials of individual discrimination claims. He has argued numerous employment and labor cases in both state and federal appellate courts, including two successful arguments before the United States Supreme Court.

Zach's labor-management relations practice encompasses advising employers during representation campaigns, collective bargaining, labor arbitrations and all forms of counseling regarding union and employee relations as well as employment at will and related employment issues. He has negotiated collective bargaining agreements with most major U.S. labor unions and also has substantial experience appearing before the National Labor Relations Board, where he tried the second longest case in NLRB history. In addition, Zach provides day-to-day counseling and advice to employers on a wide range of issues including complex labor and employment law issues in mergers and acquisitions, the intersection between labor and antitrust law, federal preemption, and the arbitration of stautory claims.

Having practiced in Washington for many years, Zach has testified before the U.S. Congress and the EEOC on multiple occasions and has worked extensively with Congress and the White House, on behalf of the U.S. Chamber of Commerce and other organizations, on numerous pieces of legislation. He is a long time member of the U.S. Chamber's Labor Relations Committee and has submitted many *amicus curiae* briefs on behalf of the Chamber and other organizations to the U.S. Supreme Court on labor and employment law issues.

A noted author and sought-after speaker on labor and employment issues, Zach co-chairs the Practising Law Institute's Annual Employment Law Institute and has written numerous articles in the *New York Law Journal* and a wide variety of other publications. He is one of nine lawyers in New York City to earn a "Band One" ranking in Labor and Empoyment in *Chambers USA* and *Chambers Global* and is a long-time Fellow of the College of Labor and Employment Lawyers. He also is a member of the Advisory Board of New York University Law School's Center for Labor and Employment Law, teaches employment law to members of the federal judiciary through the Federal Judicial Center, and has been included in every edition of *Best Lawyers in America* during the past 20 years. In 2015, he was selected as one of New York's Top 100 lawyers and was selected to Lawdragon's Hall of Fame in Labor Law (one of 30 lawyers nationally).

RICHARD F. GRIFFIN, JR., ESQ.
BIOGRAPHY

Richard F. Griffin, Jr. was sworn in as General Counsel of the National Labor Relations Board on November 4, 2013 for a four year term. Prior to becoming General Counsel, Mr. Griffin served as a Board Member from January 9, 2012 through August 2, 2013.

Mr. Griffin previously served as General Counsel for International Union of Operating Engineers (IUOE). He also served on the board of directors for the AFL-CIO Lawyers Coordinating Committee, a position he held since 1994. Since 1983, he has held a number of leadership positions with IUOE from Assistant House Counsel to Associate General Counsel. From 1985 to 1994, Mr. Griffin served as a member of the board of trustees of the IUOE's central pension fund. From 1981 to 1983, he served as a Counsel to NLRB Board Members. Mr. Griffin holds a B.A. from Yale University and a J.D. from Northeastern University School of Law.

DAVID KAHNE, ESQ.
BIOGRAPHY

David Kahne focuses on complex commercial litigation including commodities, securities, derivatives and other fixed income products and has represented financial institutions and trading firms in state, federal courts and bankruptcy courts and in investigations before regulatory agencies, including the U.S. Commodity Futures Trading Commission and the Financial Industry Regulatory Authority. Mr. Kahne's practice also focuses on public sector labor relations, working with some of New York City's and Long Island's largest public employee unions. In this context, he has represented clients in a variety of areas in both state and federal court including labor, employment, contract, pension issues and constitutional rights.

REPRESENTATIVE MATTERS

Mr. Kahne's representations have included:

- Representation of banks and funds in connection with the valuation, filing and litigation of derivative and guaranty claims arising from the Lehman Brothers bankruptcy proceedings in the United States.
- Representations of commodity trading firms in litigations arising from contracts for the purchase and sale of commodities, including the defense of an international commodities trading firm in a class action concerning claims of alleged manipulation of the North Sea Brent crude oil market in violation of the Commodity Exchange Act.
- Representations of commodity trading firms in connection with investigations by government regulatory agencies, including the U.S. Commodity Futures Trading Commission and Federal Energy Regulatory Commission, relating to the purchase and sale of natural gas, crude oil, wheat, cotton, and commodity index products.
- Representing one of the City's largest municipal unions in contract negotiations, arbitrations and related mediation and administrative proceedings.
- Representing the City municipal union umbrella organization in various health benefits and collective bargaining related matters.

ADMITTED TO PRACTICE

New York, 2008

CLERKSHIPS

Law Clerk, Hon. Brian M. Cogan, U.S. District Court, Eastern District of New York, 2009-2010

EDUCATION

J.D., *cum laude*, Georgetown University Law Center, 2007
B.A., *magna cum laude*, Duke University, 2004

LORALEIGH KEASHLY, PH.D.
BIOGRAPHY

Loraleigh Keashly is an associate professor and Masters Program Director in the Department of Communication at Wayne State University, Detroit. She is also Associate Dean, Curricular and Student Affairs, College of Fine, Performing and Communication Arts. Her research and consulting focuses on quality of work relationships and conflict and conflict resolution at the interpersonal, group and inter-group levels. Her current research focus is the nature, effects and amelioration of uncivil, hostile and bullying behaviors in the workplace with a particular interest in the role of organizational structure and culture in the facilitation or prevention and management of these behaviors. She has a particular interest in developing bystander efficacy to address negative work relationships and build constructive work relationships. She has focused her recent attention on the academic environment and works with universities on these issues.

STEVEN M. KLEIN, ESQ.
BIOGRAPHY

Steve Klein has been a Senior Associate Counsel for the Civil Service Employees Association, Inc., Local 1000, AFSCME, since 2014. In his practice, Steve represents the union and its members in both disciplinary and contract interpretation arbitrations, in court, and in various administrative proceedings, such those held by the Justice Center for the Protection of People with Special Needs and by PERB. Prior to coming to CSEA, Steve served as an Associate Counsel for the New York State Public Employees Federation for almost 25 years before his retirement in 2014. He has also worked as an Attorney Advisor for a NLRB Member and is an Adjunct Professor of Law at Albany Law School, from where he graduated.

AARON KONOPASKY, J.D., PH.D.
BIOGRAPHY

Aaron Konopasky is a Senior Attorney Advisor in the ADA/GINA Policy Division at the U.S. Equal Employment Opportunity Commission (EEOC) headquarters in Washington, D.C., where he assists the Commission in interpreting and applying the statutes it enforces. Dr. Konopasky has participated in the development of regulations under the Americans with Disabilities Act of 1990 (ADA), the Age Discrimination in Employment Act of 1967 (ADEA), and the Rehabilitation Act of 1973, as well as numerous policy documents and other Commission publications.

In 2009, Dr. Konopasky was awarded the Commitment to Excellence Exceptional Achievement Award, the highest honor conferred by the EEOC. The award recognizes EEOC employees who have distinguished themselves by making significant contributions to the Agency's mission, strategic goals and objectives, and core organizational values, and whose accomplishments are far above others in quality, scope, and impact.

Dr. Konopasky joined EEOC after receiving his J.D. from Stanford Law School. During law school, Dr. Konopasky was awarded the Justice John Paul Stevens Public Interest Fellowship, which recognizes strength in working with complex legal problems and dedication to social justice. Prior to law school, he received his Ph.D. in philosophy from Princeton University, where he worked his research focused on foundational issues in psychology, and served as an adjunct professor of philosophy at Rutgers University, Tulane University, and the University of New Orleans.

DAVID LOPEZ, ESQ.
BIOGRAPHY

David Lopez was sworn in as General Counsel of the U.S. Equal Employment Opportunity Commission (EEOC) on April 8, 2010. He was nominated twice by President Barack Obama and confirmed by the Senate in 2010 and 2014. Mr. Lopez is the first EEOC field trial attorney to be appointed as the agency's General Counsel. He has served at the Commission in various capacities for the past 25 years, including as Supervisory Trial Attorney in the Phoenix District Office and Special Assistant to then-Chairman Gilbert F. Casellas.

As General Counsel, Mr. Lopez runs the Commission's litigation program, overseeing the agency's 15 Regional Attorneys and a staff of more than 325 lawyers and legal professionals who conduct or support Commission litigation in district and appellate courts across the country. During his tenure, Mr. Lopez has cultivated "one national law enforcement agency," encouraging the EEOC's litigators nationwide to operate more collaboratively and cohesively with each other and other internal partners

Under his leadership, the EEOC's trial program has been extremely successful. Among the notable victories is the $240 million jury verdict - the Commission's largest award ever - in *Henry's Turkey Service*, a case brought on behalf of over thirty intellectually disabled men; a $17 million jury verdict for farmworker women victims of sexual harassment and retaliation in *Moreno Farms, Inc.*; and a $1.5 million sexual harassment and retaliation verdict affirmed by the 6th Circuit Court of Appeals in *New Breed Logistics.*

In June 2015, the Supreme Court ruled 8-1 in favor of the Commission in *EEOC v. Abercrombie & Fitch Stores, Inc.*, holding that an employer may not refuse to hire an applicant if the employer was motivated by avoiding the need to accommodate a religious practice. In this case, Samantha Elauf was denied hire because she wore a headscarf or hijab and thus failed to conform to the companies “look policy.”

Other significant appellate victories, during his tenure, include *The Geo Group, Inc.* (class sexual harassment and retaliation lawsuit reinstated after finding EEOC met its pre-suit requirements); *EEOC v. Sterling Jewelers, Inc.* (nationwide sex discrimination case reinstated after appeals court held that sole question for judicial review is whether EEOC conducted an investigation not sufficiency of investigation); *Baltimore County* (making older workers contribute more to pensions violates the Age Discrimination in Employment Act); *Boh Brothers* (plaintiffs can prove same-sex harassment under Title VII of the Civil Rights Act with "gender stereotyping" evidence); *Houston Funding* ("lactation" discrimination violates Title VII as amended by the Pregnancy Discrimination Act); *United Airlines* (employers may have to reassign disabled employees non-competitively as a reasonable accommodation under the ADA); and *Serrano & EEOC v. Cintas* (Commission can bring "pattern or practice" suit under section 706 of Title VII).

Mr. Lopez has also served as Co-Chair of the committee that developed the Commission's Strategic Enforcement Plan for 2013 to 2016. He is the Chair of the Commission's Immigrant Worker Team, a group tasked with strengthening and coordinating EEOC's enforcement and outreach on employment discrimination issues affecting immigrant and other vulnerable workers. He also convened a work group focused on discrimination issues affecting the LGBT community. Through his leadership on these issues, EEOC filed and settled its first cases alleging sex discrimination on the basis of transgender status and sex stereotyping against *Lakeland Eye Clinic* and *Deluxe Financial*. Notable cases involving immigrant and vulnerable workers include *Vail Run Resort* (over $1 million for Latina workers subjected to egregious

sexual harassment and retaliation); *Mesa Systems, Inc.* ($450,000 for Hispanic workers subjected to derogatory slurs and discriminatory application of Speak-English Only policy); and *ABM Industries, Inc.* ($5.8 million settlement for Latina janitorial workers subjected to rape, unwelcome groping and explicit sexual comments).

Mr. Lopez has been recognized by various organizations for his extensive civil rights work. In 2016, Mr. Lopez received the *National Religious Freedom Award* from the International Religious Liberty Association (IRLA), *Liberty* Magazine, and North American Religious Liberty Association (NARLA) for his advocacy of civil, religious, and employment rights throughout his government career. In 2014, the *National Law Journal* named Mr. Lopez one of "America's 50 Outstanding General Counsels," and the magazine, *Diversity and the Bar*, recognized Mr. Lopez as a "Latino Luminary" for his work as a civil rights attorney and as General Counsel. In 2012, he was awarded the *Friend in Government Award* from the American-Arab Anti-Discrimination. In 2011, *Hispanic Business* named Mr. Lopez to its list of 100 Influentials in the Hispanic community.

Prior to joining the EEOC, Mr. Lopez was a Senior Trial Attorney with the Civil Rights Division, Employment Litigation Section, of the U.S. Department of Justice in Washington, D.C. Between 1988 and 1991, Mr. Lopez was an Associate with Spiegel and McDiarmid in Washington, D.C.

Mr. Lopez obtained his J.D. from Harvard Law School in 1988 and graduated magna cum laude from Arizona State University in 1985, with a B.S. in Political Science.

JOSE L. MANJARREZ, ESQ.
BIOGRAPHY

Jose L. Manjarrez is an attorney and law enforcement officer. He is employed by the New Jersey Division of Parole, where he has worked for 12 years. Mr. Manjarrez was promoted to the rank of Sergeant in February of 2016 and currently supervises a team of 9 officers within his district office. While working for the Division of Parole, Mr. Manjarrez was able to serve as a pro bono attorney in employment discrimination and unemployment insurance cases that involved workplace bullying as direct and ancillary issues.

Mr. Manjarrez also worked on cases involving criminal records employment discrimination, which gave him the opportunity to incorporate his criminal justice experience into his work in the area of employment law. Part of Mr. Manjarrez's pro bono service was done through the Legal Aid Society's Employment Law Unit, where he received awards for outstanding pro bono service in 2013 and 2014. He obtained his B.A. from Montclair State University; his J.D. from Pace Law School; and his MPS from the School of Industrial and Labor Relations at Cornell University; where he wrote about several topics including workplace bullying. Mr. Manjarrez is a member of the New York State Bar Association Labor and Employment Law Section, and the Workers' Rights and Responsibilities Committee.

Mr. Manjarrez is admitted in New York and New Jersey and fluent in Spanish.

RACHEL MINTER, ESQ.
BIOGRAPHY

Rachel Minter has practiced exclusively in the area of labor and employment law since 1979. In 1986 she started her firm in New York City, The Law Office of Rachel J. Minter, where she has represented private- and public-sector unions and primarily represents plaintiffs in employment law matters. Her plaintiff-side practice includes litigating disability, gender, race and age discrimination cases; retaliation and sexual harassment cases; negotiating employment contracts and severance agreements; and handling employee misclassification issues under state and federal wage and hour laws.

Rachel's representation of persons with disabilities began in 1988, pre-dating passage of the ADA, when she was recruited for a *pro bono* project providing advice on employment law issues to members of the New York City Chapter of the National Multiple Sclerosis Society. Although at the time she knew no one with MS, or much about the condition, Rachel has continued to participate in the program since, as her disability practice has widened to include clients with a variety of physical and mental challenges, for whom she negotiates reasonable accommodations and litigates disability discrimination cases.

A long-time active member of the Labor and Employment Law Section, Rachel is currently an at-large member of the Section Executive Committee and chairs the Section's Sub-Committee on Disability Law. Rachel is also a member of the NYSBA Standing Committee on Disability Rights and the New York City Bar Association's Committee on Legal Issues Affecting People with Disabilities.

Rachel has presented a number of programs on disability issues for NYSBA and the Section, including "Accommodating Learning Disabilities in the Workplace" "Dealing with the Mentally-Ill Employee" "Finding the Bottom Line – Rights of People with Disabilities in New York State" and "Can We Talk? Reasonable Accommodation and the Interactive Process." Rachel conceived and moderated a workshop for the Section's 2015 Annual Meeting on "Disabilities in the Legal Profession," and has developed a longer and more extensive version of that program as a half-day stand-alone CLE to be presented in December, 2016.

Rachel also speaks to non-lawyers on employment disability topics at programs such as the Baruch College Annual Conference on Visual Impairment and Employment Policy, and the International Dyslexia Association, and recently conducted training on learning disabilities for managers and supervisors at Bank of America.

Rachel received her A.B. in Psychology, *magna cum laude*, from Clark University, where she was inducted into membership in *Phi Beta Kappa*. She is proud to have received her J.D. from the Antioch School of Law, the first law school in the country to offer clinical education.

LOUIS G. SANTANGELO, ESQ.
BIOGRAPHY

Louis G. Santangelo is an Associate General Counsel in Citi Group's Global Market Office of the General Counsel. Mr. Santangelo is the primary employment attorney for several of Citi's institutional businesses in North America including Fixed Income Indices, Commodities, Equities, Credit Products, Global Securitized Markets, Municipal Securities, and Capital Markets Origination. He previously supported Citi's Investment Banking and Smith Barney Retail Brokerage businesses. His duties include defending all employment-related litigation including discrimination, harassment, retaliation, and compensation claims, advising management and human resources on all aspects of the employment relationship including recruiting, hiring, performance management, discipline, and termination, and conducting investigations including with respect to harassment and discrimination, fraud, and other misconduct in the workplace. Mr. Santangelo is engaged in Citi's ICG Pro Bono efforts including its Cancer Advocacy Program, and he is a former member of the Legal Department's Diversity Council.

Prior to working at Citi, Mr. Santangelo was an Associate General Counsel for Ryan Beck/Gruntal serving as its Employment Counsel. Prior to that, he worked in private practice primarily on employment discrimination litigation.

Mr. Santangelo received his J.D. from St. John's University School of Law, where he was Director of Publications for the Criminal Law Institute and Executive Editor of its Federal Case Review. He received his B.A. from Iona College.

Mr. Santangelo has published several articles relating to employment law in the New York Law Journal and the NYSBA State Bar News, and he has spoken on employment law related topics at New York State and City Bar Association conferences, Financial Services Industry seminars, and Law Schools.

HOWARD SCHRAGIN, ESQ.
BIOGRAPHY

HOWARD SCHRAGIN is a seasoned labor and employment attorney who handles a wide range of labor and employment matters on behalf of employees and employers, including employment discrimination, harassment, retaliation, single plaintiff, class and collective wage and hour claims (overtime and unpaid compensation), wage and hour compliance, disability and other leave-related issues, wrongful termination, contract disputes, restrictive covenants and employee benefits.

Prior to founding Sapir Schragin LLP, Mr. Schragin worked as a Senior Attorney with one of the nation's preeminent labor and employment law firms. Prior to that, Mr. Schragin worked for a number of other prominent labor and employment law firms, where he counseled and advised clients across a multitude of industries on a variety of workplace, and represented clients in all phases of employment related litigation in federal and state courts and before administrative agencies. He also served as an Assistant Corporation Counsel for the New York City Law Department where he litigated employment and civil rights actions brought in federal and state courts against the City of New York, its agencies and employees.

Mr. Schragin is a member of the New York State Bar Association, Labor and Employment Law Section, New York City Bar Association and Westchester County Bar Association. He has written and spoken for various organizations on a range of employment law topics, including the Family and Medical Leave Act, Americans with Disabilities Act, separation agreements and restrictive covenants, employment hiring practices, genetic discrimination, pre-employment drug, medical and psychological testing, electronic and digital media in the workplace and human resources best practices. Mr. Schragin was also a frequent contributor to the New York Employment Newsletter.

FRAN A. SEPLER
BIOGRAPHY

Fran Sepler, President of Sepler & Associates, is a nationally recognized expert in the field of workplace complaints, employee relations and employment investigations, and the author of "Finding the Facts: What Every Workplace Investigator Needs to Know." Her firm, Sepler & Associates, located in Minneapolis, was founded in 1991 to address the emerging issues of discriminatory harassment and the challenges of diversity. She has conducted over 1200 employment investigations, provided expert advice to hundreds of employers and attorneys regarding the proper techniques for conducting investigations and offers in house and freestanding seminars on conducting employment investigations.

Ms. Sepler has helped organizations of every type identify and address workplace bullying. She has designed and implemented anti bullying initiatives in both the private and public sector as well as assisted large public universities create anti-bullying programs including quasi-judicial review of bullying complaints.

She has spoken at Bar events in fifteen states, SHRM events in 25, and been a speaker for each of the last twenty years at the Upper Midwest Employment Law Institute, most recently providing a full day investigative program. She has also presented at the ABA Annual Employment and Labor Section conference. Most recently, she testified before the EEOC Select Committee on Workplace Harassment and again before the full Commission.

Ms. Sepler has provided training and employee relations consulting to thousands of organizations throughout the world. Her work has taken her to third world nations, refugee camps and National Football League training facilities, movie sets, gold mines and stockyards. She is nationally recognized for her ability to communicate effectively on complex and controversial subjects and to do so professionally and neutrally. She has also conducted research into the dynamics of workplace conflict which offer employers a rigorous and thorough understanding of the elements of prevention, detection and correction.

ROBERT T. SZYBA, ESQ.
BIOGRAPHY

Robert T. Szyba is an associate in Seyfarth Shaw's Labor & Employment Department. He defends and counsels employers on a wide range of employment-related issues, including background check and Fair Credit Reporting Act violations, "ban the box" issues, prevailing wage requirements, wage and hour compliance, whistleblower retaliation, family and medical leave compliance and interference/retaliation claims, paid sick leave, and discrimination/harassment. His clients operate in a variety of industries, including retail, background check services, for-profit education, foodservice and hospitality management, transportation, electrical, tolling, public works contractors, accounting, and insurance. Mr. Szyba also advises on preventive employment counseling, pre-litigation strategy and litigation avoidance, alternate dispute resolution and mandatory arbitration programs, and employment policies and procedures.

Mr. Szyba represents clients in complex employment litigation, including class, collective, and multi-district litigation, as well as single-plaintiff lawsuits. He has extensive experience in New Jersey and New York state and federal courts, as well as federal district courts across the country. He represents clients at both trial and appellate levels. He also represents clients before federal and state administrative agencies, such as the Department of Labor, New Jersey Division on Civil Rights, New Jersey Office of Administrative Law, and New York State Division of Human Rights.

Mr. Szyba currently serves as the Editor-in-Chief of the *New Jersey Labor and Employment Law Quarterly*, a publication of the New Jersey State Bar Association's Labor and Employment Law Section, and is a member of the Advisory Board of the Hofstra Labor & Employment Law Journal. He is a regular panelist and presenter for various legal associations in New York and New Jersey on employment law topics and issues, such as handling whistleblower issues, compliance with state and federal wage and hour laws, discrimination and harassment litigation avoidance, class action litigation, and litigation strategies. He is an active member of the American Bar Association, the New York State Bar Association, the New Jersey State Bar Association, and The Sidney Reitman Employment Law American Inn of Court.

Mr. Szyba is fluent in Polish.

Education

- J.D., Hofstra University School of Law, *cum laude* (2009)
  Editor-in-Chief, *Hofstra Labor & Employment Law Journal*
  Distinguished Service to the School Award
  Dean's List
  Moot Court Association
  Willem C. Vis International Moot Arbitration Team
- B.M., Berklee College of Music, *cum laude* (2001)

PHYLLIS TAYLOR, ESQ.
BIOGRAPHY

Ms. Taylor is the Vice President for Legal Services at Consolidated Edison Company of New York, one of the nation's largest investor-owned energy companies. In this capacity, she is responsible for the Labor and Employment, Health and Retirement Benefits, General Litigation, and Workers' Compensation Practice Groups. Ms. Taylor has held a number of legal positions throughout her career, including Executive Vice President and General Counsel of the Battery Park City Authority, Executive Vice President and General Counsel of the New York State Environmental Facilities Corporation, Vice President of Independent Fiduciary Services, and Deputy Comptroller and General Counsel for the New York City Comptroller's Office.

She is a member of the Diversity and Inclusion Council at Consolidated Edison, a Member of the New York State Bar Association (Employment Law Committee), a Member of the Association of Corporate Counsel, a Member of the In-House Benefits Counsel Network, an Emeritus Member of the Board of Directors of the National Association of Public Pension Attorneys, and a Member of the Board of Directors of the Community Service Society of New York.

SARAH WARBELOW, ESQ.
BIOGRAPHY

Sarah Warbelow is the Legal Director for the Human Rights Campaign, leading HRC's team of lawyers and fellows focused on federal, state, and municipal policy. She also coordinates HRC's advocacy efforts as amicus curiae ("friend of the court") in litigation affecting the lesbian, gay, bisexual, transgender and queer community. As part of her public education efforts on the laws, legislation, and policies affecting the LGBTQ community, Warbelow regularly appears on national television and contributes to media outlets such as the New York Times, NPR, the Washington Post, the Wall Street Journal, and Time Magazine.

Warbelow joined the Human Rights Campaign in January 2008 as senior counsel for special projects and Justice for All fellow, then served as HRC's State Legislative Director, from September 2009 to April 2014. Warbelow is also an affiliated professor at George Washington University and George Mason Law School, teaching courses on civil rights law and public policy. She received her Masters of public policy and law degree from the University of Michigan.

RICHARD K. ZUCKERMAN, ESQ.
BIOGRAPHY

Richard K. Zuckerman represents management in all public and private sector labor and employment law areas, including collective bargaining, discipline and litigation-related matters. His public sector clients include school districts, cities, counties, towns, villages, libraries and fire and ferry districts. He also serves as general counsel to school districts and as a hearing officer in General Municipal Law Section 207-a and 207-c disputes.

A Best Lawyer in America© since 2012, Rich was recently named Best Lawyers' 2017 Labor Law – Management "Lawyer of the Year" for Long Island, after being named the Best Lawyers' 2015 New York City Labor Law - Management "Lawyer of the Year." He has since 2007 been named a New York Super Lawyer® in Labor and Employment Law, and has been named as a Who's Who in Labor Law by the Long Island Business News.

Rich is a former Chair of the New York State Bar Association (NYSBA) Labor and Employment Law Section and a former President of the New York State Association of School Attorneys. He is currently the Vice-Chair to the Municipal Law Section's Executive Committee and a Fellow of the Governors of The College of Labor and Employment Lawyers, as well as a Fellow of the American and New York Bar Foundations, and an Inaugural Member of the Board of Advisors for the St. John's University School of Law Center for Labor and Employment Law. He is one of the co-editors for the New York State Bar Association's treatise "Public Sector Labor and Employment Law (3d Edition)," 2011, 2013, 2014, 2015 and 2017 Supplements, and was an editor for the American Bar Association's treatise "Discipline and Discharge in Arbitration" and Supplement. In addition, he was a contributing author to the 6th edition of the ABA's contract arbitration treatise "How Arbitration Works" (Elkouri & Elkouri), and has also co-authored numerous labor and employment law and education-related articles.

Rich has presented at numerous legal programs regarding various labor, education and employment law-related topics. He is admitted to practice before the United States Supreme Court, the federal Second Circuit Court of Appeals and the Eastern and Southern Districts of New York, as well as New York State courts. He is a graduate of the Columbia University School of Law, where he served as Director of the First Year Moot Court program. He graduated *summa cum laude* from the State University of New York at Stony Brook, where he was elected to *Phi Beta Kappa* in his junior year and received the William J. Sullivan Award, the University's most prestigious academic and service award.

Education
State University of New York at Stony Brook (B.A., *summa cum laude, Phi Beta Kappa*, 1981)
Columbia University School of Law (J.D., 1984)

Bar Admissions
New York